Senate Judiciary Committee hearing on the nomination of Brett Kavanaugh to be an associate justice on the Supreme Court, part 2

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Body

Participants: Sen. Charles E. Grassley, R-Iowa, Chairman; Sen. Orrin G. Hatch, R-Utah; Sen. Lindsey Graham, R-S.C.; Sen. John Cornyn, R-Texas; Sen. Mike Lee, R-Utah; Sen. Ted Cruz, R-Texas; Sen. Jeff Flake, R-Ariz.; Sen. Thom Tillis, R-N.C.; Sen. Ben Sasse, R-Neb.; Sen. Michael D. Crapo, R-Idaho; Sen. John Kennedy, R-La.; Sen. Dianne Feinstein, D-Calif., Ranking Member; Sen. Patrick J. Leahy, D-Vt.; Sen. Richard J. Durbin, D-Ill.; Sen. Sheldon Whitehouse, D-R.I.; Sen. Amy Klobuchar, D-Minn.; Sen. Chris Coons, D-Del.; Sen. Richard Blumenthal, D-Conn.; Sen. Mazie K. Hirono, D-Hawaii; Sen. Cory Booker, D-N.J.; Sen. Kamala Harris, D-Calif.

Witnesses: Brett Kavanaugh, nominated to be an associate justice on the U.S. Supreme Court

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(CORRECTED COPY - CORRECTS SPEAKER I.D.)

GRASSLEY: Welcome back, Judge Kavanaugh.

The next person to ask questions is Senator Durbin.

DURBIN: Thank you, Mr. Chairman, Senator. 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'd 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?

KAVANAUGH: No, I was not involved in the documents process or substance.

DURBIN: No one told you that you'll 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?

KAVANAUGH: Senator, so there's a couple things packed into your question. So I did study the nominee precedent, read all the hearings. This came up in Justice Scalia's hearing, so I read that there with all his memos from being head of the Office of Legal Counsel, and he was asked about that. And I know with Chief Justice Roberts, there were four years of information when he was principal deputy solicitor general, that those were not disclosed, either.

DURBIN: But as for White House documents, you're breaking new ground here, or I should say, covering up old ground here.

KAVANAUGH: Well, I -- I guess I -- again, I wasn't 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 don't distinguish. It's all executive branch documents; Justice Department documents and White House documents are not different.

DURBIN: But you realize that when it comes to the role of the National Archives, we're being asked to give you special treatment?

KAVANAUGH: I -- I -- I'm not -- I can't comment because I don't know.

DURBIN: Judge Kavanaugh, this is your field -- judicial nominations.

KAVANAUGH: What -- let me ask you what the question is.

DURBIN: This is your nomination.

KAVANAUGH: Sorry.

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.

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's a decision for the Senate and the executive branch to work out. As a nominee, I will -- the -- in their long-term privileges and protections, as he mentioned -- mentioned that were in effect for that discussion, and it's not for the nominee to make that decision.

DURBIN: Well, that is -- that's 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 is going to reflect on you and your nomination, and of course you know that.

KAVANAUGH: Well, I guess I -- again, looking at the nominee precedent, Senator, that was true in Justice Scalia's case. All his memos from 1974 to 1977 when he was head of the Office of Legal Counsel, a consequential time, I -- at least as I understand it, those might not have been disclosed. He's asked about that at his hearing.

Chief Justice Roberts' four years of deputy solicitor general memos, which would have been potentially relevant (ph)...

DURBIN: So you're perfectly fine with this notion?

KAVANAUGH: I -- no, I -- I said I am -- it's up to the chairman, and the -- and you, and the -- the committee, the Senate and the executive branch to work out.

DURBIN: In fairness, Judge Kavanaugh, I think it's up to you. I think it's up to you. If you said at this moment to this chairman and to this committee, "stop, pause. Hit the pause button. I don't 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. And I didn't 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, is -- we're limited to even discuss because of the fact that we are classifying and withholding information about your nomination.

First is Mr. Bill Burke, 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 don't 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 won't you do that?

KAVANAUGH: Senator, I -- I do not believe that'***s*** consistent with what prior nominees have done who have been in this circumstance. It'***s*** a decision for the Senate and the executive branch. Justice Scalia explained that very clearly, I thought, in his hearing.

DURBIN: Are you happy with that decision?

KAVANAUGH: I do not -- it'***s*** 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, and Justice Scalia, again, explained that well, I thought, in his hearing.

DURBIN: I wasn't here for Justice Scalia.

KAVANAUGH: Well...

DURBIN: But I tell you that...

GRASSLEY: Let me interrupt without taking time away from you, so don't charge him for this time. But here'***s*** something that -- the nominee doesn't need any help for me to answer this -- but we don't care what the nominee thinks. We're -- we've got to follow -- follow the Presidential Records Act, and that'***s*** what we're following, is the ***law***.

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 Burke, who was a former assistant...

GRASSLEY: Yeah (ph).

DURBIN: ... to the nominee, who has decided what will be withheld...

GRASSLEY: OK.

DURBIN: ... what is going to be committee confidential. So it isn't the Presidential Records Act, please.

GRASSLEY: Well, the -- let -- still, let me make clear here. You know, we anticipate 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.GRASSLEY: President Bush acted consistently with federal ***law*** when he expedited -- expedited the process, and gave us unprecedented access, in record time, to Judge Kavanaugh'***s*** record, but we have worked hand and 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's the same as what 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 reviews and the current administration reviews 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're 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.

DURBIN: Mr. Chairman, the National Archives have stated publicly that how -- the way we are handling the records for this nomination are unprecedented and they've had nothing to do with it. They have asked until the ***end*** of October to produce records, and they've been told we don't need you.

We're going to finish this hearing long before then. I'd like to ask that be placed in the record the statement from the National Archives, related to the records related to Judge Kavanaugh. May I have consent to place this in the record?

GRASSLEY: Yes -- yes -- I'm sorry, what...

DURBIN: Statement from the National Archives made...

GRASSLEY: Put in the record, yes, without objection.

DURBIN: Thank you. And now I'm going to throw you a pitch which you've seen coming for 12 years. I want to talk to you about the 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.

I -- yesterday I asked you to show the American ***people*** that you have nothing to hide by coming clean with this -- on this issue, and I'd like to refer specifically to some of the questions that were raised because of that 2006 testimony.

I believe we have here a statement -- my question, as well as your response. I'm sure you've seen this because it's been reported in the paper that you've 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 don't answer more than you're asked, don't 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 re-nominate him? And at the time of the nomination, what did you know about Mr. Haynes' role in crafting the administration's detention 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' nomination, I've know Jim Haynes but it was not one of the nominations that I handled."

KAVANAUGH: Can you raise it a little higher? I can't see the bottom -- got it, OK.

DURBIN: I asked you about this when we had a meeting in my office.

KAVANAUGH: Yes.

DURBIN: And I -- I still don't understand your answer in terms of how you could state as clearly and unequivocally, "I was not involved and am not involved" in the questions about the rules governing the detention of combatants.

You were involved in the discussions about access to counsel for detainees. You confirm this during the meeting 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 Jose Padilla.

You confirm that in our meetings and there are e-mails that support that fact. You were involved -- and this is one 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 confirm 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've been given are obvious, what were you trying to tell me here?

Did you really disclose accurately your role?

KAVANAUGH: Yes. I understood the question then and my answer then and I understood...

PROTESTER: (OFF-MIKE) Disable ***people*** have human rights. We're allowed to make our own (inaudible) decisions.

DURBIN: Go ahead.

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 wasn't. In other words, the program -- crafting the program for the enhanced interrogation techniques for the detainees...

DURBIN: Mr. -- Judge Kavanaugh, that'**s** not the question. Do you see me asking you whether you crafted the program? I didn't. I asked you about your involvement in the Haynes judgment, and then you went further...

KAVANAUGH: Crafting...

DURBIN: ... Yes, then you went further. You violated the second rule I give to every witness, you answered more than I asked.

KAVANAUGH: I adhered to the first one, I told the truth.

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've given you, you clearly were involved in questions about rules governing detention of combatants.

KAVANAUGH: So I understood the question then, and I understand it now and my answer about that -- that program. I told the truth about that and in the reports that have come out subsequently have shown that I've told the truth about that.

My name is not in those reports. Now, for the -- the 2005 signing statement, by that time I'm in 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 asked, I said on the signing statement, it would've crossed my desk on the way, so would a speech draft on the Iraq War, so would a speech -- you know those things would have crossed my desk. Prepared by others, not prepared by me, but they crossed my desk on the way to the president.

DURBIN: In the 2006 hearing, you told Chairman Arlen Specter you gave President Bush advice on signing statements, including quote "identifying potential constitutional issues in legislation." Did you make any comments regarding the December 30th, 2005 signing statement on the McCain torture amendment, including potential constitutional issues?KAVANAUGH: I can't 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 can't remember all of the ins and outs of who thought what -- but I do remember that it -- the Counsel of the President was in charge ultimately of signing statements in terms of the final recommendation to the President.

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.

KAVANAUGH: That -- Senator, again, we were -- at least I understood it then and I understand it now to be referring to the program we were talking about that was very controversial that Senator Feinstein spent years trying to dig into. And I was -- in that -- I was not read into that program. I told the truth about that and...

DURBIN: Let me go to another area of questioning if I can. Thank you very much.

In your dissent in Garza v. Hargan, you wrote that the ***court*** had created, quote, "a new right for unlawful immigrant minors in the United States 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?

KAVANAUGH: Senator, the Garza case involved first and foremost a minor; it**s** important to emphasize it was a minor.

DURBIN: Yes.

KAVANAUGH: So she had been -- and she**s** in an immigration facility in the United States. She**s** from another country, she does not speak English, she**s** -- and she**s** 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 was, what's 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's the closest body of law on point? The parental consent decisions of the Supreme Court, where they've repeatedly upheld parental consent laws over the objection of dissenters who thought that's going to delay the procedure too long, up to several weeks.

And I'm getting -- I'm getting to the point -- I'm getting to the point.

DURBIN: Judge -- well, I -- before you get to the point, you've just bypassed something. You just bypassed the judicial bypass, which she received from the state of Texas when it came to parental consent. That's already happened here.

KAVANAUGH: But that -- that...

DURBIN: And you're still stopping her.

KAVANAUGH: I -- I -- I'm not. The -- 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.

DURBIN: But Judge, the clock is ticking.

KAVANAUGH: It is.

DURBIN: The clock is ticking. A 20 week clock is ticking.

KAVANAUGH: And I...

DURBIN: She made the decision early in the pregnancy, and all that I've described to you and the judicial decisions, the clock is ticking. And you are suggesting that she should've waited to have a sponsor appointed who she may or may not have consulted in making this decision.

KAVANAUGH: Again, this is -- I'm a Judge; I'm 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, so page 895 -- "minors benefit from consultation about abortion" -- it's a quote, talking about consultation with parents.

DURBIN: So you're add -- 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...

KAVANAUGH: So...

DURBIN: ... and the clock is ticking on her pregnancy.

KAVANAUGH: A couple of things there, Senator. You said you are adding. I'm not adding; I'm a Judge. The policy's being made by others. I'm 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 -- 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's an appropriate objective.

DURBIN: Was that a state requirement?

KAVANAUGH: The second -- the second question...

DURBIN: Was that a state requirement?

KAVANAUGH: The second question is the delay, your point. In the parental consent cases of the Supreme ***Court*** recognize 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 of 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 it -- on safety, I specifically talk about safety. I specifically say that 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 -- I consider the circumstances. She'**s** a 17 year old by herself in a foreign country in a facility where she'**s** detained and she has no one to talk to and she'**s** 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 look, some ***people*** disagree with those precedents and think those kinds of statutes should not be allowed. But I had to -- I -- precedent'**s** not like a cafeteria where I can take this but not that.

I had to take Casey in completely. Casey re-affirmed Roe...

DURBIN: I -- I have some other questions, so I ask you if you please...KAVANAUGH: Well, it'**s** an important question though and I want to make sure...

(CROSSTALK)

DURBIN: It'**s** a critical question. It'**s** a...

KAVANAUGH: And I did my -- I did my level best in a emergency posture. So what -- I had basically two days to do this case.

DURBIN: It'**s** two-to-one, en banc decision, which you dissented from, correct?

KAVANAUGH: I -- I did the best to follow precedent, and as I always try to do to be as careful as I can in following the precedent of the Supreme ***Court***.

DURBIN: Let me ask you a personal question: What'**s** the dirtiest, hardest job you've ever had in your life?

KAVANAUGH: I worked construction when I was -- 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 7:00 -- 6:55. He wanted me to be early. And that'**s** -- that'**s** probably the one.

I also, I should say, Senator, I -- I had a what -- one person, I guess, as a lawn business for many summers -- business. You know, I cut a lot of lawns, and that'**s** how I made some cash when I was -- I started that probably eighth grade, maybe seventh grade. I -- I would cut my parents' lawn, but then I cut a lot of lawns in the neighborhood, and actually distributed flyers to -- 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.

DURBIN: My dirtiest job I ever had was four summers working in a slaughterhouse.

KAVANAUGH: Yes.

DURBIN: I always wanted to go back to college.

KAVANAUGH: Yes.

DURBIN: Couldn't wait to get out of there. It was unbearable. It was dirty. It was hot. The things I did were unimaginable, and I wouldn't even start to repeat them.

Then came a case before you called Agri Processor Company v. NLRB.

At least a third of the workers, Judge Kavanaugh, in our nation's slaughterhouses are immigrants. It stands visits to Iowa or Illinois, probably Delaware -- you pick it. You're 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.

Agri Processors' case was a notorious meatpacking 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 Processors' Brooklyn warehouse told reporters, quote, "We were treated like garbage, and if we said anything, we got fired immediately."

Judge Kavanaugh, you've bent ***over*** backwards 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 a, quote, "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 textualist, to be carefully weighing every word of a statute.

KAVANAUGH: Yes.

DURBIN: 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 didn't you stick to the plain language of the controlling statute and the binding Supreme ***Court*** precedent?

KAVANAUGH: Because the Supreme ***Court*** precedent compelled me to reach the results that I reached, and here's why, Senator. Let me explain.

The Supreme ***Court*** had a case in 1984 called the Sure-Tan decision, and the Sure-Tan decision considered the interaction of the National Labor Relations ***Law*** -- Act, and the immigration ***laws***. And what the -- 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.

And in Part 2B of the opinion -- you have to read Part 2B of the opinion, of the Supreme ***Court***'s opinion. If you read Part 2B of the opinion, the ***court*** then goes on to say, "and because the immigration ***laws*** do not prohibit employment of ***people*** unlawfully in the country," and makes clear the Supreme ***Court*** makes clear -- this is when

it's being considered in Congress in '84. It ends up in the '86 act. The court makes clear, as I read Part 2B, and I think I'm 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 can't vote in the union elections.

So what I was doing there, Senator, it's all about precedent. I read that, and I -- my opinion, I -- 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 the -- from the Sure-Tan case, I went and asked for the Marshall papers, 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 they -- that what I was reading in there was 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 -- I stand by what I wrote then, and I think I correctly analyzed Part 2B.

Now, Senator, did it...

DURBIN: I'm going to -- I -- I have to...

KAVANAUGH: If it ends...

DURBIN: I'm running out of time here, so...

KAVANAUGH: I know, but if it ends -- your -- if -- if the Supreme Court Sure-Tan opinion had ended at Part 2A, hundred percent would agree with you, and my decision would have been different.

DURBIN: Well, let me just say, you said...

KAVANAUGH: If you read Part 2B, I think you'd see...

DURBIN: You said earlier today, you don't get to pick and choose which Supreme Court precedent you follow. The majority on Agri Processors' case was following Supreme Court precedent. In the Sure-Tan case, the Supreme Court, a seven-to-two 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's a quote from the case.

KAVANAUGH: But that's Part 2A. You've got to go to Part 2B.DURBIN: Well, let me -- hang on. Let me tell you some people who went to both parts, and couldn't 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 didn't -- or in your view, not have that right -- that they did not have that right to unionize.

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'm with you 100 percent.

But then the Supreme Court goes on to say -- and we consider also in resolving this question the 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 augment transcript from Sure-Tan in my dissenting opinion, I -- and look, I have no -- I have no agenda in any direction. I'm the -- I'm a judge. So I'm just trying to resolve the precedence...

(CROSSTALK)

DURBIN: Let me just close -- let me close by saying this. I'm just a judge. I just follow precedent. Gosh, we've heard that so often, and I hope it's the case, but we know that there's much more to the -- to your job to that.

KAVANAUGH: I agree.

DURBIN: That fact that you were a dissenter and everyone else saw this the other way should give us pause when you say, "I'm just following precedent."

KAVANAUGH: Well, I respectfully -- Senator, that opinion, I'm -- I'm proud of that opinion because I think it carefully details the ***law*** in that case I'm -- of following the Supreme ***Court*** precedent. And to your point that other judges disagree, I'll just -- there was a case I had about 10 years ago or eight years ago called Papagno. It was a case where I ruled in favor of a criminal defendant on a restitution matter.

Every other ***court*** beforehand 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 on the Lagos case, and it was -- they agreed with our one opinions, the Papagno opinion.

Just to point out that just because other ***courts*** of appeals might have disagreed does not necessarily mean we were necessarily wrong because the Supreme ***Court*** ultimately decides that.

I understand your question; I appreciate them. Thank you.

GRASSLEY: Senator Cornyn and I've -- Senator Leahy's 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 in (ph) far as the Committee's concerned is a lot more dignified and civil, and -- but unfortunately some of the hijinks continue even on the Senate floor.

I know Senator McConnell asked consent for the Judiciary Committee to continue meeting 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's unfortunate.

So, Judge, I believe we met in the year 2000.

KAVANAUGH: Yes.

CORNYN: 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...

KAVANAUGH: Yes.

CORNYN: ... helped -- helped me get ready. I regret you didn't have better material to work with, but...

KAVANAUGH: It was an honor, Senator. It was an honor.

CORNYN: It was a great experience and an educational experience, but I got to appreciate your skills as a lawyer from that time and have followed your career closely since, and I'm proud to support your nomination based on my personal knowledge of your skills, your temperament, your character, and your fidelity to the rule of ***law***.

But I do want to pick one bone with you. I did this -- this isn't unique to you -- based on that experience. That case, as you may recall, involved a tradition in the Santa Fe independent school district, unfortunately was the site of a 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 weren't required to do so. The school didn't 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 in violation of the establishment clause.

I'm not going to ask for you opinions because this issue will likely come back before the ***court***, but since I mentioned it to Judge Gorsuch -- Justice Gorsuch, I'm going to mention it to you.

The thing that is 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'***s*** -- that George Washington himself at the request of the very Congress which passed the Bill of Rights proclaimed a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many and signal favors of the almighty God.

Since I had you here, I thought I'd mentioned that.

KAVANAUGH: Yes.

CORNYN: I'm not asking for your opinion since likely you'll be called upon to decide cases involving the establishment clause in the future. But since we had that history together...

KAVANAUGH: Yes.

CORNYN: ... I thought I would just tell you that still sticks in my craw ...

KAVANAUGH: I -- I understand -- I understand, Senator. We remember, certainly, cases I lost. I -- I remember and they still stick in my craw, too, Senator, so.

CORNYN: Well, I just marvel that under the First Amendment that we can -- a variety of voices can speak, and that'***s*** generally a good thing, but it can be about violence, sexism, it can be about almost anything, but you can't speak about religion in public -- in a public forum.

KAVANAUGH: Well, there've been -- you know, 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'**s** a case where it was an after school program at a school -- a school gym I think or auditorium and the religious group was excluded, and the Supreme ***Court*** made clear, no, you can't just exclude the religious groups.(CORRECTED COPY - CORRECTS SPEAKER I.D.)

KAVANAUGH: 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 to -- but the principle -- principle you're espousing I do think is reflected in some more recent Supreme ***Court*** precedent.

CORNYN: Well I'll just conclude with this, as I understand the constitution requires the government to be neutral. And as Chief Justice Rehnquist I think in this case the government evidenced hostility to religious speech in the public square.

That's just one - one person's opinion, and again, I'm not asking you for any opinion with regard to a case that may come before the ***court***.

PROTESTER: (OFF-MIKE)

CORNYN: Mr. Chairman, I hope that won't - time won't be subtracted from my 30 minutes.

(CORRECTED COPY - CORRECTS SPEAKER I.D.)

LEE: It will not be.

CORNYN: Thank you. So Judge Kavanaugh, I'm intrigued by a comment that you made earlier about the role of precedent. We've heard a lot about precedent, you alluded to this book that you and others - other judges wrote with Brian Garner on the ***law*** of judicial president - precedent.

I checked it out, it's 900 pages long.

(LAUGHTER)

And I haven't read every page of it either.

KAVANAUGH: I don't think it's meant - it's not meant to be read word for word. It's a treatise where you go to a section that might be on point or something.

CORNYN: But let me just ask you a more question, then we can work our way into that. Should - when a - 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?

KAVANAUGH: No, that's an important principle of the judicial independence and the judicial role. But the judge's umpire vision that Chief Justice Roberts articulated and I've - I've talked about publicly many times is critical, when you go to a baseball game, the umpire's not wearing the uniform of one team or another, and that's a critical principle.

CORNYN: Well it - it strikes me as an important point given the suggestion that one of the reasons ***people*** have objected to your nomination is I believe the quote was you have Republican blood flowing in your veins, strikes me as a strange and bizarre statement.

KAVANAUGH: I've been a judge for 12 years, Senator, and 307 opinions, I'm very proud of that record and been an independent judge for 12 years. You're not a - as a judge, you're not a Republican or a Democrat as a federal judge.

CORNYN: And you talked about - 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 don't follow.

KAVANAUGH: Well there's been a debate sometimes about what are - 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 near 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 and - and that in Federal 78, it's well explained that judges make decisions based on precedent.

And precedent therefore, as I read judicial power has constitutional origins in a constitutional basis in the text of the constitution.

CORNYN: And I think you've touched on this as well, judges unlike legislators don't run for election. You don't have a platform, vote for me, this is what I'll do if elected into office.

One of the most important elements of the - of limiting the important role of judges, I think, under the Cfonstitution is that you're 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 you talked about to agree with you. Could you talk about the importance of deciding cases on a case by case basis?

(CORRECTED COPY - CORRECTS SPEAKER I.D.)

LEE: We'll add another 20 seconds.

CORNYN: Thank you.

KAVANAUGH: Absolutely, Senator. It's important to understand and I - I think Senator Graham alluded to this as well, as judges you don't just issue policies or issue opinions out of the blue.

You decide, as the Article III says, cases and controversies. And that means there's a process, litigants coming to the federal trial ***court*** and - for example and litigate against one another, and there's a process there, a trial or summary judgment motion, the district judge renders a decision and that comes up to the ***court*** of appeals in my case.

And there's briefing and oral argument, I like to say - there's a process, I like to say process protects you. It's one of my things I always like to keep in mind. You go through a process to help make good decisions, 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. I - you change your mind, you know, Senator, you've 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 your deciding that case, you write an opinion, you're not trying to resolve every issue imaginable and the opinion, you're trying to resolve this case under the principles and precedents, the text of the ***law*** in question, the text to the statute in question and decide that case or controversy.

And that's 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.

PROTESTER: (OFF-MIKE)

CORNYN: And, Judge, don't you think that what you've 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've already announced in all cases that have to do with subject X, I've made up my mind, I don't care what the facts are.

Isn't that unfair to the litigants?

KAVANAUGH: It can be, Senator, at least where an overbroad ruling may resolve things that ***people*** who are effected by it may have thought well I didn't - I wasn't part of that case, why am I now effected in a particular way?

I think one of the things I can say about how I've tried to write my opinions, the 300 opinions, is I'm always concerned about -

PROTESTER: (OFF-MIKE)

KAVANAUGH: I'm always concerned about unintended consequences, this is one of the reasons I go through so many drafts of my opinions and really work through them is even just a sloppy foot note or an ambiguous word and opinion, it'***s*** true when you're drafting ***laws*** here too, but -

PROTESTER: (OFF-MIKE)

KAVANAUGH: If you don't - you're concerned about unintended consequences, which is why it'***s*** so important to be clear in the opinions and to be exactly precise and not to decide too much.

PROTESTER: (OFF-MIKE) our choice (ph). Stop Kavanaugh. Our bodies, our choice. Stop Kavanaugh. Our bodies, our choice.

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 in Washington D.C. and another plane hit the Pentagon here in Washington?

KAVANAUGH: Yes, I remember...

CORNYN: New York, I should say. Not in (ph) Washington.

KAVANAUGH: Yes, I was -- I was in the -- in the West Wing when the -- hit the second tower. I remember that up in the upstairs counsel'***s*** office with a couple other ***people*** in the counsel'***s*** office. And then we were ushered downstairs and then told to get out and run out because there was fear, as we later learned, about flight 93. I think it -- don't 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 -- saved so many Americans. Sacrifice that of course we still all celebrate, in the sense of celebrating their lives and their heroism for saving all of us here in Washington. But ***ended*** up out in Lafayette Park with the rest the staff and bewildered.

It changed America, changed -- changed the world, changed the presidency, changed Congress, changed the ***courts***, all the issues that came before -- was a new kind of war as President Bush described with an enemy that didn't wear uniforms and that would attack civilians and so new kinds of ***laws*** had to be considered and Congress had to work through that and President Bush had to focus so intently.

And as I've have said before, my remembrance is that on September 12, his basic mentality was this will not happen again. And having -- traveling with him from 2003 to 2006 everywhere as -- 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'm sure that'***s*** been true of the succeeding presidents as well because the threat -- the threat -- the threat still exists, of -- of course.

CORNYN: Well as we came to learn, Osama bin Laden and Al Qaeda was responsible for that attack and has now morphed into other -- 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.

KAVANAUGH: Yes.

CORNYN: The Hamdan case, which you've 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. And just correct me if I'm wrong but notwithstanding the experience 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?

KAVANAUGH: That is correct. I wrote the majority opinion ...

CORNYN: How could you do that? How could you possibly do that?

KAVANAUGH: So, the rule of law applies to all who come before all the courts of the United States.

CORNYN: Even an enemy combatant?

KAVANAUGH: Equal -- equal justice under law. Everyone is entitled to ...

CORNYN: Even -- even a noncitizen?

KAVANAUGH: Yes. Noncitizens who are tried in U.S. courts of course have the constitutional rights -- and so -- and really my model on that judicial model for thinking about something like that -- because I thought about what you're asking about -- Justice Jackson, of course, Robert Jackson who's been Franklin Roosevelt's attorney general, that he's in the (ph) Korematsu case, even though that was one of President Roosevelt's policies, Justice Jackson now -- 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's a 6-3 decision. Those two are the deciding votes, therefore. They both were -- were appointees of President Truman. They get to the -- and it's wartime against Korea -- they get to the Supreme Court, they're the deciding votes in the Youngstown Steel case, which was an extraordinary national moment, one of the great moments.

And so it's -- it's your conception of the role of a judge is -- it's about the law. That's 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've tried to ensure that as a judge.

CORNYN: Well, it's 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 the big guy or that you are picking and choosing who you're 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 the White House on September the 11th 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 apply the law equally to everybody that comes to your court.

Sometimes the -- I think -- well let me allude to something Senator Sasse I think was eloquently speaking about yesterday in terms of the separation of powers. Very important aspect of our constitutional system and one that I

know you've dealt with often on the D.C. Circuit ***Court*** of Appeals. And that has to do with what -- what I've read some judges talk about, some constitutional scholars talk about a conversation between the branches.

KAVANAUGH: Yes.

CORNYN: in other words, when the D.C. Circuit ***Court*** or the Supreme ***Court*** decides a case, they finally decide that case but they don't finally decide what the policy is ...

KAVANAUGH: That'**s** right.

CORNYN: ... for the United States or the American ***people***. Correct?

KAVANAUGH: That'**s** correct, Senator. And I think one of the important things that judges can do is adhere, of course, to the ***laws*** passed by Congress, but then in writing the opinion, make clear -- and I've 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 if there'**s** a -- sometimes there'll be in a hole statute, or something that seems unintended in a statute, and to alert Congress to that. Chief Judge Katzmann of the Second Circuit who'**s** a great judge I served with on the Judicial Branch Committee which is appointed by the Chief Justice.

And he has written a book about statutory interpretation, but he'**s** also been a leader of a project to make sure that Congress is alerted of 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.

PROTESTER: (OFF-MIKE).

KAVANAUGH: And it'**s**...

PROTESTER: (OFF-MIKE).

KAVANAUGH: And so, that...

PROTESTER: (OFF-MIKE).

KAVANAUGH: ...that project'**s** been very successful. I think Chief Judge Katzmann'**s** project -- and it'**s** one -- even without that project, how you write your opinions, I think, is important. We don't update the statutes; you update the statutes. But it'**s** good for us to write our opinions in a way that points out potential issues that Congress might want to be aware of.

CORNYN: And that'**s** part of the conversation between the...

KAVANAUGH: Yes.

CORNYN: ...two coequal branches of government?

KAVANAUGH: Absolutely. And I think that'**s** an important dialogue to -- to have between Congress and the judiciary, and the back and forth is very important on that front.

And I think that'**s** -- one thing I'm always thinking about in my opinions, you write the ***laws***, but if the ***law*** looks like there'**s** some -- some issues 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 statutory -- I am well aware that statutory drafting is a very difficult process. That'**s** something I think judges need to be, actually, more aware of is how difficult the legislative drafting process is.

Even if you're doing it as one person it would be difficult, but then, you're doing it as a collective body. And then, you're doing it with the House, and with the President involved. There are a lot of ***people*** in and it'**s** 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 not working out it'**s** -- it'**s** not -- it'**s** appropriate, I think, for judges to point that out in their opinions.

CORNYN: And, of course, even if it'**s** a constitutional basis for your decision that could be changed by constitutional amendment, correct?

KAVANAUGH: Well, that'**s** 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 the -- James Madison taking -- taking the lead on -- on that.

But so too, they did not think it was perfect. They have an amendment process that'**s** specified in Article V of the Constitution. And that amendment process was intended to be used. And we've seen it used to correct structural issues -- the 12th Amendment on presidential elections; the 17th Amendment, of course, as you all know well on Senate elections; the 22nd Amendment which limited presidents to only two terms; the 25th Amendment which corrected some issues with respect to vice presidency.

And so too, of course the 13th, 14th, and 15th Amendments -- the most important amendments in -- 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 -- the -- the job of the ***people***, which is the Congress and the state legislatures, is to amend the Constitution. It'**s** not the job of judges to do that on our own. And, obviously, that'**s** a basic divide of constitutional responsibility that is set forth right in the text of Article V of the Constitution.

CORNYN: I can't remember who said it -- I think Justice Jackson, perhaps -- who said the Supreme ***Court*** is always right -- is not final because it'**s** always right. It'**s** right because it'**s** final, or words to that effect.

KAVANAUGH: Yes.

CORNYN: 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'**s** a constitutional matter, the way the Constitution is being interpreted, it'**s** within our power as the American ***people*** to change our own Constitution by amendment.

