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CONFIRMATION HEARING ON THE NOMINATION OF HON. NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

MARCH 20, 21, 22, and 23, 2017

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CONFIRMATION HEARING ON THE NOMINATION OF HON. NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 20, 2017

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

The Committee met, pursuant to notice, at 11:07 a.m., in Room SH–216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

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

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

Chairman GRASSLEY. Good morning, everybody. I want to welcome everybody to this confirmation hearing on the nomination of Judge Neil Gorsuch, and he is nominated to be Associate Justice of the Supreme Court of the United States.

Judge, welcome to the Senate Judiciary Committee.

Judge GORSUCH. Pleasure to be here. Thank you.

Chairman GRASSLEY. This is a big day for you and your family. You have been before this Committee once before for the confirmation hearing to the Tenth Circuit, where you now sit. I imagine that this hearing may be a little better attended than the last time you were here.

Judge GORSUCH. Just a little, Senator.

Chairman GRASSLEY. Yes. Before we begin, I would like to give you the opportunity to introduce your family and anybody else you want to introduce.

Judge GORSUCH. Senator, this is quite a lot different than it was the last time I was here, and I appreciate all the attention.

I would like to introduce my family who are here. My wife, Louise, who, as you remember, stole the show in the East Room the day I was nominated.

Chairman GRASSLEY. Yes.

Judge GORSUCH. I have got here somewhere, I am told, in the audience, my brother-in-law, my brother-in-law's folks, Phil and Priscilla Albright, and my nephew Jack. How are you doing, Jack?

[Laughter.]

Judge GORSUCH. I have got my cousin Meg Hopkins and her daughter with her, Lori. I have got a bunch more family coming. My daughter is watching back home in the West.

I have got my longtime assistant, Holly Cody. Where is Holly? There she is. Ten years we have worked together. I consider her family.

And I have got a whole bunch of my law clerks here in the audience, and if they would not mind just standing up for a second, I would like to recognize them because I consider them family, too.

So, Senator, I am very blessed to have so many family here with me today.

Thank you.

Chairman GRASSLEY. Thank you. We thank you, Judge. We are delighted to have your family here as well for this very important moment in your life.

Before I give my opening statement, I want to set out a couple of ground rules. I want everyone to be able to watch the hearing without obstruction. If people stand up and block the view of those behind them or speak out of turn, it is not fair or it is not very considerate to others. So officers will immediately, under our rules, remove those individuals.

Now I would like to take a minute to explain about how we are going to proceed. We will have 10-minute rounds of opening statements. The Ranking Member and I may go a minute or two over the 10 minutes, but I am going to ask everyone else to limit your remarks to 10 minutes. And I hope everybody on both sides of the aisle will respect that.

We will then turn to our introducers, who will be formally presenting the judge. Then we will administer the oath to the judge, and we will close today's portion of the hearing with the judge's testimony.

Tomorrow morning, we will begin at 9:30 a.m. for the opening round of questions. Each Senator will have 30 minutes for the opening round. After the first round, the Senators will have 20 minutes for a second round.

And finally, as I have discussed with the Ranking Member, later today we will notice a mark-up to consider the judge's nomination for next Monday the 27th. In anticipation of his nomination will be held over for 1 week, as any Senator has that right under our rules to do so, we will then vote on his nomination the following Monday, April 3.

With that, I would turn to my opening statement and then to Senator Feinstein for her opening statement.

One of Justice Scalia's best opinions begins with this declaration. It is "the proudest boast of our democracy that we have a government of laws and not of men."

The phrase comes from the Massachusetts Constitution of 1780. This infant State constitution linked the Government of laws, and not of men, directly to the separation of powers.

Justice Scalia said the Founders "viewed the principle of separation of powers as the absolutely central guarantee of a just government because without a secure structure of separated powers, our Bill of Rights would be worthless."

In plain words, it was the desire to preserve and protect liberty and self-government that guided the Framers as they designed our Constitution. And the founding charter they designed is a remarkable document, as we know.

The Bill of Rights, of course, preserves liberty by restricting what the Government may do. But the single most important feature of our Constitution is not any particular enumerated right or even the entire Bill of Rights taken together. The most important feature of our Constitution is the design of the document itself.

That design divides the limited power of government vertically between State and Federal Governments, and it distributes power horizontally between co-equal branches.

It is this very delicate balance of power, entrusted to competing factions, that ensures that liberty for the people will endure. It is the Constitution's design that protects against the mischief that results from the concentration of political power.

The Founders understood this fundamental principle, and Justice Scalia understood it better than anyone. He was fond of telling law students, "Every tin horn dictator in the world today, every president for life, has a bill of rights. But the real key to the distinctiveness of America is the structure of our Government."

Our constitutional republic is also designed around the notion that the people, acting through their representatives, retain ultimate authority to govern. It was the people, through their representatives, who ratified the Constitution that establishes our system of government.

Under that system, except where the Constitution has already answered the question, decisions are made by elected representatives. Elected, yes, but also accountable to the voters.

But to endure, our system of self-government requires judges to apply the text of our laws as the people's representatives enacted them. So our judges, by design, play a crucial, but limited role. They decide cases or controversies, but in resolving those cases, they may look only to the laws the people wrote.

Judges are not free to rewrite statutes to get results they believe are more just. Judges are not free to reorder regulations to make them more fair. For sure, judges are not free to update the Constitution. That is not their job. That power is retained by the people, acting through their elected representatives.

And when our judges do not respect this limited power, when they substitute their own policy preferences for those in the legislative branch, they take from the American people the right to govern themselves. As that happens, inch by inch and step by step, representative government is undermined, the carefully constructed balance of power is upset, and individual liberty is lost.

These are not stale concepts. If anything, the enormous size, the enormous power, and the enormous complexity of the modern state renders them more relevant than ever before.

In recent months, I have heard that now more than ever we need a Justice who is independent and who respects the separation of powers. Some of my colleagues seem to have rediscovered an appreciation for the need to confine each branch of government to its constitutional sphere.

I do not question the sincerity of those concerns. Some of us have been alarmed by Executive overreach and the threat it poses to the separation of powers. Whether it was the executive branch unilaterally rewriting Federal law, as the Obama administration did dozens of times, or the Executive's repeated failure to enforce and defend the laws passed by Congress, over the last 8 years we have witnessed repeated abuses by one branch at the expense of the other two.

Just ask the Supreme Court, which unanimously rejected arguments the Obama administration made in more than 40 cases. The policies that drove those abuses were, of course, problematic. But policies can be changed and must be changed.

To this Senator, what is far more distressing about each Executive overreach and each failure to defend the law is the damage that it does to the constitutional order. The damage those abuses inflict is far more difficult to undo than the policies that animated them. For as John Adams observed, "Liberty, once lost, is lost forever."

So the separation of powers is just as critical today as it was during the administration, the last administration. And the preservation of our constitutional order, including the separation of powers, is just as crucial to our liberty today as it was when our founding charter was first adopted.

No matter your politics, for all of these reasons you should be concerned about the preservation of our constitutional order and, most importantly, the separation of powers. And if you are concerned about these things, as you should be, I want you to meet Judge Neil Gorsuch.

Fortunately for every American, we have before us today a nominee whose body of professional work is defined by an unfailing commitment to these principles. His grasp on the separation of powers, including judicial independence, enlivens his body of work.

As he explains, "To the Founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design."

About the Executive, he writes that through "the hard-won experiences under a tyrannical king, the Founders found proof of the wisdom of a government of separated powers."

The judge's job, our nominee says, is to deliver on the promise that "all litigants, rich or poor, mighty or weak, will receive equal protection under the law and due process for their grievances."

The nominee before us understands that any judge worth his salt will "regularly issue judgments with which they disagree as a matter of policy, all because they think that is what the law fairly demands."

Fundamentally, that is the difference between a legislator and a judge. All of us should keep this in mind during the course of this hearing.

Judge, I am afraid over the next couple of days, you will get some questions that will cause you just to scratch your head. Truth be told, it should puzzle anyone who ever takes a civics class. We will hear that when you rule for one party and against another in a case, it means you must be for the winner and against the loser.

Senators will cite some opinions of yours, and then we will hear that you are for the "big guy" and against the "little guy." You will scratch your head when you hear this because it is as if you judges write the laws instead of us Senators.

But if Congress passes a bad law, as a judge, you are not allowed to just pretend that we passed a good law. The oath you take demands that you follow the law, even if you dislike the result.

So if you hear that you are for some business or against some plaintiff, do not worry. We have heard all of that stuff before. It is an old claim, from an even older playbook.

You and I and the American people know whose responsibility it is to correct a law that produces a result that you dislike. It is the men and women sitting here with me. Good judges understand this. They know it is not their job to fix the law. In a democracy, that right belongs to the people.

It is for this reason that Justice Scalia said this. "If you are going to be a good and faithful judge, you have to resign yourself to the fact that you are not always going to like the conclusion you reach. If you like them all the time, you are probably doing something wrong."

Judge, I look forward to hearing more about your exceptional record, and I look forward to the conversation we will all have about the meaning of our Constitution and the job of a Supreme Court Justice in our constitutional scheme.

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

Senator Feinstein.

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

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Judge Gorsuch, I want to welcome you and your family.

We are here today under very unusual circumstances. It was almost a year ago today that President Obama nominated Chief Judge Merrick Garland for this seat. Unfortunately, due to unprecedented treatment, Judge Garland was denied a hearing, and this vacancy has been in place for well over a year.

I just want to say I am deeply disappointed that it is under these circumstances that we begin our hearings. Merrick Garland was widely regarded as a mainstream moderate nominee. However, President Trump repeatedly promised to appoint someone in the mold of Justice Scalia and said that the nomination of Judge Gorsuch illustrates he is a man of his word.

For those of us on this side, our job is not to theoretically evaluate this or that legal doctrine or to review Judge Gorsuch's record in a vacuum. Our job is to determine whether Judge Gorsuch is a reasonable mainstream conservative, or is he not. Our job is to assess how this nominee's decisions will impact the American people and whether he will protect the legal and constitutional rights of all Americans, not just the wealthy and the powerful.

We hold these hearings not because court precedent and stare decisis are something average Americans worry about. We hold these hearings because the U.S. Supreme Court has the final word on hundreds of issues that impact our daily lives.

The Supreme Court has the final say on whether a woman will continue to have control over her own body or whether decisions about her healthcare will be determined by politicians and the Government. It decides whether billionaires and large corporations will be able to spend unlimited sums of money to buy elections and whether States and localities will be able to pass laws and make it harder for poor people, people of color, seniors, and younger people to vote.

It is the Supreme Court that will have final word on whether corporations will be able to pollute our air and water with impunity. Or whether the NRA and other extreme organizations will be able to block common sense gun regulations, including those that keep military-style assault weapons off our streets.

And it is the Supreme Court that will have the ultimate say on whether employers will be held accountable for discriminating against workers or failing to protect workers when they are harmed or killed on the job.

For example, last year Judge Gorsuch sat on a case that involved a truck driver who was stranded in the freezing cold for several hours after his trailer's brakes froze. He had no heat. In fact, it was so cold that the driver was having trouble breathing. His torso was numb, and he could not feel his feet.

Despite this, his employer directed him to wait for a repairman or else drive both the truck and the trailer. When no one came, the driver unhitched the trailer to search for assistance because driving with frozen brakes with a fully loaded trailer would have been too dangerous. A week later, he was fired.

After hearing the case, the administrative law judge ruled that firing the driver was a violation of the health and safety law intended to protect workers. The United States Department of Labor's Administrative Review Board and the Tenth Circuit agreed. Judge Gorsuch dissented and sided with the company.

In another case, Judge Gorsuch wrote a separate opinion, this time to challenge a longstanding legal doctrine that allows agencies to write regulations necessary to effectively implement the laws that Congress passes and the President signs. It is called the *Chevron* doctrine.

This legal doctrine has been fundamental to how our Government addresses real world challenges in our country and has been in place for decades. If overturned, as Judge Gorsuch has advocated, legislating rules are very difficult.

In fact, Congress relies on agency experts to write the specific rules, regulations, guidelines, and procedures necessary to carry out laws we enact. These are what ensure the Clean Air Act and the Clean Water Act to protect our environment from pollution.

They are the specific protections put in place by the FDA and the Agricultural Department that safeguard the health and safety of our food supply, our water, our medicines, and they are the details needed to support the infrastructure of our communities, our roads, highways, bridges, dams, and airports.

We in Congress rely on the scientists, biologists, economists, engineers, and other experts to help ensure our laws are effectively implemented. For example, even though Dodd-Frank was passed nearly 7 years ago to combat the rampant abuse that led to our

country's worst financial crisis since the Great Depression, it still requires over 100 regulations to be implemented by the Securities and Exchange Commission, the Commodities Futures Trading Commission, and other regulators in order to reach its full effectiveness as intended by Congress when it was passed.

Judge Gorsuch's position, were it to be adopted, would take away agencies' authorities to address these necessary details. Such a change in law would dramatically affect how laws passed by Congress can be properly carried out.

Two weeks ago, The Washington Post ran an op-ed written by a woman who desperately wanted to have a baby. She described how she and her husband went to great lengths for 4 years trying to get pregnant and were thrilled when they finally succeeded.

Tragically, after her 21-week check-up, they discovered her daughter had multicystic dysplastic kidney disease. They were told by three separate doctors that her condition was 100 percent fatal and that the risk to the mother was sevenfold if she carried her pregnancy to term.

The mother described their excruciating decision and the unforgiving process the couple endured to get the medical care they needed. The debate over *Roe v. Wade* and the right to privacy, ladies and gentlemen, is not theoretical.

In 1973, the Court recognized a woman's fundamental and constitutional right to privacy. That right guarantees her access to reproductive healthcare. In fact, the Supreme Court has repeatedly upheld *Roe*'s core finding, making it settled law for the last 44 years.

I ask unanimous consent, Mr. Chairman, to enter into the record the 14 key cases where the Supreme Court upheld *Roe*'s core holding and the total 39 decisions where it has been reaffirmed by the Court.

Chairman GRASSLEY. Without objection, it is included.

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

Senator FEINSTEIN. Thank you.

If these judgments, when combined, do not constitute super precedent, I do not know what does. Importantly, the dozens of cases affirming *Roe* are not only about precedent. They are also about a woman's fundamental and constitutional rights. *Roe* ensured that women and their doctors will decide what is best for their care, not politicians.

President Trump repeatedly promised that his judicial nominees would be pro-life and "automatically" overturn *Roe v. Wade*. Judge Gorsuch has not had occasion to rule directly on a case involving *Roe*. However, his writings do raise questions.

Specifically, he wrote that he believes there are no exceptions to the principle that "the intentional taking of a human life by private persons is always wrong." This language has been interpreted by both pro-life and pro-choice organizations to mean he would overturn *Roe*.

The Supreme Court is also expected to decide what kind of reasonable regulation States and localities can implement to protect our neighborhoods and schools from gun violence. In fact, just last month, the Fourth Circuit became the fifth appellate court to up-

hold a State's ban on assault weapons and large-capacity magazines under *Heller*.

These new cases, taken together, enable the enactment of prudent and legal legislation to restrict military-style weapons from flooding our streets. Now while Judge Gorsuch has not written decisions on the Second Amendment, he did write an opinion to advocate making it harder to convict a felon who illegally possessed a gun.

In this opinion, Judge Gorsuch argued against the Court's own precedent. Specifically, in this case, the defendant had been charged with attempted robbery in July of 2009. After pleading guilty, he was given probation.

However, "he was repeatedly both orally and in writing told that possession of a firearm" violated his probation, which would mean he could not "escape the consequences of his felony conviction." Less than a year later, he was apprehended by the police holding "a fully loaded Hi-Point .380-caliber pistol with an obliterated serial number" in clear violation of his probation.

Later, he argued he did not know he was a felon. Six Circuit Courts, including the Tenth, have determined that the Government does not need to prove a defendant knew he was a felon to convict for this crime. Despite this, Judge Gorsuch wrote two separate opinions that argued in favor of making it harder to convict felons who possess guns.

In one, he wrote that sometimes following precedent "requires us to make mistakes." I find this concerning. Following precedent in this case was not a mistake. It led to the conviction of a felon who should not have had a firearm.

Judge Gorsuch has also stated that he believes judges should look to the original public meaning of the Constitution when they decide what a provision of the Constitution means. This is personal, but I find this originalist judicial philosophy to be really troubling.

In essence, it means the judges and courts should evaluate our constitutional rights and privileges as they were understood in 1789. However, to do so would not only ignore the intent of the Framers that the Constitution would be a framework on which to build, but it severely limits the genius of what our Constitution upholds.

I firmly believe the American Constitution is a living document, intended to evolve as our country evolves. In 1789, the population of the United States was under 4 million. Today, we are 325 million and growing. At the time of our founding, African Americans were enslaved. It was not so long after, women had been burned at the stake for witchcraft, and the idea of an automobile, let alone the internet, was unfathomable.

In fact, if we were to dogmatically adhere to originalist interpretations, then we would still have segregated schools and bans on interracial marriage. Women would not be entitled to equal protection under the law, and government discrimination against LGBT Americans would be permitted.

So I am concerned when I hear that Judge Gorsuch is an originalist and a strict constructionist. Suffice it to say, and I con-

clude, the issues we are examining today are consequential. There is no appointment that is more pivotal to the Court than this one.

This has a real world impact on all of us. Who sits on the Supreme Court should not simply evaluate legalistic theories and Latin phrases in isolation. They must understand the Court's decisions have real world consequences for men, women, and children across our Nation.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Senator Hatch for 10 minutes.

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

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

Judge Gorsuch, welcome back to the Judiciary Committee. This will be more of an ordeal than your last. But your fitness for the appointment, it will be just as apparent.

I served on this Committee for 40 years, and some things in the confirmation process never change. The conflict over judicial appointments in general, and over this nomination in particular, is a conflict over the proper role of judges in our system of government.

I have long believed that the Senate owes the President some deference with respect to his qualified nominees. Qualifications for judicial service include legal experience, which summarizes the past, and judicial philosophy, which describes the present and anticipates the future.

Judge Gorsuch's legal experience is well known. My Democratic colleagues have referred to the American Bar Association's rating as the gold standard for evaluating judicial nominees. The ABA's unanimous "well qualified" rating for Judge Gorsuch confirms that he has the highest level of professional qualifications, including integrity, competence, and temperament.

Judicial philosophy is both the more important qualification and the more challenging to assess. It refers to a nominee's understanding of the power and proper role of judges in our system of government. Over the last several weeks, I have addressed this issue on the Senate floor and in opinion pages around the country by contrasting what I have called impartial judges and political judges.

An impartial judge focuses on the process of interpreting and applying the law according to objective rules. In this way, the law, rather than the judge, determines the outcome.

A political judge, in contrast, focuses on a desired result and fashions a means of achieving it. In this way, the judge, rather than the law, often determines the outcome.

In my experience, a Supreme Court confirmation process reveals the kind of judge that Senators want to see appointed. A Senator, for example, who wants to know which side a nominee will be on in future cases or who demands that judges be advocates for certain political interests, clearly has a politicized judiciary in mind.

The New York Times reported last week that the most prominent lines of attack against this nomination will be that Judge Gorsuch is "no friend of the little guy." Something is seriously wrong when

the confirmation process for a Supreme Court Justice resembles an election campaign for political office.

This dangerous approach contradicts the oath of judicial office prescribed by Federal law. When taking the seat on the U.S. Court of Appeals in 2006, Judge Gorsuch swore to administer justice without respect to persons and to impartially discharge his judicial duties.

His opponents today demand in effect that he violate that oath. Advocates of such a politicized judiciary seem to think that the confirmation process requires only a political agenda and a calculator.

When a nominee is a sitting judge, they tally the winners and losers in his past cases and do the math. If they like the result, it is thumbs up on confirmation. If they do not, well, it is thumbs down.

What if, for example, Judge Gorsuch's record on the appeals court was as follows? He voted against the plaintiff in 83 percent of immigration cases, against the defendant in 92 percent of criminal cases, denied race claims more than 80 percent of the time, and agreed with other Republican-appointed judges 95 percent of the time.

I can just hear the cries of protest, accusations that he favors certain parties and is hostile to others and threats of filibuster. That is, in fact, the record of a U.S. Circuit Court Judge nominated to the Supreme Court, but not the one before us today. It is the record of Judge Sonia Sotomayor, as described by Senator Charles Schumer at her July 2009 confirmation hearing.

Not only did he champion her nomination, but he offered that statistical summary of her record as proof that, as he put it, "She is in the mainstream." Oh, what a difference an election makes.

Alexander Hamilton wrote about the importance of judicial independence, what Chief Justice William Rehnquist later called the "crown jewel of our judicial system." Today, in a bizarre twist on that principle, Judge Gorsuch's opponents say that the only way for him to prove his independence is by promising to decide future cases according to certain litmus tests.

In other words, judicial independence requires that he be beholden to them and their political agenda. If simply describing that unprincipled position is not enough to refute it, the confirmation process is in more trouble than I thought.

Judge, I know that the integrity of the judiciary, fairness to the litigants who come before you, and your own oath of office are your highest priorities. You will be in good company by resisting efforts to make you compromise your impartiality.

When President Lyndon Johnson nominated Judge Thurgood Marshall to the Supreme Court, Senator Ted Kennedy, my friend who would later chair this Committee, said, "We have to respect that any nominee to the Supreme Court would have to defer any comments on any matters which are before the Court or very likely to appear before the Court."

Now that was 50 years ago. When Justice Ruth Bader Ginsburg appeared before this Committee in 1993, she said, "A judge sworn to decide impartially can offer no forecast, no hints, for that would

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

Now in a speech earlier this year, Justice Sotomayor said this. "What you want is for us to tell you how, as a judicial nominee, we are going to rule on the important issues you find vexing. Any self-respecting judge who comes in with an agenda that would permit that judge to tell you how they will vote is the kind of person you do not want—you do not want as a judge."

Now I will close by reading from the letter we received from dozens of Judge Gorsuch's Harvard Law School peers. After describing how they were of all political, ideological, religious, geographical, and social stripes, the signers wrote, "What unites us is that we attended law school with Judge Neil Gorsuch, a man we have known for more than a quarter century, and we unanimously believe that Neil possesses the exemplary character, outstanding intellect, steady temperament, humility, and open mindedness to be an excellent addition to the U.S. Supreme Court."

I agree with that appraisal by people from all walks of life, from different political views, people who agree with you and do not agree with you, but acknowledge that you are a great judge.

And I look forward to this hearing, Mr. Chairman. Thank you.

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

Chairman GRASSLEY. Yes, thank you, Senator.

The Senator from Vermont.

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

Senator LEAHY. Thank you, Mr. Chairman.

I did find it interesting the Senator from Utah spoke about Justice Sotomayor, saying that these are the reasons her nomination—the speech, these are the reasons why Republicans should vote for her and Democrats vote against her. I would note that, of course, that Senator Hatch voted against her.

Today marks the first time the Senate Judiciary Committee has met publicly to take action on a Supreme Court vacancy that resulted from Justice Scalia's death 13 months ago. It was just hours after we learned of Justice Scalia's sudden passing the Republican majority leader declared that the Senate would not provide any process to any nominee selected by President Obama, despite the President having nearly a year left in his term.

This was an extraordinary blockade. It was totally unprecedented in our country's whole history. Some liken it to the action of the tyrannical kings who claim that they have sole control, as one of our Senators referred to here a few minutes ago, but it was a blockage backed by then-candidate Donald Trump.

Committee Republicans met behind closed doors and declared that they would surrender the independence of this Committee to do the majority leader's bidding, and they ignored the Constitution in the process. In fact, this unprecedented obstruction is one of the greatest stains on the 200-year history of this Committee.

Remember, the Judiciary Committee once stood against a Court-packing scheme of a Democratic President that would have eroded judicial independence, and that was a proud moment. Now Repub-

licans on this Committee are guilty of their own Court-unpacking scheme, and the blockade of Chief Judge Merrick Garland was never grounded in principle or precedent.

While Senate Republicans were meeting in backrooms to block President Obama's nominee, extreme special interest groups were also meeting in private to vet potential Supreme Court nominees for then-candidate Donald Trump. I do not know of any other Supreme Court nominee who was selected by interest groups rather than by a President in consultation with the Senate, as required by the Constitution.

Now Senate Republicans made a big show last year about respecting the voice of the American people in this process. Now they are arguing that the Senate should rubberstamp a nominee selected by extreme interest groups and nominated by a President who lost the popular vote by nearly 3 million votes.

That President has demonstrated hostility to our constitutional rights and values. He has leveled personal attacks against Federal judges and career prosecutors who dare to see his promised Muslim ban for what it is, unconstitutional.

He called our constitutionally protected free press "the enemy of the American people." When the President's chief of staff says the nominee before us has the vision of Donald Trump, well, that raises questions for people who have actually read the Constitution or care about the rights it protects.

More than perhaps any confirmation hearing for the last 30 years, I expect this nominee's judicial philosophy will play a central role. Now Judge Gorsuch has spent more than a decade on the Federal bench. He graduated from Harvard Law School. He clerked for the Supreme Court. He served in the Department of Justice. He received a unanimous "well qualified" rating from the American Bar Association. All things very positive for a Supreme Court nominee.

And if all those things I have read were a sufficient reason to confirm a nominee to the Supreme Court, of course, Chief Judge Merrick Garland, who had exactly the same qualifications but was refused by the Republicans, would be sitting on the Court today. That is why philosophy becomes important.

In contrast to past nominees like John Roberts, whose judicial philosophy was not clearly articulated when he appeared before this Committee, Judge Gorsuch appears to have a comprehensive originalist philosophy. It is the approach taken by jurists such as Justice Scalia or Justice Thomas, former Judge Bork.

While it has gained some popularity within conservative circles, originalism, I believe, remains outside the mainstream of modern constitutional jurisprudence. It has been 25 years since an originalist has been nominated to the Supreme Court. Given what we have seen from Justice Scalia and Justice Thomas and Judge Gorsuch's own record, I worry that it goes beyond being a philosophy and that it becomes an agenda.

We know that conservative groups that have vetted Judge Gorsuch, and the millionaires who fund them, have a clear agenda—one that is anti-choice, anti-environment, pro-corporate. And these groups are obviously confident that Judge Gorsuch shares their agenda.

The first person who interviewed Judge Gorsuch in this process explained these groups did not ask, who is a really smart lawyer who has been really accomplished? Instead, they saw a nominee who understands these things like we do. After all, Judge Gorsuch has been described by a former leader of the Republican Party as a true loyalist and a good, strong conservative.

Now the concerns I have about Judge Gorsuch's judicial philosophy and the process by which he was selected, the views of the President who nominated him, I hope and expect, Judge, that you will answer my questions and the questions of all of the Senators, both parties, as clearly as possible.

You know, it is not enough to say in private that the President's attacks on the judiciary are disheartening. I need to know that you understand the role of the courts in protecting the rights of all Americans. I need to know that you could be an independent check and balance on the administration that has nominated you and on any administration that might follow it.

Judge Gorsuch, these hearings, occurring the week after Sunshine Week, are the first opportunity for the American people to hear your views on the role of the courts and the meaning of our Constitution. Like the Founders, who did not know what legal questions would be presented in the decades to come, they set this constitutional process. It is important to understand or to determine whether you understand how the Court has a profound impact on small businesses and workers, on law enforcement and victims, on families and children across America.

It is not contrary to the duties and obligations of a Supreme Court Justice to consider the effects of their rulings. The Court's aspiration, after all, is to provide equal justice under law. That is inscribed in Vermont marble over the doorway to the Court.

Judge Gorsuch, these hearings will help us conclude if you are committed to the fundamental rights of all Americans. Will you allow the Government to intrude on Americans' personal privacy and freedom? Will you elevate the rights of corporations over those of real people? And will you rubberstamp a President whose administration has asserted that Executive power is not subject to judicial review?

It is important to know whether you serve with independence or as a surrogate to the President who nominated you or to the special interest groups that provided that President with your name.

Now I approach these hearings with these thoughts in mind. I can honestly say I have yet to decide how I am going to vote on this nomination. Unlike those who blocked the nomination of Chief Judge Merrick Garland, I believe it is my constitutional responsibility to fairly evaluate a President's nominee to the Supreme Court.

I have voted for Supreme Court nominees, and I have voted against others. I recall going on the floor of the Senate right after our Democratic leader said he would vote against John Roberts for Chief Justice. I was the next speech. I said I would vote for him.

But I am going to base my determination on the full record at the conclusion of these hearings, just as I have done for the 16 previous Supreme Court nominations I have been in the Senate.

The Supreme Court is the guarantor of the liberties of all Americans. Judge Gorsuch, when you took the oath to sit on the Federal bench, you spoke these following words that are in a judicial oath. "I will administer justice without respect to persons and do equal right to the poor and to the rich."

If confirmed, you have to be a Justice for all Americans, not for the special interests of a few. You know, I cannot think of any time in our Nation's history when that commitment is more important than it is now. That is what I have been thinking of all weekend long.

The stakes for the American people could not be higher. We know that in Vermont, but America knows that.

I thank you, Mr. Chairman.

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

Chairman GRASSLEY. Yes, and thank you, Senator Leahy.

Now to Senator Cornyn.

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

Senator CORNYN. Thank you, Mr. Chairman.

Judge Gorsuch, welcome to you and your family. As you can already tell, this is going to be a much different experience than you had 10 years ago when you were confirmed by voice vote of the entire United States Senate to the Tenth Circuit Court of Appeals to a life tenure position.

The Senate Judiciary Committee undertakes no task more important than the one before us, considering a nominee to the U.S. Supreme Court. As you know, historically, these used to be pretty routine. But that is until judges became seen as policymakers rather than as impartial interpreters and appliers of the law.

The Nation is watching, and I think that is a really good thing. At a time when fewer and fewer American citizens know our founding story and the principles upon which it is based, I think this is a wonderful opportunity for a teachable moment, and I would encourage you to take every opportunity to engage in that.

We are considering a nominee, of course, left by the death of Justice Antonin Scalia. And as we have heard before, Justice Scalia was unique. His wit and style brought the Constitution to life for lawyers in their first year of law school and for the American public at large.

He led the most important legal revolution in our lifetimes, tethering judicial interpretation to the written text. What a concept.

This was part of the broader project which the nominee before us, Judge Neil Gorsuch, described as "reminding us of the differences between judges and legislators. That judges should strive to apply the law as it is, not to decide cases based on their own moral convictions or the policy consequences they feel might serve society best."

In one dissent, Justice Scalia wrote along similar lines that, "If our pronouncements of constitutional law rely primarily on value judgments, then a free and intelligent people's attitude toward us can be expected to be quite different. The people know that their

value judgments are quite as good as those taught in any law school and perhaps better."

The Framers, I believe, shared Justice Scalia's and your modest view of the role of judging. Alexander Hamilton wrote, for example, "The judiciary may truly be said to have neither force nor will, but merely judgment."

After Justice Scalia's death, Senate Republicans decided to let the American people in this last Presidential election choose his successor. In Judge Gorsuch, President Trump chose one of the most accomplished lawyers and jurists of his generation. As we have heard, he is a husband and a father of two daughters, lives in his native Colorado and, if confirmed, would be our only Western Justice.

Judge Gorsuch attended Columbia and Harvard Law School and, of course, got his doctorate at Oxford. After clerking for two Supreme Court Justices, Byron White and Anthony Kennedy, he went to work for a startup law firm that grew to be one of the Nation's most prestigious, where he spent a decade, as he put it, working in the trenches of the law.

As a recovering lawyer and judge myself, I think it is critically important, Judge, it means that you understand better than most the impact of your decisions, actually having represented real, live clients. The law is not just an academic or intellectual exercise. It has real consequences for real people, and I would encourage you to talk about those real people that you came in contact with during your legal and judicial career.

After serving his country at the Justice Department, Judge Gorsuch, as I mentioned earlier, was nominated and confirmed to the Tenth Circuit. Not one of our Democratic colleagues then in the Senate opposed Neil Gorsuch for the Tenth Circuit Court of Appeals because there was simply no reason to do so.

In the decade since, Judge Gorsuch has written hundreds of opinions on the Constitution and innumerable laws. He has demonstrated that he actually reads the text carefully to get the right result. I am reminded that there is a difference between what we sometimes loosely call a strict constructionist and a textualist, and I would invite you to make that point during some of your testimony.

As you can see here today, his jurisprudence reflects brilliance and humility, the humility of a man committed to the Constitution and the law. That body of work is the best guide for the kind of judge Judge Gorsuch will be.

Answers to questions posed during these hearings we have already heard about specific issues cannot and should not be a guide. You are not a politician running for election, Judge, as you know.

In the dissent I mentioned earlier, Justice Scalia warned that "confirmation hearings for new Justices should deteriorate into question and answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights." It should not be the forum in which you seek the nominee's commitment to support or oppose them.

So we are not here to ask you, even though some might, how you will vote in specific cases. And it would be wrong for you to prejudge those cases, as you know.

And that is the same reason why, for example, Ruth Bader Ginsburg, during her nomination hearing, said, "A judge sworn to decide impartially can offer no forecast, no hints, for that would not only show disregard for the specifics of a particular case, it would display disdain for the entire judicial process."

Can you imagine what a litigant might think if the judge before whom he or she was to present their case said before they heard a word how they were going to decide the case? That is why it is improper for you, as you know, to prejudge cases in your testimony before the Committee, and our colleagues know that as well. But I expect them to ask a few questions nonetheless.

Well, lately, we have heard from some that they should criticize you for failing to rule for a sympathetic constituency in one case or another. But of course, as you know, Judge, if you follow the law and the facts wherever it may lead, sometimes it is for the police. Sometimes for a criminal defendant. Sometimes it is for a corporation. Sometimes it is for an employee. Sometimes it is for the Government. Sometimes it is against the Government.

That is how the rule of law works, and that is good for all Americans. One law professor at Harvard wrote, following the law regardless of the parties is, in the long run, it protects the little guy a lot better than a system rigged to favor one side.

Because of your qualifications and a demonstrated record of following the law, other than a few special interest groups, I believe you have got a broad spectrum, really surprisingly broad spectrum of people supporting your nomination. One of your colleagues on the left wrote in The Washington Post, "The Senate should confirm Judge Gorsuch because there is no principled reason to vote no."

Another liberal constitutional scholar joined a letter that stated, "Judge Gorsuch has the unusual combination of character, dedication, and intellect that will make him an asset on our Nation's highest court."

President Obama's Solicitor General, from whom this Committee will hear, wrote in The New York Times that "liberals should back Judge Gorsuch because he would live up to the promises to administer justice with respect to persons and to do equal right to the poor and to the rich."

So, Mr. Chairman, the list goes on and on. So I am very pleased the American people are about to learn why President Trump chose you as his nominee for the Supreme Court. I look forward to hearing from Judge Gorsuch, and I would encourage my colleagues to carefully consider the nominee on the merits and nothing else.

Thank you.

Chairman GRASSLEY. Thank you, Senator Cornyn.

Now, Senator Durbin.

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

Senator DURBIN. Thanks, Mr. Chairman. Judge Gorsuch, welcome to you and your family.

I have often read stories about earlier Supreme Court nominees and how little politics played any role in the selection and vetting of the nominees. Those of us on the Democratic side, as you can hear, are frequently warned not to let politics be part of this deci-

sion. When I consider the path to this historic hearing, this plea rings hollow.

The journey began with the untimely death of Justice Scalia in February 2016. President Obama met his constitutionally required obligation by nominating Judge Merrick Garland to fill that vacancy in March 2016. Senate Republican Leader Mitch McConnell announced that for the first time in the history of the United States Senate, he would refuse Judge Garland a hearing and a vote. He went further and said he would refuse to even meet with the judge.

It was clear that Senator McConnell was making a political decision, hoping a Republican President would be elected. He was willing to ignore the tradition and precedent of the Senate so that you could sit at this witness table today.

In May and September 2016, Republican Presidential candidate, Donald Trump, released a list of 21 names, including yours, that he would consider to fill the Scalia vacancy. President Trump thanked the Federalist Society and the Heritage Foundation, two well-known Republican advocacy groups, for providing the list that included your name.

Your nomination is part of a Republican strategy to capture our judicial branch of government. That is why the Senate Republicans kept the Supreme Court seat vacant more than a year, and why they left 30 judicial nominees, who had received bipartisan approval of this Committee, to die on the Senate calendar as President Obama left office.

Despite all of this, you are entitled to be judged on the merits. The Democrats of the Senate Judiciary Committee will extend to you a courtesy which Senate Republicans denied to Judge Garland: a respectful hearing and a vote.

Judge Gorsuch, you have been nominated to a lifetime appointment on the highest court in the land, and this Court has the final say on matters of fundamental importance affecting all Americans. You have a lengthy record before the Tenth Circuit, and we will ask many questions. We have found in the past that nominees try their best to dodge most of the questions, but it is our job to try to still seek the truth.

At the nomination hearing of Justice Ruth Bader Ginsburg, my friend and predecessor, Senator Paul Simon, set forth the standard for Supreme Court nominees. I have noted this with each Supreme Court nominee that I have questioned. He said, "You face a much harsher judge than this Committee, and that is the judgment of history, and that judgment is likely to revolve around the question, did you restrict freedom or did you expand it."

Let me be clear. When I talk about expanding freedom, I am not talking about freedom for corporations. "We the people" does not include corporations. Senator Simon could never have imagined that the Supreme Court would give corporations rights and freedoms that were previously reserved only for individuals under the Constitution, and yet that is where we find ourselves with the Roberts Court.

It is often said the Roberts Court is a corporate Court because of its pro-business tilt. A study by the Constitutional Accountability Center found that the Court ruled for the U.S. Chamber of Com-

merce 69 percent of the time. The Court has certainly favored big business on issues like forced arbitration, corporate price fixing, workplace discrimination cases, just to name a few.

But the Roberts Court has gone further than just ruling the way corporate America wants. In the 2010 *Citizens United* case, the Supreme Court held for the first time that corporations have the same rights as living, breathing people to spend money on elections, and that was followed in 2014 by the *Hobby Lobby* decision, which allowed for-profit corporations to discriminate against employees based on the corporation's assertion of religious belief.

I do not recall ever seeing a corporation in the pews of Old St. Patrick's Church in Chicago. Our Founders never believed that corporations were endowed with certain inalienable rights, but were seeing the Supreme Court expand the rights of this legal fiction, a corporation, at the expense of the voices and choices of the American people. This strikes at the heart of the Supreme Court's promise to provide equal justice under the law.

Judge Gorsuch, you took part in that *Hobby Lobby* case when it was before the Tenth Circuit. As I read the case, I was struck by the extraordinary, even painful, lengths the court went to protect the religious beliefs of the corporation and its wealthy owners, and how little attention was paid to the employees, to their constitutionally protected religious beliefs, their choices as individuals, and the burdens that the court's decision placed on them.

I want to hear from you about a pattern I have seen in your decisions on the Tenth Circuit. In case after case, you either dismissed or rejected efforts by workers and families to recognize the rights—that recognized their rights or defend their freedoms. Cases like *TransAm Trucking*, which we have already spoken to.

Alphonse Maddin. I had a chance to sit down with him just last week. He was the truck driver from Detroit who was driving around Chicago in the middle of January when a malfunction in his trailer froze the brakes, and he was forced to pull over on the side of the road. Al sat there on his cell phone with the dispatcher for the truck company, who told him do not leave this truck no matter what, and if you do, pull the trailer with you.

Well, that was a big problem because the brakes were frozen, and it would have been a safety hazard. And so, he waited and waited, and the hours passed, and he started feeling numb and sick. You see, there was no heater in the truck, and, according to his recollection, it was so cold. It was 14 degrees below.

Not as cold as your dissent, Judge Gorsuch, which argued that his firing was lawful. You cited a strict textualistic argument to make your point, but you chose the text that you focused on. Thank goodness the majority in this case pointed out that common sense and the Oxford Dictionary supported the majority view.

Compass Environmental Incorporated, another one of your cases. Your dissent would have vacated a penalty against an employer who failed to train construction employee Christopher Carder to avoid the electrocution hazard that killed him. *Strickland v. UPS*, your dissent would have kept *Carol Strickland*'s sex discrimination case from going to a jury, even though your fellow judges said she provided ample evidence that she was regularly outperforming her male colleagues and treated less favorably.

I want to hear more about your views on fundamental individual rights that the Supreme Court is tasked to defend: the right to privacy, the right for all faiths to practice their religion, the right to vote, equal protection, and the rights of women. The Committee has received two letters from students who you taught last year that raised some serious concerns. Tomorrow we will get to the bottom of it, I hope.

We have learned you were an aggressive defender of Executive power during the time of the Bush administration. In June 2004, after the Abu Ghraib torture scandal, I authored the first bill to ban cruel, inhuman, and degrading treatment of detainees. That legislation became the McCain Torture Amendment, which passed the Senate in December 2005 by an overwhelming 90–to–9 vote. But when President Bush signed the Amendment into law, he issued a signing statement claiming he had the authority to ignore the McCain Amendment. It turns out, you were deeply involved in this unprecedented signing statement. We need to know what you will do when you are called upon to stand up to this President or any President if he claims the power to ignore laws that protect fundamental human rights.

You are going to have your hands full with this President. He is going to keep you busy.

It is incumbent on any nominee to demonstrate that he or she will serve as an independent check or balance on the presidency. There are some warning flags. February 23rd, White House chief of staff, Reince Priebus, said, "Neil Gorsuch represents the type of judge that has the vision of Donald Trump." I want to hear from you why Mr. Priebus would say that. Make no mistake, when it comes to the treatment of workers, women, victims of discrimination, people of minority religious faith, and our Constitution, most Americans question whether we need a Supreme Court Justice with the vision of Donald Trump.

With my constitutional responsibility firmly in mind, I look forward to questioning tomorrow. Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator Durbin. Now, the Senator from Utah.

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

Senator LEE. Thank you, Mr. Chairman, and thank you Judge Gorsuch. Welcome to the Committee. I also want to welcome your friends, family members, supporters, former colleagues, and people you have worked with over the years who have come to show their support. I know they are proud of you, and they are proud of you not just because of what you have done and what you have accomplished professionally, but also because of who you are personally: a man of integrity, a man of great accomplishment, a man of character, and a man of faith.

Everyone knows that a Supreme Court confirmation hearing can be dramatic, even emotional at times. The stakes are high. As Senators, we understand that there are a few things that are more important than the obligation that we are performing here than the

duty that we are carrying out in connection with this process. These days it seems like standing for a confirmation hearing in the United States Senate after being nominated to the Supreme Court of the United States can appear a little bit like running for political office.

As we have seen over the last few weeks, there are interest groups out there, some supporting you, some opposing you, out there waging campaigns almost as if they were running a campaign for someone pursuing public office. Maybe that is why, especially on this side of the dais, it can be easy to forget that a nominee is an ordinary citizen, perhaps not ordinary in the usual sense, but at least that person is not a politician.

You, sir, are not a politician, which means that the acrimony, the duplicity, the ruthlessness of today's politics are still a little foreign to you, are still quite unfamiliar to you. I hope that they will remain unfamiliar to you.

In a former life when I was a practicing attorney, I had the good fortune of appearing in front of you on the Tenth Circuit, and so I know from my own personal experience that you are one of the best judges in the country. You come to oral argument prepared, and you ask fair, probing questions that are designed to get at one thing and one thing only, which is what the law says and what the law requires in each individual case, depending on the facts and circumstances of that case.

You are not there to promote a personal agenda or a political agenda, and you are not there to grandstand. You are there to listen to both sides of the argument in the case. You write thoughtful and rigorous opinions. They are careful, and they are well reasoned. And they are even interesting and pleasant to read, which is very difficult to achieve in the world of appellate litigation. Now, I know I am easily entertained.

[Laughter.]

Senator LEE. But I find your opinions particularly interesting.

You have the résumé of a Supreme Court Justice, but I think what is most impressive and, for our purposes, what is most important about your career and about the approach you take to the law, is your fierce independence from partisan influence and from any personal biases that you might otherwise be inclined to harbor.

The judiciary is set apart from and, in a way, set far above the other branches in our republic, the other organs of our constitutional system, specifically because we allow it to invalidate and interpret the actions of the elected branches. So, we have got two branches of government that are political in that they are run by people who are elected and stand for re-election at regular intervals, thus, making themselves directly accountable to the American people.

Our confidence in our entire system, including our confidence in the American judiciary, depends entirely on judges just like you, judges who are independent and whose only agenda is getting the law right, regardless of whether any particular judge, or any particular litigant, or any particular member of the public like—might like or dislike the outcome in that case. You are essential to making us accountable because unless you do your job right, were not held accountable because our laws do not stand. That is what

makes your role, and your particular unique approach, and your particular unique commitment to this so important.

Now, I want to take a moment to address some of the unique criticisms that you yourself, Judge Gorsuch, might be facing this week. I am sure that during this hearing some of my colleagues might claim that you are outside the mainstream. In fact, we have sadly heard some of that already today. We have heard arguments to the effect that you are an originalist, and we have heard assertions to the effect that originalism is somehow so far out of the mainstream, that it is dangerous.

Well, I would remind my colleagues who have raised such concerns or who might be harboring them, that if this is the case, then they are going to have to acknowledge the fact that there is a pretty broad spectrum of people on the U.S. Supreme Court they might be painting with that brush.

Justice Elena Kagan, before she was Justice Kagan, when she was standing before this Committee, in the second day of her confirmation hearings said, referring to the Founding Fathers and the need to figure out what the Founding Fathers understood about particular words, about how those particular words were used by the founding generation, said, "Sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do. In that way, we are all originalists." That was on June 29th, 2010, before this Committee.

Moreover, these out-of-the-mainstream arguments, out-of-the-mainstream approach, for addressing you, referring to you as an originalist, just does not stick. This is not a description that was attributed to you the last time you stood before this Committee and went through a confirmation process. Nowhere in the record is there any reference to you being outside the mainstream. In fact, your nomination to the United States Court of Appeals for the Tenth Circuit was so remarkably uncontroversial that one Senator and only one Senator—Senator Lindsey Graham from South Carolina—was the only Member of this Committee who even bothered to show up at your confirmation hearing.

Now, I would have been there, too, Judge. I was not yet a Member of the United States Senate.

[Laughter.]

Senator LEE. You were confirmed unanimously by voice vote without a single "no" vote.

I am sure that some of my colleagues will question your independence because, in their view, perhaps you have not sufficiently criticized the comments made by some of today's politicians. Personally, I think you have made your views on this subject very clear. I am sure some of my colleagues will complain that you are not providing any hints as to how you might rule in any particular case. But that, however, is a reason for your confirmation, certainly not against it.

In our system, judges do not provide advisory opinions. They do not make legislation, they do not legislate, they do not make law, they do not set policy, in the same sense that those things are made in the political branches. They decide cases and controversies only after each side has had the opportunity to make its case be-

fore the bench, and they do so outside the realm of political influence.

In an odd twist, some of the same colleagues who will question your independence will also push you to answer questions that you simply cannot. I am sure that some of my colleagues will pick apart some of your rulings, and they will try to say that you are hostile to particular types of claims or to particular plaintiffs. I do not think it is productive to evaluate someone's judicial record by looking at who wins or who loses in his courtroom, at least outside the context of evaluating how the law was interpreted in that case.

It goes without saying that in our system you face the same burden of convincing a court, regardless of who you are. And judges do not decide cases—they certainly should never decide cases—based on their own personal preferences. But to my colleagues who go down that road, the record shows with abundant clarity that you apply the law neutrally in all cases without regard to the parties.

Finally, I would urge my colleagues to keep in mind that while Judge Gorsuch's reputation will not be affected by how we treat his confirmation, the same cannot always be said of the Senate. The night Judge Gorsuch was nominated, he said, "The U.S. Senate is the greatest deliberative body in the world." I tend to agree, but these days it seems like this title is more of a challenge than an observation. It is more of an aspiration than a present sense description of reality. So, I hope we prove you right this week.

Thank you very much, and I really look forward to hearing answers to the questions we will raise to you.

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

Chairman GRASSLEY. Thank you, Senator Lee. Now, Senator Whitehouse.

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

Senator WHITEHOUSE. Judge Gorsuch, welcome. As we discussed when we met, the question that faces me is, what happens when the Republicans get five appointees on the Supreme Court? I cannot help but notice the long array of 5–to–4 decisions, with all the Republican appointees lining up to change the law to the benefit of distinct interests: Republicans at the polls and big business pretty much everywhere.

Let us look at the 5–to–4 decisions, first helping Republicans at the polls. All the Republican appointees' 5–to–4 decisions on election law favor Republicans at the polls, 6–to–0. Helping Republicans gerrymander, paving the way for the Republican red map plan that won the House against the American majority in 2012, *Gobeille*, 5–to–4, all the Republican appointees.

Helping Republican legislatures keep Democrat-leaning minorities away from the polls with targeted voter suppression laws, *Shelby County*, 5–to–4 all the Republicans; *Bartlett v. Strickland*, 5–to–4, all the Republicans. Helping corporate money flood elections and boost Republican candidates, *McCutcheon*, 5–to–4, all the Republicans, counting the concurrence; *Bullock*, 5–to–4 all the Republicans. And the infamous *Citizens United* decision, 5–to–4 all the Republicans. In each area, the Court made new law, 5–to–4,

and each decision predictably helped Republicans win elections. At 6–to–0, it is a partisan route.

Then look at cases that pit corporations against human beings. All the 5–to–4 Republican appointee decisions line up to help corporations against humans. *Citizens United* and the political money decisions should, again, count here. All three of them, 5–to–4, all the Republicans. Then come decisions to protect corporations who have harmed their employees. In pay discrimination, *Ledbetter*, 5–to–4 all the Republicans. In age discrimination, *Gross*, 5–to–4 all the Republicans. In harassment cases, *Vance*, 5–to–4, all the Republicans. In anti-retaliation cases, *Nassar*, yes, you guessed it, 5–to–4, all Republicans.

Then there are the decisions that protect corporations from class action lawsuits. *Wal-Mart v. Dukes*, 5–to–4, and Comcast, 5–to–4, both all Republicans. Then there are decisions that help corporations steer customers away from juries and into corporate-friendly mandatory arbitration. *Concepcion* and *Italian Colors Restaurant*, both 5–to–4, both all Republicans.

The *Iqbal* decision, 5–to–4, all Republicans, helped bar the courthouse door for all types of plaintiffs. All of this helps keep corporations away from juries, the one element of government hardest for corporations to control. Indeed, as you know, tampering with a jury is a crime.

The Court also helps big business against unions. *Harris v. Quinn*, 5–to–4, all Republicans. Last year *Friedrichs* was teed up as a 5–to–4 body blow against unions when Justice Scalia died. With a new 5–to–4 Court, they will be back.

Throw in *Hobby Lobby*. Corporations have religious rights that supersede healthcare for their employees, 5–to–4, all Republicans. Add *Heller* and *McDonald*, reanimating for gun manufacturers a legal theory a former Chief Justice once called a fraud, 5–to–4, all Republicans.

Help insulate investment bankers from fraud claims? Why not? *Janus Capital Group*, 5–to–4, all Republicans. *Chamber of Commerce v. EPA*, gave corporate polluters an unprecedented victory, again 5–to–4, all Republicans.

That is an easy 16–to–0 record for corporations against humans. To me, every time seems like a lot.

There is no coincidence here. Big business has law groups out trolling for test cases to go get those cases before the friendly Court. The Republican politico-industrial complex piles in with amicus briefs and floods to tell the Republican appointees on the Court what it wants. Republican Justices are even starting to give hints so big business lawyers can rush to get certain cases up pronto to the Court.

It is kind of a machine. Special interests set up and fund front groups. The front groups appear as amici before the Court. The amicus briefs or the front groups tell the Court what the special interests want. The Court follows the amicus briefs. The decision benefits the special interests, and the special interests pour more money to the front groups. On it goes like turning a crank. The biggest corporate lobby of them all is winning better than two–to–one at the Court.

This 5–to–4 rampage is not driven by principle. Over and over, judicial principles, even so-called conservative ones, are overrun on the Court's road to the happy result.

Stare decisis, that is a big laugh. These are law-changing decisions, many upending a century or more of law and precedent. Textualism. The Second Amendment uses the military term, "arms," and talks about militias, but never mind that when the gun lobby wants something. Originalism, there is a particularly good one. Find me a Founding Father who planned a big role for business corporations in American elections, or one who would have countenanced the steady strangulation of the civil jury without so much as a mention of the Seventh Amendment.

The *Citizens United* majority even fiddled with Court procedure to get to the decision it wanted to deliver, dodging its way around a record that would have belied their findings of fact, setting aside that their findings of fact were factually preposterous, as events have shown, and that appellate courts are not even supposed to make findings of fact.

It is not just us who notice. Top writers and scholars describe the Roberts Court as essentially a delivery service. Jeffrey Toobin wrote in 2009, "Even more than Scalia, Chief Justice Roberts has served the interests and reflected the values of the contemporary Republican Party." Linda Greenhouse in 2014, "I am finding it impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda." Norm Ornstein has described what he called the new reality of today's Supreme Court: "It is polarized along partisan lines in a way that parallels other political institutions and the rest of society in a fashion we have never seen."

Studies of the Court's decisions show it is the most corporate-friendly Court in modern history, with Justices Roberts and Alito vying to be the most corporate-friendly Justice. And the American public knows something has gone wrong at the Court. A 2014 poll revealed that a majority of Americans think a person will not get a fair shake in this Court against a corporation.

Now, where do you fit in? When *Hobby Lobby* was in the Tenth Circuit, you held for a corporation having religious rights over its employees' healthcare. Your record on corporate versus human litigants comes in by one count at 21–to–2 for corporations. Tellingly, big special interests and their front groups are spending millions of dollars in a dark money campaign to push your confirmation.

We have a predicament. In ordinary circumstances, you should enjoy the benefit of the doubt based on your qualifications, but several things have gone wrong that shift the benefit of the doubt. One, Justice Roberts sat in that very seat, told us he would just call balls and strikes, and then led his five-person Republican majority on that activist 5–to–4 political shopping spree. Once burned, twice shy. Confirmation etiquette has been unhinged from the truth.

Two, Republican Senators denied any semblance of due legislative process to our last nominee, one I would say even more qualified than you, and that is saying something. Why go through the unprecedented political trouble to deny so qualified a judge even a hearing if you do not expect something more amenable to come

down the pike? Those political expectations also color the benefit of the doubt.

Finally, the special interests who have done so well in that 5–to–4 extravaganza of decisions are now spending millions and millions of dollars campaigning to push your nomination. They obviously think you will be worth their money. These special interests also supported the Republican majority keeping this seat open.

I am afraid at all costs, whoever now sits in that seat, the benefit of the doubt to answer this question. Will you saddle up with the other Republican appointees and launch the Court 5–to–4 again on another massive special interest and Republican election spree?

I hope whatever we may disagree about on this Committee, we can at least agree that we cannot have a Court where litigants in these 5–to–4 decisions can predict how they will do based on who they are, because here is what it looks like now. If they are big Republican election interests, they will win every time. If they are corporations against a human being, they will win every time. And, Your Honor, every time seems like a lot.

Thank you, Chairman.

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

Chairman GRASSLEY. Thank you. Senator Graham.

OPENING STATEMENT OF HON. LINDSEY O.GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman. There is a reason I did not do this litany with Democratic nominees that appeared before the Committee. I do not think it would have made any difference in terms of how other people voted, and I did not expect them to vote with the Republican majority.

Elena Kagan and Sonia Sotomayor, I could have spent a lot of time talking about how antagonistic they are to the Second Amendment, in my view, how the unborn does not have much of a chance in their Court, how the environmentalists always win, and there is no government too big to be said "no" to.

The reason I did not do that is because I thought they were qualified, and if you believe this has been a great plan to get a Trump nominee on the Court, then you had to believe Trump was going to win to begin with. I did not believe that.

[Laughter.]

Senator GRAHAM. Obviously, I did not believe that saying all the things I said——

[Laughter.]

Senator GRAHAM [continuing]. Followed closely by Ben. But apparently what I said did not matter, and that is okay with me. The American people chose Donald Trump, and here is what I can say about the man in front of us.

No matter who had won our primary, no one could have chosen better than Neil Gorsuch to represent conservatism on the Supreme Court. So, Donald Trump deserves to be congratulated for listening to a lot of people and coming up with, I think, the best choice available to a Republican President in terms of nominating somebody who is going to keep the conservative philosophy alive and well in the Court.

And I doubt if you will be disappointed many times with Judge Gorsuch, but he is a pretty independent guy from what I can tell. You will probably be more—I have never been disappointed with Sotomayor and Kagan in the sense I knew what I was getting. They always vote with the liberal block. They are very qualified people. Sometimes the Court comes together 9–to–nothing to reject something, but most of the time people break along the lines of where they came from.

And I think Sotomayor and Kagan came from a view of the law that I do not accept in terms of who I would have chosen, but was well within the mainstream of judicial philosophy from the left. I thought they led exemplary lives quite frankly. There were a lot of attacks on them that I did not echo because I thought, give me a break. Really? Are these the two worst women in the world? They lived exemplary lives, were highly qualified, and that is why I voted for them.

I thought that is what we should be doing, and I am beginning to wonder now how the game is played. I do remember when I voted for them, how many good editorials I have from papers that nobody in South Carolina read.

[Laughter.]

Senator GRAHAM. I miss Harry. Harry is around here somewhere, Harry Reid. He said something about me. I cannot find it. But he basically said that I wished more people would follow Senator Graham's lead when it comes to voting for very highly qualified nominees. He said that on the floor. Maybe that will happen in the future. Well, time will tell.

Now, as to whether or not this man is highly qualified, I am dying to hear the argument that he is not. You may not like the view he has of the law, but I am dying to hear somebody over there tell me why he is not qualified to be sitting here when a Republican President occupies down the street.

Now, when you look at the Federalist Papers, I saw the musical, "Hamilton." It was pretty good. Reading his work was even better. And the Federalist Papers 78, 87—I cannot remember the number. Basically, what he tells us is that the role of the Senate is, make sure that the President does not pick someone specially favored for their State and association to their family, someone really cronyism, I guess, is what we are supposed to be doing. And most Supreme Court Justices, up until modern times, basically were reconfirmed without with a voice vote.

So, things have changed, and we cannot lay all the blame on our Democratic friends about politicizing the selection process. What I want to say to the public is, I am glad people like Judge Gorsuch are willing to go through this, and I am sure Justices Sotomayor and Kagan had wished on a couple of days they had not chosen that path, but I think they made it through, quite frankly, with flying colors.

So, the issue for me is, I am waiting to hear somebody over there tell me why you are not qualified for the job that you are seeking. Twenty-seven hundred decisions, and you have been overruled once. An academic record. The reason I did not do all the things you did academically, I could not get into any of the schools—into the schools you were able to get into.

But the way you have handled yourself, I think you should be proud of the way you have handled yourself on the court. I think all the statements by your colleagues who know you better than anybody up here when no TV camera is rolling say nothing but great things about you, even people who have a different philosophy.

So, I just want you to know that from my point of view, you are every bit as qualified as Justices Sotomayor and Kagan. I think you are just as good a man as they are two fine women. And over the course of the next couple of days, the American people are going to get to understand who you are and, within limits, your judicial philosophy. They are going to want you to decide every case they do not like here, and you will have to say "no."

And there is a reason I did not ask Justices Sotomayor and Kagan to give me an opinion as to what they would do when they got on the Court because I knew they would not tell me that. I did not really feel comfortable asking them that.

As to Judge Garland, the one thing I can say for sure is that when Justice Scalia passed on February the 13th, we had already had three primaries on the Republican side, and the campaign was in full swing on the Democratic side. I thought long and hard about that. Are we doing something unfair here by not allowing the current President to nominate somebody and fill a vacancy in the last year of their presidency after the political process had started?

So, when I started looking around at what other people thought, here is what Joe Biden thought in 1992. "If someone steps down, I would highly recommend the President not name someone and not send a name up. If Bush did send someone up, I would ask the Senate to seriously consider not having a hearing on that nominee. It would be a pragmatic conclusion that once the political season is underway, and it is, action on known Supreme Court nominations must be put off until after the election campaign is over." Now, that is what my friend, Joe, said in 1992.

The bottom line here is I have no doubt in my mind if the shoe were on the other foot, the other side would have delayed the confirmation process until the next President were elected. In a hundred years, when we have had the President of one party in power and the Senate in the hands of another party, I think we have had one person confirmed in the last year of a term. So, I do not feel like any injustice has been done to anybody here. And the bottom line, when you read Democratic words from the past, they are saying basically what we said.

The one thing I can say is that I have been consistent. I have voted for everybody since I have been here, four: Justices Roberts, Alito, Sotomayor, and Kagan. And I feel all four had one thing in common: no Republican would have chosen Sotomayor or Kagan, but how could a Republican say they were not qualified for the job they had? They had lived an exemplary life, well qualified, and had years on the bench.

Now, the shoe is on the other foot. I remember after I voted for Ms. Kagan, all the headlines in The Washington Post were, this will ensure that Graham gets primary. They were right. That is not the only reason, to my primary opponents, but that was the main

reason, and I made it through just fine. And I do not know how we got here as a Nation.

Scalia had 98–to–nothing. Ginsburg I think was 96–to–3. What happened between now and then? How did we go from being able to understand that Scalia was a well-qualified conservative, and Ginsburg was a well-qualified liberal, and recognize that elections matter? I do not know how we got there, but here is what I hope, that we turn around and go back to where we were because what we are doing is going to destroy the judiciary over time.

Chairman GRASSLEY. Thank you, Senator Graham. Now, Senator Klobuchar.

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

Senator KLOBUCHAR. Thank you, Mr. Chairman. Welcome, Judge. We have already met once before in my office, and all of us on the Judiciary Committee are looking forward to hearing from you. And welcome to your family as well.

This Committee has no greater responsibility than the one before us today. Our Constitution, our laws, and our values all depend on a Supreme Court that is impartial, fair, and just. Your nomination comes before us during an unprecedented time in our country's history. We are witnessing a singular moment of constitutional and democratic unease.

In recent months, foundational elements of our democracy, including the rule of law, have been questioned, challenged, and even undermined. So, I cannot evaluate your credentials in the comfort of a legal cocoon. Instead, I must look at your views and record in the real world of America today. You see, you come before us this afternoon not only as a nominee sitting at a table alone with your friends and family behind you, but in the context of the era in which we live.

From the highest levels of Government, we have heard relentless criticisms of journalists. Seventeen intelligence agencies have confirmed that Russia, an autocratic foreign government, attempted to influence our most recent election. At the same time, voting rights in the U.S. have been stripped from far too many, while dark money and extraordinary sums, adding up to an estimated $800 million in just 6 years, continues to have an outsized influence in our politics, distorting our representative democracy.

Just last month, we saw the President of the United States refer to a man appointed to the Federal bench by President George W. Bush as a "so-called judge," and we have sadly seen hate unleashed toward religious minorities from Jews to Muslims, venom directed at innocent Americans, from kids in restaurants being told to go back to where they came from, to a man gunned down while washing his car in his driveway.

The pillars of our democracy and our Constitution are at risk. You are not the cause of these challenges, Judge, these challenges to our democracy, but if confirmed, you would play a critical role in dealing with them.

This is a serious moment in our Nation's history, and as representatives of the American people, it is our duty up here to deter-

mine if you will uphold the motto on the Supreme Court building itself, to help all Americans achieve equal justice under law.

Before I was elected to the Senate, I spent 8 years leading Minnesota's largest prosecutor's office. I have seen firsthand how the law has a real impact that extends far beyond the walls of a courtroom, whether it is crime victims and their families, or people who have seen a loved one sent to jail. The decisions made from the bench affect people living right now in the 21st century with 21st century problems.

So, though the U.S. Constitution and its Bill of Rights were written in the 18th century, though the Fourteenth Amendment's guarantee of equal protection of the laws was written in the 19th century, the decisions made today affect not the lives of our 18th and 19th century ancestors, but of all Americans today.

So, Judge, these hearings will not just be about your legal experience. They are about trying to understand what you would actually do on the Court, for the law is more than a set of dusty books in the basement stacks of a law library. It is the bedrock of our society. We need to know how you approach the law.

After Judge Merrick Garland was nominated to the Supreme Court last year, we often heard about how he is a careful jurist who decides cases on the narrowest possible grounds, who builds consensus across the ideological spectrum, who does not inject political considerations into his rulings. We look forward to hearing what your judicial philosophy would be on the Court.

Looking at your past decisions, I have questions about how you would approach your work. In a speech last year, you spoke about the differences between judges and legislators. You said that, "While legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future, that judges should be none of those things in a democratic society. Judges," you said, "should instead strive to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."

I want to understand better those views of the Constitution and how they square with modern day life. Due process, equal protection of the laws, these are general and sweeping terms. And the Supreme Court, which has the power of judicial review, has the constitutional duty to be the final arbiter of what the Constitution means, rulings that can impact voting rights, civil rights, and the right of people to marry.

Many of the issues we face today are ones that this country's founders never considered, and, in fact, never could have considered because of all the social change and innovation that has taken place. We are no longer dealing with plows, bonnets, and colony deaths in England, but instead driverless cars, drones, and cybercrimes. And those were just the topics of the hearings I attended last week.

I want to understand how your judicial philosophy, which, as you suggest, looks backward, not forward, may affect the rights of our fellow citizens. I also want to understand the implications of your

views on legal precedent. One example of this occurs in the context of the *Chevron* doctrine.

In stating that courts should generally defer to reasonable interpretations of Executive agencies, this 33-year-old case guarantees that the most complex regulatory decisions, ones judges themselves may have little or no expertise to handle, are made by the scientists and professionals best equipped to rise to these challenges. These modern agency decisions include things like rules protecting public safety, requirements against lead-based paint, and clean water protections for our Great Lakes.

Last year in your concurring opinion in *Gutierrez v. Lynch*, you suggested that *Chevron* should be overturned, yet this act would have titanic real-world implications on all aspects of our everyday lives. Countless rules could be in jeopardy, protections that matter to the American people would be compromised, and there would be widespread uncertainty. Judge, if you believe it is really time to overturn *Chevron*, then we need to know with what you would replace it.

Another opinion that I want to talk about is *Riddle v. Hickenlooper*. In your concurring opinion, you suggest that the Court should apply strict scrutiny to laws restricting campaign contributions. If the Supreme Court adopted that view, it could well compromise the few remaining campaign finance protections that are still on the books. The notion that Congress has little or no role in setting reasonable campaign finance rules is in direct contradiction with the express views of the American people.

In recent polls, over three-quarters of Americans have said that we need sweeping new laws to reduce the influence of money in politics. While polls, as we know, are not a judge's problem, democracy should be. When unlimited, undisclosed money floods our campaigns, it drowns out the people's voices. It undermines our elections.

Other questions about your views in money and politics are raised by your opinion in *Hobby Lobby*. In that opinion, you found that corporations were legal persons and could exercise their own religious beliefs. This ruling leaves open the troubling argument that corporations have a right to free speech equal to that of citizens, which would invalidate the prohibition of corporations donating. These are not the only First Amendment issues I will raise. I want to talk about *New York Times v. Sullivan* and freedom of the press, as well as an area you have great expertise in, antitrust.

Judge, as I consider your nomination, I am reminded of something a Justice who hailed from Minnesota, Justice Blackmun, once said, "Surely," he wrote, "there is a way to teach law, strict and demanding though it might be, with some glimpse of its humanness and basic good. There is room for flexibility and different answers, and not all is Black and White. You see, there is a reason we have judges to apply the laws to the facts. It is because answers are not always as clear as we would like, and sometimes there is more than one reasonable interpretation."

As a prosecutor, I knew that every charging decision that we made, every case we chose to pursue, had real implications. It is the same with judges, for in the end it was not a law professor or Federal jurist who was helped by the Eighth Circuit is reliance on

Chevron. It was an hourly Minnesota grocery store worker who got his hard-earned pension. And when the Court stripped away the rules that opened the door to unlimited super PAC spending, it was not the campaign financers or the ad men who were hurt. It was a grandma in Lanesboro, Minnesota, who actually believed that giving $10 to her Senator would make a difference.

And as the granddaughter of an iron ore miner, I can tell you it was not a CEO or a corporate board chair whose life was saved by mining safety rules. It was the Minnesota iron ore workers like my grandpa, who went to work every day with a black lunch bucket 1,500 feet underground in a cage.

My dad, who ended up as the first kid in his family to graduate from high school, and from there to community college, and then to the University of Minnesota, still remembers as a little boy standing in front of the caskets of those mine workers lining St. Anthony's Church. It was the worker protections, coupled with the ability to organize as a union, that finally made those miners' jobs safe.

Judge, you have been rightfully praised for your impressive academic credentials and experience, but at these hearings I want to know more than just about your record. I want to know about how, if you are confirmed, your decisions will, in fact, reflect precedent and the law, whether your judgments and decisions will be good, whether they will be done in a way that will help all Americans, from that grandma in Lanesboro to that Minnesota grocery store worker. That is not politics. That is why we are having these hearings today.

Thank you.

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

Chairman GRASSLEY. Thank you, Senator Klobuchar. Now, Senator Cruz.

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

Senator CRUZ. Thank you, Mr. Chairman. Judge Gorsuch, welcome. Thank you for your decades of service, honorable service. Thank you for your family being here today, and thank you for your willingness to endure the spectacle of this confirmation hearing.

February 13th of last year was a devastating day for those of us who revere the Constitution and the rule of law. On that day, we lost Supreme Court Justice Antonin Scalia. Justice Scalia was one of the greatest Justices to ever sit on the Bench. He was a trailblazing advocate for the original meaning of the Constitution, and a shining example of judicial humility.

His death left an enormous hole not only in our hearts, but in the protections for the rule of law, and it left enormous shoes to fill, a daunting task that I know weighs on you as you consider the enormity of what is in front of you.

Today there is a sharp disagreement about the very nature of the Supreme Court. Some people view the Court as a hyper-powerful political branch. When they grow frustrated with the legislative

process and the will of the people, they turn to the Court to try to see their preferred policies enacted.

For conservatives, we understand the opposite is true. We read the Constitution and see that it imbues the Federal judiciary with a much more modest role than the left embraces. Judges are not supposed to make law. They are supposed to faithfully apply it.

Justice Scalia was a champion of this modest view of the judicial role, but had his vacant seat been filled by Barack Obama or Hillary Clinton, Justice Scalia's legacy would have been in grave danger. If they filled his seat, we would have seen a Supreme Court where the will of the people would have been repeatedly cast aside by a new activist Supreme Court majority.

We would have seen a Supreme Court majority that viewed itself as philosopher kings who had the power to decide for the rest of us what policies should govern our Nation and control every facet of our lives. We would have seen our democratic process controlled by five unelected lawyers here in Washington, DC.

That would have been a profound and troubling shift in the direction of the Supreme Court and our Nation's future. That is why after Justice Scalia's untimely death, the Senate chose to exercise our explicit constitutional authority, and we advised President Obama that we would not consent to a Supreme Court nominee until the people in the midst of a Presidential election were able to choose. For 80 years, the Senate had not filled a Supreme Court vacancy that had occurred in a Presidential election year, and the Senate majority rightly decided that last year would not become the first in eight decades.

The people, therefore, had a choice, a choice between an originalist view of the Constitution represented by Justice Scalia or a progressive and activist view of the Constitution represented by Barack Obama and Hillary Clinton. During the campaign, President Trump repeatedly promised to nominate Justices in the mold of Justice Scalia, and, indeed, he laid out a specific list of 21 judges, constitutionalists from whom he said he would choose his nominee. Judge Gorsuch was one of those 21.

Issuing such a list was a move without precedent in our country's Presidential history, and it created the most transparent process for selecting a Supreme Court Justice that our Nation has ever seen. The voters had a direct choice. The voters understand the 21 men and women from whom the President would pick, and they had a very different vision of a Supreme Court Justice that would be put forth by Hillary Clinton.

And in November, the people spoke in what was essentially a referendum on the kind of Justice that should replace Justice Scalia. The people chose originalism, textualism, and rule of law. The people chose judicial humility. The people chose protecting the Bill of Rights, our free speech, our religious liberty, our Second Amendment rather than handing policymaking authority over to judges on the Supreme Court.

Given that history, given the engagement of the electorate nationally on this central issue, I would suggest that Judge Gorsuch is no ordinary nominee. Because of this unique and transparent process, unprecedented in the Nation's history, his nomination carries with it a super legitimacy that is also unprecedented in our

Nation's history. The American people played a very direct role in helping choose this nominee.

Like the renowned Justice he is set to replace, Judge Gorsuch is brilliant and has an impeccable academic record. His judicial record demonstrates a faithful commitment to the Constitution and the rule of law. He has refused to legislate his own policy preferences from the bench, while recognizing the pivotal role the judiciary plays in defending the fundamental liberties protected in the Bill of Rights.

On the night he was nominated, Judge Gorsuch channeled Justice Scalia when he explained that, "A judge who likes every outcome he reaches is very likely a bad judge, stretching for results he prefers rather than those the law demands." That is exactly right, and those words should give comfort to the American people and to my Democratic colleagues.

And it is worth recalling that our friends on the Democratic side of the aisle understand this and, indeed, not too long ago agreed with it. A decade ago, Judge Gorsuch was confirmed by this Committee for the Federal Court of Appeals by a voice vote. He was likewise confirmed by the entire United States Senate by a voice vote without a single Democrat speaking a word of opposition. Not a word of opposition from Minority Leader Chuck Schumer, not from Harry Reid, or Ted Kennedy, or John Kerry. Not from Senators Feinstein, Leahy, or Durbin, who still sit on this Committee. Not even from Senators Barack Obama, Hillary Clinton, or Joe Biden.

Not a one of them spoke a word against Judge Gorsuch's nomination a decade ago, and the question this hearing poses to our Democratic colleagues is, what has changed? What has changed? Ten years ago, Judge Gorsuch was so unobjectionable, he did not merit even a whisper of disapproval. In the decades since, he has an objectively exemplary record. By any measure, he has shown himself to be even more worthy of the bipartisan support he received back then.

Unfortunately, modern reality suggests that is probably not something my Democratic colleagues feel they can do in today's political environment. Many probably believe they have no choice but to try to manufacture attacks against Judge Gorsuch, whether they want to or not, just to preserve their own political future and protect themselves from primaries back home.

We are seeing some of these baseless attacks already. Most recently, some Democrats have tried to slander Judge Gorsuch as being "against the little guy" because he has dared to rule based on the law, the law that Congress has passed, and not on the specific identity of the specific litigants appearing before him. This is absurd.

For one thing, many of these same critics who spent the last 8 years attacking the *Little Sisters of the Poor*, a Catholic charity of nuns, for having the audacity to live according to their deeply held religious beliefs. You really need to take a long look in the mirror if one day you find yourself attacking nuns, attacking the *Little Sisters of the Poor*, and then the next day you find yourself orating on the need to protect the little guy.

A judge's job is not to protect the little guy or the big guy. A judge's job and a judge swears an oath to uphold the Constitution and to follow the law fairly, impartially, and equally for every litigant, little or big.

In the past weeks as well, some of my Democratic colleagues have questioned Judge Gorsuch's independence and suggested that he needs to answer questions about the actions and statements and even tweets of the President who appointed him. I would ask, was Justice Ginsburg or Justice Breyer asked about the sexual harassment suit that had been filed against President Clinton by Paula Jones? No, neither was asked about that suit. Was Justice Kagan asked about President Obama's incendiary comments at the State of the Union attacking the Supreme Court for a decision he disagreed with? No, of course not.

Those questions were not asked because they were inappropriate political questions that have nothing to do with the record of the nominee before this Committee. Justice Ginsburg, Justice Breyer, Justice Kagan were not asked those questions, and Judge Gorsuch should not be either. Instead, we should evaluate this nomination on the record, on the merits, and on that ground I have every confidence that Judge Gorsuch will be confirmed as the next Associate Justice of the Supreme Court.

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

Chairman GRASSLEY. Thank you, Senator Franken. I mean, Senator Cruz.

Now, Senator Franken.

[Laughter.]

OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator FRANKEN. Thank you, Mr. Chairman.

Judge Gorsuch, congratulations on your nomination. You are a man of considerable qualifications and experience. And having reviewed your decisions, I can say that you are a man of strong opinions.

But the task before this Committee is not to determine whether you are a man of conviction. Rather, it is incumbent upon us to determine whether the views that you espouse, and whether your interpretation of the Constitution, take proper measure of the challenges the American people face every day.

We must determine whether your understanding of our founding document is one that will make real its promise of justice and equality to all Americans, Black and White, immigrant, Native American, gay, straight, and transgender.

We must determine whether your interpretation of our laws and the Constitution will unfairly favor corporate interests over working families or limit the ability of Minnesotans to get their day in court.

The Justices who sit on the Supreme Court wield enormous power over our daily lives, so before this Committee decides whether to advance your nomination, we have an obligation to fully examine your views on these important issues, and to make sure that those views are known to the public.

That is really the whole purpose of these hearings, to allow the people of Minnesota, the American people, to meet you, to decide for themselves whether you are qualified to serve.

But, Judge Gorsuch, having reviewed your decisions and your writings, I have concerns. In the days ahead, I will use this hearing as an opportunity to better understand your views and perhaps to alleviate those concerns.

But in order for the hearing to serve its purpose, in order for the public to determine whether you should be confirmed, you must answer the questions this Committee poses fully, candidly, and without equivocation, so I hope that is how you will approach our exchanges.

Now, with that in mind, I think it is important to acknowledge just exactly how it is that you came before us today, and we talked about this, namely through the Committee's failure to fulfill one of its core functions. Immediately following the death of Justice Scalia and before President Obama even named a nominee, my Republican colleagues announced that they would not move forward with filling the vacancy until after the Presidential election.

The Majority Leader said, "The American people should have a voice in the selection of their next Supreme Court."

The only problem with the Majority Leader's reasoning is that the American people did have a voice in this decision, twice.

Nonetheless, when President Obama nominated Chief Judge Merrick Garland, the Republican Members of the Committee responded by refusing to hold a hearing, a truly historic dereliction of duty of this body and a tactic as cynical as it was irresponsible.

As a result of my Republican colleagues' unprecedented obstructionism, Justice Scalia's seat on the Court remained vacant until President Trump was able to name a replacement.

Now, during the campaign, then-candidate Trump made no secret about what kind of nominee he would select. In fact, he openly discussed his litmus test. He said that he would "appoint judges very much in the mold of Justice Scalia." During the final Presidential debate, then-candidate Trump said, "The Justices I am going to appoint will be pro-life. They will have a conservative bent."

Now, Justice Scalia was a man of great conviction, and, it should be said, a man of great humor. But Justice Scalia embraced a rigid view of our Constitution, a view blind to the equal dignity of LGBT people and hostile to women's reproductive rights, and a view that often refused to acknowledge the lingering animus in laws and policies that perpetuate the racial divide.

Judge Gorsuch, while no one can dispute the late Justice Scalia's love of the Constitution, the document he revered looks very different from the one that I have sworn to support and defend. So it troubles me that, at this critical juncture in our Nation's history, at this moment when our country is so fixated on things that divide us from one another, that President Trump would pledge to appoint jurists whose views of our founding document seek to reinforce those divisions rather than bridge them.

This is an important moment in our history. The public's trust in our Government and in the integrity of our institutions is at an

all-time low. But that erosion of trust did not take place overnight, and it did not happen on its own.

The American people's loss of confidence in our public institutions was quickened by the Court. A study published in the Minnesota Law Review found that the Roberts Court is more likely to side with business interests than any Supreme Court since World War II.

Time and time again, the Roberts Court issued decisions that limit our constituents' ability to participate freely and fairly in our democracy, decisions like *Shelby County* where the Court gutted one of our landmark civil rights laws and removed a crucial check on race discrimination at the ballot box, or like *Concepcion*, a 5–4 decision that allows corporations to place obstacles between consumers and the courthouse door.

Perhaps most egregious of all was *Citizens United*, which paved the way for individuals and outside groups to spend unlimited sums of money in our elections.

It is no surprise that, during the 2016 elections, voters from across the ideological spectrum, Democrats and Republicans alike, described our system as rigged. That is because it is. And the Roberts Court bears a great deal of responsibility for that.

Now, in each one of those 5–4 decisions, Justice Scalia was among the majority. So as this Committee sets about the task of evaluating his potential successor, I want to better understand the extent to which you share Justice Scalia's judicial philosophy, and I will be paying close attention to the ways in which your views set you apart.

One of the ways in which your views are distinct from Justice Scalia's is in the area of administrative law. Just this past August, you wrote an opinion in which you suggested that it may be time to reevaluate what is known as the *Chevron* doctrine.

Now, in broad strokes, the *Chevron* doctrine provides that courts should be reluctant to overrule agency experts when they are carrying out their missions, like when the FDA sets safety standards for prescription drugs. This principle, outlined by the Supreme Court, recognized that our agencies employ individuals with great expertise in the laws that they are charged with enforcing, like biologists at the FDA, and that where those experts have issued rules in highly technical areas, judges should defer to their expertise.

Now, administrative law can be an obscure and sometimes complicated area of law, but for anyone who cares about clean air or clean water, or about the safety of our food and of our medicines, it is incredibly important. And *Chevron* simply ensures that judges do not discard an agency's expertise without good reason. Justice Scalia recognized this to be true.

But to those who subscribe to President Trump's extreme view, *Chevron* is the only thing standing between them and what the President's chief strategist Steve Bannon called the "deconstruction of the administrative state," which is shorthand for gutting any environmental or consumer protection measure that gets in the way of corporate profit margins.

Speaking before a gathering of conservative activists last month, Mr. Bannon explained that the President's appointees were se-

lected to bring about that deconstruction. And I suspect that your nomination, given your views on *Chevron*, is a key part of that strategy.

So this hearing is important. Over the next few days, you will have an opportunity to explain your judicial philosophy, and I look forward to learning more about how you would approach the great challenges facing our country.

But if past is truly prologue, then I fear that confirming you would guarantee more of the same from the Roberts Court, decisions that continue to favor powerful corporate interests over the rights of average Americans.

During your time on the Tenth Circuit, you have sided with corporations over workers, corporations over consumers, and corporations over women's health. What this moment in our history, and in our Nation's history, calls for is a nominee whose experience demonstrates an ability to set aside rigid views in favor of identifying common ground and crafting strong consensus opinions, someone like Merrick Garland.

But your record suggests that, if confirmed, you will espouse an ideology that I believe has already infected the Bench, an ideology that backs big business over individual Americans, and refuses to see our country as the dynamic and diverse Nation that my constituents wake up in every morning.

As I said before, I see this hearing as an opportunity to learn more about your views, and perhaps to alleviate some of my concerns, so I hope that we are able to have a productive conversation.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Before the Senator from Nebraska goes, I have not talked to the person sitting there and cannot get up and go, but I think, when you are done, we will take 5 minutes, and you can do whatever you want to do.

[Laughter.]

Chairman GRASSLEY. Go ahead, Senator from Nebraska.

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

Senator SASSE. Thank you, Mr. Chairman.

Judge, this is a special moment in the life of our Republic. We have an opportunity to stand back from more than 200 years of our history to evaluate our civic health and to recommit ourselves to a government that is intentionally limited, to powers that are intentionally distinguished and divided.

That is what these next few weeks are actually about.

Arguably, the most important thing the U.S. Senate will do this year is confirm the next Supreme Court Justice.

I want to focus my opening remarks around the simple image of a judge's black robe. It is a strange thing that judges wear robes. You people are odd. But it is not something that we should just look past as an odd convention. It is something that we should look right at. It is not some relic from history that people wore long ago in an era of formality, like a powdered wig.

So why do the robes exist, unfashionable and unattractive as they often are? The reasons are better summed up by a current sitting judge than I might be able to put them, "Donning a robe does not make me any smarter, but the robe does mean something. It is not just that I can hide the coffee stains on my shirt. It serves as a reminder of what is expected of us, what Burke has called 'the cold neutrality of an impartial judge.' It serves, too, as a reminder of the relatively modest station we are meant to occupy in a democratic society. In other countries, judges might wear scarlet. Here, we are told to by our own plain, black robes, and I can attest to the standard choir outfit of the local uniform supply store as a good deal. Ours is the judiciary of an honest black polyester."

The author of these insightful words sits before us, Judge Neil Gorsuch, and that statement is an excellent lens through which to view the work of the Committee this week and, indeed, the work of the Court over the next century and beyond.

I want to make three simple overlapping points about that judge's black robe. One, it changes the way that our eyes see the court. Two, it reiterates the calling of a judge to the judge. And three, it gives us a special opportunity to teach our kids something about our—about their Constitution, the enduring paper that defines what our Government can and cannot do.

First, then, how does it change the way we see the court? When you look at the nine Justices sitting together in their robes, they blend in with one another. It is hard to tell them apart if you squint. And, thus, it calls attention to the office rather than to the person. That is because when the judge puts on his or her robe, it forces their personalities into the background so that we can focus on the important but the modest job that they have to do, which is to drill down on facts and law.

Facts are objective. They do not change based on your personality. They are evaluated against written, objective laws, not against what the judge wishes the law said.

Someone famously said that "empathy" is an essential ingredient in arriving at a just decision. This belief is well-meant, but it is very foolish. For standing before a court, your gender, your skin, your bank account cannot decide your fate in the same way a judge's race, class, and gender should not decide your fate. Empathy is actually not the role of a Supreme Court Justice. It is, in a sense, our role, for we are men and women who have been hired and can be fired by the American people to empathize. We are to identify with the hopes and the struggles of 320 million Americans.

But the judge, instead, has a different job, to faithfully and dispassionately apply the law to the facts of the particular case. The judge's robe is there to remind the judge and us of that—that if the facts are on your side, it should not matter which judge you sit before.

Our ideal is one where you can trade out one judge for another judge, and you should get the same outcome. This is the heart of what we mean when we say that we believe in the rule of law, not of men or of women, or of Black or White, or rich or poor. We are not to be ruled by a judge's passions or by a judge's empathy or by a judge's policy preferences.

Here is the second thing that the black robe is supposed to do. It is supposed to reiterate the calling of the judge back to the judge. By way of loose analogy, many people across our country sat in church pews yesterday morning and listened to someone preach from behind a big wooden pulpit wearing a robe. Why the pulpit? Why the robe? Because these things make it harder to see the preacher. They help us all understand that yesterday morning, for those of us in that tradition, knew that it was not about the messenger but about the message that was being passed on from above. It was also to remind the minister of the same cloaking. Likewise, a good judge on the bench knows that. It is not about you, so do not make it about you.

I said that it is only a loose analogy because, of course, the job of a Supreme Court Justice is absolutely not to deliver some eternal word from God. It is, rather, to interpret a man-made, written Constitution as objectively and faithfully as they can, inserting their opinions as little as possible.

When you put on your robe, you are cloaking your personal preferences. You are cloaking your partisan views. There is not a red robe for Republicans. There is not a blue robe for Democrats. We issue here only black robes.

This brings us to the third and final point, which is that the judge's robe is also to teach our kids how they should understand their Constitution. As all of us learned in "Schoolhouse Rock," the judiciary is not only a separate branch of government from the President and the Congress, but it is also a coequal one. We have different functions, but we have the same responsibility to be upholding and to teach the Constitution.

As a coequal, the Court can examine whether the actions of the other two branches are, in fact, unconstitutional. Time and again, at important moments in our Nation's history, the Court has struck down laws passed by the Congress or put a stop to a President's Executive actions.

Here is what that means: The primary job of the Supreme Court is not to uphold the will of the majority of the moment. The primary job of a Supreme Court Justice is not to reflect the popular opinions of the day. That might sound surprising. Do we not live in a democracy where the majority is supposed to rule? The answer to that question is only a very qualified "yes," for there are critical limits to that statement.

The Constitution is a decidedly and intentionally anti-majoritarian document. The Constitution exists to protect our rights and our liberties, even when we might hold unpopular views. And the role of the Supreme Court in protecting those rights and liberties is sometimes precisely to frustrate the will of the majority.

Think about how the Constitution deals with religion and public opinion. The First Amendment prohibits the Government from establishing any state religion, and it guarantees that every citizen can worship or not worship, however their conscience dictates.

If, however, at some moment polling showed a 51 percent popular desire in this country to pass a law making church attendance mandatory, or to subsidize a particular religious denomination, the Supreme Court would rightly strike down such flawed laws. This is because, in the Constitution, we decided that we would limit our

own power. We the people decided, in the founding of this Republic, that we would restrain our own majoritarian impulses. By enacting the Constitution, we intentionally decided to tie our own hands so that there are certain things that a majority can never do, like invade someone's conscience. And if the majority in its arrogance should at some point in the future seek to cross that line, the Supreme Court will rightfully shout "no."

When Congress passes an unconstitutional law, it is, in fact, the Congress that is violating the long-term will of the people, for the judiciary is there to assert the will of the people, as embodied in our shared Constitution, over and against that unconstitutional but perhaps temporarily popular law.

Each branch serves the people but in unique ways. It is the job of the Congress and the President to act. It is the job of the Court often, to react. Each branch holds the others in check. Each branch faithfully seeks to uphold and teach the Constitution. Each branch serves the American people, but with distinct offices.

When a Supreme Court Justice puts on his or her robe, we do not want them confusing their job with those of other branches. We want them policing the structure of our Government to make sure that each branch does its job, but only its job.

Today, Judge Gorsuch sits in front of us wearing a suit and tie. Before he can put back on the black robe, he must answer this Committee's questions. And I expect that Mr. Gorsuch the citizen has policy preferences. He probably has desired outcomes. But I do not know what they are, and that is a good thing. And I expect, by the end of this week, it should be clear that Judge Gorsuch, the judge's judge, will faithfully embody the spirit of that black robe, for the American people deserve the comfort of a judiciary that is cold and impartial, not seeking to be super-legislators, for if a judge seeks to be a super-legislator, he or she should run for office so the American people can choose to hire them or fire them. But that is not the calling you have before us today.

Thank you, and thank you to your family for being willing to endure this calling and this service and this hearing.

Chairman GRASSLEY. In 4 minutes and 59 seconds, I will call on Senator Coons. Stand at ease.

[Recess.]

Chairman GRASSLEY. Senator Coons, would you proceed, please?

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

Senator COONS. Thank you, Mr. Chairman.

Welcome, Judge Gorsuch, and welcome to your family and your friends. Congratulations on your nomination, and I look forward to the opportunity to question you.

I believe my constitutional duty to advise the President on this nomination to the Supreme Court is among my most important responsibilities as a Senator. A nominee confirmed to the Supreme Court shapes our law for decades. Justices decide cases that influence the lives of generations of Americans. This hearing is our opportunity to ask you, Judge Gorsuch, questions in front of the American people to better understand how you interpret the text of our Constitution and how you apply Supreme Court precedent.

We will explore how your approach to interpreting our Constitution would impact our lives in the future. I am committed to ensuring the consideration of your nomination by this Committee is thorough and fair, and I am hopeful that as our hearing proceeds, it will promote an important dialogue about the Constitution and the courts. Based on our meeting, Judge Gorsuch, I know that you, too, hope that this moment can serve as a shared civic experience.

I am considering your nomination with an open mind, and I would ask that you be forthcoming in your responses to our questions. I would like this hearing to be substantive and to reflect the best traditions of the Senate.

However, I cannot let this moment, in commenting on the best traditions of the Senate, pass without expressing my deep regret that Chief Judge Merrick Garland was treated with profound and historic disrespect. The disrespect shown by Senate Republicans to Chief Judge Merrick Garland and to President Obama and to our institutions was unprecedented and deeply damaging. For nearly 300 days, longer than any other nominee, Chief Judge Garland's nomination to the Supreme Court sat without action. My Republican colleagues did not afford him a hearing and would not give him a vote.

I believe we have a responsibility to work to re-elevate our democratic institutions above these narrow partisan politics. I will support a process worthy of its important purpose, to carefully evaluate a candidate for the highest court in the land.

The American people are entitled to see you answer probing, thorough, and challenging questions about your views on a wide range of constitutional issues because the breadth of the issues that come before the Supreme Court cannot be overstated. Just in the last year, the Supreme Court considered cases involving Executive power, affirmative action, intellectual property, partisan gerrymandering, racial bias in the courtroom, and reproductive rights.

The seat you would fill, Judge Gorsuch, if elevated, was occupied by Justice Scalia, and you have been compared to him. While it may seem at times to many that the Supreme Court is engaged in abstract intellectual exercises about originalism or textualism or a living Constitution, even a small subset of landmark decisions Justice Scalia took part in during his nearly 30 years on the Court demonstrates otherwise.

It is because of Supreme Court decisions that gay men can no longer be criminally prosecuted for engaging in consensual relationships; that loving same-sex couples can get married in every State in our Union; that women cannot be denied attendance at one of the Nation's premier military academies, and that women are entitled to access the full range of reproductive healthcare; that juveniles and intellectually disabled people can no longer be executed; and that millions of Americans who obtained health insurance under the ACA have been able to keep that care, at least for now. These cases impacted the lives of millions of real Americans, and Justice Scalia applied his understanding of the Constitution and dissented in every one of them.

I would like to use these hearings to explore your interpretation of the Constitution. I believe that our Constitution, which I view as our Nation's secular scripture, includes guarantees of equality

and privacy, hallmarks of our modern American society. I believe in an independent judiciary that safeguards our rule of law from unlawful intrusions of the most powerful, even the President of the United States.

The legitimacy of our Supreme Court transcends the outcome of any one case, but that legitimacy rests on the unyielding responsibility of Justices to put their personal political views aside to decide cases on their merits.

Judge Gorsuch, your nomination has been championed by the ideologically driven Federalist Society and Heritage Foundation. Interest groups are already spending millions of dollars advocating for your confirmation. But as I have told you during our meetings, none of those facts will determine my vote on your nomination. I am instead looking to you to demonstrate your ability to separate politics from constitutional interpretation.

As my colleague from the State of Utah, Senator Hatch, once noted, "Judges that say what the law is promote liberty. Judges that say what they think the law should be undermine it."

I have spent a good deal of time reviewing your record. I appreciate that you are an engaging and careful writer. I also have some serious questions based on your decisions. What stands out to me is your tendency to go beyond the issues that need to be resolved in the case before you. I have seen a pattern in which you have filed dissents, dissents from denials of rehearing, concurrences, or even concurrences to your own majority opinions, to explore broader issues than what is necessary, to revisit long-settled precedent, and to promote dramatic changes to the law. This pattern concerns me because these additional writings hint at an unwillingness to settle on a limited conclusion and forge a narrow consensus with your colleagues.

I want to know that you would apply the Constitution and settled precedent to reach consensus and resolve narrowly the disputes before you. And I want to know that our treasured freedoms would be safe in your stewardship. Our Constitution, as you know, is designed to protect our diversity of views. It guarantees to all of us the freedom of expression, the right to privacy, the liberty to make our most personal life decisions, equal protection, and the ability to worship freely.

Take the freedom of religion, enshrined in the First Amendment, which says, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." I believe we must balance our respect for the significance of faith and free exercise with concerns about impacts on others' liberty. As my colleagues know, I studied both law and divinity in school, and some of the most formative and meaningful experiences of my life have been guided by my Christian faith. The command to care for the most vulnerable among us inspires my work and service as a Senator, and I value opportunities to share with my colleagues in prayer.

Throughout our Nation's history, religion has inspired countless acts of charity, kindness, and good works. But when I think about the Founders' wisdom to protect both church and state by ensuring their separation, I am in awe. Our United States were founded by people who came here for many reasons, seeking opportunity, free-

dom from oppression, and hoping in many cases to be free to practice their faith. From Pilgrims to Mormons, from the Amish to Jehovah's Witnesses, America from its founding to today has been home to many faiths from many parts of the world, and part of our Founders' genius was to abandon the European practice of having a state religion supported by state taxes.

Now today across the U.S., churches and mosques, synagogues and temples find their own way, recruit and raise up their own believers and funds free from state interference and unsustained by state support.

The Supreme Court over decades has sought to strike and preserve a careful balance between the free exercise rights of religious minorities and the power of legislatures to compel compliance with neutral laws.

Recently, the Court has decided several landmark and controversial cases: in the *Hobby Lobby* case, where the free religious exercise rights of a few were held to permit the infringement on personal liberty of many; and in another important line of cases in which substantive due process rights have been held to guarantee a right to privacy and self-determination even when longstanding practices and religiously motivated statutes are challenged as a result.

I look forward to exploring these decisions with you. Religious freedom must be freedom not to have our values and practices pushed into the public square. While other nations are besieged by sectarian wars, inclusion of all faiths and all people have been guiding lights in the success of our democracy. However, at other times in our history, sincerely held religious beliefs have been invoked to deny millions of Americans full equality under the law in defense of laws prohibiting interracial marriage or LGBT relationships or reproductive rights.

We live today in tumultuous times, as you know, Judge. The Supreme Court is likely to hear many important cases in the years to come. It will be important that we understand your values and framework for interpreting the Constitution on areas as important as Executive power, national security, the independence of the judiciary, deference to agencies, and personal liberty.

There are disturbing developments that I see in our modern environment as affronts to religious freedom and personal liberty. President Trump campaigned on putting in place a Muslim ban and has signed unlawful and discriminatory Executive orders to deliver on that promise. The new administration's Justice Department has withdrawn guidance supporting protections for transgendered individuals. And the Attorney General testified under oath at his confirmation hearing before us that secular attorneys may not have the same claim to understanding the truth as religious ones.

Our next Supreme Court Justice will play a pivotal role in sustaining and defending our rights during this critical time for our country and in the years to come. America needs a Supreme Court Justice who will protect the Constitution, not one who will countenance the faith or fear of some as a justification for infringing the liberty of many. It is against that backdrop, Judge, that I will be

seeking to understand your commitment to the rule of law, the guarantees of the First Amendment, and individual liberty.

I look forward to your testimony. Thank you.

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

Chairman GRASSLEY. Thank you, Senator Coons.

Now I go to Senator Flake.

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

Senator FLAKE. Thank you, Mr. Chairman. And thank you, Judge Gorsuch. Thank you for being here, and thank you to your family as well and your many friends and associates who have come to support you. That says a lot for you to have so many willing to be here, and I have been astounded at the number of op-eds I have read and statements I have heard from those—not just those that you agree with, but those who do not always agree with you. That says a lot about you.

I had a speech to deliver a while ago, and when it was fed into the teleprompter, your name was not as familiar as some, and it replaced it with "Judge Grouch" throughout the entire time.

[Laughter.]

Senator FLAKE. And I had to be careful.

Judge GORSUCH. I had similar problems.

Senator FLAKE. I think it is safe to say by the end of this week every spell checker in the country will know your name, and "Judge Grouch" is about as far as you can get from Judge Gorsuch in terms of your temperament. So I commend you. That may change by the end of the week as well, though.

[Laughter.]

Judge GORSUCH. I hope not.

Senator FLAKE. I do not think so.

As we all know, one of the most consequential decisions a President makes is who he or she will select to fill vacancies on the Supreme Court. This is a lifetime appointment. It means that a man or woman who is selected will likely be interpreting our laws for decades to come. Judge Antonin Scalia demonstrated how much one Justice can impact and shift the gravity of the Court, and no Justice in recent memory has so fundamentally influenced the trajectory of the Supreme Court or our approach to reading the law. He did this with an unshakable commitment to an originalist interpretation of the Constitution and a textualist approach to statutes.

Justice Scalia's passing marked a watershed moment for the future of our judiciary. One law professor remarked, "What lets the legal system survive is that people in power such as Scalia believe that the system controls their individual judgments. What will happen to the law without Justice Scalia to believe in it?"

Now, fortunately, the President has nominated a jurist who believes in the rule of law.

Now, in meeting with Judge Gorsuch and learning about his judicial philosophy, I was impressed by his respect for the law and his commitment to service. I have been particularly struck by his recognition that, "It is for Congress, not the courts, to write new law," and that a Justice should make decisions based on what the

law demands, not an outcome he or she desires. And as we discussed in my office, you said that when you don that black robe that Ben Sasse talked about, you understand that you are not a legislator. That is important.

It was brought up before by one of my colleagues that says that Judge Gorsuch is pro-business or against the little guy. I think the record suggests that he faithfully applies the law and the laws as enacted by Congress. Good judges do not decide cases based on how big the guy is but based on the law and the facts.

Now, I am not alone in thinking that. Harvard Law Professor Noah Feldman, a self-described liberal, recently wrote that,"Siding with workers against employers is not a jurisprudential decision. It is a political stance. And Justices, including progressive Justices, should not decide cases based on who the parties are." I think Judge Gorsuch's opinions show just that: He decides cases based on what the law says, not who the parties are.

Judge Gorsuch has repeatedly reminded us that while we as legislators may appeal to our own moral convictions in shaping the law, judges in a democratic society should not decide cases based on their own moral convictions or their policy preferences. With Judge Gorsuch, I think the record shows that we can be confident that he will read the law as written and not legislate from the Bench.

With regard to the separation of powers, Judge Gorsuch has cautioned against "governmental encroachment on the people's liberties," which could occur should the political majorities of the legislative and executive branches be permitted to decide cases and the political unresponsive judiciary branch be allowed to create or execute policies. For my part, I am excited to confirm a Justice who reveres the separation of powers as a central principle of our Constitution.

Judge Gorsuch has also demonstrated support for religious liberties. Our country has always valued the right of individuals to practice their faith according to the dictates of their own conscience. He once wrote that our religious freedom statutes "do not just apply to protect popular religious beliefs. It does perhaps its most important work in protecting unpopular religious beliefs, vindicating this Nation's long-held aspiration to serve as a refuge for religious tolerance."

The Supreme Court later agreed with Judge Gorsuch that it is the Government's job to protect an individual's ability to practice their religion, not to instruct them how to practice their religion.

Now, finally, as an Arizonan, I am proud of the fact that Judge Gorsuch is a fellow Westerner. Where you are from influences your understanding of cultural and regional sensitivities, and the current makeup of the Supreme Court has an unmistakable lack of geographic diversity. Of the eight current Justices, five of them were born in New York or New Jersey. As we say in Arizona and elsewhere, "New York City." This is nice to have someone from the West with a Western perspective, and, fortunately, Judge Gorsuch fits that bill.

When I met Judge Gorsuch earlier this week, we talked about our respective Western backgrounds. I told him about my days growing up on a cattle ranch in rural Arizona. He told me that his

heart has always been in the American West. You learn a lot about a person by how they spend their time with their friends and family. There is no mistaking it with Judge Gorsuch. He is a Westerner through and through.

Now, what makes Judge Gorsuch a true Westerner is more than just where he lives or what his personal interests are. In the West, we pride ourselves on being a free people with strong communities and limited Government. Judge Gorsuch's jurisprudence reflects what every Westerner knows to be true: An intrusive Federal Government cannot interfere with the ability of Western States to govern themselves. And perhaps more than anything, it will be Judge Gorsuch's Western perspective that most enriches debate on the Supreme Court for years to come.

Now, there has been a lot said about what happened last year with the nomination of Merrick Garland. I find it striking and very revealing that one of the first calls that Judge Gorsuch made when he received this nomination was to Merrick Garland, his friend. I think that says a lot about the man, regardless of any of our thoughts, and certainly what happened here should not reflect on Judge Gorsuch. But I appreciate the temperament that you have and your willingness to subject yourself and your family and friends to this process. And I look forward to the rest of the hearing.

I yield back.

Chairman GRASSLEY. Thank you, Senator Flake.

Now, Senator Blumenthal.

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

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you for being here, Judge. I live in the Western part of Connecticut.

[Laughter.]

Judge GORSUCH. Close enough.

Senator BLUMENTHAL. I love Colorado, and my first job was on a farm in Nebraska where my grandfather raised corn and cattle, so we can go into other commonalities. But I want to join in thanking you and your family and say that, despite the hardships of going through this process, I suspect there are quite a few lawyers in Connecticut who would not mind changing places with you.

But I also want to thank one group that perhaps should be given gratitude, and that is your fellow judges on the Federal bench. Some of them are here. I have no doubt that many are watching. I have had the honor in the last 40 years to appear before many of them, and they make sacrifices that are often unappreciated by most Americans who enjoy the benefits of their service, often financial sacrifices, personal sacrifices, sometimes even physical threats, as happened when the schools were desegregated or when women's clinics were protected in the United States. And so I want to thank them and, through you, express my gratitude.

The independence of those judges has never been more threatened and never more important, and a large part of the threat comes from the man who nominated you, who has launched a campaign of vicious and relentless attacks on the credibility and capacity of our judiciary to serve as a check on lawless Executive action.

His demeaning and disparaging comments about the judiciary have shaken the foundations of respect for judicial rulings—rulings that hold the President accountable to the people and our Constitution.

Respect for the opinions of our judges is fundamental, as you well know. Without it, our democracy cannot function. Alexander Hamilton said that the judiciary is the least dangerous branch because it has the power of neither the purse nor the sword. Essential to its power to protect us is its respect and trust and credibility. And the President has gravely undermined it, and that is why I believe you have a special responsibility here this week, which is to advocate and defend the independence of our judiciary against those kinds of attacks. It is not enough to do it in the privacy of my office or my colleagues' behind closed doors. I believe that our system really requires and demands that you do it publicly and explicitly and directly.

We meet this week in the midst of a looming constitutional crisis. Just hours ago, not far from here, the Director of the FBI revealed that his agency is investigating potential ties between President Trump's associates and Russian meddling in our election. The possibility of the Supreme Court needing to enforce a subpoena against the President is no longer idle speculation. It did so in *United States v. Nixon*. So the independence of the judiciary is more important than ever, and your defense of it is critical.

You are also the nominee of a President who set a set of litmus tests, saying that his nominee would be pro-life and pro-Second Amendment and of a conservative bent. In fact, he said that he would nominate someone, and I am quoting almost exactly in one of the debates, "who would automatically overturn *Roe v. Wade*." So, again, if you fail to be explicit and forthcoming and definite in your responses, we have to assume that you will pass the Trump litmus test.

Your nomination also imposes on you a special burden because of the process that brought you here. The President has largely outsourced the selection process to conservative groups. He specifically referred to them on May 11th when he said that a list would be prepared by the Heritage Foundation and the Federalist Society. On June 13th, he said, "We are going to have great judges, conservative, all picked by the Federalist Society."

You must be clear that your views are not theirs, and while under ordinary circumstances this Committee might be satisfied with the platitudes of "I cannot reach conclusions or state conclusions because of the possibility that I may have to consider a case before the Court," these times are not ordinary.

The rule of law is more than the pillars and the judicial robes that people ordinarily associate with the U.S. Supreme Court. Justice has a human face and a voice and, as you know from being in the trenches, real clients with real lives, and the law has real consequences in their lives.

I met with Alphonse Maddin, the trucker who was fired by *TransAm Trucking*. When he left his truck in sub-zero weather, that truck was disabled. It could not be driven, and he was freezing.

I met with Patricia Caplinger, who was denied relief by your court after suffering a very serious injury resulting from a defective product use.

I met with the children of Grace Hwang who was denied leave by Kansas State University even though she was suffering from cancer.

I am troubled by the results in those cases for those real people, but also for the broader issues that those decisions reflect in workers' safety and consumer protection, as well as the rights of women to healthcare and reproductive decisions that are protected by the Fourth Amendment. And the right of privacy goes beyond just women's healthcare. It also relates to surveillance and Government snooping and a right that is central to our democracy.

Let me just close by saying that you have a special obligation to be forthcoming about your views, not to prejudge the merits of a particular case before the Court, but to share your views on longstanding precedent that the President who nominated you indicated would be overturned. And you have an obligation to be forthcoming as well because the decision before us is not about Justice Scalia, nor is it about your confirmation 10 years ago. The Supreme Court is different. The Supreme Court is the ultimate resort of justice in this country. And as much as you may have encountered little difficulty 10 years ago, you now have a record. And we are here to judge that record and to make sure that our decision—and I agree with my colleagues that it will be probably one of the most consequential and profoundly important decisions that I make as a United States Senator—is the right one for the country and will above all make sure that the rule of law is preserved for real people with real lives, and that we assure that the independence of our judiciary will continue to protect us from overreaching and tyranny and the constitutional crisis that is now a real danger before us. Thank you for being here.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator Blumenthal.

Now, the Senator from Idaho.

OPENING STATEMENT OF HON. MIKE CRAPO, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. Thank you, Mr. Chairman. Judge, welcome and congratulations on the high honor of your nomination.

Much of the discussion surrounding this nomination has centered on answering the key question: What kind of Justice should serve on the U.S. Supreme Court?

Some want a judge in their own making—predictable, ideological and political. Others regard the role of judge as a final arbiter of justice—clothed in those dark, black robes, unquestioned, and seated on an elevated platform well above the court proceedings.

In recent years, selecting judges has become more about a numbers game with the courts, measured at least in part by comparing vacancies filled by each President. Often, in fact, as recent as last week and this week, we read about Federal court proceedings in-

variably coupled with the name of the judge and the President who appointed him or her.

Because venue shopping has become all too common a practice today, the individual judge can become more important than the facts of the case. In this scenario, the judge serves not justice, but politics in another form.

Whenever Congress considers a judicial nomination, people talk earnestly about the importance of independence. For some, that word flows from the central work of the Founders of our Constitution, who created a separate branch of government empowered to review laws passed by the legislature and signed and executed by the President and the executive branch. To others, independence is more about giving judges the power to issue decisions without personal consequence.

The true American vision of justice is one in which the judge fairly and impartially finds the facts and applies the law. The law is supreme. The facts decide the day. The judge could be substituted with another and the outcome remains the same. The President who nominated him or her is never mentioned in the article about the decision, and venue shopping is a relic of another era.

This is the vision most Americans have of the proper judge on the Federal bench. As I reflect on the nomination of Judge Gorsuch, I think back to our meeting soon after his nomination was announced. I have met several Supreme Court nominees in my service in the Senate. All of them have impressive credentials and legal experience. But Judge Gorsuch stands out for a notable reason. He understands and is focused on the principle that a judge is the servant of the law, not the maker of it.

One of his comments during our visit still resonates with me. He said, "My personal views are irrelevant as a judge." Is that not the ideal illustration of a judge steadfastly committed to the law?

To quote the late Justice Scalia, "If you are going to be a good and faithful judge, you have to resign yourself to the fact that you are not always going to like the conclusions you reach. If you like them all the time, you are probably doing something wrong."

Judge Gorsuch recognizes that the law may be imperfect, being the product of an imperfect system. But there is a remedy to the imperfection of law: the political system, directly accountable to the public. The people choose policymakers, not Federal judges.

The law can frustrate. In Black and White it is stark, and change comes slowly and often deliberately, just as our forebears designed. Law that can change in a moment and capriciously is inherently destabilizing.

An activist judge who makes law plants insecurity in our system. Rather, our Constitution provides for law to be enacted legislatively with the sanction of the American people through the ballot box. Policy changes advanced by judges can be reversed and reversed again. Law properly grounded in the democratic and political process cannot.

"Equal protection under the law." "Justice is blind." These are not just catchy phrases that echo back to our time in civic classes. These are guiding principles of our Republic and reaffirmed in the Fourteenth Amendment to our Constitution. Fundamentally, each

of us should know courts will find for us when the law is on our side, whether we are rich or poor, strong or weak, or a big guy or a little guy. That is principled justice.

Some may not like a particular law. That is fair and not unexpected. But the remedy for this disagreement is not changing judges but changing the law. Fortunately, our system of Government has the exact solution available to us: passing a new law through the deliberate, careful, and publicly accountable political processes.

No one seriously questions Judge Gorsuch's fitness and capability to serve on the highest court in our land. His credentials are exemplary. He is widely respected for his intellect, his judgment, and his modesty. His admirers span the political spectrum. Judge Gorsuch is intelligent and open-minded. He is exactly the model for an appointment to the U.S. Supreme Court.

Mr. Chairman, I look forward to hearing from the nominee himself. The next few days will prove extraordinarily insightful as we discuss with Judge Gorsuch his philosophy of jurisprudence, what animates him to interpret the law, and his vision for the Federal judiciary.

I look forward to this hearing. Thank you very much, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator from Idaho.

Now, the Senator from North Carolina.

OPENING STATEMENT OF HON. THOM TILLIS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator TILLIS. Thank you, Mr. Chair. Judge Gorsuch, thank you for being here, and congratulations to you and to your family and friends who are either here present or watching on TV.

I have had a couple of opportunities to be in your presence, and I really appreciate your calm, respectful demeanor, and I am completely convinced you have an at-rest heart rate of about 4.

[Laughter.]

Senator TILLIS. Before I get into a few brief comments—and I want to be brief so that we can get through the comments and to the questions and move your nomination forward—I do think there is a little bit of confusion right now in terms of the comments made by some of my colleagues. This is not directed to you, Judge Gorsuch, but perhaps to those watching and to my Members.

The nominee before us today is not President Trump. The nominee before us today is not Leader McConnell. And the nominee is not Judge Merrick Garland. It is one of the most extraordinarily talented and capable people that we could possibly have going to the Supreme Court. So I hope that this nomination hearing focuses on the one person before us who will go on, I believe, to fill the vacancy on the Supreme Court.

This is a very important role that we have. I consider it one of the most important jobs that I have as a U.S. Senator. In the 2 years that I have been here, nothing rises to the level of importance of your nomination and the composition of the Supreme Court. These appointments last for life. They will outlast most

Presidents and many Senators. It affects all Americans, and the decisions you render will last for decades.

I have no doubt that you have the qualifications. As a matter of fact, Senator Graham—I associate myself with Senator Graham's comments. The only reason I did not pursue your academic line of schools mainly had to do with their admission requirements. I appreciate the hard work that you did academically. I appreciate the hard work that you did as a litigator. And the work that you have done as a judge I think is truly extraordinary.

I want to just go back to a comment or a conversation we had in my office. I mentioned to you in my office that I do not like activist judges, period—conservative or liberal. It is not their role. The activists are us. We get elected. We go out to the people. We convince them that we want to make changes. We pass laws. Your job is to interpret them as a judge. And I believe that you responded to me that you fully understood that your role fell squarely within Article III and that mine fell squarely within Article I, and you saw the very bright line between the two.

And I think you are going to do a great job. I think in your nomination acceptance, your quote was, "It is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives."

There have been some comments today made about cases that you have taken up, and I think they probably in some cases relate to the instances where you were not really happy about the outcome. And I look forward to getting to some of those. I think that two or three have been mentioned that I intend to go through as a part of my review of your decisions. There are a number of examples where you interpreted the law. You did not become an activist. You did not allow your empathy or your sympathy for a case to influence what your job is. I for one find that inspiring.

And so, Mr. Chair, I am going to keep my comments short, not for a lack of a desire to want to speak more about Judge Gorsuch's extraordinary background and history and qualifications for the job, but because I desperately want the American people to get you to spend more time talking and let us spend more time listening so that they recognize the historic opportunity we have to confirm you to the Supreme Court. And I look forward to the remaining testimony.

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

Chairman GRASSLEY. Thank you, Senator Tillis.

And now I will call on the Senator from Hawaii.

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

Senator HIRONO. Thank you, Mr. Chairman. Aloha, Judge Gorsuch.

Judge GORSUCH. Hello.

Senator HIRONO. Thank you as well, of course, for being here.

This hearing is about more than considering a nominee for the Supreme Court. It is about the future of our country. It is about the tens of millions of people who work hard every day, play by the rules, but do not get ahead. It is about the working poor who are

one paycheck away from being on the streets. It is about Muslim Americans who are victims in a renewed wave of hate crimes asking for protection from the courts. It is about women having the choice of what to do with their bodies, our bodies. It is about LGBTQ Americans who want the same rights as everyone else.

For me, this hearing is about the people in this country who are getting screwed every single second, minute, and hour of the day. I have into public service to help these people, and my questions over the coming days will draw on their experience as well as my own.

My story might be unique for a United States Senator, but it is a story that is familiar for millions of people in our country. When I was nearly 8 years old, my mom changed my life when she brought me to this country from Japan, fleeing an abusive marriage. Back then there were no religious tests to determine who could immigrate to this country. There were no language requirements. You did not need any special skills. If President Eisenhower pursued the same policies President Trump would like to, it is very possible I would not be here today.

I always knew I wanted to give back to my State and my country, but I never thought politics would be the path that I would choose. But the Vietnam War opened my eyes to how public service could create social change. I joined campus protests, questioned why we were sending so many young men to die in a far-off country.

A small group of us decided that in order for things to change, we needed to do much more than protest. Many of us ran for office because we needed to take a seat at the table to be able to fight and help make lives better. It is why I am here today.

Over the past few months, I have heard from thousands of people who are deeply worried about their families, their kids, and the future of our country under the Trump administration. Many of them are worried about what will happen if you are confirmed to the Bench.

Apart from the legal analysis, whenever a case comes before a judge, it invariably involves real people, people who are often there because they have experienced the worst day in their lives. Whether they are victims of a crime, suffered a serious injury due to corporate malfeasance, or because they have lost their livelihood due to discriminatory behavior from their employer, each of them is looking to the Court to protect their interests and their rights.

During our meeting, I was encouraged when you said that the purpose of Article III of the Constitution was to protect the rights of the minority through access to the courts. But as I have reviewed your opinions, I have not seen that the rights of minorities are a priority for you. In fact, a pattern jumps out at me. You rarely seem to find in favor of the little guy.

In *TransAm Trucking*, your dissent argued that the company was justified in firing an employee who faced a choice between operating his vehicle in an unsafe manner and freezing to death in his truck.

In a number of other cases, including *Thompson School District*, your decisions made it more difficult for families with special needs children to get the help they needed as the law intended.

In *Planned Parenthood of Utah v. Herbert*, your dissent was far too deferential to the decisions of a Governor who based those decisions on unverified information.

In *Burwell v. Hobby Lobby*, your opinion justified denying access to contraception based on the argument that corporations, like people, can hold religious beliefs.

The facts in each of these cases might be different, but there is a clear pattern to your writing. You consistently choose corporations and powerful interests over people. But more than that, you have gone to great lengths to disagree with your colleagues on the Tenth Circuit so that you can explain why some obscure or novel legal interpretation of a particular word in statute must result in finding for a corporation instead of an individual who has suffered real live harm. This tendency demonstrates a commitment to ideology over common sense and, indeed, the purpose of the law, and it is deeply troubling.

For example, again, in *TransAm Trucking*, you fixated on the plain meaning of the word "operate," despite choosing a definition out of context and using it at odds of the clear purpose of the statute, which was a safety purpose. And in *Longhorn Service Company*, you found a difference between a "floor hole" and a "floor opening" in order to side with a corporation trying to avoid a citation for a safety issue. You found a difference in these terms, between a "floor hole" and a "floor opening," that the rest of your colleagues on the Tenth Circuit did not—truly a case of a distinction without a difference. It is like arguing whether your nomination is because of a vacancy or an opening on the Supreme Court.

These decisions affected not just the individuals who came before you. As a Supreme Court Justice, your decisions will have lasting consequences for the rest of us.

During the campaign, President Trump made it very clear that he had a series of litmus tests for his Supreme Court nominees. Over a 2-year period, the President said that his nominee must favor overturning *Roe v. Wade*, denying women access to healthcare on the basis of religious freedom, and upholding the *Heller* decision on guns, which the NRA believes prevents Congress, States, or local governments from passing commonsense gun safety legislation. Each of these tests would have a profound impact on the lives of every American.

Donald Trump's litmus tests for his Supreme Court nominees were crystal clear. In nominating you, Judge Gorsuch, I can only conclude that you met the President's litmus tests. Your ideological perspective or, as some would say here, your judicial philosophy, on these issues matter because if you are confirmed, you will have a lifetime appointment to the Supreme Court.

In our courtesy meeting, you said you have a heart, so, Judge Gorsuch, we need to know what is in your heart. We need to understand how you will grapple with a number of important questions the Court will be asked to consider in the years ahead.

Will the Court protect the rights of working people and our middle class or side with corporations who want to dismantle organized labor in America?

Will the Court uphold a woman's constitutional right to choose or upend decades of legal precedent to overturn *Roe v. Wade*?

Will the Court protect free and fair elections by stopping unfettered campaign spending or allow corporations and the ultra-rich to hijack our democracy with dark money?

Will the Court protect the right to vote for all Americans or allow States to use voter fraud as an excuse to disenfranchise vulnerable communities?

Will the Court protect our land, water, our earth, or gut decades of environmental regulations?

Will the Court protect access to our justice system or slam the courthouse door to all but the wealthiest among us?

Judge Gorsuch, my colleagues, this is not merely a hearing to consider the confirmation of one Supreme Court Justice. No. We are considering the affirmation of our country's values. The Supreme Court does not just interpret our laws. The Supreme Court shapes our society. Will we be just? Will we be fair? Will America be a land of exclusivity for the few or the land of opportunity for the many? Will we be the compassionate and tolerant America that embraced my mother, my brothers, and me many decades ago?

Make no mistake. A Supreme Court vacancy is not just another position we must fill in our Federal judiciary. A Supreme Court vacancy is a solemn obligation we must fulfill for our future generations. Let us treat it as such.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator from Hawaii.

Now, the Senator from Louisiana.

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

Senator KENNEDY. Thank you, Mr. Chairman.

How are you doing, Judge?

Judge GORSUCH. Great. Thank you very much.

Senator KENNEDY. I walked by the Supreme Court the other day. I live nearby. And on that building, as many of us know, are the words "Justice, the Guardian of Liberty."

Now, we live in cynical times, but I think those words are sacred—sacred to most Americans. And they really tell us everything we need to know about the importance of the U.S. Supreme Court, in my judgment.

Without justice, without equal treatment by the law, liberty—which is why our country was founded—becomes an empty promise.

So even though it is easy to look to elected officials, the President, Congress, Governors as last protectors of liberty, we as Americans have entrusted that, I think we can all agree, to our Supreme Court. And that is why, in my judgment, this hearing is important. And that is why we need, if we can, to go beyond politics, beyond the person who lives in the White House, beyond whatever the issue of the day happens to be, and we need to try to truly understand our role in this process, which is to advise and consent.

I hope we can focus on temperament, on legal philosophy, on legal reasoning, on qualifications, on experience. And for just a

minute, I hope we can forget that we are all politicians here, you excluded——

Judge GORSUCH. Thank you, Senator.

Senator KENNEDY [continuing]. And focus instead on the judiciary and the role we get to play in affecting that most American of institutions, the U.S. Supreme Court.

Now, I have had the opportunity to meet Judge Gorsuch and to read his work, and I like what I see. A former Governor in my State once said of the then-Attorney General, "If you want to hide something from him, put it in a law book." You obviously do not have that problem. You appear to me to be exceptionally well qualified to be a Supreme Court Justice. I was especially impressed with your Doctor of Philosophy in law. That stuck out to me. A D.Phil from Oxford is probably the most difficult terminal degree in the world. You also attended Columbia and Harvard, and they are satisfactory as well.

I have read about 20 of your opinions. My favorite is *A.M. v. Holmes*. Your dissent was very short, four pages, but you packed a lot in those four pages. As far as I am concerned, that dissent should be required reading in every law school.

All I can say after reading those 20 opinions—some of which I agreed with, some of which I did not—is that you write really, really well. Your opinions are engaging, whether you agree with them or not. Judge Gorsuch is direct, clear, concise. You are collegial, and you have a clean grasp of the law. There is no boilerplate language that lawyers often put in their briefs, and sometimes judges do as well.

I also might add that another thing struck me about your opinions. You show concern for the parties. You use their names. You do not refer to the parties as "appellants" or "appellees" or "respondents." You call them by their name, and I like that.

Judge Gorsuch's respect for judicial independence and for precedent, in my judgment, is apparent in all of his opinions. He is an unyielding supporter of the separation of powers, and I believe that he genuinely understands and values the role of the judiciary as a check on both the legislative and executive branches. And that is very, very important to me.

As are we all, I am rather fond of the Constitution and the structure that it creates, separating powers so no branch of government can bully another or bully the American people.

One of the main purposes of the United States Constitution, in my opinion, is to tell us when to stop, to reaffirm that the authority of the state over its people is limited and it is finite.

Let me be blunt. I am looking for a judge, not an ideologue. I do not want somebody on the U.S. Supreme Court who is blinded by ideology. I am not interested in people who want to use the judiciary to advance their own personal policy goals, whether they are to the right or to the left.

I want a judge to apply the law as it is as best he understands it, not to try to reshape the law as he wishes it to be.

I also want a person who is intellectually curious, who is earnest in his desire to rule fairly, and who is willing to really fight for his view of justice.

I guess what I want is a cross between Socrates and Dirty Harry, and I believe you just might be that person.

Let me say one final thing. I am an officer of the court, as a lawyer, as are you. None of the questions that I am going to ask you today are designed to trick you, as if I could. Nor are they designed to suggest that you should violate Canon 3(A)(6) of the Code of Conduct for United States Judges, which says, "A judge should not make public comment on the merits of a matter pending or impending in any court." Nor will my questions be designed to cause you to violate Rule 2.10(A) of the American Bar Association Model Code of Judicial Conduct, which, as you know, states, "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in a court."

And, finally, nor will my questions be designed to ask you to violate Rule 2.10(B) of the American Bar Association Model Code of Judicial Conduct, which states, "A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of his judicial office."

If you think any of my questions today or tomorrow or later this week cross those lines, I hope you will speak up so we can talk about it.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator from Louisiana.

Now it is your opportunity to take a rest while other people say what I imagine will be very good things about you. So we are going to call to the bench Senator Bennet and Senator Gardner and Neal Katyal. We will take Senator Bennet and Senator Gardner first. Mr. Katyal was Acting Solicitor General for President Obama. I know you have busy schedules, and I want to thank you for taking time to introduce our nominee today. So would you depart from the table? And the——

Judge GORSUCH. You do not have to ask me twice, Mr. Chairman.

[Laughter.]

Chairman GRASSLEY. Okay. And then we will have the other people come. Just stand at ease for just a couple minutes here. It will not take very long.

[Pause.]

Chairman GRASSLEY. It is my understanding that you two have kind of decided that Senator Gardner should go first and then-Senator Bennet.

And then when you folks depart the table, we will have Mr. Katyal come to the table.

Senator Gardner.

PRESENTATION OF HON. NEIL M. GORSUCH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. CORY GARDNER, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator GARDNER. Thank you, Mr. Chairman. Chairman Grassley, Ranking Member Feinstein, I would like to begin by thanking all of you on the Committee for your hard work during these hearings in the next several days.

Today, it is with great pleasure that I introduce, along with my colleague and fellow Coloradan, Senator Michael Bennet, and share my strong support for our outstanding Supreme Court nominee, Judge Neil Gorsuch.

If you have ever had the privilege of visiting Confluence Park in Denver, you will notice a plaque bearing a poem by Colorado Poet Laureate Thomas Hornsby Ferril. It is a poem known as "Two Rivers," describing the settlement of the West: "I wasn't here, yet I remember them, that first night long ago, those wagon people who pushed aside enough of the cottonwoods to build our city where the blueness rested." Where the optimistic blueness of our Colorado skies rests against the mountains and the plains, we are reminded about how incredibly diverse our great Nation is, its people and its geography.

Judge Gorsuch's nomination helps recognize that, indeed, there are highly qualified jurists west of the Mississippi River. Judge Gorsuch is a fourth-generation Coloradan, skier, fly fisher, serving on a court that represents 20 percent of our Nation's landmass, whose family roots reflect the grit and determination that built the West.

Once confirmed, Mr. Gorsuch will join Justice Byron White and be only the second Coloradan to have served on the U.S. Supreme Court and the only Coloradan to be serving on the U.S. Supreme Court who did not break the NFL rushing record. But the good news is, today, he does have the endorsement of number seven, John Elway, of the great Denver Broncos.

Should he be confirmed, Judge Gorsuch will make history as he represents the first Generation X Justice of the U.S. Supreme Court, the emerging generation of American leadership. Judge Gorsuch was confirmed to the Tenth Circuit Court unanimously by voice vote in 2006. Eleven years ago, Senator Graham presided over an empty Committee room, empty dais. What a difference a court makes.

But when you look at his record, his writing, his statements, it is easy to see why Judge Gorsuch has such overwhelming appeal. Judge Gorsuch is not an ideologue. He is a mainstream jurist who follows the law as written and does not try to supplant it with his own personal policy preferences. As he said, "Personal politics or policy preferences have no useful role in judging. Regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

Judge Gorsuch is not an activist judge but rather a faithful adherent to and ardent defender of our Constitution. He is an originalist, as Justice Kagan even described herself in her confirmation hearing to the U.S. Supreme Court.

Judge Gorsuch recognizes that the judiciary is not the place for social or constitutional experimentation, and that efforts to engage in such experimentation delegitimize the court. As he said, "This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary. As a society, we lose the benefit of give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide."

Judge Gorsuch has a deep appreciation and respect for the constitutional principles of Federalism and the separation of powers prescribed by our Founding Fathers. As he stated, "A firm and independent judiciary is critical to a well-functioning democracy." Judge Gorsuch understands the advantage of democratic institutions and the special authority and legitimacy that come from the consent of the governed. As he said, "Judges must allow the elected branches of government to flourish and citizens, through their elected representatives to make laws appropriate to the facts and circumstances of the day."

Judge Gorsuch appreciates the rule of law and respects the considered judgment of those who came before him. As he said, "A good judge will seek to honor precedent and strive to avoid its disparagement or displacement."

It is this appropriate temperament, this fidelity to the Constitution, this remarkable humility that has made Judge Gorsuch a consensus pick among Colorado's diverse legal and legislative communities.

Former Colorado Senator, Democrat Ken Salazar, in praising Judge Gorsuch's temperament during his Circuit Court confirmation, said, "A judicial nominee should have a demonstrated dedication to fairness, impartiality, precedent, and the avoidance of judicial activism from both the left and the right. I believe that Mr. Gorsuch meets this very high test."

Jim Lyons, a prominent Colorado lawyer and former adviser to President Bill Clinton, said, "Judge Gorsuch's intellect, energy, and deep regard for the Constitution are well known to those of us who have worked with him and have seen firsthand his commitment to basic principles. Above all, this independence, fairness, and impartiality are the hallmarks of his career and his well-earned reputation."

Colorado's former Democratic Governor Bill Ritter and former Republican Attorney General John Suthers jointly said, "It is time to use this confirmation process to examine and exalt the characteristics of a judge who demonstrates that he or she is scholarly, compassionate, committed to the law, and will function as part of a truly independent, apolitical judiciary. Judge Gorsuch fits that bill."

According to the Denver Post, Marcy Glenn, a Denver attorney and Democrat, recalls two cases before Gorsuch in which she represented underdogs. And I quote Marcy Glenn, "He issued a decision that most certainly focused on the little guy." Judge Gorsuch has a consistent record of applying the law fairly, and his reputation among his peers and lawmakers is evidence of it.

For all of these reasons cited today, I am certain Judge Gorsuch will make Colorado proud and that his opinions will have a positive

impact on this country for generations to come. I look forward to Judge Gorsuch receiving a fair hearing and, after that, to working with my distinguished colleagues on both sides of the aisle to expeditiously confirm his nomination.

Thomas Hornsby Ferril wrote another poem. This one memorialized on a mural on the walls of the Colorado Capitol rotunda. It ends with these words: "Beyond the sundown is tomorrow's wisdom, today is going to be long, long ago."

The wisdom of Neil Gorsuch, guardian of the Constitution, will serve our Nation well for generations to come.

Mr. Chairman, Committee Members, thank you.

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

Chairman GRASSLEY. Thank you, Senator Gardner.

Now, Senator Bennet.

PRESENTATION OF HON. NEIL M. GORSUCH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. MICHAEL BENNET, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BENNET. Thank you, Mr. Chairman. I want to thank you and the Committee for allowing me to be here today. It is a distinct privilege to be here with my colleague, Senator Gardner from Colorado, to introduce Judge Neil Gorsuch, a son of Colorado born and raised in Denver with a distinguished record of public service, private practice, and outstanding integrity and intellect. And I welcome as well his wife, Louise, who met the judge during their studies at Oxford and who moved from the United Kingdom to Colorado, where they now live with their two daughters in Boulder.

Senator Gardner has done a great job summarizing Judge Gorsuch's professional background. His experience and his approach to his work has earned him the respect of the bench and the bar in our State.

Judge Gorsuch's family has deep roots in Colorado. His grandfather grew up in an Irish tenement in Denver and began supporting the family at the age of 8. His other grandfather was a lawyer who worked his way through law school, serving as a streetcar conductor in Denver. And his grandmother was one of the first women to graduate the University of Denver in the 1920s.

As a person and as a lawyer, Judge Gorsuch exemplifies some of the finest qualities of Colorado, a State filled with people who are kind to one another, who, by and large, do not share the conceit that one party or one ideology is all right and the other all wrong, and who are conscious of the legacy we owe the generations who forged our State out of a Western territory of the United States.

If confirmed, Judge Gorsuch will be the first Justice since Sandra Day O'Connor from the West. No less an authority than Justice Scalia observed this lack of representation when he wrote in dissent that the Court has "not a single genuine Westerner," and then added with parentheses, "California does not count."

[Laughter.]

Senator BENNET. And with respect to our Ranking Member, I think I speak for my colleague from Colorado that, on this point,

and perhaps this point alone, he, I, and Justice Scalia are in agreement.

[Laughter.]

Senator BENNET. I am also here because I believe the Senate has a constitutional duty to give fair consideration to this nominee, just as we had a duty to consider fairly Judge Merrick Garland, President Obama's nominee to fill this vacancy.

I am not naive about the reasons the Senate majority denied Judge Garland a hearing and a vote. The Senate's failure to do its duty with respect to Judge Garland was an embarrassment to this body that will be recorded in history and in the lives of millions of Americans.

And it is tempting to deny Judge Gorsuch a fair hearing because of the Senate's prior failure. But, Mr. Chairman, two wrongs never make a right. The Supreme Court is too important for us not to find a way to end our destructive gridlock and bitter partisanship.

In my mind, I consider Judge Gorsuch as a candidate to fill the Garland seat on the Supreme Court. And out of respect for both Judge Garland and Judge Gorsuch's service, integrity, and commitment to the rule of law, I suggest we fulfill our responsibility to this nominee and to the country by considering his nomination in the manner his predecessor deserved but was denied.

Mr. Chairman, there is a second cloud that hangs over this confirmation hearing. It is President Trump's reckless attacks on the judiciary. These attacks, like the President's attacks on the free press, have no precedent in the history of our Republic.

The independence of our courts is an essential strength of our democracy. Attacking the judicial branch erodes the public confidence that gives force to their judgments. It damages the very foundation of our constitutional system.

Disagreeing with a court's decision is acceptable. Disparaging a judge is always wrong.

I have no doubt that, unlike the President, Judge Gorsuch has profound respect for an independent judiciary and the vital role it plays as a check on the Executive and legislative branches. I may not always agree with his rulings, but I believe Judge Gorsuch is unquestionably committed to the rule of law.

Mr. Chairman, it is customary for Senators to introduce nominees from their home State, and I am not here today to take a position or persuade any of our colleagues how to vote. That is a matter of conscience for each of us. I am keeping an open mind about this nomination and expect this week's hearings will shed light on Judge Gorsuch's judicial approach and views of the law. Like many Americans, I look forward to the Committee's questions and the testimony from the nominee.

And as one of two Americans privileged to represent the State of Colorado in the United States Senate, I am here this afternoon to uphold a tradition with the hope that, in some small way, it helps restore the Senate's strong history of comity and cooperation, especially in our Nation's most difficult times.

Whatever the results of this hearing, we Senators must respond in some way to the expectations of most Coloradans and most Americans who are eager for us to work together and to treat each

other with respect, particularly when it comes to extraordinarily important decisions like this one.

Thank you, Mr. Chairman.

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

Chairman GRASSLEY. Thank you, Senator Bennet, Senator Gardner. Thank you very much, and you are dismissed.

And we will have Mr. Katyal come to the table now.

And as I said, he was Acting Solicitor General in the previous administration.

Thank you very much, and you may proceed at your will.

INTRODUCTION OF HON. NEIL M. GORSUCH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY NEAL KATYAL, NEAL KATYAL, FORMER ACTING SOLICITOR GENERAL, WASHINGTON, DC

Mr. KATYAL. Thank you, Mr. Chairman and Senator Feinstein. It is my privilege to introduce Judge Gorsuch to this honorable Committee.

Unlike Senators Gardner and Bennet, I am, unfortunately, only a part-time Colorado resident, but I am very proud to see this distinguished judge with an excellent first name be nominated for this position.

[Laughter.]

Mr. KATYAL. Judge Gorsuch was born in Denver in 1967, the fourth generation of his family to hail from Colorado. He attended Columbia and Harvard Law School, and later clerked for Judge David Sentelle and Justices White and Kennedy. Judge Gorsuch then spent a decade at a law firm. And after serving in a leadership role at the Justice Department, he returned to Colorado as a Federal judge. I suppose the fly fishing in DC just was not good enough.

In the few minutes I have, I would like to bring in my world of litigating cases before the Supreme Court of the United States. I have argued 32 cases over the last decade, two more arguments coming next month. My arguments have been on behalf of the most diverse client base imaginable: death penalty inmates, States, the Federal Government, Native American Tribes, our Nation's largest corporations, what the great Senator from Hawaii called the so-called little guy, and everyone in between.

I can tell you the one thing you really want when you are in front of the Court is just an opportunity to be treated fairly; to have your position listened to, not caricatured, and treated with the gravity it deserves; to have jurists who work day and night to get the right answer, not motivated by party or politics, but by justice. And honestly, that is how our Supreme Court works. Every time I am up there, I get a lump in my throat because I see it firsthand. And I wish the Court would televise its proceedings so that the American public would see what I get to see every day.

[Laughter.]

Mr. KATYAL. And it is because of that deep need for fairness, on the Court that, I am, like so many Americans are, outraged that Merrick Garland does not sit on the Court today. I have had the pleasure of appearing before him, and he has grilled me, once for

over an hour. Indeed, I think maybe using the word "pleasure" is probably the wrong word to use.

Garland's brilliance, his experience, his fairness and meticulous attention to detail make him perhaps the most qualified nominee ever to have been named to the Supreme Court, and there is no doubt in my mind that if Merrick Garland had been confirmed and another vacancy had opened up, Judge Gorsuch would be sailing through this body with something close to 100–to–0 vote.

It is a tragedy of national proportions that Merrick Garland does not sit on the Court, and it would take a lot to get over that. Indeed, there is less than a handful of people that the President could have nominated to even start to rebuild that loss of trust. But in my opinion, Neil Gorsuch is one.

I say that knowing many people in my party will disagree and think the damage cannot be repaired, no matter who the nominee is. I can understand that sentiment. For those folks, there is nothing I can say about the nominee to make things right.

But if you have not closed your mind to the possibility of a new nominee, despite the undeserved and unprecedented treatment of Merrick Garland, I would like to tell you a bit about Judge Gorsuch. There is a reason why our Supreme Court Bar has lined up behind Judge Gorsuch. There is a reason why the American Bar Association has given him the highest rating. I have seen Judge Gorsuch in action, and I have seen him hearing cases and studied his written opinions. This is a first-rate intellect and a fair and decent man.

Judge Gorsuch and I served together on the Federal Appellate Rules Committee. It is complicated work and, quite honestly, not the sort that most people find particularly interesting. But the judge commits himself to it fully, and his work reflects his commitment to resolving disputes according to established standards. That is, the judge's work reflects his dedication to the rule of law.

The judge's commitment to the rule of law would endear him well to our Founders. Ours is a government of laws, not of men and women. That principle is the essence of constitutional government and the foundation of our freedoms.

Yet, if ours is to remain a government of laws, the subject of the laws must not be allowed to interpret it for themselves. No one can be a judge in his own cause. The Founders forged a judiciary independent of the Executive and legislative branches. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution," Alexander Hamilton wrote in Federalist 78. "Without this, all the reservations of particular rights or privileges would amount to nothing."

We live in a unique time. The current President has displayed open contempt for the courts, attacking judges who disagree with him and even questioning their legitimacy and motives. Judges who have questioned the President's authority have had to be placed under increased scrutiny and protection because of the reaction among some Members of the public.

Between the President's attacks on the judiciary and his controversial policies, he seems intent on testing the independence and integrity of our court system, and that brings me back once again to my support of Judge Gorsuch. As a judge, he has displayed a

resolute commitment to the rule of law and the judiciary's independence. Even those who disagree with him can see the judge's decisions are meticulously crafted and grounded in the law and our Constitution. And when the judge believes the Government has overstepped its powers, he is willing to rule against it.

It is very difficult to make the transition to Justice. I have seen Justices Kagan and Breyer go through it firsthand. It is not just the massive power all of a sudden that one wields. It is also the glare of the spotlight, an awareness of becoming part of history, and, most important, getting along with eight new colleagues who will be at your side for decades.

To do this well is hard. It requires equal parts and equal servings of humility and ability. That is what Justices Kagan and Breyer brought to their transitions, and what Judge Gorsuch has. In short, to make up a word, Judge Gorsuch has "humibility," humility and ability.

In sum, Judge Gorsuch and I come from different sides of the political spectrum. We disagree about many things, but we agree on the most important things, that all people are equal before the law and that a judge's duty is to uphold the law and uphold these principles and the Constitution above all.

The judge has done that during his time on the bench, and I know he will continue to do so as a Justice on the Supreme Court. It is, therefore, my honor to recommend that his nomination be reported favorably to the Senate.

[The prepared statement of Mr. Katyal appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Katyal. I know you have a busy schedule. Thank you for being here.

We will wait until—do you want to change everything that you have to do?

Judge, will you come forward? And before you sit, would you raise your right hand to be sworn?

[Witness sworn.]

Chairman GRASSLEY. Thank you. Please be seated. And you may tell us what you want us to hear at this point.

STATEMENT OF HON. NEIL M. GORSUCH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge GORSUCH. Mr. Chairman, Senator Feinstein, Members of the Committee, I am honored and I am humbled to be here.

Since coming to Washington, I have met with over 70 Senators. You have offered me a warm welcome and wise advice. Thank you.

I also want to thank the President and the Vice President. They and their teams have been so gracious to me, and I thank them for this honor.

I want to thank Senators Bennet and Gardner and General Katyal for their kind introductions, reminding us that long before we are Democrats or Republicans, we are Americans.

Sitting here, I am acutely aware of my own imperfections. But I pledge to each of you and to the American people that, if I am confirmed, I will do all my powers permit to be a faithful servant of the Constitution and laws of this great Nation.

Mr. Chairman, I could not even attempt to do this without Louise, my wife of more than 20 years. The sacrifices she has made, and her open and giving heart, leave me in awe.

