

Full committee hearing on the nomination of Neil Gorsuch to be an associate justice of the Supreme Court.

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GRASSLEY: Welcome back, Judge Gorsuch. Glad to have you back and I'm sure you're glad to be here.

Good morning, everybody. I'd like to welcome everyone, especially our nominee, as I just did. This is day two of **the Supreme Court** nominee's hearing. We have a long day in front of us, so we'll immediately turn to members' questions. It's my intention to get through all members' first rounds of questions today, so it's important that we all stick to our time limits so that we can stay on that schedule.

I realize that 10 hours is a long time for you to sit there and answer questions for 20 of us, so I'm going to defer to you when you might need a break. In the meantime, I would anticipate a break about 30 minutes for lunchtime, and I hope for the members of the committee, I have not made up my mind on this yet, but we do have a vote scheduled at noon and it might -- I'm sorry?

(UNKNOWN): There are two votes.

GRASSLEY: Two -- OK. We have two votes at noon, so it might be appropriate to use that period of time for our lunch break. I'll make a decision on that later on. So with that understanding with you and to accommodate you because you're the person that has to sit there and answer questions, and so whatever your needs are, you let us know.

I started yesterday morning, Judge and audience, with Justice Scalia's comments that our government of laws and not man is the pride of our constitutional democracy. Our democracy requires judges to let the people's elected representatives do the law-making. You, Judge, said that Justice Scalia's great accomplishment was to, quote, "You remind us of the differences between judges and legislators," end of quote. Legislators, in other words, consult their own moral convictions to shape law as we best think it to be, but you said that judges can't do those things, rightly so, from my point of view.

Our Constitution is also a charter of liberty. Justice Scalia said that our Constitution guarantees our liberties primarily through its structure. That happens to be the separation of powers. You said, Judge, that -- said much the same thing. And I quote you, "What would happen to disfavored groups and individuals," end of quote, if we allowed

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judges to act like legislators, quote, "the judge would need only want his own vote to revise the law willy-nilly in accordance with preferences," end of quote.

The separation of powers in our system requires an independent judiciary made of judges respectful of the other two branches, but not beholden to them. Judges must be equally independent of the president who nominates them and us senators who confirm the same judiciary members.

Let's start with independence from the executive.

No one, not even the president, is above the law. One of the most remarkable things about your nomination is the broad bipartisan support that you received. You've earned great praise from individuals who aren't exactly supporters of the president, but who strongly supported your nomination. GRASSLEY: Yesterday, we heard from one of them, Neal Katyal. President Obama's former solicitor general said that you, quote, "will not compromise principle to favor the president." In 2006, former Colorado Senator Salazar, a Democrat, said that you have, quote, "the sense of fairness and impartiality that is a keystone of being a judge," end of quote. And legal commentator Jeffrey Rosen similar praised you for your independence.

So let's start with my first question. I'd like to have you describe in any way you want to what judicial independence means and specifically tell us whether you'd have any trouble ruling against the president who appointed you.

GOR SUCH: (OFF-MIKE)

GRASSLEY: Turn your microphone on.

GOR SUCH: I'm sorry.

That's a softball, Mr. Chairman. I have no difficulty ruling against or for any party, other than based on what the law and the facts and the particular case require. And I'm heartened by the support I have received from people who recognize that there's no such thing as a Republican judge or a Democratic judge. We just have judges in this country.

When I think of what judicial independence means, I think of Byron White. That's who I think of. I think of his fierce, rugged independence. He did his -- he said, "I have a job." People asked him what his judicial philosophy was, I'll give the same answer. I decide cases. It's a pretty good philosophy for a judge. I listen to the arguments made. I read the briefs that are put to me. I listen to my colleagues carefully and I listen to the lawyers in the well, and this experience has reminded me what it's like to be a lawyer in the well. It's a lot easier to ask the questions, I find, as a judge, than it is to have all the answers as a lawyer in the well.

So I -- I take the process -- the judicial process very seriously, and I go through it step by step and keeping an open mind through the entire process as best as I humanly can. And I leave all the other stuff at home and I make a decision based on the facts and the law. Those are some of the things judicial independence means to me. It means to me, the judicial oath that I took to administer justice without respect to persons, to do equal right to the poor and the rich and to discharge impartially the duties of my office. It's a beautiful oath. It's a statutory oath written by this body. That's what judicial independence means to me. Happy to talk about the separation of powers too, if you'd like, Mr. Chairman, which you referenced in there. I'm happy to answer another question, entirely up to you.

GRASSLEY: Well, your record made clear that you aren't afraid to fulfill your role independently and you just emphasized that. You've vacated orders of administrative agencies acting outside their authority and you ruled on cases where Congress has overstepped its bounds. So I think you could maybe speak about the separation of powers, but at the same time, maybe you could give me a couple of your cases that demonstrate your commitment to that independence of the executive branch of government.

GOR SUCH: Sure. On -- on -- on the first point, you know, I have decided, as I noted yesterday, over 2,700 cases, and my law clerks tell me that 97 percent of them have been unanimous, 99 percent I've been in the majority. They tell me as well that according to the Congressional Research Service, my opinions have attracted the fewest number of dissents from my colleagues of anyone I've served with that they studied over the last 10 years.

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Now, the Congressional Research Service speculates whether that's because I'm persuasive or I believe in collegiality. I don't see why it has to be choice. GORSUCH: My law clerks also tell me that in the few cases where I have dissented, that I'm as likely almost to dissent from a Democrat appointed colleague as a Republican appointed colleague, and that's again because we don't have Democrat or Republican judges. According to The Wall Street Journal, I'm told that of the eight cases that they have identified that I've sat on that have been reviewed by the United State Supreme Court, our court was affirmed in seven of them.

Now, I think Louise might argue for the eighth because in that case the Supreme Court didn't like a procedural precedent of our court that as a panel we were bound to follow. So, they remanded it back. We decided on the merits as the court instructed, cert denied (ph) eight out of eight.

On the separation of powers, it is -- it is, Mr. Chairman, the genius of the Constitution. Madison thought that the separation of powers were -- was perhaps the most important liberty-guaranteeing device in the whole Constitution. And this is a point of civics that I -- I do think maybe is lost today, how valuable the separation of powers is.

You have in Article I the people's representatives make the law. That's your job, and I don't think it's an accident that the framers put Article I first. Your job comes first, to make the law. Article II, the president's job is to faithfully execute your laws. And our job, Article III down at the bottom, is to make sure that the cases and controversies of the people are fairly decided.

And if those roles were confused and power amalgamated, founders worried that that would be the very definition of tyranny, and you can see why. Judges would make pretty rotten legislatures. We're life tenured. You can't get rid of us. It only takes a couple of us to make a decision, or nine, or 12 depending on the court. That'd be a pretty poor way to run a democracy.

And at the same time, with respect, legislators might not make great judges because they're answerable to the people. And when you come to court with a case or a controversy about a past -- past facts, we want a neutral -- rigidly neutral, fair -- scrupulously fair decision maker. We want somebody who's going to put politics aside.

So, the separation of powers I don't think has lost any of its genius over 200 years. In fact, it's proven it.

GRASSLEY: Thank you. I've heard my colleagues and people not in the Senate say that now more than ever, we need a justice who will be independent of the president who nominated him or her. So, I'd like to ask about your nomination and your independence.

A lot has been made about the list of judges then-candidate Trump proposed as possible nominees. To me, it was the most transparent that we've had in history and we didn't have Secretary Clinton give out such a list. Of course, you weren't on the first group that came out and otherwise added later. So, I'm curious, when did you first learn that you were on candidate Trump's extended list?

GORSUCH: Well, Mr. Chairman, you're -- you're right, there -- there were two lists as I recall over the summer. And I wasn't on the first list. And I remember having breakfast one day with a friend who may be here. Brian (ph)? There you are. You remember this.

(UNKNOWN): (OFF-MIKE)

GORSUCH: We were having breakfast one day and he said, "Neil, you're not on the list." And I said, "I'm -- you're right, I'm not on the list." He said, "You should be on the list." And I said, "I love my life in Colorado. I wouldn't change a thing. I'm a happy man. I have a loving wife, a beautiful home and children, a great job with wonderful colleagues. I'm a happy person."

Walking away from breakfast and I get an e-mail from Brian (ph) saying there's a new list...

(LAUGHTER)

... and you're on it. That was the first I heard of it.

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GRASSLEY: And I assumed you thanked him (ph).

GORSUCH: I don't know about that.

(LAUGHTER)

I -- I -- I don't know if -- I don't think he had -- you didn't know. I -- I don't -- I don't think we -- we were all surprised.

GRASSLEY: I'm kidding.

GORSUCH: And at any rate, we are -- we are where we are. GRASSLEY: OK. Tell me about the process that led to your nomination. Did anyone ask you to make any promises or assurances at all about your view on certain legal issues or the way that you'd rule in certain cases?

GORSUCH: Senator, I think you'd be reassured by the process that unfolded. I -- I try to live under a shell during the campaign season, watch baseball and football, go about my business. But I did hear lots of talk of litmus tests from all around, it was in the air, and I don't believe in litmus tests for judges. I've written about that years ago.

I wasn't about to become party to such a thing and I'm here to report that you should be reassured, because no one in the process, from the time I was contacted with an expression of interest for a potential interview to the time I was nominated. No one in that process, Mr. Chairman, asked me for any commitments, any kind of promises about how I'd rule in any kind of case.

GRASSLEY: And that's the way it should be.

So, we've just discussed your independence from the president, but there's also independence from the legislative branch. It's odd that some of the same folks who will claim that you're not independent from the president will turn around and to try to extract from you promises and commitments before they pass judgment on your nomination. The irony, of course, is that extracting commitments during the confirmation process is exactly what would undermine your independence as a judge.

One way that they'll do this is asking you about precedent. So, let's talk about that. For starters, I've got a book here that you co-wrote, an 800-page book on precedent. Your 12 coauthors included judges from across the ideological spectrum, such as Bill Pryor who was also on President's Trump -- President Trump's Supreme Court list, and Diane Wood, who was reportedly on President Obama's list.

You've also touched on the value of precedent in speeches that you've given or in your opinions. For instance, in the speech you gave honoring Justice Scalia last year, you said this, quote, "Even when a hard case does arrive, once it's decided, it takes on the force of precedent, becomes an easy case in the future and contributes further to the determinacy of our law," end of quote, especially if more recent opinions have called into question the rationale of the original case. But you've also suggested that there may be circumstances where it's appropriate to revisit precedence. Specifically, you wrote that it may be appropriate to reconsider a decision where it has become a quote, "precedential island surrounded by a sea of contrary law," end of quote.

So, there may be times where it is appropriate to reconsider certain decisions, especially if more recent opinions have called into question the rationale of the original decision. I think all of us would agree, for instance, that *Brown v. Board of Education* which finally overruled a repugnant separate but equal standard in *Plessy*, is the textbook example of this.

So, with these things in mind, I'd like to explore the approach that you take to Supreme Court precedence. Could you tell us what you believe is the value of precedent in our legal system?

GORSUCH: Absolutely, Senator.

And if I might, Mr. Chairman, go back just a moment to promises. I have offered no promises on how I'd rule in any case to anyone and I don't think it's appropriate for a judge to do so, no matter who's doing the asking. And I don't

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because everyone wants a fair judge to come to their case with an open mind and decide it on the facts and the law.

One of the facts and one of the features of law that you have to decide it on is the basis of precedent, as you point out. And for a judge, precedent is a very important thing. We don't go reinvent the wheel every day, and that's the equivalent point of the law of precedent. We have an entire law about precedent, the law of judicial precedent, precedent about precedent, if you will. GORSUCH: And that's what that 800-page book's about. It expresses a mainstream consensus view of 12 judges from around the country appointed by, as you point out, presidents of both parties, great minds. Justice Breyer was kind enough to write a forward to it. It makes an excellent door stop.

(LAUGHTER)

And in it we talk about the factors that go into analyzing precedent; any consideration of precedent.

There are a bunch of them. You've alluded to some of them. The age of the precedent, very important factor. The reliance interests that have built up around the precedent. Has it been reaffirmed over the years? What about the doctrine around it? Has it built up, shored up, or has it become an island, as you point out? Those are all relevant considerations.

It's workability is a consideration too. Is it (inaudible); can people figure out how to abide it? Or is it just too confusing for the lower courts and their administration?

Those are all factors that a good judge will take into consideration when examining any precedent.

You start with a heavy, heavy presumption in favor of precedent in our system. Alexander Hamilton said that's one important feature -- I think it was Hamilton -- said one important feature of judges, if we're going to give them life tenure, and allow them that extraordinary privilege, they should be bound down by strict rules and precedents. Francis Bacon called precedent the anchor of the law.

So you start with that heavy presumption in favor of precedent, you consider those factors in that light, and, yes, in a very few cases, you may overrule precedent. It's not an inexorable command, the Supreme Court said.

That's the law of precedent, as I understand it, and as I believe expressed in that book with my very highly respected colleagues.

GRASSLEY: As a lower court judge, you're bound by not only Supreme Court precedent but, as you demonstrated, the precedent of your own court. But as a Supreme Court justice, part of your job will be to decide when existing Supreme Court precedent need not be reconsidered. How will you decide when you revisit existing precedent?

GORSUCH: Mr. Chairman, I don't think the considerations change. It's the same analysis that I would have as a Supreme Court justice, if I'm fortunate enough to be confirmed, that I have when I'm considering circuit precedent as a circuit judge. It's the exact same process. The exact same rules apply.

GRASSLEY: OK.

This is the 14th Supreme Court hearing that I've participated in, so I have a pretty good idea of some of the questions that you're going to be -- get today.

You're going to be asked to make promises and commitments about how you'll rule on particular issues. Now, they won't necessarily ask you that directly; for instance, how you will rule on this issue or that issue?

Instead they'll probably ask you about old cases, whether they were correctly decided. Of course, that's another way of asking the very same question. They know that you can't answer, but they're going to ask you anyway.

I've heard justices nominated by presidents of both parties decline to answer questions like these. That's because, as the nominee put it, quote, "a judge sworn to decide impartially can offer no forecasts, no hints, for that would

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show not only disregard for the specifics of this particular case, it would display disdain for the entire judicial process," end of quote.

Now, you probably know that's what Justice Ginsburg said at her hearing, and it's what we call the Ginsburg standard.

The underlying reason for this is, of course, is that making promises or even giving hints undermines the very independence that we just talked about. I'd like to ask you if you agree with what I just said.

GORSUCH: I do, Mr. Chairman.

GRASSLEY: So let me ask you about a couple of Supreme Court cases.

In *Heller*, **the Supreme Court** held that the Second Amendment protects an individual right to bear arms. If I ask you to tell me whether *Heller* was rightly decided, could you answer that question for me? GORSUCH: Senator, I'd respectfully respond that it is a precedent of the United States Supreme Court. And as a good judge, you don't approach that question anew as if it had never been decided. That would be a wrong way to approach it.

My personal views, I'd also tell you, Mr. Chairman, belong over here. I leave those at home. Mr. Katyal yesterday said that what he wants is a fair judge, and that's what I wanted as a lawyer. I just wanted a judge to come in and decide on the facts and the law of my client's case and leave what he had for breakfast at the breakfast table. And part of being a good judge is coming in and taking precedent as it stands and your personal views about the president have absolutely nothing to do with the good job of a judge.

GRASSLEY: Let me ask you about *Citizens United*. In this case, **the Supreme Court** held that the government can't restrict independent political expenditure by a non-profit corporation. Do you agree with that decision?

GORSUCH: And Senator, I'd give you the same response. I -- I know people have their views personally about lots of Supreme Court decisions and about a lot of other things. We're all human beings. I get that. I'm -- I'm not an algorithm. They haven't yet replaced judges with algorithms. Though I -- I think eBay's trying, and maybe successfully.

We're all human beings, but the judge's job is to put that stuff aside and approach the law as you find it, and that's part of the precedent of the United States Supreme Court, that I'm sworn as a sitting judge to give the full weight and respect to due precedent.

GRASSLEY: Those two cases were 5-4 decisions. So let me ask you about something that was unanimous, *Hosanna-Tabor*. **The Supreme Court** ruled nine to zero that the Obama administration couldn't tell a church who its ministers can be. The only thing controversial about that case was that the Obama administration actually tried to convince **the Supreme Court** that a bunch of government bureaucrats could tell a church who its ministers could be. Like I said, that case was nine- zero.

Can you tell me if that case was decided correctly?

GORSUCH: Respectfully, Senator, I give you the same answer.

GRASSLEY: OK. Those are relatively recent cases. Let's talk about cases that's been around for a while. Let's look at *Gideon v. Wainwright*. It was decided unanimously a long time ago, 50 years or more. It says a criminal defendant has a right to an appointed attorney if he can't afford one. Everyone who watches cop TV shows know that this -- this law. Does that make a difference? Can you tell me if you agree with the principle of *Gideon*? Is it the same answer, the same reason?

GORSUCH: Mr. Chairman, it's certainly a seminal decision of the United States Supreme Court, there's no doubt about it. It's a very old decision of **the Supreme Court** now. It's been reaffirmed many times. There's a lot of reliance interest built around it.

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So I could talk to you about the factors that a good judge considers in analyzing precedent and the weight due a precedent, but I'm not in a position to tell you whether I personally like or dislike any precedent that's not relevant to my job. Gideon is a seminal precedent of the United States Supreme Court and it deserves respect on that basis. Precedent is kind of like our shared family history as judges. It deserves our respect because it represents our collective wisdom, and to come in and think that just because I'm new or the latest thing and know better than everybody who comes before me would be an act of hubris, inappropriate to the judicial role.

GRASSLEY: Well, what if I asked you about Bush v. Gore?

(LAUGHTER)

GORSUCH: I -- I -- I know some people in this room who have some opinions on that, I'm sure, Senator. But as a judge, it's a precedent of the United States Supreme Court and it deserves the same respect as other precedents of the United States Supreme Court when you're coming to it as a judge, and it has to be analyzed under the law of precedent.

GRASSLEY: Well, let's go to a -- a kind of a more controversial issue, but along the same lines I've been asking you. I think the case that most people are thinking about right now and the case that every nominee gets asked about, Roe v. Wade. Can you tell me whether Roe was decided correctly? GORSUCH: Senator, again, I would tell you that Roe v. Wade, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed. The reliance interest considerations are important there and all the other factors that go into analyzing precedent have to be considered. It is a precedent of the United States Court, was reaffirmed in Casey in 1992 and in several other cases.

So, a good judge will consider it as precedent of the United States Supreme Court, worthy as treatment of precedent like any other.

GRASSLEY: What about Griswold, which was decided a few years before Roe, the case where the court found constitutional right to privacy? Can you tell me your views on Griswold?

GORSUCH: Senator, it's a precedent that's now 50 years old. Griswold involved the right of married couples to use contraceptive devices in the privacy of their own home and it's 50 years old. The reliance interests are obvious. It's been repeatedly reaffirmed. All very important factors, again, in analyzing precedent.

GRASSLEY: Well, I think I'm going to stop questions, but I'd kind of sum up what you and I just talked about in regard to precedent so everybody understands the principles that are at stake here. There are two reasons why you can't give your opinion on these cases. One I believe is independence and the other one's fairness to future litigants. Is that the way you see it?

GORSUCH: It is, Senator. If I were to start telling you which are my favorite precedents or which are my least favorite precedents or if I view a precedent in that fashion, I would be tipping my hand and suggesting to litigants that I've already made up my mind about their cases. That's not a fair judge. I didn't want that kind of judge when I was a lawyer and I don't want to be that kind of judge now and I made a vow to myself I wouldn't be. That's the fairness problem.

And then the independence problem. If it looks like I'm giving hints or previews or intimations about how I might rule, I -- I think that's the beginning of the end of the independent judiciary if -- if judges have to make effectively campaign promises for confirmation. And respectfully, Senator, I haven't done that in this process and I'm not about to start.

GRASSLEY: Thank you. I'll yield back eight seconds.

Senator Feinstein?

(LAUGHTER)

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FEINSTEIN: Thank you very much, Mr. Chair.

Welcome, Judge, and good morning.

GOR SUCH: Good morning, Senator.

FEINSTEIN: Good to see you again.

Since we're one Roe, I wasn't going to begin with this, but I well recall the time we spent in my office and we talked about precedent. And in my opening remarks, I indicated that if anything had super precedent, Roe did in terms of the numbers, and I've put that in the record.

Here's why it becomes of concern. The president said that he would appoint someone who would overturn Roe. You pointed out to me that you viewed precedent in a serious way in that it added stability to the law. Could you elaborate on the point that you made in my office on that?

GOR SUCH: I'd be delighted to, Senator. Part of the value of precedent -- it has lots of value. It has value in and of itself because it's our history and our history has value intrinsically. But it also has an instrumental value. In this sense, it adds to the determinacy of law.

We have lots of tools that allow us to narrow the realm of admissible dispute between parties so that we can -- people can anticipate and organize their affairs. It's part of the reason why the rule of law in this country works so well. We have statutes, we have rules, we have a fact-finding process and a judicial system that's the envy of the world.

And precedent is a key part of that because, as the Chairman pointed out when he quoted an old piece of mine, once the case is settled, that adds to the determinacy of the law. What -- what was once a hotly contested issue is no longer a hotly contested issue. We move forward.

And -- and, Senator, the value of that is -- the United States Supreme Court takes something like 70 or 80 cases a year. That is a tiny fraction of all the disputes in our federal legal system, right? FEINSTEIN: Right.

GOR SUCH: My -- my law clerks told me it's something like 0.001 percent, and they're unanimous in those cases which have divided circuit judges. That's why the Supreme Court largely takes the case, because it's divided us. It's one of the rare cases where we disagree. They're unanimous 40 percent of the time.

FEINSTEIN: One other question.

GOR SUCH: Sure.

FEINSTEIN: Do you view Roe as having super-precedent?

GOR SUCH: Well, Senator, I -- "super precedent" is a...

FEINSTEIN: In numbers...

(CROSSTALK)

GOR SUCH: It has been reaffirmed many times. I can say that.

FEINSTEIN: Yes.

GOR SUCH: Yes.

FEINSTEIN: Dozens. All right. I -- I would like now to go to -- to take you back to 2005, when you were in the Justice Department. And I want to explain to you why I'm going here. This has to do with torture. The Intelligence

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Committee was informed in 2006, and Attorney General Gonzales played a role in this, of the nature of the enhanced interrogation techniques. And we were given a very soft view.

Senator Rockefeller became chairman of the committee in 2007 and began a study of three detainees and the enhanced interrogation techniques. When I became chairman in 2009, I added that and we took all of the major detainees and looked at them in a six-year study. The staff spent long hours analyzing every cable, every e-mail, looking at more than 100 interviews.

And essentially, putting in a 7,000-page report, 32,000 footnotes, documenting where the information -- there are no conclusions, there are just facts. That 7,000-page report has remained classified. I have read it. We have put out a 450-page summary which is public. And in that summary, we indicate that those cases that the administration spelled out, where torture produced operable intelligence, was simply not so.

We elaborate on that in the big report. And my hope is that one day not too distant, that report will be declassified so the American people can actually see. But I wanted to ask you some questions along these lines.

It's my understanding that a set of talking points were prepared for a press conference for the attorney general on November 22, 2005. The talking points ask whether, and I quote, "aggressive interrogation techniques employed by the administration yielded any valuable information," end quote. And in the margin next to this question, you hand-wrote one word: "yes." What information did you have that the Bush administration's aggressive interrogation techniques were effective?

GORSUCH: Senator, I'd have to see the document. I don't recall -- I mean, sitting here, it's been -- it's been a long time.

FEINSTEIN: All right. That's fair enough. Why don't we do this? I'd be happy to share the documents with you. I took these pages out of my binder. I think they...

GORSUCH: Fair enough.

FEINSTEIN: ... they were there so I wouldn't have to pause. And I -- but let me just hold up that answer.

GORSUCH: Sure.

FEINSTEIN: And we'll get you the documents on that.

GORSUCH: Thank you.

FEINSTEIN: Because -- let me do the next question.

In December 2005, after the passage of the Detainee Treatment Act, you advocated that President Bush should issue a signing statement to accompany the law. In an e-mail you sent to Steven Bradbury and others, you said the signing statement would, and I quote -- this is your quote -- "help inoculate against the potential of having the administration criticized some time in the future for not making sufficient changes in interrogation policy in light of the McCain portion of the amendment. This statement clearly and in a formal way would be hard to dispute later; puts down a marker to the effect that McCain is best read as essentially codifying existing interrogation policies," end quote. FEINSTEIN: To be clear, the context was that earlier in 2005, the Justice Department's Office of Legal Counsel had concluded that CIA interrogation tactics, like waterboarding and sleep deprivation (sic), did not amount to cruel, inhuman or degrading treatment.

I read your e-mail as advocating a continuation of these interrogation techniques, and worse, saying that Senator McCain's amendment actually codified them, which it did not. Is that true? And doesn't it mean that when you wrote this in an e-mail, you were condoning waterboarding as lawful?

GORSUCH: Senator, I'd want to see the e-mail again. I don't feel comfortable commenting on documents that aren't in front of me.

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But I can say this: that I do remember...

FEINSTEIN: My staff has the documents...

GOR SUCH: Great.

FEINSTEIN: ... here. They can bring them down to you...

GOR SUCH: That'd be great.

FEINSTEIN: ... right now.

GOR SUCH: Thank you, that'd be wonderful.

FEINSTEIN: OK. And then, I'll put aside this part...

GOR SUCH: OK.

FEINSTEIN: You'll have the documents because there are more -- and I'll go on to the next subject.

GOR SUCH: No, that's fine. I'm happy to...

(CROSSTALK)

FEINSTEIN: I know. I want you to look at the documents.

GOR SUCH: I'd like to just know what I'm talking about. My recollection generally, I can -- from 12 years ago...

FEINSTEIN: Eric (ph), bring him the documents, please.

GOR SUCH: Thank you.

(LAUGHTER)

Thank you, Eric (ph).

(LAUGHTER)

My recollection generally, working on the Detainee Treatment Act, Senator, was that at that time, after Rasul was issued by the Supreme Court, there were a lot of habeas petitions coming in from detainees at Guantanamo Bay. Some brought by my friend, Neal Katyal.

And there was an effort by some in the administration, along with many on Capitol Hill, to try and provide a regime for the processing of those claims in a way that would conform with the Youngstown ideal of Congress and the president acting together in unison and that -- Senator McCain and Senator Graham put together legislation that emphasized that not only was torture unacceptable, which it always had been under U.S. law, but the cruel, inhuman and degrading treatment was also unacceptable under U.S. law.

FEINSTEIN: But let me help you here. I know from the document that you worked on the Graham effort.

GOR SUCH: Yes.

FEINSTEIN: For example, a self-assessment that you wrote said that you quote, "helped coordinate the legislative effort on the Graham Amendment within DOJ and in consultation with DOD and others."

GOR SUCH: That's absolutely right, Senator. I sure did and I'm proud of it because we managed to come up with a bipartisan bill that I think passed this body with over 80 or maybe 90 votes, I don't remember, which did two things. One, affirmed this country's commitment to prevent cruel, inhuman and degrading treatment. And second, which

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provided a regime that was agreed by the Congress and the president on how Guantanamo detainees should have their claims processed.

FEINSTEIN: Except, after you read the documents, just so you know, the conclusion that we come away with is that when the bill on the McCain Amendment was about to be voted on, you forwarded press articles explaining what having these two provisions together meant. That was the McCain Amendment prohibiting torture and confining it to the Army Field Manual...

GOR SUCH: Yes.

FEINSTEIN: ... and the Graham Amendment, which would bar habeas. In other words, a detainee could not use the habeas corpus right to file in a court of law and challenge their conditions of detention. So, that was looked at as off-setting McCain, but basically preventing habeas corpus from being used, and of course, it was overturned by the court.

GOR SUCH: Senator, you're absolutely right that it was eventually litigated as all these things are. It was a bipartisan effort and it was between the Department of Defense -- Department of Defense wanted congressional approval for something so that they knew what the rules would be. They were desperate to have some congressional involvement and investment in this process. GOR SUCH: And as a lawyer, that's all I was, I was a lawyer for a client, right? I was advising them on how to go about doing that legally in conjunction with Senator Graham's office and others. And it was a bipartisan effort and we put together our best effort.

The D.C. Circuit upheld it. The Supreme Court of the United States eventually many, many years later found that the process was -- was insufficient, and that's the Boumediene case, as you know, Senator.

But to say that there was no process would be inaccurate too because the Detainee Treatment Act had a long list of prescribed processes and the question just simply was whether they were adequate enough under the suspension clause and that was a close case that divided the court very closely. And I respect that decision as a precedent of the United States Supreme Court no less than any other, Senator.

FEINSTEIN: One last question on this.

GOR SUCH: Sure.

FEINSTEIN: When President Bush signed the Detainee Treatment Act, he issued a statement that basically said he would only construe the law consistent with his powers as commander-in-chief. According to press reports, administration officials confirmed, and I quote, "The president intended to reserve the right to use harsher methods in special situations involving national security," end quote. In other words, the signing statement reflected the president's belief that he had the power to not comply with the law he had just signed.

According to e-mails, and this you'll verify, you were involved in preparing that signing statement and you advocated for the issuance of the signing statement. They even showed you saying to the top State Department lawyer that Harriet Miers, the White House counsel, quote, "needs to hear from us, otherwise this may wind up going the wrong way."

GOR SUCH: Well, Senator, I can tell you what I recall. I haven't read...

FEINSTEIN: OK.

GOR SUCH: I need to read the e-mail.

FEINSTEIN: That's fair enough. GOR SUCH: But my loose recollection of something that happened, I think 11, 12 years ago is that there -- there were individuals in -- in maybe the vice president's office who wanted a more aggressive signing statement along the lines that you've described and that there were others, including at the State Department, who wanted a gentler signing statement. And my recollection sitting here, as best I can give it to

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you without studying the e-mail, is that I was in the latter camp. John Bellinger among others, I would have associated myself with there.

And I don't know what was in the president's head when he wrote the signing statement, I can't tell you that. I don't know. I can only tell you what I remember and I certainly would never have counseled anyone that they could disobey the law.

FEINSTEIN: OK. I've no reason not to believe you. But if you will read those...

GOR SUCH: Sure.

FEINSTEIN: ... and then in my second round, we'll go back to it.

GOR SUCH: Sure.

FEINSTEIN: And I'd be very happy to because I think you'll see that we didn't make this up.

GOR SUCH: Senator, I'm not suggesting you are. But -- and I'm -- there was a -- there was a tug of war among parties in the White House.

FEINSTEIN: Oh, I figure that (ph).

GOR SUCH: Right.

FEINSTEIN: I wanted to know which side you were on.

GOR SUCH: Well, count me in with John Bellinger most of the time on these things, OK?

FEINSTEIN: OK.

GOR SUCH: All right? And that's my recollection and Matt Waxman would be another one. So that's my recollection, Senator, sitting here and I'll study these.

FEINSTEIN: OK.

Let me ask you a question on wiretapping. In December of 2005, news broke that President Bush had ordered the NSA to intercept the content of certain communications of Americans without a court order, outside of the requirements of the Foreign Intelligence Surveillance Act known as FISA. You helped prepare the public defense of the program. For example, in draft testimony that you prepared for Attorney General Gonzalez defending the program, you wrote this. Quote, "These authorities are vested in the president and they are inherent in the office. They cannot be diminished or legislated away by other co-equal branches of government."

Paul Clement, President Bush's solicitor general, quote, "found this proposition unconvincing and it was removed from the testimony." Do you still believe that the president has inherent authority, this is important, to intercept the communications of Americans in the United States that cannot be legislated in a way by Congress?

GOR SUCH: Goodness no, Senator.FEINSTEIN: Good.

GOR SUCH: And I didn't believe it at the time.

What I was -- serving at the time, as I recall -- again my recollection, and I'd be happy to review whatever you have before you -- is that I was acting in the capacity as a speech writer and taking material produced by the components that were responsible for litigating these issues, including Mr. Clement, Paul Clement, dear friend of mine, and the Office of Legal Counsel and others and assembling it to put words in -- together that -- that sounded like English. And I think people like my writing. And that was my job. I think I was the scribe.

FEINSTEIN: OK, let's move on.

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I'd like to go to the Heller case. When we met in my office, we discussed the Heller decision, which you said you were open to discussing since the case had been decided. At that time, you said you thought both the majority opinion written by Justice Scalia and the dissent written by Justice Stevens were brilliant examples of originalism, where both justices sought to explain their reasoning by looking at the original public meaning of the Second Amendment.

Which decision did you agree with and why?

GORSUCH: Well, Senator, I think we -- we've alluded to my difficulty here.

I -- I do think everything you just said is accurate. Both Justice Scalia and Justice Stevens wrote excellent opinions in that case. I am not here, though, to grade my boss's work. That would be kind of impertinent of me, I suspect. And certainly, I'm -- I'm sure they would think so. I also worry that saying I agree with one or the other will indicate to clients or to litigants in future cases -- because it's now a precedent of the United States Supreme Court. It's binding. It's the law whether we like it...

FEINSTEIN: Right.

GORSUCH: ... or not, it's the law. And if I start saying I like one opinion or I like the other opinion...

FEINSTEIN: All right.

GORSUCH: ... I'm signaling... FEINSTEIN: I'll let you off the hook.

(LAUGHTER)

Let me go to another one.

GORSUCH: Thank you. Thank you, Senator.

FEINSTEIN: In D.C. v. Heller, the majority opinion written by Justice Scalia recognized that, and I'm quoting, "Of course the Second Amendment was not unlimited," end quote.

Justice Scalia wrote, for example, laws restricting access to guns by the mentally ill or laws forbidding gun possession in schools were consistent with the limited nature of the Second Amendment. Justice Scalia also wrote that quote, "weapons that are most useful in military service, M-16 rifles and the like, may be banned," end quote, without infringing on the Second Amendment.

Do you agree with that statement, that under the Second Amendment, weapons that are most useful in military service, M-16 rifles and the like, may be banned?

GORSUCH: Senator, Heller makes clear the standard that we judges are supposed to apply. The question is whether it's a gun in common use for self-defense, and that may be subject to reasonable regulation. That's the test, as I understand it. There's lots of ongoing litigation about which weapons qualify under those standards and I can't prejudge that litigation...

(CROSSTALK)

FEINSTEIN: No. I'm just asking you, do you agree with his statement? Yes or no would be fine (ph).

GORSUCH: The statements out of the Heller decision from the United States...

FEINSTEIN: Justice Scalia statement.

GORSUCH: Well, whatever's in Heller is the law and I follow the law.

FEINSTEIN: So, you agree with it?

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GORSUCH: Well, it's not a matter of agreeing or disagreeing, Senator, respectfully it's a matter of it being the law. And -- and my job is to apply and enforce the law.

FEINSTEIN: All right, fair enough.

Let me give you another one. The Fourth Circuit, Judge Harvie Wilkinson authored a separate concurrence in the Fourth Circuit case *Kolbe v. Hogan*. Here's what he said.

"No one really knows what the right answer is with respect to regulation of firearms. I am unable to draw from the profound ambiguities of the Second Amendment. An invitation to courts to preempt this most volatile of political subject and arrogate to themselves decisions that have been historically assigned to other more democratic actors. Disenfranchising the American people on this life-and-death subject would be the grievous and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours."

Do you agree with Judge Wilkinson that the Second Amendment is ambiguous? If so, should the ambiguity be decided by the courts or by legislatures?

GORSUCH: I -- I'd begin by saying I hold Judge Wilkinson in high regard. He's a very fine man and a very fine judge.

FEINSTEIN: Can you do a yes or no?

GORSUCH: No I -- I'm -- I wish I could.

FEINSTEIN: I wish you could, too. GORSUCH: But you know, the Supreme Court of the United States isn't final because it's infallible, as Justice Jackson reminds us, it's infallible because it's final. And Judge Wilkinson had his view, and the Supreme Court has spoken, and *Heller* is the law of the land. And Justice -- Judge Wilkinson may disagree with it, and I understand that, and he may -- but he will follow the law no less than any other judge in America. I am confident of that. He's a very fine judge who takes his oath seriously.

FEINSTEIN: OK. I asked you that question on super precedent and let me end with one on workers rights, if I might.

As you know, there have been a number of Supreme Court cases where the court has made it harder for workers to hold their employers accountable when they have experienced discrimination or be injured on the job. And we've discussed that one case, *TransAm*, I think three or four of us.

Let me give you a short list; *Ledbetter v. Goodyear Tire*, which limited the ability of women to seek equal pay; *Gross v. FBL Financial Services*, 2009, which made it more difficult to prove age discrimination; and the *University of Southwest Texas Medical Center v. Nassar* in 2013, which made it more difficult for employees to prove they've been retaliated against for reporting discrimination, including based on race, gender, national origin, religion and other factors; *Vance v. Ball*, which made it more difficult for workers to prove just plain discrimination claims.

As Senator Whitehouse pointed out, each of these cases was 5-4 and Justice Scalia voted with the majority against the employee in every case. President Trump and others have said you are the next Scalia. So, I think it's only fair to ask you, do you disagree with any of the majority opinions that Judge Scalia joined in these cases? If so, which ones do you especially disagree with and why? These have already been decided.

GORSUCH: I understand, Senator. But again, if I indicate my agreement or disagreement with a past precedent of the United States Supreme Court, I'm doing two things that worry me sitting here.

The first thing I'm doing is I'm signaling to future litigants that I can't be a fair judge in their case because those issues keep coming up. All of these issues, as you point out, keep coming up. Issues around all of these precedents will be continued to be litigated and are hotly litigated. I've had post-*Ledbetter* (inaudible) cases in my court, for example. FEINSTEIN: Then how do we have confidence in you that you won't just be for the big corporations, that you will be for the little men? This is the question that Senator Hirono I think so well asked yesterday. You know,

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those of us I think on both sides care very much about workers rights, but the record is such that one questions whether the court is capable in its present composition to give a worker a fair shot.

So, I'm just looking for something that would indicate that you would give a worker a fair shot. Maybe it's in your background somewhere that I don't know about, but I'd like to have you respond to it any way you can.

GOR SUCH: Senator, I really appreciate that and I think there is a way you can take a look at this question without me potentially pre-judging a case and I appreciate your respect for that. And just to finish that thought, I'm concerned that I have to look the litigant in the eye in the next case, and if I've prejudged that case, they can look at me and say you're not a fair judge and I've got no answer for that, got no answer for that.

So, what I think can give you comfort in this area is, Senator, I know a case or two has been mentioned yesterday. Respectfully, I'd suggest that does not represent the body of my work. I've written -- I've participated in 2,700 opinions over 10 and-a-half years. And if you want cases where I've ruled for the little guy, as well as the big guy, there are plenty of them, Senator. The Ute Indian tribe...

FEINSTEIN: Would you be willing to submit some of them?

GOR SUCH: Oh, goodness (ph).

FEINSTEIN: It's hard to read 2,700 cases. GOR SUCH: I'll name a bunch of them right now...

(CROSSTALK)

FEINSTEIN: ... TransAm.

GOR SUCH: I'm -- I'm sorry, Senator, of course. Ute 5-6, Fletcher, the Rocky Flats case which vindicated the rights of people who had been subject to pollution by large companies in Colorado -- uranium pollution. I -- I point you to the magnesium case. Similar pollution case in the Salt Lake -- in the Salt Lake City area. Colorado's effort with renewable energy, upheld that.

Orr v. City of Albuquerque involving a pregnancy discrimination in the police department of Albuquerque. WD Sports, a discrimination claim. Casey, Energy West, Crane, Simpson v. CU involving young women who have been harassed by the football team, AM v. -- AM, Browder, Sutton. I -- I can give you a long...

FEINSTEIN: That's helpful.

GOR SUCH: ... long list, Senator.

FEINSTEIN: That's helpful, and we'll find them and we'll read them.

GOR SUCH: And -- and -- and Senator, the bottom line I think is that I'd like to convey to you from the bottom of my heart is that I'm a fair judge. And I think if you ask people in the Tenth Circuit is he a fair judge, you're gonna get the answer that you got yesterday from both Senator Bennet and Senator Gardner and from General Katyal and the same answer you got from Senator Allard and Senator Salazar ten years ago.

And Senator, I can't guarantee you more than that, but I can promise you absolutely nothing less.

FEINSTEIN: OK. I have a minute and 21 seconds.

Let's talk Chevron. That's been used, you know, thousands of times and it really perplexes me. Olympia Snowe and I did something that took me 12, 13 years to get to, and that is changing the corporate fuel economy standards. And thanks to Senator Inouye and Senator Stevens, they put it finally in a commerce bill and it passed. So, now we are on our way to 54 miles a gallon. Here's the point. We could do the rules for the first 10 years, but who knew we needed the experts to do them from that point on. So, what we said in the legislation was that science would prevail, and that's still the law. It's working. The goal is -- I've read articles. They say they'll be 54 miles by 2025 if this continues.

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What is wrong is that? How else could we have done it?

GORSUCH: I -- I'm not aware of anything wrong with that, Senator. I -- I've never suggested otherwise.

FEINSTEIN: But -- but you -- what you've said is the Congress could not legislate by leaving some of the rules up to the scientists or other professionals in departments, as I understood it in Chevron.

GORSUCH: I -- I appreciate the opportunity to correct this misunderstanding, Senator.

FEINSTEIN: Sure, appreciate it.

GORSUCH: The case I think you're referring to is Gutierrez.

FEINSTEIN: That's correct.

GORSUCH: It involved an undocumented immigrant to this country. OK. And the question was there were two conflicting statutes. One said he could apply for immediate discretionary relief in this country from the attorney general. Second said he had to wait outside the country to 10 years. We had a judicial precedent that said the first statute controls. That was the ruling of our court.

After that, three or four years -- I can't remember exactly -- the Board of Immigration Appeals in its infinite wisdom says our interpretation is wrong. Chevron, you have to undue your precedent, the judicial precedent that this man had relied upon and that he now had to wait outside the country not just 10 years, but 13 or 14 because it took them so long to make up their mind.

Well, Senator, that reminded me of, you know, when Charlie Brown's going in to kick the ball and Lucy picks it up at the last second. And that struck me as raising serious due process concerns, fair notice and separation of powers concerns when an executive bureaucracy can overturn a judicial precedent without an act of Congress.

That's what the case was about. And it suggested, respectfully Senator, that under the APA, the Administrative Procedures Act, this body passed judges to decide to legal questions and left to administered -- administrative agencies great deference when it comes to fact finding. OK? That's how I read Section 706 is fact-finding by scientists, biologists, chemists, the experts get great deference from the courts. GORSUCH: The only question is, who decides what the law is? And can a man like Mr. Gutierrez, the least amongst us, be able to rely on judicial precedent on the books or can he have the ball picked up as he's going in for the kick?

FEINSTEIN: I think I've exceeded my time.

GORSUCH: I -- I'm sorry.

(CROSSTALK)

FEINSTEIN: Thank you very much. Thank you.

GRASSLEY: I want to make clear to everybody, you didn't exceed your time because I said if you ask your question before the last second's up, and you did, that we'd give whatever time it took for that to be done. And if everybody follows that rule, I think we'll be treating everybody fairly.

Before I call on Senator Hatch, I'd like to enter into the record an article in The Wall Street Journal, editorial titled this, "Neil Gorsuch, How Would You Vote? Democrats Demand the Nominee Declare Himself on Cases," end of the title. I'll just quote the first paragraph. "Democrats have come up empty trying to find something scandalous that Neil Gorsuch has said, so now they're blaming him for what he won't say to wit. They want him to declare how he would rule in specific areas of law, questions that every Supreme Court nominee declines to answer," end of quote.

I -- without objection, I enter that in the record.

Senator Hatch.

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HATCH: Well, thank you, Mr. Chairman.

Judge, as I said yesterday, my goal in this confirmation process is to get an understanding or a handle on your understanding of the proper role of judges in our system of government. Now, you gave an interesting lecture last year at Case Western Reserve School of Law about Justice Scalia's legacy. Justice Scalia, you explained, emphasized the difference between judges and legislators. You reminded us, as you put it, "that legislators may appeal to their own moral convictions and the claims about social utility to shape the laws they think it should be in the future, but the judges should do none of these things in a democratic society," end quote.

I think that accurately describes Justice Scalia's view. Is that also your own view?

GORSUCH: Senator, it is. Though, I've got to confess, that lecture was attended by about 20 people and it's got a lot more attention since.

(LAUGHTER)

HATCH: Well, we're making sure it gets some more.

In your opinions on the appeals court, you take great care to identify what issues the court may or may not address. In one opinion last year, for example, you used phrases such as. quote, "It's not our job," unquote, and quote, "It simply isn't our business," unquote. What is an appellate court's job in your view?

GORSUCH: It is a limited, but vital role in our separated powers. A judge is there to make sure that every person, poor or rich, mighty or meek, gets equal protection of the law. It is chiseled above the Supreme Court entrance in Vermont marble, though I believe the Lincoln Memorial is made out of Colorado marble. And that is -- that is a profound and radical promise, that every person is protected by our laws equally, and in all of human history, that may be the most radical promise in all of law.

And what it means to me is that when I sit on the bench and someone comes to argue before me, I treat each one of them equally. They don't come as rich or poor, big guy or little guy. They come as a person and I put my ego aside when I put on that robe and I open my mind and I open my heart and I listen. And I tell my clerks that their very first and most important job is to tell me I am wrong and to persuade me I am wrong as I read the briefs and listen to the arguments.

And then if they manage to do that, I tell them their next job is to try and persuade me I'm wrong again because I want to make sure I leave no stone unturned. I want to get to the bottom of it. I have one client. It's the law. And it's a great joy and it's a great privilege and it's a daunting responsibility to come in every day and to try and get it right. Then I go listen to the arguments of the lawyers, I don't treat them as cat's paws. They're not there to be toyed with. I treat them, I hope, always, as respected colleagues who lived with the arguments, studied the cases, know the facts far better than I do. GORSUCH: I might actually learn something from them. I go in with the questions I actually have that I want answered, and then I sit and I listen to my colleagues after that. And, Senator Hatch, I can't tell you how many times on the Tenth Circuit I've gone through that whole process, I go to conference, I think I know my mind and then one of my colleagues -- Harris Hartz was here yesterday, he's often the one, there are plenty of others -- who say something absolutely brilliant, changes my mind.

And that's the judicial process and that's the role I see for the appellate judge.

HATCH: Well thank you, that's a very good explanation. We held a confirmation hearing for Justice Sonia Sotomayor in 2009. Senator Charles -- Senator Charles Schumer now the minority leader was a leader of this committee and phrased the nominee in this way, quote, "Judge Sotomayor puts the rule of law above everything else. Judge Sotomayor has hewed carefully to the text of statutes even when doing so results in rulings that go against so-called sympathetic litigants," unquote.

Do you agree with Senator Schumer that your duty as a judge is to follow the law even when it requires running against sympathetic litigants?

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GORSUCH: Yes, Senator. I can't tell you that when I go home and take off the robe I'm not a human being, that I don't think about some of those cases but my job is to apply the law as fairly as I can in each and every case without respect to persons. That's my oath. There's not every law in the book I love, you love. I'm sure of that. But my job isn't to write the laws, it's to apply the laws and I try to do that.

And that enough is enough for a day's work and it's enough for a life's work.

HATCH: In my opening remarks yesterday, I mentioned a letter we received from dozens of your peers at Harvard Law School. And, Mr. Chairman, I ask consent that this letter be included in the record at this point.

GRASSLEY: Without objection, it'll be included.

HATCH: The signers were of all parties and ideologies and represented many different faiths, lifestyles, and views. They all support -- strongly support your nomination. The letter said that you personified disinterested philosophy that respects judicial modesty combined with compassionate appreciation of the lives impacted by your decisions. Now how can you do both?

GORSUCH: Senator, I'm just a person. And I remember how hard it is to be a lawyer, I remember what it was like to represent clients who had problems. Told my kids when they ask me what my job was when I was young, it was to help people with their problems. And as a judge, I have to resolve their problems. One of the hard things about being a judge is that somebody has to win and somebody has to lose.

You make half the people unhappy 100 percent of the time. That's the job description. But you have to believe in something larger than yourself and that you're part of something larger than yourself. And I believe in the rule of law in this country and I believe an independent judiciary is one of the keys to it. And I feel it has been a calling to be part of it and an honor.

HATCH: The Fourth Amendment protects the right to be free from, quote, "unreasonable searches and seizures," unquote. It was written in the late 18th century when the tools used by law enforcement to investigate crime and monitor suspects were radically different than they are today. In your view, how should a judge approach interpreting and applying constitutional provisions like the fourth amendment in cases where the technologies or -- and/or methods at issue were obviously not even imagined by the founders?

GORSUCH: May I offer an example, Senator, I think might be helpful? HATCH: Sure.

GORSUCH: I take *United States v. Jones*, recent case for the United States Supreme Court involving whether police officers might attach a GPS tracking device to a car. Modern technology -- how do you apply the original Constitution written 200 years ago to that? And the court went back and looked at the law 200 years ago and one of the things it found was that attaching something to someone else's property is a trespass to chattels, a common law, and would be considered a search. And the court held that if that's a trespass to chattels and a search 200 years ago, it has to be today, though the technology is obviously different.

So the technology changes, but the principles don't. And, it can't be the case that the United States Constitution is any less protective of the people's liberties today than it was the day it was drafted.

HATCH: Well, you authored the opinion in *Meshworks v. Toyota Motor Sales*. Now this 2008 case applied principles to early cases involving photography, relative (ph) the old technology to determine the intellectual property protections for digital modeling, a new medium.

How should judges approach questions of intellectual property in cases that involve new technology or new applications of old technology? Should they confine themselves to analogous technologies, or may judges create new doctrines or case law that they believe better addresses the changing technological landscape?

GORSUCH: Well, Senator, I think it's actually a very similar sort of question, right. We look back. We find what the law was at the time, the original understanding, if you will, and we make analogies to our current circumstance. We judges love analogies.

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We work with analogies. And that's how lawmaking through the judicial process happens. That's proper judicial decision making. It is a very different thing if you want to create a revolution in the area and change the law dramatically.

That's for this body to do. It's for judges to interpret the law as best they can from the original understanding to current circumstances -- and apply to current circumstances. So in *Meshworks*, that's exactly what we did.

And looked at old case law having to do with copyright and applied it to digital media. Same principles from the beginning of the Copyright Act just applied to a new medium.

HATCH: Well, several of your writings have called into question the so-called Chevron doctrine, that's been raised here already. Most Americans probably wonder why a Supreme Court nominee would talk about a gas station, but the concept of Chevron is very straightforward.

It commands federal judges to defer to an agency's interpretation of the law. In effect, this deference allows unelected, unaccountable bureaucrats to rewrite the law. Any middle-schooler, however, should be able to see how Chevron is inconsistent with the basic duty of judges under the Constitution.

As you probably know, I'm a Chevron skeptic, and have led the fight to overturn this decision legislatively with my Separation of Powers Act. I introduced this bill last Congress with the support of several colleagues on this committee and will soon reintroduce it.

Now, I chose its title for a reason. Re-examining Chevron is not about being anti or pro regulation; rather, it's about restoring the constitutional allocation of powers between the three branches. It's about maintaining fidelity to the laws passed by Congress and the exact bounds of authority granted to regulatory agencies.

And it's about enduring the bureaucracy abides by the law no matter what its policy goals, liberal or conservative.