There'**s** provisions in the Constitution itself to do that. It'**s** 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'**s** not something dictated to us from down on high from the marble palace, or somewhere like that here in Washington.

KAVANAUGH: Well, I...

CORNYN: It is ultimately our government, our responsibility, our authority that provides legitimacy to the government itself. You agree with that?

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're right about Justice Jackson'**s** line. I think it is a clever line, but ultimately I agree with you.

I -- I've always had a little bit of a problem with that line because -- we're infallible because we're final -- no, the -- both parts of that are -- 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, you know, in that -- in the way you're describing either because there is the -- the ***people*** always have an ability to correct through the amendment process.

Now, the amendment process is hard and hasn't 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 14th Amendment -- 13th, 14th Amendments.

And that'***s*** an important example, I think, of your -- probably the best example, frankly -- of the point you're making about the ***people*** being able to respond to a horrific decision of the -- of the Supreme ***Court***.

CORNYN: Well, in fairness to Justice Jackson...

KAVANAUGH: Yes.

CORNYN: ...maybe he was thinking, as I originally thought, about the expression as being binding on lower ***court*** judges...

KAVANAUGH: Yes.

CORNYN: ...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***...

KAVANAUGH: I think...

CORNYN: ...to decide what ***laws*** should govern them.

KAVANAUGH: I think that'***s*** probably right, Senator. I don't want to be -- Justice Jackson'***s*** one of our greatest justices -- to question anything is...

CORNYN: No doubt.

KAVANAUGH: ...is, you know, whether it was Korematsu dissent, or Barnette, or Youngstown, or Morissette on mens rea, Justice Jackson wrote some of the greatest opinions, and the example of judicial independence as well, so. But on that one line, I -- I -- I take your point.

CORNYN: Let me just ask you one last question. We've talked a lot about the role of precedent. And Senator Feinstein talked about stare decisis and basically cases that it had (ph) been decided provide the precedent for future cases.

But in the -- on occasion, the Supreme ***Court*** has decided that its decisions were just wrong and chosen to overrule those previous decisions. I'm thinking of Plessy versus Ferguson, for example, which was a scar on our body politic that said that separate but equal educational facilities met the constitutional requirement of -- of -- of the 14th Amendment.

But can you talk about the extraordinary circumstances under which the Supreme ***Court*** would revisit a precedent?

KAVANAUGH: Well, Brown versus Board of Education, of course, overturned Plessy. And Plessy was wrong the day it was decided. It was inconsistent with text and meaning of the 14th Amendment which guaranteed equal protection.

And the Supreme ***Court*** in -- in the Strauder versus West Virginia case in 1880 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 principal in the Plessy decision, in a horrific decision which allowed separate but equal.

And then Brown versus Board corrected that in 1954, of course, corrected it on paper. It's still decades and we're still seeking to achieve racial equality. The long march for racial equality is not ***over***.

But Brown versus Board, as I've said publicly many times before, the single greatest moment in Supreme ***Court*** history by -- in so many ways; the unanimity that Chief Justice Warren achieved which is a -- just a great moment; the fact that it lived up to the text of the Equal Protection Clause; the -- 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 a badge of inferiority.

That moment in Brown versus Board of Education is so critical to remember. And the opinion is so inspirational. I encourage everyone to -- it's a -- it's a relatively short opinion but it's very powerful, it's very focused on the text of the Equal Protection Clause and correcting that awful precedent of -- of Plessy versus Ferguson, a great example of leadership.

And -- and just the last point I'll mention on process, they -- they were -- it was -- 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 argument originally and then decided there's a lot going on and maybe not everyone's seeing it the same way, the justices. And they had a re-argument, which I think 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 mentioned yesterday and I mentioned today, keep working at it as a team of nine.

And -- and they came out unanimous. Chief Justice Warren, thankfully, led the ***court*** in that decision. That was -- that was a great moment, the greatest moment in Supreme ***Court*** history.

CORNYN: Thank you, judge.

LEE: Thank you. I awarded two additional minutes to Senator Cornyn because he was interrupted, by my count (ph), five times during his testimony. Senator Whitehouse is next.

WHITEHOUSE: Thank you. Good afternoon, Judge Kavanaugh.

KAVANAUGH: Thank you, senator.

WHITEHOUSE: Are you good for another half-hour?

KAVANAUGH: I'm good.

WHITEHOUSE: All right, good. In my office, you told me that you could provide no assurance to me that -- that you'd uphold a statute requiring insurance companies to provide coverage for pre-existing medical conditions. Is that still true here in public?

KAVANAUGH: Well, I think, senator, it's important to understand the principal at play here. The principle's...

WHITEHOUSE: We've 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 a statute?

KAVANAUGH: Well, senator, judges like to explain their -- their decisions.

WHITEHOUSE: Yes, but I get to ask the questions. Usually you get to ask the questions because you're the appellate judge. But today for a 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?

KAVANAUGH: So to -- to prepare for this moment, I went back and read...

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 -- I -- it'**s** -- it could be as simple as yes or no.

KAVANAUGH: But I can enhance your understanding of my answer if I explain it, I think.

WHITEHOUSE: I really just want your answer on the record. I think I'm pretty capable of understanding it on my own.

KAVANAUGH: But well, then everyone to understand my answer. So there'**s** a -- there'**s** nominee precedent of how justices and nominees in my position have answered in the past. I'll -- I'll be succinct, if I can. And all eight sitting justices of the...

WHITEHOUSE: I know, you've...

KAVANAUGH: ... Supreme ***Court***...

WHITEHOUSE: ... actually said this in the hearing, so ***people*** who are listening and interested have actually already heard you say this.

KAVANAUGH: Well, I think it'**s** really important. So I want to...

WHITEHOUSE: Say it again then.

KAVANAUGH: ... I -- I -- 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, you know, 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?

WHITEHOUSE: Got it. Everybody else does it and your answer is still no.

KAVANAUGH: So the reason everyone else does it, though, is rooted in judicial independence and my respect for precedent. So it'**s** a combination of my respect for precedent, nominee precedent and my respect for judicial independence. So I can't give assurances on a specific hypothetical...

WHITEHOUSE: OK.

KAVANAUGH: ... base (ph).

WHITEHOUSE: OK, let me on to another subject which is executive privilege. Executive privilege is a principle that is founded in the Constitution and the separation of powers, correct?

KAVANAUGH: The Supreme ***Court*** so ruled in the United States versus Richard Nixon case. So that was the first -- that -- the -- the key issue in United States...

WHITEHOUSE: That'**s** all right. I just needed the answer to the question and you've answered it. The...

KAVANAUGH: ... OK. The source is important.

WHITEHOUSE: ... the -- as a privilege, it needs to be asserted, does it not? That'**s** true of privileges generally?

KAVANAUGH: I don't know where you're -- where this is going. But the -- the -- the...

WHITEHOUSE: It's a pretty straightforward question. Don't privileges need to be asserted in order to apply?

KAVANAUGH: ... Well, privileges are recognized...

WHITEHOUSE: Once they're asserted.

KAVANAUGH: ... I think as a general proposition in -- say...

WHITEHOUSE: Fair enough.

KAVANAUGH: ... say ...

WHITEHOUSE: I'm only asking as a general proposition.

KAVANAUGH: ... Yes, in attorney-client privilege, you would assert the...

WHITEHOUSE: You have to assert it.

KAVANAUGH: ... attorney-client privilege. Yes.

WHITEHOUSE: And who asserts executive privilege?

KAVANAUGH: Ordinarily -- well, that's a -- that is a complicated question, senator, actually. That -- that...

WHITEHOUSE: Who does it come back to? Ultimately, who exerts executive privilege?

KAVANAUGH: ... So it depends what you're talking about, so what kind of executive branch document you're talking about it depends. In -- in my experience...

WHITEHOUSE: Ultimately, it's the president?

KAVANAUGH: ... There's not -- there's not as much precedent on that, there's some. The Supreme ***Court*** -- this was -- the Supreme ***Court*** in the United States versus Richard Nixon...

WHITEHOUSE: Isn't it fair to say that executive privilege belongs to the president of the United States, the Chief Executive?

KAVANAUGH: Yeah, it can also belong to the former president in the case of former presidential records; that's the one caveat I want to put on that...

WHITEHOUSE: OK. Fair caveat.

Is the assertion of executive privilege by the president subject to judicial review?

KAVANAUGH: Well, of -- of course, because United -- under the precedent, United States v. Richard Nixon said two things.

WHITEHOUSE: Yeah.

KAVANAUGH: It said one, the 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, held that the executive privileges rooted in the separation of powers and in Article II.

But secondly...

WHITEHOUSE: The reason I'm asking doesn't 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 look 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'm 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 Judicial review, and we have failed to get subpoenas out of the Committee for documents so we can't trigger it that way. And there'**s** 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'**s** basically commonly agreed -- and put that in to the context of what we are looking at. And particularly with respect to Chairman Leahy'**s** questioning earlier if some of the documents he'**s** 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've had other witnesses come and do non-assertion, assertions of executive privilege. And so I'm sorry to drag Committee business before you, but I do think it is important that we try to get this right.

KAVANAUGH: Can I make one addendum based on my experience from the time which is, I don't think formal assertions usually occur until after there has been a subpoena, at least from my time working...

(CROSSTALK)

WHITEHOUSE: Which is why not being able to get a subpoena kind of bollockses (ph) up the process, yes indeed.

The role of the Federalist Society, and 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 -- you can see him ***over*** your shoulder.

KAVANAUGH: Yes.

WHITEHOUSE: Has said that the Federalist Society was in-sourced in to 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'm 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 your words speaking, I guess, to the Federalist Society, at a 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 two 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 be in-sourced to the White House for this process?

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 favor ...

(CROSSTALK)

WHITEHOUSE: Would it (ph) 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?

KAVANAUGH: Well, my experience was when Justice Kennedy retired on a Wednesday, Mr. McGahn called me later that afternoon, said we need to talk on Friday. He come ***over*** to my office on Friday evening, or late afternoon. We talked for three or four hours -- interview and going through the usual kinds of questions you would go through when you're embarking on a process like this -- and then I met with the -- interviewed with the president on Monday morning...

(CROSSTALK)

WHITEHOUSE: So is it your testimony that you don't know what the role of the Federalist Society was in your selection?

KAVANAUGH: My experience in -- my personal experience and what I know is that Mr. -- that President Trump made the decision, for starters. President (ph) -- 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, spent a lot of time on it, and I also know that the vice president...

WHITEHOUSE: But you have no knowledge to share with us today about the role of the Federalist Society and how they were in-sourced into the White House? That is a mystery to you as well as to us?

KAVANAUGH: I'm not sure what Mr. McGahn meant, I think -- by that comment -- I think the Federalist Society members are -- lawyers and the administration are Federalist Society members, and so it should not be a surprise that -- because it'***s*** an organization...

WHITEHOUSE: And Leonard Leo'***s*** role specifically from the Federalist Society?

KAVANAUGH: I don't know.

WHITEHOUSE: OK.

KAVANAUGH: I don't know the specifics.

WHITEHOUSE: Well, let'***s*** go from specifics to generals, and let me put up a graphic that shows some of the folks who fund the Federalist Society. It'***s*** 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 don't 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?

KAVANAUGH: Senator, Mr. McGahn was the one who contacted me, I interviewed with, then the president and I know the president was -- I'm the president'**s** nominee. He was directly involved in making that decision. I'm 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 -- get input on the -- at least the ***people*** who were the finalists.

So that that part of it, my 12 day experience was with the White House counsel'**s** office and the president and vice president too.

WHITEHOUSE: OK. So ...

KAVANAUGH: And I also don't ...

WHITEHOUSE: Whatever ...

KAVANAUGH: I'm not familiar with ...

(CROSSTALK)

WHITEHOUSE: Whatever the role is of the Federalist Society was in all of this, it was, and there'**s** plenty of reporting. We don't need to litigate that between us. You don't know is what you've testified and that'**s** fine.

KAVANAUGH: On my process, and again -- yes.

WHITEHOUSE: But you're 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've been inside that machine.

KAVANAUGH: I -- I did not run it and Judge Gonzales, when I was in the counsel'**s** office was the counsel. He ...

WHITEHOUSE: But you've been inside the process.

KAVANAUGH: I have -- I have been inside the process, yes.

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 don't 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 don't report their donors.

But I'd be prepared to make a very substantial bet that there'**s** enormous overlap between the funders of the Judicial Crisis Network campaign for your confirmation and the Federalist Society donor group to the extent the were 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?

KAVANAUGH: Senator, there are a lot of premises in your question that I'm not sure ...

WHITEHOUSE: I'm not asking you to accept the premise as it'**s** true, I'm asking it as a hypothetical.

KAVANAUGH: Well, I ...

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 running on your behalf for your confirmation, would that be a matter of concern or is that all just fine and we shouldn't even care about getting the answers?

KAVANAUGH: So two things, Senator. One is describe the process I went through Mr. McGahn, the president and the vice president in the selection and that's what I know about my process. Two, on the ads, there a lot of ads against me as well. And I've seen those, and, you know, our family's seen those and then there's ads for me and we've seen those too. And as Chief Justice Roberts said in his hearing, it's a free country and there are ads for and against and obviously we've -- as Senator ...

(CROSSTALK)

WHITEHOUSE: Should we -- should we as citizens know who they are, who's funding the ads? Just as a matter of citizenship, is that ...

KAVANAUGH: Well, I think that's 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's the First Amendment implications of that and that would come to a ***court***.

I would keep an open mind on that case under the precedent and First Amendment ***law*** and would -- would think about that. The policy question I think is -- is really for Congress in the first place to -- to determine, assess, study exactly what kind of disclosure requirement should be put in place.

WHITEHOUSE: Yes.

KAVANAUGH: I understand ...

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.

KAVANAUGH: I do understand the concerns about money in the political system. I -- I -- when I worked for -- in the time it takes all of you, and when I worked for President Bush in the '04 -- '03, '04 timeframe, for example and how many fundraisers he had to do and going back to the September 11 point and the time and burdens on the presidency, he had to do a lot of -- running for president while being president ...

WHITEHOUSE: Yes. It's 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's like that and the public doesn't know who's behind it, only the -- the very few ***people*** are in on what the deal is. So it's gotten easier since President Bush but not better.

KAVANAUGH: Well I think for some members, particularly in the House, if you have a -- if you're running for reelection and a third party group comes in against you, you -- and you don't have -- you have to go out and the fundraising and spend even more time, I think that -- at least as I understand, that's part of concern I've heard ***over*** the years just generally is the time that each of you has to spend and the members the House have to spend ...

WHITEHOUSE: So let me just continue on forward through this product problem of -- 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?

KAVANAUGH: Yes, I've seen briefs by the Pacific Legal Foundation.

WHITEHOUSE: Yes. Do you know what they do?

KAVANAUGH: I -- I'll take your description.

WHITEHOUSE: OK. 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're 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 and 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?

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 they're 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 it'***s*** across the entire ideological spectrum, you -

WHITEHOUSE: What are the signals that that'***s*** gotten out of hand? That there'***s*** something rotten in Denmark?

KAVANAUGH: That'***s*** an interesting question, Senator, and I think it'***s*** an important one, but it'***s*** not one that I think I have a great answer to.

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'***s*** 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 main like citizens for peace and prosperity and puppies and nobody knows who'***s*** really an interest.

So that would be one thing that I think would be a concern. Another would - 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 of somebody who has actually tried cases and who has been around courtrooms a lot and who'***s*** seen a lot of litigation, 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'***s*** just something that doesn't seem right about that, that seems to me a little bit like faux litigation, that there'***s*** 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?

KAVANAUGH: I will -

PROTESTER: (OFF-MIKE)

KAVANAUGH: -- acknowledge, Senator, I'm not entirely familiar with that phenomenon. I would be interested in --

WHITEHOUSE: I might follow up with you with a, you know, question for the record to get your more deliberate thoughts about it.

KAVANAUGH: And - and on your amicus thought, I'm interested in the specifics of your proposal and certainly if confirmed I would -

WHITEHOUSE: Because here's the concern, you know perfectly well that the court depends on - as much as anything on its reputation, you don't have a purse and you don't 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've 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 nominee selection.

And that the same funders are behind the judicial crisis network operation that is politically pushing for you, that the -

PROTESTER: (OFF-MIKE)

(CORRECTED COPY - CORRECTS SPEAKER I.D.)

LEE: Senator Whitehouse, we're going to add one minute to your time, you've been interrupted twice.

PROTESTER: (OFF-MIKE)

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're 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 five to four decisions that I talked about yesterday, which I think is the most heartbreaking 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've been in front of the First Circuit a lot, I've been in front of the Supreme Court once, I've been in front of the renowned (ph) 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'll at least consider that that's 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 can't be a single Democrat appointee with them, that's 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's 100 percent, 100 percent for this crowd of big special interests.

And then here's where you come in at the end. This is the Roberts five majority in those five to four cases where these conservative groups have come in to make their pitch. They have won 92 percent of the time in those five four cases. (CORRECTED COPY - CORRECTS SPEAKER I.D.)

WHITEHOUSE: If you figure they're throwing a couple of long balls, you know, like hail marys, and maybe that's the eight percent, that's 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-interest behind the Pacific ***Law*** Foundation and the Washington ***Law*** Foundation and this little array of, I would say strategic litigators who were funded by corporate interests and right wing interests. And then these (inaudible) who we don't know who is behind them and then you see this result. That's a tableau 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'd 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.

KAVANAUGH: Senator, a couple 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 -- I take your point on the disclosure. I'd be interested in the specifics of anything you're talking about about disclosure requirements for the Supreme ***Court***.

Two, I do believe deeply in the idea that we're a team of nine and need to be working together and I take -- I take the point too, that's it's very important if I'm confirmed that I work with as best I can and I will, to maintain the confidence of all the American ***people*** and the independence and impartiality of the Supreme ***Court*** at all time. I am aware that we all ultimately.

PROTESTER: (Inaudible). Why won't you listen to us? If you love America, stop (inaudible).

KAVANAUGH: I'm -- I'm 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 at 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'm 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.

PROTESTER: That would be a first for you. Your political hack will take away our healthcare...

WHITEHOUSE: My...

PROTESTER: ... in the way that you (ph) not pretending to be impartial.

WHITEHOUSE: My time has expired. Mr. Chairman. There will be a second round, correct?

(CORRECTED COPY - CORRECTS SPEAKER I.D.)

LEE: There will be. I'm happy to give you an additional minute in light of the fact that you had two additional interruptions if you'd like.

WHITEHOUSE: Well, 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; 7 times as many that think it's 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 100 percent win rate for them in those cases.

I think we're at a tough place right now and I think we really need to get back for -- away from that. So thank you.

LEE: Thank you Senator Whitehouse. Judge Kavanaugh, I want to get back to a couple of questions that my 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***?

KAVANAUGH: No.

LEE: And during the campaign of President Trump, as I recall he came out with two different lists -- two different list 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?

KAVANAUGH: I was not.

LEE: Were you included in the second list?

KAVANAUGH: I was not.

LEE: OK, so -- so you were -- you became under consideration only after President Trump took office, correct?

KAVANAUGH: That'***s*** my understanding. That'***s*** when I became identified as I understand.

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 is in the United States Senate or the United States House of Representatives?

KAVANAUGH: There is no aisle or separate caucus rooms and Supreme ***Court***, either literally or figuratively, in my view.

LEE: And under most circumstances in most years in recent -- in the past decade or so, the number of cases that are decided on a 5 to 4 margin very low, less than 20 percent as far as I can count. Is that roughly consistent with your understanding?

KAVANAUGH: That is.

LEE: Meaning that the configuration of 5 to 4 is much less common than basically all of the -- 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?

KAVANAUGH: No, it is still a decision of the ***court*** no matter what the ultimate majority opinion is composed of.

LEE: And it would -- would it behoove a lawyer who was an officer of the ***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?

KAVANAUGH: Well I -- if I were a lawyer arguing before the Supreme ***Court*** I probably would refrain from questioning the motivation of the justices. I think each of the justices, I know them. They are all committed to the Constitution of the United States and impartially discharging their duties, of course have different perspectives on

certain issues and -- but they are all -- I think we're fortunate to have eight hard working justices who have outstanding records and are committed to the Constitution and committed to the independence of the judiciary.

LEE: What about of this 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?

KAVANAUGH: The precedent stands either way.

LEE: Thank you. I want to get back to a separation of powers point that has come up along various lines of questions asked by colleagues today. Is the Constitution relocated to the judicial branch? Is it something that is to be upheld and interpreted only by those who wear black robes?

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're considering the passage of a ***law*** you might assess the first amendment implications or if it'***s*** a -- national security, the fourth amendment implications and -- or the due process, fifth amendment implication.

LEE: And we've all taken our own oath to uphold the Constitution.

KAVANAUGH: Right. So, you do your best and then the executive branch as well, a 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, and the context of a specific case or controversy. We don't -- President Washington, George Washington, asked the Supreme ***Court*** for an advisory opinion in his first term on a disputed legal issue. It actually might have been his second term.

But he -- President George Washington asked for an opinion. The Supreme ***Court***, respectfully, wrote back and said, we don't provide advisory opinions on -- we only decide cases or controversies. Thereby, I think, underscoring the point you're making with your question which is constitutionality of -- of ***laws***...

PROTESTER: (OFF-MIKE).

KAVANAUGH: ...is assessed in the...

PROTESTER: (OFF-MIKE).

KAVANAUGH: ...is assessed in the first instance by Congress and the executive.

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 with it?

If -- if we see a particular right that might be jeopardized by an active Congress we are considering, it wouldn't be inappropriate for us to say, look, we're not sure, exactly, how far the Supreme ***Court*** will go here. Out of an abundance of caution, out of respect for the Constitution, we're going to draw the line more carefully so that we make sure that we don't step into unconstitutional territory?

KAVANAUGH: That has happened historically and, I think, happens today. And that -- that underscores how the Constitution tilts toward liberty in so many different ways. It tilts toward liberty because it'***s*** 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 -- 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, fourth amendment objection, eighth amendment cruel and unusual punishments clause objection, equal protection objection. And based on my view of the Constitution, I'm going to vote no on this ***law***. That'***s*** another way in which the constitutional structure all fits together and tilts toward liberty.

LEE: For that very reason, it would probably lead to some bad results if we were not to do that. In other words, if we were always inclined to say, let'***s*** just pass this, if it'***s*** unconstitutional the ***court*** will do something about it.

KAVANAUGH: Well.

LEE: Can you foresee instances in which that could create problems?

KAVANAUGH: Yes, Senator. I think Justice Kennedy has written eloquently about this. Each -- each official, each officer in Congress, each member of Congress, each Senator, the President takes an oath, of course, a constitutional oath, to abide by the Constitution.

And that'***s*** very important for each member to understand and underscore as I know all of you do. And that is an -- that is an important part of the separation of powers process. I don't think that the framers thought, well, let'***s*** pass something even we, ourselves, meaning the members of Congress, think there'***s*** a constitutional problem here. That -- that'***s*** not how it has worked historically nor do I think that'***s*** how the framers, necessarily, intended for Congress to work.

LEE: And there are a myriad of instance, moreover, in which we might enact something that, for some reason or another, might not be challenged for a long time, or might be difficult to challenge due to justice ability (ph) issues, somebody lacking standing, absence of a right controversy, and so forth.

KAVANAUGH: That -- that, particularly, happens in the national security context, I think, Senator because there'***s*** often not someone with standing, especially if it'***s*** something being done in a foreign country against -- against foreign citizens that might be difficult to get into ***court*** in some way or another.

LEE: One of the reasons I focus on this today is there was a -- an exchange you had with one of my colleagues, earlier today, about the indefinite detention of American citizens, apprehended on U.***S***. soil.

KAVANAUGH: Yes.

LEE: There was some discussion surrounding this suggesting that Ex parte Quirin might, somehow, justify this. You don't need to respond to this, but I think it'***s*** -- it'***s*** a point that needs to be mentioned. Justice Scalia mentioned in his dissent in Hamdi 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 Salvatore'***s*** (ph) 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, not withstanding the possibility that the Supreme ***Court*** might not step in, in a particular case.

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 Stevens. One of his more powerful dissents on individual...

PROTESTER: (OFF-MIKE).

KAVANAUGH: ...liberty.

PROTESTER: (OFF-MIKE).

KAVANAUGH: One of his more powerful dissents protecting individual liberty. Their ruling, Justice Scalia with Justice Stevens, 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 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're right. There was an American -- there was an American citizen involved. The ***court***, you're right also, of course, you've studied this as much as anyone, but the ***court*** did resolve the case very quickly. And the opinion -- I've spent many an hour trying to decipher certain paragraphs of that opinion for cases I've had.

It's -- it's not -- it's not easy. I will -- I will say the ***court***, to its credit -- I'll give a little credit, did have an eight hour, or something, oral argument. The Attorney General of the United States argued Quirin personally and I've read the transcript of that to try to figure out what was going on in the opinion, but did not unlock the box completely, for me.

I don't know what was going on in the Quirin opinion, but your point, Justice Scalia did say it's 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 rush decisions in a judicial context sometimes aren't -- aren't always the -- the best.

LEE: On that point, would you be open to the idea of bringing back the era of the eight hour oral argument?

(LAUGHTER)

It could (ph) be fun.

KAVANAUGH: I don't -- the eight hour oral argument. We did have one in a -- in an in bank (ph) case maybe two years ago that went -- went all afternoon. I don't -- I don't --

(CROSSTALK)

-- after we got back to the conference room, I don't think anyone was saying we should do that in every case.

LEE: Understood, understood. Let's talk about judicial philosophy for a minute. I'd 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's the difference between those two?

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's speaking at a level of generality, and they're tough cases that the margins always -- I'm trying to figure out what the line is here. But as a general proposition, it's important for every judge to go in with the mindset of I'm not the policymaker, I'm the ***law*** interpreter, the ***law*** applier in a particular case.

And I think that's a very important part of the Federalist papers, it's 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.

LEE: Now within that framework, when we enact a ***law***, what determines what it is that you have to interpret it -- what (ph) that you have to interpret? Is it -- is it what we say or is it what we subjectively intended?

KAVANAUGH: It is what is written in the text of the statute, Senator. Justice Kagan said it well at a talk two years ago, maybe three at Harvard ***Law*** School, I was present in the audience.

She said we're all textualist now, she was talking about Justice Scalia who of course brought about a significant change in the focus of all federal judges. I've seen it across the supposed philosophical spectrum.

All federal judges pay very close attention of the text of the statute and that's why I think Justice Kagan said we're all textualist now because she explained that every judge really cares about the words that are passed by Congress.

Now why -- 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*** as of -- as is to what is signed by the president, it's what's gone through the Senate and the House, and that is the ***law***.

But it also is 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's negotiations late at night ***over*** precise words and compromises inevitably.

Legislation is compromised, the constitution was a compromised legislation to (ph) compromise, and when we depart from the words that are specified in the texts of the statute, we're potentially upsetting the compromise that you all carefully negotiated in the legislative negotiations that you might have had with each other.

And so that's a danger that I try to point out when we're having oral argument in a case where we're deciding cases that if we deviate from what Congress wrote, we're potentially upsetting this careful compromise even if we think we would have struck the compromise in a different place as judges, that's not really our role.

So I think both as a formal and functional matter, it's important to stick to the text. There are canons of interpretation which occasionally cause you presumption -- a mens rea of presumption against extraterritoriality and the like that cause you to super impose a presumption on the text.

But otherwise, sticking to what you passed is very important.

LEE: But you certainly consider yourself a textualist, and if you follow Justice Kagan's statement we're all textualist now, meaning that's what judging is, judging is --

KAVANAUGH: Judging is paying attention to the text in statutory cases, paying a text -- 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.

LEE: How does textualism relate to or differ from originalism?

KAVANAUGH: So originalism, as I see it, has, to my mind, means in essence constitutional textualism, meaning the original public meaning of the constitutional text. Now originalism -- it's 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're all originalists now, which was her comment. By that she meant the precise texts to the constitution matters, and by that the original public meaning, of course informed by history and tradition and precedent, those -- those matter as well.

There's a different conception that some ***people*** used to have of originalism, which was this (ph) orginal intent, in other words what did the ***people*** -- some ***people*** --

LEE: Subjectively --

KAVANAUGH: -- subjectively intent the text to mean, and that has fallen out of the analysis because, for example, let's just take the 14th 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 apt with the ***law*** shall be the same for the black and the white, as (ph) Brown v. Board focuses on the text. But there were some racist members of Congress involved in that (ph) who didn't think it should apply in -- in that way to certain -- certain leased (ph) aspects of public life.

But we don't -- if you're doing -- paying attention to the texts, you don't take account of those subjective intentions and nor is it proper as a general proposition to take account of the subjective intentions.

They can be evidence in certain cases, the First Amendment, for example, of the meaning of the words --

LEE: Of the original public meaning.

KAVANAUGH: -- they can be of the original public meaning, they can be evidence of that, but you're not -- you don't follow the subjective intention. So the original public meaning, originalism, what I've referred to as constitutional textualism with 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've said repeatedly, you also look at historical -- the history, you look at the tradition, Federalist 39 -- 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.

You know, start with the words, as Justice Kagan said we're all originalists now in that respect of paying at least some attention to or more than some paying attention to the words of the constitution.

LEE: So if we stipulate for our purposes today as we're 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're an originalist?

KAVANAUGH: That's correct, and Justice Kagan -- as Justice Kagan said, I think that's what she meant, we're all originalists now, and I don't -- think she said what she meant and meant what she said when she said that.

LEE: Sure. What by the way, would be the argument against that? To me, that sounds like judging. What -- what would one argue against being that type of judge, against being a textualist, originalist?

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*** -- the -- so, 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's not a set of aspirational principles; it's a -- it's ***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, like a statue that is inconsistent with the Constitution, the supreme ***law*** controls. Namely, the Constitution controls ***over*** a contrary statute, and that's of course also discussed in Federalist 78 as well, of what's the supreme ***law*** of the land and the Constitution's the supreme ***law***.

Again, precedent, history -- historical practice subsequent to the passing of the tax -- we see that for example in establishment clause cases. The ***court*** will often look -- the tax, what's the historical practice and precedent which I said is rooted in Article III. Those things all go in to it but the words -- the original public meaning are -- are an important part of Constitutional interpretation -- has been I think throughout.

LEE: Let's 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 -- than the influenza virus which is rapidly gaining on us, what if we decided we're all busy?

There are parades to attend, there are political rallies to organize -- that we get tired of the busy, drudgerous (ph) work of actually making ***laws***, and we also don't want to make ourselves accountable for the ***laws*** we pass. It's

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?

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 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 -- the -- 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***.

LEE: And yet in some respects it'***s*** not that far removed from some of what we do today. We may not pass something as extreme as what I've 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?

KAVANAUGH: Well the Supreme ***Court***, as you know, Senator, has a non-delegation principle and it -- at least under current precedent it is allowed the delegation -- and I don't want to get too specific here, but it has allowed some delegation. Now, some justices or judges would say actually when the executive enacts rules pursuant to those delegations, that'***s*** the exercise of executive power, but I think there'***s*** been some push-back on that.