I love you so much.

We started off in a place very different than this one, a tiny apartment and little to show for it. When Louise's mother first came to visit, she was concerned by the conditions—understandably. As I headed out the door to work, I will never forget her whispering to her daughter, in a voice I think intended to be just loud enough for me to hear, "Are you sure he is really a lawyer?"

[Laughter.]

Judge GORSUCH. To my teenage daughters watching out West, bathing chickens for the county fair, devising ways to keep our determined pet goat out of the garden, building a semi-functional plyboard hovercraft for science fair, driving 8 hours through a Wyoming snowstorm with high school debaters in the back arguing the whole way, these are just a few of my very favorite memories. I love you girls impossibly.

To my extended family here and across Colorado, when we gather, it is dozens of us. We hold different political and religious views, but we are united in our love. And between the family pranks and the pack of children running rampant, whoever is hosting is usually left with at least one drywall repair.

To my parents and grandparents, they are no longer with us. But there is no question on whose shoulders I stand. My mom was one of the first women graduates of the University of Colorado Law School. As the first female Assistant District Attorney in Denver, she helped a program to pursue deadbeat dads. And her idea of daycare sometimes meant I have to spend the day wandering the halls or tagging along behind the police officers. She taught me that headlines are fleeting, courage lasts.

My dad taught me that success in life has very little to do with success. Kindness, he showed me, is a great virtue. He showed me too that there are few places closer to God than walking in the wilderness or wading a trout stream, even if it is an awfully long drive home with the family dog after he encounters a skunk.

To my grandparents, as a boy, I could ride my bike to their homes. They were a huge influence. My mom's father, poor and Irish, worked to help support his family as a boy after losing his own dad. But the nuns made sure he got an education, and he became a doctor.

Even after he passed away, I heard stories for years from grateful patients who recalled him kneeling by their bedsides so they might pray together. His wife, my grandmother, grew up on a Nebraska farm, where an icebox was not something you plugged into the wall but something you lowered into the ground. With 7 children, she never stopped moving, and she never stopped loving.

My dad's father made his way through college working on Denver's trolley cars. He practiced law through the Great Depression. And he taught me that lawyers exist to help people with their problems, not the other way around. His wife came from a family of pioneers. She loved to fish, and she is the one who taught me how to tie a fly.

I want to thank my friends, so many of whom are here, liberals and conservatives and independents from every kind of background and belief. Many hundreds have written this Committee on my behalf, and I am truly touched by their support.

They have been there for me always, not least when we recently lost my Uncle Jack, a hero of mine and a lifelong Episcopal priest. He gave the benediction when I took an oath as a judge 11 years ago. I confess I was hoping he might offer a similar prayer soon. As it is, I know he is smiling.

I want to thank my fellow judges across the country. Judging is sometimes a lonely and hard job. But I have seen how these men and women work, how hard they work, with courage and collegiality, independence, and integrity. It is their work that helps make real the Constitution and laws of the United States for all of us.

I want to thank my legal heroes. Byron White, my mentor, a product of the West, he modeled for me judicial courage. He followed the law wherever it took him, without fear or favor to anyone. War hero, Rhodes Scholar, and, yes, the highest paid NFL football player of his day. In Colorado today, there is God, there is John Elway, and there is Peyton Manning. In my childhood, it was God and Byron White.

I also had the great fortune to clerk for Justice Kennedy. He showed me that judges can disagree without being disagreeable, that everyone who comes to court deserves respect, that a case is not just a number or a name but a life's story and a human being with equal dignity to my own.

Justice Scalia was a mentor too. He reminded us that words matter, that the judge's job is to follow the words that are in the law, not replace them with those that are not. His colleagues cherished his great humor too. Now, we did not agree on everything. The Justice fished with the enthusiasm of a New Yorker. He thought the harder you slapped the line on the water, somehow the more the fish would love it.

Finally, there is Justice Jackson. He wrote so clearly that everyone could understand his decisions. He never hid behind legal jargon. And while he was a famously fierce advocate for his client when he was a lawyer, he reminded us that, when you become a judge, you fiercely defend only one client—the law.

By their example, these judges taught me about the rule of law and the importance of an independent judiciary, how hard our forebears worked to win these things, how easy they are to lose, how each generation must either take its turn carrying the baton or watch it fall.

Mr. Chairman, these days, we sometimes hear judges cynically described as politicians in robes, seeking to enforce their own politics rather than striving to apply the law impartially. But if I thought that were true, I would hang up the robe. The truth is, I just do not think that is what a life in the law is about.

As a lawyer for many years working in the trial court trenches, I saw judges and juries, while human and imperfect, striving hard every day to fairly decide the cases I put to them.

As a judge now for more than a decade, I have watched my colleagues spend long days worrying over cases. Sometimes the an-

swers we reach are not the ones we personally prefer. Sometimes the answers follow us home at night and keep us up. But the answers we reach are always the ones we believe the law requires. And for all its imperfections, I believe that the rule of law in this Nation truly is a wonder, and that it is no wonder that it is the envy of the world.

Of course, once in a while, we judges do disagree. But our disagreements are not about politics, but about the law's demands.

Let me offer an example. The first case I wrote as a judge to reach the Supreme Court divided 5–to–4. The Court affirmed my judgment with the support of Justices Thomas and Sotomayor, while Justices Stevens and Scalia were in dissent.

Now that is a lineup some might think unusual. But actually, it is exactly the sort of thing that happens, quietly, day in and day out, in the U.S. Supreme Court and in the courts across this country.

I wonder if people realize that Justices Thomas and Sotomayor agree about 60 percent of the time, or that Justices Scalia and Breyer agreed even more often than that, all in the very toughest cases in our entire legal system.

And here is another example about my record. Over the last decade, I have participated in over 2,700 appeals. Often these cases are hard, too. Only about 5 percent of all Federal lawsuits make their way to decision in a Court of Appeals. I have served with judges appointed by President Obama all the way back to President Johnson. And in the Tenth Circuit, we hear cases from six different States covering two time zones and 20 percent of the continental United States.

But in the West, we listen to one another respectfully. We tolerate. We cherish different points of view. And we seek consensus whenever we can. My law clerks tell me that 97 percent of those 2,700 cases I have decided were decided unanimously, and that I have been in the majority 99 percent of the time. That is my record, and that is how we do things in the West.

Of course, I make my share of mistakes, too. As my daughters never tire of reminding me, putting on a robe does not make me any smarter. And I will never forget my first day on the job. Carrying a pile of briefs up the steps to the bench, I tripped on the hem of my robe and just about everything went flying.

But troublesome as the robe can be, the robe does mean something to me, and not just that I can hide coffee stains on my shirt. Putting on a robe reminds us judges that it is time to lose our egos and open our minds. It serves, too, as a reminder of the modest station we judges are meant to occupy in a democracy. In other countries, judges wear scarlet, silk, ermine. Here, we judges, we buy our own plain black robes. And as Senator Sasse knows, I can attest the standard choir outfit at the local uniform supply store is a pretty good deal. Ours is a judiciary of honest black polyester.

When I put on the robe, I am also reminded that, under our Constitution, it is for this body, the people's representatives, to make new laws, for the Executive to ensure those laws are faithfully executed, and for neutral and independent judges to apply the law in the people's disputes.

If judges were just secret legislators, declaring not what the law is but what they would like it to be, the very idea of a government by the people and for the people would be at risk. And those who came before the court would live in fear, never sure exactly what the law requires of them, except for the judge's will.

As Alexander Hamilton said, liberty can have nothing to fear from judges who apply the law, but liberty has everything to fear if judges try to legislate, too.

In my decade on the bench, I have tried to treat all who come before me fairly and with respect, and afford equal right to poor and to rich. I have decided cases for Native Americans seeking to protect Tribal lands, for class actions like one that ensured compensation for victims of a large nuclear waste pollution problem produced by corporations in Colorado. I have ruled for disabled students, for prisoners, for the accused, for workers alleging civil rights violations, and for undocumented immigrants. Sometimes, too, I have ruled against such persons. My decisions have never reflected a judgment about the people before me, only a judgment about the law and the facts at issue in each particular case.

A good judge can promise no more than that, and a good judge should guarantee no less, for a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers rather than those the law compels.

Mr. Chairman, as a student many years ago, I found myself walking through the Old Granary burial ground in Boston. It is where Paul Revere, John Hancock, and many of our Founders are buried. And there, I came across the tombstone of a lawyer and judge who today is largely forgotten, as we are all destined to be soon enough. His name was Increase Sumner. And written onto his tombstone over 200 years ago was this description of the man: "As a lawyer, he was faithful and able; as a judge, patient, impartial, and decisive. In private life, he was affectionate and mild; in publick life, he was dignified and firm. Party feuds were allayed by the correctness of his conduct; calumny was silenced by the weight of his virtues; and rancour softened by the amenity of his manners."

Mr. Chairman, those words stick with me. I keep them on my desk. They serve for me as a daily reminder of the law's integrity, that a useful life can be led in its service, of the hard work it takes, and an encouragement to good habits when I fail and when I falter. At the end of it all, I could ask for nothing more than to be described as he was. And if confirmed, I pledge to you that I will do everything in my power to be that man.

[The prepared statement of Judge Gorsuch appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Judge.

I have just a few words to say, to read, but before I do that, we will convene tomorrow at 9:30. Each person will have 30-minute rounds. I want to finish the first round tomorrow, so not taking into consideration any of the judge's needs to get away from the table for time to eat and do other things, I would suggest that we have at least 10 hours of work to do, in addition to whatever the judge needs. So I ask you to be prepared for that.

And the way I would like to do it, since each person has a half-hour, if you start your last question before the time runs out, I will ask the judge to give a short answer. But I think we have to move on very quickly and get it done.

And then the next day, we have 20-minute rounds, and there will be as many rounds as people need, because I would like to get done by Wednesday night. And if we can get it so I can get to bed at 9 o'clock like I like to, I would appreciate it.

We have questions for the record being due at 5 p.m. This timeline is consistent with how we have handled past Supreme Court nominations. I want everybody to know that now so that Members and their staffs can be working on written questions throughout the week.

With that, we will recess until——

Senator FEINSTEIN. When?

Senator LEAHY. Five p.m. when?

Chairman GRASSLEY. Oh, I am sorry. Friday at 5 p.m.

With that, the meeting is adjourned.

[Whereupon, at 3:15 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 1 follows Day 4 of the hearing.]

CONTINUATION OF THE CONFIRMATION HEARING ON THE NOMINATION OF HON. NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, MARCH 21, 2017

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

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

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

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

Chairman GRASSLEY. Welcome back, Judge Gorsuch. Glad to have you back, and I am sure you are glad to be here.

Good morning, everybody. I would like to welcome everyone and 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 will immediately turn to Members' questions. It is my intention to get through all Members' first round of questions today. So it is important that we all stick to our time limit 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 am 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 I might—I am sorry?

Senator LEAHY. There are two votes.

Chairman GRASSLEY. Two? Okay. We have two votes at noon. So it might be appropriate to use that period of time for our lunch break. I will make a decision on that later on.

So with that understanding with you and to accommodate you because you are the person that has to sit there and answer questions, and so whatever your needs are, you let us know.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. I started yesterday morning, Judge and audience, with Justice Scalia's comments that our Government of

laws and not men is the pride of our constitutional democracy. Our democracy requires judges to let the people's elected representatives do the lawmaking.

You, Judge, said that Justice Scalia's great accomplishment was, to quote you, "remind us of the differences between judges and legislators." Legislators, in other words, consult their own moral convictions to shape law, as we best think it to be. But you said that judges cannot do those things, rightly so from my point of view.

Our Constitution is also our 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, Judge, said much the same thing, you, "What would happen to disfavored groups and individuals" if we allowed judges to act like legislators? "The judge would need only his own vote to revise the law willy nilly in accordance with preferences."

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 us 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 have received.

You have earned great praise from individuals who are not exactly staunch supporters of the President, but who strongly supported your nomination. Yesterday, we heard from one of them, Neal Katyal. President Obama's former Solicitor General said that you "will not compromise principle to favor the President."

In 2006, former Colorado Senator Salazar, a Democrat, said that you have "the sense of fairness and impartiality that is a keystone of being a judge." And legal commentator Jeffrey Rosen similarly praised you for your independence.

So let us start with my first question. I would like to have you describe, in any way you want to, what judicial independence means and specifically tell us whether you would have any trouble ruling against a President who appointed you.

Judge GORSUCH. That is a softball, Mr. Chairman. I have no difficulty ruling against or for any party other than based on what the law and the facts in the particular case require, and I am heartened by the support I have received from people who recognize that there is 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 is 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 will give the same answer. I decide cases.

It is 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 is like to be a lawyer in the well. It is a lot easier to ask the questions, I find, as a judge than it is to have all the answers as the lawyer in the well.

So 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 is a beautiful oath. It is a statutory oath written by this body. That is what judicial independence means to me.

Happy to talk about the separation of powers, too, if you would like, Mr. Chairman, which you referenced in there. Or I am happy to answer another question. Entirely up to you.

Chairman GRASSLEY. Well, your record made clear that you are not afraid to fulfill your role independently, and you just emphasized that. You vacated orders of administrative agencies acting outside their authority, and you have ruled on cases where Congress has overstepped its bounds.

So I think you can 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?

Judge GORSUCH. Sure. 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. Ninety-nine percent I have 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 have served with that they have studied over the last 10 years. Now the Congressional Research Service speculates whether that is because I am persuasive or I believe in collegiality. I do not see why it has to be a choice.

My law clerks also tell me that in the few cases where I have dissented that I am as likely almost to dissent from a Democrat-appointed colleague as a Republican-appointed colleague, and that is again because we do not have Democrat or Republican judges.

According to the Wall Street Journal, I am told that of the eight cases that they have identified that I have sat on that have been reviewed by the U.S. 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 did not like a procedural precedent of our court that, as a panel, we were bound to follow. So they remanded it back.

We decided it on the merits, as the Court instructed. Cert. denied. Eight out of eight?

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

That you have in Article I the people's representatives make the law. That is your job. And I do not think it is an accident that the Framers put Article I first. Your job comes first. You 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, the Founders worried that would be the very definition of tyranny. And you can see why. Judges would make pretty rotten legislators.

We are life tenured, right? You cannot get rid of us. It only takes a couple of us to make a decision, or 9, or 12, depending on the court. That would be a pretty poor way to run a democracy.

And at the same time, with respect, legislators might not make great judges because they are answerable to the people. And when you come to a court with a case or a controversy about a past—past facts, you want a neutral, rigidly neutral, fair, scrupulously fair decisionmaker. You want somebody who is going to put politics aside.

So the separation of powers I do not think has lost any of its genius over 200 years. In fact, it has proven it.

Chairman GRASSLEY. Thank you.

I have 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 would 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 have had in history, and we did not have Secretary Clinton give out such a list.

Of course, you were not on the first group that came out and otherwise added later. So I am curious. When did you first learn that you were on candidate Trump's extended list?

Judge GORSUCH. Well, Mr. Chairman, you are right. There were two lists, as I recall, over the summer. And I was not on the first list. And I remember having breakfast one day with a friend, who may be here. Bryan? There you are. You remember this?

[Laughter.]

Judge GORSUCH. We were having breakfast one day, and he said, "Neil, you are not on the list." And I said, "You are right. I am not on the list." He said, "You should be on the list."

And I said, "I love my life in Colorado. I would not change a thing. I am a happy man. I have a loving wife, beautiful home and children, a great job with wonderful colleagues. I am a happy person."

I am walking away from breakfast, and I get an email from Bryan saying, "There is a new list—"

[Laughter.]

Judge GORSUCH. "And you are on it." That was the first I heard of it.

Chairman GRASSLEY. And I assume you thanked him.

Judge GORSUCH. I do not know about that.

[Laughter.]

Judge GORSUCH. I do not think he—you did not know? I do not think we—we were all surprised.

Chairman GRASSLEY. I am kidding.

Judge GORSUCH. And at any rate, we are where we are.

Chairman GRASSLEY. Okay. 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 would rule in certain cases?

Judge GORSUCH. Senator, I think you would be reassured by the process that unfolded. 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 do not believe in litmus tests for judges. I have written about that years ago. I was not about to become party to such a thing.

And I am 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 would rule in any kind of case.

Chairman GRASSLEY. And that is the way it should be.

So we have just discussed your independence from the President, but there is also independence from the legislative branch. It is odd that some of the same folks who will claim that you are not independent from the President will turn around and 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 will do this is asking you about precedent. So let us talk about that. For starters, I have a book here that you co-wrote, an 800-page book on precedent. Your 12 co-authors included judges from across the ideological spectrum, such as Bill Pryor, who was also on President Trump's Supreme Court list, and Diane Wood, who was reportedly on President Obama's list.

You have also touched on the value of precedent in speeches that you have given or in your opinions. For instance, in the speech you gave honoring Justice Scalia last year, you said this. "Even when a hard case does arise, once it is decided, it takes on the force of precedent, becomes an easy case in the future, and contributes further to the determinacy of our law," especially if more recent opinions have called into question the rationale of the original case.

But you have also suggested that there may be circumstances where it is appropriate to revisit precedent. Specifically, you wrote that it may be appropriate to reconsider a decision where it has become a "presidential island surrounded by a sea of contrary law."

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 a textbook example of this. So with these things in mind, I would like to explore the approach that you take to Supreme Court precedents. Could you tell us what you believe is the value of precedent in our legal system?

Judge GORSUCH. Absolutely, Senator. And if I might, Mr. Chairman, go back just a moment to promises? I have offered no promises on how I would rule in any case to anyone, and I do not think it is appropriate for a judge to do so, no matter who is doing the asking.

And I do not because everybody wants a fair judge to come to their case with an open mind and to 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 do not go reinvent the wheel every day. And that is 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.

And that is what that 800-page book is 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 foreword to it. It makes an excellent doorstop.

[Laughter.]

Judge GORSUCH. And in it, we talk about the factors that go into analyzing precedent, any consideration of precedent, and there are a bunch of them. You have 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. Its workability is a consideration, too. Can people figure out how to abide it, or is it just too confusing for the lower courts in 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 who said that is one important feature. I think it was Hamilton who said one important feature of judges, if we are 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 is not an inexorable command, the Supreme Court has said.

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

Chairman GRASSLEY. As a lower court judge, you are bound by not only Supreme Court precedent, but as you have 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?

Judge GORSUCH. Mr. Chairman, I do not think the considerations change. It is the same analysis that I would have as a Supreme

Court Justice, if I am fortunate enough to be confirmed, that I have when I am considering Circuit precedent as a Circuit Judge. It is the exact same process. The exact same rules apply.

Chairman GRASSLEY. Okay. This is the fourteenth Supreme Court hearing that I have participated in. So I have a pretty good idea of some of the questions that you are going to get today. You are going to be asked to make promises and commitments about how you will rule on particular issues.

Now they will not necessarily ask you that directly. For instance, how will you rule on this issue or that issue? Instead, they will probably ask you about old cases, whether they were correctly decided. Of course, that is another way of asking the very same question. They know that you cannot answer, but they are going to ask you anyway.

I have heard Justices nominated by Presidents of both parties decline to answer questions like these. That is because, as the nominee put it, "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of this particular case, it would display disdain for the entire judicial process."

Now you probably know that is what Justice Ginsburg said at her hearing, and it is 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 would like to ask you if you agree with what I just said?

Judge GORSUCH. I do, Mr. Chairman.

Chairman GRASSLEY. So let me ask you about a couple of Supreme Court cases. In *Heller*, Supreme Court held that the Second Amendment protects an individual's right to bear arms. If I ask you to tell me whether *Heller* was rightly decided, could you answer that question for me?

Judge GORSUCH. Senator, I would respectfully respond that it is a precedent of the U.S. Supreme Court, and as a good judge, you do not approach that question anew, as if it had never been decided. That would be a wrong way to approach it.

My personal views, I would 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 is 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 precedent have absolutely nothing to do with the good job of a judge.

Chairman GRASSLEY. Let me ask you about *Citizens United*. In this case, the Supreme Court held that the Government cannot restrict independent political expenditure by a nonprofit corporation. Do you agree with that decision?

Judge GORSUCH. And Senator, I would give you the same response. I know people have their views personally about lots of Supreme Court decisions and about a lot of other things. We are all human beings. I get that. I am not an algorithm. They have not

yet replaced judges with algorithms, though I think eBay is trying and maybe successfully.

We are all human beings. But the judge's job is to put that stuff aside and approach the law as you find it, and that is part of the precedent of the U.S. Supreme Court that I am sworn as a sitting judge to give the full weight and respect to due precedent.

Chairman GRASSLEY. Those two cases were 5–4 decisions. So let me ask you about something that was unanimous, *Hosanna-Tabor*. The Supreme Court ruled 9–0 that the Obama administration could not 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 9–0.

Can you tell me if that case was decided correctly?

Judge GORSUCH. Respectfully, Senator, I would give you the same answer.

Chairman GRASSLEY. Okay. Those are relatively recent cases. Let us talk about cases that have been around for a while. Let us look at *Gideon v. Wainwright*. It was decided unanimously a long time ago, 50 years or more.

It says a criminal defendant has the right to an appointed attorney if he cannot afford one. Everyone who watches cop TV shows know 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?

Judge GORSUCH. Mr. Chairman, it is certainly a seminal decision of the U.S. Supreme Court. There is no doubt about it. It is a very old decision of the Supreme Court now. It has been reaffirmed many times. There is a lot of reliance interest built around it.

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 am not in a position to tell you whether I personally like or dislike any precedent. That is not relevant to my job.

Gideon is a seminal precedent of the U.S. 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 am 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.

Chairman GRASSLEY. What if I asked you about *Bush v. Gore*?

Judge GORSUCH. I know some people in this room have some opinions on that, I am sure, Senator. But as a judge, it is a precedent of the U.S. Supreme Court, and it deserves the same respect as other precedents of the U.S. Supreme Court when you are coming to it as a judge. And it has to be analyzed under the law of precedent.

Chairman GRASSLEY. Well, let us go to kind of a more controversial issue, but along the same lines I have 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?

Judge GORSUCH. Senator, again, I would tell you that *Roe v. Wade*, decided in 1973, is a precedent of the U.S. Supreme Court. It has been reaffirmed. The reliance interest considerations are important there, and all of the other factors that go into analyzing precedent have to be considered.

It is a precedent of the U.S. Supreme Court. It was reaffirmed in *Casey* in 1992 and in several other cases. So a good judge will consider it as precedent of the U.S. Supreme Court worthy as treatment of precedent like any other.

Chairman 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*?

Judge GORSUCH. Senator, it is a precedent that is now 50 years old. *Griswold* involved the right of married couples to use contraceptive devices in the privacy of their own home.

And it is 50 years old. The reliance interests are obvious. It has been repeatedly reaffirmed. All very important factors again in analyzing precedent.

Chairman GRASSLEY. Well, I think I am going to stop questioning, but I would 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 cannot give your opinion on these cases. One, I believe, is independence, and the other one is fairness to future litigants. Is that the way you see it?

Judge 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 precedent in that fashion, I would be tipping my hand and suggesting to litigants that I have already made up my mind about their cases. That is not a fair judge.

I did not want that kind of judge when I was a lawyer, and I do not want to be that kind of judge now. And I made a vow to myself I would not be. That is the fairness problem.

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

Chairman GRASSLEY. Thank you. I will yield back 8 seconds.

[Laughter.]

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chair.

Welcome, Judge, and good morning to you again.

Judge GORSUCH. Good morning, Senator.

Senator FEINSTEIN. Since we are on *Roe*, I was not 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 have put that in the record. Here is 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?

Judge GORSUCH. I would be delighted to, Senator.

Part of the value of precedent, it has lots of value. It has value, in and of itself, because it is 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 is 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 is 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 a case is settled, that adds to the determinacy of the law.

What was once a hotly contested issue is no longer a hotly contested issue. We move forward. And Senator, the value of that is the U.S. 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?

Senator FEINSTEIN. Right.

Judge GORSUCH. My law clerks tell me it is something like .001 percent, and they are unanimous in those cases, which have divided Circuit Judges. That is why the Supreme Court largely takes the case, because it has divided us. It is one of the rare cases where we disagree. They are unanimous 40 percent of the time.

Senator FEINSTEIN. One other question.

Judge GORSUCH. Sure.

Senator FEINSTEIN. Do you view *Roe* as having super precedent?

Judge GORSUCH. Well, Senator, super precedent is——

Senator FEINSTEIN. In numbers?

Judge GORSUCH. It has been reaffirmed many times. I can say that.

Senator FEINSTEIN. Yes.

Judge GORSUCH. Yes.

Senator FEINSTEIN. Yes, dozens.

All right. 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 am going here. This has to do with torture.

The Intelligence 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 the 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 6-year study. The staff spent long hours analyzing every cable, every email, 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 indicated 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 is 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 asked whether, "aggressive interrogation techniques employed by the administration yielded any valuable information." 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?

Judge GORSUCH. Senator, I would have to see the document. I do not recall. I have been sitting here.

Senator FEINSTEIN. All right. That is fair enough.

Judge GORSUCH. It has been a long, long time.

Senator FEINSTEIN. Why do we not do this? I would be happy to share the documents with you. I took these pages out of my binder. I think they were there——

Judge GORSUCH. Fair enough.

Senator FEINSTEIN [continuing]. So I would not have to pause, and I—but let me just hold up that answer.

Judge GORSUCH. Sure.

Senator FEINSTEIN. And we will get you the documents on that.

Judge GORSUCH. Thank you.

Senator 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 email you sent to Steven Bradbury and others, you said the signing statement would—this is your quote—"help inoculate against the potential of having the administration criticized sometime 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."

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 did not amount to cruel, inhuman, or degrading treatment. I read your email 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 does it not mean that when you wrote this in an email that you were condoning waterboarding as lawful?

Judge GORSUCH. Senator, I would want to see the email. Again, I do not feel comfortable commenting on documents that are not in front of me. But I can say this, that I do remember——

Senator FEINSTEIN. My staff has the documents here.

Judge GORSUCH. Great.

Senator FEINSTEIN. They can bring them down to you——

Judge GORSUCH. That would be great.

Senator FEINSTEIN [continuing]. Right now.

Judge GORSUCH. Thank you. That would be wonderful.

Senator FEINSTEIN. Okay. And then I will put aside this part.

Judge GORSUCH. Okay.

Senator FEINSTEIN. You will have the documents because there are more—and I will go on to the next subject.

Judge GORSUCH. No, that is fine. I am happy to——

Senator FEINSTEIN. Is that all right?

Judge GORSUCH. Of course.

Senator FEINSTEIN. I know, I want you to look at the documents.

Judge GORSUCH. I would like to just know what I am talking about. My recollection generally from 12 years ago——

Senator FEINSTEIN. Eric, bring him the documents, please.

Judge GORSUCH. Thank you, Eric.

[Laughter.]

Judge GORSUCH. 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 that cruel, inhuman, and degrading treatment was also unacceptable under U.S. law.

Senator FEINSTEIN. Let me help you here. I know from the documents that you worked on the Graham effort.

Judge GORSUCH. Yes.

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

Judge GORSUCH. That is absolutely right, Senator. I sure did, and I am 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 do not remember, which did two things. One, affirmed this country's commitment to prevent cruel, inhuman, and degrading treatment and, second, which provided a regime that was agreed by the Congress and the President on how Guantanamo detainees should have their claims processed.

Senator 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.

Judge GORSUCH. Yes.

Senator 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 offsetting McCain, but basically preventing habeas corpus from being used. And of course, it was overturned by the Court.

Judge GORSUCH. Senator, you are 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.

And as a lawyer—that is 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 insufficient, and that is 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 U.S. Supreme Court no less than any other, Senator.

Senator FEINSTEIN. One last question on this.

Judge GORSUCH. Sure.

Senator 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, "The President intended to reserve the right to use harsher methods in special situations involving national security."

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 emails, and this you will verify, and 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, "needs to hear from us. Otherwise, this may wind up going the wrong way."

Judge GORSUCH. Well, Senator, I can tell you what I recall. I have not read——

Senator FEINSTEIN. Okay. That is fair enough.

Judge GORSUCH. I need to read the email. But my loose recollection of something that happened I think 11, 12 years ago is that there were individuals in maybe the Vice President's office who wanted a more aggressive signing statement along the lines that you have 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 you without studying the email, is that I was in the latter camp. John Bellinger, among others, I would have associated myself with there.

And I do not know what was in the President's head when he wrote the signing statement. I cannot tell you that. I do not know.

I can only tell you what I remember, and I certainly would never have counseled anyone that they could disobey the law.

Senator FEINSTEIN. Okay. I have no reason not to believe you, but if you will read those.

Judge GORSUCH. Sure.

Senator FEINSTEIN. And then in my second round, we will go back to it.

Judge GORSUCH. Sure.

Senator FEINSTEIN. And I would be very happy to—because I think you will see that we did not make this up, okay?

Judge GORSUCH. Senator, I am not suggesting you are. And I am—there was a tug of war among parties in the White House.

Senator FEINSTEIN. Oh, I am sure of that.

Judge GORSUCH. Right. And——

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

Judge GORSUCH. Well, count me in with John Bellinger most of the time on these things, okay?

Senator FEINSTEIN. Okay.

Judge GORSUCH. All right?

Senator FEINSTEIN. Okay.

Judge GORSUCH. And that is my recollection. And Matt Waxman would be another one. And so that is my recollection, Senator, sitting here, and I will study these.

Senator FEINSTEIN. Okay. Let me ask you a question on wiretapping. In December 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 Gonzales defending the program, you wrote this: "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, "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 away by Congress?

Judge GORSUCH. Goodness, no, Senator.

Senator FEINSTEIN. Good.

Judge GORSUCH. And I did not believe it at the time. What I was serving at the time, as I recall—again, my recollection, and I would be happy to review whatever you have before you—is that I was acting in the capacity as a speechwriter and taking material produced by the components that were responsible for litigating these issues, including Mr. Clement, Paul Clement, a dear friend of mine, and the Office of Legal Counsel and others and assembling it to put words together that sounded like English.

And I think people like my writing, and that was my job. I think I was the scribe.

Senator FEINSTEIN. Okay. Let us move on. I would 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?

Judge GORSUCH. Well, Senator, I think we have alluded to my difficulty here. 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 bosses' work. That would be kind of impertinent of me, I suspect, and certainly, I am 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 is now a precedent of the U.S. Supreme Court. It is binding. It is the law.

Senator FEINSTEIN. Right.

Judge GORSUCH. Whether we like it or not, it is the law. And if I start saying I like one opinion or I like the other opinion, I am signaling——

Senator FEINSTEIN. All right. I will let you off the hook. Let me go to another one.

Judge GORSUCH. Thank you.

[Laughter.]

Judge GORSUCH. Thank you, Senator.

Senator FEINSTEIN. In *D.C. v. Heller*, the majority opinion, written by Justice Scalia, recognized that—and I am quoting—"Of course, the Second Amendment was not unlimited." 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 "weapons that are most useful in military service, M16 rifles and the like, may be banned" 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, M16 rifles and the like, may be banned?

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

Senator FEINSTEIN. No. I am just asking you, do you agree with his statement? "Yes" or "no" would be fine.

Judge GORSUCH. Are the statements out of the *Heller* decision from the United States——

Senator FEINSTEIN. Justice Scalia's statement.

Judge GORSUCH. Well, whatever is in *Heller* is the law, and I follow the law.

Senator FEINSTEIN. Do you agree with that?

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

Senator 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 is 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 subjects 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 gravest 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?

Judge GORSUCH. I would begin by saying I hold Judge Wilkinson in high regard. He is a very fine man and a very fine judge.

Senator FEINSTEIN. Can you do a "yes" or "no"?

Judge GORSUCH. No, I wish I could.

Senator FEINSTEIN. I wish you could, too.

Judge GORSUCH. But you know, the Supreme Court of the United States is not final because it is infallible, as Justice Jackson reminds us. It is infallible because it is final. And Judge Wilkinson had his view, and the Supreme Court has spoken, and *Heller* is the law of the land.

And 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 is a very fine judge who takes his oath seriously.

Senator FEINSTEIN. Okay. 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 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 have 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 Texas Southwestern Medical Center v. Nassar* in 2013, which made it more difficult for employees to prove they have 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 is only fair to ask you, do you disagree with any of the majority opinions that Justice Scalia joined in these cases? If so, which ones do you especially disagree with and why? These have already been decided.

Judge GORSUCH. I understand, Senator. But again, if I indicate my agreement or disagreement with a past precedent of the U.S. Supreme Court, I am doing two things that worry me sitting here.

The first thing I am doing is I am signaling to future litigants that I cannot 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 have had post-*Ledbetter Act* cases in my court, for example.

Senator FEINSTEIN. Then how do we have confidence in you that you will not just be for the big corporations?

Judge GORSUCH. Oh——

Senator FEINSTEIN. That you will be for the little man. This is the question that Senator Hirono, I think, so well asked yesterday. You know, 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 am just looking for something that would indicate that you would give a worker a fair shot. Maybe it is in your background somewhere that I do not know about, but I would like to have you respond to it any way you can.

Judge GORSUCH. Senator, I really appreciate that, and I think there is a way you can take a look at this question without me potentially prejudging a case. And I appreciate your respect for that.

And just to finish that thought. I am concerned that I have to look the litigant in the eye in the next case. And if I prejudge that case, they can look at me and say you are not a fair judge, and I have no answer for that. I have 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 would suggest that does not represent the body of my work. I have written 2,700—I have participated in 2,700 opinions over 10½ years, and if you want cases where I have ruled for the little guy as well as the big guy, there are plenty of them, Senator.

The *Ute Indian Tribe*——

Senator FEINSTEIN. Would you be willing to submit some of them?

Judge GORSUCH. Oh, goodness.

Senator FEINSTEIN. It is hard to read 2,700 cases.

Judge GORSUCH. I will name a bunch of them right now.

Senator FEINSTEIN. It took me a long time on *TransAm*.

Judge GORSUCH. I am sorry, Senator. Of course. *Ute 5* and *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 point you to the *Magnesium* case, similar pollution case in the Salt Lake City area. Colorado's effort with renewable energy,

upheld that. *Orr v. City of Albuquerque*, involving pregnancy discrimination in the police department in Albuquerque.

W.D. Sports, a discrimination claim. *Casey*, *Energy West*, *Crane*. *Simpson v. CU*, involving young women who had been harassed by the football team. *A.M.*, *Browder*, *Sutton*—I can give you a long, long list, Senator.

Senator FEINSTEIN. That is helpful. Well, that is helpful. And we will find them, and we will read them.

Judge GORSUCH. And Senator, the bottom line, I think, is that I would like to convey to you from the bottom of my heart that I am a fair judge. And I think if you ask people in the Tenth Circuit "Is he a fair judge?" you are going to 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 10 years ago.

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

Senator FEINSTEIN. Okay. I have a minute and 21 seconds. Let us talk *Chevron*. That has 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 is 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 is still the law. It is working. The goal is—I have read articles that say there will be 54 miles by 2025 if this continues.

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

Judge GORSUCH. I am not aware of anything wrong with that, Senator. I have never suggested otherwise.

Senator FEINSTEIN. But what you have 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*.

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

Senator FEINSTEIN. Sure. Appreciate it.

Judge GORSUCH. The case I think you are referring to is *Gutierrez*.

Senator FEINSTEIN. That is correct.

Judge GORSUCH. It involved an undocumented immigrant to this country, okay? 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. The second said he had to wait outside the country for 10 years.

We had a judicial precedent that said the first statute controls. That was the ruling of our court.

After that, 3 or 4 years, I cannot remember exactly, the Board of Immigration Appeals, in its infinite wisdom, says our interpretation is wrong. *Chevron*—you have to undo 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 is 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 is what the case was about, and it suggested, respectfully, Senator, that under the APA, the Administrative Procedures Act, this body tasked judges to decide legal questions and left to administrative agencies great deference when it comes to fact-finding, okay?

That is how I read Section 706 is, fact-finding by scientists, biologists, chemists. The experts get great deference from the courts. 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 is going in for the kick?

Senator FEINSTEIN. I think I have exceeded my time.

Judge GORSUCH. Oh, I am sorry.

Senator FEINSTEIN. I apologize. Thank you very much.

Judge GORSUCH. No, I apologize.

Senator FEINSTEIN. Thank you.

Chairman GRASSLEY. I want to make clear to everybody you did not exceed your time because I said if you asked your question before the last second is up, and you did, that we would give whatever time it took for that to be done. If everybody follows that rule, I think we will be treating everybody fairly.

Before I call on Senator Hatch, I would 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 will just quote the first paragraph. "Democrats have come up empty trying to find something scandalous that Neil Gorsuch has said, so now they are blaming him for what he will not 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."

Without objection, I enter that in the record.

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

Chairman GRASSLEY. Senator Hatch.

Senator 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. He reminded us," as you put it, "that legislators may appeal to their own moral convictions and to claims about social utility to shape the law as they think it should be in the future. But the judges should do none of these things in a democratic society."

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

Judge GORSUCH. Senator, it is, though I have to confess, that lecture was attended by about 20 people, and it has a lot more attention since.

[Laughter.]

Senator HATCH. Well, we are 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, "It is not our job," and, "It simply is not our business." What is an appellate court's job in your view?

Judge GORSUCH. It is a limited, 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 a—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 do not 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 if they manage to do that, I tell them their next job is to try and persuade me I am 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 is law. And it is a great joy, and it is a great privilege, and it is a daunting responsibility to come in every day and to try and get it right.

And then, I go listen to the arguments of the lawyers. I do not treat them as catspaws. They are not there to be toyed with. I treat them, I hope, always as respected colleagues who have lived with the arguments, studied the cases, know the facts far better than I do. 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 cannot tell you how many times in the Tenth Circuit I have gone through that whole process. I go to conference, and I think I know my mind. And then one of my colleagues—Harris Hartz was here yesterday—he is often the one. There are plenty of others, who say something absolutely brilliant, changes my mind.

And that is the judicial process, and that is the role I see for the appellate judge.

Senator HATCH. Well, thank you. That is very good explanation.

We held a confirmation hearing for Justice Sonia Sotomayor in 2009. Senator Charles Schumer, now the Minority Leader, was a Member of this Committee and praised the nominee in this way. "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." Do you agree with Senator Schumer that your duty as a judge is to follow the law even when it requires ruling against sympathetic litigants?

Judge GORSUCH. Yes, Senator. I cannot tell you that when I go home and take off the robe I am not a human being and that I do not 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 is my oath.

There is not every law in the book I love, you love. I am sure of that. But my job is not to write the laws, it is to apply the laws. And I try to do that, and that enough is enough for a day's work, and it is enough for a life's work.

Senator 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 of this letter be included in the record at this point.

Chairman GRASSLEY. Without objection, it will be included.

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

Senator 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 "personify a disinterested philosophy that respects judicial modesty combined with compassionate appreciation of the lives impacted by your decisions." Now, how can you do both?

Judge GORSUCH. Senator, I am 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. I told my kids when they asked me what my job was when I was young, it is 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 is the job description. But you have to believe in something larger than yourself and that you are 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.

Senator HATCH. Well, the Fourth Amendment protects the right to be free from "unreasonable searches and seizures." 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?

Judge GORSUCH. May I offer an example, Senator, I think might be helpful?

Senator HATCH. Sure. Sure.

Judge GORSUCH. I take *United States v. Jones*, a recent case from the U.S. 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 is a trespass to chattels in a search 200 years ago, it has to be today, though the technology is obviously different.

So, the technology changes, but the principles do not. And it cannot 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.

Senator HATCH. Well, you were—you authored the opinion in *Meshworks v. Toyota Motor Sales*. Now, this 2008 case applied principles from earlier cases involving photography, a relatively 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 technologies or new applications of old technologies? 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?

Judge GORSUCH. Well, Senator, I think it is 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. We work with analogies, and that is how lawmaking through the judicial process happens. That is proper judicial decisionmaking.

It is a very different thing if you want to create a revolution in the area and change the law dramatically. That is for this body to do. It is for judges to interpret the law as best they can from the original understanding to current circumstances, and apply it to current circumstances.

So, in *Meshworks* that is exactly what we did, and looked at old case law having to do with copyright and applied it to digital media, the same principles from the beginning of the Copyright Act, just applied to a new medium.

Senator HATCH. Well, several of your writings have called into question the so-called *Chevron* doctrine that has 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.

Now, as you probably know I am 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. Reexamining *Chevron* is not about being anti or pro-regulation. Rather, it is about restoring the constitutional allocation of powers between the three branches. It is about maintaining fidelity to the laws passed by Congress and

the exact bounds of authority granted to regulatory agencies. And it is about ensuring that the bureaucracy abides by the law, no matter what its policy goals, liberal or conservative.

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

Judge GORSUCH. Senator, *Marbury v. Madison* is the cornerstone of——

Senator HATCH. It sure is.

Judge GORSUCH. Of the law in this country. I do not know anybody who wants to go back and reconsider that. I hope not.

Senator 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 "no friend of the little guy." We have had that come up time and again in these proceedings in the last couple of days.

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: "I do not know who decided that the Democratic critique of U.S. Supreme Court nominee Judge Neil Gorsuch would be that he does not side with the little guy." It is a truly terrible idea.

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

Chairman GRASSLEY. Without objection, so ordered.

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

Senator 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 in the record an essay I wrote on the subject that appeared at Scotusblog.com.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator HATCH. Now, Judge, how would you respond to that type of criticism?

Judge GORSUCH. Senator, a good judge does not give a whit about politics or the political implications of his or her decision, decides 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 is a job. You do your very best, and you go home, and that is 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 Democrat 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 do not think of them that way.

But my decisions have always been independent, regardless of who I am agreeing or disagreeing with. And have 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 want to some examples, I would point you to *Carloss*, *Krueger*, *Ackerman*, three recent Fourth Amendment cases ruling for the accused, the least amongst us, against the Government.

Senator HATCH. Well, 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 are criticized for that same common sense idea, and I want to give you a chance to respond. How does relying on courts to make policy undermine both democracy and the legitimacy of the Federal judiciary?

Judge GORSUCH. Well, again, it goes to our separation of powers. Judges would make very poor legislators. We are not equipped for it. We are not responsive to the people. Cannot elect us, cannot get rid of us. You are stuck with us. And we do not have the opportunities to talk to people, to have hearings like this one in places like this.

I am permitted four law clerks for 1 year at a time right out of a law school. It is kind of an evanescent crowd. It replenishes itself every year. Now, if you were to make laws, I do not think you would 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 is just not how anyone would design the railroad. And so, those are some of the problems I see, Senator.

Senator HATCH. Well, thank you. And that——

Judge GORSUCH. With all respect to my law clerks. I love them very much.

[Laughter.]

Judge GORSUCH. They are like family, but they are not the same as your staffs and the investigative powers you have.

Senator HATCH. Well, they are lucky to be with you is all I can say.

In that same—in that National Review piece, you pointed out some liberal policies of lawyers 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 policies that were liberal, not that they were achieved through litigation. Again, I want to give you a chance to respond.

Judge GORSUCH. Well, I would say that in that article—I would say a couple things about it. First, as I pointed out and I believe, the courts are a very important place for the vindication of civil rights and for minorities.

Senator HATCH. Yes.

Judge GORSUCH. It is a place where unpopular voices get heard the same as popular voices. In a democracy and the legislature, majorities win. That is not the case in courts. The best argument should prevail. So, they play an important role.

And, second, I pointed out that one thing that we lack as judges to make good policy decisions as legislators is the ability to com-

promise. These bodies, legislative bodies, you can put together a compromise. Judges, somebody has to win, somebody has to lose, Senator. It is not a great place to compromise, and, again, we are not great—we are not well-equipped to do your work.

At the same time, I did criticize—I pointed out a column by a liberal columnist, self-identified liberal columnist, very fine man, and I agreed 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.

Senator 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: "Over the course of his 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 filed and has prevailed with class actions on behalf of consumers. We should applaud such independence of mind and spirit in Supreme Court nominees."

Now, Mr. Chairman, I ask consent that this column appropriately titled, "There is No Principled Reason to Vote Against Gorsuch," be included in the record at this point.

[No response.]

Senator HATCH. Mr. Chairman.

Chairman GRASSLEY. Without objection, it is ordered.

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

Senator HATCH. Judge, is that an accurate description of your work in private practice?

Judge GORSUCH. It is, and I am grateful that David is here today with me.

Senator HATCH. Well, I am grateful he is here, too.

Judge 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 "v." I thought that would make me a better lawyer, and I would 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 would not leave, and he stole the gravel, and we had to kick him out. And then he brought a bunch of lawsuits, 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 hundred-year-old law, no furtive mining, the no furtive mining statute. And we brought suit, and we won a claim for conversion and malicious use of process, among other things, in county court. It may have been one of the highlights of my career when one of the jurors came up afterwards and said to me, son, you are a young Perry Mason.

[Laughter.]

Judge GORSUCH. 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 do not know if it still is, they probably have done better now—the largest plaintiff side antitrust verdict that had been affirmed in American history.

We represented class actions of consumers, some dry holes, some successful, all sorts of clients—individuals, companies, nonprofits. 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.

Senator HATCH. You are 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.

Now here is the conclusion: "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." The author says that parties who come before you, "can rely on a record of fair analysis and resistance to simply rubber stamping business interests or Executive agency actions."

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

Chairman GRASSLEY. Without objections, so ordered.

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

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

Judge GORSUCH. Sir, I am heartened by that article. I had not read that one, and——

Senator HATCH. It is a good article.

Judge 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.

Senator HATCH. That is 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 addressed 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 standard.

Opponents of your nomination do not like this result, and they accuse you of being anti-woman. That, of course, is not true at all, and any fair person would have to conclude it is not true. Your critics simply demand that as a judge, you must follow of their polit-

ical priorities that availability of birth control is more important than religious freedoms.

Now, I have two questions about your decision. Is that not 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?

Judge GORSUCH. Senator, our job there was to apply the statute as best as 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 is all any judge can promise or guarantee. I respect all of my colleagues who addressed that case.

Senator 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: "It does perhaps its most important work in protecting unpopular religious beliefs, vindicating the Nation's longstanding aspiration to serve as a refuge of religious tolerance." 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?

Judge GORSUCH. Well, I might give you even a couple other examples of RFRA's application that I have been involved in that might shed some light on this. It is the same statute that applies not just to *Hobby Lobby*. It also applies to *Little Sisters of the Poor* and protects their religious exercise. And it has also been applied in a case where I appointed counsel because I saw something potentially meritorious there. And our court held it applied to a Muslim prisoner in Oklahoma who was denied a halal meal.

Senator HATCH. Right.

Judge GORSUCH. It is also the same law that protects the rights of a Native American prisoner who was denied access to his prison sweat lodge, and 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 wrote the Native American prisoner case, and I participated in and I wrote a concurrence in the Muslim prisoner case.

Senator HATCH. Well, thank you for doing so. I also want to give you a chance to answer and 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?

Judge GORSUCH. No.

Senator HATCH. Of course not. Another Senator mentioned just a few of the thousands of cases in which you participated and said, "I am troubled by the results in those cases." He never took issue with how you applied the law in those cases. He said only that the results troubled him. And as I described Monday in my opening statement, I 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?

Judge GORSUCH. I associate myself with the approach I think all good judges attempt, to follow the law wherever it leads.

Senator HATCH. My time is up, Mr. Chairman. I am sorry.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Well, thank you, Judge Gorsuch. 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 and practice, 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, and I understand you respect him as a jurist. Is that correct?

Judge GORSUCH. Very much so, Senator. Whenever I see his name attached to an opinion, it is one I read with special care. He is an outstanding judge.

Senator LEAHY. Do you think he was treated fairly by this Committee, yes or no?

Judge GORSUCH. Senator, as I explained to you before, I cannot get involved in politics. And there are judicial canons that prevent me from doing that, and I think it would be very imprudent of judges to start commenting on political disputes between themselves or the various branches.

Senator LEAHY. The reason I ask that question, since this Committee began holding hearings—public hearings of Supreme Court nominations began in 1916. I was not 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 express an opinion. I think it was shameful. I think it has severely damaged the reputation of this Committee. I think it has severely damaged the reputation of Senators who concurred with that. We were anything but the conscience of the Nation in that regard, and those who proudly held their hand up and swore that 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 to the far right, big money, special interest groups. And you may not like that terminology, but even Republican Senators have praised the fact that the President had gone to this group and had a list when he was running for office of who he could select from. A list given not by—prepared by him, but by these special interest groups, and they want—they have an agenda.

They are confident you share their agenda. 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.

Chairman GRASSLEY. Without objection, so ordered.

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

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

Chairman GRASSLEY. Without objection, so ordered.

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

Senator LEAHY. Now, the two far right interest groups that recommended you to the President, and 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 the Constitution and laws should be grounded solely in the original meaning of the text. You said judges should, I quote, "should strive to apply the law as it is, focusing backward, not forward." If they do that—let us 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?

Judge GORSUCH. Senator, I can tell you that the Supreme Court of the United States has a lot of precedent in this area, as you are 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 is a lot of precedent in this area.

Senator LEAHY. Well, is there—is there precedent from the drafters that "speech" include corporate money being put into corporations and being put into campaigns?

Judge GORSUCH. Senator, that was exactly what was at issue in part in *Austin*, 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.

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

Judge GORSUCH. Well, Senator——

Senator LEAHY. That is an easy "yes" or "no."

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

Senator LEAHY. But nothing about corporate money.

Judge GORSUCH. I do not remember that term, no, Senator.

Senator LEAHY. Trust me—trust me, there was not.

Judge GORSUCH. I trust you.

Senator LEAHY. Okay.

Judge GORSUCH. Entirely.

[Laughter.]

Senator LEAHY. No, you do not have to.

Judge GORSUCH. Not that much?

[Laughter.]

Senator LEAHY. I will let it go.

[Laughter.]

Senator LEAHY. In *Citizens United*, Justice Kennedy indicated that restrictions on campaign donations could only be justified by concerns about quid pro quo corruption. Now, President Trump has said, that the reason he made campaign donations was so that when he needs something from them, "they are there for me." His campaign contributions buy favors.

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

Judge 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 be obtained on expenditure limits.

Senator LEAHY. You do not believe that putting an unlimited amount of money by somebody who has a particular interest in the outcome of actions by the Congress, putting an unlimited amount of money into specific campaigns, that is not enough to show the intent to buy favors, or enough to show corruption?

Judge GORSUCH. I am not sure I tracked the question, Senator. I am sorry.

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

Judge GORSUCH. I think *Citizens United* made clear that quid pro quo corruption remains a vital concern and is 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.

Senator LEAHY. If somebody were to out and out buy a vote or buy a favor, we would all agree that is corruption, is it not?

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

Senator LEAHY. Well, would you agree with me?

Judge GORSUCH. I would follow the law, and that is my understanding—that would certainly fall within my understanding of the law.

Senator LEAHY. When I was a prosecutor, we would call that corruption.

Judge GORSUCH. All right. I will trust you there, too, Senator.

Senator LEAHY. And I did. Now, but influence is different ways. For example, when you became a judge, you were here in Washington. You were working in Washington. I understand there were three extremely well-qualified Coloradan women attorneys who were on the short list being considered by the Bush White House.

The Denver Post did a profile of these women, and at that point—and your name was not on that list. At that point, a billionaire, a 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?

Judge GORSUCH. Senator, with respect to my nomination, as I recall——

Senator LEAHY. I am talking about the Circuit.

Judge GORSUCH. Yes, yes. As I recall, all of my clients, or an awful lot of them, came out of the woodwork to say nice, supportive things about me. And Phil Anschutz was one, and I think there are

probably letters in there from the fellow with the gravel pit, too, and——

Senator LEAHY. Which one do you think the White House listened to the most, Mr. Anschutz or a gravel pit owner? I mean, let us——

[Laughter.]

Judge GORSUCH. Senator——

Senator LEAHY [continuing]. Let us be realistic.

Judge GORSUCH. Senator, I think what they probably listened to was the fact that they had seen me in action at the Department of Justice. That is my guess if you ask me to guess, but that is a guess because I did not make the decision.

Senator LEAHY. I raise this because some of these same people helped to fund the group that put you on the list for President Trump.

Now, President Trump, as you know, has attacked judges who dared to uphold the Constitution. He is going after them. He has said things that I do not think any one of us would do. So, you have to prove that you will be an independent judge. You have heard that from both sides here.

Let me ask you a question in this—in this regard. You are a person who believes in religious freedom. You said that before. In December 2015, the Senate Judiciary Committee adopted my sense of the Senate that "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, and 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?

Judge GORSUCH. Senator, this is an issue that is currently being litigated actively, as you know, and I——

Senator LEAHY. Well, I am not asking about the litigation in the Ninth Circuit or anything. I was—I am asking about the fact, is a blanket religious test, is that consistent with the First Amendment?

Judge GORSUCH. Senator, we have a free exercise clause that protects the free exercise of religious liberties by all persons in this country. If you are asking me how I would apply it to a specific case, I cannot talk about that for understandable reasons.

Senator LEAHY. Well, because the President——

Judge GORSUCH. The understandable reasons, just so I am frank and candid with you as I can be. Senator, when you ask me to apply it to a set of facts that look an awful lot like a pending case in many Circuits now, my worry——

Senator LEAHY. I will try a hypothetical. Would the President have the authority to ban all Jews from the United States or all people that come from Israel?

Judge GORSUCH. Senator——

Senator LEAHY. Would that be an easy question?

Judge GORSUCH. 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 *Zadvydas* has held that due process rights extend even to undocumented persons in this country, okay? I will apply the law. I will apply the law

faithfully and fearlessly, and without regard to persons. I do not care——

Senator LEAHY. How about with regard to religion?

Judge 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 did not want them discriminated against because they were a large company or a small individual with an unpopular belief. And that is the kind of judge I have tried to be, Senator, and I think that is my record.

Senator 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?

Judge GORSUCH. I need to know more specifics.

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

Judge GORSUCH. Oh, Senator, that would—that would be inappropriate, yes. That is against the law. That is against the law.

Senator LEAHY. Well, of course, we go right back to the—should we ban people based solely on their religion, solely on their religion?

Judge GORSUCH. Senator, we have the Religious——

Senator LEAHY. Not on whether they form a threat or something, but you ban somebody solely on their religion?

Judge GORSUCH. Senator, we have not just the First Amendment free exercise clause in this country, very important protection. We have not just the equal protection guarantee of the Fourteenth 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 this body with the support of Senator Kennedy and Senator Schumer when he was in the House.

And that imposes an even higher standard on the Government than the First Amendment when it comes to religious discrimination. It says that there—if there is any sincerely held religious belief, earnestly held religious belief, the Government must meet strict scrutiny before it may regulate on that basis, strict scrutiny being the highest standard known in American law.

Senator 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 am 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 has 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."

Judge GORSUCH. Senator, a lot of people say a lot of silly things.

Senator FEINSTEIN. That sounds silly.

Judge GORSUCH. My grandfather——

Senator LEAHY. Well, that is more than silly. That is a—he wants—this Congressman wants you on the Court so they can uphold a Muslim ban.

Judge GORSUCH. Senator, he has no idea how I would rule in that case. And, Senator, I am not going to say anything here that would give anybody any idea how I would rule in any case like 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 they would rule in a case that is currently pending and likely to make its way to the Supreme Court.

Senator LEAHY. Well, the President's national security determinations, are those reviewable by the Court?

Judge GORSUCH. Senator, no man is above the law.

Senator LEAHY. Okay, because they have asserted that their national security determinations are unreviewable by the Court. I have heard Presidents—other Presidents say that in the past. I disagree when they say that. Do you disagree?

Judge 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, okay, and Justice Jackson wrote a brilliant opinion in *Youngstown*. Now, it is really important to know who he was. He was the fiercest——

Senator LEAHY. I wrote a paper on that, so I know it.

Judge GORSUCH. I know you did. I know you did. Well, I know—we talked about it. And, you know, 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.

In 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 is when the President is acting at his greatest strength because there are 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 I.

When the—when the Congress and the President are in disagreement, that is the other end of the spectrum. The President there is acting with the—at the lowest ebb of his authority. And when Congress is silent, that is the gray area in between. That is how a court, as opposed to a lawyer or advocate, approaches the problem.

Senator LEAHY. Well then, let us go to that then. President Trump has declared that torture works. And he said, I quote him: "Bring a hell of a lot worse than waterboarding." A 2002 memo authored by Jay Bybee from the Office of——

Senator FEINSTEIN. Legislative——

Senator LEAHY [continuing]. Legal Counsel, claimed that 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.

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

Judge GORSUCH. Well, have a Convention Against Torture and implementing legislation which ban torture. We have the Detainee Treatment Act, which we talked about earlier, which bans cruel, inhuman, and degrading treatment. We also happen to have an Eighth Amendment.

Senator 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 and any other ones you cited?

Judge GORSUCH. Senator, no man is above the law.

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

Justice Department Attorney John Yoo justified the program. He said, "The statutes passed by Congress cannot infringe on 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 "inherent power" to override our surveillance laws to conduct national security searches?

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

Senator LEAHY. Well, let me ask it a different way. If Congress passed a specific law on surveillance, and if a President said I am going to violate that law because I am President, does he have that power?

Judge GORSUCH. No man is above the law, Senator.

Senator LEAHY. Senator Lee, who was here a minute ago—I do not know if he—Senator Lee led the efforts to pass the USA Freedom Act to end the NSA bulk collection of Americans' 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 the power to supersede that law?

Judge GORSUCH. Senator, I cannot issue advisory opinions at this table in cases or controversies and how they would come out.

Senator LEAHY. Not——

Judge GORSUCH. And I just—I cannot do it. It would not be responsible.

Senator LEAHY. Is that law——

Judge GORSUCH. But 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.

Senator LEAHY. Well, when you were there, and I do not 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 in the Commander-in-Chief and the President," and you appeared—advocated for a similar view when

you attempted to give President Bush the flexibility not to be bound by Senator McCain's legislation.

Judge 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 is my recollection.

And my role was a lawyer and predominately 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.

Senator LEAHY. Were you involved in *Hamdan v. Rumsfeld*?

Judge 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 and providing advice as a lawyer about the Detainee Treatment Act, I am sure, yes.

Senator LEAHY. You have read the *Shelby County* decision. If you were on the Court, which side would you have voted with?

Judge GORSUCH. Senator, I admire the various ways——

[Laughter.]

Judge GORSUCH. You would be a formidable companion in the courtroom.

Senator LEAHY. Yes, Senator Feinstein said, "Do not let it go to your head, Pat."

[Laughter.]

Judge GORSUCH. Oh, he should.

Senator LEAHY. And I am not. I am not. I am just—I am a lawyer from a small town.

Judge GORSUCH. Yes, right. I have heard that story.

[Laughter.]

Judge GORSUCH. Whenever a lawyer says, "I am just a lawyer from a small town," watch out. He is about—last time—you got to watch your wallet, because it is gone quickly in my experience. And I might have played that line once or twice myself.

Senator LEAHY. No, but I ask these questions because there were—both Justice Alito when he was before us and Justice Roberts, and Judge Alito and Judge Roberts, answered some precedent questions. And you say there are no precedent questions you could answer?

Judge GORSUCH. Well, no, Senator, I am happy to say *Shelby* is a precedent of the U.S. Supreme Court. It is a recent one. It is 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.

Senator LEAHY. You have been critical of class actions, and Justice Scalia in the *Ledbetter* case and the *Wal-Mart v. Dukes* case made it more difficult, I believe, for Americans to have their day in court. Would you join Justice Scalia's decision in *Wal-Mart*? Just whatever answer you want.

Judge 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 have ruled against class actions, and I have 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 live near Rocky Flats, a uranium processing plant that 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, a jury found for them, and they win. Finish the lawsuit.

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

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

And you need to be reminded that you should not be offended as Members go to vote, and you will have your 30 minutes, and I hope that is enough because I want to keep this moving. You can be back here around 12:45 or thereabouts. I will wait until you get the orders.

[Laughter.]

Chairman GRASSLEY. Does that detract from anything?

Judge GORSUCH. We are okay.

[Laughter.]

Chairman GRASSLEY. Okay.

Senator Graham.

And, Senator Graham, if I go ahead of time, you will recess the Committee?

Senator GRAHAM. Yes, sir.

Chairman GRASSLEY. Until that time?

Senator GRAHAM. Yes, sir.

Chairman GRASSLEY. Thank you.

Senator GRAHAM. Judge, I want to read a statement here that I associate myself with. "I certainly do not want you to have to lay out a test here in the abstract, which might determine what your vote or your test would be in a case you have yet to see that may well come before the Supreme Court."

Does that sound like a reasonable standard?

Judge GORSUCH. Yes, Senator.

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

You are not a political person. I am, so I am going to take a bit of a moment here to talk about the fairness of what is going on, in terms of you and Judge Garland.

Judge Garland was a fine man. I am 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.

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. "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 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 on the possibility of a vacancy coming about by somebody stepping down, not dying, once the campaign season was afoot.

Justice Scalia 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 nominees" a vote.

This is Senator Schumer in the last—July 27th, 2007: "We should reverse the presumption of confirmation. We should not confirm any Bush nominee to the Supreme Court except in extraordinary circumstances."

That was the last year of President Bush's last term.

To my Democratic colleagues, on November 21st, 2013, you decided, when you were in charge of this body, by a 52–to–48 vote, to change the rules of the United States Senate with the nomination of executive branch appointments and all judges below that of the Supreme Court.

I am not going to ask you whether you think that was fair or not, because that is not your job.

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 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 am one of two or three left—that believed that it was wrong to filibuster Supreme Court judges and judges in general because you do not 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 a Democrat President because that is 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 in the judicial philosophy world. That is why I voted for them.

But now things are different. I believe that vote November 21st, 2013, forever changed the way the Senate works when it comes to Executive appointments of judicial nominations and will do long-term damage to the judiciary as a whole because the most ideological will be rewarded.

We do not have that requirement yet for the Supreme Court, and I hope we never will. Time will tell. I am 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 Judge Garland, a 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 is just not me saying that.

This is what the Federalist Papers No. 76 said about the requirement of advise and consent. This is what Mr. Hamilton wrote a very long time ago, in 1788. "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 could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them. . . . To what purpose then require the co-operation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and 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 to the Supreme Court were confirmed without a hearing, some without even a recorded vote.

I am not here to say that my party is without fault in the area of judges. We are not. I am here to say that, in 2013, November 2013, the game changed in a way that I think Mr. Hamilton would be very disappointed in. And it is not that I do not 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 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.

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 do not think there is any reason to suggest that you are his favorite.

Had you ever met President Trump personally?

Judge GORSUCH. Not until my interview.

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

Judge GORSUCH. No, Senator.

Senator GRAHAM. What would you have done if he had asked?

Judge GORSUCH. Senator, I would have walked out the door. It is not what judges do. They do not do it at that end of Pennsylvania Avenue, and they should not do it at this end either, respectfully.

Senator GRAHAM. This is what 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 Justices 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 did not 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.

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 is 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 do not want to take the time, it says more about you than him.

All I can say is, 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 that.

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 us talk about our interaction a long time ago.

Judge GORSUCH. Thank you, Senator, for those very kind words.

Senator GRAHAM. Well, it was something you have earned, not something that you need to thank me for.

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

Judge GORSUCH. 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.

Senator GRAHAM. It would be news to them we are not at war.

Judge GORSUCH. I am sure that is right.

Senator GRAHAM. It would be news to the families who have lost a loved one in this fight. So I think we are at war.

Would you agree with me it is not a traditional war?

Judge GORSUCH. Certainly not, Senator.

Senator GRAHAM. There is no capital to conquer, no air force to shoot down, and no navy to sink. There is no taking of Berlin and Japan.

Do you agree with me it would be hard to determine when the war is actually over?

Judge GORSUCH. Senator, that was a question that the Court struggled with in the *Hamdi* case, as you know.

Senator GRAHAM. And we had a lot of conversations about how to proceed forward when you were in the Bush administration. Is that correct?

Judge GORSUCH. We did.

Senator GRAHAM. And you were in the camp of the—the **Youngstown** steel camp, that if Congress is involved, the President is stronger, not weaker. Is that right?

Judge GORSUCH. That is right, Senator.

Senator GRAHAM. But there are some authorities that the President as Commander-in-Chief has that cannot be taken away by the Congress. They are inherent to the job. Is that true also?

Judge GORSUCH. There are certainly people who believe that, Senator.

Senator GRAHAM. Well, I am one of them.

Having said that, because you cannot have 535 Commanders-in-Chief, 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?

Judge GORSUCH. Yes, Senator. I believe it is.

Senator GRAHAM. There were people in the Bush administration who 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 practices we can employ in terms of interrogation standards. Is that correct?

Judge GORSUCH. Yes.

Senator GRAHAM. And it also tried to come up with a system of judicial review. I was in the camp that we are at war, and, in past wars, you do not give enemy prisoners lawyers. I do not 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?

Judge GORSUCH. There is certainly legal authority suggesting that, Senator.

Senator GRAHAM. And it is the Court's job to determine if the procedures in question pass muster.

Judge GORSUCH. That is correct, Senator. Of course, this body plays a role too.

Senator 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 is 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 or Congress pass constitutional muster. Is that the general layout of this situation?

Judge GORSUCH. That is the separation of powers at work.

Senator GRAHAM. And there was a crosscurrent here.

There was an email that you were not part of, you were not included on the email, 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 lead, which may be what led to DOJ–LA's confusion. But the key point for us is that we have greenlight to engage on Graham.

And what I was trying to do was preserve the Combatant Status Review Tribunal concept, the ARB, Administrative Review Board concept, and allow the courts to judge the work product at the D.C. Circuit Court of Appeals, to have judicial review, but let the CSRT go first.

Do you remember that?

Judge GORSUCH. I do.

Senator GRAHAM. Okay. And it was settled in the Congress where the Combatant 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 to see if it was capricious, arbitrary, if it made sense.

The Supreme Court in *Boumediene* struck that down, saying it was not an adequate substitute for habeas. Is that correct?

Judge GORSUCH. That is absolutely correct, Senator.

Senator GRAHAM. And your role in all this was trying 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.

Judge GORSUCH. As a lawyer?

Senator GRAHAM. Yes.

Judge GORSUCH. I was not a policymaker, but I did advise.

Senator GRAHAM. As a lawyer.

Judge GORSUCH. 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.

Senator GRAHAM. Any lawyer, I think, who understands this area of the law would suggest the President is 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 the signing statement should say or look like?

Judge GORSUCH. That is my recollection, and that is about all I can recall.

Senator GRAHAM. I remember it very well because Vice President Cheney's signing statement was going to be, we have inherent authority to do whatever we think we need to do. And there were a lot of other people saying, no, you do not 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 have seen him in action in very complicated, emotional matters, where you had one group of people who could give a damn about the terrorist and another 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 a preponderance of the evidence you are, in fact, an enemy combatant. Then if they reach that conclusion, you can be held under the law of war as long as you are a threat to our Nation.

Is that a fair summary of where we are at?

Judge GORSUCH. That is my understanding, Senator.

Along the way, your legislation did prevail in the D.C. Circuit, and in the Supreme Court, of course, it was a close call. It was 5–4, as I recall.

Senator GRAHAM. And that just proves that five people can be wrong.

[Laughter.]

Senator GRAHAM. While I disagree, I certainly respect the Court's decision.

Judge GORSUCH. You are not going to get me to commit on that one either.

Senator GRAHAM. No, do not worry. I am not even going to try.

The bottom line here is, there will be more legislation coming 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 is a difference between the law of war and domestic criminal law. Do you agree with that?

Judge GORSUCH. Yes, Senator.

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 group. That is correct?

Judge GORSUCH. That is right.

Senator GRAHAM. The law of war is about winning the war.

Judge GORSUCH. Well, Senator, there are——

Senator GRAHAM. How you fight the war.

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

Senator GRAHAM. Right.

Judge GORSUCH. Laws about that.

Senator GRAHAM. Yes. And we are fighting an enemy who has no rules that would do anything. And I have always been in the camp that I do not want to be like them. I think that is their weakness. And the strongest thing we could do is stand up for a process that stood the test of time, which is intelligence-gathering in a humane

way. Because they would cut our heads off, it does not make us weak because we will not cut their heads off. It actually makes us stronger, over the arc of time. So that is 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.

Judge GORSUCH. To challenge precedent?

Senator GRAHAM. Yes.

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

Senator GRAHAM. That is how *Brown v. Board of Education* came about.

Judge GORSUCH. You are exactly right, Senator.

Senator GRAHAM. Okay. Let us talk about *Roe v. Wade*.

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

[Laughter.]

Judge 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's interests and when the woman's interests tend to prevail.

Senator GRAHAM. Okay. So let me just break it down.

The Court said there is a right to privacy, that the Government cannot 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?

Judge GORSUCH. That was the scheme set forth.

Senator GRAHAM. And I think medical viability was the test that the Court used.

Judge GORSUCH. Well, that is the test that the Court came around and applied in *Casey* in 1992.

Senator GRAHAM. Okay.

Judge GORSUCH. And so viability became more of the touchstone rather than a rigid——

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

Judge GORSUCH. Senator, I am not a scientist or a doctor.

Senator 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 us look at when medical viability occurs.

That is 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 am not asking you to agree with my legislation. I am saying that I am developing—we are one of seven nations that allow wholesale, on-demand, unlimited abortion at 20 weeks, the fifth month of pregnancy. I would like to get out of that club.

But we are 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 an unborn child at 20 weeks, the medical protocols are such that you have to

provide anesthesia because you do not 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 provide anesthesia.

And my theory is, well, let us 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 am going to make the argument that there is a compelling state interest at that stage of the pregnancy to protect the child against death that is going to be excruciatingly painful.

You do not have to say a word. I am just letting everybody know that, if this legislation passes, it will be challenged before you, and you will have to look at a new theory of how the state can protect the unborn.

And here is what I think. You will read the briefs, look at the facts, and make a decision. Am I fair to conclude that?

Judge GORSUCH. Senator, I can promise you no more than that, and I guarantee you no less than that, in every single case that comes before——

Senator 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 is in the fifth month, and that does not make us a better nation.

There will be people on the other side saying, no, that is 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 is exactly the same answer I have 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 would be unworthy of the job.

Now, about what is going on in the country with President Trump, whether you like him or you do not, he is President. But you have said several times that he is not above the law as President. Is that correct?

Judge GORSUCH. Yes, Senator.

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.

Judge GORSUCH. Senator, yes. I see that having all sorts of constitutional problems, under current law.

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

Judge GORSUCH. Yes, Senator. That is my recollection of it.

Senator GRAHAM. So in case President Trump is watching, which he may very well be, one, you did a good job from picking Judge Gorsuch. Number two, here is the bad part——

[Laughter.]

Senator GRAHAM [continuing]. If you start waterboarding people, you may get impeached.

Is that a fair summary?

Judge GORSUCH. Senator, the impeachment power belongs to this body.

Senator GRAHAM. Okay, that is even better.

Would he be subject to prosecution?

Judge GORSUCH. Senator, I am not going to speculate.

Senator GRAHAM. But he is not above the law?

Judge GORSUCH. No man is above the law.

Senator GRAHAM. Okay.

Judge GORSUCH. No man.

Senator GRAHAM. Thank you. I think you are a man of the law, and I really want to congratulate the President that picked you.

Quite frankly, I was worried about who he would pick. Maybe somebody on TV.

[Laughter.]

Senator GRAHAM. 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 did not 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 will be happy with that, because I am.

Judge GORSUCH. Thank you, Senator.

Senator GRAHAM [presiding]. We will recess until 12:45.

[Recess.]

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman, and 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 *Hamdan*, and you were not involved in the drafting of the McCain section of the bill on the Detainee Treatment amendment.

Judge GORSUCH. Senator, that would not fit quite with my recollection.

Senator DURBIN. Please.

Judge 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 was one voice among a great many, and that in terms of when it was struck down, *Hamdan* held that the Detainee Treatment Act did not 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*.

Senator DURBIN. So what I am driving at, though, is the McCain section relative to cruel, inhuman, and degrading treatment. And I assume or I hope you have had a chance to take a glance at the emails that Senator Feinstein gave you. You said in your email 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?

Judge GORSUCH. Senator, I have not had a chance to look at that. I am sorry. I just scarfed down a sandwich over the break, and I will be happy to read it, but I am not sure what I can answer you, here sitting, off the top of my head. It was 12 years ago, and I am doing the best I can with my recollection. My recollection——

Senator DURBIN. I am trying to get this leap from your memory of this email, which I understand there were 100,000 pages of emails.

Judge GORSUCH. Exactly.

Senator DURBIN. In fairness to you.

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

Senator 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 waterboarding.

Judge GORSUCH. Sitting here, that would be my understanding, Senator.

Senator DURBIN. The problem with what I have just described is when you were talking about a signing statement, waterboarding was still happening, and you were saying in your email, "I want to essentially codify existing interrogation policy." There is an inconsistency there which we are going to have to wait until the second round to resolve.

Judge GORSUCH. Okay.

Senator DURBIN. Okay. Let me read something to you and ask you for a reaction. It is a statement that was made about 8 days ago by a Congressman named Steve King of Iowa, and here is what he said: "You cannot rebuild your civilization with somebody else's babies. You have to keep your birth rate up, and that you need to teach your children your values. In doing so, you can grow your population, you can strengthen your culture, and 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?

Judge 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 the 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 have sent him to the bar for discipline.

I can tell you that when it comes to access to justice, I have written on this topic; I have worked on this topic for the last 6 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 cannot take too much credit—tried to do something about it.

I can tell you that when prisoners come to court, pro se, handwritten complaints, and I see something that might be meritorious in them, I appoint counsel. That is my record, Senator.

Senator DURBIN. Can you describe your relationship with Professor John Finnis?

Judge GORSUCH. Sure. He was my dissertation supervisor.

Senator DURBIN. When did you first meet him?

Judge GORSUCH. Whenever I went to Oxford, so it would have been 1990——

Senator DURBIN. 1992.

Judge GORSUCH. Well, it could have been two or three. Somewhere in there.

Senator DURBIN. And what was his relationship with you or you with him?

Judge 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, 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 did not let an argument that I was working on go unchallenged from any direction.

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

Judge GORSUCH. Whatever it is, it is, yes.

Senator DURBIN. Do you still have a friendship, a relationship with him?

Judge 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.

Senator DURBIN. Did he know you were from Colorado?

Judge GORSUCH. I do not know. It must have at some point come out in our conversations. I do not know when.

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

Judge GORSUCH. He did not write my book, Senator.

Senator DURBIN. Help write?

Judge GORSUCH. He did not help write my book. I wrote my book. I certainly expressed gratitude to my dissertation supervisor in a book that is basically my dissertation.

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

Judge 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 and an external examiner, and that was hard. That was hard.

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

Judge GORSUCH. Oh, yes. Yes.

Senator DURBIN. You called him one of the great scholars.

Judge GORSUCH. Well, and Oxford has a stable—and it is part of the reason why it was such a privilege. I mean, here I was a kid from Colorado, and I have 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. H.L.A. Hart was even still alive then.

Senator 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 "largely given up bearing children at a rate consistent with their community's medium-term survival." He warned they were on a path to "their own replacement, as a people, by other peoples, more or less regardless of the incomers' compatibility of psychology, culture, religion, or political ideas and ambitions, or the worth or viciousness of those ideas and ambitions."

He went on to say, "European states in the early 21st century move . . . into a trajectory of demographic and cultural decay . . . population transfer and replacement by a kind of reverse colonization."

Had you ever read that before?

Judge GORSUCH. Nope.

Senator DURBIN. Had you heard it before?

Judge GORSUCH. Nope. Not to my recollection.

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

Judge GORSUCH. Senator, I am not here to answer for Mr. King or for Professor Finnis. We——

Senator DURBIN. But I am asking 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?

Judge GORSUCH. Senator, before I expressed any view on that, I would want to read it, and I would want to read it from beginning to end——

Senator DURBIN. I just read it to——

Judge GORSUCH. Not an excerpt. And, Senator, I have had a lot of professors. I have been blessed with some wonderful professors. And I did not agree with everything they said, and I would not expect them to agree with everything I have said.

Senator DURBIN. Well, let me ask you this specific one. It was 1993, and you were at Oxford, and this is 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?

Judge GORSUCH. Senator, I know he testified in the *Romer* case. I cannot say sitting here I recall the specifics of his testimony or that he gave a deposition.

Senator DURBIN. I guess the reason I am raising this is this is a man who apparently had an impact on your life, certainly your academic life, and I am 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.

Judge GORSUCH. Well, I guess, Senator, I think the best evidence is what I have written. I have written over—oh, gosh, written or joined over 6 million words as a Federal appellate judge. I have written a couple of books. I have been a lawyer and a judge for 25 or 30 years. That is my record, and I guess I would ask you respectfully to look at my credentials and my record, and some of the examples I have given you are from my record about the capital habeas work, about access to justice. I have spoken about overcriminalization publicly. Those are things I have done, Senator.

Senator DURBIN. And what about LGBT and Q individuals?

Judge GORSUCH. Well, Senator, there are—what about them?

Senator DURBIN. Well, the point I made is——

Judge GORSUCH. They are people, and——

Senator 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 have ruled on relative to that class?

Judge GORSUCH. Senator, I have tried 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. It is a radical promise in the history of mankind.

Senator DURBIN. Does that refer to sexual orientation as well?

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

Senator 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?

Judge GORSUCH. Senator, I would agree with you it is highly inappropriate.

Senator DURBIN. You do not believe it is prohibited?

Judge GORSUCH. Senator, it sounds like a potential hypothetical case that might be a case or controversy I might have to decide, and I would not want to prejudge it sitting here at the confirmation table. I can tell you it would be inappropriate.

Senator 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?

Judge GORSUCH. Senator, those are not my words, and I would never have said them.

Senator DURBIN. I did not say that. I asked you if you agreed with the statement.

Judge GORSUCH. And I am telling you I do not.

Senator DURBIN. Thank you.

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

EEOC's enforcement guidance on pregnancy discrimination provides as follows: "Because Title VII 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?

Judge GORSUCH. Senator, there are a lot of words there, and if you are asking me to parse them out and give you a legal opinion—and I fear that you may be—I would respectfully say I would have to study it in the course of a judicial case.

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

Judge GORSUCH. Senator, I would need to—it sounds like you are asking me about a case or a controversy, and with all respect, when we come to cases and controversies, a good judge will listen. Socrates said the first virtue of a good judge is to listen courteously and decide impartially.

Senator DURBIN. I think you know why I am asking these questions.

Judge GORSUCH. No. This one I do not.

Senator DURBIN. The reason I am asking about your views on pregnancy, women, and the workplace 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 did not 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 it 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?

Judge GORSUCH. No, Senator, and I would be delighted to actually clear this up.

Senator DURBIN. Please.

Judge GORSUCH. Because the first I heard of this was the night before my confirmation hearing. I have been teaching legal ethics at the University of Colorado for 7 or 8 years. It has been a great honor and pleasure. I teach from a standard textbook that every professor—well, I do not know if every professor—a number of professors at CU and elsewhere use. It is an excellent textbook, Professors Lerman and Schrag.

One of the chapters in the book confronts lawyers with some harsh realities that they are 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, and that is 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 would 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 is 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 are 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—the hypothetical is that it is 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 is a choice, too. It is a hard choice.

Or you can push back in some way, shape, or form. And we talk about the pros and the cons in a Socratic dialogue so 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?

And I am shocked every year, Senator, how many young women raise their hand. It is 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, could not 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.

Senator DURBIN. And I wanted to give you that opportunity. I told you yesterday we would get to the bottom of this and I would give you your 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 do not know 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 had an impact. It was profound.

The question, of course, was the military orders in the United States and 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 internment camp, and that whole military directive was challenged in this case. And it was interesting that it was upheld in 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 would like to ask your thoughts on them.

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 would 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 confirmed that as well. Are we up to it in terms of constitutional protection and the role of the Court?

Judge GORSUCH. We better be. Senator, a wise old judge, kind of like Judge Johnson, you are going to hear from; he is 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 does not happen everywhere else around the world. We take it for granted in this country. It is 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 is humbling, that prospect, to me. And 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.

Senator DURBIN. Let me ask you about another case that has been referred to. Yesterday, many of us mentioned Al Maddin sitting in that truck—it was about 3 in the morning—on I–88, west of Chicago. I have 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 either drag that trailer with the frozen brakes behind you out onto that highway, or you wait." And so he waited for hours, and finally, feeling numb and life-threatening cold, he unhitched the trailer and took his tractor to a place for some gas and to warm up and then returned to it when they fixed it.

Seven different judges took a look at those facts and came down on Al Maddin's side, except for one: you. Why?

Judge GORSUCH. Senator, this is one of those you take home at night. The law said that the man is protected and cannot be fired if he refuses to operate an unsafe vehicle. The facts of the case, at least as I understood them, was that Mr. Maddin chose to operate his vehicle, to drive away and, therefore, was not protected by the law. He would be protected if he refused to operate, but he chose to operate. Now, Senator——

Senator DURBIN. But you know the distinction, though, because his dispatcher told him, "Do not leave unless you drag that trailer."

Judge GORSUCH. Right.

Senator DURBIN. And he said, "I cannot do it. You know, the brakes are frozen." And he went out there in 14 below and unhitched that trailer, he thought, because he was in danger. And when you wrote your dissent in this, you said it was an unpleasant option for him to wait for the repairman to arrive.

Judge GORSUCH. I said more than that, Senator. I said——

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 and generic phrase "health and safety." You went on to write, "After all, what under the sun, at least at some level of generality, does not relate to 'health and safety'?"

We had a pretty clear legislative intent for a driver who feels he is in danger of his life, perhaps, and you dismiss it, the only one of seven judges, and say, "No. You are fired, buddy." And, you know, he was blackballed from trucking because of that. Never got a chance to drive a truck again.

Judge 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 wrote, I said it was an unkind decision. I said it may have been a wrong decision, a bad decision. But my job is not to write the law, Senator. It is 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 have been stuck on a highway in Wyoming in a snowstorm. I know what is involved. I do not make light of it. I take it seriously. But, Senator, this gets back to what my job is and what it is not. And if we are going to pick and choose cases out of 2,700, I can 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.

You know, I would point you, for example, to *W.D. Sports* or *Casey*, *Energy West*, *Crane*, *Simpson v. CU*. That is just a few that come to mind that I have scratched down here on a piece of paper.

Senator DURBIN. Judge, we up here are held accountable for our votes, and I have been in Congress for a while, and I have cast a lot of them. Some of them I am not very proud of; I wish I could do it all over again. I have made mistakes. But your accountability is for your decisions, as our accountability is for our votes. And if were picking and choosing, it is to try to get to the heart of who

you are and what you will be if you are given a chance to serve on the Supreme Court.

I would 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 Court 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 the Dictionary law and so many different aspects of this.

What I was troubled by—and I asked you then, and I will 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 is right and wrong when it comes to family planning, and the Court says that is what will decide it, 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. You 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-in corporations in America, 60 million people had 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 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 the company to say, as you told me, "There is some kind of family planning I like and some I do not like"?

Judge 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 at the Tenth Circuit am I a serious and careful judge, I think you will hear that I am. And I am delighted to have an opportunity to talk to you about that decision.

As you know, in RFRA, the Religious Freedom Restoration Act, Congress was dissatisfied with the level of protection afforded 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 does not offend the First Amendment. So laws banning the use of peyote, Native Americans, tough luck, even though it is essential to their religious exercise, for example.

This Congress decided 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 abridged 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.

Okay. I have applied that same law, RFRA and RLUIPA—they are companion statutes—to Muslim prisoners in Oklahoma who seek halal meals, to Native Americans who wish to use an existing

sweat lodge in Wyoming, and to *Little Sisters of the Poor*. *Hobby Lobby* came to court and said, "We deserve protections, too. We are a small family held company." A 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 are entitled to protection, too, under that law."

It is 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 did not 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 are not otherwise defined. That is what a good judge does. He does not make it up. He goes to the Dictionary Act.

In the Dictionary Act, Congress has defined "person" to include corporation. So you cannot 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. In fact, the Government in that case conceded that nonprofit corporations can exercise religion. Conceded that. So that is the case.

Then we come to the strict scrutiny side.

Senator DURBIN. I do not want to cut you off.

Judge GORSUCH. Oh, I am sorry.

Senator DURBIN. I am going to get in big trouble with the Chairman——

Judge GORSUCH. Oh, I do not want to get you in trouble.

Senator DURBIN [continuing]. From Iowa here.

Chairman GRASSLEY. I think I would want you to continue your answer to his question.

Judge GORSUCH. I am sorry, Mr. Chairman.

Chairman GRASSLEY. No, please. I want you to continue.

Judge GORSUCH. Okay. All right. So then you have the religion, the first half of the test met. All right? So then you go to the second half. Does the Government have a compelling interest in the ACA in 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 was not as strictly tailored as it could be because the Government had provided different accommodations to churches and other religious entities.

The Greens did not 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 could not provide an explanation why it could not do the same thing here. And that is the definition of "strict scrutiny."

Now, Congress can change the law. It can go back to *Smith v. Maryland* if it wants to, eliminate RFRA altogether. It could say that only natural persons have rights under RFRA. 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 am sorry. But we did our level best, and we were affirmed by the U.S. Supreme Court, and it is a dialogue like any statutory dialogue between Congress and the courts.

Senator DURBIN. Thank you, Judge, and thank you, Mr. Chairman.

Chairman GRASSLEY. The Senator from Texas.

Senator CORNYN. Thank you, Mr. Chairman.

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

Judge GORSUCH. I get a lot worse. I have a lot worse the other day.

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

Chairman GRASSLEY. Without objection, all documents will be included.

[The information appears as submissions for the record.]

Senator 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?

Judge GORSUCH. That is the easiest question of the day, Senator. Thank you. No.

And I have to correct myself. Senator Durbin, it is not *Smith v. Maryland*. That is third-party doctrine. It is *Employment Division v. Smith* that we are talking about. I apologize to you for that.

Senator CORNYN. Well, I am glad to hear you answer my question the way you did. I expected that you would. But that seems to be implied in some of the questioning that you are getting, that you look at who the litigants are and who you would like to win, the little guy, as we have heard—and I will get to that again in a minute—and then go back and try to justify the outcome. But I agree with you; that is not what good judges do.

I want to return briefly to, I know, something you have 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' 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 and 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?

Judge GORSUCH. I think so, Senator, to the best of my recollection.

Senator CORNYN. Okay. 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 not have to pay attention to the law, or perhaps had authorities that were not otherwise laid out in the statute, that the President could disregard what Congress has passed and what the President had signed into law.

On the other hand, there were those like you in an email 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 and 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 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, here, I will just read it. It says, "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 as Commander-in-Chief and consistent with the constitutional limitations on judicial power."

So that is the statement in the signing statement that you sought to make more expansive and accommodate the three concerns that you raised. Is it not correct?

Judge GORSUCH. Senator, your understanding of events is a lot fresher than mine, but sitting here, I cannot disagree with anything you have said.

Senator CORNYN. Well, and I understand this is, what, 12 years ago.

Judge GORSUCH. Something like that.

Senator CORNYN. And you were asked questions initially by Senator Feinstein without the benefit of actually being able to refresh your memory from reading the emails. 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. You know, 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." And I know as somebody who has actually practiced law in the trenches, as you said you have and you did, you were concerned and write in this article about your concerns for access to justice for the little guys—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?

Judge GORSUCH. I really appreciate this opportunity and venue to be talking about these things because these I care about and I can talk about as a judge.

I wrote that article in conjunction with some input from a lot of wonderful people, so I cannot take total credit for it. And I thank them, and you can see who I thank.

My point there was threefold, starting with the fact that too few people can get to court with legitimate grievances today. That is 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 am not a big blame guy. But I am a look-inside guy. And what do I see in our profession? There are three things that I pointed to in that article.

First, our own ethical rules. It is a very unusual profession where we are allowed to regulate ourselves. It is quite an extraordinary privilege. Usually it is the legislature, right? But lawyers basically regulate themselves. And do all of our ethical rules necessarily help our clients or do some of them help us more than they help our clients?

And I point to some that, for instance, regarding the unauthorized practice of law, why is it you have to be a lawyer to help parents with disabled children in administrative proceedings to seek relief under IDEA? That was an example I pointed to.

Why is it that every time certain companies that provide online 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 cannot get a landlord-tenant contract drawn up?

Those are all results of our ethical rules, and I am not sure whether they are worth the price that we pay for them. It is estimated, I have heard—I cannot verify it—that our ethical rules result in a $10 billion a year surplus to lawyers from clients every year. That was one.

Number two was our own rules of procedure which yield cases like the one we talked about that took 25 years to resolve. That is wrong. That is wrong. We should be able to resolve cases in less time than it takes for my law clerks to be born, raised, and get through law school.

And the third thing I pointed to was our legal educational system, where we have 3 years of post-graduate education for everybody who wants to have anything to do with lawyering. The best lawyer in the country in this history came from your State, Senator Durbin, and he did not ever go to law school. And he always said the best way to become a lawyer, read the books. Still true.

And other countries around the world do not have 3 years of post-graduate legal education. Now, this is where Justice Scalia and I—this is a disagreement. He thought 3 years was necessary for everybody. I am not convinced. In England, where I studied, you could become a lawyer through 3 years of an undergraduate degree or 1 year as a post-graduate degree, 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 to serve the people they would like to serve.

Those are the problems I talk about in that article.

Senator 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 of many things more unjust for people of modest means in America than being denied access to the courts because our system is so expensive and so time-consuming they just simply cannot afford it?

Judge GORSUCH. I think it is a problem when 80 percent of the American College of Trial Lawyers, the best lawyers in the country, arguably—they certainly think they are. Sorry.

[Laughter.]

Judge GORSUCH. When 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 litigation costs rather than the merits of the litigation, that is a problem both ways. And these are lawyers who operate on both sides of the "v."

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

Judge GORSUCH. Ordinarily. Some do. What we are seeing today, though, Senator, is an explosion of pro se, that is, filings by the person without a lawyer. And that is 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.

Senator CORNYN. Judge, let me ask you about another case involving the little guy. This was an immigration case that you will recall was a conflict between two provisions of immigration law, *Gutierrez-Brizuela v. Lynch*. I hope I pronounced that approximately correctly.

Do you recall the case?

Judge GORSUCH. I do, and we have talked a little bit about it with Senator Feinstein, and I would be happy to——

Senator CORNYN. Well, I am happy to hear it again because I heard, I believe it was, Senator Feinstein—maybe I am mistaken there—or maybe one of our other colleagues—I apologize if I misstated that—that talked about this deference to administrative agencies as being necessary and a fundamental doctrine. But can you explain how that ended up hurting the little guy in that case?

Judge GORSUCH. So, Senator, in that case there were two statutes that this undocumented immigrant faced. 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 10 years out of the country before he could seek relief.

Now, I am not criticizing Congress' handiwork 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 trumped, that the man had a right to apply for immediate discretionary relief and did not have to wait 10 years out of the country. And then some number of years later—I cannot remember whether it was 3 or 4, I want to say. Do not hold me to that. The Board of Immigration Appeals in its infinite wisdom comes back and says we are wrong. The Court of Appeals got it wrong; the 10-year statute trumps.

Okay. It says, though, that we are not just wrong, but we are wrong retroactively. So it is as if our decision never existed. And this man, who had relied on our holding to apply for immediate discretionary relief, was denied the opportunity to do so and told now he had to go start his 10-year waiting period.

Now, instead of 10 years, it is now equivalent of, what, 13 or 14 years. And to me, that just seemed like he 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 is a matter of due process and fair notice. When he is told that is the law, he should be able to rely on it.

And I also think it is 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 is 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.

Senator CORNYN. In this case the little guy was actually relying upon a judgment of a court of law——

Judge GORSUCH. Yes, he——

Senator CORNYN [continuing]. And was effectively, or at least the attempt was to overrule that court decision by an administrative regulation or interpretation. Is that correct?

Judge GORSUCH. Yes.

Senator CORNYN. And if you had applied the *Chevron* test—we have talked about that a little bit—said if it is ambiguous, the statute is ambiguous, and the agency's interpretation is a legal one, then you are obligated to enforce the agency decision rather than the judgment of the court of law.

Judge GORSUCH. Senator, we did apply the *Chevron* case faithfully because we had to, and I also wrote separately to ask questions, because I am a Circuit Judge. You know, I never dreamt I would be sitting here, I can tell you that, when I wrote this opinion. And part of my job as a Circuit Judge is to tee up questions for my bosses. And it struck me, here is a question. Is this result

consistent with the Administrative Procedures Act? Which says in Section 706 that we are 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 what the law is. And is this consistent with our values of equal protection, due process, and separation of powers?

Those are questions I raised, Senator, to tee up for my bosses.

Senator CORNYN. So you actually applied the *Chevron* test in your judgment and wrote a separate opinion raising these questions perhaps for review by the Supreme Court.

Judge GORSUCH. I follow precedent.

Senator CORNYN. It sounds like it, even when you disagree with the outcome.

Judge GORSUCH. Well, we got to an outcome we could live with there, too, Senator, and applied *Chevron*. But I did raise it in the separate concurrence to raise these questions. You know, I do not know how I would rule if I were a Supreme Court Justice on the question. I have to be honest with you, Senator Cornyn, because I would want to do what a good judge does. Keep an open mind, read the briefs. And I could change my mind. I think here of my old boss, Dave Sentelle, who, when I clerked for him, he wrote a panel opinion going one way at the beginning of the year, and by the end of the year he wrote an en banc opinion, an opinion for the full court, reversing his own panel opinion.

Now, some people say that is a man who does not have a spine, something like that. I say that is a judge with an open mind.

Senator 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 is one part of the Federal Government that is completely out of control of the regular voters in this country, it is the bureaucrats who do not stand for election like Members of Congress do. And so I hope it is something that we legislatively can look at as a way to help rein in the regulatory state, which, in my humble opinion, hasten 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 is 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 U.S. Supreme Court. I had that chance on two occasions when I was Attorney General of Texas. This case was called the "*Santa Fe Independent School District v. 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 inspirational thought before the football game. They got sued by the ACLU, and that case ended up going to the U.S. Supreme Court where the Court held by a vote of 6–3 that student-led prayer was unconstitutional. That led the late Chief Justice Rehnquist to make the statement that rather than neutrality toward religious expression, that the Court now exhibits "hostility to all things religious in public life."

We do not seem to have many limits on expressions of sex, violence, or crime in the public square, but we do seem to have com-

punctions 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 am asking you the question, I am already thinking through my head here. I am 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 am very troubled by what Chief Justice Rehnquist called "hostility to religious expression in the public square" and what that has done to change our country, not in a good way.

Judge GORSUCH. Senator, I appreciate your thoughts, and it is 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 are guaranteed free exercise of religion, and you are also guaranteed no establishment of religion. Those two commands are in tension because, to the extent we accommodate free expression, at some point the accommodation can be so great that someone is going to stand up and say you have established or you passed a law respecting the establishment of religion. It is a spectrum and it is 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 is 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 has proved a difficult test, according to six Justices at least who have expressed dissatisfaction with this test, but 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 is a bit of a challenge in this area. We struggle along.

Senator CORNYN. Well, just as one citizen to another, let me tell you I think it is 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.

My final topic, at least for this round, let me ask a little bit about originalism and textualism. Our mutual friend, Bryan Garner, mentioned to me that textualism is not the same thing as being a strict constructionist. I know we use that phrase, at least colloquially some. But if a judge is not 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?

Judge GORSUCH. Well, Senator, I hope it is not what he had for breakfast. And, you know, 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 do think when we are 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.

I used to say she could teach a monkey how to read. I think she did: Me. And I think that is 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 are doing." I do not want to have him 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 cannot. It is 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 Rorschach inkblot tests, I have usurped your role. I have taken away the right of self-government by the people, for the people.

I 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, by the people. Maybe that is the—gosh, is that the——

Senator WHITEHOUSE. Gettysburg.

Judge GORSUCH. It is the Gettysburg Address, isn't it? I read them both. Thank you, Senator. It is the Gettysburg Address. It is the Gettysburg Address.

Senator CORNYN. Well, Judge, let me ask you—I am sorry to interrupt you.

Judge GORSUCH. No. I am sorry. It is just a matter of separation of powers. It is not my job to do your job.

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

Judge GORSUCH. Right. And it is not a matter of strict construction. Strict construction in my mind sounds like I am putting the finger on the scale toward a particular interpretation, maybe even a pro-government interpretation. I do not 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 is a pretty good starting place for fair notice and for separation of powers, I think, Senator.

Senator CORNYN. Thank you, Judge.

Judge GORSUCH. Thank you.

Chairman GRASSLEY. Mr. Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Let me ask unanimous consent to put into the record a letter from over 100 groups

dated March 14, 2017, regarding what they describe as Judge Gorsuch's troubling money and politics record and a letter from Demos 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."

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

[The information appears as submissions for the record.]

Senator WHITEHOUSE. Thank you.

Before we get into that, Judge, let me—since we we are 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 cannot 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 wanderings of a court that could make up its own facts and then go in that direction?

Judge GORSUCH. I have not thought about that, Senator, to be honest with you. I know——

Senator 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 is not using an expansive question presented to enable itself to wander throughout the legal landscape beyond the constraints of the case?

Judge GORSUCH. Senator, it is 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.

Senator WHITEHOUSE. Very rare, yes.

Judge GORSUCH. And that is very—that is a very important standard.

Senator WHITEHOUSE. Yes.

Judge GORSUCH. It may—I have not thought about it in separation of powers, but it is a very important principle that I take seriously. I was a trial lawyer for a long time.

Senator WHITEHOUSE. And in terms of the constraint to narrow the question, does that have separation-of-powers overtones as well?

Judge GORSUCH. And I give you kind of a similar answer on that, Senator. I do not know about that, but I would say it is an important general practice. Sometimes there are exceptions that a court can and should go beyond a question presented, but it is pretty rare. Usually, we stick within—well, we do not—the questions presented are whatever the parties present to us on an intermediate court. They get to choose. We do not get to choose.

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

Judge GORSUCH. Well, we generally refrain from examining arguments that have not been adequately developed or made for risk of improvident mistakes.

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

Judge GORSUCH. In the loosest sense.

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

Judge GORSUCH. Senator, I—as I understand it, you may be referring to money that is not spent by a candidate or a party in connection with——

Senator WHITEHOUSE. And where you actually do not know who the true source of the money is.

Judge GORSUCH. Okay.

Senator WHITEHOUSE. Is that a fair enough definition for us to——

Judge GORSUCH. Sure.

Senator WHITEHOUSE [continuing]. Agree on? Okay. Could you let us know first what you know about the campaign that is being run to support your confirmation? There has been a lot of talk about how this is outside of politics and we are above politics, but there is a group that is planning to spend $10 million on TV ads in which their own press release describes as a comprehensive campaign of paid advertising, earned 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 am wondering what you know about that.

Judge GORSUCH. I have heard a lot about it, Senator, from you, from others. I have heard a lot about it.

Senator WHITEHOUSE. Do you know—what do you know about it?

Judge GORSUCH. I know that there is a lot of money being spent in this by, as I understand it, both sides. I think it is——

Senator WHITEHOUSE. Well, I would not leap to that conclusion at this point.

Judge GORSUCH. Okay. I know what I have read; I know what I have heard from friends and family and acquaintances. I know what you are saying, what you have just indicated.

Senator WHITEHOUSE. Do you know——

Judge GORSUCH. There appears to be a lot of money being spent——

Senator WHITEHOUSE. Do you know who is spending the money?

Judge GORSUCH. Senator, I could speculate based on what I have read and what I have heard, but I do not know individuals who are contributing. I do not know that.

Senator WHITEHOUSE. Do you know if your friend Mr. Anschutz is contributing?

Judge GORSUCH. I do not know.

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

Judge GORSUCH. Well, Senator, I think we have a long tradition from *Buckley v. Valeo* indicating that this body has robust authority to regulate disclosure. And——

Senator WHITEHOUSE. Yes, but my question is do you think there is a public interest——

Judge GORSUCH. Senator——

Senator WHITEHOUSE [continuing]. In disclosure of political funds in a democracy? That is, I do not think, a prejudgment. That is just a values proposition and one of the considerations that you ought to be able to answer without much hesitation.

Judge GORSUCH. And, Senator, what I am prepared to say is I recognize that, as a matter of First Amendment interests, the Supreme Court has validated the proposition that disclosure serves important functions in a democracy. At the same time the Supreme Court has also acknowledged that those disclosure functions can sometimes themselves have unintended consequences, as with the *NAACP* case, which I know you are familiar with, where you can use disclosure as a weapon to try and silence people. And we have a long history in this——

Senator WHITEHOUSE. That is hardly the case with respect to the dark money operation that is funding this campaign in your favor, is it not?

Judge GORSUCH. Senator, I am not prejudging any case. What I am suggesting to you is that there are interests here in this area of First Amendment disclosure. That is what we are talking about——

Senator WHITEHOUSE. Yes.

Judge GORSUCH. In my mind generally, okay, 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.

Senator WHITEHOUSE. And in theory so did the Court in *Citizens United*.

Judge GORSUCH. And in theory in *Citizens United*. At the same time, the Court has also recognized in *NAACP*, for example, that disclosure can be used as a weapon to silence voices. And we have a long history of anonymous speech serving valuable functions in this country——

Senator WHITEHOUSE. So here is a——

Judge GORSUCH. A Publius.

Senator WHITEHOUSE. Here is 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 have will go on to a related question.

Judge GORSUCH. Senator, that is a policy question for this body. And this——

Senator WHITEHOUSE. Well, it is 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 should declare themselves so that we can evaluate who is behind this effort.

Judge GORSUCH. Senator——

Senator WHITEHOUSE. Right? That would not be a policy determination. That would be your values determination.

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

Senator WHITEHOUSE. Do you really think that a Supreme Court that decided *Citizens United* does not get involved in politics?

Judge 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 am just not——

Senator WHITEHOUSE. And got deeply involved in politics, did they not? They changed the entire political environment, the entire political ecosystem with one decision. You must recognize that.

Judge GORSUCH. Senator, it is a precedent of the U.S. Supreme Court. There were thoughtful opinions by Justices on both sides.

Senator WHITEHOUSE. I did not say that they were not thoughtful. I was responding to your question that they do not—your response that they do not get involved in politics. What could be more involved in politics than to open this ocean of dark money that flooded into our politics?

Judge GORSUCH. Senator, what I mean to suggest is that I believe every Justice on the 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. It is hard. Judges make half the people unhappy 100 percent of the time. That is our job description. And people do criticize judges. I understand your criticism.

Senator WHITEHOUSE. This is a little different.

Judge GORSUCH. But I do not question their motives, Senator.

Senator WHITEHOUSE. This is a little different. I think you have seen 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 was not just a question of two parties and you are going to make one of them angry because you 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 which party won, would you not agree?

Judge GORSUCH. Senator, if a court errs as a matter of law, there are various remedies. There is a legislative remedy because there is 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 is the law of precedent, which we have discussed, I wrote this 800-page book on, makes a great doorstop, gift for Christmas. I have a really bad deal on royalties.

Senator WHITEHOUSE. And another way for the Court to clean up after itself if it——

Judge GORSUCH. Yes, that is what I am suggesting. There is a way to do that, right? Precedent is not an inexorable command, and so the Court can reverse itself. It happens.

Senator 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 could be your friend Mr. Anschutz. We do not know because it is 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 where that to happen say in a lower court,

these would be facts that would be noteworthy and that we would be entitled to have an answer to.

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

Judge GORSUCH. Senator, I am not sure what the question for me is.

Senator WHITEHOUSE. Is it any cause of concern to you that your nomination is the focus of a $10 million political spending effort and we do not know who is behind it?

Judge GORSUCH. Senator, there is a lot about the confirmation process today that I regret, a lot.

Senator WHITEHOUSE. Yes?

Judge GORSUCH. A lot. When Byron White sat here, it was 90 minutes. He was through this body in 2 weeks, and he smoked cigarettes while he gave his testimony. There is a great deal about this process I regret. I regret putting my family through this.

Senator WHITEHOUSE. But to my question——

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

Senator WHITEHOUSE. There are going to be—that is just not—that just does not do, Judge Gorsuch. There are going to be questions that you will be asked to decide on the U.S. Supreme Court that are going to be dependent on the values you bring to this. I do not think you can avoid talking about those values here. You are an expert on antitrust law, correct? You are very good at that.

Judge GORSUCH. I would not count myself an expert, Senator. I——

Senator WHITEHOUSE. And when you write about antitrust law, you understand that there are values to which the law should be directed if it is going to be successful. You have written about the values of competition, that the antitrust laws should operate in such a way as to maximize and support competition and that the antitrust laws that 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?

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

Senator WHITEHOUSE. A lower judge does?

Judge GORSUCH. Yes. And so——

Senator WHITEHOUSE. The Supreme Court, usually it is a new question; otherwise, it would not be there for you.

Judge GORSUCH. Well, Senator, respectfully, I disagree. A Supreme Court Justice is bound by precedent to.

Senator WHITEHOUSE. No, but the question likely presented in the case is one that is new. Otherwise, it would not 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?

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

Senator WHITEHOUSE. I guess what I am saying is that the part of the decision that is guided by precedent is not the part that I am asking about. The part that I am asking about is the values determination, and I am 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 lodestar, or is it just a burden on people's communication?

Judge GORSUCH. I would refer you again to *Buckley v. Valeo* and the *NAACP*.

Senator WHITEHOUSE. I am asking actually you, not——

Judge GORSUCH. And I am giving you my answer, Senator, as best I can——

Senator WHITEHOUSE. Okay.

Judge GORSUCH. Which is the First Amendment, which I am sworn to uphold as a judge. It contains two competing messages here. On the one hand, it has regularly recognized the rights of this body to legislate in this area if it wishes to do so. If it has not done so, with respect, that is not my fault. Okay. It is 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——

Senator 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?

Judge GORSUCH. Senator, what I am saying——

Senator WHITEHOUSE. I am taking a lot of time to get what I would think would be a fairly simple answer.

Judge GORSUCH. Well, I am sorry, but I do not think this is simple stuff at all, Senator. I think this is hard stuff. And I think you have First Amendment concerns and precedents, all right, in the area——

Senator WHITEHOUSE. Yes.

Judge GORSUCH. That would have to be considered. We would have to see what law Congress enacted. I would then want to go through the full judicial process, Senator. I would want to read the briefs. I would want to keep an open mind. I would want to——

Senator WHITEHOUSE. But you just asserted right here that the value of not chilling speech was something that we should consider, right?

Judge GORSUCH. I said the Supreme Court of the United States in *NAACP* recognized that the First Amendment protections we all as people in this country enjoy——

Senator WHITEHOUSE. Which is a value that we should consider.

Judge GORSUCH. Can be chilled sometimes.

Senator WHITEHOUSE. And not chilling is a value that we should consider.

Judge GORSUCH. It is a First Amendment right we are talking about, Senator.

Senator WHITEHOUSE. And where does anonymity—let us say $1 billion in anonymous funding into our elections, where does that fit in in your—into the values that you bring to this?

Judge GORSUCH. In the first instance, Senator, it is for this body to legislate——

Senator WHITEHOUSE. Yes.

Judge GORSUCH. And then it would come to court and the record will be made.

Senator WHITEHOUSE. Of course, *Citizens United* did actually overrule a law that we had written, so that is hardly the be all and the end all.

Judge GORSUCH. It is a dialogue. It is a separation-of-powers dialogue that we have in all areas. Congress passes a law, a lawsuit is brought, a record is made, a factfinder makes facts, judges determine the law, a ruling is issued, Congress responds, and the cycle continues. And, Senator, that is our history in this area and so many others.

Our founders were brilliant. They did not give me all the power. I do not wear a crown; I wear a robe. They did not give you all the power. They provided it——

Senator WHITEHOUSE. When it comes to the determination to state what the law is, particularly in constitutional matters, they actually did give the Supreme Court the power, and that is why it is important to us to ask these questions now before you go on to the Supreme Court and we have no accountability left. And so the values that you bring to that in those areas where you are 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?

Judge GORSUCH. I do. I would not claim him as my closest personal friend but someone whom I admire greatly. And it——

Senator WHITEHOUSE. And would you describe—how would you describe any differences that you may have in judicial philosophy with Chief Judge Garland?

Judge GORSUCH. I would leave that for others to characterize. I do not like it when people characterize me, and I would not prefer to characterize him. He can characterize himself.

Senator WHITEHOUSE. What is interesting is that this group sees a huge difference between you that I do not 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 is a $17 million delta, and for the life of me I am 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?

Judge GORSUCH. You would have to ask them.

Senator WHITEHOUSE. I cannot because I do not know who they are. It is just a front group.

There is a—it has 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: Kochs, Mercers,

DeVoses, and, yes, Anschutzes. 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 Koch brothers run every year to bring candidates to their conference. 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 and 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?

Judge GORSUCH. Senator, I have no information about anything you have just described. I do not know about that.

Senator WHITEHOUSE. And—wow, because guess what? You are going to be asked to make decisions on the Supreme Court that if you do not know that, you are going to have a very hard time figuring out how to make the right call. That is a—it is a real concern.

You know, this is the first Supreme Court in the history of the United States that has nobody on it who has ever run for political office ever, and yet it makes these wild leaps like *Citizens United* that completely deform democracy and then I do not know if they do not know what they are doing; I do not know what the motivation is. You—I sure do not know, but I do think it is a concern to be asked to make decisions like that without a real grounding in what is going on around you.

Let me ask a little bit just about—to narrow it down more to just the judicial branch. What do you think the Court's approach should be to the sort of machinery of corporate influence that surrounds the Supreme Court? There are corporate front groups that have been described 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 they are—in the 5–to–4 decisions I listed yesterday, their record is 16–to–0 with the Supreme Court in terms of helping the corporate interests, so it looks like they are doing really, really well, these frequent-flier corporate front amici.

When they turn up at the Supreme Court, should they disclose more about whose interests 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?

Judge GORSUCH. Senator, to your earlier question, I think I can talk about my record. I am not a philosopher king, but I can talk about my record. And my record is that in the last 10 years I do not think there has been a single motion to recuse me. I have tried to be very careful in which cases I hear.

Senator WHITEHOUSE. This is a——

Judge GORSUCH. And——

Senator WHITEHOUSE. Go ahead.

Judge GORSUCH. I take that very seriously as part of my obligation as a judge. I cannot claim I am perfect but I have tried awful hard, and I have not had a motion filed against me because I do take seriously impartiality and the appearance of impartiality.

Senator WHITEHOUSE. So——

Judge GORSUCH. And, Senator, all I can say to you is I commit to maintaining my impartiality as best I can and to recuse where the law suggests I should. And——

Senator WHITEHOUSE. So back to my question about these amicus briefs and not knowing who is behind the front groups who turn up and pelt the Court with the briefs.

Judge GORSUCH. Senator, there is a——

Senator WHITEHOUSE. The corporate rule——

Judge GORSUCH. Corporate disclosure statement rule as I recall.

Senator WHITEHOUSE. Yes, but it is not much of one because here is 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 do not put my name on any of this stuff but this is what I want you to do, as long as the front group then pays for the brief itself, there is 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?

Judge GORSUCH. Well, I think that is a very interesting suggestion and one I will take to heart, Senator. Obviously, this Congress has a role in rulemaking process as well, and there is a rulemaking Committee and a Rules Enabling Act process for the lower courts, and the Supreme Court has its own rulemaking process. And I appreciate that information for both functions——

Senator WHITEHOUSE. And as a——

Judge GORSUCH. And welcome your involvement.

Senator WHITEHOUSE [continuing]. Supreme Court Justice, you will also have a role in policing the judiciary as the top court. One of the things that has cropped up is special interest 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 by one writer as a "cross between Maoist cultural re-education camps and Club Med." There has 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?

Judge GORSUCH. Senator, I know as a sitting judge I disclose every trip I take that is not official business that anybody else pays for.

Senator WHITEHOUSE. And to your credit you went to none of these as far as I can tell.

Judge GORSUCH. Thank you, Senator. I appreciate that acknowledgment. I do go to a lot of moot courts and things like that and, you know, and everything I have done is disclosed. So that is—it is all there, there. You have all the information.

Senator WHITEHOUSE. Yes. I will 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 interest 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 mindboggling." And, by the way, all of those came from newspapers below the Mason-Dixon line. That is not just Yankee elitists talking.

So my time is expired, but I look forward to further rounds. And I appreciate your time with me.

Judge GORSUCH. Thank you.

Chairman GRASSLEY. Who am I to tell you how you should answer questions, but if I were sitting where you were and values were brought up, it seems to me it is the Congress that deals with values, as Representatives are people and you look at the law.

And when it comes to briefs, I would assume that you do not care who paid for them. You are only interested in what the brief says.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thank you, Judge.

What you are 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 and you have poly, which means many, and ticks, which are bloodsucking parasites.

[Laughter.]

Senator LEE. It works out.

I would also like to echo something said by our Chairman a moment ago. When we are 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 your 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?

Judge GORSUCH. No, Senator.

Senator LEE. Have you ever held a position as a State legislator?

Judge GORSUCH. No, Senator.

Senator LEE. Have you ever held a position as a Member of Congress?

Judge GORSUCH. Goodness, no.

Senator LEE. Have you ever held any public office in a policymaking arena outside the Federal judiciary?

Judge GORSUCH. I have served on my kids' schoolboard——

Senator LEE. Have you——

Judge GORSUCH. But that is about as close to policy as I care to get.

Senator LEE. Have you had any role in setting Federal—in establishing and making laws governing Federal campaign finance?

Judge GORSUCH. No, Senator. That is this body's province.

Senator LEE. Okay. It seems to me, Judge, that it would be 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 should not say because otherwise that might cause problems for you when you did not make the set of laws to begin with.

By the way, were you involved in the *Citizens United* case?

Judge GORSUCH. Senator, I was not involved in the *Citizens United* case, and I appreciate the opportunity to clarify that fact. I would also like to clarify that nobody speaks for me, nobody. I speak for me. I am a judge. I do not have spokesmen. I speak for myself.

Senator 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 is more than just a job, is it not, more than just a job or an adventure? It is sort of part of the legal education experience that many lawyers are able to go through, is that right?

Judge GORSUCH. As your 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 are 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 has not been decorated, there is a chair, have at it. And you get to hire four brand-new young folks straight out of law school who do not know a darn thing. Have at it. Have fun.

Senator LEE. Did you acknowledge that when you were a law clerk?

Judge GORSUCH. Well, you know, part of the reason why I am a judge is because of my experience as a law clerk, a shared experience with the same fellow your dad clerked for, Byron White, and we used to race writing opinions. And this is the humility of maybe the smartest lawyer I knew. I am talking about a Rhodes Scholar, first-in-his-class-from-Yale type stuff. And he would say first one done with the draft wins. What does it mean to win drafting an opinion? That was not real clear to me.

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 paws—he had these big hands, thick, you know, pulling up sugar beets. And so he would hunt and peck and he could still beat me.

It is a very close relationship. It is an intimate working relationship. And it becomes one of the great joys of your life. You see these young people—I have been out to pasture 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 am making them proud.

And you see these young people come and go and you get to see what they go on to do, and they go on to do such wonderful things. I have had young people who go on to clerk for the Supreme Court, about a dozen of them, for all kinds of Justices, Justices Scalia and Thomas, Justices Kennedy, Kagan, and Sotomayor. And that is 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—a young lady who is doing fishery policy in South Africa, all sorts of really wonderful things, and it just gives you hope and heart for the future.

You know, as I tell my students, somebody has to run the zoo, and you want it to be the best and the brightest. And it is so heartening to see these young people, some of whom are the first in their family to go to college, immigrants to this country, rise to the very top.

Senator LEE. Winston Churchill was known to have said that we shape our buildings, and then our buildings shape us. There seems to be a corollary here with law clerks, and 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 jurisprudential style. They know your quirks. They know most likely what you like to have for lunch. But you would say there develops a pretty close relationship between a law clerk and the judge during a clerkship. Would you agree with that?

Judge GORSUCH. I always think that a family that skis together, stays together. We skied together.

Senator LEE. Yes. And it is much more true of skiing than snowboarding I think. Just snowboarding is a lot more painful.

Judge GORSUCH. That is a value judgment I am happy to make.

Senator LEE. Yes. One of the reasons I ask about this is because I have some letters that I would like to introduce for the record. There is a piece written by three lawyers who clerked both for you and Justice Scalia. I tried really hard to think of a great term for this, the Scalia-Gorsuch combo or something like that, but I could not come up with anything interesting. But that is a good duo for whom these lawyers had clerked. And they have written a great piece talking about you. It is entitled "A Principled and Courageous Choice." I would like to submit that for the record.

Chairman GRASSLEY. Without objection, it will be submitted.

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

Senator LEE. They write, "Judge Gorsuch's opinions reflect the principle Justice Scalia spent his career defending, that in a democracy the people's elected representatives, not judges, get to decide what the laws should be and what laws we should have." They go on to say that they believe that you, Judge Gorsuch, will be, quote, "as principled, as courageous, and as committed to the Constitution and our country," close quote, as Justice Scalia was. So they go on to urge that we confirm you to the Supreme Court.

I would also like to enter into the record another letter that is written by someone else who clerked for you, Judge Gorsuch, and who also clerked for Justice Kagan on the Supreme Court. He writes, quote, "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 is remarkably similar on these metrics to Supreme Court Justice Elena Kagan." He also goes on to write, quote, "This zeal 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," close quote. He writes that "Liberals should welcome a nominee like Gorsuch." I would like to enter this one into the record also, Mr. Chairman.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator LEE. Thank you, Mr. Chairman.

Let us move on. One of my colleagues earlier today asked some questions about remarks that you assisted in preparing, remarks that were prepared for delivery by then-Attorney General Alberto Gonzales in connection with the Senate Judiciary Committee Oversight hearing concerning the terrorist surveillance program. This was a hearing that occurred on February 6, 2006. One of my colleagues referred to this this morning. Are you familiar with what I am describing?

Judge GORSUCH. Very vaguely.

Senator LEE. Okay. 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?

Judge GORSUCH. Quite a mouthful.

Senator LEE. Yes, quite a mouthful. That is why it is commonly known as the PDAAG, but most people might not immediately recognize the term PDAAG, as I am sure they would in 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 recognized your ability to write, a talent that has now become apparent to many of us as we have reviewed your judicial writings.

You were brought in as a scrivener 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?

Judge GORSUCH. It is, Senator.

Senator LEE. Okay. It is also my understanding that not only were you not thoroughly 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 did not even have the clearance necessary to know the details of the program and therefore could not speak to those details.

Judge GORSUCH. Sitting here, that is my recollection, too.

Senator LEE. Okay. So as a result of that, any work that you did on those prepared remarks, it would have been done based on your limited understanding, based on a limited set of facts that you were given in preparing. And then anything you would have done from that moment forward you would have said, look, I do not know the facts of this, I cannot know the facts of this, you all are going to have to fill in the details. I have done the best I can based on as-

sumptions I have drawn and the limited facts I have been given about this program.

Judge GORSUCH. Yes. That is my recollection, too.

Senator LEE. Thank you. Some of my colleagues have suggested that your rulings reflect a particular bias, a bias in favor of the big guy and against the little guy. It is not always apparent in every case whether there is in fact a big or a little party. I suppose in some cases it is open to dispute. In other cases it might be very apparent that one out-powers the other in terms of economic heft and access to good lawyers and so forth.

But I have reviewed your work, and I would like to say that, yes, in some instances it is easy to identify a party that might thusly be described as little. And I cannot 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 have 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-Brizuela v. Lynch*. That was a ruling that was most decidedly in favor of a little guy. In fact, it does not 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 has 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* and *Holmes*, *Orr v. City of Albuquerque*, *Williams 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 immunity against police officers, cases arising under the Family Medical Leave Act, sex discrimination cases, and cases involving politically motivated firings.

So these are just a few examples, but just to be clear and 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?

Judge GORSUCH. Senator, you try to treat each person as a person. We are all just people at the end of the day. And that equal-justice promise, the equal protection under law is the most radical guarantee I am aware of in the history of human law, a recognition that no one is better than anyone else.

And, Senator, all I can tell you are some facts. These are the facts of my record. Ninety-seven percent of the time out of 2,700 cases, we have ruled unanimously. Ninety-nine percent of the time, I am 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 are not sure whether it is because I seek consensus or because I am persuasive. I do not care which it is.

My law clerks tell me as well that I am as likely to dissent from a Democrat as a Republican-appointed colleague, not that that matters.

Senator LEE. By the way, what if this were not 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——

Judge GORSUCH. Senator, I know the men and women of the Tenth Circuit. I know the judges with whom I served. I question the motives of none, ever. We disagree sometimes, but when we disagree, it is about the law, not politics.

And I think sometimes really in this country we are kind of like David Foster Wallace's fish. He wrote about a fish swimming in an aquarium, and it spent so much time in water and is so surrounded by it that the fish does not even realize it is 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 am not here to say it is perfect or anywhere close to it. We are a work in progress. 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 are protected because of the rule of law.

I think we are a little bit like David Foster Wallace's fish. We are surrounded by the rule of law. It is in the fabric of our lives so much so we kind of take it for granted.

You know, just to go on, you know, my work on Access to Justice in the Rules Committee and outside the Rules Committee, speaking on it, I mean we are talking about overcriminalization, capital habeas. I have removed judges and lawyers when I have had to or sought their removal. I believe in our Seventh Amendment jury trial right. I have ruled for the least amongst us when it comes to immigrants—we have talked about a couple of examples—and criminal defendants.

I can give you a whole long line of cases I can cite where I have ruled for Fourth Amendment claimants and other criminal defendants: *Ford*, *Makkar*, *Farr*, *Games-Perez*, *Sabillon-Umana*'s, *Spaulding*, *Carloss*, *Ackerman*, *Krueger*. That is just criminal that I have just jotted down here.

Environmental cases: *Rocky Flats*, *Magnesium* in the renewable energy case. Civil rights you mentioned: *Orr*, *W.D. Sports*, *K.C.*, *Energy West*, *Crane*, *C.U. v. Simpson*. Those are just some that come to mind.

Senator LEE. So does this tell us that you are in fact objective or does it just tell us that you are really, really good at covering up the fact that you are 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 would be an awful lot of work to go to, in order to rule for the little guy as often as you have.

Judge GORSUCH. Senator, I am not buying into any of that, with respect. With respect, I view my job to be fair. It is what General Katyal said to you all yesterday. What he wants is a fair judge. That rang true to me when I heard it. I did not know he was going to say that. That is 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.

And that is hard. I am not here to tell you it is easy and I am not here to tell you I am perfect, okay? I am a human being. I am not an algorithm. But I try really hard, and it is almost like an athlete. It is something judges practice. And hopefully, we get better at it with time.

Senator LEE. When you say fair, you are not talking about fairness necessarily in some abstract ethereal sense, in some Solomonic way in which you are just being wise in your own mind. You are 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 and subject to the constraints of the United States Constitution, a Constitution that puts the power to prescribe laws with prospective general applicability in the political branches of government, in the legislative branch and in the executive branch insofar as the Executive is involved in the lawmaking process and then insofar 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 have to decide who the decisionmaker 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 kind one." But then you say, "It is not our job to answer questions like that."

So you do not have to respond to this, but let me tell you how I interpret the language that was an issue in that case 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.

So I would like to ask about the law in that case, in the *TransAm Trucking* case. The applicable statute said that you cannot fire someone for, quote, "refusing to operate a vehicle." Is that consistent with your recollection?

Judge GORSUCH. Sitting here, that is my recollection.

Senator LEE. In that case, the trucker was fired because he operated his vehicle, the vehicle that he was assigned to, against company orders. Is that a fair summary based on what you remember from that case?

Judge GORSUCH. Yes, Senator.

Senator LEE. So one could argue—and I think one 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 what the law said that the person could not be fired for refusing to operate a vehicle and that statute were being invoked not in the context of where the person was fired for refusing to operate a vehicle

but where the person in fact operated a vehicle, those are two different things, are they not?

Judge GORSUCH. I thought so, Senator. That was my judgment in that case.

Senator LEE. Dickens wrote that the law is an ass, and sometimes you might encounter cases where that is 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 is not your job to rewrite the law. It is not your job to write it in the first place, and it is not your job to rewrite it after the fact, is it?

Judge GORSUCH. I do not believe so, Senator.

Senator LEE. You had another case under the same statue that was involved in the *TransAm* case. It is a 2007 case called *Copart, Inc. 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?

Judge GORSUCH. Senator, your recollection is better than mine on the attorney's-fees issue.

Senator LEE. Courts do not always award attorney's fees, but as I recall, the Court did in that case.

So I do not really understand the argument that some are making or the implication 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 did not 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 has been mentioned by some of my colleagues, and that is the *Hwang* case. It is 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 could not continue to perform it.

That, as I recall, was a unanimous opinion. Is that correct?

Judge GORSUCH. Senator, that was another very hard case to go home after. The individual there had—was sick, very sick and had been given I think 6 months off I think already if I remember correctly. And I cannot remember whether it was University of Kansas or Kansas State. And then she was asking for another 6 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.

And it was undisputed in that case she just could not through no fault of her own. And the District Court said that is just not a claim under the Rehabilitation Act, maybe for breach of contract, maybe something else, but not under Federal statutory law. That is my recollection sitting here. And my panel of three judges unanimously agreed that was the correct application of law in those facts. No one is here to say that—love the law in every case and the results it yields.

I am here to say that I promise to apply the law faithfully, and I can guarantee you no more and promise you no less than that, Senator, in every case.

Senator LEE. If I am remembering that case correctly, Judge Lucero was on that panel with you, is that right?

Judge GORSUCH. I do not recall.

Senator LEE. I will check to make sure. I think he was, and Judge Lucero was not nominated by a Republican President.

Judge GORSUCH. Judge Lucero is one of my dear friends and colleagues, and he was appointed by President Clinton. That is true. He did an excellent job.

Senator LEE. So if you were wrong in this case, then so was he. You did write 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," close 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.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Thank you, Senator Lee.

I want to make an announcement that we will take a 10-minute break after Senator Klobuchar.

Judge, just so you know the plan, we are going to take that 10-minute break, and I hope it will not be 11 or 12 minutes.

Senator Klobuchar.

Senator 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 cannot 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 am 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, have 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 in to 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?

Judge GORSUCH. Senator, that is a very important question. I appreciate the opportunity to discuss it with you.

I come to it with an open mind. It is not a question that, I confess, I have given a great deal of thought to. I have experienced more cameras in the last few weeks than I have in my whole lifetime by a long, long way. I have to admit, the lights in my eyes are a bit blinding sometimes, so I would have to get used to that.

Senator KLOBUCHAR. But would you favor it or not?

Judge GORSUCH. Senator, I would treat it like I would any other case or controversy. That is what I can commit to you, that I would want to hear the arguments. I know there are Justices on both sides of this issue, right?

Senator KLOBUCHAR. I think Justice Souter said over his dead body would they have cameras, but 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 had not taken 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 standard for Supreme Court Justices?

Judge GORSUCH. Well, Senator, what I said is I disclosed every trip that is reportable.

Senator KLOBUCHAR. Okay, I am sorry. Yes. But the specific question is on Supreme Court Justices.

Judge GORSUCH. Yes. I know that the rules are different. I do not know how different they are. I have not studied that, Senator.

Senator KLOBUCHAR. Would you favor them having the same set of rules that apply to you right now?

Judge GORSUCH. Senator, I would say two things. First, I have no problem living under the rules I have lived under. I am quite comfortable with them. And I have had no problem reporting every year, to the best of my abilities, everything I can. So I can tell you that. It does not bother me what I have had to do. I consider it part of the price of service, and it is a reasonable and fair one.

I would also say I do not know what the arguments are. I have not studied them, and I would want to commit to you that I would give it very fair consideration, and I would want to hear what my colleagues have to say.

Senator KLOBUCHAR. Okay. Yes. It is pretty straightforward to me, because it applies to the other Federal judges. I do not think this is a matter of precedent or what has happened. You are going to be, in the words of Hamilton, if you get confirmed, in the room where it happens. So all we are trying to do is to make this as transparent as possible of what people's interests are. So I just hope you will consider that.

Judge GORSUCH. Of course I will.

Senator KLOBUCHAR. And I think I will move on to some of the harder stuff here.

Judge GORSUCH. I pledge to you I will consider both of those things.

Senator KLOBUCHAR. Okay. 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.

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?

Judge GORSUCH. Senator, I think that is just another way, honestly, of trying to get at which Supreme Court precedents I agree with and I disagree with.

Senator KLOBUCHAR. I do not think it is. It is 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, someone who respects precedent so much that they are still going to enforce the law. So I just thought there could be one example, even if it is a really old one.

Judge 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 with my colleagues.

Senator KLOBUCHAR. Yes. One of the reasons I am asking this is that several past nominees have made this promise about respecting precedent before this Committee, and these are people you respect and admire, Justices. At the same time they said they would 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 would 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* as a departure from prior precedent?

Judge 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 is part of the law of precedent too, as we have talked about, that you start with a strong presumption in favor of precedent. That is the anchor of the law. It is the starting point. But there are instances when a court may appropriately overrule precedent after considering a lot of factors, and we have talked about them, and I am happy to discuss them with you again if you would like, but I do not want to waste your time either, so you tell me.

Senator KLOBUCHAR. So you see this as something where there was precedent—I mean, you can go back to *Buckley v. Valeo*. As you know, parts of that, as you discussed earlier with my colleagues, stayed in place, but it overturned parts of that: *Austin*, *McConnell*. There was just a number of cases that it overturned. To us up here, it was a major overturning of precedent. So that is

why we are so concerned when people say, oh, we are going to respect precedent, and then they come in and do that.

And, actually, you have suggested that you would actually go further than *Citizens United*, and that was in *Riddle v. Hickenlooper*, a 2014 case. While it was a narrow case about campaign finance caps on individual contributions to major political candidates, the outcome of the case is not 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 is what I wanted 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 regulations?

Judge GORSUCH. Senator, I welcome the opportunity to clarify *Riddle v. Hickenlooper*. In that case, the law in Colorado allowed individuals to contribute more money to major-party candidates than to minor-party candidates.

Senator 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 is 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 is any basis for applying strict scrutiny to contribution limits that apply evenly across the board? Why else would you have cited that opinion?

Judge GORSUCH. I am happy to try and explain again. So, the facts of the case, and that is 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 I know you are 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 am 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 is something less than strict scrutiny in the First Amendment context for contributions. That is the instruction that I as a lower court judge have in the First Amendment context. But this was an equal protection challenge, okay? Saying it is not just contributions. It is the inequality of contributions that is 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.

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 of the equal protection context? And I pointed to two

excellent opinions by wonderful District Judges in the area, Judge Boasberg and Judge——

Senator KLOBUCHAR. All right, all right. I really did read it. Okay, okay. I understand that, but here is the deal, that the other judges were happy to just decide it on that narrow basis, right? So then you write the concurring opinion to bring up this other issue, and I think again about Justice White, who is your mentor or was your boss, and there is a Law Review article by the Dean of Tulane: "Time and time again, Justice White avoided broad theoretical bases for a decision when a narrow fact-specific rationale would suffice." And yet you write this concurrent——

Judge GORSUCH. Can I answer you, Senator?

Senator KLOBUCHAR. Yes.

Judge GORSUCH. Because I am almost there, okay? So I write to point out this conflict in the Supreme Court's directions that I saw.

Senator KLOBUCHAR. Okay.

Judge GORSUCH. All right? And then I said in our case, Byron White, it does not matter, because Colorado could not meet even a rational basis test. Forget about whether it is strict scrutiny or something close to strict scrutiny. It could not meet rational basis test because Colorado could not articulate any good reason, any—maybe there is one out there. I do not know. But I said they have articulated nothing.

Senator KLOBUCHAR. Okay, but let us just continue on now with some other cases, because it is a bit of a pattern.

Judge GORSUCH. Okay.

Senator KLOBUCHAR. 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 finances, it opens up the possibility that you would strike down, then, this idea that corporations should not be giving money directly to campaigns.

Do you think these creatures of statute have the same constitutional rights as living, breathing human beings?

Judge GORSUCH. Goodness no, Senator. *Hobby Lobby* had nothing to do with the First Amendment of the Constitution.

Senator KLOBUCHAR. But it was about corporations.

Judge GORSUCH. It was, under RFRA.

Senator KLOBUCHAR. So you do not think, then—maybe we can end this line here. So you do not think that they would have these rights, a corporation would have these rights under the First Amendment?

Judge GORSUCH. I do not 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 are dealing with statutes, what words we are supposed to use and what definitions are.

And, Senator, if in RFRA, again, if this body wishes to say only natural persons enjoy RFRA rights, that is fine, and I will abide that direction. I am not here to make policy; I am here to follow it.

Senator KLOBUCHAR. Okay. On to another policy that is pretty important. That is the *Chevron* case. 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—you do not imply; you say—it could have titanic real-world implications when it comes to our rules, 13,500 cases on the books since 1984. In your book you say you do not 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 have your answer. That was good. But in the concurring opinion you say, "There is an elephant in the room with us today." Sorry, guys, he was not 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. Maybe the time has come to face the behemoth."

That sounds to me like, again, you are going a step further and talking about overturning a major precedent, and I want to know if that is what you mean, if you think it should be overturned, and if you have considered the ramifications of that when Justice Scalia himself was the original champion of the *Chevron* doctrine.

Judge 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——

Senator 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*.

Judge GORSUCH. Senator, I am 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 is not 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 is 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 the 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.

Senator KLOBUCHAR. But as a Supreme Court Justice, if you were to make this decision to overturn *Chevron*, would you consider the implications on all of the cases in the U.S., and the rules and the uncertainty that it would create?

Judge GORSUCH. Goodness, Senator, yes.

Senator KLOBUCHAR. And would you overturn it? Is that what this means when you talk about maybe it is time to face the behemoth?

Judge 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 there as I conceived it was to say, hey, listen, look at some of the implications, the real-world implications of what we are doing here.

Senator KLOBUCHAR. Okay, 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?

Judge GORSUCH. Senator, I do not pre-judge it. I can tell you what did pre-exist it. It was *Skidmore* deference, which was an opinion written by Justice Jackson, actually. That is what pre-existed. So there was deference before, and we had the administrative state for 50 years, and agencies would issue rules and decisions. I do not know what all the consequences would be, and I would pledge to you—I was not thinking about being a Supreme Court Justice then. I was identifying an issue for my bosses.

If I am so fortunate as to become a Justice, I would try and come at it with as open a mind as a man can muster. And I would tell you, remind you, what I bear in mind would be David Sentelle. When I was with him as a law clerk, he 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 en banc court, the full court, reversing himself. Now, some people think that does not 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 is what I would commit to you.

Senator KLOBUCHAR. Okay. Let us go to another piece of this philosophy, and that is originalism; in other words, where the words and phrases in the Constitution should be interpreted according to their original public meaning or how the Founders and their contemporaries would have understood them. Regardless of whether you characterize yourself as an originalist, you have applied originalism in several decisions, including last year in *Codova v. City of Albuquerque*, where in a separate concurring opinion you described the Constitution as a "carefully crafted text judges are charged with applying according to its original public meaning," which are the buzzwords 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 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*?

Judge GORSUCH. Well, Senator, I would certainly agree that the Constitution must endure, and that it is 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 is important to try and understand law according to its original understanding, public meaning. Words have meaning.

Senator KLOBUCHAR. So you do not agree with *McCulloch* about adapting to the crises of human affairs——

Judge GORSUCH. No, Senator.

Senator KLOBUCHAR. So you do agree.

Judge GORSUCH. I am trying to answer——

Senator KLOBUCHAR. I just want a yes or no, that is all.

Judge GORSUCH. Well, I think it takes—these are complicated things that take more than a yes or no, respectfully. What I would say is the Constitution does not change. The world around us changes, and we have to understand the Constitution and apply it in light of our current circumstances. That is what we are trying to do as judges.

So, for example, one of my favorite cases in this area is *Jones*, right? The 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 would have qualified as a trespass to channels and a search by the Government, and says 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 the people's liberties now than it was 200 years ago.

Senator KLOBUCHAR. So when the Constitution refers 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 could not vote?

Judge GORSUCH. Senator, I am not looking to take us back to quill pens and horses and buggies.

Senator KLOBUCHAR. Okay. But if you could just answer that question? It is pretty important to me.

Judge GORSUCH. I am trying to.

Senator KLOBUCHAR. Okay.

Judge GORSUCH. Of course women can be President of the United States. I am the father of two daughters, and I hope one of them turns out to be President of the United States.

Senator KLOBUCHAR. Great. Okay, that is wonderful. How about the Air Force? I agree with you; that is good. So in that case you would say, well, we cannot take it at its literal words. So then the Constitution also says Congress has authority to oversee the land and naval forces, but there is 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.

Judge GORSUCH. Senator, I think the generals in the Air Force can rest easy.

Senator KLOBUCHAR. Okay, great.

Judge GORSUCH. Let me give you another——

Senator KLOBUCHAR. How about Virginia—let us keep going here because I am almost out of time here. In *United States v. Virginia*, the Court held that the Virginia Military Institute violated the Equal Protection Clause of the Fourteenth Amendment by excluding all women from VMI's military training. In his dissent, Justice Scalia stuck to his 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?

Judge GORSUCH. And the majority in that case argued that it was.

Senator KLOBUCHAR. Okay.

Judge 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 is quite radical and significant, and that was what the majority of the Supreme Court of the United States held.

Senator KLOBUCHAR. So would you agree, then, that when you look at other things, would you be willing to apply this same approach to equal rights for minority groups, women, LGBT, including transgender people, racial minorities, the same approach you used when you just made the statement about the "he" and "his" in the Constitution, about not having the Air Force, about the *Virginia Military* decision?

Judge GORSUCH. Senator, a good judge applies the law without respect to persons. That is part of my judicial oath.

Senator KLOBUCHAR. Okay. So do you see it—your textualism, the original public meaning, then, would you apply it to these other contexts as well that I just mentioned?

Judge GORSUCH. Senator, what I am trying to say to you is I do not take account of the person before me. Everyone is equal in the eyes of the law.

Senator KLOBUCHAR. Okay. I am just trying to figure out this, because I think for some things, a lot of people who subscribe to this theory, they say we can have originalism for some cases but not for others, and I call it selective originalism. It just seems to me when you look at some of the opinions that use originalism that you have and some do not, but I have one——

Judge GORSUCH. Senator, if I might respond to that?

Senator KLOBUCHAR. Yes.

Judge GORSUCH. I would ask you to take a look at *Jones* again; *Kyllo*, the search of a home using a heat-seeking device. I would ask you to maybe take a look at *Crawford*, the right to confront witnesses, maybe as well the *Apprendi–Booker* line 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 his sentence tried by a jury of his peers. Those are all what

one might characterize as originalist opinions protecting individual liberties.

Senator KLOBUCHAR. You know what? We could do it on the second round. That would be good.

Judge GORSUCH. All right.

Senator 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?

Judge GORSUCH. Senator, I have not studied that, and it would be presumptuous of me to offer an opinion in a court that I have not sat upon.

Senator KLOBUCHAR. Okay. Well, it may be very relevant when this refugee case comes up, so you might want to study up on it.

I am going to end here. I am going to do a lot of work on antitrust in the next round. I know you are an expert. Senator Lee and I have been heading up that Subcommittee for a long time. But I am going to end with freedom of the press in honor of my dad. He was a newspaper reporter his whole life, and I am especially concerned in today's world, where we are seeing these attacks on the media, about maintaining the press' role as a watchdog.

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 do not always like that, but they can—unless they say something untrue with actual malice.

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?

Judge 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 are 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 case. Proof of actual malice is required to state a claim. That has been the law of the land for, gosh, 50, 60 years.

I could point you to a case in which I have applied it, and I think it might give you what you are 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. He claimed he was not a Member, just a fellow traveler, and sought damages for that. Our

court declined to grant that relief, saying that substantial truth is protected even if it is not strictly true, and much more is required by the First Amendment in order to state a claim.

Senator KLOBUCHAR. Okay. In *Branzburg v. Hayes*, a Supreme Court case, they did not recognize the reporter's privilege, at least 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 courts should recognize a reporter's privilege?

Judge GORSUCH. Senator, I know those cases come up from time to time, so I have to be very careful.

Senator KLOBUCHAR. Okay.

Judge GORSUCH. Your description of the case is entirely accurate.

Senator KLOBUCHAR. Thank you very much.

Judge GORSUCH. Thank you.

Chairman GRASSLEY. Okay. Before we recess, I would like to enter into the record a commentary in the Chicago Tribune called "Crying Wolf Over Neil Gorsuch," written by Dennis Hutchison, a lifelong registered Democrat. Specifically, he talks about concerns over *Chevron* deference.

He writes, "There are two sides to deference, however. My guess is that pro-*Chevron* advocates will soon be begging Federal courts not to defer to interpretive findings of agencies." End of quote.

I enter that in the record without objection.

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

We will recess for 10 minutes, so that means we will reconvene at 3:31.

[Recess.]

Chairman GRASSLEY. Senator Cruz, it is your turn now.

Senator CRUZ. Thank you, Mr. Chairman.

Judge Gorsuch, congratulations on making it through more than half of a long day and making it 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 has focused on a lot of weighty matters. So let me start with something lighter 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?

[Laughter.]

Judge GORSUCH. Forty-two.

Senator CRUZ. Thank you, Judge.

And for those who are watching who may be a bit confused at this exchange, could you explain what it is to which we are referencing?

Judge GORSUCH. Well, Senator, sometimes we have young people who come to court to be sworn in. Often, they are my law clerks. There are a couple of them right there. They have not enjoyed this privilege yet, and they come to court and they are 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. Are there any questions from the bench? And it is sort of like this. It

is a bit intimidating. This has been a reminder to me of what it is like to be down here rather than up there.

And the 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 ask them that question to put them at ease, and they all know the answer, and they all know the answer because they have all read Douglas Adams' "Hitchhiker's Guide to the Galaxy."

And if you have not read it, you should. It may be one of my daughters' favorite books, and so that is a family joke.

Senator CRUZ. Well, it is a book I very much enjoyed as well, 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 am 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?

Judge GORSUCH. You know, as I said, 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 is something we share in common, too—was and remains the privilege of a lifetime. And it has everything to do with why I am here.

I would not have become a judge, but for watching his example. And the humility with which he approached the job, and I do not mean a phony humility. I mean real humility, every day. He always said two heads were better than one.

He would sit down in my office, plunk himself down in a chair across the desk. He would be talking about a case and say, "Ugh." It always started with a grunt. I mean, that is how he started a conversation. It was like "hello"—"ugh." "So what does the great Judge Gorsuch think about this one?"