Judge, do you agree that there's nothing extreme or inherently ideological when the Supreme Court said in *Marbury v. Madison* that, quote, "It is emphatically the province and duty of the judicial department to say what the law is," unquote?

GORSUCH: Senator, *Marbury v. Madison* is the cornerstone of the law in this country. I don't know anybody who wants to go back and reconsider that. I hope not.

HATCH: I feel the same way. Last week the New York Times reported that the primary line of attack against you is that you are, quote, "no friend of the little guy," unquote. We've had that come up time and again in these proceedings in the last couple of days. HATCH: Harvard Law School professor Noah Feldman, who does call himself a liberal, wrote an opinion piece on the subject that appeared last week on bloomberg.com. He opens this way, quote, "I don't know who decided that the Democratic critique of the U.S. Supreme Court nominee Judge Neil Gorsuch would be that he doesn't side with the little guy. It's a truly terrible idea."

Now, Mr. Chairman, I ask that this column by Professor Feldman be placed on the record at this point.

GRASSLEY: Without objection, so ordered.

HATCH: Now, Judge, some of your critics question whether you have a solid track record of judicial independence and objectivity. In particular, they question whether you would stand up to the current president, if he were to exceed his authority under the Constitution and laws Congress has enacted? So Mr. Chairman I ask consent to place on the record an essay I wrote on the subject that appeared at scotusblog.com.

GRASSLEY: Without objection, so ordered.

HATCH: Now, Judge, how would you respond to that kind of criticism?

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GORSUCH: Senator, a good judge doesn't give a wit about politics, or the political implications of his or her decision, besides where the law takes him or her fearlessly.

I walk past every day a bust of Byron White in my courthouse. My courthouse is named for Byron White. And when I do that I think about his absolute determination just to get it right no matter where it took him. He said, "It's a job. You do your very best and you go home." And that's -- that's how I approach things.

And if you look at my record, Senator, respectfully I think it demonstrates that. According to my law clerks, again when I do dissent, which is very rarely, I do so in about equal numbers between judges who happen to be appointed by Democratic presidents and who happen to be appointed by Republican presidents. And I hate to even use those words because they are all just to me judges; I don't think of them that way.

But my decisions have always been independent regardless of who I'm agreeing or disagreeing with, and if I ruled against the government, my goodness, ask the U.S Attorney's Office in Colorado -- I give them a pretty hard time. I make them square their corners, Senator Hatch, all right.

And if you wanted some examples I'd point you to Carlas (ph), Krueger, Ackerman, three recent Fourth Amendment cases, ruling for the accused, the least amongst us, against the government.

HATCH: In 2005, before being appointed to the Appeals Court you wrote an op-ed piece for National Review in which you criticized the reliance on the courts by litigants seeking to achieve policy results that they could not achieve through the regular political process.

Not that long ago there was a consensus that courts are not the appropriate place to make policy. Now you're criticized for that same common-sense idea. And I want to give you a chance to respond, but how does relying on courts to make policy undermine both Democracy and the legitimacy of the federal judiciary?

GORSUCH: Well, again, it goes to our separation of powers. Judges would make very poor legislators. We're not equipped for it. We're not responsive to the people, can't elect us, can't get rid of us. You're stuck with us, and we don't have the opportunities to talk to people, to have hearings like this one, in places like this. I'm permitted four law clerks for one year at a time, right out of law school. It's kind of an evanescent cloud, replenishes itself every year.

Now, if you were to make laws, I don't think you design a system where you let three older people with four young law clerks straight out of law school legislate for a country of 320 million. That's just not how anyone would design a railroad. And so those are some of the problems I see, Senator.

HATCH: Thank you and that...

GORSUCH: With all respect to my law clerks. I love them very much. They're like family. But they're not the same as your staffs and the investigative powers you have.

HATCH: There lucky to be with you is all I can say.

In that same -- in that National Review piece you pointed out some liberal policies that lawyers (ph) have sought to achieve through litigation. Some of your critics have tried to turn this into one of those gotcha moments, claiming that your real qualm was with those -- was with those policies that were liberal, not that they were achieved through litigation. Again, I'm going to give you a chance to respond. GORSUCH: Well, I would say that in that article, I'd say a couple of things about it. First, as I pointed out and I believe, the court's a very important place for the vindication of civil rights and for minorities. It's a place where unpopular voices get heard the same as popular voices.

In a democracy, in the legislature, majorities win. That's not the case in courts. The best argument should prevail. So they play an important role.

Second, I pointed out that one thing that we lack as judges to make good policy decisions, as legislators, is the ability to compromise. These bodies, legislative bodies, you can put together a compromise. Judges, somebody has

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to win; somebody has to lose, Senator. It's not a great place to compromise. And again, we're not great -- we're not well equipped to do your work.

At the same time, I did criticize -- I pointed out a column by a liberal columnist, a self-identified liberal columnist, a very fine man. And I agree with him that his side had done some -- spent perhaps too much time in court instead of in front of the legislature. I can report to you, having lived longer, as I did report to you in 2006, that the problem lies on both sides of the aisle; that I see lots of people who resort to court perhaps more quickly than perhaps they should.

HATCH: Well, some liberal organizations are claiming that in private practice, you represented only big corporations. Your former law partner, David Frederick, who happens to be on the board of directors of the liberal American Constitution Society, has a very different take. In an opinion piece published in the Washington Post, he describes your work at the firm this way, quote: "Over the course of this career, he has represented both plaintiffs and defendants. He has defended large corporations, but also sued them. He has advocated for the Chamber of Commerce, but also found and prevailed with -- has prevailed with class actions on behalf of consumers. We should applaud such independence of mind and spirit in Supreme Court nominees," unquote.

Now, Mr. Chairman, I ask consent that this column appropriately titled, quote, "There is no principled reason to vote against Gorsuch," unquote, be included in the record at this point.

Mr. Chairman?

GRASSLEY: Without objection, so ordered. HATCH: Judge, is that an accurate description of your work in private practice?

GORSUCH: It is, and I'm grateful that David is here today with me.

HATCH: I'm grateful he's here, too.

GORSUCH: Senator, I represent -- I wanted to go to a place where I could represent plaintiffs as well as defendants, not pick one side of the beat. I thought that would make me a better lawyer and I'd see more of life that way. And I did. And we represented small plaintiffs. My very first trial, I represented a man who bought a gravel pit. And the prior owner wouldn't leave. They stole the gravel. And we had to kick him out. And then he brought a bunch of lawsuits for we thought malicious use of process, trying to kick my guy out.

Well, we found an old statute that said when you furtively mine another person's property, you get statutory damages. It was quite an unexpected find. It was like a 100-year-old law -- no furtive mining, the no furtive mining statute.

And we brought suit and won a claim for conversion and malicious use of process, among other things, in county court. It may have been one of the highlights in my career when one of the jurors came up afterwards and said to me, "Son, you're a young Perry Mason."

(LAUGHTER)

That was my first trial, Senator. I represented large defendants. I represented large plaintiffs as well, along with a very significant team, my partners. We won what was at that time, I don't know if it still is -- they've probably done better now -- the largest plaintiff's side antitrust verdict that had been affirmed in American history. GORSUCH: We represented class actions of consumers, some dry holes; some successful. All sorts of clients -- individuals, companies, non-profits, represented pension funds, public employee pension funds, a variety of clients. It was a great and wonderful practice, and I loved every minute of it.

HATCH: You're a person with great experience for your young age, I have to say. Liberal groups also claim that you favor employers over employees. In fact, they suggest that you actually -- you are actually biased in that direction. An analysis published in the Stanford Law Review, however, came to a very different conclusion.

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Now, here's the conclusion: Quote, "After surveying his labor and employment decisions, it is clear that Judge Gorsuch does not favor or oppose employees, employers, unions or the NLRB. His opinions do not show pro-labor or anti-labor tendencies", unquote. The author says that parties who come before you, quote "Can rely on a record of fair analysis and resistance to simply rubber stamping business interests or executive agency actions", unquote.

Now, Mr. Chairman, I ask that this essay be included in the record at this point.

GRASSLEY: Without objections, so ordered.

HATCH: Judge, is that your goal, to focus only on the facts and the law in every case?

GORSUCH: Senator, I'm heartened by that article. I hadn't read that one, hadn't seen it.

HATCH: It's a good article.

GORSUCH: But to answer your question, when I became a judge, they gave me a gavel, not a rubber stamp. And nobody comes to my court expecting a rubber stamp.

HATCH: That's good. *The Supreme Court* recently decided two cases coming from your court that involved the Religious Freedom Restoration Act, a bill that I was instrumental in. I was one of its authors. I talked Senator Kennedy into coming on board. When Clinton signed it on the South Lawn, Kennedy was the biggest duck in the puddle. He was very proud of that particular bill.

RFRA makes it difficult for the government to substantially burden the exercise of religion and applies this protective standard to everyone and to every exercise of religion. Now, these cases address whether the Affordable Care Act's birth control mandate violated RFRA or the Religious Freedom Restoration Act.

You were in the majority deciding that RFRA applied to the plaintiffs in both cases, and that the birth control mandate failed to meet RFRA's standard. Opponents of your nomination do not like this result. They accuse you of being anti-woman. That, of course, isn't true at all, and any fair person would have to conclude it's not true. Your critics simply demand that as a judge, you must follow their political priorities, that availability of birth control is more important than religious freedoms.

Now I have two questions about your decision. Isn't that really a policy dispute that should be addressed by Congress? And was your job in these cases to impose your or anyone else's priorities, or to interpret and apply those statutes the way Congress enacted them?

GORSUCH: Senator, our job there was to apply the statute, as best we could understand its purpose, as expressed in its text. And I think every judge who faced that case -- everyone -- found it a hard case and did their level best. And that's all any judge can promise or guarantee. I respect all of my colleagues who addressed that case.

HATCH: Well, we respect you for doing so.

You wrote a concurring opinion in the Hobby Lobby case. You wrote about the Religious Freedom Restoration Act this way, quote, "It does perhaps its most important work in protecting unpopular religious beliefs, vindicating the nation's long-standing aspiration to serve as a refuge of religious tolerance", unquote.

In other words, Congress enacted RFRA to apply broadly and robustly to ensure that, among other things, the little guy would be protected as much as the big one. Is it fair to say that the court's decision in Hobby Lobby and your concurring opinion upheld this purpose, and in doing so, effectively promoted religious tolerance? GORSUCH: I might give you even a couple of other examples of RFRA's application that I've been involved in that might shed some light on this. It's the same statute that -- that applies not just to Hobby Lobby. It also applies to Little Sisters of the Poor and protects their religious exercise. And it's also been applied in a case where I had point of council.

So, I saw something meritorious there. And our court held. It applied to a Muslim prisoner in Oklahoma who was denied a halal meal.

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HATCH: Right.

GOR SUCH: So also the same law that protects the rights of a Native American prisoner who was denied access to his prison sweat lodge. It appeared solely in retribution for a crime that he committed. And it was a heinous crime.

But it protects him, too. And I wrote those decisions as well, Senator, yes. I -- I wrote -- I wrote the Native American prisoner case. And I participated in and I wrote a concurrence in the Muslim prisoner case.

HATCH: Well, thank you for doing so. I also want to give you a chance to answer or respond to a few things that were said during statements on Monday.

One of my Democratic colleagues said it is important to know whether you are a surrogate for President Trump or for particular interest groups. Are you?

GOR SUCH: No.

HATCH: Of course not. Another senator mentioned just a few of the thousands of cases in which you participated in and said quote, "I'm troubled by the results in those cases," unquote.

You never took issue with how you applied the law in those cases. He said I'll need that -- the results troubled him. And I described Monday in my opening statement, I have contrasted judges who focus on the process or arriving at a result with judges who focus on what they want the result to be.

Which approach do you associate with?

GOR SUCH: I associate myself with the approach.

HATCH: Sure.

GOR SUCH: I think all good judges attempt...

HATCH: Certainly (ph).

GOR SUCH: ... to follow the law wherever it leads.

HATCH: My time is up, Mr. Chairman. I'm sorry.

GRASSLEY: Senator Leahy?

LEAHY: Thank you...

(CROSSTALK)

LEAHY: Good to have you back. Now, you know from our earlier discussions -- and I had told you very frankly that of course I felt that if the Republicans had followed the Constitution in practice (ph) Chief Judge Merrick Garland would be on the Supreme Court today.

I also respected you for calling Chief Judge Garland when your nomination was announced. I understand you respect him as a jurist, is that correct?

GOR SUCH: Very much so, Senator. Whenever I see his name attached to an opinion, it's one I read with special care. He's an outstanding judge.

LEAHY: Do you think he was treated fairly by this committee, yes or no?

GOR SUCH: Senator, as I explained to you before, I can't get involved in politics. And there's judicial canons that prevent me from doing that. And I think it'd be very imprudent of judges to start commenting on political disputes between themselves or the various branches.

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LEAHY: The reason I asked that question, since this committee began holding hearings -- public hearings, since (ph) Supreme Court nominations began in 1916 -- I wasn't here at that time. But it has never denied a hearing or a vote to a pending nominee ever until Chief Judge Garland.

I can't express his (ph) opinion. I think it was shameful. I think it has severely damaged the reputation of the committee.

I think it has severely damaged the reputation of the Senators who concurred with that. We were anything by the conscious of the nation in that regard. And those who proudly held their hand up for this and swore they would uphold the Constitution of the United States did not.

Now, it becomes more of a problem because it appears the president outsourced your selection for the far-right, big money, special interest groups. And you may not like that terminology. But even Republican senators have -- have praised the fact that the president had gone to this group and had a list when he's running for office of who he could select from. The list given not by -- prepared by him, but by these special interest groups.

And they want -- they have an agenda. They're confident you share their agenda. LEAHY: In fact, the first person who interviewed you for this nomination said they sought a nominee "who understands things like we do."

And, Mr. Chairman, I would ask that an article in the Wall Street Journal entitled "Trump's Supreme Court Whisperer" be included in the record.

GRASSLEY: Without objection, so ordered.

LEAHY: And another one in which the New York Times, "In Gorsuch, Conservative Activist Sees Test Case for Shaping the Judiciary," that those be included in the record.

GRASSLEY: Without objection, so ordered.

LEAHY: Now, the two (inaudible) right interest groups that recommended you to the president, I want you to have a chance to talk about this, the Federalist Society and the Heritage Foundation, applauded the Citizens United decision, which allowed unrestricted corporate money to pour into elections.

You have suggested that constitutional law should be grounded solely in the original meaning of the text. You have said judges should, I quote you, "strive to apply the law as it is, focusing backward, not forward." Well, if they do that, let's go to the First Amendment.

Do you believe that James Madison and the other drafters of the First Amendment understood the term "speech" to include corporate money being funneled into campaigns?

GORSUCH: Senator, I can tell you that the Supreme Court of the United States has a lot of precedent in this area, as you're well aware. Quite a lot of it permitting Congress to compel disclosure; to limit contributions; and a lot of other case law in this area. There's a lot of precedent in this area.

LEAHY: Well, is there precedent from the drafters that speech included corporate money being put into corporations -- being put into campaigns?

GORSUCH: Senator, that was exactly what was at issue in part in Austin (ph), and then again in Citizens United. And the Supreme Court issued a variety of opinions on that subject, on that very subject, looking back to the original understanding of the First Amendment to see whether it embraced the speech at issue in those cases. And different justices came to different conclusions on that score.

LEAHY: But nothing in the Federalist Papers talked about corporate money going into campaigns. Is that correct?

GORSUCH: Well, Senator...

LEAHY: That's an easy yes or no.

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GORSUCH: I think there's an awful lot in the Federalist Papers and elsewhere that were relevant to and considered by both concurrences and dissents in Citizens United.

LEAHY: But nothing about corporate money.

GORSUCH: I don't remember that term, no, Senator.

LEAHY: Trust me...

(CROSSTALK)

LEAHY: ... trust me, there wasn't.

GORSUCH: I trust you.

LEAHY: OK.

GORSUCH: Entirely.

LEAHY: No, you don't have to.

(LAUGHTER)

GORSUCH: Not that much?

(LAUGHTER)

LEAHY: The -- I'll let it go.

(LAUGHTER)

The -- in Citizens United, Justice Kennedy indicated restrictions on campaign donations could only be justified by concerns about quid pro quo corruption. Now, President Trump has said, and I quote, that the reason he made campaign donations was so that when he needs something from them, "they are there for me." (inaudible) his campaign contributions buy favors.

Shouldn't Congress, not the courts, make the determination about the potential for corruption, especially if we're talking about quid pro quos?

GORSUCH: Senator, I think there is lots of room for legislation in this area that the court has left. The court indicated that if, you know, proof of corruption can be demonstrated, that a different result may obtain on expenditure limits. LEAHY: (inaudible) you don't believe that putting an unlimited amount of money by somebody who has a particular interest in the outcome of actions by the Congress, putting unlimited amount of money into specific campaigns, that's not enough to show the intent to buy favors, or enough to show corruption? GORSUCH: I'm not sure I track the question, Senator. I'm sorry.

LEAHY: If you have corporate money that is basically unlimited under Citizens United, can be funneled through various special interest groups, does that at least raise concerns about quid pro quo corruption?

GORSUCH: I think after Citizens United made clear that quid pro quo corruption remains a vital concern and a subject for potential legislation and I think there is ample room for this body to legislate even in light of Citizens United whether it has to do with contribution limits, whether it has to do with expenditure limits or whether it has to do with disclosure requirements.

LEAHY: If somebody were to out and out buy a vote or buy a favor, we'd all agree that's corruption, is it not?

GORSUCH: I think Justice Kennedy would agree with you, yes.

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LEAHY: Would you agree with me?

GORSUCH: I follow the law and that's my understanding -- that would certainly fall within my understanding of the law.

LEAHY: When I was a prosecutor, we'd call that corruption.

GORSUCH: All right. I'll trust you there too, Senator.

LEAHY: And I did. Now -- but it influences different ways. For example, when you became a judge, you were here in Washington; you were working in Washington. I'm -- I understand there were three extremely well-qualified (inaudible) women attorneys who were on the short list being considered by the Bush White House. The "Denver Post" then did a profile of these women and at that point -- and your name was not on -- on that list.

At that point, a billionaire conservative donor intervened. He lobbied the White House to appoint you. You were his lawyer, he liked you, he made donations to the same far-right interest groups that were on the list that recommended you to President Trump. Are these areas of concern?

GORSUCH: Senator, with respect to my nomination, I -- as I recall...

LEAHY: ...I'm talking about the circuit. GORSUCH: Yeah, yeah. As I recall, all of my clients were -- an awful lot of them came out of the woodwork to say nice, supportive things about me and Phil Anschutz was one and I -- I think there's probably letters in there from the fellow with the gravel pit too.

LEAHY: Which -- which one do you think the White House listened to the most, Mr. Anschutz or a gravel pit owner? I mean let's be realistic.

GORSUCH: Senator, I think what they probably listened to was the fact that they'd seen me in action at the Department of Justice. That's my guess, if you ask me to guess but that's a guess because I didn't make the decision.

LEAHY: I raise this because some of these same people helped to fund the groups that put you on the list for President Trump. Now, President Trump, you know, has attacked judges who dare to oppose the constitution. He's gone after them. He's said things that I don't think any one of us would do. So you have to prove you can be an independent judge. You've heard that from both sides here.

Let me ask you a question in this regard; you are a person who believes in religious freedom, you've said that before. In December 2015, the Senate Judiciary Committee adopted my sense of the Senate that the, quote, "The United States must not bar individuals from entering into the United States based on their religion." This passed almost every Senator with the exception of Then-Senator Sessions, a couple others voted for it.

Now does the First Amendment allow the use of a religious litmus test for entry into the United States?

GORSUCH: Senator, that's an issue that's currently being litigated actively, as you know, and I...

LEAHY: I'm not asking about the litigation, the Ninth Circuit or anything else. I'm asking about the fact, is a blanket religious test, is that consistent with the First Amendment? GORSUCH: Senator, we have a free exercise clause that protects the free exercise of religious liberties by all persons in this country. If you're asking me how I apply it to a specific case, I can't talk about that, for understandable reasons.

LEAHY: Well, could the -- could the...

GORSUCH: The understandable reasons, just -- just so, you know, we're -- we're -- I'm frank and candid with you as I can be. Senator, when you ask me to apply to a set of facts that look an awful lot like a pending case in many circuits now...

(CROSSTALK)

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LEAHY: Would the president have the authority to ban all Jews from the United States or all people that come from Israel?

GORSUCH: Senator...

LEAHY: Would that be an easy question?

GORSUCH: We -- we have a Constitution, and it does guarantee free exercise. It also guarantees equal protection of the laws and a whole lot else besides. And the Supreme Court in Zadyddas (ph) has held that due-process rights extend even to undocumented persons in this country, OK. I will apply the law. I will apply the law faithfully, and fearlessly and without regard to persons. I don't care...

LEAHY: Regards of religion?

GORSUCH: Anyone, any law is going to get a fair and square deal with me. My job as a judge is to treat litigants who appear in front of me as I wished to be treated when I was a lawyer, with my client, large or small. I didn't want them discriminated against because they were a large company or a small individual with an unpopular belief. And that's the kind of judge I've tried to be Senator, and I think that's my record.

LEAHY: Well Judge, let me ask you this. Do you -- do you agree with me that there should not be a religious test in the United States?

GORSUCH: I -- I -- I need to -- to know more specific...

LEAHY: Well let me give you an example, should there be a religious test to serve in the military?

GORSUCH: Oh Senator, that would -- that would be inappropriate, yes. That's -- that's against the law. It's against the law.

LEAHY: Go right back to the question (inaudible) based solely on their religion, solely on their religion...

GORSUCH: Senator we have...

LEAHY: Not -- not on whether they form a threat or something, but to ban somebody solely on their religion.

GORSUCH: Senator, we have not just the First Amendment free exercise clause in this country, very important protection. We have not just equal protection guarantee of the 14th Amendment, which prohibits discrimination on the basis of race, gender, ethnicity. We also have the Religious Freedom Restoration Act that Senator Hatch mentioned, which was a bipartisan bill, passed by the body with support of Senator Kennedy and Senator Schumer when he was in the House. And that imposes an even higher standard on government than the First Amendment when it comes to religious discrimination. It says that there, if there's any sincerely held religious belief, earnestly held religious belief, the government must meet strict scrutiny before it may regulate on that basis, with the strict scrutiny being the highest standard known in American law.

LEAHY: Well, the reason I ask these questions, there is a legitimate concern. I hear stories from my grandparents when signs used to say no Irish need apply, or no Catholic need apply. I'm sure Senator Feinstein can speak about those of her religion. President Trump promised a Muslim ban. He still has on his website to this day, he's called for a total and complete shutdown of Muslims entering the United States. And a Republican congressman recently said, the best thing the President can do for his Muslim ban is to make sure he has Gorsuch on the Supreme Court before the appeals get to that point.

GORSUCH: Senator, a lot of people say a lot of silly things. My grandfather...

LEAHY: That's more than silly. That's a -- he wants -- this congressman wants you on the court so that it can uphold a Muslim ban. GORSUCH: Senator, he has no idea how I'd rule in that case.

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And Senator, I'm not going to say anything here that would give anybody any idea how I'd rule in any case like that that could come before the Supreme Court or my court of the Tenth Circuit. It would be grossly improper of a judge to do that. It would be a violation of the separation of powers and judicial independence if someone sitting at this table, in order to get confirmed, had to make promises or commitments about how'd they rule in a case that's currently pending, and likely to make its way to the Supreme Court.

LEAHY: Well, our -- the president's national security determinations, are those reviewable by the court?

GORSUCH: Senator, no man is above the law.

LEAHY: OK. Because (inaudible) asserted that there are national security determinations are unreviewable by the courts. I've heard president's -- other president's say it in the past. I disagree when they say that. Do you disagree?

GORSUCH: Senator, as a judge -- as a judge, I apply the law. And the law here, I think, is Youngstown. I look to Justice Jackson.

LEAHY: OK.

GORSUCH: And Justice Jackson wrote a brilliant opinion in Youngstown. Now, it's really important to know who he was. He was the fiercest...

LEAHY: I wrote a paper about him, so I know it.

GORSUCH: I know you did. I know you did. Well, I know you're -- we talked about it. And here was the fiercest advocate of executive power, as FDR's attorney general. Fierce advocate of executive power. And when he became a judge, he said, "The robe changes a man, or it should." And you go from being an advocate to being a neutral adjudicator.

And the Youngstown system of analysis, when it comes to presidential power and foreign affairs, has three categories. One, the president acting with the concurrence of Congress. That's when the president is acting at his greatest strength, because they're shared responsibilities in our Constitution. He has commander in chief power; this body has power of the purse and the power to declare war assigned to it in Article 1. When the Congress and the president are in disagreement, that's the other end of the spectrum. The president there is acting at the lowest ebb of his authority. When Congress is silent, that's the gray area in between. That's how a court, as opposed to a lawyer or advocate, approaches the problem.

LEAHY: Well, then, let's go to that then. President Trump has declared that torture works. And he says, and I quote him, "bring a hell of a lot worse than waterboarding", closed quote. A 2002 memo, out there by the -- from the Office of...

(UNKNOWN): Legislative.

LEAHY: ... Legal Counsel claimed that any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vestate (ph) of the commander in chief in the president.

Now, considering the fact that Congress has passed a law on this, what controls (ph)?

GORSUCH: We have a convention against torture and implementing legislation which banned torture. We have the Detainee Treatment Act, which we talked about earlier, which bans cruel, inhuman and degrading treatment. We also have an 8th Amendment.

LEAHY: Well, let me ask you this, does the president have the right to authorize torture, if it violates the laws that have been passed by Congress, or the other ones you cited?

GORSUCH: Senator, no man is above the law.

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LEAHY: Well, then, let me ask you another question. President Bush's warrantless surveillance program, and you were working there, resulted in the illegal collection of thousands of Americans communications. Now, many of us felt that it is a direct violation of our surveillance laws.

The Justice Department Attorney John Yoo justified the program. He said that statutes passed by Congress cannot infringe the president's inherent power under the Constitution to conduct national security searches.

So, do you believe that President Bush's warrantless surveillance program was justified because the president had, quote, "inherent power to override our surveillance laws to conduct national security searches"?

GORSUCH: Senator, as a judge, before I even try to decide a question like that, I'd want briefs, an argument, and I'd want to go through the whole judicial process. I wouldn't begin and try to attempt to offer an off-the-cuff opinion...

LEAHY: Let me ask it -- ask it a different way.

If Congress passed a specific law on surveillance, and if a president said "I'm going to violate that law because I'm president," does he have that power? GORSUCH: No man is above the law, Senator.

LEAHY: OK.

Senator Lee, who was here a minute ago, I don't -- Senator Lee and I led the efforts to pass the USA Freedom Act to end the NSA (inaudible) collection of America's phone records, had a clear decree from Congress that dragnet collection of Americans' phone records is not permitted. Is it still your answer that the president does not have a power to supersede that law?

GORSUCH: Senator, I can't issue advisory opinions at this table in cases or controversies and how they would come out. And I just -- I can't do it, it wouldn't be responsible.

LEAHY: Is that law...

GORSUCH: Every law that this body passes I take seriously. I respect this body and nobody is above the law in this country, and that includes the president of the United States.

LEAHY: Well, when you were there -- I don't know whether these are among the things that Senator Feinstein gave you, but when Jay Bybee wrote, "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the commander-in-chief in the president." And you appear to have advocated for a similar view when you attempted to give President Bush the flexibility not to be bound by Senator McCain's legislation.

GORSUCH: Senator, my recollection is that Mr. Bybee was long gone from the department before I ever showed up and that by the time I got there, the department and the president were willing to work with Congress to try and establish a regime that would govern operations at Guantanamo. That's my recollection and my role was a lawyer and predominantly overseeing litigation filed by others against the government.

I had a role as a lawyer, a significant one, but I was not a policymaker, Senator.

LEAHY: Were you involved in Hamdan v. Rumsfeld?

GORSUCH: Senator, Hamdan, I recall, was a decision that passed in the first instance on the Detainee Treatment Act. So to the extent I was involved in providing advice as a lawyer about the Detainee Treatment Act, I'm sure, yes. LEAHY: OK. You've read the Shelby County decision. If you were on the court, which side would you have voted with?

GORSUCH: Senator, I admire the various ways...

(LAUGHTER)

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You -- you would be a formidable companion in the courtroom.

LEAHY: Senator Feinstein said don't let it go to your head, Pat.

(LAUGHTER)

GORSUCH: Oh, he should.

LEAHY: I'm not, I'm not. I'm just -- I'm a lawyer from a small town.

GORSUCH: Yeah, all right. I've heard that story. Whenever a lawyer says, "I'm just a lawyer from a small town," watch out. He's about -- last time -- you got to watch your wallet because it's gone quickly in my experience and I might have played that line once or twice myself.

LEAHY: I ask these questions because there were -- both Justice Alito when he was before us and Justice Roberts and -- and Judge Roberts answered some precedent questions. And are you saying there are no precedent questions you could answer? GORSUCH: Well, no, Senator, I'm happy to say Shelby is a precedent of the United States Supreme Court. It's a recent one, it's a controversial one, I understand that. What its precedential reach will prove to be remains to be seen because for example, as I read it, the decision left room for Congress to legislate in this area if it wishes, to make new findings, and to express a new possible regime for section four and section five coverage.

And that possibility is live and could yield further litigation, undoubtedly would.

LEAHY: You've been critical of class actions. And Justice Scalia in Ledbetter case, and the Wal-Mart-Dukes case, made it more difficult, I believe, for Americans to have their day in court. Would you have joined Justice Scalia's decision in Wal-Mart?

GORSUCH: Well...

(CROSSTALK)

LEAHY: ... just (inaudible) answer you want.

GORSUCH: Senator, I would tell you that my record on class actions I think will reflect, if you look, and I know you have, that I represented class actions. I represented people fighting class actions. I've ruled against class actions and I've ruled for class actions. And in each case, it depends upon the facts and the law presented to me.

The most recent class action case, significant one that I can think of, involved residents who lived near Rocky Flats, a uranium processing plant, made nuclear weapons outside of Denver. And those folks filed a class action for damage to their property, and it took 25 years for that case, bouncing up and down and back and forth across the legal system, before I finally issued a decision saying "stop, enough," they win. They had a trial. The jury found for them, and they win. Finish the lawsuit.

And I believe it has been finished. And I believe they've been finally paid, though of course it's been so long, many of them, it's their children who are getting the money.

GRASSLEY: Before Senator Graham, I thought I'd give some directions. We have this vote at noon. It's just one roll-call vote. And Senator Graham should finish about 11 -- 12:11 or 12:12. And then we'll adjourn, depending on when your last word is in answer to his question, 30 minutes later. So somewhere around 12:40, 12:45, I'll gavel the committee back into session.

And you need to be reminded that you shouldn't be offended as members go to vote, and you'll have your 30 minutes. And I hope that's enough, because I want to keep this moving. You can be back here around 12:45 or thereabouts.

I'll wait until you get the orders.

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(LAUGHTER)

Does that detract from anything?

GOR SUCH: We're OK.

GRASSLEY: OK.

Senator Graham?

And Senator Graham, if I go ahead of time, you will adjourn the committee, recess the committee until that time.

GRAHAM: Yes, sir. Yes, sir.

Well, Judge, I want to read a statement here that I associate myself with. I certainly don't want you to have to lay out a test here in the abstract, which might determine what your vote or your test would be in a case you have yet to see that may well become before the Supreme Court.

Does that sound like a reasonable standard?

GOR SUCH: Yes, Senator.

GRAHAM: That's what Senator Leahy said on July 21st, 1993. I think it was good then. I think it's good now.

You're not a political person. I am. So I want to take a bit of a moment here to talk about the fairness of what's going on in terms of you and Judge Garland.

Judge Garland was a fine man. I'm sure I would have voted for him. At the time his nomination came about, we were in the middle of selecting a new president. We were in the last year of President Obama's term. To my Democratic colleagues, I want to remind you of some things that people on your side have said.

On June 25th, 1992, it was an election year, there was a suggestion that maybe one of the judges on the Supreme Court would step down before the election in November. This is what the chairman of this committee, Joe Biden, said about that possibility then. GRAHAM: "It would be our pragmatic conclusion that once the political season is underway, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over. If someone steps down, I would highly recommend the president not name someone, not send a name up. If the Bush -- if Bush did not send someone up, I would ask the Senate to seriously consider -- if Bush did send someone up, I would ask the Senate to seriously consider not having a hearing on that nominee."

That was Joe Biden. The possibility of a vacancy coming about by somebody stepping down, not dying once the campaign season was afoot.

Justice Alito passed away in February. There had already been three primaries. The campaign season, in my view, was afoot. This is what Senator Reid said on May 19, 2005. "The duties of the United States Senate are set forth in the Constitution of the United States. Nowhere in that document does it say the Senate has a duty to give presidential nominee a vote."

This is Senator Schumer in last, July of 2007. "We should reverse the presumption of confirmation. We should not confirm any Bush nominee to the Supreme Court except in extraordinary circumstances." And that was the last year of President Bush's last term.

To my Democratic colleagues, on November the 21st, 2013, you decided when you were in charge of this body by 52 to 48 vote to change the rules of the United States Senate for the nomination of executive branch appointments and all judges below that of the Supreme Court. I'm not gonna ask you whether you think that was fair or not because that's not your job.

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I will say to the public I thought it was incredibly unfair. I thought it was a power grab by our Democratic colleagues that will change the nature of the judiciary for the rest of our lives because what you have done is you made it that you can confirm a judge now within one party if you have over 50 votes, not having the requirement to reach across the aisle to pick up a vote or two, which is a moderating influence. That is lost forever for all the judges below **the Supreme Court**.

I was in the gang of 14 that was formed to deal with a wholesale filibuster of all Bush nominations. New to the body, I felt it would be bad to change a 100-and-something, almost 200-years I guess plus precedent of how we deal with nominations coming from a president. But there was a wholesale filibuster of everything Bush. And there were 14 of us. I think I'm one of two or three left that believe that it was wrong to filibuster Supreme Court judges and judges in general because you don't like the outcome of the election.

And we came up with a standard that you should only filibuster in extraordinary circumstances, which I think is consistent with what Hamilton had in mind in terms of the role of the Senate. That you expect a Republican nominee or a Republican president to pick someone different than the Democrat president because that's what the campaigns are all about.

Qualified judges -- and I believe that Sotomayor and Kagan were well within the reasonable mainstream of judges who would be to the left of center (ph) in the judicial philosophy world, that's why I voted for them. But now things are different.

I believe that that vote, November the 21st, 2013, forever changed the way the Senate works when it comes to executive appointments, judicial nominations, and will do long-term damage to the judiciary as a whole because the most ideological will be rewarded. We don't have that requirement yet for **the Supreme Court** and I hope we never will. Time will tell. I'm not optimistic.

At the time of that vote, the Senate had confirmed 19 of President Obama's judicial nominations. That same time, in President Bush's second term, there had been four confirmed. I thought it was a manufactured crisis. I thought it was politically motivated. And when it comes to cries of being unfair, they fall on deaf ears.

As to Justice Garland, fine man. I fully expected Trump to lose. He won. I think he deserves the right of every president to pick qualified people, and that's just not me saying that. This is what the Federalist Papers Number 76 said about the requirement of advise and consent. This is what Mr. Hamilton wrote a very long time ago in 1788. GRAHAM: "The Senate could not be tempted by the preference they might feel to another to reject the one proposed because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They cannot even be certain that a future nomination would present a candidate in any degree more acceptable to them. To what purpose then require the cooperation of the Senate? It would be an excellent check upon a spirit of favoritism in the president. It would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment or from a view to popularity."

That was the check and balance, advise and consent rules of the game that were established in 1788. When you look at the history of the Senate's role in confirming justices to **the Supreme Court**, it has changed dramatically. Many of the judges of **the Supreme Court** were confirmed without a hearing, some without even a recorded vote. I'm not here to say that my party is without fault in the area of judges, we're not. I'm here to say that on 2013 -- in November 2013, the game changed in a way that I think Mr. Hamilton would be very disappointed in.

And it's not that I don't understand, I very much do. When my time came for Sotomayor and Kagan to appear before this committee, I knew what awaited me if I applied the Hamilton standard. Partisan people abound on both sides of the aisle. The ferocity by which people wanted me to vote no was real, apparent and I could feel it. I believed that if -- if Strom Thurmond could vote for Ginsburg and that 98 senators could vote for Scalia, that there was a point in time where it was expected that you would vote for somebody you would not have chosen, you would use the qualifications of that person.

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So, we find ourselves here today, confronting a nomination of one of the most qualified people I think President Trump could have chosen from the conservative world. You are not an unfit person. I don't think there's any reason to suggest that you're his favorite.

Had you ever met President Trump personally?

GOR SUCH: Not until my interview.

GRAHAM: In that interview, did he ever ask you to overrule Roe v. Wade?

GOR SUCH: No, Senator.

GRAHAM: What would you have done if he had asked?

GOR SUCH: Senator, I would have walked out the door. It's not what judges do. They don't do it at that end of Pennsylvania Avenue and they shouldn't do it at this end either, respectfully.

GRAHAM: This is what the speaker -- excuse me, the Democratic leader in the House said about you. "Neil Gorsuch is a very hostile appointment and a very bad decision, well outside the mainstream of American legal thought. If you breathe air, drink water, eat food, take medicine or in any other way interact with the courts, this is a very bad decision."

I want to ask you to respond to what I think is complete, absolute political garbage. And statements like that were also directed against Justice Sotomayor and Kagan. I remember Sotomayor being called a racist because she gave a speech that was edgy. I remember Elena Kagan being called unpatriotic because she was involved in a decision at Harvard to kick the ROTC unit off the campus. And the reason I didn't buy one was a racist and the other was unpatriotic is because I took the time to look at the way they lived their lives and I listened to what people had to say who had interacted with them all their lives. GRAHAM: To my Democratic colleagues, if you take the time to listen to people who have interacted with Judge Gorsuch throughout his entire career, you will find pretty quickly that he's a fine decent man who has tried to be a good father, a good husband, a good lawyer and a good judge. And if you don't want to take the time, it says more about you than him.

All I can say is that it is impossible to conclude that what Nancy Pelosi said about you is anything other than political talk because there are no facts to justify them. The ABA gave you the most highly qualified rating they could give anybody. I just want you to know that I believe you have led a life you should be proud of, that you have tried your best to be a good father, a good husband, a good lawyer and a good judge.

Now, let's talk about our interaction a long time ago.

GOR SUCH: Thank you, Senator, for those very kind words.

GRAHAM: Well, it's something you've earned, not something that you need to thank me for.

The bottom line is, are we at war, in your view, as a nation?

GOR SUCH: Senator, all I know is that there are a lot of young men and women out there in harm's way so that we may sit here and have this conversation.

GRAHAM: It would be news to them we're not at war.

GOR SUCH: I'm sure that's right.

GRAHAM: It would be news to the families who've lost a loved one in this fight. So I think we're at war. Would you agree with me it's not a traditional war?

GOR SUCH: Certainly not, Senator.

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GRAHAM: There is no capital to conquer, no air force to shoot down and no navy to sink. There's no taking of Berlin and Japan. Do you agree with me it would be hard to determine when the war is actually over?

GOR SUCH: Senator, that was the question that the court struggled with in the Hamdy (ph) case, as you know.

GRAHAM: And we had a lot of conversations about how to proceed forward when you were in the Bush administration, is that correct?

GOR SUCH: We did.

GRAHAM: And you were in the camp of the Youngstown Steel camp that if Congress is involved, the president is stronger, not weaker, is that right?

GOR SUCH: That's right, Senator.

GRAHAM: But there are some authorities that the president as commander-in-chief have that cannot be taken away by the Congress. They're inherent to the job. Is that true also?

GOR SUCH: There are certainly people who believe that, Senator.

GRAHAM: Well, I am one of them. But having said that, because you can't have 535 commander-in-chiefs, Senator McCain and myself were trying to pass legislation that basically codified the practices of the Bush administration post-waterboarding. Is that a fair summary of the conflict?

GOR SUCH: Yes, Senator. I believe it is.

GRAHAM: There were people in the Bush administration that did not want to go down the road that waterboarding was torture. That was not the view of Senator McCain or myself. At the end of the day, the Detainee Treatment Act codified how we treat enemy combatants in a time of war in terms of what practices we can employ in terms of interrogation standards. Is that correct?

GOR SUCH: Yes.

GRAHAM: And it also tried to come up with a system of judicial review. I was in the camp that we're at war, and in past wars, you don't give enemy prisoners lawyers. I don't remember any German or Japanese prisoner having a lawyer when they were captured. So traditionally, is it the commander-in-chief's job to determine who the enemy force is?

GOR SUCH: There's certainly legal authority suggesting that, Senator.

GRAHAM: And this court's job to determine if the procedures in question pass muster?

GOR SUCH: That's correct, Senator. Of course this body plays a role, too.

GRAHAM: So the dilemma was that I believed it was the Department of Defense, the commander-in-chief's job to determine the enemy force because that's their expertise. And Congress could regulate the naval and land forces and we had a say about how they could do that and the courts have a say as to whether or not the procedures used by the president and Congress pass constitutional muster. Is that the general layout of this situation?

GOR SUCH: That's the separation of powers at work. GRAHAM: And there was a cross-current here. You were -- there was an e-mail that you weren't part of. You were not included on the e-mail. But it says, "Neil and I have just been told separately this is not what the White House wants. We have been given authorization to engage on the Graham amendment, not just authorization. They want us to engage, to eliminate if possible, but if not, to fix. DOD, not DOJ, has the lead, which may be what led to DOJ L.A.'s (ph) confusion. But the key point for us is that we have green light to engage on Graham."

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And what I was trying to do was preserve the combat status review tribunal concept of the ARB, Administrative Review Board, concept and allow the courts to judge the work product at the D.C. Circuit Court of Appeals. They have judicial review, but let the CSRT go first. Do you remember that?

GORSUCH: I do.

GRAHAM: OK. And it was settled in the Congress for the combat status review tribunal would have the first shot at determining whether somebody is an enemy combatant and the D.C. Circuit Court of Appeals could review their work product, see if it was capricious or arbitrary, if it made sense. The Supreme Court (inaudible) struck that down, saying it was not an adequate substitute for habeas. Is that correct?

GORSUCH: That's absolutely correct, Senator.

GRAHAM: And your role in all this was try to find out a way to engage Congress on the Detainee Treatment Act because it was your view that Congress being involved would strengthen the president's hand.

GORSUCH: As a lawyer?

GRAHAM: Yes.

GORSUCH: I was not a policymaker. But I did advise, as did many others. There were many other very fine lawyers too, Senator, who advised the administration that engaging Congress would be a good idea because we had read our Youngstown and our Justice Jackson.

GRAHAM: Any lawyer, I think, who understands this area of the law would suggest the president's stronger when he has congressional support.

The signing statement. Is it fair to say there was a conflict between the vice president's office and other parts of the Bush administration about what this signing statement should say or look like?

GORSUCH: That's my recollection and that's about all I can recall.

GRAHAM: I remember it very well because Vice President Cheney's signing statement was going to be we have an authority -- inherent authority to do whatever we think we need to do. And there were a lot of other people saying no, you don't have the authority just to set aside a law, you have to have a reason to object to it.

So, I just want the public to understand that when it comes to this man, I've seen him in action in very complicated, emotional matters, where he had one group of people who could give a damn about the terrorist and the other group of people that wanted to criminalize what I thought was a real world fight and we tried to find that middle ground.

And in a 5-4 decision, the Supreme Court struck down my proposal and we fixed it later, with a huge bipartisan vote, so that every enemy combatant today has a habeas proceeding, where the government has to prove by preponderance of the evidence you're in fact an enemy combatant. And if they reach that conclusion, you can be held under the law of war as long as you're a threat to our nation. Is that a fair summary of where we're at?

GORSUCH: That's my understanding, Senator. Along the way, we -- your legislation did prevail in the D.C. Circuit and the Supreme Court. Of course, it was a close call, it was 5-4 as I recall.

GRAHAM: Yes, and that just proves that five people can be wrong.

(LAUGHTER)

So, while I disagree, I certainly respect the court's decision.

GORSUCH: You're not going to get me to commit on that one either.

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GRAHAM: Don't worry, I'm not even going to -- not even going to try.

The bottom line here is there will be more legislation coming or regarding the role of the government in gathering information. But from sort of a civics point of view, which Senator Sasse is going to take you through, there's a difference between the law of war and domestic criminal law. Do you agree with that?

GORSUCH: Yes, Senator.

GRAHAM: That a common criminal -- the goal of the law is to prosecute a crime that one individual or group committed against another individual or groups. That's correct?

GORSUCH: That's right. GRAHAM: The law of war is about winning the war.

GORSUCH: Well, Senator, there are...

GRAHAM: How you fight the war.

GORSUCH: There are, as you know, rules about that, too.

GRAHAM: Right.

GORSUCH: Laws about that.

GRAHAM: Yeah. And we're fighting an enemy who has no rules, that would do anything -- and I've always been in the camp that I don't want to be like them. I think that's our weakness and the strongest thing we can do is stand up for a process that's stood the test of time, which is intelligence gathering in a humane way. Because they would cut our heads off doesn't make us weak because we won't cut their heads off. It actually makes us stronger over the arch of time, so that's my commercial about that.

So, there will be more litigation and there are no bad guys or girls when it comes to challenging precedent. Do you agree with that, people have the right to do that?

GORSUCH: To challenge precedent?

GRAHAM: Yes.

GORSUCH: Every person is allowed to come to court to bring whatever claim they have. That's how our system works.

GRAHAM: That's how Brown v. Board of Education came about. GORSUCH: You're exactly right, Senator.

GRAHAM: OK. Let's talk about Roe v. Wade.

What is the holding of Roe v. Wade, in 30 seconds?

(LAUGHTER)

GORSUCH: The holding of Roe v. Wade in 30 seconds, Senator, is that a woman has a right to an abortion. It developed a trimester scheme in Roe that specified when the state interests and when the women's interests tend to prevail.

GRAHAM: OK. So let me just break it down.

The court said that there's a right to privacy, that the government can't interfere with that right in the first trimester. Beyond the first trimester, the government has more interest as the baby develops, is that fair to say?

GORSUCH: That was -- that was the scheme set forth.

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GRAHAM: And I think medical viability was the test that the court used.

GORSUCH: Well, that's the test that the court came around and applied in Casey in 1992.

GRAHAM: OK.

GORSUCH: So viability became more of the touchstone rather than a rigid...

GRAHAM: Is it fair to say that medical viability 1992 may be different than it is in 2022 medically?

GORSUCH: Senator, I'm not a scientist or a doctor.

GRAHAM: I would suggest that medical viability may change as science progresses. So you may have people coming in and saying, "In light of scientific medical changes, let's look at when medical viability occurs." That's one example of litigation that may come before you. I have legislation that says at 20 weeks, the unborn child is able to feel excruciating pain and the theory of the legislation is that the state has a compelling interest to protect an unborn child from excruciating pain which is caused by an abortion. I'm not asking you to agree with my legislation, I am saying that I am developing -- we're one of seven nations that allow wholesale, on-demand, unlimited abortion at 20 weeks, the fifth month of pregnancy. I'd like to get out of that club, but we're going to have a debate in this body and the House about whether or not we want to change the law to give an unborn child protection against excruciating pain at 20 weeks because you can -- the standard medically is that if you operate on unborn child at 20 weeks, the medical protocols are such that you have to provide anesthesia because you don't want to hurt the child in the process of trying to save the child.

So medical practice is such that when you operate on an unborn child at 20 weeks, which you can do, you have to apply anesthesia. And my theory is, well let's just look at it the other way, should you allow an abortion on demand of a child that can feel excruciating pain? Is that what we want to be as a nation? Does that run afoul of Roe v. Wade? I'm going to make the argument that there's a compelling state interest at that stage in the pregnancy to protect the child against death that is going to be excruciatingly painful.

You don't have to say a word. I'm just letting everybody know that if this legislation passes, it will be challenged before you and you'll have to look at a new theory on how the state could protect the unborn. And here's what I think. You'll read the briefs, look at the facts and make a decision. Am I fair to conclude that?

GORSUCH: Senator, I can promise you no more than that and I guarantee no less than that in every single case that comes before me no matter what the subject matter.

GRAHAM: Well, this is a real world situation that may develop over time because 70-something percent of the American people side with me on the idea that at 20 weeks, we should not be in the club of seven nations that allow abortion on demand because that's in the fifth month and that doesn't make us a better nation. There'll be people on the other side saying "No, that's an erosion of Roe," and it will go to the court maybe, if it ever passes here.

And the only reason I mention this is that everybody who wants to challenge whatever in court deserves a person like you. A person like you, no matter what pressures are applied to you, will say over and over again, "I want to hear what both sides have to say, I want to read their legal arguments, look at the facts and I will decide." That to me is reassuring and that's exactly the same answer I got from Sotomayor and Kagan.

No more, no less and we can talk forever about what you may or may not do. If you do anything different than that, I think you'd be unworthy of the job. GRAHAM: Now, about what's going on in the country with President Trump, whether you like him or you don't, he is president. But you have said several times that he is not above the law as president. Is that correct?

GORSUCH: Yes, Senator.

GRAHAM: You told Senator Leahy if there was a law passed that a Muslim could not serve in the military, you believe based on current law, that would be an illegal act.

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GOR SUCH: Senator, yes. I -- I see that having all sorts of constitutional problems under current law.

GRAHAM: So if we have laws on the book that prevent waterboarding, do you agree with me that the Detainee Treatment Act prevents waterboarding?

GOR SUCH: Yes, Senator. That's my -- my -- my recollection of it.

GRAHAM: So, in case President Trump is watching, which he may very well be -- one, you did a very good job picking Judge Gorsuch. Number two...

(LAUGHTER)

Here's the bad part.

(LAUGHTER)

If you start water boarding people, you may get impeached. Is that a fair summary?

GOR SUCH: Senator, the impeachment power belongs to this body.

GRAHAM: OK. That's even better. Would he be subject to prosecution?

GOR SUCH: Senator, I'm not going to speculate.

GRAHAM: But he's not above the law?

GOR SUCH: No man is above the law.

GRAHAM: OK. GOR SUCH: No man.

GRAHAM: Thank you. I think you're a man of the law and I really want to congratulate the president to pick you. Quite frankly, I was worried about who he'd pick, maybe somebody on TV.

(LAUGHTER)

But President Trump could not have done better in choosing you and I hope people on the other side will understand that you may not like him. I certainly didn't agree with President Obama, but I understood why he picked Sotomayor and Kagan and I hope you can understand why President Trump picked Neil Gorsuch. I hope you'll be happy with that because I am.

GOR SUCH: Thank you, Senator.

GRASSLEY: We will recess until 12:45.

(RECESS)

GRASSLEY: Senator Durbin.

DURBIN: Thanks, Mr. Chairman. Thanks, Judge.

Just to be clear, going back to Senator Graham's line of questioning. You helped draft the provision stripping the courts of jurisdiction, which was struck down by the Supreme Court in *Homdone* (ph), and you weren't involved in the drafting of the McCain section of the bill on the Detainee Treatment Amendment.

GOR SUCH: Senator, that wouldn't fit quite with my recollection.

DURBIN: Please.

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GORSUCH: My recollection is that Senator McCain and Senator Graham wrote the legislation, with input from the Department of Defense and the Department of Justice and a whole lot of others besides. And, I -- I was one voice among a great many, and that in terms of when it was struck down and held that the Detainee Treatment Act didn't apply retroactively, it only applied prospectively. And then several years later, gosh, I want to say it was 2008 maybe, the court came back around in *Boumediene*.