And in any event, the Supreme ***Court*** has a 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.

LEE: And when we do that, at some point we're shirking our own responsibility because we're making lawmakers whether than ***laws***, and we're also consolidating in to one body the power to make and enforce ***laws*** which is not only something that can lead to ***tyranny***; it'***s*** 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, didn't the Supreme ***Court*** uphold the disclosure requirements at issue in Citizens United?

KAVANAUGH: It did; I believe that was an 8-1 margin.

LEE: And in fact, you've -- you've 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, isn't that right?

KAVANAUGH: That -- that is what the Supreme ***Court*** has said in certain contexts and -- and that is the ***law*** as set forth by the Supreme ***Court***, that they -- Citizens United'***s*** a good example of that, Senator.

LEE: And -- and in a case called Emily List v. FEC, you wrote that disclosure requirements trigger our rights that receive, "less first amendment protection," than speech prohibitions -- other types of speech prohibitions.

KAVANAUGH: And I -- 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.

LEE: Do you have a favorite among the Federalist Papers?

KAVANAUGH: I have ...

(CROSSTALK)

LEE: I'm not asking you to choose here between a Liza and (ph)...

(CROSSTALK)

KAVANAUGH: Yeah, no, that's 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; it's very important when Hamilton explains all the ways in which the presidency is not a monarchy on our constitutional system. I think that's very important.

Federalist 10, which talks about factions in America and explains that having the separation of powers, and 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's -- that makes it frustrating at times because it's 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*** that -- 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 about the national and federal government, so the combination in 39 (ph) -- the combination that we have, this odd -- that's 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 -- in one body is the very definition of ***tyranny***. I start my separation of powers class every year with that exact quote that you read yesterday, Senator Klobuchar, because that's very important.

51 (ph), if men -- if men were angels, we don't -- we wouldn't need government. So I -- I -- sorry, I've got, like, eight kids...

LEE: It's -- it's -- no, it's (ph) -- it's brilliant, and I -- and I think that's a great -- greatest hits list. If these were on Spotify, I'd say you put together a list of those.

(LAUGHTER)

Let's close in the -- in the minute and a half I've got left -- I gave myself an additional 30 seconds because of the two interruptions 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 in the D.C. Circuit and 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 wouldn't need government, and if we had access to angels to govern ***over*** us, we wouldn't 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?

KAVANAUGH: That's a -- that's an interesting question, Senator. I think we recognize that we're all imperfect, first of all. All of us as humans are imperfect, and that -- that includes judges and that includes legislators, it includes -- all of us are imperfect, and so we recognize that in how we go about setting up our government.

If -- if there were some perfect group of ***people***, we'd put all the power in one -- that one body, but because we're imperfect, putting all the power in that one body would be as -- 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're imperfect is dividing the power, separating the power, and that -- 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'd still have state governments that can further protect liberty and be laboratories of Democracy as well. I think all that is because we're imperfect and because we recognize the imperfections.

It'**s** also why we have things like a jury system, and we -- the -- even within the judiciary, we didn't trust a judge to do trials on his or her own -- criminal trials, we have a -- or civil trials, we have a jury system to recognize and we have usually 12 in a -- and that is designed to recognize that we're imperfect and sometimes it -- that'**s** why we have group decision-making, that'**s** why we have 535 legislators, that'**s** why we have nine justices. We don't usually have one person, and so too in juries.

So I think that all maybe stems from the same philosophical understanding that we're imperfect beings and that we divide power and that we make sure that no one person in a -- a jury situation or other situations where our liberty can be affected is exercising total control.

LEE: Great. Thank you very much, Judge. My time is expired. I am not the chairman of this committee, even though I'm playing him on TV. I understand that under the previous order entered before he left, we're supposed to take a 10-minute break. We will stand in recess for 10 minutes.

(RECESS)

GRASSLEY: Welcome Back, Judge Kavanaugh. Senator Klobuchar.

KLOBUCHAR: Thank you very much, MR. Chairman. I was just visited by your wife who'**s** here and she just told me you celebrated her 64th wedding anniversary. Is that correct?

GRASSLEY: (OFF-MIKE)

KLOBUCHAR: Yes, well, that'**s** what she told me. I thought this was very romantic that you're gathered here. So I want to start, Judge Kavanaugh, going back to where we started yesterday, and that is about the documents and that 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?

KAVANAUGH: Senator, I'm not going to take a position. That'**s**, in my view, a decision for the committee in consultation or discussion with the executive branch. I am the --

KLOBUCHAR: So you're not going to say whether or not you have a problem with it?

KAVANAUGH: I'm not -- I don't think it'**s** my role to say one way or another, at least as I analyze the current situation. That'**s** a decision for the committee and the executive branch and the presidential library. They're (ph) President Bush'**s** documents, ultimately.

KLOBUCHAR: Since right now we're not able to review those documents in addition to the 102,000 that the White House has deemed theirs that we're not able to see, an asserted privilege (ph) that'**s** never happened before in a Supreme ***Court*** nomination hearing, is there anything in those documents or in the staff secretary documents that you'd think we'd like to know that'**s** relevant to some of the topics we've discussed today?

GRASSLEY: Before you answer, without taking time off of her time, it's 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 haven't had very many ***people*** take us up on the offer.

KLOBUCHAR: OK, but Mr. Chairman, not to go into my time either, to respond to you, I -- I wasn't talking about those 189,000 documents. I was talking about the ones that we're not allowed to see at all from the staff secretary time as well as the 102,000 that the White House as exerted -- has asserted privilege on that we're not able to see. So I'm not even talking about the 189,000. OK? Thank you.

GRASSLEY: I stand corrected.

KLOBUCHAR: All right. So again, I asked if there's anything in those documents you think would be relevant to our discussion here.

KAVANAUGH: Senator, those documents are President Bush's documents and for the committee in the -- in the Bush Library in the executive branch to -- 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 in Justice Scalia's hearing, in Chief Justice Roberts' experience with the ***S***.G. documents with Justice Kagan --

KLOBUCHAR: Those are solicitor general for the viewers out there. But I'm talking about the ones in the White House time (ph) --

KAVANAUGH: Well, I guess I'm not seeing a distinction. They're both executive branch documents. So there's one executive branch --

KLOBUCHAR: I think one is involving the ongoing solicitor general, but I have just one more question on this line. You've just said that rush decisions aren't always the best in answer to the discussion with Senator Lee. And 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?

KAVANAUGH: Senator, I'm -- that -- that's a decision for the committee and I'm not familiar with the circumstances of the document. On the social general documents, I just want to say one thing. With Chief Justice Roberts, it was not active cases. That was four years of his documents from the time he was solicitor general is it (ph) from 1989 to 1993, he was nominated in 2005. It's my understanding that those documents -- so my only point is it's not a new issue but it's also not for the nominee to decide because they're the president's --

KLOBUCHAR: OK.

KAVANAUGH: -- former president's documents.

KLOBUCHAR: OK. Why don't we move on to the executive power issues. And 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'm struggling with the practical implications of that. Is it -- what about a president who commits murder or if she jeopardizes national security or if he obstructs an investigation or a white-collar crime. How do you differentiate between these crimes when you characterize them as dastardly?

KAVANAUGH: So I think there's several issues going on with that question, Senator. The first thing I want to underscore is that what I wrote in the Minnesota ***Law*** Review was -- when -- in 2009 when President Obama was president -- or becoming president -- was thoughts on a variety of topics reflecting on my experience --

KLOBUCHAR: I just want to pick up the tempo little with my questions because I have so many of them. Just is -- could we get to that point about the dastardly, if there's a way to differentiate.

KAVANAUGH: Yes, but just to underscore -- it's real important -- that was a proposal for -- to be considered. It was not a constitutional position. I did not take any constitutional position on the issues you're 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 --

KLOBUCHAR: There isn't 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 --

KAVANAUGH: But there are two different things going on. The one is about special counsel investigations, for example, or criminal investigations and -- or civil lawsuits. And that's a question for Congress to consider whether they want to supplement the protection provided by Clinton versus Jones because there was a lot of criticism of Clinton versus Jones.

The second question, getting right to your point, is what is an impeachable offense. And that's actually decision for you, not for me. And because the House and the Senate --

KLOBUCHAR: But I'm just figuring out how -- whether we know something is dastardly or not if we can't even investigate it.

KAVANAUGH: Well, I think I'm going to repeat, that's a question for the -- you're asking for -- what -- is it a high crime or misdemeanor...KLOBUCHAR: I'm asking about -- I'm asking about your position that you -- that you stated in this ***law*** review article that a president should be not subject to investigations while in office.

KAVANAUGH: The dastardly comment --

KLOBUCHAR: But you -- oh, (ph) you're just -- just to -- you're only saying that they should be subject to investigation as part of an impeachment and that there's no other investigation that could occur? Is that fair (ph)?

KAVANAUGH: No. I -- I was -- first of all, in constitutional position on criminal investigation and -- and prosecution. I did not take a position on the constitutionality, period. On the idea that I talked about was something for Congress to look at if it wanted, so that's point one. The -- point two is the idea that at the -- what is an impeachable offense, and that really is a question for -- for the House and the Senate.

KLOBUCHAR: Let me -- 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're very concerned about that.

But in the seven 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 a statute unconstitutional, even if a ***court*** has held or would hold the statute -- 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 (ph) 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 Seven-Sky?

KAVANAUGH: So "ignore" is not the -- the concept there, as I think we discussed when we met, we had a good back-and-forth on that, was the concept is prosecutorial discretion, and that's the concept I referred to in the Aiken (ph) County opinion to explain the footnote you're referencing. Excuse me. And prosecutorial discretion is, of course, firmly rooted. United States versus Richard Nixon case says "The -- the executive branch has the absolute, exclusive authority and absolute discretion whether to prosecute a case." That's an exact quote from United States versus Richard Nixon. And then, Heckler versus Cheney 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.

KLOBUCHAR: But do you -- so you, if a -- if a court has held a statute constitutional, do you believe that a president should have to enforce it?

KAVANAUGH: So for example, let's talk about, for example, the marijuana laws. Those are constitutional, but a U.S. attorney or the attorney general could say, "We're not going to devote our resources to a low-level marijuana offense." Those are perfectly constitutional.

KLOBUCHAR: Let me just try one other example, if you -- 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 -- if they have a pre-existing condition.

So let's 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?

KAVANAUGH: So that's a pending case, so I cannot talk about it.

KLOBUCHAR: OK. 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, quote, "pose a significant threat to individual liberty," end quote. So does it follow that you think these -- that other independent agencies are also constitutionally suspect?

KAVANAUGH: So the Supreme Court has, of course, upheld since 1935 Humphreys executor decision (ph), that the concept and practice of independent agencies. What -- and on the CFPB decision, the structure of that agency deviated from the traditional historical practice of independent agencies.

KLOBUCHAR: Do you think the Humphreys (ph) case was -- that was 80 years ago was correctly decided?

KAVANAUGH: It -- it's a precedent of the Supreme Court, and it's been reaffirmed many times. But on that CFPB case, I -- I need to get this out, which is I did not say that the agency could -- 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.

KLOBUCHAR: Yeah, but it also, I mean, 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?

KAVANAUGH: Well, there's...

KLOBUCHAR: So then, does it follow that that agency, as well, would be unconstitutional?

KAVANAUGH: No, with the -- again, Senator, my -- let's go from the back door, which is the remedy, if there's 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 performance in full...

KLOBUCHAR: But wouldn't have anyone heading it up.

KAVANAUGH: No, it would have a single -- single person heading it up, but removable at will. In the case of the CFPB, so the agency...

(UNKNOWN): Abortion (inaudible)

KLOBUCHAR: I -- I would like...

(UNKNOWN): (inaudible)

KLOBUCHAR: I -- I want to turn to what the majority felt about your dissent, and I think they recognize that the dissent would threaten many, if not all independent agencies. I think they specifically mention the FTC, and I would add other ones like the Federal Reserve, Securities and Exchange Commission. It -- does it follow that you think these agencies are unconstitutional?

KAVANAUGH: No, I didn't say -- I didn't say anything remotely like that, respectfully, Senator, in that -- the case. All I was talking about was a single-headed independent agency.

KLOBUCHAR: But that's like Social Security.

KAVANAUGH: But the -- the SEC, the FTC -- those are the traditional -- the FERC, the NLRB are all multi- -- the -- the Fed -- multimember independent agencies. And so those agencies are all the traditional Humphreys executor agencies (ph). And the concern, I explained with the single director independent agency goes back to your point about Federalist 47, which is if you have an independent agency that has -- is completely unaccountable to Congress, or -- unaccountable to Congress or the president, and it's one person in charge, that becomes an extremely powerful position.KLOBUCHAR: OK, 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's a lot of the argument you've made to some of my colleagues, Senator Sasse, is our -- Congress has to step in.

But in this case, Congress stepped in. Congress said, "We have this major financial crisis. That's why we started this agency. We have done this." And then you come in in a very -- in a minority opinion here, and you say that it's unconstitutional and I would throw another federal 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.

KAVANAUGH: Yes....

KLOBUCHAR: All right though, it just doesn't make common sense to me that we would throw an agency out like that or...

KAVANAUGH: But I - but I didn't...

KLOBUCHAR: ...even the head of it. You're basically putting your judgment in the place of Congress.

KAVANAUGH: but I didn't 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 two. 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 and doing its important consumer functions.

KLOBUCHAR: Let's go to one where you actually did throw out the rules and that's net neutrality, right? And that is, in my mind, a bedrock of a free and open Internet allowing consumers and small businesses to have equal playing field. But in U.S. Telecom Association, the FCC, in your own opinion you went out of your way to dissent against the protections. This was a 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 if 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're unconstitutional, so tell me why I'm wrong.

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 and Williamson decision. It's in the godfather of the major rules or major questions doctrine is Justice Breyer who wrote about in the 1980s as a way to apply Chevron (ph).

The Supreme Court adopted that the Brown and Williamson case applied it in the UARG case, the one you referenced Justice Scalia's opinion, and what that opinion says it is. It is okay for Congress to delegate various matters to the executive agencies to do rules but on major questions of major economic work, social significance, we expect Congress to speak clearly before such a delegation and that is it had not happened in my view with respect to net neutrality and I felt bound by precedent therefore to apply the major questions...

KLOBUCHAR: Some minor rules would be OK, but not major. And I know in the decision you say well you'll know the difference when you see it and I think that's why the other judges on the court from - appointed by both parties went with the traditional and precedential way of how to look at this and you used the 1986 law review article by, albeit, Justice Breyer, and then dicta from the King v. Burwell case in 2015. And it just - what I'm trying to show here is this pattern where to say Congress should step in and do everything, you're stepping in in these cases.

KAVANAUGH: So I would say it's a pattern to adhering to precedent.

KLOBUCHAR: OK, but it seems that the precedent to me when you look at for instance Chevron and I know the White House touted the fact that you've overruled the Federal agency actions 75 times and they said that you led the effort to reign in executive agencies in the press release when you were announced. How do you explain -- what did that mean, how you led the effort?

KAVANAUGH: I don't know - I - I don't know what that's referring to. I know my record. I'm sure I've upheld agency decisions dozens and dozens and dozens and dozens of times. We get agency cases. That's what we do on the D.C. Circuit and I've upheld them, I'm sure in the same range if not many more times and so - and on the - and so I think my record will show that I've ruled both ways on those kinds of cases. I don't think I have a - a pro this or a pro that record.

KLOBUCHAR: One last question in this area on consumer, so the major doctrine, major rules doctrine actually raises questions to me about your view of Chevron and as you know, it's that 1984 case. I would think its settled off but I'll ask you that where courts generally defer to reasonable interpretations of agencies and what would you replace it with if you're not going to uphold it?

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 with 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's 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 ***court*** should be careful not to unduly second guess agencies. And I've written an opinion in American Radio Relay League where I made clear that ***court*** shouldn't be unduly second guessing agencies.

KLOBUCHAR: OK, I want to move to campaign finance since those were the documents that I received and were able to make public. Of course I think they all should be made public, the ones that - and I don't 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 '76 being settled (inaudible). It seems like you have some issues with those rulings. How do you view the precedent created by Buckley and will you respect it?

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're talking about the Supreme ***Court*** has twice struck down contribution limits, one in the case Randall versus Sorrell.

KLOBUCHAR: I'm aware of these cases.

KAVANAUGH: Justice Breyer wrote. So I don't think there'***s*** - Buckley v. Valeo is an important precedent. There'***s*** a lot of case ***law*** subsequent to those mails, McConnell, Wisconsin Right to Life, Citizens United which fleshes out some of those...

KLOBUCHAR: My issue is that we've 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 - was a, you know, lawmaking from the ***court***, the Citizens United case.

And so I'm 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?

KAVANAUGH: As a D.C. circuit judge, I've upheld contribution limits in two important cases, one ruling against the RNC in RNC versus FEC, where it was challenging limits on contributions to political parties and I rejected that challenge.

And another Bluman versus FEC contributions by foreign citizens to U.***S***. election campaigns, and I - and I upheld that wall.

KLOBUCHAR: Let'***s*** 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?

KAVANAUGH: Our case dealt with contribution limits, so that'***s*** what I was so pining on in that case. So I'm not sure that there are the state of the ***law*** and the expenditure limits was not before us in that case, and so I don't want to opine on expenditure limits.

But I - what I did do -

KLOBUCHAR: Well you should know that it was - that opinion was cited by -

KAVANAUGH: Well I don't know if it was cited - well I don't want to talk about - I don't want to talk about pending -

(CROSS TALK)

-- I don't want to talk about a pending case, 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're too low in cases like Randall versus Sorrell and McCutcheon.

KLOBUCHAR: OK, in light of the recent indictments, do you stand by your interpretation of the Bipartisan Campaign Reform Act in this case - in that case, the Bluman case?

KAVANAUGH: I'm not sure the question there -

KLOBUCHAR: You can go back to it on the second round. Look forward to it. OK, 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 Trinco, Twombly, Legion (ph) and most recently Ohio v. American Express. This could not be happening to my view at a more troubling time.

We're experience a wave of industry consolidation, annual merger filings increased by more than 50 percent between 2010 and 2016. I'm 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 majorities found to be anti-competitive. So I'm afraid it'**s** - you're 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'**s** very complicated, so I'm just going to go to the guts of it from my opinion. The majority of ***courts*** and the - what happened here is a Republican majority FTC challenges a deal and then you decent and you apply your own pricing test to the merger.

My simple question is where did you get this pricing test?

KAVANAUGH: Well I affirm - I - 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.

And that case is very, 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 factor.

KLOBUCHAR: But where did you get the pricing test is what I want to know, because you used a different test, and I'm trying to figure that out, what legal authority actually requires a government to satisfy your standard to block a merger.

I think what I - I remember in our discussion you cited these non-binding horizontal merger guidelines that you used to come up with this test.

KAVANAUGH: Well you're - you're looking at the effect on competition, and what the Supreme ***Court*** has told us at least from the late 1970'**s** is to look at the effect on consumers and what'**s** 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's what the case -

KLOBUCHAR: I know, I was just trying to get to where that - 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 healthcare in the long term and what was viewed as poor 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?

KAVANAUGH: It's a very fact specific case and the health - the market in question there where two health insurers that were not selling health insurance in the down stream market, but we're acting as purchasing agents for employers in the upstream market where they negotiated prices with hospitals and doctors.

And so the theory of 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 at the ***end*** of my dissent, Senator, that there might be a problem in the - in the upstream hospital doctorate (ph) market, but I did not think there was a problem in the market that was that 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 and that other - it's a - it's a three - it's a -

KLOBUCHAR: But you did suggest that the ***courts*** 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?

KAVANAUGH: I think the Supreme ***Court*** in the 1970's moved away from the analysis in those cases, because those cases focused on the effect on competition - I mean on competitors, not competition.

In the 1970's, the Supreme ***Court*** moved to focus on the effect on competition, which in turn is really consumer - what will be the effect on consumers.

KLOBUCHAR: OK. Thank you and could I just -

GRASSLEY: Senator Cruz.

KLOBUCHAR: -- one sentence here, Mr. Chair?

GRASSLEY: Yes, proceed.

KLOBUCHAR: Just that this antitrust issue is very - as you know, very dense. But again, I am very concerned about what's going on with these cases nationally, and then when I looked at these two cases, I - appears to me that you would go even further.

And I think we need less mergers, not more, and more competition.

KAVANAUGH: Can I - can I add one thing -

KLOBUCHAR: Yes.

KAVANAUGH: -- one thing? When I referred to the overlap of Chevron and State Farm, that's when I was talking about words like feasible and reasonable. I just - I wasn't sure I was clear on that.

KLOBUCHAR: Thank you.

GRASSLEY: Senator Cruz.

CRUZ: Thank you, Mr. Chairman. Welcome back, Judge Kavanaugh.

KAVANAUGH: Thank you, 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 Capital Police in terms of, in a calm and professional manner dealing with the unfortunate disruptions we've seen, and maintaining an environment where this hearing can focus on the record and substance of this nominee. And so, thank you for the - the tremendous work that the men and women here are doing.

WHITEHOUSE: Mr. President, I think we'd like to second and - Senator Cruz, second that sentiment on our side as well.

GRASSLEY: Thanks both of you very much. I've expressed it to many of the policemen individually as I see them. Proceed. Start his 30 minutes ***over***.

CRUZ: Judge Kavanaugh, let's start with just a general question. What - what makes a good judge?

KAVANAUGH: Senator, a good judge is independent, first of all, under our constitutional system, someone who's impartial, who is an umpire, who is not wearing the uniform of one litigator or another, of one policy or another. Someone who reads the ***law*** as written, and formed (ph) by history, and tradition, and precedent in constitutional cases.

The ***law*** is written and formed by the cannons 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 - on constitutional cases, of course, routed 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's hard work to dig in and find the right answer in a particular case, and I think that's, critically, important as well. Judicial temperament, there are a lot of factors that go into it and that's a - those are some of them. I'm sure there are more.

CRUZ: One of the things that I was looking at, it's striking, both, overheated redirect we have heard from some of our Democratic colleagues, and also from some of the protesters ***over*** the last two - two 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've been on the D.C. Circuit, of all the matters that you and Chief Judge Garland have voted on together, that you voted together 93 percent of the time. Not only that. Of the 28 published opinions that you've 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've 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've joined 28 out of 30 of them, ***over*** 93 percent of those opinions. What is your reaction to - to those - those data and the level of remit?

KAVANAUGH: Well, I think we're trying hard to find common ground and to, as I've said before, he'***s*** a great judge - a great chief judge, and he'***s*** 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'***s*** a judge who does not, like I try to be as well, judge who'***s*** not trying to impose any personal preferences on to the decision, but take the ***law*** as written. And that'***s*** what I - I've tried to do in those cases. And that probably explains some of that. I think it also goes back to - I don't think - I think judges are distinct from policy makers. 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 of your arguments and seeing judges decide cases in real time. And I think those statistics reflect - reflects the reality of how judges go about their business. Like I've said several times, I think of the Supreme ***Court*** as a team of nine and I'm going to try to be team player on the team nine.

That of course there are going to be disagreements at times, so I don't want to overstate. But if you have that mindset of we're 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, a range of reasonable answers and some others. And I think that'***s*** what those statistics reflect of me.

CRUZ: So, you talked about the difference between your own policy preferences and what the ***law*** describes...

KAVANAUGH: Yes.

CRUZ: ...or mandates?

KAVANAUGH: Yes.

CRUZ: How would you describe a judicial activist?

KAVANAUGH: I would describe a judicial activist as someone who lets his or her personal 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, and the text and precedent don't support that result, or a judge in the other direction who upholds the ***law*** as constitutional when the text and precedent would suggest that the ***law*** is, in fact, unconstitutional. So too in statutory cases, it'***s*** the same principle.

When a judge does not stick with the compromises that you've reached and written into the text of a statue 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 review - review in the committee report and I'm going to super-impose that onto the text of a statute passed by Congress. That'***s***, to me, the definition of a judicial activist adding to or subtracting from the text as informed by the precedent.

CRUZ: In your time on the D.C. Circuit, you've written a number of opinions addressing separation of powers. Why does separation of powers matter? Why should - why should an American at home watching this on - on CSPAN care about the separation of powers?

KAVANAUGH: ***People*** should care about the separation of powers because it protects individual liberty, and it'***s*** 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 -- 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 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 -- the independent judiciary that helps enforce those rights. Secondly, the whole structure, as I have explained, tilts toward liberty in the sense that you start with a system -- it's hard to pass a wall to affect what you do or cannot do, hard to get a ***law*** through Congress. And that's by design. There's a -- the bicameralism principle, a House and a Senate and 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 doesn't mean you go straight to prison, you go -- if you're charged with a crime, you go before an independent judiciary.

And just add further protections for liberty, you have a -- the jury protections that are in --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 -- for example, members of the Congress don't serve for life. You have to run for reelection. And that's a check, again, to help protect individual liberty, to help ensure accountability as well.

So too with presidents. So the document's just chock full with protections of individual liberty and that's ultimately why the separation of powers matters as much as the individual protections that are in the Bill of Rights and also in article 1 section 9, article 1 section 10 of the original Constitution.

CRUZ: How about the doctrine of federalism? That -- that's been an issue you haven't encountered as much serving on the D.C. circuit, but can you share with this committee why federalism matters and again, why -- why Americans watching this hearing at home should -- should care about the principles of federalism?

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 -- if the U.S. constitution only protects the fourth amendment, only protects your -- against unreasonable searches and seizures up to a certain line, it's 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 contrary. There's not always the same views in -- in Texas that there might be in California, for example, on particular issues. And so you have different ***laws*** --

CRUZ: Vaguely (ph).

KAVANAUGH: Yes. And different ***laws*** in those states. And also, I think the federalism serves the -- the more general idea of the government that's closest to you for most of your day to day activities -- and my wife's of course, and 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 -- with government and -- and federalism in that sense it 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 issues is of concern to you. For example, the schools is a -- is a classic one.

CRUZ: So what is the importance and the relevance of the 10th amendment?

KAVANAUGH: The 10th amendment is -- 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 of the local government and also for the protection of individual liberty and I think the 10th amendment underscores that.

It also makes -- it helps underscore something else, which is the states can't 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 can't order states to -- to do certain things that the states themselves have not chosen to do. And so that'***s*** an important part of the federalism principle as recognized by the Supreme ***Court*** and that comes out of Constitution as well.

What you make of the ninth amendment? Robert Bork famously described it as an -- as an ink blot. Do you share that assessment? 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 -- 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 aren't just enacting their own policy preferences into the Constitution.

And 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 by 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'***s*** of the foundations of the unenumerated rights doctrine that'***s*** folded into the Glucksberg Test and rooted in history and tradition. So how you get there is -- as you know well, Senator, there are stacks of ***law*** reviews written to the ceiling on all that. Whether it'***s*** privileges and immunities, substantive (ph) 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.

CRUZ: Let'***s*** talk a little bit about the First Amendment. Free speech, why is that an important protection for the American ***people***?

KAVANAUGH: It'***s*** 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 principal.

But it'***s*** broader than that; it'***s*** 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 a debate, and ***over*** time, and that freedom of speech is important to help advance that cause of the debate.

And it's important just as an individual matter, I think, to have that protection written in to 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's a particularly important in the 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 provides to individual ***people***, but also for the broader purpose of that advances society progress, or economic process, or social process.

Most good ideas were unpopular at one point or another, and take time to take hold in -- 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 versus 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's 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 principal of free speech.

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?

KAVANAUGH: Yes, Senator. To begin with it's important in the original Constitution, even before the Bill of Rights, that the framers made clear in Article VI, no religious tests 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 (ph) religion, recognizing the religious freedom, at least to serve in public office.

And then, in the First Amendment to the Constitution, ratified in 1791, the principal of religious liberty's written right in to the First Amendment to the Constitution, and the framers understood the importance of protecting conscience. It's 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 Newdall (ph) opinion. And religions -- 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 can't be denied just because of your religious status, and the Supreme ***Court*** has articulated that principal in a variety of different ways in particular cases.

You look at, for example...

PROTESTER: Senator Collins and Senator Murkowski, listen to your constituents. They want you to (inaudible). They want (inaudible). Senator Collins and Senator Murkowski, please (inaudible)? Please (inaudible)! You know he's an (inaudible)! You know he is! Your constituents are (inaudible) you! The majority wants you to vote (inaudible)!

KAVANAUGH: In other countries around the world, in China for example, you...

PROTESTER: (Inaudible) Down Syndrome. Judge Kavanaugh and senators, he is a threat to ***people*** with disabilities. Look at his (inaudible). (Inaudible) ***people*** with disabilities, and intellectual disabilities. He does not believe that ***people*** with disabilities have rights! He is a threat to ***people*** with disabilities.

KAVANAUGH: So if you look at other countries around the world, and you're not as -- you're not free to take your religion in to the public square. You know, crosses are being knocked off churches, for example. Or you can only practice in your own home; you can't bring your religious belief in to the public square.

PROTESTER: (Inaudible). Without the information about Judge Kavanaugh you can't tell -- many ***people*** don't know that he'**s** lying (inaudible).

KAVANAUGH: And the -- being able to participate in the public square is a part of the American tradition, I think, as a religious person, religious speech, a religious ideas, religious thoughts -- that'**s** important. So too on the establishment clause, some of those...

PROTESTER: He swore an oath before God (inaudible) the country (inaudible)!

KAVANAUGH: Some of those cases 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 versus Chambers of course also. A local town meeting, I should say, Marsh versus Chambers upheld a legislative meeting as well.

So the religious tradition reflected in the First Amendment is a foundational part of American liberty, and it'**s** important for us, as judges, to recognize that, and recognize too as with speech, unpopular religions are protected -- our job -- we can, under the religious freedom restoration act, question their sincerity of a religious belief, meaning is someone lying or not about it.

But we can't 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.CRUZ: How would you describe the interaction between the Free Exercise Clause and the Establishment Clause, and -- and are they at cross-purposes in intention, or are they complimentary with each other?

KAVANAUGH: I think in general it'**s** good to think of them as both supporting the concept of freedom of religion, and in the Newdow case I wrote I tried to explain some of those principles, but I think it'**s** important to think that to begin with you're equally American no matter what religion you are, if you're no religion at all, that it'**s** also important, the Supreme ***Court*** has said, that religious ***people*** be allowed to speak, enter, participate in the public square without having to sacrifice their religion in -- 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 -- of both clauses as well.

The cases that are establishment clause cases that don't involve coercion but are some of the more -- the symbol -- the religious symbols cases that -- as you well know, Senator, that'**s** a complicated body of ***law***, but -- in each -- probably area of that has to be analyzed in its own silo. But as a general matter, I think it'**s** 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.

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 -- and -- and why you undertook it?

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 the -- 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 -- I agreed to represent them because I like -- 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 have 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 state -- in the District ***Court*** in Maryland and thought (ph) -- that synagogue now stands and they -- you know, they were very grateful.

And so that was the kind of litigation -- that was the couple years I was actually -- at a ***law*** -- 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'***s*** something that means a lot to me.