And you were expected to have a view about pretty much anything and everything that he asked, and he would just sit there and chuckle at you. And he would laugh at you, and you were wondering what he thought. He never revealed his hand, and he would just walk out of the office. He would say, "Oh, that is what Judge Gorsuch thinks. Okay."

And then he would go back, and he would think about it himself. And then he would come back in again, and just the whole thing would repeat itself as he was working through each case himself. He would 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, he said it is to decide cases. And I know a lot of people think that is just mundane or maybe cover dishonesty in some way. It is just not true. It was the humility of the man.

He knew that lawyers worked really hard because he had been a lawyer, a workaday lawyer for 14 years, I think it was, in a law

firm. He tried cases—small cases, big cases—and he knew what it was like to have to be the lawyer in the well and how hard it is to have all the answers, how easy it is to ask the questions.

Senator 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.

Judge GORSUCH. Yes. Well——

Senator 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-necked law clerks.

Judge GORSUCH. Yes.

Senator 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?

Judge GORSUCH. He would come up for a game of horse with the clerks, former law clerks at reunions.

Senator CRUZ. How is his jump shot?

Judge GORSUCH. His best shot at that age, and we are talking in his seventies, late seventies, was from the free throw line back up over his head like that. And he could hit it pretty regularly.

[Laughter.]

Judge GORSUCH. His eye-hand coordination was just uncanny. So I remember those, those law clerk reunions at the basketball court where he would 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, and we walked past all the portraits of all the former Supreme Court Justices, which are down at ground level. And he would ask me, "Ugh," grunt, "how many of these guys do you honestly recognize?"

And I was one of those pencil-necked law clerks, and the truth was I thought I knew a lot about the Supreme Court, the law, and the answer was about half, the honest answer. And he said, "Me, too." And he said, "The truth is we will all be forgotten soon enough, me included."

And I remember saying, "Justice, that is impossible. You are one of the greats. No way you are going to be forgotten." His portrait now hangs down in the basement.

Senator CRUZ. Well, there is wisdom in that humility.

Let us 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, 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 notion of reading the Constitution for what it says?

Judge 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 do not think that is a very fair or appropriate or useful way to engage in discourse. So I am worried about using labels in ways that are sometimes an excuse for engagement with the ideas, sometimes pejoratively.

The truth is I do not think there is a judge alive who does not want to know about whatever legal text he or she is charged with interpreting something about its original meaning, as enacted. And I do not think this is an ideological thing. I look at decisions like *Jones*, which we have talked about, or decisions like *Kyllo*, the thermal imaging of a home. Is that a search under the Fourth Amendment?

The Supreme Court goes back and looks at the original history and says it is equivalent to Peeping Toms, which, of course, would be a search under the Fourth Amendment. The Constitution is 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 cannot 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 is not right that an individual should be sentenced to prison and then hand sentence on the basis of facts a jury has not 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 is a very careful—you might agree or disagree with it, but it is 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 am with so many other people who have come before me, Justice Story, Justice Black, and yes, Justice Kagan, who, sitting at this table, said we are all originalists in this sense, and I believe we are.

Senator 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, you

know, the notion that, gosh, how could the Framers possibly imagine modern contrivances, modern contraptions?

Well, thermal imaging did not exist in the 1700s.

Judge GORSUCH. Right.

Senator CRUZ. 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 does not 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 can possibly be applied in a world of internet and technology and changing—changing reality?

Judge GORSUCH. Well, it is just these discussions we have 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 did not know about thermal imaging or GPS tracking devices or DNA or email. 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 is not what we wish. It is 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, all 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 are disagreements over what the law is. That has been very important to me.

And the other thing it does is it is a due process value. We are interpreting the law in a way that we can charge people with notice of because we are judging them for their past conduct. People lose their liberty, their property on the basis of our interpretations of the law. That seems to me that it should only be fair that there are interpretations we can charge them with notice of, right?

Similar thing when we come to statutory interpretation, right? What does that text mean? What could a reasonable reader understand that text to mean?

You know, my favorite case in statutory interpretation when I teach this stuff and talk to my law clerks about it is the fish case. There the statute read something like, I am not going to 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 fisherman who knows that the Coast Guard is after him, and he has an illegal catch and he throws it overboard? That case went to the U.S. Su-

preme Court. It is a great case. And it divided in a way that people do not expect, right?

Justice Ginsburg wrote the majority opinion and along with Justice Alito writing a concurrence, saying fish? This statute is about email. Nah, no, no. Justice Kagan and Justice Scalia wrote a dissent, saying fish? That is a tangible object, right? He had notice. He should not have done it.

And so these things do not divide along any kind of ordinary ideological line. I am confident that there are Justices who in that case or in *Heller* or in any of these cases would, as a matter of policy, have come out differently than they did as in a matter of judging. And that, to me, is all the difference in the world. We are not doing what we would like, but what we think the law is.

Senator CRUZ. Let us turn to another topic. Some of my colleagues on the Democratic side have raised 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 Federalist Society?"

[Laughter.]

Senator CRUZ. And given that context, for the sake of candor, I will 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 would not ascribe to either of those labels.

And I understand you gave a talk at a Federalist Society event at the problems of over-criminalization. Can you tell us a bit about that talk?

Judge GORSUCH. Yes, I think it is fun to go into audiences and challenge them sometimes a bit. I think it is important. And as to the Federalist Society, I do not have a card either, and I really do not want a back statement for past dues.

[Laughter.]

Judge GORSUCH. But I attend maybe one event a year or something like that. It is all alumni forums that you all have. And at that speech, 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 does not 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 of relatively recent vintage.

I asked my law clerks to go find out, okay, now how many of those—how many laws do we have that have criminal penalties that are in regulations, too, right? Just out of curiosity. And I thought they'd be able to come back with a number.

And apparently—they reported back, and I trust them. They are 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 warned, you know, he lived in a time when there were too few written laws, so that the king could pretty much do as he wished. Tyrannical king. That is 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 cannot know what the law is.

And of course, there is the great example of Caligula, right, 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 is a problem, too, right, for due process, fair notice. And the truth is in like so much else in life, we are aiming for the golden mean. Not too much, not too little. A point where people have enough fair notice, but are not overwhelmed. That is what I spoke about.

Senator 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 am 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 does not run afoul of the law. And then that is something that should concern all of us.

You know, I would note when you gave this speech, would you say it is fair to say that not everyone at the Federalist Society who heard your speech agreed with everything you said?

Judge GORSUCH. Oh, goodness. That was the whole point of this speech, Senator.

Senator CRUZ. Well, and in my experience, a great many Federalist Society debates—events are structured as debates, where you have sometimes sharply contrasting views for the purpose of intellectual discussion and, hopefully, thinking in addressing hard problems.

Judge GORSUCH. And there is a counterpart to the Federalist Society now, the American Constitutional Society. One of my friends who was just here is on the board. It does similar good work.

Senator CRUZ. Sure.

Judge 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 is what I get out of it. I learn things.

Senator CRUZ. I would note that the Federalist Society describes its purpose as "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 can 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 fine debating point in a Committee of the United States Senate, in a courtroom, it runs foursquare into decades, if not centuries, of precedents 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?

Judge GORSUCH. No, Senator.

Senator CRUZ. The NAACP is a corporation. Is there any credible argument that the NAACP has no First Amendment protections?

Judge GORSUCH. I think these are long-settled precedents we are talking about.

Senator CRUZ. And the same, I would note, is true for the NRA, for La Raza, 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 and 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?

Judge GORSUCH. I believe it is.

Senator CRUZ. I think that is 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 gun issues we have the NRA and the Brady Center debating back and forth, 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.

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, theirs in that regard?

Judge 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 from 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 DC, where you have cattle, it is a cattle drive down the main road in Denver. They shut it down. That is 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 the Willard or pick your favorite fancy, at the Plaza in New York. Yes, they bring the prize steer into the lobby of the Brown Palace.

And in between, there is a rodeo and the stock show, and the kids show their animals. My kids never made it to the Grand National. They are more county fair types with their chickens and their rabbits and dogs and whatever. But the kids compete to the Grand National, this Grand National. This is big time.

And then there is mutton busting, and I think my children still have PTSD from mutton busting.

[Laughter.]

Judge 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.]

Judge GORSUCH. And you attach the one to the other and see how long they can hold on. And you know, it usually works fine when the sheep has a lot of wool, and you tell them to hold on—I tell my kids hold on monkey-style, you know, really get in there, right, get around it.

Because if you sit upright, you go flying right off, right? So you want to get in. But the problem when you get in is that you are so locked in that you do not want to let go, right? And so then the poor clown has to come and knock you off the sheep.

And my daughters, you know, they got knocked around pretty good over the years.

Senator CRUZ. Well, as a Texan, I think everyone's life could be rendered richer by going to the rodeo, and I thank you for sharing that experience with your clerks.

Judge GORSUCH. Well, I am sorry. We could talk mutton busting all day.

Chairman GRASSLEY. Senator Franken.

Senator FRANKEN. Good to see you, Judge. Evidently, there is no animal abuse laws——

[Laughter.]

Judge GORSUCH. You sound like my daughters on that score, Senator.

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. Then Senator Lee brought it up. And I want to just go through the facts real quickly because I understand the reasoning behind your dissent, but I am actually kind of puzzled by it as well.

Okay. So Alphonse Maddin is a truck driver. He has made a stop off the interstate at 11 p.m.. He comes back on—or he is about to come back on, notices his brakes are frozen on his trailer.

Okay. So he decides I am not going to go on—it is dangerous to go with frozen brakes onto the interstate, frozen brakes on my long trailer. He is in the cab, and he calls in for—pulls over to the side, calls in for a repair. Gets the dispatcher. The dispatcher says, well, you know, wait. Hang on there. Wait.

Okay. A couple hours goes by. The heater is not working in his cab. It is 14 below zero, 14 below zero. He calls in and he says, my feet, I cannot feel them. I cannot feel my feet. My torso, I am begin-

ning not to be able to feel my torso. And they say hang on, hang on, wait for us.

Okay. 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 does not make much sense.

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 them back, and a supervisor says wait. You have to wait. So he has a couple choices here. Wait or take the trailer out with the frozen brakes onto the interstate.

Now when those brakes are locked, and you are pulling that load on a trailer with its brakes locked, you can go maybe, what, 10, 15 miles an hour. Now what is that like on an interstate? Say you are going 75 miles an hour. Someone is going 75 miles an hour. They come over a hill and slam into that trailer.

Also he has hypothermia. He is a little woozy. Probably figures that is not too safe. I do not think you would want to be on the road with him, would you, Judge?

Judge GORSUCH. Senator——

Senator FRANKEN. You would or not? It is a really easy yes or no.

Judge GORSUCH. Would I want to be on the——

Senator FRANKEN. Would you like to be on the road with him?

Judge GORSUCH. Would I want to be on the road with him?

Senator FRANKEN. Yes.

Judge GORSUCH. With the hitched trailer or the unhitched trailer, Senator?

Senator FRANKEN. Well, either, but especially with the hitched trailer with the locked brakes.

Judge GORSUCH. No. I do not think that was a serious option. I agree with you.

Senator FRANKEN. Okay. I thought that was—I would not want to be there either.

Judge GORSUCH. Yes. An unhitched trailer——

Senator FRANKEN. So what he does is he unhitches it—-

Judge GORSUCH. Right.

Senator FRANKEN [continuing]. And goes off in the cab.

Judge GORSUCH. And then I believe he comes back 15 minutes later.

Senator FRANKEN. And he comes back after he gets warm so that he can be there when it gets repaired.

Judge GORSUCH. Right.

Senator FRANKEN. Okay. He gets fired. He gets fired. And the rest of the judges all go that is ridiculous. He should not—you cannot fire a guy for doing that. It was—there were two safety issues here.

One, the possibility of freezing to death or driving with that rig in a very, very dangerous way. Which would you have chosen? Which would you have done, Judge?

Judge GORSUCH. Oh, Senator, I do not know what I would have done if I were in his shoes, and I do not blame him at all for a moment for doing what he did do.

Senator FRANKEN. But what——

Judge GORSUCH. I empathize with him entirely.

Senator FRANKEN. Okay. Just we have been talking about this case. You have not decided what you would have done? You have not thought about for a second what you would have done in his case?

Judge GORSUCH. Oh, Senator, I thought a lot about this case because I——

Senator FRANKEN. And what would you have done?

Judge GORSUCH. I totally empathize and understand——

Senator FRANKEN. I am asking you a question. Please answer the questions.

Judge GORSUCH. Senator, I do not know. I was not in the man's shoes, but I understand why he did——

Senator FRANKEN. You do not know what you would have done? Okay. I will tell you what I would have done. I would have done exactly what he did.

Judge GORSUCH. Yes. I understand——

Senator FRANKEN. And I think everybody here would have done exactly what he did, and I think that is an easy answer, frankly. I do not know why you had difficulty answering that.

Okay. So you decide to write a thing in dissent. If you read your dissent, you do not say it was like subzero. You say it was cold out. The facts that you describe in your dissent are very minimal. But here is the—here is the law that—and you go to the language of the law, and you talk about that. "I go to the law."

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 is the law.

And you decided that they had the right to fire him, even though this law says you may not discharge an employee who refuses to operate a vehicle because he did operate the vehicle. Is that right? That is your—that is how you decided, right?

Judge GORSUCH. That is the gist of it.

Senator FRANKEN. Well, no. Is that how you decided? That is what you decided, right?

Judge GORSUCH. Well, Senator, there are a lot more words in the opinions, both in the majority by my colleagues and in dissent, but that—I am happy to agree with you that is the gist of it.

Senator FRANKEN. Right. Well, that is what you have said. And I—look, I am not a lawyer, but I have been on this Committee for about 8 years, and I have paid some attention. So I know that what you are talking about here is the plain meaning rule. Here is 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 is what you used, right?

Judge GORSUCH. That is what was argued to us by both sides, Senator.

Senator FRANKEN. But that is what you—that is what you used?

Judge GORSUCH. Yes, both sides argued that the plain meaning supported their——

Senator FRANKEN. Yes, and you used it to come to your conclusion.

Judge GORSUCH. But both sides did.

Senator 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 is absurd.

Now I had a career in identifying absurdity.

[Laughter.]

Senator FRANKEN. And I know it when I see it, and it makes me—you know, 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 nomination, it has been talked about, one of the first calls you placed was to Chief Judge Garland. And you said to me, "I think the world of Merrick Garland."

And I asked you a couple times if you are 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 had been on the bench for 10 years. So that sounded fair to me, and I decided to leave well enough alone, and I moved on to another topic.

But your relationship with politics came up against 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, "still a little foreign to you, are still quite unfamiliar to you."

But it turns out that is 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 emails back and forth between former Bush administration officials and you in 2004, back before you joined that administration.

And the Neil Gorsuch in those emails seems to be very, very familiar with politics. The Neil Gorsuch in those emails 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.

"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."

Now that does not sound like someone who steers clear of politics to me. You went on to write, "While I have spent considerable time trying to help the cause on a volunteer basis in various roles, I have concluded that I would really like to be a full-time member of the team."

You attach your résumé, which describes in detail your work in support of political campaigns and candidates. Basically, you had worked on Republican political campaigns since 1976. You worked for Reagan, Bush 1, Bush 2. You were cited for distinguished serv-

ice 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 résumé, touting your work on political campaigns dating back to 1976.

These messages establish that for a good deal of your prior career, you did not avoid politics. Quite the contrary, you were very politically active. So in light of that, I would like to ask my question again. Do you think Merrick Garland was treated fairly by the United States Senate?

Judge 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 when we just disagree with the policy of the statute. So I appreciate the opportunity to respond there.

Senator FRANKEN. When there is a scrivener there?

Judge GORSUCH. Scrivener's error.

Senator FRANKEN. Error?

Judge GORSUCH. Error, yes.

Senator FRANKEN. Okay, I am sorry.

Judge GORSUCH. Not when we just disagree with the policy. With respect to campaigns——

Senator FRANKEN. Well, if I read my statutory interpretation from, let us 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.

Judge GORSUCH. Oh, yes.

Senator FRANKEN. And I think you can apply it without it—I mean, do you not think it is absurd that this man was put—given that choice and then fired for it? Do you not think that was absurd?

Judge GORSUCH. Senator, my heart goes out to him.

Senator FRANKEN. Okay, never mind.

Judge GORSUCH. My heart goes out to him, but it is just not my job to write——

Senator FRANKEN. How do you think Merrick Garland was treated by the Republicans?

Judge GORSUCH. And Senator, since I became a judge 10 years ago, I have a canon of ethics that precludes me from getting involved in any way, shape, or form in politics. They are the reason why judges do not clap at the State of the Union and why I cannot even attend a political caucus in my home State to register a vote in the equivalent of a primary.

Senator FRANKEN. Okay. But I do not think that this is—you have to state your political views. That is not what—this is about how a Supreme Court Justice who is nominated by the President of the United States, this is like in the Constitution. I think you are allowed to talk about what happened to the last guy who was nominated in your position.

You are allowed to say something without being—without getting involved in politics. You can express an opinion on this.

Judge GORSUCH. Senator, I appreciate the invitation, but I know the other side has their views of this, and you, your side has your views of it. That, by definition, is politics.

Senator FRANKEN. Okay, okay.

Judge GORSUCH. And Senator, judges have to stay outside of politics. I think the world of Merrick Garland. I think he is an outstanding judge.

Senator FRANKEN. Okay, I understand.

Judge GORSUCH. I have told you what I think about him.

Senator FRANKEN. I understand. Thank you. Thank you.

I do not mean to cut you off, but you know, 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, and I know—I do not hold it against you that you did political work. Lots of people did.

Judge GORSUCH. 1976, I was walking the district with my mom.

Senator FRANKEN. Yes.

Judge GORSUCH. When she was running for State house.

Senator FRANKEN. Looking again at the emails 5 or so months after your message to Mr. Schlapp you emailed Ken Mehlman. Mr. Mehlman was your law school roommate, and at the time you emailed him, he was the Chairman of the Republican National Committee. You had just interviewed for a job at the Department of Justice, and you wanted him to put in a good word. So he did.

Mr. Mehlman emailed the White House, and he wrote, "Neil is a wonderful guy, was my law school roommate, did the 72-hour effort in Ohio for us, and was part of Lawyers for Bush." Mr. Mehlman wrote, "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 us think back to the 2004 election. Let us look at Ohio, where you volunteered.

Ohio is one 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, but 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 were a member of the group Lawyers for Bush-Cheney. As a lawyer and as a student of the Constitution, how did you feel about the right to marry being put to a popular vote?

Judge GORSUCH. Senator, I do not recall any involvement in that issue during that campaign. I remember going to Ohio——

Senator FRANKEN. Were you aware of that issue at all?

Judge GORSUCH. Oh, certainly, I was aware of it.

Senator FRANKEN. And how did you feel about it?

Judge GORSUCH. Well, Senator, my personal views? Any revelation of my personal views about this matter would indicate to peo-

ple how I might rule as a judge, mistakenly, but it might. And I have to be concerned about that.

Senator FRANKEN. These discriminatory amendments were part of a deliberate effort to drive up the turnout, and we know that because—we know that because your friend Ken Mehlman said so. Mr. Mehlman was interviewed by The Atlantic in 2010 and said that the Bush campaign had "been working with the Republican to make sure that anti-gay initiatives and referenda 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. It has 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 have been involved in the fight for marriage equality, one of the things I have learned is how many people were harmed by the campaigns in which I was involved. I apologize to them and tell them I am sorry."

That is 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, the Supreme Court has settled this issue. Marriage equality is now the law of the land. So you should not have any problem answering this question. How have your views of marriage equality changed, if at all, since the 2004 election?

Judge 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——

Senator FRANKEN. It is settled law.

Judge 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——

Senator FRANKEN. Okay. Can I move on to something else then? Thank you.

Judge GORSUCH. Well, if I might finish?

Senator FRANKEN. I understand. You have given a version of this answer before. So I understand. I understand.

I would like to return to something I raised in my opening statement, and that is 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. Now I do not think that is 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 are not talking about

a change over a 4-year period. We are talking about a change of potentially 40 years of law, number one."

That is change of potentially 40 years of law. Change the law. You and your colleagues here have said the job of a judge is to follow the law, even if he dislikes the results. You have said that. Not change the law or change 40 years of the law.

But that is what Reince Priebus said this is about. When the White House chief of staff was talking to his friends at CPAC, he says that Justice job, that your job is to change 40 years of law. Yet my colleagues and you say it is to follow the laws as written. Well, it cannot be both. So which is it?

Judge GORSUCH. Senator, it is 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 is the Tenth Circuit, where I have served for the last 10 years——

Senator FRANKEN. Okay.

Judge GORSUCH. And where my opinions have been unanimous 97 percent of the time, Senator.

Senator FRANKEN. I know.

Judge GORSUCH. I have been in the majority——

Senator FRANKEN. I understand, and again, you have given many times that answer. So if you will indulge me?

Mr. Priebus went on to say your nomination was central to President Trump fulfilling his policy objectives. "Neil Gorsuch represents the type of judge that has the vision of Donald Trump, and it," 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 that 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 he 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 of settled law or have an effect on the law moving forward?

Judge GORSUCH. Respectfully, Senator, Mr. Priebus does not speak for me, and I do not speak for him. I do not appreciate when people characterize me, as I am sure you do not appreciate it when people characterize you. I like to speak for myself.

I am a judge. I am my own man.

Senator FRANKEN. Okay. I just want to just, you know, we have had some talk about this. I do not think we are crazy to think that the administration and Reince Priebus, I do not think he was lying. And does it not—are you comfortable with your nomination being described in such transactional terms?

Judge GORSUCH. Senator, there is a lot about this process I am uncomfortable with, a lot. But I am not God. No one asked me to fix it. I am 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.

Senator FRANKEN. I have it. Well, I find it unsettling that the administration is talking about—the chief of staff is talking about the Supreme Court that way. But I want to get back to the panel at CPAC.

After Mr. Priebus discussed your nomination, Steve Bannon talked about the President's agenda. He described three priorities, and one of them was "the deconstruction of the administrative state." Now here is what Mr. Bannon meant by that.

He said that regulation was a problem from his perspective. "Every business leader we have had in is saying not just taxes, but it is also regulation." He said that if you look at the President's appointees, "They were selected for a reason, and that is deconstruction. The way the progressive left runs is if they cannot get it passed, they are just going to put in some sort of regulation in an agency. That is 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?

Judge GORSUCH. Senator, respectfully, I believe that is a question best directed to Mr. Bannon.

Senator FRANKEN. He is not here. I am just quoting him. That is all.

I think the White House does see judges as a part of this deconstruction, and I think that they are seeing your nomination as an important step toward achieving this goal. You have shown a willingness to disregard agencies' interpretations of statutes. You did that in *TransAm Trucking* with a Department of Labor regulation, for example.

You have done it in other cases as well, and in August, you wrote that concurrence to your own unanimous opinion in which you describe *Chevron*, the Supreme Court's landmark administrative law case, as "permitting Executive bureaucracies to swallow huge amounts of core judicial and legislative power." You wrote, "Maybe the time has come to face the behemoth."

Now generally speaking, as we have 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 to ensure that pharmaceuticals or medicines are safe, those agencies turn to experts to develop those policies, experts like scientists at the FDA, for example.

And I think that is a good thing. We want experts doing the work. What we Senators do not want to be doing is deciding how much lead can be in your water or what the distance in the slats are in a baby's crib. I do not trust Senator Coons to do that.

[Laughter.]

Senator FRANKEN. *Chevron* provides that when agencies do that, courts should be wary of stepping in to overrule them without a good reason. This is—Scalia agreed with *Chevron*.

But I am concerned that this administration sees common sense health and safety rules as a burden on big business, and I am concerned that they want to appoint pro-corporate judges who are will-

ing to substitute their own judgment on these matters for those of experts. Do you believe that *Chevron* was wrongly decided?

Judge GORSUCH. Senator, I am a Circuit Judge. I do not 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 to 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 is part of my job to say these things when I see problems like that. It is a due process problem I saw, and no one, Senator, is suggesting that scientists should not get deference, or chemists or biologists. Section 706 of the APA is quite clear that on facts——

Senator FRANKEN. Well, 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 Fourteenth Congress, *Chevron* deference was mentioned only twice on the Senate floor. But between the announcement of your nomination on January 31st 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 are choosing your words very carefully, and I know you are trying not to signal how you might rule in certain cases, but I think some of the signals have already been sent.

Thank you.

Chairman GRASSLEY. Senator Sasse.

Senator 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 am disappointed in Senator Cruz partly because he stole a lot of my originalism plan of questioning, but also because he went to mutton busting.

[Laughter.]

Senator SASSE. 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 am sure she did not expect me to read it, but how in the world is Gorsuch able to go so many hours at a time without peeing.

[Laughter.]

Senator SASSE. I will not make you answer, but the SCOTUS bladder is something the whole country stands in awe of. You are over halfway through your 11 hours today, so congratulations.

Judge, let us do biography for just a second. You are a father. Remind me of the ages of your children.

Judge GORSUCH. Boy, I do not even know what to say now.

[Laughter.]

Judge GORSUCH. You really caught me off guard there, Senator Sasse.

Senator SASSE. You are welcome.

Judge GORSUCH. My daughters are 17 and 15.

Senator SASSE. Okay. So, besides fishing, have they ever played sports?

Judge GORSUCH. Oh, my goodness, yes.

Senator 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?

Judge GORSUCH. No, but I think some of my buddies have.

[Laughter.]

Senator SASSE. Have you—have you ever asked a referee underneath the zebra stripes of their jersey to wear your kid's Little League jersey as the undershirt, the referees?

Judge GORSUCH. No, it would not have helped any. My kids were pretty rotten at basketball.

Senator SASSE. We are 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 has been happening in the room over the course of the last six or 7 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 is not your job.

And some of this questioning really has not been a fruitful use of our time. It is well meaning to talk about the outcome objectives of a whole bunch of these cases, but I would submit that it is dead wrong. I want to give you just a couple of the questions we have heard earlier today at different times.

"How can we have confidence that you will not 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 is 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 tip off.

If the law is wrong, and I am 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 do not fix the laws that are wrong. We would not 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 is not the oath that you will take, that is not the Constitution that we have all taken an oath to and pledged to, and it is not what the American people want.

So, frankly, I applaud you for your perseverance and patience with us as we have continually gone down a path of asking you to answer questions, many of which are fundamentally political questions, and that you should not be answering, and that we should not be asking. So, thank you for your endurance.

I would like to go back to something that is a little more productive for the Committee, and, frankly, I think productive for the moms and dads at home. And I would like to talk a little bit more

about the judge's robe. We 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 judges 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 have spoken eloquently about it in the past, but I think it is 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 is 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, who, 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 is why you are going to be confirmed, because people believe you to be a good and fair-minded judge.

But every American in a more fundamental way needs to know what is 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 us engage in a little thought experiment. Thirty or 40 years from now when you retire and hang up your robe, and you are 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?

Judge GORSUCH. Senator, that is a question I ask my kids every semester when I teach ethics, finish the semester with asking them to spend 5 minutes writing their obituary. They hate it. They think it is corny, and it might be a little corny. And then I ask them if they will volunteer to read some of them, and people want to be remembered for the kindnesses they showed other people by and large.

And what I point out to them—what I try to point out is it is not how big your bank account balance is. Nobody ever puts that in their draft obituary, or that they billed the most hours, or that they won the most cases. It is how they treated other people along the way.

And for me, it is the words I read yesterday from Increase Sumner's tombstone. And that means as a person I would like to be remembered as a good dad, a good husband, kind and mild in private life, dignified and firm in public life. And I have no illusions that I will be remembered for very long, none, if Byron White is nearly forgotten, as he is now as he said he would be. I have no illusions I will not last 5 minutes. That is as it should be.

"The great joy in life," Shaw said, "is devoting yourself to a cause you deem mighty before you are thrown on the scrapheap." 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 am going to last as long as you suggest. And that will be good enough for me.

Senator SASSE. Well said. And would it be that more who taught legal ethics, and business ethics, and medical ethics, and theological ethics, would assign their students the obituary challenge. We might live less in the soundbite culture and more in a way that thinks about service, and duty, and calling. It is a great assignment.

Neither Cory Gardner nor Michael Bennet have to fear that you are going to challenge them for a Senate seat from Colorado in the future?

Judge GORSUCH. Senator, I admire them both, and I think it is a wonderful fact they were both here to introduce me, and that they follow a tradition, the West, where Senator Salazar and Senator Allard, Republican, Democrat, introduced me last time around. And, frankly, 10 Circuit nominations, thanks to—he is not here at the moment—but Senator Hatch cares about the Tenth Circuit, Republican and Democrat, generally going very smoothly.

And it shows. It shows that you all have picked—I do not know how it works. I do not know how this crazy process works, but the colleagues you have selected for me over the years are wonderful colleagues, wonderful people. And I have been richly blessed to spend 10 years with every one of them.

Senator SASSE. So, when you distinguish between the rearview mirror of a Justice later or a judge later in life looking back, and the rearview mirror of a Senator, we have different callings. And so, I think, without putting words in your mouth, you are going to be able to say that you can be proud of your career, even if you failed to advance your policy preferences in this calling.

But unpack that for the American people. Help them understand how the retrospective look of a Senator and her or his career is different than a judge's retrospective look.

Judge GORSUCH. I suspect, but I do not know because I have not sat where you sit. I would not presume to be able to walk in your shoes. But I presume gingerly that you will 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 is an experience every young person should have. It will give them a lifelong love of this body. It 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 have done fairness to each person who has come before you, decide their case on the facts and the law, and that you have just carried on the tradition of a neutral, impartial judiciary that each person can come to with some sense that they are going to receive a fair hearing for their disputes. That is what we do. We just resolve cases and controversies. And lawyers are supposed to be fierce advocates, and I was once a fierce advocate for my clients. But a judge is supposed to rule impartially, to listen courteously, and rule impartially.

So, frankly, my legacy should look and will look a lot smaller than yours, and that is the way the design of the Constitution works.

Senator SASSE. In an earlier line of question, you were asked about 2004, and the presidential election, and your participation in it. I just want to clarify, you were not a judge in 2004.

Judge GORSUCH. Goodness no, Senator.

Senator SASSE. Correct.

Judge GORSUCH. I was a private attorney.

Senator SASSE. And when you went on to the bench, what changed in your life?

Judge GORSUCH. Justice Jackson says, "A robe changes a man or it should." Now, I am 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 a dissent, as we have talked about earlier, in *Korematsu*. He wrote the *Steel Seizure* concurrence. He was a brave man. That is a judge's judge, calling it like he sees it in each case as it comes, and writing clearly so that people can understand exactly what he is up to, and he is not hiding behind jargon, legalese, or four million footnotes.

That is the best I can do on that.

Senator SASSE. Senator Cruz earlier asked you a series of questions about originalism, and I appreciated your—I will probably paraphrase you inartfully. But you said you worry that the labels sometimes put us into boxes that eliminate the requirement or reduce the requirement we have to actually engage each other's ideas. So, I will not 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 "too rigid" in adapting to our changing culture.

Do you believe that originalism is just one judicial philosophy among many, or is it a description of what judges do?

Judge GORSUCH. I am with Justice Kagan on this. I think it is what we all want to know. I do not know a judge who would not want to know what the original understanding is of a particular term in the Constitution or a statute. That is 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 does not necessarily decide the case, but it provides us a language to talk to one another in which we are trying to seek something outside of ourselves, outside of our own personal beliefs, about what the Constitution or the statute at hand means.

We are trying to do it in a way that is neutral and that we can say provides fair notice to those whose lives we are affecting, so that we are interpreting the law in a way that we can say they should have known. They were on notice. We are not putting a person in prison willy nilly based on our preferences. We are taking away their liberty, but we are preserving it in accordance with the Constitution as it was written.

Senator SASSE. I would like to talk a little bit about cultural catechesis, or civics. As you and I have discussed in previous meetings, I am of the 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 is quite the point of America, right, that there are all sorts of things people might differ about and they might want to argue about. Our Founders came here, and they did not 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 Fremont, or in Omaha, Nebraska. And you do it in the town square, and do it at the church or the synagogue, you do it in the bar. And you fight about questions, but fight free from violence, and so, we protect each other's rights to argue and to dissent.

And we are 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 is about limited government. It is about principled pluralism. It is about intentionally distinguished and divided powers. And I think all three branches have an obligation to do some of that teaching about civics.

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 are always only one generation away from the extinction of freedom." If we do not pass along the meaning of America to the next generation, it means the next generation of our rulers are not going to understand why we have this beautiful inheritance that we have in a constitutional system of limits.

As a judge on the Tenth Circuit, and soon to be as a Justice on the Supreme Court, can you explain what you think your responsibilities and freedoms are to teach civics to the American people?

Judge GORSUCH. Senator, as a judge on the Tenth Circuit, I have tried hard to do that, literally teaching class, speaking where I am invited when I am invited, going to law schools, talking to students, and visit the courthouse, and it has been a great privilege and a joy.

I think here of Justice O'Connor—Sandra Day O'Connor—and when she retired she did an awful lot of this. She has done an amazing amount of work. And I do think that there is a need to remind people how to talk to one another, how we talk to one another, and more fundamentally about how brilliant the design of this Constitution is. Not perfect, but e pluribus unum. From many, one.

And we are all not Republican judges, Democratic judges. We are judges, and I think we do have an opportunity, and that is 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 is a Western thing, I do not know, or a MidWestern thing, Senator. But I really believe in this country, and I am opti-

mistic about its future. I see the young people. I teach them. I get law clerks that 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 did not want a monument as a memorial here in 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, you got two of them here. And every year when I go do that selection process, I do not know about Senator Coons, but it is 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 am so fortunate to be confirmed, on just this topic, Senator, with you, with Senator Coons, and anyone else.

Senator 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 have discussed having been tapped in the past to participate in speech writing. Talk about the purposes of both concurring dissents and traditional dissents, and what you think the objectives are at the appellate level in your opinions, and is there a distinction when you are on SCOTUS.

Judge GORSUCH. When I sit down to write an opinion, people sometimes ask me who I am writing for. I am writing for myself. I am trying to convince myself that I have it right. And I go through a lot of drafts, and I sometimes, as my law clerks know, change tack as I am—I am drafting. I do not know how many drafts I have gone through on some opinions, 30? More.

Senator SASSE. He actually said 130, but whatever.

[Laughter.]

Judge GORSUCH. Because I am trying to get it right, and I find I test ideas as I write. It is one thing to say to somebody else, oh, go write this up. It is 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 is 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 of gobbledygook, and us lawyers are guilty of a lot of gobbledygook, that does not persuade me. I want to know through a clear line. I want to be able to see my argument or my topic sentences.

And maybe it is Sister Rose Margaret, I do not 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 am wrong. So, it is an iterative process because at the end of the day, that is what it is all about.

And then it is 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 cannot have too much pride of authorship. He has to accept criticism, constructive criticism, and try and incorporate or deal with that criticism. Maybe that is why my

opinions have attracted relatively few dissents, I do not know, but I take collegiality very seriously.

As to writing separate opinions, I do not do it very often, and when I do it, it is usually because I am just stuck. I might be wrong, but I am just stuck. Something does not seem right to me, and I have tried to discuss it with my colleagues, I have tried to work it out. I have bent 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 cannot, I write up what I can as respectfully as I can, and usually in as few words as I can, a dissent or a separate concurrence. Sometimes because it is back bound, but it is just where I am stuck. Sometimes it is 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, it seems kind of tough to me. And I think that is part of the process of a good judge.

Senator SASSE. I am a historian by background, and when I was writing my dissertation to your audience question, one of my advisors just kept pounding me saying, I do not know who you are 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 is 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 are finally going to find your voice.

Judge GORSUCH. Yes.

Senator SASSE. Is there something analogous in the writings of the Supreme Court where you are not just writing for other Justices, but you have an obligation to write for the American people?

Judge GORSUCH. I think if you are sitting and writing your dissertation for yourself with a picture of your aunt, you are right on target, because I think if I am 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 have issued, but they will understand why I have where I have. I was candid about it. I did not 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 is what a good judge does is candor, the duty of candor.

Senator 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 is 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 did not have one?

Judge GORSUCH. That is a big question. For us adults——

Senator SASSE. The Chairman said I could have an extra hour, so take your time.

[Laughter.]

Judge GORSUCH. Yes, I have 4 minutes and 19 seconds on that. That is a big question for us adults who are where we are. It is a big question for my middle school- and high school-age kids.

The Constitution as a negative document, the theory behind it, in short order, was to divide liberty—to divide power the better to protect liberty. That is the theory, that if you put all power in one set of hands, are going to get tyranny. And our Founders had too much evidence of that in their own time.

It is kind of a hard-won inheritance, part Enlightenment theory, right, 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 I, write the laws, and it is tough. It is supposed to be tough to protect liberty. We do not 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 the 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 would wish it to be. We are not legislators. We are judges. The legislative power is invested in this body.

That is 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 does not 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. And I am glad to have the opportunity to recognize that fact here as a Westerner.

So, we have the separation of powers between horizontally, vertically. And that was not thought enough to protect liberty. The drafters of the Constitution, many of them thought that would be more than sufficient, that, in fact, was the main way to preserve liberty.

But our Founders were very suspicious and very jealous of their liberties, so they added the Bill of Rights, and they enumerated 10 of them, as you know, starting with freedom of speech, the freedom of religion, no establishment of religion, right to bear arms. The Third Amendment, which I am glad we do not litigate much. I wonder how many of the high school kids now watching know what the Third Amendment is about. Go look it up.

[Laughter.]

Senator SASSE. And get 20 bucks out of your pocket at the same time.

Judge GORSUCH. So, that is what the Bill of Rights is about—it is ensuring not just these negative protections, but some positive, affirmative guarantees against governmental encroachment.

Senator SASSE. Thank you. I want to ask a few more questions about the Bill of Rights, but I will save it for my next round since we are at 40 seconds remaining. Thank you, sir.

Chairman GRASSLEY. Thank you. Senator Coons.

Senator COONS. Thank you. Chairman Grassley, I would 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 the church and state and free exercise.

Chairman GRASSLEY. Without objection, it is entered.

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

Senator COONS. Thank you. Good afternoon, Judge.

Judge GORSUCH. Hi, Senator. Good to see you.

Senator COONS. It has been a very long, and hopefully very informative and instructive day. And I will suggest——

Chairman GRASSLEY. I was supposed to announce something. We will not take this away from your time, but I want everybody to be aware that after you get done, Senator Coons, we are going to take a 10-minute break.

Senator 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 us have a conversation, if we could, about religious free exercise and about liberty interests. 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' 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. In coming to that conclusion, you opened your opinion by writing, "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 have 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 are trying to assess free exercise reins?

Judge GORSUCH. So, under the Religious Freedom—Senator, thank you. Interesting, good question. I mean, this is—this is—this is what it is 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 is a law that this Congress passed because it was not 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.

Senator COONS. If you could, Judge, help me with your choice of the term——

Judge GORSUCH. Yes.

Senator COONS [continuing]. "Complicity," which does not appear in that statute, and had not previously appeared in free exercise jurisprudence.

Judge GORSUCH. Thank you for prodding me along. The point is, what is a sincerely held religious belief? The individuals there were 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.

Senator COONS. Right.

Judge GORSUCH. They were okay——

Senator COONS. That is exactly—excuse me, Judge, but that is exactly why the question of your use of this term "complicity" is so interesting to me——

Judge GORSUCH. Yes.

Senator COONS [continuing]. 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 profit corporation, to impact the choices and life decisions of 13,000 people. It is a truly unprecedented decision. If I could just quote for a moment——

Judge GORSUCH. Sure.

Senator COONS [continuing]. 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 am 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 Greens objected to.

Judge GORSUCH. Right.

Senator COONS. How far does this new concept, this newly injected concept of complicity go?

Judge GORSUCH. Senator, it is not a new concept at all, with respect, because in enacting RFRA, Congress revived some older free exercise case law——

Senator COONS. That is right.

Judge GORSUCH. Much of it written by Justice Brennan. *Thomas* would be a leading example involving, I believe it was a Jehovah's Witness.

Senator COONS. Yes.

Judge GORSUCH. Okay, who was okay in producing certain goods that could be used as armaments, but not others.

Senator COONS. Right.

Judge GORSUCH. Complicity in war making was a matter of faith that——

Senator COONS. The key distinction—the key distinction, if I could, Your Honor, between Thomas and this was that in that case, here is an individual whose deeply held religious belief made him say I cannot make turrets for tanks.

Judge GORSUCH. Right.

Senator COONS. So, the question is uniformly applicable law, unemployment insurance, can he benefit? Fine. But it does not in any way implicate others' liberty interests.

The core concern with the choice to recognize a very large multibillion dollar, nationwide for-profit company, and to privilege the religious interests of its owners through the legal fiction of a for-profit corporation, as it impacts 13,000 individuals. That was not the case in Thomas.

Judge GORSUCH. Senator, respectfully I think we are 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 are mixing apples and oranges because on the first one, complicity is very much in play, and it is 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 is a matter of religious faith. And, in fact, I do not recall anyone doubting or the Government disputing that the Greens' religious faith was sincerely held on that score.

Senator COONS. That is right.

Judge GORSUCH. So, I think it is a given. So, this complicity discussion I think, frankly, Senator, is a red herring, to mix my metaphors, because everyone accepted it.

Senator COONS. We have apples, oranges, and red herrings. We have a full meal——

[Laughter.]

Judge GORSUCH. I know I am mixing—I know it is terrible. I would not want to write it down in an opinion. It is terrible.

Senator 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 that 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 have been recognized.

In the interpretation of RFRA, you choose to define "person" to include for-profit corporations. Help me with why you made that move.

Judge GORSUCH. I would be delighted to, Senator, and thank you for the opportunity. I think I would point to a couple of things. First, RFRA is a statute, and it uses the term "person," and it does not define the term "person." And when Congress does not offer us a specific definition, we go to the Dictionary Act, which Congress has passed for just these circumstances.

And there it says persons include corporations. That is the law as Congress wrote it and if Congress wishes to change the law and say only natural persons enjoy the rights of RFRA, I am a judge. I follow the law. But the law as drafted does not 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.

Senator COONS. That is right, and that is exactly why this was seen as such a departure. There was a long-settled expectation that religious free exercise rights adhere 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 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.

Judge GORSUCH. Right.

Senator 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 are done with the analysis, is in some ways tendentious, because the idea that a for-profit corporation could have religious free exercise rights was nowhere in the earlier case law that Congress explicitly intended to be the narrow purpose of RFRA.

So, does Congress' 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?

Judge 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.

Senator COONS. That is right.

Judge GORSUCH. That was a corporation, for-profit. So, respectfully, I am not sure it is accurate to say there is no precedent for it. Second, I would say to you the position you are advocating is a fine position, respectable position. It is a good position. It was adopted by precisely two Justices of the Supreme Court, and only two.

Senator COONS. So, the question I want to ask you now 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 "your 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 am looking for how you find a limiting principle in this new field? What is the limiting principle now?

Judge GORSUCH. Senator, respectfully, I do not believe that is accurate either because all the Court held was that the Government had to come up with another alternative to provide the contraceptive care it wished to provide. The Court acknowledged—the Supreme Court acknowledged that there was a compelling interest in providing the contraceptive care, and simply said that an accommodation could be reached that did not involve the Greens or require them to give up their sincerely held religious beliefs, much as had been done for churches——

Senator COONS. That is right.

Judge GORSUCH. And hospitals, and lots of other entities. And the Government could not explain why it could not accommodate other entities, like *Hobby Lobby*, as well or *Little Sisters of the Poor*.

Senator COONS. But if I might just briefly, Judge, strikingly to me in the Tenth Circuit opinion in which you participated, you did not recognize as a compelling interest gender equity in providing health insurance to millions. The Supreme Court did. They balanced these equities differently. Why did you not think that was a compelling interest to provide access to healthcare for millions?

Judge GORSUCH. Senator, I think it was just a matter of what had been—what the record was in that particular case before us.

Senator COONS. That is also a striking point for me. This was a preliminary injunction.

Judge GORSUCH. Correct.

Senator COONS. It is a significant groundbreaking opinion where one of your colleagues, one of the other Tenth Circuit Judges, said we really should not be deciding something of this import on a PI. We ought to be remanding to develop the facts below. The facts were not really well explored. And the larger point I am trying to make is that I think this could lead to some very troubling applications.

So, let us just take a minute and look at a few of the contours of what this, I think, precedent-setting decision might mean. So, let us imagine the Greens were from a different religious perspective, if they were Scientologists, for example, who reject the use of antidepressants, or Jehovah's Witnesses, who reject the use of blood transfusions, or Christian Scientists, who reject really modern medicine largely altogether. Could their sincerely held religious beliefs as Scientologists, or Jehovah's 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?

Judge GORSUCH. No, Senator, not necessarily. It does not 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——

Senator COONS. Well, the ACA was not passed with overwhelming bipartisan support.

Judge GORSUCH. I am sorry; speaking of RFRA.

Senator COONS. Right, the accommodation is in the ACA.

Judge GORSUCH. Oh, and the ACA, you can override RFRA any time you want. Congress could say RFRA does not apply to the ACA. That is another alternative. You can abandon RFRA. You can say it does not apply to this particular statute. You can say it applies only to natural persons. You can say it does not apply to contraceptive care. Congress controls this decision, Senator.

Senator COONS. That is right.

Judge GORSUCH. It is your decision. It is not mine, with all respect. We are just trying to implement what you have asked us to do.

Senator COONS. So——

Judge GORSUCH. And, Senator, on your hypotheticals, okay?

Senator COONS. Yes.

Judge GORSUCH. Justice Brennan wrote these First Amendment cases that you are seeking to revive, I would remind you that, all right?

Senator COONS. Yes.

Judge GORSUCH. Justice Brennan, all right? And the fact of the matter is sometimes the Government can prove a compelling interest, and then it has the most narrowly tailored way to get there, and sometimes it cannot. And each case has to be taken on its facts in the particular context in which it arises.

Senator COONS. Well then, help me—help me walk through, if you would, given we already know how you draw the compelling interest line in this particular instance of access to family planning or contraception. How else might you weigh these equities or draw these lines? If the Greens, 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?

Judge GORSUCH. Senator, it would—it would go back—we would do the analysis.

Senator COONS. Right.

Judge GORSUCH. The same analysis. Do they have a sincerely held religious belief? Sometimes people do not. I have had claims, for example, of individuals——

Senator COONS. But in this instance, would you not agree that their sense of the complicity that you referenced in your opinion would likely apply?

Judge GORSUCH. It depends.

Senator COONS. Even though it is very attenuated——

Judge GORSUCH. Well, Senator——

Senator COONS [continuing]. The choice of their employee to spend their money in a way they disapprove, is not that different from the choice of the employee to choose among two dozen forms of contraception, one of which they strongly disapprove?

Judge GORSUCH. Senator, I think it depends on the facts of the case. So, for example, I have had a case where a number of people came before us and said we have a sincerely held religious belief that marijuana is God.

Senator COONS. Okay.

Judge GORSUCH. It turned out it was a drug distribution ring, all right?

Senator COONS. Right.

Judge GORSUCH. And what they really worshipped was the almighty dollar.

Senator COONS. Many of us have teenagers at home watching.

Judge GORSUCH. Well.

[Laughter.]

Judge GORSUCH. And they were really just trying to make a buck, okay? And the District Court found that was not a sincerely held religious belief. So, you can get off the train there. That is one place where you may get off the train in your hypothetical.

You have another place to get off the train. It is substantial burden.

Senator COONS. Right.

Judge GORSUCH. 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 is all statutory. You could abolish it tomorrow.

Senator COONS. Well, let us take an example that I think was central to a lot of this analysis, *United States v. Lee*. It is an older case, 1982. It was a unanimous case. It is one where an Amish businessman declines to pay for Social Security taxes——

Judge GORSUCH. Right.

Senator COONS [continuing]. 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 good law?

Judge GORSUCH. I think *Lee* would be the sort of law you look at when you are applying RFRA, absolutely.

Senator COONS. Because RFRA simply restored——

Judge GORSUCH. Yes.

Senator COONS [continuing]. The strict scrutiny standard that Lee was decided under.

Judge GORSUCH. The Religious Freedom Restoration Act, exactly. So, that is a very good example, Senator, of where the Government was able to prove compelling interest in their own tailoring, yes.

Senator COONS. Because the ability to have a Social Security scheme nationally that is sustainable is a compelling interest.

Judge GORSUCH. Yes.

Senator COONS. But a nationwide plan to provide access to healthcare is not.

Judge GORSUCH. No, Senator. Again, I think we are mixing our apples and oranges because the Government in the ACA was spotted the compelling interest. The problem was the narrow tailoring. You could get there without forcing the Greens to do something their religion prohibited. So, it was not like the system of Social Security, which depends upon everyone's participation. That was the distinction the Supreme Court drew.

Senator COONS. Let me just quote, if I could, Justice Scalia, who addressed this same issue in *Employment Division v. Smith*. And he said, "it is precisely because we are 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 does not protect an interest of the highest order."

Now obviously, the law has 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?

Judge GORSUCH. Under the Religious Freedom Restoration Act, it is a four-part test effectively.

Senator COONS. Right.

Judge 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, and is it narrowly tailored?

And that is the law you have set forth, Senator, because this body did not like, frankly, Justice Scalia's decision in *Smith*. And if this court—sorry—if this—the old trial lawyer in me. Sorry, getting tired. If this Congress wishes to say Justice Scalia was right in *Smith* and we have changed our minds, that is entirely up to this Congress.

Senator COONS. Well, I am going to move on to another line of questioning, but I just want to say that one of the challenges I face in a couple of different gates through the analysis as 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 are the mediating decisions of thousands of individuals versus the free exercise of the Greens.

You have talked about being a Westerner. You have, I think, entertained us with mutton busting, something I have not seen yet, and clearly I should.

[Laughter.]

Senator COONS. And I am—I am interested——

Judge GORSUCH. I recommend it.

Senator COONS. I am 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 is not a genuine Westerner on the Court, and that California does not 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 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 did not. Instead, you expressed a belief in the inviolability of human life. What did you mean by that?

Judge GORSUCH. Senator, respectfully, I am not sure I would agree with your characterization.

Senator COONS. Of the book or of being a Westerner?

Judge 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 do not 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, one we all have had personal struggles with, Senator, as I know you have and I have. And this is a human problem. We 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 a lot of my family Members have done.

The 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. And——

Senator COONS. Well, if I—if I can, Judge, I would like to help walk through that exploration of what you—what you looked at in the book.

Judge GORSUCH. Sure.

Senator COONS. And I think the *Cruzan* decision is a very important one, because essentially the tension here is between whether there is a right for a conscious terminally ill adult to end their own life by refusing lifesaving 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?

Judge GORSUCH. Yes, Senator, I do. Privacy is in a variety of places in the Constitution. The first and most obvious place, back to the Bill of Rights, is the Fourth Amendment, the right to be free from unreasonable searches and seizures in your homes, papers, and effects. That is privacy, right?

The Third Amendment, which I alluded to, but did not want to reveal.

Senator COONS. Quartering of troops in homes.

Judge GORSUCH. No quartering of troops. Stay out of my house with your troops. Now, happily we do not litigate that much, all right?

The First Amendment, the right to free expression, which we have been talking about, the freedom of religious belief and 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 *Meyer*, which involved 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.

Senator 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 is a dividing line you draw between the facts in *Cruzan* and what has been proposed in or adopted in states like Oregon.

Can you point to any principle of constitutional law that says that, or has that principle, as you enunciated it, ever been offered by the Supreme Court or recognized by the Supreme Court?

Judge GORSUCH. Senator, I was speaking as a commentator before I became a judge, not expressing views as a judge, all right? My views as a commentator I am 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 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 as a commentator has to do with the equal protection principles we have been talking about today, the equal justice under law principles. And I am concerned—in the book I expressed concerns as a commentator about what legalization might mean for the least amongst us, the most vulnerable, the disabled, the elderly who might be pressured into accepting an early death because it is a cheaper option than more expensive hospice care, things like that, that might cost more. And so, that was a concern I expressed.

Senator, I do not 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.

Senator COONS. It is a very, very hard discussion, as you said, something that has an enormous impact on the terminally ill and their families.

Judge GORSUCH. Yes.

Senator COONS. There was a case that I think was active at the time you were at the Department of Justice where the U.S. Attorney General was suing Oregon to block their Death with Dignity law that permits in that State physician-assisted suicide. And in the documents you produced to this Committee, you sent a message

expressing hope that the Federal Government would win that particular case.

Why did you want the Federal Government to win that case?

Judge GORSUCH. Well, I was an Advocate for the Government at the time, Senator. That is 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 is a very different mindset.

Senator COONS. And when you are up for consideration for the Supreme Court, it is important to know what you view as settled precedent. So, let me in my last 2 minutes ask a question or two about that.

Judge GORSUCH. Sure.

Senator COONS. In the *Glucksberg* case, which is about physician-assisted suicide, Justice Stevens 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 is your view of the application of *Casey*'s mystery of human life language here?

Judge GORSUCH. Senator, the Supreme Court in *Glucksberg*, the majority held that this issue is for the States to decide and the people to decide. The people of Oregon have made their decision to legalize it, for example. It was just legalized in November in my home State of Colorado. That is their right.

Senator COONS. And how did you feel about that?

Judge GORSUCH. Senator, my personal views have nothing to do with my job as a judge.

Senator 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.

Judge 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 am not making it up. There are other arguments, though, that one might deploy that I analyze as well. That is not the only available argument for legalization by any means.

Senator COONS. Thank you, Judge. Thank you, Mr. Chairman.

Chairman GRASSLEY. We will recess for 10 minutes, so that would be approximately 5:40, and then it will be Senator Flake.

[Recess.]

Chairman 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 will 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 take over, and I will operate within that.

And then I would like to suggest that I have Senator Tillis to take over about 8 o'clock, so I can be in bed by 9 o'clock because I get up at 4 in the morning, and I want to be able to get a good night's sleep so I can run in the morning.

And so you understand, Judge, that I am not—I hope you will understand why Tillis is taking over.

Judge GORSUCH. I am a little envious, Mr. Chairman.

[Laughter.]

Chairman GRASSLEY. Okay.

Senator Flake.

Senator FLAKE. Thank you, Mr. Chairman. Thank you.

This is a long day. I know what it feels like. It reminds me of being at the end of the table—I have 10 brothers and sisters—and getting there and there are 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 10 siblings, and I have five children as well. I do not know about my colleagues, but that is how I get elected in Arizona. It helps, not so much for a judge, but for Senators, it does.

And just like Ben's family, my family has been texting me throughout this process, asking me to ask questions that they would ask. I asked a few of them for suggestions, and my son, Dallin, a teenager, said, ask him if he would rather fight a hundred duck-sized horses or one horse-sized duck.

[Laughter.]

Senator FLAKE. I have never heard of it either. Apparently, it was a question on Reddit a while ago, but anyway, that is where it is going from here, I think.

Judge GORSUCH. You can tell him I am very rarely at a loss for words.

Senator FLAKE. Okay. All right.

Judge GORSUCH. But you got me.

Senator FLAKE. I will tell him. A teenager stumped you there.

My brother Scott asked if you have ever worn gym shorts and a tank top under your robe.

[Laughter.]

Judge GORSUCH. Senator, on that one, we have what is called the Fifth Amendment, 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.

Senator 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? You like to ski, but that is kind of a pedestrian sport.

Judge GORSUCH. Wow, spoken like an Arizonan there, the Valley of the Sun.

No, 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——

Senator FLAKE. That is not pedestrian at all.

Judge GORSUCH. One of them is right now doing some backcountry skiing out near Telluride, as we speak. So that is something we love to do as a family.

Senator FLAKE. Where does your family vacation?

Judge GORSUCH. Near Winter Park, Colorado. It is a resort owned by the City of Denver. And it is where I learned to ski as a kid. My parents would 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 would come back exhausted, which was good, too. They liked to run me ragged that way.

Senator FLAKE. What is the largest trout you ever caught?

Judge GORSUCH. Oh, now we are talking. I love to fish. And that is where I find a lot of solace. You cannot focus on the worries of the world when you are only worried about a trout. Everything else goes away, just disappears. You are in the most beautiful—trout—trout live in beautiful places.

Senator FLAKE. They do.

Judge GORSUCH. They are very picky, and they pick well.

So during the summertime, fishing, hiking. I like to row. I 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 have to learn how to read.

Senator FLAKE. That is great.

Tell me about your civic involvement, outside of the courtroom. You mentioned the school board a while ago.

Judge GORSUCH. Yes, boy, that I found taxing and loved every minute of it. But I have spent a lot of my free time teaching or working on the rules Committee. I have been in the rules process for the last 6 or 7 years now. The 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 is 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.

Senator FLAKE. I found that, and I think that typifies the West and small towns. I grew up in a town called Snowflake. I am a fifth-generation Arizonan. You are a fourth-generation Coloradan, I understand. That is how it works. People get along. They have to. And on a school board, there is no passing the buck there. You have to make decisions. Local government is like that.

Jury duty, have you ever been called up?

Judge GORSUCH. You know, I have. It was when I was at the Department of Justice, and I thought for sure——

[Laughter.]

Senator FRANKEN. Sorry.

Judge GORSUCH. Have you served on a jury?

Senator FRANKEN. No, I just thought it was very odd questions for this, but it is great. It is great.

Judge GORSUCH. You know——

Senator FLAKE. I thought it was pertinent. I wanted to know. Can a judge be called for jury duty?

Senator FRANKEN. I am sorry I laughed. It just caught me—go ahead.

Judge GORSUCH. Thank you.

I actually think it is a very excellent question, because I think anyone who has served on a jury appreciates the important civic function that is involved. It is a way citizens actually interact with their government, right? In a very real way.

Senator FLAKE. Were you disqualified or did——

Judge GORSUCH. No, I thought for sure I would 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 were sent back. And I came out and I had been elected foreman, which I refused to serve as. I just did not think that was appropriate, and I did not want to have undue influence.

But the Seventh Amendment and the right to a 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. In my time serving on a jury, I wondered, is it going to prove out my beliefs or am I going to come out more of a cynic? I came out more optimistic and a true believer in the jury system than ever. I really believe in the wisdom of juries.

Senator FLAKE. Thanks.

Senator FRANKEN. That was a great question.

Senator FLAKE. Thanks, Al. I appreciate it. It is 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?

Judge GORSUCH. Oh, there are so many I admire. I admire them all. They all bring something to the table, men, women, from every kind of background.

Senator FLAKE. Tell me how it works. Are you bunched up where these are Republican-appointed judges, these are Democrat-appointed judges? Do you notice that? Do you forget that? How is it?

Judge GORSUCH. You know, the nicest gift I have gotten in the last few weeks, there 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 was not eating very well, as I was marching around the Senate halls. They said I was looking a little gaunt.

That is how we work in the Tenth Circuit. And I am sorry for outing them, but you touched my heart. Thank you.

And that is 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. And I think you are going to hear in a couple days from two former

Chief Judges of the Tenth Circuit who have retired now. You are going to hear about how we operate in the Tenth Circuit.

It is often reputed to be the most collegial Circuit in the country. Collegial not in some ordinary, pedestrian sense of we are 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.

Senator FLAKE. Just for the record, the Tenth Circuit is seven active judges appointed by Democrats, five by Republicans, yet of the 2,700 cases for which you have sat, you filed dissents on just 36. Is that right, 1.3 percent? And of the 25 dissents that Judge Gorsuch has authored, more than half, 52 percent, were from majority opinions written by Republican appointees.

And it has been said or implied that you act in a partisan way somehow, or that former work in the 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.

I think even more telling, as the Congressional Research Service shows, 97 percent of the majority opinions that you authored were for a unanimous court. As you mentioned, you work 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, people say that this is a judge way out of the mainstream, it simply does not 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, she said, quoting, "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?

Judge GORSUCH. Senator, Federal criminal law imposes very long sentences, and to be a judge complicit in adjudicating criminal cases, I thought I could not close my eyes to what the reality is, and I wanted to see it for myself firsthand my first year on the bench, so I did.

Senator FLAKE. Can you tell me about the Tenth Circuit capital habeas project?

Judge GORSUCH. Senator, I think it started one day after an argument when a few of us were concerned that the quality of representation of death row inmates in our Circuit was not what we would 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 Shumaker, David Tye, 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.

Senator FLAKE. Thank you.

Let us talk about Western issues for a bit. We have talked about the importance of geographic diversity on the Court, and people say, 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 have encountered, and we will flesh that out.

Let me introduce, for the record, a letter from one of Judge Gorsuch's former clerks. Also, let us do one from a Federal judge in Montana.

But let me talk about for a second some of the policies that have come out. In one case, you rejected the idea that the dormant commerce clause prevents Colorado from requiring that 20 percent of electricity would come from renewable sources. Now whether or not you agree with that policy, and there is a lot of disagreement around here about that—but we do not live in Colorado. You do. So its wisdom is not really our business.

Would you agree that the principles of Federalism allow States to experiment with policies like environmental protection, in this sense?

Judge 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 percent of energy in Colorado had to be from renewable sources by a certain date. That law was challenged by fossil fuel producers out of State, alleging that it violated what is called the dormant commerce clause under the Federal Constitution and case law interpreting it. And I did write for a unanimous panel that there was no constitutional violation, and the State was permitted to proceed with its experiment.

Senator FLAKE. Is that indicative of the concept of laboratories of democracies that States have been described as?

Judge GORSUCH. Consistent with that principle.

Senator FLAKE. All right. Thank you.

One complicated issue that we have in the West that you really do not get as much elsewhere is the split estate property rights. It is possible that I might own a parcel of land but somebody else might own the mineral rights, and still somebody else might own the water rights.

Have you encountered that in your jurisprudence?

Judge 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. Then they found out, my gosh, there is some 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 could control some of the valuable mineral rights underneath. Very complicated stuff. And, yes, I have encountered those cases too.

Senator FLAKE. Is that a perspective that you think would be useful on the Supreme Court?

Judge GORSUCH. I think that is for this body to decide.

Senator FLAKE. Thank you.

Also, another aspect of living in the American West is that 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 the relationship between State and local government and the Tribes?

Judge GORSUCH. Senator, I have 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. It depends where you are. That sounds like Oklahoma. Pueblo sounds like New Mexico. And then when I think reservations, I think of Utah and some places in Colorado and Wyoming. And there are variations all throughout the American West.

Our history with Native Americans is not the prettiest history. And as a judge, you try very hard to administer the law fairly, without respect to persons, and equally. I would point you maybe to my cases involving the Ute Indian Tribe, where they have had a long time trying to control their Tribal lands, or *Fletcher*, involving the Osage Nation in Oklahoma and the right to an accounting of the property due them under agreements with the United States. I try to treat all persons who come before me fairly.

Senator FLAKE. That is also a perspective that a Western Member can bring to the Supreme Court. That is my supposition. I know you will not say that, but I think that is 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.

Chairman GRASSLEY. Yes.

Senator FLAKE. Also, one from a law school clerk, and also one from a judge in Montana.

Chairman GRASSLEY. Those documents, without objection, will be entered.

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

Senator FLAKE. Thank you.

Let us turn for a minute to separation of powers. You have written eloquently about *Chevron* deference and your concerns. I share those concerns. *Chevron* did not 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 the judiciary is insufficiently vigilant of Executive overreach.

What are your thoughts on that?

Judge GORSUCH. Senator, those are policy considerations. As a judge, my job is to look at the law. I would say I do not conceive of *Chevron* deference as a conservative or liberal issue. 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. The next day, it may be another party. So a good judge does not care who it advantages. A good judge looks at the law.

Senator FLAKE. So setting the boundaries for where deference ought to be is the job of the legislature and not the judicial branch.

Judge GORSUCH. Well, in the first instance, the Administrative Procedures Act is the statute that you would look at.

Senator FLAKE. Right. Thank you.

With regard to the Second Amendment, you have been asked about stare decisis and the role of precedent, and it is usually by those 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?

Judge GORSUCH. All precedent of the U.S. Supreme Court deserves the respect of precedent, which is quite a lot. It is the anchor of law. It is the starting place for a judge.

And the Chairman kindly held up my overlong book, right? And that is the law of precedent, a very mainstream consensus view by a bunch of judges from across the country who got together and we wrote it down, and it is all in there. And Justice Breyer was kind enough to write a forward to it. And it articulates how a good judge goes about assessing the law of precedent in any case.

Senator FLAKE. Thank you.

Let me just close with religious liberty, religious freedom. I would not ask you your religion or how you practice your faith. 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?

Judge 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 is quite an experiment, really. Most nation-states are 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 is still an experiment today 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 is a pluralistic commitment we have in this country that, well, is very special in the world.

Senator FLAKE. Well, thank you.

Mr. Chairman, I will do something very unSenatorial. I have a couple minutes left, but I will yield back so people can go vote.

Chairman GRASSLEY. Okay.

Senator FLAKE. Or is—he is not back.

Chairman GRASSLEY. I will stay. I think Senator Blumenthal will be here. I will stay here just a few minutes, so we will just stand in recess. I hope everybody will kind of stay close by.

Senator FLAKE. Thank you, Mr. Chairman.

[Recess.]

Chairman GRASSLEY. Senator Blumenthal. I will call on him, and, Senator Blumenthal, while I am gone, if you have anything that you want to put in the record, just ask your permission to do it, and you can do it.

Senator BLUMENTHAL. I thank you very much, Mr. Chairman. I have two sets of documents, and with your permission, I will enter them into the record.

Chairman GRASSLEY. Yes, okay.

Senator BLUMENTHAL. Thank you.

[The information appears as submissions for the record].

Chairman GRASSLEY. I am going to go vote now.

Judge GORSUCH. It is just us.

Senator BLUMENTHAL [presiding]. Good evening, Your Honor, and thank you for your patience and your perseverance with us.

You will recall the conversation or visit we had in my office not that long ago, and you will, I am sure, recall that I quoted the first line in your concurrence in the case of *Gutierrez-Brizuela*. You remember that first line.

Judge GORSUCH. Senator, I am sorry. I do not remember the first line, but——

Senator BLUMENTHAL. The line was, "There is an elephant in the room with us today."

Judge GORSUCH. Oh, yes. Yes, yes.

Senator BLUMENTHAL. And cited before——

Judge GORSUCH. Yes, yes.

Senator BLUMENTHAL. And do you recall what I said or who I said was the elephant in the room?

Judge GORSUCH. I am sorry, Senator. I do not. I apologize sincerely. I do not remember.

Senator BLUMENTHAL. I will refresh your recollection. The initials are D.J.T.

Judge GORSUCH. Okay.

Senator BLUMENTHAL. Donald Trump.

Judge GORSUCH. Yes.

Senator BLUMENTHAL. He was the elephant in the room with us then. I think he is 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 "so-called judge" in one of his tweets? Do you recall that tweet?

Judge GORSUCH. I do.

Senator BLUMENTHAL. And do you recall his second tweet when he referred to the Court and said that they were to be "given blame" if an act of terrorism occurred because of striking down the travel ban? Do you recall that tweet?

Judge GORSUCH. Yes, Senator.

Senator BLUMENTHAL. And during the campaign, a completely different Federal judge, born in this country, he said could not rule fairly on his case because the judge was "a Mexican." Do you recall that?

Judge GORSUCH. I do.

Senator BLUMENTHAL. What do you think the President meant when he used the words "so-called judge"?

Judge GORSUCH. Senator, I do not know what was in his mind. You would have to ask him.

Senator BLUMENTHAL. How would you feel if he called you a "so-called judge"?

Judge GORSUCH. Senator, I care deeply about the independence of the judiciary. I cannot talk about specific cases or controversies that might come before me, and I cannot 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. We get called lots of names all over the place. We have to accept criticism with some humility. It makes us stronger and better. I take it from my teenage daughters. I take it from litigants. This process, there has been plenty of criticism. That is fine.

Thomas Jefferson did not much like *Marbury v. Madison*, and he did not mind saying so. Presidents have tried to pack the Court. That is part of our constitutional history. We have a First Amendment. People can speak their mind.

But, Senator, I am sorry, I do not mean to interrupt, but I did want to add one other point, if I may.

Senator BLUMENTHAL. Please do.

Judge 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 is a lonely job, too. I am not asking for any crocodile tears or anything like that. I am just saying I know these people, and I know how decent they are. And when anyone criticizes the honesty or integrity, the motives of a Federal judge, well, I find that disheartening, I find that demoralizing, because I know the truth.

Senator BLUMENTHAL. Anyone, including the President of the United States?

Judge GORSUCH. Anyone is anyone.

Senator BLUMENTHAL. Because no person is above the law, including the President of the United States.

Judge GORSUCH. That is right, Senator.

Senator BLUMENTHAL. And is not that reference by the President to a "so-called judge," is not his attack on the same judges who struck down that order as playing politics, is not that an attack on the judiciary, on its integrity?

Judge GORSUCH. Senator, I cannot comment on specific cases, and I cannot get involved in politics. I have said what I think I ethically may in this area.

Senator BLUMENTHAL. Well, maybe you can share with the President what that wise old judge told you. Maybe you can quote it to us again.

Judge GORSUCH. I think you are going to hear from him yourself on Thursday, and I am sure he will not mind, hesitate, or in any way have any question or fear about saying it to you himself. But I am happy to share it with you, too. The ultimate test of the rule of law is whether the Government can lose in its own courts and accept the judgments of those courts.

Senator BLUMENTHAL. And, in your view, was the President of the United States showing proper respect when he attacked the courts in that way? Was he accepting the rule of law?

Judge GORSUCH. Senator, I have gone as far as I can go ethically, with the canons that restrict me, about speaking on cases. I cannot talk about specific cases, and I cannot get involved in politics. Respectfully, I believe I have gone as far as I am able to go.

Senator BLUMENTHAL. Well, I just want to make clear that I am 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 the purse nor the 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 Appeals, as a so-called judge, he undermines the bedrock of our democracy, which is respect for the courts. Courts do not have armies. They do not have police forces. All they have is the respect and credibility. 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.

Judge GORSUCH. I appreciate the opportunity to talk about my record because I can talk about that, Senator. My record is when there is a judge who is accused of perhaps using language that might bear on a man's ethnicity, arguably, in the course of sentencing, a panel of my court on which I sat replaced him. My record is that when an undocumented alien—immigrant, sorry, is not properly represented and there is a history of the lawyer failing his clients in that area, sent him, referred him for dismissal from our bar.

Senator BLUMENTHAL. Because you believe that respect for the courts is important.

Judge GORSUCH. Senator, the independence and integrity of the judiciary is in my bones.

Senator BLUMENTHAL. Well, I am going to 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 is 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 is 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 do not know whether you saw the debate, the third presidential debate, where he promised, and I am quoting, about overturning

Roe v. Wade, "That will happen automatically, in my opinion, because I am putting pro-life Justices on the Court."

Are you familiar with that statement?

Judge GORSUCH. I am, Senator.

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 Lesley Stahl on "60 Minutes," "I am pro-life. The judges will be pro-life."

On June 28, 2015, an interview on CNN with Jake Tapper, "I am pro-life." He was then asked would that be a litmus test. "It is. It is."

There are others, but what I am asking you is, are you aware of that litmus test?

Judge GORSUCH. Senator, I cannot say I am aware of each of those statements, but I am definitely aware that there was discussion of litmus tests by lots of people during the election process, yes.

Senator BLUMENTHAL. Well, these discussions are by the President of the United States——

Judge GORSUCH. Yes.

Senator BLUMENTHAL [continuing]. Who has nominated you for this position.

Judge GORSUCH. Very aware of it, Senator.

Senator BLUMENTHAL. And he interviewed you.

Judge GORSUCH. He did.

Senator BLUMENTHAL. And you have testified here that there was no mention of *Roe v. Wade*.

Judge GORSUCH. Senator, what I have testified to is that there was no request for me to commit on any case or controversy or anything that might come before me——

Senator BLUMENTHAL. Was there any mention of *Roe v. Wade*?

Judge GORSUCH. There was, briefly.

Senator BLUMENTHAL. And what did he say and what did you say?

Judge GORSUCH. 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. And he said something like if he had had a little more time, he thinks he might have won it. 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.

Senator BLUMENTHAL. Did he mention *Roe v. Wade* by name?

Judge GORSUCH. I do not think so, not to my recollection, just that abortion was very divisive. And then he moved on to other topics of interest to him.

Senator BLUMENTHAL. Like what?

Judge GORSUCH. Senator, the next topic I remember—and this is just my recollection—is he expressed concern that our country's nuclear armaments are old.

Senator 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*?

Judge GORSUCH. No, Senator. That is it.

Senator BLUMENTHAL. Never a mention of that case or of abortion in any of your conversations with any of the President's advisers?

Judge GORSUCH. Not to my recollection, no.

Senator BLUMENTHAL. And what about with officials of the Heritage Foundation who may have discussed the Supreme Court with you?

Judge GORSUCH. 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 conversations that I am aware of that anyone has alerted me to that they are from the Heritage Foundation.

Senator 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 do not know whether you recall the case of *Planned Parenthood Association of Utah v. Herbert*.

Judge GORSUCH. I do.

Senator 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.

Judge GORSUCH. Temporarily, as a preliminary matter. That is my recollection, yes.

Senator BLUMENTHAL. As a preliminary matter, the panel of the Tenth Circuit restored the funding.

Judge GORSUCH. Issued a preliminary injunction or a TRO; probably a preliminary injunction.

Senator BLUMENTHAL. Correct. Preliminary injunction is correct. Were you on that panel?

Judge GORSUCH. No. No, Senator, I was not.

Senator BLUMENTHAL. Okay. And any of the parties subsequently have the right to ask for a rehearing, do they not?

Judge GORSUCH. They do.

Senator BLUMENTHAL. Is there a time limit?

Judge GORSUCH. For the parties there is a time limit prescribed by rule. It is also possible for the court, what we call "sua sponte," or on its own, to seek rehearing, and there is no time limit prescribed by rule for that.

Senator BLUMENTHAL. So the time limit for the parties is 2 weeks, correct?

Judge GORSUCH. That sounds right, Senator. I would not swear to it, but I trust you.

Senator BLUMENTHAL. Well, I would never presume to know the rules——

Judge GORSUCH. I always check the rules on that sort of thing because I always think I know, and it is 10 days or 14 days, so I always look.

Senator BLUMENTHAL. I am sure you do. Well, 2 weeks passed, and none of the parties requested a rehearing, correct?

Judge GORSUCH. That is right. That is right.

Senator BLUMENTHAL. But one of the judges did.

Judge GORSUCH. That is right.

Senator BLUMENTHAL. That judge was you.

Judge GORSUCH. Senator, that is internal deliberative process that would not normally be revealed, but I have no problem acknowledging that.

Senator BLUMENTHAL. That you asked for the rehearing?

Judge GORSUCH. I did.

Senator BLUMENTHAL. The parties actually were fine with the result. They settled the case. They were off about their business. And you asked for the rehearing, correct?

Judge GORSUCH. No, Senator. That is not correct.

Senator BLUMENTHAL. Well, correct me.

Judge GORSUCH. A preliminary injunction, the Court of Appeals, the panel has indicated, should issue, subject to—this court has to enter it, I believe. I do not think our court entered it directly. As I recall, the parties either reached some sort of agreement with respect to preliminary relief or the court entered it. I do not recall which. But the case proceeded and may still be proceeding for all I know.

Senator BLUMENTHAL. But one way or the other, none of the parties asked for any further proceedings. Only you did.

Judge GORSUCH. That is right.

Senator BLUMENTHAL. And did the court decide to grant an en banc hearing?

Judge GORSUCH. Very narrowly voted against it, Senator. It was a close vote.

Senator BLUMENTHAL. And you dissented.

Judge GORSUCH. I did.

Senator BLUMENTHAL. Now, you know Rule 35 says, and I am quoting, "an en banc hearing is not favored and ordinarily will not be ordered."

Judge GORSUCH. Oh, of course. It is an extraordinary thing. We probably hear between zero and three en bancs a year over the course of my time. Do not hold me to that, but it is somewhere in that range, usually.

Senator 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?

Judge GORSUCH. Oh, I have done it, Senator.

Senator BLUMENTHAL. How often?

Judge GORSUCH. I cannot tell you how many times, sitting here. I just cannot. But I can tell you I have done it. And 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 is not unusual.

Senator BLUMENTHAL. By this time the funding was going to Planned Parenthood, correct?

Judge GORSUCH. I do not know. I do not know.

Senator BLUMENTHAL. Well, it is a matter of, I believe, public record that it was, in fact, restored. And the parties never asked for that en banc hearing.

Let me ask you, what was the exceptional importance of this case that prompted you to seek a rehearing en banc?

Judge GORSUCH. 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 have heard during my time have been sua sponte. It is acknowledged in the Committee reports to the rules. "Wright and Miller," the Bible on civil procedure that every young lawyer lives with, acknowledges the regularity and the propriety of the sua sponte en banc. So just to put that aside. I just do not see any——

Senator BLUMENTHAL. I am asking you about your reasons. And, by the way, I know you do not have a number, but maybe you can supply it, because I am willing to bet that number is a tiny, minute fraction of the 2,700 cases.

Judge GORSUCH. Of course.

Senator BLUMENTHAL. And even of all of the cases where you have dissented.

Judge GORSUCH. Of course. I would be very reluctant to reveal internal deliberative processes any further, Senator, of a court, and I do not think you want us to. But I have gone pretty darn far here, and I would be happy to consider any reasonable request that we can talk about that.

Senator BLUMENTHAL. By the way, the judge who dissented from the panel opinion was Judge Bacharach, correct?

Judge GORSUCH. Yes.

Senator BLUMENTHAL. He voted against the rehearing en banc, did he not?

Judge GORSUCH. He wrote a special concurrence saying that he thought the panel decision was gravely wrong.

Senator BLUMENTHAL. But there was no exceptional reason for rehearing en banc.

Judge GORSUCH. He decided not to vote for en banc. That is correct. But he thought the panel opinion was gravely wrong.

Senator BLUMENTHAL. I am going to——

Judge GORSUCH. And, Senator, if you want me to explain why I sought en banc and the reasons, I would be delighted to do so.

Senator BLUMENTHAL. Well, I am going to give you the opportunity to do it.

Judge GORSUCH. I appreciate it.

Senator BLUMENTHAL. And I apologize for interrupting, and you will understand our time is limited, and that is why I am sort of pressing to move on.

Judge GORSUCH. I understand, but an implication of impropriety, anything like that, Senator, I would appreciate the chance.

Senator BLUMENTHAL. Absolutely.

Judge GORSUCH. Okay.

Senator BLUMENTHAL. I am not even asking for extra time, Mr. Chairman. Please proceed.

Judge GORSUCH. Senator, it is 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 has discontinued funding because he opposed lawful abortions, 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 are well aware of involving alleged unlawful action—alleged—then his conduct was lawful and constitutional. The law was agreed by everyone. The only question was: What was the Governor's intention? That is 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 a 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 did not concede away the case. And it seems to me very important, Senator, that we abide our standards of review and we do not pick and choose the areas of law to start abandoning our standards of review. And a standard of review for clear error, for factual findings is what I wrote about. And I do not 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 error standard of review. And as you point out, Judge Bacharach, while he did not think that 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 Democratically appointed judge, because we are judges first. And, Senator, there were four judges who wanted en banc in that case. That is a large number in our Circuit. There is nothing unusual or untoward about that case at all. It is what we do as judges.

Senator BLUMENTHAL. Do you recall the date of your dissent?

Judge GORSUCH. I do not, Senator.

Senator BLUMENTHAL. Would it surprise you to know that it was—well, the case was pending in July 2016, your dissent was sometime in that time period at the height of the presidential campaign.

Judge GORSUCH. I would have said it was in the summer, Senator, yes. I would say I have also, Senator, revived 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 do not choose when they come to me or how they come to me.

Senator BLUMENTHAL. I understand.

Judge GORSUCH. And any other implication would be erroneous.

Senator BLUMENTHAL. Let me ask you, we talked about precedent, and precedent is important as law, correct?

Judge GORSUCH. Yes.

Senator BLUMENTHAL. And people rely on it. That is one of the key criteria that you have established for sustaining precedent, and I am not even sure that the term has been used here, but stare de-

cisis, which is an important principle of following well-established and accepted law.

Let me ask you, did you agree—or, I am sorry, do you agree with the result in *Brown v. Board of Education*?

Judge GORSUCH. 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 one race can never be equal.

Senator BLUMENTHAL. And do you agree with the result?

Judge GORSUCH. In *Plessy*, no. Absolutely not.

Senator BLUMENTHAL. No. Do you agree with the result in *Brown v. Board*?

Judge GORSUCH. *Brown v. Board of Education*, Senator, was a correct application of the law of precedent, and——

Senator BLUMENTHAL. So you agree with it?

Judge GORSUCH. Senator, it is a correct application of the law of precedent.

Senator BLUMENTHAL. By the way, when Chief Justice Roberts testified before this Committee and he was asked by Senator Kennedy, "Do you agree with the Court's conclusion?"—meaning in *Brown*—"that the segregation of children in public schools solely on the basis of race is unconstitutional," Judge Roberts answered, unequivocally, "I do." Would you agree with Judge Roberts?

Judge GORSUCH. Senator, there is no daylight here.

Senator BLUMENTHAL. Okay.

Judge GORSUCH. 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 is one of the great stains on the Supreme Court's history that it took it so long to get to that decision.

Senator BLUMENTHAL. Do you agree with the Court's outcome, the result, in *Griswold v. Connecticut* and *Eisenstadt v. Baird*? And you know that they struck down the ban on contraception. I believe it has been discussed earlier. Do you agree with the result in those cases?

Judge GORSUCH. So *Griswold*, Senator, as you know, held that the Fourteenth Amendment Due Process Liberty Clause provided 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.

Senator BLUMENTHAL. Right.

Judge GORSUCH. Senator, those are precedents of the U.S. Supreme Court. They have 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.

Senator BLUMENTHAL. I have a very simple question for you. Do you agree with the result?

Judge GORSUCH. Senator, I will give you the same answer.

Senator BLUMENTHAL. Again, I just want to tell you what Justice Alito said in response to that question. He said very simply, talking about *Eisenstadt*, "I do agree with the result in *Eisenstadt*."

Judge GORSUCH. It was an application of equal protection principles, and——

Senator BLUMENTHAL. Well, I know what it was. I am asking you for a direct, clear, unequivocal answer.

Judge GORSUCH. And, Senator, I am trying to give it to you. And as I recall, Justice Alito said the same thing, which is that there is an equal protection argument. Once you have *Griswold* in place, then it follows as a matter of equal 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.

Senator BLUMENTHAL. I want to tell you what Chief Justice Roberts said when he was asked the same question about *Griswold*. He said, "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, perhaps you can give me somewhat more direct and unequivocal answers in the same way that Justices Roberts and Alito and Kennedy did to the same questions.

Thank you, Mr. Chairman.

Senator TILLIS [presiding]. The Senator from Idaho.

Senator 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 am 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.]

Judge GORSUCH. You know, Senator, a couple of things have made my day recently, and hearing that was definitely one of them. You know, in Colorado, I mean, where I come from, that is big stuff.

Senator CRAPO. Well, it is. And, you know, some of us Westerners who do not have a pro team in our State kind of agree with that as well.

Judge GORSUCH. Senator, I will 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 appear 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 is 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.

Senator CRAPO. That is very impressive, and at the end of my opportunity to ask questions here, I am going to 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 your-

self on the bench. It is 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?

[Laughter.]

Senator CRAPO. And do not say, "No Tell'em Creek."

Judge GORSUCH. Do I have to answer this question, Mr. Chairman?

[Laughter.]

Senator CRAPO. No, you do not have to answer it. At least not publicly.

Judge GORSUCH. I would be happy to share with you privately my views on this subject.

Senator CRAPO. We will talk.

Judge GORSUCH. My experience is, though, that once the word gets out, then it is not my favorite spot anymore.

Senator CRAPO. Okay. You have 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 do not 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.

You know, this is also a point in this hearing that pretty much everything has been said but not everybody hasten an 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 will just read part of it. It is "to administer justice without respect to persons, and do 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 laws of the United States." That is some pretty high-minded language.

What is your opinion of the role of a Justice on the Supreme Court?

Judge GORSUCH. Senator, it is the same thing. It does not change. It is 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 does not change, and the law is the law. It is 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. A 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 U.S. Supreme Court are unanimous in their decisions 40 percent of the time.

Now, 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 has changed, but in some ways it has not because that 40 percent number has been remarkably steady since the Second World War. That is a pretty incredible thing when you think about it.

Senator CRAPO. It is.

Judge GORSUCH. That is a testament to our rule of law. It is human, it is imperfect, but it is sure better than anything else anybody has ever devised.

Senator CRAPO. Well, that commitment to interpreting and applying the law honestly, fairly, and impartially is critical. It is 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 is 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 have already said it, but I am going to ask you to say it again. Did anyone in the nomination process, the President included, require of you a commitment for any kind of a litmus test as to how you would rule on any issue or in any case whatsoever?

Judge GORSUCH. No, Senator. And if they had, I would have walked out of the room, period.

Senator 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?

Judge GORSUCH. Senator, if that is where the law and the facts lead me, do it without hesitation. It is—I have done it. I have 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, or 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.

Senator 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 is 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 that 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?

Judge GORSUCH. Senator, it really comes from my experience as a lawyer, and General Katyal 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 did not 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 a judgment as they could. That is what I wanted, a human judge, somebody who was a person. It helped if they were kind, but I would take a curmudgeon. There were some curmudgeons. A fair curmudgeon any day of the week I would take.

Senator CRAPO. Yes.

Judge GORSUCH. 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 tell you what, asking the questions is a 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.

Senator CRAPO. Well, thank you. Now, let us 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.

Judge GORSUCH. Senator, precedent is 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 has come before them. It 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 are life tenured, need to be bound down by strict rules and precedents. And I take that obligation seriously.

Senator CRAPO. So that people can know what to expect out of the law.

Judge GORSUCH. Reliance is a huge part of it.

Senator 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?

Judge GORSUCH. The same way a Circuit Judge approaches a question with Circuit precedent. We do the same thing. Nothing changes. It is the same set of principles.

Senator CRAPO. So what process do you go through to make the decision that you should revisit precedent?

Judge GORSUCH. Start with a presumption in favor of history, and that people who came before you were just as smart or maybe even smarter than you are. When you put on the robe, you lose the ego. You look at the reliance interests that have formed around the precedent. You look at how long it has been around. You look to see whether it has been reaffirmed. You look at the quality of the initial decision. You look at the doctrine and whether it has been built up around it or whether it has eroded away. You look at

workability. Those are some of the factors a good judge looks at when deciding any challenge to a precedent.

Senator CRAPO. And I assume it is not a decision reached lightly.

Judge GORSUCH. Senator, no decision should be reached lightly as a judge.

Senator 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 have 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?

Judge GORSUCH. Well, Senator, it is part of the Bill of Rights, like all of the rest of the Bill of Rights, and it was thought important to add as part of the first 10 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 unenumerated, unlimited power, and that there was reserved to the people and to the States abundant rights.

Senator CRAPO. I agree with that. A lot of my constituents and, frankly, a lot of people that I talk to around the country believe 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. Because of certain Supreme Court rulings, because of certain doctrines related 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?

Judge 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.

Senator CRAPO. Understood.

Judge GORSUCH. But I would 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 is 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 are aware of that discuss this issue.

Senator CRAPO. 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 in your—and, again, I realize you may not be able to go very far in this answer, but I would 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 is 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?

Judge GORSUCH. Well, Senator, I would be happy to, of course. In that case, again, it 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 raised a variety of questions.

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 the 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 am worried about that.

I worry about the separation of power. 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. The last time I checked, that is the legislative power, though, and to overturn judicial precedents on statutory on interpretation, that is this body's role.

So those were some of the things I worried about, and I worried about just the plain old statutory text, too, of the APA in which Congress is assigned the task, of course, of fact-finding to the agencies and told us, again, to provide a highly deferential standard of review to the agencies, the chemists, the biologists, the scientists; but 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.

Senator CRAPO. Well, I appreciate the perspective that you have. Again, still talking about Federalism and the Tenth Amendment, you are familiar with the dormant Commerce Clause concept?

Judge GORSUCH. Yes.

Senator CRAPO. Could you describe what that means to you?

Judge GORSUCH. Well, the Commerce Clause appears in Article I. Article I affords this body and the House of Representatives the power to legislate interstate commerce, among many other things. That is the Commerce Clause, the non-sleeping, the non-dormant Commerce Clause.

Senator CRAPO. Right.

Judge GORSUCH. But we have this sleeping thing over here, and it is the product of judicial interpretation that suggests that sometimes even when Congress has not exercised its powers under the Commerce Clause, States infringe Congress' authority by stepping into the regulation of interstate commerce themselves in a way that, though Congress has not itself proscribed, would still offend congressional authority. That is the doctrine.

Senator CRAPO. Correct.

Judge GORSUCH. Okay.

Senator CRAPO. So that is 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 to.

Judge GORSUCH. Well, Senator, I have tried to make clear today that my feelings, respectfully, on any of these topics are things I try to leave behind, and 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 is it. And I cannot promise or agree or pledge anything more than that to this Congress. I just cannot, not as a good judge, not as someone who has to look litigants in the eye and tell them I am a fair and impartial judge of their case, not to someone who respects the separation of powers. So that is where I come from on that.

Senator CRAPO. 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 are 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. 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. Did I get that right? Or objected to that part of the ruling, is that correct?

Judge GORSUCH. That is right. Yes, two dissenters did not feel the need to reach that issue.

Senator CRAPO. I just wanted to be sure that was——

Judge GORSUCH. That is right.

Senator CRAPO [continuing]. Made clear in the record.

In the time I have left, which is about 8 minutes, I would just like to ask you about several of the things that I believe you have written about. The first is the Seventh Amendment right to trial. I understand that you have written about that. Is that correct?

Judge GORSUCH. I have, Senator.

Senator CRAPO. What are your thoughts about that?

Judge GORSUCH. Senator, I believe in juries. I liked trying cases to juries. I liked being on a jury. I think it is a part of our civic engagement that is really valuable. People feel connected to their Government. Hamilton and Madison, I think it was—I cannot remember which—in the Federalist Papers debated, you know, is it a bulwark of liberty or is it the very palladium of liberty? That is what they thought of the Seventh Amendment. And I think it is just so difficult for litigants to get to a jury now. And we spend so much time in preliminary discovery, what we call discovery, motions practice. Lawyers become poets of the nastygram. They can write interrogatories in iambic pentameter. But there just are not that many jury trials anymore. And I am not sure that is a good thing.

Senator CRAPO. Does this relate to your writings also about or your concerns about access to justice?

Judge GORSUCH. Yes, Senator. Yes.

Senator CRAPO. Can you expand on that a little bit?

Judge GORSUCH. Well, when it becomes so expensive and takes so long to get to a jury, to get to a trial, some people do not bring good claims. A lot of people are left not bringing good claims to court. That is 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 that you cannot afford to do it. You have to get on.

And as I indicated earlier, the American College of Trial Lawyers—and both represent both plaintiffs and defendants—have indicated both these problems are real in our system and need to be addressed.

Senator CRAPO. Thank you. The last issue I will ask you about is your thoughts, which you have already referenced somewhat, on overcriminalization in the law. Could you basically just reiterate that for us?

Judge GORSUCH. Yes, Senator. 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, and that 8-point font, I need to bring out my reading glasses for when I pull open the Federal Register. And, you know, I have a hard time reading it. And I have a hard time imagining 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 would have too much written law, a paper blizzard, so much so that the prosecutor can choose his charges with impunity and the people do not have notice really what is 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 are looking for a golden mean.

Senator CRAPO. Well, and I think earlier today you also referenced—maybe you meant to in these comments—the regulatory explosion of criminal penalties. Is that a part of this as well?

Judge GORSUCH. I would say it has been part of—I do not know about an explosion, but it is just a fact of life that has been with us for a while and growing.

Senator CRAPO. I will not ask you to comment on this, but I think it is an explosion, and not just on the criminal side, in the civil side as well, just 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 I think we have a lot of difficulty simply because of the complexity that we are creating in our legal system. And many of those difficulties will need to be resolved at the policy level. I understand that.

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?

Judge GORSUCH. That is what I am told.

Senator CRAPO. Remarkable. Thank you again.

Judge GORSUCH. Enviable.

[Laughter.]

Judge GORSUCH. No, this has been a great pleasure, a great honor to be here with you, Senator, and with all of your colleagues.

Senator 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. I truly do appreciate it. Thank you very much.

Before I yield my time, I would like to ask unanimous consent first to enter a letter into the record from the president of Colorado Farm Bureau endorsing Judge Gorsuch; second, a letter from Todd Seelman, managing partner at the Denver office of—I will probably mispronounced this—Lewis, 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 a Colorado District Court Judge, John Kane, in which he rebuts basically the notion that there is any kind of ideological bias in your record, and I think says very positive things about Judge Gorsuch.

I would ask unanimous consent to put these documents into the record.

Senator TILLIS. Without objection, the documents will be entered into the record.

Senator CRAPO. Thank you very much.

[The information appears as submissions for the record.]

Senator TILLIS. The Senator from Hawaii.

Senator 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.

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 divine 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 court's steady march toward protecting corporate interests 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 III. 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 extended discussion today with Senator Franken about your dissent in the *TransAm Trucking* case. I want to talk to you about another case, *Longhorn Service Company v. Perez*, in which you overruled an agency decision about worker safety. You were in the majority in a 2–1 decision—could have 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 law's intent and purpose to protect worker safety?

Judge GORSUCH. Senator, I appreciate the opportunity to address that. As I think you have indicated, I was not the author of that opinion. I did not write it. One of my colleagues wrote that opinion. Another one of my colleagues dissented. You are quite right about that.

I do not have 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——

Senator HIRONO. Excuse me.

Judge GORSUCH. Spaces——

Senator HIRONO. Excuse me, Judge. That case held that you overruled the agency decision.

Judge GORSUCH. Yes.

Senator HIRONO. Which did not make a distinction.

Judge GORSUCH. With respect, Senator, OSHA regulations do make a distinction between, as I recall, it has been a while——

Senator HIRONO. Not in this case, sir.

Judge 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 fracking rig. And what you have to do in terms of remediation, cover or a handrail. There are different consequences whether it is 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 do not recall, whatever the agency wanted them to do. And the question was whether they had been provided notice they were being charged with whether it was a hole versus an opening.

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 cannot change the charge in the middle of the proceedings, as I recall.

Senator HIRONO. Well, the dissent indicated that this distinction was nonsense, and therefore, they——

Judge GORSUCH. Well, that might be true.

Senator HIRONO. Yes.

Judge GORSUCH. I mean, I do not know. As they say, I do not have a dog in that hunt. I am just trying to apply the OSHA regulation.

Senator HIRONO. If I can go on? So that law, though, was for the purpose of worker safety. And I think you responded to one of the questions from my colleagues that you do look to the purpose of the law and that is what judges should effect. So the purpose of that law was worker safety. So I am 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 Maddin. And if your decision had been the majority, which it was not, it would have made a driver like Mr. Maddin choose between endangering his own life and health or keeping his job.

I am hoping that you will share more about your approach to cases like *TransAm Trucking*. Your dissent dismissed the argument that the law should be interpreted in light of its purpose of protecting public health and safety, saying that those goals were too ephemeral and generic. Did 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?

Judge 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 saw that the individual drove away. He operated the motor vehicle. So I did not see how he could claim protection of a statute that hinges on a refusal to operate.

I am 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, and 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.

Senator HIRONO. I think that you could possibly have interpreted the definition or the requirement that he actually refused to drive the vehicle. He refused to drive the vehicle with the attached trailer. 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 going to work this hard to strain the text of a law to undermine the purpose, which was for the safety 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 Congress passes or will pass to really be effective in protecting American workers.

I would 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 had also been a concern, is out the window. This has unquestionably changed the landscape of our elections, unleashing a flood of corporate money and 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?

Judge GORSUCH. Well, Senator, I appreciate the opportunity to answer that. If I might, though, I would just point to my record on employment cases. There are plenty of cases where I have ruled for

the employee and not the employer. We can pick one and talk about one, but there are many, many where I have ruled for the employee, even overturning the District Court when the District Court ruled for the employer. Lots of them, and I would be happy to talk about any of them.

Senator HIRONO. Well, I am not.

Judge GORSUCH. But if we want to——

Senator HIRONO. I am not asking about the others. So let us——

Judge GORSUCH. I understand. I understand that.

Senator HIRONO. Can you respond to my question about *Citizens United* and unfettered foreign money that can come into our campaigns?

Judge GORSUCH. Senator, I would say that there is 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 would say this——

Senator HIRONO. Are you saying—I would just like a clarification. Then you are saying that *Citizens United* leaves open for Congress to prohibit foreign money in our elections? Is that not already happening?

Judge GORSUCH. Senator, I would say there is ample room in the area of campaign finance for further legislation, all sorts of room where the Court's made 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 the Congress passed one law that, based on one record, the Supreme Court found to violate the First Amendment.

Senator HIRONO. So since, since there is so much concern about foreign money and foreign governments attempting to interfere or really, no, 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?

Judge GORSUCH. Senator, I am not making any promises to anyone about how I would rule. I understand people would like me to make promises, but I just—that is not what a good judge does. It is not fair to the parties. I do not prejudge cases. That would be a violation of separation of powers, in my view. It would 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 fact-finder, 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.

Senator HIRONO. Thank you. You have articulated that many times.

The sheer volume of speech bought by corporate money drowns out the voices of everyday Americans on important issues. I am concerned with influence-peddling in politics, such as from billion-dollar donors like the Mercers or Philip Anschutz.

Judge Gorsuch, given that you volunteered on numerous Republican political campaigns dating back to the 1970s, were you ever concerned with the flood of unfettered money in our elections and campaigns?

Judge GORSUCH. Senator, the first campaign I worked on I was about 9 years old. It was my mom's. She was running for the State house, and I think it was, again, her idea of daycare that I would walk with her.

[Laughter.]

Senator HIRONO. So just—I am sorry. You know, I have only 18 minutes left. And had you ever been concerned? Because certainly you worked on political campaigns when you were beyond 9 years old.

Judge GORSUCH. I did.

Senator HIRONO. Was there ever a time when you were concerned about unfettered money in our political campaigns?

Judge GORSUCH. Senator, I have lots of concerns as a person and as a citizen. But I am now a judge, and my personal views have nothing to do with how I rule on cases.

Senator HIRONO. Thank you.

Judge GORSUCH. It is a discipline that a judge learns and exercises and, hopefully, improves upon over time. And I am steadfast about that, Senator. It means—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.

Senator HIRONO. Thank you. I would like to move on.

Judge GORSUCH. Of course.

Senator HIRONO. I listened to your conversation with Senator Coons about the *Hobby Lobby* case, and it is 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 rights to the exercise of religious—of religion 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 dissent 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?

Judge GORSUCH. Senator, I appreciate that question. The answer is I considered it very closely, very carefully. So did the Supreme Court of the United States, which affirmed our court. And as you know, the Religious Freedom Restoration Act goes above and beyond the First Amendment in protecting religious liberties.

It is a judgment made by this Congress that it is free to amend at any time if it wishes. It can eliminate corporations from coverage. It can eliminate the strict scrutiny that is 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.

Senator HIRONO. You did write a concurring opinion on that?

Judge GORSUCH. I did.

Senator HIRONO. And I think your concurrent opinion could even be deemed an expansion of the plaintiff's 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 no further in 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?

Judge GORSUCH. Senator, the sincerity of the belief, I believe, was undisputed by the Government, at least in our court. So I just do not think that was at 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 is the most narrowly tailored way to achieve that compelling interest.

It is strict scrutiny. It is 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 compromise——

Senator 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.

Judge GORSUCH. Yes.

Senator HIRONO. 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 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 is really a basis for this belief?

Judge GORSUCH. You are asking me whether I would, as a judge, decide that someone's sincerely held religious belief is wrong?

Senator HIRONO. Well, based on scientific evidence or some other factual evidence.

Judge 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?

Senator HIRONO. Well, therefore, could not be a sincerely held belief.

Judge GORSUCH. Oh, sometimes a court will hold that a belief is not sincerely held. That is true. That does happen. I have had a case involving just that scenario, and it involved a group of drug distributors who claimed they worshipped marijuana.

Senator HIRONO. Yes. I was here when you responded to that.

Judge GORSUCH. Okay. All right. Okay.

Senator HIRONO. And you know, I hate to be rude, but I am down to less than 12 minutes. So if you do not mind, sir, I would 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 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 *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?

Judge GORSUCH. No. And let me compliment Neal Katyal. When he was Acting Solicitor General of the United States, he confessed error by the Government in that case. That was an admirable move.

Senator HIRONO. Thank you for that "yes" and "no" answer. I appreciate that.

Going on to *Hamdan*, during a time as a senior official in the Bush Justice Department, you appeared to play a significant role in developing and promoting the arguments in *Hamdan 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?

Judge 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 is a remarkable thing. It does not happen everywhere in the world.

Senator HIRONO. Is your answer that there is no Executive order that would not be judicially reviewable?

Judge 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 would have to go through assessing what the claim is, what the defenses are, take evidence, hear the arguments, make a decision.

Senator HIRONO. I understand. The court could say it is 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. Mr. Miller said that Donald Trump's national security decisions, "will not be questioned."

I take it that you do not agree with Mr. Miller that there are areas like national security where the President's decisions "will not be questioned" even by a court, even by the Supreme Court. I take it you do not agree with that?

Judge GORSUCH. Senator, I give you the same answer that the beauty of our system, and I do not 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. That is a remarkable thing when you think about it.

Senator 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 rubberstamp 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. 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 would 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 "demoralizing and disheartening." But then you went silent, even as President Trump escalated his attacks.

I would like to give you an opportunity to set the record straight. What is your view of President Trump's comments on judges?

Judge GORSUCH. Senator, I just discussed this with Senator Blumenthal a moment ago, and I am happy to repeat myself.

Senator HIRONO. Please.

Judge GORSUCH. I cannot talk about specific cases. That would be improper. And I cannot 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 am not talking about any case or controversy.

And I am talking about the independence of our judiciary. Judges have to be tough. We take slings and arrows under bright lights. It is 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 do not like. In fact, our job usually makes—I am sorry, Senator. I do not mean—it looks like you wanted to say something?

Senator HIRONO. Yes. So Donald Trump's comments about the judiciary, while he may have focused on specific judges, indicate basically that he does not 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?

Judge 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 have been on panels where we have replaced a judge who has done that.

When lawyers fail to fulfill their obligations, I have commented, when appropriate, in cases and controversies properly before me. I have, in fact, even sent a lawyer to referral to the bar.

Senator, I have worked to try and provide representation to individuals when I have seen pro se handwritten complaints that seem to me to have merit. I have appointed lawyers in those cases. That is my record as a judge, and I can assure you I am nobody's rubberstamp.

Senator HIRONO. So when you were speaking about certain comments being disheartening and demoralizing, you were merely speaking broadly?

Judge GORSUCH. I do not think I was merely speaking broadly, Senator, with all due respect.

Senator HIRONO. You were speaking broadly.

Judge GORSUCH. Senator, I am speaking about anyone.

Senator HIRONO. You were speaking broadly.

Judge GORSUCH. Okay.

Senator 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 us move on. In your 2006 book on the future of assisted suicide, you argued that *Casey* should be read more as a decision based merely on respect for precedent rather than based on the recognition of constitutional protections for "personal autonomy"—and that is in quotes, "personal autonomy"—or for "intimate or personal"—again in quotes—decisions.

So you wrote that in your book, but since that time, well, in fact, before that time, 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*——

Judge GORSUCH. *Obergefell*.

Senator HIRONO. You know which case I am talking about.

Judge GORSUCH. I do, Senator. Yes, of course.

Senator HIRONO. 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?

Judge GORSUCH. Senator, I have never expressed personal views as a judge on this subject, and that is because my personal views do not matter. *Obergefell* is a precedent of the U.S. Supreme Court. It entitles persons to engage in single-sex marriage. That is a right that the Supreme Court has recognized. It is a precedent of the U.S. Supreme Court, entitled all the deference due a precedent of the U.S. Supreme Court, and that is quite a lot.

Senator HIRONO. So in your view, the Constitution does provide protections for intimate and personal decisions, and we shall see how far that constitutional protected right goes in other decisions.

So, basically, what you wrote in your book is your personal opinion, and we can pretty much forget about it. Not to be rude to you.

Judge GORSUCH. Senator, no, no. Not at all. I am not sure I tracked the question, though. I think it is me, not you.

Senator HIRONO. Well, okay. Let us move on.

During the presidential campaign, Donald Trump laid out his litmus test—and I only have 43, 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 would not be here. And do you think that you have 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?

Judge GORSUCH. Senator——

Senator HIRONO. And because I have run out of time, you can provide that information to our Committee.

Judge GORSUCH. May I respond, Mr. Chairman?

Senator TILLIS. Yes.

Judge GORSUCH. Senator, I have been here for 2 days. I will be here for a third. I hope I have given you some picture of my credentials, my experience, my track record as a judge. I hope I have 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 have 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 have given you some sense of my track record. Ninety-seven percent of the time, unanimous decisions. Ninety-nine percent of the time in the majority. Been reversed maybe once by the U.S. Supreme Court, that is arguable, in 10 years.

I hope I have given you some picture of who I am and my record. No one else speaks for me, and I do not speak for anyone else, Senator. I really appreciate the chance to have this conversation with you.

Senator HIRONO. Thank you. We will see you tomorrow also.

Judge GORSUCH. Thank you.

Senator HIRONO. Thank you, Mr. Chairman.

Senator TILLIS. Judge, we are going to give you the option of a 10-minute break. But instead of saying time certain of, well, it

would be 7:57 p.m., as soon as you get back, we will get started. And we will go to rodeo rules. So we will make sure that we do not go over 8 seconds. In the West, you would at least understand that.

So we will adjourn. We will start no later than 7:57 p.m.

Judge GORSUCH. Thank you, Senator. I appreciate it.

Senator TILLIS. Or not adjourn. Recess.

[Recess.]

Senator TILLIS. I call the Committee back to order.

Judge GORSUCH. No, I am fine, thank you.

Senator TILLIS. Judge, my first very important question, please pronounce your last name.

[Laughter.]

Judge GORSUCH. I have answered to a lot of things, Senator. "Gorsuch" is how I say it, but——

Senator TILLIS. The reason I ask that question is we had probably four or five cheat sheets up here with different phonetics. So, that is "Gor-such, right?"

Judge GORSUCH. That is how I would say it, but——

Senator TILLIS. For the press, it is "Gor-such." For everybody in the audience, it is "Gor-such." 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.]

Senator TILLIS. I want to thank you for being here. And, Judge, I want to tell you, 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.]

Judge GORSUCH. Well, we will forgive you that.

Senator TILLIS. But I love the fact that you are an outdoorsman because it 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 felt like I joined one when I joined the U.S. Senate.

[Laughter.]

Senator TILLIS. And I am going to talk a little bit about that today.

Yesterday I was saying I wanted to have you talk more and me less. I am not sure if I can live up to that promise because I want to go through a number of things. I am a numbers guy. I like the fact that you have repeated the numbers in 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, what is that, one-thousandth of your cases are in question here.

And I am going to go back to those because they are fairly limited, but before I do let me talk about another piece of absurdity. The absurdity would be talking about how President Trump set some sort of a 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 equality, 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 a candidate if we were going with a

President Clinton nomination. I do not understand why it is relevant here. It is not you. We are here to talk about you and your qualifications.

Another absurdity that I think we will see over the next couple of days is the absurdity of people saying that you are sidestepping the questions about cases that may come before you. I actually think you are following a code of conduct. You are following the Code of Conduct for United States Judges. You are following the American Bar Association Model Code of Judicial Conduct, Rule 2.10(a) and (b). I appreciate you respecting and living what you say, and that is the rule of law and code of conduct of judges.

Now, I want to get into some specific cases, and I guess I will start with freedom of speech.

Judge Gorsuch, I am going to read some of my notes because I want to make sure I get my points right. I want to also apologize again because I may do a little bit of talking, but I do believe the First Amendment states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." I think the first few words mean something very significant, and I think that you do, too.

Now, clearly this amendment is not meant to limit the ability of the Federal Government to curtail free speech. Do you agree that the Founders intended this amendment to be a check on the Federal Government?

Judge GORSUCH. Senator, that is what it is.

Senator TILLIS. Is it fair to say the Framers, when they were crafting this First Amendment, were concerned especially about political speech as opposed to, say, activity like exotic dancing or other speeches or activities that people argue are covered by the First Amendment?

Judge GORSUCH. The Supreme Court has held that political speech is the core of the First Amendment.

Senator TILLIS. So, it is fair to say the Supreme Court has routinely held that political speech, especially during a campaign for public office, is at the core of the First Amendment.

Judge GORSUCH. It has.

Senator TILLIS. A lot has been said today about money in politics and a landmark case called *Citizens United*. *Citizens United* is a very popular punching bag for some of my colleagues across the aisle. You spent a lot of time talking about this with Senator Whitehouse earlier today.

If you listen to them on the subject, you would think this decision resulted in the ability for a corporation to pump hundreds of millions of dollars directly to political candidates. The facts of the case get wrapped around buzz words like "dark money." However, I want to use some time today to walk through 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 a statute aimed at limiting certain speech, and it was Congress' activities in regards to speech that the Framers were concerned about. In fact, the statute prohibited entities, such as cor-

porations, including non-profits and labor unions, from using their general treasury to fund any advertisement that used the candidate's name within 30 days of a primary or 60 days of a general election, including to promote a movie, as well as many express advocacy communications.

This case had nothing to do with direct 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* was about an entity's ability to 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?

Judge GORSUCH. Well, as you say, Senator, there was a movie involved.

Senator TILLIS. The organization wanted to broadcast the film or to advertise the film before a 2008 Democratic primary. The Federal Government went into court and said a nonprofit could not produce or advertise a movie highly critical of a candidate. Judge Gorsuch, are you familiar with the oral arguments of the case?

Judge GORSUCH. I remember listening to them on tape at one point, but it has been a while, Senator.

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 is 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 a 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, and they go to Random House, and Random House says, yes, we will publish that. We are talking about how far the constitutional ban would go, and we are talking about books." The Deputy Solicitor General said, "The labor unions' 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 is 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 or against a candidate.

That is not the end of the story. The Supreme Court ordered reargument. 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 classic electioneering."

Again, I want everybody listening to realize what we are talking about here when we talk about *Citizens United*. They argue that there was constitutional authority to actually prevent the pub-

lishing of a pamphlet opposing a candidate if produced by a nonprofit organization. We as a country have a long history of people being able to criticize the Government, which includes specific offices in Government. Sometimes this was done anonymously because disclosing the speakers' 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?

Judge GORSUCH. I cannot see it. I am sorry.

Senator TILLIS. We got this from the Library of Congress. It is a collection of some of Thomas Paine's writings, including, "Common Sense," and political writings. In this pamphlet, he urged the 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 painted a picture of this case as support for big money in 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 contained such speech. That is the *Citizens United* case. I find it curious my friends are so concerned about Executive power and not concerned about the Federal Government arguing its authority to prevent production of movies, books, and pamphlets. It is foundational to our democracy.

So, as I stated previously, they are 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 have heard dispute that.

Now, I want to close out here with a little bit of discussion about your political positions or your past being instructive to the decision by some as to whether or not they should support your confirmation. Let us talk a little bit about now Justice Kagan on *Citizens United* as the Solicitor General.

The reason that this came to my attention today was 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?

Judge GORSUCH. The United States.

Senator TILLIS. So, let me go back to when Justice Kagan was Solicitor General. When she was nominated, she was a lawyer at the Department of Justice. In fact, she was the Solicitor General. As we have 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 a pamphelt.

She accounted for her arguments as Solicitor General this way, her quote, "I have tried very hard to take the cases and to make

the decisions that are in the interest of my client, which is the U.S. Government." My guess is, that is what you were doing when you were in a different role representing the U.S. Government. I think that what she did was advocate for her client. You would do the same. Whether or not I would have voted for her, we will never know because I was not here.

But I also want to bring up one 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 her 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 and often had to place political considerations before 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 do not think there is much more to say about it either except to say this. In spite of her position to argue that things like pamphlets and movies 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, 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 delay confirmation.

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 have 15 minutes, and I am going to go really quickly. This will be a lightning round.

The ethics class. I am going to go back to absurdity. I appreciate that Senator Franken mentioned what he did because it is a perfect theme for my line of questions. There is 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 briefly about the course curriculum?

Judge GORSUCH. I can try, Senator. I am very heartened by the fact that scores and scores of my former students have written this Committee on my behalf.

Senator TILLIS. And I am going to seek unanimous consent to put some letters of support into the record.

[The information appears as submissions for the record.]

Judge GORSUCH. And over the last 7 or 8 years, I have used the same textbook. You can take a look at the teaching manual and you will see exactly what we discussed.

Senator TILLIS. So, it was not an arbitrary comment. It was not 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 would like

to submit to the record, that suggest the same. But it was not something—it was not arbitrary. It was not off the cuff. It was something that was a part of a curriculum that had existed for how long?

Judge GORSUCH. Seven or 8 years, Senator.

Senator TILLIS. Okay. I would like to seek unanimous consent that I can put forth a series of documents from 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.

[The information appears as submissions for the record.]

Senator TILLIS. Okay. Now, I want to move into a couple of things that I really want to get to in the *TransAm Trucking* case. First off, you have given me hope that I could actually understand legal opinions. Yours are well-written. One of them was your dissent on *TransAm Trucking*.

You are not here to have a heart. You are here to interpret and apply the law, and I appreciate that about you because I suspect you have a really big heart. But I thought it interesting.

I highlighted several parts in your dissent. One was when they suggested that he should drag the trailor instead of keeping it there or leaving it there. Your parenthetical comment, "That was an illegal and maybe sarcastically offered option." So, you did not consider that a viable option. There are going to be people here that say that you were okay with that. That is wrong. It is 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 the *TransAm* decision was a wise or kind one, but it is 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 has pointed giving employees the right to operate vehicles in a way the employers forbid."

I think that if you go back and people read these dissents, it is 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 needed or the reference point that you thought you needed to judge otherwise. And 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 was you 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 would have been in a position to come up with a different judgment. But that is our job. You told Senator Whitehouse, "It is not my job to do your job." That was one of your best quotes of the hearing today.

And you are absolutely right. It is our job is to make value judgments. It is our jobs to get votes, and our jobs to answer to the American people every time we get elected or go to a campaign

every 2 years or 6 years. So, I, for one, think that you came up with a well-reasoned dissent in *TransAm Trucking*.

Now, I want to move to one that I just want to make sure I have time to get to because it is 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 is purely by coincidence, and it really is, I am wearing an autism pin today because I am a big advocate for autism research and Autism Speaks. I do not have any personal family experience with it, but it is something to me that is very important.

In *Thompson R2–J School District v. Luke P.*, you all came up with a decision that was contrary to what I would like to do for parents and families who have children with autism, who are in the public school system and not getting the results that they would hope to get. And in this case, again, I think you have the IDEA absolutely right.

There is no way that you could have reached that far to support what clearly had to be—in this case it was an appeal—that would have been sympathetic to *Luke P.* 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 did not do it, so as Speaker of the House, we went in there and we said that if a parent, after spending a year in public school, did not 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 have a few hundred kids now who are getting the education that they need in a private school setting.

Thank you for forcing me to do my job. It preceeded my time as Speaker of the House, but we knew we had 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 quickly to make sure I have my notes right. One thing I like about you is sometimes your decisions seem to make everybody mad, which probably means it is a pretty good decision. So, I think sometimes maybe you even exceed the 50 percent rule.

[Laughter.]

Senator TILLIS. Like the case——

Judge GORSUCH. My daughters would agree with you.

Senator TILLIS. Like the case in *Riddle v. Hickenlooper*. You recognized that a minority political party was being treated unfairly as a result of actions that were taken—I do not know if there 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 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 have found that in other examples. I love the fact that you do not believe that judges, after they have 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 you all should have done that, not a bunch of judges in a room when they are deliberating. So, I think you were giving them food for thought.

That is extraordinary that you would do that kind of work. That is why you are going to make a great Justice on the Supreme Court, and that is why I fully support you. 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 have here: respect the President's right to seat somebody on the Supreme Court. They do not have to vote, for you, but you deserve an up or down vote. I have voted for cloture on a nominee, an Attorney General that I did not vote for. But I respect this institution and this process enough to let it go forward.

So, I am going to work very hard to support you. I am not an attorney, but I did stay at a Holiday Inn Express a few weeks ago. Outside of watching "Law and Order" every once in a while when I get home late and unwind, I do not practice law. But I can tell based on what I have heard today you are a man of extraordinary patience.

Yesterday, I mentioned that I thought your at-rest heart rate was about four. I saw it spike up 50 percent maybe to five or six today.

[Laughter.]

Senator TILLIS. I will leave you with this. Peyton Manning, who I love, he went to University of Tennessee, and then he tarnished his career by going on to the Broncos and beating the Panthers in the Super Bowl.

Judge GORSUCH. Oh.

[Laughter.]

Judge GORSUCH. Oh.

Senator TILLIS. But let me tell you something—I love Peyton Manning. In fact, I have a quote on the walls in my office that I make my staff look at every day, and it says, "Pressure is just something you feel when you don't know what you're doing." You clearly know what you are doing. You have not exhibited one iota of pressure. That is what is going to make you a great Justice.

The respect that you have shown when disrespectful questions were lobbed your way was remarkable, and I appreciate you being here. I appreciate your patience, and I am going to yield back the rest of my time.

But I will say that the break after 7 tonight also does not 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.

The Senator from Louisiana.

Judge GORSUCH. Senator, thank you.

Senator TILLIS. Yes, and by the way, you did not get to talk much, but I promise tomorrow you will get to talk a lot.

[Laughter.]

Judge GORSUCH. I have heard myself speak more today than I am accustomed to.

Senator TILLIS. The Senator from Louisiana.

Senator KENNEDY. How you doing, Judge?

Judge GORSUCH. I am great. How about yourself?

Senator KENNEDY. You are that close to being done. That close.

I think you have done pretty well today, and I just want to go on record as saying this is—this is an important nomination, and I appreciate all the questions asked today, even the ones I disagree with. I did not know what to expect. I mean, this thing could have turned into "The Gong Show" real easily. It did not, and I appreciate that.

I want to ask you a couple of questions, some things that maybe we did not get to talk about much. First, why have you recused yourself in almost a thousand cases?

Judge GORSUCH. 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 in 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 did not want to cause an unnecessary recusal problem later. Sometimes after a court decides a case, a recusal issue pops up. Judges miss things. We are 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 is a cost to the system that is not insignificant to your colleagues and taxing on them. And it also raises questions, of course, to the parties who have to start all that over, and it cost them money and time. And I did not want to create that kind of problem for the litigants and for my colleagues.

And so, I set up a process consistent with the practice of my colleagues. I talked to my colleagues about how they do it, and tried to conform with the practices of the Tenth Circuit as best I could. And as you know, most of the recusals were not really—I mean, "recusal" is not even the right word. They are screened out——

Senator KENNEDY. Right.

Judge GORSUCH. By the clerk's office before they ever get to me. We are on a wheel.

Senator KENNEDY. Right.

Judge GORSUCH. And so, I just get the next one on the wheel. Everybody gets the same workload.

Senator KENNEDY. Right.

Judge GORSUCH. It does not affect our workload, but it does affect confidence in the judiciary and——

Senator KENNEDY. The recusal rules are different for the U.S. Supreme Court as I appreciate it.

Judge GORSUCH. Yes, Senator.

Senator KENNEDY. Okay. I want to ask you about the relationship between the United States Constitution and a State constitution and the interaction. And let me get specific so you will know what I am talking about.

I think this is well-settled law. A DWI, we call DWI in Louisiana. Some States call it DUI, but a DWI roadblock. I think it is well-settled in a number of cases in the U.S. Supreme Court that says a DWI roadblock, so long as you use neutral criteria, is perfectly

permissible under the Fourth Amendment. If I say anything wrong, stop me. It is clearly a seizure, but as long as you have neutral criteria.

Do you remember why the Supreme Court made that decision?

Judge GORSUCH. I am sure you are going to tell me, Senator.

Senator KENNEDY. Well, if you—if you do not know, I will—my understanding is that the Constitution only protects against unreasonable searches and seizures.

Judge GORSUCH. Right.

Senator KENNEDY. And the Court balanced the public interest versus the extent of the privacy violation. But let us suppose—so that is well-settled law. You can—under the Federal Constitution, you can have a DWI roadblock.

Let us suppose the Supreme Court of Massachusetts—I wish—I wish Attorney Franken was here, said, you know, we appreciate that, and we appreciate that is a Federal law, but we have a Fourth Amendment in the Massachusetts Constitution, and we want to go further, and we want to outlaw roadblocks. We want to give more protection. We do not want to take away protection 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 is permissible?

Judge GORSUCH. 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 is deciding on independent and adequate State grounds and not resting on the U.S. Constitution. If there is 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.

Senator KENNEDY. Yes. Well, what if the adequate and independent State grounds are not clear? What do you do?

Judge GORSUCH. Well, that is *Michigan v. Long*, and there is a precedent, and there is a test for it. And, again, if it looks like it could have been on the—on Federal—the decision could have been made on Federal grounds, then the Federal court will examine it on that basis. If the State court makes clear that it is independent and adequate State grounds, why then State law controls.

Senator KENNEDY. Do you think it makes sense—I mean, is not the law complicated enough? Do we really need 50 rules for DWI roadblocks?

Judge GORSUCH. Well, Senator, we have this thing called federalism.

Senator KENNEDY. I have heard of it.

Judge GORSUCH. Yes, I figured you might. And it is part of our separation of powers, and it is part of how we preserve liberty, right? We diffuse power to protect liberty, and Federalism is a key part of it.

Senator KENNEDY. Okay. I have not read all your cases, but I have not seen many where you dealt with substantive due process or equal protection, so I want to talk about that for a few minutes.

If you have a case where you do not have a fundamental right or a fundamental liberty, and you do not have a suspect classification, so you are not going to use strict scrutiny. You are going to be—you are going to use the rational basis test, which means you are going to uphold the statute if the legislature has a rational reason that is connected to a legitimate goal.

How far do you go? How closely do you think Federal judges should examine what the legislature does? 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 with bite?

Judge GORSUCH. I have, Senator. And before we get to that, I think it is important to acknowledge there is also intermediate scrutiny.

Senator KENNEDY. That is true.

Judge GORSUCH. And, for example, many gender cases.

Senator KENNEDY. For gender, but I am talking about just plain old variety, no gender, no race, no kind of special heightened scrutiny, just rational basis.

Judge GORSUCH. The Supreme Court has indicated what you are describing as rational basis with bite. But sometimes if there is a discriminatory animus present, even though there might be a legitimate rational basis one could conjure for the rule, that might fail strict scrutiny, Senator.

Senator KENNEDY. Yes. What does the rational basis test mean to you?

Judge GORSUCH. Well, generally speaking, usually speaking, it means that if there is any rational reason that one can conjure for the rule, it stands out of deference to the legislative process.

Senator KENNEDY. Does it have to be a good reason?

Judge GORSUCH. It has to be a rational reason, not one that I find personally persuasive, but one that someone could find persuasive.

Senator KENNEDY. Okay.

Judge GORSUCH. That is out of deference to the lawmaking process of this body, Senator.

Senator KENNEDY. Understand. I want to ask you about the *TransAm* case. It has been talked about a lot. You dissented. Pretty tough facts. Your dissent probably, I guess, made you about as popular as cholera.

Judge GORSUCH. It seems so.

Senator KENNEDY. But as I understand it, you just looked at the statute, and what—tell me what you, what the statute said again?

Judge GORSUCH. It said that an employee who refuses to operate a motor vehicle has certain legal protections from firing.

Senator KENNEDY. But he did not refuse. He operated.

Judge GORSUCH. That is what I thought the facts suggested, Senator.

Senator KENNEDY. Yes. Well, I thought about that case when I was reading a case of yours that I commented on yesterday, *A.M. v. Holmes*, another case. Pretty recent, last year. And as I—as I appreciate it, the majority opinion was kind of tough to get through. It was, like, 95 or a hundred pages. But 13-year-old kid, seventh grader, he is fake burping in class.

Judge GORSUCH. He is.

Senator KENNEDY. And he is pretty good at it.

Judge GORSUCH. He is very good at it apparently.

Senator KENNEDY. He disrupts the whole class.

Judge GORSUCH. He does.

Senator KENNEDY. So, the teacher takes him out, sits him down in the hall, calls the assistant principal. She calls the police officer, I guess, assigned to the school. They take him to the principal's office, and the police officer arrests him, and the kid's mom sues. I think it was a 1983 action if I recall.

Judge GORSUCH. That is right.

Senator KENNEDY. His mom sues, and the majority held qualified immunity.

And so, this is the way you described the case. "If a seventh grader starts trading fake burps for laughs in gym class, what is a teacher to do, order extra laps, detention, a trip to the principal's office? Maybe. But then again, maybe that is 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, "suggest the law permits exactly this option, and they offer 94 pages explaining why they think that is so. Respectfully, I remain unpersuaded."

But it is your last paragraph in that opinion that made me think of *TransAm*. 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 in Oliver Twist,—"and there is little we judges can do about it, for it is, or should be, emphatically our job to apply, not rewrite, the law enacted acted 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 do admire. It is only that in this particular case, I do not believe the law happens to be quite as much of a ass as they do, and I respectfully dissent."

Is that what happened in *TransAm*?

Judge GORSUCH. That is who I am, Senator.

Senator KENNEDY. Can you tell me something that you think is a good idea, but you think is unconstitutional?

Judge GORSUCH. Oh, Senator——

[Laughter.]

Judge GORSUCH. It has been a long day.

Senator KENNEDY. I know.

[Laughter.]

Senator KENNEDY. And you are this close to "CSI Miami," okay?

Judge GORSUCH. No. No, no, no.

[Laughter.]

Judge GORSUCH. Senator, I have loved every minute I have spent with you and with all of your colleagues. I am sure I could conjure something.

Senator KENNEDY. Well, think about it tonight.

Judge GORSUCH. But, Senator, I would not opine on it if I could. It is just not my job. It is just not—my job—as you just read it, that is how I see my job. And I respect my colleagues who see it differently because they did. They wrote a 94-page opinion in that case, a thoughtful one.

Senator KENNEDY. Yes, I read it.

Judge GORSUCH. And I respect them deeply, and the same thing in *TransAm*. Sometimes the law is what it is. They see it—I am sorry, Senator.

Senator KENNEDY. No, you go ahead.

Judge GORSUCH. No. We just do the best we can, day in and day out, in cases like these, and nobody hears about it. And it is the quiet, quiet work of judges trying to get it right.

Senator KENNEDY. And that is why I enjoy your opinions, aside from the fact they are well-written. You kind of play outside the pocket. I mean, you adhere to the written word, which is what I want to ask you about next.

It is clear you do not like labels, okay? You would not call yourself an originalist.

Judge GORSUCH. Senator, I am happy to embrace that. I do not reject it. I just am concerned about the level of our discourse in this society today when we are often quick to dismiss one another—Republican, Democrat, whatever.

Senator KENNEDY. That is fair enough.

Judge GORSUCH. Whatever.

Senator KENNEDY. That is fair enough.

Judge GORSUCH. That is not the world I care to inhabit. I care to inhabit the 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.

Senator KENNEDY. Yes, and I believe the phrase you use is "the original public understanding of the Constitution."

Judge GORSUCH. Yes, Senator.

Senator KENNEDY. What does that mean?

Judge GORSUCH. It means I am not looking for hidden intentions, trying to get inside, respectfully, your head. I am looking for the words you use. I am trying to understand what they mean, what a reasonable person at that time would have understood they mean, because that is the fixed meaning I can latch onto and say I am enforcing that, not my will.

Senator KENNEDY. Is it the meaning of the—of the Drafters in 17, what, 87——

Judge GORSUCH. No.

Senator KENNEDY [continuing]. Or is it the meaning of the legislators who approved the Constitution, or is it the meaning of—the general meaning of the people? What if they did not contemplate it?

Judge GORSUCH. Senator, they do not 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, all right? What a reasonable person would have understood them to mean, the fish case in the statutory construction scenario.

What would a reasonable reader understand that to mean? And it serves a couple of important functions. First, it does not necessarily decide cases. It does not determine outcomes, and no one is looking to go back to horses and buggies.

Senator KENNEDY. I know that.

Judge GORSUCH. Right. What it does do is give us a way to communicate with one another that is neutral, that we are aiming at something outside ourselves as a basis for decision. That is part of the separation of powers. Not legislating, judging.

Senator KENNEDY. I get that.

Judge GORSUCH. Second, it is a due process concern.

Senator KENNEDY. I get it.

Judge GORSUCH. It is a fair notice concern. I can charge—I am putting people in prison for long periods of time as a judge. I am complicit in that. And I want to do it on the basis that I know that person had fair notice of the laws that are applicable to him or her. That is important to me, and with all judges.

Senator KENNEDY. I do not mean to cut you off.

Judge GORSUCH. Oh, I am sorry.

Senator KENNEDY. I just have to be mindful of the clock.

Judge GORSUCH. I am sorry.

Senator KENNEDY. What is a penumbra?

Judge GORSUCH. It means not just the thing itself, but what surrounds it.

Senator KENNEDY. What is a legal penumbra?

Judge GORSUCH. Senator, that is a phrase that has been used in opinions by the Court.

Senator KENNEDY. Do you believe there are unenumerated rights in our Constitution?

Judge GORSUCH. Senator, the Supreme Court interprets the Constitution, and that is a legitimate function of the U.S. Supreme Court. And in interpreting the Constitution, it necessarily declares in this case or that case. It sets a precedent as it interprets.

I come back to the GPS case because I think it is a wonderful example, or *Heller*. That is another example. You can pick all sorts of examples where the Court is interpreting a textual right in the Constitution or a statute.

Senator KENNEDY. Let me ask you about euthanasia. I did not read your whole book.

Judge GORSUCH. I do not think many people have, Senator.

Senator KENNEDY. But I read enough about it, and I read a little bit of it. I believe you are an Episcopalian?

Judge GORSUCH. I attend an Episcopal church in Boulder with my family, Senator.

Senator KENNEDY. I am a Methodist. I was a Presbyterian. When Becky and I got married, she was Methodist, and I was Presbyterian. We compromised, and I became a Methodist.

[Laughter.]

Judge GORSUCH. That is the way it works.

Senator KENNEDY. But as I understand your thesis about euthanasia, which you oppose, it is not really based on religious teachings. It is based on secular, moral thinking. Tell me about that. Euthanasia, I mean, from one perspective, you know, if we have the right to control our bodies, if we have autonomy privacy and disclo-

sure privacy and all that, you know, this idea of self-determination. But you believe it can lead to something worse. Is that your thesis?

Judge GORSUCH. Well, Senator, this was in my capacity as a commentator before I became a judge.

Senator KENNEDY. Sure.

Judge GORSUCH. And as a student.

Senator KENNEDY. Right.

Judge GORSUCH. And when I was fortunate enough to get a scholarship to study law and a doctorate, and I know you have spent some time thinking about similar things in a similar place, it struck me as an important and unresolved legal issue that deserved some thinking and a contribution, where I could study and maybe add something to the discussion. Not that I have any great insights or perfect answers in this area. It is hard.

Senator KENNEDY. I do not think anybody does.

Judge GORSUCH. It is hard. I agree. I agree with that, Senator. And there I expressed the belief that—a conclusion as a commentator that the right to refuse treatment recognized in *Cruzan* by the U.S. 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.

At the same time, I agree with the Supreme Court as well that the right of—question of assisted suicide is primarily a State responsibility. And that is where in *Glucksberg* and *Quill* the Supreme Court has left the issue. Then the question becomes, what do you do? It is a question we all have to face. Do you legalize it or do you not? It is a hard question.

Senator KENNEDY. If you legalize it, it cheapens life, doesn't it?

Judge GORSUCH. Senator, what I worry about is the least amongst us in those circumstances.

Senator KENNEDY. The unprotected.

Judge GORSUCH. My concern is that when you have a cheap option and an expensive option, people who cannot afford the expensive option, they are the ones who tend to get hurt—the disabled, the elderly, the weak, minorities.

Senator KENNEDY. Yes.

Judge GORSUCH. So, those are my concerts. I might be right, and I might be wrong. History will tell. And if I am right, great, and if I am wrong, yelling and screaming about it will not make many better at it. It will not make right. It was a contribution, part of a debate, part of a 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.

Senator KENNEDY. Do you prefer wet flies or dry?

Judge GORSUCH. Dry.

Senator KENNEDY. Dry. I do, too.

[Laughter.]

Judge GORSUCH. Happy to express my view on that.

Senator KENNEDY. Do you use—do you use a floating line or a sinking line?

Judge GORSUCH. Well, with a dry fly, a floating line.

Senator KENNEDY. You have to use the dry, but you do not use wet flies with a sinking line to go after those trout?

Judge GORSUCH. Well, I have been known to cheat once in a while, and a bead head might go on as a drop or underneath my dry.

Senator KENNEDY. Did you know President Obama at Harvard?

Judge GORSUCH. Senator, I knew him, but not well. It is a big school.

Senator KENNEDY. Yes. Was 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 would not get called on? You do not have to answer that.

[Laughter.]

Judge GORSUCH. We were in different sections, Senator.

Senator KENNEDY. Okay. All right. I just want to ask you one last one. It is about legislative intent. You have—I have read where you have said that trying to discern legislative intent is a "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 does not make it—the search for legislative intent and looking at the legislative history, it may not be dispositive, but that does not make it useless.

I mean, would you not love to have a verbatim transcript of everything that was said at the, what was, 1787 Convention, 1789?

Judge 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 is presented to me, and I look at everything that is presented to me. Everything that is presented to me. I read everything that is presented to me. And I have used legislative history from time to time, as you have seen, and I know you have read a whole lot of my stuff.

I do worry when I am putting someone in prison, for example, or taking—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 the law, that has suffered through the process of compromise, bicameralism in both houses, and presentment and signature by the President, and it goes in the law books.

Hidden law can be a problem. I worry a little bit about that, particularly in the criminal context, Senator. It is a matter, again, of due process and fair notice. So, those are the considerations that a judge, I think, always considers: what is 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.

Senator KENNEDY. I do not know if you are a drinking man, but you may want to have a cocktail tonight and just kind of relax. I am done. Just do not drink vodka. Stay away from vodka for a while.

[Laughter.]

Judge GORSUCH. Senator, I am going to hit the hay.

[Laughter.]

Judge GORSUCH. Thank you very much.

Senator KENNEDY. You have never been to Russia, have you? I meant to ask that——

[Laughter.]

Senator KENNEDY. Strike that. Strike that question.

Judge GORSUCH. I have never been to Russia.

[Laughter.]

Senator KENNEDY. Thank you, Judge. Thank you, Mr. Chairman.

Judge GORSUCH. Thank you, Senator. Thank you.

Senator KENNEDY. Let us go home.

Senator TILLIS. Thank you, Senator Kennedy. Judge, you are done for the day. We want to extend thanks to you and to the fellow Members who played it out.

We will start a series of 20-minute rounds tomorrow, and I for one will be here for every bit of it because you have taught us a lot today, and I think the American people should be very proud that we have somebody like you that is coming before this body and headed for the Supreme Court.

We are going to recess tonight and convene again at 9:30 a.m. tomorrow morning. Until such time, we stand in recess.

[Whereupon, at 8:54 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 2 follows Day 4 of the hearing.]

CONTINUATION OF THE CONFIRMATION HEARING ON THE NOMINATION OF HON. NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, MARCH 22, 2017

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

The Committee met, pursuant to notice, at 9:37 a.m., in Room SH–216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

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

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

Chairman GRASSLEY. Good morning, Judge, and I know you slept well.

[Laughter.]

Senator FEINSTEIN. He did not answer that.

Judge GORSUCH. Is that a question?

Chairman GRASSLEY. Welcome back. And of course, we have, as a Committee, I do not know that we have recognized your wife, Louise. But she is back and very patient, sitting there.

You mentioned yesterday that the confirmation hearing of your mentor, Justice Byron White, lasted all of 90 minutes. Yesterday's hearing was a bit longer, and I am sure that you needed your rest, and I am glad you had it.

I was impressed yesterday both with your poise and your thoughtfulness throughout the long day. I came away with, I think, a greater admiration for you and particularly how seriously you take your duty to give each litigant who enters your courtroom a fair shake, as well as for your commitment of judicial independence. And I have had an opportunity to comment to various journalists or TV people or radio people, and I have stressed your statements about independence.

Before I start my question, I want Committee Members, those of us up here and the ones that are not here, to understand that I am prepared to stay as long as we need to so that everyone ask all their questions of the nominee today so that we can move on to other people that want to testify in regard to this nominee. So

I hope that we can move things along, and we will not have to stay a long time, but I am willing to do that. And then tomorrow, we will have that schedule.

I want also the Committee Members as well as the nominee to know that when we finish the questions, we will move to the regular Committee room of the Judiciary Committee. That is just down the hall, Dirksen 226, for a closed session, as we have done with every Supreme Court nominee I think since Senator Biden was Chairman of the Committee, as I recall.

Now I would like to go to my questions, and as I said yesterday, they will be 20 minutes long. Let us visit about judicial independence. Yesterday, I predicted that you would get asked a lot of questions that it would not be right for you to answer. And unfortunately, I was right, and you got those questions from many people, maybe even people on both sides of the aisle.

A lot of these questions concerned issues that might one day come before you as a Justice. And as you very clearly explained, it would compromise your independence if you pre-committed to how you would rule on future cases. It would also be unfair to the future litigants, and you made that very clear.

And of course, there is nothing new about all this because we have quoted the Ginsburg standard, after Judge—Justice Ginsburg said during her confirmation hearing, and it has probably been repeated several times, but I do not know that we can repeat it too many times.

"A judge sworn to decide impartially can offer no forecasts, no hints, for what—for that would show not only disregard for the specifics of a particular case, it would display a disdain for the entire judicial process."

Senators know a nominee cannot answer questions, but of course, those questions get answered anyway. And I would probably want to confess the 13 before you, I probably have asked some of those inappropriate questions.

You were also asked many questions about how you would decide past Supreme Court cases, but you cannot answer those either. As Justice Kagan told us, "I have pretty consistently said that I do not want to grade or give a thumbs up or a thumbs down on particular Supreme Court cases."

At the time, the former Chairman said, "I certainly do not want you to have to lay out a test here in the abstract, which might determine what your vote or your test would be in a case you have yet to see." So you, the present nominee, deserve no less, and that applies to easy cases just as well as it might apply to hard cases.

In any event, we do not need to dwell on hypotheticals. You have a 10-year record on the Tenth Circuit. You have written over 770 opinions, or at least been involved with that many, and heard probably a little less than 3,000, but getting close to that number. So without talking about hypotheticals, there is plenty that we can talk about.

So I am going to start by *Thompson School District v. Luke P.* Luke P. was an autistic student. His parents sued their local Colorado school district so that it would pay Luke's tuition at a private residential school. The statute at issue dealt with the Individuals with Disabilities Education Act. We call that IDEA for short.

You held that the district did not have to pay under this statute because all the experts who examined Luke found that he was progressing in his public school.

Judge, where did you get that standard?

Judge GORSUCH. Mr. Chairman, the standard under IDEA, or, as you said, the Individuals with Disabilities Education Act, the standard that you have articulated is the standard set by the Supreme Court in a case called *Rowley*, and there are additional precedents in the Tenth Circuit interpreting and developing that standard. And so in that case, Mr. Chairman, the panel was applying settled Circuit law and Supreme Court law.

The statute, as you know, balances two very important interests. The interests of children and their families with disability to ensure the child receives appropriate education. On the other hand, it also balances the interests of school districts, for whom these cases can be very expensive and challenging.

And that balance is a policy judgment as to how that is made. That is made by this body, and then as interpreted by the Supreme Court in *Rowley*. Those are the standards we apply, the policy choices of this Congress as interpreted by the U.S. Supreme Court.

Chairman GRASSLEY. And you did not have any discretion to disregard that precedent of either the Supreme Court or the Tenth Circuit?

Judge GORSUCH. No, Mr. Chairman.

Chairman GRASSLEY. And I think you had a Judge Briscoe, a Clinton appointee, was on the panel. And it is my understanding she joined your opinion in full, and so the *Luke P.* opinion was unanimous?

Judge GORSUCH. It was, Mr. Chairman.

Chairman GRASSLEY. Congress could, of course, as you said, amend IDEA, and States could create standards of their own, as Senator Tillis worked to do when he was in the North Carolina legislature. He is not here, but I think he would—that is my understanding of what he worked on.

Judge GORSUCH. That is my understanding, too, Mr. Chairman. And of course, I have had other cases involving IDEA where the parents and the child prevailed based on the existing law—*The School of the Deaf and Blind* case, the *Jefferson County* case. So it just depends upon the facts and the law in each particular case.

Chairman GRASSLEY. Yes. Well, I think you just pointed out my last point that there is plenty of evidence that you rule as you see the law requires you to rule. Sometimes it comes out against the little guy and sometimes very much in favor of the little guy.

Judge GORSUCH. That is right, Mr. Chairman.

Chairman GRASSLEY. Okay. Because you take an oath to administer justice without respect to person and do equal right to both the poor and the rich. Your tenure on the Tenth Circuit I think is a proud testament to the seriousness with which you understand the role of a judge, and you have ruled in favor of students bringing IDEA claims in other cases as well.

I want to go on to something that Senator Klobuchar brought up, but probably something I was working on maybe before she even got to the United States Senate, and this is cameras in the courtroom. And I made a point when I appeared before the Judicial

Council last week and Justice Thomas introduced me, I said, "Remember, today I did not bring up about cameras in the courtroom." He says, "We are getting off to a good start."

[Laughter.]

Chairman GRASSLEY. Because obviously he does not agree with me on this point.

She asked for your opinion on having cameras in the Supreme Court, Senator Klobuchar did, and you said that you had not given the subject a great deal of thought. I want you to know that I believe that public access to our court system is an important issue, and having cameras in the courtroom is one way to improve public access.

Now I know this is not a very popular subject with some of the Justices on the Supreme Court, as I just hinted. And in fact, as Senator Klobuchar mentioned yesterday, Justice Souter once famously quipped that the television cameras would have to "come roll over my dead body for that to happen." And he is not on the Court now. So that is one less person in opposition.