DURBIN: So what I'm driving at though, is the McCain section relative to cruel, inhuman and degrading treatment and I assume or I hope you've had a chance to take a glance at the e-mails Senator Feinstein gave you. You said in your e-mail, you wanted a signing statement, to the effect that the view is that McCain is best read as essentially codifying existing interrogation policies. So, what interrogation policies did you think the McCain amendment was essentially codifying?

GORSUCH: Senator, I haven't had a chance to look at that. I'm sorry. I scarfed down a sandwich over the break and I will -- I will be happy to read it but I'm -- I'm not sure what I can answer you here sitting off the top of my head. It's been 12 years ago and I'm doing the best I can with my recollection. My recollection --

DURBIN: I'm trying to get this leap from your memory of this e-mail, which I understand there were a 100,000 pages of e-mails.

GORSUCH: Exactly Senator, I think the Department of Justice has produced something like 200,000 pages of stuff.

DURBIN: I will concede that point. But, your lack of memory at the moment and contrast that with your clear statement that you believe that the McCain bill, which I supported outlawed water boarding.

GORSUCH: I -- I -- I -- sitting here that would be my understanding Senator.

DURBIN: The problem with what I've just described is, when you were talking about a signing statement, water boarding was still happening and you were saying in your e-mail I want to essentially codify existing interrogation policy. There's an inconsistency there, which we're going to have to wait to the second round to resolve.

GORSUCH: I -- I -- OK.

DURBIN: OK. Let me read something to you and ask you for a reaction. It is a statement that was made about eight days ago by a Congressman named Steve King of Iowa, and here's what he said. You cannot rebuild your civilization with somebody else's babies. You've got to keep your birthrate up and that you need to teach the children your values. In doing so, you can grow your population, you can strengthen your culture, you can strengthen your way of life. The reaction to that statement was overwhelming. Civil rights leader Congressman John Lewis called it bigoted and racist. Republican House Speaker Paul Ryan said he clearly disagreed with King's comments, went on to say the Speaker clearly disagrees and believes America's long history of inclusiveness is one of its great strengths. What would your reaction to that statement be?

GORSUCH: Senator, I can talk about my record and I can tell you that as a federal judge, when a defendant comes to court with an allegation that sentencing judge made improper comments based on his ethnicity, me and my colleagues - my colleagues and I have removed that judge from the case. I can tell you that when an immigration lawyer fails to provide competent counsel time and time again, I've sent him to the Bar for discipline.

I can tell you that when it comes to access to justice, I've written on this topic, I've worked on this topic for the last six years together with many wonderful people on the rules committee trying to make our civil litigation system cheaper and faster because it takes too long for people to exercise their Seventh Amendment liberties. And I can tell you, together with my colleagues, when we found that the level of representation of inmates on death row was unacceptable in our circuit - a whole bunch of us, I can't take too much credit, tried to do something about it.

I can tell you that when prisoners come to court, prose (ph) handwritten complaints and I see something that might be meritorious in them, I appoint counsel. That's my record, Senator.

DURBIN: Can you describe your relationship with Professor John Finnis?

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GORSUCH: Sure. He was my dissertation supervisor.

DURBIN: When did you first meet him?

GORSUCH: Whenever I went to Oxford so it would have been 1990...

DURBIN: ...Two.

GORSUCH: Well, it could have been two or three, somewhere in there.

DURBIN: And how - what was his relationship with you or you with him?

GORSUCH: He was my dissertation supervisor and I would describe that as a relationship between teacher and student and he was a very generous teacher, particularly generous with his red ink on my papers. I remember sitting next to the fire in his Oxford office, it was like something out of Harry Potter. And he always had a coal fireplace burning and sometimes whether I was being raked over the coals, he was - he did not let an argument that I was working on go unchallenged from any direction.

DURBIN: So that was over 20 years ago that you first met him?

GORSUCH: Whatever it is, it is. Yes.

DURBIN: Do you still have a friendship or relationship with him?

GORSUCH: Last time I saw him - gosh, when he - I know I saw him when he retired and there was a party held in his honor and I remember seeing him then and that was a couple of years ago.

DURBIN: Did he know you were from Colorado?

GORSUCH: I don't know. It must have, at some point, come out in our conversations. I don't know.

DURBIN: And do you recall saying some words of gratitude for his help in writing your book?

GORSUCH: He did not write my book, Senator. He did not help write my book. I wrote my book. I certainly expressed gratitude to my dissertation supervisor in a book that's basically my dissertation.

DURBIN: He - I think you were quoted as saying in 2006, you thanked Finnis for his, quote, "kind support through draft after draft."

GORSUCH: And there were a lot of drafts, Senator. I mean, golly, that was a very tough degree. That was the most rigorous academic experience of my life and I had to pass not just him but an internal examiner, an external examiner, and that was hard. That was hard.

DURBIN: In 2011, when Notre Dame ran a symposium to celebrate his work, you recalled your study under him and you said, quote, "it was a time when legal giants roamed among Oxford's spires."

GORSUCH: Oh, yeah. Yeah.

DURBIN: You called him one of the great scholars.

GORSUCH: Well, and - and Oxford has a stable and it's part of the reason why it was such a privilege. I mean, here was a kid from Colorado and I got a scholarship to go to Oxford, I had never been to England - to Europe before and at Oxford at that time, they had John Finnis, Joe Raz, Ronald Dworkin, HLA Hart was even still alive then.

DURBIN: So let me, if I can, read a couple statements from Professor Finnis. In 2009, Professor Finnis wrote about England's population. He said England's population had, quote, "largely given up bearing children at a rate consistent with their community's medium-term survival." He warned they were on a path to, quote, "their own replacement as a people by other peoples more or less regardless of the incomers' compatibility of psychology,

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culture, religion, or political ideas and ambitions or the worth or viciousness of those ideas and ambitions." He went on to say, quote, "European states in the early 21st century move into a trajectory of demographic and cultural delay, population transfer and replacement by a kind of reversed colonization."

Had you ever read that before?

GORSUCH: Nope.

DURBIN: Have you heard it before.

GORSUCH: Nope, not to my recollection.

DURBIN: Could you distinguish what he said with with Congressman Steve King said?

GORSUCH: Senator, I'm not here to answer for Mr. King or for Professor Finnis.

(CROSSTALK)

DURBIN: ... your reaction to these things. Do you feel that what Professor Finnis wrote about purity of culture and such is something that we should condemn or congratulate?

GORSUCH: Senator, before I expressed any view on that, I'd want to read it. And I'd want to read it from beginning to end, not in excerpt. And Senator, I've had a lot of professors. I've been blessed with some wonderful professors. And I didn't agree with everything they said, and I wouldn't expect them to agree with everything I've said.

DURBIN: Let me ask you this specific one. It was 1993 and you were at Oxford, when you believe you first met this professor. Professor Finnis was tapped by the then-Colorado Solicitor General Timothy Tymkovich, to help defend a 1992 state constitutional amendment that broadly restricted the state from protecting gay, Lesbian and bisexual people from discrimination.

During the course of the deposition which he gave in support of that effort, Finnis argued that antipathy toward LGBT people, specifically toward gay sex, was rooted not just in religious tradition, but Western law and society at large. He referred to homosexuality as bestiality in the course of this as well.

Were you aware of that?

GORSUCH: Senator, I -- I know he testified in the Romer case. I can't say sitting here I recall the specifics of his testimony or that he gave a deposition.

DURBIN: I guess the reason I'm raising this is this is a man who apparently had an impact on your life, certainly your academic life. And I'm trying to figure out where we can parse his views from your views; what impact he had on you as a student; what impact he has on you today with his views. GORSUCH: Well, then I guess, Senator, I think the best evidence is what I've written. I've written over -- gosh, written or joined over 6 million words as a federal appellate judge. I've written a couple of books. I've been a lawyer and a judge for 25 or 30 years. That's my record. And I guess I'd ask you respectfully to look at my credentials and my record. And some of the examples I've given you from my record about the capital habeas work, about access to justice. I've spoken about over-criminalization publicly.

Those are -- those are things I've done, Senator.

DURBIN: And what about LGBT (inaudible) individuals?

GORSUCH: Well, Senator, there are -- what about them?

DURBIN: Well, the point I made is...

GORSUCH: They're people. And, you know...

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DURBIN: Of course. But what you said earlier was that you have a record of speaking out, standing up for those minorities who you believe are not being treated fairly. Can you point to statements or cases you've ruled on relative to that class?

GOR SUCH: Senator, I try to treat each case, and each person, as a person, not a this kind of person, not a that kind of person -- a person. Equal justice under law is a radical promise in the history of mankind.

DURBIN: Does that refer to sexual orientation as well?

GOR SUCH: Senator, the Supreme Court of the United States has held that single-sex marriage is protected by the Constitution.

DURBIN: Judge, would you agree that if an employer were to ask female job applicants about their family plans, but not male applicants, that would be evidence of sex discrimination prohibited by Title VII of the Civil Rights Act?

GOR SUCH: Senator, I'd agree with you it's highly inappropriate.

DURBIN: You don't believe it's prohibited?

GOR SUCH: Senator, it sounds like a potential hypothetical case. It might be a case or controversy I might have to decide, and I wouldn't want to pre-judge it sitting here at the confirmation table. I can tell you it would be inappropriate.

DURBIN: Inappropriate. Do you believe that there are ever situations where the costs to an employer of maternity leave can justify an employer asking only female applicants and not male applicants about family plans?

GOR SUCH: Senator, those are not my words and I would never have said them.

DURBIN: I didn't say that. I asked you if you agree with the statement.

GOR SUCH: And I'm telling you I don't.

DURBIN: Thank you.

In Wang vs. Kansas State, the case involved a cancer-stricken professor. You wrote an opinion that noted that EEOC guidance commands deference, quote, "only to the extent its reasoning actually proves persuasive.

EEOC's enforcement guidance on pregnancy discrimination provides as follows. Because Title Seven prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant.

The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker. Do you find this instruction to be persuasive?

GOR SUCH: Senator, I -- there's a lot of words there. And if you're asking me to parse them out and give you a legal opinion, then I -- I fear that you may be -- I -- I'd respectfully say I'd have to study it in the course of a judicial case.

DURBIN: Well, let me bring it right down to the operative words. Whether employee should or should not make inquiries into whether an applicant or employee intends to become pregnant.

GOR SUCH: Senator, I need to -- it sounds like you're asking me about a case for a controversy. And I -- with all respect, when we come to cases in controversies, a good judge will listen.

Socrates said the first virtue of a good judge is to listen courteously and decide impartially.

DURBIN: I think you know why I'm asking these questions.

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GOR SUCH: No, this one I -- I don't.

DURBIN: The reason I'm asking is because about your views on pregnancy women in the work place is because two of your former students from legal ethics and professionalism class last spring wrote to this committee to say how troubled they were by your comments in an April 19th class.

It was a gender-targeted discussion regarding the hardship to employers of having female employees who may use maternity benefits. One of these students signed her name publicly to her letter, which is a pretty brave thing to do.

That student didn't just make this issue up after you were nominated. Last night, the University of Colorado Law School confirmed that she had voiced her concerns with administrators shortly after your April 19th class and also confirmed that the administrators told her they would raise this matter with you, though they never actually did so.

When we receive information like this which raises questions about your views and conduct on important issues, I want to get to the bottom of it. I mentioned that to you yesterday in my opening statement that I would be bringing this up.

So, I just want to ask you to confirm, did you ask your students in class that day to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby?

GOR SUCH: No, Senator. And I'd be delighted to actually clear this up.

DURBIN: Please.

GOR SUCH: Because the first I heard of this was the night before my confirmation hearing. I've been teaching legal ethics at the University of Colorado for seven or eight years. It's been a great honor and a pleasure.

I teach from a standard text book that every professor -- well, I don't know if every professor -- a number of professors at CU and elsewhere use. It's an excellent textbook -- Professors Lerman and Shrag.

In one of the chapters in the book confronts lawyers with some harsh realities that they're about to face when they enter the practice of law. As you know and I know, we have an unhappy and unhealthy profession in a lot of ways.

Lawyers commit suicide at rates far higher than the population. Alcoholism, divorce, depression are also at extremely high rates. Young lawyers also face the problem of having enormous debts when they leave law school.

As a -- and that's a huge inhibition for them to be able to do public service like you and I are so privileged to be able to do. We talk about those things.

There is one problem in the book -- and I'd be happy to share with you the book and the teacher's manual so that you can see for yourself, Senator -- which asks a question. And it's directed to young women because sadly, this is a reality they sometimes face.

The problem is this. Suppose an older partner woman at the firm that you're interviewing at asks you if you intend to become pregnant soon. What are your choices as a young person?

You can say yes, tell the truth. Hypothetical is that it's true and not get the job and not be able to pay your debts.

You can lie, maybe get the job. You can say no.

That's a -- that's a choice, too. It's a hard choice. Or you can push back in some way shape or form. And we talk about the pros and the cons in this acatic (ph) dialogue that they can think through for themselves how they might answer that very difficult question.

And Senator, I do ask for a show of hands, not about the question you asked, but about the following question. And I ask it of everybody. How many of you have had questions like this asked of you in the employment environment, an inappropriate question about your family planning?

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And I am shocked every year, Senator, how many young women raise their hand. It's disturbing to me.

I knew this stuff happened when my mom was a young practicing lawyer, graduating law school in the 1960s'. At age 20, she had to wait for a year to take the bar. I knew it happened with Justice O'Connor, couldn't get a job as a lawyer when she graduated Stanford Law School and had to work as a secretary. I am shocked it still happens every year that I get women, not men, raising their hand to that question. Thank you for the opportunity to clarify that Senator.

DURBIN: And I wanted to give you that opportunity. I told you yesterday we'd get to the bottom of this and I'd give you a chance to tell your side of the story. You made a point yesterday of talking about your four heroes and one of them was Justice Jackson, and I went back to look at some of his cases. I just know of him, I don't much about him and I found his dissent in *Korematsu*. And this was a case which I thought was fascinating, because his dissent was not that long, but it was -- had an impact. It was profound. The question, of course, was the military orders in the United States on the treatment of Japanese Americans. Fred Korematsu was caught up in it and was basically told he had no choice. He had to go off to the interment camp and that whole medical, pardon me, military directive was challenged in this case, and it was interesting that it was upheld on an opinion by Justice Black, but among the dissenters was Robert Jackson. In his dissent, he said some things that I thought were pretty interesting and I'd like to ask your thoughts on it.

He gave a constitutional condemnation, of what he considered the military's racist exclusion orders, but what he articulated in the second half of the opinion is what I'd like to ask you about. He really raised a question about the role of the courts, even the Supreme Court, in time of war, in time of fear, when it came to military orders and whether the courts and the Constitution were up to it. That was really an amazing challenge to us as a nation, a nation of laws. So, what do you think about the role of the court challenging the military or the Commander-in-Chief in time of war? And as Senator Graham reminded us, many people believe we are at war and I believe you confirm that as well. Are we up to it, in terms of constitutional protection, in the role of the court?

GOR SUCH: We better be. Senator, a wise old judge, kind of like Judge Johnson, you're going to hear from. He's going to come talk to you from Colorado, a hero of mine, known me since I was a tot. He taught me that the test of the rule of law is whether the government can lose in its own courts and accept the judgment of those courts. That doesn't happen everywhere else around the world. We take it for granted in this country. It's a remarkable blessing from our forefathers and it is a daunting prospect, as a judge, to have to carry that baton, and to do it on the Supreme Court of the United States it's humbling, that prospect, to me. I pledge to you that I will do everything I can to uphold the Constitution and the laws as a good judge should at all times.

DURBIN: Let me ask you about another case that's been referred to. Yesterday, many of us left Al Madden (ph) sitting in that truck. It was about three in the morning on I-88, west of Chicago. I've driven it many times. It was in January. The temperature in the cab was 14 degrees below zero. He had no heater in his cab. His dispatcher told him, sit tight you are to drag that trailer with the frozen brakes behind you out onto that highway or you'll wait. And so he waited for hours, and finally, feeling numb and life threatening, he unhitched the trailer and took his tractor to a place for some gas and to warm up and then return to it when they fixed it. Seven different judges took a look at those facts and came down on Al Madden's (ph) side except for one, you. Why?

GOR SUCH: Senator, this is one of those you take home at night. The law said that the man is protected and can't be fired if he refuses to operate an unsafe vehicle. The facts of the case, at least as I understood them, was that Mr. Madden chose to operate his vehicle to drive away, and therefore, wasn't protected by the law. He would be protected if he had refused to operate, but he chose to operate. Now Senator --

DURBIN: You know the distinction though, because the dispatcher told him, don't leave unless you drag that trailer.

GOR SUCH: Right.

DURBIN: And he said, I can't do it. The brakes are frozen and they went out there at 14 below and unhitched that trailer, he thought, because he was in danger. And you wrote your dissent (ph) on this, you said it was an unpleasant option for him to wait for the repairman to arrive.

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GORSUCH: I said more than that, Senator --

DURBIN: I know you did. You went on to say that you thought that the statute, which we thought protected him, you said, especially ends in the ephemeral (ph) and generic phrase, health and safety. You went on to write, after all, what under the sun, at least at some level of generality doesn't relate to health and safety.

We had a pretty clear legislative intent for a driver who feels he's endangering his life perhaps, and you dismiss it. The only one in seven judges that say no.

You're fired, buddy. And you know what? He was blackballed from trucking because of that, never got a chance to drive a truck again.

GORSUCH: Senator, all I can tell you is my job is to apply the law you write. The law, as written, said that he would be protected if he refused to operate. And I think by any plain understanding, he operated the vehicle. And if Congress wishes to revise the law, I wrote this -- I said it was an unkind decision. I said it may have been a wrong decision, a bad decision.

My job isn't to write the law, Senator, it's to apply the law. And if Congress passes a law saying a trucker in those circumstances gets to choose how to operate his vehicle, I will be the first one in line to enforce it. I've been stuck on the highway in Wyoming in a snow storm. I know what's involved. I don't make light of it, I take it seriously.

But Senator, this gets back to what my job is and what it isn't. And if we're going to pick and choose cases, out of 2,700, I could point you to so many in which I have found for the plaintiff in an employment action or affirmed a finding of an agency of some sort, for a worker or otherwise.

I'd point you, for example, W.D. Sports or Casey, Energy West, Crane or Simpson v. CU -- that's just a few that come to mind and I've scratched down here on a piece of paper.

DURBIN: Judge, we up here are held accountable for our vote. And I've been in Congress for a while and I've cast a lot of them. Some of them I'm not very proud of, I wish I could do it all over again. I've made mistakes. But your accountability is for your decisions, as our accountability is for our votes.

And if we're picking and choosing, it's try to get at the heart of who you are and what you will be, if you're given a chance to serve on the Supreme Court.

I'd like to go, if I can, for just a moment to this famous case, which you and I discussed at length, Hobby Lobby. I still struggle all the way through this and it was a lengthy decision with trying to make a corporation into a person. Boy, did the courts spend a lot of time twisting and turning and trying to find some way to take RFRA and say that Congress really meant corporations, like Hobby Lobby, when they said person. It was dictionary law on so many different aspects of this.

What I was troubled by and I asked you then, I'll ask you again. When we are setting out, as that court did, to protect the religious liberties and freedom of the Green family, the corporate owners, and their religious belief about what's right and wrong when it comes to family planning, and the courts says that we'll decide what the Green family decides when it comes to health insurance.

You made a decision that thousands of their employees would not have protection of their religious beliefs and their religious choices when it came to family planning. It closed the door to those options in their health insurance. And, by taking your position to the next step, to all those who work for closed-end corporations in America. 60 million people have their health insurance and their family planning and their religious belief denigrated, downsized, to the corporate religious belief, whatever that is.

Did you stop and think when you were doing -- making this decision about the impact it would have on the thousands and thousands, if not millions of employees, if you left it up to the owner of a company to say as you told me.

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There's some kind of in family planning I like and some I don't like.

GORSUCH: Senator, I take every case that comes before me very seriously. I take the responsibility entrusted in me in my current position very grave. I think if you ask the lawyers and judges of the 10th circuit, am I serious and careful judge?

I think you'll hear that I am. And I'm delighted to have an opportunity to talk to you about that decision. As you now in RFRA, the Religious Freedom Restoration Act, Congress was dissatisfied with the level of protection affording by the Supreme Court under the First Amendment to religious exercise.

The court in a case called Smith v. Maryland, written by Justice Scalia said any neutral law of general applicability is fine. That's -- doesn't offend the First Amendment. So laws banning the use of peyote, Native Americans, tough luck.

Even though it's essential to their religious exercise, for example.

This Congress decided that that was insufficient protection for religion. And in a bill sponsored by Senator Hatch, Senator Kennedy, Senator Schumer when he was in the House wrote a very, very strict law and it says that any sincerely held religious belief cannot be abridge by the government without a compelling reason.

And even then, it has to meet -- it has to be narrowly tailored, strict scrutiny, the highest legal standard known in American law.

I've applied that same law, RFRA and RLUIPA, they're companion statutes to Muslim prisoners in Oklahoma who seek (inaudible). To Native American who wish to use an existing sweat lodge in Wyoming and the Little Sisters of the Poor.

Hobby Lobby came to court and said we deserve protections too, we're a small family held company, small number of people who own it, I mean. They exhibit their religious affiliations openly in their business.

They pipe in Christian music, they refuse to sell alcohol or things that hold alcohol. They close on Sundays though it costs them a lot. And they came to court and said we're entitled to protection too under that law.

It's a tough case. We looked at the law and it says any person with a sincerely held religious belief is basically protected except for strict scrutiny. What does person mean in that statute? Congress didn't define the term.

So what does a judge do? A judge goes to the Dictionary Act, as you alluded to senator, the Dictionary Act is an act prescribed by Congress that defines terms when they aren't otherwise defined. That's what a good judge does, he doesn't make it up, he goes to the Dictionary Act.

In the Dictionary Act, Congress has defined person to include corporation. So you can't rule out the possibility that some companies can exercise religion. And of course we know churches are often incorporated.

And we know nonprofits, like Little Sisters or hospitals can practice religion. And in fact, the government in that case conceded that nonprofit corporations can exercise religion, conceded that. So that's the case.

Then we come to the strict scrutiny side.

DURBIN: I don't want to cut you off.

GORSUCH: Oh, I'm sorry.

DURBIN: I'm going to get in big trouble with...

GORSUCH: Oh, I don't want to get you in trouble.

DURBIN: ... Chairman Iowa here.

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GRASSLEY: I think I would want you to continue your answering his question.

GOR SUCH: I'm sorry Mr. Chairman. I apologize.

GRASSLEY: No please. No I want you to continue.

GOR SUCH: OK. All right. So then you've got the religion, the first half of the test met. So then you go to the second half. Does the government have a compelling interest in the ACA and providing contraceptive care?

The Supreme Court of the United States said, we assume yes. We take that as given. And then the question becomes, is it narrowly tailored to require the Green family to provide it? And the answer there, the Supreme Court reached and precedent binding on us now and we reached in anticipation is no.

That it wasn't as strictly tailored as it could be because the government had provided different accommodations to churches and other religious entities. The Green's didn't want to have to write down and sign something saying that they were permitting the use of devices they thought violated their religious beliefs.

And the government had accommodated that with respect to other religious entities, and couldn't provide an explanation why it couldn't do the same thing here. That's the definition of strict scrutiny.

Now, Congress can change the law. It can go back to Smith vs. Maryland if it wants to -- eliminate RIFRA altogether. It could say that only natural persons have rights under RIFRA. It could lower the test on strict scrutiny to a lower degree of review if it wished. It has all of those options available, Senator.

And if we got it wrong, I'm sorry, but we did our best -- level best and we were affirmed by the United States Supreme Court. And it's a dialogue, like any statutory dialogue, between Congress and the courts.

DURBIN: Thank you, Judge. Thank you, Mr. Chairman.

GRASSLEY: The senator from Texas.

CORNYN: Thank you, Mr. Chairman.

Before I start, yesterday in my statement I mentioned an op-ed by -- in the New York Times written by Neal Katyal. My apologies to him if I butchered his name. With a name like Cornyn, I'm used to it, but I apologize.

GOR SUCH: I get a lot worse. I got a lot worse the other day.

CORNYN: The title of the op-ed is "Why Liberals Should Back Neil Gorsuch." I'd like to ask consent that this be included in the record, along with other supportive letters.

GRASSLEY: Without objection, all documents will be included.

CORNYN: So Judge, I have a pretty basic question for you. Does a good judge decide who should win and then work backward to try to justify the outcome?

GOR SUCH: That's the easiest question of the day, Senator. Thank you. No. And I have to correct myself.

Senator Durbin, it's not Smith vs. Maryland. That's third-party doctrine. It's Employment Division vs. Smith we're talking about. I apologize to you for that.

CORNYN: Well, I'm glad to hear you answer my question the way you did. I expected that you would. And -- but that seems to be implied in some of the questioning that you're getting. You look at who the litigants are and who you would like to win -- the little guys -- we've heard, and I'll get to that again in a minute. And then go back and try to justify the outcome. But I agree with you. That's not what good judges do.

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I want to return briefly to -- I know it's something you've talked to Senator Feinstein and Senator Durbin about. Again, just to give you every opportunity to make sure this is crystal clear. I remember back when George W. Bush was president of the United States there was a practice of signing statements that went along with his signing legislation into law.

That was criticized by some of our friends on the other side of the aisle as somehow undermining Congress's intent or the president's own signature enacting a bill into law. And so Senator Feinstein raised the question of back when you worked with Senator McCain, Senator Graham on the Detainee Treatment Act, the signing statement that the president ultimately issued that went along with his signing that legislation into law.

Did I characterize that correctly?

GORSUCH: I think so, Senator, to the best of my recollection. CORNYN: OK. So the question is this, Judge. There were some in the administration who wanted a single statement; basically that the president was signing the law, but, you know, if you could find an argument that the president did have to pay attention to the law, then -- or perhaps had authorities that weren't otherwise laid out in the statute, that the president could disregard what Congress had passed and what the president had signed into law.

On the other hand, there were those like you, in an e-mail, who laid out the case for a more expansive signing statement. You made the point that on the foreign public relations front, allowing us to speak about this development positively rather than grudgingly would be helpful.

You said that while we all appreciate the appropriate limitations of the usefulness of legislative history, it would be helpful as this provision is litigated, which it inevitably would be, to have a statement of policy from the executive branch on why this law was enacted.

And third, that you said it would help inoculate against the potential of having the administration criticized in the future for not making sufficient changes, when in fact all the bill did was to codify existing law with regard to interrogation practices. Senator McCain made that comment.

So, you at least, I guess, I hate to put it in these terms, you lost that argument in a sense because the vice president's lawyer prevailed in that argument and they had a single statement in the signing statement basically making reference to, well it's -- here, I'll just read it: "So the executive branch shall construe Title X of the act in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and the Commander in Chief and the consistent with the constructional limitations on judicial power.

So that's the statement in the signing statement in the signing statement that you sought to make more expansive and accommodate the three concerns that you raised. Isn't that correct?

GORSUCH: Senator, your understanding of events is a lot fresher than mine. But, I - sitting here I can disagree with anything you've said.

CORNYN: Well, and I understand this was what 12 years ago.

GORSUCH: Something like that.

CORNYN: And, you were asked initially questions by Senator Feinstein without the benefit of actually being able to refresh your memory from reading the e-mails. But, I think we have covered that enough, I hope and laid that to rest.

I want to talk a little bit about the little guy. In these confirmation hearings, sometimes very complicated and complex issues are dealt with in a rather simplistic and misleading sort of way. But, first of all, I want to talk to you a little bit about an article that you wrote in the Judicature magazine called Access to Affordable Justice.

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And, I know as somebody who actually practiced law, in the trenches, and you said you have, and you did, you were concerned and you write in this article about your concerns for the access to justice for the little guy and little gals, I guess.

And, you point out that litigation had become so expensive and so time consuming that essentially it was out of reach. Justice in our courts of law to resolve legitimate disputes was out of reach for people of modest means.

Could you expand on those concerns that you raise in that article?

GORSUCH: I really appreciate this opportunity and venue to be talking about these things. Because, I - these I care about and can talk about as a judge. I wrote that article in conjunction with some input from some wonderful people, so I can't take total credit for it. And, I thanked them. And, you can see who I thank.

My point there was three fold. Starting with the fact that too few people can get to court with legitimate grievances today. That's a fact. Too few people can get lawyers to help them with their problem.

I teach young folks law, who leave law school unable to afford their own services. Think about that. Think about that. And, hundreds of thousands of dollars in debt. How do they go be main street lawyers? How do they help people who need legal services?

And, I pointed to three potential sources of problems where we lawyers maybe should look internally rather than blame others for the problem. There is plenty of blame to go around. I'm not a big blame guy.

I am a look inside guy. What do I see in my profession? Three things I pointed to. First, our own ethical rules. It is a very unusual profession where we're allowed to regulate ourselves. It is quite an extraordinary privilege; usually it's the legislature, right.

But, lawyers basically regulate themselves and do all of our ethical rules necessarily help clients or do some of them help us more than they help our clients?

And, I pointed to some that for instance in regarding the unauthorized practice of law. Why is it you have to be a lawyer to help parents with disabled children and administrative proceedings to seek relief under idea?

Was an example I pointed to. Why is it that every time certain companies that provide legal services for basic things get sued every time they move into a new state? Why is it I can go to Walmart and get my hair, teeth, eyes taken care of, but I can't get a landlord contract drawn up. Those are all the results of our ethical rules. I'm not sure whether they're worth the price that we pay for them. It's estimated, I heard I can't verify it, that our ethical rules result in \$10 billion a year in surplus to lawyers and clients every year.

That was one. Number two was our own rules of procedure, like the one we talked about, it took 25 years to resolve.

That's wrong. That's wrong; we should be able to resolve cases in less time that it takes for my law carts (ph) to be born, raised, and get through law school.

And the third thing I pointed to was our legal educational system, where we have three years of post-graduate education for everybody who wants to - who had anything to do with lawyering.

The best lawyer in the country - this history, came from your state, Senator Durbin, and he didn't, ever, go to law school. And he always said the best way to become a lawyer, "read the books."

Still true. In other countries, around the world, don't have three years of post-graduate legal education. Now, this is where Justice Leahy (ph) and I - this is the disagreement.

He think - he thought three years was necessary for everybody; I'm not convinced. In England, where I studied, you could become a lawyer through three years of an undergraduate degree, or one year as a post-graduate degree.

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All followed by a lot of on the job, practical training. And I wonder whether all that debt is worth it or whether it induces people to pick jobs that they have to pick to pay their debt, rather than serve the people they'd like to serve.

Those are the problems I talk about in that article.

CORNYN: Judge, you make this statement, "That the rules sometimes yield more nearly the opposite of their intended result, expensive and painfully slow litigation that itself is a form of injustice."

Can you think about - can you think of many things more unjust or people of modest means in America than being denied access to the courts because our system is so expensive and time consuming they simply can't afford it?

GOR SUCH: I think it's a problem when 80 percent of the American College of Trial Lawyers, best lawyers in the country arguably, they certainly think they are - sorry, but then 80 percent of them say that good claims are priced out of court and 70 percent of them say that cases are settled based on the litigation costs, rather than merits of litigation.

That's a problem on both ways, and these are - these are lawyers who operate on both sides on the...

CORNYN: So, basically, you have to be able to pay a lawyer's hourly rate or you have to agree to some contingent fee arrangement, and lawyers aren't going to take a contingent fee case unless there is at least some reasonable prospect for their being compensated out of any settlement in judgment, ordinarily.

GOR SUCH: Ordinarily, some - some do. What we're seeing today though, Senator, is an explosion pro-say (ph), that is filings by the person without a lawyer.

And that's what I was trying to address there. I do think access to justice, in large part, means access to a lawyer.

Lawyers make a difference; I believe that firmly. My grandpa showed that to me, what a difference a lawyer can make in a life.

CORNYN: Judge, let me ask you about another cases involving the little guy. This was an immigration case, that you'll recall was a conflict between two provisions of immigration law.

Gutierrez-Brizuela vs. Lynch, I hope I pronounced that approximately correctly, would you - do you recall the case?

GOR SUCH: I do, and we've talked a little bit about it with Senator Feinstein and I'm happy to...

CORNYN: Well then, I'm happy to hear it again because I heard, I believe it was Senator Feinstein, maybe I'm mistaken there or maybe one of our other colleagues, I apologize if I misstated that.

It talked about this deference to administrative agencies that was being necessary and a fundamental doctrine. But can you explain that how ended up hurting the little guy in that case?

GOR SUCH: So, Senator, in that case there were two statutes that this undocumented immigrant faced, and he was trying to remain in the country.

One statute said that he had the right to apply for immediate discretionary relief from the Attorney General, no promises about the outcome, but he could at least apply to the Attorney General.

The other statute seemed to suggest that he had to wait ten years out of the country before he could seek relief. Now, I'm not criticizing Congress of any work (ph) here, okay?

But those two statutes appeared a little in conflict, so the case came to our court in the first instance.

And our court held that the first statute helped (ph), that the man had a right to apply for immediate discretionary relief and didn't have to wait ten years out of the country.

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And then some number of years later, I can't remember whether it was three or four I want to say, don't hold me to that, the board of immigration appeals and its infinite wisdom comes back and says we're wrong. Court of Appeals got it wrong. The ten year statute trumps. Okay. Says, though, that we're not just wrong, but we're wrong retroactively. So, it's as if this decision never existed. And this man who relied on our holding, to apply for immediate discretionary relief was denied the opportunity to do so and was told now he had to go start his ten year waiting period.

Now, instead of ten years it's equivalent of 13 or 14 years and to me that just seems he just had the rug pulled out from underneath him. And, I think a person in this country should be able to rely on the law, as it is. And, it's a matter of due process and fair notice, when he's told that's the law, he should be able to rely on it and I also think it's a separation of powers question.

When, with all respect a bureaucracy can overrule neutral dispassionate judges on the meaning of a law based on their political whims at the moment, that's a separation of powers issue, I think. And, maybe an equal protection issue, too. Because a political branch can single out people for disfavor. Judges are sworn to treat every person equally in that Vermont marble.

CORNYN: In this case the little guy was actually relying upon a judgment of a court of law and was effectively or the attempt was to overrule that court decision by an administrative regulation or interpretation, is that correct?

GORSUCH: Yes.

CORNYN: And, if you had applied the Chevron test, we talked about that a little bit, said that the -- if it is ambiguous, and the agencies interpretation is a legal one, then you're obligated to enforce the agency decision rather than the judgment of the court of a law.

GORSUCH: Senator, we did apply the Chevron case faithfully, because we had to. And, I also wrote separately to ask questions because I'm a circuit judge. And, I never dreamt that I would be sitting here, I can tell you that, when I wrote this opinion. And, part of my job is to tee up questions from my bosses. And it struck me, here is a question, is this result consistent with the Administrative Procedures Act? Which says, the Section 706 that we're supposed to defer to agencies when it comes to questions of fact, to the scientists, to the biologists, but when it comes to questions of law, APA Section 706 entrusts courts to decide that the law is and is consistent with our values of equal protection, due to process and separation of powers. Those are questions I raised, Senator, to tee up for my bosses.

CORNYN: You actually applied the Chevron test in the -- in your judgment, but wrote a separate opinion raising these questions for review by the Supreme Court.

GORSUCH: I follow precedent.

CORNYN: Sounds like it. Even when you disagree with the outcome? GORSUCH: Well, we got to an outcome that we could live with there too, Senator and applied Chevron. But, I did raise this in a separate concurrence to raise these questions. You know, I don't know how it ruled as far as Supreme Court Justice on the questions.

I've got to be honest with you Senator Cornyn, because I'd want to do what a good judge does, keep an open mind, read the brief and I can change my mind. I think here of my old boss Dave Sentel, when I clerked for him. He wrote a panel opinion going one way at the beginning of the year and at the end of the year he wrote an embank opinion reversing his own panel opinion. Now some people say, that's a man who doesn't have a spine, something like that. I say that's a judge with an open mind.

CORNYN: Well, speaking for myself, the idea that agencies unelected bureaucrats, have the latitude to interpret their own legal authorities, if the Congress is ambiguous and their interpretation is deemed reasonable is a troubling concept, because if there's one part of the federal government that is completely out of control of the regular voters in this country, it is the bureaucrats who don't stand for election, like members of Congress do. So, I hope it's

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something that we legislatively can look at as a way to help rein in the regulatory State, which, in my humble opinion, has gotten out of control.

Let me talk to you about the Establishment Clause, if I may. I firmly believe the Supreme Court has lost its way in limiting religious expression in this country, that's my opinion. And part of my conviction stems from an experience I had 20 years ago, when I had a chance to argue before the United States Supreme Court.

I had that chance two occasions when I was Attorney General of Texas. This case was called the Santa Fe Independent School District versus Doe. The school district in Southeast Texas around Galveston, had a practice before football games, of inviting a student to offer a prayer, or a poem, or maybe just an inspiration thought before the football game.

They got sued by the ACLU. And that case ended up going to the United States Supreme Court, where the court held by a vote of six to three that student led prayer was unconstitutional. That led the late Chief Justice Rehnquist to make the statement that, rather than neutrality of religious expression that the court now exhibits, quote, "hostility" to all things religious in public life.

We don't seem to have many limits on expressions of sex, violence or crime in the public square. But we do seem to have compunctions about religious expression in the public square.

And I wonder if you could just talk to us a little bit about your views, not prejudging cases, but the sorts of considerations that you believe the Founders, for example, had in mind.

And of course as I'm asking you the question, I'm already thinking through my head here, I'm not asking you to prejudge any future case. So let me give you the latitude to answer the question any way you deem fit. But I have to tell you I'm very troubled by what Chief Justice Rehnquist called "hostility" to religious expression in the public square and what that's done to change our country, not in a good way.

GORSUCH: Senator, I appreciate your thoughts and it's a very difficult area, doctrinally, because you have two commands in the first amendment that are relevant here. You have the free exercise clause on the one hand, and you have the establishment clause on the other.

So you're guaranteed free exercise of religion and you're also guaranteed no establishment of religion. Those two commands are intentional because to the extent we accommodate free expression, at some point the accommodation can be so great that someone's going to stand up and say, you've established. Or you've passed a law respecting the establishment of religion.

It's a spectrum. And it's a tension. And as in so many areas of law, judges have to mediate two competing and important values that our society holds dear. The court has struggled in establishment clause jurisprudence to provide a consistent, comprehensive test. I think that's a fair statement.

The current dominant test is called the Lemon Test, and it asks whether the intent is to establish a religion, promote a religion; whether the effect is to help advance a religion; and whether there is too much entanglement between state and religion.

It's proved a difficult test according to six Justices at least -- have expressed dissatisfaction with this test, and never at the same time. So Lemon endures. And academics have thoughts about various options and alternatives, I know, and the Justices themselves have expressed various and sundry ideas. I can tell you as a lower court Judge, just trying to faithfully do what the Supreme Court wants us to do, it's a bit of a challenge in this area. We struggle along.

CORNYN: Just as one citizen to another, let me tell you I that I think it's a morass and unfortunately the result is, like Chief Justice Rehnquist said, hostility to religious expression in the public square and I think our country is poorer for it.

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Let me -- my final topic, at least for this round, let me ask you a little bit about originalism and textualism. Our mutual friend, Bryan Garner, mentioned to me that textualism isn't the same thing as being a strict constructionist, I know we use that phrase at least colloquially some.

But if a judge isn't going to be bound by the text of the Constitution or the text of a Statute, what is a judge going to be bounded by?

GORSUCH: Well, Senator, I hope it isn't what he had for breakfast. And when I was a lawyer, all I wanted was a judge who put all of his personal things aside, her personal views and come to the law and the facts in each case fairly. And I think when we're talking about interpreting the law, there is no better place to start than the text. Maybe here I have to blame Sister Mary Rose Margaret. She taught me how to read and she taught me how to diagram a sentence. And it was under pain of the hot seat paddle which hung above her desk for all to see.

Well you say, she could teach a monkey how to read. I think she did, me. And I think that's where we want to start for a couple of reasons with the text of the law. First we go back to the due process considerations, the fair notice considerations we spoke of earlier.

Before I put a person in prison, before I deny someone of their liberty or property, I want to be very sure that I can look them square in the eye and say you should have known, you were on notice, that the law prohibited that which you're doing.

I don't want to have him to say how am I supposed to tell? I need an army of lawyers to figure that out. Some people can afford armies of lawyers, most Americans can't. It's a matter of fair notice and due process. The other part again is separation of powers considerations.

If I start importing my feelings, if I treat statutes or laws as workshop ink block tests, I've usurped your role. I've taken the right of self government by the people, for the people. Took a jog to the Lincoln Memorial the other morning before the start of all this. Second inaugural address, there it is.

Believe in government for the people and by the people? Maybe Well maybe that's the -- gosh is that the - - it's the Gettysburg Address isn't it? I read them both, thank you, Senator, it's the Gettysburg Address, it's the Gettysburg Address.

CORNYN: Well Judge, let me ask you -- I'm sorry to interrupt you.

GORSUCH: No, I'm sorry it's just a matter of separation of powers. It's not my job to do your job.

CORNYN: Well what sort of escapes me is if people who argue that somehow judges aren't bound by the text of the statute, it is the text of a statute that Congress votes on. So how in the world, if it's something else other than the text, that ought to direct the outcome, how can anybody have that kind of fair notice that we depend upon so people can align their fears consistent with the law?

GORSUCH: Right and it isn't a matter or strict construction. Strict construction, in my mind, sounds like I'm putting the finger on the scale for a particular interpretation, maybe even a pro-government interpretation. I don't see it that way at all. A judge should try and reach a fair interpretation.

What a reasonable person could have understood the law to mean at the time of his actions. That's a pretty good starting place for fair notice and for separation of powers, I think, Senator.

CORNYN: Thank you. Thank you, judge.

GORSUCH: Thank you.

GRASSLEY: Mr. Whitehouse.

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WHITEHOUSE: Thank you, Chairman. Let me ask unanimous consent to put into the record a letter from over a hundred groups dated March 14, 2017 regarding what they described as Judge Gorsuch's troubling money in politics record. And I letter from DEBOS (ph) dated March 9, 2017, urging opposition to Judge Gorsuch's confirmation and a New York Times article captioned Neil Gorsuch has web of ties to secretive billionaire.

GRASSLEY: Without objection, all three documents will be included.

WHITEHOUSE: Thank you.

Before we get into that Judge, let me, since we were talking about separation of powers, could you just reflect on -- whether the constraint that an appellate court is obliged to take the findings of fact, as lower courts have found them and can't indulge in its own fact finding or fact making.

Does that have a separation of powers element to it, in terms of constraining the free range wonderings of a court that could make up its own facts and then go in that direction?

GORSUCH: I hadn't thought about that Senator, to be honest with you. I know --

WHITEHOUSE: How about the question presented. Should the Supreme Court in the question presented try to keep the question narrow to the case presented, so that it's using an expansive question presented, to enable itself to wonder throughout the legal landscape, beyond the constraints of the case?

GORSUCH: Senator, it's generally, as you know, on the facts the practice of an appellate court not to review or overturn the facts of a trial court, except in the presence of clear error.

WHITEHOUSE: Very rare.

GORSUCH: And that's very -- it's a very important standard.

WHITEHOUSE: Yep.

GORSUCH: I may -- I haven't thought about it in the separation of powers, but it's a very important principle that I take seriously. I was a trial lawyer for a long time.

WHITEHOUSE: And in terms of the constraint and how narrow the question is, does that have separation of powers overtones, as well?

GORSUCH: And I give you a similar answer on that, Senator. I don't know about that, but I would say it's an important, general practice. Sometimes, there are exceptions that a court can and should go beyond a question presented, but it's pretty rare.

Usually, we stick within -- well, we don't -- the questions presented are whatever the parties present to us in an intermediate court. They get to choose, we don't get to choose.

WHITEHOUSE: That's part of what separation of powers is about, in terms of constraining the judicial branch to actual cases and controversies, correct?

GORSUCH: Well, we generally refrain from examining arguments that haven't been adequately developed or made, for risk of improvident mistakes.

WHITEHOUSE: Now, let me turn to another topic, let's talk for a minute about money, and in particular, let's talk about dark money. Are you familiar with that term?

GORSUCH: In the loosest sense.

WHITEHOUSE: How would you describe it in the loosest sense, just to make sure you and I are on the same wavelength?

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GOR SUCH: Senator, as I understand it, you may be referring to money that's not spent by a candidate or a party in connection --

WHITEHOUSE: And where you actually don't know who the true source of the money is.

GOR SUCH: OK.

WHITEHOUSE: Is that a fair enough definition for us to --

GOR SUCH: Sure.

WHITEHOUSE: -- again on? OK.

Could you let us know first what you know about the campaign that is being run to support your confirmation. There's been a lot of talk about how this is outside of politics and we're above politics, but there's a group that is planning on spending \$10 million on TV ads, in which their own press release as a comprehensive campaign of paid advertising, earned (ph) media, research, grassroots activity and a coalition enterprise, all adding up to the most robust operation in the history of confirmation battles. That sounds pretty political to me, and I'm wondering what you know about that?

GOR SUCH: I've heard a lot about it, Senator. From you, from others, I've heard a lot about it.

WHITEHOUSE: Do you know -- what do you know about it?

GOR SUCH: I know that there's a lot of money being spent in this by, as I understand it, both sides.

WHITEHOUSE: Well, I wouldn't leap to that conclusion at this point.

GOR SUCH: OK. I know what I've read, I know what I've heard from friends and family and acquaintances. I know what you're -- what you've just indicated.

(CROSSTALK)

WHITEHOUSE: Do you know --

GOR SUCH: Again, appears to be a lot of money being spent --

WHITEHOUSE: Do you know who is spending the money?

GOR SUCH: Senator, I could speculate based on what I've read and what I've heard, but I don't know individuals who are contributing. I don't know that.

WHITEHOUSE: Do you know if your friend, Mr. Angetz (ph) is contributing?

GOR SUCH: I don't know.

WHITEHOUSE: Do you think that it should matter who is contributing? Do you think that there's a public interest in the public knowing who is contributing.

GOR SUCH: Well Senator, I think we've got a long tradition from Buckley v. Valeo indicating that this body has robust authority to regulate disclosure and...

WHITEHOUSE: Yeah, but my question is do you think there's a public interest...

GOR SUCH: And senator...

WHITEHOUSE: ... in disclosure of political funds in a democracy? That's -- I don't think a prejudgment. That's just values proposition and one of the considerations that you ought to be able to answer without much hesitation.

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GORSUCH: And Senator, what I'm prepared to say is, I recognize that is matter of First Amendment interests. **The Supreme Court** has validated the proposition, the disclosure serves important functions in a democracy.

At the same time, **the Supreme Court's** also acknowledged that those disclosure functions can sometimes themselves have unintended consequences as the NAACP case which I know you're familiar with where you can disclosure as a weapon to try and silence people.

And we have a long history in ...

WHITEHOUSE: That's hardly the case with respect to the dark money operation that is funding this campaign in your favor is (ph) it (ph)? GORSUCH: Senator, I'm not prejudging any case. What I am suggesting to you is that there are interests here in this area of First Amendment disclosure. That's what we're talking about, in my mind, generally.

WHITEHOUSE: Yep.

GORSUCH: OK. That are competing on the one hand, in order for informed voters and citizens to be able to make decisions, **the Supreme Court** in Buckley has validated the interest that this body has in regulating disclosure.

WHITEHOUSE: And in theory, so did the court in Citizens United.

GORSUCH: And in theory in Citizens United. At the same time, the courts also recognized in NAACP, for example that disclosure can be used as a weapon to silence voices. And we had a long history of anonymous speech serving valuable functions in the country.

(CROSSTALK)

WHITEHOUSE: So here's a -- here's a live example right now. We have this \$10 million that is being spent on behalf of your confirmation. Do you think, for instance, that we on this panel ought to know who is behind that? And -- well answer that and then I'll go on to a related question.

GORSUCH: Senator, that's a policy question for this body.

WHITEHOUSE: Well, it's also a question of disclosure. You could ask right now that as a matter of courtesy, as a matter of respect to the process that anybody who is funding this can declare themselves so that we can evaluate who is behind this effort, right? That wouldn't be a policy determination, that would be your values determination.

GORSUCH: It would be a **politics** question. And I'm not, with all respect Senator, going to get involved in **politics**. And if this body wishes to pass legislation, that's a political question for this body. And there's ample room for this body to pass disclosure laws for dark money or anything else it wishes to and can be tested in the courts. So Senator, with all respect, the ball's in your court.

WHITEHOUSE: Do you really think that a Supreme Court that decided Citizens United doesn't get involved in **politics**?

GORSUCH: Senator, I think every justice on **the Supreme Court** of the United States is a remarkable person trying their level best to apply the law faithfully. I'm just not...

(CROSSTALK)

WHITEHOUSE: And they got (ph) deeply involved in **politics**, did they not? They changed the entire political environment. The entire political ecosystem with one decision, you must recognize that.

GORSUCH: Senator, it's a precedent (ph) of the United States Supreme Court, they were thoughtful opinions but justices on both sides.

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WHITEHOUSE: I didn't say that they weren't thoughtful. I was responding to your question that they don't -- your response, that they don't get involved in politics. What could be more involved in politics than to open this ocean of dark money that's flooded into our politics?

GOR SUCH: Senator, what I mean to suggest is that I believe every justice on that court is trying to apply the First Amendment and the laws of this country faithfully. You may disagree with them. Many people do. I understand that. I -- it's hard, judges make half the people unhappy 100 percent of the time.

That's our job description. And people do criticize judges, I understand your criticism. But I do not question their motives, Senator.

(CROSSTALK)

GOR SUCH: I do not question their motives, Senator.

WHITEHOUSE: This is a little different. I think you see more like 90 percent of the public unhappy with Citizens United, because they see the problem that it caused in our democracy. And in that case, it wasn't just a question of two parties and you're going to make one of them angry because you've decided for the other.

This is the Supreme Court operating in its role as the legal constitutional guide to the operation of American democracy. And if they get that wrong, that is a much, much bigger deal, whether their motivations were pure or impure, when or whether they got that wrong is a bigger question than just what party won, wouldn't you agree?

GOR SUCH: Senator, if a court errors as a matter of law, they are various remedies. There is a legislative remedy, because there's always another law to be passed and another case to test. Every case comes on its own facts with its own record and can be analyzed anew.

And then there's the law of precedent, which we've discussed. I wrote this 800-page book on, makes a great doorstop, gift for Christmas. I've got a really bad deal on royalties.

(CROSSTALK)

WHITEHOUSE: ...court to clean up after itself --

(CROSSTALK)

GOR SUCH: That's what I'm suggesting. There is a way to do that, right? The President is not inexorable command. And so, the court can reverse itself, it happens.

WHITEHOUSE: If a question were to come up regarding recusal on the court, how would we know that the partiality question in a recusal matter had been adequately addressed if we did not know who was spending all of this money to get you confirmed. Hypothetically, it could be one individual. Hypothetically, it can be your friend, Mr. (Anghez) (ph). We don't know because it's dark money. But if you were to ever find that out or even if you were to have suspicions, I think in any challenge as to whether recusal was appropriate or not, were that to happen in say a lower court, these are the facts that would be noteworthy and that we'd be entitled to have an answer to.