They gave me something -- a thing to hang on the wall, "Justice, Justice Shalt Thou Pursue (ph)," which has hung on my wall in my chambers the whole 12 years I've been there, as just a reminder of a representation I had in the past and the importance of the equal treatment and religious liberty and a successful pro bono representation that meant a lot to me.

CRUZ: Well, and I'll -- I'll note some of the Democratic senators on this -- on this committee...

PROTESTER: (OFF MIKE)

CRUZ: Some of the Democratic senators on this committee have suggested that you would somehow side with -- 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 -- prevent it being built is -- is very much an instance that you chose to give your -- your time and your energy and your labor for free to a litigant that I think most would -- would view as the little guy in that -- in that battle.

KAVANAUGH: That'***s*** correct, Senator, and I've tried as a judge always to rule for the party who has the best argument on the merits, and that'***s*** 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 the little guy, big guy is not the relevant determination. If you're the little guy, so to speak, and you have the right answer under the ***law***, then you'll win in front of me.

CRUZ: Earlier in the questions from Senator Graham, he asked you a question, "Are you a Republican?" and -- and he asked in present tense and -- and -- and your answer, you acknowledged that you had been a registered Republican. Indeed, you'd served in -- in a Republican administration previously.

But of course you have been a federal judge for 12 years. Do you consider yourself a Republican judge?

KAVANAUGH: I'm not sure what the current registration is, but shortly after I became a judge -- I'd assume this registration (ph) -- I haven't changed it, but I was -- I don't know if it'***s*** still listed.

But it -- shortly after I became a judge and had voted I think in one election, I decided -- I read about the Second Justice Harlan having decided that he didn't want to continue voting while being a federal judge, and I thought about it, that practice, and I would be the first to say I'm not the Second Justice Harlan, I'm 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're 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 -- I'm not trying to...

CRUZ: Let -- let me ask one final question, because my time is expiring and I want to ***end*** -- ***end*** on a lighter note.

KAVANAUGH: Yes. Yes.

CRUZ: You and I have both had the joys of coaching our daughters in basketball.

(LAUGHTER)

Can you tell this committee what -- what have you learned coaching your daughters playing basketball?

KAVANAUGH: Well, it's been a tremendous experience to be able to coach them for the last 7 years, and all the girls on the team, and I've learned about something I saw in my own life, but 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 coach girls, so when you see a girl develop confidence over time or you see a competitive -- a competitive spirit, the teamwork, the toughness that's developed over time, the drive, you know, win with class, lose with dignity, winning and lose -- the -- the ability to lose but still put forth your best effort.

And so I -- I've learned just how important -- I think I understood that from my own experiences, 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've heard from a lot of parents over the last eight weeks, while I've been in this process, about, you know, the effect I had some of the girl's lives, which was very nice to hear, in terms of my -- my coaching.

So like I said yesterday, coaches have such an -- such an impact on people, and I've learned -- I've learned that. That's why Senator Kennedy said in my own vigil meeting (ph), "I hope you keep coaching." And I'm going to -- either way this comes out, I'm going to -- I'm going to try to keep coaching. Thank you, Senator.

GRASSLEY: Senator Coons.

COONS: Thank you, Chairman Grassley. Thank you, Judge Kavanaugh. As we discussed in my office and in a letter I've sent to you to follow up on, I hope to question you today about your views on rule of law, separation of powers, presidential power. And Chairman, I'd like to start by entering into the record a series of articles that I think lay some of the foundation for my concerns.

GRASSLEY: Without (inaudible).

COONS: Thank you.

GRASSLEY: Go ahead, if you ...

COONS: First two 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 3rd 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's devoted to the presidency by law professor, Garrett Epps, and Brett Kavanaugh's legal opinion show he'd give Donald Trump unprecedented new power by Fordham professor, Shugerman.

GRASSLEY: Is that previously said without order.

KAVANAUGH: Can you repeat who the third one was? Sorry, I want to make sure I know the names.

COONS: I think it was "Brett Kavanaugh's radical view of executive power" by Brown University professor, Corey Brettschneider, if I'm not mistaken.

KAVANAUGH: OK. That's not a law professor, though, right?

COONS: Correct.

KAVANAUGH: OK.

COONS: It's 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 the ensure that the president is not above the ***law*** by preventing him from firing someone appointed to investigate him.

Sitting on panel at Georgetown in 1998, you took a different view. You said at that time, and I quote, "The prosecutors should be removable at will by the president." Given what's in your record, a long record of writing and speaking on this topic. I think there's legitimate cause for concern about your views on presidential power and whether it's 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?

KAVANAUGH: Well, that's a question of precedent, and it's a question of -- that could before me, either as a sitting judge on the D.C. circuit or if I'm confirmed as a Supreme ***Court*** justice. So I think that question is governed by precedent that you'd have to consider.

United States versus Nixon, of course, the special prosecutor regulation in that case was at issue in United States versus Richard Nixon and the ...

COONS: Judge, if I could. I'm 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?

KAVANAUGH: Well, that would depend ...

COONS: I'm not asking for a recitation of precedent, I -- we will get into some precedent later.

KAVANAUGH: OK.

COONS: I'm just trying to make sure I understand if you stand by that publicly expressed view back in 1998.

KAVANAUGH: I think all I can say, Senator, is that was my view in 1998.

COONS: OK. Well, then, let's 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'd 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 (ph)."

Do you stand by your criticism of the Independent Counsel statute as a constitutional travesty?

KAVANAUGH: Well, that was understated compared to what members of this committee and others said in 1999, when the decision was made to ...

COONS: But Judge, I'm interested in your views, not 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 constitutional travesty?

KAVANAUGH: So let me make a few things clear. This is old Independent Counsel statute. That's distinct from the special counsel system that I've specifically said is consistent with our traditions. I said that in the Georgetown article, as you know. I've said that, actually, in the PHH case, most recently.

The statute you're 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 statue. That's ...

COONS: But I'm interested, if I might, Judge, in your views. You chose to describe the Independent Counsel as a constitutional travesty. What did you mean?

KAVANAUGH: Well, I meant, I think what Justice Kagan said, when she said at Stanford, a few years ago, that Justice Scalia's decent in Morrison V. Olson, and this is a quote, "was one of the greatest descents ever written, has gotten better every year, by identifying Justice Scalia's descent is one of the greatest descents 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.

COONS: I'll actually strongly disagree. You offered that quote, that cite of Justice Kagan, when we meet. I was struck, perhaps I should call Justice Kagan and tell her she's one of your judicial hero's. 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 descent in Morrison V. Olson.

I believe Justice Kagan was complimenting the forcefulness and the clarity of the Scalia's writing in the descent, not agreeing with the legal theory. I'm trying to get to the point of ...

KAVANAUGH: I think I disagree with that, 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's an important point.

KAVANAUGH: It is, but I think in that article -- and I've read that article, it's 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 on one of the cases (ph) ...

(UNKNOWN): (OFF-MIKE)

KAVANAUGH: I think she's referring there -- at least, I read her as referring there that 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 old article to, in any way ...

COONS: Let's put it this way. Justice Kagan may have complimented Scalia's descent in its writing or its holding. You've criticized the Independent Council statute as a constitutional travesty, and I'm simply trying to get to the bottom of why you held that view and why you've chose to say that in a speech just two years ago.

KAVANAUGH: Well, it was Morrison v. Olson was a one-off case about a one-off statute that hasn't existed for 20 years. The statute's gone. The case, as Justice Kagan -- I think I took my lead from her comment. I'm -- I know I read that. I've cited it many times in -- in speeches I've given.

But the -- the -- that statute's just real important, to be clear here. And I know you know this, Senator, but so everyone understands, that statute hasn't existed since 1999 -- 1999. Special Counsel systems...

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 f. Olson as a decision of the Supreme ***Court*** is still good ***law***.

KAVANAUGH: Well, I think...

COONS: In fact, your own circuit said so forcefully this year, right?

KAVANAUGH: It think Humphrey's Executor is good law.

COONS: I -- I think that's 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?

KAVANAUGH: I -- I think they were applying Humphrey's Executor. They might have cited Morrison, but the principal would be...

COONS: They literally said, and I quote, "Morrison remains valid and binding precedent," and criticized your...

KAVANAUGH: In how it applied to Humphrey's.

COONS: ... criticized your minority as flying in the face of Morrison.

KAVANAUGH: And -- and again, we're -- we're 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 -- a serious mistake -- just Senator Durbin's words, unrestrained, unaccountable, unconstitutional. And I think the case...

COONS: So what I'm concerned about, Judge -- what I'm 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 is a serious mistake.

So let's 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 vote of seven to one. It's 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 two 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.

KAVANAUGH: Yeah. (inaudible)

COONS: And then you said, "Well, sure, Morrison v. Olson." And I'm struck by that, having watched that speech. Non 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's already been effectively overturned," which I disagree with, "and I would put the final nail in the coffin."

So here's a recent public statement by a sitting D.C. Circuit judge who's now before me as a nominee to serve on the Supreme Court, so I've got a question: Would you vote to overturn Morrison?

KAVANAUGH: Senator, first of all, I -- Korematsu's been now overturned, and Buck v. Bell's a disgrace.

COONS: Right.

KAVANAUGH: So I'm -- I'm...

COONS: So it's striking you didn't choose either of them. You reach out and say, "Oh, this old -- 30-year-old decision about a statute long gone, that's the one I'm going to hold up to get rid of."

KAVANAUGH: And -- and may -- I -- I really did have Justice Kagan's comment foremost in mind. I -- I thought she had already talked about Morrison v. Olson, and...

COONS: Nothing to do with a view of presidential power?

KAVANAUGH: Well, I've -- I've written about the Special Counsel system, and I've said in the 1999 Georgetown article that the Special Counsel system is the traditional approach that's used when there's a conflict of interest in the executive branch. There's a need for an outside counsel, and I've said that's traditional, and when I said that again in the PHH case that you just cited...

COONS: And is that Special Counsel fireable at will, or only for cause...

KAVANAUGH: And that's...

COONS: ... in your conception of what's the most appropriate structure?

KAVANAUGH: So that's the hypothetical that you're asking me, and I -- 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's 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 -- what is the specific statute you have at issue?

Remember, the old independent counsel had a lot of moving parts to it that were...

COONS: OK.

KAVANAUGH: ... all of which were novel, and together produced Justice Scalia's dissent. No -- I don't think any one aspect (inaudible)

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?

KAVANAUGH: Sir, I'm not going to say more than what I said before.

COONS: Well, I think what you said before is clear. I -- I think your enthusiasm for overturning Morrison is unmistakable.

PROTESTER: (Inaudible) executive immunity has no place in democracy. For all of you who support this, for all of you who support this, it is un-American. It's -- it is absolutely un-American, and shame on you, and shame on all of you.

KAVANAUGH: I want to -- I want to repeat two things, Senator, because they're important. One is Humphrey's Executor is the precedent that stands, and I've called it an entrenched precedent in an opinion on independent agencies generally. And two is the Special Counsel system, both in the PHH case -- decision recently, and in the old Georgetown ***Law*** Journal article, I've specifically said that that's the traditional way that criminal investigations proceed when there's a conflict of interest in the usual Justice Department process, it's not appropriate.

COONS: Humphrey's Executor's 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's long-settled precedent, yes. You've said that about a number of cases.

But a key -- a key difference here is whether you'll say that something was rightly decided. I'm 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's 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, yeah, it's long-settled, but you know, if we were to overturn it, it wouldn't mean the elimination of independent agencies. So why did you need to go there? Why have that conversation, if this long-settled case is actually well-reasoned?

KAVANAUGH: What I said in the PHH case is that Humphrey's Executor is the precedent that governs independent agencies. I've 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 diminish 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 precedence makes a big difference as you know, of course.

And so I referred, so that's why I conclude 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.

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 protections.

KAVANAUGH: Right. President Roosevelt wanted to fire Humphrey who was a Republican...

COONS: Will you -- will you simply just state that it's well reasoned, well decided, long-settled ***law***?

KAVANAUGH: I'll say it's an important precedent of the Supreme ***Court*** that I have applied many times. It's been reaffirmed...

COONS: It's troubling to me that you can't say that Humphrey's Executor was well decided.

KAVANAUGH: But again I'll follow the eight nominees...

COONS: Was Marbury versus Madison well decided?

KAVANAUGH: Of course -- of course. The -- of course it is. The concept of judicial review wasn't even invented in Marbury versus Madison. It's right here in the constitution as I read it and also referred to in Federalist 78. We mistakenly say Marbury created it and the concept of judicial review it actually exists right there. So it's a correct application. But the reason I'm hesitating...

COONS: So let me bring this back to the current context and why all of this is of concern to me and relevant.

KAVANAUGH: But I didn't finish my answer though.

COONS: With a series of public statements by you that are recent about your enthusiasm for overturning Morrison and you're not going to comment on that here, you won't answer that question here. You've 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 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?

KAVANAUGH: Under the Supreme ***Court*** precedent which I've 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...

COONS: For decades...

KAVANAUGH: On Morrison, you may disagree with what I'm 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 doesn't exist anymore and that Humphrey's is the precedent on independent agencies. Now you may disagree with me on that but I think that's the premise on which she spoke. I don't want to put words in her mouth but that's 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.

COONS: OK. I'm just -- I'm concerned that I'm having difficulty getting what I think is a clear and decisive answer from you on a number of things. Would you overturn Morrison? What's your view of executive theory? Is it appropriate for a president to fire a special counsel investigating him? I'm 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 -- in this case because you lay out, you embrace this theory of the executive -- 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's predicated on the idea that Congress can impose some restrictions on the executive power to fire at will executive branch officers.

KAVANAUGH: Just with respect Senator, I think you're significantly ***over*** reading 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 out Humphrey's in that case as I -- at least I read it.

I'm -- I -- I guess you don't agree with the opinion but I -- I explained in great detail why I thought this deviation from Humphrey's mattered as a mattered as a matter of historical practices.

COONS: Let's get then if we could judge in the few minutes I've got left to the question of investigations because this is also something you've written about, you've spoken about and its 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?

KAVANAUGH: That -- that's not what I said Senator. So two things on that. One, the independent counsel you're referring to there, it's just important because ***people*** forget this is distinct from the special counsel system. So it's very important I specifically in that Georgetown ***Law*** Journal approved of the traditional special counsel system.

COONS: And the traditional special counsel system has a special counsel that can be fired at will by the president, correct?

KAVANAUGH: Well in the Watergate situation there was a regulation that protected the special counsel from that.

COONS: And what happened to the special counsel in Watergate?

KAVANAUGH: Well there was a new regulation then put in place, as you know, and then in the United States versus Richard Nixon that new regulation was parsed pretty carefully an then more generally...

COONS: This is exactly why your quote that the independent counsel statute was a goo goo post-Watergate reform gave me some (inaudible).

KAVANAUGH: But that wasn't the -- 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 counsel system with a new regulation put in after the episode you're referring to. And the special -- and then when the independent counsel system came up in 1999 for reauthorization, there was everyone here. Everyone. Well, agreed, I think I'm not...

COONS: You're not alone. You're not alone.

KAVANAUGH: I think I'm not exaggerating to say that the quote you put up before that one was understating what everyone here said about the independent counsel system.

COONS: 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'***s*** constitutionally dubious for a criminal prosecutor to investigate the president?

KAVANAUGH: I've never taken a position on the constitutionality. I -- all I've 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'***s*** when President Obama was in office.

COONS: So this is just a policy argument, not a constitutional argument.

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'll have an open mind, I'll listen to the arguments, I'll dig into the history. I've seen all sides of this. I will -- I'll -- I will have a completely open mind on the constitutional issue. And again, briefs and arguments. I think I've also shown a capacity to -- if I'm presented with a better argument than something I've had before, to adopt the better argument.

I've certainly done that -- a good example of that in the national security context in the -- in the first Bulull (ph) case, I'd pointed out how I'd reconsidered something I'd written before by the national security context. I'm not a -- but -- but the larger point is that I've not taken a position on constitutionality before.

COONS: Well -- and I'll just come back to a point we've now talked about several times. In several different contexts in several different ways, you've chosen to make a constitutional point, either expressing enthusiasm for a returning 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'll give you another quote in a different 2016 speech, you said there Justice Scalia never wrote a better opinion than his dissenting 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 one day be the ***law*** of the land.

KAVANAUGH: There --

COONS: I assume here you're talking about the constitutional analysis in Scalia'***s*** dissent and you're expressing a hope, an expectation that it'll someday be the ***law*** of the land. You sit before me as a nominee to be in a seat where that will be eminently within your reach.

KAVANAUGH: But again, Senator, I just want to avoid melding a lot of different things into one. Because they're 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's only about the independent counsel statute, as I see it, and the independent counsel statute doesn't exist anymore, that's where -- you know, that's why Justice Kagan probably felt free to comment about Morrison as well.

COONS: Well --

KAVANAUGH: And then on special counsels, I've said what I've repeated many times, here. On investigation and indictment of a sitting president, number one, I've never taken a position on it and number two, it's important to underscore the Justice Department for 45 years -- this is the Justice Department, not me. The Justice Department for 45 years has taken the position in 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's now a President Obama appointed district judge in D.C. an excellent district judge. I'm not saying I agree with that or disagree with that, I'm saying that's the consistent Justice Department view for 45 years. So before a case like this would come before the ***courts***, whether I'm on the D.C. circuit or otherwise, the Justice Department presumably would have to change its position.

That's one. Two. a prosecutor at some point in the future would have to decide to seek an indictment that -- 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's a lot of things that would have to happen before this hypothetical that you're presenting even comes to pass.

And if it does come to pass, you can be assured -- you can -- that I have not taken a position on the constitutional issue that you're raising on that specific question, at least as I understand the question. And that's totally distinct from the Morrison issue as I understand it.

COONS: Well, and I'll -- I'll tell you again, the reason this has been gravely concerning to me, why I raised in our meeting and sent your letter about it and why I've dedicated so much time to this question is I really don't view the issue in the independent counsel statute in 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'd love to overturn Morrison v Olson isn't because Scalia wrote a powerful and moving dissent, it's because of a view of the executive branch having all the power of the executive branch in the president's hands that you've articulated across speeches, interviews, writings, and an opinion. An opinion this year.

I think that's really your view of the executive branch.

KAVANAUGH: But I have not said --

COONS: It raises real concerns --

(CROSSTALK)

KAVANAUGH: -- I never said that. I've 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.

COONS: This is how I read your dissent in PHH this year, is arguing, advancing the unitary executive theory.

KAVANAUGH: And I refer to a -- a single president, but same -- same concept. But --

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's at issue in all these articles and cases. The ability to fire at will a special prosecutor, correct?

KAVANAUGH: So the -- I have taken as a given in all these case --

COONS: That's a -- that's a yes or no. Is that what they -- is that what you --

KAVANAUGH: I just want to be real clear. And I'm 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's point one. Point two is I've specifically said what I've said about special counsel systems being the traditional mechanism. Point three is I've never taken a position on the constitutionality of indicting or investigating a sitting president.

And point four is that the question of who controls --

(CROSSTALK)

COONS: -- just a minute, for two left (ph) if I might. On -- on that point that you've never taken a position on the constitutionality of investigating a president, it was this --

KAVANAUGH: (Inaudible).

COONS: -- American Spectator article where you said -- and -- and I'm quoting -- if there's 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 shouldn't be held accountable through the criminal justice system. You mentioned you might make an exception for violent crime and I -- I -- I --

KAVANAUGH: Now that's --

COONS: A last question for you if I might, whether -- what if a presidential aide commits an assault, an act of domestic violence?

KAVANAUGH: I never said anything like that, Senator, in terms of --

GRASSLEY: I will -- I will let you -- I will let you answer that and then we'll go on --

COONS: And I'd like to conclude if I might.

KAVANAUGH: Yes, I -- I -- I've not said anything approaching what you're broad description is (ph). 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 -- for indictment, is that that occurs after a president leaves office, whether that's because the term ***ends*** or because of the impeachment process and that's how the Justice Department -- again, for 45 years, that's been the ***law***, but it's not my -- that's not my ***law***, that's the Justice Department's ***law*** again, with -- with Randy Moss writing the most important --

COONS: I -- I recognize the amount of time. I'd like to conclude, if I might, Mr. Chairman, briefly. I look forward to continuing this line is a 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've said, that you've written, and that you've decided as a judge about whether or not a president can be held accountable.

I think the ability of the Special Counsel to conduct an independent investigation of the president is foundational to the rule of ***law***.

KAVANAUGH: I've said the same thing.

(CROSSTALK)

COONS: And I look forward to a next round where we can investigate that with early ...

(CROSSTALK)

KAVANAUGH: I've said the exact same thing.

(CROSSTALK)

COONS: But frankly, judge, your views about executive power as I think you have detailed, your statements about what you'd like to overturn and what limits you think there should be, really leave me concerned and it'***s*** because of our current context, it'***s*** because of the environment we're operating in and I look forward to another round and to more questions.

KAVANAUGH: Thank you. I look forward to it but I -- just to -- when you said about Special Counsels is exactly what my article said in 99', exactly PHH said.

COONS: Thank you Mr. Chairman.

GRASSLEY: Before I call on Senator Sasse, a couple things. One, in regard to independent counsel statute, that issue in Morrison, that statute was never renewed and does not have any effect today and we in Congress chose not to redo it because it was nearly universally condemned.

I often quote Senator Durbin about independent counsels quote, "unchecked, unbridle, 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 (ph) 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'll enter it in record. All 30 of these op-eds (ph).

COONS: Mr. Chairman -- Mr. Chairman, while we're on the 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'd like to submit those for the record. They -- they reveal his thinking on a unitary consecutive theory.

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'll try to get them. So far we've been very fortunate. Senator Sasse.

SASSE: Thank you Mr. Chairman. Judge, by my account you're about half done. Congratulations. You're going to be here past midnight I think. I also want to talk about limited government in general and about limits on executive in particular.

I think today has been -- Senator Cruz done 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 don't 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 ours.

Just a few minutes ago, a woman shouting please vote no on Kavanaugh. Presidents shouldn't have the power to do whatever they want. Vote no on Kavanaugh is one of the loudest shouts of today.

He'll 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 the president should have the power to do whatever they wanted I couldn't vote for you either.

So I'm headed toward voting for you because I don't 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'***s*** go -- again, I think Senator Coons' asked lots of fair questions but as a non lawyer, at many times we got lost in weeds.

Not critical of his questioning but I'd 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?KAVANAUGH: I 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 Federal of 69'.

Secondly, the president serves a term in office. Not an unlimited term in office, again, specified in Federal of 69'. The president is subject to the ***laws***. No one'***s*** above the ***law*** in the United States including the president of the United States. And that'***s*** something that is made clear in Federal of 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 doesn't have the power to adjudicate disputes because an independent judiciary has the power to adjudicate disputes in cases and controversies along with a jury.

As Justice Jackson'***s*** framework in Youngstown famously made clear, it'***s*** important to understand that though, even in the national security context where the constitution gives the Command-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've 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.

Because substantial power in the war power'***s*** 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've made clear in my writings that president has very limited power in Youngstown category three to disregard such a ***law*** and or -- or practice.

The historical example that'***s*** accepted by the Supreme ***Court*** is command of troops and battle, for example that -- that Congress couldn't 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 doesn't like what the executive has done. Usually we're very reactive and that'***s*** understandable.

Something happens that seems bad, Congress will come in and say we don't want that to happen again in war time 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's 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're trying to win the war so I can see steel mills.

And that didn't work by a six to three vote of the Supreme ***Court***, given the statutes Congress has passed. So two (ph), no president is above the ***law*** in the sense that a president remains subject to the Supreme ***Court*** set in the Clinton versus Jones case.

Civil process, so that's a precedent of the Supreme ***Court*** on civil suits while -- while in office. So to 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, is opined on for 45 years, is the timing of the indict ability question in 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 is expired or because of the impeachment process.

SASSE: Can I -- can I interrupt to unpack there and then I'll come back, I want to have you finish, because I think you're 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 I think is an important debate, it's about personnel matters. But for just a second, let's play out this question of criminality versus civil charges against a president.

And I -- and I admit that I'm sort of -- as a non-lawyer, I follow in the Midwestern tradition of -- 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'll run circles around me telling me why can't answer.

But I kind of want to try the start of a hypothetical. Imagine 10 years in the future, there's a president from the purple party, so it's none of the current participants in public life and it's none of these parties even, and this president ran for office with an instinct to demonstrate self reliance.

And he/she decides that they won't be a part of any motorcades, they're going to drive themselves. And they're drunk one night and there's a motor vehicle homicide committed by the president.

That's both a criminal and a civil matter. Is the president immune from either being sued or being charged with a crime because they're president?

KAVANAUGH: No, no one has ever said, I don't think, that the president is immune from civil or criminal process. So immunity is -- is the wrong term to even think about in this process.

The only question that's ever been debated is whether the actual process should occur while still in office. That's 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 to the only question with the criminal process is not immunity, that's the wrong term, it's defer (ph) timing and the -- as I've 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 doesn't prevent investigations, gathering of evidence, questioning of witnesses I wouldn't think necessarily. I don't want to opine too much, but that's -- that's certainly how it's proceeded under the special

counsel system that we've 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 don't think anyone thinks of immunity. And why not? No one's above the ***law***.

That's just such a foundational principle of the constitution and equal justice under ***law*** and that's what Hamilton was concerned about in Federalist 69, and that's what the -- 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's why Hamilton felt the need to convince the ***people***, no this is not a monarchy, and how did Hamilton go about convincing the ***people*** that?

He wrote all the ways it was distinct in Federalist 69, some of which I've outlined to you, appropriations is another important one to real -- I mean as Senator Berg reminded me when I met with him in my 2006 process, Senator Berg pulled -- pulled out his pocket constitution and Senator Berg, as everyone who remembers Senator Berg knows, was very focused on the appropriations clause of the constitution, the fact that the constitution --

(CROSSTALK)

SASSE: -- he drive through West Virginia to show you.

KAVANAUGH: Yes, exactly.

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 categories -- I guess vertical and horizontal federalism, so there isn't just executive legislative distinction here. In my hypothetical, the drunk driving accident could have happened in Virginia or Maryland instead of D.C. and so then we'd have to have debates about which level of government would be involved.

Are there are other categories of limitation on executive action?

KAVANAUGH: Well I think a -- a huge one -- really the hugest question as I -- as I've 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 is -- dwarfs all other questions in -- in many ways. And Hamilton made clear in Federalist 69 the answer to that question was no. Now it's sometimes thought and -- and opined by commentators or -- or even scholars that oh, actually that's changed ***over*** time and actually presidents have (inaudible) that really has not changed in practice at least ***over*** time.

Obviously there's no definitive Supreme ***Court*** case, but you look at all the significant wars, and I wrote this in the book review of the Baron (ph) book which I, you know, recommend to you.

I think you would enjoy that. All the -

SASSE: Thanks for calling me a nerd on national TV, I appreciate that.

(LAUGHTER)

KAVANAUGH: 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 -- is an anomaly in -- in many respects and I think some of -- the fact that it was undeclared and unauthorized really did lead the -- the -- to the Youngstown decision.

But you know, Vietnam, the Persian Gulf War, the -- the AUMF against Al Qaeda, the 2003 Iraq War, and then going back World War II, World War I, the War of 1812. They're 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's some questions about short term air strikes and things like that. But a significant war, that -- that's the biggest of all and that's something that Hamilton talked about in 69 and that our historical practice, I think, is actually lived up to.

I don't mean to footnote Korea, that's an enormous exception, but -- but the -- you know, since then, they've all been congressionally authorized. ***People*** debate the Gulf of Tonkin Resolution, but the words of it are -- are quite broad.

SASSE: This isn't the place for this full detour, but I just want to underscore one thing you said about Hamilton and -- and it -- 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's the overarching thing.

What -- we have -- 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 a 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's another way of saying, if we're 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 of -- when things are going wrong in America, and we should all admit that things are a mess in this country -- we've had -- in the governance of our country, there's a lot that's 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's 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 don't know that we have three branches of government -- shame on us, not shame on them that they don't understand that, because we're 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 a 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're 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's go back to Senator Koonz's point about personnel. I sit on the Armed Services Committee as well, and one of the things that we do there -- I don't know, every second week maybe -- is that we have confirmation votes of dozens, scores, sometimes hundreds of promotions in flag officers. And why do we do that?

It's 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's getting promoted at the Air Force, that 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 T.V.. It's often a pretty pro forma moment at the start of -- 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's unity in hiring or in promotion. It's just a lot of that is non-controversial so it doesn't *end* up salacious; it doesn't *end* up on T.V.

Jump in, please -- I know you're trying to say something.

KAVANAUGH: Well I think that's an important addition is that the president -- and this goes to Senator Koonz 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'd be able to dispense offices and dispense -- you can't create offices, first of all -- and can't unilaterally fill even Secretary of Defense, or Secretary of State because the framers were so concerned about *over*-broad executive power that they required Senate confirmation for even those positions, who if confirmed, then become executive officers.

That's 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 -- in many ways and I think that's very important.

And -- and I think we've spent -- I spent a little too little time. I mentioned it on appropriations but the -- that's 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 can't 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 -- you all know this better than anyone -- can restrict activities of the executive branch in multiple ways. And I think that's an important thing that Hamilton also talked about.

So Congress has substantial power (ph). Now, that's not say that -- the (ph) president has large powers, of course, under the Constitution. But we sometimes forget, and I think your civics lesson's 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.

SASSE: And one of the reasons why the executive branch seems so powerful right now is, again, because of how weak the legislature is. I mean, it -- it's a fundamental part of why we have the term president.

In the 1780s, this wasn't a very common term in the English language. President was just a nounified (ph) form of the name presiding officer. And we made it up, our founders made it up so that we wouldn't have a term that sounded a lot like a king.

And so, we wanted to be sure that the term presiding officer sounding 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's not supposed to be 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 doesn't finish its work, punts those powers to Article II and then it's 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 (ph) and the constitutionality of one-person-headed (ph) independent executive agencies, or pseudo-independent (ph) agencies versus commission structure-headed (ph) independent agencies.

KAVANAUGH: The traditional independent agencies that were upheld by the Supreme ***Court*** in Humphrey's Executor in 1935 are multimember independent agencies. And so usually, sometimes three, five, occasionally more but they're multimember independent agencies. And that's been all the way through.

And then the -- for the significant independent agencies. The CFPB -- and, I had no -- it's 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's 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, and I'll just repeat what I wrote in the dissent. I said that, first of all, that's 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 that 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 (ph) diminution of presidential authority beyond the traditional independent agencies, in -- in this sense, the traditional independent agencies 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, he was able to designate new chairs of the various independent agencies, and the chairs of course set the policy direction and control the agenda. That's historically been the way. That does not happen with the CFPB.

And finally, having a single person -- just going back to liberty -- who's in charge, who's not removable at will by anyone, not accountable to Congress, in charge of a huge agency is something that's 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'm just repeating what I wrote here, I'm not intending to go beyond what I wrote in that opinion, that was a -- an issue of concern.

And I -- and I did put in a hypothetical, because I've -- it seems abstract that -- I think we'll realize this issue with that agency or -- 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's going to realize -- of a different party...

SASSE: Right.