[Laughter.]

Chairman GRASSLEY. I can respect that opinion, but quite frankly, it just happens to be wrong from my point of view. When Mr. Katyal introduced you on Monday, I was glad to hear him say that he wished the Court would televise its proceedings so that all Americans could see what goes on there.

That is a view shared by a number of my colleagues on this Committee. We believe that allowing cameras in the Federal courthouse would open the courts to the public and bring about better understanding of the Court and its important work. You may be aware that for a number of years, I have sponsored bills called Sunshine in the courtroom Act, which give judges the discretion to allow media coverage of Federal court proceedings.

Given your discussion with Senator Klobuchar yesterday on the issues, I am not going to ask for your opinion to have cameras in the courtroom, but I would very much appreciate this. If you would think about the issue, I would appreciate it if you keep an open mind as you move forward in this process.

And I guess if I could ask you to have that open mind, that is all I would ask you to do at this point.

Judge GORSUCH. You have it. I am sure—I have gotten to know some of these guys pretty well over the last few weeks. Some nice folks.

Chairman GRASSLEY. I want to bring up the part that legislative history will bring up, and I think I am going to refer to some cases. I do not know whether they are the same cases I have read, but I know you have a different, maybe a little different point of view on legislative history, and I would like to know what that is.

But I also remember my first discussions with Justice Scalia, like when he came around to my office, as you came around to my office, I asked him about it, and he said it should not play any role whatsoever. And I think I have seen him totally committed to that point of view. During the 29 years that he was on the Supreme Court, he did not lead me astray in my office, and he kept a pretty consistent point of view.

So it deals with the weight that judges should give when interpreting statute. You have been a judge for over 10 years so you have had time to think about the role of legislative history in cases that have come before you. In fact, there is one in particular that I would like to discuss, one that Senator Feinstein talked about a little bit in her opening statements, *U.S. v. Games-Perez*, I believe it is pronounced.

The defendant in that case was appealing his conviction under a Federal felony in possession statute, which provided that defendants must knowingly violate the law against felons possessing guns.

The legal question before your court was whether the defendant must know both that he was a felon and that he was in possession of a firearm or whether the Government had to prove only that the defendant knew that he was in possession of a firearm.

Now at the defendant's original plea hearing, the trial judge told him, "You will leave this courtroom not convicted of a felony and instead granted the privilege of a deferred judgment." So there was a real question about whether the defendant actually knew that he was a felon.

You upheld his conviction because the Tenth Circuit precedent required you to do so. Tenth Circuit precedent said that the word "knowingly" applied only to possessing a firearm, but not being a felon. Although you were required to follow precedent and you did, you wrote a separate concurrence to highlight that the precedent should be revisited.

You wrote, "Our duty to follow precedent sometimes requires us to make mistakes. Unfortunately, this is that sort of case." You went on to write, "It makes no sense to read the word 'knowingly' as so modest that it might blush in the face of the very first element only to regain its composure and reappear at a second," end of your quote.

So you were somewhat critical of the Tenth Circuit precedent because of its reliance on legislative history. You wrote that legislative history can be misleading because it is "stocked with ample artillery for everyone. The fight is hard fought. Each inch of the historical terrain is heavily contested, but in the end, almost no ground is taken by either side."

You touched on this a little bit yesterday, but I would like to ask you when it is appropriate to look to legislative history to interpret statutes? Are there some circumstances when it is more appropriate than others, and what are the dangers?

And I guess 30 years ago, I told Scalia that history was very important. I am not sure I agree with that today, knowing the importance of us writing clear statutes. But I thought we did not always write very clear statutes, and I thought you ought to go back in and look at what we think about it.

But what are the circumstances when it is more important than others, and what are the dangers?

Judge GORSUCH. There is a lot to unpack there, Mr. Chairman. Let me begin by saying I respect all the work that this body does, and a good judge takes seriously everything you do and reads everything put before him or her. You do not close your mind to any argument. You put on the robe, you open your mind.

But I think that case illustrates some issues along the lines of what you would asked me to discuss. So the statute there says, and simplifying, that it is a crime to knowingly be a felon in possession of a gun.

And our precedent, on the basis of an interpretation about legislative history, and the legislative history was very long in that case, extremely long. The statute goes back, I think, to the 1940s and has been revised many, many times. So one can read a lot of history in that statute, and it can be argued both ways. There is good history both sides cited us.

On the basis of its reading of that history, our court took the view that the Government need only prove that the defendant is a felon who is knowingly in possession of a gun, and that was the jury instruction given in that case.

The defendant said, well, hold on a second. The word "knowingly" is here. "Knowingly a felon in possession." How does the word "knowingly" leap over the word "felon" and only touch down at the word "in possession"? It defied a bit of grammatical gravity, the defendant argued.

And as a matter of plain meaning, I had to agree with him. I did not understand how just reading the words, the plain words on the statutory page, a reasonable person could understand that mens rea element, the "knowingly," the mental element, to only apply to the second act in the statute, to the possession of the gun, as opposed to the knowing felon status.

And the defendant had at least a colorable argument that he did not know he was a felon in that case because the sentencing judge told him he was not a felon, as you pointed out, Mr. Chairman. The sentencing judge I think several times, as I recall the record, and it has been a while since I have looked at it, said more than once to him, if you complete your deferred sentence, you'll have no felony conviction on your record.

So I thought this was a case where the Government had to square its corners. And before you could put a man in prison—I think for 5 years in that case. It may have been longer. Felony possession statutes have rather long sentences attached to them. But the Government should be forced to prove each and every element that the plain language of the statute imposed upon it.

And that resort to legislative history to put a man in prison on the basis of legislative history rather than the plain language struck me as a due process, a fair notice problem to that individual.

So that was why I wrote the concurrence. I followed our precedent. It was a precedent of the court. I have an obligation to do it, but I also felt I had an obligation to point out the mistake.

Chairman GRASSLEY. You may have just said this, but I want to emphasize. So I would like to know what intersection you understand there is between notice of the law, legislative history, and original meaning of the legal text?

Judge GORSUCH. Yes. And I did touch on it, and I think notice is the key to the rule of law, that the people can understand what is expected of them. That the law is sufficiently clear that before they are put in prison for 5 or 10 or 20 years, and that is what Federal sentencing statutes require of judges in many, many cases, that were not putting them in prison on the basis of some secret

law, some hidden, unexpressed intentions or intentions that are very hard to find in the fine print of some book that is not available widely, but on the basis of what is in the statutory books that we are all charged with knowing.

Chairman GRASSLEY. Can I sum up what you just said? If I am wrong, tell me. But you are basically saying the law means what it says it means. Is that right?

Judge GORSUCH. That is a good starting point, right? That the plain text of the statute is usually a pretty good starting point, and reading it as you would expect a reasonable citizen to do so, you know, not a—not a—not a pointy-headed judge.

Chairman GRASSLEY. I have only got 35 seconds left. So for the benefit of my Members, I am starting out on something before my time is up. So I do not know whether this is something I want you to comment on, but I want you to be very clear that sometimes cases dealing with the False Claims Act and qui tam come before the Supreme Court, and sometimes the Supreme Court gets it wrong, from my point of view.

There is lots of times, and Senator Leahy has been very good in helping me do this, we have had to rewrite the statute to get back to what I thought we made very clear in 1986, but according to the courts, we did not make very clear. I co-authored this amendment to going way back to an 1860 law that the Congress obliterated because of World War II because they did not think defense contractors should be sued in those instances under qui tam.

So we brought it back and even went beyond what it was in the 1860s to empower qui tam relators or whistleblowers to help the Government identify and prosecute fraud on the taxpayers. The False Claims Act is the most effective antitrust tool that we have. And since the 1986 amendments that Congressman Berman, then a Member of the House, and I was a Member of the Senate, got passed, the taxpayers have recovered more than $53 billion in public funds lost to fraud.

And we had people in the Justice Department when we first passed this did not like it because if a relator came to them or a whistleblower came to them, and they said like that was like saying they were not doing their job. We had a District Judge in the late 1980s, I think, told some prosecutor for the Justice Department that was trying to argue that a relator should not have a certain amount of money. He said, "Do you realize you would not even have a case if this whistleblower had not brought it to your attention?"

And I think we are over that now, but you know, the Defense Department and the pharmaceuticals over the last 30 years have tried to gut this legislation. Even 4 years ago, the Chamber of Commerce wanted to do something to it that would have really done injustice to the good that it has done. So that is something, you know, that I think that is working. We ought to keep it there.

As you know, in most cases, a plaintiff must have suffered an injury to have Article III standing to come before the court. There is, however, an important Supreme Court case called *Vermont Agency of Natural Resources*, which established that qui tam relators have a constitutional standing under the False Claims Act to pursue claims for fraud against the United States.

I do not know whether you are familiar with it. If you are, I guess I am calling it to your attention so you can understand that is pretty important from my point of view. You are familiar with it?

Judge GORSUCH. I am, Senator.

Chairman GRASSLEY. You nodded your head.

Judge GORSUCH. Mr. Chairman, I am well familiar with your views on qui tam cases. I have had a couple in my Circuit, and I know they have served——

Chairman GRASSLEY. Well, did you rule in my favor?

[Laughter.]

Chairman GRASSLEY. No, no. You ruled in favor of somebody that was before you.

Judge GORSUCH. That one—that one—the one I have in mind, the little guy won that one. Yes, Mr. Chairman.

Chairman GRASSLEY. Okay. So I hope you know how important this rule has been for the protection of the Treasury against fraud, and I am certainly very passionate about this issue. So I think if the False Claims comes up, I hope sometime you will remember, whether I am alive or dead, that Senator Grassley is interested in this.

[Laughter.]

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thank you. Thanks very much.

Mr. Chairman, I would like to put three letters of opposition in the record, if I may, with your concurrence?

Chairman GRASSLEY. Yes.

Senator FEINSTEIN. Thank you very much.

Chairman GRASSLEY. Sure. And is that all of them, or you got a couple others?

Senator FEINSTEIN. Yes, they are all here.

Chairman GRASSLEY. Okay. Without objection, whatever Senator Feinstein has that she wants in the record, without objection, it will be done.

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

Senator FEINSTEIN. Thanks very much.

I am not a lawyer, but as I read the case, this man was a felon in possession of a gun with the serial number struck off, in concert with another man who had a weapon that I believe was used in the situation. So he was a felon with a gun, and his probation instructed him that he was not to carry that weapon. So I have very strong feelings about that, and I just wanted to say that.

I do not think you have to respond, but what I would really like to talk to you about——

Judge GORSUCH. Senator, may I?

Senator FEINSTEIN. Sure. Absolutely.

Judge GORSUCH. I do not mean to eat up your time or anything, but this is exactly the sort of thing I think I have been trying to convey to Members of the Committee, which is it is my job to decide these cases without respect to persons.

There is the little guy, right there. He is a criminal defendant. He is unsympathetic. I completely understand everything you are saying about him. That was all true.

The question still, does the Government have to prove what the law requires of the Government or anybody, the big guy? There is no bigger guy than the Federal Government.

Senator FEINSTEIN. I understand.

Judge GORSUCH. And so I am just trying to follow the plain words of the law, "knowingly be a felon in possession," and the convicting judge told him that he was not a felon. And I follow precedent in that case, Senator. The man is in prison because of—because of precedent. But I do wonder——

Senator FEINSTEIN. I do accept that is your view.

Judge GORSUCH. Okay.

Senator FEINSTEIN. And I would like to move on.

Judge GORSUCH. Of course.

Senator FEINSTEIN. It is not my view.

Judge GORSUCH. I understand.

Senator FEINSTEIN. He was a felon.

Judge GORSUCH. Yes, he was.

Senator FEINSTEIN. So let me go on. I sent some documents down—not down to you, but over to you yesterday.

Judge GORSUCH. Yes, yes.

Senator FEINSTEIN. And I would like to ask you about one of them, and this is the one that has to do about torture. It is labeled at the bottom "DOJ NMG0143890." And I can send it down to you again if you want? I do have notes in this——

Judge GORSUCH. No, I have got it right here. I have got it right here. Yes.

Senator FEINSTEIN. Okay. There is no date on the document, but the document talks about the McCain and Graham amendments to the Detainee Treatment Act, which was before Congress in November and December of 1905, and it asked specific questions about the indictment of Jose Padilla, who was indicted on November 22, 2005. So the notes must have been on or after November 22, 2005.

Take a look at your handwritten notes on page 2. The document says, "Has the aggressive interrogation techniques employed by the administration yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?" Your handwritten note says "yes."

My question is what information did you have that the Bush administration's aggressive interrogation techniques were effective?

Judge GORSUCH. And Senator, I am working on 12 years of passage of time here. So my memory is what it is, and it is not great on this. But my recollection——

Senator FEINSTEIN. But you are very young.

Judge GORSUCH. Well——

[Laughter.]

Senator LEAHY. Accept it.

Judge GORSUCH. I will take it. Thank you. I am not sure my wife entirely agrees with you anymore, Senator. But thank you, that is kind.

My recollection of 12 years ago is that was the position that the clients were telling us. I was a lawyer. My job was as an advocate, and we were dealing with the detainee litigation. That was my involvement.

Senator FEINSTEIN. You actually answered the question.

Judge GORSUCH. Yes, and I think——

Senator FEINSTEIN. So you had no personal information?

Judge GORSUCH. Oh, no.

Senator FEINSTEIN. That you took the position of your client?

Judge GORSUCH. Yes.

Senator FEINSTEIN. And that, because I know a lot about what happened——

Judge GORSUCH. I know you do.

Senator FEINSTEIN [continuing]. That circles around in my brain a little bit because it seems to me that people who advise have an obligation to find the truth in these situations.

And when we learned about what happened on the Intelligence Committee, the Gang of 8 learned earlier. We learned much later. I think it was 2006. We saw—and when we looked into it, we really saw the horrendous nature of what went on—the absence of supervision, the absence of direction, the contracting out to people who, in my view, we are not qualified to do what they did. And I think terrible things happened.

It is a closed chapter, but it should never again happen. This is America, and it is not what we stand for.

So let me move on to something that does trouble me about originalism, if I may? And let me read something. I have a constituent who happens to be the dean of a law school, who sent me a question.

Judge GORSUCH. Uh-oh.

Senator FEINSTEIN. And I want to present it to you, and here it is. You are a self-professed originalist in your approach to constitutional interpretation. For example, you wrote——"Judges should instead strive, if humanly and so imperfectly, to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."

Now do you agree with Justice Scalia's statements that originalism means there is no protection for women or gays and lesbians under the equal protection law because this was not the intent or understanding of those who drafted the Fourteenth Amendment in 1868?

Judge GORSUCH. Senator, first of all, a good judge starts with precedent and does not reinvent the wheel. So to the extent there are decisions on those topics, and there are, a good judge respects precedent. That is the first point.

Second point I would make is it would be a mistake to suggest that originalism turns on the secret intentions of the drafters of the language of the law. The point of originalism, textualism, whatever label you want to put on it, what a good judge always strives to do, and I think we all do, is try to understand what the words on the page mean. Not import words that come from us, but apply what you, the people's representatives, the lawmakers have done.

And so when it comes to equal protection of the laws, for example, it matters not a whit that some of the drafters of the Fourteenth Amendment were racists, because they were, or sexist, because they were. The law they drafted promises equal protection of the laws to all persons. That is what they wrote.

And those—the original meaning of those words, John Marshall Harlan captured them in his dissent in *Plessy*. An equal protection of laws does not mean separate in advancing one particular race or gender. It means equal.

And as I said yesterday, I think that guarantee, equal protection of the laws guarantee, the Fourteenth Amendment, that it took a Civil War for this country to win is maybe the most radical guarantee in all of the Constitution and it may be in all of human history. It is a fantastic thing, and that is why it is chiseled in Vermont marble above the entrance to the Supreme Court of the United States.

Senator FEINSTEIN. I understand that, but here is what is hard, and let me be very personal about it because this is important. I have sentenced women to State prison for committing abortion. I was a Member when California had an indeterminate sentence law, actually the youngest in the country, and I know what life was like.

You have two daughters.

Judge GORSUCH. I do.

Senator FEINSTEIN. I am one of three daughters, and I know what life was like. I have heard of young women killing themselves. I have heard of passing the plate in colleges so that a young woman could go to Tijuana to have an abortion. I read a letter from a woman who is going to be in the audience tomorrow of how trying to get pregnant, finding that the fetus was catastrophic, and having just a terrible time.

So the law has finally progressed that we now have the right to vote. That took a long time. We are still fighting for equal pay for equal work, and it goes on and on. And as women take their place in the workplace, in society—we could have had a woman as President perhaps—life changes. And the originalism that the days when the Constitution was written project to me do not bring somebody forward, they bring them backward in terms of rights that women did not have. They were not looked at as equal.

As a matter of fact, we could not even get ratified a constitutional amendment. Very simple, equality under the law should not be abridged on account of sex. That was the Equal Rights Amendment. And the time was extended from 3 years to give it more time, and they could not get the number of States to approve it.

So if one looks at originalism in my context, which is real life, I want your two daughters to have every opportunity they possibly could have, be treated equal, be able to control their own bodies in concert with their religion, their doctor, whatever it may be, and not be conscribed to a lesser fate because the law is interpreted in a backward sense. Does that make sense to you?

Judge GORSUCH. Senator, I understand your concern, and I share it. I come from a family of strong women. My two teenage daughters, you are right. I want every opportunity for them that a young man has.

I have a strong wife. Anyone who knows her knows that. My mother——

Senator FEINSTEIN. But you are pivotal in this.

Judge GORSUCH. And Senator, I am daunted sitting here under the lights at the prospect of what is to come, if I am so fortunate to be confirmed, and I am daunted by the job I currently hold. And

I take that trust very seriously, and no one is looking to return us to horse and buggy days.

We are trying to interpret the law faithfully, taking principles that are enduring and a Constitution that was meant to last ages and apply it and interpret it to the today's problems, to today's problems.

And I think if you look at a number of cases where the Court has applied what might be labeled by some as originalism, you will see, for example, in *Kyllo*, the search of a home with a heat-seeking device. The Court looked back to find out would that be considered an unreasonable search? The technology did not exist, of course. But would something like that have been considered an unreasonable search at the time of the Fourth Amendment's adoption?

And found it is essentially equivalent to a Peeping Tom, and of course, that would have been considered an unreasonable search by the Government. And so a heat-seeking device, thermal imaging, is also a search of a home. That is how we use neutral principles, the law, to apply it to current realities, not to drag us back to a past, but to move forward together as judges applying the law neutrally.

Senator FEINSTEIN. Here is the problem. I have been through this before. This is my—well, I have been through six hearings. I listened to Senator Specter, when he was Chairman of this Committee, tell the Chief Justice, "Well, you have described super precedent."

We talked about precedent, and what has happened is every Republican-appointed judge has gone back and is a "no" vote. So how does—how does one look at you, and we have talked about precedent, for the life of me, I really do not know when you are there what you are going to do with it.

And it is so—and as you say, this is not text. This is real life. And young women take everything from granted today, and all of that could be struck out with one decision.

Judge GORSUCH. Senator, all I can do is I cannot promise you how I would rule in a particular case. That would be deeply wrong to sit here at a confirmation table, and I think we agree on that, that it would be a violation of the independent judiciary for a nominee to a court to make a promise on any case in order to win confirmation.

Senator FEINSTEIN. No, I do not expect you to.

Judge GORSUCH. I know you do not, and I am really grateful for that. I know you appreciate my position.

All I can promise you is that I will exercise the care and consideration due precedent that a good judge is supposed to, and I have written a book on it. This is not something that is just words in a room. This is years of toil in putting together a mainstream consensus view on what precedent is and the law of it with 12 other—12 judges appointed by Presidents from both sides, with a foreword by Justice Breyer.

And I did not expect anyone to ever read it. I think a few people have read it now, probably not—still not that many. But that is my life's work that sort of thing. I care about the law. I care deeply about the law and an independent judiciary and following the rules of the law.

And that is the commitment I can make to you. I cannot promise you more, and I cannot guarantee you any less.

Senator FEINSTEIN. Well, what worries me is you have been very much able to avoid any specificity like no one I have ever seen before. And maybe that is a virtue. I do not know. But for us on this side, knowing where you stand on major questions of the day is really important to a vote "aye." And so that is why we press and press and press.

It is very hard because you mention that you—the number of cases you sat on, and the percent that was unanimous I think was 97 percent, you said. And so we realize that these are few cases on which the distinction is made, and it is hard to make that distinction.

So, you know, when one sees a lot in this country—and I just want to say this. For me, I sat on 5,000 cases. These were women convicted of felonies in the State of California. I did it for 6 years. And so I saw the inside of this whole issue, and that is one of the reasons why I feel so strongly.

Particularly, let me ask you another area. Assisted suicide.

Judge GORSUCH. Sure.

Senator FEINSTEIN. You make the statement that there is no justification for having anything to do with the end of someone's life, encouraging the end of life. Well, California just passed an End of Life Options Act that takes a number—I think three doctors. I, in my life, have seen people die horrible deaths, family, of cancer, when there was no hope. And my father begging me, "Stop this, Dianne. I am dying."

You know, my father was a professor of surgery, now trying to save him. So there are times you cannot, and the suffering becomes so pronounced—I just went through this with a close friend—that this is real, and it is very hard.

So tell us what your position is in the situation with California's End of Life Option Act as well as what you have said on assisted suicide.

Judge GORSUCH. And Senator, this is something I can speak about because I have written about it, and I am delighted to talk about my record. I wrote a book in my capacity as a commentator. It was my doctoral dissertation, essentially, before I became a judge.

I would have to tell you, as a judge, put that aside, and we talked about that. But I will talk to you about what I wrote in the book because I think it is fair.

What I wrote in the book was I agree with the Supreme Court in the *Cruzan* decision that refusing treatment—your father, we have all been through it with family. My heart goes out to you. It does. And I have been there with my dad and others. And at some point, you want to be left alone. Enough with the poking and the prodding. I want to go home and die in my own bed in the arms of my family.

And the Supreme Court recognized in *Cruzan* that is a right in common law to be free from assault and battery, effectively, and assumed that there was a constitutional dimension to that. I agree.

Senator FEINSTEIN. Supposing you cannot handle the pain, and you know that it is irreconcilable?

Judge GORSUCH. And Senator, the position I took in the book on that was anything necessary to alleviate pain would be appropriate and acceptable even if it caused death. Not intentionally, but knowingly. Okay? I drew a line between intent and knowingly.

And I have been there. I have been there.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman. Sorry.

Chairman GRASSLEY. Senator—no, no apology.

Senator FEINSTEIN. Thank you.

Chairman GRASSLEY. Senator Hatch, because Senator Graham has to go to a hearing or a Committee meeting, has accommodated Senator Hatch—or Senator Graham. So go ahead, Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Let us see if I can sort of get my head around where we are at here because I am not so sure I have been playing the same game as everybody else. I might have to reevaluate what game I need to be playing in the future.

It is important to know where you stand before I can vote yes. I think that is true for a Republican nominee, but not so much for a Democrat.

Let me tell you what Senator Leahy said. I certainly do not want you to have to lay out a test here in the abstract, which might determine what your vote—or your test would be in a case you have yet to see that may well come before the Supreme Court.

Now that is the standard when there is a Democratic nominee. Now when there is a Republican nominee, you have got to tell these Senators that you will not get in the way of their agenda. I am not asking you to tell me whether or not you agree with my agenda. I am asking you whether or not you will fairly hear the cases before you because to do anything else would be unfair to you.

The life issue is very real. There are a lot of Americans who believe that life begins at conception. There are a lot of Americans who believe that *Roe v. Wade* was a grab of power from legislative people, but it is the law of the land. It will be given due weight if somebody challenges it.

Do you agree with me it is the law of the land that in late-term abortions, they have been limited through congressional action and approved by the Supreme Court?

Judge GORSUCH. In certain circumstances, yes.

Senator GRAHAM. In certain circumstances, the Congress overwhelmingly voted to limit abortions in the last trimester, and the Supreme Court said in those circumstances you have the authority to do that. Is that the state of the law?

Judge GORSUCH. That is part of the state of the law, Senator.

Senator GRAHAM. And I would imagine this issue will be revisited as long as people have differences. There will be a lot of issues coming before the Court because Americans do not agree on some of the more emotional topics like when life begins, and what is the role of the legislative body? What is the role of the Court? When do you have a soul, if you have one? And what is the right to be conferred by unelected judges versus people who have to answer to the public?

So all I am saying, if we are going to vote against a nominee because they will not tell us things that we want to hear about issues

important to us, then the whole nominating process has become a joke. And what has happened over time is that somehow, some way, we have gone from Scalia, the originalist, getting 98 votes; Ginsburg, the bastion of liberalism on the Court, well qualified, getting 96 votes.

What has happened? Did the Constitution change? I do not think so. I think politics has changed. I think it has changed in a fashion that we should all be ashamed of as Senators, and I think we are doing great damage to the judiciary by politicizing every judicial nomination. "If you do not agree with my basis view of the world, I cannot vote for you."

This is what Greg Craig, the former White House counsel in the Obama administration, said about Elena Kagan. "She is a progressive in the mold of Obama himself." So Reince Priebus said that Trump picked a good guy. Well, Greg Craig, the former White House counsel, said that Obama picked in Elena Kagan "a progressive in the mold of Obama himself."

I did not vote for President Obama, but he won in spite of my opposition. I do believe, as President of the United States, he had a right to pick somebody from the progressive wing of the law. I expected him to do so, and he did. Twice. I knew full well what I was getting, and I hope you understand that you are getting one of the most qualified conservative judges in the country.

Senator Feinstein said her goal was to find out if you are a reasonable, mainstream conservative. I would tell you, Senator Feinstein, without any hesitation, this man is as mainstream as you will get. If you do not believe me, listen to the people who know him the best, 2,700 cases and being reversed once.

The bottom line here is we are taking the nomination process to a place it was never intended to go by the Framers of the Constitution, and Alexander Hamilton would be rolling over in his grave to believe that the United States Senate has now gotten to the level of where "I cannot vote for you if you will not tell me about cases important to me and you do not share my philosophy."

That means advise and consent is not really advise and consent. It means that we are the President and we are the judge, and if you would not rule like us, you cannot be on the Court. And if you come from a philosophy that we reject as a party, then you cannot be a judge. That will be bad for the country.

Now let us talk a little bit about *Griswold*. You said that *Griswold* was a case decided by the Supreme Court that does what?

Judge GORSUCH. Senator, it guarantees married couples the privacy in their own home to use contraceptives.

Senator GRAHAM. Is it a longstanding precedent of the Supreme Court?

Judge GORSUCH. It is, Senator.

Senator GRAHAM. What weight would you give that?

Judge GORSUCH. Well, Senator, under the law of precedent, you look at the age. This one's over 50 years. You look at the reliance interests, which are obvious and substantial. You look at whether it has been reaffirmed, which it has many times. And Senator, as I said yesterday, I just cannot imagine a State attempting to pass a law like that.

Senator GRAHAM. Well, let us say they did.

Judge GORSUCH. And I cannot imagine the Supreme Court of the United States taking that claim seriously.

Senator GRAHAM. Let us say they did, and I am with you on both. Would you listen to the people who made the argument to make the argument?

Judge GORSUCH. Senator, you listen to every person who comes to court.

Senator GRAHAM. So to overturn *Griswold*, you have got to get a case in controversy, right?

Judge GORSUCH. Right.

Senator GRAHAM. That means somebody somewhere has got to convince, I do not know, some State or some body somewhere to outlaw contraception in the marital relationship. That would be a case in controversy.

Judge GORSUCH. Well, you would have to have to have a State that would pass a law like that.

Senator GRAHAM. Or what about a city council?

Judge GORSUCH. Or whatever. And then you would have to have somebody try and enforce it.

Senator GRAHAM. Right. Then it would maybe get to you. And if that day ever comes, you would listen to what the other side had to say, then you would decide. Is that fair enough?

Judge GORSUCH. You would apply the precedent of the U.S. Supreme Court, and if they were trying to overturn the precedent, you go through the factors and you consider them.

Senator GRAHAM. So you are not here to tell us what you like or do not like in the law. You tell us about the process of how the law works?

Judge GORSUCH. That is right, Senator.

Senator GRAHAM. And you are here as a human being, cannot imagine some legislative body, particularly at the State level, outlawing contraception. You just do not see that as a real threat right now?

Judge GORSUCH. I do not see it as a real threat today, Senator.

Senator GRAHAM. Originalism. Are you an originalist?

Judge GORSUCH. Senator, as we spoke of yesterday, I am happy to be called that. I do worry about the use of labels in our civic discussion to sometimes ignore the underlying ideas. As if originalism belonged to a party, it does not. As if it belonged to an ideological wing, it does not.

Senator GRAHAM. Well, here is what I would say about originalism. Whether you like it or not, is it bound by the law?

Judge GORSUCH. Of course it is. It is the whole point of how you interpret the law.

Senator GRAHAM. Now to those who believe that the Constitution is a living, breathing document that can speak to you and nobody else, that bothers me. But there are people on the Supreme Court who have the view that the Constitution is a living, breathing document related to the times in which we live in. That seems to open the door that I can get the outcomes I want, not so much bound by the words or the history.

The bottom line is there are different ways of looking at the role of being a judge. Do you—do you believe that your way of looking at being a judge has stood the test of time?

Judge GORSUCH. I do.

Senator GRAHAM. Do you believe over the last 10 years your way of looking at being a judge has received respect from people who disagree with you?

Judge GORSUCH. I think you are going to hear from some of them tomorrow.

Senator GRAHAM. Do you believe that the American Bar Association has looked at your way of being a judge and found you well qualified?

Judge GORSUCH. I am very honored by their assessment.

Senator GRAHAM. You have decided over 2,700 cases. Is that right?

Judge GORSUCH. That is right.

Senator GRAHAM. Been overturned once maybe?

Judge GORSUCH. Maybe.

[Laughter.]

Senator GRAHAM. Okay. I am going to say once.

Judge GORSUCH. Well——

Senator GRAHAM. And you are just going to have to live with it.

Judge GORSUCH. Well——

[Laughter.]

Senator GRAHAM. And accept it. The bottom line is——

Judge GORSUCH. Maybe.

Senator GRAHAM. Let us say it is once. I would say that the way you judge has been viewed by people above you as being acceptable almost all the time but once.

Now to my friends on the other side, what more can you ask for? What are you looking for? Are you looking for somebody that will make your political life easy? Well, he is not the guy.

Because he is not going to make your political life easy because he was appointed by the guy that you were all against and I did not vote for. I have not voted for a President who won in 12 years.

[Laughter.]

Senator GRAHAM. So I am probably not the one to give you legal advice—I mean political advice. But I have voted for nominees of those who did win in the time that I have been here.

I intend to vote for you for the same reasons that I articulated for Sotomayor and Kagan in terms of your qualifications. I intend to vote for you because I think you represent a conservative's view of how to be a judge. I am excited about that.

I think President Trump, with all of his problems and all of his mistakes, chose wisely when it came to this man. And I want to congratulate the President, and I want to say this. That when you rejected some of the statements that President Trump made toward judges as being, what were your words——

Judge GORSUCH. Senator, I spoke of when anyone.

Senator GRAHAM. Anyone. Which would include President Trump.

Judge GORSUCH. Anyone.

Senator GRAHAM. Okay.

Judge GORSUCH. Criticizes the honesty, the integrity, the decency of Federal judges and what they do or attacks their motives in how they come about arriving at their decisions, I know those people.

I know how hard they work and how decent they are. I find that disheartening and demoralizing. That is what I have said.

I am not saying we are immune from attack from decisions. I am not saying that we shouldn't have thick skin. My hide is pretty thick, and I know that the hides of Federal judges have to be.

Senator GRAHAM. Well, I just want to associate myself with what you said about what President Trump said. That I thought it was really out of bounds. You are the most powerful man in the world, and judges work in quiet dark corners. They have no political machine. They have no PAC. They cannot go out and do news conferences.

Of the three branches of the Government, they are the most vulnerable. So I stand firmly with you and firmly with anybody. My friends on the other side say that President Trump was really out of bounds. But here is what I wish some of you all would do.

Here is what Nancy Pelosi said. "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." That means picking you. I have not heard one person on that side say that is out of bounds. That is political garbage.

To my good friend Ron Wyden, "No Senator who believes that individual rights are reserved to the people and not to Government can support this nomination." Elizabeth Warren, "Let us not mince words. The nomination of Judge Gorsuch is a huge gift to the giant corporations and wealthy individuals who have stolen a Supreme Court seat in order to make sure that the justice system works for them."

It is okay to criticize Trump, but apparently it is okay for you to slander this man, and none of you say a damned thing about it. I do not think it is okay. I do not like what is going on here, and I do not like where the Senate is heading. But there is nothing I can do about it other than be myself.

So, Judge, I just want to say I think you are qualified. I think the answers that you cannot give us come from the fact that you understand that if you gave those answers, you would compromise your ability to fairly decide cases that may come before you in the future. And that when a Democrat says that, they are just being a good judge. When you say that, "Oh, I cannot vote for you." What a double standard.

Thank you.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Mr. Chairman, while the Senator from South Carolina is still in the room, he began his statement quoting me and saying, of course, and went on to say that a President should be able to show his own philosophy in his nominations. And he pointed out the President Obama, as he said, nominated two Supreme Court Justices.

I think the record should show President Obama nominated three Supreme Court Justices, one of whom was Merrick Garland, a person whose philosophy has been praised by both Republicans and Democrats. And it was the Republican Party that ignored the Constitution, did not allow him to have a vote, did not allow him to come before this body, did not uphold their advise and consent oath—their advise and consent.

So, I just—I just wanted the record corrected. It was not two nominees. It was three. The third one was not heard because for the first time in the history of the United States, the Senate refused to hold a hearing, refused to have a vote.

Now, Senator Feinstein talked about the dark days before *Roe v. Wade*. I have some experience with that. We had two cases in Vermont, *Leahy v. Beecham* and *Leahy v. Bartlett*. I will tell you very briefly about it.

Leahy v. Beecham was a case that, in effect, I brought a declaratory judgment before *Roe v. Wade* before the Vermont Supreme Court. I organized that case so that the Vermont Supreme Court, a very conservative court, could rule on the constitutionality of our anti-abortion statute in Vermont. They came out with a decision, basically what *Roe v. Wade* did, this conservative five-Member Vermont Supreme Court in *Leahy v. Beecham*.

Leahy v. Bartlett was a case where I prosecuted somebody procuring abortions, and these are the doctors that I want to go back to. I have a call from the police at 3 in the morning. I was the State's attorney at the time. I went to the emergency room at our local hospital. A young co-ed nearly died from bleeding from a botched abortion. At that time it was illegal.

We found out that the person who had procured it, he had done this with a number of people. He would then—he would then blackmail them for either sex or money. And when I brought it to trial, we found the person doing the abortion was from Montreal. They said they would go to trial figuring she would never appear to—for the case. She was there. Two Royal Canadian Mounties escorted her.

And I pointed out to the defense attorney the evidence would show she was trained to do these abortions working for the SS in Auschwitz so she could abort the women prisoners that they had impregnated so that they could keep on using those women that way before they put them in the gas chambers. He looked at the names of the people who would be the potential jurors. They sought a plea. Now, on another—that is why I applaud the senior Senator from California for raising the issue she did.

Yesterday I asked about your connections to billionaire super donor Philip Anschutz. His role is a very extensive role in lobbying the White House to get you on the Tenth Circuit. And once on the court, you said you recused yourself from cases involving him, and I commend you for that. You did the right thing.

But you wrote in your Senate questionnaire that you currently follow a recusal standard broader than what is required by the Supreme Court, and if you—if confirmed, you would follow the weaker Supreme Court standard. Does that mean if confirmed you would no longer recuse yourself from cases involving Mr. Anschutz?

Judge GORSUCH. Senator, what it means is I will, if I am fortunate enough to be confirmed, go through the same process I did when I became a judge on the Tenth Circuit, and which I committed to do at that time, which was look at the applicable law, look at the facts. I had a law clerk—I do not know if he is somewhere around here.

Senator LEAHY. Well, no, but let me—let me get back to this. You found—you found the facts were such that you recused yourself——

Judge GORSUCH. Yes.

Senator LEAHY [continuing]. With Mr. Anschutz when you were on the——

Judge GORSUCH. Yes.

Senator LEAHY [continuing]. Court of Appeals.

Judge GORSUCH. Yes.

Senator LEAHY. If he had a case before the U.S. Supreme Court, would not the facts be the same?

Judge GORSUCH. He is a former client, and I treated him as I treated my former clients, large and small. And, Senator, I would have to look at the recusal standards that are applicable to Supreme Court Justices.

Senator LEAHY. Well, the Federal recusal standards apply to both Supreme Court Justices and other judges.

Judge GORSUCH. Yes.

Senator LEAHY. But the only difference is, of course, the Supreme Court, whether they recuse themselves or not, that is not reviewable.

But would you—again, you found enough reason to recuse yourself on the Circuit, and I applaud you for that. Would not those same reasons apply to the Supreme Court?

Judge GORSUCH. And, Senator, I would just have to study the law and the practice of the Court just as I did when I came on the Tenth Circuit, and I commit to you the same process and the same integrity of the process. You look at the law, you look at the practice of your colleagues, you consult with your colleagues. That is what I did. I had a law clerk prepare an extensive memorandum for me in which he analyzed all of the relevant precedents, the practices of my colleagues, and the facts.

Senator LEAHY. Well, I would note the—okay. The Federal standard, as far as studying the law, it is the same law for the Court of Appeals and the Supreme Court, with one exception. The Supreme Court is not reviewable.

Now, I asked you yesterday whether there was any circumstance in which the President has the power to authorize torture or surveillance in violation of laws passed by Congress. You answered, and I thought correctly, no man is above the law. Now, I am sure President Bush and his lawyers believed he was operating within the law when he authorized torture and warrantless surveillance, but they still thought they could violate a statute if they were exercising their Article II power.

Is there any circumstance where a President could ignore a statute passed by Congress, signed into law, and still authorize torture or warrantless surveillance? If you had a statute against torture and warrantless surveillance, is there any circumstance in which a President could ignore that statute?

Judge GORSUCH. Well, Senator, I do not want to deal with a case that might come before me, and those are the sorts of things that come before me. But I can speak generally, and I am happy to.

Senator LEAHY. Go ahead.

Judge GORSUCH. Presidents make all sorts of arguments about inherent authority. They do, and that is why we have courts to decide. Presidents of both parties have made arguments, for instance, about the War Powers Act, both parties. And the Congress has

taken a different position on that matter, for example, with both parties.

And the fact is we have courts to decide these cases for a reason, to resolve these disputes. And I would approach it as a judge through the lens of the Youngstown analysis——

Senator LEAHY. Okay. Have you thought of a case where a court has said a President could ignore a law that was on the books?

Judge GORSUCH. Senator, sitting here——

Senator LEAHY. Just think of one offhand.

Judge GORSUCH. I cannot think of one off hand, Senator.

Senator LEAHY. Thank you. Neither can I.

Judge GORSUCH. Yes.

Senator LEAHY. Now, the architect of President Trump's Muslim ban has declared that there is no such thing as judicial supremacy, and the powers of the President to protect our country "are very substantial and will not be questioned." It was felt that he was signaling that the President could ignore judicial orders.

Any President, do they have to comply with a court order, assuming—I mean obviously they could appeal one. But assuming it has been upheld, do they have to—do they have to comply with it?

Judge GORSUCH. That is the rule of law in this country, Senator Leahy. And Presidents for a long time have said all sorts of things like that. President Jefferson said things like that.

Senator LEAHY. Well, we are not—he was——

Judge GORSUCH. President Jackson——

Senator LEAHY. He was slightly before my time.

[Laughter.]

Voice. Just slightly.

Judge GORSUCH. But Presidents say these things, right, Congress says things, and then judges decide. And that is the way our system works. And, Senator, all I can commit to you, again, is I am a judge now. I take that seriously, and you had better believe I expect judicial decrees to be obeyed.

As I said yesterday, a wise old judge, who you are going to hear from tomorrow, one of my heroes says that "The real test of the rule of law is where a government"—government—"can lose in its own courts and accept those judgments."

Senator LEAHY. Well, I believe in the rule of law, too. That is why I have stayed on this Committee for decades. When I took my oath before the Vermont Supreme Court when I was sworn into the Bar, I took it very seriously. I did with our Second Circuit Court of Appeals and our Federal courts. And when I was sworn into the U.S. Supreme Court Bar, I took that very seriously. I believe that ultimately we are a country of laws, and we should follow them.

Now, speaking of which, yesterday we discussed the relevance of what our Framers meant in the Constitution, and many feel they wanted to prevent a President from being corrupted by foreign governments. Obviously, I am referring to the emoluments cause. What is the purpose of the emoluments clause?

Judge GORSUCH. The emoluments clause, Senator, is not a clause that had attracted a lot of attention until recently, but——

Senator LEAHY. Well, but Governor Randolph in the 1787 Constitutional Convention pointed it out.

[Laughter.]

Senator LEAHY. I mean, if you want to go back to Jefferson, I will go back to Randolph.

Judge GORSUCH. I am with you. And among other things, it prohibits Members of the Government of this country from taking emoluments, gifts from foreign agents. And the question is, what exactly does that mean, and that is a subject on which there is ongoing litigation right now, Senator, I believe, certainly threatened litigation, impending litigation. And I have to be very careful about expressing any views.

Senator LEAHY. Well, what Randolph said, it was done in order to exclude corruption and foreign influence, to prohibit anyone in office from receiving or holding any emoluments in foreign states. Now, you are hesitant to discuss it. You would not be hesitant to discuss the Fourth Amendment or the Fifth Amendment, would you?

Judge GORSUCH. Well, I am hesitant to discuss any part of the Constitution to the extent we are talking about a case that is likely to come before a court, pending or impending. And I do think that the emoluments clause has sat in a rather dusty corner for a long time until recent headlines, and I know that there are cases that are at least impending in that area.

I would be happy to try and talk about things that are not likely to come before me, but I cannot——

Senator LEAHY. Well, let me ask you this. Then what does the Constitution say a President must do if he or she receives a foreign emolument?

Judge GORSUCH. Well, Senator, that is a—that is a good question. I do not believe it has been fully resolved.

Senator LEAHY. Well, I think it is kind of easy. The clause prohibits receipt of any emolument without the consent of the Congress.

Judge GORSUCH. Right.

Senator LEAHY. Now, you are a judge. As I said yesterday, I am a lawyer from a small town in Vermont. But if it says they cannot receive any emolument without the consent of the Congress, is the answer not pretty simple what a President must do if he or she receives a foreign emolument? They have to get the consent of the Congress.

Judge GORSUCH. Sure. I thought you were asking what would be the remedy if they violated it.

Senator LEAHY. Oh no, I am asking what they have to do.

Judge GORSUCH. You are absolutely correct. Of course, Senator.

Senator LEAHY. I appreciate that.

Judge GORSUCH. Well, no, you have read the——

[Laughter.]

Senator LEAHY. I understand your concern, and I appreciate it as a judge——

Judge GORSUCH. I know you do.

Senator LEAHY [continuing]. Answering questions about any pending litigation. But you have been very hesitant to even talk about various Supreme Court precedents. I know that Chief Justice Roberts, when he was before us, he said he agreed with *Griswold* and *Brown*. Justice Alito said he agreed with *Hamdan* and *Eisenstadt*. So, we have had Justices nominated by Republican

Presidents who have been willing to discuss past precedent. I was just kind of hoping you would be as transparent as these prior nominees were.

During the campaign, President Trump promised to appoint judges very much in the mode of Justice Scalia. Now, he had every right to say what he wanted. He could have picked anybody. The Vice President said you two are cut from the same cloth. But Justice Scalia was a friend of mine. He was an intelligent, influential jurist. I voted for him, in case people wonder, and not just because we both have Italian ancestry.

But his interpretation of the protections afforded by the Constitution left our most vulnerable communities out. Do you agree with Justice Scalia's characterization of the Voting Rights Act as a perpetuation of racial entitlement?

Judge GORSUCH. Senator, the Voting Rights Act was passed by this body during the civil rights era in order to protect civil rights.

Senator LEAHY. Well, it was also updated just a few years ago during President George W. Bush's tenure.

Judge GORSUCH. In 2006 it was reauthorized with the support of the President, that is right. And that is true, and it is designed to protect the civil rights of Americans.

Senator LEAHY. But do you agree with Justice Scalia's characterization of it as a perpetuation of racial entitlement?

Judge GORSUCH. Senator, I do not speak for Justice Scalia. I speak for myself.

Senator LEAHY. Okay. So, with that, others who—you know, there was a lot of people who—in the Administration described who have described you are. One of the reasons we have these hearings is so the American people and this Committee can determine better who you are. And that is why I have not—I made it very clear I will be here at the hearing and make that determination, because I was concerned——

I know that Steve Bannon was a strong advocate for your selection. And with all due regard to Mr. Bannon, he is well known for giving a platform to extremists, and misogynists, and racists. At the CPAC conference a few weeks ago, both Mr. Bannon and Reince Priebus praised your nomination. And I would ask consent that a report of that be included in the record.

Chairman GRASSLEY. Without objection, your article will be entered.

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

Senator LEAHY. And Mr. Priebus said you have the vision of Donald Trump, and by nominating you, Donald Trump was talking about a change in potentially 40 years of law, suggesting you are coming in here as a Trojan horse. What vision do you share with President Trump?

Judge GORSUCH. Senator, I mean no disrespect to any other person in saying they do not speak for me, and I do not speak for them, you know. I have great admiration for Justice Scalia, as we have talked about. I have admiration for every Member of this Committee, and for the President of the United States, and for the Vice President of the United States. But, respectfully, none of you speaks for me. I speak for me.

I am a judge. I am independent. I make up my own mind.

Senator LEAHY. Well, the reason I asked, Mr. Bannon, Mr. Priebus, and the President had closed-door interviews with you, and in these things, including this material I just put in the record, they promised their donors a nominee that would bring a pro-corporate, socially conservative agenda to the Court. Are you saying they are speaking for themselves, not for you?

Judge GORSUCH. I am.

Senator LEAHY. Thank you. In your view, in the Constitution it speaks about high crimes and misdemeanors. What kind of conduct does that include?

Judge GORSUCH. Well, Senator——

Senator LEAHY. We have talked about the Founders. They put that in, so——

Judge GORSUCH. I think, you know, classically we have talked about felonies that have been typically what this body has impeached individuals for. There have been a variety of cases involving sadly Federal judges, as well as Presidents, as well as a Justice attempt. And usually it has been more along the high crimes rather than the misdemeanors.

Senator LEAHY. We would—I would assume that you would not think of a misdemeanor in the sense that we have like traffic violations, going through a stop sign or something like that. That is a misdemeanor. But would you accept that is probably not what is meant in the high crimes and misdemeanors?

Judge GORSUCH. I would not want to issue an opinion on that without the full judicial process, Senator.

Senator LEAHY. All righty.

Judge GORSUCH. I do not know. I know misdemeanors in 1789 looked a lot different than misdemeanors today. We have a lot more criminal law today and a lot more misdemeanors today than we did back then. I can say that.

Senator LEAHY. I am going to start—I am going to start driving more carefully. Thank you, Mr. Chairman.

[Laughter.]

Chairman GRASSLEY. Senator Hatch.

Senator HATCH. Judge, I have only been around here 40 years, and I have seen an awful lot of great people in the law come before this Committee. And I have not seen anybody any better than you. I am very—I am very proud of—go ahead.

Chairman GRASSLEY. Can you talk louder?

Senator FEINSTEIN. You have to—the mic is not carrying you.

Senator HATCH. I am very proud of you and the service that you are giving to our country. There is no question that any fair observer would say how lucky we are to have you nominated by whomever to be a Justice on the Supreme Court of the United States of America.

I held the highest rating an attorney could have when I was a partner in a Pittsburgh law firm. In Utah, I held the Martindale-Hubbell AB rating. These are ratings, as you know, given by your peers without your knowledge. And I have to say that I have been around here 40 years, and I have seen all kinds of judges come before this Committee, and there have been a number of great ones. And you, sir, are one of the great ones, and I am proud of you.

But I knew that before you came here to testify, but now that you are testifying, it even reinforces that opinion in my mind. And why anybody in this body would vote against you, I will never understand. Admittedly, you are of a different political persuasion perhaps than some of my friends on the other side, but I have supported people who are totally different from my political beliefs. And all I can say is that, you know—and I have refused to support some people, too.

But, my gosh, you know, let me just go into this. I am troubled by the suggestion that skepticism of *Chevron*, the *Chevron* case somehow means that one is somehow reflexively opposed to regulation. In my mind, such a charge is completely unfounded. After all it is important to remember that the *Chevron* deference first flourished as a reaction against liberal judges overturning the articles of the—or the actions of the Reagan Administration.

And many of my colleagues on the other side of the aisle have now suddenly rediscovered the importance of the Constitution's limits on Executive power, something they were conspicuously silent about when President Obama was in office, but are now quite enthusiastic about that now that a Republican is in the White House. And I find it surprising that they do not appreciate how *Chevron* impedes an independent judiciary's ability to hold the executive branch accountable to the law.

Now, Judge Gorsuch, do you think your writings reflect a kneejerk attitude against common sense regulations?

Judge GORSUCH. No, Senator.

Senator HATCH. I do not either, even if you did not like those regulations. Is that fair?

Judge GORSUCH. Senator, I have enforced all manner of regulation that is lawful without respect to my personal point of view.

Senator HATCH. And sometimes you do not like some of them.

Judge GORSUCH. Senator, whether I did or did not is not material.

Senator HATCH. Well, I kind of would like to hear, though, even so. That is okay.

In addressing the *Chevron* issue, many are invoking the importance of relying on scientific expertise. But despite how some are mischaracterizing the issue, *Chevron* deference is not the same thing as respecting the judgments of experts on technical matters, but rather about how to handle questions of law, questions on which judges themselves are experts. Nor does the issue of judicial deference call into question how much authority Congress can or should give agencies and their experts to write regulations.

Now, Judge Gorsuch, would you mind explaining the difference between all of these issues for those who may not be experts in administrative law?

Judge GORSUCH. I would be happy to, Senator.

Senator HATCH. Okay.

Judge GORSUCH. Section 706 of the Administrative Procedures Act says basically two things, and I am paraphrasing. It says the courts are supposed to defer to the factual findings of agencies. So, to the extent you are talking about expert biologists, chemists, whatever manner of regulatory expertise we are talking about there, the courts are to defer to that and to take that seriously.

And we do, just as we would, say, the factual finding of a jury or a District Court Judge that comes to us with a presumption of correctness. Clear error standard of review, very hard to meet.

Section 706, however, also goes on to say that when it comes to questions of the law, the courts are to interpret the law. Despite that command from this body, the courts have created a doctrine that says that if there is any ambiguity in the law, the agency gets to make the decision about what the law means.

And I have questions about that doctrine. I have raised questions about whether that is compatible with the plain language of Section 706 and the instruction of this body. And I have raised some questions that arise in a case that I actually had to deal with and how it would impact people, real people, if agencies can change the meaning of the law back and forth every 4 years, depending upon the outcome of an election.

For example, what happens when some individual—I am not worried about large corporations here honestly, Senator Hatch. They have got armies of lawyers, lobbyists. They can predict which way the wind is drifting in the agency. Sometimes they can capture the agency. I am worried about the ordinary American, and sometimes even the non-American.

The case happened to involve an undocumented immigrant. That is the case I actually dealt with, and there he faced two competing statutes. One said he could rely on and seek permission to remain in the country from the Attorney General and get immediate discretionary relief. The other statute said he had to wait out of the country 10 years.

Our court interpreted the law as Section 706 says we are supposed to, and said the first statute controls because there was an apparent conflict between the two, and said he could rely on the opportunity to seek immediate discretionary relief. He did in reliance on that judicial precedent.

Then the agency comes in years later and says we are wrong. *Chevron*. Sprinkle *Chevron* on it. We have to overturn our decision, and he has to leave the country, and wait not just 10 years now, but 13 or 14, or whatever it was. And to me, that raises questions not only about the consistency with Section 706 and the instructions that Congress has given us, but due process and fair notice.

If the law can change so easily, not through bicameralism and presentment to the President—bicameralism in this body, passage of both houses, presentment to the President—the order specified for law making in the Constitution. If the law can change so easily as that, where is the due process to the individual, the person who does not have an army of lawyers? How is he supposed to figure that out?

What about the equal protection problems when you allow an agency to pick and choose unfavored targets for changes in law? They do not have to go through bicameralism and presentment. They can pick their targets with more or less impunity, the least amongst us, the most vulnerable, the little guy, if you will, the person without the lobbyists.

And then, what about the separation of powers? I thought that judges were supposed to say what the law is. I thought that is what Justice Marshall said. And I thought the point of having

judges decide the law is because you want someone who is neutral and independent to say what the law means, someone who does not have a dog in the hunt.

So, those were the questions I raised in that case. I did it as a Circuit Judge because part of my job as a Circuit Judge is to identify problems that I see for my bosses.

So, Senator Hatch, that is a long-winded answer, and I am sorry for it, but I hope it is helpful.

Senator HATCH. I liked it. I liked it. I think, again, perfect illustration of why you should be on the U.S. Supreme Court. And while they may sound like legal technicalities, I think it is incredibly important that we distinguish questions of law, questions of fact, and questions of the wisdom and constitutionality of agency authority, which I think are being confused and conflated to suggest that reining in *Chevron* somehow represents an attack on the role of experts in developing sensible safeguards that keep us healthy and safe. So, I appreciate purchase your comments.

In previous exchanges, a number of my colleagues have brought up your work on some of the very difficult issues that you have dealt with while you were a lawyer in the Justice Department. And while I appreciated your answer, I wondered if I could describe the responsibilities—if you could describe the responsibilities of a government lawyer just a bit more.

In particular, I would like to hear you briefly spell out your understanding of the difference between policymaker and advocate as well as a distinction between how a lawyer might be called upon to give a different type of evaluation of the law as an executive branch lawyer and as a judge or Justice. I just do not want you to get unfairly tagged with the legal and policy views of an Administration that you personally might not share. So, I would like you to take some time and explain that.

Judge GORSUCH. Senator, as lawyers we play different roles in different places in our lives, and depending upon who our client is at the time. As a private lawyer, I represented plaintiffs and I represented defendants. I represented large corporations. I represented individuals in class actions and pension funds—public employee pension funds, CalPERS, for example. I represented hospitals, doctors, victims, defendants.

So, where you stand as a lawyer changes. You are someone's voice. You are your client's voice. So, that is in private practice what a lawyer does consistent with the rules of ethics and the law of the land as best they can. And often those are hard things because your client's interests always butt up against another person's.

And sometimes I ask whether our rules of ethics are all that great. One of our rules of ethics, when talking about the zeal a lawyer should exhibit, says that a lawyer does not have to engage in offensive tactics. Well, how is that for a professional promise? We do not have to engage in offensive tactics. I do not know. Only a lawyer could love that.

At any rate, moving to government practice, there are policymakers who are the clients. The President of the United States, the Attorney General, the Cabinet officials, they are the policymakers. The role I served in was in a litigation capacity supervising cases

and controversies, civil lawsuits involving the United States as my client. I was in the role of an advocate in those cases.

As a judge, you put that aside. You put aside all the stuff you did as plaintiff or defendant in private practice, all the stuff you did as a government lawyer, and you only have one client now, the law. You wake up every day, and you just try and get it right as best you can.

And Justice Jackson is who comes to mind here to me. He was—he was one of the finest and fiercest advocates of his day, and one of the fiercest advocates of Executive power when he was Attorney General of the United States during the New Deal for Franklin Delano Roosevelt. When he became a judge, he also became one of the fiercest critics of Executive power as a judge, because he knew the difference in the roles that we serve. And he said, "A robe changes a man or should."

And I believe that, and I have seen it. I have seen so many fine lawyers go on to be very fine judges and put aside their personal points of view, or their clients' perspectives, or which side of the V they served on, or what sort of client they served, and become neutral, fair judges. At least that is what I have aspired to be for the last 10 years.

Senator HATCH. Well, and I think you have accomplished that, too. Judge, yesterday, Senator Sasse spoke to you about the need to teach civics to our fellow citizens, and especially to the younger generation. And I hope that this hearing is contributing to that because perhaps the most prominent theme this week has been the separation of powers. Now, you said yesterday, and I agree, that the separation of powers is critically important, but seems to have gotten lost today.

Now, Judge, judges do not exist and work in a vacuum doing whatever they want to do. They exist and work as part of a system of government, and, therefore, must do what they are supposed to do. The role of judges in that system is by design, and that design has a purpose described in the Constitution's preamble as including securing the blessings of liberty. Our liberty requires that each separated branch of government stick to—stick to its job.

That is why I think one of the most important things you said yesterday was this: "It is not my job to do your job." I thought that was pretty neat for you to say that. So, let me ask you to expand on that simple statement, if you would.

Judge GORSUCH. Senator, we all have roles to play. When we choose to take up a role in our Government, we all have a particular place in it, and we have to respect the boundaries of it. And it is my job to respect in part the boundaries of this branch, and not engage in the temptation to legislate through the cloak of a judicial robe. Judges would make very poor legislators.

Senator HATCH. Well, sometimes legislators make very poor legislators, too.

[Laughter.]

Senator HATCH. I have seen a few.

Judge GORSUCH. I respectfully disagree, Senator.

[Laughter.]

Judge GORSUCH. I have great, great respect for this body, and I know——

Senator HATCH. I did not say all.

[Laughter.]

Judge GORSUCH. I know in our civic culture today there is a great pessimism about our Government. I do not share that. I think this body still works, and I think it is important and vital that it work, because it is the people's voice. It is people's representatives. It is where lawmaking is supposed to occur. And for you to do your job, it is important that I do not do your job. It is important that I do my job and let you do yours.

If judges became legislators, we would be bad at it, and we would absolve you from your responsibilities. You could wash your hands of it. It sounds like some might want to do that. I do not know. You are smiling. But, respectfully, I am poorly equipped. I am not—I am not a representative of the people. I am not answerable to the people, and I do not have the expertise of your wonderful staffs are sitting behind you.

My job is to decide cases, and I really—I am okay at that on a good day, right? I am never going to be good at your job, and I need to respect that. And I need—it is also very important for legislators to respect that we do what we do, and that we do not run campaigns, and we do not make promises about how we rule in cases and controversies that come before us. That is part of the mutual respect for the separation of powers.

Senator HATCH. Well, you have cited Justice Robert Jackson several times. In fact, he once occupied the seat to which you have been nominated. In 1953, he lamented what he considered a widely held belief that the supreme—that the Supreme Court, "no longer respects impersonal rules of law, but is guided by personal impressions which from time to time may be shared by a majority of Justices."

One recent poll showed that three-quarters of Americans believe that Supreme Court decisions are influenced by the Justices' personal political views. Is this not what we are really talking about, and what the approach called originalism is really all about? Should judges not base their decisions on impersonal rules of law rather than their own personal impressions?

Judge GORSUCH. Senator, I am here to testify to you that is not how I see our judicial system operate.

Senator HATCH. Yes.

Judge GORSUCH. We resolve hundreds of thousands of cases every year in the Federal system, almost all of them, as I say in the Tenth Circuit, for example, unanimously. It is a remarkable thing that even when we get to the Court of Appeals, only 5 percent of all cases get so far as my court, and even then, of those over the last 10 years, we have been unanimous 97 percent of the time in the cases I have participated in.

That is a wonder. That is an amazing accomplishment. That is the rule of law in this country. And too few people know how it actually works, and if they did, they would be heartened.

Senator HATCH. Thank you Judge. I appreciate your comments.

Chairman GRASSLEY. Just as soon as I make four announcements, we are going to take a 5-minute break.

First of all, I want to enter into the record a *Washington Post* op-ed by two former Chief Judges of the Tenth Circuit, Judges

Tacha and Henry, entitled "Gorsuch is the Kind of Judge Our Framers Envisioned."

Without objection, that will be entered in the record.

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

Chairman GRASSLEY. Second, my plan is to, in consultation with Senator Feinstein, to take a break around 12:30, whoever is just ready to start about that time or just finishes around 12:30, and it will be a half hour. And then, I would like to have any Member who wants a third round to let us know ahead of time so we can kind of plan what we are doing after we get done with this second round we have. I hope there is not too many that want to do that, but if they do we want to be respectful of everybody to ask all the questions that they can before we finish tonight.

And then now, Judge, we are going to take a five-minute break, but because I was late in announcing this, Senator Durbin has come back from another Committee meeting, and he is the next one up. So, I want to have it just be 4 minutes and 59 seconds.

Judge GORSUCH. Yes, sir.

Chairman GRASSLEY. Recess.

[Recess.]

Chairman GRASSLEY. Senator Durbin, it is your turn now.

Senator DURBIN. Mr. Chairman, I ask consent to enter into the record seven articles relative to this hearing.

Chairman GRASSLEY. Without objection, your articles will be entered in the record.

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

Senator DURBIN. Thank you.

Judge Gorsuch, I sat here yesterday for hours, not nearly as many hours as you sat here, until I reached the point where I could finish your sentences and complete your answers before you.

My Republican colleagues assumed the well-known courtroom strategy of never asking a question that could hurt their witness, and made every effort to humanize you so that we know your love of fly fishing and rodeos and family. I know that Senatorial assignment. I have been there myself.

So the Democrats on the Committee pressed you for answers to harder questions and tried to peel back your professional and carefully guarded persona so that we might understand whether there is any chance there is a beating heart and an independent streak in Donald Trump's most important decision of his nascent presidency.

We were given this public hearing to develop an insight into what it was that made your record so attractive to the Federalist Society, to the Heritage Foundation, and to President Trump.

You fended off most questions of substance, so we turned to your written opinions. I am sure the press and public are puzzled out there why we spent so much time talking about a truck driver named Alphonse Maddin, who was fired and blackballed from ever driving again because he was faced with what Senator Franken correctly called an absurd choice of freezing to death or endangering the lives of innocent motorists by driving a disabled truck on the interstate.

Many of us still cannot understand how seven judges could look at those facts and the law in the case and only one, Judge Neil

Gorsuch, come down on the side of the trucking company that fired him.

Now we have another question that has been raised, and it relates to the Individuals with Disabilities Education Act. It is a landmark law. It mandates access to public education for students with disabilities.

The National Education Association took a close look at your record in these IDEA cases. They found that in eight of the 10 cases to come before you, you ruled against students with disabilities.

Furthermore, in one of the two cases in which you sided with the student plaintiff, you wrote a concurring opinion "expressing your personal belief that IDEA provides only limited rights to students with disabilities."

That pattern is troubling. Your opinion in *Thompson R2–J School District v. Luke P.*, in this case, a school district appealed the District Court's ruling that the district failed to provide a severely autistic child with the educational services guaranteed to him under IDEA.

The court ordered the school district to reimburse the cost of a private residential school placement for the child. The District Court relied on the expert testimony of autism specialists, psychologists, and occupational therapists to reach that conclusion.

They reached the conclusion: "The nature of *Luke's* problems required a residential placement," and "that the reinforcement and consistency *Luke* needed to make educational progress could not be achieved in a regular school setting at that time."

You reversed this District Court ruling, and in doing so, you rejected not only the judgment of the Federal District Court but also the judgment of a hearing officer and the Colorado State administrative law judge. You asserted that, "The assistance that IDEA mandates is limited in scope" and that it only requires "the creation of an individualized program reasonably calculated to enable the student to make some progress toward the goals within that program."

You also said, directly from your opinion, "From this direction, we have concluded that the educational benefit mandated by IDEA must merely be 'more than de minimis.'"

This morning, the Supreme Court ruled on that standard that you established in the case. Here is what they said in the case of *Endrew F. v. Douglas County School District*, a unanimous decision by the Supreme Court written by the Chief Justice, "When all is said and done, a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to sitting idly . . . awaiting the time when they were old enough to drop out."

The court went on to say, "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

It is a powerful decision. It is a unanimous decision. It was written by the Chief Justice of the Court. It is an issue which we need

to face in America with the incidence of autism and children with severe disabilities.

Why, why in your early decision, did you want to lower the bar so low to "merely more than de minimis" as a standard for public education to meet this Federal requirement under the law?

Judge GORSUCH. Senator, I really appreciate the opportunity to respond to that, because I just saw the opinion. It was handed to me as I was headed to the bathroom a moment ago. I guess it was just handed down.

Let us start with the *Luke P.* case and work forward from there.

Luke P. was a unanimous decision by my court. It included on the panel of three judges an appointee who happened to be appointed by a Democrat President. There was no dispute in my court about the applicable law, and there was not because we were bound by Circuit precedent, a case called *Urban v. Jefferson County*, 1996, that said that the appropriate standard was de minimis. The educational standard had to be more than de minimis.

That is the law of my Circuit, Senator. And I have been asked an awful lot about whether I abide precedent and whether I always like the results that I reach. Here is a case for you.

Senator DURBIN. But I might——

Judge GORSUCH. Senator, if I might finish——

Senator DURBIN. Sure. Of course.

Judge GORSUCH. I would appreciate the opportunity to finish this.

If anyone is suggesting that I like a result where an autistic child happens to lose, it is a heartbreaking accusation to me, heartbreaking.

But the fact of the matter is, I was bound by Circuit precedent and so was the panel of my court and had been bound for about 20—well, 10 years by the standard in *Urban v. Jefferson County*.

Now, Senator, there are other cases where, again, unanimously, my court had ruled for children with disabilities under this law. *The School of Deaf and Blind*, another *Jefferson County* case, are examples where I joined, participated, or wrote in IDEA cases for the family under our binding standard.

I understand today that the Supreme Court has indicated that the Urban standard is incorrect. That is fine. I will follow the law.

Now, sometimes—I think it was Justice Jackson who said just because I made a mistake unknowingly yesterday does not mean I should make a mistake knowingly today. I would invoke him here.

I was wrong, Senator. I was wrong because I was bound by Circuit precedent, and I am sorry.

Senator DURBIN. I want——

Judge GORSUCH. I am going to try to apply the law, and I can tell you that we were doing it unanimously in all of those cases.

And the Supreme Court is our boss, and we respect their last word. They are final.

Senator DURBIN. Judge, in 8 out of 10 cases that came before you, you ruled against the students with disabilities. And the difference——

Judge GORSUCH. I am sure they were unanimous panels, Senator, if you look.

Senator DURBIN. And the difference in this case—the difference in this case is about a word. We know that words are important, and they can make a critical difference in a person's life. You can ask Alphonse Maddin that question.

The word that you inserted into the Circuit standard when it came to these cases was "merely"—"merely." I would say most people reading that would say you have pushed the de minimis statute even further down the standard pole. And it was that word, "merely more than de minimis," that was specifically overruled by the Supreme Court.

So my question to you is, if you wanted to just stick with Tenth Circuit precedent, you felt your hands were tied, why would you add the word "merely" to modify that?

Judge GORSUCH. Senator, all I can say is what I have said to you before, which is a unanimous panel of the Tenth Circuit following 10-year-old Circuit precedent, including a Democrat colleague—I do not view my colleagues as Democrats or Republicans—followed our Circuit precedent.

And these cases have been decided unanimously, I think all of them, if I had to guess, that you are pointing at.

And to suggest that I have some animus against children, Senator, would be mistaken.

Senator DURBIN. Judge, please. I am not suggesting that. You were——

Judge GORSUCH. I am glad to hear it.

Senator DURBIN. What I am basically saying to you is I can only look at your court opinions, the words you write, because, like many nominees, you are careful in your testimony before us, and we have to look at your words and try to look into your heart with these words.

And when I look at that word "merely," it troubles me. Do I believe you love your family and love children? Of course you do.

But when it comes to applying the law to a truck driver blackballed for life from driving a truck, when it comes to applying the law when it comes to a family—I cannot imagine the pain they are going through with an autistic child—I want to try to understand what Neil Gorsuch's heart is leading him to.

You told us time and again: No place for my heart here. This is all about the facts. This is all about the law.

I do not buy that. I do not think that the decisions of courts are so robotic, so programmatic, that all you need to do is look at the facts and look at the law and there is an obvious conclusion. If that were the case, there would never be a dissent.

Judge GORSUCH. Senator, there was no dissent in that case.

Senator DURBIN. Well, in other cases, there have been dissents, and you have written them. And the point I am making to you, like the case with *TransAm*, is were looking for an insight into your values and your judgment, and it is hard in this kind of hearing to get close to it.

Let me take you to an issue I raised yesterday about your mentor and supervisor at Oxford, Professor Finnis, who, as I understand it, helped you write your doctoral—or at least moderated the—I have never gone through this experience—the writing of your doctoral thesis, which led to the publication of a book on euthanasia.

Is that correct?

Judge GORSUCH. Senator, he was my dissertation supervisor. He wrote none of my book. And I have written none of his work.

Senator DURBIN. Would you say he gave you kind support through draft after draft?

Judge GORSUCH. Absolutely.

Senator DURBIN. That is exactly what you said.

Judge GORSUCH. As every good dissertation supervisor would do.

Senator DURBIN. So I guess what I am driving at is this. There is a statement which you made in that book, which has been often quoted, and I want to make sure that I quote it accurately here today.

Give me just a moment to make sure I find it. It relates to the taking of life. I am sorry, I am having difficulty finding it on this page.

And I quote, "The intentional taking of human life by private persons is always wrong."

That was a statement that you included in your book, correct?

Judge GORSUCH. I believe so.

Senator DURBIN. I believe so, too.

How could you square that statement with legal abortion?

Judge GORSUCH. Senator, as the book explains, the Supreme Court of the United States has held in *Roe v. Wade* that a fetus is not a person for purposes of the Fourteenth Amendment, and the book explains that.

Senator DURBIN. Do you accept that?

Judge GORSUCH. That is the law of the land. I accept the law of the land, Senator, yes.

Senator DURBIN. I think that is an important element to bring in this, because when you were questioned by Senator Coons about this whole area and asked why you would express an opinion, you said: I was not a judge at the time. I was a commentator.

So that is another brief opening of a narrow door here to an insight into what you are thinking, and I wanted to have some clarity on the record when it came to that.

Judge GORSUCH. Sure.

Senator DURBIN. Thank you for that clarification.

Let me ask you about the Sixth Amendment. In 1961, Clarence Earl Gideon, accused of stealing money from a poolroom cash register in Panama City Florida, asked for a lawyer. His request was denied. He represented himself and was sentenced to 5 years in prison for petty larceny.

He took his case to the Supreme Court, which held unanimously that the Sixth Amendment entitled Clarence Gideon to a lawyer. In 1963, the retrial took place, and then, represented by counsel, Mr. Gideon was found not guilty.

Judge Gorsuch, do you agree that the Sixth Amendment right to counsel is fundamental?

Judge GORSUCH. As recognized by the U.S. Supreme Court in *Gideon v. Wainwright*, Senator, yes.

Senator DURBIN. Have you ever written an opinion finding that a defendant's Sixth Amendment right to effective assistance of counsel was violated?

Judge GORSUCH. Oh, I am sure I have, Senator.

Senator DURBIN. You have authored 52 opinions that discuss the Sixth Amendment generally, according to the Stanford Law Review. In none of these did you find that an attorney provided ineffective assistance of counsel in violation of the Sixth Amendment.

Further, according to the Stanford Law Review article, you have dissented four times in a Sixth Amendment context, each time with reasoning that favored the Government.

I am concerned whether you appreciate the importance of this fundamental right. Let us take the 2009 case, *Williams v. Jones*.

Mr. Williams was offered a plea agreement of 10 years. His lawyer threatened to quit if he accepted the agreement. He advised Mr. Williams, if you took a deal and pled guilty, that would be perjury.

That was clearly a false statement by his lawyer. Mr. Williams relied on that misinformation from his lawyer. He lost at trial and was sentenced to life in prison without possibility of parole.

When *Mr. Williams'* case came to the Tenth Circuit, you were the lone dissent. Your colleagues, Judges Kelly and McConnell, both Republican appointees, disagreed with you. And then, in 2012, the Supreme Court disagreed with you too.

In *Lafler v. Cooper*, Justice Kennedy wrote the opinion holding that, prejudice can exist, "if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."

The Supreme Court noted that 97 percent of Federal convictions, 94 percent of State convictions, end in guilty pleas. So the accused, even before a trial, must have the competent guidance of an attorney in deciding whether to take a plea deal.

In light of *Lafler v. Cooper*, please tell me what you feel about your lone dissent in *Williams v. Jones*.

Judge GORSUCH. I would be happy to.

So, Senator, under the Sixth Amendment Strickland test, before you reverse a conviction or a plea deal, you have to find two things. First, you find whether there is ineffective assistance. But that is only part of the equation because the Supreme Court, Justice O'Connor, said we do not reverse where there is no prejudice. So you have to show prejudice as well, ineffective assistance plus prejudice, before reversal occurs.

So oftentimes, you will have cases where there was ineffective assistance. But at the end of the day, you cannot say there was a harm or a foul.

Now, that is a counterfactual hypothetical that you have to ask yourself, and it is a hard question.

Senator DURBIN. Did you feel there was ineffective assistance in the *Williams v. Jones* case?

Judge GORSUCH. In *Williams v. Jones*, the question was one of prejudice, in my mind, as I recall.

Senator DURBIN. You said there were two tests. I asked you about the first one. Did you feel that this defendant had ineffective legal assistance?

Judge GORSUCH. I do not recall what I said on that subject. What I do recall saying is, whether there was or was not ineffective assistance with respect to providing the plea deal, communicating it

to the client, the gentleman had a fair trial, and he had what everybody admitted was a full and fair trial. And——

Senator DURBIN. But that was not the point of the case, not in that case or in *Lafler*. And the facts on ineffective assistance are clear.

His lawyer threatened to quit if the defendant accepted the plea agreement and advised his client that, if he took a deal and pled guilty, that would be perjury. That was false.

That is, in my mind, prima facie ineffective assistance.

Was there a prejudice? Oh, I think there was. A choice between a plea deal of 10 years or life in prison?

Judge GORSUCH. And, Senator, the question was whether there is prejudice in light of a fair trial that took place, and that was the question that the court had to consider.

I accepted—I think I accepted that there was deficient performance or ineffective assistance. And the question was one of prejudice.

And the Sixth Amendment is about a fair and free trial for all individuals. And this gentleman, by everyone's admission, had one. He admitted he had a fair trial.

Senator DURBIN. But that is not the point.

Judge GORSUCH. And so——

Senator DURBIN. The point is——

Judge GORSUCH. Well, that was question.

Senator DURBIN [continuing]. That he was misled by the incompetence of his counsel to turn down a 10-year plea deal, misled, led to trial, which might have been fair on its face, and a life sentence at the end of the day.

And the Supreme Court clearly—you were the lone dissenter in that case at the Circuit level.

Judge GORSUCH. Yes.

Senator DURBIN. The Supreme Court clearly decided that you were wrong, with Justice Kennedy's opinion that I read.

Judge GORSUCH. It was a 5–to–4 decision by the U.S. Supreme Court——

Senator DURBIN. And the point——

Judge GORSUCH. A closely divided decision. And you are absolutely correct that Justice Kennedy wrote for the majority and said that, in the context of a plea deal, even if there is a fair trial, prejudice will be presumed on the basis of a plea that might have been accepted, could have been accepted, that could have averted a fair trial.

And that is the standard, Senator. And since the Supreme Court has announced it, I have faithfully applied it.

Senator DURBIN. Thank you.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Now Senator Cornyn.

Senator CORNYN. How are you doing, Judge?

Judge GORSUCH. I am doing fine. Thank you. Great.

Senator CORNYN. I think you are. I think you are. It has been an endurance test, I know. But I think you are doing fine.

Let me just join the Chairman, Senator Grassley, in saying that I hope you really will take a look at cameras in the courtroom.

You know, a camera like this one, hidden behind a facade with just a lens protruding that does not move around the room and just reflects what is happening before the court, I think would serve a similar educational role, would be enlightening to a lot of schoolkids and adults and others as to how our judiciary actually functions. And I think they may find out how boring some of the cases are, if you are interpreting the Internal Revenue Code or something like that. But I think just as I hope people have been enlightened and educated by this hearing, at least some of it, I think there is a lot that people would learn and benefit from in terms of the role that the judiciary plays in our Government.

And so I would just ask you to—and you have already committed to doing this—keep an open mind and take a look at that. I think there are plenty of examples of State Supreme Courts, for example—I can think of one, in particular, that has a fixed camera there that people do not play to, people just do not even know is there, that would be very helpful to our general awareness of, again, the role that the Supreme Court plays.

So, enough about that.

So you participated in 2,700 or so decisions?

Judge GORSUCH. Yes, Senator. More than that.

Senator CORNYN. And how many cases have you been asked about here?

Judge GORSUCH. A few.

Senator CORNYN. That is my impression as well. I can think of maybe less than five. Of the decisions that you have rendered as a Federal judge over the last 10 years, we are talking about less than five cases.

And that strikes me—I am not criticizing, necessarily, but it strikes me as a little bit of cherry-picking when it comes to your overall record.

And I think you had a discussion with Senator Graham about what the appellate courts have said—or, excuse me, the Supreme Court said about your work, and it is pretty darn good. I think you all were quibbling about whether there was one reversal or none, but I will leave that alone.

Let me ask about the case that Senator Durbin was inquiring about, just handed down from the U.S. Supreme Court, apparently this morning.

You have not had a chance to read that yet, have you?

Judge GORSUCH. It was handed to me on the way to the bathroom.

Senator CORNYN. You have not had a chance to read it. So, neither have we. Neither have we. And so I look forward to reading that. I am sure you do as well.

But in the case that Senator Durbin asked you about that you actually did render a judgment and write an opinion on involving a student with disabilities, that was appealed to the Supreme Court of the United States, was it not?

Judge GORSUCH. I do not recall. You——

Senator CORNYN. Well, we checked it out. It was, and they denied certiorari. And it takes four judges, does it not, on the Supreme Court to grant a writ of certiorari?

Judge GORSUCH. That is right.

Senator CORNYN. And so, apparently, there were not four judges that thought that case merited review by the Supreme Court of the United States.

My point is, if people are going to cherry-pick, and I is speaking generally now, not necessarily just this hearing, if people are going to try to cherry-pick a judge's decisions, and to characterize them as caring or not caring about children with autism or whatever the sympathetic plaintiff would be—and, of course, they deserve our care and sympathy, as a general matter.

But if somebody is going to try to characterize your entire judicial career based on the decisions in these handful of cases when the Supreme Court of the United States has found no fault with them and has basically deferred to the judgment of the Tenth Circuit and your decision, it strikes me that this is kind of an indictment of the whole Federal judicial system. If you can go in and cherry-pick individual cases and talk about how sympathetic the plaintiff is, you are basically saying: Well, I do not believe that the trial was fair. I do not believe the appellate review by the Circuit Court was fair. And I do not believe that the review by the U.S. Supreme Court is fair.

And that strikes me as a radical, radical view. And I am not asking you a question. I am making a statement.

Well, the other thing is, it completely ignores Congress' role. I bet you can answer this question. If Congress had decided to change the standard in the case that Senator Durbin talked about in the intervening time period, would you have followed that new congressionally declared standard?

Judge GORSUCH. Of course, Senator. Absolutely. That is my job, to follow the law that you pass as best we can, to the best of our abilities, consistent with our own Circuit precedent interpreting law.

Senator CORNYN. This is what makes my head explode, that, somehow, we want to blame judges for our failures as Members of the legislature. If we see something we think is an injustice or is wrong, it is within our authority to change it as elected representatives of the American people. Assuming we can get it passed both Houses and signed by a President, we can change it.

So to me, it seems entirely unfair to suggest it is your fault because we did not act in a way that one or more of my colleagues might feel would be more just and more fair and more appropriate.

Let me ask you a little bit—well, first, let me clear up one thing, if I can. Hopefully, I will clear it up, not make it more confused.

Senator Feinstein—who I admire and respect, and she knows that is true—made, I think, a suggestion that, somehow, based on an originalist orientation, that you would say that the Fourteenth Amendment to the United States Constitution somehow applied to men but not to women.

Do you remember that question? Maybe I butchered that a little bit.

Judge GORSUCH. I am not sure that was quite her question, in fairness, and I do not she think she implied that, and I certainly would not.

Senator CORNYN. Well, let me just ask you. You do believe the Fourteenth Amendment applies to all persons, right?

Judge GORSUCH. Of course, by its very terms, its express terms.

Senator CORNYN. So any suggestion that it applied to some but not all persons, you would disagree or reject that?

Judge GORSUCH. The Supreme Court of the United States has made that very clear.

Senator CORNYN. Let me ask you about another topic that was a favorite of Justice Scalia, one that I came to respect, personally.

Now, when you are a practicing lawyer, or even when you are a judge, people talk about legislative history as if it is somehow a mystical and magical thing that will provide the answers to all questions. But Justice Scalia was pretty much critical of the use of legislative history, or I should say the misuse of legislative history, where statutes were ambiguous.

As a matter of fact, my able staff has pointed out one story that he apparently invoked in a 1993 case. You may be familiar with this. He said the use of legislative history is the equivalent of entering a crowded cocktail party and looking over the heads of your guests for your friends.

So when judges use legislative history basically to find a way to confirm maybe even their own bias, or to confirm their outcome in a case, I think Justice Scalia was telling us that is dangerous territory and you ought to enter it with caution. So I would like to have you comment on it.

But also, there was a dissent he wrote in another famous case, *Hamdan v. Rumsfeld*, where he said about the use of legislative history to justify the Court's opinion, he said, "The question," talking about the question in the case, "was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted solely for use in the briefs in this very litigation."

He went on to say, "The handful of floor statements that the Court treats as authoritative do not 'reflec[t] any general agreement.' They reflect the now-common tactic—which the Court once again rewards—of pursuing through floor-speech ipse dixit what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs."

Before you respond, Judge, I just want to mention one other anecdote. Since I have been here in the Senate, I have actually been on the floor of the United States Senate where we vote to pass legislation, and then a Senator comes out and says: And now, for some legislative history.

I was shocked. But with the loose way that courts sometime treat legislative history, that, as Justice Scalia said, can reward bad behavior on the part of the legislature.

So would you now offer us your views on the appropriate use of legislative history and how judges should review legislation passed by Congress where there is some perceived ambiguity?

Judge GORSUCH. I would be very happy to, Senator.

Excuse me.

I would start by saying that a good judge entertains all arguments from all comers. So you read the briefs as presented to you. You do not tell people what they can and cannot argue, generally speaking. There are more and less persuasive arguments to be made, but people get to make their arguments.

I believe in trial lawyers, for example, getting to try their cases, and appellate lawyers getting to argue their arguments and leaving them space and the courtesy and room to do that.

So I do not believe it is my job to tell people how to argue their own cases. It is presumptuous of a judge.

I would say that it is well-known, and I think appropriately so, that the law that governs is what this body passes, in connection with the House of Representatives and signed by the President.

That is the law. That is all that is the law, nothing more and nothing less. And everything else stitched around it is not law. And it may or may not have persuasive value in interpreting and understanding the law, but it is not law.

The Founders in the Constitution prescribed a process for making law, and they made it hard. They made it really hard. That was the part of separation of powers they really believed in. They did not want lawmaking to be easy because they wanted to preserve the liberty of the people. So they divided the lawmaking authority between two bodies, and they required the signature of the President or a legislative override. Tough process. Not the case in every country in the world or even in every State.

So that is what law is. And there are some due process considerations in this area, fair notice considerations in this area, that I take seriously. That we charge people with notice of the law—generally speaking, ignorance of the law is no excuse.

We assume that it is reasonable for the people to be on notice of all 5,000 Federal criminal laws that this body has passed. Is it also reasonable to expect them to know all the floor statements that have been issued about the law, everything that might have been entered into the record but not discussed by unanimous consent?

Is that reasonable? Is that fair notice? Is that due process?

And these are not idle considerations, because, more often than not, we are talking about a criminal statute, and we are talking about whether someone goes to prison, Federal prison, for a long time.

And I have concerns about relying on things that are not law and charging people with notice of things that are not law as a basis for putting them in Federal prison. That is the concern.

So I hope I have addressed your question, Senator.

Senator CORNYN. Well, you have. And Senators and Members of the House of Representatives do not vote on documents. For example, the documents that have been admitted here by unanimous consent that nobody has talked about or perhaps even read, or the floor statements, those are not things that have achieved the consensus, the hard-fought consensus that you talked about legislation having to achieve, and a presidential signature.

So I appreciate your speaking to that.

Just a few other cats and dogs here that I want to go over with you.

The day you were nominated, you spoke about judges looking backward, not forward, in interpreting the law. Now, I think some people have taken that in a negative sense. They view the word "backward" as somehow pejorative.

Those who view history as an inevitable path forward of social progress may incorrectly hear that to mean your approach will not support their goals.

Can you explain what you mean by looking backward and not forward? Can you explain why your approach to the law is not hostile to social progress?

Judge GORSUCH. "Backward" does not mean backward, Senator. The role of the judge is to say what the law is, the great Chief Justice Marshall declared in *Marbury v. Madison*. Our job is to say what the law is.

So, for example, in a criminal case, when we are interpreting a statute and whether it permits a man or woman to be sent to prison, we are charging with knowledge of the law as it was at the time he or she committed his alleged crime. We are saying this is what the law is. This is what it means. This is what it meant at the time you committed a crime.

That is backward-looking. That is what I mean by backward-looking.

We resolve cases and controversies over things that happened in the past, disputes from the past, a crime committed, a breach of contract, a business dispute, a landlord-tenant problem, whatever it may be, it is a case or controversy that, by the time it gets to the Court, is in the past. We are asking what the law was at the time that the events in question took place.

That is our job, and we are saying what the law was, what it is.

Senator CORNYN. Is that another distinction between the role of a judge and a legislator?

Judge GORSUCH. Yes. We look backward, in the sense, in the sense of looking to historic facts in the cases and controversies between the people that have arisen, and saying what the law at that time was, and what they can reasonably be charged with notice of.

Your job as legislators, eh, you are not concerned with history. You are concerned with the future. You are concerned with writing new laws of general applicability that govern our society and our social coordination problems going forward.

Senator CORNYN. Thank you.

Judge, there are some Members of this body who have suggested that you are hiding your judicial philosophy. That was a claim we heard repeated by at least one Member of this Committee yesterday.

But to me, I do not know what they have been listening to and what they have been paying attention to. If that is their conclusion, I do not think they have been paying attention to the proceedings here over the last day and a half or your testimony.

Over the last 3 days, we have heard a description of your legal philosophy and the reasoning behind it time and time again. You discussed, for example, precedents with Senator Feinstein. We heard you discuss the history and legal test of the Religious Freedom Restoration Act with Senator Coons. You and I discussed the importance of faithful adherence to the Constitution and statutes passed by Congress, and you talked about this with Senator Klobuchar as well.

Yesterday, we heard 12 hours of discussion of your decade of judging, your judicial philosophy, which you described in almost,

roughly, well, 2,700 cases, hundreds of which were in published opinions, some not.

So if somebody has arrived at the conclusion that you have been hiding your legal philosophy during your time before this Committee, do you think that is an accurate assessment?

Judge GORSUCH. I would hope no one would reach that conclusion, Senator.

Senator CORNYN. I think no reasonable person would reach that conclusion, based upon what we have all had an opportunity to see and hear this last day and a half.

Thank you.

Judge GORSUCH. Thank you.

Chairman GRASSLEY. I think it has worked out just right for Senator Whitehouse to go ahead, and then we will adjourn for recess for one half hour.

Senator FEINSTEIN. Mr. Chairman.

Chairman GRASSLEY. Yes.

Senator FEINSTEIN. May I ask unanimous consent to make part of the record an interview with Justice Scalia entitled, "The Originalist," in January 2011?

Chairman GRASSLEY. Without objection, so ordered.

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

Senator FEINSTEIN. Thank you.

Chairman GRASSLEY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much, Chairman.

Judge Gorsuch, the state of play after our conversation yesterday, as I recall it, is that you would not say that anonymous billionaire dark money is a bad thing in our democracy, and you would not call on the dark money behind the $10 million political campaign for your nomination to reveal itself.

Now, if I am wrong in that recollection, I just wanted to give you a moment to either amend or correct my recollection of those two points yesterday.

Judge GORSUCH. Thank you, Senator.

I believe what I said yesterday is that Congress is the primary organ for lawmaking in our legal order, and that Congress has ample authority and opportunity to pass campaign-finance regulation, including disclosure laws, that *Buckley v. Valeo* expressly recognizes the power of Congress, especially in the area of disclosure——

Senator WHITEHOUSE. And what I was asking you, just to be clear and to the point, is whether you saw disclosure as an affirmative value in the same way, for instance, that you see reliance interests for corporations on the law as an affirmative value.

Judge GORSUCH. And, Senator, you are mistaken. I never said reliance interests for corporations.

Senator WHITEHOUSE. Reliance interests for parties.

Judge GORSUCH. That is what I said, Senator, and that is because that is the law. In the law of precedent, we look to reliance interests.

And when it comes to the First Amendment——

Senator WHITEHOUSE. There is no statute that says reliance interests. That is judge-made law. That is law precedent.

Judge GORSUCH. That is the law precedent, yes.

Senator WHITEHOUSE. Because judges follow important principles.

Judge GORSUCH. Precedents, Senator. We follow precedent.

Senator WHITEHOUSE. Which are grounded often in principles. There is more to the law than just what Congress declares, is there not? There is the entire devolution of the Constitution into all of the doctrines that the Supreme Court has parsed it into over the years. That is done without Congress, is it not?

Judge GORSUCH. And one of the precedents of the U.S. Supreme Court—if you want to call it a principle, I am not going to argue with you—in *Buckley v. Valeo* had to do with disclosure.

And the Supreme Court expressly recognized that, under the First Amendment, Congress and the States, who have actually been busy in this area, as you know, legislating, have the power to pass laws requiring disclosure, up to a point. There comes a point—there is a point that the Supreme Court has also recognized in *NAACP* where disclosure can be used as a club.

Senator WHITEHOUSE. So let us talk about *NAACP* for a minute, because twice you reverted to that yesterday.

NAACP v. Alabama is the case you have in mind when you say that, I believe, correct?

Judge GORSUCH. Yes.

Senator WHITEHOUSE. And it suggests, when you raise that in the context of a conversation about dark money, that you find an equivalence between billionaires meddling secretly in our democracy behind a screen of front groups that they have thrown up to obscure their hands and families in the Jim Crow South whose homes and churches were being bombed, whose sons were being lynched by White mobs in, essentially, mass racist murders across the South but particularly in Alabama, in that State, and where the disclosure of their Membership in the NAACP would have put them immediately into harm's way.

Now, presumably, that is not what you meant.

Judge GORSUCH. Senator——

Senator WHITEHOUSE. Let me give you a chance to clarify that you do not see those two things as equivalent.

Judge GORSUCH. Senator, I never said any such thing, and I would not, and I have not.

Senator WHITEHOUSE. Well, when you cite the *NAACP* case, it is hard not to revert to its facts, which were——

Judge GORSUCH. Yes, exactly.

Senator WHITEHOUSE [continuing]. Which were those.

Judge GORSUCH. Very important facts.

Senator WHITEHOUSE. Yes.

Judge GORSUCH. Every case, every precedent, is built around its facts. That is absolutely right.

Senator WHITEHOUSE. So that may not have much application to the case of billionaires secretly meddling in American democracy behind front groups, correct?

Judge GORSUCH. Senator, if I might?

Senator WHITEHOUSE. Please.

Judge GORSUCH. We were talking about disclosure requirements, as I recall.

Senator WHITEHOUSE. And that is where secretly meddling comes in. That is why I used that phrase.

Judge GORSUCH. I believe we were talking about disclosure requirements and First Amendment doctrine, and I indicated that *Buckley v. Valeo* has given this Congress, if it chooses, the opportunity to pass laws in this area expressly. And all I acknowledged is that there does come a point at which one has to worry at the other end of the spectrum under existing Supreme Court precedent, and that is the *NAACP* principle.

And, Senator, that is it. That is all I have said.

Senator WHITEHOUSE. Great.

Judge GORSUCH. I have not—I have not——

Senator WHITEHOUSE. I wanted to make that——

Judge GORSUCH. And to read anything else into that——

Senator WHITEHOUSE. I wanted to make that clear.

Judge GORSUCH. Would be a mistake.

Senator WHITEHOUSE. I think there is a very significant difference in the facts.

Judge GORSUCH. Of course there is.

Senator WHITEHOUSE. Very good.

So let me go back into our history a little bit.

In 1816, Thomas Jefferson expressed concern about, and I will quote him here, "monied corporations which dare already to challenge our Government to a trial of strength." And a little bit more than around a century later, Teddy Roosevelt warned, and I will quote Teddy Roosevelt, "that unless the great corporations are controlled by the Government, they will themselves completely control the Government."

Should the Supreme Court in its decisions keep in mind Thomas Jefferson's and Teddy Roosevelt's warnings about what can happen when massive economic powers jump the fence to become massive political powers?

Judge GORSUCH. Well, Senator, as you know, corporate speech, when it comes to the First Amendment, does not receive the same protections as individual speech. There is a difference in the doctrine there. So that is an example, perhaps, of an instantiation in law of some of the concerns you are expressing.

Another instantiation example to me is antitrust law, the Sherman Act passed by this body and interpreted by the Supreme Court over many years now, trust-busting-era stuff. And it does try to keep competition as an important value in our legal system.

Senator WHITEHOUSE. So let me elaborate a little bit on that point, because you have said that before in your decisions in the antitrust realm, that competition is an important value that judges should bear in mind as they are interpreting antitrust law and antitrust precedent.

And I agree with you. I think it absolutely is. I think you also said that innovation is another such value, and I agree with you on that, too.

My concern is that this Supreme Court right now, at least the Republican-appointed majority recently, particularly the *Citizens United* group, seems to not admit the possibility that the similar kinds of concentration of power that destroy competition and innovation in the economic market can also take place in the political

marketplace and can destroy competition and innovation in the political marketplace.

Do you see that principle, that there could be a point where political power is so concentrated that it, in effect, is crushing the opposition rather than allowing free competition as a potentiality that the Court should bear in mind as it makes its decisions?

Judge GORSUCH. Senator, here I think of *Buckley* again and its recognition that corruption and the appearance of corruption are legitimate interests that Congress can pursue in legislation. And that is an example of, I think, the principle you are talking about, which *Citizens United* also speaks of.

It says there the record before it did not satisfy the Court that Congress' legislation in that particular case had established a case of corruption. I understand you disagree with that, but it did recognize that corruption and its appearance remains an area where Congress may legislate in the future.

Senator WHITEHOUSE. So let us go to that point, because they did say that no amount of corporate spending—none, there is no limit on the amount of corporate spending in politics that could lead to either corruption or the appearance of corruption. To me, that is fanciful in the extreme.

And they got to that point with three—well, I would say they did fact-finding, which they are not supposed to do, but I do not want to quarrel over that point with you here, because that is not the point of my question. So let us say what they did was they made some presumptions.

One presumption that they made was that all this corporate political spending they unleashed was going to be independent of candidates. That was presumption one.

Presumption two was that it was all going to be transparent. ExxonMobil was going to put up the ad saying, "We hate Whitehouse because he is fighting us on climate change, and you should be with us," and everybody would know who the players were.

The third is that the back-and-forth that this would produce would not affect confidence in government.

Now, I think that the facts, reality as it has developed since the *Citizens United* decision, completely bely all three of those points. All of the major candidates for—at least most of the major candidates in the last presidential election had what they called affiliated super-PACs.

I mean, what does "affiliated" mean? It does not mean independent. So clearly, I mean, just on that alone, it does not even pass the dictionary test. Clearly, there is no independence.

As to transparency, this whole dark money problem belies their assumption of transparency.

And public confidence has crashed in government since that decision, for, among other reasons, I think, when you are sitting there looking at the TV and an ad comes on that says vote for Senator Snooks or vote against Senator Snooks, and this ad is brought to you by Americans for Puppies and Prosperity, and everybody looks around and they know perfectly damn well there is no such real thing as Americans for Puppies and Prosperity. There is no real

corporation running that. There is no real person running that. It is a screen. It is a front. It is a shell for the real actors behind it.

I think that is very damaging to Americans' confidence in their government on both sides of the aisle, which I think is one of the reasons why all three of the major commentators on the Supreme Court have basically described them in the modern age now as instruments of the Republican Party.

And I think it also is why the majority of Americans looking at the Supreme Court think they will not get a fair shake there against a corporation. In fact, 36 percent, more than a third, think that the Court will be much more favorable to a corporation than to a person.

So the question here for you is, would you be willing, if you came to the conclusion that the independence presumption or the transparency presumption or the confidence presumption of *Citizens United* were, in fact, wrong, to reconsider that case?

Judge GORSUCH. Senator, what I—I have a couple reactions to that, if I might.

Senator WHITEHOUSE. But do not lose the answer to my question in your——

Judge GORSUCH. No, I am going to start—I am going to start with that, but there is one other observation I want to make——

Senator WHITEHOUSE. Sure. Help yourself.

Judge GORSUCH. Beyond it, if I might.

Okay. Thank you.

I want to promise you what I promise every litigant, and I hear a litigant before me, asking for an overturning of a precedent. That is what I hear. And I hear arguments for that. And arguments for overturning precedent include changed circumstances, and that is what I am hearing. That is the kind of nature of argument that I am hearing.

That is something a judge takes seriously, of course, always. And any litigant can come to court and argue anything. That is the beauty of our system. I will follow the law of judicial precedent in this area and every other area put to me.

I will make no promise for the result in any case. That is not what judges do. We listen to the cases put to us.

Senator WHITEHOUSE. And for the record, it is not what I want you to do.

Judge GORSUCH. I understand.

Senator WHITEHOUSE. What I want you to do——

Judge GORSUCH. And I am telling——

Senator WHITEHOUSE [continuing]. Is tell me that if the proper decision is that this was so wrongly decided it should be reversed, you would be willing to go there on proper judicial decisionmaking.

Judge GORSUCH. I will follow the law of judicial precedent in this and every other area, Senator, is my promise to you.

The other thing I would say that I would like to say is—two other things.

One is, there is room for—for not just further litigation, Senator, but for legislation in all of these areas. If there are changed circumstances that Congress observes, it is free not just to bring a lawsuit but pass a bill——

Senator WHITEHOUSE. Here is the problem——

Judge GORSUCH. In any of these areas. And finally, Senator——

Senator WHITEHOUSE. Here——

Judge GORSUCH. May I just finish?

Senator WHITEHOUSE. You finish, but then let me come back to that.

Judge GORSUCH. Of course. Of course.

The last thing I want to say is I am distressed to hear you think that judges or the Supreme Court is an organ of a party. That, to me, is just—I know you feel that way, and that distresses me.

Senator WHITEHOUSE. It distresses me too.

Judge GORSUCH. And I just do not——

Senator WHITEHOUSE. Quite a lot.

Judge GORSUCH. And I just do not see judging that way, and I do not see our rule of law that way. I do not see Republican judges, and I do not see Democrat judges. I see judges.

Senator WHITEHOUSE. Well——

Judge GORSUCH. And, Senator, I think the rule of law in this country works, and it works so well that to speak like that diminishes what we have.

And it is, for me, a failure to appreciate the beauty of our system, that we resolve hundreds of thousands of cases a year almost always unanimously as judges; that the disputes are limited to a fraction of a fraction of a fraction of a percent; and that once we resolve them, through the dispute process of litigation where we have precedent, that settles that problem and we can move on to the next one.

Senator WHITEHOUSE. Well——

Judge GORSUCH. It is a miraculous system, really.

Senator WHITEHOUSE. In my time that remains, which is getting briefer and briefer, let me make two points.

One, on the Tenth Circuit, I do not believe you hardly ever have party-line decisions made by your court. We looked. I count only two in the entire time you have been on the court.

Judge GORSUCH. I really appreciate you pointing that out.

Senator WHITEHOUSE. So it is a very different——

Judge GORSUCH. Thank you.

Senator WHITEHOUSE. It is a very different world where you are. When you get to the Supreme Court, now we have these 5–to–4 decisions that I pointed out, and it is 6–to–0 one party over the other party's interests at the polls. It is 16–to–0 corporate interests versus human interests in litigation.

There is a point where it becomes reasonable to discern a pattern, and I see a pattern, and it distresses me.

Now the point that I wanted to get back to—I have 2 minutes left—was your question about Congress can do this. Congress can rewrite these laws. Congress can demand disclosure.

Here is the problem. In the same way that a small competitor can be crushed by a dominant business in the economic market, once you let certain political interests achieve the kind of dominance that *Citizens United* has let them get, they can start to exert disproportionate control over Congress, and now Congress cannot do that any longer because there is no longer a fair playing field.

If the Court can rebuild a fair and competitive playing field, then maybe we can do something about it.

But to say to Congress that you should solve this while at the same time the Court has put Congress in a position where it cannot solve it because the unlimited power and the secret money of these interests is such a powerful and pernicious effect, is something that I would like you to at least be thinking about as a point, if you get to that Court.

I hope you will take that sincerely. You are quite expert at antitrust law. You understand that principle in the economics sphere. I urge you to consider that *Citizens United* has caused that to happen in the political sphere.

And with that, my time has expired.

Chairman GRASSLEY. Do you have anything you want to say?

Judge GORSUCH. I would like to, if I might, just briefly, Senator.

Chairman GRASSLEY. You can proceed.

Judge GORSUCH. Just to cheer you up a bit, I hope, about the judicial process, I think that you are right, that there are some 5–4 decisions. There are. But what that overlooks, I think, Senator, are some facts that I shared, I hope, with the American people yesterday, that even at the Supreme Court, where they take the 70 or 80 hardest cases every year, where Circuit Judges disagreed—and even then, only about 5 percent of cases get to me; that is what we are talking about, a fraction of a fraction of 1 percent of the cases—that they are unanimous with nine Justices appointed by five different Presidents 40 percent of the time. It is a remarkable thing.

Senator WHITEHOUSE. Look, I understand——

Judge GORSUCH. We should be proud of it. We should be proud of it.

Senator WHITEHOUSE [continuing]. And I get it. But what we have as a right is to have the Supreme Court make a fair decision in every case——

Judge GORSUCH. I agree.

Senator WHITEHOUSE. Not just 99 percent of them but all of them. And I think these 5–to–4 decisions are a problem.

You said earlier that sometimes—I think I am quoting you correctly—sometimes big corporations can capture an agency. That is a well-known principle of administrative law and of economics. Just let us be sure that our Supreme Court does not get to be one of those agencies that is captured on any subject.

Judge GORSUCH. Nobody will capture me.

Senator WHITEHOUSE. I hope not.

Chairman GRASSLEY. We will recess now until——

Senator FEINSTEIN. That is a good line to recess on.

Chairman GRASSLEY [continuing]. Until 1 minute after 1.

[Recess.]

Chairman GRASSLEY. Thank you. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Thank you, Judge.

I want to begin by making a broad point, a point that relates to some of the discussions we have had so far in this hearing. A number of my colleagues in recent weeks have expressed concern, understandably, with maintaining the reputation of the Federal judiciary. There is a good reason that we do this. We, in fact, are the Judiciary Committee. It is our job, among other things, to exercise a degree of oversight over the Federal judiciary, make sure it is

working well, to make sure that the laws and the personnel that we have in place are up to the task of deciding cases and controversies in the Federal court system.

I will be the first to acknowledge I do not love every outcome in every case that comes before the Federal judiciary. In some cases, decisions made in Federal courts are frustrating to me. In some cases, I disagree with them, sometimes strongly. And yet as a lawyer, as a citizen, as one who is interested in these sorts of things, I can say with confidence that I would stack the Federal judiciary up against any system of its kind anywhere in the world. And I can say with absolute confidence this is the best there is. It is imperfect because human beings by their nature are imperfect. But it is really, really good. It is one of the reasons why it is important for us to defend the integrity of the Federal judiciary, even while sometimes disagreeing with the outcome of a particular case.

It is one of the reasons why many of my colleagues, along with many Americans, expressed concern when the President of the United States referred to a judge who issued a ruling he did not like as a "so-called judge." It was understandable why some people were concerned about that. It is not a statement I would make, in part because I think it is important to uphold the Federal judiciary as a system that is good, notwithstanding its imperfections.

And yet I find it interesting, ironic, and quite troubling that many of the same people who were the first and the loudest to complain about what the President of the United States said in referring to a "so-called judge" have been some of the first to denigrate the Federal judiciary. I do not just mean criticizing a particular decision or a particular judicial philosophy. I mean referring to the Supreme Court of the United States as an "organ of the Republican Party." This is wrong. This is not the kind of statement that should ever flow from the mouth of a United States Senator, from a Member of the Judiciary Committee, from a citizen who loves this country and wants to make sure that our Federal judiciary remains an institution that is revered and respected, although its decisions might from time to time be less than perfect. There is no good reason to make a comment like this.

Now, I also find it interesting that in the first 2 days of this hearing alone, we have seen the independence of Judge Gorsuch attacked no fewer than 27 times. We have seen the independence of the Supreme Court of the United States and of the Federal judiciary called into question no fewer than 17 times. Those are stats from the first 2 days alone. Those statistics do not reflect statements made today. One could argue that those statistics may well have doubled by today. They have certainly increased substantially, and I find that troubling. I certainly find that is something that we ought not be aspiring to. What we ought to be aspiring to is talking about how we can improve the Federal judiciary, talking about the highest ideals of our system.

That does not mean we all have to express agreement with this nominee or any opinions that this nominee may have written or even this nominee's judicial philosophy. But it does, I think, mean that we ought to identify disagreement as disagreement, genuine disagreement when we see it, rather than impugning the character

of individual jurists or the credibility of the Federal judiciary as a whole.

I think the American people have been asked time and time again to settle for this, and I do not think it is time for them to settle. I think it is time for them to expect more. I think it is time for the American people and for the United States Senate to expect more of us, of this Committee, of this body when we speak of the Federal judiciary. And that means not referring to it as an organ of the Republican Party, the Democratic Party, or any other political enterprise, or anything else, for that matter. We have an independent Federal judiciary, and it needs to be respected as such.

A lot of this conversation is somewhat ironic in the sense that a lot of the criticism against the Federal judiciary is perhaps, I wonder, a bit misguided. It is true that we should all be concerned about the excessive accumulation of power in the hands of the few. There was no concern that weighed more heavily upon the founding generation, upon the Founding Fathers as they convened in Philadelphia in that hot, fateful summer of 1787. They were concerned about what would happen if too much power were accumulated in the hands of the few, and so they put together a system that was designed to diffuse that power, to spread it out, to make sure that no one person and no one group of people could accumulate too much power.

What we have seen over recent decades is power reaccumulating. One way of putting it is that power has been taken away from the American people in two steps: first, as it has been moved from the American people at the State and local level to Washington; within Washington as it has been handed over, in many instances voluntarily relinquished, by the people's elected lawmakers to unelected, unaccountable bureaucrats.

In some instances, it is effectively handed over to the judiciary, although this is a little bit less common, but we have seen that in some instances as in some of the statutory frameworks that we have discussed today, where Congress will come up with an impossibly broad, non-judicially manageable statutory standard, and then we just expect the courts to figure it out, complaining about it when we do not like the results.

In any event, this power has been taken away from the people in these two steps, from the people to Washington, from the people's elected representatives in Washington whose job it is to make law, whose only job it is to make law, over to those who are unelected and unaccountable.

It is, I believe, no coincidence that during exactly that same time period, the last 70 or 80 years, I would say—and, by the way, I would add to that this has been done under the leadership of both political parties. It has been done under Congresses, Senates, and White Houses of every conceivable partisan combination. During that same time period, you have seen not only the accumulation of power, but also the accumulation of wealth.

It is, I believe, no coincidence that currently, as we sit here today, six of our Nation's ten wealthiest counties are now suburbs of Washington, DC. This is notwithstanding the fact that it is not a banking hub. It is not an area that manufactures anything. It is not a technological innovation hub. It is not the home of any vast

store of natural resources. No. The money is here because the power is here, concentrated in the hands of just a few elites.

So in that respect, this should come as no surprise that there are people who spend an extraordinary amount of money trying to make sure that they can get access to that power—that power that controls as much of the economy as it does and as much of the lives and livelihoods as it does; that there are people willing, whether they are rich or poor or somewhere in between, to invest a whole lot of money in trying to influence Government. So I wonder. Why is it that we are so slow to ask the question? Why do we allow this much power to be accumulated in Government? Why do we allow this much of our Government to be based in Washington rather than with the people? And why within Washington do we allow so much of that power to be accumulated in the hands of the few within the administrative, regulatory state?

This has a whole lot to do with why we have seen the rise of super PACs, with why we have seen the rise of billionaires, millionaires, poor people, rich people, getting behind political causes of one sort or another, this, of course, giving disproportionate advantage to those who have a lot of money to influence Government. There are people on the left and on the right devoting a whole lot of time and a whole lot of resources, a whole lot of influential capital to doing just that. That should be concerning. That is, I believe, a symptom of the true underlying malady, which is that we have allowed too much power to accumulate right here.

So as long as we are asking the question of are not these super PACs dangerous—which I think few Americans would quibble with that. I think few Americans would say, "Yes, I love super PACs. I think they are the best thing ever." I do not think many Americans would say, "Yes, we ought to have that much power that can be wielded by the rich and powerful or by political interests." I do not think many Americans would disagree with that. But we ought to ask ourselves why is it that they have such an incentive to do this. Why do they want to spend so much of their money doing this? What is it they have to gain? And have we made it too easy for too many of them to gain too much simply by trying to influence Government?

But in that discussion, I hope we will never lose sight of the fact that we do have a treasure in the Federal judiciary, a treasure that should never be diminished as an organ of any political party or any interest. The rule of law is a cultural norm that is not easy to establish and, once established, needs to be maintained. I hope we can do that.

Judge Gorsuch, I would like to talk to you about some of the issues that have been raised with you. You have had some Members of this Committee asking you to opine on specific legal issues, on specific cases or types of cases, and some have even expressed frustration about the fact that you have not said more in response to their questions.

I would like to ask you a few questions about that and about the issues that could come along with that, and I find it significant and worth mentioning here that in a recent op-ed published in the Washington Post, two of your former colleagues, Judge Tacha and Judge Henry, both of whom I believe are here—I think I saw them

earlier today. As a lawyer who has argued before each of them many times, sometimes winning, sometimes losing, I was glad to see them here.

Judge GORSUCH. Yes.

Senator LEE. But they issued this opinion—this op-ed about the issue of judicial independence. I assume you saw the op-ed, or maybe you were aware of it.

Judge GORSUCH. I am aware of it.

Senator LEE. But they wrote, among other things, as follows, and I want to quote this. They said: "Detailed discussions during the confirmation process on issues that might come before a judge are not proper; in fact, they would in all likelihood require recusals from the cases discussed. Litmus tests are not acceptable."

So Judges Tacha and Henry, both of whom have served as Chief Judges on the Tenth Circuit, make an important point. If you were to rule—if you were to make a commitment today as to how you might rule on a certain issue, on a particular type of case, and if that issue were subsequently to come before the Supreme Court of the United States, and if by then you have been confirmed as an Associate Justice of the Supreme Court of the United States, isn't it possible, in fact, isn't it likely that a litigant could file a motion for your recusal in that case?

Judge GORSUCH. Yes, Senator, and I really want to thank Judge Tacha and Judge Henry, both of whom are retired from the bench, for having gone out of their way to write that article together and to come to Washington. And I think you are going to hear from them tomorrow. One happens to be a Republican-appointed judge; the other happens to be a Democrat-appointed judge. And, again, I do not buy into those labels. They are judges. And they both led the Tenth Circuit, and they are people I admire greatly and esteem personally.

And so you are absolutely right. I would face the possibility of a recusal motion, and I would have to face the litigant in front of me, who would say, quite reasonably, look me in the eyes and say, "How can you be fair in my case when you have already opined on its contents in front of the United States Senate?" And to be honest with you, Senator, I do not know how I would look them in the eye. And whether that means I am on the Supreme Court of the United States, if fortunate enough to be confirmed, or I go home to Colorado and those cases come before me, I am still faced with the same predicament, yes.

Senator LEE. And if such a motion were to come forward, it is not exactly the kind of circumstance in which you would say, well, that would be frivolous. It is not necessarily an act of paranoid fantasy to say such a motion for recusal could be filed.

Judge GORSUCH. No, Senator, which is why we have a judicial canon that prohibits me from opining on cases that might be pending or impending. And, Senator, there is a second reason that I think is vitally important, too, and it goes beyond the parties. It goes to the integrity of the judiciary itself. If persons coming to this table, this rather lonely table in this rather big room, have to make promises or hints or previews or nudges and gestures about how they are going to rule in cases, then I do not know where we are as an independent judiciary.

It is like a campaign promise for office, it seems to me. And you know what? It has not happened so far. The precedent in this area is strong, and I admire it. I have looked back. I am no expert. I have not read every jot and note. But Justice Ginsburg, Justice O'Connor, Justice Souter, Justice Scalia, all of them declined to offer hints and previews. And, Senator, I am not going to be the first judge to come to this table and break that tradition and compromise the integrity of the independent judiciary.

Senator LEE. So that tradition, while strong, like any chain could be damaged, could be undone by its weakest link.

Judge GORSUCH. That is right.

Senator LEE. And you do not want to be that link.

Judge GORSUCH. I am not going to be that link, whatever happens to me.

Senator LEE. And if, in fact, answering questions that you should not answer could trigger a motion for your recusal, and if a motion for recusal that might be filed as a result of your answering such a question, would not necessarily be frivolous, might end up having to be granted, that could create additional opportunities for mischief in that people could deliberately plant questions, directly position questions, demanding that you answer them as a condition of your moving forward in this Committee, questions themselves that could result in your non-participation in a particular case, thus opening this process up for manipulating that process and undermining the integrity of them both. Would that be an accurate characterization, or would I be crazy to suggest that?

Judge GORSUCH. Senator, I should hope that is never any person's motive.

Senator LEE. And I am not suggesting that it is any person's motive in this case. What I am saying is that if we weaken that link, that could easily become the motive given what we know would likely be the outcomes.

Judge GORSUCH. That would be, I think, a poor day for the United States courts.

Senator LEE. One of my colleagues criticized your opinion in *Longhorn Service Company v. Perez*, so I went back and looked at that case. Here is what happened, in essence. *Longhorn*, the company involved in the case, prepares wells for fracking by lowering a metal platform over the well, inserting piping through the platform, and pumping contaminants into the well.

OSHA came to inspect the well and cited the company for a couple of reasons. The company ended up challenging OSHA, and the company prevailed on one of its claims and it lost on one of the other claims.

I think it is significant that when the accusation is being made that this somehow reflects a determination on your part or a bias on your part to favor the big guy and rule against the little guy, that is misguided. It is wrong in this case for two independent reasons.

First and foremost, there is no bigger big guy than the Federal Government. There is no stronger Goliath than this Government. That is not to suggest that its intentions are malicious. It is only to suggest that this is a formidable foe. I do not think it would ever be fair to say that someone litigating against the Federal Govern-

ment is anything other than the little guy, especially whereas here it is not as if the business were a giant corporation known by all people.

Second, there were two claims at issue in this case. Only one of them was one upon which the business entity prevailed.

I see my time has expired, and as I would always do before your court, I will stop talking once my time has expired. Thank you, Judge.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Thank you, Senator Lee.

Now, Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Good day again, Judge. I really had promised I was going to start with antitrust, but the real world has intervened again, as it does very often. And so I am going to lead off asking about the case that was decided today by the Supreme Court.

Let me start by saying I care a lot about this issue of kids with disabilities. When my daughter was born, she could not swallow, and for a year and a half she was fed by a tube. She ended up not having a long-term disability, but it made me really understand, because I have to know a lot of these parents through this time, what they go through every single day. And while I can wear my politics on my sleeve about where I am on this issue, I know that you are a judge and must make decisions. And our job here—and I have tried to stay away from making these political statements. I have tried to stay away from asking how you are going to decide a certain case in my questions yesterday. But we have to figure out what your philosophy is, and so that is why we keep going into such excruciating detail, as you know, about these decisions that you have made in the past.

So what happened this morning was that the Supreme Court unanimously rejected, in an opinion by Justice Roberts, the standard that you used to evaluate how much help kids with disabilities get in school. It was not your case, but it was a standard that was like the standard that you used. And nine Justices disagreed with you. Justice Roberts' opinion says, "When all is said and done, a student offered an educational program providing merely providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all."

Now, ironically, he actually called out the language that you used in that Tenth Circuit case, and he said, "Whatever else can be said about it, this standard is markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit."

So I want to start where Senator Durbin left off in his initial question, and you said that you decided *Thompson R2–J School District v. Luke P.* the way you did because you were affirming precedent in *Urban County v. Jefferson County School District*, which is, of course, a case in your Circuit, and you said so you were bound by it.

So over our brief lunch break, I looked at it, and I am just not sure that is true, and maybe we just have a different interpretation. I know this is going to sound nerdy to people that are not lawyers, but this is our job today, and a holding of courts is precedent. It is part of a court's opinion that is later binding on courts. But

a holding is different than dicta, and when I look at this case that you—and you wrote the decision yourself and, yes, some other judges joined you, but you wrote it. And I looked back at the case you relied on, and it actually mentions this de minimis standard. But it is just in a paragraph along with some other standards. It is a Third Circuit case that uses this de minimis standard, and the actual Tenth Circuit case uses a broader standard. And so in the end, even this section of the case is not used—that case is not used to decide it. It says we do not reach the issue.

So for me, this case that you said was binding on you, it is just dicta in the case. It is not a holding. And so to me, you actually were the first in this case that you wrote to come up with this standard, and then you actually made it—which I will get to in a second. You added the word "merely." But why do not we just start with do not you see this as more dicta than as a holding?

Judge GORSUCH. Senator, I would have to go back and look at it carefully, but, no, I would not agree with that. My recollection is that the Tenth Circuit precedent was very clear, that "some" meant more than "de minimis." "Some meaningful educational benefit" in Rowley was a Supreme Court precedent and that our court had interpreted that to mean more than de minimis, and that a number of Circuits had come to the same conclusion.

The Supreme Court did not take this case just for fun. It took it because there was a Circuit split on this issue. And the Tenth Circuit was with the Third Circuit, and I believe there are probably some others. I would have to go back and look at it. You have it before you.

Senator KLOBUCHAR. There were some other Circuits.

Judge GORSUCH. Yes, so that is what happened. That is what the Supreme Court does, is when Circuit Judges disagree in the rare cases, and this is——

Senator KLOBUCHAR. Yes, and I do understand that. But what I am saying is through——

Judge GORSUCH. And to suggest that we were in any way out of the mainstream or that I was doing anything unusual there would be mistaken because it is the standard used by many Circuits up until, I guess, today.

Senator KLOBUCHAR. Okay, but it was a 9–0 decision against the standard.

Judge GORSUCH. Of course, which——

Senator KLOBUCHAR. So to me, that does seem out of the mainstream, and also——

Judge GORSUCH. It is just wonderfully reaffirming to me, Senator, that, again, even in cases where Circuit Judges disagree—and here is one where there was a Circuit split. And as you point out, it sounds like a lot of Circuits on both sides of the issue, and a technical issue and maybe a little nerdy, as you say. But that is what we judges do. We are trying to follow the precedent as best we can. Sometimes we get disagreements. And then the Supreme Court, exercising collegiality, comes together and resolves it.

Senator KLOBUCHAR. Okay.

Judge GORSUCH. That is how our system is exactly supposed to work.

Senator KLOBUCHAR. I understand. But let us go back to this again. So my position is that this was not necessarily binding, this case that you cited. But then beyond that, the Third Circuit case that was not binding, that you cited, that says it must be more than de minimis, you went a step forward, and this is what Senator Durbin was getting at. You added the word "merely."

So you said it is "merely more than de minimis." So I was trying to figure this out at lunch, and I figured out that if you had a gas tank and it said it has to be on more than empty, that could mean it could be any way up to full. It is a broad range of the kind of how full your gas tank would have to be.

But you added this word "merely," so you said the standard is that it has to be merely more than de minimis or, in a gas tank, merely more than empty. That implies something entirely different. That creates a ceiling to me more than a floor in its language. It is a ceiling because it says, well, the standard is it has to be merely more than de minimis as opposed to more than de minimis. And so that is something else where I think you actually took something that was not necessarily a precedent, you added the word "merely" to make it even more narrow, and so it is not a surprise to me then that the Supreme Court 9–0 rejected that language. Any response on that?

Judge GORSUCH. I disagree.

Senator KLOBUCHAR. Okay. And then the next question I have is that in some of these other cases we talked about yesterday, you did a separate concurrence. So even if you are right and I am wrong, and you were somehow bound by a Third Circuit case when you wrote that opinion, maybe you could have written a concurring opinion like you did in *Chevron*, you wrote in the *Gutierrez* case, you wrote a concurring opinion to your own opinion expressing a view that was different than the one that was binding on you. So you could do it in this case as well. So why pick the *Gutierrez* case or *Riddle v. Hickenlooper* to do a concurring opinion and not a case like this one that is really about the kind of services that a child with autism is going to get?

Judge GORSUCH. Senator, I have written cases for families in IDEA cases, Individuals with Disabilities Education Act. I have written decisions against the families in these cases. And in each case, Senator, it has been based on my assessment of the facts and the law. And the opinions I have issued or not issued have been based on my assessment of the facts and the law, not any personal animus, not any wrong motive, Senator. I can assure you of that. And any suggestion otherwise would be mistaken.

And, Senator, all of these opinions in the Tenth Circuit that we are talking about have been unanimous, every one of them, including this one. And, Senator, to suggest that it is somehow out of the mainstream, I would respectfully ask you to look at who joined the opinion, and you will find one of my colleagues who happened to be appointed by a Democrat joined that opinion. And you will see other opinions where I have joined Republicans and Democrat-appointed judges ruling for the family.

And so, Senator, all I can say is I was trying faithfully, to the best of my ability, to follow Supreme Court precedent in *Rowley*, the Tenth Circuit opinion, as I understood it in *Urban*, and a num-

ber of other Circuits had interpreted *Rowley* in the same way. And my colleagues, subsequently after me, interpreted it in the same way. This decision that was under review was by another separate panel of the court, the one that just went to the Supreme Court. My colleagues in a separate panel, made up, I believe, again, of Republican and Democrat-appointed——

Senator KLOBUCHAR. Okay, but the difference for me and all of us up here today is they are not up for the job of the highest court of the land, and in this case you wrote the opinion, and you told us that earlier opinion was binding precedent. And I am not certain that it was because the words were from a different Circuit. And so, you know, I guess we will disagree on this, but I am——

Judge GORSUCH. Well, I am happy to explain that——

Senator KLOBUCHAR [continuing]. Not questioning—I am—this is something where I am actually trying to get at your judicial philosophy. I have no other way to do it except to look at these opinions.

And I want to move on here because I brought up the *Chevron* case before, and then I also found out that in 2015 you sought to revive the non-delegation doctrine, which restricts the amount of discretion Congress may choose to delegate to Federal agencies. You did this in a dissent, but it was something that has not been used since the 1930s. It was used twice in the 1930s. And, again, it seems to me like in certain things—and what it does, basically, is says that Congress cannot delegate its legislative powers to agencies, and I think there is a reason other courts have not used it.

But it feels to me like you pick certain types of cases where you are kind of reaching really broad and going back to doctrines from the 1930s, and then you do not do that for other kinds of cases that certain people in America would care about. So I am trying to figure out why you pick certain cases to write concurring opinions on and to be more broad, and then other cases where you really stick to the text. And that is what I would like you to answer.

Judge GORSUCH. I always try to stick to the text, Senator, with respect. And in this case, again, I was following a Tenth Circuit precedent that was 10 years old at the time, and sometimes the Tenth Circuit will often adopt standards from other Circuits that it finds persuasive. And it may have in that case, you say, adopted it from the Third Circuit. I do not have it in front of me, but I believe you. And often my colleagues will adopt—and I will, too—standards by other Circuits. Rather than reinvent the wheel, we will say we agree with another Circuit.

And that is how law is decided in cases. It is part of precedent. It is the respect due a persuasive opinion by a colleague, a thoughtful colleague. And every one of these judges in every one of these cases does their level best, and Circuit splits arrive only because judges are doing their level best to interpret the law. And in this case, there were, as you point out, several Circuits, it sounds like, on both sides of this question, an honest interpretation effort of the statute before us in light of Supreme Court precedent.

Senator KLOBUCHAR. And so do you want to comment at all on the non-delegation doctrine?

Judge GORSUCH. I would be happy to. The case that you are referring to involved the Sex Offender Registry and Notification Act,

and, Senator, why I chose to write there was the same reason Justice Ginsburg and Justice Scalia wrote in the area, because in that case the law as enacted sent to the Attorney General essentially the discretion to write a law. And the legislative power is invested in this body, not in the Attorney General, a particularly odd place to delegate legislative authority, not just to some agency with expertise like with biologists or chemists, but to the chief law enforcement officer, and to send to the chief law enforcement officer the opportunity to write a criminal law. Justice Ginsburg and Justice Scalia, again, people think they do not agree. Well, they often do, and here is an example.

Senator KLOBUCHAR. But is there a way to get there without pulling out this doctrine that has not been used since the 1930s?

Judge GORSUCH. Well, Senator, it is a point they made in an opinion, and I had a subsequent case raising that question, and I thought it was important to address.

Senator KLOBUCHAR. Okay. I wanted to just go back on one point. We had a long discussion yesterday about originalism, and I think you and I agreed that "he" can mean "she" in the text of Article II of our Constitution, meaning we can have a woman President. I was just using that as an example that not everything in the text is exactly as it should be or will be construed. We agreed that Congress' authorization of the Navy and Army also provided for the authorization of the Air Force.

But then we got to that *United States v. Virginia*, and you say you can also get to the outcome of Justice Ginsburg's majority opinion in that case, where the Virginia Military Institute's male-only admission policy was found to violate the Equal Protection Clause of the Fourteenth Amendment, and so you get there through radical original meaning.

And what I thought was interesting there compared to the other two examples was that Justice Ginsburg's majority opinion had nothing to do with original public meaning, and the cases she relied on to get to that also had nothing to do with original public meaning.

And so when you have to decide cases that deal with social changes that the general public could never have anticipated back when the Constitution was written, are not you just relying on the intervening decisions of non-originalist judges to get there? So when you said, well, yes, that is fine, it is precedent, it is Justice Ginsburg's opinion, that is because Justice Ginsburg was a non-originalist in how she interpreted; and then you in turn rely on her opinion to get to the point that it is okay and a normal outcome. So I am trying to get at, because——

Judge GORSUCH. I am not sure I track the question.

Senator KLOBUCHAR. Sure. The question is that it is selective originalism. Sometimes you use originalism at its core, and then sometimes to get to an outcome that is more normal, you do not use originalism. You could not in that case of Virginia Military Institute, but you rely on non-originalist judges to get to the outcome.

Judge GORSUCH. I think I understand the question. I think the answer is precedent. A judge always starts where he or she finds themselves. We do not live in a vacuum. I am not writing on a blank slate as a judge. I am not, you know, a philosopher king. I

am a judge of cases. That is my job. And so you take the precedent at hand. And, Senator, that is a very important thing to me.

Senator KLOBUCHAR. Isn't another way to look at it—I went to the University of Chicago Law School, and Judge Posner taught there for years, and I know you disagree with his account. He is a Republican-appointed judge. And he said that it was naive to think that judges believe only in the legal technicalities of their argument, especially when you get—he did not say this, I am adding this part, especially when you get to the highest court of the land. The truth is, he says, that they consult their own moral convictions to produce the best results for society. And you do not agree with that, but I am just trying to get at when you get to this highest court of the land where—by the way, I said it was a 9–0 decision. It was an 8–0 decision because there are only eight Justices there, in my earlier question of you. When you get to that highest court of the land, it seems to me that Posner is being honest, that people do consult. They try to apply the law, but when you are at that last court in the land deciding things, oftentimes they are grounding their decisions in where they are morally about what these outcomes are going to be. Is there any merit to that at all?

Judge GORSUCH. Senator, I can just say that has not been my experience. I have been doing this a long time, and I respect Judge Posner greatly, as I know you do. And I respect you greatly, and your view. I can just speak to my view. Maybe I am just more optimistic. You can call me naive if you want. But my experience watching Justice White, Justice Kennedy, all of the Justices of the Supreme Court who have been mentioned here today, every one of them I believe is doing his or her level best to apply the law based on the facts and circumstances.

There is realm for some disagreement. There is not a single right answer to every case. I will concede you that. But that does not mean just because there is not a single foreordained answer from God in every legal dispute that judges are not trying to look at the legal materials and only the legal materials and trying to make sense of the legal materials, and that alone, and leaving the rest of the stuff aside.

That has been my experience of good judges. They leave their moral convictions, their views about social utility, whatever it is, whatever they ate for breakfast, over there. They take the briefs, they take the law, they take the facts, they take the Constitution, they take the precedents, they take the original understanding, and they try to make sense of it as a judge does. And that is just not how a politician thinks, respectfully. It is not how a citizen thinks about ordering my daily affairs.

Senator KLOBUCHAR. Okay. So you——

Judge GORSUCH. But a judge—I am sorry.

Senator KLOBUCHAR. Yes, and you and I actually share that view. It is just that is not—these decisions that Senator Whitehouse has outlined, other things that have been happening, it does not feel that way. And I have respected Republican-appointed judges and Democrat-appointed judges. We have had judges that actually will not make decisions, in my county days, on the Mondays after a Viking game because they thought it would affect them too much with the outcome.

Judge GORSUCH. Exactly.

Senator KLOBUCHAR. All right. But——

Judge GORSUCH. That is what I am talking.

Senator KLOBUCHAR. But, but, but the point is—that is why I brought it up. But the point is that this just does not seem to be happening lately with these decisions, like *Citizens United* and the Court that you want to serve on. And so I am a fixer. I like to fix things, and one of the ways I can fix that is by making sure that we put judges on there that are going to view themselves as true, fair jurists and not legislators making change.

And the second thing is about some of these things I brought up earlier, and I will just end with that. Cameras in the courtroom, thank you, Senator Grassley, for your leadership. But the second is the ethics rules, and I just wanted to take 30 seconds here.

Yesterday, when you and I talked about it, you said you did not know how different they are between the regular Federal judiciary and the Supreme Court. Actually, the Code of Conduct for United States judges adopted in 1973 applies to every Federal judge other than the Justices of the Supreme Court, and that includes reporting, of course, trips and gifts and things of value. And so I do ask you, as you look at ways, if you are confirmed, if you look at ways to bring back, I think, some trust. We are struggling with that, obviously, right now in the Congress. But one of these ways is to be as transparent as possible, and that means to me cameras in the courtroom, and it also means having the ethics rule apply to the Supreme Court. And I have a lot of respect for and enjoy the Justices there now, but I think that would be a very positive move.

Thank you.

Chairman GRASSLEY. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. And congratulations, Judge Gorsuch, on making it through Day 2 of the gauntlet and continuing to do so with flying colors.

I want to go back to a topic that Senator Lee addressed a few minutes ago, which is we have heard over the past several days a number of my Democratic colleagues in Congress bemoan and condemn "vicious and reckless and personal attacks against judges," what they have called a "unprecedented attack against the credibility and independence of the judiciary." And so if I understand their argument correctly, it is completely inappropriate, it is an absolute abuse of power to criticize, to malign, to attack judges.

Now, if that is their argument, Mr. Gorsuch, I have got a question for you. What position do you currently hold?

Judge GORSUCH. I am a judge on the Tenth Circuit Court of Appeals.

Senator CRUZ. And if the Senate were not to confirm you to the Supreme Court, what position would you continue to hold then?

Judge GORSUCH. The one I happily enjoy now.

Senator CRUZ. So if you are and will continue to be a Federal Judge on the Court of Appeals, it is interesting to assess how my Democratic colleagues have fared under their own test that it is inappropriate, that it is offensive to somehow malign a Federal judge. Former Speaker Nancy Pelosi said on national television, Judge Gorsuch is "hostile to women's rights and holds radical views far outside the mainstream of American legal thought." She continued,

"What saddens me the most as a mom and a grandmother is his hostility toward children in school, children with autism." She additionally went on to say, "If you breathe air, drink water, eat food, take medicine, or in any other way interact with the courts, if you care about that for your children, he is not your guy."

It is interesting given the Democrats are complaining about people criticizing Federal judges.

Senator Whitehouse on Monday said, "Tellingly, big special interests and their front groups are spending millions of dollars in a dark money campaign to push your confirmation. They obviously think you will be worth their money."

That also somehow falls short of the Democrats' complaints about criticism directed at the judiciary.

Indeed, Senator Hirono on Monday said, "You consistently choose corporations and powerful interests over people, ideology over common sense, and, indeed, the purpose of the law."

Senator DURBIN: "In case after case, you either dismissed or rejected efforts by workers and families to recognize their rights and defend their freedoms."

Senator FRANKEN: "But if the past is prologue, then I fear that confirming you would guarantee more of the same from the Roberts' Court, decisions that continue to favor powerful corporate interests over the rights of average Americans."

Tom Perez, the DNC Chairman: "Gorsuch on the Supreme Court is intolerable. Judge Gorsuch would discriminate against a majority of Americans from the Bench." The Chairman of the Democratic Party charging that a judge would discriminate.

These are serious attacks. Many of them impugn your integrity directly. And yet this is a confirmation hearing. The Founders understood a confirmation hearing would be in the political arena. My colleagues, the Democrats, have a right to engage in whatever attacks they choose. But it is a little rich for them to be maligning a sitting Federal judge and at the same time giving speeches about how unacceptable it is for anyone to criticize a Federal judge. You cannot have both at the same time.

Now, I am not going to ask you to respond to any of these attacks. I actually think these attacks speak for themselves. But I will ask you this: As a judge today, and as, I believe, a Justice in short order, will you pledge to be faithful to the law and the Constitution and neither favor nor disfavor any litigant based on who they are?

Judge GORSUCH. I guarantee you no more, and I promise you no less.

Senator CRUZ. That is precisely what we should expect of judges.

Let us turn to a different topic. The last couple of days we have heard a lot of discussion about originalism, textualism, and the Constitution. And some of my colleagues have suggested that understanding the Constitution as having a fixed and original meaning somehow prevents the Constitution from changing to meet changed circumstances.

Judge Gorsuch, did the Founding Fathers, in all of their wisdom and foresight, did they anticipate that the Constitution might need updating? And did they provide any mechanism to update the Constitution should new challenges arrive?

Judge GORSUCH. Yes, Senator Cruz, they did.

Senator CRUZ. And what was the mechanism that the Founding Fathers created?

Judge GORSUCH. There is a process for amending the Constitution.

Senator CRUZ. And has that process been employed?

Judge GORSUCH. It has, Senator, from time to time.

Senator CRUZ. And it has worked quite well, I would note.

Now, I understand that there has been some discussion today about the Supreme Court's decision in *Endrew F. v. Douglas County School District*. This morning, the Supreme Court issued the opinion that abrogates Judge Gorsuch's opinion in the Luke P. case. Endrew F. originated in the Tenth Circuit, but you did not sit on the original panel.

Judge GORSUCH. No, Senator, I did not.

Senator CRUZ. And as I understand it, Tenth Circuit precedent from 1996 and drawn from the Supreme Court's own opinion in *Board of Education v. Rowley* in 1982 held that a school district is compliant with IDEA so long as the student is "making more than de minimis" progress in school.

My Democratic colleagues have repeatedly demanded over the last 3 days that Judge Gorsuch follow precedent, and indeed, I will commend them for highlighting this case as yet another example of Judge Gorsuch doing exactly that: following precedent—following precedent in the Tenth Circuit that itself was following precedent from the U.S. Supreme Court.

Judge Gorsuch, as a Judge of the Tenth Circuit, were you bound to follow Tenth Circuit precedent?

Judge GORSUCH. Yes, Senator.

Senator CRUZ. And if the Supreme Court changes the precedent, are you then bound to follow the new precedent?

Judge GORSUCH. Yes, Senator. That is how it works.

Senator CRUZ. That is precisely how it works. And in this instance, the fact that you followed precedent faithfully should give comfort to Senators on both sides of the aisle that you will continue to do so as a Supreme Court Justice.

I would now like to introduce several items into the record. I want to start with a letter from Supreme Court practitioners. I would like to enter into the record a letter from a group of attorneys who, combined, have argued over 500 cases before the U.S. Supreme Court. They include lawyers who clerked for Ruth Bader Ginsburg and Stephen Breyer, and the signatories unanimously support Judge Gorsuch's nomination. These accomplished attorneys called Judge Gorsuch fair-minded, dedicated, smart, and unfailingly polite. And they tell us that they would be pleased to appear before him.

They conclude by saying he has "an unusual combination of character, dedication, and intellect that would make him an asset to our Nation's highest court."

I would like to enter this letter into the record.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator CRUZ. I would like to also enter into the record an article from Evan Young, a former law clerk to Justice Scalia. Mr. Young

writes that Justice Scalia "did not want to rule the American people by imposing even his most cherished personal beliefs on us." He wanted the American people to rule themselves, something that he could facilitate by being a relentlessly principled judge, telling us what the law required, and then letting the country make its own choices.

Based on his record, Judge Gorsuch exhibits that same judicial humility. He understands that he should never confuse the law's commands for his own ideas of what the law should command.

I would like to enter this article into the record as well.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator CRUZ. I would also like to enter into the record an essay from Michael McConnell, a former colleague of Judge Gorsuch on the Tenth Circuit and a very well respected legal thinker across the country and, indeed, across the globe, who writes that "the President could not have made a finer appointment to fill Justice Scalia's seat." What I found especially enlightening was the way Michael McConnell not only addresses the intellectual seriousness of Judge Gorsuch's jurisprudence, but also testifies personally to the strength of his character.

Judge McConnell writes that Judge Gorsuch was "a man defined by his gracious personality, someone who always treats everyone with respect. He actively engages with lawyers, listens carefully to their position, and reflects fair-mindedly on what was said." Judge McConnell concludes by nothing that, ultimately, Judge Gorsuch is "the kind of Justice Americans of all political stripes should hope for."

I would like to enter this essay into the record as well.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator CRUZ. In addition, I would like to enter into the record an article from the Wall Street Journal that describes Judge Gorsuch's strong defense of religious freedom for everyone. The article quotes Judge Gorsuch's legal reasoning in a Religious Freedom Restoration Act case where he explained that, "The act does not just apply to protect popular religious beliefs. It does perhaps its more important work in protecting unpopular religious beliefs, vindicating this Nation's long-held aspiration to serve as a refuge of religious tolerance."

I would like to enter this article into the record as well.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator CRUZ. And one final entry. I would like to enter into the record a letter from Scott Barker, a long-time Colorado Democrat and a practicing attorney in Denver. He urges the confirmation of Judge Gorsuch, saying that he has "performed admirably as a Tenth Circuit appellate judge," and that "you would have to look long and hard for someone in the Colorado Bar who would say a disparaging word about Judge Gorsuch."

I would like to enter this letter into the record as well.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator CRUZ. And with that, Mr. Chairman, I yield my time.

Chairman GRASSLEY. Senator Franken.

Senator FRANKEN. Thank you. I will take the 7 extra minutes of Senator Cruz's time.

[Laughter.]

Senator FRANKEN. Judge, hi. During our courtesy visit, I asked you if you had read the *New York Times* investigative series on the pervasive use of forced arbitration. You had not but you said you would. Were you able to do so?

Judge GORSUCH. I was. I managed to fit it in, Senator.

Senator FRANKEN. Thank you. Thank you so much.

Judge GORSUCH. No, it was——

Senator FRANKEN. I said you do not have to read this, and you said, no, I will, I promise. And you did, so thank you.

I do not think that most Americans realize that when they sign up for a credit card or cable service or sign an employment agreement or fill out their parent's nursing home resident agreement that they are also signing away their constitutional right to go to court.

The *New York Times* series, while shocking, illustrated something that I have been saying for quite a long time. Forced arbitration clauses, which are buried in the fine print of contracts that we sign every day, restrict Americans' access to justice by stripping consumers and workers of their legal rights and insulating corporations from accountability.

Businesses across the Nation use these clauses to force individuals into a privatized justice system where the corporation can write the rules. Everything can be done in secret without public rulings. Discovery can be limited, making it hard for consumers to get the evidence they need to prove their case, and there is no meaningful judicial review, so there is not much a consumer or employee can do if the arbitrator gets it wrong. It is simply unfair.

Now, there seems to be no question about how arbitration clauses came to permeate nearly every aspect of our lives. In a series of decisions, including *Rent-A-Center*, *Concepcion*, and *Italian Colors*, the Roberts Court effectively reshaped the Federal Arbitration Act into a permission slip for corporations to opt out of the civil justice system.

And in the years since, we have seen business after business use arbitration clauses to avoid accountability for their wrongdoing even under the most egregious of circumstances. A few years ago, my staff heard the story of a 71-year-old man at a nursing home who died from, quote, "profound dehydration," and whose family was forced into arbitration to resolve their wrongful-death claim.

Last year, we learned that Wells Fargo customers who had had fraudulent accounts opened in their name and without their consent were forced into arbitration because the bank successfully argued that the clause in their real accounts also applied to their fake accounts.

Very recently, Fox News tried to force its former anchor Gretchen Carlson into arbitration when she sued her boss Roger Ailes for sexual harassment. Fox News also tried to use the arbitration clause in her employment contract to prevent her and other victims of his abuse from speaking to anyone about what had happened to them.

Companies have also learned to pair forced arbitration agreements with class-action bans to shutter the courtroom doors to groups of individuals with small claims. And once blocked from going to court as a class, most people drop their claims because it does not make financial sense to go it alone.

Now, this way of doing business is profoundly unfair and unjust. It is anathema to our system of civil justice and does not even scratch the surface of the many stories that the *New York Times* series revealed.

Judge Gorsuch, what was your reaction to the series? Were you shocked? Because I have worked on this issue for 8 years now and even I was shocked.

Judge GORSUCH. Senator, it made me think about a little bit of history. It used to be back at common law that arbitration was disfavored because it was thought that everyone should go to trial. Trials were the norm, Seventh Amendment and all that. And then in about I think in 1925 Congress passed a law——

Senator FRANKEN. Twenty-four.

Judge GORSUCH. Called the Federal Arbitration Act.

Senator FRANKEN. Twenty-four.

Judge GORSUCH. Twenty-four, okay. All right.