So, it's kind of odd to be sitting here in a United States Supreme Court nomination hearing, with a \$10 million spend taking place for you out there in the political world, and absolutely no idea who's behind it. Is that any cause of concern to you?

GOR SUCH: Senator, I'm not sure what the question for me is?

WHITEHOUSE: Is it any cause of concern to you that your nomination is the focus of a \$10 million political spending effort and we don't know who's behind it?

GOR SUCH: Senator, there's a lot about the confirmation process today that I regret.

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(LAUGHTER)

GORSUCH: A lot.

(LAUGHTER)

WHITEHOUSE: Yeah?

GORSUCH: A lot. When Byron White sat here it was 90 minutes. He was through this body in two weeks and he smoked cigarettes while he gave his testimony. There's a great deal about this process I regret. I regret putting my family through this.

WHITEHOUSE: But to my question?

GORSUCH: Senator, the fact of the matter is, it is what it is. And it's this body that makes the laws. And if you wish to have more disclosure, pass a law and a judge will enforce it, Senator.

WHITEHOUSE: There are going to be -- that's just not -- that's just doesn't do, Judge Gorsuch. There are going to be questions that you will be asked to decide on the United States Supreme Court that are going to be dependent on the values you bring to this. And I don't think you can avoid talking about those values here.

You're an expert on antitrust law, correct? You're very good at that.

GORSUCH: I wouldn't count myself an expert, Senator.

WHITEHOUSE: And when you write about antitrust law, you understand that there are values to which the law should be directed if it's going to be successful. You've written about the values of competition, that the antitrust law should operate in such a way as to maximize and support competition. And that the antitrust laws should be read in such a way as to maximize and support innovation. Those are proper values for a judge applying antitrust law to pursue, are they not?

GORSUCH: Senator, a judge applying antitrust law looks to precedent, predominantly, for guidance as to what decision ...

WHITEHOUSE: A lower judge ...

GORSUCH: Yes ...

WHITEHOUSE: In the Supreme Court, usually it's a new question; otherwise it wouldn't be there for you.

GORSUCH: Senator, respectfully I disagree. The Supreme Court Justice is bound by precedent too.

WHITEHOUSE: I know but the question likely presented in the case is one that is new, otherwise it wouldn't be in the Supreme Court, they would not have taken it for review, and it would have been settled at the circuit or judge-- at the district judge level, no?

GORSUCH: Senator, the precise question may be new, but the notion that precedent wouldn't bring to bear instructions and information on how it should be decided, would be mistaken as well.

WHITEHOUSE: I guess what I'm saying is, that the part of the decision that is guided by precedent is not the part that I'm asking about. The part that I'm asking about is the values determination. And I'm trying to determine if you think that openness with respect to the money that flows around in our democracy in such large numbers right now, is a value that is worth pursuing? Is it a touchstone? Is it a loadstar? Or is it just a burden on people's communication?

GORSUCH: I'd refer you again to Buckley versus Valeo and NAACP.

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(CROSSTALK)

WHITEHOUSE: I'm asking actually you.

GOR SUCH: And I'm giving you my answer, Senator, as best I can ...

WHITEHOUSE: Okay.

GOR SUCH: ... which is the First Amendment, which I'm sworn to uphold as a Judge. Contains two competing messages here.

On the one hand it is regularly recognized the rights of this body to legislate in this area if it wished to do so. If it hasn't done so, with respect, that's not my fault, okay? It's on legislators to legislate. And Buckley recognizes their authority.

On the other hand, it is recognized there may be limits when it chills expression, as it did in the NAACP case. And we have to be worried about that. Because there is room in our democracy ...

WHITEHOUSE: So if we have to be worried about the chilling of expression, which is a value proposition that you have just enunciated, should we not -- am I not also entitled to ask the question about whether we should be worried about the influence of dark money essentially corrupting our politics?

GOR SUCH: Senator, what I'm saying ...

WHITEHOUSE: It's taking a lot of time to get what I would think would be a fairly simple answer.

GOR SUCH: I'm sorry, but I don't think this is simple stuff at all, Senator. I think this is hard stuff.

And I think you've got First Amendment concerns and precedents ...

WHITEHOUSE: All right.

GOR SUCH: ... in the area ...

WHITEHOUSE: Yes.

GOR SUCH: ... that would have to be considered. We'd have to see what law Congress enacted. I'd then want to go through the full judicial process, Senator. I'd want to read the briefs. I'd want to keep an open mind ...

(CROSSTALK)

WHITEHOUSE: You just asserted right here that the value of not chilling speech was something that we should consider, right?

GOR SUCH: I said the Supreme Court of the United States and NAACP recognized that the First Amendment protections we all as people in this country enjoy, can be ...

WHITEHOUSE: which is a value that we should consider ...

GOR SUCH: ... can be chill, and sometimes ...

WHITEHOUSE: and not chilling is a value that we should consider.

GOR SUCH: It's a First Amendment right we're talking about, Senator.

WHITEHOUSE: And where does an anonymity -- let's say a billion dollars in anonymous funding into our elections -
- where does that fit in, in your -- into the values that you bring to this?

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GORSUCH: In the first instance, Senator, it's for this body to legislate.

WHITEHOUSE: Yes.

GORSUCH: And then it would come to court. And then the record would be made ...

WHITEHOUSE: For Citizens United it actually overruled a law that we had written, so that's hardly the be all and the end all.

GORSUCH: It's a dialogue. It's a separation of powers dialogue that we have in all areas. Congress passes a law. A lawsuit's brought. A record's made. A fact finder makes facts. Judges determine the law. A ruling is issued. Congress responds. And the cycle continues.

And Senator, that's our history in this area and so many others. Our Founders were brilliant. They didn't give me all the power. I don't wear a crown. I wear a robe. They didn't give you all the power. They divided it ...

WHITEHOUSE: ... as to the determination to state what the law is, particularly in constitutional matters, they actually did give the Supreme Court the power. And that's why it's important to us to ask these questions now before you go onto the Supreme Court and we have no accountability left.

And so the values that you bring to that in those areas where you're not just implementing Congress' will, but are bringing your own values to the Constitutional document that we treasure, that is why I think these questions are important.

Let me ask something slightly different. You said you knew Judge Garland?

GORSUCH: I do. I wouldn't claim I'm his - my closest personal friend, but someone whom I admire greatly.

WHITEHOUSE: And would you describe - how would you describe any differences, that you may have in judicial philosophy, with Chief Judge Garland?

GORSUCH: I would leave that for others to characterize. I don't like it when people characterize me, and I would not prefer to characterize him.

He can characterize himself.

WHITEHOUSE: What's interesting is that this group sees a huge difference between you that I don't understand.

The dark money group that is spending money on your election spent at least \$7 million against him getting a hearing and a confirmation here, and indeed produced that result by spending that money.

And then, now, we have \$10 million going the other way; that's a \$17 million delta and for the life of me, I'm trying to figure out what they see in you that makes that \$17 million delta worth their spending.

Do you have any answer to that? GORSUCH: You'd have to ask them.

WHITEHOUSE: I can't because I don't know who they are, it's just a front group. There is a - it's been, I think, fairly and fully documented that there is a small group of billionaires who are working very hard to influence and even to control our democracy.

Coax, Mercers, Devosas, and, yes, Anchansaces (ph). They often network together, they attend planning conferences, they pool their resources.

As a candidate, President Trump made fun of the "beg-a-thon," to use his word, that the Coke brothers run every year to bring candidates to their conference.

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They set up an array of benign sounding front groups to both organize and conceal their manipulation of our politics, and Supreme Court Justices socialize with this small group.

And then they go and they tender - render decisions that give that small group immense political advantage, particularly the ability to hide the political expenditure of their money.

And then they go back to socialize some more with that group, and they even speak at the "beg-a-thon" political retreats. Does that look right to you? How as a judge, do you think, -- as a Justice of the Supreme Court should you comport yourself in terms of keeping a distance from interests that are before the Court?

GORSUCH: Senator, I have no information about anything you just described. I don't know about that, and...

WHITEHOUSE: And, wow, because, guess what, you're going to be asked to make decisions on the Supreme Court, that if you don't know that, you're going to have a very hard time figuring out how to make the right call.

That's a - it's a real concern. You know, this is the first Supreme Court in the history of the United States that has nobody on it who's never run for political office, ever.

And yet it makes these wild leaps, like Citizens United that completely deform democracy and then, I don't know if they don't know what they're doing, I don't know what the motivation is, you - I don't know - I sure don't know.

But I do think it's a concern to be asked to make decisions like that without a real grounding in what's going on around you.

Let me ask a little bit just about - to narrow it down more to the Judicial Branch, what do you think the Court's approach should be to the, sort of, machinery of corporate influence that surround the Supreme Court?

There are corporate fund groups, that have been described, I think, very well as the "think tank as disguised political weapon" that surround the Court and constantly pelt it with amicus briefs on behalf of big corporate and industrial interests.

At this point, their, in the five to four decisions I listed yesterday, their record is 16-0 at the Supreme Court in terms of helping the corporate interests, so that looks like they're doing really, really well. These corporate flyer, corporate front entity.

When they turn up at the Supreme Court, should they disclose more about who's interest they represent? Would it be good for the reputation of the Supreme Court and for our democracy if people knew who actually funded them when they turn up?

GORSUCH: Senator, to your earlier question, I think I can talk about my record. I'm not a philosopher king, but I can talk about my record. And my record is that in the last 10 years, I don't think there's been a single motion to recuse me. I try to be very careful in which cases I hear.

WHITEHOUSE: This is --

GORSUCH: And I want to take that very seriously. It's part of my obligation as a judge. I can't claim I'm perfect, but I've tried awful hard and I haven't had a motion against me because I do take seriously the impartiality and the appearance of impartiality.

And so, all I can say to you is that I commit to maintaining my impartiality as best I can, and to recuse where I'm -- where the law suggests I should.

WHITEHOUSE: So, back to my question about these amicus briefs and not knowing who's behind the front groups who turn up and help the court with the briefs?

GORSUCH: Senator, there's --

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(CROSSTALK)

WHITEHOUSE: Court rule --

GORSUCH: -- a disclosure statement rule, as I recall.

WHITEHOUSE: Yeah, but it's not much of a one because here's what it says. It says that the filers shall identify every person, other than the amicus curiae, its members or its counsel, who made a monetary contribution to fund the preparation or submission of the brief.

As you know, the preparation and submission of a brief is not particularly expensive and the monetary contribution is not ordinarily reported as being the funders of the organization. So, if an -- as I understand it, if an organization gives \$100 million to a front group and says go in there and -- but, don't put any of my name on this stuff but this is what I want you to do -- as long as the front group then pays for the brief itself, there's no filing that reports who the interest is behind it.

And I worry that we have an operation going surrounding the court, that the court itself is actually blind to the true roots of. And should the court not understand what the interests are behind these front groups --

GORSUCH: I think that's a very interesting suggestion and one that I will take to heart, Senator. Obviously, this Congress has a role in rule making process as well. There's a rule making committee and a rules enabling ad (ph) process for the lower courts. The Supreme Court has its own rule making process and I appreciate that information for both functions.

WHITEHOUSE: And as a Supreme Court --

(CROSSTALK)

WHITEHOUSE: -- who have a role in policing the judiciary as the top court, one of the things that's cropped up is special interests training camps basically at lush resorts, for lower court judges -- as much as 40 percent of the Federal Judiciary has gone to these special interest-funded training sessions, described as one writer as a cross between malice-cultural reeducation camps and Club Med.

There's been a wide array of condemnation of this practice from editorialists, of all stripes, and is that something as a matter of kind of protecting the integrity of the courts to which the Supreme Court should attend itself?

GORSUCH: Well Senator, I know as a sitting judge, I disclose every trip I take that isn't official business that anybody else pays for.

WHITEHOUSE: And so to credit, you went to none of these, as far as I can tell.

GORSUCH: Thank you, Senator, I appreciate that acknowledgement. I do go to a lot of mute (ph) courts and things like that and everything I've done is disclosed. So, that's -- it is all there, there. You have all of the information.

WHITEHOUSE: Yeah. I'll just note that some of the editorializing about this, it creates an egregious, ethical conflict of interest bordering on wholly improper out-of-court communication with special interests, lobbyists or representatives of people who have filed lawsuits. Another said it looks like an interest group has put part of the Federal Judiciary in its saddle. A third said the conflict is clear and the judge's participation is mine-boggling. And by the way, all of those came from newspapers below the Mason-Dixon line, that's not just Yankee Elitist talking.

So, I -- my time has expired but I look forward to further rounds and I appreciate your time with me.

GORSUCH: Thank you.

GRASSLEY: Who am I to tell you how should answer questions, but if I were sitting where you were and values were brought up, it seems to me that it's the Congress that deals with values as representatives of our people and

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you look at the law, and when it comes to briefs I would assume you don't care who paid for them, you're only interested in what the brief says. Senator Lee.

LEE: Thank you, Mr. Chairman and thank you judge. What you're seeing here is the confluence that occurs by operation of the Constitution between law and politics. And you as a textualist understand as well as anyone where the word politics comes from. You break the word down into its two Greek roots. You've got poli, which means many and tics, which are blood-sucking parasites.

(LAUGHTER)

LEE: It works out. I would also like to echo something said by our Chairman a moment ago. When we're focused on the identity of the parties, on the identity of those speaking to the court, the identity of those people might matter more if you're focus is on their identity.

If on the other hand, your focus is on the law and what the law requires, the focus is likely to be different. Judge Gorsuch, are you a lawmaker?

GOR SUCH: No, Senator.

LEE: Have you ever held a position as a member of Congress?

GOR SUCH: Goodness no.

LEE: Have you held any public office in a policy making arena, outside the Federal Judiciary?

GOR SUCH: I've served on my kids' school board, but that's about as close to policy as I care to get.

LEE: Any role in setting Federal - - in establishing and making laws governing Federal Campaign Finance?

GOR SUCH: No, Senator, that's this body's province.

LEE: OK, it seems to me, judge, that it would be a unfair for anyone to state or to imply that you then are responsible somehow for the expressive conduct of third parties. Third parties who are not you. It would be unfair for me to attribute to you something that someone else is saying.

And it would seem to me to be especially unfair to say to you, as a sitting Federal Judge and nominee for Supreme Court of the United States, to say to you that you have to tell someone else something that they shouldn't say because otherwise that might cause problems for you when you didn't make a set of laws to begin with. By the way were you involved in the Citizen's United case?

GOR SUCH: Senator, I was not involved in the Citizen's United Case and I appreciate the opportunity to clarify that fact. I'd also like to clarify that nobody speaks for me, nobody, I speak for me. I'm a judge, I don't have spokesmen, I speak for myself. LEE: Thank you for clarifying that for us. Judge, yesterday you referred to the fact that you had some of your law clerks here with you yesterday. I suspect some of them are here today as well. Tell us a little bit about the relationship that exists between a judge and the judge's law clerks. It's more than just a job or an adventure.

It's sort of part of the legal education experience that many lawyers are able to go through, is that right?

GOR SUCH: As you father knew well. It is one of the great joys of this job and one of the great surprises, right? You practice law for 20 years, you're used to working with pretty senior people and then all of a sudden you show up, as I did my first day, and there is a pile of briefs waiting in a tiny office that hasn't been decorated.

There's a chair, have at it and you get to hire four brand new young folks straight out of law school who don't know a darn thing. Have at it, have fun.

LEE: Did you acknowledge that when you were a law clerk?

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GORSUCH: You know, part of the reason I'm a judge is because of my experience as a law clerk. Shared experience with the same fellow your dad clerked for, Byron White (ph) and we used to race writing opinions. This is the humility of maybe the smartest lawyer I knew, talk about Rhode Scholar, first in his class from Yale type stuff. And he'd say first one done with the draft wins.

Well what does it mean to win? Drafting an opinion, that wasn't real clear but he was a pretty competitive guy. And what it meant was, whoever got the first draft done, the other one went in the bin and we worked off the draft of the guy who won. I never won.

And he could only type with these big -- you know, these big hands, thick, pulling (ph) up sugar beets. And so he'd hunt and peck and he could still beat me. It's a very close relationship, it's an intimate working relationship. And it becomes one of the great choice of your life.

You see these young people, you know I've been out to pastor (ph) for 10 years, I thought I was done. You know, that was my life. I love my life. I love my home state. I hope I'm making them proud. And you see these young people come and go.

And you get to see what they go on to do. They go on to do such wonderful things. I've had young people go on to clerk for the Supreme Court, about a dozen of them for justice -- all kinds of justices.

Justice Scalia and Thomas, Justice Kennedy, Kagan, Sotomayo. And that's a -- that's a deep and inspiring thing. And you watch them go on beyond that. Some of them are teaching kids at Harvard, Vanderbilt, Notre Dame. Some people, young lady who's doing fisher (ph) policy in South Africa doing all sorts of really wonderful things. And it just gives you hope and heart in the future. You know, as I tell my students, somebody has to run the zoo. You want it to be the best and the brightest and it's so heartening to see these young people, some of whom are first in their family to go to college, immigrants to this country, rise to the very top.

LEE: Winston Churchill was known to have said then (ph), we shape our buildings and then our buildings shape us. There seems to be a corollary here with law clerks. You shape your law clerks, they end up probably having an influence on you as well.

At a minimum I would think that you develop the kind of relationship with them to where they know you, they know your jurish (ph) credential (ph) style. They know your quirks. They know most likely what you like to have for lunch.

But you would say there -- there develops a pretty close relationship between a law clerk and -- and the judge during a clerk shift (ph). Wouldn't -- would -- would you agree with that?

GORSUCH: I always think that a family that skis together stays together. We ski together.

LEE: Yes. And it's much more true of skiing than snowboarding, I think. Snowboarding is a lot more painful and...

GORSUCH: That's a value judgment I'm happy to make.

LEE: Yeah. One of the reasons I ask about this is because I've -- I've got some letters I'd like to introduce for the record. There's a piece written by three lawyers who clerked both for you and Justice Scalia. I -- I tried really hard to think of a -- of a great term for this, the Scalia, Gorsuch combo but I couldn't come up with anything interesting.

But it's -- that's a -- that's a good duo for whom these lawyers have clerked. And they've written a -- a great piece talking about you. It's entitled "A Principled and Courageous Choice." I'd like to submit that for the record.

GRASSLEY: Without objection, that will be included.

LEE: They write, Judge Gorsuch's opinions reflect the principle Justice Scalia spent his career defending. That in a democracy, the peoples elected representatives, not judges get to decide what the laws should be -- what laws we should have.

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They go on to say that they believe that -- that you, Judge Gorsuch, will be "as principled, as courageous and as committed to the Constitution and our country" as Justice Scalia was. So they go on to -- to urge that -- that we confirm to the Supreme Court.

I'd also like to enter into the record another letter that's written by someone else who clerked for you, Judge Gorsuch, and who also clerked for Justice Kagan on the Supreme Court.

LEE: He writes, "Gorsuch will make an exceptional Supreme Court Justice. He possesses a rare combination of intelligence, humility, and integrity, not to mention a fierce commitment to the rule of law. In fact, he's remarkably similar on these metrics to Supreme Court Justice Elana Kagan."

He also goes on to write, "this zeal (ph) for the rule of law gives me every confidence that Gorsuch, like Kagan, will stand firm against any effort by the Trump administration to abuse executive power", closed-quote. He writes that liberals should welcome a nominee like Gorsuch.

If I could enter this one into the record also, as well.

GRASSLEY: Without objection, so ordered.

LEE: Thank you, Mr. Chairman.

Let's move on. One of my colleagues earlier today asked some questions about remarks that you assisted in preparing remarks that were prepared for delivery, but then Attorney General Alberto Gonzalez in connection with Senate Judiciary Committee Oversight hearing concerning the Terrorist Surveillance Program. This is a hearing that occurred on February 6, 2006.

One of my colleagues referred to this -- this morning -- are you familiar with what I'm describing?

GOR SUCH : Very vaguely.

LEE: OK. My understanding is that at the time, you were serving as the Principal Deputy Associate Attorney General. Would that be correct to say you were in that position? Quite a mouthful.

GOR SUCH : Yes.

LEE: That's why it's commonly known as the PDAAG, but most people may not immediately recognize the term PDAAG as I'm sure they would at your household.

So, the issue in that hearing as I understand it was whether or not this TSP program was unlawful. And you were involved, as I understand it, not on the basis of your expertise in this area, but on the basis of your writing ability. Based on the fact that people recognize your ability to write, a talent that has now become apparent to many of us, as we've reviewed your judicial writings. You were brought in as a scribe (ph) of sorts, someone who would give voice, so to speak, to what the Attorney General might say and not based on your expertise of this TSP program. Is that consistent with your recollection of these events?

GOR SUCH : It is, Senator.

LEE: OK. It's also my understanding that not only were you not fully familiar with this TSP program, but you legally could not have been. It was impossible for you to be familiar with that program, for the simple reason that you didn't even have the clearance necessary to know the details of the program, and therefore, couldn't speak to those details.

GOR SUCH : Sitting here, that's my recollection.

LEE: OK. So, as a result of that, any work that you did on those prepared remarks would've been done based on your limited understanding, based on a limited set of facts that you were given in preparing it, and then anything you would've done from that moment forward, you would've said, look, I don't know the facts of this, I can't know the

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facts of this, you all are going to have to fill in the details. I've done the best I can based on assumptions I've drawn and the limited facts have been given about this program.

GORSUCH : Yes, that's my recollection.

LEE: Thank you.

Some of my colleagues have suggested that your rulings reflect the particular bias. Bias in favor of the big guy and against the little guy. It's not always apparent in every case, whether there is in fact a big or a little party. I suppose in some cases it's open to dispute, in other cases it might be very apparent that one outpowers the other, in terms of economic heft and access to good lawyers, and so forth.

But, I reviewed your work and I'd like to say, yes, in some instances, it is easy to identify a party that might thusly be described as little. I can't discern any bias in your work that favors one type of party over another. In fact, there are a whole lot of cases where you've ruled in favor of the little guy. Among those cases was one discussed just a few minutes ago in your conversation with my colleague, Senator Cornyn, in *Gutierrez Pesola (ph) v. Lynch*.

That was a ruling that was most decidedly in favor of a little guy. In fact, it doesn't get much more little guy than a David going against a Goliath, that is the Federal Government. A David, who is someone in a very precarious position, relative to the Federal Government, against the entity with more money and more lawyers than any enterprise that's ever existed on planet Earth.

Other cases in which I know you have ruled in favor of the little guy, include but are by no means limited to *Fisher v. City of Las Cruces*, *A.M. v. Holmes*, *Orr v. City of Albuquerque*, *William v. W.D. Sports* and *Walton v. Powell*. Now, these cases do not all fit into a common framework. In fact, they involve a pretty wide range of issues, including cases involving qualified (ph) immunity against police officers, cases arising under the Family Medical Leave Act, sex discrimination cases and cases involving politically-motivated firings. These are just a few examples.

But just to be clear, in going into this, as a judge, do you have any bias that you can detect? How do you approach a case? Do you look at a case and say, this person is well represented and powerful, this one is less well represented and not powerful? Does that influence how you approach the law in any case?

GORSUCH: Senator, you try to treat each person as a person. We're all just people at the end of the day, and that equal justice promise, equal protection under law, is the most radical guarantee I'm aware of in the history of human law, the recognition that no one is better than anyone else.

And Senator, all I can tell you -- here's some facts. These are the facts of my record. Ninety-seven percent of the time out of 2,700 cases, we ruled unanimously; 99 percent of the time, I'm in the majority. According to the Congressional Research Service, as I understand it, of the judges studied in the Tenth Circuit, my opinions attract the fewest dissents. They're not sure whether it's because I seek consensus or because I'm persuasive. I don't care which it is.

My law clerks tell me as well that I'm as likely to dissent from a Democrat as a Republican appointed colleague. Not that that matters.

LEE: But -- by the way, what if this weren't the case? What if you were dissenting in a lot more cases? What if you were a lot more likely to dissent from one type of judge versus another? Would that...

GORSUCH: Senator, I know the men and women of the Tenth Circuit. I know the judges with whom I serve. I question the motives of none, ever. We disagree sometimes, but when we disagree, it's about the law, not politics.

And I think sometimes, really in this country, we're kind of like David Foster Wallace's fish. He wrote about a fish swimming in the aquarium and it spends so much time in water and it's so surrounded by it, the fish doesn't even realize it's in water. And I feel like sometimes, when we nitpick and we complain about the quality of justice in this country, which leaves a lot to be desired -- there is much room for improvement. I'm not here to say it's percent or anywhere close to it. We are a work in progress.

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But the rule of law in this country is so profoundly good compared to anywhere else in the world that we can complain and know that we're protected because of the rule of law. I think we're a little bit like David Foster Wallace's fish. We're surrounded by the rule of law. It's in the fabric of our lives, so much so we kind of take it for granted. Just to go on, my work on access to justice (ph) in the Rules Committee and outside the Rules Committee, speaking on it, my work (ph) talking about overcriminalization, capital habeas. I've removed judges and lawyers when I've had to or sought their removal. I believe in our Seventh Amendment jury trial right. I've ruled for the least amongst us when it comes to immigrants -- we've talked about a couple of examples -- and criminal defendants.

I can give you a whole long line of cases I can site where I ruled for Fourth Amendment claimants and other criminal defendants. That just criminal; Ford, McCar (ph), Far (ph), (inaudible), Spaulding (ph), Carlas (ph), Acruman (ph), Krueger. That's just criminal I've just jotted down here. Environmental cases; Rock Flats, magnesium in the renewable energy case. Civil Rights. You mentioned Orr, W.D. Sports, Casey, Energy West, Crane (ph), C.U. v. Simpson. Those are just some that come to mind.

LEE: So does this tell us that you are in fact objective or does it just tell us that you're really, really good at covering up the fact that you're not objective? I mean, it seems to me that if you were biased and determined to rule only for the big guy, only for large wealthy corporations, it'd be an awful lot of work to go to in order to rule for the little guy as often as you have.

GORSUCH: Senator, I'm not buying into any of that, with respect. With respect, I view my job to be fair. It's what General Codshell (ph) said to you all yesterday, what he wants is a fair judge. That rang though to me when I heard it. I didn't know he was going to say that. That's exactly what I thought when I was a lawyer.

I just wanted to go into court and have the judge hear my client, hear them, really hear them as a person on the facts and the law and leave everything else alone, at home where it belongs. Now that's hard. I'm not here to tell you it's easy and I'm not here to tell you I'm perfect. OK?

I'm a human being. I'm not an algorithm but I try really hard, and it's almost like an athlete. It's something judges practice and hopefully we get better at it with time.

LEE: When you say fair, you're not talking about fairness necessarily in some abstract ethereal sense, in some solomonic way in which you're judge being wise in your own mind. I -- you -- you -- you were being fair in a manner that is consistent with and dictated by your judicial oath.

And your oath to uphold and protect and defend and operate within, subject to the constraints of the United States Constitution, a Constitution that puts the power to prescribe laws with perspective general applicability in the political branches of government, in the legislative branch and in the executive branch.

And so far the executive is involved in the law making process and then in so far as the executive is involved in the execution of those laws. The judicial branch on the other hand is there to give effect and meaning to those words. Not just based on what is fair in some abstract sense but also what is fair in the sense that you've got to decide who the decision maker is.

Who makes the law and how to give effect to those words. One of the many cases that comes up from time to time is one called TransAm Trucking v. Administrative Review Board. You wrote in that case, it might be fair to ask whether TransAm's decision, meaning the decision to fire the driver in question, was a wise or a kind one.

But then you say, it's not our job to answer questions like that. So you don't have to respond to this but -- but I'm going to tell you how I interpret the language that was an issue in that case. As -- as someone who has served as a law clerk in the federal judiciary and as someone who has litigated cases.

If I were involved in that case, a case in which the judge wrote those words, I might think to myself regardless of whether I like the law and regardless of whether I like the decision made by the employer in that case, this is a judge who is bound by the law and is acknowledging as much in his opinion.

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So I'd like to ask about the law in that case -- in the -- in the TransAm Trucking case. The applicable statute said that you cannot fire someone for "refusing to operate a vehicle." Is that consistent with your recollection?

GORSUCH: Sitting here, that's my recollection.

LEE: In that case, the trucker was fired because he operated his vehicle, the vehicle he was assigned to, against company orders. Is that a fair summary based on what you remember from that case?

GORSUCH: Yes, Senator.

LEE: So one could argue -- and I think -- I think could argue conclusively, and I think it was argued and decided in that case that this was a fairly clear application of the law. Because if -- if -- if what the law said that the person couldn't be fired for refusing to operate a vehicle.

In that statute we're being invoked not in a context where the person was fired for refusing to operate a vehicle but where in fact the person operated a vehicle. Those are two different things, aren't they?

GORSUCH: I thought so, Senator. That was my judgment in that case.

LEE: Dickens wrote that the laws an ass. And sometimes you might encounter cases where that's true. Sometimes you can look at those who make the laws and say, exhibit A, your honor, as to why this law is an ass.

But it's not your job to rewrite the law. It's not your job to write it in the first place and it's not your job to rewrite it after the fact, is it?

GORSUCH: I don't believe so, Senator. LEE: You had another case under the same statute that was involved in the TransAm case. It's a 2007 case called Copart Inc. (ph) v. Administrative Review Board. In that case, a trucker had been fired for refusing to drive a truck that he considered unsafe. You wrote an opinion ruling in favor of the trucker and awarding him attorney's fees, is that right?

GORSUCH: Senator, your recollection is better than mine on the attorney's fees issue.

LEE: What's don't (ph) always award attorney's fees, but as I recall and the court did in that case.

So, I don't -- don't really understand the argument that some are making or the implication that some are trying to raise, that you were somehow unfair in the TransAm case, because after all, in the TransAm case, you applied the law, it didn't apply in the way the terminated employee wanted it to apply in that case, but you applied it fairly in the other case.

I also wanted to bring your attention to another case that's been mentioned by some of my colleagues, and that's the wrong case. It's the case where a professor with cancer wanted to extend her leave. The University said no and the professor sued. The panel ultimately concluded that the law required her to show that she could continue to perform her job if the University provided an accommodation. And all the parties in that case agreed that she could not, that she couldn't continue to perform it. That, as I recall, was a unanimous opinion, is that correct?

GORSUCH: Senator, that was another very hard case to go home after. The individual there had -- was sick, very sick. And had given I think six months off I think already, if I remember correctly. And I can't remember if it was the University of Kansas or Kansas State. And then she was asking for another six months off. And the University said no. And she sued under the Rehabilitation Act, which prescribes that reasonable accommodations must be provided to workers to perform their essential job functions. But to prevail, they have to show they can perform their essential job functions.

It was undisputed in that case, she just couldn't, through no fault of her own. And the District Court said that's just not a claim under the Rehabilitation Act -- maybe for a breach of contract, maybe something else -- but not under Federal Statutory law. That's my recollection sitting here.

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And my panel, three judges, unanimously agreed that that was the correct application of the law and those facts. No one is here to say that love the law in every case and the results it yields. I'm here to say that I promise to apply the law faithfully and I can guarantee no more promising no less than that, Senator, in every case.

LEE: If I'm remembering that case correctly, Judge Lucero was on that panel with you, is that right?

GOR SUCH: I don't recall. I will check to make sure, I think he was and Judge Lucero was not nominated by a Republican President. Judge Lucero is one of my dear friends and colleagues and he was appointed by President Clinton. That's true, an excellent judge.

LEE: So, if you were wrong in this case, then so was he. You did right in that case also, something that I thought showed a fair amount of reflection on the plight of the plaintiff in that case, writing quote, "By all accounts, the plaintiff was a good teacher, suffering a wretched year" closed-quote, indicating that you were aware of her plight. This is hardly the kind of statement made by a judge who is unsympathetic. This is in context the kind of statement made by a judge who understands the deeply human context of every case, and also understands the deeply sacred nature of the oath you took to uphold and protect and defend the Constitution of the United States and to operate within the constraints of the Constitution.

For that, I thank you and I respect you.

GOR SUCH: Thank you, Senator.

GRASSLEY: Thank you, Senator Lee.

I want to make an announcement that we could take a 10-minute break after Senator Klobuchar. Judge, just so you know the plan, we're going to take that 10-minute break and I hope it won't be 11 or 12 minutes.

Senator Klobuchar?

KLOBUCHAR: All right. Thank you very much, Mr. Chairman.

Thank you, Judge. As I said yesterday, your nomination comes before us during an unprecedented time in our nation's history. In recent months, foundational elements of our democracy have been challenged and questioned and even undermined. And for that reason, I just can't look at your nomination in the comfort of a legal cocoon.

And I believe we should evaluate your record and philosophy against the backdrop of the real world today.

So starting with something easy with the real world, Senator Grassley and I are leading a bill on cameras in the courtroom. I'm not going to ask you specifically about that bill for federal courts. But a number of your fellow people who are sitting at that table in years past, including Justice Sotomayor, has said that they were open to it and were positive about bringing cameras into the Supreme Court.

And just to give you a sense of why this is so interesting, only a few people can get in there, yet the decisions affect everyone in America. Even just last month, 1.5 million Americans tuned into CNN's broadcast when the Ninth Circuit heard arguments challenging the president's refugee and travel ban.

So what is your opinion on having cameras in the Supreme Court?

GOR SUCH: Senator, that's a very important question. I appreciate the opportunity to discuss it with you. I come to it with an open mind. It's not a question that I confess I've given a great deal of thought to. I've experienced more cameras in the last few weeks than I have in my whole lifetime by a long, long way.

And I've got to admit that the lights in my eyes are a bit blinding sometimes. So I'd have to get used to that.

KLOBUCHAR: But would you -- will you favor it or not?

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GORSUCH: Senator, I would treat it like I would any other case or controversy. That's what I could commit to you. That I would want to hear the arguments. I know there are justices on both sides of this issue. Right?

KLOBUCHAR: Yeah, I think Justice Souder said "over his dead body" would they have cameras. But I would -- I was hoping that things have changed. I was hoping that things have changed since then, and that we see just more and more interest in these decisions. And I hope that you will remain open to it and will favor it.

My second question, which also pertains to transparency, is a discussion you had with Senator Whitehouse about the federal rules for federal judges in terms of disclosing trips and things like that. And you had said that you hadn't take those trips, but if you had, you would have disclosed them. And I appreciate that.

Do you think that there should be that same kind of federal ethics standards for Supreme Court justices?

GORSUCH: Well, Senator, what I said is I've disclosed every trip that's reportable.

KLOBUCHAR: OK. I'm sorry.

GORSUCH: And...

KLOBUCHAR: Yes, but the specific question is on Supreme Court justices.

GORSUCH: Yes. I know that the rules are different. I don't know how different they are. I haven't studied that, Senator.

KLOBUCHAR: Would you favor them having the same set of rules that apply to you right now?

GORSUCH: Senator, what I can -- I'd say two things. First, I have no problem living under the rules I've lived under. I'm quite comfortable with them. And I've had no problem reporting every year to the best of my abilities everything I can. So I can tell you that.

It doesn't bother me what I've had to do. I consider it part of the price of service and it's a reasonable and fair one. I'd also say I don't know what the arguments are. I haven't studied them. And I'd want to commit to you that I'd give it very fair consideration. And I'd want to hear what my colleagues have to say.

KLOBUCHAR: OK. GORSUCH: You know, I...

(CROSSTALK)

KLOBUCHAR: It's pretty straightforward to me because it applies to the other federal judges. I don't think this is a matter of precedent or what's happened. You are going to be, in the words of Hamilton, if you get confirmed, "in the room where it happens."

And so all we're trying to do is to make this as transparent as possible of what people's interests are. And so I just hope you'll consider that.

GORSUCH: Of course I will.

KLOBUCHAR: I think I'll move on to some of the harder stuff here.

GORSUCH: (inaudible) to you I will consider both of those things.

KLOBUCHAR: OK. Thank you.

On the issue of precedent, I think this idea of an independent judiciary is important now more than ever. So I want to start with that. When you accepted the president's nomination, you said "a judge who likes every outcome he reaches is very likely a bad judge." And in your book, you said again that "good judges often decide cases in ways antithetical to their own policy preferences when the law so requires."

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So I want to ask, can you give me an example of a Supreme Court case that you believe was wrongly decided under the law, but that you will continue to follow if you are confirmed because the precedent is so strong?

GORSUCH: Senator, I think that's just another way, honestly, of trying to get at which Supreme Court precedents I agree with and I disagree with.

KLOBUCHAR: I don't think it is. It's about -- it's something that you actually said when the president nominated you, and you said it in public. You said that this is a definition of a judge, that they -- someone who, you know, respects precedent so much that they're still going to enforce the law.

So I just thought there could be one example, even if it's a really old one.

GORSUCH: Well, I think Senator Lee and I were just talking about a couple of cases where the results were not attractive to me as a person, where I followed the law to the best of my abilities. And did so, you know, with my colleagues.

KLOBUCHAR: Yeah, one of the reasons I'm asking this is that several past nominees have made this promise about respecting precedent before this committee. And these are people you respect, justices, and admire. At the same time they said they'd respect precedent, and then they later became justices with a lifetime appointment, and they overturned precedent.

One of those examples is *Citizens United*. Two past nominees who later became justices stated they'd honor precedent during their hearings, and then they joined an opinion that not only broke from precedent, but gutted a law passed by Congress, releasing this unprecedented wave of money.

So do you view *Citizens United* at a departure from prior precedent?

GORSUCH: Senator, *Citizens United* did overrule *Austin*. So in that respect, it is an example of a court that in part overruled a precedent. And that's part of the law of precedent, too, as we've talked about, that you start with a strong presumption in favor of precedent. That's the anchor of the law. It's a starting point.

But there are instances when a court may appropriately overrule precedent, after considering a lot of factors. And we've talked about them, and I'm happy to discuss them with you again if you'd like. But I don't want to waste your time either. So you tell me.

KLOBUCHAR: So you see this as -- you see this as something where there was precedent that was -- I mean, you go back to *Buckley vs. Valeo*. You know, parts of that -- yes, we -- you discussed earlier with my colleague, stayed in place, but it overturned parts of that; *Austin*; *McConnell*. There were just a number of cases that it overturned.

To us up here, it was a major overturning of precedent. And so that's why we're so concerned when people say, "Oh, we're going to respect precedent," and then they come in and do that. And actually, you've suggested that you would actually go further than *Citizens United*, and that was in *Riddle vs. Hickenlooper*, a 2014 case.

And while it was a narrow case about campaign finance caps on individual contributions to major political candidates, the outcome of the case isn't really one I want to talk about. That was all the judges -- I think there was an agreement on the case.

But you alone wrote a concurring opinion, and that's what I want to focus on, suggesting that making a political contribution was a fundamental right that should be afforded the highest level of constitutional protection, which is strict scrutiny.

If the Supreme Court adopts the standard that you suggested, the few remaining campaign finance limitations that we have in place and left on the books could fall. So do you believe that strict scrutiny is the appropriate standard for reviewing campaign finance regulation?

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GORSUCH: Senator, I welcome the opportunity to clarify Riddle vs. Hickenlooper. In that case, the law in Colorado allowed individuals to contribute more money to -- to major party candidates than to minor party candidates. KLOBUCHAR: I know -- I really do. I read the case. I understand that. But I just want to with my limited time focus on that concurring opinion, because that's what the actual opinion said, but then you took it a step further to talk about this possibility. You cited an opinion by Justice Thomas in your concurrence, joined by Justice Scalia, suggesting that all contribution limits should be subject to strict scrutiny.

So, could you clarify for us, do you think there's any basis for applying strict scrutiny to contribution limits that apply evenly across the board, why else would you have cited that opinion?

GORSUCH: I'm happy to try and explain again. So, the facts of the case -- and that's what I was deciding -- were uneven contribution limits. It was permissible to give more to major party candidates than to minor party candidates. And the law, as you're, I know, well aware, Senator, under Buckley, says the contribution to candidates is a first amendment fundamental right. It says that. And I was quoting Buckley, I'm sure, or citing Buckley to that effect.

And then the question becomes, what level of scrutiny should we apply to that case? Buckley suggests that it's something less than strict scrutiny in the first amendment context for contributions. That's the instruction that I, as a lower court judge have in the first amendment context.

But this was an equal protection challenge, OK. Saying, it's not just contributions. It's the inequality of contributions that's the problem here. That this system favors major party candidates over minor party candidates. And normally, when we have a fundamental right in equal protection analysis, we apply strict scrutiny. And so I was faced with a situation where, do you take this little less than strict scrutiny out of the first amendment context and import it into the equal protection context, or do you apply the normal strict scrutiny at the equal protection context? And I appointed to two excellent opinions by wonderful district judges in the area. Judge Boasberg (ph) and Judge --

KLOBUCHAR: OK. All right. I really did read it. So here's -- OK. OK. I know, I understand that, but here's the deal, is that the other judges were happy to just decide it on that narrow basis, right? So then you write the concurrent opinion to bring up this other issue. And I think again about Justice White, who you've, is your mentor, was your boss, and there is a law review article from dean of Tulane, time and time again Justice White avoided broad theoretical basis for a decision when a narrow fact specific rational would suffice. And yet you write this concurrent, and so --

GORSUCH: (inaudible) Senator? Because I'm almost there.

KLOBUCHAR: Oh.

GORSUCH: OK. So I write to point out this conflict in the Supreme Court's directions that I saw.

KLOBUCHAR: OK. GORSUCH: All right? And then I said, in our case, our in White (ph), it doesn't matter. Because Colorado couldn't meet even a rational basis test. Forget about whether it's strict scrutiny or something close to strict scrutiny. It couldn't meet rational basis test because Colorado couldn't articulate any good reason, any -- maybe there is one out there, I don't know. But I said, they've articulated nothing.

KLOBUCHAR: OK. But let's just, let's continue on with other cases, because it's a bit of a pattern. Not a concurring opinion, but in the Hobby Lobby case, you found that corporations were legal persons and could exercise their own religious beliefs. And for me, when it comes to campaign finance, this opens up the possibility that you would strike down then this idea that corporations shouldn't be giving money directly to campaigns. Do you think they're -- these creatures of statute have the same constitutional right as living, breathing, human beings?

GORSUCH: Goodness no, Senator. Hobby Lobby had nothing to do with the first amendment of the Constitution.

KLOBUCHAR: But it was about corporations.

GORSUCH: It was. Under RFRA.

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KLOBUCHAR: So you don't think then -- maybe we can end this line here. So you don't think that they would have these rights, a corporation would these rights under the first amendment?

GORSUCH: I don't think Hobby Lobby speaks to the question of the first amendment at all. What it speaks to is a question of the Religious Freedom Restoration Act, and what a person is is defined under that statute by reference to the Dictionary Act, which is Congress' direction to us when we're dealing with statutes. What words we're supposed to use, and what definitions are. And Senator, in RFRA, again, if this body wishes to say only natural persons enjoy RFRA rights, that's fine. And I will abide that direction. I'm not here to make policy. I'm here to follow it.

KLOBUCHAR: OK. On to another policy that's pretty important. It's the Chevron case. And in your Gutierrez concurrence, and this is where you wrote the actual opinion and then wrote your own concurring opinion, which I noted is better than writing a dissent to your own opinion, but you wrote a concurrence to your opinion, and to me, this move, as you imply in your concurrence, or you don't even imply, you say, it could have titanic real world implications when it comes to rules (ph) -- 13,500 cases on the books since 1984. In your book, you say you don't overturn precedent unless it is universally accepted, affirmed by courts repeatedly, and people have extensive reliance on the decision.

So my question is, why in your concurring -- and Senator Feinstein asked you about the facts of the case. I do not want to talk about that because she already did and I got your answer, that was good. But in the concurring opinion, you say, there is an elephant in room with us today. Sorry guys, he wasn't referring to the Republican Party. There is an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is, Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Quote, maybe the time has come to face the behemoth, end quote.

That sounds to me like again, you are going a step further and talking about overturning a major precedent. I want to know if that's what you mean, if you think it should be overturned, and if you've considered the ramifications of that when Justice Scalia himself was the original champion of the Chevron doctrine.

GORSUCH: Senator, all I can do is explain to you why I was concerned about Chevron in that case. And I was concerned because again, we had an undocumented immigrant who was following judicial precedent --

KLOBUCHAR: I really do understand the facts. But I want to know why you did a concurring opinion to your own opinion in order to make this broader sweep, and talk about you said, the time has come to face the behemoth. You were clearly talking about overturning Chevron.

GORSUCH: Senator, I'm trying to answer your question as best I can. And I was concerned about the due process implications that arise in cases like Mr. Gutierrez, where an individual, who isn't aided by an army of lawyers or lobbyists -- can they anticipate changes in law by agencies back and forth willy-nilly, even to the point of overruling judicial precedent. And that's a due process concern I raised.

I raised an equal protection concern about the ease with which individuals like Mr. Gutierrez can be singled out by political branch in a way that judges are supposed to protect. I raised a separation of powers concern about whether judges should be the ones saying what the law is.

KLOBUCHAR: But as a Supreme Court justice, if you were to make this decision to overturn Chevron, would you consider the implications on an all of the cases in the U.S. and in the rules and the uncertainty it would create?

GORSUCH: Oh, goodness Senator -- yes.

KLOBUCHAR: Would you overturn it? Is that what you're -- is that what this means when you talk about, maybe it's time to face the behemoth?

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GORSUCH: Senator, my job as a circuit judge is when I see a problem, I tell my bosses about it. Like any good employee. And my job is there, as I conceived it, was to say hey, listen, look at some of the implications, the real world implications of what we're doing here.

KLOBUCHAR: OK, but you would be the boss if you were the Supreme Court justice. And what rule do you think should replace it? Should we have de novo review? Is that better? What do you think should replace Chevron, deference?

GORSUCH: Senator, I don't prejudge it. I can tell what did preexist it was Skidmore deference, which was written -- an opinion written by Justice Jackson, actually. That's what preexisted. So there was deference before. And we had the administrative state for 50 years. And agencies would issue rules and decisions. I don't know what all the consequence would be, and I would pledge to you, I wasn't thinking about being a Supreme Court justice then. I was identifying an issue for my bosses.

If I be so fortunate as to become a justice, I would try and come at it with as open a mind as man can muster. And I would tell you, remind you, what I bear in mind, David Sentelle -- when I was with him as law clerk, issued a panel opinion at the beginning of my year with him going one way, and then by the end of the year, wrote for the enbant (ph) court, the full court, reversing himself. Now some people think that's -- that doesn't show a lack of sufficient steel. I think that shows an open mind and a lack of ego that a judge should bring to bear when he or she puts on the robe. And that's what I would commit to you.

KLOBUCHAR: OK. Let's go to the other piece of this philosophy, and that's originalism. And, in other words, whether words and phrases in the Constitution should be interpreted according to their original public meaning (ph), or how the founders and their contemporaries would have understood them. Regardless of whether you characterize yourself as an originalist, you've applied originalism in several decisions, including last year in *Cordova v. City of Albuquerque*, where in a separate concurring opinion, you describe the Constitution as a, quote, "carefully crafted text judges are charged with applying according to its original public meaning," which are the buzz words for originalism. Criticisms of the principles underlying originalism are not new. In fact, I believe some lines from Chief Justice John Marshall's opinion in *McCulloch v. Maryland* in 1819 almost two centuries ago, are still relevant to our discussion of the point today.

He wrote that the founders must have intended our Constitution to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. He continued, "To have prescribed the means by which government should in all future time execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for as they occur."

He added, "If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it." Do you agree with the point that Justice Marshall made in *McCulloch*?

GORSUCH: Well, Senator, I would certainly agree that the Constitution must endure and that it's a lot bigger than any of us and it will live in that sense, hopefully, a very great deal longer than any of us. Our children's children. I do think it's important to try and understand law according to its original understanding, public meaning. Words have meaning.

KLOBUCHAR: So you don't agree with *McCulloch* about adapting to the crises of human affairs?

GORSUCH: No, Senator.

KLOBUCHAR: So you do agree. I just want...

GORSUCH: I'm trying to answer the...

KLOBUCHAR: I just want a yes or no, that's all.

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GORSUCH: Well, I think it takes -- these are -- these are complicated things that take more than a yes or no, respectfully. And what I would say is the Constitution doesn't change, the world around us changes and we have to understand the Constitution and apply it in light of our current circumstances. That's what we're trying to do as judges.

So for example, one of my favorite cases in this area is Jones, right? Supreme Court of the United States is faced with a GPS tracking device attached by the police onto a car. Is that a search? And the court goes back and looks at the time of the founding, what qualified as a search and found that that would have qualified as a trespass to (inaudible) in a search by the government. And says (ph) if that would have been offensive 200 years ago, that sort of thing, it has to be offensive now.

The Constitution is no less protective of people's liberties now than it was 200 years ago.

KLOBUCHAR: So when the Constitution refers like 30-some times to his or he when describing the president of the United States, you would see that as well, back then they actually thought a woman could be president even though women couldn't vote?

GORSUCH: Senator, I'm not looking to take us back to quill pens and horses and buggy.

(CROSSTALK)

KLOBUCHAR: But if just -- if you could answer that question, it's very important to me.

GORSUCH: I'm trying to.

KLOBUCHAR: OK.

GORSUCH: Of course women can be president of the United States.

KLOBUCHAR: OK.

GORSUCH: I'm the father of two daughters. KLOBUCHAR: Great.

GORSUCH: And I hope one of them turns out to be president (inaudible).

KLOBUCHAR: OK, that's wonderful. How about like the Air Force -- I agree with you, that's good. So in that case, you say well, we can't take it at its literal words. So then, the Constitution also says Congress has authority to oversee the land and naval forces, but there's no mention of the Air Force and I assume you believe that would also include the Air Force, because if they knew an air force existed, they would have included the Air Force back then?

GORSUCH: Senator, I think the generals of the Air Force can rest easy.

KLOBUCHAR: OK, great.

(CROSSTALK)

KLOBUCHAR: How about Virginia -- let's keep going here because I'm almost out of time here. In *United States v. Virginia*, the court held that the Virginia Military Institute violated the equal protection clause of 14th Amendment by excluding all women from VMI's military training. In his defense, Justice Scalia stuck to signature originalism and criticized the majority, saying the decision is not the interpretation of a Constitution, but the creation of one.

Is the interpretation of the equal protection clause in *U.S. v. Virginia* consistent with the original public meaning?

GORSUCH: The majority in that case argued that it was...

KLOBUCHAR: OK. And...

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GORSUCH: ... and the majority said that the words "equal protection of the laws," whatever the secret harbored intentions of the writers, had an original public meaning that's quite radical and significant and that was what the majority of the Supreme Court of the United States held.

KLOBUCHAR: So would you agree, then, that when you look at other things, would you be willing to apply the same approach to equal rights for minority groups, women, LGBT, including transgender people, racial minorities, the same approach you used when we argue -- when you just made the statement about the he and his in the Constitution, about the -- not having the Air Force, about the Virginia military decision?

GORSUCH: Senator, a good judge applies the law without respect to persons. That's part of my judicial oath.

KLOBUCHAR: So do you see it as your textualism (ph), the original public meaning then, would you apply it to the these other contexts as well that I just mentioned? GORSUCH: Senator, what I'm trying to say to you is I don't take account of the person before me. Everyone is equal in the eyes of the law.

KLOBUCHAR: OK. I'm just trying to figure out this because I think for some things, a lot of people who subscribe to this theory, they say well, we can have originalism for some cases but not for others and I call it selective originalism, and it just seems to me when you look at some of the opinions that use originalism that you have and some don't. But I...