KAVANAUGH: ...in particular. And then I think everyone's going to realize, "Wow, that's an odd structure." Now I -- maybe not, but that's what I wrote in my opinion that that will seem very weird as a -- because that's not what happens with all of the traditional independent agencies.

And so when president -- whenever any president leaves and has appointed in the last 2 years the CFPB Director, the new president might campaign on consumer protection -- let's imagine, OK, a presidential campaign -- candidate campaigns on consumer protection and consumer issues and then comes into office and can't actually appoint a new CFPB Director for the whole term of his or her office -- that's going to seem, I think, quite odd structurally, at least, that's what I said in my opinion, again not intending to go beyond what I said in my opinion.

SASSE: So is it fair to say that if you have a single person-headed agency and the president doesn't have the authority to hire or fire this person, that that person, having ***law*** making -- policy making 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?

KAVANAUGH: I -- I -- absolutely that's a fair summary. A branch unto itself.

SASSE: I want to ask unanimous consent to enter into the record, Mr. Chairman -- I've got a letter from several dozen legal scholars, they're 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, quote, "Agree that Judge Brett 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, judicial (ph) -- Judge Kavanaugh'***s*** long record of teaching and mentoring students of diverse backgrounds is to be applauded and, quote, "Judge Kavanaugh would continue to help build productive bridges between the bench, legal practitioners, and the academy," close quote.

Mr. Chairman, can I ask unanimous consent? Chairman, can I ask unanimous consent to include it?

CHAIRMAN: Ordered.

SASSE: Thank you. I have a series of questions I'd like to ask you about both precedent and the First Amendment, but I'm going to be out of time too soon, so I'm going to do some smaller ball stuff first and save for the next round. I'd like to go back to the -- the Kagan quote on Scalia and the "We're all textualists now" point.

What'***s*** a fair way to characterize the position that folks would have held before Justice Kagan said we've all become textualists now? When ***people*** were -- when there were non-textualists, who were they and how does it make any sense? What'***s*** the fairest construction you can put on it?

KAVANAUGH: Well, 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 wouldn't bear to serve that broad policy ***end***. And so I think that'***s*** probably a -- one -- 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'***s*** really what Congress was getting at in terms of the statute, and therefore we're going to follow that committee report or floor statement rather than following the text of the statute. So that'***s*** 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 didn't get 100 percent of what he wanted in terms of moving the statutory interpretation, but he got pretty darn close in terms of moving the -- the ball in terms -- 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 -- 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'***s*** what you've passed and that'***s*** 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.

SASSE: So I think one of the things that concerns me about the way we've talked about your nomination and -- and a lot of media reports about it is that it'***s*** been said that you've 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've been -- you've worked in Republican White House -- you've worked in the George W. Bush White House and because you're 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 (ph)." You're supposed to be a Republican when you're on the bench.

And then there are other ***people*** -- I think that'***s*** a terrible view -- there are other ***people*** who say, "Well hopefully he can grow in office, and he -- because he'***s*** going to be put -- nominated and confirmed to the swing seat, the Kennedy vote, the Powell vote on the ***court***, he will be big enough to rise above all the muck of politics and when there are really big issues facing the country that get to the ***court***, at least in a 4-4 ***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?

KAVANAUGH: Not entirely sure what it means to individual ***people*** who use that term.

SASSE: Are -- are you being considered for the swing seat?

KAVANAUGH: I -- I am being nominated to replace Justice Kennedy, who was his own man, as am I my own judge, and I've talked about his jurisprudence and his devotion to liberty, which he found as the unifying theme of all the -- 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've read that he publicly -- in public statements didn't -- didn't like that term, and I'm not sure I always know what ***people*** mean by that term. As I said repeatedly, but I really believe it, I think of the ***court*** -- at least, if I'm on it, it'***s*** what I think of the ***court***, period, as a team of nine.

And If I'm on it, I'm 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 (ph), sometimes, as I know you do, too, Senator. And I do -- I think that'***s*** important.

I'm not naÃ¨ve. I'm not naÃ¨ve. There 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 cases ...

SASSE: I'm only interrupting you because I watched the chairman pull his little gavel. And I if don't get my question in before the bell, I'm done, so I can get one more off if I fire fast.

GRASSLEY: Make sure it'***s*** a short question.

SASSE: Yes, sir. When I was writing my dissertation, I struggled to find my voice at my point. And I had an advisor who was great. He said, "Put an 8x10 (ph) picture up next to your keyboard, and make it be somebody that you're writing to everyday, and make it be somebody who'***s*** 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 kid, and she'***s*** far smarter than I am. She didn't know anything about the topic I was writing about, and it was an incredibly helpful device, for me to, everyday, figure out who I was writing to that day.

When you write your opinions, who are writing for?

KAVANAUGH: Multiple audiences, Senator. I'm thinking, first and foremost, about the litigants before us, and I want the losing party, in particular, to respect the opinion. They're 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 grappled with the ***law***, that I grappled with the best arguments.

So I want the losing party to come away (ph), saying, "He got it." I -- as a litigant, I knew how important that was. When I lost, I at least -- I felt like got a fair shake. Why does that matter, both due process in the individual case, but it builds ***over*** all confidence.

I think, in the judiciary, to know you're getting a fair shake, even when you lose. I'm also writing for the parties affected by the decision. So we decide and controversies, but we write opinions that have precedential effect, as we've discussed often.

So the opinions need to be clear. They need to be organized. They can't if there'***s*** a screwed up footnote or something. That'***s*** going to -- I've seen it in my executive branch and private practice experience, that'***s*** 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'm thinking about the affected parties, whether its agencies or regulated parties or the criminal defense bar, the prosecution of the U.***S***. attorneys office.

I'm always thinking about that. I'm thinking about someone like you, I think, somewhat of 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've seen, in a few of them, like the PHH cases, a long introduction, where they can just read the introduction and say, "I got it," and then they can read the whole thing, if they want. I think that'***s*** very important as well.

I'm writing -- I think about students. So students, where do they learn ***law***? They learn ***law***, often times, by reading opinions. I've taught for 12 years, and I certainly understand the value of teaching. But teaching through your opinions, that'***s*** not the first thing I'm thinking about, but I am -- that is -- OK, could a student learn from this, about the criminal, you know, the -- the 4th Amendment or learn about the 1st Amendment.

If they read my opinion, if I give the -- to Senator Coon'***s*** conversation, if I give the historical backdrop of -- of the independent agencies, maybe a student will pick that up and think that'***s*** -- that'***s*** good.

And then I'm thinking -- I think also about professors as well, not in a sense of trying to convince, necessarily, if it'***s*** 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 so, I'm -- and they're writing treatises, ***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***. Thank you. I'll ***end***. Thank you, Chairman.

GRASSLEY: Well, tell me you didn't answer that question first.

(LAUGHTER)

SASSE (ph): You told me to ask last.

GRASSLEY: We're going to take a 10-minute break, but if you can be back in five minutes it would benefit Senator Blumenthal.

KAVANAUGH: Yes, OK. I'll do it.

(RECESS)

GRASSLEY: Senator Blumenthal.

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 coconspirator implicated in some of the most serious wrong-doing that involves the legitimacy of his president. There'***s*** 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, his friends, or even his own actual indictment.

We're in uncharted territory here. It is unprecedented for a Supreme ***Court*** nominee to be named by a president who is an unindicted coconspirator. In the U.***S***. versus Nixon case, two of the justices had been appointed by Richard Nixon but not while he was an unindicted coconspirator. I would like your commitment that you will recues 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?

KAVANAUGH: Senator, one of the core principles I've 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've studied the history of nominees is not to make commitments on particular cases...

BLUMENTHAL: I'm not asking for a particular commitment and I'm going to take your answer as a no. It'***s*** really a yes or no question. You will not commit to recues yourself; you will not commit to take yourself out of that decision despite the unique circumstances of your nomination.

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 precedence set by all the nominees before me, I need to be careful. You may disagree with this but this is part of what I see as independence of the judiciary.

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've articulated it in the decisions that you've 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 eight 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 request 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 -- the pregnancy, which was eight weeks, was four weeks further, when you participated 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 pregnancy.

All of what I've said is correct, as to the facts here, correct?

KAVANAUGH: No, senator, I respectfully disagree in various parts. My ruling, my position in the case would not have blocked --

BLUMENTHAL: It would have delayed it, and it would have set it perilously close to the 20-week limit under Texas ***law***, correct?

KAVANAUGH: No. We were still several weeks away. I said several things that are important, I think. First...

BLUMENTHAL: Well, I want to go on, because I can read your dissent, but I want to go to --

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.

Secondly, 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 consent -- parental consent requirements. I was reasoning 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 explain that.

I also did not join the separate opinion, the separate dissent that said she had no right to attain an abortion, 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 that it was safe.

BLUMENTHAL: Let'***s*** talk about your dissent in just a moment, but first, I want to talk about a list. It'***s*** the list that Donald Trump circulated in May of 2016 of his potential Supreme ***Court*** nominees. Was your name on that list?

KAVANAUGH: It was not.

BLUMENTHAL: And then he circulated another list in November of 2017, another list of Supreme ***Court*** nominees. November, 2017, was your name on that list?

KAVANAUGH: 2017, yes. There was another list in the interim between those two.

BLUMENTHAL: And his litmus test for that list was that the justice that he'd nominate would have to automatically overturn Roe v. Wade, correct?

KAVANAUGH: I'm not going to comment on what he had said. Whatever he had said publically...

BLUMENTHAL: Well, he said it. That'***s*** not indisputable. And in between, in...

KAVANAUGH: I'm not sure the exact words you just used are consistent with what he said, but whatever he said publically will stand on the record.

BLUMENTHAL: Exactly. October of 2017, your decision and dissent in Garza occurred, correct?

KAVANAUGH: It did, but that case came to us in emergency posture. I didn't 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.

BLUMENTHAL: OK, what occurred then between May of 2016 and November of 2017 besides your Garza dissent that put you on that list?

KAVANAUGH: Well, Mr. McGahn was White House counsel and the president had take office, and by then, if I'm -- sorry, I'm looking at the date. I think I got it. May...

BLUMENTHAL: You can hold it up higher.

KAVANAUGH: No, that'***s*** OK, I've got it now.

BLUMENTHAL: So let me...

KAVANAUGH: I'm dismissing the interim list, but -- but -- so President Trump had taken office, Mr. McGahn was White House counsel, those are just facts. And then what else happened?

BLUMENTHAL: It's a mystery.

KAVANAUGH: No, it's not a mystery, I'm just debating whether I want to say. But a lot of judges and lawyers...

BLUMENTHAL: Well, let's talk -- let's talk about you...

(CROSSTALK)

KAVANAUGH: Can I answer the question? Can I answer the question?

BLUMENTHAL: I want to talk about your dissent.

KAVANAUGH: But I had the answer to your question. You said, what else happened, and I haven't answered.

BLUMENTHAL: Go ahead.

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.

BLUMENTHAL: And maybe more than a few of them decided your dissent in Garza...

KAVANAUGH: I think it had happened long before that, actually. They -- they...

BLUMENTHAL: Well, let's 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's used by Justices Scalia and Thomas in their dissents from Supreme ***Court*** opinions that affirm Roe v. Wade. They 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 don't refer to it as Roe v. Wade protecting Jane Doe's right to privacy or the right to an abortion. You refer to it as existing Supreme ***Court*** precedent. Not Supreme ***Court*** precedent, existing Supreme ***Court*** precedent.

Now, I don't refer -- I don't recall seeing a judge refer to existing Supreme ***Court*** precedent in other decisions, this is certainly not commonly unless they're opening the possibility of overturning that precedent. It's 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're careful to never say that the constitution protects the right to choose. You can see that the parties have, quote, "assumed for purposes of this case," ***end*** quote, that the plaintiff has a right to ***end*** her pregnancy, but not that she actually has that right. You write, quote, "as a lower ***court***, our job is to follow the ***law*** as it is, not as we might wish it to be." KAVANAUGH: There, I have to interrupt, senator, because I was referring to the parental consent cases as well, which I just 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 a parental consent statutes, which allowed reasonable regulation, as Casey said, minors benefit from consultation about abortion, that's an exact quote from Casey. And the Supreme ***Court*** had upheld those statutes even thought they allowed -- I mean, they encased (ph) some delay in the abortion procedure, and Justices Marshall, Brennan and Blackmun dissented 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 direction, but we have to follow it as faithfully as possible, and the parental consent, were the -- was the model -- not the model, the precedent. Can I say on abortion on demand, I don't -- I'm not familiar with the codeword, what I am familiar with is Chief Justice Burger and his concurrence on Roe v. Wade itself.

So he joined the majority in Roe v. Wade, and he wrote a concurrence that specifically said that the ***court*** to date does not uphold abortion on demand, that'***s*** 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 don't constitute an undue burden, and that'***s*** then the parental consent, the informed consent, the 24 hour waiting period, parental notice ***laws***. And that'***s*** what I understood Chief Justice Burger to be contemplating and what I was recognizing when I used that term. I'm not...

(CROSSTALK)

BLUMENTHAL: Well, it also was a signal -- let'***s*** 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 require.

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?

KAVANAUGH: I think that'***s*** what legal scholars have -- some -- some legal scholars have undoubtedly said things like that ***over*** time, but that -- that'***s*** different from what I as a judge -- my position as a judge is that there'***s*** 45 years of precedent and there'***s*** Planned Parenthood v. Casey, which reaffirmed Roe.

So that'***s*** precedent on precedent, as I've explained, and that'***s*** important. And that'***s*** an important precedent to the Supreme ***Court***. It'***s*** not the only ...

(CROSSTALK)

BLUMENTHAL: Well, I -- I think ...

(CROSSTALK)

KAVANAUGH: ... it'***s*** not the only precedent though, and Casey, it'***s*** 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 way 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 doesn't constitute an undue burden. And so existing Supreme ***Court*** precedent is the body of precedent on the regulations too, it'***s*** not -- it'***s*** Roe, but then what regulations? And that'***s*** the body of existing Supreme ***Court*** precedent.

BLUMENTHAL: And that'***s*** exactly the point here. You were telling the Trump administration 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 and ...

KAVANAUGH: Well, I'll just say two other things, Senator? One, I didn't 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 secondly I -- or I'll say three things -- secondly, I said in a footnote, joined by Judge Henderson and Judge Griffith that -- the whole -- my whole dissent was joined by both of them -- that the government could not use this transfer to be a sponsor procedure as a ruse to delay the abortion past unsafe time...

BLUMENTHAL: OK, you didn't join that dissent. But let me ask you --

KAVANAUGH: And I said thirdly that if the nine days or seven days expired, that the minor, at that point, unless the government had some other argument it had not unfolded yet that was persuasive and I -- since they hadn't unfolded it yet, I'm 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 wasn't 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.

BLUMENTHAL: Well, let me just ask you then, can you commit, sitting here today, that you would never overturn Roe v Wade?

KAVANAUGH: So Senator, each of the eight justices currently on the Supreme ***Court***, when they were in this seat, declined to answer that question.

BLUMENTHAL: I understand -- I understand your answer. You've given it on other issues before. But you can understand, also, given what we've seen in Garza (ph) 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 weight 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 healthcare issues.

You've taken the position in Seven-Sky's (ph) -- and I'm 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 deems -- when he deems the statute unconstitutional, even if a ***court*** has held that -- 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 conditions. That protection has real world consequences. Pre-existing conditions include Alzheimer's, arthritis, congestive heart failure, Crohn's disease, hepatitis, lupus, mental disorders. That's just a very partial list, including being pregnant.

You have answered my colleague, Senator Coons, that you wouldn't 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's a case pending. Do you believe that the president can refuse to enforce that institute even if the United States Supreme ***Court*** upholds it?

KAVANAUGH: Senator, a couple things. First of all, just to close out the prior discussion, you said delayed completely. That's 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 United States versus Richard Nixon case, which says the executive branch has the exclusive authority and absolute discretion whether to prosecute a case.

That's an exact quote from U.S. Phoenix (ph) and if I'm remembering correctly. And then in Heckler v. Chaney, the Supreme ***Court*** says that that principal applies to civil enforcement as well. So that's the precedent of the Supreme ***Court*** that I was referring to and explained later in Aiken (ph). But why did I have that in there at all? I would -- 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 we should wait to consider it --

BLUMENTHAL: But here's my -- here's 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?

KAVANAUGH: So a couple things on that, Senator. The concept of prosecutorial discretion, as you -- as you know, of course, former U.S. attorney, is -- is well-rooted in American ***law***. So if a U.S. attorney decides we're going to go after bank fraud and not after not after low-level marijuana, that's -- that's classic prosecutorial discretion.

BLUMENTHAL: But we're not talking about that discretion. We're 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's not going to enforce, or consumer protection statutes or even anti-corruption statutes. We're talking about statutes that, as you said here, regulate individuals and they protect them. Simply because he deems them unconstitutional, refuse to enforce them.

Not in selective cases, across the board.

KAVANAUGH: A couple of things, Senator. First of all, for a few of your examples, of course, there are private causes of action as well --

BLUMENTHAL: There are private causes of action, but the government is the chief enforcer.

KAVANAUGH: I agree with that. I'm not -- I'm not disputing that. On prosecutorial discretion, what I said in the subsequent Aiken County case, I -- I elaborated on that but in -- then (ph) a subsequent Marquette speech that's published in the Marquette Lawyer that you have, I -- 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 (ph) --

BLUMENTHAL: Well, my point is there are no limits here.

KAVANAUGH: But that's what the -- the Supreme ***Court***, if you look at the quote in United States versus Richard Nixon, which I know you've read, says the executive branch has the exclusive authority and absolute discretion whether to prosecute a case. Now, Heckler v Cheney refers back to that, cites that and that's in the civil context. There's some limits presumably on prosecutorial discretion. But this came up in the immigration context.

In -- in President Obama's administration, that's still -- still something I won't comment on directly. But there are - there are always questions about prosecutorial discretion of -

BLUMENTHAL: Well let - let me just point out, and I apologize for interrupting you, but my time is limited.

KAVANAUGH: I understand.

BLUMENTHAL: 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 versus Commissioner as your authority.

KAVANAUGH: Yes.

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 ***court*** - the statute constitutional.

I'm going to leave this topic, I hope we'll have an opportunity to return to ensure (ph) tomorrow, and I want to talk about the 2nd Amendment and your position on gun violence prevention.

As you know, my state has a tragic history and experience, recent, 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're going to have more and more of them, and they are in common use, they are commonly used to kill ***people***.

That'***s*** 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're in common use only because they are not in any way regulated for the public safety.

GRASSLEY: As you need to answer that question, and then when you're done answering that question, I'm going to call on Senator Flake.

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 '70s and '80s, plagued by gang and gun, drug violence and it'***s*** known for a while as the murder capital of the world.

So I understand and appreciate your - your initial comment on that. Secondly, 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'***s*** 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'm following all the precedent.

Not (ph) a cafeteria where I can pick which precedents I want to apply, I have to apply all the precedent. I did that, I explained it in painstaking detail why I thought the test I was applying was appropriate in that case and - and went through the test.

I made clear that the - the Supreme ***Court*** part three of Justice Scalia'***s*** majority opinion in Heller allowed - still allowed a lot of gun regulation, machine guns can be banned, ***laws*** - traditional ***laws*** fell into (ph) possession, concealed carry were identified there, ***laws*** prohibiting guns - possession by the ***people*** with mental illness, government buildings, schools, those were all pre-identified.

And then I - it'***s*** important to point out also the footnote in Heller - in Heller says this list is not meant to be exhaustive, and so I think that'***s*** guidance to the lower ***court*** when applying that test, as Chief Justice Roberts said at the oral argument in Heller, you reason by analogy for most historical exceptions and regulations.

And that'***s*** something that I think is - is - 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 try to do it as faithfully as I could.

GRASSLEY: Senator Flake.

FLAKE: Thank you, Mr. Chairman. Thank you, Judge. Thank you for your - your -

GRASSLEY: Well hey wait a minute, would you please start his time ***over***. Judge, you've been attacked for this short footnote that you wrote in the Affordable Care Act case about when a president may declined (ph) enforce the ***laws*** passed by Congress.

But in a different opinion, you actually ordered the executive branch to comply with the ***law***. You wrote, quote, "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***", ***end*** of quote.

Obviously you do not think the president has a blank check to ignore the ***law***. Senator Flake.

FLAKE: Thanks, always happy to defer, Chairman.

(LAUGHTER)

I appreciate your endurance here today, Judge. And let me just ask, you - you mentioned your mother as one of your judicial heroes. Who else would you put on that list? Who - what ***people*** do you admire and why?

KAVANAUGH: My mom, as you mentioned, of course. Trial judge, world's consequences, real ***people*** in the real world and saw her operate her ***court*** room with firmness and civility and was well respected as a prosecutor first and as a judge and her civility and work ethic are something - and remembering that cases have real world consequences.

Justice Kennedy, as I've mentioned, modeled independence, fiercely dependent - defended judicial independence throughout his career, model civility and collegiality. You could look at 30 years of his opinions and what's the harshest thing ever written? It's not - you can't - you can't 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 and I was sworn in May 30, 2006 in his chambers, my - and he said you're going to go back and you're going to feel - soon you're going to feel lonely. You've been doing this job at the White House, it's all energetic, and you're going to feel quiet.

And he said you get - get out and teach, and he's taught since 1975 I believe, when he became a Ninth Circuit judge and I - I followed that example, and teaching's been an important part of my life.

So he - he taught - he instructed that. He - 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've discussed, in terms of his focus on the text but it -- it was rooted in his appreciation for the Constitution and the rule of ***law***.

And he had -- as he often said but its true if you look through his jurisprudence that decisions where he ruled in ways that ***people*** did not expect, protection of the Fourth Amendment for example, of the thermal imaging case Kelo. The Jones case on GPS tracking.

First Amendment, Texas v. Johnson, he had a (inaudible) the dissent. So he was a fierce also protector of individual liberty, even in a national security context.

I looked back to Chief Justice Rehnquist and Justice Jackson for whom Chief Justice Rehnquist clerked, as two ***people*** 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 Morrisett (ph), Korematsu, and Youngstown, Barnette as well.

Rehnquist, I think such a firm but -- firm but also affable manner. I wrote about Rehnquist. I gave a speech about him and wrote -- I referred to the fact "The Brethren" was this book that came out in the late 70s, very critical of -- well the sources were very critical of the Supreme ***Court***, I'm not saying the authors were, of some of the Justices individually.

But Rehnquist is referred to by all these terms throughout that it emphasized his collegiality. And I think that's why he was such a hero. And then I'll just -- I'll end it with -- you know anytime you look at the Constitution and you think about people who've 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's very important. And he was a real world consequences person. I listened -- I pulled up an old oral argument one time in a First Amendment case that he -- so it was argued in the early '70s. And it was about ads on a bus -- on the interior of a bus. And I guess -- I guess it was political ads on the interior of the bus and the question was whether the -- they were permissible and the First -- the First Amendment right to run these ads on the interior of the bus.

And the worry was that the -- they would identified -- it would look like the city was putting its informator (ph) on the 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 a political candidate. And he said, do you really think that people are that stupid.

(LAUGHTER)

And it just showed his -- he got the real world's consequences in a way that no one else would have. Of course his -- his legacy is -- is towering in terms of what he did as a litigator and helped, not single handedly, but he certainly -- he had colleagues.

But he helped bring the end of Plessy versus Ferguson and achieve the greatest moment in Supreme Court history in Brown versus Board. So I always think about Thurgood Marshall's legacy as well.

So that's a much more long winded answer than you expected Senator. But appreciate you giving me the time.

FLAKE: That's 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 -- and that certainly is important. We'll 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 separate from 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 interest.

Now more than ever, I think that we have to insure that our institutions are independent and are firm against encroaching partisan politicking. There's no where important, obviously, than the judiciary -- Alexander Hamilton famously wrote in Federal of 78'. You've 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, the power of the executive branch and the political passions of the legislator. I believe that if you are confirmed with the Supreme Court, I don't believe that you would erode (ph) judicial independence or otherwise disrupt the separation of powers between the three branches.

You've been discussing your reverence for the separation of powers with us today. Particularly, the important of keeping the judiciary the least dangerous branch by making sure that it stays a political and I'll discuss that more in a moment.

But specifically I'm 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; Constitution, Federalist papers, (inaudible), the president with positive powers.

You've also discussed today, cases. You've mentioned Youngstown, U.S. versus Nixon, those that you admire because they involved the judiciary standing up to the president and putting limits on executive power.

These presidents certainly restrained presidential power. But I'm curious, what limits are there, if any, that would prevent a president from centralizing an executive power and using it for his own political or personal purposes.

What protections are there? Statutory, Constitutional, judicial that are built in to the system. Can you talk a little about that? We've talked about the positive things that give a president or endow the executive with power, what constraints are there?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 principle executive officers who might be -- the Senate might not approve.

But also sometimes as ways of restraint. They're also built into the constitutional -- there'**s** the ultimate -- ultimate remedies in the Constitution for -- there'**s** 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'**s** no one -- there'**s** no one who has -- who'**s** guaranteed a permanent time because of the ultimate checks that are in for -- in the constitutional system as well.

There are statutes then beyond the Constitution and I didn't mean that to be an exhaustive list but there are -- there are innumerable 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 I under -- 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 37, I think historical practice is relevant to judicial decision-making, as we've seen in a lot of judicial decision, but when I worked in the executive branch, one of the questions I always ask when I ask as a judge is, "How has this been done before?"

And I think that'**s** always -- two things I always tell students, two things to always yourself, "What is the text of the relevant ***law*** say (ph)?" -- regulation, code, statute, the Constitution, and "How has it been don before?" which is really a question of precedent or norm within the executive branch or norms within Congress. Those are important -- important as well.

So I think there'**s** constitutional and statutory structures as well as customed (ph) or norm that all constrain Congress and constrain the executive branch and constrain the judiciary as well.

FLAKE: You discussed with Senator Sasse the danger of independent agencies that amass too much power in any individual.

KAVANAUGH: Yes.

FLAKE: Would that not be true with the executive as well?

KAVANAUGH: The -- that was -- that was the debate at the Constitutional Convention, Senator, was whether to have a plural executive -- in other words, multimember executive -- or to have a single president.

And ultimately the framers at the convention decided to go with a -- and Wilson and Gouverneur Morris -- James Wilson and Gouverneur Morris were really the -- 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'**s** why Hamilton wrote Federalist 69 -- well, that'**s** why they put all the checks into the Constitution and why Hamilton wrote Federalist 69 to point out for the ***people*** who were voting on ratification all those differences between the king and a monarchy.

And so that -- that fear has existed throughout American history, I think of an executive that'**s** unchecked, and it'**s** why, for example, the Supreme ***Court*** has been willing -- Marbury'**s** another case, President Jefferson of course is trying -- is the one who loses in -- in Marbury v. Madison, President Truman loses in Youngstown, President Nixon loses in the United States v. Richard Nixon, Homdee (ph), National Security'**s** not applying check for the president (ph) -- that was President Bush.

FLAKE: Let me bring it up to today. You've mentioned a couple of times that you live in the real world.

KAVANAUGH: I try, yes. I -- I -- work (ph) -- that -- that'**s** important for a judge.

FLAKE: Yes. 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 midterms by the Jeff Sessions Justice Department. Two easy wins now in doubt because there was not enough -- there is not enough time. Good job, Jeff.

Should a president be able to use his authority to pressure executive or independent agencies to carrying out directives for purely political purposes?

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 nominee sitting here need to be careful about is commenting on current events or political controversies.

I don't think we want judges commenting on the latest political controversy, because that would ultimately lead the ***people*** to doubt whether we're independent or whether we're politicians in robes, and so maintaining that strict independence of the judiciary requires me, I think, to avoid on commenting on any current events.

FLAKE: All right, forget I just said that.

KAVANAUGH: Well, I -- I -- I said I -- I understand, but I just -- I just (ph)...

(CROSSTALK)

FLAKE: (inaudible) just -- 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?

KAVANAUGH: Well, Senator, I think that hypothetical that you're asking is -- is directly analogous to -- analogous to the current events, and therefore I hesitate to get in -- it'**s** also me commenting on something that'**s** not a case or an issue or something I've written about.

And I just -- I -- I -- I've thought about this principle as well. And looking at all 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 Justice-ship is how he'**s** fervently stood up for the independence of the judiciary and try to keep the judiciary out of politics through what he does off the bench as well as on the bench, and I think that'**s** -- 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.

FLAKE: I -- well, let me -- let me rephrase in a different way. You -- if you have an executive who is abusing his or her authority by instructing independent agencies of government to -- 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?

If -- and I understand your aversion, as many in this body had -- I wasn't here yet -- to the Independent Counsel Statute was that we did away with -- express you're a little more saying when about (ph) a special counsel, but what other remedies are there? And what other constraints are there on a president?

KAVANAUGH: Well, the constraints are -- on the executive generally are important ones. The appropriations power is a huge check. I mean, that is an enormous check if employed as fully as it might be. The confirmation -- power of executive branch officials, the -- the ultimate check, of course, that -- that you -- you referred to is always -- is always part of the -- the system.

And then just to be clear on the -- the special counsel system that I've spoke approvingly of in the 1999 ***law*** journal article and I've 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.

FLAKE: Right.

KAVANAUGH: And they're (ph) -- if -- 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 -- that possibility is present (ph) to -- to the Congress, of course, in general.

FLAKE: Right. But if the president could fire an independent counsel, or the special counsel, is that any restraint at all?

KAVANAUGH: Senator, that hypothetical was tested, I suppose, in the September of 1973 if I have my month right. And I might not have my month right. But I -- it might have been a different month -- but in 1973 and the system held.

FLAKE: Right. Thank you, we'll move on and maybe get back to this tomorrow. The 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've suggested that you have concerns with Chevron Deference; I share those concerns, as we spoke about. You've explained that Chevron Deference can allow executive agencies to stretch the meaning of the ***law*** beyond what Congress intended. I think we've certainly seen that.

You've also encouraged Congress -- it can also encourage Congress to abdicate its legislative power by punting its lawmaking responsibilities to the other two branches. We've spoke at length about that in 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've had that frustration for years now. Myself, and Senator Tim Kaine and others trying to -- unsuccessfully, to 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 -- that aside, your opinions suggest that a Chevron analysis has a two-part test. One determining if there'***s*** 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?

KAVANAUGH: Well, that's a huge problem, senator. And that -- I think that's at the -- the heart of the concern I have about how certain cannons of statutory interpretation have been applied, including -- 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 -- what is at the root of that disagreement? Because we're both independent judges and -- and why are we disagreeing?

And it occurred to me in -- in some -- some cases that the disagreement is not about what the best meaning of the statute is or what the precedent says. The disagreement's about whether something's 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's really hard to get neutral principles for how much ambiguity is enough.

And there're 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's your ambiguity trigger? So to speak.

And then second of all, when applying whatever trigger you come up with, how the heck to 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're 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, observation of human nature, but also leaves the judges umpire vision in real trouble in those cases, because if there's no neutral principals to determine ambiguity, then -- and this is not a minor deal, so if you're in a case about deference to a agency, the fate of huge regulations -- so to give you the example, three judges could be sitting around after a little argument and all three could agree -- actually, the agency's reading of the statutes not the best reading of the statue given the words.