Senator FRANKEN. Very, very close.

Judge GORSUCH. All right.

Senator FRANKEN. It is as close as you can get without being right.

[Laughter.]

Judge GORSUCH. I try.

Senator FRANKEN. Very good. Very good.

Judge GORSUCH. And it made me think of that. It made me think, well, gosh, it does not have to be this way. The Federal Arbitration Act, what it did was to favor arbitration. Congress expressed a preference that people should arbitrate their disputes. They made a judgment, policy judgment in favor of arbitration because it is quicker, cheaper, easier for people.

Senator FRANKEN. But that was really conceived in 1924 as two equal parties, business to business.

Judge GORSUCH. Yes.

Senator FRANKEN. And what I am going to—and I am going to continue on here because, I mean—unless you want to——

Judge GORSUCH. Well, I was not quite finished, but if you—it is——

Senator FRANKEN. Well, no, no——

Judge GORSUCH. Your time. I do not——

Senator FRANKEN [continuing]. Finish. It is my time, but if you can do it short, why do you not finish your thoughts?

Judge GORSUCH. I will do the best I can.

Senator FRANKEN. Okay. Thanks.

Judge GORSUCH. If Congress thinks that the courts are not applying the Federal Arbitration Act as it wishes or if it wishes to revise or eliminate the Federal Arbitration Act, I mean, 1924 is a long time ago and——

Senator FRANKEN. Well, my feeling is is that the Court, through these 5–4 decisions, the Roberts Court has changed what the intention of the law was back in 1924. But I am going to continue.

In our courtesy visit you emphasized the threshold question that you say the Federal Arbitration Act requires in the opinion you authored in *Howard v. Ferrellgas*. You discuss how, when dealing with arbitration clauses, courts must first determine whether an agreement to arbitrate between two parties actually exist. And you go on to detail the analysis of the contract formation principles that must happen in order to make that determination. I think I understand what is required in that threshold question, but in order to fully grasp how you approach the issue of forced arbitration going forward, I want to move on to the next step in the analysis.

So assuming the parties did in fact form a contract, I want to know whether there are any circumstances under which you believe that the mandatory arbitration clause should not be enforced. In other words, let us talk about the practical outcomes that arise when courts enforce these clauses and whether in your view any of them make clauses so unfair that you would deem then unenforceable.

I will give you an example of how forced arbitration affected a Minnesota soldier who was deployed at Camp Anaconda in Iraq. Now, I know Camp Anaconda. I visited it four times on USO tours. I would go there, I would tell a few jokes, and then leave very quickly. See, Camp Anaconda has a nickname. The soldiers there called it Mortaritaville because it had been hit—it was hit so often by enemy fire. And in fact, the first soldier I ever met in Walter Reed had both legs—lost both of his legs to a mortar at Camp Anaconda.

Well, one soldier who was deployed in Anaconda, Minnesota soldier, learned while he was there that his house had been foreclosed upon and sold in clear violation of a law we wrote, that Congress wrote, the ServiceMember's Civil Relief Act, which protects serviceMembers from civil actions while on active duty. The mortgage lender had falsified paperwork stating under oath that the soldier was not in military service. So the house went into foreclosure and was sold at an auction for a third of its assessed value. Can you guess who bought it? You can, right.

Judge GORSUCH. I can. You have shared this with me before, so I actually know who bought it.

Senator FRANKEN. Oh, okay. Well, then——

Judge GORSUCH. That is okay.

Senator FRANKEN [continuing]. It is not fair. The bank.

Judge GORSUCH. The bank, right. Yes.

Senator FRANKEN. The Bank.

Judge GORSUCH. Right.

Senator FRANKEN. It turns out there were over 80 other foreclosures taking place against servicemembers by the same lender. So the soldier tried to file a class-action suit on behalf of his fellow servicemembers. Unfortunately, a mandatory arbitration clause, which the soldier did not even realize was buried in his mortgage documents, also included a ban on class-action suits. So his case was not only forced out of court and into arbitration, but he had to go it alone.

Now, fortunately, the Minnesota soldier had a lawyer willing to take on his individual claim even though it is—often that is not cost-effective for the lawyer. They eventually settled on terms that

are confidential. As a result, we have no real way of knowing how many other servicemembers' rights were violated or whether this particular serviceMember was ultimately made whole. And of course he was prevented from even telling the other 80 serviceMembers who had been harmed how it all went down.

Judge Gorsuch, this is a case where we know the law was violated. We know that a bank unlawfully took this soldier's home while he was away serving our country. And to add insult to injury, the man also lost his constitutional right to have his claim heard in a public court of law.

So tell me, was it fair to limit this soldier's claim to secret arbitration and to prevent all the soldiers who had also lost their homes from being included in this case?

Judge GORSUCH. Senator, I am a big believer in jury trials and in the Seventh Amendment. And in the Rules Committee over the last 6 years I have worked with my colleagues to try and make litigation cheaper, faster, and more accessible so that people can vindicate their jury trial rights.

I have a proposal with a wonderful judge from the Ninth Circuit currently pending before the Rules Committee asking if we can actually reverse the presumption, because right now, when you file a complaint in Federal court, if you do not specify that you want your jury trial right, it goes away and you are presumed to want a bench trial. I do not understand that presumption. I think it should be——

Senator FRANKEN. I am talking about——

Judge GORSUCH. The other way around.

Senator FRANKEN [continuing]. In this agreements, on this particular agreement, this——

Judge GORSUCH. Well——

Senator FRANKEN. This is—this case is settled. It is not a live controversy. The thrust of my question is when do the principles of equity and fairness apply? So once there is a determination that there is indeed a contract, what does it take for the courts to decide that the outcome is so unjust that it cannot be enforced?

Judge GORSUCH. Well, under the Federal Arbitration Act, which is an act of this Congress, an act of lawmaking by this Congress, the first step and the key step is did the parties agree to arbitrate? And normal state contract formation principles apply there.

Senator FRANKEN. I know. We have——

Judge GORSUCH. And so——

Senator FRANKEN [continuing]. Talked about that. That is the initial test. We have talked about it.

Judge GORSUCH. I think it is very important, though, Senator, if you are asking me the question, I have to give you the answer. And the answer is under normal state contract formation principles, there are a number of defenses that can be raised. Unconscionability might be an argument if I were a lawyer in this case that I would want to raise in the case you are presenting. That would be an argument I would raise.

Senator FRANKEN. Do you not think this was unconscionable?

Judge GORSUCH. That would be an argument if I were a lawyer I would want to raise. I do not know how it would come out. I would have to—you know, I would have to have the full judicial

process in order to adjudicate it, but that would be an argument. If I were the lawyer, that is one I would make. Right.

I would also, if I were a lawyer and worried about these things, come to this body and ask you to revisit a nearly 100-year-old law and perhaps rethink the balance between arbitration and jury trials.

Senator FRANKEN. Well, I have done that with my Fairness in Arbitration Act, which I keep introducing.

Let us turn to the secretive nature of forced arbitration. Last year, the public was shocked to learn that over the course of 5 years Wells Fargo employees have been incentivized to open millions of sham accounts in the names of Wells Fargo customers and then charge the customers for those accounts, of course without their permission. Many of them lost—their credit rating just plummeted. This was a bad outcome for these people.

One reason this fraudulent practice was allowed to continue for so long was because Wells Fargo's customer account agreement included and continues to include a forced arbitration clause. When customers discovered and attempted to sue Wells Fargo for the sham accounts, the company argued successfully that any dispute arising from the sham account was covered by the arbitration clause in the real account. So those customers were forced into secret arbitration.

One such complaint was filed in September 2013. If that suit had been able to proceed in court, other Wells Fargo customers could have been alerted to the wrongdoing and may have been able to save themselves from being charged for the sham accounts and the life-changing damage it did to their credit scores, to their bank accounts, to the ability to buy a house.

Judge Gorsuch, would you agree that one benefit of our civil justice system is ensuring that other victims are made aware of widespread wrongdoing and that such awareness allows them to mitigate the harm for themselves?

Judge GORSUCH. I have spoken about that very issue, Senator.

Senator FRANKEN. Good. Now, it just—it does not just hurt customers. This—it hurts employees. Two weeks ago, I, along with a few of my colleagues here, introduced a number of bills aimed at combatting unfair forced arbitration clauses. In advocating for our legislation, we were joined by former Fox News anchor Gretchen Carlson. Last summer, Ms. Carlson took on one of the most powerful men in media, Roger Ailes, suing him for sexual harassment. Mr. Ailes' lawyers tried to force her case into private arbitration because of an arbitration clause in her employment contract.

Even worse, the arbitration clause also prohibited her from speaking out about the claims, as is the case in most employment arbitration agreements. Had Ms. Carlson chosen to sue Fox instead of directly suing Mr. Ailes, her colleagues at Fox News, many of whom were also victims of sexual harassment, would have been left in the dark about her case and may never have come forward with their own claims. And Roger Ailes' now well-documented abuse of women might well have continued.

In an op-ed published shortly after she joined us on Capitol Hill to talk about her legislation—our legislation, our legislation, the group of Senators who met—Ms. Carlson wrote, quote, "So many

women are being silenced by employers who force them into a secret star chamber proceeding called arbitration. By coercing women to remain silent about illegal behavior, the employer is able to shield abusers from true accountability and leave them in place to harass again," end quote.

Judge Gorsuch, the Seventh Amendment gives us the right to a trial by jury in civil lawsuits. Would you agree that a critical aspect of a jury trial is the fact that it is usually open to the public?

Judge GORSUCH. Absolutely. The Seventh Amendment—I am a big believer in the Seventh Amendment—all the amendments. And that amendment, civil jury trial, I have spoken about this a lot over the last couple days. I believe in it. I believe in juries. I believe in the civil involvement of the people in their government. I believe in the openness and transparency of a courtroom, the ability of every person to come into it, poor or rich, mighty or meek and have their cause heard. There are so many virtues to it. Transparency is one of them, absolutely.

Senator FRANKEN. I am so glad to hear you say that because these decisions, one 5–4 decision after another by the Roberts Court has closed the jury to employers—I mean, to employees and to customers, one after another. And that is why, frankly, there is so much at stake here. As Senator Whitehouse has demonstrated, what we are worried about is another 5–4 Roberts Court making one decision after another that hurts workers, employees, that hurts consumers.

And, you know, you said earlier there is no Democratic judges, there are no Republican judges. If that is the case, what was Merrick Garland about? That is what it was about. It was about let us leave this up to the election even though there was almost a year left. That is what this is about. And what this Court has done—and, listen, I am sure there are a lot of cases decided where judges go back and forth, but there is a sort of core group of cases in which the Roberts Court continually has ruled in favor of corporations and against workers and consumers. That is what this is about, and that is why—this is not—I know I am over my time, Mr. Chairman, and I will just try to finish out with a thought.

Chairman GRASSLEY. Okay. Go ahead.

Senator FRANKEN. I think I have a thought.

Senator FEINSTEIN. Maybe.

Senator FRANKEN. Maybe. Thank you, Ranking Member.

This is really about something. And my colleagues on the other side say, you know, that we are making something up over here. We are trying to really figure out whether we are going to see a continuation of this pro-corporate bias and of this bias toward big money and a perversion of our political system like through Citizens United and where the weight shifts against the little guy and for the big guy, and if that—if—this election was supposed to be about the little guy but that is my thought.

Senator SASSE. Could I—does Al—Senator Franken, if you want another minute, you can have a minute of mine.

Chairman GRASSLEY. I want to move on.

Senator SASSE. Okay.

Senator FRANKEN. Wait a minute. He gave me a minute.

[Laughter.]

Senator FRANKEN. Ah, gee.

Chairman GRASSLEY. I want to—when he gets done, we are going to take a 10-minute break——

Judge GORSUCH. Thank you.

Chairman GRASSLEY [continuing]. For the benefit of the nominee.

Judge GORSUCH. Thank you.

Senator SASSE. I know this is probably imprudent, but, Senator Franken, I think you had two different thoughts. And one of them I completely agree with to the degree that I understand the facts and the other one I think is a non sequitur for what we are talking about. So I found a lot of what you just said now compelling. I do not know all the facts of the particular fraud case you are talking about, but I do not see exactly how that applies to what the judge who is sitting in front of us being considered for today.

But to the degree that—if you are right on a lot of the facts you stipulate, it sounds to me like we ought to legislate about it and we ought to talk together about what we should do to fix this problem. I do not know what it has to do with the confirmation of a Supreme Court nominee because I think we are talking with him about what the law is. I think a lot of your commentary was on what you think the law should be, and if your fact pattern is right, I think there is a problem there we should also fix.

But I do not think it is right that when you conclude to say the Republicans are indifferent to this problem, I am interested here not in the Republican-Democratic distinction but in the legislative judging distinction. So we can follow-up.

Chairman GRASSLEY. The problem is lawyers get paid a lot more in court than they do doing arbitration.

Senator SASSE. Thank you, sir.

[Laughter.]

Senator SASSE. I would like to enter into the record——

[Laughter.]

Senator SASSE. I think what just happened was one of the only nonlawyers on the Judiciary Committee just got slapped by the senior nonlawyer on the Judiciary Committee.

[Laughter.]

Senator SASSE. Nebraska is going to beat Iowa in football this year, sir.

[Laughter.]

Chairman GRASSLEY. That is what you think.

[Laughter.]

Senator SASSE. I thought you were a Cyclone.

Anyway, I would like to enter into the record a letter written by some of Judge Gorsuch's law students at the University of Colorado law school. These students hold very political views, but they all support the judge's nomination. They call him, quote, "a kind and brilliant person dedicated to the rule of law and to the Constitution," close quote. They write that he was even able to make a, quote, "mandatory ethics class memorable." So well done.

I would like to note one story from the letter from a law student who served as an extern, quote, "While serving as an extern, I helped him in drafting an opinion rejecting a prisoner's appeal. The prisoner had no lawyer and very weak arguments, so I turned in a draft that explained very briskly why the prisoner's claim lacked

merit. The judge then asked me, 'Where are the responses to the prisoner's arguments?' "—close quote. "I told him that I did not see the need to address those because they were so weak. Well, that did not go over well with the judge. Judge Gorsuch responded, "We owe this man the kindness of stating his arguments as fairly as we can and then responding with clear answers in plain English. We owe him the kindness of explaining to him in a way that he can understand why he lost the case. Ruling against this man does not relieve us of our obligation to show him that kindness' "—close quote.

I would like to ask that we enter that letter into the record.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator SASSE. I would also like to enter into the record a letter from dozens of Judge Gorsuch's Columbia University classmates in support of his nomination. Again, this is a diverse group praising the judge's character and, quote, "unflagging commitment to respectful and open dialogue on campus," close quote. The alumni are united in their belief that the judge would, quote, "serve our country with honor and distinction on the Supreme Court." I ask that this letter be entered into the record.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator SASSE. Finally, I would like to enter into the record a letter from the past president of the Colorado Trial Lawyers Association, Gordon Netzorg, in support of the judge's nomination. He has observed that the judge is, quote, "completely honest and above-board, a man of integrity," close quote. He also points out that the judge enjoys strong bipartisan support from the Colorado Bar. I ask that this letter be entered into the record.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator SASSE. Judge, you said yesterday that there is a lot about this process that you do not like and that makes you uncomfortable. I would love to hear more about it, but I recognize that you probably would not answer that question, that you cannot and therefore will not answer. I think as a newbie here—I think I am one of five people on the U.S. Senate that has never run for anything before in my life before getting here—I think that this Congress does not function as it should on a broad range of issues. You said yesterday that this is still the greatest deliberative body in the world. I hope that can be true again, but humbly, there are a whole bunch of not-for-profit boards in my little town of Fremont, Nebraska, that function a lot better at deliberation than the U.S. Senate does right now.

Speaker Pelosi or Leader Pelosi is not a Member of the Senate but the U.S. Congress is a place that the American people look at, and when they see us, they do not primarily see public servants. They do not primarily see a distinction between the Article I branch in which we serve as the Legislature versus an Article II and III branch that are supposed to check and balance one another. They do not primarily see a distinction between the House and the Senate. They primarily see political parties. And our Founders did

not intend that. George Washington's farewell address spoke directly to the danger of faction.

We live in an era where there is going to be even more disintermediation of public discourse through media channels as the barriers to entry get smaller and the digitization of journalism creates a world where there are going to be much more fragmented conversations. It is possible for us to just silo ourselves in a way where we create an echo chamber around ourselves so we only have to talk to and listen to people who already agree with us. The domain of shared facts is declining, and it is a really dangerous thing.

And I worry about what comes next for the country. I worry about what comes next for public discourse broadly. I worry about what comes next in this institution. And I do not want to put too fine a point on it, but I think that people who have watched these hearings over the course of the last 3 days know that you should be confirmed, know that you will be confirmed, and know that comments like Leader Pelosi's that if you are an American who drinks water or breathes air, they should be scared of you, that is absurd. And my colleagues know that it is absurd. And there is a real danger in not condemning that kind of reckless speech.

As is kind of well known, I think I am the third or fourth most conservative guy in the U.S. Senate by voting record but I am not particularly partisan and I have not been bashful about speaking out against my party when my party has been reckless about facts. And I hope that some of the folks on the other side of the aisle, as we head toward a vote in this Committee and then we head toward a vote on the Floor in 2 weeks, will also speak out against the kind of reckless nonsense of telling the American people, who have day jobs, by the way—there are some folks who are watching on C–SPAN and that is wonderful. There are parents and teachers in Nebraska who are—and across the country who are using the C–SPAN hearings here as an occasion to teach their kids civics, and that is great. We need more—we need a more engaged public.

But most people are not watching these hearings, and most people are going to see some headline summary of what happened 2 weeks from now after there is a vote. And when the vote for you should be 95–to–0 or 95–to–5 or 100–to–0—math was not my strong suit so Franken will fill me in on the difference between 1924 and 1925—when they see a final vote, if it is not something overwhelming, if they see something that looks like Republicans voted one way and Democrats voted another way and they have echoing in their ears the sounds of people saying that you are some sort of a shill for big business and that the American people should be scared of you, we will have in this body done something to further erode the public trust.

And so I sincerely hope that my colleagues on the other side of the aisle, as they approach voting, will recognize that the audience after they vote is not just people in their next primary who want to see a greater politicization of every question in American life. But the audience for their vote is also going to be people who 10 and 15 and 20 years from now are going to look back on this body at this time and next year and two and 3 years from now and say

did we work to create a bigger and broader domain of shared facts and of shared public trust?

I know you will not comment on this confirmation process directly because it is fundamentally a political question, but I wonder if you might comment a little bit on how you see the interplay between Article I and Article II coming together to create a new member of the court, the highest court, of Article III.

Obviously, the President nominates someone to serve on the Supreme Court, and we have the constitutional duty in the Article I branch of providing advice and consent. Some of us have done that both with the last President and with this President, have given advice on the kinds of people that we think should be on the Court, and we ultimately have a duty to consent or not to consent.

It could be done in this Committee or it could be done exclusively on the Floor in the full body. It could be done—as you mentioned with Justice White, it could be done in 90 minutes or it can be done over the course of 2 weeks. There are lots of ways that the Senate could organize itself. But could you help the American people understand what do you think are the hardest questions that should right be being put to you and to future nominees for the Court? When we are doing our duty to having—after provided often private advice to the President but also in public about the future and when we are deliberating about consenting or not consenting, what are the hardest questions that you think it is appropriate that this body would ask of nominees?

Judge GORSUCH. Senator, I am grateful for the question, but that is one I am going to have to respectfully decline to answer out of respect for the separation of powers. I just do not think it is appropriate for an Article III judge to be trying to tell this body how to do its business. I just do not. Of course, I have my personal thoughts. I put them over there. I am a judge. And respectfully, I have more optimism for this country. I do. And I have more optimism for this body and for the Congress as a whole. I have seen it work. And maybe I will just leave it there.

Senator SASSE. I hope you are proved right.

I would like to pursue something that Senator Cruz asked about a few minutes ago. There has been presupposition behind some questions earlier today that if you believe in textualism, if you believe in originalism, if you believe that one of the core jobs of someone who sits on the Bench is to understand the original public meaning, that somehow that means you are locked in time in history in 1788. Our Constitution has this glorious amendment process. Can you explain the relationship between the amendment process and originalism? Since the document does evolve in a formal, explicit, amended way, how does that relate to original public understanding?

Judge GORSUCH. The Constitution is a law. Like any other law, it is our foundational law, and it was drafted to last maybe unlike certain other pieces of legislation that this body might think outdated and wish to update. That is its prerogative. The Constitution was designed to last and it was a brilliant, brilliant document. And the Founders really were amazing. If you ever go to Philadelphia, you have got to go to Independence Hall and the Constitutional Center there and see how it happened. And it is inspiring.

And part of the wisdom of the document is the recognition, the humility that even the Founders, brilliant as they were, could not anticipate what might happen 100 years, 200 years—we might hope a lot longer than that—down the line. And so they recognized that, ultimately, it is about we the people. The people are sovereign to this country, not a king, not a class. And if the people wish to change their Constitution, there is a provision. There is a way to do that. It is a government by the people and for the people. And that is the amendment process in a nutshell, Senator.

Senator SASSE. As a sitting Supreme Court Justice tasked with upholding the U.S. Constitution, is it ever appropriate to cite international law? And if so, why?

Judge GORSUCH. I am not going to—it is not categorically improper. There are some circumstances when it is not just proper but necessary. You are interpreting a contract with the choice-of-law provision that may adopt a foreign law. That is an appropriate time to look at any choice-of-law provision by any party in any contract. Treaties sometimes require you to look at international law by their terms.

But if we are talking about interpreting the Constitution of the United States, we have our own tradition and our own history, and I do not know why we would look to the experience of other countries rather than to our own when everybody else looks to us. For all the imperfections of our rule of law, it is still the shining example in the world.

That is not to say we should sweep our problems under the rug or pretend that we have solved all of the problems in our culture, in our society, in our civic discourse, but it is to say that we have our history and our Constitution, and it is by we the people.

And so, as a general matter, Senator, I would say it is improper to look abroad when interpreting the Constitution as a general matter.

Senator SASSE. How do independent agencies fit in a constitutional system of three branches?

Judge GORSUCH. Senator, independent agencies are in the executive branch, and there is a case called *Humphrey's Executor* that was decided in the 1930s that permits independent agencies to be created. By an independent agency we mean that it is headed by usually a group of individuals who are removable only for cause as opposed to at will.

Senator SASSE. How do you understand the term American exceptionalism?

Judge GORSUCH. I think that term means many things to many people, Senator, and I do not wish to get involved in politics. I have spoken as to how I see our Constitution and the brilliance of it and the reverence I hold for it. And I think I will just leave it there, with your permission.

Senator SASSE. What role does the Declaration of Independence play in interpreting the Constitution?

Judge GORSUCH. The Declaration of Independence is an amazing document, right? These are men who—as Benjamin Franklin said, we either hang together or we hang separately. When they put their name to that document, it was a death warrant if they failed. And that is why John Hancock is now synonymous with a signa-

ture. No one remembers who John Hancock was, but they know that is a signature because he wrote his name so bigly—big and boldly.

Senator SASSE. You just said bigly.

Judge GORSUCH. Bigly.

[Laughter.]

Senator SASSE. And I just won five bucks.

[Laughter.]

Judge GORSUCH. You embarrassed me in front of my nephew and he loves it.

[Laughter.]

Senator SASSE. He is the one paying me the five bucks.

[Laughter.]

Senator SASSE. The Declaration of Independence I think?

[Laughter.]

Senator SASSE. Is that where we were? I think my work here is done, but I do want to hear your answer.

Judge GORSUCH. John Hancock, right, the signature, that was his death warrant, but he did not want the king to have any ambiguity about who it was that was signing that document. And it was his death warrant. That is remarkable, a remarkable thing that the men and the women who fought for our freedom, with all apologies to my British wife.

It is, however, not the law. The Declaration is not the law. It is a Declaration of Independence. The Constitution is the foundational document and the foundational law of the country, to answer your question. The Declaration I think certainly informs every American and should inform a judge in understanding the background of the Constitution and our laws. It is not a document that should be lightly discarded.

Senator SASSE. Thank you. I do still want to ask you some questions about the Ninth and Tenth Amendment, but I will save that for future rounds, as I am at time. Thank you, Chairman.

Chairman GRASSLEY. Before you take your break and on the issue of America being an exceptional nation, I would hope that you could consider what de Tocqueville said about America being an exceptional nation and say that without being political.

Thank you very much. We will take a 10-minute break.

[Recess.]

Chairman GRASSLEY. I am going to wait a couple of minutes.

Judge GORSUCH. Oh, you are.

Chairman GRASSLEY. No, no, you stay there, please. What we are trying to do is figure out how we end up tonight and get everything done we have got to get done. I think we have got something, we have got a plan here.

[Pause.]

Chairman GRASSLEY. We are going to give 30 seconds to Senator Franken, but not right now——

[Laughter.]

Chairman GRASSLEY [continuing]. And then go to Coons. After we finish a second round, we will do what has been done for the last 30 or 40 years with a nominee. We are going to have a closed session, and then we will reconvene after we have the closed session, and then we will start our third round. In other words, at the

end of the second round I should make clear we are going to have this closed session, and by doing that, then when people are done with their third round, if they want to leave and not come back, they will not have to. And then for the third round, I think I have consulted with a leader here that we would allow 15 minutes but we would hope that you could do it in less than 15 minutes so that we can get done sooner than we got done last night.

So that is the way we will handle it, and I hope not everybody wants a third round, but I can understand if everybody does want a third round. This is a very important part of our function as Senators, so we will do whatever it takes to satisfy everybody so the questions get asked that you want to ask.

Senator Franken, for 31 minutes——

Senator FRANKEN. Seconds.

Chairman GRASSLEY [continuing]. Thirty-one seconds.

Senator FRANKEN. Thank you. Thank you, Mr. Chairman.

Judge Gorsuch, you were right. The Federal Arbitration Act was passed in 1925, as you said, not in 1924, as I said. I was wrong, and especially so because I chose to correct you when I was the one who was wrong, and I humbly apologize.

Judge GORSUCH. Not at all, not at all.

Chairman GRASSLEY. That does not happen very often around the Senate.

[Laughter.]

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

Thank you, Senator Franken.

Thank you, Judge.

I will submit for the record, as many of my colleagues have, two more documents, an editorial from the *Washington Post* from Matt Whit, who experienced the hardship of depriving individuals of the ability to make their own end-of-life choices when his mother endured a painful death by refusing nutrition; and a letter from 21 national LGBT groups expressing concerns about Judge Gorsuch's opinions and whether they do indeed respect fundamental rights that would enable them to be protected from discrimination.

Chairman GRASSLEY. Without objection, those are entered.

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

Senator COONS. Thank you, Mr. Chairman.

Judge, I enjoyed our conversation yesterday about *Hobby Lobby* and your writings on assisted suicide, and I want to return to a discussion of privacy and the autonomy of adults to make their own decisions even when it might conflict with settled law or with the majority's view of morality.

Yesterday, when I asked you whether the Constitution contains a right to privacy, you agreed that it does, and I was glad to hear that. But you went on to describe this right and its origins, and you cited I think the Third and Fourth Amendments and two cases from the 1920s that have to do with parenting, I think Pierce and Meyer.

But you did not mention more recent cases where the right to privacy has been central: *Griswold*, protecting access to contraception; *Roe* and *Casey*, protecting the right to choose an abortion; *Lawrence* and *Obergefell*, protecting a same-sex couple's right to in-

timacy or to marry. And I think it is important to establish that when you agreed there is a right to privacy in our Constitution, that we were talking about the same thing.

In general, this area of substantive due process and right to privacy is one about which there has been vigorous debate, so I thought it was constructive for us to have a broader conversation about it.

First, do you agree those cases that I just cited all relied on the right to privacy as an essential part of their holding?

Judge GORSUCH. Senator, you and I were discussing, I believe, some of those more recent cases in the line of the Fourteenth Amendment, substantive due process case law, and all I was pointing out, or trying to at any rate, was that they have a prominence that goes back quite a ways.

Senator COONS. That is right. So would you agree that these are cases, the ones I just referenced, where the right to privacy really is an essential part of their holdings?

Judge GORSUCH. I agree they all grow out of the Fourteenth Amendment due process liberty component, which has been interpreted by the Supreme Court to include privacy in a lot of different areas.

Senator COONS. So would you agree, just to make sure I have understood you right, that the right to privacy today extends to protecting women's right to have autonomy over their reproductive choices and protecting the privacy of intimate relationships between consenting adults, whether same-sex or opposite sex?

Judge GORSUCH. You have *Casey*, you had *Lawrence*, you have *Obergefell*. All of those are, I think, in the line of cases you are talking about, Senator. Yes.

Senator COONS. So let us take a minute and look at *Casey* and how it explores and identifies this right to privacy. It is now, I think, 25 years old. It is a '92 case. It reaffirmed the constitutional right to choose an abortion. And the opinion of the Court notes—and I am going to quote here at some length—that these protections extend to matters involving, quote, "the most intimate and personal choices someone may make in a lifetime, choices central to dignity and autonomy, central to the liberty protected by the Fourteenth Amendment, and at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state." I think that is a well-known piece of the Casey opinion. Is that familiar to you?

Judge GORSUCH. Generally, yes.

Senator COONS. And in your book on assisted suicide you say, "that it remains unclear whether *Casey*'s mystery-of-life passage is properly understood as a persuasive but non-binding dictum." By calling this central section of the *Casey* opinion dicta, are you saying that future courts do no need to pay attention to it?

Judge GORSUCH. No, Senator, and I was not even—I do not recall being that emphatic about it.

Senator COONS. Okay.

Judge GORSUCH. What I said was that obviously *Casey* reaffirmed the right to abortion generally in *Roe*, and then the ques-

tion is what additional work does that language do, and that remains an open question in a lot of ways, what additional work that language does.

Senator COONS. Well, then, let us explore that, if we could. Should this *Casey* language be relied upon in other cases?

Judge GORSUCH. I think that is going to be an argument that counsel will make to a court and the court will have to consider through the proper judicial process—briefing, argument, decision.

Senator COONS. Well, let me just argue that it has been relied upon, that it was essential to the holdings in *Lawrence* and *Obergefell*. If that is correct and it has been relied upon in subsequent key Supreme Court cases, is *Casey* and this particular piece of the *Casey* holding indisputably settled law?

Judge GORSUCH. Senator, *Casey* is settled law in the sense that it is a decision of the U.S. Supreme Court. And you also have *Obergefell* and *Lawrence*. Those are all precedents of the U.S. Supreme Court, entitled to the weight of precedent, which is quite considerable, as we have discussed.

Senator COONS. Well, we have talked about precedent. You talked at some length about what are the tests of precedent. One of my concerns here is that the language in your book, I would argue, lays out a roadmap for ignoring this section of this holding, or minimizing or marginalizing it. Do I misread your writings here?

Judge GORSUCH. I do not know what you are referring to exactly, Senator.

Senator COONS. The section in your book on assisted suicide where you say *Casey's* mystery-of-life passage is persuasive but non-binding.

Judge GORSUCH. Again, Senator, I am not sure that is an accurate portrayal of the book in the first instance. I think I said that an argument could be made to that effect, at most, because you had two holdings in *Casey*. You had one, a stare decisis or a precedent-based holding. *Roe* is upheld because it is precedent.

Senator COONS. Right.

Judge GORSUCH. And second, there was a second argument for upholding Roe, and this is part of it, this language. So both are sufficient to the day, and sometimes as a court you ask which is binding holding. Sometimes there is not just the law of judicial precedent but a law of interpreting when we have multiple holdings.

Senator COONS. That is right.

Judge GORSUCH. The Marks opinion, for example, which talks about how you pick which holding is binding in the future. So, Senator, we have a whole law which applies here.

Senator COONS. I understand that.

Judge GORSUCH. A whole body of case law——

Senator COONS. It is exactly because of that and what I think are concerns that you raise about whether this is precedent that should be relied on, or a section of the Casey opinion that should be relied on, that I just wanted to emphasize that I view it as an important foundation of this mystery-of-life passage and the subsequent due process views it expresses, really central to *Lawrence* and *Obergefell*. They are rooted in *Casey's* interpretation of liberty under the Fourteenth Amendment.

So would you disagree with me that *Lawrence* and *Obergefell* squarely rely upon *Casey's* view of liberty under the Fourteenth Amendment?

Judge GORSUCH. Senator, I think it would be an injustice to *Lawrence* or *Obergefell* for me to sit here and try to characterize them in miniature. They are thoughtful, lengthy opinions that have a considerable amount of analysis unto themselves. I would just say they are what they are. They are precedents of the U.S. Supreme Court, and they——

Senator COONS. So they are precedents, and you would view them as binding and as settled law.

Judge GORSUCH. Senator, they are precedents of the U.S. Supreme Court, due all the weight of a precedent of the U.S. Supreme Court. I have written a book about how much weight that is, with 12 judges from around the country, appointed by Presidents of both parties. Justice Breyer was kind enough to write a forward. And it presents the mainstream view, the consensus view. Think about it, 12 Circuit Judges agreeing on 800 pages.

Senator COONS. If you could get 50 Senators to agree on something, you would truly be worthy of——

Judge GORSUCH. I would be happy if I could get 20 of you to agree.

[Laughter.]

Senator COONS. So let me continue with that exploration, if I could. So if these cases, *Lawrence* and *Obergefell*, are settled law, and they are relying critically on this understanding of substantive due process that is rooted in *Casey* and its analysis, under what basis or circumstances would they be subject to reconsideration? When might they be open to being reexamined if they are currently indisputably settled law?

Judge GORSUCH. Senator, every precedent is subject to a presumption that it stays, right? Francis Bacon called precedent the anchor of the law. Alexander Hamilton said that judges, because we are life tenured, need to be bound down by strict rules and precedents.

Senator COONS. Right, and I think in your opening exchange with Senator Grassley you identified just a few factors, a reliance interest, whether it has been reaffirmed repeatedly, whether the legal construct it was on has been upheld or whether it is an island unto itself. Am I roughly remembering your——

Judge GORSUCH. There are a number of factors, and you have named a few of them, and they are all outlined in the book, among other places, and the Supreme Court precedents.

Senator COONS. Well, let us move to a key moment in this line of cases where settled precedent was overturned. You testified yesterday that Justice White was your judicial hero, a Justice for whom you clerked. And with all due respect, I think Justice White, who was an exceptional football player and jurist and Coloradoan, in this particular line of cases I think he was on the wrong side, in Casey and in *Bowers*.

So let us discuss *Bowers v. Hartwick*, which was a case that upheld a Texas statute criminalizing sexual intimacy between same-sex couples. In his 1986 decision in *Bowers*, Justice White declined to extend due process protections and recognize any funda-

mental right of intimacy. And in 2003, the Supreme Court overturned, directly overturned *Bowers* and *Lawrence*. Justice Kennedy wrote the *Lawrence* decision in reliance upon this *Casey* language, and he did not mince words. Justice Kennedy said, "*Bowers* was not correct when it was decided, as it is not correct today. It ought not remain binding precedent. *Bowers* should be and now is overruled."

You clerked for both Justices White and Kennedy. Was Justice Kennedy correct in stating that *Bowers* was wrong when it was decided?

Judge GORSUCH. Senator, that is the law of the Supreme Court. And you are right, I clerked for both men. I admire both men greatly. Both taught me an awful lot, and I a not here and I will not say a bad word about either one of those gentlemen.

Senator COONS. I wrestle with your admiration for Justice White when his jurisprudence fails to recognize what I and the current Supreme Court and many Americans view as a core liberty interest inherent in each one of us. Obviously, Justices can be revered for their writing and their decisions even when developments in the law and history have long passed them by.

You have also expressed admiration for Justice Scalia, and he dissented sharply, memorably in both of these same-sex decisions. He actually said in one of those dissents memorably that the majority's holding would mean, "that state laws against bigamy, same-sex marriage, adult incest, prostitution, adultery, fornication, bestiality, and obscenity would be called into question." As a legal matter, do you agree with Justice Scalia's statement in that dissent?

Judge GORSUCH. Senator, that is a dissent. It is not the controlling law——

Senator COONS. That is right.

Judge GORSUCH. Of the Supreme Court.

Senator COONS. And sometimes dissents are meant to signal a direction a certain Justice would like the law to go.

Judge GORSUCH. I am sure it does, but it is a dissent. And, Senator, with respect to Justice White, I am not here to spend an undue amount of time defending him. But we all, everyone—I know you indicated that you disagree with him; that is fine. Every one of us makes mistakes at some point in time. I do not think——

Senator COONS. Did he make a mistake in *Bowers*?

Judge GORSUCH. Senator, the Supreme Court has held that. Justice Kennedy held that. As you pointed out, you read the language, that is the binding law of the Supreme Court of the United States. And, Senator, I revere both men, both men greatly.

Senator COONS. But if you would, Judge, what I am looking for is some sense of your understanding of the scope of the substantive due process analysis in *Casey*. Because you took the initiative to write that it should be understood very narrowly, that it might not be something that would stand the test of time, because a Justice you identified as your judicial hero did not agree with it, and a Justice you did not describe as your judicial hero overturned it, so I am just expressing concern.

Judge GORSUCH. Senator, I am sorry to interrupt you, but that is not correct.

Senator COONS. Okay.

Judge GORSUCH. If you took away from my discussion that I do not consider Justice Kennedy a judicial hero, then I am sorry because I thought I made that very clear in my opening remarks before this body. And if I did not, I want to make it real clear right now, all right?

Senator COONS. Duly noted.

Judge GORSUCH. That I am immensely grateful—Senator, I cannot let that pass. I am sorry.

Senator COONS. You did note in your opening that you learned from him respect for litigants and that you admired your time with him, and I remember you saying very positive things about your clerkship with Justice——

Judge GORSUCH. I am glad, I am glad. I do not want the record of this Committee to go down in history as anything less than holding him in great admiration. That is very important to me, Senator.

Senator COONS. Thank you.

Judge GORSUCH. Very important to me.

Senator COONS. Justice Scalia, for whom you have also expressed a great deal of admiration, expressed in his other dissent, a key one in this case, that *Obergefell* literally was undermining American democracy, that it was a threat to American democracy. Presumably he was referring to the fact that the Court's decision struck down State laws adopted by referenda.

What did you understand him to mean? Do you view *Obergefell* as a threat to democracy somehow?

Judge GORSUCH. Senator, Justice Scalia had his views, and he expressed them in his dissent. They are his views. The law of the land is the holding of the Supreme Court in *Obergefell*.

Senator COONS. That is right. Your views you expressed in 2005 in an article in National Review called "Liberals and Lawsuits."And in that article you said marriage equality and death with dignity cases were examples of what liberals relied on, an over-weaning addiction to the courtroom to advance. What did you mean by that?

Judge GORSUCH. Senator, we discussed that article yesterday. I am happy to do it again. I was pointing out there, I think, two things, and a third. The first I was pointing out was that there are important civil rights issues that courts have to be available for, and that the courts are open to all persons. One of the beauties of our courts is that they can vindicate civil rights for minorities.

Senator COONS. That is right.

Judge GORSUCH. It is a non-majoritarian institution.

Senator COONS. And the line of cases I have been working through with you are two that are landmark cases but that also have memorable dissents where significant advances in civil rights were made, and that is exactly what I was trying to explore, why you sort of picked out those two areas to, I will say, denigrate in this National Review article. Maybe I misread it.

Judge GORSUCH. I do not mean to denigrate anyone's views, Senator. This was before I was a judge. And the second point I made was that there are some comparative disadvantages to resolving policy matters for courts. One of the disadvantages comparatively is that judges are not well-equipped to decide policy matters. We

have four evanescent law clerks that come to us for a year out of law school. Great policymakers they are not, with all respect to my law clerks, all right? They are wonderful legal researchers, but they are not great policymakers.

Senator COONS. Speaking as a former clerk, I appreciate the recognition that some are great legal researchers. I am not sure I was either a good policy advisor or researcher for my judge.

Let me, if I can, move to asking you about the basis on which you might ever be open to reconsidering, as Kennedy did, White's decision in *Bowers* with *Lawrence*, the decision in *Obergefell*. *Obergefell*, which recognized a constitutional right to marriage equality for same-sex couples, rooted in the substantive due process, is something that is now settled law and on which I would say there is now a great deal of reliance, one of your core factors, one of the core factors in deciding whether or not a precedential decision should be reviewed.

Do you think there is significant reliance interests on *Obergefell*?

Judge GORSUCH. I am sure there are, Senator, yes.

Senator COONS. And would you include in that the thousands, probably tens of thousands of couples that have now married and purchased property and signed contracts and changes in State law and municipal law such that you would agree there is really a significant reliance interest on this decision?

Judge GORSUCH. Reliance interests are, as you point out, Senator, an important factor in any consideration of precedent, absolutely.

Senator COONS. And so overturning this key piece of precedent would not just disrespect the now 25-year-long settled mystery-of-life analysis of *Casey* and the settled *Lawrence* decision, but also the reliance interests of many couples in this *Obergefell* decision?

Judge GORSUCH. Senator, I have declined to make any promises, hints, or previews in how I would resolve any case.

Senator COONS. That is right.

Judge GORSUCH. And I am going to continue that here.

Senator COONS. But I am simply asking if you think there is a significant reliance interest, and I think you have agreed.

Judge GORSUCH. And I have already said yes.

Senator COONS. Let me just turn, if I might, in the little time I have got left, and we might pick this up in my last round, to an important decision on this same question, the Fourteenth Amendment substantive due process right. In *Browder v. City of Albuquerque*, we talked yesterday about you being a Westerner, and this is a particularly Western case in which a police officer going off shift decided to just roar through the middle of town at 66 miles an hour, speeding through 11 different intersections and, tragically, one red light, killing a person and severely injuring another.

Access to the Federal courts in this case rests on 42 Section 1983, and your own decision, the unanimous decision of the Tenth Circuit that you wrote, describes substantive due process, which is the foundation of all these privacy cases we were just talking about, as very much uncharted, more than a little open-ended, a murky area with a paradoxical name.

What did you mean by all that in this case?

Judge GORSUCH. Senator, a lot of that was quotes from other cases, as I recall.

Senator COONS. Two out of the four, yes.

Judge GORSUCH. All right.

Senator COONS. I was a law clerk.

Judge GORSUCH. And just so we are dead accurate here, I think those are quotes from the U.S. Supreme Court.

Senator COONS. Yes, they are.

Judge GORSUCH. All right. I think that is not an insignificant fact to note, Senator.

Senator COONS. It is not insignificant.

Judge GORSUCH. All right. In that case, the question was whether there is a substantive due process right to pursue not a privacy interest but a lawsuit, a tort-type lawsuit against a police officer for his conduct. We have precedent in the Tenth Circuit saying indeed there is. And in that case, the majority opinion that I wrote for the court, I upheld the right of the family to pursue the police officer for damages under the United States Constitution.

Senator COONS. That is right.

And if I might, Mr. Chairman, I have a follow-on question which we will get to in the third round.

Chairman GRASSLEY. Okay.

Senator COONS. Thank you.

Chairman GRASSLEY. Senator Flake.

Senator FLAKE. Thank you, Mr. Chairman.

And thank you, Judge, for your endurance through this process.

Yesterday you mentioned that, quote, "All precedents of the Supreme Court deserve the respect of precedent." I will ask a couple of questions about Supreme Court precedent. One recent precedent was the *Hosanna-Tabor* case. This unanimous opinion affirmed the ministerial exemption to the First Amendment. In other words, the Government does not get to tell churches or other religious groups how it selects its ministers. Does *Hosanna-Tabor* deserve the respect of precedent?

Judge GORSUCH. Yes, Senator.

Senator FLAKE. Thank you. Another recent opinion was *U.S. v. Lopez*. The opinion involved a gun-free school zone act. Importantly, the act was passed pursuant to our commerce power. The Supreme Court struck down the bill saying, "To uphold the Government's contentions here, we have to pile inference upon inference in a manner that would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." Does *U.S. v. Lopez* deserve the respect of precedent?

Judge GORSUCH. It is a precedent of the U.S. Supreme Court. That is a weighty thing, Senator.

Senator FLAKE. Thank you. Still one more, a recent opinion in *Glossip v. Gross*. It was actually handed down in your Circuit, I believe. It involved the constitutionality of the death penalty under prohibition of cruel and unusual punishment. The Court said, quote, "It is settled that capital punishment is constitutional." Does that one deserve the respect of precedent as well?

Judge GORSUCH. It does, Senator.

Senator FLAKE. Is foreign law ever valid precedent in an American court?

Judge GORSUCH. Senator, we have just discussed this with Senator Sasse. There are instances when foreign law may be appropriately cited. For example, in contract disputes between private parties, sometimes they will have a choice of law provision where they have contracted for the application of a particular state's law, or maybe even a particular nation's law. In interpreting the United States Constitution, it is generally not useful for courts to be looking at foreign law. We have our own traditions that are, frankly, the envy of the world, if we want to talk about American exceptionalism. It does not require us to look very far to find our own precedents and our own history that are more germane usually, Senator.

Senator FLAKE. Thank you. We talked yesterday a bit about being from the West. In the Tenth Circuit, you deal with a lot of issues that are not brought up as much elsewhere, public lands issues, disputes, and also Tribal issues. Can you tell me how dealing with Tribal issues has affected your view on religious liberty, or has affected your jurisprudence? There was a case, *Yellow Bear*, a sweat lodge issue.

Judge GORSUCH. Sure. The *Yellow Bear* case involved a Native American who had murdered his daughter, 3 years old, and was in Federal prison, and was denied access to an existing sweat lodge in the prison. The prison had various reasons why it said it was unable to provide access to the sweat lodge for Mr. Yellow Bear. We applied the Religious Freedom Restoration Act, which was a claim brought. There was no question about the sincerity of the man's religious beliefs, no question that he found solace in his faith after he had done what he had done.

And then the question becomes, if it was a sincerely held religious belief, was it a substantial burden. And that box we checked too, because the prison denied him any access to the sweat lodge.

So once you do those two things, the case then shifts to the Government, as it does in any *RFRA* case, any *Religious Freedom Restoration* case, regardless of who is bringing it, no matter how unpopular, the least amongst us. The government has to have a compelling interest, and it has to show that its compelling interest was executed in the most narrowly tailored way possible.

And here, the Government just could not come up with a good reason why it could not provide Mr. Yellow Bear with any access to the sweat lodge. It talked about the difficulty of moving him because he was an unpopular prisoner and potentially subject to violence by other prisoners. But the evidence showed they were able to move him for medical reasons, and able to move him to the cafeteria, for example, and back and forth. It could not show that it was much more, if any, of a burden financially or otherwise on the personnel of the prison to also make the sweat lodge available at least sometimes.

And so our court held that there was a violation of the *Religious Freedom Restoration Act* in that case, just as we would in any other.

Senator FLAKE. Thank you. Let me shift gears quite a bit here and talk about technology. You mentioned in the *Jones* opinion on GPS tracking and the heat lamp case, *Kyllo*, in the context of originalism, that technology cases provide thorny issues for the

Court, obviously. You have dealt with some of your own, including the review of Colorado's retail tattle-tale law, *DMA v. Brohl*. How should judges approach issues of new technology as it applies to litigation?

Judge GORSUCH. Senator, in the first two cases you are dealing with the question of an unreasonable search and seizure and what is a search. In the *Jones* case, is it a search to attach a GPS tracking device onto a car? If it is a search, perhaps the Government will need a warrant to do that. If it is not a search, it can just do it willy nilly.

So you have to ask yourself, well, what is a search? Is that a search? And to do that, the Court went back and looked at the law of trespass as it was at the time of the founding and concluded that would be what is called a trespass to chattels, a trespass on your private property, not on physical property but personal property; and that would qualify as a search or a trespass or a property right violation at the time of the founding and concluded that when we are interpreting the term an unreasonable search, what is a search for the Fourth Amendment, that the Constitution of the United States today cannot be less protective now of the people's liberties than the common law understanding was at the time of the founding. That is the way the Court reasoned in that case, using existing legal principles to address a new technology, and that is the sort of thing judges do.

Senator FLAKE. How should judges familiarize themselves with new technology? Do we get to leave that to law clerks, like we often leave it to staffers to understand new technologies? How important is it?

Judge GORSUCH. These are areas where Congress has a role too, respectfully, Senator. New technologies challenge us, all of us. And what is a reasonable search? Guidance from Congress is helpful in that regard. In fact, I think Justice Alito wrote a separate opinion in the *Jones* case inviting Congress' action in this area when we are dealing with new technologies, precisely because of the challenge of trying to address vastly new circumstances, new technologies that we have not seen before.

Senator FLAKE. You are right. I mean, we deal with that issue here all the time, trying to balance security versus privacy issues. We think that we have it done or balanced, and then new technology comes and upsets it. I am sure it is the same for the Court.

Let me continue on this vein talking about Congress' role as opposed to the Judiciary. Mr. Chairman, I would like to introduce into the record a piece published in Tech Policy Daily called "Gorsuch and Tech Policy." And in it, the author, a professor at Boston College Law School, concludes: "Our Justices should be willing to work hard and understand new technologies and think critically about how traditional legal concepts map into cyberspace." He concludes, "Judge Gorsuch's record suggests no reason to doubt he is up to the task." So, that makes us all feel better, I am sure.

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

Senator FLAKE. But let me talk about this in the context of an issue that we talked about yesterday and has been brought up a number of times, *Chevron* deference, as it relates to innovation here. I do not want to go back to your views on this. There is a

great deal, as I said, of exchanges on this subject. But let me talk about the relation to technology here.

If judges defer to policy decisions of Executive agencies, as *Chevron* calls for, those decisions depend largely on the public or the policy preferences of the agencies. Is that not right?

Judge GORSUCH. Senator, I am sorry. I am not sure I entirely tracked the question.

Senator FLAKE. Well, if agencies—if Congress sets a broad policy and the agencies interpret that and write regulations based on that, and the courts defer to the agency interpretation, then policy depends on the policy preferences of the agencies more than it does Congress in that view, right?

Judge GORSUCH. That sounds like a reasonable conclusion.

Senator FLAKE. Well, just as an example, if the Bush Administration had a policy on a certain technology, and then the Obama Administration came in and changed that policy, whether it is the FCC or the FTC, and then it was changed back when the Trump Administration came in, the technology community out there is getting whipsawed back and forth. They cannot rely on policy. I think that is why Congress and the courts need to take a hard look at agency deference and why I think we need to return here in Congress—and this has been discussed in the past couple of days—to legislating on different questions and doing more than we have over the past couple of decades and giving more instruction to agencies on how to interpret, or giving them less to interpret; I will put it that way. But I do think that we will have more consistent policy and policy that the private sector can rely on if Congress has to go through this exercise more than the agencies, because the agencies, it can go back and forth depending on who is in power there.

So that is just a long way of saying I agree with what seems to be, and I hope I read it correctly, your skepticism of *Chevron* deference, and that we ought to maybe tip the balance back toward relying on Congress, or the intent of Congress at least.

Mr. Chairman, I would like to introduce into the record a letter of support from the Hispanic Leadership Fund, which notes: "Judge Gorsuch has an exceptional record in defending the Constitution and our fundamental rights such as the Second Amendment and the right to religious liberty."

Chairman GRASSLEY. Without objection, so ordered.

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

Senator FLAKE. In the time I have remaining, a short time, let me just talk a little—you have mentioned in passing about another technology issue, cameras in the courtroom. It has been presented as educational, and maybe people, after viewing this, may have a different view of it. Obviously, we are the legislative branch. Everything we do here should be and always will be in the open and on television. I am glad C–PAN is here and in every hearing, just about, that we have, with the exception of the intelligence agencies.

But when you apply it sometimes to the third branch—take *TransAm Trucking* that has been discussed here at length—it is a pretty boring case when it was a camera-less courtroom that heard it. It was about standards of administrative review, statutory interpretation. But now, in this hearing room, it all of a sudden becomes

a battle between the big guy and the little guy, and I think that there is a legitimate concern about opening up our courtrooms to cameras and what that will incentivize.

So I hope you have said that is something that you will look at, as will everyone on the Court, but I hope that we pause as we do so, and watching these hearings over the past couple of days I hope will give us more pause about cases that do not lend themselves well when you consider what Edmund Burke said about the cold neutrality of an impartial judge being the standard. That sometimes to me seems inconsistent with cameras in the courtroom and what that incentivizes.

So with that, Mr. Chairman, and with the thanks of a lot of endurance, like I said, over the past couple of days, and you still have more to come, I yield back.

Chairman GRASSLEY. I am surprised you are such a reasonable Senator you would be against cameras in the courtroom.

[Laughter.]

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. I want to take issue with my good friend from Arizona and state, as I have before, how strongly I feel that cameras in the courtroom, including in the U.S. Supreme Court, would be a very good thing. I know the Chairman agrees with me, as do other Members of the Committee, and I believe that the American public would be better informed about the work of the Court and about their rights if more of the proceedings in our Federal courts were better known to them. I think that the image and the performance of our attorneys, of juries, of judges would not only attract interest but also elevate the performance there. So I hope you will take that under advisement.

Judge GORSUCH. Senator, one thing I have really gotten out of this process that I did not really appreciate, I knew the advice and consent function worked between Article 1 and Article 2, and I have been asked to comment on that, and I will not, but I have learned a lot, and I appreciate the advice I have gotten, thoughtful advice on a number of issues from Senators across the spectrum. You are thoughtful people who care deeply about this country, and you care deeply about the judiciary, and I appreciate that and the input that I have received from all of you. Thank you.

Senator BLUMENTHAL. Well, I very much appreciate that statement, and it leads to my next observation, which is about this process. As much as there has been some handwringing and some doubt expressed, I happen to think this kind of process is a lot healthier for our democracy than the 90 minutes that our common mentor, Justice White, spent in your place. I think, actually, although I did not know him as well as you, but I did see him on occasion on a basketball court in the highest court in the land, and had occasion to observe his elbows——

Judge GORSUCH. Did you get one? Did you get one in the side?

Senator BLUMENTHAL. I know that I have a right to remain silent.

[Laughter.]

Senator BLUMENTHAL. But I think he would have enjoyed the give and take.

Judge GORSUCH. He enjoyed physical contact in any sport activity. You may be right. You may be right about that.

Senator BLUMENTHAL. And I appreciate your being here to answer all our questions and, as I said yesterday, your patience and perseverance. I also——

Judge GORSUCH. Senator, I consider it a privilege to be here with you.

Senator BLUMENTHAL. Thank you. I also want to raise a question, talking about court procedure, relating to conflicts of interest and ethics. I think you were asked yesterday about the proposed ethics rules that have been applied to your court——

Judge GORSUCH. Yes.

Senator BLUMENTHAL [continuing]. To the appellate court, to the District Court, but not to the Supreme Court. Would you view such legislation as a violation of the separation of powers?

Judge GORSUCH. Senator, I am afraid I just have to respectfully decline to comment on that because I am afraid that could be a case or controversy, and you can see how it might be. I can understand Congress' concern and interest in this area. I understand that. But I think the proper way to test that question is the prescribed process of legislation and litigation.

Senator BLUMENTHAL. I assume that you have observed all those rules as a member of the Tenth Circuit Court of Appeals.

Judge GORSUCH. I have done my best, Senator.

Senator BLUMENTHAL. Have they been unduly burdensome?

Judge GORSUCH. No, Senator, no.

Senator BLUMENTHAL. Have you found that they interfered at all with your discharge of duties as a judge?

Judge GORSUCH. No, Senator.

Senator BLUMENTHAL. Would you object personally to following those rules as a member of the U.S. Supreme Court?

Judge GORSUCH. My personal views, Senator, have nothing to do with my job as a judge.

Senator BLUMENTHAL. Will you commit to following those rules personally on your own without any legal requirement?

Judge GORSUCH. Senator, what I have committed to do is to take a look at the law, talk to my colleagues collegially, and then make up my own mind, and I am taking into account all the advice I have gotten in this process carefully. I will carefully consider that. But, Senator, I am not going to make any promises in this process to anyone about anything other than to be the best possible judge I can be.

Senator BLUMENTHAL. Well, I hope that you will be as persuasive as possible after you make up your own mind and hope that you will decide that these rules make sense because, again, in terms of the appearance and the credibility of the Court, I think that they are important.

I want to go back to some questions I asked you yesterday which perhaps you did not get a chance to clarify, and I want to give you that opportunity. If you recall, we were talking about *Brown v. Board of Education*, and you said, I believe, that you agree with that decision. Do I have it correctly?

Judge GORSUCH. Senator, it is a seminal decision of the U.S. Supreme Court interpreting the Fourteenth Amendment, maybe one of the great moments in Supreme Court history.

Senator BLUMENTHAL. You said, that it "corrected an erroneous decision, a badly erroneous decision," and you called it "a correct application of the law of precedent." And you said also that it vindicated a dissent "that got the original meaning of the Equal Protection Clause right." That sounds to me like you agree with the result in *Brown v. Board of Education*.

Judge GORSUCH. Sir, you can characterize it however you want. I said what I said, and I stick by what I said.

Senator BLUMENTHAL. So unlike Justice Kennedy and Justice Roberts, Chief Justice Roberts, in their confirmation hearings, you will not say that you agree that it was the right result.

Judge GORSUCH. Senator, I have said it was a seminal decision of the U.S. Supreme Court that corrected a badly erroneous decision that vindicated the original understanding and the correct original meaning, rather, of the Fourteenth Amendment, and is one of the shining moments of constitutional history of the U.S. Supreme Court. That is what I have said.

Senator BLUMENTHAL. So why will you not say that you agree with the result?

Judge GORSUCH. Senator, I do not know what it means—I am not sure what we are arguing about here.

Senator BLUMENTHAL. We are not arguing. I am just asking why you are so averse to saying, yes, it was the right result.

Judge GORSUCH. I am saying as a judge, it was a seminal decision that got the original understanding of the Fourteenth Amendment right and corrected one of the most deeply erroneous interpretations of law in Supreme Court history, *Plessy v. Ferguson*, which is a dark, dark stain on our Court's history, and it took way too long for the U.S. Supreme Court to get the Fourteenth Amendment right. It is an embarrassment in our history. That is what I have said, Senator.

Senator BLUMENTHAL. And Chief Justice Roberts, in response to Senator Kennedy's question, "Do you agree with the Court's conclusion that the segregation of children in public schools solely on the basis of race is unconstitutional?" Then Judge Roberts, "I do."

You said yesterday—and I am quoting you now—that there is no daylight between you and——

Judge GORSUCH. Respectfully, I do not see any daylight between what I have just said and what you just quoted from the Chief.

Senator BLUMENTHAL. Okay.

Judge GORSUCH. I just do not, Senator.

Senator BLUMENTHAL. I am not going to dwell on this.

Judge GORSUCH. We are all on the same page on *Brown v. Board of Education*, Senator.

Senator BLUMENTHAL. Okay.

Judge GORSUCH. It is a great and important decision.

Senator BLUMENTHAL. Would you say the same about *Griswold v. Connecticut*?

Judge GORSUCH. What I have said about *Griswold v. Connecticut*, Senator, is that it is a decision by the U.S. Supreme Court recognizing the right of married couples, in the privacy of their own

home, to use contraceptive devices. It was decided, I believe, in 1965, though Senator Franken may wish to correct me.

Senator BLUMENTHAL. No, you are right about 1965.

Judge GORSUCH. Good. All right, 1965.

Senator BLUMENTHAL. And if I am wrong, I am not going to tell you I am wrong.

[Laughter.]

Senator BLUMENTHAL. It was decided in 1965, and that was its holding, and I am asking you do you believe it was the right result?

Judge GORSUCH. And what I have said is, Senator, it is 50 years old, more than 50 years old, right? The reliance interests surrounding it are obvious and strong. It has been repeatedly reaffirmed. Those are powerful things in the law of precedent. I have also said I cannot imagine a State trying to pass a law in this area, and I have said I cannot imagine the U.S. Supreme Court taking such a law seriously. I do not know how clear I could be to you, Senator.

Senator BLUMENTHAL. You could be much more clear about your personal beliefs.

Judge GORSUCH. Right.

Senator BLUMENTHAL. Do you believe——

Judge GORSUCH. And my personal views have nothing to do with my job as a judge.

Senator BLUMENTHAL. Well, let me invoke your beliefs as a commentator. Do you believe it was the right result based on your understanding of the law, not your personal beliefs about whether contraceptives are a good thing or a bad thing, but your beliefs about the constitutional underpinning the right to privacy, the Fourth Amendment, substantive due process underpinning of *Griswold v. Connecticut*? Was it the right result?

Judge GORSUCH. Senator, I have consistently, not picking out *Griswold* or any other particular case, I have drawn a line that I think is required of a good judge to be fair and to respect the separation of powers, without respect to precedent. A precedent of the U.S. Supreme Court, as we were talking with Senator Flake, they are all precedents. They all deserve respect of a judge.

Senator BLUMENTHAL. But some more than others.

Judge GORSUCH. Senator, it depends upon the factors under the law of precedent, what weight you give a precedent.

Senator BLUMENTHAL. Why is your—I am sorry.

Judge GORSUCH. Including the age of the precedent, how often it has been reaffirmed, the reliance interests surrounding it, whether it was correctly decided, whether it is constitutional versus statutory, and a number of other things that we have discussed repeatedly.

Senator BLUMENTHAL. And you are saying that there is no threat of it coming before the Court because a State legislature is unlikely to pass the kind of criminal ban on contraceptive use that existed then?

Judge GORSUCH. I have said, Senator, with this particular precedent we are talking about, it is over 50 years old, a weighty factor; that the reliance interests surrounding it are obvious and many and great. I have said that it has been repeatedly reaffirmed by the U.S. Supreme Court. I have said that I cannot imagine a State ac-

tually legislating in this area. And I have said that I cannot imagine the Supreme Court taking a challenge, someone wishing to challenge that precedent, seriously. I do not know how much more clear I could be to you, Senator, as a judge.

Senator BLUMENTHAL. Would you say the same about *Eisenstadt v. Baird*?

Judge GORSUCH. I have already, Senator, several times in the course of this hearing.

Senator BLUMENTHAL. And you are unwilling to do, as Justice Alito did, and he was a judge, and I think you would probably say he was a good judge, correct?

Judge GORSUCH. I think every member of the U.S. Supreme Court sitting is a very fine judge, yes.

Senator BLUMENTHAL. And he said about *Eisenstadt v. Baird*, "I do agree with the result." You are unwilling to say that, and you are unwilling to say, as Chief Justice Roberts did about *Griswold*, "I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and availability of that."

Judge GORSUCH. Respectfully, Senator, I think we are splitting hairs, I really do, because I have told you quite clearly that both of those precedents are in the realm of 50 years old, that they have serious reliance interests around them, that they have been repeatedly reaffirmed. And, Senator, what I have tried to do with respect to all precedents is treat them equally in my presentation before you, because as a judge I come at them equally. In my line of work, a precedent is a heavy, weighty thing, and it deserves respect as precedent, as part of our history.

Senator BLUMENTHAL. Well, we are doing more than, with all due respect, Your Honor, we are doing more than splitting hairs here, because words matter. And the words of Chief Justice Roberts and Justice Alito's were different than yours. Asking you to agree that these results were correct I think is a relevant and important question, and your declining to do so—I respect your reasons, but I think that it speaks volumes, with all due respect.

Judge GORSUCH. Well, let me try it this way for you, Senator. Maybe this will help. The way I look at it is I do not come at these issues fresh. It is not whether I agree or disagree with any particular precedent. That would be an act of hubris, because a precedent, once it is decided, it carries far more weight than what I personally think.

Senator BLUMENTHAL. Well, let me ask you——

Judge GORSUCH. The point of a precedent—I am trying to be as helpful to you here as I can be, Senator—is that it represents collective wisdom. And to say I agree or I disagree with a precedent of the U.S. Supreme Court as a judge, it is an act of hubris that to me just does not feel like a judicial function. For a judge, precedent is more important than what I think, and my agreement or my disagreement with it does not add weight to it. It is what it is.

Senator BLUMENTHAL. Let me ask you about *Loving v. Virginia*. As you know, it invalidated bans on interracial marriage under both the Equal Protection and Due Process Clauses. Do you agree with the result there?

Judge GORSUCH. Seminal, important application of the principles recognized in *Brown v. Board of Education*, and a vindication again

for the original meaning of the Equal Protection Clause, that all of us, every single person, is equal, and that we can all choose with whom we wish to live our lives without respect to race. It is one of the great moments. We visited some dark moments in Supreme Court history, and we visited some bright moments, Senator.

Senator BLUMENTHAL. And *Lawrence v. Texas*, which held that the Government cannot criminalize gay and lesbian relationships?

Judge GORSUCH. That is a holding of the U.S. Supreme Court due all the way to precedent, Senator, as well.

Senator BLUMENTHAL. And would you agree that it overturned an incorrect decision?

Judge GORSUCH. That is what it declared, Senator. That is the precedent of the U.S. Supreme Court.

Senator BLUMENTHAL. Do you agree?

Judge GORSUCH. Senator, it is a precedent of the U.S. Supreme Court. I am going to give you the same answer every time.

Senator BLUMENTHAL. Well, I suspect you will. But let me just say that the answer that you have given leaves doubt in a lot of minds. To quote from a concurrence by Justice Kennedy, as well as Justice Souter and Justice O'Connor, and I am quoting, "Liberty finds no refuge in a jurisprudence of doubt." Your declining to be more direct and give the same answer about these cases that you did about *Brown* leaves doubt in the minds of millions of Americans who rely on privacy rights. They are relying right now. And I think that doubt is regrettable.

I want to ask you—I think I know the answer. Do you agree with the result in *Roe v. Wade* and *Planned Parenthood v. Casey*?

Judge GORSUCH. Senator, I am drawing the same line that Justice Ginsburg drew, Justice O'Connor drew, Justice Souter, Justice Scalia. Many, many, many people who have sat at this confirmation table have declined to offer their personal views to this or that precedent, whether it is one side's favorite or another side's favorite, one side's least favorite, the other side's least favorite. We have gone back and forth today on precedents, which ones people like and do not like. And I understand that every citizen and every Member of the Senate have their precedents that they prefer personally and not. I understand that. I respect that. That is part of the process and our First Amendment liberties.

But as a judge, as a judge, my job is to decide cases as they come to me. And if I start suggesting that I prefer or not, dislike this or that precedent, I am sending a signal, a hint, a promise, a preview, as Justice Ginsburg called it, about how I would rule in future cases where those principles from that case are going to be at issue, and all of these cases that we just discussed that are very alive with controversy, as you know, Senator, which is why you are asking about them. And for a judge to start tipping his or her hand about whether they like or dislike this or that precedent would send the wrong signal. It would send the signal to the American people that the judge's personal views have something to do with the judge's job.

And the one thing I have tried to convey over the last 3 days is that I do not believe that is part of the judicial function, and I do not believe that is what good judges do. And I have also said, Senator, and I believe this firmly, that once a judge starts committing,

promising, hinting, previewing, forecasting, agreeing or disagreeing with precedent at this confirmation table, we are in the process then of campaign promises, and we are in that process, Senator, I fear, of judges having to make commitments, tacit promises, hints, previews, as Justice Ginsburg called it, in order to become confirmed. And once we do that, I am fearful for the independence of our judiciary.

Senator BLUMENTHAL. Well, just for the record, because I am out of time, I am not asking you to look forward to cases and controversies that may come before you. I am simply asking you whether you accept the basic core principles of the right to privacy that are articulated in those decisions.

I apologize, Mr. Chairman, that I have gone over by a couple of seconds.

Chairman GRASSLEY. No, that is fine.

Before Senator Crapo, we have a vote sometime between 4:45 and 5:15. The exact time we do not know. But that would be a good time for us to have the break for to move to our closed session and then come back here, and whoever has not had their second round yet will get their second round. And then we will immediately go to the third round.

Senator CRAPO.

Senator CRAPO. Thank you very much, Mr. Chairman.

And Judge Gorsuch, I want to go back to the issue you have just been discussing. First of all, to say that I respect your absolute resistance to being invited to put your personal opinions onto the issues that you will need to face as a Supreme Court Justice if you are confirmed. I appreciate it, and I respect it.

The fact is that as now Justice Ginsburg said, if you can be pushed into giving hints about what your feelings are about the precedent of the U.S. Supreme Court decisions or other cases, then you will have violated what I think is an appropriate approach that a judge should bring to jurisprudence. And so I just wanted to tell you I appreciate.

I know you are getting questions again and again and again. And you consistently make it very clear that you are leaving your personal opinions out of it, as a judge should do. So I, for one, want to tell you that I appreciate that and recognize it.

That leads, though, to one of the issues that I wanted to return to with you. You and I talked about it yesterday, and in fact, you have talked to a number of Senators about it, and it is back again to the question of originalism and textualism. And I realize that it is hard to put labels on this issue because they do not really necessarily portray what it is we are trying to talk about.

But the aspect of this that I would simply like you to discuss a little more in detail is the one really that Senator Feinstein started out with today. If it is—and I do not want to put words in your mouth. But if it is the approach that a judge or a Justice should take, that they look at the Constitution or a statute as it was written and try to determine what reasonable people would understand it, the words in the statute to mean, does that mean that somehow for all time in the future as society evolves and as science evolves and as circumstances develop that were not contemplated perhaps at the time the Constitution or the statutes were written, does it

mean that we do not have a way to deal with applying those laws or the Constitution to new circumstances?

And does that—if the answer to that is, no, there is a way to apply these laws and to interpret the Constitution, does that mean that we are somehow changing the Constitution, or what are the parameters of that entire concept? Could you discuss that a little more completely?

Judge GORSUCH. Well, Senator, I—we have discussed this quite a lot. I am happy to try to do it again. But the job of a judge is not to make law, but to interpret the law and to apply the law as best as humanly possible. And one way to do that, we start with precedent. That is where we start. We do not reinvent the wheel. And we apply the precedent we like and the precedent we do not like because our personal views have nothing to do with our job.

We apply all the precedent. And if you cannot do that, well, then you are in the wrong line of work. A judge's job is to apply precedent without respect to persons and without respect to their personal views.

Then when we look at, say, an unanswered question where there is not precedent, for example, one thing a good judge will want to know is what the original understanding of that law was at the time. In the statutory context, I have talked about the fish case.

Senator CRAPO. Yes.

Judge GORSUCH. In the Constitutional context, I have used a couple of cases that I think are good examples. One is the thermal imaging case, and the other is the GPS tracking device case. Those are some of my favorite teaching cases when I go talk to young people about these issues.

And the point of them all is to demonstrate two things. That when we speak about the original understanding of the law, we are protecting due process interests. We are applying the law as we could expect a reasonable citizen, person in this country to have understood it.

So that when I am putting a person in prison, for example, which we do as judges. We are complicit in that process. That I know I am putting that person in prison for something that they could reasonably be charged with knowing to be improper. Not something that comes from my heart, that I made up. Not my personal views, not what I like or dislike or agree with or disagree with. But what I can say that person should have known. That is the due process/fair notice value.

And the other aspect of it is the separation of powers value that is behind this, which is, again, I can make a reasonable claim that I am declaring that the law is. A reasonable claim that I am not just doing politics. A reasonable claim that I am trying to interpret and apply rather than alter and amend the work of the people's representatives.

For after all, this is a democracy at the end of the day. It is not an oligarchy of judges.

Senator CRAPO. I think that is an important distinction that you just made. You are trying to interpret and apply rather than to alter or amend the meaning of the Constitution or the words of the Constitution or the words and meaning of a statute. And to me, that is really the core issue here.

That what I hear you saying is that your objective, whether it is called originalism or textualism or what have you, is to identify what a reasonable person would interpret the words in the Constitution to mean and not to say or to try to interpret it to mean what you think they should have said or written at the time.

Which does not mean that you cannot apply those principles to new developments in society or in science. It simply means that you must interpret the words as they were intended and as reasonably understood. And if we are to change it, then there is a process for that to take place.

Judge GORSUCH. That is right, Senator. And that process lies with the people's representatives for the amendment process, as we have discussed. Exactly.

Senator CRAPO. Thank you.

One other question that I have in this round, and I do not intend to mean by that I will call for another round. But I would like to talk with you for a minute about the concept of independent agencies that you briefly discussed with Senator Sasse.

As I understand independent agencies, they are basically agencies of the U.S. Government. They are in the executive branch, as you indicated, but they are independent. And there was—perhaps you could go through—you are aware, I am pretty sure, of the *Myers* case and then the *Humphrey's Executor* case?

Judge GORSUCH. I am.

Senator CRAPO. I think you referenced the *Humphrey's Executor* case earlier. Could you just explain what those two cases tell us?

Judge GORSUCH. Well, *Myers* initially suggested that—I think it is a fair reading to say that it cast doubt on the proposition whether there could be an agency whose head would—would not be subject to removal by the President at will. And *Humphrey's Executor* overturned *Myers* and held that was, indeed, proper.

Of course, the Court has more recently also reentered this area in the *Peekaboo* case and indicated that while one layer of for cause removal protection is appropriate, two layers crosses a line.

Senator CRAPO. Explain to me a little. I am not as familiar with the *Peekaboo* case.

Judge GORSUCH. Sure.

Senator CRAPO. Exactly——

Judge GORSUCH. So *Humphrey's Executor* says that you may have an agency, a multi-member agency where the head of it is removable only for cause. These are gross generalizations.

Senator CRAPO. I understand, and I ask you only to be general in your description.

Judge GORSUCH. Right. And I am not signaling my agreement or disagreement with anything. I am trying to faithfully report to you the precedent of the U.S. Supreme Court.

Senator CRAPO. Understood. And that is the question I asked.

Judge GORSUCH. And the *Peekaboo* case is a more recent case in which there were two layers of for cause removal. And the question was whether that was constitutionally permissible consistent with Article II and the statutory structure, and the Supreme Court said two layers is one too many.

Senator CRAPO. And what was the second layer? Was that congressional oversight?

Judge GORSUCH. Two layers—no, two layers of for cause removal.

Senator CRAPO. Oh, I see.

Judge GORSUCH. Yes, yes.

Senator CRAPO. So the notion is that even after the *Humphrey's Executor* and *Peekaboo*, there still are limits to the amount of independence that Congress can give to an agency?

Judge GORSUCH. That is what the *Peekaboo* case basically says, yes.

Senator CRAPO. Well, I think I am going to leave it at that. There are a lot more aspects of that I would love to discuss with you, but obviously, the notion of understanding the importance of the three separate parts of Government that our Constitution created and the potential that this line of cases has of allowing Congress to create a fourth branch that is not responsible to either or maybe any of the other three branches is troubling to many of us.

And so it is just an important area that I wanted to get your general understanding of. I will not ask you to opine on it or to give your personal opinions.

Judge GORSUCH. I am grateful for that, Senator. It is—*Humphrey's Executor* is a precedent of the U.S. Supreme Court, and you know, I understand that some people like it and some people do not.

Senator CRAPO. Understood. Like I said, I have a lot more questions, but I am not going to use up any more of your time or mine in this round.

Senator FEINSTEIN [presiding]. Thank you, Senator.

Senator Hirono.

Senator HIRONO. Thank you, Madam Chair.

Judge Gorsuch, it is good to see you again.

Judge GORSUCH. Likewise, Senator.

Senator HIRONO. Despite the many hours that you have been before us, I still feel like there is much more we need to know about you and what kind of Justice you would be, and I still need reassurances that you will be the kind of Justice who is open to applying the law and the Constitution to protect the rights of the working poor, who are just one paycheck away from being homeless.

Who understands the importance of ensuring that victims of discrimination cannot only ask for, but can also receive protections from our courts. And who demonstrates a commitment to the constitutional principles that protect the right of women to make the intimate and personal choice of what to do with our own bodies.

So I would like to try again with you today. You painted a picture for us yesterday of the Court that is straight out of a Norman Rockwell painting. You said, "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. And a judge, a neutral and fair judge will hear it."

This is a wonderful idea that anybody can file a claim to protect their rights or interests and that those claims will be heard and ruled upon by neutral judges, apparently uninfluenced by their own strongly held and frequently expressed personal views and judicial philosophy.

But of course, you and I both know politics and the courts are intertwined. In fact, you told us so in your 2005 National Review

Online article, which was entitled "Liberals'N'Lawsuits." In that article, you wrote that as a result of Republican wins in the presidential and Senate elections, Republicans were in charge of the judicial appointment process. As a result, you wrote, "The level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the left truly out in the cold."

This shows you understand or at least recognize that judges appointed and confirmed by Republicans will have less sympathy for liberals pushing constitutional litigation, as you put it. I am profoundly troubled by this because I thought judges, as you described, make decisions divorced from their personal and philosophical leanings.

So should justice depend on who won the last election or who is in charge of nominating and confirming judges?

Judge GORSUCH. Senator, I appreciate the opportunity to answer that question because I have tried to make clear as I can over the last few days that I do not view my colleagues as Republican judges or Democrat judges. I view them as judges, and I believe that the courts are open to all persons.

And I believe if you look at my record as a judge, as opposed to anything else, you are going to see that I have decided over 2,700 cases, that 97 percent of the time they have been unanimous, that 99 percent of the time I have been in the majority, that according to the Congressional Research Service at least, my opinions have attracted the fewest dissents of any Tenth Circuit Judge they studied.

Senator HIRONO. Judge Gorsuch, if I may?

Judge GORSUCH. Those are—of course.

Senator HIRONO. And I am listening to your answer, and I am not getting a response to the question I asked, which was—I will ask it again. Should justice depend on who won the last election or who is in charge of nominating and confirming judges? And I think that requires a yes or no answer from you.

Judge GORSUCH. And I do not think it does, Senator, as I have tried to express. I do not think—when you come to the Tenth Circuit, come to my court, I think it would be deeply wrong to suggest that it depends on who won the last election what kind of justice you are going to get in my court. It is not the way it happens.

And I know the men and women of the Federal judiciary, and I know how hard they work, how lonely the job is often, how much criticism they attract from all sectors, and I know that when they wake up in the morning, they do so with one thing in mind, to be a fair and independent judge for each case that comes to him or her. That is what I know. That is what I have seen. That is what I have witnessed.

I know the men and women of the Federal judiciary. I know a lot of them, and I admire them.

Senator HIRONO. So——

Judge GORSUCH. And I do not think it matters whether they are Republican-or Democratic-appointed judges, no.

Senator HIRONO. That does not square with the view that is expressed in the article wherein you acknowledged that the people in

charge of the judicial nomination and confirmation process will—or may result in, if it is the Republicans, less open to liberal views.

So how do—how do your views in that article square with what you are telling me right now?

Judge GORSUCH. Senator, I appreciate the chance to talk about that article again. We have chatted about it a few times the last couple of days. And as I have tried to explain, I made a couple of points there.

First was that the courts have to be open to civil rights claims. They are very important for vindicating the rights of unpopular voices, minority voices, the least amongst us. That is what courts are for.

But I also made the point that sometimes social issues, problems today are not best resolved in the courts because the courts have certain limitations. One, we are just not very good at making social policy. I have got four law clerks straight out of law school. With all respect to them, I love them, but they do not know a lot, all right?

You have staffs for making social policy. This is the place of the people's representatives. We are not a democratic institution. We are life-tenured judges. I would not hire a bunch of life-tenured judges to run a country, with all respect, and call it good. There is a separation of powers.

And so the point was—the other point I was trying to make there was, judges, somebody has to win and somebody has to lose. There is no room for compromise. Now one of the things this body is really good at, at its best, is compromise, right? That is what you do in legislation.

Senator HIRONO. Well, yes.

Judge GORSUCH. Some, there is a give and a take, a pull and a tug, right? And——

Senator HIRONO. Judge Gorsuch?

Judge GORSUCH. That is not present in litigation. So those are some of the points I was trying to make in that article.

Senator HIRONO. I believe I am trying to have more of a conversation with you, and in fact, I am glad that you acknowledge that judges are really bad at the compromises that result in legislation. So I actually have a question about that later.

But you know, you drew a conclusion in your article about the impact of Republican wins in the elections, and I think that is—that was a really astute observation. It was a real world conclusion. And as we exercise our advise and consent role, the judicial philosophy of the judges who are nominated matters a great deal in determining what rights and whose rights are protected in the courts. As you say, there are winners and losers.

So, Judge Gorsuch, you clearly understand that our political system has a tremendous impact on the courts. If not, we would have Chief Judge Merrick Garland before us, not you.

You also understand the impact of politics on protection of our rights or, rather, again, as I said, on what rights and whose rights are protected. And again, in your 2005 National Review article, you admonish liberals for seeking to protect their rights in court rather than through the political process.

And you wrote, in part, "It would be a very good thing for all involved, the country and independent judiciary and the left itself, if liberals take a page from their own judges of the New Deal era, kick their addiction to constitutional litigation, and return to their New Deal roots of trying to win elections rather than lawsuits."

And of course, since you wrote your article, the Democratic nominee for President did win the popular vote in all three presidential elections, including the last one. So you describe the left as being addicted to constitutional litigation. But we all know, of course, on the right, we have seen well-funded groups looking for plaintiffs to bring lawsuits to advocate a corporate agenda, and there is little doubt——

Let me just go over one example of the right looking for plaintiffs. In *Friedrichs*, conservative lawyers sought to challenge the 40-year-old rule established unanimously by the Supreme Court in *Abood* that all employers represented by a union, including those choosing not to join the union, must pay for their representation. Overturning *Abood* would unquestionably hurt unions.

And the challenge to this 40-year-old precedent did not appear from nowhere. It was, in fact, invited by Justice Alito in his opinion on another case ruling against unions. And while the attempt in *Friedrichs* failed when the 4–4 Supreme Court left in place the Ninth Circuit decision, I am sure we will soon see another well-funded attempt.

And in fact, there is little doubt that Justice Scalia or someone like Justice Scalia would have ruled against the teachers' union in that case, and it would have been a 5–4 decision.

In your article, why did you aim your criticism at the left and not to constitutional litigation from the right? What does that focus tell us about how you would assess such lawsuits if you are confirmed to the Supreme Court?

Judge GORSUCH. Senator, I thank you for the opportunity to address that. As I have indicated I think probably five or six times in the course of these hearings, the last couple of days, I was agreeing with a self-described liberal commentator on his own assessment, a Washington Post columnist. I was agreeing with his assessment.

And I also have explained that, and I explained 10 years ago when I was before this body last time, that I have seen plenty of examples on both sides and really across the ideological spectrum of lawsuits that maybe perhaps better belonged in front of legislators.

Senator HIRONO. Well, as I mentioned, I thought that was a very astute observation and agreement on your part that politics do enter into who becomes judges and who becomes appointed and confirmed.

In fact, the Roberts court has issued numerous 5–4 decisions in cases like *Lilly Ledbetter*, *Citizens United*, *Hobby Lobby*, in which corporate interests win out over individual rights, and clearly, the composition of the Court and identity of the fifth Justice, a Justice Garland versus a Judge Gorsuch, does matter a great deal in the real world.

Your article reflects also a suggestion that the courtroom be used only for extraordinary cases. Now this does not square with what

you told me yesterday that the beauty of our system is that anybody can file a claim and be heard. Who decides whether a claim is extraordinary enough to be—to seek justice in the courts?

Judge GORSUCH. Senator, with respect, I do not recall ever using the words that the courtroom is only for extraordinary cases. That does not sound like me.

Senator HIRONO. It is in the article that I am talking about where you suggest——

Judge GORSUCH. I would be surprised to hear that I said that courtrooms are only for extraordinary cases. I represent a lot of people in a lot of pretty ordinary cases as a lawyer. As a judge, I resolve a lot of pretty ordinary cases in the sense that they do not make a lot of precedent or do not get a lot of attention but matter deeply to the individuals involved.

Senator HIRONO. Judge Gorsuch.

Judge GORSUCH. That is part of what a good judge does, part of what a lawyer does.

Senator HIRONO. I just read the article that I am quoting, and frankly, what you set forth in that article, "Liberals'N'Lawsuits," I think has definitely endeared you to the Heritage Foundation and the billionaires who recommended you for this position.

Frankly, courts should not depend, of course, on who won or lost the election. It should depend on judges who understand that the law is there for all of us. And I do remain concerned about that is really how you view the law.

When we look at the relationship between politics and the courts, I am deeply concerned about the decision the Court itself, the Supreme Court itself, has made which has tilted the political field so significantly. And this impacts both the laws we are able to pass and the composition of the Court that, in turn, is supposed to interpret and apply those laws in the cases that come before the Court.

I am sure you are as familiar as I am with Justice Felix Frankfurter's famous admonition that "courts ought to—ought not to enter this political thicket." But of course, there are times when the Court must do so, for example, to ensure one person, one vote.

But courts also must be careful in doing so, getting into the political thicket. The Court's legitimacy itself is at risk when it strays too far into the political thicket, such as by deciding an election such as it did in *Bush v. Gore*.

In the last few years, with the *Citizens United* and *Shelby County* decisions, we have seen the tremendous, in my view, damage the Court can do to our political process when it tilts the electoral process so heavily against ordinary Americans.

And as we discussed yesterday in the 2010 *Citizens United* decision, the Court struck down bipartisan laws limiting campaign contributions that went back more than a century and opened a flow of money and potential corruption that has dominated our politics and drowned out the voices of ordinary Americans ever since. And in 2013, the Roberts court, in another narrow 5–4 decision in *Shelby County*, substituted its conclusions for that of Congress and gutted core protections of the Voting Rights Act, which were essential for the right to vote for millions of Americans.

So taken together, these two decisions, *Citizens United* and *Shelby County*, have made it harder for millions of Americans to have

their voices heard in our elections process and their votes counted at the ballot box. Since *Citizens United*, the floodgates have opened to unfettered corporate money in our elections. Since *Shelby County*, 13 States have enacted laws placing limitations on voting.

And many of these are in the States that would have been prevented from passing such laws in the first place before the Court gutted the Voting Rights Act. And after *Shelby County*, they could pass such laws, and pass them they did.

So given your clear understanding of the relationship between the political process and the courts, would you acknowledge that these decisions, *Shelby County* and *Citizens United*, have had an impact on our elections?

Judge GORSUCH. Senator, they are precedents of the U.S. Supreme Court, and obviously, they have impacts.

Senator HIRONO. Would you acknowledge that elections have an impact on the composition of the Court?

Judge GORSUCH. Senator, again, I would say that there are not Republican judges or Democrat judges. There are judges. In my experience, there are fair judges appointed by Republican Presidents and Democratic-appointed judges. And people surprise you from time to time, Senator.

Senator HIRONO. Well, clearly, elections have an impact on the composition of the Court because we have you. We do not have Judge Merrick Garland. So would you acknowledge that the composition of the Court influences the decisions that it makes?

Judge GORSUCH. What do you mean by that, the "political composition" of the Court, Senator? I am sorry.

Senator HIRONO. No, the composition. I did not say political composition. Would you acknowledge that the composition of the Court influences the decisions that it makes?

Judge GORSUCH. Well, I do think each individual Member of a court impacts a court in the sense that when I get a new colleague and an old colleague retires, there is a new dynamic with that new person. They bring with them fresh eyes from practice and maybe some new ideas, and maybe they also need some time to come up to speed in other things. Every person is different. I will acknowledge that, of course.

Senator HIRONO. So yesterday in response to my concerns about the impact of *Citizens United*, your narrow reading of OSHA, and your expansive view of the Religious Freedom Restoration Act, your answer was that Congress has latitude to act and legislate. But by tilting the political playing field so heavily to toward corporations and against individuals, has the Court not impacted the composition of who is in Congress and made it, therefore, even harder for Congress to take meaningful action to, say, pass laws to protect worker safety or the access of students with special needs to an education?

Judge GORSUCH. Senator, the Supreme Court of the United States, I was not involved in these decisions that we are discussing. I was not there.

Senator HIRONO. However, they are precedent. They are being cited.

Judge GORSUCH. They are precedent, and I have to follow them, and I respect them as precedent.

Senator HIRONO. Yes.

Judge GORSUCH. Precedent of all kinds has impacts, of course, and it is obviously for this body, as the lawmaking body, to assess what it thinks of the impacts of any judicial decision and to legislate appropriately. And we do our job, and respectfully, Senator, the Congress does its job.

Senator HIRONO. Well, Judge Gorsuch, the Court is not an innocent bystander here. You have set forth a magical notion of what Congress can do and legislate. I wish you were right. I would love for all of us to be able to work together in a way that moves us forward for our entire country.

And you did acknowledge yesterday that passing legislation is not easy. In fact, you acknowledged that today. For example, Congress, in passing the Voting Rights Act Reauthorization in 2006, held 20 hearings and gathered over 40,000 pages of evidence. And yet the Supreme Court substituted its own judgment to sweep all that away, eliminating a core part of the Voting Rights Act, which Congress had concluded and experience in the last election has now proven was still needed.

In doing so, this decision has had a real world impact, changing who gets to participate in the political process and, therefore, who gets elected and who has input in the kinds of laws that are passed and, indeed, who gets nominated to the Supreme Court.

I yield 15 seconds, Mr. Chairman.

Chairman GRASSLEY. Thank you very much.

What we would like to do, we have two people left. According to the message we got from the Senate, we will have a vote at 4:50 p.m. So I am hoping you two folks will get done, and if you ask questions that have never been asked before, we will get done really on time.

[Laughter.]

Senator TILLIS. With you pointing that gavel at me, I am pretty sure I will.

Chairman GRASSLEY. And——

Senator LEAHY. That was a subtle hint from the Chairman.

Chairman GRASSLEY. So I would ask you two to finish, and then we will go vote at 4:50 p.m. or whenever you two are done.

Senator TILLIS. Yes.

Chairman GRASSLEY. And then we will reconvene, hopefully, by 5:20 p.m. in 226 for our closed session.

Senator TILLIS. Well, Mr. Chair, I hope to keep my streak alive by yielding back about 5 minutes in each of the prior two rounds.

Chairman GRASSLEY. Praise the Lord.

[Laughter.]

Senator TILLIS. You know, we have heard a lot of discussions about precedent and past decisions, and there are clearly ones that some of the Members want to pick and choose that they like and ones that they want to pick and choose that they do not like. Do you have that option as a judge?

Judge GORSUCH. I understand the impulse, Senator.

Senator TILLIS. Yes.

Judge GORSUCH. It is a human impulse.

Senator TILLIS. Sure.

Judge GORSUCH. And as the people's representatives——

Senator TILLIS. Yes, but do you have that option?

Judge GORSUCH. I do not have that option, Senator.

Senator TILLIS. That is what I thought.

Judge GORSUCH. I am a judge.

Senator TILLIS. That is what I thought. I mean, the law is the law.

Judge GORSUCH. That is right.

Senator TILLIS. And you have got to follow it, and it has got to be instructive.

Judge GORSUCH. That is right.

Senator TILLIS. Would you consider it an inappropriate question for me to get you to answer a question that would be in violation of the Code of Conduct for United States Judges? Would you consider that an inappropriate question?

Judge GORSUCH. Senator, questions are not inappropriate. Answers would be inappropriate. I am the one who is bound by my Code of Conduct.

Senator TILLIS. You are a kind man. That is why I will never be nominated for the Supreme—well, there are a lot of reasons, but that is one of them.

[Laughter.]

Senator TILLIS. You know, I—overnight I decided to go—I do not know why I do because reading press reports is a lot like roadkill. You try to avert your eyes, but then you go back and look at it. And so I looked at the roadkill of the overnight press, and of course, there were people saying you sidestep issues.

These folks do not get it. You were following a Code of Conduct and you answered the questions to the best of your ability within the guidelines that you, as a judge, have. You are a Judge on the Tenth Circuit. And I think you did it well.

So I think any reporter out there like the Lazy Blogger from McClatchy, who reported you sidestepping questions. You have not sidestepped a single one. You have answered every one to the best of your ability within the guidelines that you have as a sitting judge, and I appreciate you doing that.

And I appreciate your consistency. There was never an instance over the course of these last 3 days where you wavered, and I, for one, am glad that you did that.

You ever see the movie "Jeremiah Johnson?"

Judge GORSUCH. I have not, Senator.

Senator TILLIS. It is a great movie. It was filmed, I think, out in Utah, with Robert Redford, and I think Will Greer was the old codger. A lot of this discussion over the past couple of days reminds me of a great scene in "Jeremiah Johnson."

Jeremiah and Will Greer meet up in the high country, and the old—I think his character was Bear Claw said, you know, "I hate skinning bears, but I do not mind hunting them." And Jeremiah Johnson was relatively new to the high country. He says, "I am scared of hunting bears, but I do not mind skinning them."

So they go to bed at night with the understanding that Bear Claw would go out in the morning and that Jeremiah Johnson would stay behind and skin the bear once he got one.

And early in the morning, there is this great sunrise, and Bear Claw is running through the woods, and right behind him is this

huge brown bear. He runs up to the cabin. He jumps into the window. The bear jumps in with him. He runs out the front door and shuts it and says, "There is one for you. I will have another one shortly."

[Laughter.]

Senator TILLIS. Well, that is what Congress is doing to the Supreme Court and to courts across this country. We are not properly hunting the bear. We are not living up to that expectation of actually producing a bear where we have taken care of the things that we should have before you had to skin it.

Your job is to determine whether or not it passes constitutional muster, whether or not it passes the legal test based on decisions that we have made here. For example, in Hobby Lobby, you mentioned had the Affordable Care Act been exempted from RFRA, it probably would have produced a different result.

Judge GORSUCH. One sentence in the statute.

Senator TILLIS. Yes. Well, you would think that the sponsor of the RFRA bill in the House, now Minority Leader Schumer, would have remembered that bill. It was a pretty consequential bill.

So you would think that they would have taken the time if they wanted to exempt it. I believe he is a good attorney. He would have known that, and he would have exempted it. So they left you no other choice because they did not skin that bear if that is, in fact, what they wanted to do.

Let me tell you another reason why not properly preparing the bear, the legislative outcome, is a problem. This morning, we heard about the case on children with disabilities that the Supreme Court decided this morning. It is a bittersweet moment for me.

On the one hand, maybe it provides some level of comfort to families who have a child with autism and an opportunity to maybe put them in a private setting, a residential setting where they can get the care they need. On the other hand, the bear is not ready to be skinned because I know what is going to happen.

What is going to happen in all but nine States that have actually had the courage and dealt with the opposition to come up with a way for a child with autism to have an IEP developed that the public school is not satisfying and have funds go to the private school, we have not given clarity to those other 41 States. Parents are still going to have to fight. They are still going to be uncertain.

Why? Because we have not done our jobs. If are serious about this issue, do our jobs. Not force you to do that.

Because now what is going to happen, I am not an attorney, but I can pretty much guess what is going to happen in States that have not had the courage to take this issue on. In North Carolina, a lot of Democrats voted against the bill, because there are special interests that do not like opportunity scholarships or do not like public funds going to private schools for other reasons. Because they think other students will get access to it, and they are willing to hold these kids hostage when they know they need this help.

Now in North Carolina, we have about 1,200 kids with disabilities who have benefited because we skinned the bear, we hunted the bear. You did not have to deal with it because we took affirmative action in the State legislature to do it right.

Now what we are going to do is determine the consequences of this action of the Court taking the position they did that is in conflict with how you all ruled in *Luke P.* They are not going to know whether or not they can take the kid in. They are going to have to spend a lot of money probably fighting with the school system to ultimately get that child in the proper setting to be educated.

They are still going to have uncertainty. They may have certainty about the legal view of this particular case, but they have no certainty about how they are going to help this child, how they are going to get them the education they need, how they are going to be able to generalize the skills they may learn in the classroom, but like in the case of *Luke P.*, not have it transcend into the home setting.

So we have not done anything good as a result of causing you all to do our job. In fact, you do not do our job well. Legislators are bad judges, and judges are bad legislators, just as you said.

So we still have to fix that problem, and I do not think that it is a problem at all for you to say that we have an overweening addiction, liberals and conservatives, to constitutional litigation. Why do they do that? Because we are not doing our job. Because we are going off into our individual conferences and not coming to a consensus on something like education for children with autism.

That is not a hard problem. It is one I solved. It is one my colleagues and I solved when I was Speaker of the House in North Carolina.

So much of what we are talking about today, the five cases, out of all the cases that you have been involved in, are almost all rooted in the reality that we have not done our jobs. And we are just going, well, you know what, we will let the judges work it out.

I do not want you to work it out because you cannot possibly work it out to the level of specificity that is required to give the little guy, that child that needs education, those parents who are living paycheck to paycheck, the certainty that they need to take care of these very, very difficult challenges.

So we need to do our jobs. There is not—there is virtually no case that was brought up today that people took exception to your position, even when you were in the majority and writing the concurring opinion, that is not rooted in a lack of definitive action, bipartisan action, problem-solving action by this legislative body.

And I, for one, think people should go back to these cases. I am not even going to go through them all. *TransAm Trucking*, *Thompson v. Luke P.*, all of them where they are talking about they did not like your outcome. They did not like the legislative fix. It should have never required you to fix it.

And this is something that I just remembered this morning or as Senator Hirono was speaking about politics. Was it Republicans or Democrats that passed a law in Colorado that was the subject of *Riddle v. Hickenlooper*?

Judge GORSUCH. I do not know.

Senator TILLIS. You have no idea. But here is the thing I said last night. I do not think Senator Hirono was here when I said it. You managed to make a lot of people mad there. You exceeded your 50 percent threshold because you made Democrats and Republicans

mad. Because it benefited them to some little guy, small party, startup sort of party effort in Colorado.

I think the numbers defy the narrative that you are for the big guy, just by the sheer volume of cases that you have heard where there has been great consensus. So this whole narrative of you being for the big guy, are you not solving problems that we created?

You know, I say oftentimes here, we have this tendency in Senate hearings to bring witnesses before us where many of their problems are rooted in decisions that past Congresses have made. And then we beat you until you bleed, and then we beat you for bleeding. And that is exactly what we are doing here.

I think that we really need to look at ourselves and put a mirror down there and ask ourselves really a lot of the things that we are potentially criticizing you for your problem. They are our problem. We did not properly dispose of the bear before you were required to skin it.

I am on the waiver here. So I will always be at the tail end of the Committee. No matter how senior I get in the Senate, I will still be here as long as I yield back at least 4 or 5 minutes, and the chair supports me coming back on the Committee.

I do not ask questions that have already been asked and answered satisfactorily. And I think you have done a good job of answering a lot of questions over the last 3 days. And I look forward to what I hope is the final round, and I look forward to supporting your nomination.

Last thing. There is one thing that I think we do have to talk about in the third round, and that has to do with the disturbing trend that I see here of increased polarization. But I will wait and talk about that in the final round.

And I yield back my 9 minutes and 1 seconds of time.

Chairman GRASSLEY. Thank you very much.

Senator Kennedy.

Judge GORSUCH. And I am going to watch "Jeremiah Johnson." [Laughter.]

Senator KENNEDY. Thank you, Mr. Chairman.

I want to kind of choose my words carefully here. I have listened really carefully, and I think I have been here as much as anybody else has, if not more. But I still have some questions. I think—I think from my questions and from my comments, I have demonstrated pretty clearly I am very impressed with you, Your Honor, and I think you would make a great Supreme Court Justice.

Some have criticized my friends on the other side for asking you how you would rule in specific cases. And I do not think that is an appropriate question. But if I am going to be honest, I would have to say I would love to know the answer to that, too. Because we live in a real world, and I can tell you my people, in selecting a President, who he was going to appoint to the U.S. Supreme Court was one of the main reasons that some of them voted for him.

And I can assure you that if you are confirmed, and I think you will be, and you go on the Supreme Court—and I do not think this will happen, but it has happened before—-and you act in a way unlike one could reasonably conclude you would act as if based on what you have said here. I do not know how to put it.

If you went on the Court and started acting like Andy Kaufman or something, my clients are going to—I mean, my constituents are going to have something to say about it. So I do not want the fact that I am still asking you the questions to be misunderstood. But this is a big deal.

I would like you to walk me through one more time how you would approach construing a statute. Let us suppose a State passes a law that says no law shall discriminate against people on the basis of eye color. I doubt that will ever come to the U.S. Supreme Court. I doubt a legislature will ever pass it.

That is in front of you, and you have got to construe it. What is the first thing, what are the steps you go through?

Judge GORSUCH. Senator, I understand entirely the desire of everyone to want to know the views that I might subscribe to personally and get me to make commitments about how I would rule in future cases. I understand it.

Senator KENNEDY. I am not asking you to do that, Your Honor. I hope you will understand that.

Judge GORSUCH. I do, but I am—and I am not saying there is any improper questions. There are only improper answers. And as a judge, as a sitting judge, I am bound by canons of ethics.

Senator KENNEDY. Right.

Judge GORSUCH. And I have tried to be as full and as open as I can possibly be, consistent with those canons. And those canons are important. They are important to me because if I did make a bunch of campaign promises here, what does that mean to the independent judiciary? What does that mean to the litigants in front of me? What does that mean for the future of this country?

Those things are important to me, and there is a long line of judges who have come before me. And this is an unbroken chain, and I do not want to be the weak link.

Senator KENNEDY. I understand.

Judge GORSUCH. That is important to me. In terms of statutory interpretation, you start with the text of a statute. You look at its plain words. You consider how a reasonable person would understand those words, the affected persons at the time. You look at them. They have a fixed meaning, and you try and apply it according to its plain meaning as best as you humanly can.

Senator KENNEDY. Plain meaning to whom, Your Honor?

Judge GORSUCH. To the average——

Senator KENNEDY. To the lawmaker? To the people who have to comply?

Judge GORSUCH. To the people who have to comply. To the average person, the public understanding.

Senator KENNEDY. Okay.

Judge GORSUCH. Not a private understanding. We do not live back in Caligula's world. Thank goodness. Caligula, who posted, as I have indicated before, his laws so high in a hand so small, nobody could read them. He knew what they were, secret law. Ours is public law. That is our system, made by the people and their representatives, a government by the people, for the people.

And a judge's job is not to become a legislator and rewrite it and fix the problems in it.

Senator KENNEDY. What if the words are unclear?

Judge GORSUCH. If the words are——

Senator KENNEDY. Well, let me stop for a second. I apologize for interrupting, but I am probably going to be cutoff here in a second. Suppose the words are clear. Do you just stop?

Judge GORSUCH. You stop. You are done. Well, unless you have a constitutional difficulty. You are talking about a statutory interpretation case, though. So I am assuming we are just dealing with statutory interpretation, and if the words are clear, you stop.

Senator KENNEDY. Would you not want to go take a look at the legislative history just to make sure that you are right that the words are clear?

Judge GORSUCH. Senator, the Supreme Court of the United States precedent is quite plain on this very point. If the words are plain, you stop.

Senator KENNEDY. In determining whether the words are plain, and look, I am not about to—I am not about to debate Supreme Court precedent with you. I will lose handily. But I have read a number of cases that also say it is okay for a judge to take a look not only at the plain meaning of the words, but that legislative history is appropriate. It is not dispositive of what the statute means, but it can be helpful.

And it is also okay for a judge to look at a statute and try to imagine what problems the legislative branch was trying to address. And the example I gave last night, admittedly it was late and we were both tired, but I would love, and I will bet you, you would, too—strike that. I should not have said that. I will bet many people would love to have a transcript of the Constitutional Convention that drafted our Constitution.

Now if a Member of that convention made certain comments, and they were written down and we had a transcript, you could not go to his comments and say, well, he must speak for the whole convention. That would not be right. That is a failing of legislative history. But you are sure—if Benjamin Franklin said it, you would want to know it.

And that is the case where the legislative history or the problems that the drafters were trying to address could have an impact. Do you think if a statute is clear you should never look at that?

Judge GORSUCH. Senator——

Senator KENNEDY. That is honestly a question, not a suggestion.

Judge GORSUCH. And I take it that way, Senator, and I am answering it not from my personal preference, but from a matter of precedent. And the Supreme Court of the United States precedent on this is plain, happily. This one I can give you. If the statute is clear, that is the end of the interpretive exercise for a court, period. Period.

You are correct that if there is an ambiguity in the statute, then a court will look to other tools, canons of construction, perhaps the legislative history. There is debate over how valuable that is that we have all discussed several times in the last few days and the value and some of the issues associated with that.

I respect very much the work of this body. When I am a judge, I like to get every scrap of information anybody wants to put in front of me. I read it all. I take it all seriously.

There are problems we have discussed with perhaps too much reliance on legislative history, the due process issue. I think that we have discussed the Caligula problem.

Senator KENNEDY. Right.

Judge GORSUCH. The fair notice problem.

Senator KENNEDY. Right.

Judge GORSUCH. The bicameralism and presentment issues we have discussed and separation of powers. It is not the law. But you look at everything somebody gives you. A judge does not say, "Ah, I am not going to read that brief today because I do not like the color of the brief." You know, it should be a lighter shade of blue. You know, I look at all material put before me.

But when the statute is plain, Senator, the precedent of the United States says to the judge stop.

Senator KENNEDY. And when it is not plain, which I think is oftentimes the case—well, many times the case, we can probably agree on that. If Senator Tillis or Senator Coons or Senator Franken passed a bill, and it is not clear, then would it ever be appropriate for a judge to say, okay, it is unclear. I am going to take a look at legislative history, but I am also going to try, through looking at the legislative history, try to understand what was the problem they were trying to solve.

Is that ever appropriate?

Judge GORSUCH. Senator, I am not sure what you mean by that, to be honest with you.

Senator KENNEDY. Well, why did they pass the statute? Would you ask yourself why did they pass the statute?

Judge GORSUCH. Well, one concern I have with that enterprise is I have a very difficult time getting in the head of anyone else. And trying to get in the head of 535 of you, plus a President, well, frankly, Senator, that is often beyond me.

Senator KENNEDY. Okay. Let me switch to another subject, the Third Amendment. I do not remember the language. It is quartering troops. It has not gotten a lot of attention, and there has not been a lot of jurisprudence on it.

But some think that it has privacy implications. Have you given any thought to that?

Judge GORSUCH. Senator, I think it does suggest, hey, my house. You got to—is off limits to your troops. There is a privacy implication in there. Yes, I do.

Senator KENNEDY. Okay.

Judge GORSUCH. Yes, yes.

Senator KENNEDY. I think Justice Douglas cited it in either *Griswold* or one of the privacy line of cases.

Let me ask you this. I want to talk to you a second about State action. I do not need to tell you, you know better than I do, the Bill of Rights protects us against government. Some State constitutions have bills of rights that actually establish our rights vis-a-vis each other as individuals, but the Federal Bill of Rights does not do that. It is our protection against government.

What is your feeling about the State action? What do you understand a State actor to be?

Judge GORSUCH. Senator, you are going to have to help me out. In what context are we talking about here? State action require-

ment is—the protections of the Bill of Rights are as against the State.

Senator KENNEDY. Right.

Judge GORSUCH. Against the Government.

Senator KENNEDY. Right.

Judge GORSUCH. Yes.

Senator KENNEDY. Right.

Judge GORSUCH. If that is what you were getting at, yes.

Senator KENNEDY. Yes. If——

Judge GORSUCH. They are rights as against the Government. They are protections as against the Government.

Senator KENNEDY. But sometimes there are entities that are alleged to be acting in the shoes of the State, agents of the State.

Judge GORSUCH. Ah, yes. Yes. That is an interesting problem, right? Because Congress today has created a multiplicity of arrangements, and is it government or isn't it government is actually a question that arises from time to time. And if you would like a look at what I have written in the area, I might refer you to *U.S. v. Ackerman*, another case where I ruled for the little guy maybe, if you like.

And it had to do with whether the National Center for Missing and Exploited Children is a governmental entity. And the line of cases in the Supreme Court goes all the way back to *Dartmouth College* case, and it is a fun read in terms of the *Dartmouth College* case. What qualifies as a governmental entity?

The Supreme Court of the United States recently struggled with the issue in the context of *Amtrak*. So there are questions around this area as to what is government and what is not. Very important. Because if something qualifies as government, it has to square its corners under the Constitution and the Bill of Rights, of course.

So, for example, in the *Ackerman* case, if NCMEC is a governmental entity, it needs to comply with the Fourth Amendment. You cannot invade—cannot invade personal privacy without complying with the warrant requirement, for example. Yes, so there are very important questions as to what is and what is not a State actor.

Senator KENNEDY. Yes. Well, I want to be clear for the record. You mentioned the little guy, and I know that has come up a lot. And everybody is entitled to their own opinion. I was taught justice is blind, and it does not matter whether the party, it does not matter its wealth or its status or its power. You decide cases on the basis of the law.

I mean, Lady Justice is wearing a blindfold. So I agree with you completely on that, and I understand the other point of view, but I do not agree with it.

Your book on euthanasia. Could you, kind of like you are talking to a Tenth grader, give me a summary of your thesis in your book?

Judge GORSUCH. I can try, Senator. I find it a very hard issue. It is one every American has deep, understandable views about. It concerns the end of life.

Chairman GRASSLEY. I am going to ask if you can pull the mike just a little bit closer.

Judge GORSUCH. Oh, I am sorry. Of course. I apologize. The end of life, which we all face.

Senator KENNEDY. Yes.

Judge GORSUCH. It is a problem all of us face. And it is a book in which I struggle with the end of life issues that we all face and how we as a people might consider resolving them. I wrote it before I became a judge, as a commentator with my thoughts as an individual, not as a judge.

Senator KENNEDY. Well, what I read of it, as I told you last night, I did not read the whole thing. But I read parts of it. It is very well written, and it is something that we all have to deal with and we all think about.

Judge GORSUCH. Yes, and I do not—I appreciate you having read some of it. I expect until about a month or two ago, it had not been exactly widely read.

Senator KENNEDY. I have a feeling it is now, Your Honor.

Judge GORSUCH. Well, I expect it will make a good doorjamb for most folks. But I conclude that there is a very important interest in being left alone at the end of life and that there is an understandable and appropriate zone of privacy there that we need to respect. And we have all experienced it when parent or grandparent wants to go home, had enough. It is time.

Senator KENNEDY. And your thesis, once again—not to re-plow old ground, but I want to be sure I understand—is not based on religion?

Judge GORSUCH. Goodness, no, Senator.

Senator KENNEDY. It is secular. It is based on your secular moral values.

Judge GORSUCH. Well, it is not even my—it is an attempt to work through——

Senator KENNEDY. I do not mean to imply they are yours. It is based on not your—your thesis is based on secular moral values.

Judge GORSUCH. Yes.

Senator KENNEDY. That once you cheapen life, once we become desensitized to taking life, it is easier to take the life of those who are less powerful than you and I.

Judge GORSUCH. Senator, that is one worry I expressed, and that the difference between refusing treatment and killing people raises with it questions about what happens to the least amongst us.

Senator KENNEDY. Yes.

Judge GORSUCH. The vulnerable, the elderly, the disabled. And I do not profess to have the final answer here. I am not a philosopher king. But I do know that when you have a more expensive option and a cheaper option, those who cannot afford the more expensive option tend to get thrust into the cheaper option.

Senator KENNEDY. Yes.

Judge GORSUCH. And so those are some of the concerns I worked through. It is a long book. It is complicated, and I do not profess to have the right final or complete answer. I hoped, at most, to contribute to a discussion on an unanswered social question where all people, and I do think all people have a good faith interest in trying to reach some consensus socially on it.

Senator KENNEDY. Well, it was well written. What I read of it was very well written. It got you an Oxford DPhil. It was your thesis, was it not?

Judge GORSUCH. More or less.

Senator KENNEDY. Yes. Well, it got you an Oxford DPhil. That is pretty good.

How am I doing, Mr. Chairman?

Chairman GRASSLEY. You have 2 minutes and 31 seconds.

Senator KENNEDY. Okay. I am going to yield back my time.

Thank you, Your Honor.

Judge GORSUCH. Thank you, Senator. I appreciate it.

Senator KENNEDY. I appreciate it very much.

Chairman GRASSLEY. We just got notice on our iPhones that the vote is starting right now. So we will recess now, and we will reconvene in 226 for probably, I would guess, a half hour, depending on how long the discussion goes on.

And then we will come back here, and we will start with the third round. And I hope not everybody takes a third round, and I hope everybody will try to stay in less than 15 minutes.

Thank you very much. Judge, the time is yours for a while.

[Recess.]

Chairman GRASSLEY. I want everybody to know that I normally do not start until the Ranking Member is here, but I can go ahead because of other things that she is going to be doing for a while.

Judge, we are starting out for a third round. As I said, I hope everybody cannot exceed 15 minutes, and hopefully shorter. I want to lead by example for how much time I take. It will be a lot less than any of that. I am going to ask you, Judge, about a dozen questions that really you can answer "yes" or "no," and then I will yield back my time.

I want to give you a hint that all of these questions can be answered by "yes."

[Laughter.]

Chairman GRASSLEY. In Ute Indian Tribe, am I right that you held that a country's prosecution of a Tribal Member for action taken on Tribal land caused irreparable injury to Tribal sovereignty?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Fletcher v. U.S.*, did you rule that Members of another Tribe had a legal right to demand an accounting from the Secretary of Interior for funds the Government held in trust?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Cook v. Rockwell*, did you rule that plaintiffs had the right to pursue tort claims against a nuclear weapons manufacturing plant for committing environmental crimes?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *United States v. Magnesium*, did you reinstate a lawsuit against a corporation alleged to have violated anti-pollution laws?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In Energy and Environment Legal Institute, did you uphold a Colorado law requiring that a certain amount of electricity sold come from renewable sources?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Orr v. City of Albuquerque*, did you hold that the pregnancy discrimination claims of two female police officers deserved a trial?

Judge GORSUCH. Yes.

Chairman GRASSLEY. Did you in two cases affirm a finding by that the Department of Labor's Benefit Review Board that retired miners were entitled to Black Lung benefits from their employers?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Casey v. West Las Vegas Independent School District*, did you hold that a former school superintendent could take her claims for retaliatory discharge to trial?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Crane v. National Science Foundation*, did you hold that an academic employee had been wrongfully terminated from his university position without appropriate findings of fact?

Judge GORSUCH. Yes.

Chairman GRASSLEY. In *Browder v. City of Albuquerque*, did you deny qualified immunity to police officers who wrongfully arrested a seventh grader for making fake burps in a gym class?

Judge GORSUCH. I voted that way, yes, in *AM v. Holmes*.

Chairman GRASSLEY. In *Blackmon v. Sutton*, did you deny qualified immunity to staff at a juvenile detention Senator for using a restraining chair to punish a pretrial detainee?

Judge GORSUCH. Yes.

Chairman GRASSLEY. Those are just a few examples of cases where you have ruled in favor of what I would call the little guy. But I have one last question. I think that whether you rule for or against the little guy or the great big guy is not the real question. The real question is whether you apply the law faithfully. Would you agree with me on that point?

Judge GORSUCH. I can tell you I tried my best.

Chairman GRASSLEY. I yield back my time, which will be 11 minutes and 33 seconds, and encourage my colleagues to do the same.

Senator DURBIN.

Senator DURBIN. Thank you, Judge. We have asked previous nominees for the Court about their experience in private practice and the pro bono work that they have done. Could you tell us briefly what pro bono work you have done as a private lawyer?

Judge GORSUCH. Oh gosh. Senator, over the course of my career, it would be varied at different points in time, different things. As a judge, I have done a lot of work on the Rules Committee. I have done a lot of work trying to make litigation faster and cheaper together with colleagues. I do not deserve a ton of credit. A lot of—we work by consensus on the Rules Committee.

The Capital Habeas Project, again, was a collegial effort. Before that I would point as—you know, I spent time at the Department of Justice. That is not pro bono work, but it is public service. As a private lawyer, we did all sorts of different things. We would modify our fee arrangements. We would do contingent arrangements. We waived our fee arrangements.

Senator DURBIN. Did you ever represent, either pro bono or otherwise, an unpopular or notorious client?

Judge GORSUCH. I would think a lot of my clients would have been considered unpopular, Senator, and notorious is in the eye of the beholder. But certainly, people who were accused of crimes, people who were involved in what might be considered scandals. Yes, Senator, without revealing any attorney-client information, yes.

Senator DURBIN. Of course. I want to ask you about an email you sent at Justice. The subject line was "Elite Law Firm Pro Bono Work for Terrorists," and you included an article about conservatives criticizing lawyers who were representing Guantanamo detainees and a list of their law firms.

You sent this email to someone working on this Committee, and you said, "I thought you might find this of interest. It seems odd to me that more has not been made of this. See especially the list of firms below." This was one of several emails you sent criticizing and drawing attention to lawyers representing Guantanamo detainees.

Chief Justice John Roberts when he appeared before this Committee was asked about the fact that he had represented some unpopular clients, and said—here is what he said: "Our Founders thought they were not being given their rights under the British system to which they were entitled, and by representing the British soldiers, John Adams helped show that what they were about was defending the rule of law and not undermining it. And that principle that you do not identify the lawyer with the particular view of the client or the views that the lawyer advances on behalf of a client is critical to the fair administration of justice."

So, for the record would you put in perspective any comments that you made about people representing Guantanamo detainees?

Judge GORSUCH. Senator, my friend, Neal Katyal, who introduced me, successfully represented some of those detainees, and I have nothing but admiration for those lawyers. And the email you are referring to is not my finest moment, blowing off steam with a friend privately. The truth is I think my career is better than that.

And when I have seen individuals who have needed representation as a judge, and I have got handwritten pro se filings, and I have seen something that might have merit in it, I picked up the phone and I have gotten a lawyer for that person. When I have seen lawyers who are not representing even undocumented aliens appropriately, I have done something about it.

So, I would like to think that my career taken as a whole, Senator, represents my values appropriately.

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

Chairman GRASSLEY. Okay. Senator Flake.

Senator FLAKE. I yield back the balance of my time and encourage my colleagues to do the same.

[Laughter.]

Chairman GRASSLEY. Okay. Senator Whitehouse.

Senator WHITEHOUSE. Good luck with that.

[Laughter.]

Chairman GRASSLEY. The chair did not encourage him to do that, but I surely did not discourage it.

Senator WHITEHOUSE. Well, let me start by paying a compliment to our Chairman. I think that he has handled these hearings in a very gracious way. He has given us a great deal of time and leeway. And whatever our opinions might be about the suitability of the nominee, and obviously that is as yet undetermined for many, I think we can agree that the Chairman has done a thoughtful and good job. And I appreciate the way in which this has been managed.

Judge Gorsuch, this is probably the last time you will pay attention to me.

Judge GORSUCH. Do not count on that, Senator.

[Laughter.]

Senator WHITEHOUSE. I am not likely to appear before the Court unless things should change fairly dramatically.

[Laughter.]

Senator WHITEHOUSE. So, there are just a few things that——

Judge GORSUCH. Now, that would be interesting.

[Laughter.]

Judge GORSUCH. You know, I have had Senator Lee in my courtroom.

Senator WHITEHOUSE. Yes? And I have argued in the Supreme Court, but some time ago. I wanted to tell a story to you need to follow-up a little bit on our conversation where I was trying to draw an analogy between anti-competitive controlling economic power and anti-competitive controlling political power.

I was elected to the Senate in 2006. I was sworn in in 2007. For the first 3 years that I was here—2007, 2008, and 2009—there was constant Republican activity on climate change in the Senate. During that period, the Republican candidate for President even had a robust climate change platform, and there were probably four or five separate bills that had Republican co-sponsors.

I was on the environment Public Works Committee where Senator Warner—John Warner of Virginia, a Republican, had a bill. Senator Susan Collins had a bill with Senator Cantwell. Senator Alexander had a bill. I think Senator Graham was even working on one. There were a considerable number of them. We did not have agreement on that issue yet, but there was activity. People were talking. The legislative process was going forward.

The Citizens United decision was decided in January 2010. The fossil fuel industry asked for that decision to be rendered, expected it to be rendered, and moved incredibly rapidly to take advantage of its new opportunities. And from that moment forward there has not been a single comprehensive piece of legislation with a Republican co-sponsor related to carbon dioxide emissions.

That industry is defending, according to the International Monetary Fund, a $700 billion a year subsidy. So, the amount of weight they can throw behind trying to stop any effort to interfere with their current status quo goes beyond almost any reasonable number to spend in politics.

So, just bear that in mind as you go forward that, in my view, *Citizens United* did not expand debate in the public sphere, particularly on that issue. It actually allowed powerful special interests to squash public debate, and I think the conduct of the Senate proves that point. So, take that for what it is worth, but I think

if you look at it at some point, you will find that what I am saying is accurate.

The second thing that I wanted to touch on is the jury. A great number of the decisions that I listed in that 16–to–90, *corporate v. human*, 5–to–4 array that the Supreme Court has decided recently had the effect of limiting access to a jury, did it with raising pleading standards, did it with limiting class actions, did it with encouraging mandatory arbitration.

To me, the civil jury matters quite a lot. To the Founders, it was one of the casus belli of the Revolution. They took it terribly seriously. Hamilton described it as one of the absolute pinnacles of what we needed. Adams described the popular vote and the jury as the heart and lungs of liberty. So, this was a big deal.

De Tocqueville described the civil jury as a political institution. He meant that in the best possible way.

Judge GORSUCH. Right.

Senator WHITEHOUSE. It was part of our polis, part of the way in which the public had the chance to participate in making decisions. He called it part of the sovereignty of the people. Blackstone, who was probably the single jurist who most educated the founding generation, said that "The civil jury is what prevents the encroachment of the more powerful and wealthy citizens."

So, you have a Constitution, a great deal of which is dedicated to protecting the individual from the power of government and the power of the State, and to dividing up the power of government and the State so it does not unify and crush individual behavior, or dreams, or wishes. This institution is the one that was designed to protect the individual against other more powerful and wealthy citizens. And in this world, our most powerful and wealthy citizens are these ginormous corporations, ones that collectively in the fossil fuel industry enjoy that $700 billion per year subsidy.

So, I would urge that as you consider this array of cases that chips and chips and chips and chips away at the civil jury access that regular Americans have, particularly where it involves big corporations because they are the ones who can force mandatory arbitration on people, for instance, they are the ones who tend to be the victims of class action suits, for instance, that you bear that in mind.

Are you sensitive to that so-called political institution of the civil jury, and do you agree with me that it has a role in defending the little guy against the more powerful and wealthy citizens?

Judge GORSUCH. Senator, I have talked a lot about the Seventh Amendment over the last 3 days. Quite a lot. I am a believer in the civil jury system, and I do not know whether it is the very bulwark of liberty or the palladium of liberty.

Senator WHITEHOUSE. You have got the Hamilton quote. Good for you.

Judge GORSUCH. All right?

Senator WHITEHOUSE. Yes.

Judge GORSUCH. They debated that——

Senator WHITEHOUSE. Yes.

Judge GORSUCH. Which one it was.

Senator WHITEHOUSE. Yes.

Judge GORSUCH. But I am a big believer in it. I spent a lot of time in the trial trenches of the law. I saw the value of the jury system. And, yes, Senator I am a big believer in civil juries.

Senator WHITEHOUSE. Good.

Judge GORSUCH. And my record proves it.

Senator WHITEHOUSE. Stick with it because it is going away unless the judiciary breathes a little bit of life into it. And at the moment, I think the Supreme Court is leaning the opposite way.

The last thing I want to ask you has to do with an email that you sent back in some time ago, but I think you will remember it. Back in February 2006, the scene was Attorney General Gonzales' testimony to this Committee with respect to the terrorist surveillance program.

Judge GORSUCH. Okay.

Senator WHITEHOUSE. It was the testimony that led to the Department of Justice Inspector General investigation. And I have the declassified version of it here which found that the Attorney General's testimony was incomplete and confusing, and that it was confusing, inaccurate, and had the effect of misleading those who were not knowledgeable about the program, which was obviously all of us because it was a classified program, and we had not been read into it.

On this day when the Attorney General of the United States was giving misleading, confusing, and inaccurate testimony to this Committee, you emailed back to Kyle Sampson and William Machella, "I think the AG is doing a really nice job today. He is running circles around the Committee Members." Now, running circles around the Committee Members worries me a little bit in the context of testimony that proved to be incomplete, misleading, inaccurate, and was criticized as such by the inspector general of the Department of Justice.

Do you recall when you sent that memo what you knew about that testimony, and when it was that you came to realize that Attorney General Gonzales' testimony was inaccurate and misleading to this Senate Committee?

Judge GORSUCH. Senator, someone shared that email with me this morning, and I looked at it. I do not have an independent recollection of it sitting here 11 years later, whatever it is. And to my knowledge I did not have any classified information at that time that——

Senator WHITEHOUSE. I gather that you did help him prepare that testimony.

Judge GORSUCH. Senator, I did as a speechwriter work from public materials.

Senator WHITEHOUSE. As we know, Director Comey and others subsequently testified to all of the drama that surrounded that, which was the subject of why—that was the reason that this was misleading and inaccurate. There was the confrontation in the Attorney General's hospital room. There was the mad dash running up the stairs to try to beat White House counsel to the Attorney General's bedside.

I think either Mullen or Comey testified it was the only time that they had ever used their sirens to try to get someplace fast, and it had kind of creepy Third World overtones, and people, you

know, rushing to get to the bedside of the stricken Attorney General before a White House counsel could do mischievous things. So, it was very significant when it ultimately came out.

Do you recall what you knew that day or at the time that you were preparing the Attorney General's testimony?

Judge GORSUCH. That is a——

Senator WHITEHOUSE. Had those events taken place, and were you aware of them? It must have been the talk of the Department if they had happened.

Judge GORSUCH. Senator, a fair question, and to my recollection sitting here, I found out about those things when everybody else did.

Senator WHITEHOUSE. The famous Schumer-Comey hearing.

Judge GORSUCH. Whenever it came out publicly, Senator. I was not——

Senator WHITEHOUSE. You were not read into it, and you had not heard about the excitement in Attorney General Ashcroft's hospital room.

Judge GORSUCH. That is my recollection, Senator.

Senator WHITEHOUSE. Okay. Very well. Thank you.

Judge GORSUCH. Thank you.

Senator WHITEHOUSE. You are going to love hearing this, Mr. Chairman. I yield back my time.

[Laughter.]

Chairman GRASSLEY. Senator Sash—Sasse.

Senator SASSE. I will go with "Sash." That is all right, Chairman.

[Laughter.]

Judge GORSUCH. I am "Grouch," so what the heck?

[Laughter.]

Senator SASSE. Judge, can we talk a little bit about the Ninth Amendment?

Judge GORSUCH. Absolutely.

Senator SASSE. It reads, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." What does that mean?

Judge GORSUCH. Well, Senator, I think it means what it says. The Ninth Amendment has not been much interpreted by the Supreme Court. There are different views about its effect and its meaning, and I do not doubt that there will be cases and controversies in which I would, if confirmed, and maybe even if I am not, asked to construe the meaning of that. It is one of those amendments that has not had a lot of judicial attention. We have talked about some others.

Chairman GRASSLEY. There is a publication in 1950 I read called "The Forgotten Ninth Amendment."

Judge GORSUCH. Right. Right.

Chairman GRASSLEY. Well, that is 60 years ago, and it was forgotten then.

Judge GORSUCH. Well, Senator Lee has written a book that includes some discussion of this as well.

Senator SASSE. Judge Bork referred to it at one time as an ink blot, seemingly implying that it could just be ignored. Is there any precedent that we need to know about to understand the Ninth Amendment as it comes down through the courts?

Judge GORSUCH. There are amendments that have been less interpreted and more interpreted. The Ninth Amendment is one of those that has been less interpreted, Senator.

Senator SASSE. What is the best way to understand how the Constitution divides power between the Federal Government, the States, and the people? And, in particular, how do we know whether or not some power that has not been specifically enumerated and given to the Federal Government since the people give the Government power? The Government does not give us rights. The people gave the Federal Government certain enumerated powers. If it is not enumerated, how do we know if it belongs to the States or to the people?

Judge GORSUCH. Senator, we have talked a lot about Federalism in these last few days. The people in this country are sovereign, as Lincoln said. It is a government by the people, for the people. So, the people are sovereign, and it depends on what powers they have given to the State Government and to the Federal Government. And there are variations between the States as to what authorities are given and how.

Nebraska, you have a unicameral legislature last time I checked. I do not know if you are the only one.

Senator SASSE. We are.

Judge GORSUCH. Right? But that is—the people have organized their State Government in a certain fashion, and that is for the people to do.

Senator SASSE. But is there any precedent on the Tenth Amendment that would give us some sense of what might belong to the domain of the Ninth?

Judge GORSUCH. So, we do have precedent in the Tenth Amendment area. I think the leading precedent might be the New York case by Justice O'Connor, which we have discussed a couple of times over the last couple of days, which makes clear that the Federal Government cannot commandeer State Government, cannot tell State government to enforce and how to enforce Federal dictates unilaterally.

Now, there are some—you know, there are limits to that principle, too. A 55-mile-an-hour speed limit, which is a Federally induced requirement, has been upheld, attached to the spending authorities. There comes a question of how far Congress can go in conditioning funds before it winds up commandeering a State Government.

Senator SASSE. I want to ask more questions about the ways that you would recommend that future hearings be conducted, but you will not answer. So instead, I will just agree with Senator from Rhode Island in commending the Chairman on how he has run the last 3 days.

Thank you, sir.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much. Thank you, Mr. Chairman. Thank you, Judge.

Judge GORSUCH. Thank you.

Senator KLOBUCHAR. Mr. Chairman, you will be excited. I am going to mention one of your pieces of legislation here, so it will be good.

I have been waiting for 2 days to talk about antitrust, but events of the day keep from getting in the way in terms of what we have been focusing on, and I know that is to your chagrin since you have taught in the area. We have talked about this. You are an expert as well as my counsel, Michael Kades, who has been waiting months for this to happen since he is an expert on antitrust.

Senator Lee and I have a long headed up that Subcommittee, and we have been very active a lot of hearings. And I think there is good reason to think that this could be a major area of the law ahead. We have seen people struggling to afford everything from prescription drugs to cable TV, and one way to help bring prices down, as you know, is to vigorously enforce our antitrust laws. Vigorous enforcement also fosters small business growth, and reduces inequality, and increases innovation. Obviously, if you have only two companies competing, you are going to have less of an incentive to be innovative.

As we discussed in our meeting, tackling concentrations of power is a linchpin to a healthy economy and a democracy, and we are right now living through an unprecedented wave of mergers. Over the last 5 years, there was a 50 percent increase in mergers reviewed by the FTC and the Department of Justice. Just last year, then-Assistant Attorney General for antitrust Bill Baer, a lifelong antitrust practitioner, said his agency was "reviewing deals with such serious antitrust concerns, that they should never have made it out of the corporate boardroom." That is his quote.

We also have a situation where the President of the United States in a rather unprecedented move commented about major merger that is currently over at the Justice Department. And then—and another major merger involving seed companies actually met with the CEOs involved in that merger, and they came out of the meeting and said they talked about the merger. And these are just things that we have not seen happen since these mergers are supposed to be within the purview of the Justice Department.

So, you have taught a number of antitrust classes at the University of Colorado. And, as you know, although the Supreme Court has not addressed the merits of a merger case in decades, recent court decisions, *Trinko*, *Credit Suisse*, and *Legion*, have made it more difficult to bring antitrust cases challenging anti-competitive conduct. Do you think the courts have made antitrust enforcement too difficult? What do you say to your classes about this specific issue?

Judge GORSUCH. Senator, thank you for bringing up antitrust. I cannot count myself as an expert, but I can tell you it is an area I enjoyed practicing in very much. I represented plaintiffs as well as defendants. I represented class actions as well as defended against antitrust charges. I attempted sometimes, quite unsuccessfully, to interest the Department of Justice and attacking a merger or two for a client. You know what that business is like.

When I teach antitrust, I try to teach everything about antitrust. I try not to take a view. I try to teach it in the Socratic method. I try to expose my students to the roots of our antitrust decisions—

Appalachian Coal, what might be classified as the biggest bad school. I tried to expose them as well to the Chicago School, which, you know, you are a graduate of the University of Chicago, and give them some sense of the economics that lie behind that.

And then, I tried to expose them as well to more recent learning in this area and expose them to Professor Sunstein and his book, Nudge. So, I try not to take a view. I try to expose them to all views so they can make up their own minds. I believe that is an important function as a teacher is not to—not to be doctrinaire, but to be challenging. And I was very gratified the other day when I opened up the mail in my class, which I was teaching antitrust when all this happened, and I had said—they were very curious whether I was going to get the nomination. I said, nah, it is not going to happen, but if it does and I turn into a pumpkin, I will have a friend step in to teach the rest of the semester.

In the mail the other day, I have a tie with pumpkins on it.

Senator KLOBUCHAR. There you go, yes. So, what do you see as the dangers to consumers and innovation if the courts make antitrust enforcement too difficult?

Judge GORSUCH. Well, the real problem at the end of the day, I mean, you have a problem of lack of competition between competitors, and then of course that filters down to the consumer level. And what that yields are higher prices, and lower output, the dead weight loss to the economy, loss of production, and those are real harms.

And the antitrust laws, as you know, were the original Federal regulatory regime. That was it for the national economy for a long time, and they are still vital and brilliant in their simplicity and design.

Senator KLOBUCHAR. You know, one issue that is particularly important to me, and this gets into my bill with Senator Grassley, which I will not ask you to comment on—he has been very vigorous and done some great work in this area—is the pay for delay pharmaceutical agreements where prescription drug companies actually pay generic drug companies to keep their cheaper drugs out of the market. These deals, in our view, can increase the cost of prescription drugs by billions of dollars a year. There was actually a CBO score on that, and until 2013, some courts had treated such agreements as per se legal.

Then the Supreme Court, as you know, in *FTC v. Actavis*, held that they were subject to the rule of reason. And I know you teach that case because it is on your antitrust syllabus. So, what do you understand its reasoning and holding to be, and do you believe it was correctly decided? You may not want to go into that part, but how do you describe this case to your students?

Judge GORSUCH. Well, it is a great case. And as you will recall, and at least as I remember it because I do teach from it. And the year it came down, I had my students argue both sides, and half of them played the Supreme Court. They correctly predicted the outcome. It was quite impressive.

As I recall, one side was arguing for a per se unlawful rule. The other side was arguing for a per se lawful rule. And the Supreme Court, through Justice Breyer, as I seem to remember, who himself is an antitrust expert, said that the rule of reason applies, in part

because we as courts, he said, had not had a lot of experience in this area, and are very leery about making any per se rules, any bright line rules until we have some experience.

That is one lesson we have learned in antitrust law over the years is to be cautious about per se rules in either direction before you have some experience, and that you can learn from the economics as you go.

Senator KLOBUCHAR. As I was looking over that syllabus, I also noticed that you assigned both the 2008 DOJ report on monopolization and the FTC's response.

Judge GORSUCH. Yes.

Senator KLOBUCHAR. As you know, this is a big debate. The FTC criticized the DOJ's report because the DOJ's guidelines were too lenient on monopolization. It would hurt consumers. That is their position. How do you teach this controversy, and which agency do you think had the better understanding of the law?

Judge GORSUCH. Senator, I teach it the same way as I teach the rest of the course, which is in a very Socratic method, and to try and expose my students to all the learning that I know of that is available. And it is quite a comprehensive course. I think it is considered one of the more difficult classes at the law school, or I hope it is. Federal courts maybe even harder, I do not know.

Senator KLOBUCHAR. So, you do not want to weigh in on this debate.

Judge GORSUCH. Oh, Senator, there is no way you are going to get me——

[Laughter.]

Senator KLOBUCHAR. All right. All right. One last thing here. We live in an age where there are dominant internet companies in many areas which control access to customers. internet search, social media, online travel are just a few examples. And Senator Lee and I both hear concerns in our role with the Subcommittee that when such dominant platforms do not deal with potential competitors, their refusal can pose a serious threat to new businesses, consumers, and innovation.

On refusals to deal as an antitrust violation, in the *Novell* case, you wrote, "The point of the profit sacrifice test is to isolate conduct that has no possible efficiency justification." That principle is not explicitly in the Supreme Court cases. So, is it your view that a refusal to deal can violate the Sherman Act only if there is no possible efficiency justification?

Judge GORSUCH. Senator, I would have to go back and read what I wrote *Novell* to give you a fair and honest answer to that question. But I can tell you in *Novell* I was attempting to apply the Supreme Court's teaching in *Trinko* and *Aspen Skiing*, which are the two refusal to deal cases, as faithfully as I could, and I can tell you that.

You know, we have had some fun refusal to deal cases over the years.

Senator KLOBUCHAR. Yes.

Judge GORSUCH. Think about it. I mean, *Aspen Skiing* and——

Senator KLOBUCHAR. There you go.

Judge GORSUCH. Right?

Senator KLOBUCHAR. Well, there may be more fun to come because, you know, I think one of the things about using such an absolute test and risking immunizing the conduct, particularly in the context of the internet, could be a problem because I think we have to look at what may be to come here. And we are just beginning to see a new kind of competitive marketplace with companies that may have control, and it may be really hard for new customers to get in. So, that was just something I wanted to plant in your head here as we go forward since you will be—if you are confirmed, you have a lot of expertise in this antitrust area.

And I just think we are just seeing more and more issues that are new and coming up, even in the last few years. And I know there has not been a case for a while, but there could well be one.

Judge GORSUCH. I appreciate that, Senator.

Senator KLOBUCHAR. All right. So, thank you very much.

Judge GORSUCH. Thank you.

Chairman GRASSLEY. Senator Lee.

Judge GORSUCH. Mr. Chairman? Mr. Chairman, before this is over, I would like to have one word to everyone. I do not know when is appropriate moment before folks leave.

Chairman GRASSLEY. Well, maybe we ought to notify offices and tell people to come back——

Judge GORSUCH. Oh, gosh no. No, no, no, no. No, no. I just want to say thank you before people leave.

Chairman GRASSLEY. Why do you not do that right now and take as long as you want?

[Laughter.]

Judge GORSUCH. Does that mean I get to leave?

[Laughter.]

Judge GORSUCH. No, I just know some people are walking out the door, and I just want to say this for the record, and if there is anybody left watching, I still want to catch them, the American people.

I have spent the last, what is it, 2 months in these buildings with you, 72 of your colleagues, and I wish the American people could see what I have seen. That is all. I think if they had seen what I have seen, they would be much bigger believers in their government than they are.

It is not perfect, my branch is not perfect, but I am a believer in it. And I want to thank you, all of you, each and every one of you for doing what you do for the American people, the seriousness with which you take this project, and, Mr. Chairman, for the courtesies you have all shown me, each and every one of you.

Thank you. That is what I wanted to say before folks went home.

Chairman GRASSLEY. God bless you. Senator Lee.

Senator LEE. Thank you, Judge, and thanks for your nice comments about our institution. We are not an institution that receives a lot of praise every day, and that means a lot.

Judge GORSUCH. You deserve a lot more than you get.

Senator LEE. I wanted to cover one thing with you very briefly. One of my colleagues mentioned a few minutes ago an email that you had sent praising remarks by Judge—then-Attorney General Alberto Gonzales back in 2006, February 6th, 2006.

I have got a copy of the transcript from that day. The remarks that you were supposedly praising were made and are recorded on page 53 of the transcript, which I offer into the record, and I also ask unanimous consent to offer those portions of the transcript and a copy of the email into the record.

Chairman GRASSLEY. Okay. Without objection, so ordered.

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

Senator LEE. The comments that were the subject of that discussion, recorded on page 53 of the transcript, indicate that the Committee took a break and reconvened after lunch at 1:45 p.m. on the date in question. The email, which I have offered into the record and which was sent by you on February 6th, 2006 to Kyle Sampson and Will Machello, was sent at 1:17 p.m.

Unless I am missing something, that would indicate that your email in which you said, I think the Attorney General is doing a nice job today, was sent roughly one half hour before the comments that were deemed problematic by my colleague and were raised a few minutes ago. Do you, Judge Gorsuch, have the ability to see 30 minutes into the future?

[Laughter.]

Judge GORSUCH. Right now, I kind of wish I did.

[Laughter.]

Senator LEE. I would find it very impressive if you did, but absent that very remote possibility, I would submit to my colleagues that it is impossible that the email that Judge Gorsuch sent on February 6th, 2006 at 1:17 p.m., had any reference to the comments made reference to by my colleague from Rhode Island a few minutes ago.

That is all. Thank you.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Mr. Chairman. Thank you, Your Honor, and I want to thank my colleague, Senator Franken, for allowing me to go ahead. I have a speech to give with a colleague in the Capitol in a few minutes.

And I would like to thank Louise and everyone else from your family, and your family of clerks and supporters, who steadfastly have been with you through what has been I know a very demanding and long process. I think you have shown more diligence and more stamina than certainly I would have or many of our colleagues would have.

I just want to conclude, if I could, a conversation that I opened in in my second round of questioning about the *Browder* case, *Browder v. Albuquerque*. I did not want to leave this unresolved, because we had a long conversation about substantive due process, and I have made reference before to a practice you engage in of writing concurrences, and sort of trying to understand what that means and what I can conclude about that.

So, just to remind everybody, *Browder* is a case where you dealt with a claim that an off duty—a newly off duty police officer went roaring through the center of town at 60 miles an hour, sped through 11 intersections with his lights on in his police car, and rammed a car and killed one person and badly injured another. And this is a case that was in Federal court because of Section

1983, which is an important statute that allows the vindication of rights that have been violated, constitutional rights.

And I was struck in this case that you went out of your way to write a concurrence to your own majority opinion. And the way I read it was that you argued Federal courts should decline to address Section 1983 violations if there is a remedy under State tort law. Why did you go out of your way to write a concurrence that would, if applied, significantly narrow a Federal court's ability to consider valid constitutional claims?

This was a case directly applying substantive due process analysis and where you said, "I do not think we ought to keep the doors of the Federal courthouse open." I have familiarity with 1983 claims from my own county service and role supervising a police department. It plays a central role in making sure that litigants who have suffered some loss or injury under color of State law have a chance to pursue a remedy.

Why did you write that concurrence, Judge?

Judge GORSUCH. Senator, I appreciate the opportunity to clarify the record on that because I think there may be some confusion. I vindicated the 1983 claim in that case, as I have in many, many, many cases, Senator, if you want to pick them out, one here, one there. I could give you, for instance, *Sutton*, which we have talked about, or *AM* we have talked about. Those are just a couple. I could give you a whole bunch more if you want.

What I wrote separately to indicate was sometimes we judges judge best when we judge least. And if there is already a State tort claim that is perfectly suitable and can achieve everything that the plaintiff wants, and, in fact, sometimes the plaintiff wants to be in State court, but gets dragged—removed, I should say—that is the legal term—to Federal court, okay? That happens not infrequently in my Circuit in 1983 cases.