GORSUCH: Well, Senator...

KLOBUCHAR: I have one...

GORSUCH: Senator, if I might respond to that. I'd ask you to take a look at Jones again (inaudible) search of home using a heat- seeking device. I'd ask you to maybe take a look at Crawford, the right to confront witnesses. Maybe as well, the Apprendi and Booker line (ph) written by Justice Stevens, a very originalist opinion about the right of an accused to be able to have all of the elements of an offense that increases a sentences tried by a jury of his peers. Those are what one might characterize as originalist opinions protecting individual liberties.

KLOBUCHAR: You know what, we could do it on the second round. That'll be good.

GORSUCH: All right.

KLOBUCHAR: Just some minor things here at the end. When the Supreme Court temporarily blocks a lower court ruling, they need five votes. A practice known as the courtesy fifth has developed in which a fifth justice will provide the vote needed to stay the lower court ruling, even if that justice might not have otherwise been inclined to do so. Do you think the practice of the courtesy fifth is a good thing?

GORSUCH: Senator, I haven't studied that. It'd be presumptuous of me to offer an opinion in (ph) a court that I haven't sat upon.

KLOBUCHAR: OK. Well, it may be very relevant when this refugee case comes up, so you might want to study up on it.

I'm gonna end here with -- I'm gonna do a lot of work on anti- trust in the next round. I know you're an expert. Senator Lee and I have been heading up that subcommittee for a long time, but I'm gonna end with freedom of press in honor of my dad. He was a newspaper reporter his whole life and I'm especially concerned in today's world where we're seeing these attacks on the media about maintaining the press's role as a watch dog.

Our founders enshrined freedom of the press in the First Amendment. As Thomas Jefferson said, "Our first objective should be to leave open all avenues to truth, and the most effective way to do that is through the freedom of the press." In New York Times v. Sullivan, the court issued a landmark ruling in support of First Amendment protections for the press by affirming that when newspapers report on public officials, they can say what they want. Maybe we don't always like that, but they can. Unless they say something untrue with actual malice.

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Do you believe under New York Times v. Sullivan that the First Amendment would permit public officials to sue the media under any standard less demanding than actual malice? And can you explain to the people here today and those watching on TV what that standard means to you?

GORSUCH: New York Times v. Sullivan was, as you say, a landmark decision and it changed pretty dramatically the law of defamation and libel in this country. Rather than the common law of defamation and libel, applicable normally for a long time, the Supreme Court said the First Amendment has special meaning and protection when we're talking about the media, the press in covering public officials, public actions and indicated that a higher standard of proof was required in any defamation or libel claim. Proof of actual malice is required to state a claim.

That's been the law of the land for, gosh, 50, 60 years. I could point you to a case which I've applied it and I think might give you what you're looking for, Senator, in terms of comfort about how I apply it; Bustos v. A&E Network. It involved a prisoner who was concerned that he had been misrepresented as a member of the Aryan Brotherhood. Claimed he wasn't a member, just a fellow traveler and sought damages for that. Our court declined to grant that relief, saying that substantial truths protected, even if it's not strictly true. And much more is required by the First Amendment in order to state a claim.

KLOBUCHAR: OK. And Branzburg v. Hayes, a Supreme Court case, they didn't recognize a reporter's privilege and this is in the context of criminal grand jury testimony. Could you just end here by talking about the scope of the Branzburg decision and whether there are instances where a court should recognize a reporters' privilege?

GORSUCH: Senator, I know those cases come up from time to time, so I have to be very careful.

KLOBUCHAR: OK.

GORSUCH: But your description of the case is entirely accurate.

KLOBUCHAR: Thank you very much.

GORSUCH: Thank you.

s3: Before -- before we recess, I'd like to enter into the record a commentary in the Chicago Tribune called "Crying Wolf Over Neil Gorsuch", written by Dennis Hutchinson, a lifelong registered Democrat. He specifically -- he talks about concerns over Chevron deference (ph), he writes quote, "There are two sides to deference (ph) however. My guess is that pro-Chevron advocates will soon be begging Federal Courts not to defer to interpretive findings of agencies", end-quote.

I'll enter that into record without objection.

We will recess for 10 minutes. So, that means we'll reconvene at 3:31.

(RECESS)

GRASSLEY: Senator Cruz, it's your turn now.

CRUZ: Thank you Mr. Chairman. Judge Gorsuch, congratulations on making it through more than half of a long day and making through with flying colors. And I think this hearing has been helpful for illustrating the proper temperament and approach that we should expect of a federal judge.

And I think you are acquitting yourself in an excellent manner. This hearing is focused on a lot of weighty matters. So let me start with something lighter. And a -- and a topic on which I believe you have some familiarity.

What is the answer to the ultimate question of life, the universe, and everything?

GORSUCH: Forty-two.

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CRUZ: Thank you judge. And those who are watching who may be a bit confused at this exchange, could you explain what it is to which we're referencing?

GOR SUCH: Well, Senator, sometimes we have young people who come to court to be sworn in. Often, they're my law clerks, there are a couple of them right there. They haven't enjoyed this privilege yet. And they come to court and they're very nervous.

And the clerk tells us about their career and their record and submits them to the court, I move their admission to the bar (ph), are there any questions from the bench? And it's sort of like this, it's a bit intimidating. This has been a reminder to me of what it's like to be down here rather than up there.

And last time I had this kind of interaction with Senator Lee, it was when he was down here and I was up there. Any rate, I sometimes asked them that question to put them at ease. And they all know the answer and they all know the answer because they've read Douglas Adams, "Hitchhiker's Guide to the Galaxy."

And if you haven't read it, you should. It may be one of my daughter's favorite books. And so that's a family joke.

CRUZ: Well it -- it -- it is a book I very much enjoyed as well. And -- and -- and it is, I think a delightful example of the humanity of a judge that we -- that your record has demonstrated.

You began your career with the opportunity to serve as a law clerk to Byron White. Byron White was an extraordinary man. Byron White was the only justice that John F. Kennedy put on the Supreme Court.

Byron White is, I believe, in fact I'm quite certain, the only Supreme Court justice in history to lead the NFL in rushing. And also to graduate first in his class from Yale Law School. Could you share with this committee what it was like to be a law clerk for Byron White and to interact with him every day during your clerkship?

GOR SUCH: You know as I -- he really was my childhood hero. And to actually get picked out of the pile to spend a year with him as Senator Lee's dad did, that's something we share in common too, was and remains the privilege of a lifetime. And it has everything to do with why I'm here.

I wouldn't have become a judge but for watching his example. And the humility with which he approached the job, and I don't mean a phony humility, I mean a real humility, every day. He always said two heads were better than one.

He'd sit down on my office, plunk himself down in a chair across the desk, and we'd talk about a case. He'd say ehh (ph). He always started with a grunt. I mean, that's how he started a conversation. It's like hello. So what does the great Justice Gorsuch think about this one?

(LAUGHTER)

And you were expected to have a view about pretty much anything and everything that he asked. And he'd just sit there and chuckle at you. And he'd laugh at you and you were wondering what he thought. He never revealed his hand.

And he'd just walk out of the office, saying, oh that's what Justice Gorsuch thinks. OK. And then he'd go back and he'd think about it himself. And then he'd come back in again and the whole thing would repeat itself. As he was working through each case himself, he'd want to bounce ideas off of this know nothing 20 year old, 20 something year old kid.

And that to me, taught me everything about what it means to be a judge. And the fact that when asked his judicial philosophy in this sort of setting, it's to decide cases. And I know a lot of people think that's just mundane or maybe cover, dishonesty in some way.

It's just not true. It was the humility of the man. But he knew that lawyers worked really hard because he had a lawyer. A work a day lawyer for 14 years, I think it was in a law firm. He tried cases, small cases, big cases. And he

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knew what it was like to have to be the lawyer in the well (ph) and how hard it is to have all the answers, how easy it is to ask the questions.

CRUZ: Now you and I both had the experience of clerking at the Supreme Court after Justice White had ended his time on the basketball court.

GORSUCH: Yes, well. CRUZ: Or maybe you were luckier than I. For those who do not know, above the Supreme Court, above the roof of the courtroom, is a basketball court which is referred to tongue-in-cheek as the highest court in the land. And Justice White for many years would play in the basketball games. NFL Hall of Fame football player with a bunch of pencil-neck law clerks.

GORSUCH: Yes.

CRUZ: And his elbows and fouls were legendary. When I was clerking, he was no longer playing. Were you lucky enough to get him up on the basketball court?

GORSUCH: He would come up for a game of horse with the clerks, former law clerks at reunions.

CRUZ: How's his jump shot?

GORSUCH: His best shot at that age, and we're talking in his 70s, late 70s, was from the free throw line back up over his head like that. And he could hit it pretty regularly.

(LAUGHTER)

His eye-hand coordination was just uncanny. So I remember those - those law clerk reunions at the basketball court where he'd come up and stiffly throw it up and sink it. I remember walking through with him in the basement, arm in arm. Liked to walk arm in arm at that age. We walked past all the portraits of all the former Supreme Court justices which are down in the ground level.

And he'd ask me, how many of these guys you honestly recognize? And I was one of those pencil neck law clerks and the truth was I thought I knew a lot about the Supreme Court, the law. The answer was about half, the honest answer. He said "me too." He said, the truth is we'll all be forgotten soon enough, me included. I remember saying "Justice, that's impossible. You're one of the greats. No way you're going to be forgotten."

His portrait now hangs down in the basement.

CRUZ: There is wisdom in that humility. Let's shift to another topic, a topic that has been raised some in this hearing which is there are some Democratic Senators on this committee who have raised a challenge to the notion of originalism. And indeed, have painted originalism as some quaint and outdated mode of interpreting the constitution, have suggested that their view of the constitution is it is a living, breathing, changing document, flexible enough to become - to accommodate whatever policy outcome the particular judge might desire.

The alternative is that a judge is obliged to follow the constitution, the text of the constitution as informed by the original understanding at the time it was adopted. Do you share the view of the Democratic attacks that originalism is somehow a quaint and outdated and notion of reading the constitution for what it says? GORSUCH: Senator, I want to say a few things about that and I appreciate the opportunity. The first is that sometimes we, in our discourse today, our civil discourse, use labels as a way to not engage with other people; to treat and divide us and them. And as a judge, I just don't think that's a very fair or appropriate or useful way to engage in discourse.

So I'm worried about using labels in ways that are sometimes an excuse for engagement with the ideas, sometimes pejoratively. The truth is, I don't think there's a judge alive who doesn't want to know about whatever legal text he or she is charged with interpreting, something about its original meaning as enacted. And I don't think this is an ideological thing.

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I look at decisions like Jones, which we've talked about, or decisions like *Kyllo*, the thermal imaging of a home; is that a search under the Fourth Amendment? Supreme Court goes back and looks at original history and says it's equivalent to peeping toms which of course would be a search under the fourth amendment. The constitution's no less protective today of the people's liberties than it was 200 years ago.

Or when we look at *Crawford* and the right to confront witnesses and not just have pieces of paper flying in evidence that you can't confront reasonably, to cross-examine your opponent; fundamental right of the Sixth Amendment. Look back to the original understanding that informs us. Or in the Fifth Amendment, Justice Stevens in *Apprendi*, wrote a very fine examination of the original history of the constitution.

And said it's not right that an individual should be sentenced to prison in hand sentence (ph) on the basis of facts a jury hasn't found. Those are all originalist if you want to put that label on it. Opinions, every one of them. You could look at *Powell v. McCormack* about the qualifications of members of Congress. That was written by Chief Justice Warren.

It's a very careful - you might agree or disagree with it, it's a very careful examination of the original history and understanding of the relevant provisions of the constitution. Or *Heller*, Second Amendment case. Justice Scalia and Justice Stevens both, majority and dissent, wrote opinions that are profoundly thoughtful in examining the original history of the constitution.

I guess I'm with so many other people who've come before me, Justice Story, Justice Black and yes, Justice Kagan, who sitting at this table said we're all originalists in this sense. And I believe we are.

CRUZ: Well Judge, I thank you for that very scholarly and erudite answer. You are right that Justice Kagan gave an answer that had many similar aspects and said we apply what they say, what they meant to do, so in that sense we are all originalists. And you know, you referenced the *Kyllo* case. I think it does - it serves well to rebut the caricature that some on the left try to paint of originalism. There, dealing with thermal imaging, the notion that gosh, how could the framers possibly imagine modern contrivances, modern contraptions. Well, thermal imaging did not exist in the 1700s. The framers had no idea what it was. And so, under the caricature that some of the Democrats have suggested, you would assume the originalists in the case would all line up on the side of saying "well gosh, the Fourth Amendment doesn't cover that."

And yet, the *Kyllo* case, the majority opinion, 5-4 was written by Justice Scalia, perhaps the leading originalist on the court. It was joined by Justice Thomas and indeed, Justice Stevens dissented in that case. And so I think that case illustrates that any judge doing his or her job, a thorough understanding of the original understanding of the language is essential to effectively doing your job.

Would you share your thoughts about how the constitution intersects with modern technology, how a 200 plus year old document could possibly be applied in a world of internet and technology and changing - changing reality?

GORSUCH: Well it's just these discussions we've been having, right? You go back and you look to the evidence of what it was understood at the time to protect. Of course Madison didn't know about thermal imaging or GPS tracking devices or DNA or e-mail. And no one is looking to take us back to the horse and buggy day or quill pens or to turn back the clock on anything.

The point is to apply the law in a way that allows us to be able to say as judges, it's not what we wish, it's what the law was understood to mean. It has a fixed meaning, as Madison said in the fixed meaning canon of construction, that the constitution should have a fixed meaning. Right? And the judges may disagree over what that is. We disagree once in a while.

Not as often as some would like to portray. Once in a while. But our disagreements are not political disagreements. They're disagreements over what the law is. And that's -- that's very important to me.

And the other thing it does, is it's a due process value. We're interpreting the law in a way that we can charge people with notice of because we're judging them for their past conduct.

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People lose their liberty, their property on the basis of our interpretations of the law. And it seems to me that it should only be fair that their interpretations we can charge them with notice of.

CRUZ: Right.

GORSUCH: Similar thing when we come to statutory interpretation.

CRUZ: Right.

GORSUCH: What does that text mean? What could a reasonable reader understand that text to me. Now, my favorite case in statutory interpretation when I teach this stuff and talk to my law clerks about it is the Fish case. You know, that -- there the statute read something like -- no, I'm not gonna get it -- get it exactly right.

But if you destroy email documents or other tangible objects when you know the cops are after you, you go to jail. Well, what does that mean in the context of a fish -- fisherman who knows that the Coast Guard's after 'em and he's got an illegal catch and he throws it overboard.

That case went to the United States Supreme Court. It's a great case.

And it divided in a way that people don't expect, right? Justice Ginsberg wrote the majority opinion in -- along with Justice Alito writing a concurrence saying fish. This statute's about email not (ph) no (ph) notes (ph).

Justice Kagan and Justice Scalia wrote a dissent saying fish, that's a tangible object. Right?

CRUZ: Right.

GORSUCH: He had notice. He shouldn't have don't it. And so, these things don't divide along kind of ordinary ideological line.

I'm confident that there are justices who in that case, or in Heller, or in any of these cases, what is a matter of policy have come out differently than they did as a matter of judging. And that, to me, is all the difference in the world.

We're not doing what we would like but what we think the law is.

CRUZ: Let's turn to another topic. Some of my colleagues on the Democratic side if -- raise some questions about the Federalist Society and have raised it with a tone that suggests it is some nefarious and secret organization.

Indeed, I was waiting to see the question are you now or have you ever been a member of the Federal Society?

(LAUGHTER)

And -- and given that context for the sake of candor, I'll go ahead and self-report now. I am and have been a member of the Federalist Society since I was 21 years old and a first-year law student when I happily joined.

And indeed, there are over 60,000 members -- law students, and lawyers, and indeed those just interested in the Constitution and the rule of law. And one of the things that has struck me about the Federalist Society is the incredible range and diversity of opinions within the Federalist Society.

You have conservatives, you have libertarians, you have those with -- who believe in fidelity to law and wouldn't ascribe to either of those labels. And I understand you -- you -- you gave a talk at a Federalist Society event at the problems of over-criminalization.

Can you tell us a bit about -- about that talk?

GORSUCH: Yeah. I think it's fun to go into audiences and challenge them sometimes a bit. I think it's important.

And as to the Federalist Society, I don't have a card either. And I -- I really don't want a -- a back statement for past due dues.

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(LAUGHTER)

But I -- I -- I attend maybe one event a year or something like that. It's all on my forms that you all have. And at that speech, I -- I did talk to the society about the problem of over-criminalization as I saw it.

On the federal statutory books, today, we have approximately 5,000 criminal laws. That doesn't count, of course, all the criminal laws at the state and local level.

And Congress pours out a lot of new criminal laws all the time. Most of those laws are relatively recent vintage.

And I ask my law clerks to go find out -- OK, now, how many of those -- how -- how many laws do we have that are -- have criminal penalties that in regulations, too?

CRUZ: Right.

GORSUCH: Just out of curiosity. I thought they'd be able to come back with a number. And apparently, they reported back and I trust 'em. They're -- they're pretty smart.

They came back and said that scholars have given up trying to count the number. They gave up at around 300,000.

And Madison Ward [ph], you know, he lived in a time when there were too few written laws so that the kind could pretty much do as he or she wished -- he, tyrannical king. That's the experience they had. But he foresaw a world -- and warned about a world in which we have too many laws to the point where the people can't know what the law is.

And of course, there's the great example of Caligula...

CRUZ: Right.

GORSUCH: ...who posted laws -- ancient Roman emperor deliberately posted laws written in a hand so small and up so high that nobody could tell what the law was. Better to keep the people on their toes. Sorry.

And that's a problem, too...

CRUZ: Right.

GORSUCH: ...for due process, fair notice.

And the truth is, and like so much else in life, we're aiming for the golden me (ph). Not too much, not too little. Point where people have enough fair notice but aren't overwhelmed. That's what I spoke about.

CRUZ: Well, and I agree with you. It is a significant problem, one that this committee has addressed multiple times and I hope will continue to address. Indeed, I'm reminded of one legal thinker who famously observed in heaven there is no law and the lion lies down with the lamb. In hell, there is nothing but law, and due process is meticulously obeyed.

And living in a situation where by the account you just shared, there are over 300,000 potential crimes in a regulatory sense. At some point makes it exceedingly difficult for an honest citizen to conduct himself or herself in a way that doesn't run afoul at the law.

And -- and that -- that is something that should concern all of us. You know, I would note, when you gave this speech, I -- would you say it is fair to say that not everyone at the Federalist Society who heard your speech agreed with everything you said?

GORSUCH: Oh, goodness. I -- that was the whole point of this speech, Senator.

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CRUZ: Well, and -- and -- and in my experience, a great many Federal Society debates -- events are structured as debates where you have sometimes sharply contrasting views for the purpose of intellectual discussion and -- and hopefully thinking and -- and addressing hard problems.

GORSUCH: And there's a counterpart to the Federalist Society, now the American Constitutional Society.

CRUZ: Right.

GORSUCH: One of my friends who was just here is on the board. It does similar good work.

CRUZ: Sure.

GORSUCH: I think these societies -- debating societies, useful to ideas percolating, being shared in a civic way, in a way that we can discuss with one another calmly, coolly, thoughtfully, not yelling at one another, not using labels to dismiss one another. That's what I get out of it. I learn things.

CRUZ: I would note that the Federalist Society describes its purpose as quote, "It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."

And I think of very few people qualified to be a judge who would not agree with those basic precepts about the foundation of our country.

Let me turn to a different topic, which is several of my colleagues on the Democratic side have focused on corporations and have been critical of decisions such as the Supreme Court decisions in Citizens United or Hobby Lobby and have put forth the proposition that corporations are not people and hence cannot have First Amendment rights, cannot have free speech rights, cannot have religious liberty rights.

And while that may be a perfectly find debating point in a committee of the United States Senate, in a courtroom, it runs four- square into decades if not century of precedence on the other side.

The New York Times is a corporation. Judge Gorsuch, is there any credible argument that the New York Times enjoys no First Amendment protections whatsoever?

GORSUCH: No, Senator.

CRUZ: The NAACP is a corporation. Is there any credible argument that the NAACP has no First Amendment protections?

GORSUCH: I think these are long settled precedents that we're talking about.

CRUZ: And the same I would note is true for the NRA, for (La Rasa) (ph), for the ACLU -- every one of those is corporations -- the Sierra Club and every one of those the Supreme Court has for decades -- held Simon & Schuster, a major book publisher.

There is -- every one of those the Supreme Court has held are protected by the First Amendment, is that a fair characterization?

GORSUCH: I believe it is.

CRUZ: I think that's important to note in the public debate. That part of the reason we have such a robust arena of free speech, part of the reason I think it is a good thing that on the gun issues we have the NRA and Brady Center debating back and for citizens of good intentions and morals, believing strongly on an issue, expressing their First Amendment rights, petitioning Congress, speaking out publicly. And the First Amendment exists to protect your right on one side or the other to speak and let the public domain resolve that issue.

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Let me turn to a different issue and return, perhaps, to a lighter topic. I understand that you like to take your law clerks, some of them very much not from the west, to the Denver Rodeo every year. And to have them observe and react to cattle roping and bronc riding and mutton busting. Is that true and can you share a bit of your experiences and even better there's in that regard. GORSUCH: Well Senator, I get law clerks from all over the country, many from my region. I maybe favor my region, but I get plenty out of the area, too. And we have a great rodeo in Denver every year, the Grand National. And it begins with a parade down 17th Street, which would be like a parade down Pennsylvania Avenue in D.C. where you have cattle -- it's a cattle drive down the main road in Denver, they shut it down. That's how you mark the opening of the Grand National.

And the closing of the Grand National is celebrated by the prize steer getting to spend a little time in The Brown Palace Hotel. Now, the Brown Palace Hotel is like a (willer) (ph) or pick your favorite fancy, at the Plaza in New York. Yes, they bring the prized steer into the lobby of the Brown Palace. And in between, there's a rodeo and the stock show.

And the kids show their animals. My kids never made it to the Grand National, they're more kind-of-ferret types, with their chickens and their rabbits and dogs and whatever. But, the kids compete to the Grand National -- it's Grand National, it's big time.

Then there's mutton busting. And I think my children still have PTSD from mutton busting.

(LAUGHTER)

GORSUCH: Mutton busting, as you know, comes sort of like bronco busting for adults. You take a poor little kid, you find a sheep --

(LAUGHTER)

GORSUCH: -- and you attach the one to the other --

(LAUGHTER)

GORSUCH: -- and see how long they can hold off.

(LAUGHTER)

GORSUCH: You know, it usually works fine when the sheep has got a lot of wool and you tell them to hold on -- I tell my kids hold on monkey-style, you know? You need to get in there, right, and get around it?

(LAUGHTER)

GORSUCH: Because if you sit upright, you go flying right off, right? So, you want to get in. But the problem is when you get in is that you're so locked in that you don't want to let go, right? And so, then the poor clown has to come and knock you off the sheep. And my daughters -- they got knocked around pretty good over the years --

(LAUGHTER)

CRUZ: -- well, as a Texan, I think everyone's life can be rendered richer by going to the rodeo and I thank you for sharing that experience with your clerks.

GORSUCH: I'm sorry...

(OFF-MIKE)

(LAUGHTER)

GORSUCH: We can talk mutton busting all day.

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(LAUGHTER)

GRASSLEY: Senator Franken.

FRANKEN: Good to see you judge. Evidently, there's no animal abuse laws --

(LAUGHTER)

GORSUCH: You sound like my daughters on that score, Senator.

FRANKEN: You know, I wanted to get to some questions. But first, I want to talk about TransAm Trucking, because Senator Durbin brought it up, and Senator Lee brought it up. And I want to just go through the facts real quickly because I'm -- I understand the reasoning behind your dissent, but I'm actually kind of puzzled by it as well.

OK. So, Alphonse Madden (ph) is a truck driver. He's made a stop off the interstate at 11 p.m. He comes back on -- or he's about to come back on, notices his brakes are frozen on his trailer. OK. So he decides "I'm not going to go on; it's dangerous to go with frozen brakes onto the interstate; frozen brakes on my long trailer."

He's in the cab. And he calls in for -- pulls over to the side, calls in for a repair. Get the dispatcher. Dispatcher says, "Well, you know, wait, hang on there, wait for us."

OK. A couple hours go by; the heater is not working in his cab. It's 14 below zero; 14 below zero. He calls in and he says, "My feet -- I can't feel; I can't feel my feet; My torso -- I'm beginning not to be able to feel my torso." And they say, "Hang on, hang on; wait for us."

OK. Now he actually falls asleep. And at 1:18 a.m., his cousin -- I think -- cousin calls him and wakes him up. And his cousin says that he is slurring his speech and he doesn't make much (inaudible). Now, Mayo Clinic in Minnesota says that is hypothermia. And he had fallen asleep -- if you fall asleep waiting in 14 below zero weather, you can freeze to death. You can die.

He calls him back, and the supervisor says, "wait; you've got to wait." So he has a couple of choices here: wait or take the trailer out with the frozen brakes onto the interstate.

Now, when those brakes are locked and you're pulling that load on a trailer with its brakes locked, you can go maybe -- what? -- 10, 15 miles an hour. Now, what's that like on an interstate? Say, you're going 75 miles an hour; someone's going 75 miles an hour; they come over a hill and slam into that trailer.

Also, he's got hypothermia. He's a little woozy. Probably figures that's not too safe. I don't think you'd want to be on the road with him, would you, Judge?

GORSUCH: Senator...

FRANKEN: You would or not?

GORSUCH: I...

FRANKEN: It's a really easy yes or not. Would you like to be on the road...

(CROSSTALK)

GORSUCH: Would I want to be on the road with him?

FRANKEN: Yeah.

GORSUCH: With the hitched trailer or the unhitched trailer, Senator?

FRANKEN: Well, either, but especially with the hitched trailer, with the locked brakes.

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GOR SUCH: No, I don't think that was...

(CROSSTALK)

FRANKEN: OK. I thought that was -- I wouldn't want to be there, either.

GOR SUCH: I agree with you. Yeah.

FRANKEN: And so what he does is he unhitches it...

GOR SUCH: Right.

FRANKEN: ... and goes off in the cab.

GOR SUCH: And then I believe he comes back 15 minutes later.

FRANKEN: And he comes back after he gets warm, so that he can be there when it gets repaired.

GOR SUCH: Right.

FRANKEN: OK. Gets fired. He gets fired. And the rest of the judges all go that's ridiculous; he shouldn't -- you can't fire a guy for doing that. It was -- it was -- there were two safety issues here. One, the possibility of freezing to death or driving with that rig in a very, very -- very dangerous way. Which would you have chosen? Which would you have done? GOR SUCH: Oh, Senator, I don't know what I would have done if I were in his shoes. And I don't blame him at all for a moment for doing what he did do. I empathize with him entirely.

FRANKEN: But -- OK. Just -- you -- we've been talking about this case. Don't -- you know, you haven't decided what you would have done? You haven't thought about for a second what you would have done in this case?

GOR SUCH: Oh, Senator, I thought a lot about this case...

(CROSSTALK)

FRANKEN: And what would you have done?

GOR SUCH: I totally empathize and understand...

(CROSSTALK)

FRANKEN: I'm asking you a question. Please answer questions.

GOR SUCH: Senator, I don't know. I wasn't in the man's shoes. But I understand why...

(CROSSTALK)

FRANKEN: You don't know what you would have done. OK. I'll tell you what I would have done. I would have done exactly what he did.

GOR SUCH: I understand.

FRANKEN: And I think everybody here would have done exactly what he did. And I think that's an easy answer. Frankly, I don't know why you had difficulty answering that.

OK. So, you decided to write a thing in dissent. If you read your dissent, you don't say it was, like, sub-zero. You say it was cold out. The facts that you describe in your dissent are very minimal. But, and here's the -- here's the law that -- and you go to the language of the law. And you talk about that -- I go to the law.

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A person may not discharge an employee who refuses to operate a vehicle because the employee has reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition. That's the law.

And you decided that they had the right to fire him, even though the law says you may not discharge an employee who refuses to operate a vehicle, because he did operate the vehicle. Is that right? That's your -- that's how you decided, right?

GORSUCH: That's the gist of it.

FRANKEN: Well, no. Is that how you decided? That's what you decided. GORSUCH: Senator, there are a lot more words in the opinions, both in the majority by my colleagues and in dissent. But that -- I'm happy to agree with you that that's the gist of it.

FRANKEN: Right. Well, that's what you've said. And I -- look, I'm not a lawyer. But I've been on this committee for about eight years. And I've paid some attention. So I know that what you're talking about here is the plain meaning rule. Here's what the rule means. When the plain meaning of a statute is clear on its face, when its meaning is obvious, courts have no business looking beyond the meaning to the statute's purpose.

And that's what you used. Right?

GORSUCH: That's what was argued to us by both sides, Senator.

FRANKEN: But that's what you -- that's what you used.

GORSUCH: Yes. Both sides argued that the plain meaning supported their...

(CROSSTALK)

FRANKEN: Yeah, and you used it to come to your conclusion.

GORSUCH: Both sides...

FRANKEN: But the plain meaning rule has an exception. When using the plain meaning rule would create an absurd result, courts should depart from the plain meaning. It is absurd to say this company is in its rights to fire him because he made the choice of possibly dying from freezing to death or causing other people to die possibly by driving an unsafe vehicle. That's absurd.

Now, I had a career in identifying absurdity.

(LAUGHTER)

And I know it when I see it. And it makes me, you know, the -- it makes me question your judgment. You stopped by my office a few weeks ago. I asked you about Merrick Garland. I had read somewhere that after you accepted the nominations, we talked about it, one of the first calls you -- calls you placed was to Chief Judge Garland.

And you said to me, "I think the world of Merritt Garland." And I asked you a couple of times if you were bothered by the way the Senate treated Merrick Garland, who you clearly have a great deal of respect for.

You said something to the effect of, "Senator, I try to stay away from politics." Now, you'd been on the bench for 10 years, so that sounded fair to me, and I decided to leave well enough alone and we moved on to another topic.

But your relationship with politics came up again yesterday. My good colleague Senator Lee lamented the extent to which the confirmation process has become political, and suggested that you and other nominees are not equipped to navigate that process because confirmation politics are, in his words, quote, "still a little foreign to you; are still quite unfamiliar to you."

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But it turns out that's not really entirely accurate. After you were nominated, this committee made a formal request for documents relating to your previous nomination and to your time at the Department of Justice. This is standard procedure. Those documents include e-mails back and forth between former Bush administration officials and you in 2004, back before you joined that administration. And the Neil Gorsuch in those e-mails seems to be very, very familiar with politics.

The Neil Gorsuch in those e-mails was looking for a job. Here is a message you sent to Matt Schlapp, President Bush's political director. This was in November, 2004, just after President Bush won re-election. Quote, "I spent some time in Ohio working on the election" this is you. "What a magnificent result for the country. For me personally the experience was invigorating and a great deal of fun." That doesn't sound like someone who steers clear of politics to me.

You went on to write, quote "while I've spent considerable time trying to help the cause on a volunteer basis in various roles, I have concluded that I'd like to be a full-time member of the team." You attach your resume which describes in detail your work in support of political campaigns and candidates. Basically you had worked on republican political campaigns since 1976.

You had worked for Reagan. Bush 1, Bush 2, you were cited for distinguished service to the United States Senate for work in support of President Bush's judicial nominees by the senate republican conference, which suggests that even the political aspects of confirming judicial nominees is something that you are not unfamiliar with. Now, when we met earlier, I asked you what you thought of the way Senate republicans treated Merrick Garland, and rather than answer the question you replied "I try to avoid politics."

But here you are in 2004 pledging your allegiance to the cause and shopping around a resume touting your work on political campaigns dating back to 1976. These messages establish that, for a good deal of your prior career, you didn't avoid politics. Quite the contrary. You were very politically active. So in light of that, I'd like task my question again, do you think Merrick Garland was treated fairly by the United States Senate?

GORSUCH: Senator, a couple of things in response to that, if I might. Going back, the absurdity doctrine argument was never presented to the court. And it usually applies in cases where there is a scrivener's error, not where we just disagree with the policy of the statute. So I'd appreciate the opportunity to respond there.

FRANKEN: When there is a scrivener there.

GORSUCH: Scrivener's error.

FRANKEN: Error. Okay. I'm sorry.

GORSUCH: Not when we just disagree with the policy. With respect to...

FRANKEN: Well, if I read my statutory interpretation from -- let's see. This is from the Notre Dame Law School National Institute for Trial Advocacy. This is a pretty well known exception to the plain meaning rule.

GORSUCH: Oh, yeah.

FRANKEN: And I think you can apply it without it. I mean don't you think it is absurd that this man was put -- given that choice and then fired for it? Don't you think that was absurd?

GORSUCH: Senator, my heart goes out to him.

FRANKEN: Okay, never mind.

GORSUCH: My heart goes out to him. it's just not my job --

FRANKEN: How do you think Merrick Garland was treated by the Republican senators?

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GORSUCH: Senator, since I became a judge ten years ago, I have a canon of ethics that precludes me from getting involved in any way, shape or form in politics. The reason why judges don't clap at the state of the union and why I can't even attend a political caucus in my home state to register a vote in the equivalent of a primary.

FRANKEN: Okay. But I don't think that this is -- you have to state your political views. That's not -- this is about how a Supreme Court justice who was nominated by the president of the United States, this is like in the constitution. I think you're allowed to talk about what happened to the last guy who was nominated in your position. You're allowed to say something without being -- about getting involved in politics. You can express an opinion on this.

GORSUCH: Senator, I appreciate the invitation. But I know the other side has their views of this, and your side has your views of it. That by definition is politics.

FRANKEN: Okay.

GORSUCH: And, senator, judges have to stay outside of politics. I think the world of Merrick Garland. I think he's an outstanding judge.

FRANKEN: Okay. I understand.

GORSUCH: I've told you what I think of him.

FRANKEN: I understand. Thank you. Thank you. I don't mean to cut you off but we have time. I think it is really important for us to understand how your political work and your political views might inform the views of the law. I know your -- I don't hold that against you that you did political work, lots of people did.

GORSUCH: 1976 I was walk on the district with my mom (inaudible) state house.

FRANKEN: Looking again at the e-mails five or so months after your messages to Mr. Schlapp, you e-mailed Ken Mehlman. He was your law school roommate. At the time you e-mailed him, he was chairman of the Republican National Committee. You just interviewed for a job at the department of justice.

You wanted him to put in a good word, so he did. Mr. Mehlman e- mailed the White House, and he wrote "Neil is wonderful guy, he was my law school roommate, did the 72 hour effort in Ohio for us and was part of lawyers for Bush." Mr. Mehlman wrote, quote "He is a true loyalist." Now again, being politically active or a loyal republican are not disqualifying characteristics for a Supreme Court nominee; not in my book, anyway. Let's think back to the 2004 election. Lets look at Ohio where you volunteered. Ohio is 1 of 11 states in 2004 where Republicans working to support the re-election campaign also worked to put anti-gay marriage amendments on the ballot.

These state constitutional amendments passed. All 11 of them. The text varied state by state by generally the amendments defined marriage as being between a man and a woman. The amendments sent a clear message to lesbian and gay couples that their unions were not equal in the eyes of the law. Now, you were a campaign worker in Ohio. You ember the group lawyers for Bush-Cheney. As a lawyer and student of the constitution, how did you feel about the right to marry being put to a popular vote?

GORSUCH: Senator, I don't recall any involvement in that issue during that campaign. I remember going to Ohio...

FRANKEN: Were you aware of that issue at all?

GORSUCH: Certainly, I was aware of it.

FRANKEN: How did you feel about it?

GORSUCH: Senator, my personal views? Any revelation of my personal views about this matter would indicate to people how I might rule as a judge. Mistakenly, but it might. I have to be concerned about that.

FRANKEN: These discriminatory amendments were part of the deliberative effort to drive up the turnout. And we know that - we know that because your friend, Ken Mehlman, said so. Mr. Mehlman was interviewed by The Atlantic

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in 2010, and said the Bush campaign had quote "been working with the Republicans to make sure anti-gay initiatives and referendum would appear on November ballots in 2004 and 2006 to help Republicans.

Now to be clear, there is nothing to suggest that you were involved in crafting that strategy, but at the time this tactic received a lot of attention, including in Ohio where you worked on the campaign. There was a profound impact on people's lives. But a lot has changed since 2004. Mr. Mehlman announced publicly that he is gay, for one.

He also voiced regret about what happened. He apologized. He said "at a personal level, I wish I had spoken out against the effort. As I've been involved in the fight for marriage equality, one of the things I've learned is how many people were harmed by the campaigns in which I was involved. I apologize to them and tell them I'm sorry." That's a brave thing to say. It is hard to admit regret.

Mr. Mehlman had a personal connection to the issue, to be sure. But our country has come a long way in a relatively short amount of time. A lot of folks have changed their view about marriage equality. Republicans and Democrats alike. In the meantime, Supreme Court has settled this issue. Marriage equality is now the law of the land, so you shouldn't have any problem answering this question. How have your views of marriage equality changed, if at all, since the 2004 election?

GORSUCH: Senator, my personal views, if I were to begin speaking about my personal views on this subject, which every American has views on, would send a misleading signal to the American people that my --

FRANKEN: It is settled law.

GORSUCH: It is absolutely settled law. There is ongoing litigation about its impact and its application right now. And I cannot begin to share my personal views without suggesting mistakenly to people...

FRANKEN: Okay, can I move on to something else then? You've given a version of this answer before. So I understand. I understand. I'd like to return to something I raised in my opening statement, and that's your view of administrative law.

Standing before conservative activists gathered at CPAC, the conservative political action committee, President Trump's chief strategist, Steve Bannon, and his white House chief of staff, Reince Priebus, outlined the president's agenda. Two topics were featured prominently. Deregulation and your nomination. I don't think that's a coincidence.

Reince Priebus started by explaining why nominating you was so important for the president to do right out of the gate. he said, referring to your nomination, "number one, we're not talking about a changeover of a four year period, we're talking about a change of potentially 40 years of law, number one.

FRANKEN: -- nomination, quote, number one, we're not talking about a change over a four year period. We're talking about a change of potentially 40 years of law, number one. That's change of potentially 40 years of law. Change the law. You and your colleagues here said the job of a judge is to follow the law, even if he dislikes the results. You've said that. Not change the law. But change 40 years of the law. But that's what Reince Priebus said this is about.

When the White House Chief of Staff is talking to his friends at CPAC, he says a justice's job, your job, is to change 40 years of law. Yet my colleagues and you say it's to follow the laws as written. Well it can't be both, so which is it?

GORSUCH: Senator, it's to be a judge. To be fair. To follow the law. To apply it to the facts and circumstances of each case. And to live out my judicial oath, on whichever court I serve on, whether it's the tenth circuit where I've served for the last 10 years --

FRANKEN: OK.

GORSUCH: -- and where my opinions have been unanimous 97 percent of the time, Senator.

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FRANKEN: I understand that. And again, you've given many times that answer. So, if you'll indulge me -- Mr. Priebus went on to say your nomination was central to President Trump fulfilling his policy objectives. Quote, Neil Gorsuch represents a type of judge that has the vision of Donald Trump. And he added (ph), referring to your nomination, fulfills the promise that he made to all of you. Speaking to the conservative activists gathered at CPAC.

What do you think Mr. Priebus was talking about? Was he suggesting that if confirmed, you would be positioned to shape the court's decisions for the next 40 years or was suggesting you could reach back 40 years, *Roe v. Wade* turned 44 this year. And President has promised to nominate judges who would overturn *Roe*. *Chevron* is 33 years old. I think this is a legitimate question. Was Mr. Priebus suggesting that you go back and change 40 years, or upset a law, or have an effect on the law moving forward?

GOR SUCH: Respectfully, Senator, Mr. Priebus doesn't speak for me and I don't speak for him. I don't appreciate how people -- when people characterize me, as I'm sure you don't appreciate it when people characterize you. I like to speak for myself. I am a judge. I am my own man.

FRANKEN: OK. I just want to -- just -- we've had some talk about this. I don't think we're crazy --

(LAUGHTER)

-- to think that the administration and Reince Priebus -- I don't think he was lying. And doesn't it -- doesn't it -- are you comfortable with your nomination being described in such transactional terms?

GOR SUCH: Senator, there's a lot about this process I'm uncomfortable with. A lot. But I'm not God. No one asked me to fix it. I'm here as a witness trying to faithfully answer your questions as best I can, consistent with the constraints I have as a sitting judge. Here to answer questions about my qualifications, and my record.

FRANKEN: I got it. Well I find it unsettling that the administration is talking -- that the Chief of Staff is talking about the Supreme Court that way. But I want to get back to the panel, CPAC, after Mr. Priebus discussed your nomination, Steve Bannon talked about the President's agenda. He described three priorities, and one of them was quote, the deconstruction of the administrative state.

And here's what Mr. Bannon meant by that. He said that regulation was a problem from his perspective. Quote, every business leader we've had in is saying not just taxes but it is also regulation. He said that if you look at the President's appointees, quote, they were selected for a reason, and that is deconstruction. The way the progressive left runs is if they can't get it passed, they're just going to put in some sort of regulation in an agency. That's all going to be -- going to -- it's all going to be deconstructed.

Taking Steve Bannon at his word, do you think only cabinet appointees were selected to bring about this deconstruction, or do you think the White House also sees a role here for its judicial nominees?

GOR SUCH: Senator, respectfully, I believe that's a question directed to Mr. Bannon.

FRANKEN: He's not here. I'm just quoting him, that's all.

I think the White House does see judges as a part of this deconstruction. I think that they're seeing your nomination as an important step for achieving this goal. You've shown a willingness to disregard agencies' interpretations of statutes. You did that in *Transam Trucking*, with the Department of Labor regulation, for example. You've done it in other cases as well. And in August you wrote that concurrence to your own unanimous opinion in which you described *Chevron*, the Supreme Court's landmark administrative law case, as quote, permitting executive bureaucracies to swallow huge amounts of core judicial and legislative power. You wrote quote, maybe the time has come to face the behemoth.

Now generally speaking, as we've discussed, *Chevron* provides the courts should defer to an agency's interpretation of the federal laws that it is tasked with administering. When Congress passes laws that require agencies to implement them, say by issuing safety standards for children's toys or rules that ensure that

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pharmaceuticals or medicines are safe, those agencies turn to experts to develop those policies. Experts like scientists at the FDA, for example.

I think that's a good thing. We want experts doing the work. What we Senators don't want to be doing is deciding how much lead can be in your water, or what the distance in baby -- the slats are in a baby's crib. I don't trust Senator Koons to do that.

Chevron provides that when agencies do that, courts should be wary of stepping in to overrule them without a good reason. This is Scalia's, agrees with Chevron. But I'm concerned that this administration sees common sense health and safety rules as a burden on big business. I'm concerned that they want to appoint pro corporate judges who are willing to substitute their own judgment on these matters for those of experts. Do you believe that Chevron was wrongly decided?

GORSUCH: Senator, I'm a circuit judge. I don't tell my bosses what to do. I do, when I see a problem, raise my hand and tell my bosses I see an issue here. And I did in that case. Not because of any big corporate interest, but because of what happened to Mr. Gutierrez, an undocumented immigrant in this country. And the whipsaw that he was placed in by a change in law affected by an administrative agency, a bureaucracy, overruling a judicial precedent, and telling him he now had to wait not 10 years out of the country but 14. Something like that.

And, Senator, that's part of my job to say these things when I see problems like that. It's a due process problem I saw. And no one, Senator, is suggesting that scientists shouldn't get deference or chemists or biologists. Section 706 of the APA (ph) is quite clear that on facts --

FRANKEN: But you want to address this behemoth. And that suggests that the comments made by Mr. Priebus and Mr. Bannon know exactly what they -- what you think about these issues. And I think some of my colleagues on the other side of the aisle do as well.

This is a big deal. During the entire 114th Congress, Chevron deference was mentioned only twice on the Senate floor. But between the announcement of your nomination on January 31 and last week, that decision was mentioned 30 times by 4 different Senators. Each of those four senators discussed the case while speaking in support of your nomination. Three of those senators are members of this committee.

So I know you're choosing your words very carefully, and I know you're trying not to signal how you might rule in certain cases, but I think some of those signals have already been sent. Thank you.

(UNKNOWN): Senator Sasse --

SASSE: Thank you, Mr. Chairman. Judge -- I -- you mentioned that there are a number of things about this that have been disappointing to you in the process. I'm disappointed in Senator Cruz, partly because he stole a lot of my originalism plan of questioning. But also because he went to mutton busting. I was convinced that I was the only guy that had mutton busting in today's pool. So, my wife also sent me a text a little bit ago and said -- and I'm sure she didn't expect me to read it, but -- how in the world is Gorsuch able to go so many hours at a time without peeing?

(LAUGHTER)

I won't make you answer, but the SCOTUS bladder is something the whole country stands in awe of. So you're over halfway through your 11 hours today so congratulations. Judge, let's do biography for just a second. You're a father. Remind me the ages of your children?

GORSUCH: Boy, I don't even know what to say now. You really caught me off guard there, Senator Sasse.

SASSE: You're welcome.

GORSUCH: My daughters are 17 and 15.

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SASSE: OK. So besides fishing, have they ever played sports?

GORSUCH: Oh my goodness, yes.

SASSE: Have you ever gotten to a little league game early, pulled the umpire aside in the parking lot, and asked him or her to commit in advance that they will decide the games for the underdog?

GORSUCH: No but I think some of my buddies have.

(LAUGHTER)

SASSE: Have you ever asked a referee underneath the zebra stripes of their jersey to wear your kids' little league jersey as the undershirt?

GORSUCH: No, it wouldn't have helped any. My kids were pretty rotten at basketball.

SASSE: We're obviously not going to pursue this very far but I do want to make sure that everybody at home knows a little bit of what's been happening in the room over the course of the last six or seven hours because some of my colleagues are asking a bunch of tough questions that are really important for you to have to answer. At the same time, there are a whole bunch of questions that have been asked today that are really asking you to take your legal career and your legal ethics and set them aside and play politician on TV today.

And that really isn't your job and some of this questioning really hasn't been a fruitful use of our time. It's well-meaning to talk about the outcome objectives of a whole bunch of these cases but I would submit that it's dead wrong. I'm going to give you just a couple of the questions we've heard earlier today at different times. How can we have confidence that you won't be for the big guy?

At another point, how can we know - how can we know that you feel for the little guy? This sounds noble but it's fundamentally a corruption of what the judge's job is. To seek assurances from you like this is like seeking assurances from a referee before the game that they will pledge to a certain outcome before the tipoff. If the law is wrong, and I'm somebody who believes that lots of our laws are wrong and overreaching around here, the question should be directed back at us on this panel and on this dais, why we don't fix the laws that are wrong.

We shouldn't be asking you as the judge to commit that when our laws are clunky and bad and in conflict, you will divine how to change the law on the fly. That's not the oath that you'll take, that's not the constitution that we've all taken an oath to and pledged to, and it's not what the American people want. So frankly, I applaud you for your perseverance and patience with us as we've continually gone down a path of asking you to answer questions, many of which are fundamentally political questions and that you shouldn't be answering and that we shouldn't be asking.

So thank you for your endurance. I'd like to go back to something that's a little more productive for the committee and frankly, I think, productive for the moms and dads at home and I'd like to talk a little bit more about the judge's robe both spoke about it yesterday, I would note with no coordination. It turns out we both just read your stuff from the past.

And the judge's black robe reminds us of the meaning of your job. It reminds the plaintiffs that stand before the court, it reminds the judge as he or she dresses in the morning, and it reminds our kids or it gives us an opportunity to teach our kids, and you've spoken eloquently about it in the past. But I think it's fitting for you to unpack it a little bit more in light of some of today's questioning.

Earlier today, you were implored to tell us a little bit more about what is in your heart. And I think that's fundamentally a confusing question for us to be asking of a judge except insofar as we would ask you, are you a man of your word so when you take an oath in your heart, are pledging to keep your word and to keep your oath. And I think we all know that the answer to that question is yes and it's why you're going to be confirmed, because people believe you to be a good and fair-minded judge.

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But every American in a more fundamental way needs to know what's in the heart of legislators because we are supposed to speak for the hearts and minds and hopes and dreams of 320 million American people. We are supposed to cast a vision for the country, those things we want to conserve and preserve and those things that we should argue about and change.

We are the ones who are supposed to weigh the pros and cons of various legislative options that are available to us. Judges, on the other hand, are supposed to be following the law impartially. Your heart is supposed to be inclined neither toward the rich nor toward the poor, nor toward black nor white nor people with big bank balances or small bank balances.

But your heart is supposed to be your commitment to the law as you find it. So let's engage in a little though experiment. 30 or 40 years from now, when you retire and hang up your robe and you're out fishing or sitting on the front porch of your surely lovely home and you look back over your career, how will you know if you were a good judge?

GORSUCH: Senator, that's a question I ask my kids every semester when I teach ethics. Finish the semester with asking them to spend five minutes writing their obituary. They hate it. They think it's corny. I might be a little corny.

And then I ask them if they'll volunteer to read some of them. And people wanna be remembered for the kindnesses they showed other people by in large. And what I point out to them, what I try to point out is, it's not how big your bank account balance is, nobody ever puts that in their draft obituary.

Or that they build the most hours or that they won the most cases, it's how they treated other people along the way. And for me, it's the words I read yesterday from Increase Sumner's tombstone. And that means as a person, I'd like to be remembered as a good dad, a good husband, a kind and mild in private life, dignified and firm in public life.

And I have no illusions that I'll be remembered for very long. Not if Byron White is as nearly forgotten as he is now, as he said he would be. I have no illusions, I won't last five minutes. That's as it should be.

The great joy in life, Shaw said, is devoting yourself to a cause you deem mighty before you're thrown on the scrap piece heap. An independent judiciary in this country, I can carry that baton for as long as I can carry it and I have no illusions I'm gonna last as long as you suggest. And that'll be good enough for me.

SASSE: Well said. And would it be that more of who taught legal ethics and business ethics and medical ethics and theological ethics would assign their students the obituary challenge, you might live less than the sound byte culture and more in a way that thinks about service and duty and calling. It's a great assignment.

Neither Cory Gardner nor Michael Bennet have to fear that you're gonna challenge them for a Senate seat from Colorado in the future?

GORSUCH: Senator, I admire them both and I think it's a wonderful fact they were both here to introduce me. And that they follow a tradition to the west, where Senator Salazar and Senator Allard, Republican, Democrat, introduced me last time around.

Frankly, 10 Circuit nominations, thanks to -- he's not here at the moment, but Senator Hatch, cares about the 10th Circuit. Republican and Democrat generally going very smoothly and it shows, it shows, that you all have picked -- I don't know how it works. I don't know how this crazy process works.

But the colleagues you've selected for me over the years are wonderful colleagues; wonderful people and I've been richly blessed to spend 10 years with every one of them.

SASSE: So when you distinguish between the rearview mirror of the justice later, or a judge, later in life looking back in the rear view mirror of a senator, we have different callings. And so I think, without putting words in your mouth, you're gonna be able to say that you can be proud of your career, even if you failed to advance your policy preferences in this calling.

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But unpack that for the American people; help them understand how the retrospective look of a senator and her and his career is different than a judge's retrospective look. GORSUCH: I suspect, but I don't know because I haven't sat where you sit. I wouldn't presume to be able to walk in your shoes. But I presume, gingerly, that you'll look back on your career and say, I accomplished this piece of legislation or that piece of legislation and changed the lives of the American people dramatically, as a result.