But two judges will say, I think it's ambiguous. And the third one says, I don't think it's ambiguous. So the two will defer to the agency, of no it's not the best reading of the statute. That can be a billion dollar decision right there, fate of huge regulations -- rise or fall just on that. And one judge will say, well I think it's not ambiguous -- well I think it is.

And there's not a great -- in my experience, sitting in those conference rooms, a great neutral principal. And to my mind that's a concern if you have as I do, the idea that judges should be umpires and we should have, you know, neutral rules of the road. That's something I focused on, I explained that in some length in that Harvard article. I know you and I talked about that as well.

FLAKE: Right. Let's talk about the stare decisis precedent. How -- you talked a little about, I think with Senator Lee about 5/4 decisions, they have the same weight, same precedent as those decided anonymously. Kelo 2005, was a 5/4 decision obviously concerning the government's ability to seize property for economic purposes. Those of us in the west 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's 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's a big concern out west.

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.

FLAKE: Duly noted.

KAVANAUGH: Yes, but I know it's a special concern in the west as well. And it is a precedent of the Supreme ***Court***. But to your point I've 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 in the fact that the -- you couldn't see it to the naked eye that the fairy shrimp had been present in a tire rut three years earlier was not enough to designate a huge swathe of...

FLAKE: Said it was the size of an ant, or something?

KAVANAUGH: I did, yes, sir. So I had that case, and 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, Carpenter's case it's called.

There 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's important to understand that when something like that happens there are lots of effected parties. I've talked about this in other cases like my Mingo Logan case, when the government regulation -- the policy's not my concern but in assessing a standing for example, or retroactivity, which was another case I had.

You need to think about the effected parties -- so businesses, workers, the coal miners in the Mingo Logan case, or the ***people*** in lumber -- the timber industry in the Carpenter's case but also sympathetic to the fact that westerners don't think ***people*** in the east always understand what's going on with those designations. I put...

FLAKE: Not even remotely.

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 in the second paragraph, the opinion, "for easterners reading this opinion, the size of this designation is twice the size of the state of New Jersey," and so I said, "if you're an easterner imagine driving up the New Jersey Turnpike, and then all the way back down it and you'll have some sense of what it would take to drive across this designation of land." Which was my way of saying -- trying to appreciate what the effect of some of these things in the west.

FLAKE: Getting back to the precedent, you know, when you're not in the Supreme ***Court***, if you're in one of the lower ***courts*** then you always look to the Supreme ***Court*** and those are -- those precedents are of equal weight, I guess, any decision that's made. But when you're on the Supreme ***Court***, precedent is only precedent until it's not precedent anymore.

Until there's a decision made, and my question I guess is what -- a decision like Kelo, decided in 2005, 5/4 decision. Does it have the same weight as a Texas versus Johnson, decided in 1989 on the flag burning issue? But how do you -- what weight do you give it once you're on the high ***court***?KAVANAUGH: Well I think you start with principals that the Supreme ***Court*** itself has articulated about precedent, and those principals look at of course whether the decision is wrong -- grievously wrong, whether the decision is inconsistent -- deeply inconsistent with other legal principals 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 that 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 the traditional public uses, but going to economic development for private parties.

And so, again, I think I've cited this before, but Judge Sutton on the Sixth Circuit, his book "51 Imperfect Solutions" is a great book about how state Constitutions can, 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'**s** 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 (ph) designation, can find protection. Thank you, Mr. Chairman.

KENNEDY: Senator Hirono.

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 the 63 National, State and Local LGBT Groups from Earthjustice, from Muslim advocates, from 63, within lawyers and supporters of Whole Woman'**s** Health from Secular Coalition for America, and from Asia-Pacific American Advocates. I ask unanimous consent to enter these letters into the record.

KENNEDY: (Inaudible) objection.

HIRONO: Thank you.

Judge Kavanaugh, Chief Justice John Roberts has recognized that, quote, "The judicial branch is not immune," ***end*** quote, 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.

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?

KAVANAUGH: No.

HIRONO: Have you ever faced discipline or entered into a settlement related to this kind of conduct?

KAVANAUGH: No.

HIRONO: I started asking these questions about sexual harassment because it'**s** so hard to hold lifetime appointees to the federal bench accountable and because I did not want the Me Too 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 a 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 e-mail group that the judge used to send what the "Times" reported was, quote, "A steady diet of tasteless humor," ***end*** quote.

The report describes the list is made up of friends and associates, including his (inaudible), 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 don't 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 don't remember it?

KAVANAUGH: No, I don't remember anything like that. And - and I'm not ...

HIRONO: So the answer'***s*** no. Have you ever ...

KAVANAUGH: Well - well - if I could elaborate.

HIRONO: I think that'***s*** a complete answer. Let me go on. Have you otherwise ever received sexually suggestive or explicit e-mails from Judge 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 ...

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?

KAVANAUGH: No, Senator. And you know, there were 10 - I worked in Washington D.C., there were 10 judges in the courthouse with him, in Pasadena, prominent - prominent federal judges in the courthouse with him.

And we worked side-by-side with him, day-after-day, while he chief judge of the 9th Circuit.

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?

KAVANAUGH: I have no reason not to believe them, Senator.

HIRONO: So - you know, let me just put this into a context, because of you have justified that you basically saw no evidence of this kind of behavior at all. You never heard of it, but you were closely with him on number of projects, it wasn't 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'***s*** Judge Kozinski (ph).

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?

KAVANAUGH: Had I heard those allegations, Senator, I would've done three things immediately. I would've called Judge Tom Griffith who's on our ***court***, who's on the Codes of Conduct committee for the federal judiciary appointed by Chief Justice Roberts.

I would've called Chief Judge Garland who's chair of the executive committee. I would've called Jim Duff who's chair of the Administrative Office of the U.***S***. ***Courts***. If, for any reason, I was not satisfied with that, I would've called Chief Justice Roberts directly.

HIRONO: So you believe that all judges who, including yourself, if you ever heard of (ph) any allegations about these kinds of behaviors, you would report it, you would go through whatever processes were set up by the ***courts*** to ...

KAVANAUGH: I would do that, and ...

HIRONO: ... prevent this kind of behavior and to hold ***people*** accountable. And yet - you know, someone that you've been close to that you've 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 say anything.

So let me just mention that this is why the Me Too movement is so important, because often in these kinds of -- of situations where there are power issues involved, as certainly there are between judges and clerks, that often -- you know, that it's an environment where ***people*** see nothing, hear nothing, say nothing, and that's what we have to change.

KAVANAUGH: I agree with you, Senator.

HIRONO: That's good (ph).

KAVANAUGH: I agree -- 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 to know first that the...

(CROSSTALK)

HIRONO: Judge Kavanaugh, perhaps if all of those situations, all 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?

KAVANAUGH: There's a premise in there that I'm not sure is accurate.

HIRONO: The premise being that he engaged in domestic abuse?

KAVANAUGH: No, no, no, the recommendation premise, but I'll -- but put that aside. No, I was not aware of those allegations until they became public, when there was the news reports about them.

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 the 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.

KAVANAUGH: Yes, yes sir (ph).

HIRONO: You argued that Hawaii could not limit those who voted for the Office of Trustees to only Native 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, quote, "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's not that they came from Polynesia, they were a part of Polynesia. Hawaii is a part of Polynesia, Native Hawaiians did not come from Polynesia -- let me repeat that -- they're a part of Polynesia.

You also implied that Native Hawaiians couldn't qualify as an Indian tribe and therefore were not entitled to Constitutional protections given to indigenous Americans because, and I quote you, "they don't have their own government, they don't have their own elected leaders, they don't have -- they don't live on reservations or in territorial enclaves, they don't 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.

KAVANAUGH: Well the -- the Supreme ***Court*** -- the Supreme ***Court*** agreed, though.

HIRONO: And why they are so offensive.

KAVANAUGH: The Supreme ***Court*** agreed 7-2.

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 don't 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 don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. You know, it's hard to know what to say to this assertion. It sounds like you're 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'm going to refer to an email that you sent out...

KAVANAUGH: May I respond to that?

HIRONO: Let me -- let me get to my question.

KAVANAUGH: OK. (OFF MIKE)

HIRONO: You sent out an email on June 4th, 20 -- 2002, and I want 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 OHA Native Hawaiian programs should be -- undergo strict scrutiny because there are Constitutional -- questionable validity under the Constitution, were you looking to Rive v. Cayetano as a basis for this view which you expressed in your email?

KAVANAUGH: So Senator, first of all, I appreciate your perspective. The amicus brief I wrote was a -- was -- the Supreme ***Court*** agreed with by a 7-2 decision written by Justice Kennedy in that case, Rice v. Cayetano. And that decision in -- in the case, just so I'm 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 a 7-2...

HIRONO: Yes, Judge...

KAVANAUGH: That was...

HIRONO: Kavanaugh, I attended that Supreme ***Court*** hearing.

KAVANAUGH: Yes. I did as well.

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 didn't 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 -- the Supreme ***Court*** agree with you -- were you thinking about the Rice decision when you made this view known?

KAVANAUGH: That'***s*** an email 16 years ago. I don't recall what I was thinking about when I wrote the...

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 15th Amendment, not the 14th Amendment, the 15th to do -- Amendment (ph) having to do with voting rights, and my question to you is do you think Rice v. Cayetano raises constitutional questions when Congress passes ***laws*** to benefit Native Hawaiians?

KAVANAUGH: I think Congress'***s*** power with -- with respect to an issue like that is substantial. I don't want to pre-commit to any particular program, but I understand that Congress has substantial power with respect to declaring -- recognizing tribes...

HIRONO: But you believe that any of these kinds of programs or ***laws*** passed by Congress should undergo strict scrutiny and raises constitutional questions?

KAVANAUGH: Well, as I -- as I sit here today as a judge, I would listen to arguments under -- that -- that 16 years ago, and I'm working in the -- 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've said about Native Hawaiians. The specific case was about an election to a state office...

HIRONO: Yes, that'***s*** why it'***s*** a state action case, I am well aware of the basis on which a Supreme ***Court*** made that decision.

KAVANAUGH: Yes.

HIRONO: 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 it, it is a state action 15th Amendment voting rights case? And 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 raced based. I'm asking you if that is an appropriate citation of the Rice decision.

KAVANAUGH: Senator, I think Congress has substantial power, of course, in this area that you're 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.

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 your problem here. Your view is that Native Hawaiians don't 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.

I think that my colleagues from Alaska should be deeply troubled by your views. And I know that in you Amicus brief and in your Wall Street Article, you did not mention one word about Alaskan 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 Senators Feinstein about Roe v Casey and your conversation with Senator Durbin about Garza, and also raised by my colleague Senator Blumenthal.

You talked about the importance of presidents. You said you understand the strong feelings about abortion. You said you recognize the real world effected cases and you don't live in a bubble.

But I think when you talk about respect for president, it'***s*** misleading because there are ways to say you are relying on president, i.e. Roe and Roe v. Wade and his 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 it 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 (ph) women. So both Senators Durbin and Blumenthal explained the facts in Garza, so I won't 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 weren't. You turned this case into a parental consent case, which it wasn't.

Then you looked at the facts and rules 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 abortion would be -- would no longer be feasible by finding her sponsors that she did not need and that you deemed these factual circumstances, 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 point on a state such as Texas; the minor will have received a judicial bypass. That is true but is irrelevant to the current situation. Why? The current situation was all about parental consent and the need to get -- to get judicial bypass, which this young woman did. So if there'***s*** anything that'***s*** irrelevant is your argument that this was a parental consent case.

Then you went on to analyze this case on the bases of whether or not keeping her under lock and key, insisting that there would be sponsors found for her which could have ***ended*** up being in unfeasible timeframe for her to get an abortion. Do you deem those not to be undue burdens?

That a young woman had already received a state judicial bypass, as referenced before. The fact that she did not have, you thought, that parental consent and that was not even an issue. It was irrelevant.

So this is very disturbing. Is it any wonder there'***s*** -- there are so many ***people*** who even if you are not sitting there in spite of the fact that President Trump said his nominee 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 will prevent -- that will put barriers before a woman's right to choose. So I find it really a rather unbelievable.

And by the way, you also mention -- you know you said several times that in Garza -- Garza you did not join the decent, which basically says an alien minor does not have a constitutional right to an abortion.

So does the fact that you didn't join the decent mean that undocumented persons do have a constitutional right to an abortion?

KAVANAUGH: Well, I decided that case based on the precedent of the Supreme ***Court*** and the arguments that were presented in the case. I made clear that I was following as carefully as I could the precedent. You mentioned parental consent and spousal consent, just the Supreme ***Court*** has upheld parental consent ***laws*** but has rejected spousal consent ...

(CROSSTALK)

HIRONO: Usually it requires a judicial waiver, which was the case in the Texas case. You can't just require parental consent as in this case where parents were beating her up. How can you expect parental consent in a situation like that? So ...

(CROSSTALK)

KAVANAUGH: That -- that would be a situation for the bypass. This was a analogy for a woman who was a minor, that's critical, who was in a immigration facility by herself in the United States and had ...

(CROSSTALK)

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's not even an issue. But I do have a question.

Since you've mentioned several times that you did not join the decent and the crux of the decent 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 consent because you disagree with that. That in fact alien minors do have a right to an abortion in our country.

KAVANAUGH: Well as a general proposition -- first of all, the government did not argue in that case that aliens lack constitutional right generally to obtain an abortion.

HIRONO: Yes, even they didn't argue it because probably they figured that that's -- that is a decided issue but maybe you don't think so. Do you think that is an open question as to whether or not alien minors or in fact, aliens in our country have a right to -- constitutional right to an abortion? Do you think that is an open case?

KAVANAUGH: The Supreme ***Court*** has recognized that persons in the United States have constitutional rights.

HIRONO: OK? So I hope that's why you didn't 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's why judges go out of their way to voice their disagreement with the majority to show what their views are. And you have the highest dissent rate among active D.C. Circuit judges -- 5.1 dissents per year.

I'm going to talk about several studies that analyzed your decision. The first study by Professor Elliot Ash and Professor Daniel Chen shows that compared to other circuit ***court*** judges elevated to the Supreme ***Court*** since the 1980s, you not only had the highest rate of dissents; you also had 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 second study by ***people***...

(UNKNOWN): (OFF-MIKE)

HIRONO: ... thank you. I'm on a roll here, Mr. Chairman.

(LAUGHTER)

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.

KENNEDY: Without objection.

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 project our clean air and water. Mr. Chairman, I ask unanimous consent to have the Public Citizen study entered into the record as well.

KENNEDY: Without objection.

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'***s*** 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.

KENNEDY: Without objection.

HIRONO: Judge Kavanaugh, why do you rarely dissent on behalf of consumers, workers, or the powerless? And please, don't talk to me about all the times that you were with the majority or where you joined other majorities.

KAVANAUGH: Well, Senator, I've ruled for workers many times. I've 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.

HIRONO: So, Judge Kavanaugh, I cited -- how many studies did I enter into the record -- in these four studies that indicate that there is a pattern to your dissents and your pattern is that you do not favor basically regular ***people***...

(CROSSTALK)

KAVANAUGH: Well, I -- well, I wrote a -- it -- one of my most important dissents, Senator, was in United States v. Burwell. That was a criminal case, an in-bank (ph) 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'***s*** 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 lengthy dissent about that, that -- that ...

HIRONO: ... I...

KAVANAUGH: ... is someone -- that'***s*** one of my most important dissents, and that was on behalf of a criminal defendant.

HIRONO: Judge Kavanaugh, the thing about patterns is that there are exceptions to the pattern. So, all of these studies that I cite to, we're not talking about the exceptions to the pattern; we are talking about the exceptions to the

pattern, we aren't talking about the existence of a pattern - you know, it kind of bothers me for - I would expect a judge to follow the ***law***.

In fact, I think you started off several times saying that you are a - how did you describe yourself, in terms of following the ***law***? You said several times ...

KAVANAUGH: Independent and pro-***law***.

HIRONO: Pro-***law***, yes.

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, a case called United States Versus Nwoye, ***over*** a dissent of another judge, where I reversed the conviction of a woman on the ground that she hadn't been able ...

HIRONO: Mr. 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, (inaudible) when you say you consider yourself to be someone who follows precedent and the ***law***, but ***over*** and ***over*** again, your colleagues and the majority who criticize you for not following the ***law*** or Supreme ***Court*** precedent, where Congress is clear you missed the plain language, where the Supreme ***Court*** clearly states rules, you ignore them.

Let me tell you some examples where your colleagues actually took the time to criticize your dissent. 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, he 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 D.C. could ban semi-automatic weapons, and the majority ruled 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 a 10-page appendix in Heller II entered into the record.

KENNEDY: Without objection.

HIRONO: In 2017, in U.***S***. v. Anthem, the majority sharply criticized your dissent. The said, quote, "Rather than engage with a record, much less adhere to our standard, the dissent offers a series of ball (ph) conclusions and mischaracterizes the ***court***'***s*** opinion," ***end*** quote.

They said that you, the dissenting colleague, applies the ***law*** as he wishes it were not as it currently is. This doesn't sound like such a pro-***law*** judge to me. Now why do your colleagues go out of their way ...

KENNEDY: Senator, if you could begin to wrap up, please, ma'am.

HIRONO: Why do your colleagues go out of their way, so often, to point out that you aren't following the ***law*** or relevant Supreme ***Court*** cases?

KAVANAUGH: Senator, my - I stand by my record. I've been in the majority, the vast majority of the time, 95 - 90 to 95 percent of the time. I've written opinions joined by colleagues of all stripes. I think there have been studies that shown the affiliation of the judges who've joined me in majority opinions, when there'***s*** 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've raised, but my opinions speak for themselves, and I'm very proud of them.

KENNEDY: Senator Crapo.

HIRONO: (Inaudible) speak for themselves also (ph). Thank you, Mr. Chairman.

KENNEDY: Thank you, Senator. Senator Crapo.

CRAPO: Thank you very much Mr. Chairman, and Judge Kavanaugh, you can relax for just a short moment because I'm going to take a few minutes at the beginning here and introduce some documents for the record.

First, Mr. Chairman, I'd like to introduce and ask unanimous consent to enter an op-ed from the San Bernardino Sun Editorial Board, stating that Brett Kavanaugh nomination might be the calm before the storm.

The Editorial Board says that Judge Kavanaugh is impeccably credential, 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 cohesion to introduce this document to the record.

KENNEDY: Without objection.

CRAPO: Secondly, 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 it is strongly -- the -- the -- the "editorial board is strongly inclined to support" Judge Kavanaugh'***s*** confirmation, has endorsed nominees from both Republican and Democrats in the past.

The board advocates for the deference to the president in picking to the 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.

KENNEDY: Without objection.

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, an African American judge on the 9th 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 under-represented in federal (sic) clerkships (sic)." During the event, Judge Kavanaugh "provided his insights 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 with in a number of capacities." Again, I submit this document for the record.

KENNEDY: Without objection.

CRAPO: Fourth, the Georgetown Prep letter. Judge Kavanaugh'***s*** former Georgetown Prep classmates, these men grew up with Judge Kavanaugh. They've known him for 35 years. They know him as a 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'd like to put this letter into the record, Mr. Chairman.

KENNEDY: Without objection.

CRAPO: And then finally for documents for the record, 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.

KENNEDY: Without objection.

CRAPO: Well, thank you very much, Mr. Chairman.

And -- and, Judge Kavanaugh, I'd 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***, statutes that we've had in the United States.

My colleagues have asked you a lot about the old independent counsel statute. I think it'***s*** 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'm going to mention three important differences and then I'm 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.

Now, I think those are important differences related to the conversations you had earlier. And Judge Kavanaugh, I'd just -- with that clarification -- like to ask you if you'd like to give any more comment or clarification to the discussions that were raised with you earlier.

KAVANAUGH: Thank you, senator. I appreciate the distinctions, which I think are accurate and it'***s*** important to understand. As you underscore, the old independent counsel statute had many parts to it that combine 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.

CRAPO: Well, thank you. And I -- I just -- I felt like you didn't get an opportunity to make that clarification and that the record needed to be clear for the American ***people***.

KAVANAUGH: Thank you, senator.

CRAPO: And 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, has -- as has been said, called that ***law***, "Unchecked, unbridled, unrestrained and unaccountable."

And as we've heard, Justice Kagan has praised Justice Scalia'***s*** dissent, calling the ***law*** into question. So I just -- I -- I just did want the record to be clarified somewhat in that, you know, context.

KAVANAUGH: Thank you, 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'll 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 into -- in response to that questionnaire, which was more than any other nominee has been asked.

Secondly, you've 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've 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 -- of your decisions.

And unfortunately, we haven't seen a lot of focus on that yet in the questioning that you've 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'm 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 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'***s*** different between all of the other circuit ***courts*** and the D.C. circuit ***court***?

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'***s*** 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'll get more of those cases involving agencies of the government here in D.C. as 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 their 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*** -- Fifth Circuit has a good deal 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 don't want to -- I have a lot of friends on the other ***courts*** of appeals, Senator, I don't want to diminish the work that they do because it'***s*** very important work what they do as well.

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're 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 we've been talking about extensively here, these types of issues. And I just think it'***s*** important for that to be brought out.

KAVANAUGH: Thank you.

CRAPO: With regard to the D.C. Circuit on which you sit, you've spent how many years as a judge on that circuit?

KAVANAUGH: Twelve years and three months.

CRAPO: And how many decisions, do you know the number of decisions you have participated in?

KAVANAUGH: I think I've handled well ***over*** 2,000 cases, including all the cases counted up together.

CRAPO: In how many of those were you the author of the opinion?

KAVANAUGH: I've written majority opinions -- published majority opinions in, I believe 307 cases is the current number.

CRAPO: And there'***s*** been some discussion even with the last questioning that you received about what the norm is -- what the pattern is with your decision making? 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 then, I guess I'm 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?

KAVANAUGH: It has to be in the 90s, I believe.

CRAPO: I heard yesterday from the Chairman it was 97.

KAVANAUGH: Yes, I believe that'***s*** -- that sounds correct.

CRAPO: So if there'***s*** a pattern here, it'***s*** that you are right there with the majority of your colleagues on the ***court*** on most cases, and I don't mean just 51 percent it'***s*** like 90 plus percent -- probably 97 percent if I remember from yesterday correctly.

KAVANAUGH: That sounds about right, Senator. Appreciate it. We are -- we're judges. We don't wear a partisan label as judges, and I've worked -- tried to work well under the ***law*** with all my colleagues.

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'***s*** 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'***s*** important for us to note when ***people*** start talking about let'***s*** 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?

KAVANAUGH: The vast majority of those are majority opinions.

CRAPO: So it was a small number that would have been dissenting opinions.

KAVANAUGH: Dissent and also some concurrences..

CRAPO: And some concurrences, yes. Again, I don't 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?

KAVANAUGH: I believe there are 13 cases where the Supreme ***Court*** has agreed with the analysis, or the decision that I had made either in a dissent or in a majority opinion for the D.C. Circuit.

CRAPO: And how about reversals?

KAVANAUGH: One case where there was a reversal.

CRAPO: So 13 to 1. Again if you're looking at a pattern it appears to me that you are, again, in the mainstream of the American judiciary. With regard 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?

KAVANAUGH: That is correct, Senator. I don't know if you have a...

CRAPO: I don't have the number on that.

KAVANAUGH: Yeah, no -- of the 13 that is correct, where they either sided or quoted otherwise agreed with the reasoning or decision I had made in a concurrence or dissent. Happy to talk about those.

CRAPO: Well let me ask you this question and you can use it there...

KAVANAUGH: Of course I'm happy to talk.

CRAPO: What I was going to ask you next is before I go in to some of the cases that I'm aware of that you've participated in that I think you're notable, are there any, of the cases that you've participated in as a judge, particularly those where you've written the opinion, but any cases you would like to note?

Like I said, we haven't really gotten into your judicial record much here. I'd like you to have an opportunity to talk about your judicial record. Are those some that you would like to discuss with us before I go on to some that I have on my papers?

KAVANAUGH: Well, I'll let you ask a few, and if there are any others I want to go to ...

CRAPO: Well, I probably run out of time before I'm done with me, but ...

KAVANAUGH: I'll try to be succinct.

CRAPO: Well, the first one is back to an issue that you've been criticized for, is equal treatment of women. One of the cases I'm aware you participated in is the United States Versus Nwoye 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?

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 council was ineffective by not presenting the battered women'**s** defense. It came up to our ***court***, and I wrote a lengthy opinion explaining why it was an effective assistance of council not to present the battered women'**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 women'**s** defense because, otherwise, the jury might not believe the claim she was making because they might think, "Well, why didn't she walk away or why did she not do something else."

And the expert testimony would explain the - what happens when you're beaten repeatedly and would explain that the jurors would not - would benefit from having that expert understanding that sometimes you can't walk away. That's the whole point, when you're in a relationship where you're beaten repeatedly.

CRAPO: Well, I appreciate that.

KAVANAUGH: And I would, therefore, reversed - reverse the conviction, in that case, that Nwoye had received.

CRAPO: And the ACLU said your opinion in Nwoye demonstrated a sympathetic and nuanced understanding of intimate partner violence and its effects. I'm going to skip ***over*** to another case, Adams versus Rice, because we're 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 Reverse Board? Can you tell me about that case?

KAVANAUGH: That's a - that's a discrimination case where the - as we analyze that 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.

CRAPO: Well, thank you. And I've got pages more of cases on this issue, but only 10 minutes left in our time. So I'm going to shift to another issue, again, looking at cases that you have decided, race and diversity.

Let's talk about Ayisii-Etoh versus 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'd rather give you a chance to just describe that case a little bit.

KAVANAUGH: Well, that case was a powerful case. The plaintiff argued it pro-say 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 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 precedent?

I wrote a separate opinion to make clear that it was, that that word -- 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 emphasize in many cases as the long march for racial equality in the United States is not ***over***. And you look back to that -- 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 in to the United States -- history that corrected in part on paper in the thirteenth, Fourteenth and Fifteenth Amendments.

Then of course a century of backtracking from the promise of the fourteenth amendment, Jim Crowe and racial discrimination leading up to Brown versus Board of Education, of course again in the Civil Rights Act and the Voting Right Act of '65 -- among the most important pieces of legislation even enacted by Congress in terms of changing America.

But still -- there's still work to be done after centuries of discrimination, racial slavery, racial oppression, racial discrimination -- in 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 represented 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.

CRAPO: Thank you judge, and let's move on to Ortiz Diaz versus 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 occurrence in which you said that the corpse (ph) sitting on box should establish a clear principal that all discriminatory transfers and discriminatory denials of requested transfers are actionable under Title 7. And you went on to make it clear that denying an employee's request to transfer because of the employee's race plainly constitutes discrimination and I'll let you go further on that if you would?

KAVANAUGH: Well the question was if you're transferred laterally, you've got the same pay and benefits -- is that really a change? And suppose it's an oral argument in that case, if anyone's interested I encourage them listen -- the oral argument in that case where I said something that I explained later in the opinion.

Look, in the real world, a transfer even if you get the same pay and benefits, may hugely effect your later job opportunities, your career track. And to think that discriminatory transfers were somehow exempt from the Civil Rights *law* merely because you had the same pay and benefits was -- was blink in reality.

And so that's what I said in the opinion. Our -- our case *law*, at that point, basically said some transfers can be actual and others not and I said -- and what I wrote was I don't see how all discriminatory transfers aren't unlawful under the Civil Rights Acts.

CRAPO: Well, I think it's important for America to know that your attitude is that strong on this. And we already went *over* the artist versus 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 more of cases on this but I got a different question on, again, still on race and diversity.

I recall the black *law* student's association letter from Harvard that we talked -- that I introduced the letter on previously but I also not 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, Presents, and Participation: a Procedural Minimum for Baston v. Kentucky Hearings." Now what that means you can explain, 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?

KAVANAUGH: Well, because I was interested in trial procedure at that time but I was also a product of a city where, as I've 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 Baston opinion, which prohibited race discrimination in preemptory challenges in jury selection. I worried -- or wrote, well, what's 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 insure that the Baston v. Kentucky decision was not evaded and so that -- you know they hit the legacy of all white juries convicting African American defendants is of course a painful part of our criminal just legacy.

And one of the things that I wanted to make sure when the Baston decision came out was that that was not circumvented procedurally.

CRAPO: Well, thank you, Judge Kavanaugh. I just want to commend you 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 you have when in reality you record is strong and deep in terms of protective 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's these issues, whether it's the independent counsel versus Special Counsel issues, or whether it's just the balance of your decision making 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've 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'd 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?

KAVANAUGH: Senator, I appreciate that and I appreciate your comments. Be an independent judge who follows the ***law***, the Constitution as written in form by history and tradition and precedent. Follow that statutes that you pass, the Congress passes as written in form by the canons of construction.

I will remember Hamilton's admonition in Federalist 78 that the judiciary exercises not wield (ph) the 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've tried to do for the last 12 years as a judge on the D.C. Circuit.

CRAPO: Thank you very much. I commend you for that answer and your approach to it.

KAVANAUGH: Thank you, senator.KENNEDY: Thank you, Senator. Judge, we're scheduled to take a 30-minute break. If you need all of it, just say so. If you do, I'm not suggesting you shouldn't take it.

KAVANAUGH: Twenty-five?

(LAUGHTER)

KENNEDY: Twenty-five. We'll be back -- we'll be back at -- I've got 20 of 8. We'll be back at five after. If you need a few additional minutes take them. When we come back, Senator Booker will begin.

KAVANAUGH: Thank you, Senator.

(RECESS)

KENNEDY: Senator Booker?

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's been about 20 years now, about six months away. Do you think that you were wrong at that point, that racial discrimination in America would be ***over*** by 2019?

KAVANAUGH: I think that was, Senator, an aspirational comment and one that, to your point -- of course, I've 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.

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*** can view us all as one race? What was going on in the 1990s that led you to have that belief?

KAVANAUGH: Hope.

BOOKER: OK. Because you and I know -- you and I are both aware of where the trends were going in the 1990s. This was the period where the drug war was in full blare, where the prison population exploded since 1980, had been up 800 percent in the federal prison population. The massive increases in racial disparities of incarcerations. Blacks constituted 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 invokes Justice Scalia's argument that we should be, quote, "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'm 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 tries to remedy the fact that they were denied the chance to go to college under the G.I. 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's never permissible for the government to use race to try to remediate past discrimination, to try to achieve justice?

KAVANAUGH: Senator, that was a brief for a client, first of all. So I'm not -- I was not saying something in my own voice particularly there. So I'm writing a brief for a client...

BOOKER: But if I can correct you, sir, you said it's just 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 discrimination, past harms, that they are seeking racial entitlement?

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, there's when you're trying to remedy past discrimination, as a general proposition, you're seeking racial equality and seeking to remedy past discrimination and the lingering effects...

BOOKER: So you disagree with Scalia that it's -- that he says it's never permissible for the government to use race to try to remediate past discrimination to try to achieve justice? You disagree with Scalia?