There is a doctrine called *Parratt*, a Supreme Court decision, that suggests that we should defer to State proceedings in those circumstances if they are perfectly adequate, fair, and complete remedies. And our precedent, I just pointed out, maybe we had missed *Parratt*, Supreme Court direction.

I was bound by our precedent. I followed our precedent. But I suggested that perhaps we needed to take another look at our precedent in light of *Parratt*, the Supreme Court's direction.

I also emphasized, to be clear, Senator, that *Parratt* only allows abstention in circumstances where the State remedy is full and complete, and there is no possibility that the State court will be an inadequate forum. If you look carefully at that concurrence you will see that language there quite clearly and quite prominently, Senator.

Senator COONS. And perhaps I misread it. In my consideration of it, I was struck by this in part because it seemed in *Zimmerman* there was already a 1990 Supreme Court decision that suggested Parratt should not be applied in that way, in that context.

But the larger point for me is that in *Browder* you are suggesting the Supreme Court—you are pointing in the concurrence—you are pointing that the Supreme Court could overturn precedent to narrow the scope of 1983 in this way to limit the situations where Federal courts would hear constitutional claims. But in our conversa-

tion about *RFRA*, and for-profit corporations, and religious rights under *Hobby Lobby*, you pointed repeatedly saying that should be done by Congress. This is what the legislative branch should do, not what the Court should do.

So, it seemed to me there was some tension between the way you looked at another situation where you issued a concurrence saying I am bound. I am bound by precedent, but I do not like it, and I think we probably ought to make a change. Instead of pointing it our way, you pointed it at the direction of the Supreme Court.

If you thought 1983 should be narrowed, why did you not call on Congress to make that change?

Judge GORSUCH. Senator, respectfully, I believe you are misreading what I wrote. I was not advocating limiting 1983 in any, way, shape, or form. I was suggesting that perhaps we as a court had not paid sufficient attention to the Supreme Court's direction in *Parratt*. That is it. And in all of these cases, I apply our precedent and the precedent of the U.S. Supreme Court, and the directions of Congress as faithfully as I can without any secret hidden agenda, Senator, none.

And in *Browder*, I upheld the plaintiff's claim. That is what I did. That is my record in that case.

Senator COONS. That is right. The majority opinion, which you wrote, which is a three-judge opinion, upheld the claim. But I guess what I was—what drew it to my attention was your comments about substantive due process. And as I—we said before, two of them were Supreme Court cites.

Judge GORSUCH. Thank you for acknowledging that.

Senator COONS. But that is a choice to say substantive due process, which is the subject of some debate among scholars and Justices, is uncharted, open ended, murky, has a paradoxical name, "substantive due process." And I just wanted to come back again because this is where we ended the previous round of questions to see If I misunderstand how you interpret substantive due process.

Are there—what are the factors that you look at, because this goes back to the *Casey*, and *Glucksberg*, and others. What are the factors that you look at to determine whether a right is fundamental and appropriately protected under substantive due process under the Fourteenth Amendment?

Judge GORSUCH. Senator, I look to precedent. And in the *Browder* case, I applied the precedent of our court and of the Supreme Court of the United States. And our precedent indicated that the plaintiffs had a claim that should be vindicated, and I upheld the plaintiff's claim.

There additionally was precedent from the U.S. Supreme Court that suggested that in circumstances where the State courts are open and available, and there is no indication that there be any unfairness, that perhaps sometimes judges judge best when they judge least. Do not make more a new law than you have to.

That is a principle that I think good judges bear in mind when you can. That is not to say you always write the narrowest or craft the strictest construction. You try and come up with a fair construction, but that sometimes if everything is available that might be made available to a party to be made whole, not to restrict their access in a way, shape, or form, Senator. But if everything can be

done that can be done, then perhaps we should stay our hand once in a while.

Senator COONS. Well, that is reassuring. As I suspect you well know, Section 1983 was originally enacted. It has been referred casually as the Ku Klux Klan Act because it in the Reconstruction Era was an avenue into State court to allow citizens who could not get any redress in State courts to get into Federal court. Forgive me.

Judge GORSUCH. Absolutely.

Senator COONS. As a way to protect constitutional rights that were newly enacted after the Civil War. And it is one that in my role as a county elected where I was trying to monitor whether or not my police department, the police department the county for which I was indirectly responsible, was conducting themselves in full compliance with the rights of our citizens.

One of those early indicators is how many 1983 filings do you see in any municipality, in any county. And I wanted to make sure I did not misunderstand your ruling in *Browder*, and your concurrence in particular, as indicating some enthusiasm for narrowing access to Federal courts for litigants.

So, if I hear you right, your concurrence—again, an unusual thing to do to write concurrence to your own unanimous majority opinion—is simply expressing that if you are confident that there is no threat to recovery in a State court, that someone injured as the individual who was killed was and her family Member, should go to State court were tort law is fully developed, and there is a great deal of precedent, rather than to Federal court.

Judge GORSUCH. Right.

Senator COONS. But this is no suggestion on your part that constitutional rights do not belong in litigation. The transition point I made earlier was the 2005 article where you were suggesting some have too much enthusiasm for pursuing relief in the Federal courts.

Judge GORSUCH. Senator, I think you now have a have a handle on where I was coming from. I appreciate the opportunity to clarify that. I think your summary right there at the end gets it.

Senator COONS. Well, I will have some more questions for the record if I might.

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

Senator COONS. I appreciate the opportunity that I have had to meet with you and to ask a number of questions, and the seriousness with which you have taken my questions and the deliberations of this Committee as a whole. Thank you very much.

Judge GORSUCH. Likewise, Senator.

Chairman GRASSLEY. Senator Crapo.

Senator CRAPO. Well, thank you, Mr. Chairman. I am going to simply say thank you, Judge, for giving us this time and for your candor with us as we have asked you questions. I am not going to ask you any further questions, and will yield back my time.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, and may I just add with a number of my colleagues my admiration for the way you

have done this. Thank you, Judge Gorsuch, for your family, your wife, and your clerks, and you for hanging in there.

Before I begin, I would like to ask consent that the following letters be entered into the record, Mr. Chairman: The Leadership Conference on Civil and Human Rights, Bend the Arc, Jewish Action, and the National Education Association.

Chairman GRASSLEY. Those three documents, without objection, will be entered.

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

Senator FRANKEN. Thank you, Mr. Chairman.

Judge, during oral arguments for *Shelby County*, Justice Scalia seemed to suggest that it is the Court's job to step in when Congress' motives cannot be trusted. Justice Scalia questioned the significant rise in support for the Voting Rights Act when Congress voted for its reauthorization in 2006, which passed the Senate 98 to zero, and the House 390 to 33.

He essentially said that a Senator would have nothing to gain by voting against reauthorizing the Voting Rights Act, and that as a result, the Court should not read anything into the overwhelming support for the bill. Justice Scalia said, "It is a concern that this is not the kind of question you can leave to Congress." He went on to say, "Even the name of it is wonderful, the Voting Rights Act. Who is going to vote against that in the future?"

When the Solicitor General suggested that it would be unusual to analyze Congress' judgment in this way, Justice Scalia said, and again quote, "I am not talking about dismissing it," meaning Congress' judgment, "I am talking about looking at it to see whether it makes any sense." So, he is suggesting that the Court look at Congress' judgment to see whether it makes sense.

Now, this highlights two things that are pretty concerning to me. One, Justice Scalia's cynicism about lawmakers' motives. His remarks demonstrate a contempt for Congress that, in my view, also demonstrates a willingness to engage in the kind of judicial activism that many of my colleagues are quick to condemn, a willingness to "legislate" from the Bench. Justice Scalia's willingness to reach beyond the legislative history to question Congress' political motivations disrespects the separation of powers.

And, two, Justice Scalia's remarks ignored the facts. When Congress debated reauthorizing the Voting Rights Act of 2006, it developed a significant legislative record: 15,000 pages of hearing testimony, documentary evidence and appendices, State records, and reports from outside experts that demonstrated the continued need for the legislation. To suggest Congress' support for the bill was based on anything other than substance ignores the reality that more Members of Congress supported the Voting Rights Act because the legislation accomplished on an ongoing basis exactly what Congress designed the Voting Rights Act to accomplish.

Judge Gorsuch, during our courtesy visit I asked what you thought about Justice Scalia's remarks, and I asked you whether you agreed that what he said demonstrated a contempt for Congress. You emphatically said that Justice Scalia's remarks were not the words that you would have chosen.

Judge GORSUCH. Senator, I admire Justice Scalia greatly, but his words are his words, and mine are mine. And I would ask you re-

spectfully to judge me based on my credentials and my record. Justice Scalia's legacy will live on a lot longer than mine, I am sure.

Senator FRANKEN. I understand that. It was good to hear that you would not have said that, but I found that frustrating because it was not the answer to my question. Here, despite a unanimous Senate vote in support of the Voting Rights Act and a 15,000-page legislative record demonstrating that there was a significant debate over the bill, Justice Scalia questioned Congress' motives in deciding to support the bill.

It seems to me that he is substituting his own personal views for the facts on the—in the record. Do you agree a willingness to engage in this kind of speculation could be perceived as judicial activism?

Judge GORSUCH. Senator, respectfully, I just do not think it is appropriate for me to comment on the work of my superiors or Justice Scalia's words at oral argument, or any other Justice's comment in oral argument.

Senator FRANKEN. Well, I think that it is important, this issue of judicial activism, because that is something that has disturbed me about the Roberts Court. And this is one of the big decisions, which is the Voting Rights Act.

But setting aside that—that was a five-four decision—I want to know whether you would—forgetting judicial activism. I want to know if you agree with the substance here. Justice Scalia seemed to be reaching beyond legislative history in this case to question the political motivations underlying congressional action. In your view, is that kind of inquiry appropriate for courts to engage in?

Judge GORSUCH. And, Senator, again, I just do not think it is appropriate for me to sit here and grade a Justice's comments at oral argument.

Senator FRANKEN. Okay. All right.

Judge GORSUCH. Judges often make—ask questions at oral argument that are hypothetical or do not represent their actual views because they are testing ideas.

Senator FRANKEN. Okay. Well, that——

Judge GORSUCH. I was not there. I did not hear it. I am not going to condemn a man for arguments I have not heard, or thought carefully about, or know more about. And Justice Scalia's legacy will live on a lot longer than mine. I am confident of that.

Senator FRANKEN. Well, let us move on to the *Shelby* decision itself. We talked about this in the courtesy visit. This was another five-four decision by the Roberts Court. Here, the Court gutted the Voting Rights Act. Before that decision, the Act required certain States, States with a history of engaging in discriminatory practices at the polls, to get the Federal Government's approval before making changes to their voting laws. It was called pre-clearance, and it worked.

Within 4 years of passing the Voting Rights Act in 1965, nearly one million Black voters registered, and the number of Black elected officials in the South more than doubled. But the *Shelby County* majority suggested that discrimination at polls was no longer a problem, essentially using the law's success at preventing discrimination to justify gutting it. So, a sharply divided Court—again, 5–4—that is important—struck down a provision that determined

which States were subject to pre-clearance. As a result, none of them are.

In the wake of that decision, States previously covered by preclearance started testing the limits of what they could do. Texas and North Carolina passed discriminatory voter ID laws. North Carolina eliminated same-day registration and cut the early voting period. When North Carolina's restrictions were challenged in court, the Fourth Circuit ultimately struck them down, finding that the State's "new provisions" target African-Americans with almost surgical precision.

You mentioned that Section Two of the act was still in place when we were talking before, which allows discriminatory laws to be challenged, but only after they have been enacted. So, I pointed out that North Carolina, for example, enacted its surgically precise restrictions in 2013, but the Fourth Circuit was not able to strike down those restrictions until 2016. So, these restrictions were in place for years, and these restrictions accomplished exactly what they were designed to do when they kept African-Americans from voting in the 2014 election. But these restrictions would have been stopped by pre-clearance.

We talked about this, and I asked you does this disturb you at all. You replied simply that equal protection of the law was one of our country's great promises, but you did not answer my question. We went around the barn a few times on this one, and you told me that voting is a fundamental right. I know that.

This is a job interview. You are applying for a lifetime appointment to the highest court in the land, and vindicating the rights of people before the Bench is one of the core functions of that job. So, knowing whether you are disturbed by a State's government's effort to systematically and strategically discriminate against its citizens by race is really, really important, and it seemed like an easy question to me.

So, I will ask you again, does that disturb you at all what happened?

Judge GORSUCH. Senator, if there are allegations of racism in legislation in the voting arena, there are a variety of remedies.

The first, of course, is a claim under the Constitution, the equal protection clause.

Senator FRANKEN. There used to be preclearance, and that used to do the job.

And, again, this is a 5–4 decision. This is what were talking about here. I want to emphasize why we are here, and why all of this matters so much.

Some of this—some of us on this side of the aisle have been accused of asking unfair questions, of impugning judges, of essentially turning this into a show, apparently because we are bitter about what happened to Chief Judge Garland.

And, yes, I strongly believe that what happened to Merrick Garland was unfair and disgraceful.

The argument that we should judge and are judging candidates solely based on their qualifications is betrayed by the fact that these are the same people who blocked Merrick Garland, and Merrick Garland has every qualification. He is a man who is recognized as one of the best appellate judges in this country, in large

part because he has developed a reputation for bringing judges across the ideological spectrum together to craft strong consensus decisions.

So, yes, I was looking forward to his nomination moving forward, but I do not blame you, Judge Gorsuch, for what happened to him. And, ultimately, this is not about Judge Garland.

If Justice Scalia had died 1 month ago, and we were here today with President Trump's nominee, we would be talking about the same things. I think I and all my colleagues have asked tough but fair questions about your record, about your judicial philosophy, and about your ability to understand the practical outcomes of these decisions. And it is because we are deeply concerned about the Roberts Court—what the Roberts Court rulings have done for the rights of Americans.

In one 5–4 decision after another, we have seen the Roberts Court go out of its way to answer questions not before it, to overturn precedents, to strike down laws enacted by Congress, and to do all of this at great cost to consumers, workers, small businesses, to middle-class Americans, to those who do not own a car and do not have a driver's license so it is harder for them to vote.

We talked about forced arbitration. Through a series of 5–4 decisions, the Roberts Court has eroded Americans' ability to seek justice in the courts when they have been cheated or mistreated by a corporation with vast resources.

We talked about voting rights and *Shelby*, another 5–4 decision. The Court gutted a key provision of the Voting Rights Act and, with it, suppressed African-American votes. That is what it did.

And in *Citizens United*, also 5–4, the Roberts Court allowed money to pour into our elections. We do not know where a lot of it is coming from, and it is eroding Americans' trust in our most fundamental democratic institutions. And the public thinks it stinks, Republicans and Democrats alike.

That is why we are here. This is about people getting to court, about people getting to vote. This is about people losing—Americans losing faith in our democracy.

So, look, while I strongly agree that it is your job to follow precedent, as you have emphasized over and over again, I also want to know that you will consider the real-world consequences of your decisions, because the stakes are just too high.

I want to know that you understand why we have been here and why we have been asking you the questions, because—and I think Senator Whitehouse spoke very, very clearly on all these 5–4 decisions.

And I just want to hear from you that you understand what the stakes of this are.

Judge GORSUCH. Senator, I appreciate the opportunity——

Chairman GRASSLEY. Please answer and then——

Judge GORSUCH. Then I am done.

Chairman GRASSLEY. But make it as short as you can.

Judge GORSUCH. I can do that.

We are all in the same boat together. This ship, we are all in it, and either we are all going to hang together or we are going to hang separately, to mix my metaphors at this late hour.

And the fact of the matter is, Senator, of course I care about this country. I care deeply about this country, and I know you do too. Thank you.

Chairman GRASSLEY. Senator Cornyn.

Senator CORNYN. Judge, let me offer an alternative point of view to my friend Senator Franken's dystopian description of where the country is and the role of the Court.

I am particularly concerned about his description of the Court's decision in *Shelby County v. Holder*, because we were—I was part of the Senate Judiciary Committee, a number of us were, when we voted to reaffirm the Voting Rights Act, to reauthorize it, and recognized it as one of the great accomplishments of America, in terms of protecting and vindicating the rights of people, everyone, to vote.

But, as you know, Congress and the Supreme Court did not gut the Voting Rights Act. Section 2 remains a part of that important, historic legislation.

And so I just recoil when I hear people describe what the Court did as gutting the Voting Rights Act. Here is what the Court did. Congress, when it reauthorized the Voting Rights Act, did not update the formula by which the—Section 5 applied, which would require preclearance in States so they could not even change their own voting laws. Because they were covered by preclearance, they had to ask permission of the Federal Government, the Department of Justice, and others in order to do so.

But for some reason, rather than update the formula with current voting records—it had decades-old, several decades-old voting information, which had an impact of keeping more States and more municipalities, more governmental entities, within the preclearance requirements of Section 5.

The irony of this is the Voting Rights Act has vindicated and protected voting rights in an unprecedented sort of way. And even those States that had been swept up into the preclearance requirements, let us say back in the 1960s, had better outcomes for minority voters than many States that were not covered by Section 5, the preclearance requirement.

So the mistake that Congress made when it reauthorized the Voting Rights Act is it included a formula that did not reflect current reality, did not recognize that America had made great strides forward, thanks to the Voting Rights Act and vindicating minority voter rights.

So I just—I was here. I remember the debate. As a matter of fact, I joined several of my colleagues and filed minority views when we reauthorized it, pointing out the irony of using decades-old voting records in reauthorizing the Voting Rights Act.

So what the Court said—the question actually presented—I will read it quickly. It says, does the renewal of Section 5 of the Voting Rights Act, the preclearance requirement, under the constraints of Section 4(b), that was the formula I referred to, exceed Congress' authority under the Fourteenth and Fifteenth Amendments, and, therefore, violate the Tenth Amendment and Article IV of the Constitution?

That is what the Court decided. The Voting Rights Act maintains its force and important role in our jurisprudence today, and the Court found that the formula simply did not reflect current reality,

what passed and exceeded Congress' authority under the Constitution.

I mention all this not to ask you a question, but just to use the opportunity to say, you know, when people agree with the Court's decisions, and I can name a number of them that my friend from Minnesota would agree with and applaud, you know, it is great. When the Court reaches a decision that disappoints your expectations or perhaps your political agenda, then it is easy to jump on the Court and criticize it.

Nobody likes to lose in a court, but I think you appropriately earlier talked about the importance of not criticizing or characterizing the judges because judges, by and large, are patriots, people performing a public service at great financial sacrifice and, unfortunately, sometimes get accused of doing things that are totally unfair and off-base.

So I just wanted to take a moment to correct the record and what the Court actually did. And I happen to come from a State, the State of Texas, that is proud of the strides that we have made to overcome the record back in the 1960s when we were not so proud, we should not have been so proud about minority voting rights. But we have made great strides in that area, as have so many places that were covered by the Voting Rights Act under Section 4, which the Court struck down as not reflecting current reality.

We should stand up and applaud our great country for trying to overcome this legacy of diminishing minority voting rights, and I think the Court's decision is something that reflects that and is to be applauded and not condemned.

So thank you for sitting there and listening. Thank you for your willingness to serve. And thank you for the way you have conducted yourself throughout this hearing. I look forward to enjoying and watching from afar your service to our country for many years to come.

Thank you.

Judge GORSUCH. Thank you for your service, Senator.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

I would like to enter into the record, if there is no objection, a letter from 55 reproductive rights, health, and justice organizations opposed to the nomination, and a letter from 72 women lawyers who submitted an amicus brief in *Whole Woman's Health v. Hellerstedt*.

Chairman GRASSLEY. Both will be entered in the record, without objection.

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

Senator BLUMENTHAL. Judge, you referred, at some point, I think, to your clerks as evanescent. I think you used that word. But I think many of them are still here, so they have——

Judge GORSUCH. They are.

Senator BLUMENTHAL [continuing]. Been far from evanescent in this proceeding.

Judge GORSUCH. They have been wonderful, as has my family.

Senator BLUMENTHAL. And congratulations to them and to you——

Judge GORSUCH. Thank you.

Senator BLUMENTHAL [continuing]. And to your clerks.

Judge GORSUCH. Thank you. I appreciate it.

Senator BLUMENTHAL. I met a couple of them earlier who said that, and I am not going to embarrass them by naming them, but one of them said that he had left his employment with a law firm to help you prepare for this proceeding, so they have been part of your team.

Who else has helped you prepare?

Judge GORSUCH. First and foremost, my wife, Louise, who has been with me through thick and thin. When the gruel is thin, the gruel is thick, she is there. She is my rock.

I also have to thank Senator Ayotte, my sherpa. I did not know that was an official title, but it is around here.

I really appreciate this opportunity.

Senator Ayotte, I did not know Senator Ayotte until the day after my nomination, well, the day of my nomination, February 1st, which would have been my father's 80th birthday. And he smiled on me that day because he gave me Senator Ayotte.

And I do not know how many miles we have logged walking the halls together, meeting with you and your colleagues. She has become a fast and permanent friend.

Where is Mary Elizabeth?

Mary Elizabeth, who was in your Republican Senate Cloakroom and is now in the White House, she has been just so special to me.

Senator BLUMENTHAL. Anyone else from the White House?

Judge GORSUCH. Oh, gosh. Is McGinley here? He is one of my former law clerks who is now a young lawyer in the White House. And I never thought I would actually have somebody carry my bag——

[Laughter.]

Mr. MCGINLEY. I never thought I would carry a bag after graduating law school.

Judge GORSUCH. I feel very guilty about it, because this is a very fantastic young lawyer. Watch out for McGinley.

Senator BLUMENTHAL. Anyone from the Department of Justice?

Judge GORSUCH. Oh, gosh. Who is here from the Department? Well, a whole bunch of folks.

Senator BLUMENTHAL. So you have been well-prepared.

Judge GORSUCH. Patrick Bumatay, Eric Tung, one of my former law clerks, one of Judge Tymkovich's former law clerks now in the Department of Justice have been helpful. As I know—to produce all those documents, I think they spent a lot of time reviewing and producing documents for this Committee, and I am very grateful to all of them.

So there have been a lot, a lot of special people.

Senator BLUMENTHAL. I would be remiss if I failed to ask whether anyone from outside organizations has assisted in this process.

Judge GORSUCH. I definitely had friends, you know, beat me up with questions and things like that, absolutely, Senator, sure. Of course.

Senator BLUMENTHAL. And has anyone from, for example, the Heritage Foundation helped you prepare?

Judge GORSUCH. I do not know who is from Heritage. No one has come up to me and said I am from the Heritage Foundation, and I am here to help.

[Laughter.]

Judge GORSUCH. I have definitely leaned on my friends, Senator, and I have leaned on people from the Department of Justice and the White House Counsel's Office, my family.

Senator BLUMENTHAL. And former clerks.

Judge GORSUCH. And former, yes, yes, yes, and current clerks too.

Senator BLUMENTHAL. I have a couple substantive questions for you.

Judge GORSUCH. All right.

Senator BLUMENTHAL. No right is absolute under the Constitution. Is that a correct statement?

Judge GORSUCH. Well, Justice Black used to think so.

Senator BLUMENTHAL. He said no law, and he said no law meant no law——

Judge GORSUCH. Right.

Senator BLUMENTHAL [continuing]. Limiting free speech.

Judge GORSUCH. Yes.

Senator BLUMENTHAL. But, in fact, rights frequently conflict, and there is a balancing that takes place, correct?

Judge GORSUCH. Senator, there are always tensions in the law that we mediate. As legislators and judges and the executive branch, we all play a role in mediating tensions between competing rights.

Senator BLUMENTHAL. I want to talk a little bit about, in that context, the Second Amendment and about the decision in *Heller*.

You undoubtedly know that Connecticut experienced one of the worst tragedies in our history when the massacre occurred at Sandy Hook. I have long been an advocate of commonsense, sensible measures to combat gun violence, going back to my earliest days as State Attorney General. And my colleagues, many of them, including Senator Feinstein who mentioned Sandy Hook here and Senator Durbin, have been champions of this measure, these kinds of measures.

And I mentioned the balance of rights because that was a theme that Justice Scalia mentioned in *Heller*. He wrote that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever for any purpose."

That I would read as a statement that the Second Amendment is not absolute. Would you agree?

Judge GORSUCH. Senator, I would agree that, in *Heller*, the Court held that it protected guns in common use, for example, not every weapon or tank or ballistic missile, but guns in common use for self-defense, subject to reasonable regulation. That is my recollection sitting here of, more or less, the test the Court——

Senator BLUMENTHAL. Well, I will give you the quote, and I think it confirms your recollection. He said that the Second Amendment did not include "dangerous and unusual weapons," such as "weapons that are most useful in military service, M–16 rifles and the like."

Do you agree?

Judge GORSUCH. Senator, the law is the law. It is the precedent of the U.S. Supreme Court. I follow the precedent of the U.S. Supreme Court as a judge. It is the same answer I have given.

Senator BLUMENTHAL. Well, let me again ask you about another part of the *Heller* opinion.

Justice Scalia wrote, he said, nothing in *Heller* was intended "to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Do you agree with that approach?

Judge GORSUCH. Senator, I agree that *Heller* is the law of the land and that it is precedent of the U.S. Supreme Court, and it is the obligation of judges to apply precedent of the U.S. Supreme Court.

Senator BLUMENTHAL. So it is a correct statement of the law?

Judge GORSUCH. If you have read from *Heller*, *Heller* is the law.

Senator BLUMENTHAL. And do you believe it is a correct interpretation of the Second Amendment?

Judge GORSUCH. Well, Senator, it is the controlling interpretation of the Second Amendment. As I indicated maybe yesterday or maybe it was today, I do not know—we have spoken about *Heller* so many times. But I think both the dissent and the majority opinion were very fine opinions, very thoughtful, if you want to use the term originalist, opinions, Justice Stevens in dissent, Justice Scalia in the majority, very thoughtful, detailed look at the original public meaning of the Second Amendment. They came to different conclusions, as judges sometimes do in hard cases.

But I think that is a wonderful case to look at and say there are judges doing admirable work of judges who might have reached different conclusions, some of them, if they were acting as legislators and voting on their preferences rather than trying to interpret a law.

Senator BLUMENTHAL. But the basic idea of conditions imposed on that right, no right being absolute, public safety being a legitimate consideration, is one with which you would agree?

Judge GORSUCH. Well, Senator, one example I remember, sitting here, in *Heller*, is the felon in possession statute, which I recall the Court specifically mentioned, and the dispossession of felons, which is a law that we administer regularly in the courts.

Senator BLUMENTHAL. And in fact, a panel of your court, the Tenth Circuit, has held that the Second Amendment does not provide the right to carry a concealed firearm. That is *Peterson v. Martinez*.

You were not on the panel, but it was the holding of your court, correct?

Judge GORSUCH. I think that is right, sitting here, but I would want to go reread it.

Senator BLUMENTHAL. I have the opinion.

Judge GORSUCH. Senator, I trust your representation.

Senator BLUMENTHAL. And you did not—no one requested a rehearing in that case, so if you had disagreed with it, you could have requested a rehearing.

Judge GORSUCH. Any judge can, as we have discussed——

Senator BLUMENTHAL. Right.

Judge GORSUCH. Request a rehearing sua sponte. Yes. Correct.

Senator BLUMENTHAL. You know, I asked about your preparation because I think you have been very adroit in answering many of my questions. And as adept as you have been, I remain troubled because you have been less forthcoming, less direct and specific than I hoped on whether you agree with the conclusions and results in some of those cases. And I think you probably sense my worry or unhappiness about some of those answers.

And I understand that your approach is that there could be cases and controversies involving these decisions, but you have left doubt. And the doubt is increased because of statements made by the President who nominated you, that he was, in fact, choosing someone who would, for example, automatically overrule *Roe v. Wade*.

And so I have felt that you had a responsibility to be, if anything, more forthcoming than judges or Justices nominated in the past.

You were fairly clear in your answer on *Brown*, that you thought it "corrected an erroneous decision," and that it was "a correct application of the law of precedent." But you gave a different answer on *Loving*, *Griswold*, *Lawrence*, *Eisenstadt*, *Obergefell*.

You said these cases were decisions of the Court. You informed us of the holding. But you were unwilling to say that they were correctly decided.

And judges or Justices in the past, and I named some, we are more forthcoming, direct, specific, saying they agreed. They thought those decisions were correctly decided.

So I remain troubled, and I am troubled because these doubts affect real lives and real people. Gay and lesbian Americans have to wonder whether *Lawrence* and *Obergefell* might be overturned, or whether you would vote that way. Americans will lack the confidence that *Griswold* and *Eisenstadt* will be upheld.

They have to question whether they will be able to make their own reproductive decisions.

Millions and millions of women who have apprehensions about *Roe v. Wade* and whether you would vote to overturn it will find very little basis for confidence in what you have said about those decisions.

And I began by saying that I was looking for core beliefs. Your response was that your personal beliefs have nothing to do with decisions that you will make. But we know that core beliefs matter, just as words matter. And the distinctions that you have used in describing different cases matter.

The great genius of our Constitution is that it grows to match the challenges of different times. The great genius of the Supreme Court, in my view, and of many Justices, is that they grow too. And I have seen it firsthand in the Justice I worked for, Justice Blackmun. You may have seen it in your brethren on the bench much more directly and closely than I.

So we cannot anticipate with precision and certainty what Justices will do once they are appointed for a lifetime on the Nation's highest court, but the American people hold us on this panel ac-

countable for making our best judgments based on all the information we can glean or elicit.

And so that is why I have probed as hard as I can for your beliefs, your commitments. I think they matter.

And I want to thank you for being here and sharing with us your ideas, to the extent you have, and say that I will be submitting more written questions as well, and I will reserve my own judgment until I have a chance to assess your responses to them and the responses that you have given us over the past 3 days.

Thank you very much, Judge.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Graham.

Senator GRAHAM. Thank you very much, Mr. Chairman.

Judge, I think we are getting toward the end here. And I only have one request, that I never hear about the fish case again——

[Laughter.]

Senator GRAHAM [continuing]. For the rest of my life and yours, because if I do, we will defund the Court.

[Laughter.]

Senator GRAHAM. I hate that case.

Judge GORSUCH. It is a great case.

Senator GRAHAM. Yes, that is your opinion.

Judge GORSUCH. I make all of my potential law clerks read it.

Senator GRAHAM. I know. That is why the Geneva Convention should apply to them.

But so, let us just say this, Sonia Sotomayor and Elena Kagan have served their Nation well, honorably, and they have not grown, in my view, to the way I would have liked them to have grown. I do not expect them to decide the cases the way I would have.

Now, growing means you have to agree with me, I guess. I know they are not going to all of a sudden change their judicial philosophy because the General Counsel to—who was the guy? To Obama? What was his name? Yes, Greg Craig said that Elena Kagan is progressive in the image of Obama himself. He did not grow a lot, in my view, in terms of his liberal philosophy.

And I do not think these two Justices have served the country poorly by not coming my way. I just think they have not grown in terms of understanding the conservative view of being a judge. But they are qualified, and they sit on the Court today, and I understand that.

As to Judge Garland, a dear man, a fine man, I do not think anything happened here on our watch that is anything unusual. When you look at the last 100 years, I think you have had one situation where, in the last year of a presidency, a vacancy was filled when it came open in the last year by a President of one party and the Senate of another.

And to my friends on the other side, if you think I believe you would have done something differently, I do not. I do not.

Here is what my friend Joe Biden, who I talked to today, by the way, as Chairman of the Committee said June 25th, 1992, when there was a potential opening in the last year of Bush 41's presidency. He said it would be—"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 Bush "did send someone up, I would ask the Senate to seriously consider not having a hearing on that nominee."

We agree, Joe. We got your message.

Here is what Harry Reid said in 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 nominees" a vote.

Here is what Senator Schumer said before the American Constitution Society. "We should reverse the presumption of confirmation. . . . We should not confirm any Bush nominee to the Supreme Court except in extraordinary circumstances."

That was in his last year, so it is not very persuasive to me.

Here is what I would say, that if an opening occurs in the fourth year of President Trump's term, and the political season is afoot, that I will be with you all if you say wait until the next election. That is the one thing I can say.

You like precedent? We just created one, and I think we will be bound by it. And Joe Biden was going to do it back in 1992, and you all would have—shoe on the other foot, we would wait until the election was over.

And why are we here? Because Trump got 306 electoral votes. So that is why we are here. That is why you are nominated and not somebody else, because I did not expect Donald Trump to pick Merrick Garland, even though he is a fine person. I expected him to pick from a list of 21, which he told the whole country before the election, here is my list.

Now the one thing you can say about President Trump, when it came to the Supreme Court, he showed his cards. It was really unprecedented. And he kept his word, and he chose from that list, all highly qualified.

And I, honest to God, cannot think of anybody I would have chosen above you.

I ran for President and lasted about 30 minutes. I enjoyed the entire process. I was, apparently, the only one.

[Laughter.]

Senator GRAHAM. But if I would have won, I would have chosen you, too.

But I think the bottom line is that you are highly qualified, from the conservative point of view, that the last 10 years have been a testament to good solid judging. You have stood out in all the right ways as a judge. You have conducted yourself honorably. And to expect a Republican to pick someone like you would be very much expected, and I am happy he did because, I will be honest with you, I was worried he would not. But now we have a great nominee, and I hope we can get you over the line here.

I want to ask you about a case that nobody else will ask you about, polygamy, not that I am advocating it. I want to get that straight. But the decision, *Obergefell*—is that how you say it?

Judge GORSUCH. *Obergefell*.

Senator GRAHAM. Okay. Justice Kennedy, the Roberts Court, decided that the due process and equal protection clauses of the Four-

teenth Amendment guarantee the right of same-sex couples to marry.

And that is the law, right?

Judge GORSUCH. Yes, Senator.

Senator GRAHAM. Is it possible three people could fall in love and want to marry? Are there places in the world where polygamy is the practice?

Judge GORSUCH. Senator, there are places in the Tenth Circuit where——

Senator GRAHAM. But it is illegal in America, is it not?

Judge GORSUCH. Senator, we just had a challenge to Utah's——

Senator GRAHAM. But the law of Colorado says it is illegal.

Judge GORSUCH. It does.

Senator GRAHAM. Is there any State in the Union that recognizes polygamy as a legal marital relationship, that you know of?

Judge GORSUCH. At the moment, to my knowledge, no.

Senator GRAHAM. So the point is that, apparently, as a Nation, we are all okay with not extending marriage to three people. One day, we may not be okay with that. One day maybe we want to broaden our view of what marriage should be.

And that day may come, and you may be the judge. And I guess what I am saying is, to Senator Blumenthal, rather than pledge allegiance to all these cases, you should treat them for their precedential value they have, and maybe one day three people will argue that we love each other as much as you love your wife or a same-sex couple. I do not know if that day will ever come, but if it does not come through the political process, the only venue for somebody to challenge would be the Court.

So in terms of *Griswold*, if you do not—if you cannot figure out what you are saying, you are not listening very well. I think what you are saying is that if there is ever an effort to overturn *Griswold*, it will mature as a case in controversy. I think you have been very honest with us. I cannot imagine a situation anywhere in America where some politician would try to change the law in this regard, and I cannot imagine the Court hearing that case.

But if that ever happened, I am glad you are willing to say I will at least listen. And for you to do more than that would, I believe, run afoul of what Justice Ginsburg said, "A judge sworn to decide impartially can offer no forecast, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."

As to Justice Roberts saying I like *Griswold*, that is certainly his right. I do not know if he tipped his hand, but I can say this: If you are listening to this man, this judge, I think he recognizes the real-world consequences of overturning that decision, and that you will apply the law. But if there is ever a case before you that challenges *Griswold*, I am glad to hear that you are going to listen.

As to these other cases, I promise you there will be legislative efforts to protect the unborn, and some of them may have a different legal theory than *Roe v. Wade*. Some of them may run into the construct of *Roe v. Wade*. I am glad you are willing to listen to those of us on this side of the issue.

As to same-sex marriage, I have been asked a lot at home to introduce a constitutional amendment to overturn the decision. I

have decided not to do that because I think it would put the country through something that is not going to bear fruit.

But to the people who believe that traditional marriage should be protected and oppose same-sex marriage, I do not think you are all crazy. I think many of you have religious views. But the Court has ruled.

And I do not know if the Court will ever decide that three people can get married, but I hope that the judges who hear that case one day, if it ever comes, will at least do what you promised to do. Listen. Base the decision on the law, should it change, and the facts of that particular case.

So the bottom line here, Judge, is that you cannot give the answers that the other side would like, because what they want you to do is make sure that they can go and tell everybody he is okay with all the cases we like.

The Roberts Court is interesting. When they upheld the Obamacare act twice, I have accused of owning Justice Roberts because I voted for him. Actually, I do not really disagree with his rulings. I am a bit surprised by it.

When Justice Kennedy decided that same-sex couples can marry and State statutes have to follow, the Roberts Court was not very popular over here.

All I can say about the Roberts Court is it is made up of some pretty incredible people. And his time will come, and his time will go.

And if you get to be part of that Court, I think Donald Trump will have done a good service for the people of the United States, because what he will have done is chosen one of the most qualified people I have ever met in my time in the Senate or otherwise, someone who has endured 2 days of very difficult questioning, shown an understanding of the law that amazes me, has lived a life that I can only compliment you on.

And as to President Trump, whatever differences we have, when it comes to this nomination, you did the country a great service.

To my colleagues, I know it is tough right now. If this man does not get 60 votes, then I do not believe we can ever find a Republican in the country, a presidential pick, that will get 60 votes. There is nobody I know better in my world, the conservative world, than this man. And I hope and pray that you will honor President Trump's selection, as I chose to honor Sotomayor and Kagan.

Whether they are better qualified, I will let other people decide. But I will fight to the death to say that you are equally qualified.

Thank you very much and Godspeed.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. The Senator from Hawaii.

Senator HIRONO. Thank you, Chairman.

Judge Gorsuch, you have sat through many hours under the cameras and under the lights over the last 3 days, and that goes for all the people who sitting there who have been supportive of you.

And for all that, many of my colleagues across the aisle, particularly, have called it an endurance test, granted. But, Judge, the real endurance test is about the struggles facing working families, women, people of color, the LGBTQ community, immigrants, and

Native peoples. It is about the struggles that everyday Americans have and face.

These are the people who will be impacted by the decisions you would make on the Supreme Court. These are the people for whom the need for justice is often most urgent. These are the people I am focused on when I consider your nomination and any nomination to the Supreme Court.

It remains to be seen if you will be a Justice for all or a Justice for some. Over the last few days, you have often told us about what counts and what does not in terms of what a Justice should do and how we should assess your nomination.

When other Senators and I have asked about your opinions in specific cases, like that involving the terrible choice facing Alphonse Maddin between freezing or being fired, you have told us to look at your whole record.

When we asked about decisions where you seem to adopt strange interpretations that narrowed laws meant to protect worker safety, you said you are a judge and do not take sides, and that if the statute was too limited, Congress should do better.

When we asked about your decision in *Hobby Lobby*, which found an expansive new right to religious liberty for a corporation that employs 32,000 people, you did not explain how you assessed the terrible impact this decision had for thousands of women who now would be denied access to healthcare.

During my last round of questions, I asked you about your understanding of the influence of politics on the composition of the Court based on your 2005 article, "Liberals and Lawsuits." It was not an attempt at a gotcha moment or to paint you in an unfair light. It was an attempt to get to the reality that both you and I understand.

I wonder how you would approach the kind of tough cases that reach the Supreme Court and how, say, a Justice Garland would approach the same case. I think there would be a big difference.

We know that Justice Scalia and Justice Ginsburg, both legendary jurists and close friends, would reach dramatically different results in cases that matter deeply in the lives of millions, cases like *Shelby County*, *Lilly Ledbetter*, *Hobby Lobby*, *Roe v. Wade*.

Donald Trump knew this too when he set forth his very clear litmus test for a Supreme Court pick. He said he wanted a Justice who, for example, would adhere to a broad view of the Second Amendment and who would overturn *Roe v. Wade*, to quote him, "automatically."

Your article in 2005 made clear you know judicial philosophy matters. Of course it does. That is why we are so focused on understanding your judicial philosophy and getting beyond platitudes about the judicial role. That is why this confirmation process matters.

This is serious business. That is why we still have questions. That is why I remain concerned.

Judge Gorsuch, over and over again, you have told us to focus on your whole record as a judge and not certain cases or certain of your writings in books or articles or emails. In fact, my Republican colleagues suggest we are being unfair to try to look to those things to discern how you would approach cases, if confirmed.

Some have even gone so far as to conflate the questions we are raising about your record in the course of our advise and consent responsibilities with Donald Trump's abhorrent attacks on Federal judges, attacks like the one on Judge Watson of Hawaii, which he repeated last night at a $30 million fundraiser for congressional Republicans.

Apples and oranges do not begin to describe the differences between what Donald Trump said and what we are seeking to do here.

Although I was not in the Senate, I recall during Justice Sotomayor's confirmation hearing that Republican after Republican ignored almost the entirety of her nearly 25 years on the Federal bench. Instead, they focused in question after question on a gross misreading of one speech—one speech—she gave to a group of young women about the value of diversity on the bench. Many of them cited that speech to justify their opposition to her nomination.

Judge Gorsuch, was that a fair basis on which to evaluate Justice Sotomayor's nomination?

Judge GORSUCH. Was what? Was the speech that she gave a fair basis on——

Senator HIRONO. To—yes, we have been criticized for focusing on some very important cases to try to get to your heart, your judicial philosophy. Meanwhile, Justice Sotomayor was judged by some of my colleagues based on one speech. And I am asking you whether that was a fair basis on which to judge her nomination.

Judge GORSUCH. Senator, I have declined to offer personal opinions about cases, and I have also declined to offer personal opinions about the advice and consent function of the Senate.

That is your constitutional responsibility, and this body's, and it would be presumptuous of me as a judge at once to say I like or dislike the work of the U.S. Supreme Court as a lower court judge, and it would be presumptuous of me as a judge to say I like or dislike how this body discharges its constitutional obligations. That is really your judgment.

Senator HIRONO. Judge, excuse me, you have consistently asked us to look at your whole record. That is why I asked the question.

You have said again and again in these hearings that you cannot provide your views on specific precedents, but at times, you have done that. You have praised the Youngstown case. You have criticized Korematsu. You have praised the *Brown* decision. You said that *Cruzan* and *Glucksberg* were rightly decided.

So how can you express these opinions but refuse to provide your views on the *Casey*, *Heller*, *Roe*, *Citizens United*, *Griswold*, *Gideon*, *Ledbetter*, *Gross*, *University of Texas*, *Southern Medical Center* cases?

Judge GORSUCH. Senator, I have offered my legal judgment as a judge about cases. I have not offered any personal views about anything, or I have tried not to very hard.

I have tried to adhere to Justice Ginsburg's rule about no hints, no previews, no forecasts. Justice Scalia, Justice Souter, Justice O'Connor, and all the judges who come before me, I have tried not to break the chain.

Senator HIRONO. You did lend your support, however, to some precedents and not others, so that is the question.

You have told us also several times that judges make terrible legislators. You told us that courts lack the staff, capacity, and training to the kinds of fact-finding that is an essential part of the legislative process.

And in that context, I do want to return briefly to *Shelby County* and the Voting Rights Act. When Congress reauthorized a key expiring provision of the landmark VRA in 2006, it did so with a nearly unanimous vote. And before reauthorizing the protection of Section 5 in jurisdictions with a long history of discrimination in voting, this Committee alone held nine hearings on the VRA.

The thousands of pages of material the Senate reviewed, together with a record developed in a dozen hearings in the House, clearly established a continuing need for Section 5. And yet, in *Shelby County*, the Roberts Court ignored this evidence and the Court's long precedent and made its own determination about the value of the extensive evidence reviewed by Congress. It struck down those provisions.

So, so much for judicial modesty. So much for balls and strikes. So much for judges judge best when they judge least, which you mentioned tonight as a virtue.

So, Judge Gorsuch, does the *Shelby County* decision raise the kind of concerns you have noted about the limits of judges as policymakers and the problems that arise when a court steps outside of the judicial role and acts as a legislative body?

Judge GORSUCH. Senator, *Shelby County* is a precedent of the U.S. Supreme Court. I am not here to disparage the work of the U.S. Supreme Court.

Senator HIRONO. Both the process and the outcome in the *Shelby County* case raise exactly the kind of concerns that make it so important for us on the Committee and in the Senate to understand your judicial philosophy. You are, after all, talking about a lifetime appointment to the highest court in the land.

And after the obstacles to voting we have seen since *Shelby County*, we now know that Congress got it right, that the evidence showed a continuing need for Section 5 of the Voting Rights Act, and the Supreme Court got it wrong when it substituted its judgment.

So once again, I am asking this in a different way, and I will give it a shot: Judge Gorsuch, doesn't the outcome of the Court's action in striking down *Shelby County* suggest you have it right when you point to the limits of judges as legislators?

Judge GORSUCH. Senator, what I would say is, after *Shelby County*, there remain some remedial mechanisms available to individuals concerned about voting rights. There is always an equal protection claim under the United States Constitution. There also is a Section 2 claim available to anyone who is concerned. It goes beyond the Constitution.

And should Congress wish to legislate, the Court in *Shelby County* made clear that it could do so with a more updated formula for preclearance. So that remains a remedial regime possibility as well.

Senator HIRONO. The real-life impact of the *Shelby County* decision was that 13 States passed laws that could be deemed voter suppression laws, including—the first State was Texas, which intentionally passed a discriminatory law.

So I think everyone understood the ramifications and the import of that particular decision. And we learned in that decision that it matters a great deal for our rights what is the judicial philosophy or, as my colleague, Senator Blumenthal, would put it, core beliefs of the judges who serve on the Supreme Court.

If judicial philosophy developed through life experiences, education, et cetera, and that judges should apply instead precedent, why would we have so many 5–to–4 decisions in critical cases?

Judge Gorsuch, I wish that I could say that this hearing has been illuminating for what was said by you. Instead, I am left to judge your nomination largely on the basis of what you refused to say.

Mr. Chairman, I yield the rest of my time.

Chairman GRASSLEY. Senator Tillis and Senator Kennedy will be the last two. So whenever you finish, the judge will be able to go. I may have a few remarks at the tail end. It is up to you guys.

Senator TILLIS. Thank you, Mr. Chair.

Just briefly, without objection, I would like to enter some other letters that come from a diverse group of people attesting to Judge Gorsuch's qualifications and balance on the bench and in law practice.

Chairman GRASSLEY. Without objection, they will be entered.

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

Senator TILLIS. I am going to be brief and yield back 10 minutes of my time.

First, I have heard the sort of messaging today about the Roberts Court. We have already heard from Senator Graham, whose comments I would like to be associated with. You know, the Roberts Court has produced a number of opinions that have made folks on my side of the aisle uneasy.

It seems to me that we have folks down on the other side of the street here that do a pretty good job of being objective and following the law. So I am not so sure this branding that they are trying to come up with or that some are trying to come up with that the Roberts Court always rules one way or the other in a 5–4 split, not to mention the multitude of judgements they make over there that are unanimous.

I want to talk a little bit about history and then just thank the judge for his contribution. But I do have to go back to some numbers, and I want to call out that, you know, there are folks here who have already laid the ground work for a filibuster, for trying to hold up the confirmation of an enormously well-qualified judge to go on to the Supreme Court.

But I think when you criticize Judge Gorsuch, you are really criticizing, because of the numbers, the entire Tenth Circuit—97 percent of the time unanimous decisions. He is in the majority of decisions in which he participates 97 percent of the time, so I would assume the concerns that you would have for Judge Gorsuch you would probably have to, to be intellectually honest, place those same concerns with anybody coming out, whether they are a Democrat or a Republican judge on the bench or put forth by a Democrat or Republican administration.

A lot of people have used history here to suggest that maybe requiring a supermajority is the norm. It could not be any further

from the truth. Republicans did not require a cloture vote. They did not seek a supermajority for Justice Ginsburg, Justice Breyer, Justice Sotomayor, or Justice Kagan. And I would believe that if we applied the same mainstream standard that seems to be being created here, maybe things would be very different on the Bench.

For example, I do not think most Americans think mainstream is to propose abolishing Mother's Day, to suggest that there is possibly a constitutional right to prostitution, or to urge the establishment of co-ed prisons. Yet those views were espoused by Ruth Bader Ginsburg. They are certainly controversial today. I suspect they were when Ruth Bader Ginsburg was before this Committee. But they did not require a special standard, and they actually voted for a confirmation. As a matter of fact, she was voted in 96–3.

Now we will move to nominations under the Obama administration. I submit that most people would not find it mainstream to believe a person of one ethnicity or gender would reach a better conclusion than a person of a different ethnicity or gender. I bet they would not think it is appropriate for a judge that is appearing here that would say impartiality is an aspiration. But those were the views that Justice Sotomayor had when she came before this Committee.

The aspiration to impartiality is just that—an aspiration. This is somebody who got voted to be a Supreme Court Justice, and we did not set a different standard. As a matter of fact, the only way that Justice Sotomayor was confirmed was through the support of Republicans. They could have filibustered it. Yet or if the Minority Leader at the time had gotten up and tried to convince us or convince the Members who were here at the time, we could have held up this new standard. It simply does not exist. It does not exist, I do not think, in the tenure of any of the Senators on this Committee.

So the question is: Are we just creating a new set of rules? And are we doing that at our own peril? Is this the new norm? Is this how we are going to run this process? This is the first time I have been through it. It has only happened 112 times in the history of the United States. This is the 113th. Are we really going to set that standard? Because it is not a standard that really has existed in history, but that is what we are on the brink of doing. And I will tell you, we could end up on a slippery slope that will not work out well for this institution, and I do not think it will work out well for the Supreme Court.

You know, we had a 63–37 vote for Kagan in spite of her comments defending that the Government had the authority to outlaw the publishing of a pamphlet, a pamphlet that could have been a modern-day equivalent to "Common Sense." In Sotomayor's case, nine Republicans, of which Senator Graham was a part, voted for Sotomayor, in spite of the comments that I just mentioned.

I really think we ought to go back, listen to what the judge has said today and yesterday and the day before, and recognize we have an extraordinarily well-qualified nominee before us who will do a great job on the Supreme Court.

And, Judge Gorsuch, I want to apologize for some of the people here who I think—I know you are a great, a very kind person, and

a kind soul. You said there were no inappropriate questions. I for one think there were a lot. But I am not going to ask you to respond to that. I am just going to thank you for your kindness. I am going to thank you for your energy. I want to thank you for your resolve. And I want to thank you for having an impeccable record that builds a compelling case for you to be the next Supreme Court Justice on the Supreme Court. I wish you the very best. I am going to keep you in my prayers. And I look forward to voting for your confirmation.

I yield back the remainder of my time.

Judge GORSUCH. Thank you, Senator.

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge, I join my colleagues in thanking you for your answers. I think they were as candid as you could make them under the rules. And I appreciate all the time you spent preparing for this hearing.

I also join my colleagues in thanking your family, especially your partner. This is a tough, tough business sometimes, and it is especially difficult on families.

You have quite an extended family as well. I have spoken casually with some of your law clerks, and they are very devoted to you, and that speaks volumes to me.

I want to thank Senator Ayotte for her wise counsel and advice.

I have two quick questions and then a request, but I cannot let go unaddressed some of the comments made by my friend from Minnesota about the Voting Rights Act.

I am from the South. The Voting Rights Act, we were the subject of the Voting Rights Act. And I can say that I guess this is sort of a glass-half-full or glass-half-empty sort of thing. But this country has gone from institutionalized slavery to an African American President in 150 years, which in the grand scheme of life, death, and the resurrection is not that long, and I am very proud of that. I did not agree with our first African-American President on all of his positions, but I am very proud of the fact that this country made that kind of progress, and I just wanted to say that for the record.

My first question, I do not know whether you picked it up from my questions and comments or not, but I have what I think is a healthy skepticism about Government. I believe I do have a right to privacy, and part of my right to privacy is to be left alone by Government sometimes. That does not mean that we do not need Government and that I do not have confidence in Government, but I think there should be limits to Government. And I think the U.S. Congress sets those limits.

Do you agree with me that our United States Constitution is a document of enumerated powers and that neither the Federal Government nor any of its branches have a power unless you can point specifically to a place in the United States Constitution that gives them that power?

Judge GORSUCH. Yes, Senator.

Senator KENNEDY. Thank you.

It has been my experience—and this I was taught—that justice is supposed to be blind. I realize that is a cliche, but cliches become cliches because they are true.

Do you agree with me that the wealth, the status, and the power of the parties to litigation should have absolutely nothing to do with the result in litigation?

Judge GORSUCH. Senator, I take an oath written by this Congress; it is a beautiful oath. It is to administer justice without respect to persons, to be blind to who they are, and also to do equal right to the poor and to the rich, and to administer the duties of my office, to discharge them impartially.

I have tried to do that here to the best of my abilities. Not perfect. I have tried to do it for the last 10 years as a Federal judge—not perfectly, but that is what I try to do each and every day, and it is a great privilege and a great honor to be able to do it. And I am humbled, I am honored every day I come to work. And I have been humbled and honored to be here with you.

Senator KENNEDY. And I believe you will do that in the U.S. Supreme Court.

My final statement is not a question. It is a request. It seems to me that justice is kind of like healthcare. It is not really accessible unless you can afford it. And I am very concerned about the cost of litigation in America and the fact that it has affected access to our courts. It has just become so expensive that many of our people cannot afford to have their day in court. And I know administratively the Federal judiciary has some powers, and I hope once you are on the Court you will talk to your colleagues and see if you can put your thinking caps on and do what you can to try to control the costs of litigation.

With that, I thank you again. I thank you, Mr. Chairman. I am sorry my iPad went off.

[Laughter.]

Senator KENNEDY. But it will not happen again.

Chairman GRASSLEY. I have a few words to say, but before I say those to you, Judge, we are going to reconvene tomorrow morning at 9:30 when we will hear from outside witnesses. So before I let you go, I think that you have demonstrated a great deal of patience, and that is probably necessary to get the votes of the United States Senate. You probably cannot show you ever get mad, but, boy, you had to be disgusted sometimes, but you did not show it.

I know you were not, but that is kind of the way I would feel if I were in your shoes.

I suppose the thing that bothers me most about a lot of the questions you got, you seemed to agree with so many people that we are trying to get a yes or no out of you, and they did not seem to want to take a yes for an answer, even if you did not say yes, because you kept saying I do not know how many times, maybe hundreds of times, "It is the law, it is the precedent," and how you are going to approach those things. There ought to be a great deal of satisfaction on people that we got somebody that says the law means something, what the people's elected representatives pass mean something, and within our system of judicial interpretation of law and the Constitution, that precedent plays a very important part, and that we have a document that is going to bring certainty, and that certainty is based upon, as it was laid out by our forefathers, to make sure we had stability and predictability in our public policies.

So evidently it did not frustrate you, but I want you to know it frustrated me that they would not take really in a sense a yes for an answer, even if you did not answer in a three-letter word.

I think you should know that I am very impressed with the way you handled all this testimony. For the last 3 days, the American people have witnessed a very impressive command of the law, most assuredly the thoughtfulness that you have put into everything you do, particularly how you responded to our questions, and that can only come from the discipline that you have given yourself as a judge already on the Tenth Circuit. And it pretty well ought to demonstrate to everybody how you are going to handle it when you get to the Supreme Court of the United States.

So I think you are to be commended for your strength in this enduring process, and I think that the American people witnessed most importantly a person who has a great deal of humility. And I think it shines through in not only your own non-verbal demeanor, but also in what you say.

So I thank you very much for being a good witness. Thank you very much for your public service. And the meeting is adjourned, and you are excused.

Judge GORSUCH. Thank you, Mr. Chairman, very much.

[Whereupon, at 7:53 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 3 follows Day 4 of the hearing.]

CONTINUATION OF THE CONFIRMATION HEARING ON THE NOMINATION OF HON. NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, MARCH 23, 2017

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

The Committee met, pursuant to notice, at 9:33 a.m., in Room SH–216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

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

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

Chairman GRASSLEY. Good morning to everybody who is here and especially those who have prepared for testimony today. We welcome everybody on what I think will be the final day of Judge Gorsuch's confirmation hearing.

We have already heard 2 days of impressive testimony from the nominee. I think he has shown great command of the law, and I think he has shown a humility with his humble delivery, and I think people learned a lot about not only our political system, but our judicial system with what has gone on in the last 3 days.

Today, we will hear from a number of outside witnesses. We will hear from a number of distinguished witnesses both in support and in opposition to the nominee. They will all speak to the qualifications to be a Supreme Court Justice. I look forward to hearing from all the witnesses today.

Let me modify this a little bit because I am going to spend maybe 15 minutes at the Agriculture Committee because the nominee for Secretary of Agriculture is before that Committee, and I am a Member of that Committee. And I will have somebody else chair. That will not stop the business going on. So that is the only time I should probably be away.

Each of our witnesses will have 5 minutes to make an opening statement, and then we will proceed to questionings. If Members have questions of the Members, we will obviously accommodate that.

But now I am going—oh, no. Do you have an opening comment? I am sorry. I just—I just about forget you.

Senator FEINSTEIN. I do not. You do not need to worry about that.

[Laughter.]

Senator FEINSTEIN. I do not, Mr. Chairman.

Chairman GRASSLEY. Okay. Okay. Now we will go to our first panel, who will feature two representatives of the American Bar Association. You may come to the table.

I will start over again. With the Standing Committee on the Federal Judiciary, Nancy Degan and Shannon Edwards. Nancy Degan is the chair of the American Bar Association

Standing Committee on the Federal Judiciary, and Shannon Edwards is the Tenth Circuit representative on the American Bar Association Standing Committee of the Federal Judiciary and served as a lead evaluator on the Standing Committee's investigation of Judge Gorsuch.

I would like to swear you, if you would let me. I do not know whether we have to stand. I guess we just do it naturally.

Do you swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. DEGAN. I do.

Ms. EDWARDS. I do.

Chairman GRASSLEY. Each answered affirmatively. We would now have you give your statement, please.

STATEMENT OF NANCY SCOTT DEGAN, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, NEW ORLEANS, LOUISIANA, ACCOMPANIED BY SHANNON EDWARDS, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, EDMOND, OKLAHOMA

Ms. DEGAN. Thank you very much.

It is a privilege to be here. I am Nancy Degan from New Orleans, and I am very privileged to chair the American Bar Association's Standing Committee on the Federal Judiciary.

And as you indicated, Senator, I am joined today by Shannon Edwards from Oklahoma City, who is our Tenth Circuit representative and was the lead evaluator on the Standing Committee's investigation of Judge Gorsuch.

The Standing Committee has conducted its independent and comprehensive evaluations of the professional qualifications of nominees to the Federal bench for the last 60 years plus. The 15 distinguished lawyers who make up our committee come from across the country, representing every Federal Judicial Circuit. They annually volunteer, on a pro bono basis, hundreds of hours to evaluate nominees to the Federal bench, and we focus solely on a nominee's integrity, professional competence, and judicial temperament.

We do not consider a nominee's political affiliation, philosophy or ideology. And we do not solicit any information from any nominee with regard to how he or she might vote on a particular issue or matter that may come before the Court.

The Standing Committee's evaluation of a nominee to the Supreme Court is based upon the premise that a Justice must possess exceptional professional qualifications. All 15 members of the Standing Committee participate in the evaluation of a Supreme Court nominee. Each Standing Committee member reaches out to a wide range of people within his or her respective Circuit who may have information regarding the nominee's integrity, professional competence, and judicial temperament.

Additionally, reading groups of scholars and practitioners review the written work of the Supreme Court nominee and advise the Standing Committee of their findings. The reading groups independently evaluate the nominee's analytical ability, knowledge of the law, application of facts to law, expertise in harmonizing a body of law, and the ability to communicate effectively.

The academic reading groups involved in Judge Gorsuch's evaluation were composed of experts in their fields from the faculties of the University of Pennsylvania Law School and the Loyola College of Law in New Orleans. The practitioners reading group included nationally recognized lawyers who have argued before the Supreme Court and served as law clerks to Justices on the Supreme Court.

These three groups read all of Judge Gorsuch's published opinions and many of his other writings. During the evaluation of Judge Gorsuch, the Standing Committee members contacted almost 5,000 people nationwide who might have knowledge of Judge Gorsuch's professional qualifications, and these included judges, lawyers, academics, and Members of the general community.

Circuit members then interviewed those who indicated that they had personal knowledge of Judge Gorsuch through their dealings with him as a judge, colleague, co-counsel, opposing counsel, teacher, organization member, and even classmate. We followed Judge Gorsuch's career from his time at preparatory school through his tenure on the Tenth Circuit. All interviews were conducted in confidence to assure accurate information and candid assessments.

Finally, as we do with every evaluation, we conducted a personal interview with Judge Gorsuch. Ms. Edwards and I met with him on February 27th and questioned him on a wide variety of topics.

After our comprehensive evaluation was completed, our findings were assembled into a detailed confidential written report, which included the written reports of the academic reading groups and the practitioners reading group, and this report was approximately 1,000 pages long.

Each member of the Standing Committee then studied that final report and individually evaluated Judge Gorsuch using three possible rating categories: qualified, well qualified, or not qualified. To merit a Standing Committee rating of well qualified, a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence, and judicial temperament.

The rating of well qualified is reserved for those found to merit the committee's strongest affirmative endorsement. Having examined Judge Gorsuch through this lens, the Standing Committee

members unanimously voted that he deserved the well qualified rating.

On March 19th, we submitted a written statement further explaining our process and our rating, and we respectfully request that it be made a part of this Committee's official record.

Thank you.

[The prepared statement of Ms. Degan appears as a submission for the record.]

Chairman GRASSLEY. Thank you.

Ms. Edwards is not going to say anything. Is that right?

Ms. DEGAN. We are pleased to answer any questions that the Committee may have.

Chairman GRASSLEY. Okay. Yes, I think I have a couple questions. They are somewhat repetitive of maybe some of the things that you said, but I would like to have that emphasis.

But before I give a short statement, I would like to compliment anybody who serves on evaluating these judges at all levels, and probably at the level of the Supreme Court, it is much more difficult and elongated as it probably should be. But I know David Brown, Des Moines, Iowa, who does this with a lot of judges and takes it real seriously.

Ms. DEGAN. Yes, sir.

Chairman GRASSLEY. And you almost—when you visit with him about the work he does, you almost think it is a full-time job. He has obviously got to go make money someplace else. So he must have some time to practice law, but he really—seems to me like he puts a lot of time into it.

Ms. DEGAN. It is an honor, sir.

Chairman GRASSLEY. So for both of you, I would compliment you on what——

Ms. EDWARDS. Thank you.

Chairman GRASSLEY [continuing]. On what you do.

As you noted in your testimony, the American Bar Association awarded Judge Gorsuch its highest rating of well qualified by unanimous vote. The statement explaining the rating states this, and you have said this already, but let me repeat it.

The rating of well qualified is reserved for those found to merit the committee's strongest affirmative endorsement. In other words, a rating of well qualified is not given lightly. Would you agree with that?

Ms. DEGAN. Absolutely.

Chairman GRASSLEY. Okay. Now I just want to mention a few points from the report. First, the Standing Committee found that "Judge Gorsuch enjoys an excellent reputation for integrity and is a person of outstanding character."

In fact, one of his colleagues on the bench said, let me quote, "I have known and interacted professionally with Judge Gorsuch since his appointment to the Tenth Circuit Court of Appeals. In my experience as a judge, I cannot identify a person more qualified in every sense of the word to serve as an Associate Justice of the U.S. Supreme Court. Judge Gorsuch would be an invaluable addition to the high court."

Second, the committee found that the judge's professional competence exceeds the high criteria reviewed by the committee. In

fact, the committee report stated, "Given the breadth and diversity and strength of the feedback that we received from judges and lawyers of all political persuasions and from so many parts of the profession, the committee would have been hard-pressed to come to any conclusion other than Judge Gorsuch has demonstrated professional competence that is exceptionally outstanding. Time and again, those with whom he has worked and those who have been involved in cases over which he has presided have applauded his intellectual acumen, thoughtful discernment, and written clarity."

On the judicial temperament, the committee found that lawyers and judges alike overwhelmingly praised his judicial temperament.

And finally, on judicial independence, the committee found "that Judge Gorsuch believes strongly in the independence of the judicial branch of government, and we predict that he will be a strong, but respectful voice in protecting it."

As one person interviewed for the report stated, "In addition to his outstanding academic credentials and brilliant mind, Judge Gorsuch's demeanor and written opinions during his tenure on the Tenth Circuit demonstrate that he believes unwaveringly in the rule of law and judicial independence. In my opinion, he is exceptionally well qualified to serve as a Justice of the Supreme Court of the United States."

I wholeheartedly agree with the American Bar Association's assessment of Judge Gorsuch, and I have one question. But before I do that, I think we had 2 days of about 20 hours total that people had a chance, if they were watching, to view some of those things that you said about his belief in the rule of law and judicial independence. In fact, if there is any one thing that I heard in answer to so many questions that somebody wanted either a yes or no, what they really got is I am going to follow the law, and I believe in judicial independence and following precedent.

Now, so I think being a little bit repetitive, but this is my last question. Would you describe once again for the Committee the scope of review that allowed you to come to these conclusions, and then I will go to Senator Feinstein.

Ms. DEGAN. Yes, sir. To merit the Standing Committee's rating of well qualified, we found, sir, that he was a preeminent member of the legal profession, that he has outstanding legal ability and exceptional breadth of experience, and that he meets the very highest standards of integrity, professional competence, and judicial temperament.

And we did this by reaching out to those who had personal knowledge about Judge Gorsuch's integrity, professional competence, and judicial temperament. We interviewed many people who not only encountered him as a judge, but also as an opposing counsel, as a co-counsel, as Principal Deputy Associate Attorney General for the United States, as a private practitioner, as a law clerk for the Supreme Court and the D.C. Circuit, and through personal dealings with him.

So the scope of our investigation was deep and broad, and involved all 15 members of our Standing Committee, in addition to the 26 professors from two law schools and the 14 very well recognized practitioners who have appeared before the U.S. Supreme Court and who previously acted as law clerks.

So that is the scope, Senator. And as I said before, we do not give the well qualified rating lightly, and I can assure you that every member of the Standing Committee reviewed intently the 997 pages that were compiled from the interview notes and the analyses by the law professors and the practitioners in order to each independently reach that rating on a unanimous basis.

Ms. EDWARDS. Senator, if I might add, our——

Senator FEINSTEIN. Could you turn on your mike?

Chairman GRASSLEY. Yes. Thank you. You sure can add. I think for no other reason than all your relatives back home ought to hear something.

[Laughter.]

Ms. EDWARDS. Some of them are up pretty early.

Our task was to cast a wide net, and that is what we did. We contacted over 5,000 individuals. I personally contacted 344 and received comments from 82. So every one of the committee members did likewise, and that is why our report is 944 pages long.

Chairman GRASSLEY. Okay. Now Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

I want both of you to know that I very much respect what the American Bar does in these events, and I have read your reports now for some 24 years and very much appreciate your work.

Let me ask you a question, and then I just want to make a comment. Did you review the documents that cover his performance at the Department of Justice?

Ms. DEGAN. These are documents that were recently submitted to the Committee. Is that right, Senator?

Senator FEINSTEIN. That is correct.

Ms. DEGAN. The Department of Justice sent us Judge Gorsuch's responses to the PDQ, which is actually called the Senate Judiciary Questionnaire, on CD–ROM, along with a stack of materials. And then DOJ sent us a supplement. We did not receive the responses that were recently submitted to the Committee.

I did take a quick look at what that encompassed just from the description on the website of the Senate Judiciary Committee and saw that it involved some 170,000 pages. Ms. Edwards and I attended some of the past two days of hearings and heard some of the questions that the Committee Members asked of Judge Gorsuch. It appeared from his answers that these materials were prepared in his role as a Principal Deputy Associate Attorney General and that he, in answering the questions, indicated that he was acting as a lawyer.

And at one point, I believe, Senator, you may have asked him about some handwritten note, and he said, "I do not have any independent recollection of that, but if I wrote it, it is because I have that from my client." His client being the Federal Government.

We did not have an opportunity to review those materials. We would base our information on the personal knowledge of those who dealt with Judge Gorsuch, and if he was acting in his capacity as a lawyer to anyone, that may be protected by the privilege.

Senator FEINSTEIN. Oh, okay.

Ms. DEGAN. But we are happy to review that, if necessary, in order to determine if we need to adjust the rating. But based on

what I heard, I do not believe that it would change the opinion of the committee.

Senator FEINSTEIN. I appreciate that. And the documents, I just want to clear, are not 150,000 pages. The documents I am referring to are much smaller in number, maybe a stack like this.

Ms. DEGAN. Oh.

Senator FEINSTEIN. But what they do indicate are some of his personal thinking on subjects of great concern, namely torture, and in a way, I regret I did not ask more questions. I will do some written questions in that area.

I happen to hold the view that a Member of this Government is held to a different standard than an attorney may be in private life. That if you think something is wrong, you have an obligation to do something about it, not just say, well, my client wanted—my principal wanted this, and so I did it. And we have too much of that in this area.

But I also want you to know that I think the work you do is very fine. I read it with care.

Let me just say one other thing, and I am going to do this because for many of us, what has happened this past year has been very painful. And you have also done an evaluation of Judge Merrick Garland, who was not given the privilege even of a Committee hearing. So I would just like to read some excerpts from your report on him.

"Garland's integrity is off the scales." Page 5.

"Garland is the best there is. He is the finest judge I have ever met. There is no one who is his peer." Page 5.

"Judge Garland has no weaknesses." Page 6.

"He may be the perfect human being." Page 6.

"He is unnaturally—"

[Laughter.]

Senator FEINSTEIN. "He is—"

[Laughter.]

Senator FEINSTEIN. "He is unnaturally blessed with brilliance. Things come to him quickly." Page 9.

"In my opinion, there is no better Federal judge than Chief Judge Garland." Page 10.

"Garland's integrity is flawless, his competence terrific." Page 16.

"I know no one, bar none, with more integrity and more commitment to truthfulness and accuracy than Judge Garland." Page 17.

"There never has been a better candidate than Chief Judge Garland." Page 18.

"I have never heard anyone say anything bad about Judge Garland." Page 18.

I read this simply to dispel anybody's thinking that this man was not worthy of this Committee's hearing.

So thank you very much for the work that you have done, and it is very much appreciated.

Ms. EDWARDS. Thank you, Senator.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Chairman GRASSLEY. You bet. And I think Judge Gorsuch made very clear yesterday and the day before his feelings about the competency of Garland as well.

But the other thing is maybe when I was talking about David Brown, I was trying to compliment you all without saying we appreciate your work very much and know you work hard at this. But I know how David Brown does it, and I assume I have got some understanding of what you go through, although I have never done and will never have an opportunity to do it.

I am going to look right here and then left. Is there anybody on our side that wants to be recognized? Senator Graham?

Senator GRAHAM. Thank you.

Chairman GRASSLEY. Anybody else that wants to be recognized on our side?

Senator HATCH. I do.

Chairman GRASSLEY. Okay, but I will get a Democrat before I come back to you.

Senator HATCH. Sure.

Senator GRAHAM. Thank you both very much for the work you do.

Is it fair to say that the people you called was a group beyond the Federalist Society?

Ms. DEGAN. Yes.

Senator GRAHAM. Okay.

Ms. EDWARDS. I do not think we knew if they were in the Federalist Society or not.

Senator GRAHAM. I do not know how many Members there are, but the odds of all of them being called are probably pretty limited.

Would you say that he is a mainstream judge?

Ms. DEGAN. Well, Senator, it depends on what you mean by "mainstream." We believe that he meets and exceeds the highest standards of integrity, professional competence, and judicial temperament. So if that is mainstream——

Senator GRAHAM. Probably——

Ms. DEGAN. the answer is yes.

Senator GRAHAM. Well, let us put it this way. If there is a stream, he is on the quality end of the stream, right?

Ms. EDWARDS. He is fishing in it.

[Laughter.]

Senator GRAHAM. He is fishing in it. There we go. Are you from South Carolina?

Ms. EDWARDS. I am from Oklahoma.

Senator GRAHAM. Close enough.

[Laughter.]

Senator GRAHAM. Would you say he is a reasonable judge?

Ms. DEGAN. Absolutely. Based on the feedback we received.

Senator GRAHAM. Would you say he has lived a good life as a person?

Ms. DEGAN. I'll let you answer that.

Ms. EDWARDS. My answer is yes.

Senator GRAHAM. Okay. Did you hear his testimony that he believed the Detainee Treatment Act outlawed waterboarding?

Ms. EDWARDS. We were here yesterday.

Ms. DEGAN. I cannot say that we did actually hear that, Senator.

Senator GRAHAM. I remember hearing that. Okay. So I just want to thank you for the service you provide to the Committee and to the country, and I hope people are listening to your evaluation.

As to Judge Garland, everything you said is absolutely true, and I will talk more about the way the process in the Senate works. But thank you both. You did the Committee and the country a great service.

Ms. EDWARDS. Thank you.

Ms. DEGAN. Thank you. It has been an honor.

Chairman GRASSLEY. I am looking to my left, and I did not say I am looking at the left. Anybody over here have a question?

Senator FRANKEN. I do not.

Chairman GRASSLEY. Okay. Then I will go—I will go back to Senator Kennedy.

Senator HATCH. How about me?

Chairman GRASSLEY. Well, I thought you did not raise your hand.

Senator HATCH. I just want to say one thing.

Chairman GRASSLEY. Oh. Then it is your turn.

[Laughter.]

Senator KENNEDY. I will defer to Senator Hatch.

Senator HATCH. I will be happy to defer to you, Senator. I just want to thank you for the work that you have done.

I agree that Merrick Garland is a wonderful person and a very good judge. I went to see him personally. I helped him to get through back 19 years ago, maybe more than 19 years ago. And that was—that was a problem. There is no question about it.

But now that has been resolved, do you see any reason why we should not totally support Judge Gorsuch?

Ms. DEGAN. Well, the ABA has given Judge Gorsuch its highest rating, and that is the most affirmative endorsement that we give. So, no, sir.

Senator HATCH. And that is hard to get, I have to admit. So I appreciate the really hard work that you folks do, and it is very meaningful to the Committee at this time.

Thank you, Mr. Chairman.

Ms. DEGAN. Thank you.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. No questions.

Chairman GRASSLEY. Okay. Now Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Thank you, Ms. Degan and Ms. Edwards, for all your hard work. I know how—how exhaustive your analysis is.

How many grades are there, the different levels of qualification?

Ms. DEGAN. Three. Qualified, not qualified, and well qualified.

Senator KENNEDY. Okay. So it is basically A, B, and F.

[Laughter.]

Ms. EDWARDS. I will add that some of the people that we talked to asked us if there was an extremely well qualified.

Senator KENNEDY. Really? An A-plus?

Ms. EDWARDS. Yes.

Senator KENNEDY. And Judge Gorsuch received an A?

Ms. DEGAN. He did. Well qualified.

Senator KENNEDY. And how many people contribute to this evaluation?

Ms. DEGAN. Well, the 15 committee members all participate, and in addition, we had two academic reading teams read all of his

published opinions and other writings, and that was about 26 additional lawyers, academics, who are—who are experts in their fields, in the fields that they reviewed. So if it was a securities law case, a securities law expert read those opinions.

And additionally, practitioners, which include those who regularly appear before the Supreme Court, that was 14 additional. So if you add all that up, if my math is right, I would say that is about 55 people or something like that. And all very distinguished lawyers and academics.

Senator KENNEDY. These 55 attorneys, are they all Republicans?

Ms. DEGAN. No, sir.

Senator KENNEDY. Are they all Democrats?

Ms. DEGAN. No, sir. Very varied. Big firms, small firms. Democrats, Republicans. In fact, we do not even—we do not get into political affiliation, Senator.

Senator KENNEDY. Good for you. Is it a gender-diverse group?

Ms. DEGAN. Very gender-diverse. Gender-diverse—every kind of diverse you can imagine.

Senator KENNEDY. Okay. And it is racially diverse?

Ms. DEGAN. Yes, sir.

Senator KENNEDY. You probably do not even ask this question. But in terms of religion, is your sense is that it is diverse?

Ms. DEGAN. Our sense is, but we do not ask that question.

Senator KENNEDY. Okay. And this group together gave Judge Gorsuch an A, well qualified?

Ms. DEGAN. Yes, sir.

Senator KENNEDY. All right. And some asked to give him an A-plus. Ms. Edwards, is that right?

Ms. EDWARDS. Yes.

Senator KENNEDY. Okay. Well, I just want to say for the record, I do not know Ms. Edwards. I just had the pleasure of meeting you today. My dad was from Oklahoma. I love Oklahoma.

Ms. EDWARDS. Thank you.

Senator KENNEDY. But I know Ms. Degan, and she is one of the most prominent lawyers in Louisiana, Mr. Chairman. She is an undergraduate graduate of the University of New Orleans. She is an honors graduate of Loyola. She is a former adjunct professor at Loyola. She practices law with Baker Donelson, one of the premier law firms not just in Louisiana, but in the world.

And I trust her judgment. And my experience with Ms. Degan has been that she calls it like she sees it. She is joined here today, I would be remiss if I did not recognize I will call him her lesser half.

[Laughter.]

Senator KENNEDY. Lesser half, but still substantial. Mr. Sid Degan, who is another very prominent attorney. He went to UNO. He went to Tulane to law school. He founded his own law firm, and he is here today volunteering his time.

I know them both well, and I trust their judgment. If they tell me that Judge Gorsuch is the best, you can take it to the bank. You can take it home to mama because it is true. And I thank you.

Ms. DEGAN. Thank you, Senator.

Chairman GRASSLEY. I believe that is the last of the questioning for the Committee and for the American Bar Association. And for

the country, we thank all of the people that participated and will continue to participate in this that you have reported.

Thank you very much.

Ms. DEGAN. Thank you.

Ms. EDWARDS. Thank you.

Chairman GRASSLEY. We will take 30 seconds for staff to give the names of the new people, and I would ask the new people to come and stand behind their chair, and I will—and then I will swear you before you sit down.

I am going to go ahead and start the introduction anyway. The next panel will be Judge Tacha, Ms. Massimino, Judge Henry, Mr. Jaffer, Judge Kane, Mr. Perkins, Ms. Bressack, and Mr. Calemine. And if I pronounced anybody's name wrong, correct me when you testify.

[Pause.]

Chairman GRASSLEY. Okay. Would you—do you swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

[Response.]

Chairman GRASSLEY. I have seen positive response. So I think—please seat. And I—we never get everybody to honor the 5-minute rule, and I do not expect you to stop in the middle of a syllable or anything like that. But if you see the red light come on and you can summarize in about 30 seconds or so, it would be very much appreciated because I am sure that there will be some questions of some of you, and so we want to move things along.

But I think I am going to do it in the way you are seated there from my left to my right. So would you start out, Judge Tacha?

STATEMENT OF HON. DEANELL REECE TACHA, U.S. COURT OF APPEALS JUDGE, RETIRED, DUANE AND KELLY ROBERTS DEAN AND PROFESSOR OF LAW, PEPPERDINE LAW SCHOOL, MALIBU, CALIFORNIA

Judge TACHA. I am pleased to do so, and good morning to the distinguished Members of this Committee.

It is a privilege to appear today to support the nomination of my former colleague and my friend, Neil Gorsuch, as an Associate Justice of the U.S. Supreme Court.

I served with Judge Gorsuch on the United States Court of Appeals for the Tenth Circuit, and I was privileged actually to be Chief Judge of that Circuit when Judge Gorsuch was appointed in 2006. In my brief time today, I will touch on three aspects of Judge Gorsuch's qualifications, all of which I consider very, very important for judges at every level in the judiciary.

First, Judge Gorsuch, the judge. Judge Gorsuch brings to the bench a powerful, powerful intellect combined with a probing and analytical approach to every issue. He brings to each case a strong commitment to limit his analysis to that case—its facts, the records, and the laws cited and applicable. He does not use his judicial role as a vehicle for anything other than deciding the case before him.

The "case or controversy" requirement for jurisdiction is, for Judge Gorsuch, a guiding principle for his judicial role. He is a student of constitutional structure and of The Federalist Papers, and

he takes very, very seriously the appropriate roles assigned to each of the three branches of government.

He is an elegant and accessible writer. In my judicial writing classes, I assign some of his opinions to demonstrate the importance of narrative to every case before the courts. His jurisprudence is informed by textualism, originalism, and precedent, but not in a formalistic or rigid way, only as the lenses through which to seek an appropriate resolution of an issue or a case.

Judge Gorsuch is a case by case by case judge whose dedication is to serving litigants and the third branch of government.

Second, Judge Gorsuch, the colleague. On a multi-judge appellate court, it is my view that one of the most important characteristics of an effective and efficient court is the level of collegiality among its Members.

This is not at all about getting along to get along. It is about improving the quality of the work of that court by careful and respectful listening to varying and divergent views, participating and engaging in robust internal debate about procedures and cases, and factoring in and listening to the diverse views of each of the other judges.

Judge Gorsuch is such a judge. His attention to the views of his colleagues informs his work. He has an acute sense for identifying those circumstances where reaching consensus is the highest value and, on the other hand, those decision points where personal conviction and reason dictate individual judgment and independent decision-making.

Judge Gorsuch believes in the court as an organic and flourishing entity where the views, the backgrounds, and the perspectives of all the judges on the court are important to the quality of his work.

Finally, Judge Gorsuch, the person. Neil Gorsuch is my friend. He has been from the day he took his role as my colleague in 2006.

I want to say that again and say it advisedly because it means something that, despite the many differences in our life experience, in our backgrounds, in our education, and in our interests, Judge Gorsuch immediately and always affirmed me, both as a person and as a colleague.

I have watched him with all kinds of people in the courthouse, in social settings, and in the rough and tumble of judicial travel and duties. He is unfailingly kind. He is thoughtful, and he is empathetic to all people.

His is the kind of dignity that reflects the dignity he accords to all people. Judge Gorsuch lives according to his values. For him, faith, family, community, nation, and his beloved Colorado define who he is. He is, for me, the gold standard in public service.

So for all these reasons, I urge the Committee and the full Senate to confirm Judge Neil Gorsuch as an Associate Justice of the U.S. Supreme Court.

[The prepared statement of Judge Tacha appears as a submission for the record.]

Chairman GRASSLEY. Judge Massimino, I hope I am right on that?

Ms. MASSIMINO. Perfect.

STATEMENT OF ELISA MASSIMINO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HUMAN RIGHTS FIRST, WASHINGTON, DC

Ms. MASSIMINO. Thank you, Mr. Chairman and Ranking Member Feinstein and Members of the Committee. It is an honor to be here today as you consider the nomination of Judge Neil Gorsuch.

I speak on behalf of Human Rights First, an independent, nonpartisan organization dedicated to advancing American leadership on human rights. My focus today is on the dangers that arise when the executive branch claims unfettered authority in the name of national security.

When Presidents override constitutionally mandated checks on their power, they threaten fundamental rights, the rule of law, and democratic ideals. They also undermine national security. This is not a hypothetical concern. Indeed, now would be an especially perilous time to promote to the Supreme Court a judge who would not stand up against presidential power grabs.

The President has advocated torture and other war crimes, banning people because of their faith, deporting refugees without due process, and he is done all of this largely while bypassing Congress and expressing contempt for judges and the judiciary itself.

So the key question you should ask of Judge Gorsuch is this. How would he respond in the face of what may be unprecedented threats to basic rights, separation of powers, and the rule of law?

In our nearly 40 years, Human Rights First has never opposed a judicial nominee, and we do not do so today. Nor do we question Judge Gorsuch's credentials, which are exemplary. I am here simply because his record raises concerns that I think you should address before moving forward with his nomination. The stakes are too high to get this wrong.

Our concerns arise from the public record of Judge Gorsuch's time at the Justice Department. They fall into three areas—subversion of congressional authority, restricting judicial review, and torture.

On all three of these issues, Judge Gorsuch is not a blank slate. As a political appointee at the Justice Department, he was directly involved in defending the Bush administration's claims that the President has extraordinary power to disregard laws in the name of national security and that the judiciary either cannot or should not review such actions.

These claims constitute a front assault on the integrity of our constitutional order. Not surprisingly, they were rejected by the courts.

With respect to Judge Gorsuch's role on congressional authority, after photographs surfaced in 2004 showing horrific abuses at Abu Ghraib, Senator McCain spearheaded the Detainee Treatment Act, strengthening the ban on torture, which passed the Senate with 90 votes. Judge Gorsuch pushed for a presidential signing statement saying the President could disregard that law to the extent it conflicted with his authority.

Judge Gorsuch argued that the law was "best read as essentially codifying existing interrogation policies," policies that included waterboarding and other forms of torture and abuse that Congress specifically intended to prohibit.

Second, on judicial review, Judge Gorsuch repeatedly sought legislation that would strip courts of habeas jurisdiction, including for people who were tortured or unlawfully detained. He also played a lead role in the litigation strategy in the *Hamdan v. Rumsfeld* case, where the Government argued that the President has the power to disregard the Geneva Conventions and that the courts are powerless to review that decision.

The Supreme Court ultimately rejected these efforts to restrict the right of habeas and denied detainees the protections of the Geneva Conventions in the *Hamdan* and *Boumediene* cases.

Third, on torture and standing up for human dignity. Some people, including political appointees in the Bush administration, like then General Counsel of the Navy Alberto Mora, were horrified when they discovered that our Government had a policy of torturing prisoners, and they tried to stop it.

Judge Gorsuch, by contrast, seems to have devoted his energies to defending it. These were the defining legal debates of our time, and Judge Gorsuch was on the wrong side of them.

Policies he promoted and defended violated American ideals and inflicted unnecessary suffering, and they did not strengthen our security. On the contrary, these policies compromised America's global standing, alienated communities whose support our country needs to fight terrorism, and handed our enemies a PR victory.

Given this record, it is essential that you probe Judge Gorsuch's views on Executive power, on torture, and the appropriate roles for Congress and the judiciary as co-equal branches of government. Did his actions at Justice reflect his legal philosophy or his desire to be a team player? Did he disagree with positions of the administration on torture? And if he did, why did not he follow the example of others and speak out?

The Senate must get to the bottom of these questions because, sooner or later—and with this administration, it is likely to be sooner—the Supreme Court will be called on to protect fundamental rights, judicial independence, and separation of powers from a President who treats the rule of law as an annoyance rather than the foundation of our democracy.

Thank you.

[The prepared statement of Ms. Massimino appears as a submission for the record.]

Senator HATCH [presiding]. Judge Henry.

STATEMENT OF HON. ROBERT HARLAN HENRY, U.S. COURT OF APPEALS JUDGE, RETIRED, PRESIDENT, OKLAHOMA CITY UNIVERSITY, OKLAHOMA CITY, OKLAHOMA

Judge HENRY. Thank you, Senator Hatch, Ranking Member Feinstein, Members of the Committee. It is a pleasure and an honor to be here today, and I thank this Committee for its wonderful service to the third branch over the years.

I am Robert Henry, president and CEO of Oklahoma City University, a former State legislator, and a former Attorney General of the State of Oklahoma, and a former Chief Judge of the United States Court of Appeals for the Tenth Circuit.

I held that court position from 1994 to 2010, and for the last 4 years of my service, I was a colleague of Judge Gorsuch. Based on

my personal experience working with him and my maintained contact through Circuit conferences, correspondence, and judicial gatherings, I am here today to speak in support of his nomination.

In Federalist 78, Publius—and in this one, that would be Alexander Hamilton—described the nature and virtues of the Federal judiciary. As the "least dangerous" branch would have neither "sword nor purse," care would have to be taken to protect its vital independence.

Permanency in office would be required, both to promote independence, and to allow for the mastery of the voluminous "strict rules and precedents," in Hamilton's words. The granting of permanence, the importance of integrity, and the long and laborious study required to master the judicial craft led Hamilton, whose star, gratefully, has ascended again of late, to observe, "Hence it is that there can be but few who will have sufficient skill to qualify for the station of a judge."

And this is why the Committee is, of course, gathered today. Fortunately, you have before you a candidate that I believe our judicial branch's architect Hamilton would warmly embrace—and not just because they both attended Columbia.

As one who has served with Neil, decided cases with him, traveled and dined with him, discussed our families together, including the menageries his daughters have maintained over the years, agreed and disagreed with him, I can attest to his truly remarkable intellect, his oft-demonstrated integrity, his mastery of Hamilton's rules and precedents, and his fine judicial temperament and collegiality.

Now I believe the subject of intellect speaks for itself and needs but summary mention: His honors degrees from Columbia and Harvard Law School; his Marshall Scholarship to Oxford, an honor he shares with Justice Stephen Breyer, that resulted in a Doctor of Philosophy degree; and his corpus of work, which includes outstanding service awards from the State Department, from the Truman Foundation, scholarly writings, and some 900 opinions that lawyers have described as "straightforward," "learned," "well-reasoned."

Deserving special mention is "The Law of Judicial Precedent." This book, which Judge Gorsuch joined with Bryan Garner, America's foremost lexicographer and legal rhetorician, and several distinguished Circuit Judges of quite diverse backgrounds is a remarkable work of legal scholarship. Impressively, all these eminent judicial co-authors of different political and occupational backgrounds produced a single volume, written with a single voice and no signed sections.

As to integrity, I have never found Neil's integrity to be in question. His career has subjected himself to various reviews of his public service. He served as a law clerk to two Supreme Court Justices, the late Justice Byron White, a highly esteemed judicial figure in the Tenth Circuit, where the courthouse is named for him—and not just because of his football records, by the way—as well as clerking for Justice Kennedy. And this Committee has reviewed him before as a Circuit Judge. All of this also speaks to Neil's mastery of the law.

He has some unique qualifications, though. In the Tenth Circuit, we have a lot of cases from the great American West. We have cases involved our Native American nations, cases involving land and water that are important, and his experience in these areas will be helpful to the Court.

I will skip judicial temperament. It is discussed in my written testimony, previously submitted. I am running low on time, and as I want to talk about one thing that is especially important to me.

When Judge Gorsuch and Judge Tymkovich and Judge Lucero were in Santa Fe hearing cases one summer, they were very distressed by the quality of legal representation of those charged with the most difficult cases that Federal judges must deal with, habeas death penalty cases. I have to say that most of these cases come from Oklahoma, and our Bar was not adequately doing the job.

Judges Gorsuch and Tymkovich volunteered, and they came to Oklahoma City and Tulsa. They created seminars, symposia. They brought their Circuit Judge colleagues to Oklahoma to hear actual cases. They met with these lawyers and helped them, trained them, and I have had one lawyer, a noted defense lawyer, who said these actions had an instrumental effect in improving the advocacy, Senator Hatch, of this most important area.

Thank you.

[The prepared statement of Judge Henry appears as a submission for the record.]

Senator HATCH. Well thank you, Judge.

Mr. Jaffer.

STATEMENT OF JAMEEL JAFFER, EXECUTIVE DIRECTOR, KNIGHT FIRST AMENDMENT INSTITUTE, COLUMBIA UNIVERSITY, NEW YORK, NEW YORK

Mr. Jameel Jaffer. Chairman Grassley, Ranking Member Feinstein, Members of the Committee, thank you for inviting me to testify.

I do not think this Committee has any task more important than the one it has been engaged in this week. If Judge Gorsuch is confirmed, he will likely play a key role in shaping American law and society for two or three decades or more.

I think it is clear that Judge Gorsuch has the professional competence to serve on the Court. I agree with Ms. Massimino, though, that Judge Gorsuch's service in the Bush administration raises important questions about his views on Executive power and the role of the judiciary in the sphere of national security.

At the time Judge Gorsuch served in the Justice Department, the Bush administration was advancing extremely broad claims of Executive power in the service of unlawful policies relating to surveillance, detention, military prosecution, and interrogation. Judge Gorsuch was closely associated with those claims. It would be a mistake to confirm him without ensuring that he will defend individual rights as well as the authority of Congress and the judiciary in the context of national security.

I want to recognize at the outset that Judge Gorsuch might approach issues relating to Executive power differently as an Associate Justice than he did as a Justice Department lawyer. At the

Justice Department, Judge Gorsuch was a lawyer with a client. He says he regarded himself as a scribe or a scrivener.

With respect, I would encourage the Committee to bring a degree of skepticism to that characterization. Judge Gorsuch sought out a high-level position with the Justice Department in the fall of 2004, just 7 months after the publication of the Abu Ghraib photos and only 5 months after the Washington Post published one of the torture program's foundational documents.

That was a memo written by the OLC, stating that interrogation methods would be lawful unless they inflicted the kind of pain ordinarily associated with organ failure or death. It was a chilling document then, and it remains an astonishing document today.

It is also worth noting that Judge Gorsuch appears not to have registered disagreement with any of the policies that he defended, though other officials did. Nor is there evidence that he registered discomfort with any of the broad arguments that the Justice Department advanced in support of those policies, though, again, others did.

The documents provided by the Justice Department suggest that Judge Gorsuch was comfortable with the policies and with the Bush administration's defenses of them. It was challenges to the policies that troubled him.

Senator Durbin asked Judge Gorsuch about an email in which he had criticized lawyers who represented prisoners held at Guantanamo. I thought the answer that Judge Gorsuch gave to that question was a good one. He said that he regretted having sent the email and that the email was "not his finest moment."

I hope you will give Judge Gorsuch an opportunity in his answers for the record to respond more fully to broader concerns relating to the positions he advanced at the Justice Department.

Questions relating to Executive power are presented especially sharply today. President Trump has issued an Executive order banning Muslims from six countries from traveling to the United States. He said that he will consider prosecuting U.S. citizens in the military commissions at Guantanamo. He is promised to intensify surveillance of minority communities inside the United States.

If Judge Gorsuch is confirmed, he will be called on to consider the lawfulness of some of those policies, and his conclusions will have far-reaching implications for the lives of millions of Americans and others and on the relationship of the United States with the rest of the world.

So I urge you not to confirm him without fully exploring his views of Executive power. This should not be a partisan issue. We all know that the powers abused today by a Republican President may be abused tomorrow by a Democratic one.

The question the Committee should ask is whether Judge Gorsuch will safeguard individual rights and the separation of powers, whoever occupies the Oval Office.

Thanks again for giving me the opportunity to testify.

[The prepared statement of Mr. Jaffer appears as a submission for the record.]

Senator HATCH. Well, thank you.

Judge Kane.

STATEMENT OF HON. JOHN L. KANE, U.S. DISTRICT COURT JUDGE, SENIOR, DISTRICT OF COLORADO

Judge KANE. Thank you, Senator Hatch and Members of the Committee.

I am the only trial judge that is appearing in these hearings. I would like to say, Senator, I have no reason for you to remember this, but I appeared before you 39 years ago. And I was honored to be here then, and I am honored to be here now.

Senator HATCH. We are honored to have you.

Judge KANE. Thank you.

Judges are no different from anybody else. Like you, we have social, political, and religious views, whether the product of culture and upbringing, or the result of education, predilection, or intellectual or philosophical pursuit. To don the robe, however, is to surrender the freedom to act on those views so that justice may be served.

The discipline of deciding, irrespective of one's personal beliefs, is the essence of judicial integrity. Being consciously aware of one's views and setting them aside at the start of every case is no easy task, nor should it be. The question for any nominee is, does he or she have the discipline to do that and decide each case according to the rule of law? I believe Judge Gorsuch does, and his opinions prove it.

Long ago I gave up identifying judges as liberal or conservative because those words seem to mean whatever the user wants. They have no common understanding and provoke no further analysis.

However one might pigeonhole either of us, the fact is Judge Gorsuch and I share few of the same social, political, or religious views. In evaluating fitness for the Bench, the real question is, does the nominee embrace the discipline of the robe? Do his or her opinions reflect any sort of ideological bias? Is the judge fair? Judge Gorsuch is not a monk, but neither is he a missionary or an ideologue.

I read a great many appellate opinions from Circuit Courts throughout the United States. To the extent that a judge can be judged by his opinions, the ones written by Judge Gorsuch tell me a great deal. His are clear, cogent, and mercifully to the point.

I have been both affirmed and reversed by him, and each time I thought he was fair and right. He treats the parties and the trial judge's rulings with respect. He does not ridicule them or take cheap shots, nor does he insult or demean other judges who might disagree with him.

His writing is filled with grace and wit. But does he know the difference between his personal views and those of the court? Judge Gorsuch is the only judge of whom I am aware who has written both majority opinions and concurring opinions in the same case. The majority opinions were the opinions of a three-judge court. The concurring opinions were his separate, additional perspectives. He has done this at least twice. He knows the difference between speaking for a court and for himself.

Judge Gorsuch's opinions also make clear his concern for the separation of powers and his keen awareness of the judiciary's independence. He has written that legislation belongs to Congress and adjudication belongs to the courts.

He has disagreed with the late Justice Scalia by suggesting there is far too much adjudicative activity in the executive branch's administrative agency rulings. He has questioned the values of the *Chevron* doctrine, which asserts the judiciary should defer to agency interpretations of statutes. The *Chevron* doctrine intrudes equally upon the authority and prerogatives of the legislative branch.

As is often the case, Justice Oliver Wendell Holmes said it best. In his decision in *Lochner v. New York*, Justice Holmes wrote, "The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law."

Like Justice Holmes, Judge Gorsuch knows that his social, political, and religious views have no place on the bench. In embracing the discipline of the robe, declaring—dedicating himself to the separation of powers and consistently devoting himself to being fair, Judge Gorsuch has earned the right to be considered by you for the highest bench in the land.

I hope you will judge him with the fairness and integrity with which he himself has served.

[The prepared statement of Judge Kane appears as a submission for the record.]

Senator HATCH. Well, thank you, Judge Kane.

Mr. Perkins, we will turn to you.

STATEMENT OF JEFF PERKINS, BERTHOUD, COLORADO

Mr. PERKINS. Mr. Chairman, Ranking Member Feinstein, and Members of the Committee. Thank you for the opportunity to give voice to my son, Luke, whose access to an appropriate education and, thus, to a meaningful and dignified life was threatened by views of Judge Neil Gorsuch.

Luke was diagnosed with autism in 1996 at age 22 months. An intensive early childhood program taught him letters, numbers, and colors, but he struggled with speech. He developed a restricted diet, an erratic sleep cycle, and intolerance to sounds. When overwhelmed, he would tantrum and often injure himself.

Luke's care became too much for my wife and me alone. His older siblings and hired caregivers helped. My parents moved next door to assist. It was clear that his education program was failing, and Luke began to regress significantly. Teachers were reinforcing inappropriate behaviors, and he was not participating in meaningful educational activities.

Moreover, his program failed to address his profound inability to generalize. Luke might learn a skill in a particular classroom with one teacher, but unable to perform it within any other setting. While such learning might check off a box on an education plan, it provided no meaningful benefit. Multiple experts agreed that he needed an intensive program with wraparound services to address his educational needs.

We made many unsuccessful attempts to address these deficiencies with the school district. Since the needed services were not

available locally, we were left with the agonizing option of sending him 2,000 miles away to a specialized school for autistic children in Boston.

When Luke enrolled in Boston Higashi School at age nine, he was not toilet trained, ate only a few foods, could not sleep in a bed, could not eat with utensils, and did not interact with his peers. Within months of enrolling, Luke was toilet trained. He ate healthy foods with proper utensils. He was sitting calmly in a classroom with peers. He participated in group activities, such as roller blading. When Luke visited home during breaks, we could shop, eat at restaurants, and even attend church together.

But this improved life for Luke was costly. Despite my comfortable income as a physician, Luke's education costs rapidly depleted our reserves. My parents contributed from their retirement savings.

In 2005, we requested reimbursement for Luke's education under the Individuals with Disabilities Education Act. At a due process hearing, the independent hearing officer found in our favor. The decision was upheld both by an administrative law judge and a U.S. District Court Judge. But when the school district appealed to the Tenth Circuit, Judge Gorsuch authored the decision overturning these previous rulings.

His legal reasoning set a new low standard of education required under IDEA as merely more than de minimus. De minimus, lacking significance or importance so minor as to merit disregard. Judge Gorsuch felt that an education for my son, that was even one small step above insignificant, was acceptable. Despite Luke's inability to meet three-quarters of his educational goals or to use any of these skills outside the classroom, his education was judged appropriate.

That left us only one real option. One of Luke's parents would have to move to a school district that would better accommodate Luke's educational needs. After much prayer and thought, my wife decided to permanently relocate. Thankfully, the Dedham School District acknowledged Luke's extraordinary needs, allowing him to finish out his time at Higashi.

Now age 22, Luke will always need support in a world that still seems perplexing and threatening to him, but his quality of life after 13 years of appropriate education is vastly better than it would have been otherwise. He cooks and does household chores. He is able to shop, work, eat, and play in the community, and he has developed a new passion, Legos. Luke's mind is uniquely attuned to this plastic brick world. He constructed this particular model this January.

His present life would have been—would not have been achievable without an appropriate education. Thankfully, Luke is unaware of the price paid for his education. The financial cost pales in comparison to the human sacrifice: his mother separated from her 13-year-old daughter, his parents' marriage broken. He is also unaware of the key place that one judge, with his radically restrictive interpretation of law, played in the fight for his right to a free and appropriate public education.

In his Tenth Circuit ruling, Judge Gorsuch eviscerated the educational standard guaranteed by the IDEA. His interpretation re-

quires that a school provide an education to a disabled child that is just above meaningless. His minimalistic interpretation of Federal law in Luke's case has been used to deny an appropriate public education to countless other disabled children in the Tenth Circuit over the last 9 years.

Legal philosophy and case law aside, such an interpretation clearly fails the common sense test. Why would Congress pass a law with such a trivial intent, and why would a parent settle for an education for any of their children, regardless of their abilities or challenges? To quote Chief Justice Roberts from yesterday's Supreme Court ruling, "When all is said and done, a student offered an educational program providing merely more than de minimus progress from year to year can hardly be said to be offered an education at all."

On behalf of all children—disabled, typical, and gifted—I urge you to deny confirmation of Judge Neil Gorsuch to the Supreme Court of the United States. Thank you for providing me this opportunity, and I ask that my full statement be included in the record.

I look forward to answering your questions.

[The prepared statement of Mr. Perkins appears as a submission for the record.]

Senator HATCH. Your full statement will be included in the record. We appreciate your testimony.

Ms. Bressack, we will turn to you.

STATEMENT OF LEAH BRESSACK,
FORMER LAW CLERK, WASHINGTON, DC

Ms. BRESSACK. Mr. Chairman, Ranking Member Feinstein, and other Members of the Committee, I am deeply honored to have the opportunity to address the Committee today and talk about one of my mentors, Judge Gorsuch.

Senator Feinstein, I grew up in California where you and Senator Boxer were my home State Senators, and my family still laughs that there was a time when I believed that only females could be Senators.

[Laughter.]

Ms. BRESSACK. Of course, when I left for college I moved to Maine, which also had two women Senators, so take from that what you will.

I served as a law clerk to Judge Gorsuch from 2009 to 2011. I would like to direct my remarks to how Judge Gorsuch approaches cases.

His commitment to assess each case from all points of view, and never make up his mind until every point of view has been considered, is the quality I respect most about him. First, Judge Gorsuch is truly independent. In deciding cases, he does not care what politicians or parties want. He only cares what the law says.

In the 2 years I worked with him, never once did politics influence a decision he made. I saw the Government win cases. I saw the Government lose cases. I saw each private litigant receive the same meticulous analysis of its arguments. Judges like Judge Gorsuch are the keepers of our independent judiciary.

Second, Judge Gorsuch works together with judges from all different points of view to build consensus wherever possible. In my

2 years clerking for the judge, the judge heard many cases together with other judges whose judicial philosophies differ from his. Yet the great majority of those cases were decided unanimously, and that is no coincidence. It is a reflection of the judge's deep respect for the opinions of his colleagues and commitment to craft decisions that benefit from their reasoning.

In my experience as a law clerk, the judge always pushed me to research all sides of a case, question the reasoning underlying each party's position, and give all arguments exhaustive consideration. That process more or less consumed my life for 2 years. It is a cornerstone of how Judge Gorsuch works, and he will not accept anything else.

Third, there is no question that a Supreme Court Justice wields significant power, but having worked closely with Judge Gorsuch, I am confident that a change in title from "judge" to "Justice" will not change him. His judicial philosophy is based on the idea that the future of this country will be decided by elected representatives, like the Members of this Committee, not by him, and that will never change.

On a personal level, some of my fondest memories of my clerkship with Judge Gorsuch were the afternoon runs that he led us on through Denver. Weaving in and out of the city streets, I questioned the judge's description of these events as jogs when to me they felt much more like a sprint. When it was easy—while it was easy to begin the run discussing cases with the judge, the true test was whether you could continue to communicate about the cases 20 minutes later when the judge was doing just fine, and most of the clerks were out of breath. I now think of those runs as a metaphor for the experience of working with the judge. His relentless drive pushes everyone around him to try harder and reach higher.

In casual conversation in chambers, the judge always wanted to hear about our experiences exploring the Colorado outdoors. I still remember the morning ritual of quizzing clerks on their adventures over the weekend. One weekend while hiking in Rocky Mountain National Park, I found myself within a few feet of a beautiful red fox, and I knew I would have the ace come Monday when the quiz occurred on Monday morning.

We all know the saying that "You are judged by the company you keep." One of the greatest gifts of clerking for 2 years for Judge Gorsuch is my co-clerks, whose humility, intelligence, and diligence mirror the qualities I admire so much about the judge.

Many of the judge's clerks, whose political views span the spectrum, have traveled to be here for this hearing, and we have uniformly recommended him as an extraordinary judge. We believe he is a judge of whom all Americans would be proud.

[The prepared statement of Ms. Bressack appears as a submission for the record.]

Senator HATCH. Thank you very much. Mr. Calemine.

STATEMENT OF GUERINO J. CALEMINE, III, GENERAL COUNSEL, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, DC

Mr. CALEMINE. Mr. Chairman and Members of the Committee, my name is Jody Calemine. I am general counsel of the Commu-

nications Workers of America. We are a labor union representing hundreds of thousands of workers across this country. Thank you very much for the opportunity to testify.

Our concern about Judge Gorsuch ascending to the Supreme Court is about as fundamental as it can get. His jurisprudence is a threat to working people's health and safety.

This hearing has already paid some attention to Judge Gorsuch's dissent in the *TransAm Trucking* case, and that attention is justified. That dissent, issued just 7 months ago, reveals an anti-worker bias, and features a judicial activism that will ultimately put workers' lives at risk.

At issue in *TransAm Trucking* is a law that protects truck drivers who refuse to operate a vehicle out of safety concerns. When driver Alphonse Maddin refused to operate his truck and trailer in the manner his supervisor directed him, which was to keep the truck parked and hitched to a disabled trailer in subzero temperatures while he froze to death waiting hours for help, and instead finally drove his truck to safety, he was exercising that right to refuse an unsafe operation, and could not be fired for it. Only one judge at any level of this case ever dissented from this view: Judge Gorsuch.

He found that when Mr. Maddin drove his truck to safety, he was not refusing to operate his truck. He was operating it, and, therefore, could be fired for disobeying orders. Judge Gorsuch has said that the result he reached might be unkind, forcing Mr. Maddin to choose between dying or losing his job, but he contends he is merely applying the unambiguous text of the law to the facts of the case.

Far from it. To reach this result, Judge Gorsuch had to choose one particular definition of the word "operate" from the dictionary. As it turned out, there are multiple definitions of "operate" in the dictionary. Judge Gorsuch chose the definition that allowed him to rewrite the law.

After he was done, a worker's right to refuse to operate would mean only refuse to drive. That is not judicial restraint, and the rewrite of the law in this case leads to absurd, deadly results and fewer rights for truck drivers.

As we know, Judge Gorsuch is no fan of agency deference, and so we have every reason to expect his judicial activism will narrow other worker rights beyond the Surface Transportation Assistance Act at issue in *TransAm Trucking*. Our union members are typically not truck drivers, but rely on other safety laws to protect them on the job, like OSHA's rule allowing us to refuse hazardous work. On a very frequent basis, a worker that we represent will identify a hazard in the workplace, and the union will stand with him and others to stop the work until the hazard is abated.

Just a few weeks ago, one of our technicians in Detroit discovered significant asbestos contamination where he was supposed to do telecom work in an underground vault directly below a manhole on a public street. He told his supervisor. His supervisor repeatedly told him to blow fresh air into the vault, which would not only expose this technician to friable asbestos floating in the air, but exposed the public on the street above as well. So, the technician re-

fused to do the hazardous work demanded by a supervisor, and he and the public are safer for it.

We take these actions knowing the law is on our side. To us, health and safety are not, as Judge Gorsuch dismissively puts it, "ephemeral and generic."

Now, the right to refuse hazardous work under the OSHA Act, unlike the statute at issue in *TransAm Trucking*, is a product of agency interpretations of the statute. If Judge Gorsuch takes a sledgehammer to workers' explicit statutory rights as he did in *TransAm Trucking*, imagine what he may do to rights stemming from agency interpretations. More workers will die on the job.

Judge Gorsuch's dissent in *TransAm Trucking*, in our view, is disqualifying. Ignoring agency interpretations, legislative purpose, common sense, and instead picking the narrowest definition one can find in the Oxford English Dictionary to redefine our rights, that is not applying the law to the facts. It is a form of judicial activism.

It is said that our health and safety laws are written in the blood of working people. Please do not allow Judge Gorsuch to repeal these laws from the highest bench in the land with his brand of judicial activism. We urge the Senate to reject this nomination, and thank you very much for your time.

[The prepared statement of Mr. Calemine appears as a submission for the record.]

Senator HATCH. Well, we thank all of you for being here today and for your testimony.

I just have one question for you, Judge Tacha. By the way, welcome. You were a great judge in our Circuit out there, and I really appreciate your leadership over the years.

Judge Tacha, this hearing has been somewhat of a civics lesson with the separation of powers being prominent—a prominent theme throughout this week. This was the first of three aspects of Judge Gorsuch's qualifications that you described in your testimony. As you put it, he "takes very seriously the appropriate roles assigned to each of the three branches of government."

Now, this is a critical principle, but it can sometimes seem a tad detached or even cold when the facts of the toughest cases are presented. I am sure you wrestled with this when you were on the Tenth Circuit. Now, how important is it for a judge, too, as Senator Schumer put it in 2009, stick to the law, even when it means ruling against sympathetic litigants?

Judge TACHA. Thank you, Senator Hatch, and I appreciate your kindness in this full Committee, and I might say I was a part of the Tenth Circuit, and now I am working in Senator Feinstein's native California at Pepperdine University. So, I am pleased to be both places.

Your question goes to the heart of what a judge does. And let me just say in response to Mr. Perkins, as a parent and as a human being, my heart goes out to you for the facts that you have laid forward that were in *Luke P.* But as a judge, to your point, Senator Hatch, the judge must look at the law as he or she sees it at that moment. And in particular, in the *Luke P.* case, Judge Gorsuch was following very longstanding precedent.

This court—I mean, this Committee—I am sorry—has heard Judge Gorsuch repeatedly say precedent is important. Precedent stands. It is an important piece of how—of the lens that I referred to that a judge looks at a case through. And to be absolutely specific, Judge Gorsuch was applying precedent that went all the way back to 1982 in the Supreme Court decision of *Board of Education v. Rowley*. So, with all my heartstrings with the family, what Judge Gorsuch was called on to do was apply that very longstanding precedent for our Circuit.

Let me also say it was not just our Circuit. I believe it was all but two Circuits. All the rest of the Circuits in the Nation were following the same standard in interpreting the IDEA. Further, I can say with some authority that he was following not as dicta, but as a holding in his case what I wrote in the *Urban* case. And both required that—the statute as interpreted must be more than de minimus. So, there is a lot of discussion, but it is important to know that was longstanding precedent from a long time back.

Now, I will say, you know, Circuit Judges are really glad when the U.S. Supreme Court clears up Circuit conflicts. And so, what happened in that case that was issued yesterday was two Circuits had chosen one standard, and the rest of us had chosen the other standard, three longstanding precedents on interpretation of the IDEA. So, yesterday the Supreme Court carried out its very important function of clearing up what the standard would be.

I have not had time—I have to say I have not had time to thoroughly review the opinion from yesterday, but I know for sure that the *Luke P.* case was based on the *Urban* case that I wrote, and it said the standard must be more than de minimus.

Senator HATCH. Well, thank you so much. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and thank you, Judge, for making that clear. I think you made a very cogent statement. I gather the standard the Court passed yesterday would have covered Mr. Perkins' son. Is that correct?

Judge TACHA. Well, I will not opine on how the law would be applied to particular facts, but it does appear to me that the standard that we had been using has changed.

Senator FEINSTEIN. Thank you. And, Mr. Perkins, I just want to thank you for being here. That display you presented is very telling. And one question. When did he do this?

Mr. PERKINS. He did this in early January of this year, ironically about 2 weeks before Judge Gorsuch was nominated to the Supreme Court.

Senator FEINSTEIN. Well, that is quite amazing because it is quite a complicated building of the Capitol, and very much appreciated. So, thank you for being such a good parent. It is very much appreciated.

I wanted to go to Mr. Jaffer, if I could. And I feel I am remiss because I wanted to ask some of these questions yesterday and did not have an opportunity to do so. So, let me now throw out a question and ask you your view on it.

The judge acknowledged that he worked on the Graham amendment, which sought to eliminate habeas for Guantanamo detainees, and he also acknowledged that in December 2005, after the Detainee Treatment Act was passed, there were different factions in

the Administration advocating different versions of a signing statement.

In an email Judge Gorsuch sent to Steven Bradbury and others, here is what he said, . And this is in the document. "Along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime 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 that would be hard to dispute later, puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation practices."

Now, this is in December 2005, 9 months after the Bradbury memo had concluded that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the standard applied under Article 16 of the Convention Against Torture.

My question to you is, what do you make of this email, "inoculate against being criticized in the future for not making sufficient changes in interrogation policy?"

Mr. JAMEEL JAFFER. So, I think that this is a really important question. So, in May 2005, the Office of Legal Counsel wrote memos that concluded, as you—as you mentioned, Senator Feinstein, that concluded that certain interrogation methods, including waterboarding, did not constitute cruel, inhuman, or degrading treatment. And my understanding of the email that you—that you—that you quoted is that Judge Gorsuch believed that the signing statement—that the way the Administration should interpret the law is to essentially ratify those interrogation methods that the Office of Legal Counsel had signed off on in May.

So, I think one really important question is what did Judge Gorsuch know about the interrogation methods that the CIA was using at the time he urged that President Bush issue a signing statement interpreting the DTA in the way that he ended up interpreting it? I think that is a really important question, and I do not think it has been answered yet in this—in this hearing.

Senator FEINSTEIN. Thank you. Thank you. Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Senator. Senator Graham.

Senator GRAHAM. Well, thank you. I remember the debate well, and here is what Senator McCain said about his amendment, which I supported vigorously. "The amendment I am offering simply codifies what is current policy and reaffirms what was assumed to be existing law for years. In light of the Administration's stated commitment, it should require no change in our current interrogation and detention practices. What it would do is restore clarity on a simple and fundamental question. Does America treat people humanely? My answer—inhumanely. My answer is no, and from all I have seen, America's answer has always been no." So, that was Senator McCain's view of what we we are trying to do here.

The Graham amendment, I cannot what the—how the bill was passed, but it was overwhelming. What I tried to do is say that the Combat Status Review Tribunal System within the military would be the primary way of determining enemy combatant status, but we would have judicial review of that at the D.C. Court of Appeals.

I think the Supreme Court said in a five-four decision that the CSRT is not an adequate substitute for habeas, and that is the law of the land today. We basically redrafted the Military Commissions Act, and I feel good about where we are at.

Mr. Jaffer, is the current system that if you are alleged to be an enemy combatant, you can be held as such, but you get a habeas hearing in Federal court? Is that correct?

Mr. JAMEEL JAFFER. That is right.

Senator GRAHAM. Okay. And the Government has to prove by a preponderance of the evidence that you are, in fact, an enemy combatant to be held?

Mr. JAMEEL JAFFER. That is right.

Senator GRAHAM. And if you are an enemy combatant, you can be held without—under the law of war indefinitely. Is that correct?

Mr. JAMEEL JAFFER. I am not sure about indefinitely. I think that is still an issue in the courts. But, yes, you can be held.

Senator GRAHAM. Well, there are people at Guantanamo Bay who are being held as enemy combatants, and they have been there for years. Is that correct?

Mr. JAMEEL JAFFER. That is right.

Senator GRAHAM. President Obama left them in that status.

Mr. JAMEEL JAFFER. Some of them, yes, that is right.

Senator GRAHAM. Yes, I think there is 48——

Mr. JAMEEL JAFFER. That is right.

Senator GRAHAM [continuing]. That have been determined too dangerous to release. So, under the Obama administration, at least to those 48, they are being held under the law of war as enemy combatants.

Mr. JAMEEL JAFFER. That is right, Senator Graham. As you know, hundreds of prisoners have now been freed from Guantanamo.

Senator GRAHAM. Right.

Mr. JAMEEL JAFFER. I do not know how many of them would have been freed——

Senator GRAHAM. Right.

Mr. JAMEEL JAFFER.—under the rules that Judge Gorsuch was proposing.

Senator GRAHAM. Right. Do you also know about 30 percent that have been freed have gone back to the fight?

Mr. JAMEEL JAFFER. I do not think that figure is accurate, Senator.

Senator GRAHAM. How many do you think have gone back to the fight?

Mr. JAMEEL JAFFER. I do not know the number, but——

Senator GRAHAM. How many Americans have been killed and others have been killed by people released at Guantanamo Bay?

Mr. JAMEEL JAFFER. Senator Graham——

Senator GRAHAM. Do you know?

Mr. JAMEEL JAFFER. The detainees—I do not know the number.

Senator GRAHAM. Okay. How about letting me help here? You have got to take some risk because you cannot hold people without due process. Do you agree with that?

Mr. JAMEEL JAFFER. I agree with that.

Senator GRAHAM. I guess the safest way is to never let anybody go, but that is not the right way.

Mr. JAMEEL JAFFER. It is not the way that the Supreme Court has proposed that the law should be—has said the law should be.

Senator GRAHAM. No, the Supreme Court says—they have never said you cannot hold anybody indefinitely. You have to give them due process.

Mr. JAMEEL JAFFER. That is right, Senator.

Senator GRAHAM. Okay. So, I am all for due process, and sometimes you make mistakes. We have actually been aligned more than most people would think. I do not believe that waterboarding was ever an appropriate technique to gain information, and I am sure you agree with that.

Mr. JAMEEL JAFFER. I do, Senator Graham. I think the question is whether Judge Gorsuch agreed with that at the time he was in the Justice Department. And my interpretation of that email is that he did not.

Senator GRAHAM. Well, is it fair to say that Judge Gorsuch, who I interacted with a lot, said that waterboarding is illegal under the Detainee Treatment Act? He said that before this Committee.

Mr. JAMEEL JAFFER. I read that. I read that. I was—I was pleased to read that. I do not think that is the view he expressed in the Justice Department.

Senator GRAHAM. Do you know why—do you know why he said that? Because I interacted with him a lot. He never bought the idea that waterboarding was consistent with the Geneva Convention. He has never bought the idea that it was consistent with other law. Some people had that view, and I am just here to tell you that he said before the country that waterboarding is now illegal without any question.

And I brought up the situation of the current President, that if he decided—and I do not think he will because of General Mattis to go down that road—he would be, in my view, violating the law. And Judge Gorsuch said no man/woman is above the law. So, I hope that gives some comfort to people that Judge Gorsuch understands that the purpose of the Detainee Treatment Act was to outlaw waterboarding and other type techniques. He acknowledged it before the country that no President can just seize the law because of national security concerns alone.

Ms. Massimino, do you agree we are at war?

Ms. MASSIMINO. I do.

Senator GRAHAM. And this is a complicated endeavor in terms of how you fight the war because there is no nation-state to fight, no Air Force to shoot down, no Navy to sink.

Ms. MASSIMINO. It is quite complicated.

Senator GRAHAM. But we need to adhere to our values, but also realize that intelligence gathering is an essential ingredient of law of war.

Ms. MASSIMINO. It is. It has been a huge challenge for us.

Senator GRAHAM. Thank you all very much. You have done the country a great service.

Senator HATCH. Well, thank you. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman. Thanks to the panel.

Just to follow-up on Senator Graham's line of questions. At the time of the memo that was sent by Judge Gorsuch on this issue in which he said that, "McCain is best read as essentially codifying existing interrogation policies," I am told the waterboarding was part of the existing interrogation policies of this country. Is that correct?

Mr. JAMEEL JAFFER. That is correct.

Senator DURBIN. He could not remember that email nor any details surrounding it. But we clearly through the McCain amendment or the McCain legislation, which I supported, we clearly wanted to outlaw waterboarding and any form of cruel, degrading, and inhumane treatment of prisoners. So, there was a built-in inconsistency here.

Mr. JAMEEL JAFFER. I think that is exactly right.

Senator DURBIN. Codify existing procedures, which included waterboarding, and address that as a signing statement on the McCain amendment, which would have prohibited waterboarding, a clear distinction which Judge Gorsuch, because of a variety of circumstances, did not directly answer.

Let me move to another issue, and I do not know if it is Mr. or Dr. Perkins. Thank you for being here. Thank you for your touching story about Luke and his travels and journey, and all that you and your family have done to bring him to this point in his life.

When Judge Tacha—did I pronounce your name correctly?

Judge TACHA. Tacha.

Senator DURBIN. Tacha? When Judge Tacha talked about the Tenth Circuit standard, she left out one word: "merely." "Merely."

I am trying to draw an analogy, and it may not be the best one. But if I said when it comes to hungry children, the law requires you to provide them more than just a little bit of food, that is a lot different than saying when it comes to hungry children, the law requires you to provide them merely more than just a little bit of food. Difference? One word has made a big difference. It has taken de minimus lower.

That was the express statement by Judge Gorsuch which expanded what was the Tenth Circuit standard when it came to your son. It was the express phrase "merely more than de minimus" that the Supreme Court unanimously struck down yesterday, saying that means no education at all.

When you saw that opinion, what was your reaction that Judge Gorsuch said he was just following Tenth Circuit precedent?

Mr. PERKINS. Well, I was devastated. At the time the opinion came out, Luke had been at Boston Higashi for five and a half years. I knew what he had accomplished in that time, all of the progress he had made. And to realize that Judge Gorsuch had by this subtle word craft taken what would seem to be—making a statement that seemed to be saying he was following precedent, but actually further restricting an already restricted precedent with unfortunately my son in the bull's eye of that decision. It was very hard to take.

Senator DURBIN. Mr. Calemine, did I pronounce your name correctly?

Mr. CALEMINE. Calemine.

Senator DURBIN. Calemine. Mr. Calemine, I am sure—the Chicago Tribune this morning chided me, and I am sure many of the Committee Members will be chided, that we spent so much time talking about a frozen truck driver. What in the world is going on here? We are talking about the Supreme Court. Why should we be talking about Alphonse Maddin and whether he was facing hypothermia or frostbite?

But whether we are talking about one young man—young boy with autism or one truck driver, we are really trying to figure out this judge and what makes him tick and what his values are. And all we can rely on are really important decisions, not the routine decisions—they come and go—but the ones where you really have a moment where you have to make a call with the law and the facts that really defines you.

Many of the arguments that I have heard here today I have heard over and over in this Committee, and that is this is programmatic. Here is the law, here are the facts, here is the judge, case closed. We know better. We know better because Merrick Garland is not sitting at the table or was not yesterday.

The decision was made that it would be Neil Gorsuch for fear that Merrick Garland, an Obama appointee, would come in and say exactly the same thing. That really tells us that there is more at stake here than just this programmatic, robotic application of the law. There is something much more fundamental here.

I thank you for coming and speaking on behalf of working people. Thank you, Mr. Chairman.

Senator GRASSLEY. Senator Lee.

Senator LEE. Thank you very much. Mr. Jaffer, I just wanted to find out whether you are familiar with the column that came out in the Wall Street Journal yesterday, an article by Jess Bravin talking about the fact that former Justice Department official, John Bellinger, corroborated Judge Gorsuch's account to the effect that he pushed back against advocates of waterboarding and other cruel interrogation techniques during the Bush Administration. Are you familiar with that?

Mr. JAMEEL JAFFER. I am not familiar with the column, but I am glad to hear that. And I think that if you have the opportunity to ask questions for the record, it would be great to get more information about precisely what Judge Gorsuch did to push back against these interrogation methods. It is great to hear if he did that, but it would be good to get that on the record.

Senator LEE. In the email that has been referenced, dated Thursday, December 29th, 2005 at 4:47 p.m., it is worth noting I think that—I do not think he is saying there were no changes being made. He used words like "sufficient" and "essentially," talking about sufficient changes and whether they essentially codified existing law, not suggesting that there were no changes at all that were made by the law. Would you dispute that?

Mr. JAMEEL JAFFER. No, I think that is another good line of inquiry. I think it would be important to ask Judge Gorsuch again what he knew of the interrogation methods that were being used at the time, and what adjustments he thought the Administration was going to make as a result of the DTA. I think those are important questions that have not yet been answered.

Senator LEE. Thank you. Judges Tacha and Henry, it is very good to see both of you, and I do have to say it is a little bit more comfortable standing on this side of a stand rather than the other side. I am used to seeing you in an elevated position with both of you in robes, so thank you for being here.

On the point, Judge Tacha, about the use of the word "merely," when you are looking at what Circuit precedent already demands, and you are trying to evaluate whether or not that precedent has been satisfied, the use of the word "merely," as I see it, could mean and ordinarily would mean, if I am not mistaken, this law does not require everything. It does not require a hundred percent if we are measuring this on a one to hundred percent basis. It requires merely X percent.

Ordinarily when a judge would use such language, a judge would not necessarily be meaning to denigrate or minimize what the law requires, but indicate that the law requires X and nothing beyond X. Would that be how you would normally use that as a judge?

Judge TACHA. That is exactly right. I cannot opine—thank you, Senator Lee, for those kind words. I cannot opine what order the adjective and everything came in the sentence. But what it does is merely define existing precedent, which was our standard—more than de minimus.

So, yes, how that word was used is probably exactly as you describe, which was there is a standard here, there is a standard here, there is a standard here, and this one is the standard that is selected by the Circuit and followed Supreme Court precedent since 1982.

Senator LEE. And as an Article III judge, even a powerful judge—at one point you were the Chief Judge of the Tenth Circuit—it is not your job to write the laws.

Judge TACHA. It definitely is not, and I will add to that Judge Gorsuch is meticulous in that. And you will find throughout his opinions, "this is not our job, this is Congress' job," or, "this is the President's job," or whatever. He is so meticulous about the roles of the three branches of government.

And, in fact, he and I have actually had these conversations. One of the things that is probably not seen, although you understand it in Committee work, is that in an appellate court there is a lot of back and forth among the judges on panels and unvalued in en banc sittings. I have heard Judge Gorsuch on many occasions say it is so important for us to be absolutely meticulous about what the role of each of the branches is.

As I said in my written comments, he is a student of the Federalist Papers and of the founding documents, and really believes in that separation of powers.

Senator LEE. And it is that separation of powers that recognizes that in our constitutional republic, it is the people who are sovereign, and the people's branch is the legislative branch. That is the branch of government where there is the most accountability to the people at the most regular intervals.

I see my time has expired. Thank you, Judge. Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you. I think on the Democratic side—I have a list here, but I will go by seniority.

Senator WHITEHOUSE. Thank you, Chairman. Mr. Calemine, you represent a labor union?

Mr. CALEMINE. Yes, sir.

Senator WHITEHOUSE. I would like to read from a New York Times news story that relates to the *Abood* case, which is a precedent of the Supreme Court that controls when labor unions like yours can charge non-members for services that they render in the collective bargaining process.

Here is what Adam Liptak, the writer in The New York Times, wrote: "In making a minor adjustment to how public unions must issue notifications about their political spending, Justice Alito digressed to raise questions about the constitutionality of requiring workers who are not members of public unions to pay fees for the union's work on their behalf," the *Abood* issue.

"Justice Sonia Sotomayor saw what was going on. 'To cast serious doubt on longstanding precedent'"—she wrote in a concurrence'"—"'is a step we historically take only with the greatest caution and reticence. To do so as the majority does on our own invitation and without adversarial presentation is both unfair and unwise.'" End quote of Justice Sotomayor.

The story continues: "Michael A. Carvin, a leading conservative lawyer also saw what was going on. He and the Center for Individual Rights, a libertarian group, promptly filed the challenge Justice Alito had sketched out. Indeed Mr. Carvin asked the lower courts to rule against his clients"—I will interject into the story my own addition that is a rather unusual behavior for a lawyer—"so that his clients could hightail it to the Supreme Court," the article continues.

Last year Justice Alito wrote a second majority opinion attacking the central precedent in the area, a 1975 decision called *Abood v. Detroit Board of Education*. But the majority in the new case, *Harris v. Quinn*, stopped short of overruling *Abood*. "By now," the story in The New York Times continues, "everyone saw what was going on. Readers of today's decision will know that *Abood* does not rank on the majority's top ten list of favorite precedents, and that the majority could not restrain itself from saying and saying and saying so," Justice Elena Kagan wrote in dissent.

"Last week," the article continues—this is some time ago—"the Court agreed to hear Mr. Carvin's case, *Friedrichs v. California Education Association*, and it may soon complete the project Alito began in 2012, that of overruling *Abood*." End of my quotation of The New York Times story.

As we know, the *Friedrichs* case did, in fact, come forward. It was expected to be a body blow to unions, according to reporting at the time. The Justice—the passing of Justice Scalia put the Court back to 5–4, so the *Friedrichs* decision came in 4–4, and went back to the Ninth Circuit, whose decision was upheld because it was a tie.

Could you just react to me as a lawyer who represents a labor union on that series of events, and what you—how that makes you think about this particular Court and its 5–to–4 decisions?

Mr. CALEMINE. Certainly. My concern is based on the quotes you read from the Times article. Is that—there is a project underway to harm workers' rights, a project under way to harm workers' or-

ganizations so that workers do not have the ability to exercise the bargaining power that they all have and win a better deal for themselves at work.

The notion that there are signals being sent for cases, rather than waiting for the case or controversy to arise, is very concerning. And it is one of the reasons why in the case of Judge Gorsuch, there has been a lot of talk about all he has done is apply the law to the facts in the *TransAm Trucking* case.

What he did was he picked out the narrowest definition in the dictionary for the word "operate," and it had a particular result. There were other definitions in the dictionary that could have been chosen, and once you saw multiple definitions, perhaps you should defer to the agency because maybe they know how the law can work effectively on the ground given their expertise.

He chose the most narrow definition, and the result was absurd. And the result, if it had carried the day, would have made life a little more dangerous for truck drivers. If the kinds of absurd results you get out of that particular definition, things like the word "operate" only means to drive, then if a trucking company told a truck driver to go over the speed limit or speed up, go faster. They can see—sometimes you can see the trucks on the computer and see how fast they are going. And the truck driver reports back, I cannot, I am in a construction zone, full of traffic, but the trucking company persists and says go faster, that trucker, if he went the speed limit, complied with the law, he would not be protected under Judge Gorsuch's version of that statute. He could be fired for going the speed limit because he is driving.

He would have to completely stop the truck on the highway to protect himself for disobeying that order. And you can imagine the traffic that could cause if that is the way this statute was carried out. Those are the kinds of absurd results.

In fact, I think Judge Gorsuch's dissent is Exhibit A for why we should have *Chevron* deference, because instead of picking out a dictionary definition, look and see the—look at the agency and see how they, the experts, have figured out how this law works in the real world.

Senator WHITEHOUSE. Thank you. My time has expired.

Chairman GRASSLEY. Senator Tillis, do you want time?

Senator TILLIS. Yes, sir. Thank you, Mr. Chair. Mr. Perkins, I first want to probably just say something. I do not know if you will need to respond or not. But probably I do not know anybody on Capitol Hill that has actually ratified bills that were sympathetic to families and persons with autism.

As Speaker of the House, we had our State employees' healthcare plan cover autism treatment, which included psychiatric care, psychological care, pharmacy care, and adaptive behavioral treatment. And I know if you have studied autism, you know how those are critically important. We went on against insurance industry's wishes to include an insurance mandate in North Carolina to do the same thing.

And the Court case yesterday, on the one hand I am happy that it provides other people that are going through your condition with an option. But in reality, it is a failing on the part of legislators. Now, you live in Colorado still?

Mr. PERKINS. Yes.

Senator TILLIS. Promise me you will not vote for a Colorado legislator that will not support a mandate, and will not support opportunity scholarships for children with autism. You do not have to make—I may have just broken a law or a rule or whatever.

[Laughter.]

Senator TILLIS. But these folks need—there are nine States in this Nation. North Carolina is one of them. We have gone probably about as far, or maybe further in some cases, than any other. But this is an example of where I am going to support Joe Gorsuch, and my guess is that Judge Gorsuch the individual, who separates his jurisprudence job from his personal feelings, is just okay with what the Supreme Court did yesterday. But in reality, the whole need for that lawsuit is a failure on the part of the States to solve the problem.

So, in a State like North Carolina, you do not have to—you do not have to get into a conflict and a lawsuit with the school system because it is still going to be difficult to do. You are still going to have to probably hire an attorney and work through all the complexities. They are going to push back.

So, I hope, and I am glad to hear that my colleagues on the other side of the aisle, all of whom are from States who have not done this, but they are okay with the fix the Supreme Court got because I am going to try and move legislation to make it easier for people like you to get the care you need.

But it is a classic example of legislators—last night I used an analogy of a bear skinner and a bear hunter. I will not use my time here. But we need to actually skin that bear here, not have the courts do it. And I do think that what Judge Gorsuch was doing was saying fix the problem.

He said, and something I will repeat time and time again to a question here before one of my colleagues on the other side of the aisle, it is not my job to do your job. I think that was a very insightful thing for him to say. In our case, if legislators did their job, you would not be before us today, your family situation would be better, and Luke would be probably farther along.

And one other thing I want to tell you. We may need to get Luke to come to my office because we are actually putting that same Lego model together, and my staff are struggling.

[Laughter.]

Senator TILLIS. But thank you for being here. If you have a brief comment, and then I have one other question, Mr. Chair.

Mr. PERKINS. I would just like to comment briefly. I would say that the Congress had indeed passed the IDEA, and based on my——

Senator TILLIS. They did, but let me——

Mr. PERKINS. Based on my reading of Judge Gorsuch's opinion——

Senator TILLIS. Mr. Perkins, let me—I do not mean to interrupt you, but I want to get one last comment, and I may just have to submit it to the record. But here is the problem with the IDEA and relying on the vagaries of the IDEA to fix the specific problems back in the State.

I am already reaching out as a result of that Court opinion yesterday, saying how do you actually provide clarity that puts the benefit in the hands or the benefit of the doubt in the hands of the parent. The way you do this properly is structurally after an IEP in the parents' judgment is failing to allow a child, in your case, to generalize the skills and learning in school back at home, how do you get—grant them the power to, after just a year, move somewhere else? How do you make sure that the State funding follows the child? How do you make sure that Federal funding follows the child? How do you make sure that the parent does not have to go into a courtroom, or an arbitrator, or all the other things that they will still have to do with that court decision?

How do you get the Members here, and I am thrilled to hear that we have such support on the other side of the aisle. How do you get us to provide more specificity in the IDEA so the burden is not on you? You have your own burden with your—with your beautiful child. You should not have to do it.

It is a failing of Congress. It is not a failing in this case of Judge Gorsuch. And I hope that people understand that I am so glad to hear in States, none of whom have stepped up and done it, are prepared to actually go with me to those States and convince them to do it, because we can solve the problem.

And I will submit my other questions for the record.

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

Senator TILLIS. Thank you, Mr. Perkins.

Mr. PERKINS. Senator Tillis, may I have the opportunity that you offered me to briefly respond? The IDEA is not a perfect law, but the fact of the matter is Judge Gorsuch in his opinion shrank and minimized the requirements of the IDEA such that they trivialize this law. And as the opinion yesterday characterized, current law provides much more significant protection to disabled children than Judge Gorsuch's ruling offered.

Senator TILLIS. But it does not provide enough, and it is because of a failing of legislators and Congressmen, not the courts. Thank you, Mr. Perkins.

Chairman GRASSLEY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Judge Tacha, in your testimony, you were talking about Judge Gorsuch as a judge, and you said "His attention to the views of his colleagues informs his work. He has an acute sense of identifying those circumstances"—I am reading from your testimony—"where consensus is the highest value. And on the other hand, those decisions were personal conviction, and reason dictate individual judgment and independent decisionmaking." Personal conviction.

Judge TACHA. That is about whether consensus should be built on the decision or whether the judge should write independently either as a concurrence or dissent, or whatever.

Senator FRANKEN. But he says—you are saying that he takes—that what is important to him is—well, his colleagues believed, "but also his personal conviction."

Judge TACHA. About how he reads the law.

Senator FRANKEN. His personal conviction about how he reads the law, because what basically he would not tell us are any of his personal convictions.

Judge TACHA. Because he would not bring those to cases. He would be——

Senator FRANKEN. Well, I am sorry, this is what bothered me is that he said his personal convictions did not enter into his decisions. And we spent 3 days here hearing that back—over and over and over and over again. "My personal convictions do not matter," but now from someone who is endorsing him say that they do matter.

And this is what I worry about, that we were not allowed to hear any personal convictions, and yet now I am hearing that those matter a great deal.

Judge TACHA. Senator, could I—could I explain that?

Senator FRANKEN. Please, may I have more time then?

Chairman GRASSLEY. Let him finish. Go ahead.

Senator FRANKEN. Thank you, Mr. Chairman. I belonged to four labor unions before I have here. It is really important. *Friedrichs* is an important case. We could not get any personal convictions on anything basically. What is your—Mr. Calemine, what is your read on—from what you see from his decisions on how you feel about how he will rule on *Friedrichs*? What is your——

Mr. CALEMINE. I think—I think—this *TransAm Trucking* dissent is only seven paragraphs long, and I think it is worth reading it closely because of what it shows his judicial philosophy being capable of, which is rewriting law. Not just applying the laws written by Congress, but rewriting it.

That is why one should pay attention to that decision as a guide on how he might treat other workers' rights laws. And then you pay attention to what he says in that decision, and the way he treats the workers' perspective in that case. For example, he describes the option that his—that the supervisor gave to the worker to illegally drag the trailer down the highway as being maybe sarcastically offered. In other words, he is excusing the boss' outrageous order.

When it comes to describing the option of staying at the truck and freezing, suffering hypothermia, he describes that as merely unpleasant. And I am—actually I am adding the word "merely" there. He describes it as unpleasant. And he describes—creates an analogy for this situation involving an office computer rather than a truck and freezing to death. That analogy I believe shows a bit about what the real concerns are here, which again, is from the boss' perspective. I think that——

Senator FRANKEN. The hostility to the worker here.

Mr. CALEMINE. Yes, if you—yes, sir. If you let Mr. Maddin drive his truck to safety, well, the next thing you know, we will have to let him drive the truck to the beach is the sense one gets from it. So, we are concerned about his ability to look at things from a worker's perspective.

Senator FRANKEN. I know I am out of time. I just want to say one thing about that, which is that this is—was not about this comfort. He had hypothermia. He had fallen asleep with hypothermia, but only was woken up when his cousin called him. And the way you freeze to death is you fall asleep and die. So, he was really given a choice between dying—possibly dying—or unhitching that

cab and driving off. And this says to me a lot about the man's judgment.

So, thank you, Mr. Chairman, for your indulging.

Chairman GRASSLEY. Judge Tacha, take a few minutes to say what you wanted to say, and then we will go to Senator Kennedy if he has—do you have questions, Senator Kennedy? Go ahead.

Judge TACHA. Just very briefly to the question of personal conviction. What I meant there, and what perhaps I did not get clear, is each judge brings to his or her reading of the law their own intellect, their own interpretations, their history, the precedent. And so, what—and I am going to give you an example here because it is really important.

Judge Gorsuch and I disagreed in a very, very important case. I will not bother you with all the details, but we read the law—it happened to be First Amendment law—quite differently. We tried to reach consensus. We were in lots and lots of conversations. Judge McConnell was in on this, too, and note all three of us appointed by Republican Presidents, and we all three had very different views on this very important First Amendment case. Finally, it came to the point where my reading of the law was different from Judge Gorsuch and Judge McConnell's.

Now, I ultimately became convinced that I was wrong after the Supreme Court reversed me 9–0, but they were—it was a wonderful exchange and a wonderful way to bring different judges' perspectives to the interpretation of whatever the case or the law is.

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Jaffer mentioned a few cases that Judge Gorsuch had worked on at the Department of Justice. And I note that, in one of those matters, the Government actually continued the litigation during the Obama administration. In fact, it filed a cert petition, made the same argument as the Bush administration had made. And the Solicitor General who signed the brief was now-Justice Elena Kagan. Of course, she was serving as Solicitor General at that time.

I would like to make the briefs part of the record, Mr. Chairman, in the case of United States Department of Defense et al., *Petitioners, v. American Civil Liberties Union*.

Chairman GRASSLEY. Without objection, it is included.

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

Senator KENNEDY. All right, just because of the nature of her job, my guess is the person on this panel who has been around the judge the most in the shortest period of time is Ms. Bressack.

Am I saying your name right?

Ms. BRESSACK. Yes.

Senator KENNEDY. Okay. And I believe you joined the Judge right out of law school.

Why don't you turn your mike on?

Ms. BRESSACK. I apologize.

I clerked on the Southern District of New York and then went to clerk for the judge on the Tenth Circuit.

Senator KENNEDY. Okay. And you finished Vanderbilt Law School?

Ms. BRESSACK. I did. Yes.

Senator KENNEDY. You were first in your class?

Ms. BRESSACK. I was.

Senator KENNEDY. Order of the Coif?

Ms. BRESSACK. Yes.

Senator KENNEDY. Okay. You were with the judge probably about every working day, right?

Ms. BRESSACK. Absolutely.

Senator KENNEDY. That is just the nature of being a clerk.

Ms. BRESSACK. That is correct.

Senator KENNEDY. Tell me what he is like.

Ms. BRESSACK. The judge is an incredibly caring person. I think sometimes when we read his opinions and we hear—and we get these characterizations that he is very robotic, I think that misses the essence of the judge, which is he takes very seriously his job of interpreting the law correctly. And he also, obviously, has great sympathy for the litigants that appear before him, and he has a deep respect for the litigants. And I think anyone who has appeared before him, as well as his clerks, understands that.