I was fortunate enough to serve as a page in this body, many years ago. It's an experience every young person should have. It'll give them a life long love of this body. It is the greatest deliberative body in the world. I believe that even sitting here.

A judge looking back, the most you can hope for is you've done fairness to each person who's come before you; decide their case on the facts and the law. And you just carry it on, the tradition, of a neutral and partial judiciary that each person can come to with some sense that they're gonna receive a fair hearing for their disputes.

That's what we do. We just resolve cases and controversies. And lawyers are supposed to be fierce advocates. I was one a fierce advocate for my clients. But a judge is supposed to rule impartially and listen courteously and rule impartially.

So frankly my legacy should look and will look a lot smaller than yours. And that's the way the design of the constitution works.

SASSE: In an earlier line of questioning, you were asked about 2004 and the presidential election and your participation in it. I just wanna clarify. You were not a judge in 2004.

GORSUCH: Goodness no, sir, I was a private attorney.

SASSE: And when you went on to the bench, what changed in your life?

GORSUCH: Just as Jackson says, a robe changes a man where it should. Now, I'm sure you would add woman today, too. A psychological change comes over that person. He was the fiercest possible advocate, attorney general for FDR. And he wrote it and said (ph) as we talked about earlier in car lots (ph).

He wrote the Steel Seizures concurrence. That's a brave man. That's a judge's judge, for calling it like he sees it in each case as it comes and writing clearly so that people can understand exactly what he's up to and he's not hiding behind jargon, legalese or 4 million footnotes. That's the best I can do on that.

SASSE: Senator Cruz earlier asked you a series of questions about originalism and I appreciated your and I'll probably paraphrase you inartfully. But you said you worry that the label sometimes put us into boxes that eliminate the requirement or reduce the requirement we have to actually engage each other's ideas.

So I won't pin you down hard on the term originalism. But many have critiqued originalism, including in some statements yesterday and today here, as backward focused or quote, "too rigid in adapting to our change in culture."

Do you believe that originalism is just one judicial philosophy among many? Or is it a description of what judges do?

GORSUCH: I'm with Justice Kagan on this. I think it's what we all want to know. I don't know a judge who wouldn't want to know what the original understanding is of a particular term in the constitution or a statute.

That's information that would be valuable to any judge and considered by a judge, again, in Heller for example, Second Amendment case, deeply thoughtful opinions by both sides on that question. It doesn't necessarily decide the case.

But it provides us a language to talk to one another, in which we're trying to seek something outside of ourselves, outside of our own personal beliefs, about what the constitution or the statute at hand means.

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We're trying to do it in a way that's neutral and that we can say it provides fair notice to those whose lives we're affecting, so that we're -- we're interpreting the law in a way that we can say they should've known. You're on notice, for not putting a person in prison willy-nilly based on our preferences. We're taking away their liberty, but we're preserving it in accordance with the constitution as it was written.

SASSE: I'd like to talk a little bit about cultural catechesis or civics. As you and I have discussed in previous meetings, I'm of a view that we have a crisis. We are not passing on the meaning of America to the next generation.

Something like 40 percent of Americans under age 35 tell pollsters that they think the First Amendment might be dangerous because you might use your freedom of speech to say something that would hurt somebody else's feelings.

Actually, that's quite the point of America, right? That there are all sorts of things people might differ about, they might wanna argue about, our founders came here and they didn't have the same views of heaven and hell and how you achieve salvation.

And they came together and they forged out of the many one polity, where we have a shared framework for ordered liberty where we protect each other's rights, even to be wrong about fundamental things, wrong in our own views as we wrestle with these things.

But we debate big and important questions in Washington, but more fundamentally in Boulder or in Freemont or Omaha, Nebraska and you do it in the town square and you do it at the church or the synagogue, you do it at the bar.

And you fight about questions, but fight free from violence. And so, we protect each other's rights to argue and defend and we're not explaining that First Amendment to the next generation. And I believe that all three branches - the legislative, executive and judicial branches -- are led by people who are taking an oath to a Constitution that's about limited government. It's about principled pluralism. It's about intentionally distinguished and divided powers. And I think all three branches have an obligation to do some of that teaching about civics.

And President Reagan, long before he was a Republican President, before he was a Republican Governor, when he was a Democratic labor union organizer, Ronald Reagan used to say in any republic, you're always only one generation away from the extinction of freedom. If we don't pass along the meaning of America to the next generation, it means the next generation of our rulers aren't going to understand why we have this beautiful inheritance that we have in a constitutional system of limits.

As a judge on the 10th Circuit, and soon to be as a Justice on the Supreme Court, could you explain what you think your responsibilities and freedoms are to teach civics to the American people?

GORSUCH: Senator, as a judge on the 10th Circuit, I tried hard to do that, literally teaching class, speaking where I'm invited when I'm invited, going to law schools, talking to students who visit the courthouse and it's been a great privilege and a joy.

I think here (ph) of Justice O' Connor, Sandra Day O' Connor. And she retired, she didn't an awful lot of this. She's done an amazing amount of work. And I do think there is a need to remind people of how to talk to one another, and more fundamentally about how brilliant the design of this Constitution is. Not perfect, but E pluribus Unum, from anyone.

And we are all, not Republican judges, Democrat judges, we're judges. And I think we do have an opportunity. That's one of the things I look forward to as a Justice. My little talks might be a little better attended on civics and I hope to do that. Maybe that's a Western thing, I don't know -- Mid-Western thing, Senator -- but I really believe in this country and I'm optimistic about its future.

I see the young people, I teach them, I get law clerks who really care about this country. And, they give me hope every day. Senator Coons and I share the distinction of being Truman Scholars and we go through the selection process of picking the next crop every year. Harry Truman didn't want a monument as a memorial here in

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Washington. Think about that, the humility of that. Instead, he wanted a living monument, a scholarship to young people who go on to do public service.

Well, I've got two of them here. And every year, when I go do that selection process, I don't know about Senator Coons, but it's one of the best days of the year for me. Because I see young people full of enthusiasm for this country and anxious to make it better.

I look forward to working, if I'm so fortunate to be confirmed, on just this topic Senator. With you, with Senator Coons and anyone else.

SASSE: Talk a little bit about the role of writing in the life of a Justice. Justice Scalia was obviously a writer with a flourish. You've discussed having been tapped in the past to participate in speech writing. Talk about the purposes of both concurring descents and traditional descents and what you think the objectives are at the Appellate level in your opinions, and is there a distinction when you're on SCOTUS?

GORSUCH: When I sit down to write an opinion, people sometimes ask me who I'm writing for. I'm writing for myself. I'm trying to convince myself that I've got it right and I go through a lot of drafts. And I sometimes, as my law clerks know --

(LAUGHTER)

GORSUCH: Change tact (ph) as I'm drafting. I don't know how many drafts I've gone through on some opinions, what -- 30?

(UNKNOWN): (OFF-MIKE)

SASSE: He actually said 130, but whatever.

(LAUGHTER)

GORSUCH: I'm trying to get it right and I find I test ideas as I write. It's one thing to say to somebody else, oh, go write this up. It's another thing to have to sit down and write it yourself. And it exposes holes and gaps in your own thinking, causes you to question yourself, wonder whether you have it right. So for me, it's an exercise of getting it right and persuading myself at the end of the day and writing in a language that persuades me.

A lot gobbledygook, and us lawyers are guilty of a lot of gobbledygook, that doesn't persuade me. I want to know through a clear line, I want to be able to see my argument and my topic sentences. And maybe it's Sister Rose Margaret (ph), I don't know. But I want to see the argument flow. I want to see how it fits together and then I want it torn apart by my law clerks who tell me I'm wrong. So it's an iterative process. At the end of the day, that's -- that's what it's all about and then it's about the test of my colleagues and I take their comments very seriously.

I believe in collegiality, I believe that two heads, three heads, nine heads are better than one. And so I think a good judge can't have too much pride of authorship, has to accept criticism, constructive criticism and try and incorporate or deal with that criticism. Maybe that's why my opinions have attracted relatively few dissents, I don't know, but I take collegiality very seriously.

As to writing separate opinions, I don't do it very often, and when I do it, it's usually because I'm just stuck. I might be wrong, but I'm just stuck. Something doesn't seem right to me and I've tried to discuss it with my colleagues, I've tried to work it out, I bend as far as I can bend. But at the end of the day, I have -- I take the oath to follow the law where it leads me and I try hard to reach a collegial consensus, but when I can't, I write up what I can as respectfully as I can and usually in as few words as I can (inaudible) concurrence.

Sometimes because it's back (ph) bound, but it's just where I'm stuck. Sometimes, because I see an issue that my bosses need to be aware of, like any good employee. "Hey, boss, you might want to think about this one, seems kind of tough to me." And I think that's part of the process of a good judge.

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SASSE: I'm a historian by background, and when I was writing my dissertation to your audience question, one of my advisers just kept pounding me saying, "I don't know who you're writing for here. It seems scattered all over the place." And he finally persuaded me to put a picture of my aunt on the farm next to my computer, and she's smarter than I am, but she knows nothing about my topic. And he said, "If you recognize that your audience should be smarter than you but ignorant of the subject matter, you're finally gonna find your voice."

Is there something analogous in the writings of the Supreme Court where you're not just writing for other justices, but you have an obligation to write for the American people?

GORSUCH: I think if you're sitting and writing your dissertation for yourself with a picture of your aunt, you're right on target because I think if I'm writing for myself and trying to persuade myself, then I figure everybody will be able to at least track what I did. Maybe not agree with every opinion, every single one of the 2,700 decisions I've issued, but they'll understand why I got where I got.

I was candid about it. I didn't hide. I stood up. I was clear. I was honest. I was forthright. Plain spoken. And you can judge my opinions for better or worse on their merits. And I think that's what a good judge does is candor, the duty of candor.

SASSE: We finished voting a day early last week, and so a lot of us were back in our states traveling and doing town halls and rotary clubs and schools. I ran into three different teachers who planned to use these hearings on C-Span to teach civics. I wonder if you could help those teachers explain, as one of them asked me, about why we have a Bill of Rights, to remind the American people, the Constitution's a negative document, it is not the government giving us freedoms, it is us giving the government a limited set of enumerated powers and originally there was no Bill of Rights and as a part of a compromise, we added one?

Today, most people, when they think about our Constitution think of the Bill of Rights first. Why do we have a Bill of Rights? And what fundamental difference would it make if we didn't have one?

GORSUCH: That's a big question for us adults.

SASSE: The chairman said I could have an extra hour, so take your time.

(LAUGHTER) GORSUCH: Yeah, I've got four minutes and 19 seconds on that. That's a big question for us adults who are where we are. That's a big question for my middle school and high school aged kids.

The Constitution is a negative document. The theory behind it in short order was to divide liberty -- divide power the better to protect liberty. That's the theory, that you put all power in one set of hands you're going to get tyranny and our founders had too much evidence of that in their own time. It's kind of a hard-won inheritance, part enlightenment (ph) theory, part on the battlefield. They saw what it was like to have power amalgamated in one set of hands; dangerous. So they divided it, they divided it three ways on our -- in our federal system.

You, Article One, write the laws and it's tough. It's supposed to be tough to protect liberty. We don't just have one house, we have two houses and then it has to be signed by the president too, really hard. Bicameralism and presentment is designed to make legislation difficult better to protect liberty. The president's powers are to execute the laws, not make them, not adjudicate disputes. Our role is to decide cases and controversies between the people under law as it is. Not as we'd wish it to be, we're not legislators, we're judges. The legislative power is invested in this body.

That's not all. Then we divide power in a way that was quite unique. Well, unusual. Federalism. So you can think of separation of powers as having a horizontal axis and a vertical axis so that the federal government has certain enumerated powers and authorities, and what the federal government doesn't enjoy, the states do as sovereigns. This country as well, we have tribes which also bear sovereignty in our part of the world and bear recognition as such. I'm glad to have the opportunity to recognize that fact here as a westerner.

So we have the separation of powers between horizontally, vertically. That wasn't thought enough to protect liberty. The drafters of the Constitution, many of them thought that that would be more than sufficient, that that, in fact, was

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the main way to preserve liberty. But our founders were very suspicious and very jealous of their liberties. They added the Bill of Rights and they enumerated 10 of them, as you know, starting with the freedom of speech, freedom of religion, no establishment of religion, right to bear arms, the Third Amendment which I'm glad we don't litigate much. I wonder how many of the high school kids now watching know what the Third Amendment's about. Go look it up.

SASSE: And get \$20 out of your pocket at the same time.

(LAUGHTER)

GOR SUCH: So that's what the Bill of Rights is about, is ensuring not just these negative protections, but some positive affirmative guarantees against governmental encroachment.

SASSE: Thank you. I want to ask a few more questions about the Bill of Rights, but I'll save it for my next round since we're at 40 seconds remaining. Thank you, sir.

GRASSLEY: Thank you.

Senator Coons.

COONS: Thank you. Chairman Grassley, I'd like to ask unanimous consent to enter into the record a letter from 19 different faith-based and secular organizations expressing concerns about Judge Gorsuch's rulings on church and state and free exercise.

GRASSLEY: Without objection, is entered.

COONS: Thank you.

Good afternoon, Judge.

GOR SUCH: Hi, Senator. Good to see you.

COONS: It has been a very long and hopefully very informative and instructive day, and I'll suggest...

GRASSLEY: (inaudible) take this away from your time, but I want everybody to be aware that after you get done, Senator Coons, we're going to take a 10-minute break.

COONS: Thank you, Mr. Chairman.

The Third Amendment, some would suggest, was rooted in the Delaware Constitution. So although obscure, it is still beloved by some in the first state.

Let's have a conversation, if we could, about religious free exercise and about liberty interest. There is an enduring tension or contest in our history between individual liberty and religious free exercise and the ability of government to enact and enforce neutral laws and I want to better understand how you view the proper balance between these competing core values. And to that end, I found Hobby Lobby and your contribution to it concerning and interesting.

The case centrally involves access to healthcare coverage, including contraception, for about 13,000 employees across 500 stores of Hobby Lobby, and the religious views of the owners of that corporation.

And you, Judge, joined the Tenth Circuit majority opinion holding that this for-profit business could because of the business's religious beliefs, refuse to provide its employees with access to family planning. But you went even further than the majority, writing an additional concurring opinion emphasizing that the owners of Hobby Lobby, the Green family, were entitled to personally raise their religious objections notwithstanding that they operated the business through trusts and corporations.

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In coming to that conclusion, you opened your opinion by writing, and I quote, "All of us face the problem of complicity; all of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others." Complicity is not a concept I've seen widely discussed in free exercise jurisprudence. Why did you choose to lead your opinion with this concept of complicity? And what does it mean as we're trying to assess free exercise range (ph)?

GORSUCH: So, under the religious freedom -- Senator, thank you. Interesting. Good question. I mean, this is -- this is what it's all about.

The religious Freedom Restoration Act protects this exercise of sincerely held religious beliefs, and affords them the highest protection known in American law -- strict scrutiny. That's a law that this Congress passed because it wasn't satisfied with the degree of protection that the Supreme Court was affording the exercise of religious liberty under the First Amendment, under Smith.

This Congress found Smith, written by Justice Scalia, to be insufficiently protective of the right to free exercise.

COONS: If you could, Judge, help me with your choice of the term "complicity," which doesn't appear in that statute and hadn't previously appeared in free exercise jurisprudence.

GORSUCH: Thank you for prodding me along. The point is, what's a sincerely held religious belief? The individuals there are devout Christians. And as they interpreted their religion, it was a violation, a sin for them to participate in any way in signing papers even, to allow the provision of certain contraceptive devices, those that they believed had the effect of destroying a fertilized egg.

COONS: Right.

GORSUCH: And they were OK...

(CROSSTALK)

COONS: That's exactly -- excuse me, Judge -- but that's exactly why the question of your use of this term "complicity" is so interesting to me is that it opens up a very broad, very attenuated, very remote connection between sincerely held religious beliefs by this devout family, through a trust, through a corporation, a for-profit corporation, to impact the choices and life decisions of 13,000 people.

It's a truly unprecedented decision. If I could just quote for a moment, what I suspect is familiar to you, the dissent of the chief judge in your circuit, Briscoe. She said this opinion was nothing short of a radical revision of First Amendment law, as well as the law of corporations, wholly unsupported by the language of the free exercise clause or the Supreme Court's previous free exercise jurisprudence.

She claimed, Judge Briscoe, that there was literally no support for the proposition that for-profit corporations enjoy free exercise rights in the Supreme Court's previous jurisprudence.

And I'm struck by the extent to which the use of the term "complicity" and your description of a substantial burden on a sincerely held religious belief opens possibly floodgates for litigation on behalf of those who have sincerely held religious beliefs.

As you mentioned, the issue here was access to family planning. There were more than 20 forms of contraception that could potentially be covered. There were only a handful -- I think four -- that the Green's objected to.

GORSUCH: Right.

COONS: How far does this new concept, the newly injected concept of complicity go?

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GOR SUCH: Senator, it's not a new concept at all, with respect, because in enacting RIFRA, Congress revived some older free exercise case law, much of it written by Justice Brennan. Thomas would be a leading example -- involving I believe it was a Jehovah's Witness.

COONS: Yes.

GOR SUCH: OK. Who was OK in producing certain goods that could be used as armaments, but not others.

COONS: Right.

GOR SUCH: Complicity in warmaking. It was a matter of faith to that...

COONS: The key distinction -- the key distinction, if I could, your honor, between Thomas and this was that in that case, here's an individual whose deeply held religious belief made him say, "I can't make turrets for tanks."

GOR SUCH: Right.

COONS: So, the question is uniformly applicable law; unemployment insurance. Can he benefit? Fine. But it doesn't in any way implicate others' liberty interests. The core concern with the choice to recognize a very large, multi-billion dollar, nationwide for-profit company, and to privilege the religious interests of its owners through the legal fiction of a for-profit corporation, is it impacts 13,000 individuals.

That wasn't the case in Thomas.

GOR SUCH: Senator, respectfully, I think we're mixing apples and oranges. Because the first consideration is whether we have a substantial burden on a sincerely held religious belief. The second is whether the government has a compelling interest narrowly tailored to override it. And I think we're mixing apples and oranges. Because on the first one, complicity is very much in play and it's the same in Thomas as it is with the Greens.

How far does my religious faith, your religious faith, permit us to engage in things that our religion teaches are wrong, sinful? That's a matter of religious faith. And in fact, I don't recall anyone doubting, or the government disputing, that the Greens' religious faith was sincerely held on this score.

So I think it's a given. So this complicity discussion I think frankly, Senator, is a red herring, to mix my metaphors, because everyone accepted it.

COONS: We've got apples, oranges and red herrings. We have a full meal...

(CROSSTALK)

GOR SUCH: I know I'm mixing -- I know it's terrible. I wouldn't want to write it down in an opinion. It's terrible.

COONS: Well, let me -- let me take, if I could -- let me take you to a number of things, because several other senators have referenced Hobby Lobby. One of the things that Judge Briscoe was saying was sort of category shattering, or precedent setting, was the extension to a for-profit corporation; the recognition of a for-profit corporation that sells crafts and hobby materials, as being a religious corporation.

Previously, only incorporated churches or synagogues or associations explicitly for -- excuse me -- nonprofit religiously affiliated organizations had been recognized.

In the interpretation of RIFRA, you choose to define "person" to include for-profit corporations. Help me with why you made that move.

GOR SUCH: I'd be delighted to, Senator. And thank you for the opportunity.

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I think I'd point to a couple of things. First, RIFRA is a statute. And it uses the term "person." And it doesn't define the term "person." And when Congress doesn't offer us a specific definition, we go to the Dictionary Act, which Congresses pass for just these circumstances.

And there is says "persons" include corporations. That's the law, as Congress wrote it. And if Congress wishes to change the law and say only natural persons enjoy the rights of RIFRA, I'm a judge. I follow the law. But the law as drafted doesn't distinguish between natural persons and corporations. It includes them both.

And the government, Senator, if I might just finish, conceded, as I recall -- and my recollection may or may not be great on this -- but as I recall, conceded that nonprofit corporations can exercise religion.

COONS: That's right. And that's exactly why this was seen as such a departure. There was a long-settled expectation that religious free exercise rights adhered to individuals, living breathing people, and to nonprofit corporations. It was a big leap for it to, for the first time, apply to for-profit corporations. And I -- I appreciate that the opinion of the majority and your concurrence referenced the Dictionary Act. But the Dictionary Act actually says on its own terms that it applies, unless the context indicates otherwise.

GORSUCH: Right.

COONS: And the reality is, as I think one of the dissents points out, all Congress was intending to do, as expressed by a number of members of Congress, was to simply restore strict scrutiny, not to open up a whole new line of free exercise rights for for-profit corporations. So, I think the context clearly indicated otherwise. And to simply say, "all I did was pull a dictionary off the shelf, look it up, person can include corporations; we're done with the analysis," is in some ways tendentious.

Because the idea that a for-profit corporation could have religious free exercise rights was no where in the earlier case law that Congress explicitly intended to be the narrow purpose of RIFRA.

So, does Congress's intent when it passes a statute -- its clearly stated intent -- have any relevance to your interpretation, especially where something like the Dictionary Act actually urges you to look at the context?

GORSUCH: Senator, I offer you two thoughts on that. First, as I recall, sitting here, and I have to go study my books, but the Supreme Court in an earlier First Amendment case did recognize a challenge by an Orthodox Jewish shopkeeper to Sunday closing laws.

COONS: That's right.

GORSUCH: That was a corporation, for profit. So respectfully, I'm not sure it's accurate to say there's no precedent for it. Second, I would say to you, the position you're advocating is a fine position, respectful -- respectable position.

It's a good position. It was adopted by precisely two justice's of the Supreme Court and only two.

COONS: So the question I want to ask you know is at what point, given this newly adopted fairly broad interpretive standard, when do we stop deferring to an employer's religious beliefs when they conflict with generally applicable laws of neutral meaning?

When do we allow the right of one to implicate the others? I think it was Justice Holmes who was attributed to have said that you're right to swing your arm stops at the end of my nose.

And part of what I think made Hobby Lobby striking to so many was that the choices of 13,000 individuals about their method of family planning were overridden by the sincerely held religious beliefs of a very successful family.

So I'm looking for how you find a limiting principle in this new field. What's the limiting principle now? GORSUCH: Senator, respectfully, I don't believe that's accurate either because all the court held was that the government had to come up with another alternative to provide the contraceptive care -- wish to provide. The court acknowledged -- the Supreme Court acknowledged that there was a compelling interest in providing the contraceptive care.

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And simply said that an accommodation could be reached that didn't involve the Green's or require them to give up their sincerely held religious belief. Much as -- had been done for churches and hospitals and lots of other entities.

And the government couldn't it explain why it couldn't accommodate other entities like Hobby Lobby as well, or Little Sisters of the Poor.

COONS: But if I might just briefly judge, strikingly to me, in the 10th circuit opinion in which you participated, you didn't recognize as a compelling interest gender, equity, and providing health insurance to millions.

The Supreme Court did, they balanced these equities differently. Why didn't you think that that was a compelling interest to provide access to healthcare for millions?

GORSUCH: Senator, I think it was just a matter of what had been -- what the record was in that particular case before us.

COONS: That's also a striking point for me. This was a preliminary injunction. It's a significant groundbreaking opinion where one of your colleagues, one of the other 10th circuit judges said, we really shouldn't be deciding something of this import on a PI.

We ought to be remanding to develop the facts below, the facts weren't really well explored. And the larger point I'm trying to make is that I think this could lead to some very troubling applications. So let's just take a minute and look at a few of the contours of what this, I think, precedent setting decision might -- might mean.

So let's image the Green's were from a different religious perspective. If they were Scientologists, for example, who reject the use of antidepressants or Jehovah Witnesses who reject the use of blood transfusions or Christian Scientists who reject really modern medicine, largely all together.

Could their sincerely held religious beliefs as Scientologists or Jehovah Witnesses or Christian Scientists lead to the conclusion that 13,000 employees could reasonably be denied access to antidepressants or to blood transfusions or to healthcare whatsoever?

GORSUCH: No, Senator. Not necessarily. It doesn't mean that at all. All it means is the government, under the law, as passed by this Congress with overwhelming bipartisan support at the time...

COONS: Well the ACA was not passed with overwhelming bipartisan support.

GORSUCH: I'm sorry, I'm speaking of RFRA.

COONS: Right. The accommodation is in the ACA.

GORSUCH: Oh, and the ACA, you can over ride RFRA any time you want. Congress could say RFRA doesn't apply to the ACA. That's another alternative. You can abandon RFRA, you can say it doesn't apply to this particular statute.

You can say it applies only to natural persons. You can say it doesn't apply to contraceptive care. Congress controls this decision, Senator.

COONS: That's right.

GORSUCH: It's your decision. It's not mine, with all respect. We're just trying to implement what you've asked us to do. And Senator, on your hypothetical's, OK?

COONS: Yes.

GORSUCH: Justice Brennan wrote these First Amendment cases that you are seeking to revive, I'd remind you that.

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COONS: Yeah.

GORSUCH: All right. Justice Brennan. All right. And the fact of the matter is, sometimes the government can prove a compelling interest and that it's got the most narrowly tailored way to get there. And sometimes it can't.

And each case has to be taken on its facts in the particular context in which it arises.

COONS: Well then help me -- help me walk through, if you would, given we already know how you draw the compelling interest in this particular instance of access to family planning or contraception. How else might -- might you weigh these equities or draw these lines?

If the Green's, for example, in Hobby Lobby, knew that several of their employees would spend their paychecks on other things they might say were immoral like gambling or prostitution, could they refuse to endorse their paychecks?

GORSUCH: Senator, it would -- it would go back to we do the analysis.

COONS: Right.

GORSUCH: The same analysis. Do they have a sincerely held religious belief?

Sometimes people don't. I've had claims, for example...

(CROSSTALK) COONS: But in -- but in this instance, wouldn't you agree that their sense of the complicity that you referenced in your opinion would -- would likely apply.

GORSUCH: It depends.

COONS: Even though it's very attenuated.

GORSUCH: Oh, no...

(CROSSTALK)

COONS: The choice of their employee to spend their money in a way they disapprove isn't that different from the choice of the employee to choose among two dozen forms of contraception, one of which they strongly disapprove.

GORSUCH: Senator, I think it depends on the facts of the case. So, for example, I've had a case where a number of people came before us and said we have a sincerely held religious belief that marijuana is god.

COONS: OK.

GORSUCH: It turned out it was a drug distribution ring.

COONS: Right.

GORSUCH: All right. And what they really worshiped was the almighty dollar.

COONS: I'll remind you many of us have teenagers at home...

(CROSSTALK)

GORSUCH: Right, right, right. Well -- and -- and they were really just trying to make a buck, OK. And the district court found that that wasn't a sincerely held religious belief. So, that - you can get off the train there. That's the one place where you -- you may get off the train and you're a hypothetical.

You got another place you can get off the train. Is it a substantial burden?

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COONS: Right.

GOR SUCH: Another place is compelling interest by the government. Another place is narrowly tailoring. So, there are four steps in the process. And you have to go through all four of them as a good judge with the facts of each case as it comes.

And, Senator, again, it's all statutory. You could abolish tomorrow.

COONS: Well, let's take an example that I think was central to a lot of this analysis, *United States v. Lee*. It's an older case, 1982. It was a unanimous case.

It's when -- where an Amish businessman declines to pay for social security taxes...

GOR SUCH: Right.

COONS: ...but not just for himself, but for a few of his employees. And the Court rejected his claim because the restriction on religious freedom, in their view unanimously, was essential to accomplish an overriding governmental interest.

Is *Lee* still a good law?

GOR SUCH: I think *Lee* would be the sort of law you look at when you're applying RFRA, absolutely.

COONS: 'Cause RFRA simply restored the strict scrutiny standard that *Lee* was decided under.

GOR SUCH: The Religious Freedom Restoration Act, exactly. So -- and that's a very good example, Senator, of where the government was able to prove compelling interest in narrow tailoring, yes.

COONS: Because the ability to have a social security scheme nationally that is sustainable is a compelling interest...

GOR SUCH: Yes.

COONS: ...but a nation-wide plan to provide access to healthcare isn't.

GOR SUCH: No, Senator. That's -- I -- again, I think we're -- we're mixing our apples and our oranges because the government in -- in the ACA was spotted the compelling interest. The problem was the narrow tailoring.

You could get there without forcing the Green's to do something their religion prohibited. So, the -- it wasn't like the system of Social Security, which depends upon everyone's participation. That was a distinction *the Supreme Court* drew.

COONS: Let me just quote, if I could, Justice Scalia who addressed this same issue in employment division...

(CROSSTALK)

GOR SUCH: Yeah.

COONS: And he said it's precisely because we're a cosmopolitan nation made up of people of every conceivable religious preference, and precisely because we value religious divergence that we cannot afford the luxury of deeming presumptively invalid as applied to the religious objector every regulation of conduct that doesn't protect an interest of the highest order.

Now, obviously, the laws changed in terms of the review standard. But do we, because of Hobby Lobby, now have to deem every law to be presumptively invalid if it offends any conceivable religious preference?

GOR SUCH: Under the Religious Freedom Restoration Act, it's a four-part test effectively.

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COONS: Right.

GORSUCH: All right? And for every challenge, you ask those questions.

Is there a sincerely held religious belief? Is there a substantial burden on it?

If check, check, then you go to the government side of the ledger. Do they have a compelling interest that isn't narrowly tailored? And that's -- that's the law you've set forth, Senator, because this body didn't like frankly Justice Scalia's decision -- and Smith.

And if this court -- if -- if -- sorry, if this -- the old trial lawyer in me. Sorry, getting tired.

If this Congress wishes to say Justice Scalia was right, and Smith, and we've changed our minds, that's entirely up to this Congress.

COONS: Well, I'm gonna move on to another live questioning. But I just want to say that one of the challenges I face in a couple of different gates through the analyses laid out was how you decided to interpret the underlying RFRA statute, how it was extended to for-profit corporations, how the balance was struck between what I think of the mediating decisions of thousands of individuals versus the free exercise of the Green's.

You've talked about being a westerner. You've, I think, entertained us with mutton-busting, something I haven't seen yet and clearly, I should. And I'm -- I'm interested...

GORSUCH: I recommend it.

COONS: I'm interested in your view of privacy and the autonomy of adults to make their decisions. It was in fact I think Justice Scalia who said there isn't a genuine westerner on the court and that California doesn't count.

As I shared with you some of my extended family was from the West. And I think of westerners as steadfastly independent folks. Justice Douglas, a famously western justice, once said the right to be let alone is the beginning of all freedom.

So, in 2006, you authored a book, "The Future of Assisted Suicide and Euthanasia", a topic of intense personal interest to many. And when reviewing your book, I -- I was expecting you to conclude that people have the right to be let alone because I think of that as an inherently western trait to make important and difficult personal decisions without the interference of government, but you didn't.

Instead, you expressed a belief in the viability (ph) of human life. What -- what did you mean by that?

GORSUCH: Senator, respectfully, I -- I -- I'm not sure I -- I'd agree with your characterization.

COONS: Of the book or being a westerner?

GORSUCH: Of the book. I agree with your characterization of being a westerner.

The book does conclude that Cruzan is absolutely correct, that there is a right to be left alone at the end of life. These are hard decisions.

I don't pretend to have any perfect answers here. I was writing this book as my dissertation, trying to contribute to what I thought was a very hard question.

And I still think a very hard question when we all have had personal struggles with, Senator. As I know you have and I have. And this is a human problem who are mortal.

Cruzan held that people have a right to be left alone presumptively under the common law, presumptively Constitutionally to stop care, go home, die in your own bed as my -- a lot of my family members have done. The

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question is whether you should also have an additional right to have someone kill you -- involve doctors in killing. And there are good arguments on both sides of that ledger as I explore in the book.

COONS: Well, if I -- if I can, Judge, I'd like to help walk through that exploration of what you...

GORSUCH: Sure.

COON: ...what you looked at in the book. And I think the Cruzan decision is a very important one because essentially the tension here is between whether there's a right for a conscious terminally ill adult to end their own life by refusing life-saving hydration and nutrition, as the Supreme Court assumed in Cruzan, or with the help of a doctor.

And a lot of this rests in whether there is a right to privacy. Do you believe the Constitution contains a right to privacy?

GORSUCH: Yes, Senator, I do. Privacy is in a variety of places in the Constitution. The first and most obviously place, back to the Bill of Rights, is the Fourth Amendment...

COONS: Right.

GORSUCH: ...the right to be free from unreasonable searches and seizures in your homes, papers, and effects. That's privacy, right? The Third Amendment, which I eluded to but didn't want to reveal... COONS: Quartering of troops and...

GORSUCH: ...no quartering of troops. Stay out of my house with your troops.

Now, happily, we don't litigate that much.

COONS: Right.

GORSUCH: The First Amendment...

COONS: Right.

GORSUCH: ...the right to free expression, which we've been talking about, the freedom of -- of -- of religious belief, expression. That requires a place of privacy.

And the Fourteenth Amendment, Senator, over now, about 80 or 90 years, the Supreme Court of the United States has held that the liberty prong of the Due Process Clause protects privacy in a variety of ways.

Having to do with child rearing and family decisions, going back to Meyers, which involve parents who wished to have the freedom to teach their children German at a time it was unpopular in this country. And Pierce, the right of parents to send their children to a parochial school if they wish.

So, Senator, yes, the Constitution definitely contains privacy rights.

COONS: One of the things that you say in your book unequivocally is that -- and I think I quote -- all human beings are intrinsically valuable. And the intentional taking of human life by private persons is always wrong. And I think that's a dividing line that you draw between the facts in Cruzan and what has been proposed or adopted in states like Oregon.

Can you point to any principle of constitutional law that says that? Or has that principle, as you annunciated it, ever been offered by the Supreme Court or recognized by the Supreme Court?

GORSUCH: Sir, I was speaking as a commentator before I became a judge, not expressing use as a judge, all right. My views as a commentator I'm happy to talk about though. I found this a very difficult question. The Supreme Court has held that this is an issue for the states to decide under Glucksberg and Quill -- for the people

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to decide on the state level. I agree with those decisions. I say so in the book. My concern about legalization that I express in the book is a commentator, has to do with equal protection principles we've been talking about today, equal justice under the law of principles.

And I am concerned in the book -- I express concerns as a commentator about what legalization might mean for the least amongst us, the most vulnerable, the disabled, the elderly that might be pressured into accepting an early death because it's a cheaper option than more expensive hospice care, things like that -- that -- that might cost more. And so that was a concern I expressed. Senator, I don't pretend though to have the last word on that or to know the right answer. I was contributing as a commentator to what I thought was a very hard discussion.

COONS: It is a very -- very hard discussion as you said, something that has an enormous impact on the terminally ill and their families.

GORSUCH: Yes.

COONS: And there was a -- a case that I think was active at the time you were at the Department of Justice where the U.S. Attorney General was -- was suing Oregon to block their death with dignity law that -- that permits in that state physician assisted suicide and in the documents you produced to this committee, you send a message expressing hope that the federal government would win that particular case. Why did you want the federal government to win that case?

GORSUCH: Well I was an advocate for the government at the time, Senator. That's my job, all right? When you represent the government, you want the government to win. When you represent somebody against the government, you want the government to lose. And as a judge, Senator, it's a very different mindset.

COONS: And when you're up for consideration for the Supreme Court, it's important to know what you view as subtle precedence so let me in my last two minutes ask a question or two about that.

GORSUCH: Sure.

COONS: In the Glucksberg case which is about physician assisted suicide, Justice Stephens said in his concurrence that "avoiding intolerable pain and indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty to find one's own concept of existence," citing the Casey decision. What's your view of the application of Casey's mystery of human life language here?

GORSUCH: Senator, the Supreme Court in Glucksberg, the majority held that this issue is for the state's to decide and for people to decide. People of Oregon have made their decision to legalize it, for example. It was just legalized November in my home state of Colorado. That's their right.

COONS: And how did you feel about that?

GORSUCH: Senator, my personal views have nothing to do with my job as a judge.

COONS: Let me ask one last question if I might. There was a line in your book that reminded me a great deal of Justice Scalia. You said that, "A Libertarian principle legalizing physician assisted suicide would require the government inevitably to allow sadomasochist killings, mass suicide pacts, duels, the sale of one's own life, not to mention illicit drugs, prostitution, the sale of one's organs." Help me understand, in closing, why finding a Constitutional right to physician assisted suicide would directly yield to this long list of other, perhaps more shocking, Constitutional rights to prostitution or drug use or the sale of organs. Help me understand that leap.

GORSUCH: Senator, in each chapter I analyzed different potential arguments one of which was this Libertarian argument. And applied faithfully to its end, it leads to where it leads as some of the authors of the argument acknowledge. I'm not making it up. There are other arguments thought that one might deploy that I analyze as well. That's not the only available argument for legalization by any means.

COONS: Thank you Judge.

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GRASSLEY: We will recess for ten minutes so that would be approximately 5:40. And then they'll be Senator Flake.

(RECESS)

GRASSLEY: Before I call on Senator Flake, this is how I would like to go forth for the rest of the evening. We have a vote scheduled at 6:10. That'll be about the time that Senator Flake will be finishing. I would like to have -- Senator Blumenthal would be the next one up. I would hope, Senator Blumenthal, you could go vote at 6:10 and be back here and takeover and I'll -- I'll operate within that and then I would like to suggest that -- I have asked Senator Tillis to take over about eight o'clock so I can be in bed by nine o'clock because I get up at four in the morning and I want to be able to -- be able to get a good night sleep so I can run in the morning.

And -- and so you understand, Judge, that I'm not -- I hope you'll understand why Tillis is taking over.

GORSUCH: Little envious, Mr. Chairman.

(LAUGHTER)

GRASSLEY: Senator Flake?

FLAKE: Thank you, Mr. Chairman.

Thank you. It's a long day and I know what it feels like. It reminds me of me at the end of the table. I have ten brothers and sisters and getting there and there's no more questions to ask. No more food left on the table either. But I appreciate your endurance here and speaking of my -- I have ten siblings. I have five children as well. I don't know about my colleagues, but that's how I get elected in Arizona. It helps.

(LAUGHTER)

Not so much for a judge, but for senators, it does. And just like Ben's family, my family's been texting me throughout this process asking me to ask questions that they would ask. I ask a few of them for suggestions, and my son Dalen, teenager, said ask him if he would rather fight 100 duck-sized horses or one horse-sized duck?
(LAUGHTER)

I never heard it either. Apparently, it's a question on Reddit a while ago, but that's where it's going from here, I think.

GORSUCH: You can tell him I'm very rarely at a loss for words...

(LAUGHTER)

But you got me.

FLAKE: OK. All right, I will tell him. A teenager stumped you, there. My brother Scott asked if you've ever worn gym shorts and a tank top under your robe.

(LAUGHTER)

GORSUCH: Senator, on that one, we have what's called the Fifth Amendment...

(LAUGHTER)

... which is part of the Bill of Rights as well and which of course protects the right not to self-incriminate. So I might have to exercise my rights under the Fifth Amendment to that one.

FLAKE: That is a good answer. My mother asked a little more serious question, and this goes to how you spend your time to let people know more about you. How do you like to get your hands dirty? Do you like to ski? But that's kind of a pedestrian sport.

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GORSUCH: Wow. Spoken like an Arizonan there, the valley of the sun. No, I -- our family loves to ski together. That is one of our favorite activities. My daughters are ferocious double black diamond skiers. One of them is...

FLAKE: That's not pedestrian at all.

GORSUCH: One of them is right now is doing back country skiing out near Telluride as we speak. So that's something we love to do as a family.

FLAKE: And where does your family vacation?

GORSUCH: Near Winter Park, Colorado. It's a resort owned by the city of Denver and it's where I learned to ski as a kid. My parents put me on a bus or the train, it was their idea of getting rid of me for the day on the weekend, and I'd come back exhausted, which was good too. They liked to run me ragged that way.

FLAKE: What's the largest trout you ever caught?

GORSUCH: Oh, now we're talking. I love to fish, and that is where I find a lot of solace. You can't focus on the worries of the world when you're only worried about a trout. Everything else goes away, just disappears. You're in the most beautiful -- trout live in beautiful places. They are very picky and they pick well.

So during the summertime, fishing, hiking. I like to row, like to run. Those are my activities and I like to read. I like to read novels. Good fiction. And if you want to learn how to write, you got to learn how to read.

FLAKE: That's great.

Tell me about your civic involvement outside of the courtroom. You mentioned school board a while ago.

GORSUCH: Boy, that -- that I found taxing and loved every minute of it, but I've spent a lot of my free time teaching or working on the Rules Committee. Been in (ph) the rules process for the last six, seven years now. Chief justice kindly appointed me to the standing committee and then to the Appellate Rules Committee more recently. And trying to make the rules more sensible so that we can get litigation done more sensibly, cheaper, faster, for all people.

It's a wonderful example of government working. People from a variety of walks of life, judges, lawyers, academics, coming together and operating more or less by consensus. Imagine that.

FLAKE: I found that as well and I think that typifies the west and small towns. I grew up in a town called Snowflake. I'm a fifth generation Arizonan. You're a fourth generation Coloradan, I understand. It -- that is how it works. People get along. They have to. And on a school board, there's no passing the buck there. You've got to make decisions, local government is like that.

Jury duty. Have you ever been called up?

GORSUCH: You know, I have. It was when I was at the Department of Justice and I thought for sure...

(LAUGHTER)

(UNKNOWN): (OFF-MIKE)

(LAUGHTER)

FLAKE: Have you served on a jury?

(UNKNOWN): No. I just thought it was very odd questions for this, but it's great.

(CROSSTALK)

FLAKE: I wanted to know. Can a judge be called to jury duty?

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(UNKNOWN): I'm sorry I laughed. I just -- it caught me (inaudible). Go ahead.

GORSUCH: Thank you.

(LAUGHTER) I actually think it's a very excellent question because I think anyone who's served on a jury appreciates the important civic function that's involved. It's a way citizens are -- actually interact with their -- their government, right, in a very real way,

FLAKE: Were you disqualified or did you...

GORSUCH: No. I thought for sure I'd get kicked off, and I guess neither side thought I was the worst one so I made it through and I went to the bathroom, when we got sent back and I came out and had been elected foreman. Which I refused to serve as but I just didn't think that was appropriate. I didn't want to have undue influence. The seventh amendment and the right to trial by jury, the only disagreement our founders had over it was whether it was a bulwark of liberty or the very palladium of liberty.

And as a trial lawyer, I had great faith in jurors, in the collective wisdom of 12 citizens to adjudicate a case fairly on the facts. My time serving in a jury, I wondered is it going to prove out my beliefs or will I come out more of a cynic? I came out more optimistic and a truer believer in the jury system than ever. I really believe in the wisdom of juries.

FLAKE: Thanks.

FRANKEN: That was a great question.

FLAKE: Thanks, Al. Appreciate it. It's the end of the day. You mentioned earlier your colleagues on the tenth circuit, can you tell me about them? What do you admire about some of them, what have you learned from some of them?

GORSUCH: Oh there are many so many I admire. I admire them all. They all bring something to the table. Men, women, every kind of background.

FLAKE: Tell me how it works. Are you bunched up or these were Republican appointed judges? Democrat appointed judges? Do you notice that? Do you forget that? How is it?

GORSUCH: You know the nicest gift I've gotten in the last few weeks, have been so many prayers, so many well wishers, so many kindnesses, but the best gift I have gotten was this enormous basket from my four most-recent colleagues, I think it was four whatever. It just happens to be my Obama appointed colleagues sent me a gift basket because they knew I wasn't eating very well as I was marching around the Senate halls. They said I was looking a little gaunt. That's how we work in the Tenth Circuit. I'm sorry for outing them, but you touched my heart.

Thank you. And that's how my colleagues are, all of them. I have served with judges appointed by President Johnson, President Nixon, President Carter, President Reagan, President Bush the First, Clinton, President Bush the Second, and Obama, and we get along. I think you are going to hear in a couple days from two former Chief Judges of the Tenth Circuit who have retired now, and you are going to hear about how we operate in the Tenth Circuit.

It's often reputed to be the most collegial circuit in the country. Collegial not in some ordinary pedestrian sense of we're just nice to one another, collegial in a real meaningful sense. We listen to one another and we value and we respect different points of view, not just tolerate them.

FLAKE: For the record, the Tenth Circuit is seven active judges appointed by Democrats, five by Republicans, yet of the 27 hundred cases for which you have sat, you filed dissents on just 36. Is that right, 1.3 percent? Of the 25 dissents that Judge Gorsuch has authored more than half, 52 percent were from majority opinions written by Republican appointees. So for those and it's been said or implied that (act in) partisan way somehow or that former work in political arena before you became a judge, if that has somehow bled over into your judgeship, it certainly is not reflected in what the record shows.

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I think even more telling is congressional research service shows 97 percent of the majority opinions that you authored were for a unanimous court, as you mentioned, you worked together. In over 98 percent of all cases in which you sat, you agreed with the majority result, 99 percent of the time. That does not sound like an ideologue. That does not sound like someone far out of the mainstream. So when I hear that on television or whatnot, when people say that this is a judge way out of the mainstream, it simply doesn't ring true with your record.

Let me submit for the record, a statement from a former law clerk. I think she was mentioned earlier. She said that soon after you took the bench on the Tenth Circuit, you said, "and he took all of his clerks and office staff, myself included, to visit several federal prisons. He wanted to see for himself and he wanted all of us to understand the importance of applying justice in every case, for the lives of others depended on us doing the best job that we possibly could." Can you tell me about that experience?

GORSUCH: Senator, federal criminal law imposes very long sentences. And to be a judge complicit in adjudicating criminal cases, I thought I couldn't close my eyes to what the reality is. And I wanted to see it for myself first-hand my first year on the bench, so I did.

FLAKE: Can you tell me about the Tenth Circuit Capital Habeas project?

GORSUCH: Senator, I think it started one day after an argument when a few of us were concerned that equality of representation of death row inmates in our circuit was not what we'd like it to be.

And I do not want to take more credit than I am due here. Real people deserve credit. My colleagues, Judge Tymkovich, Judge Lucero; and a whole lot of our staff, Betsy Shoemaker, David Tai (ph); many, many others, who put together, together with the wonderful judges in Oklahoma, some training sessions. Recruited additional lawyers, provided training for those who are already in the system, sought and obtained more funds for federal public defenders to assist. And a lot of people deserve more credit than I do.

FLAKE: Thank you. Let's talk about Western issues for a bit. You talked about the importance of geographic diversity on the court. And people were saying, well, what does that mean? Is there really a difference? Is there really a Western perspective that somebody can bring?

Let me go through a few of the issues that you've encountered and we'll flesh that out. Let me introduce, for the record, a letter from one of Judge Gorsuch's former clerks. Well, also, let's do from a federal judge in Montana.

Let me talk about for a second some of the policies that have come out. In one case, you rejected the idea that a dormant commerce clause prevents Colorado from requiring that 20% of electricity would come from renewable sources.

Now, whether or not you agree with that policy and there's a lot of disagreement around here about that, but we don't live in Colorado. You do. So, its wisdom isn't really our business. Would you agree that the principles of federalism allow states to experiment with policies like environmental protection in this sense?

GORSUCH: Senator, that was the holding of my court in that case. Colorado had passed, by voter referendum, a law that, as I recall sitting here, indicated that 20% of energy in Colorado had to be from renewable sources by a date certain.

That law was challenged by fossil fuel producers out of state, alleging that it violated what's called the dormant commerce clause under the federal constitution and case law interpreting it. And I did write for unanimous panel that there was no constitutional violation and the state was permitted to proceed with this experiment.

FLAKE: Is that indicative of the concept of the laboratories of democracies that states have been described as?

GORSUCH: It's consistent with that principle.

FLAKE: Well, thank you. One complicated issue that we have in the west that you really don't get as much elsewhere is the split estate property rights. It's possible that I might own a parcel of land that somebody else might

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own the mineral rights and still somebody else might own the water rights. Have you encountered that in your jurisprudence?

GORSUCH: It is very different than out here. And, yes, I have. Split estates, as you know, are a common feature in the West and in part at least a byproduct of homesteading acts by this Congress where initially, as I recall, Congress gave homesteaders rights down to the center of the Earth as is common out here. And then they found out, my gosh, there's valuable stuff under there and they started splitting the estates, so that homesteaders could do what they wanted to do on the surface estate, but that the Congress and the people control some of the valuable mineral rights underneath. Very complicated stuff. And, yes, I have encountered those cases too.

FLAKE: Is that a perspective that you think would be useful on the Supreme Court?

GORSUCH: I think that's for this body to decide.

FLAKE: All right. Well, thank you. Also, another aspect of living in the American West is we share a lot of land with the Indian tribes and the prevalence of tribes out West can complicate things in the legal sense. Say, deciding between municipalities or local or state government. What have you ruled on or have you dealt with in terms of relationship between state and local government and the tribes?

GORSUCH: Senator, I've had a number of tribal cases. And tribes are, as you know, sovereign nations. And our constitutional order affords this body considerable power in dealing with those sovereign nations, by treaty and otherwise.

And out West, there are all sorts of variations on that arrangement. There are classic reservations as many people in the east conceive of them. There are also ancient pueblos that predate this country by many hundreds of years. Then there are allotments to individuals and groups. Depends where you are. That sounds like Oklahoma. Pueblo sounds like New Mexico. And then, when I think of reservations, I think of Utah and some places in Colorado, Wyoming. And there are variations all throughout the American West.

Our history with Native Americans, not the prettiest history. And as a judge, you try very hard to administer the law fairly, without respect of persons, and equally. And I'd point you maybe to my cases involving the Indian tribe where they've had a long time trying to control their tribal lands.

Or Fletcher involving the Osage Nation in Oklahoma and their right to an accounting of the property due to them under agreements with the United States. I've tried to treat all persons who come before me fairly.

FLAKE: That's also our perspective that a Western member can bring to the Supreme Court. That's my supposition. I know you won't say that. But I think that that's useful.

While the Chairman is here, let me ask for unanimous consent to enter into the record a letter from Alaska senators on behalf of Indian tribes. Also, one from a law school clerk and also one from a judge in Montana.

GRASSLEY: Those documents, without objection, will be entered. FLAKE: Thank you. Let's turn for a minute to separation of powers. You have written eloquently about Chevron Deference in your concerns. I share those concerns. Chevron didn't come out of nowhere. There were serious concerns in the 1980s, with rogue judges making policy from the bench.

Now, the idea of agency deference was designed to restrain judicial overreach. I think that the pendulum has swung far too far in the other direction and that judiciary is insufficiently vigilant of executive overreach. What are your thoughts on that?

GORSUCH: Senator, those are policy considerations. As a judge, my job is to look at the law. I would say I don't conceive of Chevron deference as conservative or liberal issue.

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I do recall when Chevron was announced, many people thought it was a very conservative decision because it does advantage whoever has their hands on the reins of the administrative state at the particular time. And in 1984, that was one party. Today, you know, it may be another party and the next day it may be another party.

So a good judge doesn't care who it advantages, a good judge looks at the law.

FLAKE: So setting the boundaries for where deference ought to be is the job of the legislature, not the judicial branch?

GORSUCH: In the first instance, the Administrative Procedures Act is the statute that you look at.

FLAKE: Thank you.