KAVANAUGH: The Supreme ***Court*** ***law***...

BOOKER: I know what the precedent is. I know what the ***law*** is. I'm 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's racial entitlement?

KAVANAUGH: That position has never been adopted by...

BOOKER: I'm asking what you believe, sir, not the Supreme ***Court***.

KAVANAUGH: OK. The term I used was that what you're seeking is equality, equal and...

BOOKER: And right. And so if you're seeking equality -- I appreciate you grant that -- is it never permissible for government to use race to remediate past discrimination?

KAVANAUGH: There are a couple things that the Supreme ***Court's*** pointed out in its case ***law*** and...

BOOKER: And again, I know the Supreme ***Court*** case ***law***. Maybe I can approach this in a different way.

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'm trying to figure out if you agree with that point that Scalia is making.

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. 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'm coming at it from that perspective.

You're asking a question, I think, about specific remedies for discrimination, and there'**s** a lot. I'm a judge, as you know, and so I have to follow precedent. And the precedent allows remedies in certain circumstances...

BOOKER: And, again, sir, I've heard you use that with a lot of my colleagues, and I know what precedents are, especially dealing with a lot of very important Supreme ***Court*** issues. I'm asking about your opinions because your opinions matter, what you've said matter.

Let me give you an example. In April 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.

KAVANAUGH: That'**s** what the Supreme ***Court*** has said. And...

BOOKER: Oh, and the Supreme ***Court*** said that the desire to remedy societal discrimination is not a compelling interest?

KAVANAUGH: The Supreme ***Court*** has -- in -- let'**s** go to Bakke, for example.

BOOKER: I'm going to get to Bakke. 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'**s** clearly proven discrimination, I'm just using an absolute, do you still believe that it can never be used?

KAVANAUGH: Well, I think the Supreme ***Court*** has said it can be to remedy...

BOOKER: I know what the Supreme ***Court*** -- but what do you believe, sir? Come on. You know the history. You've recited it numerous times.

(CROSSTALK)

KAVANAUGH: I would say, look, I have trouble departing from the Supreme ***Court*** precedent and saying...

BOOKER: But you don't. You opined about it in e-mails. You've opined about it in Wall Street Journal articles. I've heard you opine about these in Rice. You just can't say right now what you believe.

KAVANAUGH: Well, a couple things, Senator, just to back up, lawyer for client in the -- in the e-mail you're reading, as well, lawyer for...

BOOKER: Christian Science Monitor article. Wall Street Journal. Your comments to a reporter. Let me approach it this way, because you're 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 in Grutter in 2003, Fisher most recently in 2006.

The simple question here is, do you believe these cases were rightly decided?

KAVANAUGH: Senator, there are important precedents to the Supreme ***Court***. And as Justice...

BOOKER: I didn't ask you if there were precedents. I've heard you go through this before. Do you, sir -- if you can't answer it, just say, Cory, I can't 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?

KAVANAUGH: Senator, I am following the precedent of the -- set by the eight justices currently sitting on the Supreme ***Court***. And 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...

BOOKER: Yeah, but, sir, there'**s** a distinction between you and Kagan, you and Ginsburg on these issues, because...

KAVANAUGH: Or Roberts, Alito, Gorsuch, Kagan, Breyer...

BOOKER: And I'm going to make the distinction between that excuse you're 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 kind of programs.

And let me give you an example. Let me give you an example. You wrote in an e-mail 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, 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?

KAVANAUGH: You know, a couple of things there, Senator. First of all, the Adarand case is in the context of contracting. The Bakke case is in the...

BOOKER: So you think that those cases, using race to remedy past discrimination is unconstitutional? That'**s** what you wrote then.

KAVANAUGH: Well, in light of the precedent of the Supreme ***Court*** representing a client in that case -- and I go through -- I think the e-mail you're referring to, I go through, actually, we shouldn't -- 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 you're referring to the e-mail I'm thinking of.

But in any event, I think, as you know, and I just want to reiterate, there'**s** precedent in the higher education context, in the contracting context that are somewhat distinct, and those precedents have been applied by judges. And my record on race discrimination cases -- I'm happy to talk about my cases, the Ayissi-Etoh, the...

BOOKER: But you're not happy to talk to me about the opinions you've expressed in the past. Do you still hold those opinions now?

KAVANAUGH: Well, that'**s** what I wrote then as a lawyer for a client.

BOOKER: But you said that -- again, that is, in fact, my personal opinion.

KAVANAUGH: That'**s** before the case is decided. And subsequent...

BOOKER: But you expressed a personal opinion on this issue then. Do you still hold that same opinion now, that was unconstitutional?

KAVANAUGH: I think you're taking -- I believe, respectfully -- personal opinion out of context. 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 with the president.

As to personal opinion, it was not my personal opinion, Kavanaugh. It was what the government'**s** position would -- recommendation would be based on President Bush'**s** stated policy.

BOOKER: OK, sir. It seems you were pretty clear there what your personal opinion was. Let me approach it again...

KAVANAUGH: Well, I don't want to...

BOOKER: Sir, we don't 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 -- it'**s** not a complicated question. Do you believe having a diverse student body is a compelling government interest?

KAVANAUGH: The Supreme ***Court*** has said so. And my efforts to promote diversity I'm very proud of.

BOOKER: But I know what the ***law*** is now.

KAVANAUGH: No, my personal...

BOOKER: I'm 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 -- 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 haven't answered my question, and I understand that you're going to stick to that.

You've also written that an effort designed to benefit minority-owned businesses, an effort to try to give them a fair shake because they had been historically excluded -- and these are your words now -- used a lot of legalisms and disguises to mask what is, in reality, a naked racial set-aside. That'**s** what you said. That'**s** how you referred to it.

KAVANAUGH: What are you reading from, Senator?

BOOKER: Sir, I'm reading from an e-mail dated August 8th. These are your words. But I don't need to know...

KAVANAUGH: Can I get a copy of it?

BOOKER: You certainly can. But let's ask you what you believe now. I'll leave aside then. OK. 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?

KAVANAUGH: The government efforts to promote diversity in the higher education contexts are constitutional. And I've made clear my own personal efforts to promote...

BOOKER: But you referred to it in the past, sir -- you referred to minority-owned businesses trying to get a fair shake after historically being excluded. You called that a -- which is very powerful. You...

KAVANAUGH: I can't -- I don't have the e-mail, Senator, so I'm a little...

BOOKER: So have you used the term naked racial set-asides? Do you remember ever using that term?

KAVANAUGH: That would -- if you're saying there's an e-mail, I'll -- but I would like to see an e-mail if I'm getting questioned about an e-mail.

BOOKER: OK, I'm going to ask my staff to provide that e-mail while I move on.

KAVANAUGH: I have promoted diversity in ***law*** clerk hiring and made a big difference in that.

BOOKER: Sir, you've told me about the diversity for running ***law*** clerk hiring, and I'm so grateful for it. You've told me a lot of things about the diversity that you personally have practiced in your own life. I really, really appreciate that.

I'm not asking you about the five black clerks that you have. That's good. I'm seeking -- you're seeking a position on the highest ***court*** in the land that's going to affect millions of ***people***. You've expressed opinions about these subjects to the media, to the press in speeches, in past e-mails, but you're 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, and in some of your cases, as well, sir, and that's the issue of racial profiling.

You once discussed the issue of racial profiling after 9/11 with your colleagues in the Bush White House.

KAVANAUGH: Can I see the e-mail?

BOOKER: What's that?

KAVANAUGH: Can I see the e-mail?

BOOKER: Yes, I will get you the e-mail. But there...

KAVANAUGH: But I can't answer if I...

BOOKER: I'm going to ask you about your views now, sir, and I'll provide the e-mail. But I'm 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 interests of safety now -- now and in the long term, and that such actions, your colleague said, may be legal under such cases as Korematsu.

KAVANAUGH: It sounds like you're quoting someone else, not me.

BOOKER: I am quoting somebody else.

KAVANAUGH: Well, that -- Senator, but...

BOOKER: Sir, sir, I'm not going to stick you with that. I know you've already said...

KAVANAUGH: But don't attribute...

BOOKER: I'm not attributing it to you.

(CROSSTALK)

BOOKER: Sir, please don't accuse me of that. I'm not. I said that was your colleague. I clearly said that was your colleague. You did not respond -- you did not respond in an e-mail by denouncing racial profiling or expressing outrage at the idea of relying on a case as odious as Korematsu.

TILLIS: Mr. Chair, point of order.

BOOKER: Can I ask for my time to be paused, Mr. Chair, while you make this point?

TILLIS: Please do.

KENNEDY: Pause Senator Booker'**s**...

(CROSSTALK)

TILLIS: Mr. Chair, just as a courtesy to the witness, we just saw an example there where I even believe that the words that were being repeated were words in an e-mail 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 he can be answered in proper context. Is that an appropriate request?

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'd like to get back to my questioning.

TILLIS: OK.

KENNEDY: Let'**s** proceed. Don't take time away from Senator Booker.

BOOKER: Thank you very much. Sir, your response to that colleague'**s** e-mail was that you generally favored race-neutral security measures. But you thought that there was -- and I'm 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 OK with using race to single out some Americans for extra security measures because they look different, but you're not OK with using race to help promote diversity and equal opportunity and correct for past racial -- documented racial inequality.

KAVANAUGH: It sounds like I rejected the racial profiling idea. What'**s** the date -- what'**s** the date of the e-mail, Senator?

BOOKER: The date of the e-mail is January 17, 2002. And so have you ever suggested or expressed an openness to -- even in a temporary circumstance, like this e-mail seems to indicate -- in an interim question of using racial profiling? Have you ever suggested that, sir?

KAVANAUGH: I'd like to see the e-mail.

BOOKER: I will provide the e-mail, sir, to you.

KAVANAUGH: But it sounds from what you read like I rejected the concept. But I'll look at the e-mail.

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're aware that overwhelmingly target African-Americans and other ***people*** of color.

Yet I've read opinions such as yours in the United States v. Washington that upheld a search, and I quote, in a neighborhood in Southeast Washington, D.C., 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 wasn't, quote, "in east of the Anacostia River."

You and I both know that those are predominantly black areas.

KAVANAUGH: Yes.

BOOKER: Predominantly African-American communities.

KAVANAUGH: Yes.

BOOKER: I understand there'***s*** 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'll give you a chance to respond -- is that you're willing to consider using racial profiling to accept police practices like heavy policing of African-American neighborhoods, but you're hostile to the use of race when it is used to promote diversity or remediate past proven discrimination.

KAVANAUGH: Can I get 60 seconds?

BOOKER: Sir, go ahead.

KAVANAUGH: OK. On the Wesby case, there was a house -- there was a call to the police. It was not the police patrolling the neighborhood. In the Wesby case, the Supreme ***Court*** reversed the majority decision that had been written by other ***people*** that I dissented from. They reversed it 9-0 this past term. So the Wesby -- what I wrote in Wesby -- and I was cited -- and the Supreme ***Court*** agreed with the approach that I had suggested 9-0.

On the general concept, you and I have discussed this in our meeting -- I'm very aware of the reality and perception of targeted policing or police activity in minority neighborhoods. And -- or I've tried 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 and...

(CROSSTALK)

BOOKER: So, sir, I tried to give you some time there, but this is what I'm hearing right now, sir. And you know -- and I appreciate your rhetoric on these matters. But, again, you're 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 didn't answer that, sir.

That'***s*** not good enough for a nominee of the highest ***court***, particularly one who has expressed -- and I'll provide you with the e-mails, as well as other quotes, for the record, as well, opposition to affirmative action and efforts to address systemic provable discrimination, such as -- and have -- and yet you also have an openness to racial profiling. And again, I'll provide that e-mail.

The cases I raised 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're more likely to be stopped by the police. They're more likely to be shot by the police and become unfairly entrapped in our broken criminal justice system.

I -- like you, you said you're an optimist -- I'm a prisoner of hope, but I think -- but even I are having trouble 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, who you've quoted numerous times.

We're a good country with great ***people***, and we're 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*** seat plays a vital role in that work, just as it did generations pats with cases like Brown.

And so (inaudible) you've answered my questions. I want to move really quick in the remaining time I have to voting rights, which is a crown jewel of the civil rights movement. It'***s*** designed to prevent states from putting up barriers for the rights of African-Americans to vote.

In the 21st century, voter ID ***laws***, which we're 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're more likely to be struck by lightning in America than to find a person committing in-person voter fraud.

You wrote an opinion in a 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'm taking you at your word that you're proud of this decision. But you were aware in trial that the author of the South Carolina voter ID ***law*** admitted that he received an e-mail from a supporter of the bill that said African-American -- that said if African-Americans were offered a $100 reward for obtaining a voter -- a photo ID to vote, it would be, and I quote, "like a swarm of bees going after a watermelon."

In response to that racist e-mail, 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 didn't have a photo ID, isn't it true that their only option was to write out a sworn statement that could expose them to criminal penalties? And isn't it true that even then they could only vote on a provisional ballot? Is that true?

KAVANAUGH: So the decision was unanimous, joined by Judge Kollar-Kotelly, who was an appointee of President Clinton'***s***, and Judge Bates, 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...

BOOKER: So you're telling me things I know. Can you just get to your feelings on this? Couldn't you see...

KAVANAUGH: Yes.

BOOKER: ... that this was going to provide an impediment and disparate impact on African-Americans? Couldn't you see the problems that this would create?

KAVANAUGH: That's why we said that the reasonable impediment provision could not just be the form that they'd prepared, but there had -- we essentially said what would have to occur...

BOOKER: And you said you were proud of the reasonable impediment provision. That's where we got -- that's a point we had to stop when we talked in my office.

Can I just ask you, because this is how I see the reasonable impediment provision. South Carolina tried to enact this ***law***. They wouldn't disenfranchise minority voters. When the ***people*** who enacted this ***law*** realized that they had to make changes to it -- you remember this...

KAVANAUGH: Yes.

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.

KAVANAUGH: I think I said senator, but, yes...

BOOKER: Of course. I'm sorry, Judge. I'm sorry. I feel comfortable with you.

Can I just show you what was up in South Carolina polling places? You could see this sign. Here's a picture -- this is a 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 doesn't 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 don't even know if you can see any reasonable provision aspect on this. Doesn't it matter that the average voter seeing this poster could be intimidated by this process?

KAVANAUGH: That's why I said in the last paragraph, 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're asking about here when I was questioning the lawyers at oral argument. And we said the proposed reasonable impediment form wasn't good enough and that there had to be a catch-all box where you could put in any reason. Then we listed all the reasons...

BOOKER: Well, sir, I appreciate you saying all that, but this is the result. And let me -- but let me go 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 a part of establishing that -- it was -- and this what it -- it was a 92-year-old South Carolinian named Larrie 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 couldn't get a valid photo ID.

According to a study by the Harvard ***Law*** School, the cost of his filing efforts were $36. That's how much all this process cost. 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're going back. Do you know what the infamous poll tax was in South Carolina in 1895? Do you know how much it was?

KAVANAUGH: The exact amount? I do not.

BOOKER: Yeah, I didn't think, but I'll tell you, sir. It was $1. That was the poll tax that you and I think is despicable and disgusting. It was $1 then, which is roughly $30 today, less than what it cost the veteran pastor, Larrie Butler, that'***s*** less than what he incurred trying to get -- to vote after the 2011 ***law***.

And if it wasn't for him holding a press conference with the governor intervening, and others giving him a special dispensation. And so here'***s*** 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 don't know if you see that this isn't that much different in terms of the cost to this person of trying to ultimately pay what was, in fact, a poll tax.

Now, my time'***s*** about to run out. And I want to say, you can answer up to this, because I've only got a minute and 30 seconds. So let me just conclude. And then I know they'll ask you this. But this isn't complicated to me, sir.

Costs like this create structural barriers that systemically disenfranchise African-Americans, ***people*** of color, and actually, poor ***people*** of all colors. I'm 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 years from now, a person who believes that efforts to promote racial justice are, in your words, naked racial set-asides, that we'll 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 about 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 voter, as one federal ***court*** said about a North Carolina ***law***, targeting them with almost surgical precision to disenfranchise them.

And now we don't even have the benefit of the Voting Rights Act provision designed to curtail discriminatory ***laws*** before they go into effect. Your answers don't provide me comfort, as a justice of our nation'***s*** highest ***court***, you will fairly take into account the barriers that continue to disenfranchise minority voters like Mr. Butler today.

Sir, I'm an optimist. I am a prisoner of hope like you. 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've 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 would make a difference for ***people*** like Mr. Butler, ***people*** leaving east of the Anacostia River, north of the river, south of the river, all ***over*** this nation.

Thank you, sir.

KAVANAUGH: Can I take a minute to respond?

KENNEDY: Sure. And then I'm going to recognize Senator Lee.

KAVANAUGH: Senator, a couple things on that. I pointed out in the South Carolina opinion -- I wrote the majority opinion -- 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've seen -- after an African-American hockey player scored the winning goal, a burst of racial commentary about him, and that was just one of many examples I could have cited in that case.

BOOKER: Racial commentary? Could you be more specific?

KAVANAUGH: Racist. Racist.

BOOKER: Racist.

KAVANAUGH: I should have said racist. 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're raising here. I was all ***over*** that. So were the other judges of, how is this really going to work in practice?

How is it -- 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 didn't 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 wouldn't 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'***s*** because they thought our decision appropriately accommodated the interests of the parties in that case and ensure that African-Americans in South Carolina were able to vote on the same basis as before.

And talking about my life and record, you were talking about that, going back to growing up -- the ***law*** journal note that I wrote on race discrimination, talked about something that I know you've 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've talked about, implicit bias or subconscious racism. I specifically talked about that in that decision.

I've been a -- I think -- a leader, so there'***s*** 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're hiring from the lower ***courts***.

And I remember reading that and thinking, well, I need to do something about that. I'm the lower ***court***. I'm one of them. And so after that, I thought, what can I do? And I didn't 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'm the only judge who'***s*** done something like that, or one of the -- certainly one of the few. And I just cold-called them, cold e-mailed them and said I'd like to come speak about minority ***law*** clerk hiring, because I'm told there'***s*** 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. And I said we need more ***law*** clerks. There'***s*** a problem. And let me tell you how to do it. And here'***s*** why you should clerk, and here'***s*** how you clerk, and here'***s*** how you -- here are the classes you should take and here'***s*** the things you need. And at the ***end*** of that meeting, I gave them my phone number and e-mail and said call me any time, e-mail me anytime if you want to help.

And then it was a big success. I got a lot of e-mails after that. I helped students get clerkships with other judges. One of them recently finished at the Supreme ***Court***, e-mailed me, thanking me for starting him on that road. And then it was a success, and I've gone back almost every year there.

And as you know, we're graduates of the same ***law*** school. That'***s*** -- a lot of ***people*** clerk from there, so it'***s*** a good place to go. And I've continued to encourage African-American ***law*** clerks -- but it'***s*** not just encouragement. I've given them help and advice and been a source of counsel. I've tried to be.

And why is that? Because I saw a problem to the extent -- of the kind you're talking about. And it's 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 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've 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've done -- you know, my cases like the Ayissi-Etoh case and the Ortiz-Diaz case -- and I think I'm -- the South Carolina case, I understand your concern about, but I'm 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're asking about, a few comments in those -- the Hawaii case. But if you look at the sweep of it, I hope it gives you confidence that I've at least done my best to try to understand the real world and tried through my actual decisions in the real world and apply the ***law*** fairly, and through my other role as a judge in hiring ***law*** clerks to be very proactive in trying to advance equality for African-Americans.

KENNEDY: Senator Lee?

BOOKER: Sir...

KENNEDY: Senator Lee?

LEE: Mr. Chairman, thank you. I think it's 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 can't cross-examine somebody about a document that they can't 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're referring, or we can also go about different procedures to make it public. We've 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 can't see it. We wouldn't do that in a courtroom, and we can't do that in our committee. Our rules don't 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.

(CROSSTALK)

BOOKER: May I respond?

KENNEDY: The objection is duly noted. Thirty seconds, Senator.

BOOKER: I really respect my colleague from Utah, and I appreciate that. I'm not the first colleague that has referenced committee confidential e-mails, not the ones you said is the exception. They were referenced before. And that's why this system is rigged, is because we have been asking -- I have letters here, sir, that have asked for -- now, the one e-mail specifically entitled racial profiling that somehow -- I mean, literally the e-mail was entitled racial profiling, that somehow was designated as something that the public couldn't see. This wasn't -- this wasn't personal information.

(CROSSTALK)

BOOKER: This wasn't personal information. There's no national security issue whatsoever. The fact that we are not allowing these e-mails out, as we have asked, as I have asked, joined a letter with my colleagues asking, and that's why I'm saying the system is rigged. More than that, Senator, you have this system where this whole areas -- whole areas of his career where he discussed...

KENNEDY: Senator, if you could begin to wrap up.

BOOKER: I will wrap up. Thank you, sir, for the generosity. But there's whole areas where we're not allowed to let these out. And so I see you're outlining a process, but I'm saying that process is unfair, it's unnecessary, it's unjust, and it's unprecedented on this committee.

KENNEDY: OK, gentlemen, I'm trying to be fair to anybody. I know Senator Lee wants to respond. With respect, if he would do that briefly, I'd like to continue on.

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's no reason why it shouldn't be something that we can discuss in public. I don't know why it was marked committee confidential. I wasn't 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'll work with you on that.

KENNEDY: Thank you, gentlemen.

(CROSSTALK)

KENNEDY: I'm next. And I don't have any e-mails.

(LAUGHTER)

I want to start -- I've 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're on your best behavior, 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.

KAVANAUGH: Thank you very much, Senator.

KENNEDY: I'm -- I just want to ask you a few questions about the ***law***. I'm not asking you to violate the canon of judicial ethics. I'm not asking you to go thumbs up or thumbs down. I'm truly not. I may have to interrupt you a few times just to move us along. I'm not trying to be rude. I want you to understand that.

KAVANAUGH: Yes, sir.

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're coming from. There's no margin for error.

KAVANAUGH: Yes, sir.

KENNEDY: We've 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 don't know if I said it this way, but I said I think it's 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 can't get by the voters. Do you agree with that?

KAVANAUGH: Yes, of course, Senator. The judges interpret the ***law***. They don't make the ***law***. And that's obviously something that's repeated a lot. I don't want a cliche, but it actually matters. If you keep that in mind, it matters.

KENNEDY: Judges also have another duty, though. I didn't 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's why they call them inalienable.

And I said this when Judge Gorsuch was here. If you think about it, 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 different but has the right to do that. And I think that's important for a judge. Can we agree on that?

KAVANAUGH: Absolutely, Senator. I think the Bill of Rights is -- protects all of us, but that includes -- and it's most relevant for free speech of the unpopular or...

KENNEDY: Right.

KAVANAUGH: ... or the unpopular criminal defendants.

KENNEDY: Even if the majority says we're the majority, because we both know that sometimes the majority just means that most of the fools are on the same side.

(LAUGHTER)

I mean, just because you're the majority doesn't mean you're right, correct?

KAVANAUGH: Just because you're the majority does not mean you're right is absolutely a correct premise.

KENNEDY: Right. That's why we have a Bill of Rights.

KAVANAUGH: Yes.

KENNEDY: All right, I want to talk about -- now, that's the easy part. I want to talk about how we go about making these decisions. And there's a tension there, and that has to do with the language. If I talk about -- and you've talked about it a little bit, but if I talked about the Holy Trinity doctrine, you'd know what I'm talking about, I'm sure.

KAVANAUGH: Yes.

KENNEDY: Now, the Supreme ***Court*** has rejected the Holy Trinity doctrine, right, OK?

KAVANAUGH: Yes.

KENNEDY: You talked about we're now textualists and are originalists, and you call the originalism constitutional textualism, I think.

KAVANAUGH: Uh-huh. Original public meaning, originalism, constitutional textualism. I think those would describe the same thing.

KENNEDY: OK. You start with the language -- let's take a statute -- with the language in the statute.

KAVANAUGH: Yes, sir.

KENNEDY: And the first question you ask as a textualist, is it ambiguous or unambiguous? Correct?

KAVANAUGH: If there's 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's the best meaning?

KENNEDY: Yeah, you read the statute.

KAVANAUGH: Yes, read the statute.

KENNEDY: You say, does it make sense? It either makes sense or it doesn't. 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've already read in the brief to do what they want to do? Did you know?

KAVANAUGH: Yes, I've said many times in my cases and talks to students that judges shouldn't be snatching ambiguity from clarity. So that's one thing. I think that goes right to your question.

But to your broader question is, that's one of my concerns about a few canons of construction that depends on an initial finding of ambiguity, which sounds great in theory, which is, oh, if it's ambiguous, go to that canon or this canon or this canon.

But in practice, ***over*** 12 years what I've found, and I've written about this, is that there's 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's hard to even talk about. Oh, I find it ambiguous, I don't think it's ambiguous, and that has, in my view, frustrated the goal that I have of the judge as umpire, the even-handed application of neutral principles in the rule of ***law***, and ultimately that's concerned me, because some of these cases where that's come up are big deal cases.

Yet it's 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's been the concern I identified.

KENNEDY: I read your ***law*** review article. You advocate the best reading of the statute.

KAVANAUGH: Uh-huh. Yes.

KENNEDY: OK. OK, let's talk about that. And I want to talk about it not in terms of the statute, but the Second Amendment. We can talk about the Heller case. You defined originalism as constitutional textualism, and you (inaudible) interpret the Constitution is -- is to ask yourself -- tell me if I get this wrong now. What would -- what -- what -- how would a reasonable person at that time have understood the Constitution? The public knowledge?

KAVANAUGH: The original public meaning. I always want to add...

KENNEDY: Public meaning.

KAVANAUGH: ... of course, precedent is a huge part of what we do in constitutional ***law***.

KENNEDY: Sure.

KAVANAUGH: But if you're looking at the words, the original public meaning, look at what the words mean. Sometimes the meanings change. Oftentimes it hasn't, but to your point, I agree.

KENNEDY: It's almost an objective test.

KAVANAUGH: You're trying to make it as objective as possible, absolutely. It is an objective test. I mean, sometimes there's different evidence about what the meaning of the word was, I think...

KENNEDY: Sure. But you're not looking at intent.

KAVANAUGH: Correct. You're not looking at the subjective intent other than to the extent that helps show the...

KENNEDY: We've thrown that out.

KAVANAUGH: Yes.

KENNEDY: OK, if you look at the Heller case, and I'm talking about the D.C. v. Heller, by the U.***S***. Supreme ***Court***, it wasn't a balancing case. You made that point clear at the ***Court*** of Appeal level. It was a text history and tradition case.

KAVANAUGH: Uh-huh.

KENNEDY: 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'***s*** my question. Doesn't the originalist approach just require a judge to be an historian, and an untrained historian at that?

KAVANAUGH: I don't think...

KENNEDY: Wouldn't we be better off hiring a trained historian to go back and look at all of this, this commentary?

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. Most of the constitutional provisions -- there'***s*** been a body of cases ***over*** time, interpreting the provision, and you don't have to do the kind of excavation that Justice Scalia and Justice Stevens did in that case, because it'***s*** 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 afterward, the right of the ***people*** to keep and bear arms shall not be infringed? Or did the prefatory clause merely state a purpose by or 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.

KENNEDY: OK. Fair enough.

Somebody commented yesterday -- maybe it was you, Judge -- that 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.

KAVANAUGH: Uh-huh.

KENNEDY: 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 it'***s*** political. And that'***s*** unfortunate, because that means we lose confidence in an independent judiciary. I'm not saying it'***s*** true, but perception is important in government.

Do you think having cameras in the courtroom would help?

KAVANAUGH: Senator, that's an issue that I thought about. And let me just give you a little perspective on our court. We've 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're same-time audio in our court. And I think that's been a -- that's worked at the Court of Appeals level for us.

I know nominees who've set 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, in the hearing the perspectives of why did they change their position, what's their view?

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's 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 can't 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've always thought, too, though, the announcement of the Supreme Court decisions, when they issue the opinions, that's a different point in time when if...

KENNEDY: What did you say Justice Marshall said? People aren't fools? Have to trust the people sometimes, right?

KAVANAUGH: And as to the decisions, right, that's 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.

KENNEDY: I know. I understand.

KAVANAUGH: But the decisions -- I think that's -- let's put it this sway. If I were starting -- I think I'll stop there.

KENNEDY: Well, I get -- 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's ironic given my generation that the only institution that the American people have -- I think have a lot of confidence in right now is the military, which wasn't true in my era.

KAVANAUGH: Well, that shows...

KENNEDY: But, you know, you've got to trust the people. And too many up here in the Beltway don't.

KAVANAUGH: I agree with your general...

KENNEDY: If they don't -- the people don't read Aristotle every day, but they get it. They'll figure it out.

Let me ask you a couple more. You're an originalist.

KAVANAUGH: Yes, I pay attention to the original public meaning, but informed -- I always want to make sure I say, the precedent -- if you're in a constitutional case, precedent is critically important. And that's part of the text of the Constitution, too.

KENNEDY: But you may -- 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.

KAVANAUGH: The meaning as opposed to the intent and then informed...

KENNEDY: Right.

KAVANAUGH: I always have to add precedent.

KENNEDY: I get it. I'm not trying to trick you.

KAVANAUGH: No, I understand.

KENNEDY: I couldn't trick you.

KAVANAUGH: I just want to be clear in case someone takes something out of context.

KENNEDY: Are you willing to overturn precedent that you think conflicts with the original public understanding of the document?

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 whether it overall...

KENNEDY: No, no, I'm just asking you, if you come upon a case, and you say, you know, I'm on the Supreme ***Court*** now, and I've looked at this, and that's not under originalism, that's not what the public understanding was.

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'd go under -- because of that or for some other reasons, you'd go onto the next steps of the stare decisis inquiry, but that's how that would work, if I understand the question correctly.

KENNEDY: OK. All right. Can we agree that there were state constitutions that preceded the federal Constitution?

KAVANAUGH: Yeah, they did, and the -- and the framers at Philadelphia drew on a lot of the experience of the state Constitution.

KENNEDY: Yeah. Yeah. They -- they drew from state constitutions.

KAVANAUGH: Sure did.

KENNEDY: And can we agree that every state now has a state constitution?

KAVANAUGH: Yes. And they protect a lot of rights.

KENNEDY: Yep. In fact, they -- before the federal Constitution was extended to the states with the Fourteenth Amendment, the only protection you had from the state government was the state constitution.

KAVANAUGH: That -- that's correct, other than the rights articulated in Article I, Section 10 of the original Constitution, yes, ex post facto and...

KENNEDY: Can -- can we agree that you're right under the -- U.***S***. Constitution. Let's take the Bill of Rights. But you know what I meant, meaning the whole document. Let's 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?

KAVANAUGH: Correct. And I think that's -- I've mentioned it a couple 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 in state ***courts*** and state ***court*** judges to think about exactly what you're saying.

KENNEDY: Well, in fact, some states have.

KAVANAUGH: Yes.

KENNEDY: California, for example, their first amendment -- they don't have a state action requirement. Am I correct in that?