So I think that the sense that I had to respect everyone around me I think was really solidified in that year of clerking. And I think he is an individual who is not only brilliant but very humble in the way that he approaches his important task of applying the law to the facts of a particular case, but also clearly understands that the litigants in front of him are real people.

Senator KENNEDY. Okay. And I appreciate all that. Tell me what he is really like.

Ms. BRESSACK. Well——

Senator KENNEDY. What is in his heart?

Ms. BRESSACK. He is just—he is a very caring man. I think that, on a personal level, he always wants to know what his clerks are planning to do after their clerkship. He takes very seriously the choices we make, whether we go into public service, whether we go into the private sector. He cares when you have personal events in your life, whether you get married, whether you have a kid.

And I think that beyond just the intelligent judge, he is just incredible human being.

Senator KENNEDY. Is he political?

Ms. BRESSACK. Not when we are deciding cases, no. I mean, again, when we approach cases, we are just looking at the arguments that are being made by the litigants, the law for us and the facts of the case, and politics has no place when we are looking at a case in that way.

Senator KENNEDY. Did you ever see him decide a case based on one of the litigant's wealth or status or power?

Ms. BRESSACK. No.

Senator KENNEDY. Okay. Did you ever see him approach a case in terms of, here is the result I want, now let me figure out how to get there? Or did he approach it from, let me look at the law and see what the law says, and then that will determine who wins the case?

Ms. BRESSACK. The latter. What he does is he approaches the case, he looks at the arguments that have been made by the parties. He looks at the applicable text, whether it is a contract, a statute, or the Constitution. And then he sincerely takes his task very

seriously, of attempting to figure out what Congress meant by the words of, for example, a statute, or what the parties meant by the words of a contract. And that is how he figures out the result that is required by the case, not based on the identity of the parties before him, government or individual litigant.

Senator KENNEDY. Did he read the briefs or did he give them to you and say summarize them for me?

Ms. BRESSACK. No. We read the briefs, and then he read the briefs, and then we talked about the briefs.

Senator KENNEDY. So you both read the briefs.

Ms. BRESSACK. Absolutely.

Senator KENNEDY. Okay. Did you ever see him render decisions that he felt the law required but he was not necessarily happy with the result?

Ms. BRESSACK. Absolutely. I mean, the job of a judge is a very difficult job. I think sometimes there are very sympathetic parties that appear before him, but he takes very seriously his oath to apply the law before him, and sometimes that means results that are not in favor of very sympathetic parties. But that does not mean that he lacks sympathy for them. He simply takes very seriously his oath to apply the law.

Senator KENNEDY. Thank you, Ms. Bressack.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

I think I will just start with you, Dr. Perkins. Thank you so much for being here and for sharing your son Luke's experience with us.

This was a matter of discussion yesterday at the hearing, as you probably heard, in light of the Supreme Court's 8–0 decision rejecting the standard that had been used in your son's case that denied him the help that he needed.

What did you think when that opinion came out yesterday? How did you feel about it?

Mr. PERKINS. Well, I guess the first thing was just I was very happy for *Endrew F.* and his family, having gone through what they went through, to ultimately have that vindication.

And I think, for ourselves, although belatedly, we did feel vindicated. We felt that, ultimately, when a very similar case made it to the Supreme Court——

Chairman GRASSLEY. I have been asked to have you speak into the mike.

Mr. PERKINS. Okay.

When this case was decided, I mean, we felt, in a sense, although indirectly, *Luke's* case and Luke's situation was being vindicated.

Senator KLOBUCHAR. You know, my mom taught second grade until she was 70 years old and worked a lot with kids with disabilities in public school. And as a parent of a son who has benefited from the IDEA, could you quickly talk about what the law's mandate, which is to help students achieve "full participation, independent living, and economic self-sufficiency," means to your family?

Mr. PERKINS. It is huge. Luke, without an appropriate education, would have—was in a very restricted situation. He basically lived

his life in his house and in a special needs classroom and school, and that was it. That was the only context that he could be in. And behaviors and a lack of tools to deal with his disability really restricted him.

Now he has a good life. He enjoys what he does. He is able to get joy out of interaction with peers, with his family. It is meant—it is a huge difference in his life.

Senator KLOBUCHAR. Thank you so much.

Mr. Calemine, just again, briefly, we have little time, I have questioned the nominee a lot on the *Gutierrez* case, which is the concurrence that he did to his own opinion regarding the *Chevron* doctrine. And, as you know, *Chevron* allows some deference to administrative decisions by agencies.

Could you just briefly talk about the uncertainty this would create for safety rules in your industry, if this was overturned for workers?

Mr. CALEMINE. As I mentioned earlier, the rule that allows us to refuse hazardous work, to do hazardous work, is a rule that is not explicitly in the OSH Act. It has been developed through agency interpretations of the statute.

So this creates an opportunity, if the courts are not going to follow *Chevron* deference, it creates an opportunity to just strip those kinds of rights away. And those rights, as we speak, are saving lives right now. That is what is at stake here.

Senator KLOBUCHAR. Thank you very much.

Last, Ms. Massimino, thank you so much for being here. You talked about, in your written testimony, about the importance of checks and balances. The Constitution gives the President certain powers as Commander-in-Chief, but those powers have the potential to be abused if they are unchecked.

How should the Supreme Court approach, in your mind, with your background with human rights, how should the Supreme Court approach the balance between national security and civil rights? And what does the judge's record suggest about how he would assess presidential assertions of Executive authority?

Ms. MASSIMINO. Thank you.

Well, it is often said that there needs to be a balance between security and liberty, but we know from long experience now that respect for human rights and individual dignity is the foundation of peace and security in the world. That was the wisdom of the Universal Declaration of Human Rights that Eleanor Roosevelt pushed forward, and it remains true today.

I heard Judge Gorsuch testify the other day that no man is above the law, and that is an important tenet for our democracy. But unfortunately, we know from sad experience, fairly recent, that is not enough.

When the Bush administration authorized torture and other abuse against detainees, torture was already a Federal crime. And the problem was that the administration, and, in particular, many of its lawyers, had a different view of the law.

So it is not enough to say that no man is above the law. According to the legal memos that were prepared at that time by Bush administration lawyers, they believed that the law against torture

allowed torture. This is the sort of "Alice in Wonderland" kind of situation that we were in.

And that is why I find that email that Senator Feinstein pointed to from Mr. Gorsuch while he was at the Justice Department one of the most troubling things about his record. He was basically arguing there that the Bush administration ought to interpret the McCain amendment—one of the strongest and most bipartisan pieces of anti-torture legislation that this body has ever enacted—as actually codifying and legalizing torture, rather than prohibiting it.

And when Judge Gorsuch was asked the other day in the hearing whether there were any circumstances in which it would be lawful for a President to authorize torture or to authorize an act that was specifically prohibited through an act of Congress, he did not answer that question. I think it is very important, particularly in this environment where we have a President that is asserting these kinds of powers, to get an answer.

Each branch of government has to play its role, and it is going to be particularly important that the Supreme Court is willing to stand up to Executive overreach in the era that we are in now.

So I urge you to get clarity from Judge Gorsuch about his specific views on those issues.

Senator KLOBUCHAR. Thank you very much.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Thank you very much, Mr. Chairman.

I appreciate all of you being here.

I have a question for Mr. Jameel Jaffer. I grew up in a family that believes very strongly in the Constitution, especially the First Amendment. They had owned a small weekly newspaper and a printing business. They said the right to practice any religion you want, or none if you want, is important. The fact that you could say what you want is important. If you guarantee all that, you guarantee diversity. If you guarantee diversity, you guarantee a democracy. But you also have to have an independent judiciary.

I asked Judge Gorsuch to give me a clear answer to basic questions. I asked him whether the First Amendment prohibits the President from imposing a religious litmus test on entry into this country. I thought it would be a fairly easy question. He said it is currently being litigated, so he could not discuss it. I meant it as a softball.

So does the Constitution allow the President to impose a religious litmus test for entry into the United States?

Mr. JAMEEL JAFFER. Of course not, Senator Leahy.

Senator LEAHY. And does it concern you that he would not answer that question?

Mr. JAMEEL JAFFER. You know, I think that there is a bigger concern here. You know, some of the responses that Judge Gorsuch gave to questions like this, including about—including in response to questions about Executive power, I think we are very abstract.

And I do not think it is enough, for example, to say no person is above the law in response to a question about the Youngstown framework. You know, the dispute 10 years ago over torture was not a dispute between people on one side who said we should follow the law and on the other side people who said we should not follow

the law. Everybody claimed to be following the law, including the Bush administration officials who authorized torture.

So really, I am hoping that, in questions for the record, the Committee will be able to get Judge Gorsuch to speak more specifically about the role he envisions for the judiciary in the context of national security.

Senator LEAHY. Hope springs eternal, but do not hope too much. He might.

But, Ms. Massimino, you would think someone with my Italian background, an Italian mother, I could pronounce that correctly.

You raised the actions of the Justice Department, and I am very concerned that he declined to answer any questions regarding his role there, what his views were, even though documents indicate that he helped the Bush administration justify torture, indefinite detention, and warrantless surveillance.

Should we be concerned about that work?

Ms. MASSIMINO. I think you should. And you know, that period of time in our history was so important to our democracy. We talk a lot here about the law, but, you know, it turned out that the lawyers were actually, in many respects, even more important than the law because they were the ones who were trying to interpret what the law meant.

And there were other people at that time, government lawyers, who were extremely troubled when they found out what was going on, and they tried to stop it. And from the record that we have here, it does not appear that Judge Gorsuch was one of them.

Senator LEAHY. Well, it was a great expansion of Executive power that many of us questioned.

In my remaining time, I know, Mr. Perkins, many of us know about the story of Luke. And, you know, I would hate to have been in your shoes, but I think I would have felt the same way.

But we found out yesterday Judge Gorsuch's application of the Individuals with Disabilities Education Act was turned down by the U.S. Supreme Court. They said the standards are markedly more demanding than the standard that Judge Gorsuch created in your son's case.

How did you feel about—what did you think when you heard the Supreme Court?

Mr. PERKINS. I was very happy that they reversed a trend that clearly Judge Gorsuch and the Tenth Circuit had been part of to water down the standards for progress such that they were of minimal practical benefit. And even with these very watered-down standards that were part of Luke's education program, he was only meeting 25 percent of his objectives, but I really appreciated the fact that Judge Roberts—or Chief Justice Roberts used words like every child should have the chance to meet challenging objectives. That, indeed, is the case. And when that can happen, even a child with severe disability can make tremendous progress.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

And I thank the Senator from Hawaii.

Chairman GRASSLEY. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

Thank you all for being here.

Mr. Perkins, yesterday was a good day for your family with the Supreme Court's decision.

IDEA is what I would call remedial legislation meant to protect a class or a group of people—in this case, people with disabilities. And generally, remedial legislation—not even generally. Remedial legislation should be broadly interpreted, broadly interpreted to effect its purpose.

So when you were before Judge Gorsuch and you saw that opinion, do you think that Judge Gorsuch did, in fact, do that, broadly interpret IDEA to effect its purpose, in your son's case?

Mr. PERKINS. Absolutely not. In fact, he did the exact opposite. He took precedent that, frankly, in light of yesterday's decision, was already inappropriately narrow or restrictive, and further restricted that interpretation, such that I really wondered why would Congress even bother, if that is really what IDEA meant?

Senator HIRONO. So do you think that, if Judge Gorsuch had looked at legislative history, perhaps, of what was behind IDEA, that he may have issued a more expansive ruling than his dissent showed?

Mr. PERKINS. I would hope so. I know that his picture of what he felt the law said was a huge distortion of what the actual intent was. And so I would have hoped that, if he had looked into it some more, he might have been able to see that he had reached a wrong conclusion and maybe backtracked in his judicial reasoning and come to a more appropriate conclusion.

Senator HIRONO. So I understand that your family had a lot of resources. You are a doctor. You had parents who helped you. You did different things to accommodate the needs of your child.

And I am wondering whether, as you sat there before Judge Gorsuch, knowing that your family is one of literally thousands, hundreds of thousands, in our country who have children who look to the IDEA for the kind of educational support that they require, what did you think about all the families who do not have the kind of resources that you have and what Judge Gorsuch's ruling would have done to their ability to do the best for their child with disabilities?

Mr. PERKINS. Actually, that is probably one of the most frequent thoughts that we had through this whole legal process, is just realizing how overwhelmed we were. With all of the resources, financial, family support resources that we were blessed with, we were overwhelmed. And to think that the people out there—I mean, many of my patients, I think how in the world, if they had had Luke in their family, could they have done this?

And having a child with a severe disability is completely overwhelming, and sometimes it may seem impossible. I mean, even for us with our resources, we felt at many times that this may be impossible, because the law apparently is not on our side.

Senator HIRONO. Thank you.

With the brief time that I have left, I would like to ask Mr. Calemine, we have concerns about how Judge Gorsuch would rule in cases relating to workers' rights and unions, and I referred to his decision in *NLRB v. Community Health Services*.

Is that a decision you are familiar with?

Mr. CALEMINE. Yes. I had to look back in my notes here.

Senator HIRONO. Okay, familiar enough.

Mr. CALEMINE. A little bit.

Senator HIRONO. So he had a dissent there that really disadvantaged these workers who had been illegally denied longer hours, and it affected their pay, so they had to get another job.

Would you share your thoughts on Judge Gorsuch's dissent and his overall judicial record on workers' rights, really briefly?

Mr. CALEMINE. Briefly, the dissent in that case involved, I believe, Judge Gorsuch saying that these hospital workers who had been unlawfully—their hours had been reduced unlawfully. They went out and got other jobs to try to make up for their loss of income.

What Judge Gorsuch wanted to do in his dissent was to subtract the money that they earned from those outside jobs from the total backpay award, which meant—it does not recognize—it is an example of not recognizing what life is like for somebody working for hourly pay trying to make ends meet.

Just going out and getting another job itself is a big problem. You have new schedules. You have family issues.

Senator HIRONO. So my question really was whether you think that, on the Supreme Court, he would continue——

Mr. CALEMINE. That is the concern.

Senator HIRONO [continuing]. A very restrained view of workers' rights.

Mr. CALEMINE. That is the concern we have, that the workers' perspective is not going to see a fair shake here.

Senator HIRONO. Thank you, Mr. Chairman.

Chairman GRASSLEY. I have one question, and then I will turn to Senator Feinstein. When she is done, we will bring on the next panel.

Judge Kane, I bet this is the first time since 1977 you have been before this Committee. Is that right?

Judge KANE. That is correct, Senator.

Chairman GRASSLEY. You have been a judge for 40 years, but before that, you were a public defender. When you were a public defender, did you adopt every position of your client?

Judge KANE. Well, I represented a number of murder defendants, and I did not agree with them on that.

[Laughter.]

Chairman GRASSLEY. So you can represent somebody without agreeing with them, just like Judge Gorsuch when he was in DOJ could also represent his superiors, as their counsel?

Judge KANE. Absolutely.

Chairman GRASSLEY. Okay.

Senator Feinstein.

Senator FEINSTEIN. Your Honor, I would just say, this is just my view, that for those in government, the standard has to be a little bit different. You have to do what is right.

And this goes up even to the launching of a nuclear bomb. I asked someone who was in a position once, if you thought the President was absolutely wrong in what he was doing, would you deny a launch? And the answer was no.

And that caused me to think about the obligation that we have as service in government to do what is right as far as we know it.

And I think that even affects attorneys who have bosses because, in this case, lives are a real problem.

In any event, I would like just quickly to put in the record the Supreme Court's opinion in the *IDEA* case.

And I would like to just quote a few lines. "To meet its substantive obligation under the IDEA, a school must offer an" educational improvement plan "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials."

So I would like to put that in the record, if I may, Mr. Chairman.

Chairman GRASSLEY. Without objection, so ordered.

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

Senator FEINSTEIN. The second thing, in response to my friend and colleague who spoke about the Detainee Treatment Act, Senator Graham, I was McCain's cosponsor on his bill, and I would like to read from his statement on the floor on February 13, 2008.

And in this, he makes clear that his view of the Detainee Treatment Act in 2005 outlawed waterboarding. He says, "I stated during the passage of that law that a fair reading of the prohibition on cruel, inhumane, and degrading treatment outlaws waterboarding and other extreme techniques."

So I would ask that this statement be part of the record, and also the opinion in this case.

Chairman GRASSLEY. Without objection, so ordered.

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

Chairman GRASSLEY. Now should I go to Senator Blumenthal.

Senator FEINSTEIN. Yes.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

And thanks to the members of the panel for sharing your insights and experience with Judge Gorsuch.

I have a question for Mr. Calemine, but others are free to answer it as well.

As you know, the importance of our consideration here is not only the results. In fact, even more important than the results is the judge's method of reasoning, his approach to analysis in cases. And a couple cases I think are illustrative.

In *Compass Environmental, Inc. v. OSHRC*, Judge Gorsuch voted to overturn a fine that was imposed by the Department of Labor against a company whose failure to properly train a worker actually caused a death.

In *TransAm Trucking v. Administrative Review Board*, as we all know now from the discussion that took place when he testified here, he voted to reverse the judgment of both an administrative judge and the Department of Labor, which held that a truck driver had been improperly fired in violation of Federal law. The truck driver abandoned his truck in subfreezing weather when the heater in his cab failed to function, and did so, in essence, to save his own life.

I wonder if you could comment about the purpose of the laws that he was interpreting here, and why you have reservations about his analytical approach, his method of reasoning in ap-

proaching these laws, and other cases that have the same effect? And I open the same question to others on the panel.

Mr. CALEMINE. Thank you.

So the purpose of the laws in the two cases that you just mentioned, Compass Environmental and TransAm Trucking, the purpose of those laws is to protect workers' health and safety. And one of the most alarming things about one of those cases is Judge Gorsuch describing those purposes as ephemeral and generic.

In other words, there is not enough concrete there to allow those purposes to guide how we interpret these laws.

So instead, we turn to things like the Oxford English Dictionary, which he did in that particular case.

Another concern from the other case, from *Compass Environmental*, is his description of OSHA's powers as being remarkable. And in that case, a worker had been electrocuted to death, and the remarkable power imposed by OSHA was a $5,550 fine, just a $5,500 fine on the employer, and that is described as remarkable.

And that is a concern because workers in this country rely on that agency and other agencies to enforce their rights every day, and we have come to rely on those interpretations.

We want to know what the law is. We do not want the Second Edition 1989 Oxford English Dictionary to suddenly be pulled out to change that law, and that is what almost happened in *TransAm Trucking*, a rewrite of the law.

Senator BLUMENTHAL. Any other members of the panel?

Ms. BRESSACK. If I might, Senator?

Senator BLUMENTHAL. Sure.

Ms. BRESSACK. I am comforted to hear that you specifically note that we are not just going to look at the results of cases in judging Judge Gorsuch, because, obviously, he has been on the bench for 10 years, so we are focused on certain cases in which he may have ruled against certain workers, but there are a number of other decisions that I believe the panel—the Committee is aware of, where he ruled in favor of workers.

And I believe that the approach he applies in all of those cases, irrespective of the result, is to look at the text that was passed by Congress and apply it fairly to the facts before him. And I believe that it is that process that does not change. It is the results that change based on, obviously, the facts of the case before him, as applied to the statute.

Senator BLUMENTHAL. And the reason I asked about the reasoning and analytical approach is precisely the answer that has just been given. To regard a worker protection statute or the concept of health and safety as ephemeral and generic is, in my view, a gross understatement of the purpose of these laws, which are basic to people who leave their homes in the morning, say goodbye to their families, expecting to come home at the end of the day without having been injured, maimed, or killed. That is the purpose of these laws. That purpose is not generic or ephemeral. It is urgent and important.

And Mr. Calemine I think well-stated the reservation I have based on his use of that language.

And by the way, I have been here for 7 years. I have never heard any United States Senator quote the Oxford dictionary for the meaning of a term. Never. Not once.

And yet, Judge Gorsuch uses it very, very abundantly in his opinions to seek a definition for how he is going to apply a statute. That is not a real-world approach to health and safety.

And it concerns me, and that is why I asked the question.

But it is not the result alone. In those cases, I was concerned about the result. He probably has ruled for individuals. And we have been throwing around this term, the "little guy." It does not matter whether it is a big or little person or a group of people. It is more the concept of preserving worker safety that is important.

Thank you.

Chairman GRASSLEY. Thank you, Senator Blumenthal.

Thank you all for your presentation, more importantly for your preparation and for informing the Committee.

Thank you very much.

And will the second panel come, but while the second panel comes—and please do not sit down until I swear.

But I want to inform the Members——

Senator FEINSTEIN. Swear you in, you mean. You are not just going to swear.

Chairman GRASSLEY. Yes, swear in.

Here is what I would like to have the Members think about. We will not get through this panel presentation—12:25 is when the vote starts, so I think we are going to go with this panel until 12:35. And then we will recess, and I will vote at the end of the first vote, and then vote on the second vote immediately.

So that means we probably will reconvene this panel about 1:05 or 1:10, in that period of time, and then we will have the rest of the panel presentation and the questions. And then we have yet one more panel, I believe one more panel after that.

[Witnesses sworn.]

Chairman GRASSLEY. Thank you.

I am going to do something that I forgot to do, and it was very wrong, my not doing it. I did not say anything about the last panel individually.

Jeff Lamken is a founding partner of MoloLamken, and he clerked for Justice O'Connor.

Heather McGhee is president of Dēmos.

Is that how you——

Ms. MCGHEE. Dēmos.

Chairman GRASSLEY. Dēmos. Okay.

Professor Lawrence Solum is a Carmack Waterhouse Professor of Law, Georgetown.

Fatima Goss Graves, senior vice president for program and president-elect of the National Women's Law Center.

Professor Jonathan Turley is on TV all the time. That does not say that here, but I can say it. He is the J.B. and Maurice C. Shapiro Professor of Public Interest Law, George Washington University Law School.

Pat Gallagher is director of the Environmental Law Program, Sierra Club.

Karen Harned is executive director at the National Federation of Independent Business Small Business Legal Center.

And Eve Hill is partner with Brown Goldstein Levy. She previously served as Deputy Assistant Attorney General for the Civil Rights Division from 2011 to 2017.

We will start there, and we will go until we see how this vote goes.

STATEMENT OF JEFF LAMKEN, PARTNER, MOLOLAMKEN, WASHINGTON, DC

Mr. LAMKEN. Thank you, Mr. Chairman, Ranking Member Feinstein, Members of the Committee, for the opportunity to speak to you about Judge Gorsuch.

Since clerking for Justice O'Connor in 1992, I have had the honor of arguing 23 cases before the U.S. Supreme Court, many of those as Assistant to the Solicitor General, first under Seth Waxman, who was President Clinton's Solicitor General, and then later under Ted Olson, who was President Bush's.

I have known Neil Gorsuch—Neil, as I have always known him—as a colleague and a friend for more than 20 years. My wife, who is here today, has known him even longer, because she went to law school with him.

I like to think I helped recruit Neil to Kellogg Huber after his Supreme Court clerkship and his time at Oxford. I think I may have edited the first brief he ever wrote as a young lawyer. I understand he has improved substantially since then, and I can tell Senator Sasse that he never once used the word "bigly" in a brief.

Of course, from the outset, it was always clear to all of us that he was not only smart and thoughtful and a great writer, but he had great judgment. In both the literal and figurative sense, he had gray hair from the beginning of his career.

But I want to speak to you about something other than Judge Gorsuch's legal acumen. I want to speak to you about his kindness, his compassion, his generosity of spirit as a person, and why those values are integral to who he is and what we should expect from him from the Bench.

Since I first got to know Neil many years ago, he has been one of my dearest friends. We both have two daughters, his a bit older than mine. And he has always been there for me to listen, to advise, and to commiserate about the trials and travails of the often-difficult project that is being a parent.

I have vivid memories of standing in Neil's backyard in Colorado after he became a judge, talking about what then seemed to me a very difficult moment. As we spoke, we scooped up horse manure, while his family's pet goat Nibbles tried to ram the judge. I honestly never understood what they saw in that goat.

Neil's kindness resonated throughout his family, excluding the goat, of course. His daughters were always so sweet to my children, even though my kids were considerably younger.

I remember Neil and his kids repeatedly leading one of my kids through one of life's adventures by the hand, whether trying to balance on skis or trying on hats at a department store. If something happens to me and my wife, Neil stands in line to inherit my children.

Some people say, if you want a friend in Washington, get a dog. Those people never got to know Neil Gorsuch; his wife, Louise; or his family. Simply put, Judge Gorsuch is a thoroughly decent and kind person.

So why does that matter to this body as it is considering his nomination? As a former colleague of mine from the Solicitor General's Office told me, if you have someone who is that good a person, it means he listens. It means he truly hears. It means he can be persuaded. That is, to my mind, the most essential attribute for a Supreme Court Justice.

The Supreme Court has an argument calendar, but the printed list of cases and counsel the Court prepares for each session is called the "hearing list." It is the chance for people to be heard. When the Chief Justice calls each case, he says we will hear argument in case number, and then he gives the case number and case name. The key words there are "hear argument," not just have argument, but hear it.

I know that everyone who appears before Judge Gorsuch, before Neil, will be heard, genuinely heard, regardless of who they are, who they represent, their position, or the nature of the controversy. His kindness and his humility make him place extraordinary value on listening to the lawyers, to his colleagues, and to those with backgrounds different from his own, who may come at the matter from a different angle or insight borne of different experiences.

I have heard a lot of speculation over the last few days and months about how Judge Gorsuch might rule on this matter or the other. I do not know how he might rule. I do not think he knows.

These are often really hard cases. That is why they get to the Supreme Court, because they are hard, because the judges disagree. But I do know that Judge Gorsuch will struggle with those hard cases.

He will immerse himself in the law, in precedent, in the context, in the record, in the briefs and the arguments. He will listen to the litigants, listen to his colleagues, to history, to experience and its lessons. And he will decide the cases based on where those things lead him at the end of the case, based on the force of the better argument, not based on a preexisting intuition that may predate the case's beginning.

That, I believe, is precisely what we should all hope for from our judges and Justices. That is true whether you consider yourself a Democrat like me, or a Republican, or an independent. If the Senate believes that as well, I believe that Judge Gorsuch should be confirmed.

Thank you.

[The prepared statement of Mr. Lamken appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Lamken.

Now Ms. McGhee.

STATEMENT OF HEATHER MCGHEE,
PRESIDENT, DEMOS, NEW YORK, NEW YORK

Ms. MCGHEE. Chairman Grassley, Ranking Member Feinstein, Members of the Committee, thank you so much for the privilege of testifying here today.

My name is Heather McGhee, and I am the president of Dēmos, a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

What is at stake is not just the critical issues that you have heard about over the past few days, but the way that we the people make decisions about all of the issues that we face as a Nation and whose voices are heard in that process.

Judge Neil Gorsuch has the potential to be the deciding vote to destroy the few remaining safeguards against big money corrupting our politics completely. His troubling record on money in politics requires this Committee to reject his nomination to the U.S. Supreme Court.

I would like to make three basic points today. First that the way that we fund our campaigns in the U.S. enables wealthy individuals and institutions to take their economic might and translate that directly into political power. Second, the Supreme Court's activism in striking down democratically enacted safeguards is what has brought us to this perilous place in our history. In the world's oldest democracy, nearly nine out of 10 Americans have lost so much faith in our system that they think a total overhaul is needed.

Senators, we are near a breaking point—nine out of 10. It is hard to imagine things getting worse, and yet the prospect of a lifetime seat for Judge Gorsuch has given us a glimpse.

Fortunately, there is an overwhelming bipartisan consensus supporting pro-democracy reforms, even though Neil Gorsuch is far outside of that consensus. Your constituents want you to stand up to big money, and your vote on this pivotal Supreme Court seat will be one of the best chances you will ever have to do so.

Leading political scientists have concluded that our Government now resembles a plutocracy more than a representative democracy. Just 25 individuals pumped more than $600 million into last year's elections. Less than 1 percent of the population provides the vast majority of the funds that determine who runs for office, who wins elections, and what issues get attention from elected officials.

They say that he who pays the piper calls the tune, and so, of course, our public policies are skewed toward the wealthy and away from working-class families and people of color who remain massively underrepresented among top donors and in the halls of power.

The role of the Supreme Court in creating this crisis cannot be emphasized enough.

Last week, Dēmos released a report calculating how much extra money has flowed into politics because of Supreme Court rulings striking down campaign finance laws. We found that, in the 2016 election cycle, court decisions were responsible for nearly half of all the big money spent.

Still, it is not too late to reverse course. The Roberts Court campaign-finance rulings have been 5–4 decisions in which the majority's basic assumptions about politics have been proven false, including the idea that so-called independent expenditures are actually independent of candidates and, therefore, cannot be corrupting, and that disclosure laws would be effective.

With a Supreme Court that was responsive to the facts rather than ideology, we could end the super-PACs that the Court created and begin to restore our democracy.

But Judge Neil Gorsuch would have been with the majority in *Citizens United*. His overall record puts him to the right of Scalia. And on the question of money in politics, he would take us even further down the Roberts Court's extreme path.

Judge Gorsuch has had two directly relevant cases. In *Hobby Lobby*, he voted to expand First Amendment rights for corporations, building on *Citizens United's* troubling logic. In *Riddle v. Hickenlooper*, he went out of his way to signal openness to applying the harshest possible standard of review to campaign contribution limits, which would deem a wealthy donor's check worthy of more constitutional protection than the Court has consistently offered for our most precious right to vote.

Judge Gorsuch was given an opportunity in this room to distance himself from one of the most unpopular court cases in American history, and he failed to do so.

Thankfully, outside of the Beltway, this is not a partisan issue at all. Ninety-one percent of President Trump's own voters thought it was important that he appoint someone to the Supreme Court who would be open to limiting big money in politics. Seventy percent of Republicans say that Congress should reject any nominee who "will help the wealthy and the privileged wield too much power in our elections."

The American people are demanding change to a political system that favors the already wealthy and well-connected.

So we urge you to vote against Judge Gorsuch's nomination and to tell your constituents that a key reason you did so was to stand with them over big money. They will thank you, and I think you.

[The prepared statement of Ms. McGhee appears as a submission for the record.]

Senator CRAPO [presiding]. Thank you very much.

Professor Solum.

STATEMENT OF LAWRENCE SOLUM, CARMACK WATERHOUSE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Professor SOLUM. Thank you very much, Senator.

Ranking Member Feinstein, I voted for you in 1992, and it is a pleasure to appear before you today.

My statement concerns an aspect of Judge Gorsuch's judicial philosophy—originalism. And over the course of these hearings, I think we have learned several things about originalism, and there are still some things that I think might be cleared up.

What is originalism? It consists of three basic ideas.

The first idea is that the meaning of the Constitution should be its original public meaning, the meaning of the words and phrases in context to "we the people."

The second idea is that meaning is fixed, not that the law is fixed, but that the meaning of the words is fixed at the time they are written.

And the final idea is that original public meaning should constrain what judges do, that judges, the President, the Members of

this august body, are all bound by the original public meaning of the Constitution.

Over the course of the past 3 days, we have learned some other things. We have learned that there are a number of myths about originalism, and I think that those myths have, for the most part, been cleared up.

Originalism does not ask the question, what would Madison do? A very silly question, when we try to apply the Constitution to modern circumstances.

We have learned that the words of the Constitution can be adapted to new circumstances. At the time the Constitution was adopted, California did not exist. It was not a State. But we have no problem concluding that, nonetheless, California is now a State and entitled to two Senators in this body.

We have learned that *Brown v. Board*, one of the most important decisions in the history of the Supreme Court, is not inconsistent with the original meaning of the Constitution. As Judge McConnell demonstrated in 1995, *Brown v. Board* was required by the original meaning of the Constitution.

And we have learned this very clearly, that originalism is not inconsistent with precedent.

What I would like to say today, most importantly, is that originalism is in the mainstream of American jurisprudence, originalism in the mainstream of American jurisprudence because, throughout our history, for the most part, with some important exceptions, the Supreme Court has been an originalist court.

But originalism is in the mainstream for another reason. Originalism can and should be endorsed by both Democrats and Republicans, by progressives and conservatives. This point is important to me personally. I am not a conservative. I am not a libertarian. I am not a Republican. But I do believe in originalism.

Why is that? It is because I am convinced that giving power to judges to override the Constitution, to impose their own vision of constitutional law, is dangerous for everyone.

If you are a Democrat and you know that the next Justice to the U.S. Supreme Court will be appointed by a Republican President and confirmed by Republican Senate, would you prefer that an originalist like Judge Gorsuch be appointed or would you prefer a conservative Justice who is a living constitutionalist who believes that their values are an appropriate ground for modifying or overriding the constitutional text?

There is a final reason that originalism is in the mainstream. The Supreme Court has never claimed the right to override the Constitution. There are cases where the Supreme Court did, in fact, depart from original meaning. But in all of those cases, the Supreme Court either strained to make its decision consistent with the text or ignored the text altogether.

I support Judge Gorsuch's nomination because he is an originalist.

[The prepared statement of Professor Solum appears as a submission for the record.]

Senator CRAPO. Thank you, Professor Solum.

Ms. Graves.

STATEMENT OF FATIMA GOSS GRAVES, SENIOR VICE PRESIDENT FOR PROGRAM AND PRESIDENT-ELECT, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC

Ms. GRAVES. Thank you, Senator, Ranking Member Feinstein, and the Committee. My name is Fatima Goss Graves, and I am senior vice president for program and president-elect of the National Women's Law Center.

Since 1972, the center has been involved in virtually every major effort to secure and defend women's legal rights.

I thank you for your invitation to testify today and ask that my full written testimony be submitted.

Over the past few days, Judge Gorsuch has talked a lot about how he follows the law rather than his personal views or his feelings, and that he applies the law to facts. But a review of his record shows that, time and again, his approach to the law gives the benefit of the doubt to employers, to politicians, to other powerful entities rather than the vulnerable individuals who rely on the law for protection. And time and again, this approach disadvantages women.

If you take the case of Betty Pinkerton, an administrative assistant whose sexual harassment claim was dismissed, Judge Gorsuch ruled against Ms. Pinkerton on the grounds that her failure to report the harassment she faced for all of 2 months was unreasonable.

During that period, she had to listen to her boss ask about her breast size, ask about her sexual habits. And, under Title VII, these sorts of remarks only become a pattern of harassment as they add up over time.

If she complained too early under Title VII, she would have no claim. And waiting 2 months, under Judge Gorsuch's approach, again, she had no claim.

This is an approach that ignores the workplace realities that the law is designed to address and the very nature of workplace harassment.

Or if you take the *Hobby Lobby* case, in which a corporation challenged the Affordable Care Act's birth control benefit, which requires health insurance plans to provide birth control without cost-sharing—access to contraception means, for women, the ability to plan their lives, to plan their futures. And the birth control benefit relieves women of a steep financial burden, which can run as high as $1,000 in upfront costs.

Judge Gorsuch joined the Tenth Circuit holding under the Religious Freedom Restoration Act that an employer's religious beliefs could override an employee's right to birth control under the Affordable Care Act, including an especially extreme holding that promoting gender equality in public health, the very goals of the birth control benefit, were not compelling government interest.

His concurring opinion was stunning in its refusal to even acknowledge the health impact and the financial burden on women who would lose insurance coverage under his approach.

Ultimately, the case reached the Supreme Court. And unlike the decisions joined and written by Judge Gorsuch, the Supreme Court instructed that, as a part of RFRA's balancing test, courts must consider the impact on women.

Judge Gorsuch's record also shows hostility to the Constitution's protections of the most personal and intimate decisions, which is the basis for the right to birth control and the right to abortion.

Yesterday, Judge Gorsuch declined to say whether *Roe v. Wade* was correctly decided, merely acknowledging that it is actually precedent of the Court. And he refused to answer key questions about other areas of the law that are core to women's lives.

When he was questioned about letters from former students who claimed that they had—that he had suggested companies can and should ask women and only women about their pregnancy plans and their family plans, even in explaining this incident, Judge Gorsuch shockingly refused to acknowledge that such behavior would violate Title VII.

And to be clear, statements like these are wildly at odds with the very letter and the very purpose of Title VII and the Family Medical Leave Act.

Finally, we reviewed Judge Gorsuch's record against a highly unusual backdrop, including promises made by President Trump that his nominee would overturn *Roe* automatically, and that he would be selected from lists approved by the Heritage Foundation and by the Federalist Society, a really highly unusual occurrence, to say the least.

When you put these extraordinary promises together with the judge's record and his refusal to provide anything but platitudes about his judicial philosophy to this Committee, there is only one possible conclusion, and that it is that Judge Gorsuch should not be confirmed.

[The prepared statement of Ms. Graves appears as a submission for the record.]

Senator CRAPO. Thank you, Ms. Graves.

And to the remaining witnesses on the panel, and the Members of the Committee, we are about halfway through a vote, and we are going to need to take a recess to go vote.

So what we will do is also give a few extra minutes to that recess, so that folks can get a bite to eat, if they can.

In fact, do we have two votes?

Chairman GRASSLEY. I will be back here about 1:10 to take up again.

Senator CRAPO. Okay. So we will recess until 1:10 and continue our deliberations at that point.

The Committee is in recess.

[Recess.]

Chairman GRASSLEY. I will abrogate the recess, but I want to explain something. This vote that we thought would get two votes done by 1:10, the first vote is not going to end until about 1:20. So I will have a chance to get through four people's testimony, and then if we have hopefully a Republican and Democrat vote and they are over here, so I can go finish voting. If you wonder about the importance of voting for me, I have not missed a vote since 1993, so that is about 7,900 votes without missing a vote, and I do not intend to miss another one.

Professor Turley.

STATEMENT OF JONATHAN TURLEY, J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Professor TURLEY. Thank you, Chairman Grassley and Members of the Senate Judiciary Committee. It is an honor to appear before you today to discuss the nomination of Judge Neil M. Gorsuch for the U.S. Supreme Court. I believe that a nominee should be extraordinary to merit the distinction of being one of nine on our highest court. I should state at the outset that I do not agree with all of Judge Gorsuch's legal views. However, I believe Judge Gorsuch to be an exceptional choice for the Court.

While many have focused on replacing a conservative with another conservative, the primary concern should be to replace an intellectual with another intellectual. Judge Gorsuch is precisely that type of nominee who has the intellectual reach and vigor to sit in the chair of the late Antonin Scalia.

One of the primary complaints regarding past nominees has been a lack of substantive writings or opinions on major legal issues of our time. Such thin records can make for good nominees. They do not make for great Justices. Judge Gorsuch is a refreshing departure from that trend. He has a record of well-considered writings both as a judge and as an author, so this is not a blind date. We have a very good idea of who Judge Gorsuch is and the type of Justice he will be.

In my written testimony, I have focused on two aspects of the nomination: first, I have addressed the criteria often used to evaluate a nominee; and, second, I have looked at the cases by Judge Gorsuch with a particular emphasis on separation of powers, agency review, and *Chevron*.

Every President and Senator has expressed a commitment to placing the best and the brightest on the Court, though few agree on the qualitative measures needed to guarantee that goal. Historically, the record is not encouraging, to be frank. Our respect for the Court often blinds us to the fact that our Justices have ranged from towering figures to virtual nonentities. To be blunt, we have had more misses than hits when it has come to appointments onto the Court. Top candidates are often rejected due to writings and views that might attract opposition. The result is a preference for nominees with "clean" records that have no public thoughts challenging conventional theories, devoid of any particularly interesting ideas.

That is not the case with this nominee. Judge Gorsuch has actively participated in debating some of the toughest questions of our time. This is, in other words, a full portfolio of work at the very highest level of analysis.

On the basis of all the criteria I discuss in my testimony, Judge Gorsuch is a stellar nominee. I realize that many do not welcome a conservative nominee any more than they welcomed a conservative President. However, President Trump has every right to nominate someone who shares his jurisprudential views.

To put it simply, Neil Gorsuch is as good as it gets, and he should not be penalized for engaging in the policy and academic debates of our time. In my written testimony, I discuss some of his

opinions. There are many, 2,700 or so cases with a full record of opinions by Judge Gorsuch. The jurisprudence reflects, not surprisingly, a jurist who crafts his decisions very closely to the text of a statute, and, in my view, that is no vice for a Federal judge. The exception, as I discuss in my written testimony, is *Chevron* in terms of the consistency of his views with those of Justice Scalia. There has been a fair amount of discussion of cases, which I would be happy to go into further today.

The confirmation hearings bring almost a mythical aspect to this process as people try to predict who a Justice will be decades in advance. Of course, nobody knows that, except perhaps the nominee. Yet, if history is any judge, even the nominee does not know that with any certainty.

These hearings often remind me of a story of Supreme Court Justice Oliver Wendell Holmes who was traveling by train to Washington, DC When the conductor asked him for his ticket, Holmes looked in all of his pockets, and the conductor finally stopped him and said, "Do not worry about your ticket, Mr. Holmes. We all know who you are. When you get to your destination, just send us the ticket." Holmes responded, "My dear man, the problem is not my ticket. The problem is . . . where am I going?"

Most nominees are in the same position as Oliver Wendell Holmes. They are not quite sure where they are going. People of good faith can evolve on the Court. I do not expect Judge Gorsuch to be a robotic vote for the right of the Court. While conservative, he has shown intellectual curiosity and honesty that I think is going to take him across the ideological spectrum.

But in conclusion, I would simply say we are not looking for the best imitation or facsimile of Justice Scalia. We are looking for someone who can be an intellectual force on the Court in his own right. That person, in my view, is indeed Neil Gorsuch, who just might eclipse his iconic predecessor. He will not be the same. He is going to bring something new. In the end, Gorsuch and Holmes share a common destination. He will go where his conscience takes him. It might be a track to the left or to the right. But he will follow his conscience. I cannot say what the final terminus will be, but it will be exciting to watch.

It is, therefore, my honor to recommend the confirmation of the Honorable Judge Neil Gorsuch for the U.S. Supreme Court.

[The prepared statement of Professor Turley appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor.

Now, Mr. Gallagher.

STATEMENT OF PATRICK GALLAGHER, DIRECTOR, ENVIRONMENTAL LAW PROGRAM, THE SIERRA CLUB, OAKLAND, CALIFORNIA

Mr. GALLAGHER. Chairman Grassley, thank you for the opportunity to testify here today on behalf of the Sierra Club and its 2.8 million Members and supporters nationwide.

A Supreme Court Justice holds considerable power over the laws which safeguard the very air we breathe and the water we drink and the integrity of our democracy. Unfortunately, Judge Neil Gorsuch's ideology threatens both bedrock environmental law and

the rights of American citizens to a fair and equal voice in our democracy. For these reasons, the Sierra Club respectfully opposes Judge Gorsuch's confirmation to the Supreme Court.

Judge Gorsuch has displayed a consistent willingness to close the courthouse doors to citizens, while holding them open for corporate interests. Think for a moment of the child in Bakersfield, California, struggling to breathe as a result of the oil and gas operations right outside her home and school, or of the family who may not be able to take their annual camping trip to the Wayne National Forest in Ohio because of fossil fuel drilling operations at that place, or of the families right here in Washington, DC, who continue to suffer from the lead contamination of their drinking water.

I presume that everyone in this room would agree that every single one of these people deserves access to the Federal courts to remedy these wrongs. Unfortunately, Judge Gorsuch's writings and judicial records show that he would shut the courthouse doors on many of these people who want nothing more than to protect their air, water, public lands, and their families.

In 2005, Judge Gorsuch authored an article in the National Review entitled "Liberals and Lawsuits," where he criticized those who seek to remedy injustices in the Federal courts when the executive branch fails to do its job. While Judge Gorsuch has repeatedly stated—reportedly stated that he wishes this National Review article would just "disappear," his judicial record continues to reflect this philosophy, as he has repeatedly denied environmental plaintiffs access to the courts. Where citizens must jump through multiple, often insurmountable hurdles just to get inside Judge Gorsuch's courtroom, corporations have been able to walk right in. Let me cite two examples.

In 2013, the Sierra Club moved to intervene in a lawsuit that an off-road vehicle group brought against the Forest Service, challenging the closure of certain forest trails to off-road vehicles. The court granted us intervention, but Judge Gorsuch dissented, concluding that we should have been excluded from the case. Tellingly, neither the Government, the off-road vehicle group, nor the majority of judges objected to our participation in that case.

Second, in 2005, a coalition of citizens groups, including the Wilderness Society and the Sierra Club, challenged a Utah county's attempt to take over Red Rock wilderness areas that were managed by the Bureau of Land Management by claiming that they were county highways. Judge Gorsuch ruled that the citizens did not have standing to sue. They did not get into the courtroom.

In an emphatic dissent to Judge Gorsuch's ruling, one that echoes my testimony here today, Judge Lucero, also of the Tenth Circuit, stated, "A citizen's right to protest and be heard on the supremacy of Federal rules and regulations is ignored."

Not only has Judge Gorsuch limited access to the courts, he has stated open hostility to the *Chevron* doctrine, a longstanding precedent of the Supreme Court that ensures scientific integrity is respected as our public servants implement clear air and clean water regulations. The *Chevron* doctrine ensures that the laws on the books are carried out by career public servants using the best available science.

Here is the most troubling issue. Judge Gorsuch's opinion that *Chevron* deference violates the Constitution echoes the current White House's extreme anti-agency demagoguery. One month ago, Trump senior adviser Steve Bannon gave a speech to the Conservative Political Action Conference in which he professed that a White House priority is the "deconstruction of the administrative state." Trump's massive budget cut for EPA was the next hammer to fall. Sadly, Judge Gorsuch's ideology will further this agenda, hamstringing the EPA's ability to enact pollution safeguards and incentivizing corporate polluters to challenge the EPA at every turn, thereby forcing Federal judges to second-guess agency scientists.

In closing, we now stand at a precipice in history. How will we deal with climate disruption? How will we lift up our communities who lack access to clean drinking water and clean air? How will we leave a safe and livable future for our children?

America cannot afford the appointment of yet another Justice whose ideology disfavors citizens groups, favors corporate interests, and leads to the degradation of the environment and our democracy. This is why the Sierra Club respectfully opposes the confirmation of Judge Neil Gorsuch to the Supreme Court.

Thank you very much.

[The prepared statement of Mr. Gallagher appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Gallagher.

Now, Ms. Harned.

STATEMENT OF KAREN HARNED, EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WASHINGTON, DC

Ms. HARNED. Chairman Grassley, on behalf of the National Federation of Independent Business, I am honored to testify today in support of the nomination of Judge Neil Gorsuch to be an Associate Justice of the U.S. Supreme Court.

NFIB is the Nation's leading small business advocacy organization, with hundreds of thousands of members across the country in every industry and sector.

As the lead plaintiff in the historic challenge to the Affordable Care Act, *NFIB v. Sebelius*, NFIB understands firsthand the importance one Justice can have on the ability of small businesses to own, operate, and grow their businesses. After reviewing Judge Gorsuch's articles, decisions, and public statements, we are pleased to see a judge who both applies the actual text of the law and the original meaning of that text at the time it became law rather than changing it to fit his personal views and preferences.

Specifically, small businesses are encouraged by three qualities Judge Gorsuch has brought to the bench. His opinions are clear and often provide bright-line rules. He has a deep respect for the separation of powers. And he has shown a willingness to tackle the difficult legal issues of our day head on.

Judge Gorsuch is not known for using ambiguous or broad language that fails to settle the question before him. Rather, his decisions provide meaningful direction for District Court Judges, as

well as businesses and ordinary individuals who may be affected by that law moving forward.

Like their larger counterparts, small business owners want—and need—certainty. They need bright-line, easy-to-understand legal standards. If small businesses do not know what is expected of them, what the rules of the game are, they may be hesitant to undertake actions that otherwise would help their business grow. Judge Gorsuch takes seriously his obligation to provide that clarity whenever possible.

Judge Gorsuch also has demonstrated that he truly respects, and seeks to protect, the separation of powers among the branches of government. This is important because NFIB is concerned about what we see as the rising tide of regulation promulgated by unelected bureaucrats. This trend over the last 30 years contravenes the fundamental principle that only Congress, as the elected and politically accountable legislative branch, should be able to enact and change statutory law.

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden as compared to their larger counterparts. That is not surprising since it is the small business owner, not one of a team of compliance officers, who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in full compliance with new and ever-changing Federal mandates. The uncertainty caused by future regulation negatively affects a small business owner's ability to plan for future growth.

For small business, the problem of overregulation has been further exacerbated by the broad deference Federal courts give to Executive agencies in their interpretations of statutes passed by Congress. This judicial deference to Executive agencies, known as *Chevron* deference, has led to a breakdown in our constitutional system of checks and balances.

Therefore, NFIB welcomed Judge Gorsuch's concurring opinion last year in *Gutierrez* encouraging the Supreme Court to revisit the *Chevron* doctrine. In my written testimony, I referenced three cases where the *Chevron* doctrine has caused serious harm to small business.

For example, in *City of Arlington v. FCC*, the Supreme Court invoked *Chevron* to find that courts must defer to an agency's interpretation of its own statutory authority. By extending *Chevron* deference to agency determinations of its own jurisdiction, the Court set a dangerous precedent that encourages agency aggrandizement of regulatory authority—with minimal judicial oversight. By abdicating its responsibility to determine the scope of an agency's statutory authority, the Court signaled that agencies may intrude into the affairs of States and businesses with impunity—as long as their actions are justified as "reasonable" to the slightest degree.

Our constitutional system of governing and our separation of powers doctrine play a large role in empowering the vitality of small businesses in the United States. When this system erodes or functions less perfectly, there is an adverse impact on small business and our Nation's economy.

Small businesses, like every American, have an important stake in who fills Justice Antonin Scalia's seat. NFIB is pleased to sup-

port the nomination of Judge Neil Gorsuch to the U.S. Supreme Court.

Thank you.

[The prepared statement of Ms. Harned appears as a submission for the record.]

Senator WHITEHOUSE [presiding]. Thank you very much.

Our next witness is the former Deputy Assistant Attorney General for Civil Rights who has specialized in disability rights. We are delighted to hear her testimony. Ms. Hill.

STATEMENT OF EVE HILL, PARTNER, BROWN GOLDSTEIN LEVY, BALTIMORE, MARYLAND

Ms. HILL. Thank you very much for inviting me to speak today. I am an attorney with more than 20 years' experience implementing the laws protecting the rights of people with disabilities. I have serious concerns about Judge Gorsuch's approach to and acceptance of America's disability civil rights laws and the basic principles of disability rights.

People with disabilities have long experienced what former President, and then candidate, George W. Bush called "the soft bigotry of low expectations." Unfortunately, Judge Gorsuch bakes these very low expectations into his disability rights jurisprudence, in spite of Congress' bipartisan attempts to dismantle such prejudices through Federal disability rights laws.

Judge Gorsuch's decisions on the education of our children with disabilities are troubling, not just for their devastating human consequences, but also for their dismissiveness of the law as established by Congress.

The Individuals with Disabilities Education Act, or IDEA, requires public schools to ensure a free appropriate public education for each student with a disability. In the *Luke P.* case that you heard about earlier, Judge Gorsuch read the IDEA to require only an education that is "merely more than de minimis." That concept appears nowhere in the statutory text of the IDEA or in Supreme Court precedent. Judge Gorsuch adopted this standard in spite of Supreme Court precedent requiring educational benefits to be meaningful, in spite of statutory text requiring appropriate educational programs, and in spite of Congress' repeated updates to the IDEA explicitly calling for high educational standards for children with disabilities. Yet in *Luke P.*, Judge Gorsuch substituted his own opinion for that of three decisionmakers who had found that Luke's school did not provide an appropriate or meaningful educational benefit. Nor did Tenth Circuit precedent require the "merely" standard. For a judge that claims fidelity to the principles of judicial conservatism, a decision to overrule the findings of three lower courts in a way that ignores statutory text and congressional intent is deeply troubling.

Luke's records showed that he was failing in over 75 percent of the goals in his plan. Few parents in this country would find a 25-percent success rate to be appropriate or meaningful for their child, with or without a disability. Yet Judge Gorsuch found that 25 percent success was a passing grade for Luke's school.

Notably, a little over a year after the change in his placement, as you heard this morning, Luke made significant progress in the

goals that his prior school had failed in. It was Judge Gorsuch's expectations, not Luke's capabilities, that were de minimis in this case.

Just yesterday, the Supreme Court explicitly and unanimously rejected Judge Gorsuch's "merely more than de minimis" standard. The Court found Judge Gorsuch's standard mischaracterized the intent and language of both Congress and Supreme Court precedent. The Court found in requiring an appropriate public education Congress meant what it said. The Court stated, "When all is said and done, a student offered an educational program providing merely more than de minimis progress from year to year can hardly be said to have been offered an education at all."

Unfortunately, it is likely too late for many of the children with disabilities in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming who have been subjected to the soft bigotry of de minimis expectations for nearly 10 years.

Judge Gorsuch's other IDEA opinions have shifted standards of review and created legal minefields of administrative processes to undermine the education rights of students with disabilities. And Judge Gorsuch's opinions on the rights of adults with disabilities also reflect, rather than challenge, the stereotypes that Congress enacted in Federal disability rights law—rejected in disability rights law.

Congress passed the Americans with Disabilities Act, or ADA, to open doors to the workplace for people with disabilities. But Judge Gorsuch in 2010 held that an employee with multiple sclerosis did not have a disability because she was able to work. He made this holding in spite of both the ADA and the ADA Amendments Act of 2008, where Congress made clear that the ADA provides and has always provided protection to people with MS and that disability is not defined, Catch–22-like, as an inability to work.

Federal disability laws are intended to address not just blatant discriminatory treatment of people with disabilities, but the ways the employment processes, benefits, and buildings have been designed in ways that inherently exclude people with disabilities. This is the basis for the central ADA requirement of reasonable accommodation.

In the case of *Hwang v. Kansas State University*, a professor requested a slight extension of her leave time to return to work when Kansas experienced an H1N1 outbreak that could have risked her life. The university routinely allowed 1-year sabbaticals for other professors, but Judge Gorsuch insisted that Professor Hwang could only extend her leave if she was already entitled to such a sabbatical. The ADA asks not just whether an employee with a disability was offered what she was contractually entitled to, but also whether something more, a reasonable accommodation, is available. Judge Gorsuch ignored that test. Instead, he suggested that Congress was wrong to require leave as an accommodation at all and that leave of over 6 months was inherently unreasonable, no matter what other employees were given.

You may believe that a judge's role is to protect the dignity of all people and especially those of disempowered minority groups. Or you may simply believe that a judge's role is to remain faithful to the clear intent of Congress as expressed in statutes. Either

way, Judge Gorsuch's opinions in disability rights issues do not meet that standard.

[The prepared statement of Ms. Hill appears as a submission for the record.]

Senator KENNEDY [presiding]. Thank you, Ms. Hill.

Senator Hatch, do you have questions?

Senator HATCH. Yes. Professor Turley—I am sorry. Professor Turley.

Professor TURLEY. Yes, sir.

Senator HATCH. You have observed and written about the confirmation process for a long time. Some of my Democratic friends have been saying that the only way to find out what they need to know about Judge Gorsuch is to demand what Justice Ginsburg once called "hints," "forecasts," and "previews" about his future votes or opinions in cases that will come before the Supreme Court.

Now, your testimony is very different. In your written statement, you insist that, "We have a very good idea of who Judge Gorsuch is and the type of Justice he will be."

Now, do you agree with me that results-oriented litmus tests based on specific issues are not the best standard for evaluating the fitness of a Supreme Court nominee?

Professor TURLEY. Absolutely. And when I referred to knowing what type of Justice that Judge Gorsuch will be, I was referring to the fact that he has a well-known jurisprudence; he has a well-known view of the Constitution. He shares that distinction as a nominee with the man he would replace, and that is one of the reasons I believe he will have a lasting legacy.

The reason that Justice Scalia has such a lasting legacy is that he was a relative rarity: He actually changed the Court more than it changed him because he came to the Court with a clear understanding of his jurisprudence.

When I look at Judge Gorsuch, I see someone that, quite frankly, is going to follow his conscience. He is unlikely to be as predictable as many have suggested. I do not think he will be robotic. I think that view, his jurisprudential view, will take him to the left and the right of the spectrum.

What we do know is he is a textualist. That should come as no surprise, and I do not think that is a vice. But what his opinions also show is someone with an intense intellectual curiosity and also an intense independence. I could think of no better possible nominee than that.

I do not want a blind date. I do not want someone who we know nothing about. What we have in Judge Gorsuch is someone who was not just a pedestrian, not participating in these important debates. He got involved, and I respect that. I do not think we should penalize someone for being active in debating these issues.

Senator HATCH. That is a good point. The suggestion has been made in this hearing that concern about the *Chevron* doctrine, which requires deference to executive branch agency interpretations of the law, is just another way of opposing regulation in general. One Democratic Senator even said that without *Chevron*, agencies would not have the authority to address problems at all.

Do you agree with that characterization?

Professor TURLEY. No, I do not. I share Judge Gorsuch's view on *Chevron*. We come from two different places, I think, probably politically. But I think how you view *Chevron* depends a lot on whether you view it from a constitutional standpoint or from an administrative law standpoint. I think I share Judge Gorsuch's view looking at it through the lens of a constitutional standpoint.

Chevron is troubling because it does tend to usurp a traditional role of the courts. It is also tends to usurp a role of this body. I also do not think that the suggestion that if *Chevron* was set aside that all of Rome would burn. I think that Judge Gorsuch made a very good point when he said in one of his opinions, "What do people think is going to happen if we do not have *Chevron*?" What is going to happen is we will be in the same position we were before *Chevron*, which was not a bad position. You had the *Skidmore* case where Justice Jackson, someone that Judge Gorsuch respects a great deal, who maintained that, we have to respect agency opinions, we have to give them great weight. The APA itself, I believe in Section 706, says that you have to defer to that.

So there is not a cliff here that people are suggesting. By moving away from *Chevron*, we would see the courts more heavily involved in the review of agency decisionmaking and also to give more authority back to this body where I believe it should rest.

Senator HATCH. Great. I agree with you.

Ms. Harned, we often speak about the impact of court decisions on the parties to a specific case and beyond. Now, I really appreciated your response in this area, and your comments, because I think they provide an important perspective on this issue. And I am sure you know from observing this process my Democratic colleagues focus only on which party wins or loses or which narrow political interest is advanced by the decision in an individual case.

Now, you seem to have a very different take. Your testimony emphasizes more broadly that clarity about the law and adherence to basic principles such as separation of powers have the most important impact. Now, that is why you have such high praise for Judge Gorsuch's approach not only to making decisions but on writing the opinions that explain those decisions as well.

Now, my view is that the law, not the judge, should determine the outcome of individual cases and the broader impact of those decisions. Do you agree with that?

Ms. HARNED. Absolutely.

Senator HATCH. Well, that was a nice quick answer.

[Laughter.]

Ms. HARNED. There was a good discussion with Senator Tillis about this as well, which is that the separation of powers is important because coming here before you is where my Members, small business owners, are going to have the greatest impact. You are in the light of day with a true public discourse about what the law should be. They are not going to be in every courtroom in the country. They are not going to be in every agency walking the halls, and they need to know that once you all enact a law, the regulation is issued that is appropriately within that statutory framework, it is a law they can rely on, because that certainty is the only way for them to be able to do business. Certainty is a critical component of small business owners' abilities to operate their business.

Senator KENNEDY. Thank you.

Senator HATCH. Thank you.

Senator KENNEDY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. May I ask unanimous consent—we have Ms. McGhee here from Dēmos. May I ask unanimous consent that Dēmos' 2017 report titled "Election Money Resulting Directly from Supreme Court Rulings"; as well as a March 13, 2000, letter from 109 House Members to Chairman Grassley and Ranking Member Feinstein urging this Committee to question Judge Gorsuch about money in politics; and a 2017 Dēmos report titled "Money in Politics, Racial Equity, and the U.S. Supreme Court"; and, fourth and finally, a 2015 Dēmos report titled "Breaking the Vicious Cycle: Rescuing Our Democracy and Our Economy by Transforming the Supreme Court's Flawed Approach to Money in Politics" all be entered into the record.

Senator KENNEDY. Without objection.

Senator WHITEHOUSE. Thank you very much.

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

Senator WHITEHOUSE. Ms. McGhee, welcome. I appreciate that you are here and the work that Dēmos has done to shed some light on the problem of money in politics and the influence that it gives special interest groups. We have kind of an unusual circumstance here in that President Trump originally outsourced the creation of the list from which Judge Gorsuch was selected to a pair of well-known right-wing interest groups. And then the notification to Judge Gorsuch that he describes in his description of the selection process, the opening sentence is, "On or about December 2, 2016, I was contacted by Leonard Leo," who is the head of one of those same special interest groups.

Then it has been reported in the news that the White House outsourced the political campaign on behalf of Judge Gorsuch to those interest groups, and, indeed, we have seen reports of a $10 million political campaign to try to influence the Senate in Judge Gorsuch's favor through a front group, so we do not know who the real donors are. It is dark money that is behind that entire operation. And it was the same front group that spent nearly an equivalent amount of money trying to disrupt the nomination of Judge Merrick Garland. And, finally, we have the Colorado reporting on Judge Gorsuch's friend and, it appears, his patron in the quest for the Tenth Circuit seat, Mr. Philip Anschutz, who is a billionaire, who is also a very big political spender. And all of that I think causes concern to some of us that although the talk may be about Olympian detachment, the actual operation of getting Judge Gorsuch before us has been special interest, dark money politics. And I would like to ask you to react to that.

Ms. MCGHEE. Thank you, Senator Whitehouse. I think you are right to express concern about this, the same way that the American people, including 91 percent of President Trump's own voters, have expressed concern about the role of the Supreme Court in expanding our current big-money system.

Judge Gorsuch had the opportunity over the past couple of days to distance himself from the entire problem of *Citizens United*, either spoken of expansively in terms of the influence of the wealthy

millionaires and billionaires and special interests in our politics to even some of the more narrow concerns.

I was particularly concerned in your exchange, Senator Whitehouse, with the judge when you gave him an opportunity to talk about something that is his predecessor, his potential predecessor's—one of his great North Stars, which is the importance of disclosure in our campaign finance system. And instead of saying clearly that there is a public interest in knowing who is spending millions of dollars to buy influence with our politicians, he was quite evasive and, in fact, to my dismay, raised the idea that disclosure chills speech and even suggested that the $650 million in secret money from society's most powerful, which is what we have seen since *Citizens United*, would be on the same level as the brave civil rights leaders in the *NAACP* case, people who endured violence, bombings, and shootings for their political activism.

And if you do not mind, I just want to read just one sentence from what Senator Scalia said——

Senator WHITEHOUSE. Justice Scalia.

Ms. MCGHEE. Sorry, Justice Scalia said in *Doe v. Reed* about the importance of disclosure, which gives us a sense that he might even be parting with Scalia on this important piece: "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

Senator WHITEHOUSE. My time has expired, Chairman. Thank you very much. Thank you, Ms. McGhee.

Ms. MCGHEE. Thank you, Senator.

Senator KENNEDY. Thank you, Senator.

Chairman GRASSLEY.

Chairman GRASSLEY. Thank you. Thanks to Senator Whitehouse and you for filling in when I had to go vote.

Professor Solum, while many try to argue that originalism is inherently conservative, others have pointed out that originalism has been ascribed to by liberal judges and academics as well. Professor Cass Sunstein at Harvard Law School, for example, once described the last Justice Hugo Black as "a liberal originalist."

Would you agree that originalism is not by itself ideologically or political in nature?

Professor SOLUM. Yes, I would, Chairman Grassley. And if I might just give an example or two, it is absolutely true that much of the interest in originalism at the beginning was generated by critics of Warren Court decisions, and originalism has been associated with conservatives to some extent. But originalism is the idea that we are going to enforce the original meaning of the United States Constitution, and the United States Constitution has implications that both conservatives and progressives, both Democrats and Republicans can welcome. Let me give an example that relates to the question we have just been discussing, the rights of corporations.

Justice Thomas in his opinion in the *McDonald* case says that incorporation of the Bill of Rights can only be justified under the Privileges or Immunities Clause of the United States Constitution.

The Privileges or Immunities Clause is different than the Equal Protection Clause or the Due Process Clause. Those clauses guarantee rights to all persons. The Privileges or Immunities Clause guarantees rights only to citizens, and corporations are not citizens.

Now, this is not a result that corporations will welcome at the State level, where the Fourteenth Amendment applies, but it is an implication of the original public meaning of the Constitution.

Chairman GRASSLEY. Thank you.

Mr. Lamken, you worked with the judge when he was in private practice at Kellogg Huber, and you said you support his nomination to the Supreme Court. Do you think his experience as a trial lawyer would be relevant to his work on the Supreme Court?

Mr. LAMKEN. Yes, I think it is highly relevant. As somebody who was a trial lawyer for many years, the judge has, from what I see, a great respect for the record, great respect for the factual development, whether that record is one that is developed by this body in support of the statutes that it enacts, or it is a record created by the parties at trial. And I think when you are a trial lawyer and you are involved in those, you develop that type of great respect that is critically important to really understanding what is going on in the cases, to understanding not merely what the abstract principles of law are, but how they are affecting people, and then how the process plays on the trial court.

I think practical experience as a trial lawyer is something that is not as common among our Supreme Court Justices now as it should be, and I think that is a good perspective he would bring to bear.

Chairman GRASSLEY. Okay. Ms. Harned, my last question. We have heard a lot during these hearings about the rule of law. We have heard in particular about how it is the role of judges to enforce laws as they have been written by the Congress. Can you explain why it is important to your clientele, small businessmen and -women, for judges to interpret statutes according to the text?

Ms. HARNED. Right, because small business owners need to know what the rules of the road are, what is expected of them, and not have to worry that, because of one judge's decision, a practice that they had been doing that they thought was perfectly legal one day is now unlegal—or illegal. And so that is why small business owners are so committed to the way that the separation of powers works, where legislators legislate and judges tell us what the law is, and that is why we have so much respect for Judge Gorsuch's work.

Chairman GRASSLEY. Okay. Thank you. I yield back my time.

Senator FLAKE [presiding]. Senator Coons.

Senator COONS. Thank you, Senator Flake.

Ms. Hill, if I might, earlier today we heard testimony, compelling testimony, from Jeff Perkins about his son, Luke, and about the consequences for Luke and his family of Judge Gorsuch's perspective in his opinion in the Tenth Circuit, and then, pointedly, the Supreme Court disagreed with Judge Gorsuch's reasoning. I believe the goal of laws passed by Congress, like the ADA and the IDEA, is access, opportunity, and participation, not isolation and segregation.

I would be interested, Ms. Hill, both Judge Gorsuch yesterday and Judge Tacha today insisted that Judge Gorsuch was bound by precedent, both Circuit and Supreme Court, to set the standard under the IDEA as "merely more than de minimis." Are they right?

Ms. HILL. I do not believe so. Of course, the Supreme Court yesterday indicated that it was not correct to approach *Rowley* or interpret *Rowley* as meaning that the standard was merely more than de minimis; rather, the standard was for meaningful and appropriate education, just as Congress had said that it was.

In addition, I looked more closely at the *Urban* case. That was the case that Judge Gorsuch cited for the de minimis standard, which, by the way, still did not use the word "merely." In *Urban*, there was no dispute about whether sufficient services had been provided for this child. There was a dispute about whether a procedural requirement of the IDEA had been followed, and whether that failure to follow the procedural requirement had created a substantive violation.

To the extent that there was no argument over whether the free appropriate public education had been provided, any argument about what the standard for free appropriate public education was is largely dicta.

Senator COONS. Thank you, Ms. Hill.

Mr. Gallagher, if I might, in a 2013 case—I think it is *New Mexico Off-Highway Vehicle v. U.S. Forest Service*—the Sierra Club attempted to intervene in a case attacking the Forest Service rule, and the Court allowed you to participate. Judge Gorsuch dissented and would not have allowed Sierra Club participation in the case, even though none of the litigants opposed your participation.

In another case in 2011, Judge Gorsuch voted to block another environmental group from litigation to assert its interests.

Why do you think it is important that interest groups like the Sierra Club be allowed to participate? And how do you think Judge Gorsuch's position would affect advocates' ability to be engaged on litigation around the environment?

Mr. GALLAGHER. Thank you, Senator. Right now, when President Trump and his adviser Steve Bannon are threatening to dismantle the EPA, and when we have a new Administrator of the EPA, Scott Pruitt, who essentially eviscerated environmental enforcement while the Attorney General of Oklahoma, it is critical that citizens be able to enforce environmental laws. This body legislated citizens' rights to enforce environmental laws. There are citizen suit provisions in all of the major environmental laws.

If we cannot get access to court and Mr. Trump and Mr. Pruitt are not going to protect our drinking water, who are we going to call?

Senator COONS. Thank you, Mr. Gallagher.

Ms. Graves, in *Strickland v. UPS*, Judge Gorsuch's Tenth Circuit colleagues found that a woman had shown enough evidence of discrimination, discrimination based on sex, to have a jury rule on her case. The woman had multiple co-workers testify she was treated worse than her male co-workers. Though the law required the court to look at the evidence in the light most favorable to the woman, Judge Gorsuch again dissented.

Can you tell us more about this case and what it says about Judge Gorsuch's approach to deciding these opinions?

Ms. GRAVES. Sure. Thank you, Senator Coons. I think that the *Strickland* case is a good example here of the concern that we have when Judge Gorsuch says he just applies law to facts, because here the real issue was that there were a lot of facts, and these facts were disputed, in fact. And when facts are disputed, the thing to do is have the jury decide, have the jury determine and resolve the facts. Here, despite a lot of evidence that she should have been able to continue her claim, Judge Gorsuch said, no, no, no, no, that is not enough.

And so in that case, that is an example of, yes, he was applying the law to the facts, but the jury itself is the one who is supposed to resolve the facts.

Senator COONS. Thank you, Ms. Graves.

Thank you, Mr. Chairman.

Senator FLAKE. Thank you.

Senator KENNEDY.

Senator KENNEDY. Thank you, Mr. Chairman.

Ms. McGhee—is it "McGhee" or "McGee-hee"?

Ms. MCGHEE. McGhee.

Senator KENNEDY. McGhee.

Ms. MCGHEE. Thank you.

Senator KENNEDY. I listened to your testimony about your criticism of Judge Gorsuch and *Citizens United*. Tell me what your complaint is with respect to Judge Gorsuch and *Citizens United*. Just briefly.

Ms. MCGHEE. Sure, absolutely. First of all, we believe that based on his record in two cases—*Hobby Lobby* and *Riddle v. Hickenlooper*—that you have a recipe for striking down some of our last remaining protections against big money. He went out of his way in Hickenlooper——

Senator KENNEDY. I do not mean to interrupt you, but I have only got 5 minutes.

Ms. MCGHEE. Okay.

Senator KENNEDY. I understand that. Do you really expect a nominee for the U.S. Supreme Court, whether he or she is nominated by a Democratic President or a Republican President, to come before the United States Judiciary Committee and talk about what is good policy or bad policy?

Ms. MCGHEE. Fortunately, he does not have to get into policy to just talk about enduring democratic principles. And I also think that the Heritage Foundation, the number of right-wing organizations that are anti-campaign finance reform that have backed his nomination for the Court would be surprised to learn that he was at all ambiguous about *Citizens United*, which is one of the most important court cases in recent memory and where all of the principles around grandly interpreting the First Amendment to give and protect the rights of millionaires and billionaires to spend unlimited amounts was just a continuation of a set of ideological jurisprudence that I would be surprised to hear him part from, and he did not when he had the opportunity.

Senator KENNEDY. I think I understand how you feel about *Citizens United*, but I want to understand your criticism of Judge

Gorsuch as a nominee for the U.S. Supreme Court. You are criticizing Judge Gorsuch for not coming before this body and offering a policy preference in terms of campaign finance in elections in America?

Ms. MCGHEE. I am not criticizing the judge. I am saying that he had an opportunity to say basic principles about our democracy and upholding an interpretation of the First Amendment that would protect a vision of one person, one vote. He was asked multiple times about many different issues concerning campaign finance reform, including cases where he went out of his way to write concurrences on majority opinions that put into doubt his opinions in future cases about issues such as the scrutiny level for campaign contributions, which is to date, we believe, a matter of settled law, and the very possibility of moving into corporations giving direct contributions to candidates based on his concurrence in *Hobby Lobby*.

Senator KENNEDY. And you would prefer to have a nominee who agrees with you on those policy issues?

Ms. MCGHEE. I would prefer to have a nominee who was open to considering the facts, and we have seen that since *Citizens United*, the facts have shown that some of the basic premises—the idea that independent spending is actually independent and cannot corrupt, the idea that disclosure is real—have been proven false.

Senator KENNEDY. All right. I am going to put you down as doubtful on *Citizens United*.

Ms. MCGHEE. Thank you, Senator.

Senator KENNEDY. Ms. Hill, how do you think judges ought to decide cases? Could you turn your mic on for me?

Ms. HILL. I think judges should decide the cases based on the law as expressed by Congress, interpreted by the agencies, and applied to the facts in front of them.

Senator KENNEDY. What if the agencies got it wrong?

Ms. HILL. If the agencies got it wrong, there are administrative procedures processes through which to challenge those and correct——

Senator KENNEDY. Okay. Do you think that a party's wealth or status or power should have any effect whatsoever on the outcome of a case?

Ms. HILL. No, I do not.

Senator KENNEDY. Okay. Thank you, Mr. Chairman. I yield back my time.

Senator FLAKE. Thank you.

Before going to the next panel, let me just ask a couple of questions.

Ms. Harned, your organization promotes small business, obviously, and regulation has a little to do with the success or failure of small business. What have you seen over the years with regard to decisions by the Supreme Court or other courts that has impacted the ability of small business to succeed?

Ms. HARNED. Right. Well, that has been—really over the last several decades, we continue to see an increasing regulatory state, and in large part that is because of agency deference that courts—or deference courts are giving to agencies, the *Chevron* doctrine. And we have seen this firsthand with a number of cases in which we have gotten involved. I have several referenced in my testimony

where, because of that agency deference, small business owners—the interpretation of the regulation by the agency governs, and as a result, a small business owner is sued and out millions of dollars in one case, the *Nack v. Walburg* case that I talk about here.

But, more importantly, more broadly, on the regulatory state generally, small business owners do bear the disproportionate burden of regulation on their business as compared to their larger counterparts. It has been a primary concern, the reason they have not been able to grow over the past 9 years. And so that is why we are so committed and so encouraged to see that Judge Gorsuch recognizes, as he said in his testimony, raised his hand to the Supreme Court and said, look, *Chevron* deference, this may be a time where we need to revisit that, because we do think it is responsible for increasing the regulatory state in this country.

Senator FLAKE. All right. Thank you.

Mr. Turley, I would like your thoughts kind of on that similar theme. With *Chevron* deference, certainly Judge Gorsuch has expressed some skepticism about it, to put it mildly, I hope. But with regard to technology, which is an increasing percentage or share of our economy, what we have seen over the past several years is you have one administration whose agencies will regulate in a certain way, and the new administration comes in with maybe a completely different idea. We just dealt with the Congressional Review Act on certain tech regulations, internet regulations, just a few minutes ago on the floor. And then the next administration might come in with something completely different. One thing that small business and large business, any business, cannot stand is uncertainty moving ahead.

With *Chevron* deference, looking back for the Congress to have maybe a more balanced or more predictable application of statutes which will govern regulation, is that a better way? What do you say?

Professor TURLEY. I do think it is a better way to move beyond *Chevron*. I have been a critic of *Chevron* for many years. I am a particular critic of Brand X, which is the subject of one of these opinions. I thought the judge was right on that one. A lot of people do not realize that Brand X says that an agency can essentially negate the legal interpretation of a Federal court, and Judge Gorsuch appropriately noted that he thought that courts interpret the law after *Marbury v. Madison*, but that is how *Chevron* works. As I have written, it serves as the *Marbury* of the administrative state saying that they can be the final word.

I think what you are seeing in our system is a dangerous shift of the center of gravity. This is a tripartite system that was designed to have three branches held together by a type of inverse pressure in a fixed orbit that Madison set. Yet, we have this rising fourth branch of administrative agencies.

I happen to identify with many people in those bureaucracies because they are dweebs like me. They have advanced degrees. They are sort of wonky. But the fact is that we have a fourth branch that I think is a dangerous change in our system, one that we are not having a debate over. *Chevron* has fueled that change. If we did not have *Chevron*, we would largely go back to the conditions of cases like *Skidmore* where the courts gave a lot of deference, even

without *Chevron*. You have the APA which requires deference to agencies. What it would do is allow judges to rule on what the law means.

By the way, apropos of your question, *Chevron* was actually a case that was a victory for Judge Gorsuch's mother. This was actually a victory of Republicans that were trying to reverse measures that were put into place by a previous Democratic administration and used administrative authority to do that.

So I would caution those that have suggested that this is going to be an apocalyptic moment. What it would do, if we went beyond *Chevron*, is return us to a position closer to the design of our Government.

Senator FLAKE. Well, thank you. My time is up and I believe the time for the panel. We will go on to the next panel. Thank you for your service.

We will call the next panel, if you want to set the nameplates. It will consist of Ms. Clarke, Mr. Kirsanow, Ms. Warbelow, Ms. Fisher, Ms. Miller, Ms. Smith, Professor Marshall, Professor Meyer, Ms. Phillips, and Professor Jaffer.

If you will please stand and raise your right arm.

[Witnesses sworn.]

Senator FLAKE. Thank you. Please be seated.

Kristen Clarke is the president and CEO of the Lawyers' Committee for Civil Rights Under Law.

Peter Kirsanow is a partner with the firm Benesch Labor Employment Practice Group and is serving his third term on the U.S. Commission for Human Rights—or for Civil Rights, I am sorry.

And Sarah Warbelow is the legal director for the Human Rights Campaign.

Alice Fisher is a partner in Latham and Watkins' Washington, DC, office and is a member of the firm's Executive Committee. From 2005 to 2008 she served as assistant Attorney General in charge of the Criminal Division at the Department of Justice.

Amy Miller is the president and CEO and founder of Whole Woman's Health.

Hannah Smith is senior counsel at Becket. She clerked for then-Judge Alito on the Third Circuit Court of Appeals, for Justice Clarence Thomas, and then for Justice Alito on the Supreme Court.

Professor William Marshall is the William Rand Kenan, Jr., distinguished professor of law at the University of North Carolina.

Tim Meyer is a former law clerk for Judge Gorsuch from 2007 to 2008. He is now professor of law and Enterprise scholar at Vanderbilt Law School.

Sandy Phillips is the mother of Jessica Ghawi——

Ms. PHILLIPS. Ghawi.

Senator FLAKE [continuing]. Who was—thank you. Ghawi, got it. Thank you. Who was tragically killed in the 2012 shooting at the Aurora, Colorado, movie theater.

Jamil Jaffer is a former law clerk for Judge Gorsuch from 2006 to 2007. He currently serves as adjunct professor, National Security Institute founder, and director of the Homeland Security law program at the Antonin Scalia Law School at George Mason University.

I welcome you all to the Committee and look forward to hearing your testimony. This will be 5 minutes each. If you can summarize that way, we will proceed after that with 5-minute rounds.

But let us go ahead, Ms. Clarke.

STATEMENT OF KRISTEN CLARKE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC

Ms. CLARKE. I want to thank the distinguished Members of this Committee for the opportunity to testify today on behalf of the Lawyers' Committee for Civil Rights Under Law. We are one of the Nation's historic, nonpartisan civil rights organizations with the unique mission of mobilizing lawyers across the country to provide critical pro bono support to advance our work.

The Supreme Court occupies a central place in American democracy. And for African Americans and other minorities, the Court has been a crucial forum for seeking equal justice under law. Historically, minority groups have looked to the Court to vindicate their constitutional and civil rights.

We have reviewed the civil rights record of Judge Neil Gorsuch, as we have done for all Supreme Court nominees for the last several decades. We do not believe that the record is sufficient to conclude that he meets our standard, which requires demonstration of a profound respect for the importance of protecting civil rights afforded by the Constitution and the Nation's civil rights laws.

Judge Gorsuch's views reflect a very narrow definition of what constitutes a civil right, and he has deep skepticism about the importance of protecting those rights in the courtroom. Our concerns are especially pronounced with respect to the question of whether he will fairly interpret and apply one of our Nation's most important civil rights law, the Voting Rights Act.

In 2013, the Supreme Court issued a decision that gutted the act in *Shelby County*, *Alabama v. Holder*. At issue in *Shelby County* were the Section 5 preclearance provision of the Act that helped identify and successfully block hundreds of unconstitutional and discriminatory voting changes and the Section 4—Section 5 provision that determined where the law applied. A closely divided Court ruled that Section 4 was unconstitutional, a decision which eviscerated the heart of the Voting Rights Act.

Witnesses have drawn parallels between Judge Gorsuch and the late Justice Scalia. During oral argument in *Shelby County*, Justice Scalia referred to Congress' renewal of the Voting Rights Act as the, quote, "perpetuation of racial entitlement." That was a startling perspective on a law that has ensured that millions of American citizens have not, merely because of the color of their skin, been unlawfully deprived of the most sacred right in our democracy.

What is most troubling about the Court's decision in *Shelby County* is that the carefully considered judgment of Congress was set aside. In 2006, the Senate voted to renew Section 5 by a vote of 98–to–0 after documenting overwhelming evidence of ongoing discrimination against minority voters.

It is unclear whether Judge Gorsuch appreciates Congress' broad enforcement powers under the Fourteenth and Fifteenth Amend-

ments and unclear whether he brings awareness of the widespread voting discrimination and voter suppression that we continue to face today. The right to vote is too important. We must understand where Judge Gorsuch—whether Judge Gorsuch is committed to fairly interpreting and preserving what remains of the Voting Rights Act.

Equally important are questions concerning Judge Gorsuch's tenure at the U.S. Department of Justice between 2005 and 2006 when he occupied the role of Principal Deputy Associate Attorney General. As a career attorney at the Civil Rights Division of the Justice Department during that time, I am personally aware of issues that led to the politicization of the agency's civil rights work. Those views were substantiated in a July 2008 Inspector General's report which found that politicization of the Civil Rights Division's hiring practices and its work violated Federal law and Justice Department policy.

We must not turn a blind eye to the fact that Judge Gorsuch had some responsibility for overseeing the division during this time. The materials provided by Judge Gorsuch, together with his Senate questionnaire, do not clarify or elucidate the extent of his involvement and the significant problems that tarnished the work and integrity of the Civil Rights Division at this time. I urge the Senate to seek answers to these important questions.

Before I conclude, I want to say a brief word about Judge Gorsuch's record on criminal justice issues. Criminal justice concerns remain at the forefront for many African American, Latino, and minority communities. Our review shows that he takes an unusually narrow view of the constitutional rights of defendants, particularly under the Fourth Amendment. Judge Gorsuch has also shown extreme deference to police officers in excessive-force decisions.

In closing, I must observe that this nomination arises at a tumultuous moment in our Nation's history. We have seen intensifying efforts to restrict the rights of minority voters, unconstitutional policing practices, rising xenophobia, religious intolerance, and other circumstances that make clear the fragile state of our democracy. Our Nation deserves a Supreme Court Justice who will interpret the Constitution and civil rights laws in a way that recognizes that discrimination is both ongoing and a threat to democracy and who is committed to ensuring equal justice under law for all Americans.

Based on the record to date, I am not able to support the nomination of Judge Gorsuch to the Supreme Court today. I respectfully request that the Lawyers' Committee for Civil Rights Under Law's report on the nomination of Judge Gorsuch and accompanying letter signed by more than 100 of our board Members expressing concern regarding the nomination be entered into the record.

Senator FLAKE. Without objection.

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

Ms. CLARKE. Thank you.

[The prepared statement of Ms. Clarke appears as a submission for the record.]

Senator FLAKE. Thank you, Ms. Clarke. Mr. Kirsanow.

STATEMENT OF PETER KIRSANOW, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS, AND PARTNER, BENESCH, FRIEDLANDER, COPLAN AND ARONOFF, CLEVELAND, OHIO

Mr. KIRSANOW. Thank you, Mr. Chairman, Members of the Committee. I am Peter Kirsanow, member of the U.S. Commission on Civil Rights and partner at Labor Employment Practice Group of Benesch Friedlander. I speak as one member of the Commission on Civil Rights, not necessarily on behalf of the commission as a whole.

The U.S. Commission on Civil Rights was established pursuant to the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to discrimination and denials of equal protection and in furtherance of that clearinghouse function and with the help of my assistant, I have reviewed the nearly 200 cases related to civil rights that Mr.—that Judge Gorsuch had authored or participated in at the Tenth Circuit.

These opinions relate to, among other things, title 7, ADA, ADEA, IDEA, equal protection clause, and a host of other provisions related to civil rights. And our examination reveals that Judge Gorsuch's approach to civil rights cases is consistent with generally accepted textual interpretation of the relevant statutory and constitutional provisions, as well as governing precedent. His opinions are squarely within the judicial mainstream when it comes to civil rights.

Of the opinions we examined related to civil rights that Judge Gorsuch participated in, he was in the minority in only 5 percent of those cases. In 43 cases he was on a three-judge panel in which the two other panel members were appointed by Presidents of the Democratic Party, and in 94 percent of those cases he joined the majority opinion or concurred in the result.

A useful example of Judge Gorsuch's mainstream textualism, mindful of the limits of the judiciary and the prerogatives of the Legislature is his dissent in *TransAm Trucking v. Administrative Review Board* where a majority of the panel found that a statutory provision that provided that an employer may not discharge an employee who refuses to operate a vehicle where that employee has a reasonable apprehension of serious bodily harm actually meant that the employee may not be discharged if he operates the vehicle, contrary to employer instructions. Judge Gorsuch applied the plain text of the statute in a very precise manner and noted that the employee in question had done the opposite of the statutory privilege; that is, he had operated the vehicle, not refused to operate the vehicle.

Similarly, Judge Gorsuch's reasoned deference to precedent and his interpretation of the text of the governing statutes yields cases and record on civil rights that is consistent with prevailing civil rights norms, for example, *Carrera v. Tyson Foods*. Judge Gorsuch upheld summary judgment against a plaintiff in a hostile environment/sexual harassment case where there was no evidence that there was a hostile environment. The evidence proffered was that supervisors were standoffish. That standing alone does not constitute a hostile environment. Moreover, the defendant had immediately discharged the employees who had made provocative gestures and immediately transferred plaintiff upon her request.

Similarly, in *Gaff v. St. Mary's Regional Medical Center*, Judge Gorsuch upheld summary judgment in a retaliation claim where there was no evidence that the hospital had fired the plaintiff for reporting sexually explicit remarks made by a coworker as opposed to firing plaintiff because the plaintiff had threatened to shoot such coworker.

As pertains to religious discrimination cases, Judge Gorsuch's record shows that he takes First Amendment issues soberly and seriously, regardless of whether or not the issue at hand may be trivial to some, may be obscure, or the plaintiff is unsympathetic or the plaintiff's beliefs may be at odds with prevailing societal norms.

An example is *Yellowbear v. Lampert* in which Judge Gorsuch upheld the free exercise rights of an unsympathetic plaintiff who had murdered a little girl, which plaintiff had been denied his right to access a sweat lodge pursuant to his religious beliefs. Judge Gorsuch has also noted that wherefore protections might be available to individuals and families who are given the Hobson's choice of either abiding by their sincerely held religious beliefs or saving their business.

In sum, Judge Gorsuch's approach to civil rights cases is consistent with the norms in jurisprudence. His record shows that he is a careful and exacting judge who has great respect for the constitutional order, the rule of law, the rule of Congress, and the corresponding limits on judicial authority. He is consistent with mainstream textual interpretation of the governing statutes, and, in addition to that, all of his record shows that he will faithfully and carefully apply the law to protect the civil rights of all Americans.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirsanow appears as a submission for the record.]

Senator FLAKE [presiding]. Thank you, Mr. Kirsanow. If you are wondering where my colleagues are, there is a vote going on right now. Chairman Grassley will be back in a minute and I will go and vote, but I assume some other Members will come in as well.

Ms. Warbelow.

STATEMENT OF SARAH WARBELOW, LEGAL DIRECTOR, HUMAN RIGHTS CAMPAIGN, WASHINGTON, DC

Ms. WARBELOW. Thank you. On behalf of the Human Rights Campaign, the Nation's largest civil rights advocacy organization for lesbian, gay, bisexual, transgender, and queer people, I am honored to be here before you today representing our nearly 2 million members and supporters nationwide. Unfortunately, I am disappointed that the topic for discussion is President Trump's nominee to the Supreme Court, Mr. Neil Gorsuch.

LGBTQ people are no strangers to the Supreme Court. We understand the power of the Court to affirm or deny our most basic rights. Jim Obergefell and his partner John Arthur had to be medivacked to a tarmac in Maryland in order to marry before John died from ALS because their home State of Ohio refused to allow them a marriage license.

Their heartbreak did not end on that Maryland tarmac. The State of Ohio attempted to erase their marriage by refusing to place Jim's name as a surviving spouse on John's death certificate.

By a narrow 5–4 ruling, the Supreme Court validated Jim and John's relationship and extended marriage equality nationwide. By his own words, Judge Gorsuch admitted he would have forced same-sex couples to pay the price of inequality for decades to come. This is why Judge Gorsuch cannot be given a lifetime appointment to the Supreme Court.

Time and time again, Judge Gorsuch has employed a dangerous brand of originalism that ignores the essential context and values of each case and the lives that they touch. His record and statements place him squarely in the mold of Justice Antonin Scalia, who consistently demeaned and denied the dignity of LGBTQ people from the Bench. Judge Gorsuch has directly questioned the Court's recognition of the fundamental right to personal autonomy that has served as the keystone for multiple LGBTQ rights cases.

Distressingly, Judge Gorsuch accepted a quote from Justice Scalia in its entirety, equating marriage equality to bestiality and made no effort to distinguish marriage, one of our society's most sacred traditions, from criminal antisocial behavior.

Despite records that Judge Gorsuch's personal friends with LGBTQ people, his choice to embrace this line of reasoning reveals a level of indifference to the LGBTQ community that should be disqualifying for an individual to be appointed to the U.S. Supreme Court.

During his time on the bench, Judge Gorsuch ruled against Rebecca Castle, a transgender woman working for a community college. After being rehired for a second term, Rebecca transitioned and began to use the women's restroom. Halfway through the semester, the school informed her she would have to begin using the men's restroom based on safety concerns. Rebecca was terminated because she refused to subject herself to the dangers of using a men's restroom.

As Justice Kennedy made clear in *Romer v. Evans*, false justifications may never be used to cloak bare animus. That is what happened in *Rebecca's* case. The Supreme Court Justices must be able to discern legitimate government interests from clear hostility to vulnerable communities.

Judge Gorsuch's other rulings such as *Hobby Lobby*, while not directly addressing the LGBTQ community, have been used to blatantly defend discrimination against LGBTQ people. Amy Stevens is one of these people. After working for a for-profit funeral home for nearly 6 years, she informed the owner she would be transitioning when she returned to work and would be dressing consistent with the women's dress code. Ignoring the employee's strong record, the funeral home owner stripped her of her job based on his belief that it is unacceptable to be transgender. In providing the funeral home a pass from complying with Title VII, the judge in this case adopted Judge Gorsuch's views regarding moral culpability, which callously disregards harm to real people. If this reasoning is widely adopted, it will undermine our core civil rights laws, allowing pervasive discrimination not only against the LGBTQ community but Americans widely.

Areas of law that the majority of Americans view as settled, including marriage equality, are being litigated and debated by groups who are emboldened that a Justice like Gorsuch will reopen

settled law. The Supreme Court will be asked to hear cases such as those that could decide whether a public school counselor from Mississippi can turn away LGBTQ youth in need, whether City of Houston employees may be stripped of their spousal benefits, or whether moms like Marisa and Terrah Pavan must both be listed on their daughter's birth certificate.

We might not agree with every decision a Supreme Court Justice may make, but we must believe that their commitment to reaching impartial judgments based on fact, not political ideology or bias. And they must agree that LGBTQ have a fundamental right protected by the Constitution and that we as individuals and a community are entitled to equal treatment under the law. We need a Justice who recognized our basic equality and shared humanity. Judge Gorsuch has never met this bar, and that is why the Human Rights Campaign opposes his nomination to the Supreme Court.

[The prepared statement of Ms. Warbelow appears as a submission for the record.]

Senator FLAKE. Thank you, Ms. Warbelow.

Ms. Fisher, I will have to excuse myself to vote, but Senator Hirono is here. Thank you.

STATEMENT OF ALICE FISHER, PARTNER, LATHAM AND WATKINS, WASHINGTON, DC

Ms. FISHER. Thank you, Senator Flake. Thank you, Senator Hirono.

It is an honor to be here today. It is a privilege to be able to testify in support of my friend and former colleague Judge Neil Gorsuch. It has been a privilege over the years to watch his career unfold. I had the pleasure of meeting him in 1991 when we both had our summer jobs in law school. He was in his third year of law school, I was getting out of my second year in law school, and we worked together as summer associates that summer in 1991. It may make me the longest person that knew him today—that is who testifying.

Of course, I was struck by his brilliance and his keen intellect, but what was more striking was his character and his integrity and his courtesy and his kindness. Every day he would walk into work and he would stop and he would talk to people, everyone in the office, ask them how they were doing, ask them about their lives, about their troubles. And he was so generous with his time and his consideration for others. It was almost like it was an unlimited reserve of courtesy, kindness, and with good humor to boot.

I was the beneficiary of that, and I am forever grateful for the time that he took with me early on in my legal career—to spend time counseling me, mentoring me, helping me. It was almost as if he cared as much about my success as he did about his own. And I was not alone as a recipient of the way he treated people. I will be forever thankful for his support. That is just the man that he is.

He has been, through the years, as you can see, driven by his devotion to his country and his devotion to public service, and he comports himself with deep humility when he comes into public service. And I can remember our conversations about when he was

entering public service and how much that meant to him to have the ability to do that.

He has a keen intellect, of course, but he holds himself to the highest standard of excellence—in his unwavering commitment to the law—and you have heard him and many others talk about that. Of course, he is an adoring husband to Louise and a devoted father and a devoted friend to many.

As I have watched Neil—Judge Gorsuch—for many years, I find him a man of the highest personal integrity. He has a commitment to fairness and decency that will serve the Supreme Court well, and I am hopeful that he is confirmed. Thank you.

[The prepared statement of Ms. Fisher appears as a submission for the record.]

Senator HIRONO [presiding]. Thank you.

Next, we have Amy Miller. Ms. Miller.

STATEMENT OF AMY HAGSTROM MILLER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FOUNDER, WHOLE WOMAN'S HEALTH, CHARLOTTESVILLE, VIRGINIA

Ms. MILLER. Thank you. Chairman Grassley, Senator Feinstein, and Members of the Committee, I am very honored to speak with you today.

My name is Amy Hagstrom Miller. I am the founder and CEO of Whole Woman's Health, a group of women's health clinics that provide comprehensive reproductive services, including abortion care. I am here today on behalf of abortion providers, women's health advocates, and the people we serve all across the country who deserve access to quality healthcare delivered with dignity and respect.

We are gravely concerned about the nomination of Judge Gorsuch to the U.S. Supreme Court. In fact, Whole Woman's Health joined 54 other reproductive health rights and justice organizations in a letter to the Senate opposing Judge Gorsuch's nomination.

In our clinics, we offer holistic care for women that includes caring for their heart, their mind, and their body. We envision a world where every woman who has decided to end a pregnancy will be respected and where she will have the information she needs and the quality care she deserves.

We were the lead plaintiff in last year's landmark Supreme Court case *Whole Woman's Health v. Hellerstedt* and witnessed how decisions made at the high court directly impact the lives of women. I know what happens when politicians find devious ways to deny women's constitutional rights and why it is so important to have independent jurists who respect precedent and the rule of law.

Roe v. Wade, the 1973 decision that guaranteed the right to abortion and the right to privacy, has been settled law for more than four decades and has been reaffirmed repeatedly by the Supreme Court. Nevertheless, that has not stopped legislators across the country from putting roadblocks in front of women seeking abortion care. More than 330 have been passed since 2010.

Nowhere was the impact of these laws more evident than in the State of Texas, where antiabortion legislators passed a law in 2013

that forced over half of the State's clinics to shut down. The law forced women to drive hundreds of miles, even across State lines, to access their right to safe and legal abortion. In some cases, the hurdles were so high women simply took matters into their own hands.

I will never forget the woman who called from South Texas right after the law went into effect. We told her our clinic was shuttered and she now had to drive 250 miles each way to San Antonio. She told us there was no way she could take 2 days off work, find child care and the money to drive that far. She said, "I will tell you what is in my medicine cabinet, and can you please tell me what to use to do my own abortion?"

In our country, where abortion has been legal for more than 40 years, no woman should be forced to take matters into her own hands, nor should she fear criminalization or jail time if she does. We need Justices on the Bench who oppose unnecessary obstacles to our constitutional rights. Neil Gorsuch is not that Judge.

I also remember the woman who called from West Texas where every single clinic had been shut down. She was a single working mother with three children. We helped her to find a clinic, raise money for her abortion, child care, transportation, and lost wages. By the time she made it to a Dallas clinic 8 weeks later, it was too late for her to have an abortion in the State of Texas. We need Judges on the Court who support our constitutional rights no matter our zip codes. Neil Gorsuch is not that Judge.

Last year, we took Texas to the Supreme Court and, in its ruling, the Court called out these and other clinic shutdown laws for what they are: sham laws that create obstacles to care with no medical basis behind them. Women need to know that if their rights are once again on trial, they will be decided by Justices who are independent and not beholden to an ideological agenda. Judge Gorsuch has refused to answer basic questions about his stance on *Roe*, *Whole Woman's Health*, or the right to privacy. Yet we know in the *Utah Planned Parenthood* case, he sided with politicians using misinformation and false claims to defund women's health services. And in the *Hobby Lobby* contraception case, he supported the notion that corporations are people.

Judge Gorsuch's positions raise concerns about his ability to be open minded, fair, and guided by the Constitution, and not his own ideology or personal beliefs. Your decision on this nomination will have profound impact on all of your constituents. Everyone loves someone who has had an abortion, and we all want the people we love to be safe and treated with respect, compassion, and dignity. I urge you to keep this in mind as you consider the awesome responsibility of entrusting a lifetime appointment to the U.S. Supreme Court.

Thank you very much.

[The prepared statement of Ms. Miller appears as a submission for the record.]

Chairman GRASSLEY. Thank you. And Senator Hirono, thank you for filling in so we could keep it going. Thank you very much.

Now, Ms. Smith.

STATEMENT OF HANNAH SMITH,
SENIOR COUNSEL, BECKET, WASHINGTON, DC

Ms. SMITH. Thank you, Mr. Chairman, Senator Feinstein, and Members of the Committee. My name is Hannah Smith, and I am senior counsel at Becket. Our firm is dedicated to protecting religious liberty for people of all faiths.

As Judge Gorsuch has said, religious liberty law, quote, "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this Nation's long-held aspiration to serve as a refuge of religious tolerance," end quote.

To prepare for this hearing, I have reviewed all 40 cases related to religious liberty in which Judge Gorsuch either wrote an opinion or cast a vote. My assessment is that Judge Gorsuch, as an Associate Justice of the Supreme Court, would be a jurist committed to protecting this vital freedom. None of his religious liberty opinions has ever been reversed by the Supreme Court. In fact, every time the Supreme Court reached the merits in one of these cases, it vindicated Judge Gorsuch's position even where he had dissented.

An examination of these cases reveals that Judge Gorsuch is also a remarkable consensus-builder. When he sat together with judges who were appointed by a Democratic President, those judges unanimously agreed with him in 80 percent of those cases. Overall, he was part of a unanimous decision almost 90 percent of the time, and when he actually authored the religious liberty decision for the court, he produced a unanimous decision every single time, 100 percent.

This is a striking record of coalition-building in an area of jurisprudence that can be quite contentious. I will focus my remarks on two areas: first, Judge Gorsuch's prisoner cases; and second, his decisions involving the Religious Freedom Restoration Act.

First, Judge Gorsuch has demonstrated repeatedly that he applies the law fairly to protect religious minorities and incarcerated persons, some of the most politically powerless in our society. For example, in *Yellowbear v. Lampert*, Judge Gorsuch addressed a case where a Native American prisoner had requested access to a sweat lodge for religious purposes. For a unanimous panel, Judge Gorsuch authored an eloquent opinion in which he said, quote, "While those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has repeatedly instructed that the sincere exercise of religion should not be among them—at least in the absence of a compelling reason," end quote. Here, there was no such compelling reason.

Judge Gorsuch recognized that, especially in the prison context, it is, quote, "easy for governmental officials with so much power over inmates' lives to deny capriciously one more liberty to those who have already forfeited so many others," end quote. Therefore, he wrote, that the Government must prove it has a good reason for denying religious liberty by offering much more than the Government's, quote, "bare say-so," end quote.

On this point, Justice Sonia Sotomayor quoted *Yellowbear* in her concurrence in another prisoner case, *Holt v. Hobbs*. There, a unanimous Supreme Court ruled in favor of a Becket client, a Muslim prisoner who sought to grow a religiously required beard.

In two other prisoner cases, Judge Gorsuch voted in favor of a Muslim prisoner seeking access to religiously required meals and reversed a lower court decision failing to adequately consider a pro se prisoner's request for a kosher diet.

Second, regarding his RFRA cases, in *Hobby Lobby* and *Little Sisters of the Poor*, the Government tried to force religious ministries and family owned businesses to change their health plans in a way that would violate their faith or else pay millions of dollars in IRS penalties. Applying RFRA, Judge Gorsuch voted in favor of the religious objectors, and the Supreme Court vindicated his position in both cases.

Now, some have tried to frame these cases as an irresolvable conflict between religious liberty and women's rights. Not so. In the *Little Sisters* case at the Supreme Court, the Government conceded that it could still achieve its interests by allowing women to access contraceptive services on the Government's own exchanges, through another government program, or through other insurance plans. The government's concessions exposed an important truth: No real conflict existed between contraceptive access and religious liberty.

In closing, Judge Gorsuch has a consistent record of carefully applying the relevant statutory and constitutional provisions, as well as governing precedents, without regard to a particular ideological outcome. His jurisprudence demonstrates an evenhanded application of the principle that religious liberty is fundamental to freedom and to human dignity and that protecting the religious rights of others, even the rights of those with whom we may disagree, ultimately leads to greater protections for all of our rights.

Thank you.

[The prepared statement of Ms. Smith appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Smith.

Now, Professor Marshall.

STATEMENT OF WILLIAM MARSHALL, WILLIAM RAND KENAN, JR., DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, NORTH CAROLINA

Professor MARSHALL. Thank you very much, Chairman Grassley and Members of the Committee. It is an honor to appear before you.

My purpose here today is to not pass judgment on Judge Gorsuch, but rather to discuss the subject of originalism and constitutional interpretation.

The term originalism is new, dating back essentially to the 1980s, but it has not had only one meaning. At first, it was said to be original intent. Then, it was changed to original public meaning. Then, it was changed by some to original public meaning abstracted to allow for technological change. Then, it was changed by others to say semantic meaning that might be completely different from the common public understanding.

Nevertheless, despite their lack of consensus on what originalism means and what the theory requires, those who support the theory argue that originalism should be the governing mode of constitutional interpretation. First, they suggest that originalism promotes

fealty to a written Constitution and is therefore consistent with the Framers' design. But the early courts did not see it that way. Chief Justice John Marshall wrote in McCulloch that "we must never forget it is a constitution we are expounding, intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." This means that constitutional interpretation is to give meaning and substance to enduring principles over time in new contexts.

The fact that the Framers did not envision this approach is also evidenced in the text of the Constitution, which uses very broad words such as freedom of speech, equal protection, due process of law. Those terms are not conducive to fixed meaning, and the Framers likely intended that they would be interpreted and given context over time.

Third, the Framers came from a common-law tradition. They understood that law changed to adapt to new circumstances. It is incorrect to suggest that was inappropriate for that to do so because the Framers knew otherwise.

And finally, the Framers were visionaries. They were not concerned only with addressing the issues of the day; they were concerned with setting forth broad principles that would guide future generations. The irony of originalism is that, while it purports fealty to the Framers, it actually demeans the Framers' enterprise because it suggests they were more concerned with solving the problems of 1787 than in developing a Constitution that could solve the problems of 2017.

Originalists also err when they suggest that their theory limits the ability of courts to insert their political preferences, at least the way originalism has been practiced by conservative jurists. For example, there is no originalist theory that can support striking down Federal affirmative action, as the conservative Court did in *Adarand*. The text of the Fourteenth Amendment's equal protection clause does not even apply to the Federal Government, and history during that period indicated that there were special programs that advantaged only African Americans.

Originalism does not support *Citizens United*. The Framers did not give much credence to corporations. They distrusted them. There were very limited charters. It does not support the expanded property rights that exist in the Regulatory Takings Doctrine, and it is worth noting that Justice Scalia, when he wrote on that, suggested those cases were supported not by text or history but by "constitutional culture."

Now, in my written arguments I suggested some results that originalism might lead to that would be troublesome: the end of one person, one vote; the overruling of *Brown*; the idea that there would be no equal protection for women, the abolishment of the United States Air Force. Now, to their credit, many originalists will not go that far, will not take us back to the way of life of a 19th century, and some have gone out of their way to argue that *Brown* can be reconciled with originalist principles, which would be news to those who drafted the Fourteen Amendment and also segregated the schools of the District of Columbia, and would also be news to the *Brown* Court itself, which looked for originalist basis and could

not find it and expressly disavowed originalism as the basis for the holding in that decision.

Now, but what does this say about originalism? I think it suggests two things. I think it suggests that originalists know in their hearts that originalism is fundamentally at odds with who we are as a Nation; and second, it also demonstrates that originalism can be used to manipulate the particular results that you want to get to, so therefore, it does not give the fixed meaning that those who support originalists say that it does.

Originalism then is a doctrine of false promises. It suggests a fealty to the Framers' design when it is actually antithetical to the Framer's vision. It purports to offer jurisprudence with fixed and predictable results when its application is nebulous and variable. It claims value neutrality when it has been erratically deployed in order to achieve specific results.

Certainly text and history are important in constitutional interpretation, but the claim that constitutional interpretation should be controlled only by history and text was one that was rejected in *McCulloch v. Maryland in 1819*. We should learn that lesson.

[The prepared statement of Professor Marshall appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor.

Now, Mr. Meyer.

STATEMENT OF TIM MEYER,
FORMER LAW CLERK, NASHVILLE, TENNESSEE

Mr. MEYER. Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today.

I am a professor of law at Vanderbilt Law School, and I had the honor to clerk for Judge Gorsuch from 2007 until 2008. I am here today to enthusiastically support his nomination to the Supreme Court. Judge Gorsuch is a brilliant, fair, principled, and independent jurist. He is also the epitome of a gentleman. You will never in your life meet a kinder or more charitable public servant.

One of the biggest risks a judge takes each year is inviting a few recent law school graduates into his or her chambers. Judges use law clerks as sounding boards for ideas; to spot flaws in arguments, including their own; and to find and help analyze precedent. This requires a judge to put quite a bit of faith in these recent law school graduates, and it requires them to invest quite a bit of time in teaching these recent law school graduates to be competent assistants and competent lawyers.

More than that, though, working side by side in close quarters every day for a year or more makes the relationship between a judge and his or her clerks especially intimate. Judges thus often become the most important mentors young lawyers have. This mentoring role is not the most important that judges play, but it does provide a window into a judge's temperament and their approach to the law.

I could not have hoped for a better mentor than Judge Gorsuch, and the country could not hope for a better teacher for its brightest legal minds. I could say a lot about Judge Gorsuch, about how he welcomes his clerks to Colorado and into his family, about how he hosted a birthday party for my 1-year-old son in chambers when

we did not know anybody in Colorado. I could talk about his love of being a lawyer, the joy he takes in the back and forth of legal argument, or his concern for the integrity of our judicial system. Instead, I want to spend my time today talking about what Judge Gorsuch has taught me about writing.

By the time I arrived in Judge Gorsuch's chambers, I had been in school for 21 years and I had probably written thousands of pages, including most of a doctoral dissertation. But I did not really learn to write until I worked for the judge. Through conversations, reading the judge's work, and reading his careful comments on my work, I learned the importance of clarity in legal writing.

The judge spends hours and many drafts on just the introductory paragraphs to his opinions. These sentences, he taught the clerks, are the most important. Lawyers need to know how the Court thought the Constitution, statutes, and regulations applied to the facts of the case. But even nonlawyers, the Judge taught us, should be able to understand the stakes in a court case and the basic reason a case came out the way it did. The litigants themselves deserve an explanation that does not require a lawyer to interpret. I have taken this lesson with me at each stop on my legal career.

Judge Gorsuch's care for writing is important in its own right because the written word is the primary medium through which judges communicate. But the judge's emphasis on writing is part of his broader concern for the process due litigants who seek the protection of our courts. As a clerk, I had the opportunity to observe over and over again Judge Gorsuch's respect for litigants and the care he took to make sure that he fairly and fully evaluated and addressed each of their claims.

I have a number of examples in my written testimony, but by way of one brief example, the Federal courts receive a very high number of pro se petitions from prisoners. For many of these petitioners, the Anti-Terrorism and Effective Death Penalty Act, passed by Congress in 1996, sets a bar to relief that they cannot clear, and consequently, many courts summarily dismiss these petitions. Not Judge Gorsuch.

When I worked for him, he insisted that each petitioner receive a written decision on his petition. Each inmate, he told me, is entitled to an explanation he can understand, no matter how far off the mark his claim. And to be frank, many of the claims we received were prepared without the aid of counsel and were difficult to understand. No matter. The Judge reminded we clerks that the Court had a duty to liberally construe that is, to give the benefit of the doubt to those who appear on their own behalf seeking the protection of the courts.

The judge's concern for fair notice also underlies his deep respect for precedent. I can recall many times that Judge Gorsuch wrote that while he might have decided a case differently, a prior panel of the Tenth Circuit had already addressed the question.

Indeed, I had the chance this morning to look back at the Tenth Circuit decision in *Endrew F.*, which is the case that the Supreme Court decided yesterday reversing the Tenth Circuit. And in that case, the Court expressly noted that the more than de minimis standard that Judge Gorsuch had applied in *Thompson* is actually

from an earlier Tenth Circuit case in *Urban* and a line of cases that stretch from *Urban* until *Thompson*.

I will end by noting that in both of these instances, prisoner litigation and disabled students, Judge Gorsuch has ruled on both sides of the issues, has come out both ways. Equally importantly, though, he has advocated for better representation for prisoners who are seeking the protection of our courts and for disabled students. Judge Gorsuch believes that access to the courts and a fair opportunity to be heard for all is a critical component of our judicial system.

And with that, I will look forward to your questions.

[The prepared statement of Mr. Meyer appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Meyer.

Now, Ms. Phillips.

STATEMENT OF SANDY PHILLIPS, BOERNE, TEXAS

Ms. PHILLIPS. Chairman Grassley, Ranking Member Feinstein, and Members of the Judiciary Committee, thank you for the opportunity to speak with you today.

My name is Sandy Phillips. I am a registered Republican, a gun owner, and I live in Texas, but I now vote a straight Democratic ticket. I am a mother, and I am here to speak on my efforts to stop other families from experiencing my nightmare.

I am here to speak on the gun violence that takes 33,000 American citizens' lives each year. On average, 91 Americans are killed each day, eight of whom are children. My daughter Jessie was one of them.

Five years ago this July, my beautiful 24-year-old daughter Jessica Ghawi was slaughtered in the Aurora, Colorado, theater massacre along with 11 other beautiful souls. Seventy others were wounded, many with wounds that will shorten their lives. I know them. I know their struggle. I know their pain, both physical and emotional, and I understand it.

My daughter went to a movie and was slaughtered. I use the word slaughtered because the killer chose to use a weapon designed for the battlefield by the military as part of his arsenal and ambushed people that could not escape. He was able to purchase 4,000 rounds of green-tipped .223 high-velocity bullets over the internet without even showing his driver's license. These steel-jacketed bullets were designed to rip through bone, tissue, flesh, seats, and walls.

When we sued that online seller to change their dangerous business practices, our case was thrown out because of the PLCAA law. The gun lobby brags that this law was their crowning achievement because it protects the industry from being sued in civil court and denies the constitutional rights of gun violence victims to have their day in court.

The night Jessie was murdered, I was texting with her. I was due to go visit her in just a few days, and we were very excited to be able to spend some mother-and-daughter time. The last thing she wrote to me was, "I cannot wait to see you. I need my momma." I wrote back, "I need my baby girl."

Minutes after that text, my phone rang. It was the young man with her that we have known for many, many years and we think of as family. What I heard on the other end of the phone changed our lives forever. I could hear horrific screaming. I asked what was wrong. He said that there had been a shooting and it was random. I asked if he was okay. He said I think I have been shot twice. At this point I grew alarmed since he was the one calling and not my Jessie. I said, "Where is Jessie?" He answered, "I am sorry." I asked, "Is she okay?" And he said, "I tried." I said, "Brent, oh, God, please tell me she is not dead." And again, he said, "I am sorry."

Brent is a firefighter and a paramedic, so I knew at that very moment that my daughter was gone. I started screaming, I am told, but I have little memory of my husband catching me as I collapsed on the floor.

Our little girl had been hit six times with the .223s that sprayed the theater in mere seconds. One bullet tore through her leg and entered into the other leg, making it impossible to escape. Three more ripped through her abdomen, one hit her clavicle and shattered it, and one exploded through her left eye, leaving a five-inch hole that blew her brains onto the theater seats, floor, and people. I live with that image every day of my life.

This preventable pain and suffering of victims and survivors has changed my life. I can no longer remain silent on the sidelines. Our Second Amendment begins with the phrase "a well-regulated," but guns are not well-regulated. Our lack of strong Federal laws let people who should not have them acquire guns too easily, people like Jessie's shooter, who showed clear signs of severe mental illness that made him dangerous to himself and others, was still able to get his hands on military-style weapons and over 4,000 bullets he bought for his attack.

Since this shooting, Colorado has put restrictions on the kind of magazine he used and passed new background check laws, but over the past few years, a small number of extremists have been pushing courts across the country to accept and endorse a gun-lobby-backed radical version of the Second Amendment that would call into question basic public safety law like those in Colorado. This version is the one that Justice Scalia rejected, understanding the Second Amendment is not unlimited.

As a mother and an American, I believe it is critical that any Supreme Court Justice understands this as well. Cases pushing these radical views could make their way to the Supreme Court in the months and years to come. This Committee must know does this nominee believe the Second Amendment have limits? Does this nominee recognize that it does not override any other constitutional rights like my daughter's right to live in a safe community? Does this nominee understand that, as times change, laws must change and responsible regulations to protect communities from gun violence have been recognized as and are constitutional and necessary? To be confirmed, any Supreme Court nominee must answer these questions clearly and convincingly. If not, the public's safety is at risk.

Thank you for the opportunity to speak with you today.

[The prepared statement of Ms. Phillips appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Phillips.

Now, Mr. Jaffer.

STATEMENT OF JAMIL JAFFER,
FORMER LAW CLERK, ARLINGTON, VIRGINIA

Mr. JAMIL JAFFER. Thank you, Mr. Chairman, and thank you to the Committee for having me here today.

I want to say obviously a very painful story from Mrs. Phillips and her daughter Jessie. I think what I want to say to Mrs. Phillips and to the Members of the Committee is that Judge Gorsuch—I have known him for 13 years—Judge Gorsuch is the kind of judge that Mrs. Phillips and that Jessie would want on the Bench. He is the kind of judge that applies the law fairly and evenhandedly to all litigants before him. He is the kind of judge that does not rule based on a policy preference or a preference for an outcome but on the law as it is written by the Members of this body, the Constitution our Framers wrote. He is the kind of judge that applies the law in the way we want the law to be applied. He is a judge's judge.

I have known Judge Gorsuch since he was a private practice attorney at a small law firm here in Washington, DC. I then followed Judge Gorsuch to the Justice Department in a different office, but I saw him there as a senior Justice Department official. I then went with him to the Tenth Circuit when he was confirmed on the bench and spent his first 4 months with him on the bench as he became a judge. I watched him transform from a passionate, strong advocate for his clients into a passionate, strong advocate for justice under the rule of law.

He is the kind of man that cares about people, that cares deeply about his family, his friends, the parties that appear before him. He feels what the litigants before him feel, and he applies the law fairly to each and every one of those litigants.

Today, we have heard from a lot of individuals on this panel about what Judge Gorsuch, if he were to be confirmed by this body to the Supreme Court, may or may not do on the Court. But what I would direct you to is his real record in the 10 years that he has been on the bench. This is not a judge that had a short period of time on the bench where we cannot tell what kind of judge he is going to be. We can look at his record and determine exactly what kind of judge he is going to be.

Now, over the last few days, you have heard about a handful of cases where people feel like he has not ruled for the little guy. Well, let me tell you about some of the cases where he has ruled for the little guy: *Avila v. Jostens*, where he voted to allow a Hispanic employee to bring a claim of race discrimination reversed in District Court; *Dasgupta v. Harris*, where he voted to deny qualified immunity to a university official accused of discriminating against an Asian American professor; *Orr v. City of Albuquerque*, where he had that two female police officers could bring pregnancy discrimination claims and reversed the District Court there also; *Gad v. Kansas State*, where he allowed a professor of sex discrimination claim to proceed; Allstate Sweeping, where he allowed two female contractors to bring a gender bias claim against a male Denver airport employee; *Chapman v. Carmike Cinemas*, where he

voted to reverse the District Court and allowed a female employee who had been sexually assaulted to bring a hostile work environment claim against her corporate employer; *Dossa v. Wynne*, where he voted to allow a female employee to sue her employer for gender discrimination; *W.D. Sports*, where he reversed the District Court and allowed a female employee's sexual harassment suit to proceed to trial; *Eisenhour v. Weber County*, where Judge Gorsuch voted to allow a female court employee to bring claims against a male judge who had sexually harassed her; *Ridgell-Boltz v. Colvin*, where Judge Gorsuch voted to reverse a District Court dismissal of a female worker's hostile work environment claim; *Lowber v. City of New Cordell*, where Judge Gorsuch ruled that a female employee could sue a city government for sex discrimination, again, reversing the District Court.

In case after case after case, Judge Gorsuch has applied the law fairly and evenhandedly to the litigants before him. Yes, it is true in the occasional cases, the three or four you heard about over the last few days, Judge Gorsuch ruled for a corporate employer, but time and time and time again, he has ruled for the little guy, the woman, the sexually harassed, the discriminated against, the disabled.

So the notion somehow that Judge Gorsuch is not capable of being an evenhanded, fair judge, the kind of judge that Mrs. Phillips and that Jessie deserve, is absolutely wrong. He is a judge's judge. He will be a credit to our Nation and to this body, and he should be confirmed swiftly.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Jaffer appears as a submission for the record.]

Chairman GRASSLEY. Thank you. I am going to call on Senator Coons because he has another assignment.

Senator COONS. Thank you very much, Mr. Chairman.

I would like to thank this entire panel. I will take just a few minutes and ask two questions, if I might?

Ms. Warbelow, over the course of the entire several days of hearings, Judge Gorsuch repeatedly said that he respects precedent and follows settled law, and I questioned him about critical cases—*Casey*, *Lawrence*, *Obergefell*. The judge also wrote that judges should, "apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."

But these three critical cases, as I questioned him about—*Casey*, *Lawrence*, and *Obergefell*—do not merely look forward. They applied a more inclusive and modern principle of liberty and its understanding to protect the right to privacy, relationships, and marriage.

Can originalism, as Judge Gorsuch defined it, protect the freedoms the Supreme Court has now recognized for LGBT individuals based on the due process clause?

Ms. WARBELOW. If we press the pause button at the exact moment in time when either the Constitution was written or any single statute was written, we miss the broader context at how it affects and applies to people's lives. It is not a surprise to anyone in

this room that in the 1700s LGBTQ community was a stranger to the law.

And if we continue to advocate for a view of the Constitution that is stuck in that time period, we will always be strangers to the law. And Judge Gorsuch himself made very clear that he thought the LGBTQ community should only have recourse through the legislature, that marriage equality was not appropriate topic for the courts and should be left solely to the legislatures.

But the role of the Court is to recognize that minority populations are often disadvantaged when it comes to the tyranny of the majority, and a good Justice looks to how people's lives are affected and how the rule of law will apply in the day to day.

Senator COONS. Thank you, Ms. Warbelow.

Ms. Miller, there has been a lot of discussion in the course of these hearings from President Trump's campaign promise about what kind of Justice he might nominate through questioning of Judge Gorsuch this week. And the potential overruling of *Roe v. Wade* seems to always hover in the middle distance in these hearings.

I am concerned, however, that there is many ways that courts can and would limit women's access to healthcare without explicitly overruling *Roe*. And as you heard perhaps in my questioning of Judge Gorsuch, I had questions for him about what his standard of complicity meant and where it came from and what its consequences would be.

In what ways could the Court limit access to reproductive care without overturning *Roe*? And what does Judge Gorsuch's record say to you about how he might approach these cases?

Ms. MILLER. Thank you for the question.

I am very concerned about his record and his ability to set aside personal beliefs and rule in a fair-minded, independent way. What we have seen since 2010, like I referenced in my statement, is 330 laws that have been passed to restrict women's access to abortion services, even with *Roe* being stable. We have seen waiting periods. We have seen requirements that close physical plants. We have seen, you know, really women with undue burden, having to travel hundreds of miles and encounter, you know, lots of obstacles.

So what we really have is a situation where a right exists on paper, but it is not—the ability to access it in the real way people live their lives is blocked.

Senator COONS. Ms. Miller, if I might, though, just to clarify, you are talking about legislatures acting. Why is that not an appropriate venue, and what is the Court's role in this?

Ms. MILLER. Well, what you might, in our case—*Whole Woman's Health*—we brought to the Supreme Court, we were able to illustrate that legislators went too far, and the Court ruled in our favor, saying you cannot just pass laws willy nilly to block people's access. They need to be substantiated by medical fact and medical evidence and that it put an undue burden on women's ability to access their rights to privacy and their right to safe abortion, as guaranteed by *Roe*.

Senator COONS. Thank you. I would like to thank you both, and I appreciate your consideration, Mr. Chairman, and the oppor-

tunity to talk with you both about legitimate concerns about the scope of the right to privacy and its impact on people's lives.

Thank you.

Ms. MILLER. Thank you.

Chairman GRASSLEY. Senator Hatch now.

Senator HATCH. Thank you, Mr. Chairman.

Let me ask Mrs. Smith some questions. I want to thank you for your work defending our first freedom, religious freedom. As you know, I am one of the authors of the Religious Freedom Restoration Act, one of the prime authors, and also I am the author of the Religious Land Use and Institutionalized Persons Act.

Now these statutes make it difficult for the Government to substantially burden the exercise of religion. And your organization, the Becket Fund, uses these statutes to vindicate the fundamental right to exercise religions for men and women of many faiths. Your written testimony quoted from Judge Gorsuch's concurring opinion in *Hobby Lobby Stores v. Sebelius* that RFRA "does perhaps its most important work in protecting unpopular religious beliefs, vindicating this Nation's long-held aspiration to serve as a refuge of religious tolerance."

In *Hobby Lobby*, Judge Gorsuch's court concluded that RFRA can apply to a corporation. My guess, however, is that in your practice, the most frequent use of these statutes is to defend the individual, the little guy, if you will, since we have had talk about that we have heard so much about. It is to defend the weak and the powerless and the disfavored.

Now I have two questions about Judge Gorsuch's record in this area. First, do any of his decisions or opinions in such cases go beyond interpreting statutes the way Congress enacted them and implementing those statutes as Congress intended?

And second, how critical is it to faithfully interpret and apply statutes like these when it might be controversial as well as when the plaintiffs are more sympathetic?

Ms. SMITH. Thank you very much for that question, Senator Hatch.

So your first question was, are there any decisions that go beyond the correct interpretation of these statutes in Judge Gorsuch's 10 years on the bench? And I have looked at a lot of his opinions that he has written where he has interpreted RFRA and its sister statute RLUIPA, which you also mentioned. And I think his jurisprudence very clearly shows that he understands the limits of these statutes. He understands the balancing test that Congress put into these statutes and that he has found in favor of religious parties some of the time, but he is also found against parties who are religious litigants in other cases.

Hobby Lobby and *Little Sisters* are two examples where he was in favor of the religious objectors, and he found that there was a substantial burden on their religious exercise in those cases. And the Government even ultimately conceded that they had alternative ways to meet their interests without forcing these religious objectors to violate their faith.

And I think, you know, those two cases show very clearly that there was no conflict to begin with between religious liberty and women's rights. But there are some other cases where he has held

that the religious parties were either insincere or that they did not suffer a substantial burden under RFRA.

There was one case I spoke about in my written testimony where a couple had set up a fake church, created to distribute marijuana, and they sought the protection of RFRA for their drug running. And Judge Gorsuch said, sorry, that is an insincere claim, and RFRA is not going to protect you there.

So I think, you know, Judge Gorsuch's ability to really require the Government, as he has said over the last few days, to square its corners, to prove its case, to show that it has a good justification for what it is doing, along with his ability to really impose and recognize these reasonable limits on religious liberty where there are meritless claims shows that he has a very balanced and thoughtful approach to applying these statutes, as he has done so over the last 10 years on the Tenth Circuit.

And how critical is it that these statutes be faithfully interpreted and faithfully applied? Well, it is absolutely critical.

And as you know, Senator, you know, RFRA has been used to protect religious minorities around the country, and certainly many of Becket's clients are religious minorities. I am thinking here of Pastor Soto, who is a pastor of a Native American church out in Texas, and the Government created Operation Powwow and went in undercover and invaded his religious circle to confiscate eagle feathers.

Now it was because of RFRA and, I might also add, the *Hobby Lobby* decision, which the Court cited, that he was able to get those precious eagle feathers back and use them in his religious ceremonies.

It was also RFRA who helped another of Becket's clients, Captain Simmer Singh, who is a devoted Sikh, to be able to ask the Army to give him an accommodation so that he could wear a religious beard and a turban according to the requirements of his faith. And eventually, he was able to get that accommodation, thanks to RFRA. And then, eventually, the Army was actually willing to change its regulations so that now all Sikhs can faithfully serve in the Army and not have to deny their faith in doing so.

So I appreciate the question, Senator. I think it is a really important point that we make here that RFRA and RLUIPA protect religious minorities around the country and do this vital work of preserving religious freedom.

Senator HATCH. Well, thank you so much.

Chairman GRASSLEY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Ms. Phillips, thank you for your testimony honoring your daughter.

Ms. PHILLIPS. Thank you very much.

Senator FRANKEN. So sorry for your loss.

Ms. PHILLIPS. Thank you. I appreciate that.

I would also like to ask Senator Grassley if he would please make note in the record that this gentleman next to me does not speak for me or my dead daughter.

Chairman GRASSLEY. You just made that point, and we accept it.

Ms. PHILLIPS. Thank you.

Chairman GRASSLEY. Proceed, Senator.

Senator FRANKEN. Okay. Ms. Clarke, thank you for being here today. I would like to talk about voting rights.

Now as Judge Gorsuch and I discussed yesterday, the Supreme Court's *Shelby County* decision gutted the preclearance provision of the Voting Rights Act, which required certain States, States with a history of engaging in discriminatory practices at the polls, to get the Federal Government's approval before making changes to the voting laws.

Shelby County struck down the provision that determined which States were covered by preclearance, meaning that none are. I am not sure that people fully appreciate just how quickly some of the States previously covered by preclearance reacted to *Shelby County*, the *Shelby County* decision.

Let us look at North Carolina. The *Shelby County* decision was issued on June 23, 2013. North Carolina legislators had already teed up a photo ID bill in anticipation of the ruling, and within hours of the decision, a State Senator indicated that it would start to move. And it did. Additional provisions were added, and the North Carolina Senate approved an omnibus package of restrictions on July 25, 2013, 2 days later.

No African-American member of the State Senate voted for the bill. The House approved the Senate's bill later that same day. The Governor signed it on August 12, 2013.

Now after *Shelby County*, Section 2 of the act remained in place. But where preclearance stopped discriminatory measures before they could do any harm, Section 2 allows plaintiffs to challenge restrictions after they have been enacted. So even though litigants successfully challenged North Carolina's restrictions under Section 2, even though this Fourth court found that the law "targeted African-Americans with almost surgical decision, the Fourth Circuit did not strike down that law until July 29, 2016."

That means that some of those restrictions were on the books for years before a successful Section 2 challenge could work its way through the courts. In the meantime, these restrictions kept people from voting.

According to the NAACP Legal Defense Fund, hundreds of North Carolina voters, disproportionately people of color, were not counted in the 2014 primary election because North Carolina eliminated same-day registration and allowed provisional ballots to be thrown out if they were cast at the wrong polling place.

So I mentioned this to Judge Gorsuch. I wanted to know whether Judge Gorsuch was bothered by the consequences of the *Shelby County* decision. He said that Section 2 was still available.

I responded by pointing out that bringing a challenge under Section 2 can take time, and in the time it takes to bring one of those challenges, people are robbed of their right to vote. We went around the barn a few times on this. He told me that voting is a fundamental right—I know that—but did not answer my question.

Ms. Clarke, I was not reassured by my conversation with Judge Gorsuch. Now I understand that he cannot weigh in on certain policies or proposals, but as a judge who makes decisions based on the facts and the law alone, as he says, I think it is important to know whether he takes proper measures of the facts.

And the fact of the matter is, is Section 2 is not adequate on its own. Do you agree?

Ms. CLARKE. Thank you for the question, Senator Franken.

Section 2 of the Voting Rights Act is no adequate substitute for the strong protections that had long been provided by the Section 5 preclearance provision of the Voting Rights Act. I believe this is an important area for the Senate to focus on.

The right to vote is the most sacred civil right in our democracy, and I listened to Judge Gorsuch yesterday in response to your question. I listened to his response to Senator Leahy, who asked for his view about Justice Scalia's statement in the Shelby County argument, where he referenced the Voting Rights Act as a racial entitlement.

And he refused to disavow that statement or distance himself from that statement, and I find that deeply troubling. I believe our Nation deserves Justices on our Nation's highest court who appreciate that the right to vote is central in our democracy and understand and appreciate that right remains under attack.

You point to the example in North Carolina, and sadly, we have seen the floodgates of voting discrimination and voter suppression open all across our country since the Supreme Court's 2013 ruling in *Shelby County*, *Alabama v. Holder*.

Texas is another example. On the day that the Court issued its ruling, it put in place a discriminatory and burdensome photo ID requirement that, on the day it went into effect, disenfranchised more than 600,000 legitimately registered voters who were without one of the forms of qualifying ID. I listened intently and carefully to Judge Gorsuch's response to questions on the right to vote and on the Voting Rights Act and remain incredibly dissatisfied.

Again, our Nation deserves a Justice who will take the Bench and understand that grave challenges arising under the Voting Rights Act and other controversies concerning voting will come before the Court, and we need a Justice who will be prepared to ensure that what remains of the Voting Rights Act is fairly interpreted and applied.

Senator FRANKEN. Mr. Chairman, may I just ask consent—thank you, by the way. Ask consent that the NAACP Legal Defense and Education Fund report entitled "The Civil Rights Record of Judge Neil M. Gorsuch" be entered into the record?

Chairman GRASSLEY. Without objection, that will be entered in. Thank you, Senator.

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

Senator FRANKEN. Thank you.

Chairman GRASSLEY. Senator Crapo.

Senator CRAPO. Thank you, Mr. Chairman. I do not have any questions.

Chairman GRASSLEY. Okay. Then Senator Hirono.

Senator HIRONO. Thank you, Mr. Chair.

Chairman GRASSLEY. Am I beginning to pronounce your name right?

Senator HIRONO. I think you have been doing okay so far. Otherwise, I would have corrected you.

Senator FRANKEN. He is actually—[whispering] it is Hirono. Hirono.

[Laughter.]

Senator HIRONO. Thank you. Okay. You have to add another 10 seconds to my time for that.

[Laughter.]

Chairman GRASSLEY. Add 15 seconds to her time.

Senator HIRONO. Thank you.

So, Ms. Clarke, let me continue with *Shelby County* because we talked about what happened in North Carolina and in Texas, where not only did they pass a voter suppression law, but they made it very plain their discriminatory intent. So, generally, these kinds of laws do not have that kind of intent, and it is very difficult, is it not, to prove discriminatory effect under Section 2?

Ms. CLARKE. Senator Hirono, it is, indeed, difficult. But sadly, we are seeing States and localities put voting restrictions on the books that not only have a discriminatory effect on protected minority groups, but we're seeing evidence of discriminatory purpose animating the laws in North Carolina. Texas' photo ID is one law that we believe clearly was adopted to disenfranchise African Americans, Latinos, the elderly, and students.

Senator HIRONO. So the very thing that people were concerned about, because you argued the *Shelby County* case, that people were concerned about would happen after the Court eliminated Section 5 would happen, did happen, and some 13 States, maybe more, are passing various kinds of laws that disenfranchise, in effect, voters.

So, well, I know that you were listening to Judge Gorsuch's testimony yesterday and the day before, probably all of you were. And it was very difficult to ascertain what his judicial philosophy is because he basically said that he would apply precedent.

Let me ask Ms. Miller, you founded Whole Woman's Health, and I commend you for that. Thank you for the work that you are doing.

I think you are probably familiar enough with the *Hobby Lobby* case, where the access to contraception coverage for some, well, there are thousands of *Hobby Lobby* employees. And to have *Hobby Lobby* be referred to as a "family owned business," when they basically had over probably 30,000 employees is a stretch to me. But nonetheless, there were thousands of *Hobby Lobby* employees whose right to contraceptive coverage was given very short shrift or no consideration at all.

Ms. Miller, do you consider Judge Gorsuch's position on *Hobby Lobby*, do you see *Hobby Lobby* as indicative of where Judge Gorsuch would be on issues relating to a woman's right to choose?

Ms. MILLER. Thank you for the question.

I absolutely do. I think that women have a right to healthcare that covers all of our healthcare needs, whether it is contraception, preventive care, abortion services, pregnancy, everything. And I do not think that we can be sort of set aside because of who we work for.

Senator HIRONO. Professor Marshall, there are a number of ways to describe originalism, and I have come to the conclusion that originalism is used as a tool and a justification to restrict the rights of vulnerable Americans. So let me ask you this.

If originalism had been applied, would the Supreme Court have made the—would Supreme Court's decisions have been what it was in the following cases? And I want to cite the cases to you. *Griswold v. Connecticut*? If they had applied originalism, would the Court have come up with that decision?

Professor MARSHALL. No, Your Honor. No, Senator. Sorry. But——

[Laughter.]

Professor MARSHALL. It would be great by me if they were appointing you to the Supreme Court.

[Laughter.]

Senator HIRONO. Thank you for that. *Loving v. Virginia*?

Professor MARSHALL. No.

Senator HIRONO. *Virginia v. United States*?

Professor MARSHALL. No.

Senator HIRONO. *Lawrence v. Texas*?

Professor MARSHALL. No.

Senator HIRONO. *Obergefell v. Hodges*?

Professor MARSHALL. No.

Senator HIRONO. Thank you. So, basically, you did write that it is basically a philosophy or an approach to construction that conservatives use to restrict rights?

Professor MARSHALL. I think it was mentioned earlier today that originalism took hold as a reaction to the Warren Court. So that might give a little bit of sense of the direction that it took.

There was just a discussion of *Shelby County*, which I would happen to agree is one of the most important cases decided by the Supreme Court in the last 100 years because of its effect, and yet the originalist case for striking down the preclearance provisions of Section 5 is very weak. It was recently—a recent article in the Harvard Law Review pointed out the fallacy behind the notion of equal dignity that the Court relied on in that case.

So, yes, it has been selectively used. And as I point out in my testimony, in cases like Federal affirmative action, when an originalist decision would clearly uphold Federal affirmative action, the originalists slid away from that decision.

Senator HIRONO. Mr. Chairman, I just wanted to express my profound sorrow for Ms. Phillips. We all share that feeling. Thank you very much for being here and testifying.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you, Senator.

Senator Kennedy, do you have any questions? Proceed.

Senator KENNEDY. Thank you, Mr. Chairman.

Ms. Miller, I think I understand your position on abortion. I went to your website—which is a well-put-together website.

Ms. MILLER. Thank you.

Senator KENNEDY. And it is an issue that divides many Americans. Would you ever support a nominee for the U.S. Supreme Court that did not agree with you on abortion?

Ms. MILLER. Senator, whether the nominee agrees with me, to me, is not what is at issue here. It is whether they can uphold the precedent and the rule of law.

Senator KENNEDY. Let me rephrase it, and I am sorry to interrupt, but they do not give me much time.

Ms. MILLER. It is okay. I know.

Senator KENNEDY. Would you ever support a nominee to the U.S. Supreme Court who would not declare in front of the United States Senate on the Judiciary that he or she supported *Roe v. Wade*?

Ms. MILLER. I think what we have seen Judge Gorsuch do is acknowledge——

Senator KENNEDY. No, ma'am. I am asking you——

Ms. MILLER. Yes.

Senator KENNEDY [continuing]. Would you ever support a nominee that would not do that?

Ms. MILLER. I am trying to answer the question. I am sorry. But what I—what we have seen him do is acknowledge that *Roe* exists, but I have not heard him affirm that he is going to uphold it.

Senator KENNEDY. Okay. But I am not asking about Judge Gorsuch. I am sorry. I am probably not being clear. Would you support any nominee for the U.S. Supreme Court who did not come before this panel and say "I support *Roe v. Wade*"?

Ms. MILLER. I believe that *Roe v. Wade* is precedent and that it is important for the Justices to uphold precedent.

Senator KENNEDY. Okay. Is that a yes?

Ms. MILLER. Yes, it is.

Senator KENNEDY. Okay. And look, that is your right. You are an American. I mean, you can believe what you want.

I do have to ask you this, though. You made a charge that Judge Gorsuch decides cases purely on the basis of his personal policy preferences, and that is a pretty serious charge. What is your basis for saying that?

Ms. MILLER. So what I said is I am concerned that he will not be able to set aside his personal beliefs and rule independently.

Senator KENNEDY. Why do you say that? What is your evidence for that?

Ms. MILLER. Because I have seen him in the *Hobby Lobby* case and the *Planned Parenthood v. Utah* case. I think that he ruled in favor, as you guys say, of the "big guy." I would say of the—you know, I tend to side with the "little gal," and I am concerned that women's rights were set aside in favor of big business.

Senator KENNEDY. Do you think judges ought to decide cases based on the wealth or status or power of the parties, based on the identity of the parties?

Ms. MILLER. Absolutely not.

Senator KENNEDY. You just said you always support the little guy, whatever that is.

Ms. MILLER. I am concerned that women's rights were set aside in favor of a large corporation in the *Hobby Lobby* case.

Senator KENNEDY. And what is your—what is your evidence for saying that?

Ms. MILLER. The *Hobby Lobby* case?

Senator KENNEDY. No. What is your evidence for making the statement about the judges in that case decided it purely on their personal policy preferences?

Ms. MILLER. Because I think the beliefs got in—I think personal beliefs and religious beliefs got in the way of objectivity when women are trying to access healthcare.

Senator KENNEDY. And what is your evidence for saying that?

Ms. MILLER. Reading the *Hobby Lobby* case.

Senator KENNEDY. The result?

Ms. MILLER. Yes.

Senator KENNEDY. Okay.

Ms. MILLER. Yes.

Senator KENNEDY. Professor Meyer, how do you like Vanderbilt?

Mr. MEYER. Very much, Senator. Thank you.

Senator KENNEDY. Yes. Do you go to the basketball games?

Mr. MEYER. Sometimes. We probably should not talk about how the first round ended at the NCAA tournament. Yes, thank you. Thank you for bringing that up.

[Laughter.]

Senator KENNEDY. You spent a year with Judge Gorsuch?

Mr. MEYER. I did, yes.

Senator KENNEDY. Yes. You saw him when he was tired?

Mr. MEYER. I did.

Senator KENNEDY. Saw him when he was under pressure?

Mr. MEYER. I did.

Senator KENNEDY. You probably saw him more than he saw his spouse that year, did you not?

Mr. MEYER. Yes.

Senator KENNEDY. He works pretty hard, doesn't he?

Mr. MEYER. He does work very hard.

Senator KENNEDY. Works you pretty hard, too, doesn't he?

Mr. MEYER. Yes, he did.

Senator KENNEDY. Have you ever seen him decide a case based purely on the personal—his personal policy preferences?

Mr. MEYER. I did not ever see him bring his personal policy preferences into chambers at all, ever.

Senator KENNEDY. Have you ever seen him walk in and say, okay, Mr. Clerk, do not show me the briefs here. We will look at those later. Let us go do some research on who the parties are?

Mr. MEYER. No. That never happened. He pays scrupulous attention to the briefs.

Senator KENNEDY. Have you ever seen him decide a case based on a litigant's wealth?

Mr. MEYER. No.

Senator KENNEDY. You spent—how long did spend with him?

Mr. MEYER. I worked for him for about 14 months.

Senator KENNEDY. Fourteen months. You ever see him in 14 months decide a case based on the litigant's status or power?

Mr. MEYER. No.

Senator KENNEDY. Did you ever see him succumb to political pressure?

Mr. MEYER. Not at all. Not once.

Senator KENNEDY. Okay. Did you ever see him sit down and use a tic sheet to say, okay, I have decided this many cases for the little guy, whatever that is, and this many cases for the big guy. So we need to give one to the little guy. Did he ever—is that his approach?

Mr. MEYER. Absolutely not, Senator.

Senator KENNEDY. I am out of time.

[Laughter.]

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

Mr. MEYER. Thank you, Senator.

Chairman GRASSLEY. Senator Blumenthal is next, but I am hoping that if no other Members come in who have not asked questions that I will ask my questions, and then I will close.

Senator Blumenthal.

Senator BLUMENTHAL. Yes, thank you.

Chairman GRASSLEY. Yes.

Senator BLUMENTHAL. First of all, Ms. Phillips, there is nothing—there is nothing anyone can say here to ease the pain or close the hurt. And I know from having worked with families of Sandy Hook and many, many others around Connecticut and the country how senselessly and needlessly you suffer as a result of gun violence.

And all I can do is pledge to you that more than saying anything, I will continue to work as hard and long as possible for common sense measures that will stop gun violence in this country.