With regard to Second Amendment, you have been asked about stare decisis and the role of precedent and it's usually by people who talk about Roe v. Wade, or decisions like that. But they rarely bring up that might also, apply to Heller or other decisions like that.

How do you see it with regard to precedent?

GORSUCH: All precedent of the United States Supreme Court deserves the respect of precedent, which is quite a lot. It's the anchor of the law, it's the starting place for a judge, and the Chairman kindly held up my over-long book, right, and that's the law of precedent.

A very mainstream consensus view by a bunch of judges from across the country, got together and we wrote it down and it's all in there. And Justice Breyer was kind enough to write a foreword to it, it articulates how a good judge goes about assessing the law of precedent in any case.

FLAKE: Right. Thank you.

Let me just close with religious liberty, religious freedom, I would not ask you your religion or how you practice your faith. But if you can just talk, in general, about what the role of faith is. People of faith coming into the judiciary or on the courts, what role should it play, what role should it not play, in your view?

GORSUCH: Senator, one of the wonders of our constitutional order is the First Amendment and the right of free exercise. Not many countries in the world are as pluralistic, when it comes to religion, as this country, it's quite an experiment, really.

Most nation states, one culture, one people, one religion. We are founded on a very different idea, that all voices are heard. That people of all faiths, and no faiths, are welcome, that we are tolerant.

It was quite an experiment to launch 200 years ago. It's still an experiment today that we are working on, and learning to live with one another, and mediate it. So the role of religion in our society is profound, and always has been, and it's a pluralistic commitment we have in this country, very special in the world.

FLAKE: Well, thank you.

Mr. Chairman, I will do something very un-Senatorial. I have a couple minutes left but I will yield back, so people can go vote.

GRASSLEY: I think Senator Blumenthal will be here for - - I will stay just a few minutes. So we will just stand in recess.

I hope everybody will kind of stay close by.

(RECESS)

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GRASSLEY: Senator Blumenthal, I'll call on him. And Senator Blumenthal, while I'm gone, if you have anything that you want to put into the record just ask your permission to do it and you can do it.

BLUMENTHAL: I -- I -- I, so with your permission I will enter them into the record?

GRASSLEY: Yes, OK.

BLUMENTHAL: Thank you.

GRASSLEY: I'm going to go vote now.

BLUMENTHAL: Good evening, Your Honor and thank you for your patience and your perseverance with us. You'll recall the conversation or visit we had in my office not that long ago. And you will, I'm sure, recall that I quoted the first line in your concurrence in the case of Gutierrez v. Brizuela. You remember that first line.

GOR SUCH: Senator, I'm sorry. I don't remember the first line.

BLUMENTHAL: The line -- the line was "There's an elephant in the room with us today incited before."

GOR SUCH: Oh, yes. Yes. BLUMENTHAL: And do you recall what I said? Or who I said was the elephant in the room?

GOR SUCH: I'm sorry, Senator. I -- I don't. I apologize sincerely.

BLUMENTHAL: I'll refresh your recollection. The initials are D.J.T. OK? Donald Trump.

GOR SUCH: Yes.

BLUMENTHAL: He was the elephant in the room with us then. I think he's the elephant in the room with us now. And the reason is, as I said then, because of his attack on the judiciary and make no mistake, I am not in any way attributing to you that attack. But you are familiar with the fact that he referred to the Article III judge who ruled against him in the travel ban case as a quote "so-called judge" in one of his tweets. You recall?

GOR SUCH: I do.

BLUMENTHAL: And do you recall his second tweet when he referred to the court and said that they were to be quote "given blame if an act of terrorism occurred because of striking down the travel ban?" Do you recall that tweet?

GOR SUCH: Yes, yes, Senator.

BLUMENTHAL: And during the campaign, completely different federal judge born in this country, he said could not rule fairly on this case because the judge was "a Mexican." You recall that?

GOR SUCH: I do.

BLUMENTHAL: What do you think the President meant when he used the words "so-called judge?"

GOR SUCH: Senator, I don't know what was in his mind. You'd have to ask him.

BLUMENTHAL: How would you feel if he called you a "so-called judge?"

GOR SUCH: Senator, I care deeply about the independence of the judiciary. I can't talk about specific cases or controversies that might come before me and I can't get involved in politics.

But I can say a couple of things about that, as you know, the first is judges have to be tough. You get called lots of names, all over the place. We have to accept criticism with some humility, it makes us stronger and better.

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I take it from my teenage daughters, I take it from litigants. This process, there's been plenty of criticisms, that's fine. Thomas Jefferson didn't much like *Marbury v. Madison*, and he didn't mind saying so. Presidents have tried to pack the court, that's part of our Constitutional history. We have a first amendment, people can speak their mind, but Senator, I'm sorry I don't mean to interrupt, but I did want to add one other point if - if I...

BLUMENTHAL: Please do.

GORSUCH: But, Senator, when you attack the integrity or honesty or independence of a judge, their motives, as we sometimes hear, Senator, I know the men and women of the Federal Judiciary, a lot of them.

I know how hard their job is, how much they often give up to do it, the difficult circumstances in which they do it. It's a lonely job too, I'm not asking for any crocodile tears or anything like that.

I'm just saying that I know these people and I know how decent they are and when anyone criticizes the honesty or integrity or the motives of a federal judge, I find that disheartening, I find that demoralizing because I know the truth.

BLUMENTHAL: Anyone including the President of the United States?

GORSUCH: Anyone is anyone.

BLUMENTHAL: Because no person is above the law, including the President of the United States.

GORSUCH: That's right, Senator.

BLUMENTHAL: And isn't that referenced by the President to a "so-called judge?" Isn't his attack on saying judges who struck down that order as playing politics, isn't that an attack on the judiciary, on its integrity?

GORSUCH: Senator, I can't comment on specific cases and I can't get involved in politics. I've said what I think I ethically may in this area.

BLUMENTHAL: Well, maybe you share with the President what that wise old judge told you, maybe you can quote to us again?

GORSUCH: I think you're going to hear from him yourself on Thursday, I'm sure he won't mind, hesitate in anyway - have any question or fear about saying it to you himself but I'm happy to share it with you too.

"The only test of the rule of law is whether the government can lose its own courts and accept the judgments of those courts."

BLUMENTHAL: And in your view, was the President of the United States showing proper respect when we attacked the courts in that way? Was he accepting the rule of law?

GORSUCH: Senator, I've gone as far as I can go, ethically, with the cannons that restrict me about speaking on cases. I can't talk about specific cases and I can't get involved in politics. Respectfully, I believe I've gone as far as I'm able to go.

BLUMENTHAL: Well, I just want to make clear that I'm looking for the same kind of expression of outrage that I felt as an officer of the court, and I am still an officer of the court, because of that attack. Because as you well know, and I cited it yesterday, Alexander Hamilton said the courts are "the least dangerous branch" because they have "neither the power of purse nor sword," what they have is respect. When the President of the United States attacks the court, attacking you because when he attacks your brethren he attacks you, the bedrock of our democracy, you as a member of the Tenth Circuit Court of Appeal, as a so-called judge. He undermines the bedrock of our democracy, which is respect for the courts. Courts don't have armies, they don't have police forces. All they have is the respect and credibility.

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And you made reference earlier to judges having to take the barbs and insults. My guess is that if a litigant before your court, and the president of the United States was a litigant in that case, used that language, you might well entertain a motion for contempt of court.

GORSUCH: I appreciate the opportunity to talk about my record because I can talk about that, Senator. My record is when there's a judge who's accused of perhaps using language that might bear on a man's ethnicity, arguably, in the course of sentencing, panel of my court on which I sat replaced him. My record, when an undocumented alien -- immigrant, sorry, is not properly represented and there's a history of the lawyer failing his clients in that area, referred him for dismissal from our bar.

BLUMENTHAL: Because you believe that respect for the courts is important.

GORSUCH: Senator, the independence and integrity of the judiciary is in my bones.

BLUMENTHAL: Well, I'm gonna return to this topic, maybe not in this round, but later, because as you well know also, although judges may be attacked, they really have no way to defend themselves and we know that as officers of the court, as advocates, and that's why I feel so deeply that not only we, but the Department of Justice should have been more vigorous in coming to the defense of those judges even though the Department of Justice was the loser in that case, because more is at stake here than the president's immigrant policies or the travel ban. It is the respect and integrity for the courts.

There's another reason that Donald Trump is the elephant in the room, and that is because he established a litmus test or actually a set of litmus tests, one of them being that his nominee and I don't know whether you saw the debate, the third presidential debate, where he promised and I'm quoting, about overturning *Roe v. Wade*, quote, "that will happen automatically in my opinion because I am putting pro-life justices on the court." Are you familiar with that statement?

GORSUCH: I am, Senator. BLUMENTHAL: Are you familiar with other occasions when he promised that he would appoint someone who would overturn *Roe v. Wade*? For example, November 13, 2017, in an interview with Leslie Stahl on 60 Minutes, quote, "I'm pro-life, the judges will be pro-life." On June 28, 2015, an interview on CNN with Jake Tapper, quote, "I'm pro-life." He was then asked would that be a litmus test. Quote, "It is, it is," end quote.

There are others, but what I'm asking you is you're aware of that litmus test?

GORSUCH: Senator, I can't say I'm aware of each of those statements, but I'm definitely aware that there was discussion of litmus tests by lots of people during the election process, yes.

BLUMENTHAL: Well, these discussions are by the president of the United States...

GORSUCH: Yes.

BLUMENTHAL: ... who has nominated you for this position.

GORSUCH: Very aware of it, Senator.

BLUMENTHAL: And he interviewed you.

GORSUCH: He did.

BLUMENTHAL: And you've testified here that there was no mention of *Roe v. Wade*?

GORSUCH: Senator, what I've testified to is there was no request for me to commit on any case or controversy or anything that might come before me.

BLUMENTHAL: Was there any mention of *Roe v. Wade*?

GORSUCH: There was briefly.

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BLUMENTHAL: What did he say and what did you say?

GOR SUCH: Senator, the president recounted to me, among other things, how the campaign went in Colorado. He knew I was from Colorado and he was disappointed he had lost Colorado. He said something like if he had had a little more time, he thinks he might have won. And then he said that one of the topics that came up during the course of the campaign was abortion and that it was very divisive and split people evenly, he found. And then he moved on to other topics.

BLUMENTHAL: Did he mention Roe v. Wade by name?

GOR SUCH: I don't think -- not to my recollection. Just that abortion was very divisive and then he moved on to other topics of interest to him.

BLUMENTHAL: Like what?

GOR SUCH: Senator, the next topic I remember, and this is just my recollection, is he expressed concern that our country's nuclear armaments are old.

BLUMENTHAL: Has anyone in interviews with you, and you mentioned one conversation with Steve Bannon, I understand you also met with other advisers, has anyone else ever mentioned Roe v. Wade?

GOR SUCH: No, Senator. That's it.

BLUMENTHAL: Never a mention of that case or of abortion in any of your conversations with any of the president's advisers?

GOR SUCH: Not to my recollection, no.

BLUMENTHAL: And what about with officials of the Heritage Foundation, who may have discussed the Supreme Court with you?

GOR SUCH: To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage. Maybe I shook someone's hand, but I have not had any substantive conversation that I'm aware of that anyone's alerted me to they're from the Heritage Foundation.

BLUMENTHAL: Well, let me go to a case that I think bears on perhaps the president's and his advisers' perception of your views on Roe v. Wade and on this issue of abortion. I don't know whether you recall the case of Planned Parenthood Association of Utah v. Herbert?

GOR SUCH: I do.

BLUMENTHAL: In that case, as you know, the governor of Utah directed all of his state agencies to end funding for the local Planned Parenthood affiliate after a deceptive and false set of videos was released and Planned Parenthood of Utah went to federal court, they sought a temporary injunction, they won -- they lost at the district court, which denied their request, and then on your court, a three-judge panel reversed the district court and granted the injunction stopping the state government from terminating the funding. That restored the funding for Planned Parenthood.

GOR SUCH: Temporarily as a preliminary matter. That's my recollection, yes.

BLUMENTHAL: As a preliminary matter, the panel of the Tenth Circuit restored the funding.

GOR SUCH: Issued a preliminary injunction or -- probably preliminary injunction, yes.

BLUMENTHAL: Correct. Preliminary injunction is correct. Were you on that panel?

GOR SUCH: No. No, Senator, I was not.

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BLUMENTHAL: OK. And any of the parties subsequently have the right to ask for a re-hearing, do they not?

GORSUCH: They do.

BLUMENTHAL: Is there a time limit?

GORSUCH: For the parties, there's a time limit proscribed by rule. It's also possible for the court, what we call sua sponte, or on its own, to seek re-hearing and there's no time limit proscribed by rule for that.

BLUMENTHAL: So the time limit for the parties is two weeks, correct?

GORSUCH: That sound right, Senator. I wouldn't swear to it, but I trust you.

BLUMENTHAL: Well, I would never presume to know the rules...

GORSUCH: I always check the rules on that sort of thing because I always think I know, and it's 10 days, 14 days. I always look.

BLUMENTHAL: I'm sure you do. Well, two weeks passed and none of the parties requested a re-hearing, correct?

GORSUCH: That's right.

BLUMENTHAL: But one of the judges did.

GORSUCH: That's right.

BLUMENTHAL: That judge was you.

GORSUCH: Senator, that's internal deliberative process that wouldn't normally be revealed, but I have no problem acknowledging that.

BLUMENTHAL: That you asked for the re-hearing?

GORSUCH: I did.

BLUMENTHAL: The parties actually were fine with the result. They settled the case, they were off about their business and you asked for the re-hearing, correct?

GORSUCH: No, Senator. That's not correct.

BLUMENTHAL: Well, correct me.

GORSUCH: A preliminary injunction the Court of Appeals the panel had indicated should issue, subject to this court has to enter, I believe, I don't think our court entered it directly. As I recall, the parties either reached some sort of agreement with respect to the preliminary relief or the court entered it. I don't recall which. But the case proceeded and may still be proceeding, for all I know.

BLUMENTHAL: But one way the -- none of the parties asked for any further proceedings, only you did?

GORSUCH: That's right.

BLUMENTHAL: And did the court decide to grant an en banc hearing?

GORSUCH: Very narrowly voted against it, Senator. It was a close vote.

BLUMENTHAL: And -- and you dissented.

GORSUCH: I did.

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BLUMENTHAL: No, you know, Rule 35 says -- and I'm quoting -- "an en banc hearing is not favored and ordinarily will not be ordered."

GOR SUCH: Of course. It's a -- it's an extraordinary -- it's an extraordinary thing. We -- we probably hear between zero and three en bancs a year over the course of my time.

That -- that -- don't hold me to that, but it's somewhere in that range usually.

BLUMENTHAL: Out of your 10-plus years, 11 years on the court, how many times have you asked -- you, yourself - - sua sponte asked for a rehearing in a case where you were not even on the panel?

GOR SUCH: Oh, I've done it, Senator. I've...

(CROSSTALK)

GOR SUCH: I can't tell you how many times sitting here. I just can't. But I can tell you I've done it.

But I can tell you, Senator, that about one out of every five en bancs, about 20 percent of en bancs in our court are sua sponte. It's not unusual.

BLUMENTHAL: But by this time, the funding was going to Planned Parenthood, correct?

GOR SUCH: I don't know. I don't...

(CROSSTALK)

BLUMENTHAL: Well, it is a matter of, I believe, public record that it was in fact restored. And the parties never asked for the en banc hearing.

Let me ask you. What was the exceptional importance of this case that prompted you to seek a rehearing en banc?

GOR SUCH: I appreciate the opportunity to answer that question, Senator. En banc rehearings happen sua sponte with regularity in our court. As I say, maybe 20 percent estimate of the cases that we've heard during my time had been sua sponte. It's -- it's acknowledged in -- in the committee reports to the rules of Wright and Miller -- the bible on civil procedure that every young lawyer lives with -- acknowledges the regularity and propriety of sua sponte en banc.

So just to put that aside, I just don't see any -- any...

(CROSSTALK)

BLUMENTHAL: I'm asking you about your reasons. And...

GOR SUCH: And now...

BLUMENTHAL: ...and by the way, I know you don't have a number, but maybe you can supply it. Because I'm willing to bet that that number is a tiny minute fraction...

GOR SUCH: Oh...

BLUMENTHAL: ...of the 2700 cases...

GOR SUCH: Of course.

BLUMENTHAL: ...and even of all of the cases where you have dissented.

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GORSUCH: Of course. I'd be very reluctant to -- to reveal internal deliberate processes any further, Senator, of a court. And I don't think you want us to. But I've gone pretty darn far, here. And I'd be happy to consider any reasonable request that we -- we can talk about that.

But...

BLUMENTHAL: By the way, the judge who dissented from the panel opinion was Judge Bacharach, correct?

GORSUCH: Yes.

BLUMENTHAL: He voted against the rehearing en banc, didn't he?

GORSUCH: He wrote a special concurrence saying that he thought the panel decision was gravely wrong...

BLUMENTHAL: But there was no...

GORSUCH: ...but decided...

BLUMENTHAL: ...exceptional reason for a rehearing en banc.

GORSUCH: He decided not to vote for en banc, that's correct. But he thought the panel opinion was gravely wrong.

BLUMENTHAL: I'm -- I'm going to...

GORSUCH: And, Senator, if you want me to explain why I saw it en banc, and the reasons, I'd be delighted to do so.

BLUMENTHAL: Well, I'm gonna give you the opportunity to do it.

GORSUCH: Appreciate it.

BLUMENTHAL: And I -- I apologize for interrupting. And you'll understand our time is limited, and that's why I'm sort of pressing to move on.

GORSUCH: I understand. But an implication of impropriety (ph)...

(CROSSTALK)

GORSUCH: ...anything like that, Senator, I'd -- I'd appreciate the chance...

BLUMENTHAL: Absolutely.

GORSUCH: OK.

BLUMENTHAL: I'm not even asking for extra time, Mr. Chairman.

GORSUCH: Senator...

BLUMENTHAL: Will you please proceed?

GORSUCH: Yeah, Senator, it's all about standards of review for me. In that case, the parties agreed on the law. There was no dispute of law.

In that case, everyone agreed that if the governor had discontinued funding because he opposed lawful abortions, but that would be unconstitutional and wrong and would have to be stricken by the court. That was uncontested.

It was also uncontested that if the governor discontinued funding because of his reaction to videos that you're well aware of involving alleged unlawful action -- alleged -- then his conduct was lawful and constitutional. The law was agreed by everyone.

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The only question was what was the governor's intention? That's it. And the district court made a factual finding that the governor's intentions were what he said they were, that he acted in response to the videos.

That was his testimony. That was the district court's finding.

And in a very unusual, I thought, step, our court overturned the factual finding of the district court and did so on the basis of a putative admission from the governor's brief as if the lawyers for the governor would concede away their case.

I read the brief. It didn't concede away the case. And it seems to me very important, Senator, that we abide our standards of review and we don't pick and choose the areas of law to start abandoning our standards of review. And the standard review for clear error for factual findings is what I wrote about.

I don't care if the case is about abortion or widgets, or anything else. When a jury or a district judge makes a factual finding, that deserves our respect under a clear area of standard review.

And as you point out, Judge Bacharach, while he didn't think it rose to the level of en banc review, he thought the panel was clearly wrong. And he happens to be, as you know -- just happens to be a -- a -- a democratically-appointed judge because we're judges first.

And, Senator, there were four judges who wanted en banc in that case. That's a large number in our circuit.

There's nothing unusual or contoured (ph) about that case at all. It's what we do as judges.

BLUMENTHAL: Do you recall the date of your dissent?

GOR SUCH: I don't, Senator.

BLUMENTHAL: Would it surprise you to know that it was -- well, the -- the case was pending in July of 2016. Your dissent was sometime in that time period, at the height of the presidential campaign.

GOR SUCH: I would've said it was in the summer, Senator, yes. I would say I've also, Senator, revived a partial -- partially a lawsuit brought by Planned Parenthood in another case.

I take the parties as I find them, and I take the facts and laws that come to me. And I don't choose when they come to me or how they come to me.

BLUMENTHAL: I understand.

GOR SUCH: And any other implication would be erroneous.

BLUMENTHAL: Let me ask you. We talked about precedent. And precedent is important as law, correct?

GOR SUCH: Yes.

BLUMENTHAL: And people rely on it. That's one of the key criteria that you've established for sustaining precedent. And I'm not even sure that the term has been used here, but stare decisis, which is an important principle of following well-established and accepted law.

Let me ask you. Did you agree or do -- I'm sorry, do you agree with the result in Brown v. Board of Education?

GOR SUCH: Senator, Brown v. Board of Education corrected an erroneous decision -- a badly erroneous decision -- and vindicated a dissent by the first Justice Harlan in Plessy v. Ferguson where he correctly identified that separate to advantage (ph) one race can never be equal.

BLUMENTHAL: And do you agree with -- with the result?

GOR SUCH: In Plessy? No.

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(CROSSTALK)

BLUMENTHAL: ...you agree with the result in Board v. -- Brown v. Board?

GOR SUCH: Brown v. Board of Education, Senator, was a correct application of the law of precedent and...

BLUMENTHAL: You agree with it?

GOR SUCH: Senator, is a correct application of the law of precedent.

BLUMENTHAL: By the way, when Chief Justice Roberts testified before this committee and he was asked by Senator Kennedy quote do you agree with the courts conclusion? Meaning in Brown, that the segregation of children in public schools solely on the base of race is unconstitutional. Judge Robert answered unequivocally quote, "I do."

GOR SUCH: Senator...

BLUMENTHAL: Would you agree with Judge Roberts?

GOR SUCH: Senator, there's no -- there's -- there's no daylight, here.

BLUMENTHAL: OK.

GOR SUCH: Justice Marshall -- sorry, Justice Harlan got the original meaning of the Equal Protection Clause right the first time. And the court recognized that belatedly. It's one of the great stains on the Supreme Court's history that it took it so long to get to that decision.

BLUMENTHAL: Do you agree with the court's outcome -- the result -- in Griswold week (ph) v. Connecticut and Eisenstadt v. Baird? And you know that they struck down a ban on contraception. I believe it's been discussed earlier.

(CROSSTALK)

BLUMENTHAL: Do you agree with the result in those cases?

GOR SUCH: So, Griswold, Senator, as you know, held that the Fourteenth Amendment Due Process Liberty Clause provided a -- a right to married couples to the use of contraceptive devices in the privacy of their own home. And then Eisenstadt extended that to single persons.

BLUMENTHAL: Right. GOR SUCH: Senator, those are precedents of the United States Supreme Court. They've been settled for 50 years nearly in the case of Griswold. There are reliance interests that are obvious. They have been reaffirmed many times. I do not see a realistic possibility that a state would pass a law attempting to undo that or that a court of the United States would take such a challenge seriously.

BLUMENTHAL: I have a very simple question for you. Do you agree with the result?

GOR SUCH: Senator, I give you the same answer.

BLUMENTHAL: Again, I just want to tell you what Justice Alito said in response to that question. He said very simply talking about Eisenstadt, quote, "I do agree with the result in Eisenstadt."

GOR SUCH: It was an application of equal protection principles.

BLUMENTHAL: Well, I know what it was. I'm asking you for a direct, clear, unequivocal answer.

GOR SUCH: And Senator, I'm trying to give it to you. As I recall, Justice Alito said the same thing, which is that there's an equal protection argument. Once you have Griswold in place, then it follows as a matter of equal

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protection that the same -- what was true for married couples is true for single persons, and that was an application of settled equal protection principles.

BLUMENTHAL: I want to tell you what Chief Justice Roberts said when he was asked the same question about Griswold. He said, quote, "I agree with the Griswold court's conclusion that marital privacy extends to contraception and availability of that." My time is about to expire. I just want to say I hope that when we resume questioning, that perhaps you can give me somewhat more direct and unequivocal answers in the same way that Roberts, Alito -- Justices Roberts and Alito and Kennedy did to the same questions.

Thank you, Mr. Chairman.

TILLIS (?): Senator from Idaho.

CRAPO: Thank you, Mr. Chairman.

And Judge Gorsuch, first of all, I want to thank you for preparing yourself for this opportunity and for this service to the United States. You have acquitted yourself very well today. In fact, I'm very impressed with your knowledge of the cases and your ability to understand and articulate your positions on the issues. I have a couple of tough questions for you first.

Is it true that you have been endorsed by John Elway?

(LAUGHTER)

GORSUCH: You know, Senator, a couple of things have made my day recently and hearing that was definitely one of them. In Colorado, I mean, where I come from, that's big stuff.

CRAPO: Well, it is. And you know, some of us westerners who don't have a pro team in our state kind of agree with that as well.

GORSUCH: Senator, I'll tell you, what meant as much to me, though, was an article I saw not too long ago, someone put in front of me from The Albuquerque Journal. And it quoted two lawyers who appeared in front of me all the time. One is a civil rights attorney, the other represents indigent criminal defendants routinely in my court. They win some, they lose some. And they both went out of their way to say, "he's a fair judge."

And you know what? The compliment of the people who work with me day in and day out, who win some and who lose some, that means the world to me.

CRAPO: That's very impressive. And at end of my opportunity to ask questions here, I'm gonna submit a statement for the record that has been submitted by another one of your associates and friends who endorses the way you have conducted yourself on the bench. It's good to have good friends who will stand up for you.

Another tough question. I appreciated the discussion that Senator Flake and you had about fishing. This is going to test your true abilities as a fisherman. Would you tell me where your favorite fishing stream is? And don't say no tell 'em creek.

(LAUGHTER)

GORSUCH: Do I have to answer this question, Mr. Chairman?

(LAUGHTER)

CRAPO: No, you don't have to answer it. At least not publicly.

GORSUCH: I'd be happy to share with you privately my views on this subject.

CRAPO: We'll talk. My experience is, though, that once the word gets out, then it's not...

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GORSUCH: Then it's not my favorite spot anymore.

CRAPO: OK. You've just proven yourself as a fisherman.

I also wanted to just tell you, I appreciated the conversation you had with one of my other colleagues here about your law clerks. I, too, am a law clerk. I don't know that you knew probably the judge I worked for, Judge James M. Carter on the Ninth Circuit. He passed away in 1979. He was appointed by Harry Truman to be a district judge in southern California and then by Lyndon Johnson to be a circuit court judge on the Ninth Circuit.

And I had the experience as his law clerk that you described your experience to be and those who serve as your law clerks, and I just wanted to tell you, you connected with me on that. I truly appreciated that bit of just learning more of your human side in that context. I want to go -- you know, this is also a point at the -- in this hearing that pretty much everything has been said, but not everybody's gotten that opportunity to ask you to say it. And I apologize if some of the things are repetitive, but some issues keep coming up.

And I want to get back into some of the core issues and just give you an opportunity to restate the case and a couple of those are pretty obvious. In fact, our chairman started out with this first issue. And that is, what is the role of a judge? I have before me here the statutory oath that we give to judges. I'll just read part of it. It is to administer justice without respect to persons and due equal right to the poor and to the rich. And it also says to faithfully and impartially discharge and perform all the duties incumbent upon the judge under the Constitution and the laws of the United States.

That's some pretty high-minded language. What is your opinion of the role of a justice on the Supreme Court?

GORSUCH: Senator, it's the same thing. Doesn't change. It's a more public role. There may be more civic education involved or at least an opportunity. Somebody might listen to you a little bit more. And Justice O'Connor, again, comes to mind here. But the job doesn't change.

And the law is the law. It's what we do day in and day out, and the discussions about the judiciary, I think, often miss the fact that judges agree overwhelmingly on the disposition of cases. Tiny percentage of the cases go to the Supreme Court of the United States, 70, 80 cases a year, a fraction of a fraction of a percent. And even then, even then, the justices of the United States Supreme Court are unanimous in their decisions 40 percent of the time. Think about that.

You have not just three judges who have to agree as on the court of appeals, generally speaking, but nine. Nine justices who are appointed by five different presidents right now. And people say the world's changed. But in some ways, it hasn't, because that 40 percent number has been remarkably steady since the second world war. That's a pretty incredible thing when you think about it.

CRAPO: It is.

GORSUCH: That's a testament to our rule of law. It's human. It's imperfect. But it's sure better than anything else anybody's ever devised.

CRAPO: Well, that commitment to interpreting and applying the law honestly, fairly and impartially is critical. That's what we need in Supreme Court justices. And again, I appreciate your answer on that question.

Now, again, I apologize that this is a repetitive question and in fact you were just asked it in another way just now, but it's one that keeps coming up and which I expect is going to be a discussion point for the rest of this process, and that is the litmus test issue. You've already said it, but I'm going to ask you to say it again. Did anyone in the nomination process, the president included, require of you a commitment of any kind of a -- for any kind of a litmus test as to how you would rule on any issue or in any case whatsoever?

GORSUCH: No, Senator, and if they had, I would have walked out of the room. Period.

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CRAPO: So to put it another way, if you had to, you would -- if the requirements of the law were that you had to rule against the president of the United States in a case, you would do so.

GORSUCH: Senator, if that's where the law and the facts lead me, do it without hesitation. I've done it. I've done it many times without respect to who is in charge. I rule for the government sometimes, I rule for the accused, for the prisoner, for the immigrant, for the student, for the employee, whomever it is based on the law and the facts of the particular case at hand. And I believe, respectfully, my record demonstrates that.

CRAPO: I think it does too.

And there has been some questioning here today about -- this is my characterization of it, but I think it's pretty clear, a desire to get you to get involved in the politics of the court, as though there is an appropriate role for a judge to be a politician or to be involved in politics. I remember in our meeting in my office, you were quite emphatic about the fact that you would not let your politics get into your job as a judge or a justice. Could you comment on that?

GORSUCH: Senator, it really comes from my experience as a lawyer and the General Koch (ph) helped put it better than I could. But the fact of the matter is, I represented plaintiffs, I represented defendants, I represented the big guy, I represented the little guy, however you want to call it. And in each and every case, all I wanted was a judge who didn't decide the case based on his personal beliefs, her personal religion, his politics, what she had for breakfast. I just wanted someone to come in and look at the law and look at the facts, study it as hard as they could, and make as neutral and dispassionate judgment as they could. That's what I wanted, a human judge, somebody who's a person.

It helped if they were kind. But I'd take a curmudgeon. There were some curmudgeons. Fair curmudgeon any day of the week, I'd take. I wanted a fair judge and I resolved to myself that I would remember, so long as I was on the bench, I would remember what it was like to be in the well. What it was like to have to make the arguments, because I'll tell you what, asking the questions, lot easier than having the answers. I sleep a lot better the night before argument as a judge than I did the night before argument as a lawyer. And so I resolved I wanted to be the kind of judge that I wanted when I was a lawyer.

CRAPO: Well, thank you. Now let's move on to the question of precedent. Could you generally, again, I realize this is repetitive; again, tell us your view of precedent, particularly as a Supreme Court Justice if you are to be confirmed. What you believe the proper role of precedent is.

GORSUCH: Senator, precedent's the starting point for any good judge. Precedent is our history, our shared history, our patrimony, the wisdom of the ages if you want to think of it that way, and it would be foolish of any judge to come in and think that he or she knows better than everybody who's come before. That would be an act of hubris. So the starting point and the great anchor of the law as Francis Bacon called it, is precedent. As Hamilton said, judges because we're life tenured, need to be bound down by strict rules and precedents and I take that obligation seriously.

CRAPO: So that people can know what to expect out of the law.

GORSUCH: Reliance is a huge part of it.

CRAPO: Now it does turn out, particularly at the level of the Supreme Court, that there are times when precedent is revisited. Could you tell us when it is appropriate? How does a person, particularly a Supreme Court Justice, how should a Supreme Court Justice approach that question?

GORSUCH: The same way a Circuit Judge approaches the question, with circuit precedent. We do the same thing. Nothing changes. It's the same set of principles.

CRAPO: So what process do you go through to make the decision that you should revisit precedent?

GORSUCH: Start with a presumption in favor of history and that people came before you were just as smart, or maybe even smarter, than you are. When we put on the robe, you lose the ego. You look at the reliance interests

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that have formed around the precedent. You look at how long it's been around. You look at, see whether it's been reaffirmed. You look the quality of the initial decision. You look at the doctrine and whether it's been built up around it or whether it's eroded away. You look at workability. Those are some of the factors a good judge looks at when deciding any challenge to a precedent.

CRAPO: And I assume it's not a decision reached lightly.

GORSUCH: Senator, no decision should be reached lightly as a judge.

CRAPO: Well said. I want to move on now to one that you have been asked a little bit about today, but not a lot and that is the Tenth Amendment to the Constitution which says, the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively and I think some people stop there, or to the people. This is the issue of Federalism. I've got a few specific questions, but could you just discuss with me, in general, your feelings about that amendment and what it means in our American jurisprudence?

GORSUCH: Senator, it's part of the Bill of Rights, like all the rest of The Bill of Rights. And it's thought important to add as part of the first ten Amendments to the Constitution as a package. And the thought was to emphasize, and make very clear, that the Federal Government is a government of enumerated powers, not a plenary government with unlimited power and that there was reserve to the people, and to the states, abundant rights.

I agree with that. A lot of my constituents, and frankly a lot of people that I talk to around the country, believe that that has pretty much been eroded in the sense that the place where there is authority reserved to the states is a very small place today.

CRAPO: Because of certain supreme court rulings, because of certain doctrines relating to the commerce clause and others, it is felt that the place in which the Federal Government is free to assert its authority, even to the point of superseding state authority, is so large now that the Tenth Amendment has lost much of its meaning.

Could you comment on that?

GORSUCH: Well, Senator, Tenth Amendment cases do come before the court and related commerce clause challenges that are kind of an analog here. So, I have to be careful.

CRAPO: Understood, but I'd point you to the New York case, Justice O'Connor again, pointing out that there are limits to how far the Congress and the Federal Government may go to commandeer state governments.

And then, of course, there's the chief justice's opinion in the ACA case with regard to Medicaid expansion and the limits of the commerce clause power there. So, there are a couple of decisions that are out there, that you're aware of, that discuss this issue.

I think that the discussions that have been had today about the Chevron case get into this arena. Earlier, when you were asked questions about it, you indicated that, and again, I realize you may not be able to go very far in this answer.

But I'd like to give you an opportunity to explain it as much as you can. I believe in the decision that you wrote, you said the elephant in the room was the question of deference to executive agency actions.

That's a rough paraphrasing of what you were discussing. And I believe you said that there were due process, equal protection and separation of powers issues related to that.

Could you expand on that a little bit?

GORSUCH: Well, Senator, I'd be happy to, of course. in that case, again, involved an undocumented immigrant and the question was whether an agency could overturn judicial precedent, retroactively, so that this man who had relied on our precedent essentially had the legal rug pulled out from underneath him and it seemed to me that that raised a variety of questions.

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First, it meant now that he had to wait not 10 years outside of the country, but perhaps 13 or 14 because they wanted to retroactively overturn judicial precedent. and I asked in terms of fair notice, advance notice, due process, how is a person, the least amongst us, anyone, supposed to organize their affairs, rely on the law, precedent? If it can be overturned by an agency willy nilly.

What are equal protection implications if the person who declares the law is now a political branch, rather than the judicial branch? Where selective picking and choosing of winners and losers can be had in the application of the law.

I worried about that. I worry about the separation of powers. How is it that an agency can overturn a judicial precedent, effectively, without the concurrence of Congress?

Congress, of course, has the power to write statutes. Last time I checked, that's the legislative power, though, and to overturn judicial precedents on statutory interpretation, that's this body's role.

So those were some of the things I worried about and I worried about just the plain old statutory texts, too, of the APA. Of which Congress is assigned the task, of course, of fact finding to the agencies. And told us to, again, to provide a highly deferential standard of review to the agencies, the chemists, the biologists, the scientists. That said, when it comes to interpreting the law that the courts are supposed to do that. So those were some of the questions that I found difficult in that case.

CRAPO: Well I appreciate the -- the perspective that you have. Again, still talking about federalism and the 10th amendment, you're familiar with the dormant Commerce Clause concept?

GORSUCH: Yes.

CRAPO: Could you describe what that means to you?

GORSUCH: Well, the Commerce Clause appears in Article One. Article One affords this body and the House of Representatives the power to legislate inter-state commerce among many other things. That is the commerce clause. The non-sleeping, the non-dormant commerce clause.

CRAPO: Right.

GORSUCH: But we have this sleeping thing over here. And it's the product of judicial interpretation that suggests that sometimes even when Congress hasn't exercised its powers under the Commerce Clause, states infringe Congress' authority by stepping into the regulation of inter-state commerce themselves in a way that, though Congress has not itself prescribed, would still offend Congressional authority. That's the doctrine.

CRAPO: Correct. So we're -- that's how I understand it as well and I realize that you may not be able to go much further in discussing your feelings about that doctrine but if you can, I welcome you too. GORSUCH: Well, Senator, I've tried to make clear today that my feelings, respectfully, on any of these topics are things I try to leave behind. I try to take the facts and the law and the precedent before me very seriously. I come here with no agenda but one. No promises but one, to be as good and faithful a judge as I know how to be. That's it. And I can't promise or agree or pledge anything more than that to this Congress. I just can't, not as a good judge. Not as someone who has to look litigants in the eye and tell them I'm a fair and an impartial judge of their case.

Not to someone who respects the separation of powers. So that's -- that's where I come from on that.

CRAPO: Well, thank you very much and I respect that. And frankly, America is very fortunate to have someone who strongly holds to that perspective nominated to this critically important position. I just want to clear up one other thing and then there's a few issues I just wanted you to also discuss a little bit further with me. Back to the Hobby Lobby case. I just wanted to give you an opportunity to clear one thing up, at least for me. Maybe everybody else understood this very clearly.

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That case went to the Supreme Court and was resolved in a 5-4 decision, but if I understand the rulings correctly, of the four judges who dissented only two of them felt that the issue relating to a for-profit corporation was dispositive. Is or -- did I get that right? Or objected to that part of the ruling? Is that correct?

GOR SUCH: That's right. The other two dissenters did not feel the need to reach that issue.

CRAPO: I just wanted to be sure that was...

GOR SUCH: That's right.

CRAPO: ...was made clear in the record. In the time I have left which is about eight minutes, I'd just like to ask you about several of the things that I believe you have written about. First is the Seventh Amendment Right to Trial. I understand that you have written about that. Is that correct?

GOR SUCH: I have, Senator.

CRAPO: What are your thoughts about that?

GOR SUCH: Senator, I believe in juries. I liked trying cases to juries, I liked being on a jury. I think it's a part of our civic engagement. It's really valuable. People feel connected to their government. Hamilton and Madison I think it was, I can't remember which, in the Federalist Papers, debated, you know, is it a bulwark of liberty or is it the very palladium of liberty? That's -- that's what they thought of the Seventh Amendment and I think it's just so difficult for litigants to get to a jury now. We spend so much time in preliminary discovery, what we call discovery, motions practice.

Lawyers become poets of the nasty gram. They can write interrogatories in iambic pentameter but there just aren't that many jury trials anymore. And I'm not sure that's a good thing.

CRAPO: Does this relate to your writings also about or your concerns about access to justice?

GOR SUCH: Yes, Senator. Yes.

CRAPO: Could you expand on that a little bit?

GOR SUCH: Well, when it becomes so expensive and takes so long to get to a jury, to get to a trial, some people don't bring good claims. A lot of people are left not bringing good claims to court. That's a problem. On the one side of the v and I saw that as a lawyer. And on the other side of the v, defendants sometimes you feel like you have to settle, not because the case has merit but because the cost and the delay to the client are so significant in getting to a decision, you can't afford to do it.

You got to get on. And as I indicated earlier, the American College of trial lawyers, both represented both clients and defendants and have indicated both of these problems are real in our system and need to be addressed.

CRAPO: Thank you. The last issue I'll ask you about is your thoughts, which you have already referenced somewhat, on over- criminalization in the law. Could you basically just reiterate that for us?

GOR SUCH: Yes, Senator. You know, as I indicated earlier I think the number is something like 5,000 federal criminal statutes on the books today and hundreds of thousands in the federal register. You know, that eight point font, I need to bring out my reading glasses from what I pull open the federal register. And you know, I have a hard time reading it. And I have a hard time imaging the American people can read it to be honest with you. And Madison warned about a world in which law, written law, is lacking.

And he also warned about a world in which we'd have too much written law, paper blizzard. So much so that the prosecutor can choose his charges with impunity and the people don't have notice, really, what's expected of them. So I think both of those things on both ends of the spectrum are a concern and Aristotle was right there too. We're looking for a Golden Mean.

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CRAPO: Well, I think earlier today you also referenced the -- maybe you meant to in these comments, the regulatory explosion of criminal penalties. Is that a part of this as well?

GOR SUCH: Well, I would say it's been part of -- I don't know about an explosion, but it's just a fact of life that's been with us for awhile and growing.

CRAPO: I won't ask you to comment on this, but I think it's an explosion and not just in the criminal side. In the civil side as well, the regulatory growth that we have seen in our government recently. This is not an issue for you, at least to discuss with me today, but -- but I think we have a lot of difficulty simply because of the complexity we are creating in our legal system. And many of those difficulties will need to be resolved at the policy level.

GOR SUCH: I understand that.

CRAPO: Judge Gorsuch, again, I just want to thank you for being willing to step up and do this service. It was notable to me, I think you said earlier that Justice White only spent about 90 minutes in his hearing, is that correct?

GOR SUCH: That's what I'm told.

CRAPO: Remarkable. Thank you again.

GOR SUCH: Envious. No, this has been a great pleasure, a great honor to be here with you, Senator, and with all of your colleagues.

CRAPO: Well, we understand what you and your family and friends are going through. We know the commitment that you have made, simply to agree to be nominated and move forward through this process. And I want to thank you for doing that as well.

GOR SUCH: Thank you.

CRAPO: I truly do appreciate it. Thank you very much. And before I yield my time, I would like to ask unanimous consent, first, to enter a letter into the record from the President of the Colorado Farm Bureau endorsing Judge Gorsuch. Secondly, a letter from Todd Sealman, managing partner at the Denver Office of -- I'll probably mispronounce this -- Lewiss Brisbois, Bisgaard, and Smith in support of Judge Gorsuch's nomination. Another letter from the Lincoln's Inn Society of Harvard Law School which is a number of people who know you from this group and who have commented on your humility, thoughtfulness, and intellect, which we have seen today.

And then finally an article from the Colorado District Court Judge John Kane in which he rebuts basically the notion that there's any kind of ideological bias in your record. And -- and I think it says very positive things about Judge Gorsuch.

I'd ask unanimous consent to put these documents into the record.

GRASSLEY: Without objection the documents will be entered to -- into the record...

CRAPO: Thank you very much.

GRASSLEY: Senator from Hawaii?

HIRONO: Thank you, Mr. Chairman. The end is nearing for today, Judge Gorsuch.

We have sat here for close to 10 hours now. And you have not told us your understanding of cases already decided by the Supreme Court, except to say that they are law and precedent.

You have not told us your view of cases currently before the court. And you will not tell us your view on issues that might someday be presented to the court.

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In fact, you have provided us less in the way of answers about how you would approach cases than previous nominees to the Supreme Court. So, how should we devine (ph) what you would bring to the Supreme Court in terms of your judicial philosophy?

By looking at your judicial record? By looking at your writings?

I see a pattern that is very much on a par with the Roberts courts steady march toward protecting corporate interest over individual rights. That is not protecting the rights of the minority as you told me in our meeting, which is the purpose of Article Three. So, I hope that in answering my questions, you can provide some reassurances that you will be a judge or justice for all Americans.

You had an extensive (ph) -- extended discussion today with Senator Franken about your dissent in the TransAm trucking case. I want to talk to you about another case, Longhorn Services Company v. Perez in which you overruled an agency decision about worker safety.

You ran the majority in a two-to-one decision -- it could've gone the other way if you had gone that way -- that overturned a sanction against a company based on a strained distinction between a floor hole and a floor opening. The dissenting judge, a President George W. Bush appointee, described this distinction as nonsense and said the distinction between a floor hole and a floor opening did not matter in this case because the company was in violation of an OSHA standard either way.

Why did you believe it was appropriate to rely on a strained distinction between floor hole and floor opening at odds with the loss intent and purposes -- purpose to protect worker safety?

GORSUCH: Senator, I -- I appreciate the opportunity to address that. As -- as I think you've indicated, I was not the author of that opinion.

I didn't write it. One of my colleagues wrote that opinion.

Another one of my colleagues dissented. You're quite right about that.

I don't have a -- a dog in the hunt when it comes to holes and openings in floors. But apparently OSHA does. OSHA distinguishes between floor holes and floor openings when it comes to...

HIRONO: Excuse me.

GORSUCH: ...faces...

HIRONO: Excuse me, Judge. I, you know -- that case, how that you overruled the agency decision...

GORSUCH: Yes.

HIRONO: ...which did not make a distinction. GORSUCH: With respect, Senator, OSHA regulations do make a distinction between, as I recall -- it's been a while, but...

HIRONO: Not in this case, sir.

GORSUCH: Well, Senator, there are different regulations for floor openings and floor holes in -- I think this is an oil and gas rig or maybe a -- a fracking rig. And what you have to do in terms of remediation, a cover or a handrail, there are different consequences whether it's a hole or an opening as I recall.

And the party there, nobody was injured but they got a fine for not doing maybe covering it up. I don't -- I don't recall. What -- whatever the agency wanted them to do. And the question's whether they've been provided notice they were being charged with whether it was a hole versus an opening.

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And Senator, all I was trying to do there, I agreed with my colleague who wrote the majority opinion that OSHA charged what it charged it had to prove and that it can't change the charge in the middle of the proceedings, as I recall.

HIRONO: Well, the dissent indicated that this distinction was nonsense and therefore...

(CROSSTALK)

GORSUCH: Well, that -- that might be true.

HIRONO: Yes.

GORSUCH: I mean, I don't know. As I say, I don't have a dog in that hunt. I'm just trying to apply the OSHA regulation.

HIRONO: Such ends (ph), go on. So, that law though was for the purpose of worker's safety. And I think you -- you responded to one of the questions from my colleagues, though you do look to the purpose of the law and that -- that that -- that is what judges should effect (ph).

So, the purpose of that law was work safety. So, I'm really not understanding why you went with the majority in making that kind of distinction.

Let me move on. Earlier you had an extensive discussion, as I mentioned, with Senator Franken about TransAm Trucking and whether you understood the impossible choice your decision would have given to the driver in that case, Alphonse Madden. And if your decision had been the majority, which it wasn't, it would've made a driver like Mr. Madden choose between endangering his own life and health or keeping his job.

I'm hoping that you will share more about your approach to cases like Transfer (sic) Trucking. Your dissent dismissed the argument that the law should be interpreted in light of its purpose of predicting public health and safety saying that those goals were too ephemeral and generic.

But the purposes of this law to protect an employee from being fired for acting in response to safety concerns play any role in your decision

GORSUCH: Senator, I appreciate the opportunity to talk about this again. The statute there protected individuals who refused to operate a motor vehicle.

And at least as I saw it -- and this is just one judge how I saw one case in 10 years -- and I -- I saw that the individual drove away. He operated the motor vehicle. And so, I didn't see how he could claim protection of a statute that hinges on a refusal to operate.

I'm relieved to know that he was able -- that he was fine and was able to meet up with his employer 15 minutes or so later, as I remember the record. But my heart goes out to him. It -- and I -- I said that in the opinion that he was put in a rotten position.

And I go home at night with cases where sometimes the law requires results that I personally would not prefer.

HIRONO: I think that you could possibly have interpreted the -- the -- the definition or the requirement that he actually refused to drive the vehicle. Do you refuse to drive -- drive the vehicle with the attached trailer? That's why (ph) you -- but you could have held I would think that he refused to drive the vehicle in an unsafe way.

So, I mean, the way I look at this decision -- and you were not in the majority -- is that if judges are gonna work this hard to strain the -- the text of a law to undermine the purpose, which was for the safety, and -- and -- and that a driver who made a decision based on that would not be fired. I think that makes it pretty tough for any laws that that Congress passes or will pass to really be effective in protecting American workers.

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I'd like to turn to Citizens United. In this case, the court adopted a narrow view that only quid pro quo corruption counts regarding campaign contributions and that appearance of corruption basically, which that had also been a concern, is out the window. This is unquestionably changed the landscape of our elections, unleashing -- unleashing a flood of corporate money in campaigns.

If corporations are able to spend unfettered money on American elections, what is there to stop a foreign company from funneling money into our elections through its American subsidiary? For example, what limits would prevent a Russian oligarch from financing a billion-dollar independent expenditure operation through an American middleman?

GOR SUCH: Well, Senator, I appreciate the opportunity to answer that. If I might, though, I -- I just point to my record on employment cases. There are plenty of cases where I've ruled for the employee and not the employer.

We can pick one and talk about one. But there are many, many where I've ruled for the employee, even overturning the district court when the district court ruled for the employer. Lots of 'em.

And I'd be happy to talk about any of 'em.

HIRONO: Well, I'm not.

GOR SUCH: But if we want to...

HIRONO: I'm not asking about the others.

GOR SUCH: I understand.

HIRONO: So, let's...

GOR SUCH: I understand.

HIRONO: Can you respond to my question about Citizens United and unfettered foreign money that can come into our campaigns?

GOR SUCH: Senator, I -- I -- I'd say that there's lots of room for Congressional regulation here. And that in fact, the Supreme Court has made clear that foreign money in particular is an area where Congress has substantial authority available to it.

I'd -- I would say this...

HIRONO: Are -- are -- are you saying -- I -- I'd just like a clarification then. You're saying that Citizens United leaves open for Congress to prohibit foreign money in our elections? Isn't that already happening?

GOR SUCH: Senator, I would say there's ample room in the area of campaign finance for further legislation. All sorts of room - that the courts make clear - remains.

It struck down one law. That does not mean that every law will be stricken. It does not mean that Congress has no role. It means that Congress passed one law that based on one record the Supreme Court found to violate the First Amendment.

HIRONO: So, since there's so much concern about foreign money and foreign governments attempting to interfere - or really, interfere with our elections, and if Congress were to pass a law that prohibited foreign contributions through middlemen or any other way, you would sustain that law?

GOR SUCH: Senator, I'm not making any promises to anyone about how I'd rule. I understand people would like me to make promises.

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I just - that's not what a good judge does. It's not fair to the parties. I don't prejudge cases. That would be a violation of separation of powers, in my view. It'd be the end of the independent judiciary.

Senator, what I would promise you to do is to look carefully at the record, with deference to the factfinder, to look at the briefs, to go through the whole judicial process and carefully consider all the arguments made by both sides as a good judge does.

HIRONO: Thank you. You've articulated that many times. The sheer volume of speech bought by corporate money drowns out the voices of everyday Americans on important issues. I'm concerned with influence peddling in politics, such as from billion-dollar donors like the Mercers or Philip Anschutz.

Judge Gorsuch, given that you've volunteered on numerous Republican political campaigns dating back to the 1970, were you ever concerned with the flood of unfettered money in our elections and campaigns?

GOR SUCH: Senator, the first campaign I worked on, I was about nine years old. It was my mom's who was running for the state House. And I think it was again her idea of daycare.

HIRONO: So, Judge Gorsuch, I'm sorry. You know, I have only 18 minutes left. And had you ever been concerned - because, certainly, you've worked on political campaigns when you were beyond nine years old.

GOR SUCH: I did.

HIRONO: Was there ever a time when you were concerned about unfettered money in our political campaigns?