KAVANAUGH: I will admit I haven't looked at the California constitution recently, but I'll take your understanding of it, Senator.

KENNEDY: Well, they don't. In a private shopping center, so long as it's a common area, somebody can go in there and protest. And you have a First Amendment right under the state constitution.

KAVANAUGH: The only question in that case would be if it conflicts with another provision of the federal Constitution.

KENNEDY: And that's my question. That's 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 doctrine, but it conflicts with your Fifth Amendment property right?

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're talking about, it violated the property right in the U.***S***. Constitution, that would control.

KENNEDY: Except that's not what the United States Supreme ***Court*** said in the Pruneyard case.

KAVANAUGH: Well, there was a...

KENNEDY: Is...

KAVANAUGH: It was a -- I think because they interpreted the property right not to be affected...

(CROSSTALK)

KENNEDY: But California won.

KAVANAUGH: Yeah, but the point being, if -- and I think I had 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.

KENNEDY: Right. I'm not going to outsmart you. You're right.

All right, you've got this -- you got this First Amendment property -- this First Amendment speech right, free speech right on steroids in California, and there's no state action required. In Golden Gateway, Pruneyard, all -- you know them.

KAVANAUGH: Yes.

KENNEDY: They all said it applies to a private entity, like a shopping center. I know that Justice Kennedy -- I don't have the language here -- but he's talked about how the Internet is the new public arena. OK? 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're living in California and you have a First Amendment right, and it's not limited by the state action doctrine?

KAVANAUGH: Senator, that sounds like a hypothetical I'm not prepared to give you a full answer on, other than -- I'll give you a broader conception of...

KENNEDY: Well, it's coming.

KAVANAUGH: 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've done and the cases the Supreme ***Court*** has decided -- but one of the interesting things that I think about is, what's the future? What are the big issues coming down the pike?

KENNEDY: That's one of them.

KAVANAUGH: 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 cyber attacks?

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 Justice Ginsburg and Breyer went through, you wouldn't have predicted September 11th, for example, or even thought to ask them questions about...

KENNEDY: I'm going to stop you, Judge. I'm going to run out of time.

KAVANAUGH: Thank you, sir.

KENNEDY: I want to talk about Chevron deference just for a second. Here's my understanding of Chevron, the deference. First of all, the statute's got to be ambiguous. And if it is ambiguous, according to our Supreme ***Court***, we've got to adopt the agency interpretation, even if it's not the most reasonable interpretation.

KAVANAUGH: That's right.

KENNEDY: It's just got to be halfway reasonable. I...

KAVANAUGH: They say reasonable, but even -- your point was it's not the most reasonable.

KENNEDY: It's not the most reasonable. OK? Here's what I don't understand. You look at the APA. This is what the APA says. I'm 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's just the ***court***. How come we have to defer to a federal agency under 5 USC Section 706?

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 in tension -- I think I used something stronger -- with that statutory provision, but Chevron concluded what it concluded, and it's been applied ***over*** time.

Now, I've pointed out some problems with it in terms of its practical application, the ambiguity trigger, and you're pointing out a problem at the core, which is, where did it come from to begin with, given what the APA...

KENNEDY: Well, not only that, Judge, but it -- I mean, I know you know this, but it encourages misbehavior. And let's suppose Senator Whitehouse or Senator Lee, they run for president. You know, they're not going to go out and run on their good looks, though they're good-looking guys and all that, but they're going to run on policy. And then they get elected and they meet us in Congress. And a lot of times they can't get their bills passed.

KAVANAUGH: That's right.

KENNEDY: So you know what they do.

KAVANAUGH: Yes.

KENNEDY: They go to one of their agencies and they say I'm going to take my policy, square peg, and put it in a round hole of a statute. And all we've 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's not right, is it?

KAVANAUGH: Senator, that's a problem I have identified in the real-world application of certain broad conceptions of deference, in that it's a judicially orchestrated shift of power from the legislative branch to the executive branch. And the phenomenon that you've described, I think, is exactly right. The president's running for office. I've seen this when the president I worked for, President Bush...

KENNEDY: They all do it.

KAVANAUGH: And that you get -- and if you can't 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's ambiguity in the old statute, and then sometimes ***courts*** will uphold it, and that's...

KENNEDY: Yeah, but your hands are tied when it comes in front of you if a president does that. And all presidents have done it. I'm not blaming them. I mean, they all do it. But your hands are tied. If the statute's ambiguous, and even if the agency interpretation is not the most reasonable, it can be the 10th most reasonable and you've got to go with it.

KAVANAUGH: So two things on that. One is, if the statute's ambiguous, as we've discussed, turns out to be a much more difficult inquiry -- and footnote nine of Chevron does say use all the tools of statutory interpretation before you get to that, and that's something -- I've cited that, you know, dozens and dozens of times, that footnote, to make sure that you're not jumping too quick to deferring to the agency interpretation.

The other thing is the major questions, major rules.

KENNEDY: Could you tell me quickly? I got two minutes.

KAVANAUGH: Yes, that means if it's a particular -- of major economic or social significance, you shouldn't defer to the agency, because that's a big deal for Congress, and...

KENNEDY: I want to ask your opinion about universal injunctions. I don't know how many federal judges, district judges we have, 700? Anybody know, 700?

KAVANAUGH: Uh-huh.

KENNEDY: As I understand a nationwide injunction, sometimes they call it universal. It means that a federal -- single federal district judge can enjoin or freeze a ***law*** or a regulation. Let's suppose we have 700 federal district ***court*** judges. One of them can enjoin a ***law*** or a regulation...

PROTESTER: Sham! This hearing is a sham! Be a hero. Shut it down. Be a hero. Shut it down. Vote no. This hearing is a sham.

KENNEDY: Thank you, ma'am. I've just got an extra 20 seconds under the rules.

(LAUGHTER)

Anybody else want to go? I'll get up to 40. I'm giving myself an extra 20 seconds. Where was I? Oh, yeah, the nationwide injunction.

One federal judge can enjoin a ***law*** or a regulation for the entire country even if every other judge in the country says I don't agree. Now, what'**s** the legal basis for that? It'**s** got to either be a statute or the Constitution.

KAVANAUGH: Senator, that is an issue that is being contested currently in ***courts*** around the country, I think, and as an issue of debate. And therefore, I think I'd better say nothing about it. I apologize for that, but it is an issue of current debate.

KENNEDY: All right.

KAVANAUGH: I apologize.

KENNEDY: It'**s** OK.

I've got nine seconds. No, I've got 29 seconds. All right, this is not meant to be a trick question. This question is not about Title IX, and it'**s** not about sexual assault, because I know you can't answer that. But it'**s** really a -- well, I'm not going to ask that. I'm going to strike it.

State action. Is a private security guard a state actor?

KAVANAUGH: Well, stated -- your question, stated that way, the answer would be no, but I think sometimes the cases, when you're -- if you're...

KENNEDY: OK, I'm going to take the no.

KAVANAUGH: There are questions of contracting and if you're a state contractor and this and that.

KENNEDY: Here'**s** my question, because I don't want to abuse this. I've always wondered this. If a city privatizes its entire police force, they're private police officers, do they have to comply with the Constitution?

KAVANAUGH: That'**s** 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'**s** an interesting question that'**s** hard to answer in the abstract without looking at the particular arrangement of the particular city or locality, figuring out how much the state'**s** involved.

KENNEDY: OK, thanks, Judge.

KAVANAUGH: Thank you.

KENNEDY: Senator Harris?

HARRIS: Thank you.

Judge, have you ever discussed Special Counsel Mueller or his investigation with anyone?

KAVANAUGH: Well, it'**s** in the news every day. I...

HARRIS: Have you discussed it with anyone?

KAVANAUGH: With other judges I know.

HARRIS: Have you discussed Mueller or his investigation with anyone at Kasowitz, Benson and Torres, the ***law*** firm founded by Marc Kasowitz, President Trump'**s** personal lawyer? Be sure about your answer, sir.

KAVANAUGH: Well, I'm not remembering, but if you have something that you want to...

HARRIS: Are you certain you've not had a conversation...

KAVANAUGH: I said...

HARRIS: ... with anyone at that ***law*** firm?

KAVANAUGH: Kasowitz, Benson...

HARRIS: Kasowitz, Benson and Torres, which is the ***law*** firm founded by Marc Kasowitz, 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?

KAVANAUGH: Well, is there a person you're talking about?

HARRIS: I'm asking you a very direct question. Yes or no?

KAVANAUGH: I need to know the -- I'm not sure I know everyone who works at that ***law*** firm.

HARRIS: But I don't think you need to. I think you need to know who you talked with. Who did you talk to?

KAVANAUGH: I don't think I -- I'm not remembering, but I'll -- I'm happy to be refreshed or if you want to tell me who you're thinking of who works there.

HARRIS: So are you -- are you saying that with all that you remember -- you have an impeccable memory. You've been speaking for almost eight hours, I think more, with this committee about all sorts of things you remember. How can you not remember whether or not you had a conversation about Robert Mueller or his investigation with anyone at that ***law*** firm? This investigation has only been going on for so long, sir, so please answer the question.

KAVANAUGH: Right, I'm not sure I -- do I -- I'm just trying to think, do I know anyone who works at that firm? I might know...

HARRIS: Have you had -- that'**s** not my question. My question is, have you had a conversation with anyone at that firm about that investigation? It'**s** a really specific question.

KAVANAUGH: I would like to know the person you're thinking of, because what if there'**s**...

HARRIS: I think you're thinking of someone and you don't want to tell us. Who did you have a conversation with at...

KAVANAUGH: I am -- I'm not going to...

LEE: Mr. Chairman, I'd like to raise an objection here. This town is full of ***law*** firms...

TILLIS: Gentleman is recognized.

LEE: ***Law*** firms are full of ***people***.

HARRIS: First of all, I'd like to...

TILLIS: Hold on. He...

HARRIS: ... pause the clock. Thank you.

LEE: The clock is paused.

HARRIS: Thank you.

LEE: Pause the clock. Let me raise my objection.

TILLIS: The senator is recognized.

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.

PROTESTER: (OFF-MIKE) vote no. You have a responsibility to all Americans. Be a hero and vote no. Be a hero and vote no. Be a hero and vote no. You have a responsibility to all Americans. Be a hero and vote no. Be a hero...

TILLIS: Senator Lee?

LEE: On that point, ***law*** firms abound in this town. And there are a lot of them. They're constantly metastasizing. They break off, they form new firms. They're like rabbits. They spawn new firms. There is no possible way we can expect this witness to know who populates an entire firm.

PROTESTER: (OFF-MIKE) is a sham.

LEE: But he'**s** not even...

(CROSSTALK)

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'**s** referring, I think that'**s** fine, but I think it'**s** unfair to suggest that an entire ***law*** firm should be imputed into the witness'**s** memory when he doesn't know who works at the ***law*** firm.

WHITEHOUSE: Mr. Chairman? Mr. Chairman?

TILLIS: Senator Whitehouse, are you making a point of order?

WHITEHOUSE: Well...

TILLIS: Senator Whitehouse, the...

WHITEHOUSE: I'm 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 for all the documents...

TILLIS: Senator Whitehouse, there'**s** never been a time in the two days where someone has made an inquiry of the chair where the chair hasn't recognized the member for a point of inquiry or point of order.

WHITEHOUSE: And I've been recognized 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 after all of ours were summarily silenced on the basis...

TILLIS: Senator Whitehouse...

WHITEHOUSE: ... that we were in a hearing and not in an executive session. If we have moved out of hearing into executive session, then I'm more than happy to make motion...

(CROSSTALK)

TILLIS: Senator Whitehouse, the mere fact that you're speaking right now means that you've been allowed to make a point of order. The matter that you're talking about yesterday was a motion that the chair said was out of order because it was -- it was an adjournment motion that would have required us to be in executive session.

Anyone who wants to make a -- want to make an inquiry of the chair may do so. But we will limit it to that before we go back to Senator Harris.

WHITEHOUSE: Very good. That's the right result.

HARRIS: Sir, please answer the question.

KAVANAUGH: I don't know everyone who works at that ***law*** firm, Senator.

HARRIS: And have you had any discussion with anyone ever about Bob Mueller and/or his investigation?

KAVANAUGH: So you said Bob Mueller or so...

(CROSSTALK)

KAVANAUGH: Have I ever had a discussion about Bob Mueller? I used to work in the administration with Bob Mueller.

HARRIS: What about his investigation? Have you had a conversation with anyone about his investigation?

KAVANAUGH: I'm sure I've talked to fellow judges.

HARRIS: Anyone aside from fellow judges?

KAVANAUGH: About Bob Mueller?

HARRIS: About his investigation, sir. I'll ask again. I asked the question just a minute ago. I'm 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?

KAVANAUGH: The fact that it's ongoing, it's a topic in the news every day, I talk -- it's -- talk to fellow judges about it. It's in our -- you know, it's in the courthouse in the District of Columbia. So I guess...

HARRIS: Then I'll ask you one last time.

KAVANAUGH: ... the answer to that is yes. So the answer is yes.

HARRIS: OK, and did you talk with anyone at Kasowitz, Benson and Torres?

KAVANAUGH: You asked me that. I need to know who works there.

HARRIS: I think you can answer the question without me giving you a list of all employees of that ***law*** firm.

KAVANAUGH: Well, actually, I can't.

HARRIS: Why not?

KAVANAUGH: Because I don't know who works there.

HARRIS: So that's the only way you would know who you spoke with? I want to understand your response to my question, because it's a very direct one. Did you speak with anyone at that ***law*** firm about the Mueller investigation? It's a very direct question.

KAVANAUGH: I'd be -- I'd be surprised, but I don't know anyone -- I don't know if the -- I don't 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.

HARRIS: That's fine. I'll ask a more direct question, if that's helpful to you. Did you speak with anyone at that ***law*** firm about Bob Mueller's investigation?

KAVANAUGH: I'm not remembering anything like that, but I want to know a roster of ***people*** and I want to know more.

HARRIS: So you're not denying that you've spoken with...

KAVANAUGH: Well, I said I don't remember anything like that.

HARRIS: OK. I'll move on. Clearly you're not going to answer the question.

When you and I met, we talked about race relations in this country, and there's 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?

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 we talked about discrimination. I appreciated your opening statement yesterday, where you talked about your experience. One of the principles I've articulated throughout this hearing is the independence of the judiciary.

HARRIS: Sorry, I'd appreciate it if you'd answer the question.

KAVANAUGH: I -- Senator, so one of the principles I've 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 not -- 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 decide cases and controversy. We're not pundits. We don't comment on current events. We stay out of political controversy.

HARRIS: With all due respect, I only have limited time. Are you saying that it's too difficult question or it's a question you can't 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 simple -- pretty simple question?

KAVANAUGH: I'm saying that the principle of the independence of the judiciary means that I can't 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, a congressman, a president. I'm not here to assess comments made in the political arena, because the risk is I'll be drawn into the political arena, and the justices and judges of the United States...

HARRIS: And I appreciate your point. I -- 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"?

KAVANAUGH: Yes, and that -- that is a term that sometimes is used to -- yes, I've heard that term.

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'll 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?

KAVANAUGH: Senator, first of all, the Supreme ***Court*** affirmed the position that I had articulated in the amicus brief 7-2 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, not for the native Hawaiian.

HARRIS: Judge, that'***s*** not what I asked you.

KAVANAUGH: I...

HARRIS: Can you define the term as you used it? What does it mean to you?

KAVANAUGH: But I need to -- you raised the case. And it -- 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...

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 twice. And I'm asking, what does the term mean to you?

KAVANAUGH: I'm not sure what I was referring to then, to be -- 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 7-2 margin agreed with the position articulated in the amicus brief, in 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...

HARRIS: Sir, I appreciate that. 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're very thoughtful about the use of your words and your knowledge that words matter, especially words coming from someone like you or any one of us.

And 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?

KAVANAUGH: So 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.

HARRIS: OK. 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 are 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 euro-centrist 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, quote, '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.

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.

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?

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...

HARRIS: And do you agree -- do you personally agree that these cases, those two cases were correctly decided? So I'm asking not what the ***court*** held, but what you believe.

KAVANAUGH: I mean, so I -- 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 14th Amendment.

HARRIS: And with due respect then, Judge, I'm asking, do you agree that those cases were rightly decided, correctly decided?

KAVANAUGH: So I think Griswold -- for -- 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...

HARRIS: Do you believe that it'**s** correctly decided?

KAVANAUGH: No quarrel with that. It'**s**...

HARRIS: Do you believe it was correctly decided? Words matter. Again, words matter. Do you believe it was correctly decided?

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...

HARRIS: So there'**s** 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'm asking you the same question. Are you willing in this confirmation hearing to agree that those cases were correctly decided?

KAVANAUGH: Given the precedent of Pierce and Meyer, I agree with Chief -- Justice Alito and Chief Justice Roberts, what they said.

HARRIS: That it was correctly decided?

KAVANAUGH: That'**s** what they said.

HARRIS: Do you believe the right to privacy protects a woman'**s** choice to terminate a pregnancy?

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 current -- sitting justices of the Supreme ***Court*** have recognized that two principles that are important. One, we shouldn't 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 secondly, I think Justice Kagan provided the best articulation of commenting on precedent. She said we shouldn't give a thumbs up or thumbs down.

HARRIS: I appreciate that. And I did hear you make reference to that, that perspective earlier. But you also, I'm sure, know that Justice Ginsburg at her confirmation hearing said, quote, this is -- on this topic of Roe -- quote, "This is something central to a woman'**s** life, to her dignity. It'**s** a decision she must make for herself. And when government controls that decision for her, she'**s** being treated as less than a fully adult human responsible for her own choices." Do you agree with the statement that Justice Ginsburg made?

KAVANAUGH: So Justice Ginsburg 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 preferences, all the -- whether it was Justice Marshall about Miranda or about Heller or Citizens United.

HARRIS: And we discussed it earlier.

KAVANAUGH: And it's rooted -- I just want to underscore, it's rooted in judicial independence.

HARRIS: No, I appreciate that. But on -- but I'm glad you mentioned that Justice Ginsburg 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 Ginsburg 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?

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 of -- 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...

HARRIS: Respectfully judge, as it relates to this hearing, you're 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?

KAVANAUGH: I'm happy to answer a more specific question. But...

HARRIS: Male versus female.

KAVANAUGH: There are medical procedures.

HARRIS: That the government -- that the government has the power to make a decision about a man's body?

KAVANAUGH: Thought you were asking about medical procedures that are unique to men.

HARRIS: I'll repeat the question. Can you think of any ***laws*** that give the government the power to make decisions about the male body?

KAVANAUGH: I'm not -- I'm not -- I'm not thinking of any right now, Senator.

HARRIS: When referring to cases as settled ***law***, you have described them as precedent and, quote, "precedent on precedent." You've mentioned that a number of times 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?

KAVANAUGH: You start with the system of precedent that's rooted in the Constitution.

HARRIS: I know, but just as a factual matter, five justices, if an agreement can overturn any precedent, wouldn't you agree?

KAVANAUGH: Senator, there's a reason why the Supreme ***Court*** doesn't do that.

HARRIS: But do you agree that it can do that?

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.

HARRIS: So we both agree. We both agree the ***court*** has done it and can do it.

KAVANAUGH: There are times, but there'***s*** a series of conditions, important conditions that, if faithfully applied, make it rare. And the system of precedents rooted in the Constitution, it'***s*** not a matter of policy to be discarded at whim.

HARRIS: But there'***s*** nothing, you and I agree, that prevents the ***court*** from doing it, meaning that it is not prohibited. The ***court*** is -- if I may finish...

KAVANAUGH: Yes.

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? There'***s*** no -- for example, there'***s*** no statute of limitations during which after that statute of limitations has passed, the ***court*** may not touch precedent? Would you agree?

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 of -- internment of -- during World War II of Japanese-Americans, and the Supreme ***Court*** this past term -- it was a 1942 or '43 decision, and the Supreme ***Court***...

HARRIS: But you'd agree there'***s*** no statute of limitations? The ***court*** can go back as far as it wanted, if it believed it was warranted? There'***s*** nothing that prevents the ***court*** from reaching back many years?

KAVANAUGH: What I would say is there are a series of conditions that the Supreme ***Court*** must meet. 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 precedent.

HARRIS: Thank you. 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, part of 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 voter ***laws***. I know you're familiar with that.

But then came the ***court***'***s*** decision in Shelby, and by a 5-4 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'***s*** just a yes-or-no question. Are you aware of that?

KAVANAUGH: I recall reading about efforts in the aftermath. But one thing I would point out is that -- I believe the Supreme ***Court***'***s*** concern in that case was with the formula that was used for what states were covered by the preclearance requirement. I do not believe the ***court*** said that Congress could -- was proscribed from going back and redoing the formula.

So on the outlived its usefulness, I believe what the ***court*** said -- I'm just describing it, not saying whether I agree or disagree -- just 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.

HARRIS: Are you aware, as it relates, again, to that North Carolina action, that the federal ***court*** of appeal 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?

KAVANAUGH: When was that decision, Senator?

HARRIS: That was -- I believe that was in -- shortly after. A few years ago, 2016.

KAVANAUGH: I'm aware that there'***s*** been a lot of voter ID litigation and other voting-related, election-related litigation in North Carolina in particular ***over*** the last several years. And I'm generally aware of all the litigation in North Carolina.

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?

KAVANAUGH: I know there'***s*** -- I'm not aware of the specifics of all of that, but I do -- I do follow election ***law*** blogs and election ***law*** updates to keep generally aware of developments in the election ***law*** area. It'***s*** an area...

HARRIS: Wouldn't you agree, then, reading about this on the blogs that it'***s*** 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, wouldn't you agree that that'***s*** troubling?

KAVANAUGH: I'm not aware of that specific. But as -- 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, long march for racial equality is not ***over***, and that ***courts*** must scrutinize efforts to look for discriminatory intent or discriminatory effects. Where there'***s*** evidence of intent and in certain ***laws***, the effects themselves can be problematic.

HARRIS: And did you -- do you believe that the ***court*** in Shelby underestimated, then, the danger that states -- that was presented in terms of states' willingness to restrict the right to vote?

KAVANAUGH: Well, I don't want to comment on the -- I think that'***s*** getting into 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 don't think Congress has done so, but that'***s***...

HARRIS: It'***s*** clearly unwilling to do it, so there will have to be some recourse, don't you 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're looking at widespread disenfranchisement, wouldn't you agree, if Congress doesn't act?

KAVANAUGH: So Shelby dealt with the preclearance requirement. There'***s*** still, of course, section two of the Voting Rights Act which allows litigation brought by plaintiffs to challenge voting restrictions that are enacted with discriminatory intent or discriminatory effects, as well.

HARRIS: Do you believe that section two is constitutional?

KAVANAUGH: I think that'***s*** asking me a hypothetical that -- about any statute.

HARRIS: Well, because you referred to it, I would like to know. I would assume that you think it'***s*** constitutional if you think it'***s*** a tool.

KAVANAUGH: Well, I think as a general matter, I don't want to pre- commit on any statute that you would identify. If there's some challenge raised, I'll, of course, listen to the arguments.

But section two 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 in terms -- you know, I've 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 '65 were enormous and are very important for ***people*** to understand.

HARRIS: I agree. And in fact, to that point, in his confirmation hearing in 2005, Chief Justice Roberts, when asked about section two and whether it was constitutional, said, quote, "I have no basis for viewing it as constitutionally suspect, and I don't." Do you agree with Chief Justice Roberts that the ***law*** is not constitutionally suspect? Or do you have a different view?

KAVANAUGH: I don't -- I don't 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 don't know what arguments could come up. And I always want to make sure I've preserved the judicial independence and have not pre-committed. But I agree, I have no basis for doing that.

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 those -- who those presidents consulted with and who they talked to -- and I can't imagine that you have that personal knowledge -- my question is, did someone tell you to say that?

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's 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.

HARRIS: Thank you. And then I'm going to follow up with some questions for the record for you on the first question I asked. Thank you.

Thank you.

TILLIS: Judge Kavanaugh, you have been -- we started this about 12 1/2 hours ago. I'm amazed that you're able to continue to respond and compose yourself in the way that you have.

I am going to cover a couple of things, and I'm 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 e-mails or e-mail chains that you were involved in. And you didn't get an opportunity to see them. You haven't seen them before.

I hadn't not, either. As a matter of fact, when I heard them read, I thought at least the 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's a reason why you don't have them. And that's because they're 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'd 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. And in this confirmation hearing, Senator Klobuchar did the same thing.

The reason why it's 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're going to go back and try and clear these documents.

I would encourage all my colleagues that if you haven't taken the time in the weeks that these documents were available to go through a process -- and Chairman Grassley is honored -- please do so before you disclose such information before this hearing. So we'll see whether or not that information is made available. And I'll assume that Senator Lee will work alongside Senator Booker to see if that's 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 don't 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 weren't allowed to answer those questions. And I'm 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's given me some food for thought on maybe where I'll go down the line, if others do.

You know, it's 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 a -- what I consider an incendiary nature and really never give you an answer to respond.

So here's a question I want -- well, maybe I will ask you this. Are you Judge Kozinski?

KAVANAUGH: No.

TILLIS: OK. Because all of this was about somebody else's behavior for whom you clerked 27 years ago. You don't even have to answer that.

So some of my colleagues are arguing because you clerked with him, and you knew him, that you knew everything about him. Now, this is what's interesting to me. It turns out you're not the only judge that we've 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, that as a matter of fact, Judge Watford, I believe, worked with Judge Kozinski on the Ninth Circuit ***court*** for about five years. I think that's right, about five-and-a-half years.

So I don't want you to respond to this, either, but if we're going to ask somebody who clerked for a judge 27 years ago, why didn't you 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's go a little bit further, because I think we've got some -- 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's 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 you to get to Rice v. Cayetano. And I want you to go back very quickly. And my -- the thing that you've said multiple times I think is very important, because we've had a number of discussions here about Voting Rights Act and -- and denying various ***people*** the right to vote.

In 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'm going to try and be brief, just so I can yield back some of my time.

KAVANAUGH: Yes, it was the Office of Hawaiian Affairs. And it was a state office, however. And they restricted voting in that -- for that office and denied voting to ***people*** who are 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 14th and 15th Amendments to the U.S. Constitution.

TILLIS: And I believe it was said by a 7-2...

KAVANAUGH: By a 7-2 majority, in an opinion written by Justice Kennedy.

TILLIS: OK. Now, I want to get -- 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 say she gives the best hugs in the world.

Today you mentioned to Senator Graham that Margaret came down and gave you a second hug.

KAVANAUGH: She did.

TILLIS: So I was wondering if those competitive instincts were at play where she's trying to make up with quantity not quality.

KAVANAUGH: It is possible. As I think I said...

TILLIS: I'm sure it was an act of love, but...

(CROSSTALK)

KAVANAUGH: Margaret is 13 now. And when you're 13, the hugs are fewer and far between.

TILLIS: That's right.

KAVANAUGH: But she came down last night, and it was very nice. She gave me a special extra hug.

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 beholden 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 that -- in your -- in your comments, you mentioned that the first day that you had with your wife, Ashley, was on September the 10th. Is that right?

KAVANAUGH: That's correct, September the 10th, 2001.

TILLIS: September the 10th, 2001.

KAVANAUGH: Yes, and...

TILLIS: And we -- we know what happened the next day.

KAVANAUGH: Yes.

TILLIS: And all the terrible events that you had to deal with, including your president that you've said every day came in the office and said this can never happen again.

KAVANAUGH: Uh-huh.

TILLIS: And that was the culture for the whole time that you were in the office. So then you move forward a few years later, and you're on the circuit, and you do Hamdan v. United States.

KAVANAUGH: Uh-huh.

TILLIS: You had personally experienced an evacuation in a building that you thought could potentially be at risk.

KAVANAUGH: Uh-huh.

TILLIS: You worked with a 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.

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 the -- were you being convicted of something that was not a ***law*** in place at the time you committed the act.

TILLIS: I read your opinion. So basically you said...

KAVANAUGH: I said it was a violation.

TILLIS: Right.

KAVANAUGH: So we reversed the conviction of Hamdan. In that case, I wrote the majority opinion in that case.

TILLIS: Incidentally, I mentioned yesterday there was probably a couple of cases that I didn't like the way you ruled. That's one of them, but you did it for the right reasons.

There's another one. Emily's List v. the FEC. Tell me a little bit about that one. We all know who Emily's List is. They proudly support promoting abortion rights and pro-choice Democratic women candidates. I went on their website today to confirm that that's still out there. Tell me what you did on that case.

KAVANAUGH: We -- they were challenging an FEC, Federal Election Commission, regulations 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 ruled for -- wrote the opinion ruling for Emily's List in that case.

TILLIS: Another one, it's another one that I find interesting, didn't like it, but understand why you did it, Republican National Committee v. the FEC.

KAVANAUGH: In that case, the Republican National Committee was challenging some restrictions on fund-raising, 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.

TILLIS: I want to go back to another one that involved another boss, actually a boss -- a prior boss that was sitting right down there as the introducers yesterday. And that was Adams v. Rice. Tell me about that case.

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.

TILLIS: And some have said that you're not for the employees, you're also big for the big corporations. Tell me a little bit about Stevens v. US Airways.

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 US Airways and ruled -- I wrote an opinion favoring the pilots in the litigation against US Airways.

TILLIS: And, you know, if we go a little bit further, I think you already covered U.***S***. v. Noe (ph), so I won't 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.

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'm 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 out on -- or invalidated the California regulation. I wrote the majority opinion sustaining it.

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*** who have suggested that somehow you're 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.

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 can't remember all the specifics. I might have talked about some of the other Bush administration initiatives and received feedback on that. And I do -- do recall that.

TILLIS: I'm glad you did that. I also think it's interesting, again, because some ***people*** haven't necessarily given you a chance to answer the question, but have suggested you'd be unfriendly to the LGBT community -- LGBTQ community.

The Human Rights Campaign ultimately put a statement out that said that, in fact, you've never been involved in any substantive legislation involving LGBTQ issues. Is that correct?

KAVANAUGH: I don't believe I've been in any cases involving...

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 haven't been involved in any of them.

KAVANAUGH: Those cases were not through our ***court***, and I'm not remembering any specific cases as a judge that I've had involving those issues.

TILLIS: Well, I would hope that, if it comes up tomorrow, that perhaps they've found some evidence that you have, because we haven't.

So I'm going to try and do what I did yesterday and be the member who spoke the least. But I'm going to do something a little bit different, because I've found out that I can. I am not going to yield back my time. I'm going to potentially reserve it for use tomorrow. But since I'm at the ***end*** of the dais, I'll 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've got the most uncomfortable position in the chamber, but you've got a far more comfortable chair then all the ***people*** sitting behind you. And I'm sure they're ready to get up. But we appreciate you being here.

I do also -- I've 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've 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'll add that technically speaking, you yielded back time, about three seconds, if you want to bring that in tomorrow.

(LAUGHTER)

But I think it was a sea change difference in terms of what we saw here at the dais, and I think it'***s*** 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're 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'll 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.

KAVANAUGH: Thank you, Senator.

END

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