GOR SUCH: Senator, I had lots of concerns as a person and as a citizen. But I'm now a judge and my personal views have nothing to do with how I rule on cases. It's a discipline that a judge learns and exercises and hopefully improves upon over time.

And I'm steadfast about that, Senator. It means the world to me as a lawyer and as a judge who cares about an independent judiciary. It comes from a place deep in my bones.

HIRONO: Thank you. I'd like to move on.

GOR SUCH: Of course.

HIRONO: I listened to your conversation with Sen. Coons about the Hobby Lobby case. And it's a decision that you joined in the Tenth Circuit and was supported by the Roberts court.

And in that case, you decided that a corporation with 23,000 employees has the rights to the exercise of religion and protected by the Religious Freedom Restoration Act and that it could use those rights to deny the thousands of women that it employed access to certain kinds of health coverage.

There was a notable descent in the Supreme Court's Hobby Lobby decision by Justice Ginsburg, joined by the two other women on the Supreme Court. And Justice Ginsburg wrote, "the exception sought by Hobby Lobby and Conestoga would deny legions of women who do not hold their employees' beliefs access to contraceptive coverage."

How much did you consider the significant need of the 23,000 Hobby Lobby employees, of which a significant number of them were women, working paycheck to paycheck, for access to healthcare that they would now be denied?

GOR SUCH: Senator, I appreciate that question. The answer is I considered very closely, very carefully. So did the Supreme Court of the United States, which affirmed our court.

As you know, the Religious Freedom Restoration Act goes above and beyond the First Amendment in protecting religious liberties, to judgment made by this Congress that it's free to amend at any time if it wishes.

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It can eliminate corporations from coverage. It can eliminate the strict scrutiny that's required and it can eliminate the act at any time. But, Senator, I gave every aspect of that case very close consideration. That was an en banc decision by our court.

HIRONO: You did write a concurring opinion on that...

GORSUCH: I did.

HIRONO: ... and I think your concurrent opinion could even be deemed an expansion of -- of the plaintiff's (ph) rights in that case.

So in your view, the corporation did make claims about contraception based on religious beliefs, which are directly contravened by scientific research. And by accepting as facts these religious beliefs and probing (ph) no further and agreeing that the corporation could deny coverage, the Hobby Lobby decision leaves us in a tough spot. So are there any limits, and if so, what are those limits on what a corporation may claim as a belief in justifying its denial of healthcare for its employees?

GORSUCH: Senator, the sincerity of the belief I believe was undisputed by the government, at least in our court. So, I just don't think that was an issue. Are there limits to how far the statute goes? Yes, there are. The government may force someone to forego and accept a substantial burden on their sincerely held religious belief if it can prove a compelling interest, which the Supreme Court accepted in this case, and can also show that it's the most narrowly tailored way to achieve that compelling interest.

It's strict scrutiny. It's the highest standard known to law and the problem in that case, again, as the Supreme Court and my court saw it, was that the government had managed to find a way to achieve its compelling interest in providing coverage to women in many other cases without requiring any -- any compromise...

HIRONO: So, I realize that the compelling state interest was conceded to the government, but my question really relates to the first part of the test, which is the sincerely held belief. And while that may not have been at issue in this case -- even though, if you were to look at their sincerely held beliefs, then there were -- there was evidence that some of their beliefs were scientifically not valid.

So my question is really, how -- would you go behind the sincerely held belief to determine whether there's really a basis for this belief?

GORSUCH: You're asking me whether I would, as a judge, decide that someone's sincerely held religious belief is wrong?

HIRONO: Well, based on scientific evidence or some other factual evidence.

GORSUCH: So that I, as a judge -- I just want to make sure I understand the question -- that I would say that the belief is scientifically invalid and therefore not protected by the statute? Is that the question?

HIRONO: Well, therefore could not be a sincerely held belief.

GORSUCH: Oh. Sometimes, a court will hold that a belief is not sincerely held. That's true. That does happen. I've had a case involving just that scenario and it involved a group of drug distributors who claimed they worshipped marijuana.

HIRONO: Yes, I was here when you responded to that.

And you know, I hate to be rude, but I'm down to less than 12 minutes, so if you don't mind, sir, I'd like to go on to another area. In 1942, an ordinary American took an extraordinary stand, his name was Fred Korematsu, who boldly opposed the forced internment of Japanese-Americans during World War II. After being convicted for failing to report for relocation, Mr. Korematsu took his case all the way to the Supreme Court, and the high court ruled

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against him. It took 39 years before a California judge overturned Mr. Korematsu's conviction in another proceeding, but the Supreme Court never overruled Korematsu.

So, Korematsu has joined the short list of the most regrettable decisions in the court's history, and even though most American citizens of Japanese ancestry were loyal, the court in (ph) Korematsu found that the government's curfew and internment program was constitutionally acceptable because some unknown faction or fraction of that group posed a special statistical risk of disloyalty and danger.

Today, if the court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, do you believe Korematsu would be applicable precedent for the court to consider?

GORSUCH: No, and let me compliment Neal Katyal. When he was acting solicitor general of the United States, he confessed to error by the government in that case. That was an admirable move.

HIRONO: Thank you for that yes and no answer. I appreciate that.

Going on to Hamdam, during your time as a senior official in the Bush Justice Department, you appeared to play a significant role in developing and promoting the arguments in Hamdam v. Rumsfeld, including the argument that the president himself had the power to set up military tribunals to try Guantanamo detainees without key human rights and other protections in the Geneva Convention and the Uniform Code of Military Justice.

Judge Derrick Watson, a Hawaii federal district court judge, recently issued a stay of significant portions of President Trump's second executive order banning nationals from six predominantly Muslim countries. And without commenting on the current case, do you believe that there are executive orders that are outside the scope of appropriate judicial review to determine if a president has overstepped his constitutional authority?

GORSUCH: Senator, to me, one of the beautiful things about our system of justice is that any person can file a lawsuit about anything against anyone at any time. Any person has access to our courts of justice on any subject, and a judge, a neutral and fair judge will hear it. I think that's a remarkable thing. It doesn't happen everywhere in the world.

HIRONO: Is your answer that there is no executive order that would not be judicially reviewable?

GORSUCH: Well, Senator, a lawsuit can be filed on it. What a court will do with it is a matter of judicial process and we'd have to go through assessing what the claim is, what the defenses are, take evidence, hear the arguments, make a decision.

HIRONO: I understand. The court could say it's a political issue and not take it.

Senior White House Adviser Stephen miller, who has been described as the architect of the Muslim ban, recently criticized the actions of federal courts in staying the initial travel ban on national TV. And Mr. Miller said that Donald Trump's national security decisions, and I quote, "will not be questioned." I take it that you don't agree with Mr. Miller that there are areas like national security where the president's decisions, quote, "will not be questioned," even by a court, even by the Supreme Court. I take it you do -- you do not agree with that?

GORSUCH: Senator, I give you the same answer. The beauty of our system -- and I don't want to eat up your time, but the beauty of our system is that anybody can bring a complaint to court and have an opportunity to be heard under the laws of our land. It's a remarkable thing when you think about it.

HIRONO: The person who nominated you, Judge Gorsuch, does not have much respect for judges or courts. As a candidate for president and now even as president, he has belittled and berated judges who do not rubber stamp his views. He attacked Judge Curiel, his family's heritage and his fairness while he was presiding over the Trump University fraud case. He sought to bully Judge Robart, who decided the first case challenging the constitutionality of his anti-Muslim travel ban.

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He sought to intimidate the Ninth Circuit, and more recently, has belittled Judge Watson in Hawaii for ruling in the second round of travel ban cases. These attacks are unfair because the judges cannot respond. Moreover, they provoke Donald Trump's supporters. Some reacted by declaring a boycott of Hawaii. All this because the distinguished federal judge in Hawaii gave weight to Donald Trump's own words about what he intended his travel ban to do.

So, I'd like to give you a chance to comment and either defend President Trump's statements on judges or condemn them. And there was a moment early in your nomination when you were reported to comment to senators that the president's anti-judicial comments were, quote, "demoralizing and disheartening," end quote. But then you went silent, even as President Trump escalated his attacks. I'd like to give you an opportunity to set the record straight.

What is your view of President Trump's comments on judges?

GORSUCH: Senator, I just discussed this with Senator Blumenthal a moment ago and I'm happy to repeat myself.

HIRONO: Please.

GORSUCH: I cannot talk about specific cases. That would be improper. And I can't get involved in *politics*. That would be another violation of my judicial obligations. So I have to be careful. I have to speak in general terms. I'm not talking about any case or controversy. I'm talking about the independence of our judiciary.

Judges have to be tough. We take slings and arrows under bright lights. It's part of the job. And we take them from all sides, all day long, every day. Our job is to make decisions, hard decisions sometimes. Sometimes that people don't like. In fact, our job usually makes, I'm sorry, Senator, I don't mean, it looks like you wanted to say something.

HIRONO: Yes. So, Donald Trump's comments about the judiciary, while he may be focused on specific judges, indicate basically that he down seem to respect the three branches of government as you do, so taken as a general proposition, if a President were to basically not give much credence or respect for the three branches of government, would you object to that President's comments?

GORSUCH: Senator, I can talk about my record as a judge. I have tried to uphold the dignity of the judicial office in the cases and controversies brought before me. When people, when judges have acted in ways that do not bring repute on the judicial office for making comments that are arguably improper, I've been on panels where we've replaced a judge who's done that. When lawyers fail to fulfill their obligations, I have commented, when appropriate in cases and controversies properly, before me. I've, in fact, even sent lawyer to referral to the bar. Senator, I have worked to try and provide representation to individuals when I've seen pro se handwritten complaints that seem to me to have merit. I've appointed lawyers in those cases. That's my record as a judge. And I can assure you, I am nobody's rubber stamp.

HIRONO: So when you were, when you were speaking about certain comments being disheartening and demoralizing, you were merely speaking broadly?

GORSUCH: I don't think I was merely speaking broadly, Senator, with all respect.

HIRONO: You were speaking broadly.

GORSUCH: Senator, I'm speaking about anyone.

HIRONO: You were speaking broadly.

GORSUCH: Okay.

HIRONO: So, Sean Spicer just tweeted regarding your comments on Trump's attacks on judges, which you said were disheartening and demoralizing and Sean Spicer just said you were speaking broadly. Let's move on. In your 2006 book on the future of assisted suicide, you argued that Casey should be read more as a decision based

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merely on respect for precedent rather than based on the recognition of Constitutional protections for personal autonomy and that's in quotes, personal autonomy, or for intimate and personal, again in quotes, decisions. So you wrote that in your book but since that time, well, in fact before that tie, in Casey the court relied on the protection for intimate and personal choices to decide many non abortion cases such as the, I always have a hard time pronouncing this, the, Obergefell.

GORSUCH: Obergefell. I do, Senator, yes of course.

HIRONO: You know which case I'm talking about? Thank you. Which recognized the right to marriage equality. Has the court's continued application of this right for personal and intimate choices changed your view that the constitution does provide protections for intimate and personal decisions?

GORSUCH: Senator, I've never expressed personal views as a judge on this subject and that's because my personal views don't matter. Obergefell is a precedent of the United States Supreme Court. It entitles persons to engage in single-sex marriage. It is a right that the Supreme Court has recognized. It is a precedent of the United States Supreme Court entitled to all the deference due a precedent of the United States Supreme Court and that's quite a lot.

HIRONO: So in your view, the Constitution does provide protections for intimate and personal decisions and we shall see how far that constitutional protective right goes in other decisions. So basically what you wrote in your book is your personal opinion and can pretty much forget about it? Not to be rude to you.

GORSUCH: Senator, no, no, not at all. I'm not sure I track this question though. I think it's me, not you.

HIRONO: Well the, okay. Let's move on. During the presidential campaign, Donald Trump laid out his litmus test and I only have 42 seconds for nominating a justice and he did say that he would want someone who is going to overturn Roe v. Wade, and that gun rights would be protected making it pretty tough for Congress to pass what I would call sensible gun legislation and that basically the religious rights of entities such as Hobby Lobby would be protected.

So, I said in my opening that it is, you know, I would assume that you comported with the President's litmus test, otherwise you wouldn't be here, and do you think that you've provided us with any particular information that would cause us to believe, aside from your statement that you will be fair, that you do not meet these litmus tests?

And because I've run out of time, you can provide that information to our committee.

GORSUCH: May I respond, Mr. Chairman?

Senator, I've been here for two days, I'll be here for a third. I hope I've given you some picture of my credentials, my experience, my track record as a judge. I hope I've given you some sense, too, that I have rejected litmus tests since the day I was a lawyer, in print for judges.

I hope I've given you some view into the way I think about the independent judiciary, about the sort of judges I admire, about the things that I think are important in our separation of powers. I hope I've given you some sense of my track record.

97 percent of the time, unanimous decisions, 99 percent of the time in the majority, been reversed maybe once by the United States Supreme Court, that's arguable in ten years. I hope I've given you some picture of who I am and my record. No one else speaks for me, and I don't speak for anyone else, Senator.

I really appreciate the chance to have this conversation with you.

HIRONO: Thank you, we'll see you tomorrow also.

GORSUCH: Thank you.

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HIRONO: Thank you, Mr. Chairman.

TILLIS: Judge, we're going to give you the option of a ten- minute break, but instead of saying time certain, of what would be 7:57, as soon as you get back, we'll get started and we'll go to rodeo rules, which means only you.

And Senator Kennedy, you are last, so we will make sure that we don't go over 8 seconds. In the west, you would at least understand that.

So we'll adjourn. We will start no later than 7:57.

GOR SUCH: Thank you, Senator, I appreciate it.

TILLIS: Not adjourn, recess.

(RECESS)

TILLIS: Judge, my first very important question. Please pronounce your last name.

(LAUGHTER)

GOR SUCH: I've answered to a lot of things, Senator.

Gorsuch is how I say it, but I'll...

TILLIS: The reason I ask that question is we've had probably four or five cheat sheets up here with different phonetic. So that is Gorsuch, right?

GOR SUCH: That's how I'd...

(CROSSTALK)

TILLIS: It's Gorsuch. For everybody in the audience, it's Gorsuch.

And I give my staff credit for actually getting it right. But I had a crisis of confidence when I saw the other cheat sheets.

(LAUGHTER)

I want to thank you for being here. And, judge, I want to tell you, we -- I grew up in the southeast, and I love skiing. It just never occurred to me to do it when the water was frozen.

(LAUGHTER)

But...

GOR SUCH: Well, we'll forgive you that.

TILLIS: But I love the fact that you're an outdoorsman, because that means you love our environment. You love being outdoors, and you want to leave a good, healthy environment for your children and everybody's children.

Senator Franken said that he had a career in identifying absurdity. I feel like I joined one when I joined the U.S. Senate.

(LAUGHTER)

And I'm going to talk a little bit about that today. Yesterday I was saying I wanted to have you talk more and me less, I'm not sure if I can live up to that promise because I want to go thru a number of things. I'm a numbers guy. I

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like the fact that you repeated the numbers. And your track record on the bench. Best I can tell if I double the number of cases that people have made an issue with you.

That is .003 of your cases. Three tenths of 1000th of your cases are in question here. I'm going to go back to those, because they are fairly limited. But before I do, let me talk about another piece of absurdity. Absurdity would be talking about how President Trump set some sort of litmus test and not recognizing that candidate Clinton told a town hall audience. I have a bunch of litmus tests. We have to preserve marriage and quality and we have to make sure Roe V Wade stays in place. That sounds like a litmus test. I would not have used that comment by candidate, if we going with President Clinton nomination. I don't understand why it's relevant here? Its not you, we are hear talk about you and your qualifications. Another absurdity that I think we will see over the next couple of days is absurdity of people saying that your side stepping the questions about cases that may come before you.

I actually think you are following a code of conduct. You are following a code of conduct of United States Judges, Canon 3A6; you are following the American Bar Association, Model Code of Judicial Conduct Rule 210 AB. I appreciate you respecting and living what you say and that's the rule of law and the code of conduct of judges. Now I want to get into specific cases and I guess I will start with freedom of speech.

Judge Gorsuch, I'm going to read some of the notes because I want to make sure I get my points right. I want to apologize again because I may do a little bit of talking. But I believe the first amendment states, congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or bridging the freedom of speech, or of the press or the right of the people, peacefully to assemble and to position the government for redress of grievances. I think the first few words mean something very significant. I think that you do to.

Now clearly this amendment is not meant to limit the ability of the federal government. To curtail free speech. It is meant, do you agree that the founders intended this to be a check on the federal government?

GORSUCH: Senator, that's what it is.

TILLIS: Is it fair to say that framers when they were crafting this first amendment were concerned about especially about political speech as opposed to say activity like exotic dancing or other speeches or activities that people argue that are covered by the First Amendment?

GORSUCH: Supreme Court has held that political speech is the core of the first amendment.

TILLIS: So it's fair to say that the Supreme Court has routinely held that political speech especially during a campaign for public office is the core of the first amendment.

GORSUCH: It has.

TILLIS: a lot has been said today about money a politics, and a landmark case called citizens united. A citizen united is very popular punching bag. For some of my colleagues across the isle. You spend a lot of time talking about this whipped Senator White House senator today if you listened to them on the subject you would think this decision resulted in the ability for a corporation to pump hundred's of millions of dollars directly into local candidates. The facts of the case get wrapped around buzz words like dark money. (H) I want to use some of my time today. To walk thru the facts of this case.

First, at its very baseline. This case was a challenge brought to a federal statute. The federal government through congress passed the statute aimed at limiting certain speech. And it was congress activities in regards to speech that the framers were concerned about. In fact a statue prevented entities such as corporations including non profits and labor unions from using their general treasury fund, to fund any advertisement.

That used the candidates name within thirty days of a primary or sixty days of a general election. Including to promote a movie. As well as many expressed advocacy communications. This case had nothing to do with debt contributions and spending coordinated with specific campaigns and candidates. In other words, this case is not about corporations making direct campaign contributions at all. Citizens united were about an enities ability to

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speak independently of any candidate or campaign. Judge Gorsuch, do you remember what behavior was in question or in other words what the Citizens United wanted to advertise?

GORSUCH: Well as you say Senator there was a movie involved.

TILLIS: It was a movie. Available on demand and home. The organization wanted to broadcast the film or to advertise the film before 2008 Democratic primary. The federal government went into court and said a non-profit couldn't produce or advertise a movie highly critical of a candidate.

Judge Gorsuch, are you familiar with the oral arguments of the case?

GORSUCH: I remember listening to them on tape at one point, but it's been a while, senator.

TILLIS: Well, during the initial oral argument for the case, the government was asked whether or not the same law could prevent a company from publishing a book. That was the functional equivalent of expressed advocacy.

Specifically, Chief Justice Roberts asked, if it's a 500-page book and at the end it says, so vote for X, the government could ban that? The response from the Deputy Solicitor General, who was defending the statute, stated we could prohibit the publication of the book.

In the oral arguments, Justice Souter stated, to point out how far your argument would go, what if the labor union paid an author to write a book advocating for the election of A and defeat B? And after the manuscript was prepared, they went to a commercial publisher, say Random House, and Random House says, 'yes, we'll publish that.' We're walking - we're talking about how far the constitutional ban would go and we're talking about books.

The Deputy Solicitor General said the labor union's conduct would be prohibited. He goes on to say, I think it would be constitutional to forbid the labor union to do that. I want everybody here to know and everybody who's listening to realize the consequences of this position.

The government at one point defended the statute by saying it could prevent the publication of a book by a corporation like Random House if the book advocated for/against the candidate.

That's not the end of the story. **The Supreme Court** was shocked that the federal government would take this position and ordered re- argument. Then the Solicitor General Kagan slightly retreated from the government's position.

Then Solicitor General Kagan said that, while the law could apply to a book, the government had not applied it in the past. But when asked again by Chief Justice Roberts about a pamphlet, she responded, I think a pamphlet would be different. A pamphlet is a pretty classic electioneering.

Again, I want everybody listening to realize what we're talking about here when we talk about Citizens United. They argue that there was a constitutional authority to actually prevent the publishing of a pamphlet opposing a candidate, if produced by a non-profit organization.

If we as a country have a long - we as a country have a long history of people being able to criticize the government, which include specific offices in government, sometimes this was done anonymously because disclosing the speaker's identity had serious implications, whether it was the American Revolution, the Jim Crow South or today.

Therefore, we must be cautious in giving the federal government, including the executive branch, power to limit or penalize for political speech.

Judge Gorsuch, you may not be able to see that. Do you recognize this book?

GORSUCH: I can't see it.

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TILLIS: We got this from the Library of Congress. It's actually - it has a number of Paine's writings, including Common Sense and other political writings. In this pamphlet, he urged American colonies to declare independence and sever ties with the British monarchy.

What some of my colleagues from the other side have attempted to do is tie you to a court case, which you had nothing to do with. They've painted a picture this case is support for big money and politics where big corporations win and the voter loses.

In reality, the facts of this case were much different. The federal government argued it could stop a movie because it contained political speech. Then it argued it could ban a book because it contained such speech.

Then it argued it could ban a pamphlet because it contains such speech. That's the Citizens United case. I find it curious my friends are so concerned about executive power, not concerned about the federal government arguing its authority to prevent production of movies, books and pamphlets. It's foundational to our democracy.

So, as I stated previously, they're attempting to link you to Citizens United and continue a narrative that I think is absurd that as a judge you will support big money and corporations and never side with the little guy. The facts dispute that. The number of cases you've heard dispute that.

Now, I want to close out here with a little bit of discussion about some of the discussion - about maybe your political positions or your past being instructive to the decision by some as to whether or not they should support your confirmation.

Let's talk a little bit about now Justice Kagan on Citizens United as a solicitor general. Let's keep in mind - and actually, the reason that this came to my attention today earlier when people were asking about the role that you played when you were working as an attorney on behalf of the government.

So, who was your client?

GORSUCH: The United States.

TILLIS: So, let me go back to when Justice Kagan was in a position - when she was nominated, she was a lawyer at the Department of Justice. In fact, she was the Solicitor General. As we talked about, she argued with Citizens United.

Now, she pressed the argument that the government had the authority to prevent the publication, not only of movies, but other forms of political speech, like Common Sense.

She accounted for her arguments as solicitor general this way. Her quote. "I've tried very hard to take the cases and to make the decisions that are in the interest of my client, which is the US government." My guess is that's what you were doing when you were in a different role representing the US government.

So, I don't think there's much power to the argument that, for some reason, you advocated for the government unless we want to go back and revisit now a Supreme Court justice's history in the same. I think that what she did was fine. Whether or not, I would've voted for her, we'll never know because I wasn't here.

But I also want to bring up one other thing. Another member brought up an email sent to you in 2004 where you noted that you had volunteered on a political campaign.

Well, once again, you may recall that Justice Kagan also had quite a political career before she became judge. After she was nominated to the Supreme Court after reviewing your emails from the Clinton White House, the AP published a report saying that as a White House aide, she had a flair of political tactics - a flair for political tactics and often had to place political considerations before her political views. And the LA Times reported she worked in the research department defending Democratic candidates from political attacks and conducting research on the opposition. I don't think there's much more to say about it either, except to say this.

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In spite of her position to think that things like Common Sense could actually be, well, banned, in spite of her political activities that seem to have reached to a far greater level than your own, when she came before this Senate, a majority of - or I should say, nine Republicans joined with Democrats, and through unanimous consent, did not force cloture. They moved on to the vote.

And quite honestly, Republicans were in a position to halt her. And I'm sorry that's on Sotomayor. On Kagan, same thing. I had the wrong sheet up. On Kagan and on Sotomayor, Republicans respected the president's authority to appoint a Supreme Court justice and Republicans did the right thing by moving forward and allowing the confirmation.

So, I think that we have a moral high ground here that my colleagues on the other side of the aisle should take note of.

Now, I want to get to other stuff. Judge Gorsuch, I want you to go back briefly. I've got 15 minutes and I'm going to go really quick. This will be a lightening round. The ethics class, this is another - I'm going to go back to absurdity. I appreciate that Sen. Franken mentioned what he did because it's a perfect theme for my line of questions.

I heard - and there's going to be a lot of it spun in the press. And I want to see if maybe a few people will actually listen to the answers to these questions. It had to do with the letters that came from the class that you teach on ethics.

Can you tell me again exactly that the - in brief? You discussed a curriculum that - a question that's raised in there, can you very briefly, in about 45 seconds, kind of summarize that?

GORSUCH: I can try, senator. I'm very heartened by the fact that scores and scores of my former students have written this committee of -

TILLIS: And I'm going to seek a unanimous consent to put some of those letters into the record.

GORSUCH: And over the last seven or eight years, I've used the same textbook. You could take a look at the teaching manual and you'll see exactly what we discussed.

TILLIS: So, it wasn't an arbitrary comment. It wasn't something that was done in this one segment. It was something that was a part of a well thought out curriculum and it started a discussion that I have letters that, without objection, I'd like to submit to the record that suggest the same.

But it wasn't something -- it wasn't arbitrary, it wasn't off- the-cuff. It was something that was a part of a curriculum that had existed for how long?

GORSUCH: Seven or eight years, Senator.

TILLIS: OK, so I think I'd like to seek unanimous consent that I can actually put forth this series of documents that have to do with some former students, speaking specifically to the letter that you were informed of the day before yesterday. And other students that were in your class that saw the facts differently, and some other documents that I think will be good reference for the other members to review. Without objection.

OK, now I want to move into a couple of things that I really want to get to. And the TransAm Trucking. First off, you've given me hope that I could actually understand legal opinions when I read them, when they are well written, and yours were. One of them was your dissent on TransAm Trucking.

These are things -- people talk -- you are not here to have heart. You here to judge the law, you're here to judge the Constitution, and I appreciate that about you because I suspect you've got a really big heart. But I thought it interesting, I highlighted several parts in your dissent. One was when they suggested that he should drive (ph) the truck instead of keeping it there or leaving it there. Your parenthetical comment, that was an illegal and maybe sarcastically offered option.

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So you didn't consider that a viable option. There are going to be people here that said that you were okay with that. That's wrong. It's absurd.

And then the other one was he could sit and wait for the truck to arrive, and you parenthetically said a legal, if unpleasant, option. You went on to say in your dissent, it might be fair to ask whether TransAm decision was a wise or kind one, but it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one.

And then you go on to say that there is simply no law anyone is -- giving an employee the right to operate vehicles in a way the employers forbid. I think that if you go back and people read these dissents, it's hard for me to imagine that you arrived at this through any other conclusion but for the fact that Congress had not explicitly provided you the authority that you thought you need, or the reference point that you thought you needed to judge otherwise. My guess is when you rode home that night, you wished that they probably had.

Now I also thought what was interesting in your dissent on the last page is you actually, you know, kind of gave some suggestions to maybe how things should have been done differently or how we should have done our job better so that maybe you were in a position to come up with a different judgment. But that's our job.

You told Senator Whitehouse, it's not my job to do your job. That was one of your best quotes of the hearing today. You are absolutely right. It's our jobs to make value judgments. It's our jobs to get votes and our jobs to answer to the American people every time we get elected or go to campaign, every two years or six years. So I for one think that you came up with a well reasoned, fact, legally based dissent on TransAm Trucking.

Now I want to move to one that I just want to make sure I have time to get to because it's one where, you know, quite honestly I would have completely loved for you to go the other way, but you did the right thing. And it's purely by coincidence. It really is. I'm wearing an autism pin today because I am a big advocate for autism and Autism Speaks. I don't have any personal family experience with it but it's something to me that's very important.

And so obviously in Thompson RJ2 School District v. Luke Peay (ph), you came up with a decision that was contrary to what I'd like to do for parents and families and children -- who have children with autism that are in the public school system and not getting the results that they would hope to get.

In this case again, I think you got the IDEA (ph) absolutely right. There was not anything in the law that could have possibly led anyone -- somebody made reference to it in the opening comments. That's why I looked into it yesterday. But there's no way that you could have reached that far to support what clearly had to be -- in this case it was appeal -- that would have been sympathetic to Luke Peay (ph) and his parents. You made the right decision.

You know what I did in North Carolina? I changed the law. I did my job. You made it very clear that the IDEA (ph) didn't do it, so as speaker of the house, we went in there, and when we said that a parent, after spending a year in public school, didn't think that their child was getting what they needed, then we would actually allow them to go to a private school and have money follow them so they can do it.

So by doing my job, we've got a few hundred kids now who are getting the education that they need in private school setting. Thank you for forcing me to do my job, and for seeing (ph) that my time as speaker of the house, but we knew we'd run into problems there, and we solved the problem. Thank you for making us do our jobs.

And then finally, the case -- I want to go back to this real quick to make sure I get my notes right. One thing I like about you is sometimes your decisions seem to make everybody mad, which it probably means it's a pretty good decision. So I think sometimes maybe you even exceed the 50 percent rule.

(LAUGHTER)

GORSUCH: My daughters would agree with you.

TILLIS: Like the case in Riddle v. Hickenlooper. I mean, that's a position where the Democrats and the Republicans were spitting mad at you, and there are many more. I mean, when you put every other minority party that was being

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treated unfairly as a result of actions that were taken -- I don't know if they were Democrats or Republicans in control when they passed that, but that was a classic example where you obeyed the law. The other thing that was interesting -- or you respected the law.

The other thing that was interesting about that case is you actually provided some food for thought on how maybe they could solve that problem that would be constitutionally sound. And I found that in other examples. I love the fact that you don't believe that judges after they've heard the argument should go back and create new arguments to arrive at a decision.

In your dissents and in your opinions you basically say they never -- and I think that was in TransAm. You said you had a thought, you thought about that. Trans Am brought forth Chevron briefly. Nobody else did. And you were making[MH1] a comment, y'all should have done that. Not a bunch of judges in a room when they are deliberating but when they are making the arguments.

So I think you were giving them food for thought. That is extraordinary that you would do that kind of work. That's why you're going to make a great judge on the Supreme Court, and that's why I fully support it. And I will call out absurdity every time I hear it this week and next week.

I will ask my colleagues to do what Republicans did before I got here, respect the president's right to seat somebody to the Supreme Court. They don't have to vote. I've voted for cloture on nominee, an attorney general that I didn't vote for. But I respect this institution and this process enough to let it go forward.

So I'm going to work very hard to support you. You know, I'm not an attorney so if I said anything legally wrong -- I did stay at a Holiday Inn Express a few weeks ago, but outside of watching Law and Order every once in a while when I get home late and unwind, I don't really follow the law.

But I can tell, based on what I've heard today, you are a man of extraordinary patience. Yesterday I mentioned that I thought your at- rest heart rate was about 4. I saw it spike up 50 percent maybe to 5 or 6 today.

But I'll leave you with this. Peyton Manning, who I love, he went to the University of Tennessee and then tarnished career by going on to the Broncos and beating...

GORSUCH: Ohhhh.

TILLIS: ...in the Super Bowl. But let me tell you something. I love Peyton Manning. In fact, I've got a quote on this wall that I make my staff look at every day. And it says, pressure is something you feel when you are not prepared, when you don't know what you're doing. You clearly know what you are doing.

You haven't exhibit one iota of pressure. That's what's going to make you a great judge. The respect that you have shown when disrespectful questions were lobbed your way was remarkable. And I appreciate your being here. I appreciate your patience, and I'm going to yield back the rest of my time. But I will say that the break after 7 o'clock tonight also doesn't replace date night, so you owe your patient wife a good dinner after all this is done. But thank you, and I yield back the rest of my time to the senator from Louisiana.

GORSUCH: Senator, thank you.

TILLIS: And by the way, you didn't talk much, but I promised tomorrow you'll get to talk a lot.

GORSUCH: I've heard myself speak more today than I'm accustomed to.

TILLIS: The senator from Louisiana.

KENNEDY: How you doing, Judge?

GORSUCH: I'm great. How about yourself?

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KENNEDY: You're that close to being done. That close. I think you've done pretty well today, and I just want to go on record as saying this is an important nomination, and I appreciate all the questions asked today. Even the ones I disagree with. I didn't know what to expect. I mean, this thing could have turned into the Gong Show real easily. And I appreciate that.

I want to ask you a couple of questions, things that maybe we didn't get to talk about much. First, why do you recuse yourself in almost 1,000 cases?

GOR SUCH: Well, Senator, in the Tenth Circuit, we have procedures. And one of the procedures is we make a list of all potential recusal possibilities.

And for me it was significant because I had been in the government at a -- at a position where we oversaw a number of different litigating units. That causes a fair amount of recusal right there.

And Senator, I was blessed with an active and robust practice and partners who went on to do much better without me than they did with me. And they had a lot of clients.

And it was my view as a circuit judge that I didn't want to cause an unnecessary recusal problem later. Sometimes after a court decides a case, a recusal issue pops up and judges miss things. It's -- we're -- we're human. It happens.

The problem when that happens, of course, is then you have to get a new judge in and start everything all over again. That's a cost to the system that's not insignificant to your colleagues and taxing on them. But it also raises questions, of course, to the parties who have to start all that over and cost them money and time.

And -- and I did not want to -- to create that kind of problem for the litigants and for my colleagues. And so, we -- I set up a process consistent with the practice of my colleagues and talked to my colleagues about how they do it and try to conform to the practices of the Tenth Circuit as best I could.

And as you know, most of the recusals are not really -- I mean, recusals not even the right word. They're screened out...

KENNEDY: Right.

GOR SUCH: ...by the clerk's office before they -- before they ever get to me. We're on a wheel.

KENNEDY: Right.

GOR SUCH: And so I just get the next on the wheel. Everybody gets the same workload.

KENNEDY: Right.

GOR SUCH: It doesn't affect our workload. But it does affect confidence in -- in the judiciary and...

KENNEDY: Would (ph) -- the recusal rules are different from the U.S. Supreme Court as (ph) I appreciate it.

GOR SUCH: Yes, sir.

KENNEDY: OK. I want to ask you about the relationship between the United States Constitution and a state constitution and the interaction. And -- and let me get specific so you'll understand what I'm talking about.

I think this is well said a lot. A DWI -- we call DWI in Louisiana. Some states call it DUI. But a -- a -- a DWI roadblock. I think it's well settled, a number of -- of cases the U.S. Supreme Court that says a DWI roadblock, so long as you use neutral criteria, is perfectly permissible in the Fourth Amendment.

If I say anything wrong, stop me. It -- it's clearly a seizure, but as long as you have neutral criteria.

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Do you remember why the Supreme Court made that decision?

GOR SUCH: I'm sure you're gonna tell me, Senator.

KENNEDY: Well, I -- I -- if you -- if you don't know, I'll -- I'll -- my understanding is that -- that the Constitution only protects against unreasonable searches and seizures.

GOR SUCH: Right.

KENNEDY: And -- and the court balanced the public interest versus the -- the extent of the -- of the -- of the privacy violation. But let's suppose -- so that's well said a lot. You can -- under the federal Constitution, you can have a DWI roadblock.

Let's suppose the -- the Supreme Court of Massachusetts -- I wish -- I wish Attorney Franken was here. Said (ph), you know, we appreciate that and we appreciate that's federal law.

But we have a -- a Fourth Amendment in the Massachusetts constitution. And we want to go further. And we want to outlaw roadblocks.

And we will give more protection -- we don't want to take away protection that -- that our citizens have under the United States Constitution, protection from government. WE want to give them more protection from government and no roadblocks period.

Do you think that's permissible?

GOR SUCH: Senator, generally speaking, decisions based on independent and adequate state grounds are permissible. The primary precedent in this area is Michigan v. Long, a decision by Justice O'Connor.

The state has to make clear that it's deciding on independent and adequate state grounds and not resting on the U.S. Constitution. If -- if -- if there's some ambiguity, we may, as federal judges, consider it to be a decision based on federal law.

But a state is free to add to the liberties of the people generally speaking.

KENNEDY: Well, what -- what if the adequate and independent state grounds aren't clear? What do you do?

GOR SUCH: Well, that's Michigan v. Long. And there's a precedent and there's a test for it.

And again, if -- if it looks like it could've been on the -- on federal -- the decision could've been made on federal grounds, then the federal court will examine it on that basis. State court makes clear that it's an independent and adequate state grounds, well then, the state law controls.

KENNEDY: Do you think it makes sense? I mean, isn't the law complicated enough? Do we really need 50 rules for DWI roadblocks?

GOR SUCH: Well, Senator, we have -- we have this thing called federalism.

KENNEDY: I've heard of it.

GOR SUCH: Yeah. I figured you might. And it's part of our separation of powers and it's part of how we preserve liberty, right.

We diffuse power to protect liberty. And federalism is a key part of it.

KENNEDY: OK. I haven't read all your cases, but I haven't seen many where you dealt with substantive due process or equal protection. So, I want to talk about that for a few minutes.

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If you have a case where you don't have a fundamental right or a fundamental liberty, and you don't have a suspect classification, so you're not gonna use strict scripts. You're gonna be -- you're -- you're gonna use the rational basis test which means you will uphold the statute if the legislature has a -- a rational reason that's connected to a -- to a legitimate goal.

How far do you go? How -- how -- how closely are you -- do you -- do you think federal judges should examine what the legislature does?

Is it -- is it -- is it a rational reason? Is it any reason? Is it -- do you make up the reason for them?

Have you ever heard of rational basis that bite?

GORSUCH: I have, Senator. And before we get to that, I think it's important to acknowledge there's also intermediate scrutiny.

KENNEDY: That's true.

GORSUCH: And for example, many gender cases.

KENNEDY: For gender. But I'm -- I'm talking about just plain old variety, no gender, no -- no race, and those kind of special heightened scrutiny, just rational basis.

GORSUCH: The Supreme Court has indicated in what you're describing as rational basis with bite. And sometimes if there's a discriminatory animus present, even though there might be a legitimate rational basis one could conjure for the rule. But that might fail strict scrutiny, Senator.

KENNEDY: What does the rational basis test mean to you?

GORSUCH: Well, generally speaking -- usually speaking, it means that if there's any rational reason one can conjure for the rule, it stands out of deference to the legislative process.

KENNEDY: Does it have to be a good reason?

GORSUCH: It has to be a rational reason. Not one that I find personally persuasive, but one that someone could find persuasive.

KENNEDY: OK.

GORSUCH: And that's how the deference to the law-making process of this body, Senator.

KENNEDY: I understand. I want to ask you about the TransAm case. It's been talked about a lot.

You dissented, a pretty tough tax. Your dissent probably I guess maybe about as popular as cholera.

GORSUCH: It seems so.

KENNEDY: But as I understand it, you just looked at the statute. And what -- tell me what you -- what the statute said again.

GORSUCH: It said that an employee who refuses to operate a motor vehicle has certain...

KENNEDY: Do you...

GORSUCH: ...legal protections from firing.

KENNEDY: But he didn't refuse, he operated.

GORSUCH: That's what I thought the facts suggested, Senator.

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KENNEDY: Well, I thought about that case when I was reading a case of your that I -- that I -- I --I commented on yesterday, *A.M. v. Holmes*. I love this case. Pretty recent, last year, and as I appreciate it, the majority of opinion was tough to get through, 95 or 100 pages. 13-year-old kid, 7th grader, he's fake burping in class.

GORSUCH: He is.

KENNEDY: He's pretty good at it.

GORSUCH: He's very good at it, apparently.

KENNEDY: He disrupts the whole class, so the teacher takes him out, sits him down in the hall, calls the assistant principal. She calls the assistant principal and she calls the police officer, I guess assigned to this school, and they take him to the principal's office and the police officer arrests him.

And the kid's mom sues, I think a 1983 action, if I recall.

GORSUCH: That's right.

KENNEDY: His mom sues and the majority held qualified immunity. And this is the way you describe the case, "If a 7th grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps, detention, a trip to the principal's office? Maybe."

"But, then again maybe that's too old school. Maybe today you call a police officer and maybe today the officer decides that instead of just escorting the now compliant 13-year-old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention."

"My colleagues, the majority, suggests the law permits exactly this option and they offer 94 pages explaining why they think that's so, respectfully, I remain unpersuaded".

But it's your last paragraph in that opinion that made me think of *Trans Am*. You went on to explain why you interpreted the statute to be contrary to the majority opinion.

But this is how you wrapped it up, "Often enough the 'law can be a ass, a idiot', quoting, Dickens and *Oliver Twist*, and there's little we judges can do about it for it is, or should, be emphatically our job to apply, not rewrite the law enacted by the people's representatives."

"Indeed a judge who likes every result he reaches is very likely a bad judge reaching for results he prefers rather than those the law compels. So it is, I admire my colleagues today for no doubt they reach a result they dislike but believe the law demands, and in that I see the best of our profession and much to admire. It's only that, in this particular case I don't believe the law happens to be quite as much of a ass as they do, and I respectfully dissent."

Is that what happened in *Trans Am*?

GORSUCH: That's who I am, Senator.

KENNEDY: Can you tell me something that you think is a good idea, but you think's unconstitutional?

GORSUCH: Oh, Senator.

(LAUGHTER)

It's been a long day.

KENNEDY: And you're this close to *CSI*.

GORSUCH: No, Senator, I've loved every minute I spent with you, and with all of your colleagues.

I'm sure I could conjure something.

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KENNEDY: All right, well think about it tonight.

GORSUCH: But, Senator, I wouldn't opine on it if I could, it's just not my job. My job, as you just read it, that's how I see my job.

KENNEDY: Right.

GORSUCH: And I respect my colleagues who see it differently, because they did, they wrote a 94 page opinion in that case, a thoughtful one.

KENNEDY: Yes, I read it.

GORSUCH: And I respect them deeply, and the same thing in Trans Am, sometimes the law is what it is. That they see it -- I'm sorry, Senator.

KENNEDY: No, you go ahead.

GORSUCH: We just do the best we can, day in and day out, in cases like these and nobody hears about it. It's the quiet, quiet work of judges trying to get it right. KENNEDY: And that's why I enjoy your opinions, aside from the fact you, kind of, play outside the pocket. I mean you're -- you adhere to the written word which is what I want to ask you about next.

It's clear you don't like labels. OK, you -- you wouldn't call yourself an originalist.

GORSUCH: Senator, I'm happy to embrace that. I don't reject it. I just am concerned about the level of our discourse in the society today when we're often quick to dismiss one another -- Republican, Democrat, whatever...

KENNEDY: That's fair enough.

GORSUCH: ...whatever.

KENNEDY: That's fair enough.

GORSUCH: It's not the world I care to inhabit. I care to inhabit an idea of respectful engagement of ideas with every person who comes before me.

I do believe the original understanding of a text is very important to a judge. And I do believe any good judge wants to know that information. And I do.

KENNEDY: And -- and I believe the phrase you use is the original public understanding of the Constitution.

GORSUCH: Yes, Senator.

KENNEDY: What does that mean?

GORSUCH: It means I'm not looking for hidden intentions. I'm trying to get inside respectfully your head.

I'm looking for the words you use and trying to understand what they mean, what a reason (ph) person at that time would've understand they mean. Because that's the fixed meaning I can latch onto and say I'm enforcing that, not my will.

KENNEDY: Is it the meaning of the -- of the drafters in 17 -- what -- 87?

GORSUCH: No.

KENNEDY: Or is the meaning of -- of the -- the legislators who approve the Constitution? Or is it the meaning of the -- the general meaning of the people? What if they didn't contemplate it?

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GORSUCH: Senator, they don't contemplate a lot of things that arise. Equal protection of the law, unreasonable search and seizure, these are broad terms. But we can give them content by looking to what the original understanding at the time was.

KENNEDY: Right. GORSUCH: What a reasonable person would've understood them to mean. The fish case in the statutory construction scenario.

What would a reasonable reader understand that to mean? And that serves a couple of important functions.

First, it doesn't necessarily decide cases. It doesn't determine outcomes. But no one's looking to go back to horses and buggies.

KENNEDY: I know that.

GORSUCH: All right. What it does do is give us a way to communicate with one another. It's neutral.

We're aiming at something outside ourselves as a basis for decision. That's part of the separation of powers. Not legislating, judging.

(CROSSTALK)

GORSUCH: Second, it's a due process concern.

KENNEDY: I get it.

GORSUCH: It's a -- it's a fair notice concern. I can charge -- I -- I'm putting people in prison for long periods of time as a judge. I'm complicit in that.

And I want to do it on a basis that I know that that person had fair notice of the laws that are applicable to him or her. That's important to me.

KENNEDY: What's the...

GORSUCH: I think all judges...

KENNEDY: I don't mean to cut you off.

GORSUCH: Well, I'm sorry.

KENNEDY: I just have to be mindful of the clock.

GORSUCH: I'm sorry.

KENNEDY: What's a penumbra?

GORSUCH: It means not just the thing itself, but what surrounds it.

KENNEDY: What's a legal penumbra?

GORSUCH: Senator, that's a -- a phrase that's been used in opinions by -- by the court.

KENNEDY: Do you believe there are unenumerated rights in our Constitution? GORSUCH: Senator, the -- **the Supreme Court** interprets the Constitution. And that is a legitimate function of the United States Supreme Court.

It -- it -- in interpreting the Constitution, it necessarily declares in this case or that case, it sets up precedent because it interprets. I -- I've come back to the GPS case, 'cause I think it's a wonderful example. Or Heller, that's another example.

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You can pick all sorts of examples where the court is interpreting a textual right in the Constitution or a statute.

KENNEDY: Let me ask you about euthanasia. I didn't read your whole book.

GOR SUCH: I don't think many people have, Senator.

KENNEDY: But -- but I read enough about it. And I read a little bit of it.

I believe you're an Episcopalian?

GOR SUCH: I attend an Episcopal church in Boulder with my families.

KENNEDY: Yeah. I'm a Methodist. I was a Presbyterian then Becky and I got married.

She was Methodist, I was a Presbyterian. We compromised, and I became a Methodist.

(LAUGHTER)

GOR SUCH: That's the way it works.

KENNEDY: But as I understand, your -- your -- your thesis about euthanasia, which you opposed, it's not really based on religious teachings. It's -- it's based on secular moral thinking. Kinda tell me about that.

That euthanasia -- I mean, it -- from one perspective, you know, if we have the right to control our bodies if we autonomal (ph) -- autonomy privacy and disclosure privacy and all that, you know, this idea of self-determination. But you believe it can lead to something worse. Is that your thesis?

GOR SUCH: Well, Senator, this was in my capacity as a commentator before I became a judge.

KENNEDY: Sure.

GOR SUCH: And as a student.

KENNEDY: Right. GOR SUCH: And when I was fortunate enough to get a scholarship to study law and a doctorate - - and I know you've spent some time thinking about similar things in a similar place. It struck me as an important and unresolved legal issue that deserves some thinking and a contribution where I could study and maybe -- maybe add something to the discussion.

Not that I have any great insights or perfect answers in this area. It's hard.

KENNEDY: Don't (inaudible) anybody (ph) does.

GOR SUCH: It's hard. I agree. I agree with that, sir.

And -- and there, I -- I expressed the belief that -- the conclusion, as a commentator, that the right to refuse treatment recognized in Cruzan by the United States Supreme Court was appropriate. People should be allowed to refuse treatment, go home, die in the arms of their family rather than being poked and prodded.

Same time, I agreed with the Supreme Court as well that the right of -- question of assisted suicide was primarily a state responsibility. And that's where Glucksberg in (ph) quilled (ph) the Supreme Court has left the issue.

Then the question becomes what do you do? It's a question we all have to face.

You legalize it or don't you. It's a hard question.

KENNEDY: If you legalize it, it cheapens life, doesn't it?

GOR SUCH: Senator, what I worried about is the least amongst us in those circumstances.

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KENNEDY: The unprotected?

GOR SUCH: My concern is that when you have a cheap option, an expensive option...

KENNEDY: Yeah.

GOR SUCH: ...people who can't afford the expensive option, they're the ones who tend to get hurt. The disabled, the elderly, the weak, minorities.

KENNEDY: Yeah.

GOR SUCH: SO, those were my concerns. I might be right and I might be wrong. History will tell.

And if I'm right, great. If I'm wrong, yelling and screaming about it won't make me any better at it. It won't make me right.

It was a contribution, part of the debate, part of the discussion. And I hope it was a respectful and useful contribution that at least one Senator has read. And otherwise -- and up until about a month ago, I think primarily occupied a very dusty bookshelf somewhere in a law library.

KENNEDY: Do you prefer wet flies or dry?

GOR SUCH: Dry.

KENNEDY: Dry. I (inaudible)...

(LAUGHTER)

GOR SUCH: Happy to express my view on that.

KENNEDY: You use a -- do you use a floating line or a sinking line?

GOR SUCH: Well, with the dry fly...

(CROSSTALK)

KENNEDY: You have to use the dry. But -- but you don't use wet flies with a sinking line to drop...

(CROSSTALK)

GOR SUCH: Well, I've been known to cheat once in a while and the bead head might go on as a dropper underneath my dry.

KENNEDY: Did you know President Obama at Harvard?

GOR SUCH: Senator, I -- I -- I knew him, not well. Our -- our paths crossed. It was a big school.

KENNEDY: Yeah. Is he one of those like front-row guys that was always raising his hand? Or did he kind of stay in the back row like I did and avoid eye contact with the professor so you wouldn't get called on? Or...

GOR SUCH: Senator...

KENNEDY: You don't have to answer that.

GOR SUCH: We were...

(LAUGHTER)

We were in different sections, Senator.

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KENNEDY: Oh, OK. All right.

I just want to ask you one last one. It's about a legislative intent.

You -- you -- you've -- I've read where you've said that trying to discern legislative intent is a quote notoriously doubtful business. And I agree with that. I mean, legislators and Congress people have a multitude of reasons for voting as they do.

But that doesn't make it the search for legislative intent and looking at the legislative history, it may not be dispositive, but it doesn't make it useless.

I mean, wouldn't you love to have a verbatim transcript of everything that was said at the, what was it, 1787 convention? 1789?

GORSUCH: Senator, I respect very much what this body does. I hope my career, my body of work, reflects my respect for this institution.

As a judge, I have to look at what's presented to me, and I look at everything that's presented to me, everything that's presented to me.

I read everything that's presented to me and I have used legislative history from time to time. As you've seen, and I know you've read a whole lot of my stuff.

I do worry when I'm putting someone in prison, for example, involved in a ruling involving their liberty in particular, about charging them with knowledge of what happens in a committee room. Or a statement that might be presented only on the floor by one individual, rather than by a law that has suffered by the process compromise, by cameralism (ph), both houses and presentment and signature by the President and goes into the law books.

Hidden law can be a problem, I worry a little bit about that, particularly in the criminal context, Senator. It's a matter again of due process and fair notice.

So those are the considerations that a judge, I think, always considers. What's fair in terms of due process and fair notice, at the same time being respectful of this institution and the hard work you do for the American people?

KENNEDY: I don't know if you're a drinking man, but you may want to have a cocktail one night, and just kind of relax. I'm done.

Just don't drink vodka, stay away from vodka for a while.

GORSUCH: Senator, I'm going to hit the hay.

Thank you very much.

KENNEDY: You've never been to Russia, have you? I meant to ask that.

(LAUGHTER)

Strike that, strike that question.

GORSUCH: I've never been to Russia.

KENNEDY: thank you, judge. Thank you Mr. Chairman.

TILLIS: thank you, Senator Kennedy.

Judge you're done for the day. We want to extend a thanks to you and everyone who played out.

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We'll start a series of 20 minute rounds tomorrow, and I for one, will be here for every bit of it because you've taught us a lot today and I think the American people should be proud that they have someone like you coming before this body, and headed for the Supreme Court.

We're going to recess tonight and convene again at 9:30 a.m. tomorrow morning, until such time we stand in recess.

END

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