Ms. PHILLIPS. Senator Blumenthal, you know you are my hero.

Senator BLUMENTHAL. Well, thank you.

Ms. PHILLIPS. And the work that you are doing in Connecticut, the whole country should look to as the leadership that you have given there to emulate throughout the country.

So thank you.

Senator BLUMENTHAL. I deeply appreciate those comments, but much more important, I deeply appreciate the work that you are doing day in and day out. And I know that every day, as you said so eloquently at the opening, the work you do reminds you of your loss. And all I can do is stand in awe and admiration of what you are doing.

And that is partly the reason why I asked Neil Gorsuch yesterday about exactly this topic and about his reading of the *Heller* decision, which, in my view, perfectly well allows measures to stop gun violence, including stopping the kind of weapon that was used to kill your daughter. The fact that this country has failed to stop the sale of such weapons and impose commonsense measures like universal background checks is absolutely reprehensible.

And I was disappointed in Judge Gorsuch's response to me when I asked him these questions because he failed to agree with me in my reading of the statute and used the same kind of disclaimer that he did in response to numerous other questions that I put to him that he would not answer about a particular case or controversy, would not state his personal views.

And I think that a person's stance on these issues is a matter of core beliefs and principles and values that a judge brings to the bench. No matter how objective and impartial he or she may be, every judge is a flesh and blood human being, not an automaton, and I was looking to what was in his heart, as one of my colleagues put it.

So I just really want to thank you for being here today and for giving a face and voice to this profoundly important American issue.

Thank you very much.

Ms. PHILLIPS. I am honored, sir. Thank you.

Senator BLUMENTHAL. I want to ask—Ms. Miller, I want to thank you for the great work that you are doing at Whole Woman's Health and the service that you provide for women every day.

And as you may know, yesterday, when I asked Judge Gorsuch about *Brown v. Board of Education*, he said, in effect, that decision was correctly reached, that the result was correct, that he agreed with it. But he was not willing to say the same about the cases underlying the constitutional right to privacy, which underlies the work that you do every day. It is not just the results of those cases. It is the core constitutional principle underlying them.

Why is the right to privacy so important for people facing the very personal, private decisions that they do in coming to your clinic, and why is apprehension or doubt about that right so hurtful?

Ms. MILLER. I appreciate your question, and I am very thankful for your support.

I cannot get over the fact that candidate Trump and President Trump has been very clear that there was a litmus test for this nomination, and in addition to that, we have not seen Judge Gorsuch affirm his support for *Roe*. He has acknowledged it exists.

And the woman's right to privacy is a fundamental right for our ability to realize our full humanity and for us to participate in society as equal citizens. We have to be able to control our reproduction and via contraception and sometimes via access to safe abortion care. And I think that is a fundamental right that has been approved and reaffirmed by the Supreme Court for over 40 years.

Senator BLUMENTHAL. Thank you.

My time is up. I really want to thank all the members of the panel for being here today. This is a profoundly important proceeding for the Nation, and you are making a great contribution.

Thank you so much.

Chairman GRASSLEY. I have three questions I want to ask, and I would like to have my time start now. But I want to yield a few seconds to Senator Kennedy because he asked for that. Go ahead.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman GRASSLEY. Out of my time.

Senator KENNEDY. I will be lightning fast if it is coming out of your time.

Professor Jaffer? Am I saying that right?

Mr. JAMIL JAFFER. Yes, sir.

Senator KENNEDY. I just want to clear up the record. Did you mean to speak for anybody today other than yourself?

Mr. JAMIL JAFFER. Well, thank you, Senator Kennedy, for the opportunity to clarify. I certainly did not, and I wanted to apologize to Mrs. Phillips. I did not mean to suggest that I was speaking on behalf of her or her family.

Senator KENNEDY. Okay. I did not take it that way, but I appreciate you clearing the record.

Thank you.

Mr. JAMIL JAFFER. Thank you.

Chairman GRASSLEY. I will bet Mr. Kirsanow thinks that if I ask him a question, it is because he has not spoken lately. But I do have a question for you.

You have watched the last 2 days of testimony. A lot of it has focused on Judge Gorsuch's record on civil rights. I would like to

focus first on the cases that he decided alleging discrimination on the basis of race. What conclusions can you draw from his record in this area?

Mr. KIRSANOW. The conclusions are, as I testified, that when it comes to the application of the law, that Judge Gorsuch is precise. He is a faithful applicant of the law to the facts. And if you are looking for an outcome-driven judge, he is your wrong judge. If you are looking for someone who will apply the statutory text as written by this body, that is your judge.

Chairman GRASSLEY. Okay. Now, Ms. Smith, now while *Hobby Lobby* seems to get the most attention, Judge Gorsuch has applied Federal law protecting religious freedom, specifically the Religious Land Use and Institutionalized Persons Act—I think you referred to that already—to protect the First Amendment rights of other Americans as well.

For example, could you tell us a bit about Calbone, and then I think you already mentioned *Yellowbear* but say it again for the benefit of responding to me. And then how—so it really does—I think it is going to show that Judge Gorsuch, depending on your response, has applied these statutes to protect Americans of all faiths.

Ms. SMITH. Thank you very much, Chairman.

Yes, so the first case that you mentioned was *Abdulhaseeb v. Calbone*, and that was a case I think that really demonstrates just what a fair judge Judge Gorsuch is because he was on that panel, and they had a pro se prisoner bring this claim for a religiously required diet. And it was a Muslim prisoner. And the panel decided that there would be potentially some merit to some of the claims that he had brought.

And so the panel decided that they were going to appoint counsel in that case. So they appointed counsel so that this Muslim prisoner would have the benefit of a real lawyer who knew what he was doing to help him argue his case effectively before the Court.

They also gave an extended schedule. So they extended the briefing schedule so that they had more time to really dig deeply into these claims. And ultimately, that panel decided that this Muslim prisoner was due a religiously required diet under the Religious Land Use and Institutionalized Persons Act, and Judge Gorsuch agreed with that decision of the Court.

And then in *Yellowbear*, the case that I discussed in my opening statement. It is a very significant case involving a Native American prisoner who had claimed that he was being denied access to a sweat lodge, which was essential to his religious practice, being a Northern Arapaho Native American.

And Judge Gorsuch, in a unanimous opinion, wrote an eloquent opinion saying that, you know, prisoners are denied so many of their civil liberties when they go to prison, but religious exercise should not be one of them. And he went on to find that the Government had not proven its case, that they had not shown that they had a compelling reason to deny him access to this sweat lodge. And so, again, in that case, the little guy, the Native American prisoner, prevailed in that case.

And I think both of these are really important cases to show that, you know, Judge Gorsuch applies Federal statutes as Con-

gress has written them to protect the religious liberty of, in these two cases, a Muslim prisoner and a Native American prisoner.

Chairman GRASSLEY. Thank you very much.

Now, Mr. Meyer, my last question. Since you worked with him for a year, I think you can touch on this issue.

What does he look to get out of advocates during oral arguments? Have you ever witnessed him change his mind about a case during oral argument?

Mr. MEYER. Thank you, Senator.

Oral argument is incredibly important to the judge. It is part of the basic notion that the litigant should have a fair opportunity to be heard. And yes, I have seen the judge change his mind based on oral arguments.

The briefs, of course, are the fullest presentation of the parties' arguments. But what oral argument does is it gives you the opportunity to interact and pose some questions to counsel that they may have not actually addressed in their briefs. And I have seen a number of cases that the judge's thinking has been shaped in certain—on certain questions by the exchanges he is had with counsel.

His preparation for oral argument is incredible. I mean, the amount of the number of hours he devotes to the briefs, and then thinking through all of the issues in the briefs and background research is really—is really incredible. It is a huge amount of time.

Chairman GRASSLEY. Okay. Senator Blumenthal, I was told you would like to ask one more question.

Senator BLUMENTHAL. I have one more brief question, Mr. Chairman.

Chairman GRASSLEY. Go ahead. Please proceed.

Senator BLUMENTHAL. Professor Marshall, I was struck in your testimony by your reference to *Brown v. Board of Education*, and as you will note in my discussion with Ms. Miller, I mentioned the distinction that there was in Judge Gorsuch's comments on the privacy cases versus *Brown* in the way that he acknowledged that the privacy cases were decisions of the Court, and he declined to say whether or not he thought they were correct, and *Brown v. Board of Education*, which he said, in effect, was correctly decided.

So my question is when I saw the reference to *Brown*, it reminded me of a question that I did not have time to raise yesterday with Judge Gorsuch, which is whether *Brown v. Board of Education* is somehow distinguishable because it is an originalist case?

I do not believe it is, but you are the professor. So let me ask you.

Professor MARSHALL. No, it is not an originalist case, or at least if it was, it would be a surprise to the framers and the drafters of the Fourteenth Amendment, who supported segregated schools in the District of Columbia. It would be a surprise to the Justices who wrote and signed on to the *Brown* case.

They looked for an originalist backing, and they specifically requested information on whether it was supported by originalism. They were told no, and they decided the case anyway. So it is very difficult to get to that point.

Some originalists try to get there, and the reason why they try to get there is because of how difficult it would be to say we have

a theory of the Constitution that does not support *Brown v. Board of Education*.

But my answer would be the problem is not with *Brown v. Board of Education*. The problem is with the theory that, if honestly applied, does not get there.

Senator BLUMENTHAL. And just by way of historical enlightenment, I think I remember correctly—it has been a while since I looked at the history—actually, Chief Justice Warren asked Justice Frankfurter to find an originalist justification for *Brown*. He went to one of his law clerks, I think it was Alexander Bickel, who then wrote about it subsequently.

And Bickel could not find anything. Frankfurter could not find anything. And Warren said, well, we are going to reach the result anyway. We will write the opinion without an originalist justification. Am I roughly correct in that?

Professor MARSHALL. You are absolutely correct.

Senator BLUMENTHAL. Thank you. I am sorry I am not in your law school class.

Chairman GRASSLEY. If you want to——

Professor MARSHALL. I think you could teach it.

Chairman GRASSLEY. If you want to review—or a view of a farmer after that discussion, I would say that you very clearly say that it is not originalist. Gorsuch said that it was not, and I think you backed up what he said because he said yesterday that he did not consider that part of—or that you can call him an originalist, at least on that point.

Okay. I want to thank——

Senator BLUMENTHAL. Thank you, Mr. Chairman, for your courtesy and being able to ask the question.

Chairman GRASSLEY. Yes. So it is my opportunity for the third time today to thank the panel for participating. I know it takes a lot of work for time to be here, your presentation and your preparation. And it is all part of a very important part that Congress does not get—and thank God does not get involved in very often because we do have continuity on the Supreme Court, but it is very important for all the testimony. So I want to thank you for that.

And then for the benefit of the Committee, I said earlier this week, so this should not come as a surprise, questions for the record are due by tomorrow at 5 p.m. The record will also remain open until tomorrow at 5 p.m.

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

Chairman GRASSLEY. The hearing is now adjourned.

Thank you all.

[Whereupon, at 3:46 p.m., the Committee was adjourned.]

[Additional material submitted for the record for Day 1, Day 2, Day 3, and Day 4 follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List
Hearing before the
Senate Committee on the Judiciary

on

The Nomination of Neil M. Gorsuch to be an Associate Justice
of the Supreme Court of the United States

Monday, March 20, Tuesday, March 21,
Wednesday, March 22, and Thursday, March 23, 2017
Hart Senate Office Building, Room 216
11:00 a.m.

Introducers

The Honorable Michael Bennet
United States Senator
State of Colorado

The Honorable Cory Gardner
United States Senator
State of Colorado

Mr. Neal Katyal
Former Acting Solicitor General 2010-2011
Washington, DC

Panel I

The Honorable Neil M. Gorsuch

Panel II

Ms. Nancy Scott Degan
American Bar Association
Standing Committee on the Federal Judiciary
New Orleans, LA

Ms. Shannon Edwards
American Bar Association
Standing Committee on the Federal Judiciary
Edmond, OK

Panel III

Majority

The Honorable Deanell Reece Tacha
U.S. Court of Appeals Judge (Retired)
Duane and Kelly Roberts Dean and Professor of Law
Pepperdine Law School
Malibu, CA

The Honorable Robert Harlan Henry
U.S. Court of Appeals Judge (Retired)
President
Oklahoma City University
Oklahoma City, OK

The Honorable John L. Kane
U.S. District Court Judge (Senior)
District of Colorado
Denver, CO

Ms. Leah Bressack
Former Law Clerk
Washington, DC

Minority

Ms. Elisa Massimino
President and CEO
Human Rights First
Washington, DC

Mr. Jameel Jaffer
Executive Director
Knight First Amendment Institute
Columbia University
New York, NY

Mr. Jeff Perkins
Berthoud, CO

Mr. Guerino J. Calemine, III
General Counsel
Communications Workers of America
Washington, DC

Panel IV

Majority

Mr. Jeff Lamken
Partner
MoloLamken
Washington, DC

Professor Lawrence Solum
Carmack Waterhouse Professor of Law
Georgetown University Law Center
Washington, DC

Professor Jonathan Turley
J.B. and Maurice C. Shapiro Professor of Public Interest Law
The George Washington University Law School
Washington, DC

Ms. Karen Harned
Executive Director
National Federation of Independent Business Small Business Legal Center
Washington, DC

Minority

Ms. Heather McGhee
President
Demos
New York, NY

Ms. Fatima Goss Graves
Senior Vice President for Program and President-Elect
National Women's Law Center
Washington, DC

Mr. Pat Gallagher
Director
Environmental Law Program
Sierra Club
Oakland, CA

Ms. Eve Hill
Partner
Brown Goldstein Levy
Baltimore, MD

Panel V

Majority

Mr. Peter Kirsanow
Commissioner
U.S. Commission on Civil Rights
Partner
Benesch, Friedlander, Coplan & Aronoff
Cleveland, OH

Ms. Alice Fisher
Partner
Latham & Watkins
Washington, DC

Ms. Hannah Smith
Senior Counsel
Becket
Washington, DC

Mr. Tim Meyer
Former Law Clerk
Nashville, TN

Mr. Jamil Jaffer
Former Law Clerk
Arlington, VA

Minority

Ms. Kristen Clarke
President and CEO
Lawyers' Committee for Civil Rights Under Law
Washington, DC

Ms. Sarah Warbelow
Legal Director
Human Rights Campaign
Washington, DC

Ms. Amy Hagstrom Miller
President and CEO
Founder
Whole Woman's Health
Charlottesville, VA

Professor William Marshall
William Rand Kenan, Jr., Distinguished Professor of Law
University of North Carolina
Chapel Hill, NC

Ms. Sandy Phillips
Boerne, TX

UNITED STATES SENATE
COMMITTEE ON THE
JUDICIARY

QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT

PUBLIC

1. **Name: State full name (include any former names used).**

   Neil McGill Gorsuch

2. **Position: State the position for which you have been nominated.**

   Associate Justice, Supreme Court of the United States

3. **Address: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.**

   Office: Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257
   Residence: Boulder, CO

4. **Birthplace: State year and place of birth.**

   1967 in Denver, CO

5. **Education: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.**

   Doctorate:
   Oxford University (1992-1993, 1994-1995); D.Phil. (2004)

   Law School:
   Harvard Law School (1988-1991); JD (1991)

   College:
   Columbia University (1985-1988); BA (1988)
   University of Colorado at Denver (Summer 1986, no degree)

6. **Employment Record: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.**

Adjunct Professor, University of Colorado Law School (2009 to present)
2450 Kittredge Loop Drive, Boulder, CO 80309

U.S. Court of Appeals, Tenth Circuit, Circuit Judge (2006 to present)
Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257

U.S. Department of Justice, Office of the Associate Attorney General, Principal Deputy Associate Attorney General (2005-2006)
950 Pennsylvania Avenue, N.W., Washington, D.C. 20530

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Partner (1998-2005), Associate (1995-1997)
1615 M Street, N.W., Suite 400, Washington, D.C. 20036

Supreme Court of the United States, Law Clerk to Hon. Byron R. White and Hon. Anthony M. Kennedy (1993-1994)
1 First Street, N.E., Washington, D.C. 20543

U.S. Court of Appeals, D.C. Circuit, Law Clerk to Hon. David B. Sentelle (1991-1992)
E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001

Sullivan & Cromwell, Summer Associate (Summer 1991)
1700 New York Avenue, N.W., Suite 700, Washington, D.C. 20006

Harvard Government Department, Head Teaching Fellow for political philosophy course (1990-1991)
1737 Cambridge Street, Cambridge, MA 02138

Cravath, Swaine & Moore LLP, Summer Associate (Summer 1990)
825 Eighth Avenue, New York, NY 10019

Harvard Government Department, Teaching Fellow for political philosophy course (1989-1990)
1737 Cambridge Street, Cambridge, MA 02138

Davis, Graham & Stubbs LLP, Summer Associate (Summer 1989)
1550 Seventeenth Street, Suite 500, Denver, CO 80202

Walden Group, LLC (2005 to present). I am a member of this LLC. Walden Group owns title to a mountain cabin.

All of the above positions were paid, except Walden Group, LLC.

7. **<u>Military Service and Draft Status</u>: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from**

social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I registered for selective service.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.**

Edmund J. Randolph Award, U.S. Department of Justice (for outstanding service to the Department)

Joseph E. Stevens Award, Harry S. Truman Foundation (for outstanding public service)

United Kingdom – United States Legal Exchange, Delegate

Marshall Scholarship to Oxford University

Harry S. Truman Scholar at and *cum laude* graduate of Harvard Law School

Phi Beta Kappa and *cum laude* graduate of Columbia University

Council on Foreign Relations

Harry S. Truman Scholarship Selection Committee, Chairman, Rocky Mountain region

Green Bag Award for exemplary legal writing

Traphagen Distinguished Alumni Award, Federalist Society, Harvard Law School

Listed in *Who's Who in America*, *Who's Who in American Law*, and *Who's Who in the World*

9. **Bar Associations: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.**

Advisory Committee on Appellate Rules, U.S. Judicial Conference, Chairman (2016 to present)

Advisory Committee on Civil Rules, U.S. Judicial Conference, Pilot Project Working Group Member (approx. 2015 to present), Liaison Member (2015-2016)

Standing Committee on Rules of Practice and Procedure, U.S. Judicial Conference, Member (2010-2016)

Federal Judges Association, Executive Committee Member, Board of Directors (2009-

2015)

Tenth Circuit Judicial Council, Member (2008-2010, 2013-2015)

Tenth Circuit Judicial Council's Court Reporter and Court Rules Committee, Member (2008-2010, 2013-2015)

American Bar Association, including its Litigation and Antitrust sections (approx. 2002-2006), Member of Judicial Division, Rule of Law and International Courts Committee (2008-2009)

American Trial Lawyers Association (approx. 2002-2006)

Selection Committee, Member, Federal Public Defender, Kansas (2008)

Selection Committee, Member (or Chair), Federal Public Defender, Colorado and Wyoming (2013)

Selection Panel for United States Bankruptcy Judge, Chairman, Colorado (2014)

American Inns of Court
Charles Fahy Inn of Court (approx. 1997-1999)
Judge William E. Doyle Inn of Court (2007 to present)

10. <u>Bar and Court Admission</u>:

a. **List the date(s) you were admitted to the bar of any state and any lapses in membership. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission. Please explain the reason for any lapse in membership.**

New York (1992) (retired status from 2009-2012; currently active status)
Colorado (1994) (currently in inactive status)
District of Columbia (1997) (currently in judicial status)

My admissions to the Colorado and D.C. bars were by reciprocal admission without taking the bar exam.

Since becoming a judge I have generally not sought to renew my bar memberships as I no longer provide legal advice. I unintentionally returned to active status in New York in 2013 by paying the bar's biennial registration fee; though, as a full-time judge, I am retired from the practice of law within the meaning of 22 NYCRR §118.1(g).

b. **List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for**

any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States (1998)
U.S. Court of Appeals for the Second Circuit (2004) (lapsed in 2009 for not having entered an appearance in a case in the court for five years)
U.S. Court of Appeals for the Third Circuit (1998) (inactive since approx. 2003 for not having entered an appearance in a case in the court for five years)
U.S. Court of Appeals for the Fourth Circuit (1997)
U.S. Court of Appeals for the Sixth Circuit (2000)
U.S. Court of Appeals for the Seventh Circuit (2006)
U.S. Court of Appeals for the Tenth Circuit (2005)
U.S. District Court for the District of Colorado (1996)
U.S. District Court for the District of Columbia (2001) (lapsed in 2011; chose not to renew membership)
U.S. District Court for the Southern District of New York (2002)
U.S. District Court for the Eastern District of New York (2002)

Since becoming a judge I have generally not sought to renew my court admissions as I no longer litigate.

11. <u>Memberships</u>:

a. **List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, or in which you have participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an office or other person from whom more detailed information may be obtained.**

To my recollection:

University of Chicago Law School, Visiting Committee Member (2014-2016). Members help the Law School's leadership decide on its strategic vision for the school's future. For more information, contact Geertrui Spaepen, Associate Secretary of the University of Chicago, at spaepen@uchicago.edu, or 773-702-8925.

Phi Beta Kappa (1998 to present). Phi Beta Kappa is an academic honor society of which I have been a member since college. Its main office is located at 1606 New

Hampshire Avenue, N.W., Washington, D.C. 20009. For more information, contact Phi Beta Kappa at 202-265-3808.

Colorado Bar Association (periodic attendance to give talks). The Colorado Bar Association is a voluntary organization of Colorado lawyers. I have been an instructor at various of its continuing legal education events. For more information, contact CBA at (303) 860-1115.

Faculty of Federal Advocates (periodic attendance to give talks). The Faculty of Federal Advocates is a voluntary organization of Colorado lawyers. I have been an instructor at various of its continuing legal education events. For more information, contact FFA at ahoffman@facultyfederaladvocates.org.

Colorado Chief Justice's Commission on the Legal Profession, Member (2011-2013). The Chief Justice's Commission on the Legal Profession (currently known as the Commission for Professional Development) identifies and addresses ways to improve the legal profession. I attended Commission meetings and participated in various work groups to advance the Commission's objectives. For more information, contact the Commission at 720-625-5150.

Oklahoma City University Law School, Visiting Jurist (2010). As a visiting jurist, I gave lectures, spoke in classes, and spoke with students and faculty. For more information, contact the law school at 405-208-5337.

Harry S. Truman Scholarship Selection Committee (approx. 2006 to present). The Truman Foundation supports Americans from diverse backgrounds in public service by awarding scholarships. As a member of the Selection Committee, I review applications, conduct interviews, and participate in selection decisions. For more information, contact the Foundation at 202-395-4831.

Association of Marshall Scholars (1992 to present). The Association of Marshall Scholars fosters personal and professional relationships among Marshall Scholars to strengthen the relationship between the United Kingdom and the United States. As a member of the Association, I sometimes attend social events and meet with other Marshall Scholars. For more information, contact the Association at 917-818-1267 or admin@marshallscholars.org.

Republican National Lawyers Association (prior to 2005). The RNLA is the principal national organization of Republican lawyers and, as I understand it, has four missions: advancing professionalism; advancing open, fair, and honest elections; advancing career opportunity; and advancing Republican ideals. To my recollection, I wrote op-ed pieces and attended meetings. For more information, contact Brittany Walker at 202-802-0437 or walker@republicanlawyer.net.

Trout Unlimited (periodic). Trout Unlimited strives to protect cold-water fisheries and promote conservation. I paid dues but, to my recollection, was not otherwise active. For more information, contact the organization at 303-440-2937 or

JFlorence@tu.org.

Westwood Country Club (prior to 2006). Westwood offers social opportunities to its members in a family-oriented atmosphere. I used the club's facilities. The Club can be reached at 703-938-2300

University Club (prior to 2006). The University Club hosts social events and is a meeting spot for members, both national and international, from a variety of professions. I participated in social events and used the club's facilities. The Club's Director of Membership is Ms. Kathleen Keenan: 202-824-1380, kkeenan@universityclubdc.com.

Columbia University Alumni Representative Committee (periodic). The Committee represents Columbia to prospective students. My responsibilities as a representative included interviewing applicants and answering their questions about Columbia University. For more information, email arcinfo@columbia.edu.

Council on Foreign Relations (2004-2009). The Council on Foreign Relations is a nonpartisan organization that seeks to inform others of foreign policy concerns. As a member, I attended, helped organize, or participated in occasional meetings. For more information, contact the Washington office at 202-509-8400.

Judge William E. Doyle Inn of Court (2007 to present). The American Inns of Court promotes the rule of law by adhering to high standards of professionalism. I have attended meetings, which usually feature guest speakers on a current legal topic. I have been leader of a pupilage group and in that role have mentored a small group of lawyers. For more information, contact Kari Elizalde at kari.elizalde@judicial.state.co.us.

Bridge Project (2007). The Bridge Project prepares a path to high school graduation for youth in public housing neighborhoods. I gave advice on college and academic choices to a high school student. For more information, call 303-871-2651.

Federal Judges Association (2009-2015), Member of Executive Committee. The Federal Judges Association is a volunteer organization comprising United States federal judges who seek to promote an independent judiciary and civics education. I attended board meetings and gatherings to promote various legal issues. I also helped guide the organization's amicus participation in cases related to the restoration of judicial cost of living adjustments. For more information, contact Executive Director Beth Palys at fja@federaljudgesassoc.org or 301-358-4442.

Federal Rules Committees: Standing Committee on Rules of Practice and Procedure, Advisory Committee on Civil Rules, and Advisory Committee on Appellate Rules (2011-2017). These committees exist to suggest improvements to the rules of procedure governing federal court litigation. I attended meetings and helped draft amendments to rules. I also participated in helping to develop pilot

projects to facilitate civil litigation reform efforts. For more information, contact the Public Affairs Office at the Administrative Office of the United States Courts (AO) at 202-502-2600.

The Federalist Society for Law and Public Policy Studies (periodic attendance to give speeches). The Federalist Society is an organization of conservative and libertarian attorneys that aims to promote principles of separation of powers and an independent judiciary. I have attended and spoken at some of the organization's gatherings. I have also sometimes spoken to individual Federalist Society chapters at various law schools. For more information, contact the D.C. office at 202-822-8138 or info@fed-soc.org.

Boulder Country Day School, Member of Board of Directors (2011-2013). As a Board Member, I participated in meetings where the Board dealt with various issues facing the school, including academics, finances, and student activities. For more information, contact the school at 303-527-4931 or info@bouldercountryday.org.

b. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.**

To my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

c. **List all conferences, symposia, panels, and continuing legal education events you have attended since you joined the Department of Justice. For each event, provide the dates, a description of the subject matters addressed, the sponsors, and whether any funding was provided to you by the sponsors or other organizations.**

The following list was compiled after persons acting on my behalf performed a thorough review of my calendar and archived emails and is accurate to my recollection.

Unless otherwise noted with an asterisk, any funding for these events came, to my recollection, from me or the government. Any funding consisted of reimbursement for my expenses. In addition, I received a teaching fee of $2,500 from the Oklahoma City University.

D.C. Bar Event (06/21/2005)
Dinner event honoring John C. Cruden, president of the D.C. Bar.

Lawsuits and Liberty Conference (06/27/2005 – 06/28/2005)
Conference studying the civil justice system and its relationship to the overall liberty of American citizens. Sponsored by Common Good.

Orientation of 2005–06 Class of AAAS Science & Technology Policy Fellows (9/14/2005)
Presentation on the challenges faced by the legal system in dealing with cases that are marked by increasing technical complexity. Sponsored by American Association for the Advancement of Science (AAAS).

Marshall Scholars Orientation (9/20/2005)
Keynote Speaker at British Embassy event.

Council on Foreign Relations (12/1/2005)
Event where Attorney General spoke on U.S. foreign policy.

St. Louis Family Justice Center Grand Opening (01/2006)
Opening of center designed to provide a one-stop resource for women and families looking to escape domestic violence and abuse. Sponsored by Area Resources for Community and Human Services.

Council on Foreign Relations (01/24/2006 – 01/25/2006)
Event on the McCain-Graham amendment and war on terror interrogation and detainee treatment issues.

Council on Foreign Relations (02/28/2006)
Event on the McCain-Graham amendment and war on terror interrogation and detainee treatment issues.

D.C. Circuit Court Judicial Conference (06/06/2006 – 06/10/2006)
Meeting of the D.C. bar, with presentations by judges and legal experts.

Tenth Circuit Judicial Conference (09/06-2006-09/10/2006)
Bench and Bar Conference.

Colorado Bar Association (11/09/2006)
CLE Event: Appellate Practice in Federal and State Courts. (Denver CO).

Tenth Circuit Meeting (11/28/2006-11/29/2006)
Investiture of Judge Jerome Holmes.

Tenth Circuit Meeting (12/03/2006-12/06/2006)
Meeting of Tenth Circuit Judges in Santa Fe, NM.

Kansas City Metropolitan Bar Association (03/08/2007)
Discussion on legal writing.

Tenth Circuit Judicial Conference (07/11/2007-07/14/2007)
Meeting of Tenth Circuit Judges.

Washburn University School of Law (03/09/2007)
Panel discussion on Appellate Advocacy.

Harvard Law School (03/20/2007-03/22/2007)*
Federalist Society Lunch. Sponsored by Harvard Law School.

Stevens Award for Outstanding Public Service in the Field of Law (06/06/2007)*
Sponsored by Truman Foundation.

Federal Judicial Center Program (07/08/2007-07/11/2007)
New Appellate Judges Seminar.

National Lawyers Association Meeting (09/10/2007)
(Denver, CO).

American Bar Association (09/29/2007)*
AJEI Summit, Panel on Oral Advocacy.

American College of Trial Lawyers (10/12/2007)
Meeting of Judicial Fellows. (Denver, CO).

Federal Judicial Center Program (09/27/2007-09/30/2007)
Summit for Appellate Judges.

Wake Forest University (11/15/2007-11/17/2007)*
Moot Court. Sponsored by Wake Forest University.

Federal Judicial Center Program (02/26/2008-02/28/2008)
2008 Orientation for Appellate Judges.

Federalist Society (04/17/2008-04/19/2008)*
Visited University of Chicago and University of Michigan chapters. Sponsored by Federalist Society.

Florida State University (05/02/2008-05/03/2008)*
Commencement Speech. Sponsored by Florida State University.

Tenth Circuit Judicial Conference (09/03/2008-09/09/2008)
Bench and Bar Conference.

Federal Bar Association (10/23/2008)*
Mock Oral Argument. Sponsored by Oklahoma City Chapter of Federal Bar Association

Federal Judicial Center Program (11/05/2008-11/07/2008)
FJC Symposium for U.S. Court of Appeals Judges.

Yale Federalist Society (02/04/2009-02/05/2009)*
Visited Yale Law School chapter. Sponsored by Yale Federalist Society.

University of Southern California (03/05/2009-03/06/2009)*
Moot Court. Sponsored by University of Southern California.

Harvard Federalist Society (04/15/2009-04/16/2009)*
Traphagen Distinguished Alumni Lecture Series. Sponsored by Harvard Federalist Society.

Princeton University (04/16/2009-04/18/2009)*
Conference on Law and Religion: Philosophical and Historical Perspectives. Sponsored by Witherspoon Institute of Princeton University.

University of Colorado (04/21/2009)
Faculty Talk (Boulder, CO).

Colorado Bar Association (05/20/2009)
2009 Colorado Employment Law Conference. (Denver, CO).

Capital Habeas Progress Meeting (10/26/2009-10/28/2009)
A meeting of judges and practitioners to discuss improving the quality of representation death row inmates receive in their federal habeas proceedings.

Federal Bar Association (12/14/2009-12/15/2009)*
William J. Holloway, Jr. Lecture. Sponsored by Federal Bar Association, Oklahoma City Chapter.

Oklahoma City University (02/09/2010-02/12/2010)*
Moot Court and Lecture. Sponsored by Oklahoma City University.

University of Michigan (04/06/2010-04/08/2010)*
Moot Court. Sponsored by University of Michigan.

Federalist Society (04/21/2010)*
Moot Court and meeting with Federalist Society.
Sponsored by the University of Chicago Law School Federalist Society.

Federal Judges Association Meeting (05/22/2010-05/26/2010)*
Sponsored by Federal Judges Association.

Tenth Circuit Judicial Conference (08/25/2010-08/29/2010)
Bench and Bar Conference.

University of Texas (03/31/2011-04/02/2011)*
Sponsored by University of Texas at Austin.

Federal Judges Association Meeting (04/12/2011-04/14/2011)*
Meeting of FJA. Sponsored by Federal Judges Association.

University of Notre Dame (09/08/2011-09/10/2011)*
Festschrift launch for John Finnis. Sponsored by University of Notre Dame.

Tenth Circuit Judicial Conference (09/20/2011-09/24/2011)
Meeting of Tenth Circuit Judges.

Institute for the Advancement of the American Legal System (12/2011)
Meeting. (Denver, CO).

Harvard University (04/03/2012-04/05/2012)*
Attended Howard Vaughan Academic Program and met with Federalist Society. Sponsored by Harvard University.

Chaves County Law Day (04/26/2012-04/27/2012)*
Law Day celebration in Roswell, NM. Sponsored by Chaves County Bar Association.

University of Colorado (09/19/2012)
Bench and Bar Conference. (Boulder, CO).

Federalist Society (11/15/2012-11/18/2012)*
2012 National Lawyers Convention. Sponsored by Federalist Society.

University of Colorado Law School (02/09/2013)
Colorado Marshall-Brennan Moot Court Competition. (Boulder, CO).

Federal Judges Association (04/24/2013-04/25/2013)*
Meeting of FJA. Sponsored by Federal Judges Association.

Tenth Circuit Judicial Conference (08/28/2013-08/30/2013)

Tenth Circuit Meeting (10/11/2013)
Investiture of Judge Gregory Phillips.

Faculty of Federal Advocates (11/12/2013)
A Brown Bag with the Honorable Timothy M. Tymkovich and the Honorable Neil M. Gorsuch. (Denver, CO).

Federalist Society (11/15/2013-11/16/2013)*
2013 National Lawyers Convention. Sponsored by Federalist Society.

Yale University (12/08/2013-12/10/2013)*
Moot Court. Sponsored by Yale University.

Colorado Bar Association (12/13/2013)
CLE Event: Brief Writing. No funding. (Denver, CO).

New York University (04/06/2014-04/08/2014)*
Moot court. Sponsored by New York University.

Federal Judges Association Meeting (05/03/2014-05/04/2014)*
Sponsored by Federal Judges Association.

University of Chicago Visiting Committee (10/29/2014-10/31/2014)*
Annual Meeting of the Visiting Committee. Sponsored by University of Chicago.

Colorado Bar Association (12/12/2014)
CLE Event on appellate practice. No funding. (Denver, CO).

Tenth Circuit Meeting (04/22/2015-4/24/2015)
Meeting of Tenth Circuit Judges.

Tenth Circuit Judicial Conference (05/17/2015-05/21/2015)

Renaissance Weekend (07/02/2015-07/06/2015)*
Interdisciplinary conference. Sponsored by Renaissance Weekend.

UK-US Legal Exchange (09/03/2015-09/11/2015)*
Meeting of UK and US jurists and attorneys. Sponsored by the American College of Trial Lawyers.

Case Western Reserve University (04/06/2016-04/08/2016)*
2016 Sumner Canary Lecture. Sponsored by Case Western Reserve University.

UK-US Legal Exchange (09/16/2016-09/23/2016)*
Meeting of UK and US jurists and attorneys. Sponsored by the American College of Trial Lawyers.

Tenth Circuit Bench & Bar Conference (09/03/2016)

Institute for the Advancement of the American Legal System (10/21/2016)
Discussion on access to justice.

Israel Academic Exchange (12/10/2016-12/19/2016)*

Gathering of legal scholars and judges from various nations in Israel. Sponsored by Academic Exchange.

Federalist Society (01/21/2017)
Lunch Talk. (Denver, CO).

A review of my emails and calendar suggests that I may have attended the events listed below; however, I have no recollection of such attendance and am unable to locate any other records that might confirm my attendance.

ABA Task Force Meeting re: Attorney-Client Privilege (9/08/2005)

Council on Foreign Relations (11/10/05 – 11/11/05)
Tenth Annual Term Member Conference, New York.

Council on Foreign Relations (12/7/2005)
Meeting with President George W. Bush.

Council on Foreign Relations Roundtable (12/12/2005)
Discussion of detainee treatment.

Council on Foreign Relations (1/09/2006)
"Iraq: The Way Forward" Event with Robert M. Kimmitt.

Council on Foreign Relations (1/13/2006)
"Lessons Learned" Event with Judge William Webster.

Council on Foreign Relations (1/23/2006)
Term Member Trip to Capitol Hill.

Inaugural Georgetown National Law Forum on Intercepting Al Qaeda,
Georgetown University Law Center (1/24/2006)
Attended speech by AG Gonzales on efforts to combat terrorism.

National District Attorneys Association Capital Conference (1/31/2006)

Heritage Foundation Luncheon (4/26/2006)
Roundtable discussion on the Patriot Act, specifically Terrorism Prosecution/Civil Liberties issues that accompany the Act; judicial confirmations; and sentencing issues.

NIJ Terrorism Research Conference (5/12/2006-5/13/2006)

Council on Foreign Relations (9/6/2006)
Roundtable on CFIUS Reform.

Council on Foreign Relations (10/10/06)

CFR Study Group – Beyond Institutions: Fostering Cultural Support for the Rule of Law

12. Published Writings and Public Statements:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

To my recollection and through searches of publicly available databases by persons acting on my behalf, I have found the following works that I authored or co-authored since law school. Copies of these materials are attached as Appendix 12(a).

The Law of Judicial Precedent (Thomas West 2016).

Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case W. Res. L. Rev. 905 (2016).

Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy, 100 Judicature, no. 3, Aug. 2016, at 46.

Law's Irony, 37 Harv. J.L. & Pub. Pol'y 743 (2014).

Intention and the Allocation of Risk, in Reason, Morality, and Law (Oxford University Press 2013).

A Reply to Raymond Tallis on the Legalization of Assisted Suicide and Euthanasia, 28 J. Legal Med. 327 (2007).

The Future of Assisted Suicide and Euthanasia (Princeton University Press 2006).

Letter to the Editor, *Nonpartisan Fee Awards*, Washington Post, March 18, 2004.

Liberals 'N' Lawsuits, National Review Online (Feb. 7, 2005).

No Loss, No Gain, Legal Times (Jan. 31, 2005) (co-authored with Paul B. Matey).

Settlements in Securities Fraud Class Actions: Improving Investor Protection, Washington Legal Foundation (Apr. 2005) (co-authored with Paul B. Matey).

The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change, 2004 Wis. L. Rev. 1347 (2004).

Letter to the Editor, *High Court Clerks and Appellate Lawyers Decry Vanity Fair Article*, Legal Times (Sept. 27, 2004) (one of multiple signatories).

Justice White and Judicial Excellence, UPI (May 3, 2002).

The Right to Assisted Suicide and Euthanasia, 23 Harv. J.L. & Pub. Pol'y 599 (2000).

Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits, 20 Hofstra L. Rev. 341 (1991) (co-authored with Michael Guzman) and Cato Institute Policy Analysis No. 178 (1992) (co-authored with Michael Guzman).

The Constitutional Case for Term Limits, Wall Street Journal, Nov. 4, 1992, at A15 (co-authored with Michael Guzman).

Searches of publicly available databases by persons acting on my behalf have yielded the following materials I either wrote or edited in college.

The State Department v. Afghanistan, The Morningside Review (Winter 1986) (associate editor).

In Lumine Tuo..., The Morningside Review (Spring 1986) (associate editor).

A Tory Defense, The Morningside Review (October 1986) (associate editor).

U.S. Cubans Defy Castro, Daily Spectator (September 16, 1985).

Band Is not 'Disgraceful', But ..., Daily Spectator (October 1, 1985).

Poor Dartmouth Clone, Daily Spectator (April 4, 1986).

Untitled, Daily Spectator (March 19, 1986).

Let's Let the Commander in Chief Lead, Daily Spectator (January 28, 1987).

Counterpoint, Just Say Yes, Daily Spectator (February 13, 1987).

Comment, Going Crazy Over Coors, Fed Up With the Rites of Spring, Daily Spectator (March 23, 1987).

Comment, a Movement Goes Astray, Fighting Racism, Not Making Revolution, Daily Spectator (April 8, 1987).

Comment, College and Core Connote CU, Daily Spectator (February 5, 1988).

Comment, Student Council Elections Ignore Inanity, Investigate Issues, Daily

Spectator (March 23, 1988).

Comment, "Progressives" Where Have All the Protests Gone?, Daily Spectator (April 11, 1988).

Comment, Taking a Stand: The University Steps Into the Real World, Overcoming a Hegemony of Ideas, Daily Spectator (February 25, 1987).

The Federalist Paper (February 27, 1987) (co-founder, editor).

The Federalist Paper (October 6, 1987) (co-founder, editor).

The Federalist Paper (October 26, 1987) (co-founder, editor).

The Federalist Paper (November 23, 1987) (co-founder, editor).

Co-Ed Fraternity Debate, Con: The Federalist Paper (March 7, 1988) (co-authored with Michael Behringer) (co-founder, contributor).

The Federalist Paper (April 6, 1988) (co-founder, contributor).

The Federalist Paper (May 4, 1988) (co-founder, contributor).

b. **Supply four (4) copies of any reports, memoranda, policy statements, minutes, agendas, or other materials you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member or in which you have participated as defined in 11(a). Include reports, memoranda, or policy statements of any advisory board on which you served or working group of any bar association, committee, or conference which produced a report, memorandum, or policy statement, even where you did not contribute to it. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.**

As noted in my response to Question 9, I have served on various legal or judicial-related committees. To my recollection and through searches of publicly available databases, persons acting on my behalf have compiled materials related to my service on those committees in Appendix 12(b).

c. **Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.**

To my recollection and through searches of publicly available databases,

persons acting on my behalf have compiled materials responsive to this question in Appendices 12(a), 12(d), and 12(f).

In addition, I testified at my confirmation hearing to be United States Circuit Judge for the Tenth Circuit on June 21, 2006. And I delivered a speech at the EEO diversity symposium while working at the Department of Justice. Copies of these materials are included as Appendix 12(c).

d. **Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, symposia, panels, continuing legal education events, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.**

Other than what is supplied in Appendix 12(c), to my recollection and through searches of publicly available databases, persons acting on my behalf have found the following remarks delivered by me:

The Federalist Society, *Getting Legal Ethics Right* Luncheon, Denver, CO, Jan. 27, 2017. The presentation substantially repeated the Feb. 2010 presentation, *But My Client Made Me Do It: The Struggle of Being a Good Lawyer and Living a Good Life*, for which a copy of the presentation has been supplied.

Tenth Circuit Bench & Bar Conference, *Life and Legacy of Supreme Court Justice Antonin Scalia*, Colorado Springs, CO, Sept. 3, 2016, video recording available at https://www.c-span.org/video/?414086-1/life-legacy-supreme-court-justice-antonin-scalia.

Case Western Reserve University School of Law, 2016 Sumner Canary Lecture, Apr. 7, 2016, published as *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905 (2016).

United Kingdom-United States Legal Exchange, London, England, Sept. 2015, published as *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 Judicature, no. 3, Aug. 2016, at 46.

The Federalist Society, 2013 National Lawyers Convention, Barbara K. Olson Memorial Lecture, Nov. 22, 2013, published as *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2015), and video recording available at http://www.fed-soc.org/multimedia/detail/13th-annual-barbara-k-olson-memorial-lecture-event-audiovideo.

The Federalist Society, *Dodd-Frank: Act Two and What's Next in Financial*

Services Laws and Regulations?, Nov. 19, 2012, video recording available at http://www.fed-soc.org/multimedia/detail/dodd-frank-act-two-and-whats-next-in-financial-services-laws-and-regulations-event-audiovideo.

University of Colorado Law School, Commencement Speech, May 11, 2012.

Chaves County Bar Association, Law Day, *The Majesty of the Law*, Roswell, NM, Apr. 26, 2012.

Harvard Law School, Cambridge, MA, Apr. 4, 2012.

Institute for the Advancement of the American Legal System, Denver, CO, Dec. 2011.

University of Notre Dame Law School, *Intention and the Allocation of Risk*, South Bend, IN, Sept. 2011.

Oklahoma City University School of Law, *But My Client Made Me Do It: The Struggle of Being a Good Lawyer and Living a Good Life*, Oklahoma City, OK, Feb. 2010.

Federal Bar Association, William J. Holloway, Jr. Lecture, *(How) Do Judges Think?*, Oklahoma City, OK, Dec. 11, 2009.

University of Colorado School of Law, Faculty Talk, *Musings on the State (Disrepair?) of the Bench-Academy Relationship*, Boulder, CO, Apr. 21, 2009.

Traphagen Distinguished Alumni Speakers Series, Harvard Law School, Cambridge, MA, Apr. 15, 2009. The presentation substantially repeated the May 3, 2008 presentation, *Ten Things to Do in Your First Ten Years of Practice*, for which a copy of the presentation has been supplied.

Florida State University Law School, Commencement Speech, *Ten Things to Do in Your First Ten Years of Practice*, Tallahassee, FL, May 3, 2008.

University of Denver Law School, Denver, CO, Jan. 31, 2008.

Marshall Scholar Gathering, Denver, CO, Dec. 5, 2007.

American College of Trial Lawyers, Judicial Fellows, Denver, CO, Oct. 12, 2007.

National Lawyers Association, *A Brief Reply to Raymond Tallis on the Legalization of Assisted Suicide and Euthanasia*, Denver, CO, Sept. 10, 2007.

American Association for the Advancement of Science, AAAS Science & Technology Policy Fellows Orientation, Washington, D.C., Sept. 14, 2005,

Federal Trade Commission Workshop, *Protecting Consumer Interests in Class Actions*, Sept. 2004. In a questionnaire I submitted to the Senate in connection

with my judicial nomination in 2006, I listed this speech as *Ensuring Class Action Fairness*, but I have no current memory of that title.

Unless otherwise noted, copies of the speeches above as well as available press reports are attached as Appendix 12(d).

In addition, I have given other talks for which I have not kept notes and do not have transcripts or recordings. For these talks, I have indicated the dates, the address of the group, and the subject matter to my recollection and where such information was available through a search of publicly available databases by persons acting on my behalf. Some of these remarks have touched on legal issues; others have not.

American Bar Association, Panel on Oral Argument, AJEI Summit, Sept. 29, 2007. The address of the group is 1050 Connecticut Ave. N.W., Suite 400, Washington, D.C. 20036.

American College of Trial Lawyers 2016 Annual Meeting, Moderator for Panel on *UK – US Legal Exchange: Access to Justice*, Sept. 9, 2016. The address of the group is 19900 MacArthur Blvd. #530, Irvine, CA 92612.

American College of Trial Lawyers, Oct. 12, 2007. Meeting of Judicial Fellows. This event took place in Denver, CO.

American Inns of Court. The address of the group is 225 Reinekers Lane, Suite 770, Alexandra, VA 22314.

British Marshall Scholarship Commission, 2007. The address of the group is Marshall Aid Commemoration Commission, Woburn House, 20-24 Tavistock Square, London, WC1H 9HF, UK.

Capital Habeas Progress Meeting, Oct. 26-28, 2009. A meeting of judges and practitioners to discuss how to improve the quality of representation death row inmates receive in their federal habeas proceedings.

Colorado Bar Association, *Appellate Practice*, Nov. 9, 2006. The address of the bar association is 1900 Grant St. # 900, Denver, CO 80203.

Colorado Bar Association, *Effective Appellate Advocacy*, May 20, 2009. The address of the bar association is 1900 Grant St. # 900, Denver, CO 80203.

Colorado Bar Association, *Effective Brief Writing*, Dec. 13, 2013. The address of the bar association is 1900 Grant St. #900, Denver, CO 80203.

Colorado Bar Association, *Appellate Practice*, Dec. 12, 2014. The address of the bar association is 1900 Grant St. # 900, Denver, CO 80203.

Common Good. The address of the group is One Metrotech Center, Suite 1703, Brooklyn, NY 11201.

Council on Foreign Relations, Moderator, Event on the McCain-Graham amendment and war on terror interrogation and detainee treatment issues, Jan. 24-25, 2006. The address of the group is 1777 F St. N.W. #100, Washington, D.C. 20006.

Council on Foreign Relations, Moderator, Event on the McCain-Graham amendment and war on terror interrogation and detainee treatment issues, Feb. 28, 2006. The address of the group is 1777 F St. N.W. #100, Washington, D.C. 20006.

Faculty of Federal Advocates, A Brown Bag with the Honorable Timothy M. Tymkovich and the Honorable Neil M. Gorsuch, Nov. 12, 2013. The address of the group is 700 Colorado Blvd., #420, Denver, CO 80206.
Federal Bar Association, Mock Oral Arguments, Oct. 23, 2008. The address of the group is 1220 North Fillmore St., Suite 444, Arlington, VA 22201.

Federal Judges Association Meetings, May 22-26, 2010, Apr. 12-14, 2011, Apr. 24-25, 2013, May 3-4, 2014.

Federalist Society National Lawyers Convention, Nov. 15-17, 2012. The address of the group is 1776 I St., N.W., Suite 300, Washington, D.C. 20006.

Federalist Society, University of Chicago Law School, Apr. 21, 2010. The address of the group is 1111 East 60th St., Chicago, IL 60637.

Federalist Society, Apr. 17-19, 2008. Visited University of Chicago and University of Michigan chapters. The addresses of the groups are, respectively, 1111 East 60th St., Chicago, IL 60637, and 625 South State St., Ann Arbor, MI 48109.

Federalist Society, *An Argument Against Consequentialism*, Yale Law School, Feb. 4, 2009. The address of the group is 127 Wall Street, New Haven, CT 06511.

Finnis Festschrift, University of Notre Dame, Sept. 9, 2011. The event took place at 1100 Eck Hall of Law, Notre Dame, IN 46556.

Florida State University School of Law Commencement Speech, May 3, 2008. The event took place at 425 West Jefferson St., Tallahassee, FL 32301.

Harry S. Truman Scholarship Foundation, 2006. The address of the group is 712 Jackson Place, N.W., Washington, D.C. 20006.

Harry S. Truman Scholarship Foundation, Recipient of Stevens Award, June 6, 2007. The address of the group is 712 Jackson Pl., N.W., Washington, D.C. 20006.

Harvard Law School, Mar. 20-22, 2007. Federalist Society event and lunch. The event took place at 1563 Massachusetts Ave., Cambridge, MA 02138.

Harvard Law School, Moot Court, Apr. 4, 2012. The event took place at 1563 Massachusetts Ave., Cambridge, MA 02138.

Israel Academic Exchange, Dec. 10-19, 2016.

Kansas City Metropolitan Bar Association, Mar. 8, 2007. Discussion on legal writing. The address of the organization is 2300 Main St. #100, Kansas City, MO 64108.

Lawsuits and Liberty Conference, June 27-28, 2005. Conference studying the civil justice system and its relationship to the overall liberty of American citizens.

Marshall Scholars Orientation, Sept. 2005. Keynote Speaker at British Embassy event.

National Lawyers Association Meeting, Sept. 10, 2007. The event took place in Denver, CO.

National White Collar Crime Center. The address of the group is 5000 NASA Blvd., Suite 2400, Fairmont, WV 26554.

New York University School of Law, Moot Court, Apr. 7, 2014. The event took place at 40 Washington Square South, New York, NY 10012.

Oklahoma City University. Informal discussions with students about clerkships and other legal issues, Feb. 9-12, 2010. The law school is located at 2501 N Blackwelder Ave., Oklahoma City, OK 73106.

Phil Anschutz Annual Dove Hunt. Discussion about the rule of law, Sept. 1, 2010. Eagle Nest Ranch, CO. I believe I spoke at similar events, including related fishing trips, in 2012 or 2013 and 2015.

Princeton University Witherspoon Institute, James Madison Program, Conference on Law and Religion, Apr. 16-18, 2009. The address of the group is 16 Stockton St., Princeton, NJ 08540.

Tenth Circuit Judicial Conference Panel, Life and Legacy of Justice Scalia, Sept. 3, 2016. The address of the group is 1823 Stout St., Denver, CO 80202.

Renaissance Weekend, Interdisciplinary Conference, July 2-6, 2015.

Tenth Circuit Judicial Conference, Aug. 25-29, 2010. Bench and Bar Conference.

University of Southern California Law School, Moot Court Competition, Mar. 5-6, 2009. The address of the school is 699 Exposition Blvd., Los Angeles, CA 90089.

University of Chicago Law School, Moot Court Competition, Apr. 21, 2010. The address of the school is 1111 East 60th St., Chicago, IL 60637.

University of Chicago Law School, Law Review Banquet, Apr. 22, 2010. The address of the school is 1111 East 60th St., Chicago, IL 60637.

University of Chicago Law School, Annual Meeting of the Visiting Committee, Oct. 29-31, 2014. The address of the school is 1111 East 60th St., Chicago, IL 60637.

University of Colorado Law School, Marshall-Brennan Moot Court Competition, Feb. 2013. The event took place at Wolf Law Building, 401 UCB, Boulder, CO 80309.

University of Colorado Law School, Bench and Bar Conference, Sept. 19, 2012, Boulder, CO. The event took place at Wittemeyer Courtroom, Colorado Law, Boulder, CO 80305.

University of Colorado Law School, Faculty Talk, Apr. 21, 2009. The address of the school is 2450 Kittredge Loop Dr., Boulder, CO 80309.

University of Illinois College of Law, Moot Court, Apr. 10, 2013. The event took place at 504 East Pennsylvania Ave, Champaign, IL 61820.

University of Michigan Law School, Moot Court, Apr. 7, 2010. The event took place at 625 South State St., Ann Arbor, MI 48109.

University of Texas Law School, Judicial Clerkship Workshop, Court of Appeals Panel Discussion, Apr. 1, 2011. The event took place at 727 E Dean Keeton St, Austin, TX 78705.

University of Southern California Gould School of Law, Moot Court, Mar. 6, 2009. The event took place at 699 Exposition Blvd, Los Angeles, CA 90089.

Wake Forest Law School, Moot Court, Nov. 15-17, 2007. The event took place at 1834 Wake Forest Rd, Winston-Salem, NC 27109.

Washburn University School of Law, Writing to Win Symposium, Mar. 9, 2007. The address of the law school is 1700 S.W. College Ave., Topeka, KS 66621.

Washington, D.C. Bar Association, 1997. The address of the group is 1101 K Street N.W., Suite 200, Washington, D.C. 20005.

Washington Legal Foundation, Supreme Court Mid-Term Preview, Feb. 11, 2004. The address of the group is 2009 Massachusetts Ave., N.W., Washington, D.C. 20036.

Wilder Elementary School, Littleton, Colorado, May 14, 2009. The event took place at 4300 West Ponds Cir., Littleton, CO 80123.

Wisconsin Bar Association. The address of the group is 5302 Eastpark Blvd., Madison, WI 53718-2101.

Yale Law School, Moot Court Competition, Harlan Fiske Stone Finals, December 9, 2013. The event took place at 127 Wall St., New Haven, CT 06511.

e. **List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.**

While I was in private practice (before mid-2005), I was interviewed by Prime Time Radio on the subject of assisted suicide. Around 2007, I was interviewed by a Denver-area sports channel for a piece about Justice Byron White's career. Prior to becoming a judge, I occasionally answered a reporter's questions, usually as background information about an ongoing case. After searching publicly available databases, I have not found transcripts of these interviews and discussions, except for one article in which I am quoted discussing *NCRIC v. Columbia Hospital for Women* and another article in which I am quoted discussing *Dura Pharmaceuticals, Inc. v. Broudo*. Copies of these articles are supplied in Appendix 12(e). To my recollection, I have not given interviews to the press since becoming a judge in 2006.

f. **If, in connection with any public office you have held, there were any reports, memoranda, or policy statements prepared or produced with your participation, supply four (4) copies of these materials. Also provide four (4) copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group, or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document, the date of the document, a summary of its subject matter, and where it can be found.**

To my recollection and based on searches of publicly available databases by persons acting on my behalf, my calendar, and my archived emails, I have compiled materials responsive to this question in Appendix 12(f). During my tenure as Principal Deputy Associate Attorney General, other U.S. Department of Justice components generated certain reports that passed through the Office of the Associate Attorney General. While I do not recall whether those reports were prepared or produced with my participation, I included them in Appendix 12(f).

13. **Judicial Office: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

U.S. Court of Appeals for the Tenth Circuit, Circuit Judge (2006 to present)

a. **Approximately how many cases have you presided over that have gone to**

verdict or judgment?

According to a February 9, 2017 Westlaw search, I understand that appellate panels on which I have been a member have issued opinions in approximately 1,800 criminal cases and 1,200 civil cases. Because some cases involve both civil and criminal issues, the sum of these figures is slightly higher than the total number of decisions issued by panels of which I was a member (approximately 2,750). During my tenure as a court of appeals judge, I have not presided over a trial.

Of these, approximately what percent were:

i. jury trials: N/A
bench trials: N/A

ii. civil proceedings: approximately 40%
criminal proceedings: approximately 60% [total 100%]

b. **Provide citations for all opinions you have written, published and unpublished, including concurrences and dissents. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.**

Please see the attached Appendix 13(b).

c. **Provide citations to all cases in which you were a panel member, but did not write an opinion. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.**

Please see the attached Appendix 13(c).

d. **For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).**

The names, affiliations, phone numbers, and addresses of counsel listed below represent the last known contact information I possess.

(1) *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

Nature of the Case: This case addressed the conflict between two provisions of immigration law. The first provision granted the Attorney General discretion to accord lawful resident status to non-citizens who illegally entered the United States. The second said non-citizens who illegally reenter must wait ten years

before obtaining lawful residency. Which takes precedence?

In 2005, the Tenth Circuit said the Attorney General retains her discretion to award legal status notwithstanding the second provision. Then, in 2007, the Board of Immigration Appeals disagreed and said the second provision strips away that discretion. The Supreme Court has instructed federal courts to defer to reasonable agency interpretations of ambiguous statutory language — even interpretations contradicting prior judicial precedents. So in 2011 the Tenth Circuit overruled its earlier decision and adopted the Board's reading. Sometime between 2007 and 2011, the petitioner, relying on the Tenth Circuit's original decision, applied to the Attorney General for discretionary relief. The Board said that its interpretation applied starting in 2007 even though the law on the books was the Tenth Circuit's original 2005 ruling.

Disposition: The panel held the petitioner was entitled to rely on the Tenth Circuit's original 2005 ruling because the court's interpretation of law, not the Board's, controlled until the court itself overruled that decision. Because the petitioner could not predict whether the Tenth Circuit would find the Board's interpretation entitled to deference and reject its prior precedent, prior precedent protected his reasonable reliance on the court's precedent.

In a separate concurrence, I questioned judicial deference to agency legal interpretations. My opinion noted that the Administrative Procedure Act vests the courts with the power and duty to interpret statutory provisions, that deferring to an agency's interpretation may be in tension with Congress's statutory directive, and that this practice may raise due process (fair notice) and separation of powers concerns.

For petitioner-appellant (Gutierrez-Brizuela):
Timothy Lee Cook
Law Office of Timothy L. Cook
P.O. Box 19512
Oklahoma City, OK 73144
(405) 682-2745
ntcooklawoffice@coxinet.net

For respondent-appellee (Lynch):
Monica Antoun
United States Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 616-4900
monica.antoun@usdoj.gov

(2) *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016).

Nature of the Case: This case concerned the limits of warrantless searches of residences. Without a warrant, officers approached a house that had several "No Trespassing" signs placed in and near the home's curtilage. Eventually the officers won admission and found drugs. The defendant filed a motion to suppress. The district court denied that motion and the defendant appealed.

Disposition: The court of appeals held that the officers did not violate the Fourth Amendment by entering the home's curtilage because they had "implied consent" to do so. In a dissenting opinion, I noted that the area immediately surrounding the home is protected by the Fourth Amendment under Supreme Court precedent. I explained as well that, under Supreme Court precedents, there is no "implied consent" to enter a home's curtilage when it and the path to it contain repeated "no trespassing" warnings explaining that entry is not permitted. I noted that the officers would have been free to enter with a warrant or in emergency circumstances.

For defendant-appellant (Carloss):
Robert Allen Ridenour
Office of the Federal Public Defender
Northern and Eastern Districts of Oklahoma
627 West Broadway
Muskogee, OK 74401
(918) 687-2430
rob_ridenour@fd.org

For plaintiff-appellee (United States):
Linda A. Epperley
Office of the United States Attorney
Eastern District of Oklahoma
520 Denison Avenue
Muskogee, OK 74401
(918) 684-5100
linda.epperley@usdoj.gov

(3) *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015).

Nature of the Case: The defendants produced a device that repairs damaged vertebrae. The FDA permitted the sale of the device but required the defendants to include a warning label that the device should be implanted via an anterior surgical approach. The plaintiff alleged that despite the label the defendants promoted the device for use in a posterior surgical approach. She sued under various state law claims. The district court dismissed these state law claims as preempted by federal law, claiming that the Medical Device Amendments (MDA) prevent states from establishing requirements for medical devices that are different from federal requirements.

Disposition: After discussing Supreme Court precedent on preemption and the MDA, the panel held that a plaintiff may bring a state law claim for highly regulated medical devices if she demonstrates that the duty from the state law is narrower than the related federal regulation specific to that particular device. Because the plaintiff failed to identify parallel federal requirements that her state law claims were narrower than, the panel affirmed the district court's dismissal.

For plaintiff-appellant (Caplinger):
Allison M. Zieve
Public Citizen Litigation Group
1600 Twentieth Street, N.W.
Washington, D.C. 20009
(202) 588-1000
azieve@citizen.org

For defendants-appellants (Medtronic, Inc.):
Andrew Tauber
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3324
atauber@mayerbrown.com

For amicus curiae (The Product Liability Advisory Council, Inc.):
Alan E. Untereiner
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411-L
Washington, D.C. 20006
(202) 775-4505
auntereiner@robbinsrussell.com

(4) *United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015) (en banc).

Nature of the Case: 18 U.S.C. § 924(c) enhances the sentence of "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . ." The defendant fired a single shot that hit and injured one victim and struck and killed another. The government sought to charge the defendant with two violations of § 924(c) for two separate crimes of violence, even though the defendant "used" the gun only once. The defendant moved to dismiss one of the charges and the district court granted the motion. A panel of the Tenth Circuit reversed, holding that two charges of § 924(c) could be brought from a single use of the firearm. The full Tenth Circuit then voted to grant rehearing en banc.

Disposition: The en banc court held that each charge under § 924(c) requires a separate "use" of a firearm. Looking at the statutory text, the court concluded that

the phrase "during and in relation to any crime of violence or drug trafficking crime" modifies the phrase "uses or carries a firearm," and an individual cannot use a firearm during and in relation to crimes of violence more than the total number of times he or she uses a firearm. To the extent any ambiguity remained in the statutory language, the court employed the rule of lenity to resolve it — a tool of statutory construction that compels courts to interpret ambiguities in criminal statutes in favor of the defendant. The court found that the rule of lenity was especially appropriate here because the government itself had argued in another en banc case before another circuit that the number of "uses," not the number of "crimes of violence," limits the number of available charges.

For plaintiff-appellant (United States):
Diana Hagen
Office of the United States Attorney
District of Utah
185 South State Street, Suite 300
Salt Lake City, UT 84111
(801) 325-3322
diana.hagen@usdoj.gov

For defendant-appellee (Rentz):
Jeremy M. Delicino
Delicino Lorenzo, LLC
10 West Broadway, Suite 650
Salt Lake City, UT 84101
(801) 364-6474
jeremy@jeremydelicino.com

(5) *MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109 (10th Cir. 2014).

Nature of the Case: In this dispute, the court was asked to consider when a defendant can be sued for securities fraud for opinions it issues. Seeking to conduct a secondary stock offering after the financial crisis in 2008, the defendant informed potential investors in its securities filings that it had investments in mortgage-backed securities. It also stated that based on internal analyses and independent consultations it predicted that the number of defaults on the underlying mortgages would level off. This prediction did not pan out, and the plaintiffs sued the defendants under section 11 of the Securities Act of 1993, which imposes liability when a registration statement contains an untrue statement of material fact. The district court dismissed the suit and the plaintiffs appealed.

Disposition: The panel held that entities can be liable under section 11 for an opinion if the plaintiff shows that the opinion is objectively false and the speaker did not believe it. Although section 11 is only triggered for an "untrue statement of a material fact," an opinion qualifies as a factual claim of the speaker's state of mind — and so an opinion can be a false statement of fact if the speaker does not

actually believe it. Further, because no harm results from relying on an opinion that proves true, the statement must also be objectively false. The plaintiffs in this case failed to make any allegations that the company disbelieved the opinion it issued. Accordingly, the panel affirmed the district court. The Supreme Court, in a separate, subsequent opinion, similarly held that opinions can be grounds for liability under section 11, because opinions can convey facts about the speaker's basis for forming that view. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1328-31 (2015).

For plaintiffs-appellants (MHC Mutual Conversion Fund, L.P.):
Jeffrey A. Berens
(former) Dyer & Berens LLP
(current) Berens Law LLC
2373 Central Park Boulevard, Suite 100
Denver, CO 80238
(303) 861-1764
jeff@jberenslaw.com

For defendants-appellees (Sandler O'Neill & Partners, L.P.):
Peter A. Wald
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
(415) 395-8006
peter.wald@lw.com

Stanley J. Parzen
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 701-7326
sparzen@mayerbrown.com

(6) *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

Nature of the Case: Mr. Yellowbear, a state prisoner, sued prison officials under the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA prohibits the government from imposing a substantial burden on a person's religious exercise unless the burden furthers a compelling governmental interest and is the least restrictive means of doing so. Mr. Yellowbear sought use of the prison's sweat lodge for prayer but the prison denied him access. The sweat lodge was located in the general prison yard and Mr. Yellowbear, due to threats against him, was housed in a special protective unit. Prison officials claimed that the cost of security accompanying him to the sweat lodge was unduly burdensome. The prison moved for summary judgment, which the district court granted. Mr. Yellowbear appealed.

Disposition: The panel vacated the district court's grant of summary judgment. Mr. Yellowbear demonstrated that access to a sweat lodge is a form of religious exercise in his Northern Arapaho faith and the prison's denial of access to the sweat lodge was a substantial burden on that religious exercise. The prison failed to carry its burden of establishing a compelling interest because it asserted only that the costs were "unduly burdensome" while failing to quantify those costs in any way. The prison also failed to show that a complete denial of access to the sweat lodge was the least restrictive means of accommodating its concerns. This opinion was quoted by Justice Sotomayor's concurrence in a separate RLUIPA case. *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring).

For plaintiff-appellant (Yellowbear):
Sean Connelly
(former) Reilly Pozner, LLP,
(current) Zonies Law LLC
1900 Wazee Street, Suite 203
Denver, CO 80202
(720) 464-5300
sconnelly@zonieslaw.com

For defendants-appellees (Lampert):
Melissa E. Westby
Office of the Attorney General for the State of Wyoming
2320 State Capitol
Cheyenne, WY 82002
(307) 777-7841
mwestb@state.wy.us

(7) *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

Nature of the Case: This case concerned whether the Religious Freedom Restoration Act (RFRA) protected two companies and their owners from certain requirements of the Affordable Care Act. RFRA prevents the federal government from imposing a substantial burden on a person's religious exercise unless the burden furthers a compelling governmental interest and is the least restrictive means of doing so. The Greens owned and operated Hobby Lobby Stores, Inc., an arts and crafts chain, and Mardel, Inc., a Christian book store. The Greens objected to providing insurance coverage for contraceptives that would prevent implantation of a fertilized egg (but not other contraceptives that prevent fertilization). Under the Affordable Care Act, their companies would have been liable for millions of dollars each year in regulatory taxes. The Greens and the companies sued to enjoin the government from enforcing the contraceptive-coverage requirement.

Disposition: The en banc court held that the companies had standing to sue and reversed the district court's denial of a preliminary injunction. The en banc majority, which I joined, concluded that the companies had demonstrated a

likelihood of success on their RFRA claim and satisfied the irreparable harm requirement. In a concurring opinion, I explained why the Greens, as individuals, also had standing to sue and were entitled to relief. I also explained that the Anti-Injunction Act did not apply.

For plaintiffs-appellants (Hobby Lobby, Inc.):
S. Kyle Duncan
(former) The Beckett Fund
(current) Schaerr Duncan LLP
1717 K Street N.W., Suite 900
Washington, D.C. 20006
(202) 787-1060
kduncan@schaerr-duncan.com

For defendants-appellees (Sebelius):
Alisa B. Klein
Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-1597
alisa.klein@usdoj.gov

(8) *Lee v. Max Int'l, LLC*, 638 F.3d 1318 (10th Cir. 2011).

Nature of the Case: The central question in this case was when a court may sanction parties for abuses of the discovery process. The plaintiffs failed to produce documents in response to a discovery request and subsequently violated two judicial orders compelling production. The district court dismissed the case as a sanction for this misconduct and the plaintiffs appealed the dismissal.

Disposition: The panel held that the district court did not abuse its discretion in dismissing the case for failure to comply with several orders compelling production of the same discovery materials. The panel explained that a litigant should not count on more than three chances to make good a discovery obligation before incurring repercussions.

For plaintiffs-appellants (Lee):
Stuart Mark Miller
Law Office of Stuart Mark Miller
24411 Ridge Route Drive, Suite 200
Laguna Hills, CA 92653
(949) 580-3737
stuartmiller@earthlink.net

For defendant-appellee (Max International, LLC):
James T. Blanch

(former) Parsons, Behle & Latimer
(current) Judge, Third Judicial District of Utah
Matheson Courthouse 450 South State Street
P.O. Box 1860
Salt Lake City, UT 84114
(801) 238-7112

(9) *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011).

Nature of the Case: This case concerned the immunity that state and municipal governments sometimes enjoy from federal antitrust laws. The City of Newkirk, Oklahoma, provided electricity to consumers inside its boundaries while Kay, a rural electric cooperative, served those on the outside. When a new jail was built just outside Newkirk, both the city and the cooperative offered to provide it with electricity. Newkirk — the only provider of sewage services in the area — said it would refuse to provide any sewage services to the jail unless the jail also purchased its electricity. Faced with this threat, the jail chose to buy electricity from the city even though Kay offered better terms. Kay then brought suit against Newkirk for anticompetitive behavior, but the district court dismissed the case, finding the city immune from federal antitrust laws.

Disposition: The Tenth Circuit reversed. While states generally enjoy immunity from the Sherman Act until Congress says otherwise, that immunity does not always extend to municipal governments. Instead, a municipality is exempt from antitrust laws only when its parent state clearly authorizes it to engage in anticompetitive conduct. In this case, the Oklahoma state legislature never permitted the city to engage in such anticompetitive conduct. Indeed, the most specific statutes on point showed the state's clear preference for, not against, competition in the provision of electricity. The Supreme Court, in a unanimous opinion, later cited this opinion and approved its reasoning. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

For plaintiffs-appellants (Kay Electric Coop.):
Douglas A. Rice
Derryberry & Naifeh LLP
4800 North Lincoln Boulevard
Oklahoma City, OK 73105
(405) 708-6784
drice@derryberrylaw.com

For defendants-appellees (City of Newkirk):
Andrew W. Lester
(former) Lester, Living & Davies, P.C.
(current) Spencer Fane
9400 N. Broadway Extension, Suite 600
Oklahoma City, OK 73114
(405) 844-9900

alester@spencerfane.com

For amicus curiae (Oklahoma Association of Electric Cooperatives):
Michael Burrage
Whitten Burrage
1215 Classen Drive
Oklahoma City, OK 73103
(405) 516-7800
mburrage@whittenburragelaw.com

(10) *United States v. Dolan*, 571 F.3d 1022 (10th Cir. 2009), *aff'd*, 560 U.S. 605 (2010).

Nature of the Case: The defendant assaulted a hitchhiker. Although the hitchhiker survived, the assault left him with over $100,000 in medical expenses. The defendant was convicted of assault. In addition to a prison sentence, the district court ordered restitution payments to the victim under the Mandatory Victims Restitution Act (MVRA). The MVRA sets a 90-day timeline after sentencing for the court to make a final determination of the victim's losses. And although the district court indicated within 90 days of sentencing that restitution was available, it did not make a final determination of restitution until after the 90 days had passed. On appeal, the defendant argued that the district court did not have jurisdiction to enter the final amount because it was past the 90-day deadline.

Disposition: The panel held that the MVRA's deadline is not a jurisdictional bar and the district court did not abuse its discretion in deciding the amount of monthly restitution payments. The Supreme Court subsequently granted the defendant's petition for a writ of certiorari and affirmed, holding that even if a sentencing court misses the 90-day deadline it still retains the power to order restitution, at least where (as here) the court clearly stated within the 90-day window that it would order restitution.

For defendant-appellant (Dolan):
Sara N. Sanchez
(former) Sheehan, Sheehan & Steltzner, P.A.
(current) Stelzner, Winter, Warburton, Flores, Sanchez and Dawes, P.A.
302 Eighth Street N.W., Suite 200
Albuquerque, NM 87102
(505) 938-7770
ssanchez@stelznerlaw.com

For plaintiff-appellee (United States):
Terri J. Abernathy
Office of the United States Attorney
District of New Mexico
555 South Telshor, Suite 300
Las Cruces, NM 88011

(575) 522-2304
terri.abernathy@usdoj.gov

e. **For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.**

Please see answer to Question 13(d) above, which provides this information.

f. **Provide a list of all cases in which certiorari was requested or granted.**

Please see attached Appendix 13(f).

g. **Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.**

To my recollection, no opinion I have authored has been reversed by a reviewing court or affirmed with significant criticism. In one instance, the Supreme Court vacated an opinion I wrote and remanded for further consideration in light of its newly issued opinion in *Gall v. United States*, 552 U.S. 38 (2007). *United States v. Gonzales*, 252 F. App'x 900 (10th Cir. 2007), *cert. granted, judgment vacated, and remanded sub nom. Sanchez v. United States*, 552 U.S. 1278 (2008).

The panel opinions I have joined written by other judges that have been reversed or vacated include, to my recollection:

Direct Mktg. Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014), *rev'd*, 135 S. Ct. 1124 (2015).

Colorado enacted notice and reporting requirements to increase the collection of use taxes imposed on residents who purchase tangible items from out-of-state retailers. The plaintiff sued, seeking to enjoin the enforcement of the requirements as a violation of the dormant Commerce Clause, and the district court agreed. On appeal and applying circuit precedent, the Tenth Circuit held that the Tax Injunction Act (TIA) precluded federal jurisdiction and ordered the district court to dismiss the claims. The Supreme Court reversed, holding that the enforcement of the notice and reporting requirements was not an "assessment, levy or collection" within the scope of the TIA. On remand, the Tenth Circuit reached the merits of the case and found that the Colorado law does not violate the dormant Commerce Clause. The losing party sought review on the merits in the Supreme Court. That Court denied review. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), *cert. denied*, No. 16-267, 137 S. Ct. 591 (Mem.) (Dec. 12, 2016).

United States v. Trotter, 483 F.3d 694 (10th Cir. 2007), *cert. granted and judgment vacated*, 552 U.S. 1090 (Jan. 07, 2008).

The defendants were convicted of various conspiracy, drug, and firearm charges. On appeal they argued, among other things, that the district court erred in calculating their sentences by failing to impose a sentence below the Guidelines range because of the disparity in punishment between powder cocaine and crack cocaine offenses. The Tenth Circuit affirmed, relying on prior precedent rejecting this argument. The Supreme Court granted the petition for writ of certiorari and vacated and remanded for further consideration in light of *Kimbrough v. United States*, 552 U.S. 85 (2007), which had recently held that district courts may find that the disparity between the Guidelines range for powder cocaine and crack cocaine offenses yields a sentence greater than necessary. On remand, the Tenth Circuit asked the district court to clarify why it refused defendants' request to impose a below-guidelines sentence. *United States v. Trotter*, 518 F.3d 773 (10th Cir. 2008). The district court stated it had exercised the discretion described in *Kimbrough* and so maintained its original sentence. The Tenth Circuit then dismissed the defendants' subsequent appeal as untimely. The Supreme Court denied review. *United States v. Trotter*, 379 F. App'x 735 (10th Cir. 2010), *cert. denied*, 562 U.S. 991 (Oct. 18, 2010).

h. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

According to a February 9, 2017 Westlaw search, I understand that panels of which I have been a member have issued approximately 2,750 opinions: roughly 600 published and 2,150 unpublished. So about 22% of my decisions have been published and 78% unpublished. By way of comparison, during my time as a judge, I understand that the Tenth Circuit published around 21.5% its decisions and released around 78.5% as unpublished opinions. The unpublished opinions are generally available on Westlaw and other online databases.

i. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

Beyond the cases described in Question 13(d) above, I have authored the following significant constitutional opinions.

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016).

Cordova v. City of Albuquerque, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J.,

concurring in the judgment).

United States v. Spaulding, 802 F.3d 1110, 1127 (10th Cir. 2015) (Gorsuch, J., dissenting).

United States v. Nichols, 784 F.3d 666, 667 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

Kerr v. Hickenlooper, 759 F.3d 1186, 1193 (10th Cir. 2014) (Gorsuch, J., dissenting from the denial of rehearing en banc).

Riddle v. Hickenlooper, 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring).

United States v. Nicholson, 721 F.3d 1236, 1246 (10th Cir. 2013) (Gorsuch, J., dissenting).

Bustos v. A & E Television Networks, 646 F.3d 762 (10th Cir. 2011).

Williams v. Jones, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting); 583 F.3d 1254, 1256 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1243 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

j. **Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.**

While sitting by designation, I authored an opinion in the following cases:

Blausey v. U.S. Trustee, 552 F.3d 1124, 1134 (9th Cir. 2009) (Gorsuch, J., dissenting).

A bankruptcy court dismissed the debtors' case because the debtors failed to include a $4,000 per month disability insurance benefit in their current monthly income calculation. Including the monthly payments would have disqualified them from a Chapter 7 discharge. The debtors argued that the Bankruptcy Code's definition of "current monthly income" incorporated the definition of "gross income" under the Internal Revenue Code, and so did not require them to include disability payments. The Ninth Circuit rejected this argument and affirmed the district court. I dissented, suggesting that the court of appeals could not hear the case because the debtors did not request permission to appeal within the 10-day window Congress prescribed by statute.

Salmon v. Astrue, 309 F. App'x 113, 116 (9th Cir. 2009) (Gorsuch, J., dissenting).

The plaintiff sought review of the Commissioner of Social Security's determination that she was not entitled to disability insurance benefits. The Ninth Circuit held that the administrative law judge failed to weigh the evidence properly because it favored one evaluation of mental impairment over another without offering an explanation. I dissented, suggesting that the district court had properly found the Commissioner's conclusions satisfied the deferential substantial evidence standard applicable to the case.

I sat by designation but did not author an opinion or join a dissent in the following cases:

Dumas v. New United Motor Mfg., Inc., 305 F. App'x 445 (9th Cir. 2008).

Grillo v. Cal. Dep't of Corr., 308 F. App'x 63 (9th Cir. 2009).

Howard v. Campbell, 305 F. App'x 442 (9th Cir. 2008).

Ikbal v. United States, 304 F. App'x 604 (9th Cir. 2008).

Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009).

Meier v. United States, 310 F. App'x 976 (9th Cir. 2009).

United States v. Hernandez-Caudillo, 304 F. App'x 543 (9th Cir. 2008).

United States v. Njai, 312 F. App'x 953 (9th Cir. 2009).

United States v. Uriarte-Acosta, 304 F. App'x 551 (9th Cir. 2008).

Rodriguez v. Editor in Chief, Legal Times 285 F. App'x 756 (D.C. Cir. 2008).

Rodriguez v. Editor in Chief, Legal Times, No. 07-5234, 2008 WL 2396189 (D.C. Cir. Feb. 25, 2008).

Rodriguez v. Editor in Chief, Legal Times, No. 07-5234, 2008 WL 2396188 (D.C. Cir. Apr. 23, 2008).

Hurt v. U.S. Court of Appeals for the Dist. of Columbia Circuit Banc, 264 F. App'x 1 (D.C. Cir. 2008).

Hurt v. U.S. Dist. Court Judges, 258 F. App'x 341 (D.C. Cir. 2007).

Rodriguez v. Editor in Chief, Legal Times, No. 07-5234, 2007 WL 5239004 (D.C. Cir. Dec. 19, 2007).

14. Recusal: If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system and a list of cases from which you were recused.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have sought to take seriously the admonition that that a judge should "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. The recusal procedure that I follow in the Tenth Circuit is broader than the recusal procedure adopted in the Supreme Court, which I would follow should I assume the position to which I have been nominated (see Question 24). In the Tenth Circuit, the clerk's office conducts a review of each case before placing it on a judge's calendar. That review checks case information the parties provide against each judge's recusal list (a list which includes family, friends, former clients, personal financial investments, and the like). Once a case is tentatively placed on a judge's calendar, each judge or his personal staff then independently reviews the matter for potential conflicts. If a case is screened out, either by the clerk's office or after review in chambers, the judge is generally assigned a new case in its place so that workloads are unaffected. When I was in private practice, my firm worked with a significant roster of clients, some of whom appear often in federal court. As a judge, my general practice has been to recuse from such cases. When I served as Principal Deputy Associate Attorney General, I helped supervise certain of the Justice Department litigating components. During my first two years on the bench, my general practice was to recuse from cases arising from these components. It has also been my practice to recuse when my financial interests might be affected or when my friends, family members, or former firm may have interests at stake. I do not retain records concerning such cases, but have attached a table of screened cases prepared by the clerk's office and those acting on my behalf together with my input and to my recollection, see Appendix 14. To my recollection, in over a decade on the bench, I have never received a motion from a party or litigant requesting that I remove

myself from a case based on partiality.

15. Public Office, Political Activities and Affiliations:

a. **List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.**

I have never been a candidate for or held an elective public office. Since law school, I have held the following appointed positions:

Law clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, 1991-1992. Appointed by Judge Sentelle.

Law clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, 1993-1994. Appointed by Justices White and Kennedy.

U.S. Department of Justice, Principal Deputy Associate Attorney General, 2005-2006. Appointed by the Attorney General and Associate Attorney General.

b. **List all memberships and offices held in and services rendered, whether compensated or not, to any political party, election committee, or President-elect transition team. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a President-elect transition team.**

Prior to becoming a judge, I volunteered on various political campaigns, including for President Ronald Reagan, President George H.W. Bush, and President George W. Bush, and participated in groups such as "Lawyers for Bush-Cheney." I have not held an office in any campaign. To my recollection, I have not authored memoranda analyzing issues of law or public policy on behalf of or in connection with a President-elect transition team.

c. **List all political events for which you were on the host committee, including the date, location, which candidate or organization it benefitted, and how much was raised at the event.**

To my recollection, I have not been on the host committee for a political event.

16. Legal Career: Answer each part separately.

a. Describe in reverse chronological order your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

Law Clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, 1993-1994.

Law Clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, 1991-1992.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

U.S. Department of Justice, Office of the Associate Attorney General, Principal Deputy Associate Attorney General, 2005-2006
950 Pennsylvania Avenue, N.W., Washington, D.C. 20530

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Partner, 1998-2005, Associate, 1995-1997
1615 M Street, N.W., Suite 400, Washington, D.C. 20036

Sullivan & Cromwell, Summer Associate, Summer 1991
1700 New York Avenue, N.W., Suite 700, Washington, D.C. 20006

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Immediately after law school, I spent the summer working for the law firm of Sullivan & Cromwell, where I assisted with corporate transactional work while studying for the bar. Thereafter, I served as a law clerk to the U.S. Court of Appeals for the D.C. Circuit with Judge David Sentelle from 1991 to 1992. In that capacity, I wrote bench memos and assisted with the preparation of opinions and dissents in matters ranging from criminal law to constitutional and administrative law. It was an intensive immersion into federal appellate law and practice. In addition, during the summer of 1992, Judge Sentelle sat by designation on the U.S. District Court for the Western District of North Carolina. There I assisted the court with several criminal trials and the disposition of civil matters.

From 1993 to 1994, I was fortunate to serve as law clerk to the Hon. Byron R. White. Justice White had just resigned from the Supreme Court and I served as his first law clerk in retirement and his only law clerk that year. Despite his "retirement," Justice White took on a heavy load of appellate cases, sitting by designation on the Tenth Circuit. I assisted Justice White with his work on the Tenth Circuit, preparing bench memos prior to argument and helping with opinions. Justice White also asked me to assist another sitting Justice, and Justice Kennedy kindly agreed to allow me to help in his chambers.

During my clerkships, approximately half of the cases I worked on were civil matters and half were criminal matters. Most involved federal appeals but, of those that involved trials, all were criminal trials.

Between my clerkships and again after them (1992-1993, 1994-1995), I attended Oxford University as a British Marshall Scholar studying for a doctorate in legal philosophy. My academic research and writing involved both criminal and civil law issues in proportions of roughly 60% criminal and 40% civil.

In 1995, I joined Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. In 1998, I became a partner at the firm and I remained there through May 2005. During my time in private practice I was involved in matters large and small for clients ranging from individuals to non-profits to corporations. My cases ranged from simple breach of contract disputes to complex antitrust, RICO, and securities fraud matters. I tried cases, participated in injunctive and evidentiary hearings, and argued motions of all kinds, including case dispositive motions to dismiss and for summary judgment, discovery disputes, *in limine* motions in preparation for trial, and post-trial motions. I also took and defended depositions regularly, worked on appeals before federal and state courts of appeals across the country, and provided antitrust and other legal counsel to clients. I estimate that, during my time in private practice, roughly 70% of my litigated matters were in federal court and 30% in state courts. Approximately 90% of these

matters involved civil disputes, with the remainder involving criminal matters.

In June 2005, I was appointed Principal Deputy to the Associate Attorney General. In that capacity I assisted in managing the Department's civil litigating components (antitrust, civil, civil rights, environment, and tax). Major litigation decisions in certain cases — such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms — are reviewed by the Office of the Associate Attorney General. I also spent a substantial amount of time reviewing and editing trial and appellate court legal briefs and developing case strategy. Virtually all of these matters were civil, though there were occasional criminal matters. I also acted as Associate Attorney General during periods when the Associate Attorney General was unavailable or recused and assisted in the development and implementation of a wide variety of initiatives and policies.

In 2006, I was confirmed to serve as a judge on the U.S. Court of Appeals for the Tenth Circuit.

ii. **your typical clients and the areas at each period of your legal career, if any, in which you have specialized.**

As a practicing lawyer, I consciously sought to maintain a general litigation practice and to avoid specialization. While in private practice, my matters ranged from complex antitrust, securities, and class actions to relatively straightforward breach of contract and breach of fiduciary duty disputes. I sought to represent and enjoyed representing plaintiffs and defendants in roughly equal proportions, and my clients ranged from individuals to non-profits to small and large corporations. My work at the Department of Justice was, if anything, even more varied, involving cases and issues arising from each of the Department's civil litigating components.

c. **Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.**

Most of my practice before I became a judge involved litigation. When I was in private practice, I appeared frequently in federal court and occasionally in state court.

i. **Indicate the percentage of your practice in:**
   1. **federal courts:** approximately 70%

2. **state courts of record:** approximately 30%
3. **other courts:** 0%
4. **administrative agencies:** 0%

ii. **Indicate the percentage of your practice in:**
1. **civil proceedings:** approximately 90%
2. **criminal proceedings:** approximately 10%

d. **List, by case name, all cases in courts of record, including cases before administrative law judges, you tried or litigated to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel. For each such case, include the docket number and provide any opinions and filings available to you.**

i. **What percentage of these trials were:**
1. **jury:** 100%
2. **non-jury:** 0%

While in private practice, I tried four jury trials to verdict, two as chief counsel and two as associate counsel. Two of the trials involved damages claims in excess of $1 billion; three were reported as among the top 100 verdicts for the years in which they were tried; all lasted between 2 and 6 weeks. To my recollection supported by my former law firm's records, I also participated in four non-jury injunctive proceedings that involved substantial evidentiary hearings and were litigated to final judgment. In a questionnaire I submitted to the Senate in connection with my judicial nomination in 2006, I referenced five non-jury injunctive proceedings, but my former law firm's records have confirmed that one of those proceedings ended after my client prevailed in temporary injunctive hearings and before judgment, and is therefore not encompassed by Question 16(d)'s request to produce related court filings. After a search of records retained by my former law firm, I have been able to identify the following matters responsive to Question 16(d):

(1) *Conwood Co. v. United States Tobacco Co.*, No. 5:98-cv-00108-TBR (W.D. Ky.). This matter involved a jury trial to verdict.

(2) *Conwood Co. v. United States Tobacco Co.*, No. 5:98-cv-00108-TBR (W.D. Ky.). In addition to a jury trial, this matter also involved a non-jury injunctive proceeding litigated to judgment.

(3) *Coleman (Parent) Holdings Inc. v. Morgan Stanley*, No. 2003-CA-005045-OCAJ-MB (Fla. Cir. Ct.). This matter involved a jury trial to verdict.

(4) *NCRIC Inc. v. Columbia Hospital For Women*, No. 2000 CA 007308 B (D.C. Super. Ct.). This matter involved a jury trial to verdict.

(5) *Zachair Ltd. v. Driggs*, No. CAL-97-20084 (Md. Cir. Ct., PG Cty.). This matter involved a jury trial to verdict.

(6) *Buntrock v. Terra*, No. 2000-CH-13859 (Ill. Cir. Ct.). This matter involved an injunctive proceeding.

(7) *Doctors Health, Inc. v. NYL Care Health Plans of the Mid Atlantic, Inc.*, No. 03-C-98-009629 (Md. Cir. Ct., Balt. Cty); *NYL Care Health Plans of the Mid Atlantic, Inc. v. Doctors Health, Inc.*, No. CAL-98-20126 (Md. Cir. Ct., PG Cty.). These two related matters involved a contested action for a temporary restraining order litigated to judgment and an injunctive proceeding.

(8) *Doctors Health Inc. v. Chase Manhattan Bank*, No. 98-604436 (N.Y. Sup. Ct.). This matter involved a non-jury injunctive proceeding litigated to judgment.

Persons acting on my behalf undertook efforts to obtain opinions and unsealed filings of the cases listed above through online court filing systems such as PACER. Where online systems were unavailable or incomplete, persons acting on my behalf undertook efforts to obtain these documents from my former law firm's electronic or paper files. For all cases but *CPH v. Morgan Stanley*, persons acting on my behalf searched my former law firm's records for any filings or opinions in the case. No filings were located in the *Doctors Health, Inc.* proceedings that took place in Maryland. As for *CPH v. Morgan Stanley*, that case spanned five years and generated nearly 3000 filings that filled dozens of boxes of paper records. Persons acting on my behalf spent an estimated 150 combined hours searching the records in *CPH v. Morgan Stanley*. Due to the scope of the task, they focused their search on filings of a non-ministerial nature such as orders, motions, and pleadings. However, where ministerial filings were readily available, they were also collected. Appendix 16(d) contains all the unsealed filings and opinions located in these searches.

e. Describe your practice, if any, before the Supreme Court of the United States, the highest court of any state, or any state or federal courts of appeals. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Also provide the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

While in private practice, I was predominantly a trial lawyer. But I also occasionally participated in appeals in state and federal courts. By way of example, I briefed and argued the *Zachair* case in the Maryland Court of Special Appeals and defended against a certiorari petition in the State Supreme Court. As

Principal Deputy Associate Attorney General, I also recall briefing three immigration cases before the federal courts of appeals, and presenting oral argument in two of those cases. To my recollection as well, my work before the Supreme Court included:

(1) *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The question presented in this case was whether Washington's prohibition against causing or aiding a suicide violated the Fourteenth Amendment. Washington law provided that a person "is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Certain doctors (respondents) who treated terminally ill patients sought a declaration in federal court that the Washington law was, on its face, unconstitutional. The State of Washington and its Attorney General were the petitioners in this case.

I helped prepare an amicus brief on behalf of the American Hospital Association in support of the petitioners. Our client's position prevailed before the Supreme Court in a 9-0 vote. The Supreme Court held that Washington's law was not unconstitutional on its face.

Co-counsel for amicus curiae (American Hospital Association):
Fredric J. Entin
James A. Henderson
Margaret J. Hardy
American Hospital Association
One North Franklin
Chicago, IL 60606
(312) 422-3000

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Principal counsel for petitioners (Washington):
Christine O. Gregoire
Attorney General
William L. Williams
Sr. Assistant Attorney General
William Berggren Collins
P.O. Box 40113
Olympia, WA 98504-0113
Telephone: (360) 7534960

Principal counsel for respondents (Glucksberg):
Kathryn L. Tucker
David J. Burman
Kari Anne Smith
Perkins Coie
1201 Third Avenue, 40th Fl.
Seattle, WA 98101-3099
(206) 583-8888

(2) *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

The question presented in this case was whether a federal district court assigned to conduct pre-trial proceedings pursuant to statutes governing multidistrict litigation can assign the case to itself at the conclusion of the pre-trial proceedings. Lexecon, Inc. and one of its principals (petitioners) brought an action in the Northern District of Illinois against two law firms (respondents), claiming various tort violations. The suit was transferred by the Judicial Panel on Multidistrict Litigation to the District of Arizona for pre-trial proceedings. At the conclusion of pre-trial proceedings, petitioners requested that the case be remanded to the Northern District of Illinois. Petitioners filed a certiorari petition after their request for a remand was denied, and after the Ninth Circuit affirmed that denial.

I contributed to the petitioners' brief, which argued that the statutes governing multidistrict litigation and transfer foreclose the practice of "self-transfer" — the refusal to relinquish cases at the end of consolidated pre-trial proceedings. Our client's position prevailed before the Supreme Court in a unanimous opinion.

Co-counsel for petitioners (Lexecon):
Michael W. McConnell
Stephen M. Shapiro
Michelle L. Odorizzi
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, IL 60603
(312) 701-7201

Kenneth S. Geller
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

Michael K. Kellogg

Mark C. Hansen
Jeffrey A. Lamken
Austin C. Schlick
Sean A. Lev
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Principal counsel for respondents (Milberg Weiss Bershad Hynes & Lerach):

Jerold S. Solovy
Ronald L. Marmer
C. John Koch
Jeffrey T. Shaw
Jenner & Block
One IBM Plaza, Suite 4400
Chicago, IL 60611
(312) 222-9350

(3) (a) *Cal. Pub. Emps.' Ret. Sys. v. Felzen*, 525 U.S. 315 (1999).
(b) *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

My involvement in these two cases arose as a result of the desire of the Council of Institutional Investors and various of its state public employee pension fund members to establish the right of class members to object to class action and derivative suit settlements and pursue those objections on appeal. The Council and its members claimed that, due to dynamics associated with the class action mechanism, class action settlements sometimes benefit lead class members, their counsel, and defendants at the expense of other class members. Council members CalPERS and the Florida State Board of Administration (SBA), together with the United States Government, first pursued the issue before the U.S. Supreme Court in *Cal. Pub. Emps.' Ret. Sys. v. Felzen*. In that case, I wrote the successful petition for certiorari on behalf of CalPERS and SBA, helped convince the U.S. Government to participate in the case on the merits on the side of our clients, and helped prepare the merits briefs. *Felzen* resulted in a tie 4-4 vote, leaving the question of objector participation unresolved, but the issue emerged again three years later in *Devlin v. Scardelletti*. In *Devlin*, a retiree objected to a class action settlement relating to his retirement plan. The Council participated as amicus and I helped write the Council's brief. Holding in a 6-3 vote that a non-named class member who timely objected to a class action settlement could appeal without first intervening, the Court in *Devlin* resolved the question of objector standing to appeal in favor of the Council and its members.

Co-counsel for petitioners (CalPERS) in *Felzen*:
Mark C. Hansen
Michael K. Kellogg
Sean A. Lev
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1801 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 826-7900

Principal counsel for respondents (Felzen) in *Felzen*:
Terry Rose Saunders
Law Offices of Terry Rose Saunders
30 North LaSalle Street
Chicago, IL 60602
(312) 346-4456

Co-counsel for amicus curiae (Council of Institutional Investors) in *Devlin*:
Mark C. Hansen
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Principal counsel for petitioners (Devlin) in *Devlin*:
Thomas C. Goldstein
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Principal counsel for respondents (Scardelletti) in *Devlin*:
Laurence Gold
Andrew D. Roth
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

(5) *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005).

The question presented in this case was whether a plaintiff can bring a securities fraud claim by alleging that the price of the security on the date of purchase was inflated because of a misrepresentation. Respondents were

individuals who purchased stock in Dura Pharmaceuticals, Inc. As part of a class action, they sued Dura and several of its officers (petitioners), alleging that petitioners made false statements concerning Dura's profits and future Food and Drug Administration approval of an asthmatic spray device. Claiming damages from the purported misstatement about the spray device, respondents alleged that they paid artificially inflated prices for Dura's securities. Petitioners argued that respondents' inflated-price theory failed to satisfy the loss causation element of a securities fraud claim, because respondents did not allege that petitioners' misstatement was causally linked—directly or proximately—to a decline in market price.

I helped prepare an amicus brief in the Supreme Court of the United States on behalf of the Chamber of Commerce, arguing that plaintiffs in securities fraud class actions may only claim losses proximately caused by the fraud they allege. The brief argued that damages cannot be obtained, where plaintiffs can point to no actual market price reaction to a corrective disclosure. Our client's position prevailed before the Supreme Court in a unanimous opinion.

Co-counsel for amicus curiae (Chamber of Commerce):
Robin S. Conrad
Stephanie A. Martz
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

Paul B. Matey
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Principal counsel for petitioners (Dura):
William F. Sullivan
Christopher H. McGrath
Tracey L. DeLange
Paul, Hastings, Janofsky
& Walker LLP 3579 Valley Centre Drive
San Diego, CA 92130
(858) 720-2500

Principal counsel for respondents (Broudo):
Patrick J. Coughlin
Sanford Svetcov

Lerach Coughlin Stoia, Geller Rudman &, Robbins LLP
100 Pine Street, Suite 2600, San Francisco, CA 94111
(415) 288-4545.

(6) *United States Tobacco Company v. Conwood Company, L.P.*, No. 02-603 (Nov. 20, 2002)

The U.S. Court of Appeals for the Sixth Circuit upheld a $1.05 billion treble damages award on behalf of my client, Conwood, against United States Tobacco Company (UST) after a jury concluded that UST had engaged in illegal monopolization. Conwood alleged that UST, which controlled nearly 80% of the U.S. market for moist snuff smokeless tobacco, had attempted to exclude competing products by entering into exclusive deals with retailers, removing competitors' sales racks, burying competitors' products in UST racks, and destroying point-of-sale advertising (the industry's primary marketing medium). The verdict, reached after a four-week jury trial, was believed to be the largest affirmed private damages award in the history of U.S. antitrust laws as of 2002. In its verdict, the jury also rejected UST's counterclaims seeking millions of dollars in damages. After trial, the court took additional evidence, conducted additional motions practice, and granted a four-year injunction against certain anticompetitive conduct by UST, a result also affirmed on appeal. UST petitioned for review in the Supreme Court, we opposed the petition, and the Supreme Court ultimately denied review.

Co-counsel for respondents (Conwood):
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway, Paducah, Kentucky 42002
(270) 443-4516.

Michael K. Kellogg
Mark C. Hansen
David C. Frederick
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400,
Washington, D.C. 20036
(202) 326-7900.

Principal counsel for petitioners (UST):
Ernest Gellhorn
Law Office of Ernest Gellhorn
2907 Normanstone Lane, N.W., Suite 100
Washington, D.C. 20008
(202) 319-7104.

These briefs are attached as Appendix 16(e).

The names, affiliations, phone numbers, and addresses of counsel listed above represent the last known contact information I possess.

17. Litigation: **Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

    a. **the date of representation;**

    b. **the name of the court and the name of the judge or judges before whom the case was litigated; and**

    c. **the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

For each of the matters below, the firm affiliation, phone numbers, and addresses of co-counsel and opposing counsel represent the last-known contact information from my records.

(1) *NCRIC v. Columbia Hospital for Women*, No. 00-7308 (D.C. Super. Ct.) (Judge Anna Blackburne-Rigsby) (trial 2004).

NCRIC, an insurance company that provided medical malpractice insurance to doctors, sued my client, Columbia Hospital for Women. NCRIC claimed that Columbia failed to pay certain insurance premiums owed by the hospital on behalf of the hospital's OB/GYN physicians, and NCRIC sought recovery of approximately $3 million dollars. Columbia denied NCRIC's allegations and counterclaimed, contending that NCRIC, not Columbia, owed money under the parties' contract. Columbia also contended that, when it brought this to NCRIC's attention and threatened to move its business to another insurance carrier, NCRIC began a multi-faceted campaign designed to induce doctors at Columbia to move their practices to other area hospitals where NCRIC was the exclusive malpractice insurance carrier. Columbia contended that NCRIC's conduct amounted to tortious interference with its business relations with its attending physicians, many of whom had served at the hospital for decades, and that the loss of so many doctors contributed to the closure of the hospital, a non-profit with more than 130 years of community service. After a two-week trial in which I served as lead counsel, the jury rejected NCRIC's breach of contract claim and found for Columbia on both its contract and its tortious interference counterclaims, awarding Columbia $18.2 million. The matter was one of the top 100 reported verdicts of 2004.

Co-counsel
Priya Aiyar

Mike Zuckman
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 236-7900

Eli Schulman
(formerly) Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC

Opposing counsel
Rodney Page
Bryan Cave, LLP
700 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 508-6002

John G. Kester
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5069

(2) *Conwood Co. v. U.S. Tobacco Co.*, Case No. 5:98-CV-108-R (W.D. Ky), *aff'd*, 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (Jan. 13, 2003) (Judge Thomas Russell, W.D. Ky.) (1997-2003).

The U.S. Court of Appeals for the Sixth Circuit upheld a $1.05 billion treble damages award on behalf of my client, Conwood, against United States Tobacco Company (UST) after a jury concluded that UST had engaged in illegal monopolization. Conwood alleged that UST, which controlled nearly 80% of the U.S. market for moist snuff smokeless tobacco, had attempted to exclude competing products by entering into exclusive deals with retailers, removing competitors' sales racks, burying competitors' products in UST racks, and destroying point-of-sale advertising (the industry's primary marketing medium). The verdict, reached after a four-week jury trial, was believed to be the largest affirmed private damages award in the history of U.S. antitrust laws as of 2002. In its verdict, the jury also rejected UST's counterclaims seeking millions of dollars in damages. After trial, the court took additional evidence, conducted additional motions practice, and granted a four year injunction against certain anticompetitive conduct by UST, a result also affirmed on appeal. UST petitioned for review in the Supreme Court, we opposed the petition, and the Supreme Court ultimately denied review. The case involved scores of depositions and massive discovery, as well as ancillary proceedings in several jurisdictions. I helped manage and run the case at all stages, from the pre-suit investigation through the drafting of the complaint; the discovery process; pre-trial motions practice; trial, where I served as second chair and handled many witnesses on direct and cross; post-trial motions practice; and the preparation of appellate briefs.

Co-counsel
Mike Guzman
Mark Hansen
Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 236-7900

Ben Powell
(formerly) Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC
(202) 395-2366

David Simpson
Eddie Foster
John S. ("Tripp") Wilson
Conwood Company
813 Ridge Lake Blvd., #100
Memphis, TN 38120
(901) 761-2050

Hank Handelsman
Pritzker Organization
71 South Wacker Drive, Suite 4700
Chicago, IL 60606
(312) 873-4900

Richard Roberts
Whitlow, Roberts, Houston & Straub, PLLC
Old National Bank Building, 300 Broadway
Paducah, KY 42001
(270) 443-4516

L. Clifford Craig
John Nalbandian
Taft, Stettinius & Hollister, LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
(513) 381-2838

Counsel for third parties
Alice Fisher
(current) Latham & Watkins
(former) Assistant Attorney General for the Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-7200

Opposing counsel
Neal Stoll
Skadden, Arps, Slate, Meagher & Flom
4 Times Square
New York, NY, 10036
(212) 735-3000

(3) *Zachair, Ltd. v. Driggs*, 762 A.2d 991 (Md. Ct. Spec. App. 2000), *cert. denied*, 768 A.2d 54 (Table) (Md. Mar. 9, 2001) (Judge Steven I. Platt) (1997-2001).

The defendants owned a valuable airport and mining facility. Plaintiff Zachair, my client, claimed that the defendants deliberately loaded the property with debt and ran it into bankruptcy. Zachair contended that the defendants then schemed to purchase the property fraudulently out of bankruptcy for an artificially low price, thereby "washing" the property of the debt associated with it. Zachair, unaware of this plan at the time, attended the bankruptcy auction as the only bidder unaffiliated with defendants, and won the auction when it bid the highest price. Zachair contended that the defendants then proceeded to engage in a pattern of conduct designed to defeat Zachair's purchase and wrest control of the property from Zachair. According to Zachair, the defendants maliciously used and abused legal process by filing multiple baseless proceedings against Zachair; improperly refused to vacate the property after the auction was consummated and they were legally obliged to leave; and proceeded to denude the property of valuable minerals resources and airport revenues. The case involved substantial dispositive motions practice and discovery, which I handled. A two-and-a-half-week trial in which I served as lead counsel followed and the jury returned a verdict in favor of Zachair on counts including abuse of process, misuse of process, conversion, and tortious interference. The jury awarded approximately $4.8 million in compensatory damages as well as punitive damages of approximately the same amount, substantially more in punitive damages than Zachair sought at trial. In post-trial motions practice, the trial judge affirmed the compensatory award of approximately $4.8 million but granted the defendants' motion to reduce the punitive award to $775,000. On appeal, where I briefed and argued, the Maryland Court of Special Appeals affirmed the trial court's judgment in all respects. The defendants then petitioned for review in the state Supreme Court and I prepared an opposition brief; the state Supreme Court denied review, thus sustaining Zachair's award.

Co-counsel
Matt Bester
(formerly) Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC
(formerly) U.S. Department of Justice Antitrust Division
(202) 353-3491

Sarah Jorgensen
(formerly) Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC

Opposing counsel

Shelby Mitchell
Baker & Hostetler
1050 Connecticut Ave., N.W., Suite 1100,
Washington, D.C. 20036
(202) 861-1601

(4) *Automall v. Am. Express*, Civil Action No. 01-1705-A (E.D. Va.) (Chief Judge Hilton) (trial in 2002).

In this case, I was retained by defendant American Express approximately two weeks before trial to supplement existing lawyers from another firm and serve as lead counsel in a breach of contract jury trial. Prior to my firm's involvement, the court had decided under *Daubert* to permit plaintiffs' expert to testify to damages in excess of $70 million. After our involvement, we crafted a new theory for exclusion of the expert witness and presented it to the court during trial toward the close of plaintiff's case. After reviewing our new theory for exclusion, the court encouraged the plaintiff to settle with my client, which it subsequently did on satisfactory terms.

Co-counsel
Mike Guzman
David Ross
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 236-7900

Stuart Alderoty
American Express Chief Litigation Counsel
American Express Tower
200 Vesey Street
New York, NY 10385
(212) 640-2000

Julie Quagliano
Steve Seeger
Jim Faughnan
Quagliano & Seeger
2620 P Street, N.W.
Washington, D.C. 20007
(202) 822-8838

Opposing counsel
Herbert Milstein
Cohen, Milstein, Hausfeld, & Toll, P.L.L.C.
1100 New York Avenue, N.W., Suite 500 West
Washington, D.C. 20005
(202) 408-4600

(5) (a) *Cal. Pub. Emps. Ret. Sys. v. Felzen*, 525 U.S. 315 (1999).
(b) *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

My involvement in these two cases arose as a result of the desire of the Council of Institutional Investors and various of its state public employee pension fund members to establish the right of class members to object to class action and derivative suit settlements and pursue those objections on appeal. The Council and its members claimed that, due to dynamics associated with the class action mechanism, class action settlements sometimes benefit lead class members, their counsel, and defendants at the expense of other class members. Council members CalPERS and the Florida State Board of Administration (SBA), together with the United States Government, first pursued the issue before the U.S. Supreme Court in *Felzen*. In that case, I wrote the successful petition for certiorari on behalf of CalPERS and SBA, helped convince the U.S. Government to participate in the case on the merits on the side of our clients, and helped prepare the merits briefs. *Felzen* resulted in a tie 4-4 vote, leaving the question of objector participation unresolved, but the issue emerged again three years later in *Devlin*. This time the Council participated as amicus and I helped write the Council's brief. By a vote of 6-to-3, the Court resolved the question of objector standing to appeal in favor of the Council and its members.

Co-counsel for petitioners (CalPERS) in *Felzen*:
Mark C. Hansen
Michael K. Kellogg
Sean A. Lev
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1801 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 826-7900

Principal counsel for respondents (Felzen) in *Felzen*:
Terry Rose Saunders
Law Offices of Terry Rose Saunders
30 North LaSalle Street
Chicago, IL 60602
(312) 346-4456

Co-counsel for amicus curiae (Council of Institutional Investors) in *Devlin*:
Mark C. Hansen
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Principal counsel for petitioners (Devlin) in *Devlin*:
Thomas C. Goldstein
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Principal counsel for respondents (Scardelletti) in *Devlin*:
Laurence Gold
Andrew D. Roth
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

(6) *Z-Tel v. SBC Commc'ns*, No. 5:03-CV-229 (E.D. Tex.) (Judge David Folsom and Magistrate Judge Caroline Craven) (2003-2005).

This case involved antitrust allegations against my client, SBC Communications. Plaintiff Z-Tel alleged that SBC sought to drive Z-Tel and other competitive local exchange carriers (CLECs) out of business by refusing to share certain allegedly essential elements of its network. Z-Tel sought damages in excess of $1 billion under federal antitrust laws, federal communications laws, and various tort theories. In turn, SBC counterclaimed, alleging that Z-Tel was ailing financially due to a poor business plan and that it had sought to avoid failure by improperly shifting certain of its operating costs onto SBC. Certain portions of Z-Tel's complaint were dismissed at the outset of the case but other portions survived into discovery. Substantial discovery ensued with multiple rounds of motions practice as well as depositions and ancillary proceedings across the country before the case was settled on satisfactory terms. I directed the defense of the case on a day-to-day basis, drafting or editing extensive pleadings, arguing many motions, and taking and defending key depositions.

Co-counsel
Steve Benz
Ken Fetterman
Mark Hansen
Aaron Panner
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 236-7900

Martin Grambow
SBC Communications (now AT&T)
175 E. Houston

PO Box 2933
San Antonio, TX, 78299
(210) 351-5966

Damon Young
John Pickett
Lance Lee
Young, Pickett & Lee
4122 Texas Boulevard
Texarkana, TX 75504
(903) 794-1303

Judge Joseph Kendall
Provost & Umphrey
3232 McKinney Avenue, Suite 700
Dallas, TX 75204
(214) 744-3000

Opposing counsel
Nick Patton
Patton, Tidwell & Schroeder, LLP
4605 Texas Boulevard
Texarkana, TX 75505
(903) 792-7080

(7) (a) *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005).
(b) *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005).

In these two cases, I helped prepare amicus briefs in the Second Circuit and the U.S. Supreme Court on behalf of the Chamber of Commerce. While the facts and questions presented in the two cases differed somewhat, broadly speaking both raised the question whether plaintiffs are permitted to sue in securities fraud class actions for losses not proximately caused by the fraud they allege. Our client's position, that such claims are not viable as a matter of law, prevailed before both the Second Circuit and the Supreme Court in unanimous opinions.

Co-counsel in *Dura* and *Lentell*
Paul Matey
(former) Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
(current) U.S. Attorney's Office in New Jersey
790 Broad Street
Newark, NJ 07102
(973) 645-2930

Robin S. Conrad
Stephanie A. Martz
U.S. Chamber of Commerce

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for petitioner in *Dura*
William Sullivan
Paul Hastings
3579 Valley Centre Drive
San Diego, CA 92130
(858) 720-2525

Counsel for respondent in *Dura*
Patrick Coughlin
Lerach, Coughlin, Stoia, Geller, Rudman & Robbins
655 W. Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

Counsel for defendant in *Lentell*
Scott D. Musoff
Skadden, Arps, Slate, Meagher & Flom
4 Times Square, New York, NY, 10036
(212) 735-3000

Counsel for plaintiff in *Lentell*
Herbert Milstein
Cohen, Milstein, Hausfeld, & Toll, P.L.L.C.
1100 New York Ave., N.W., Suite 500 West
Washington, D.C. 20005
(202) 408-4600

(8) *Teachers Ret. Sys. of La. v. Regal Entm't*, No. 444 (Del. Ch.) (Hon. William Chandler) (2004).

In this case, the plaintiff filed a shareholder derivative suit and motion for injunction challenging a $710 million special dividend and concomitant capital restructuring by my client, a leading movie theater chain. The plaintiff contended that the dividend and restructuring amounted to a breach of fiduciary duty and self-dealing. The court set the case on an expedited discovery schedule and then held an extensive evidentiary hearing on the injunction motion before ruling on the merits in my client's favor. I directed our client's defense, wrote the briefs, defended and took depositions, and argued in court. After the hearing, plaintiff dropped the remainder of its suit.

Co-counsel
Mark Hansen
Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC
1615 M Street, N.W., Suite 400

Washington, D.C. 20036
(202) 236-7900

Peter Brandow
General Counsel of Regal Entertainment
7132 Regal Lane
Knoxville, TN 37918
(865) 922-1123

William Lafferty
Morris, Nichols
Arsht & Tunnell, LLP
1201 N. Market Street
Wilmington, DE 19899
(302) 658-9200

Opposing counsel
Stuart Grant
Grant & Eisenhofer, PA
1201 N. Market Street
Wilmington, DE 19801
(302) 622-7000

(9) *Ashley v. Coopers & Lybrand Deloitte*, Law No. CL95-6466 (Albemarle Co., VA) (Judge Paul Peatross) (1995-1998).

With his late wife, Sir Bernard Ashley co-founded the Laura Ashley Company. As an outgrowth of that enterprise, Sir Bernard started a Laura Ashley-inspired country house hotel business and hired his longtime consultants, Coopers & Lybrand UK, to advise him on prospective hotel acquisitions and to manage the business. Sir Bernard alleged that his advisors eventually became more interested in their own financial advancement than his interests and led him into a hotel deal that they knew was not feasible in order to enrich themselves. He sued for, among other things, breach of fiduciary duty and fraud, claiming damages of approximately $50 million. I was responsible for the handling of this case on a day-to-day basis; taking and defending depositions; responding to, preparing, and arguing motions; and preparing the matter for trial. During discovery the court barred defendant from presenting much of its case at trial after, the court found, defendant repeatedly refused to supply appropriate witnesses for deposition. After defendant's motion for mandamus to overturn the trial court's order barring its ability to put on evidence was denied by the Virginia Supreme Court, the case settled at the outset of trial on undisclosed terms.

Co-counsel
Mark Hansen
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

(202) 236-7900

Richard Milnor
Zunka, Milnor, Carter & Inigo, Ltd.
414 Park Street
P.O. Box 1567
Charlottesville, VA 22902
(434) 977-0191

Opposing counsel
Jay Kelly Wright
Roger Fendrich
Arnold & Porter, LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

(10) *Goff v. Ford Motor Co. and David Bickerstaff*, No. 2:97-0341 (S.D. W. Va.) (Judge John Copenhaver) (1997-2000).

In this case, we represented a former car designer and expert witness for Ford Motor Company against charges that he conspired with Ford to provide false testimony in prior cases brought by product liability plaintiffs, thereby improperly securing verdicts in Ford's favor. This individual, along with Ford, was charged with violations of RICO and was alleged to be personally liable for multiple millions of dollars in damages. We defeated the class action allegations early in the case but the case was permitted to proceed to trial. I wrote and edited various dispositive motions, the opposition to the motion for class certification, as well as motions *in limine* I argued prior to trial. Our client was dismissed from the case at the outset of the trial. During the ensuing trial against Ford, I provided strategic legal advice to defense counsel.

Co-counsel
David Ross
Chris Todd
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 236-7900

John McHugh
Allen Guthrie McHugh & Thomas PLLC
500 Lee Street East, Suite 800
Charleston, WV 25301
(304) 345-7250

Counsel for other defendant
Ed Stewart

Wheeler, Trigg & Kennedy, LLP
1801 California Street, Suite 3600
Denver, CO 80202
(303) 244-1800

Opposing counsel
A. Camden Lewis
Lewis & Babcock
1513 Hampton Street
Columbia, SC 29211
(803) 771-8000

18. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

While most of my time as a lawyer and judge has involved litigation, I have devoted a significant amount of time to legal matters that do not involve court appearances, including by way of example:

(a) As a judge, I have devoted considerable time to the rules process, first as a member of the Standing Committee and now as chairman of the Appellate Rules Advisory Committee, attempting with colleagues to improve the quality of the rules and promote the goals of Fed. R. Civ. P. 1 (the "just, speedy, and inexpensive determination of every action").
(b) During my time as a judge, certain colleagues and I became concerned with the quality of representation death row inmates received in their federal habeas proceedings. Along with colleagues, led by now-Chief Judge Tymkovich, I participated in the effort to increase the quality of capital representation before the Tenth Circuit by attracting new attorneys and training existing ones.
(c) Since becoming a judge, I have taught regularly at the University of Colorado Law School. For a description of courses, see Question 19.
(d) Together with the president of the Federal Judges Association, I, along with Judge Raymond Kethledge and other colleagues, managed the FJA's role in litigation regarding the restoration of cost-of-living adjustments. The FJA participated as an amicus curiae in *Beer v. United States*, where the U.S. Court of Appeals for the Federal Circuit ultimately held that federal judges had been denied cost-of-living adjustments guaranteed by law. The FJA also supported a class action in the Court of Federal Claims, *Barker v. United States*, which led to a settlement under which the *Beer* decision was applied to all Article III judges.
(e) As Principal Deputy Associate Attorney General, I helped oversee the Department of Justice's civil litigating units. Major litigation decisions in certain significant

cases — such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms — are reviewed by the Office of the Associate Attorney General. I also spent a substantial amount of time reviewing and editing trial and appellate court legal briefs, developing case strategy, and assisting in the development and implementation of a wide variety of initiatives and policies.

(f) While in private practice, I provided a substantial amount of antitrust counseling for small and large companies, including: (1) assessing the antitrust implications of contemplated mergers and acquisitions; (2) analyzing the antitrust consequences of certain proposed and existing courses of business (*e.g.*, sales and marketing techniques); and (3) assisting my clients with efforts before federal antitrust authorities, including the Department of Justice and the Federal Trade Commission, to contest acquisitions made by rival companies as violations of federal antitrust law.

(g) I obtained a doctorate in legal philosophy at Oxford and have devoted a significant amount of time to the academic research and legal writings discussed above.

(h) I served as a law clerk to three federal appellate judges, where my responsibilities included preparing bench memos analyzing cases prior to argument; preparing draft opinions; analyzing draft opinions written by others; and, in the case of the Supreme Court, assessing petitions for certiorari.

19. <u>Teaching</u>: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, compensation received, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have taught the following classes at the University of Colorado Law School. Syllabi, which include descriptions of the subject matter of and topics covered by these classes, are attached as Appendix 19.

Advanced Appellate Advocacy (2008, 2010)

Antitrust Law (2013-2015, 2017)

Bioethics and the Law (2010)

Federal Courts (2012)

Legal Ethics and Professionalism (2009, 2010-2013, 2015-2016)

I was compensated by the University of Colorado in the following amounts for the relevant years:

2008	$19,000
2009	$7,250
2010	$14,500

2011	$19,000
2012	$20,000
2013	$20,000 (plus $3,000 backpay)
2014	$26,000
2015	$26,000
2016	$26,000
2017	$2,600

In 2010, I received $2,500 from the Oklahoma City University School of Law for teaching in the law school's Jurist-in-Residence in February 2010.

20. **Deferred Income/ Future Benefits: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.**

    I have an agreement with Princeton University Press concerning annual royalties arising from the sale of my book, *The Future of Assisted Suicide and Euthanasia*.

21. **Outside Commitments During Court Service: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

    I have no plans, commitments, or agreements to pursue outside employment in the future.

22. **Sources of Income: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).**

    Please see the attached Financial Disclosure Report.

23. **Statement of Net Worth: Please complete the attached financial net worth statement in detail (add schedules as called for).**

    Please see the attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

    a. **Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential**

conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Actual or apparent conflicts of interest could arise in matters affecting, among other things, my former law firm, clients, friends, family members, or my own financial interests. A conflict of interest could also arise from any appeal of a decision issued by a panel of the Tenth Circuit that included me as a member. I expect that I would address such conflicts by in the manner described in response to the next question, 24(b).

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and all other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

25. <u>Pro Bono Work</u>: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional work load, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In recent years, I have written and spoken on ways to encourage greater access to justice and legal services. A good example of this work is *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 Judicature, no. 3, Aug. 2016, at 46. I have also spoken and written about problems in the legal system that affect ordinary people, problems like the complexity of modern civil litigation. A good example of this work is *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2014). I have worked on the rules committees to address such problems, see Question 18. Together with colleagues, I have also sought to enhance the quality of legal representation for death row prisoners in our circuit.

Beyond legal work, I have volunteered for, among other institutions, my children's school, and the Harry S. Truman Scholarship Foundation, which seeks to encourage university students to become change agents in government and society.

Prior to becoming a judge approximately 10 years ago, I spent approximately three additional years in public service. Also, as a lawyer in private practice I sometimes took

on matters for clients that could not afford my firm's normal hourly rates. In law school, I participated in legal aid clinics, the Harvard Prison Legal Assistance Project and the Harvard Defenders.

I have not attempted to keep records of the hours devoted to the matters described above.

26. Selection Process:

a. Describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and any interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign. Additionally, list all interviews or communications you had regarding your nomination with outside organizations or individuals at the behest of anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign and list all persons present, participating, or otherwise involved in such interviews or communications. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On about December 2, 2016, I was contacted by Leonard Leo, who was working with the President-elect transition team, regarding the Supreme Court vacancy. I had additional follow-up communications with Mr. Leo shortly thereafter. On January 5, 2017, I was interviewed in person by Donald McGahn, a member of the President-elect transition team who is now the Counsel to the President. Also that day, I was interviewed in person by Vice President-elect Michael Pence, and other members of the transition team: Steve Bannon (who is now Senior Advisor to the President), Mark Paoletta (who is now Counsel to the Vice President), and Reince Priebus (who is now Chief of Staff to the President); Mr. McGahn also was present. On January 6, 2017, I had a conversation with Makan Delrahim, who was working with the President-elect transition team (and who is now Deputy Counsel to the President). Sometime the following week, I had a telephone conversation with Mr. Leo. On January 14, 2017, I was interviewed in person by President-elect Donald Trump; Mr. McGahn also was present. Following that meeting, I had additional telephone conversations with Mr. McGahn and Mr. Delrahim. On January 27, 2017, I received a call from Mr. McGahn informing me that the President intended to nominate me for the Supreme Court vacancy. On January 30, 2017, I received a call from the President informing me that he would nominate me for the Supreme Court vacancy. During this period, I also had communications with James Burnham, who is now Senior Associate Counsel to the President, and may have had other communications with the individuals listed above, or groups of them.

b. Has anyone involved in the process of selecting you for this nomination (including, but not limited to anyone in the Executive Office of the President,

the Justice Department, the President-elect transition team, presidential campaign, or the Senate and its staff) ever discussed with you any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully. Identify each communication you had prior to the announcement of your nomination with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or presidential campaign, outside organization or individual (at the behest of anyone working in the Executive Office of the President, the Justice Department, President-elect transition, or presidential campaign), or the Senate or its staff referring or relating to your views on any case, issue, or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

c. **Did you make any representations to any individuals or interest groups as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.**

No.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT

JUDGE NEIL M. GORSUCH

Supplement to Question 11(a):

The following list was compiled after persons acting on my behalf performed an additional thorough review of my calendar and archived emails and is accurate to my recollection:

Tenth Circuit Historical Society, Member (approximately 2006 to present). The Society serves to preserve knowledge of the history of the Tenth Circuit. I attended events as a member. For more information, contact the Society at (303) 298-5701.

American Judicature Society (approximately 2009). The Society, no longer in existence, was a nonpartisan and national organization of judges and lawyers whose purpose was to improve the U.S. judicial system.

To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

Supplement to Question 11(c):

The following list was compiled after persons acting on my behalf performed an additional thorough review of my calendar and archived emails and is accurate to my recollection:

Lecture/Luncheon with John Finnis (9/15/2006)

University of Denver (10/6/2006)
Speech by Judge Richard P. Matsch: Appropriate role of the legal system in American Society

Harvard Law School (03/20/2007-03/22/2007)
Moot Court Competition

Joint Eighth and Tenth Circuit Judges' Conference (07/11/07-07/14/2007)

Tenth Circuit CLE (10/2/2007)
Q&A with Judges Baldock, Kelly, and Gorsuch (Denver, CO)

University of Colorado Law School (3/16/2008-3/17/2008)
Moot Court

Faculty of Federal Advocate (2/6/2009)
Luncheon talk (Denver, CO)

IAALS Panel Discussion on E-Discovery (09/09/2009)
(Denver, CO)

University of Illinois College of Law (4/10/13)
Moot Court. *Funding from University of Illinois

University of Colorado Law School (3/11/14)
Moot Court

Tenth Circuit Judges Conference (05/17/2015-05/21/2015)
Meeting in Santa Fe, NM

Supplement to Question 12(a):

The following list was compiled after persons acting on my behalf conducted additional searches of publicly available databases and is accurate to my recollection:

Letter to the Editor, *The Independent Fed, Columbia Daily Spectator* (October 19, 1987) (multiple signatories)

Harvard Journal of Law and Public Policy (1991) (senior editor)

Copies of these materials are attached in the supplemental appendix.

Supplement to Question 12(d):

The following list was compiled after persons acting on my behalf performed an additional thorough review of my calendar and archived emails and is accurate to my recollection:

Bryon White Exhibit, Opening Remarks, Denver, CO, Nov. 14, 2006.

Investiture Remarks, Denver, CO, Nov. 20, 2006.

10th Circuit judge's oath a family affair, Denver Post, Nov. 21, 2006 (article reporting on investiture).

British Marshall Scholarship Commission, 2007 (listed previously in Question 12(d), but notes of the speech are now attached).

Catholic Lawyers Guild, Remarks on Euthanasia and Assisted Suicide, Denver, CO, June 12, 2007 (no notes available).

American Bar Association, Panel on Oral Argument, AJEI Summit, Sept. 29, 2007 (listed previously in Question 12(d), but notes of the speech are now attached).

Tenth Circuit CLE Q&A with Judges Baldock, Kelly, and Gorsuch, Oct. 2, 2007. The event took place at 1823 Stout St, Denver, CO 80202 (no notes available).

American College of Trial Lawyers, Oct. 12, 2007 (listed previously in Question 12(d), but notes of the speech are now attached).

University of Colorado School of Law, Moot Court, Mar. 16-17, 2008. The address of the group is 2450 Kittredge Loop Dr, Boulder, CO 80309 (no notes available).

Federalist Society, *An Argument Against Consequentialism*, Yale Law School, Feb. 4, 2009 (listed previously in Question 12(d), but notes of the speech are now attached).

Faculty of Federal Advocates, Luncheon Talk, Denver, CO, Feb. 6, 2009.

University of Chicago Law School, Law Review Banquet, Apr. 22, 2010 (listed previously in Question 12(d), but notes of the speech are now attached).

Phil Anschutz Annual Dove Hunt, Discussion about the Rule of Law, Eagle Nest Ranch, CO, Sept. 1, 2010 (listed previously in Question 12(d), but notes of the speech are now attached).

Faculty of Federal Advocates, A Brown Bag with the Honorable Timothy M. Tymkovich and the Honorable Neil M. Gorsuch, Nov. 12, 2013 (listed previously in Question 12(d), but notes of the speech are now attached).

University of Colorado School of Law, Moot Court, Mar. 11, 2014. The address of the group is 2450 Kittredge Loop Dr, Boulder, CO 80309 (no notes available).

Unless otherwise noted, copies of the speeches or notes above as well as a press report are attached in the supplemental appendix.

Supplement to Question 12(e):

The following list was compiled after persons acting on my behalf conducted additional searches of publicly available databases and is accurate to my recollection:

Two Election Hopefuls Disqualified, in Columbia Daily Spectator (March 24, 1986) (quoted in article).

Kirkpatrick Rejects Grad Alumni Award, Columbia Daily Spectator (October 6, 1986) (quoted in article).

Police Arrest 30 Protestors at First Eviction Attempt, Columbia Daily Spectator (February 24, 1987) (quoted in article).

Fed Paper May Sue Coors Poster Writers, Columbia Daily Spectator (March 26, 1987) (quoted in article).

Invalid Petitions Wreck Council Referendum, Columbia Daily Spectator (January 29, 1988) (quoted in article).

Not with a Bang, but a Whimper, Columbia Daily Spectator (December 5, 1989) (quoted in article).

Anne Gorsuch Burford, 62, Dies; Regan EPA Director, Washington Post (July 22, 2004) (quoted in article).

Former Reagan EPA Director Anne Burford Dies, Contra Costa Times (July 23, 2004) (quoted in article).

Copies of these materials are attached in the supplemental appendix.

PREPARED STATEMENT OF HON. NEIL M. GORSUCH

Mr. Chairman, Sen. Feinstein, Members of the Committee:

I am honored and I am humbled to be here. Since coming to Washington, I have met with over 70 senators. You have offered a warm welcome and wise advice. Thank you. I also want to thank the President and Vice President. They and their teams have been very gracious to me and I thank them for this honor. I want to thank Senators Bennet and Gardner and General Katyal for their introductions. Reminding us that – long before we are Republicans or Democrats – we are Americans. Sitting here I am acutely aware of my own imperfections. But I pledge to each of you and to the American people that, if confirmed, I will do all my powers permit to be a faithful servant of the Constitution and laws of our great nation.

*

I could not even attempt this without Louise, my wife of more than 20 years. The sacrifices she has made and her giving heart leave me in awe. I love you so much. We started off in a place very different from this one: a small apartment and little to show for it. When Louise's mother first came to visit, she was concerned by the conditions. As I headed out the door to work, I will never forget her whispering to her daughter - in a voice just loud enough for me to hear - Are you sure he's really a lawyer?

To my teenage daughters watching out West. Bathing chickens for the county fair. Devising ways to keep our determined pet goat out of the garden. Building a semi-functional plyboard hovercraft for science fair. Driving 8 hours through a Wyoming snowstorm with high school debaters in the back arguing the whole way. These are a just a few of my favorite memories. I love you impossibly.

To my extended family across Colorado. When we gather, it's dozens of us. We hold different political and religious views, but we are united in love. Between the family pranks and the pack of children running rampant, whoever is hosting is usually left with at least one dry wall repair.

To my parents and grandparents. They are no longer with us but there's no question on whose shoulders I stand. My Mom was one of the first women graduates of the University of Colorado law school. As the first female assistant district attorney in Denver, she helped start a program to pursue deadbeat dads. And her idea of day care sometimes meant I got to spend the day wandering the halls or tagging behind police officers. She taught me that headlines are fleeting

– courage lasts.

My Dad taught me that success in life has little to do with success. Kindness, he showed me, is the great virtue. He showed me too that there are few places closer to God than walking in the wilderness or wading a trout stream. Even if it is an awfully long drive home with the family dog after he encounters a skunk.

To my grandparents. As a boy, I could ride my bike to their homes and they were huge influences. My Mom's father, poor and Irish, started working to help support his family as a boy after losing his own dad. But the nuns made sure he got an education, and he became a doctor. Even after he passed away, I heard from grateful patients who recalled him kneeling by their bedsides to pray together. His wife, my grandmother, grew up in a Nebraska home where an ice box wasn't something you plugged into the wall but something you lowered into the ground. With 7 children, she never stopped moving - or loving.

My Dad's father made his way through college working on Denver's trolley cars. He practiced law through the Great Depression. And taught me that lawyers exist to help people with their problems, not the other way around. His wife came from a family of pioneers. She loved to fish. And she taught me how to tie a fly.

I want to thank my friends. Liberals and conservatives and independents, from every kind of background and belief, many hundreds have written this committee on my behalf. They have been there for me always. Not least when we recently lost my uncle Jack, a hero of mine and a lifelong Episcopal priest. He gave the benediction when I took my oath as a judge 11 years ago. I confess I was hoping he might offer a similar prayer for me this year. As it is, I know he is smiling.

I want to thank my fellow judges across the country. Judging is sometimes a lonely and hard job. But I have seen how these men and women work with courage and collegiality, independence and integrity. Their work helps make the promises of our Constitution and laws real for us all.

I want to thank my legal heroes. Justice White, my mentor. A product of the West, he modeled for me judicial courage. He followed the law wherever it took him without fear or favor to anyone. War hero. Rhodes scholar. And, yes, highest paid NFL football player of his day. In Colorado today there is God and John Elway and Peyton Manning. In my childhood it was God and Byron White.

I also had the great fortune to clerk for Justice Kennedy. He showed me that judges can disagree without being disagreeable. That everyone who comes to court deserves respect. And that a legal case isn't just some number or a name but a life story.

Justice Scalia was a mentor too. He reminded us that words matter — that the judge's job is to follow the words that are in the law — not replace them with words that aren't. His colleagues cherished his great humor too. Now, we didn't agree about everything.... The Justice fished with the enthusiasm of a New Yorker. He thought the harder you slapped the line on the water, somehow the more the fish would love it.

Finally, there is Justice Jackson. He wrote clearly so everyone could understand his decisions. He never hid behind legal jargon. And while he was a famously fierce advocate for his clients as a lawyer, he reminded us that, when you become a judge, you fiercely defend only one client — the law.

By their example, these judges taught me about the rule of law and the importance of an independent judiciary, how hard our forebearers worked to win these things, how easy they are to lose, and how every generation must either take its turn carrying the baton or watch it fall.

*

Mr. Chairman, these days we sometimes hear judges cynically described as politicians in robes. Seeking to enforce their own politics rather than striving to apply the law impartially. But I just don't think that's what a life in the law is about.

As a lawyer working for many years in the trial court trenches, I saw judges and juries — while human and imperfect — trying hard every day to decide fairly the cases I presented.

As a judge now for more than a decade, I have watched my colleagues spend long days worrying over cases. Sometimes the answers we reach aren't ones we would personally prefer. Sometimes the answers follow us home and keep us up at night. But the answers we reach are always the ones we believe the law requires. For all its imperfections, the rule of law in this nation truly is a wonder - and it is no wonder that it is the envy of the world.

Once in a while, of course, we judges do disagree. But our disagreements are never about politics — only the law's demands. Let me offer an example. The first case I wrote as a judge to reach the Supreme Court divided 5 to 4. The Court affirmed my judgment with the support of Justices Thomas and Sotomayor — while Justices Stevens and Scalia dissented. Now that's a lineup some might think unusual. But actually it's exactly the sort of thing that happens - quietly, day in and day out - in the supreme court and in courts across our country. I wonder if people realize that Justices Thomas and Sotomayor agree about 60% of the time, or that Justices Scalia and Breyer agreed even more often than that. All in the toughest cases in our whole legal system.

Here's another example. Over the last decade, I've participated in over 2,700 appeals. Often these cases are hard too: only about 5% of all federal lawsuits make their way to decision in a court of appeals. I've served with judges appointed by President Obama all the way back to President Johnson. And in the Tenth Circuit we hear cases from 6 states — in two time zones — covering 20% of the continental United States. But in the West we listen to one another respectfully, we tolerate and cherish different points of view, and we seek consensus whenever we can. My law clerks tell me that 97% of the 2,700 cases I've decided were decided unanimously. And that I have been in the majority 99% of the time.

Of course, I make my share of mistakes. As my daughters never tire of reminding me, putting on a robe doesn't make me any smarter. I'll never forget my first day on the job. Carrying a pile of papers up steps to the bench, I tripped on my robe and everything just about went flying. But troublesome as it can be, the robe does mean something---and not just that I can hide coffee stains on my shirt. Putting on a robe reminds us that it's time to lose our egos and open our minds. It serves, too, as a reminder of the modest station we judges are meant to occupy in a democracy. In other countries, judges wear scarlet, silk, and ermine. Here, we judges buy our own plain black robes. And I can report that the standard choir outfit at the local uniform supply store is a pretty good deal. Ours is a judiciary of honest black polyester.

When I put on the robe, I am also reminded that under our Constitution, it is for this body, the people's representatives, to make new laws. For the executive to ensure those laws are faithfully enforced. And for neutral and independent judges to apply the law in the people's disputes. If judges were just secret legislators, declaring not what the law is but what they would like it to be, the very idea of a government by the people and for the people would be at risk. And those who came to court would live in fear, never sure exactly what governs them except the judge's will. As Alexander Hamilton explained, "liberty can have nothing to fear from" judges who apply the law, but liberty "ha[s] every thing to fear" if judges try to legislate too.

In my decade on the bench, I have tried to treat all who come to court fairly and with respect. I have decided cases for Native Americans seeking to protect tribal lands, for class actions like one that ensured compensation for victims of nuclear waste pollution by corporations in Colorado. I have ruled for disabled students, prisoners, and workers alleging civil rights violations. Sometimes, I have ruled against such persons too. But my decisions have never reflected a judgment about the people before me — only my best judgment about the law and facts at issue in each particular case. For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels.

*

As a student many years ago I found myself walking through the Old Granary burial ground in Boston. Where Paul Revere, John Hancock, and many of our founders are buried. I came across the tombstone of a lawyer and judge who today is largely forgotten --- as we are all destined to be soon enough. His name was Increase Sumner. Written on his tombstone over

200 years ago was this description --

> As a lawyer, he was faithful and able;
>
> as a judge, patient, impartial, and decisive;
>
> In private life, he was affectionate and mild;
>
> in public life, he was dignified and firm.
>
> Party feuds were allayed by the correctness of his conduct;
>
> calumny was silenced by the weight of his virtues;
>
> and rancor softened by the amenity of his manners.

These words stick with me. I keep them on my desk. They serve for me as a daily reminder of the law's integrity, that a useful life can be led in its service, of the hard work it takes, and an encouragement to good habits when I fail and falter. At the end of it all, I could hope for nothing more than to be described as he was. If confirmed, I pledge that I will do everything in my power to be that man.

Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Nomination of Judge Neil Gorsuch to Serve as Associate Justice of the Supreme Court
March 20, 2017

One of Justice Scalia's best opinions begins with this declaration: it is the "proud boast of our democracy that we have a government of laws and not of men."

The phrase comes from the Massachusetts Constitution of 1780. This infant state constitution linked the government of *laws*, and not of *men*, directly to the separation of powers.

Justice Scalia said the founders "viewed the principle of separation of powers as the absolutely central guarantee of a just Government . . . [because] without a secure structure of separated powers, our Bill of Rights would be worthless."

In plain words, it was the desire to *preserve* and *protect* liberty and self-government that guided the Framers as they designed our Constitution. And the founding charter they designed is a remarkable thing.

The Bill of Rights, of course, preserves liberty by restricting what the government may do.

But the single most important feature of our Constitution isn't any particular enumerated right, or even the entire Bill of Rights, taken together. The most important feature of our Constitution is the design of the document itself. It divides the limited power of government vertically, between the states and federal government. And it distributes power horizontally, between the co-equal branches.

It's this delicate balance of power, entrusted to competing factions, that ensures the liberty of the People will endure.

It's the Constitution's design that protects against the mischief that results from the concentration of power. The Founders understood this fundamental principle, and Justice Scalia understood it better than anyone. He was fond of telling law students:

> "Every tin horn dictator in the world today, every president for life, has a Bill of Rights." But, "the real key to the distinctiveness of America is the structure of our government."

Our constitutional republic is also designed around the notion that the People, acting through their representatives, retain the ultimate authority to govern themselves. It was the People, through their representatives, who ratified the Constitution that establishes our system of government.

Under that system, except where the Constitution has already answered the question, decisions are made by elected representatives. *Elected*, and accountable to the voters.

But to endure, our system of self-government requires judges to apply the text of our laws as the people's representatives enacted them. So our judges, by design, play a critical–but limited—role. They decide cases or controversies. But in resolving those cases, they may look only to the laws the People wrote.

Judges aren't free to re-write statutes to get results they believe are more just. Judges aren't free to re-order regulations to make them more fair. And no, Judges aren't free to "update" the Constitution. That's not their job.

That power is retained by the *People*, acting through their elected representatives. When our Judges don't respect this limited role, when they substitute their *own* policy preferences for those in the legislative branch, they rob from the American people the right to govern themselves.

As that happens, inch by inch and step by step, democracy is undermined, the carefully constructed balance of power is upset, and individual liberty is lost.

These aren't stale concepts. If anything, the enormous size, power and complexity of the modern State renders them more relevant than ever.

In recent months I've heard that "now more than ever" we need a Justice who is independent, and who respects the separation of powers. Some of my colleagues seem to have rediscovered an appreciation for the need to confine each branch of government to its proper sphere. I don't question the sincerity of those concerns, but some of us have been alarmed by executive over-reach, and the threat it poses to the separation of powers, for quite some time now.

Whether it was the Executive branch unilaterally re-writing federal law as the Obama administration did dozens of times, or the Executive's repeated failure to enforce and defend the laws passed by Congress, over the last 8 years we've witnessed repeated abuses by one branch, at the expense of the other two. Just ask the Supreme Court, which unanimously rejected arguments the Obama Administration made in more than 40 cases.

The policies that drove those abuses were of course problematic. But policies can be changed.

To this Senator, what's far more distressing about each Executive overreach and each failure to defend the law, is the damage it does to our constitutional order. The damage those abuses inflict is far more difficult to undo than the policies that animated them. For as John Adams observed, "Liberty, once lost, is lost forever."

So, the separation of powers is just as critical today as it was during the last Administration. And the preservation of our constitutional order—including the separation of powers—is just as crucial to our liberty today as it was when our founding charter was adopted.

No matter your politics, for all of these reasons you should be concerned about the preservation of our constitutional order and the separation of powers.

And if you are concerned about these things, as you should be: meet Judge Neil Gorsuch.

Fortunately for every American, we have before us today a nominee whose body of professional work is defined by an unfailing commitment to these principles. His grasp on the separation of powers—including judicial independence—enlivens his body of work.

As he explains: "To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design."

About the executive, he writes that through "[the] hard won experience under a tyrannical king, the founders found proof of the wisdom of a government of separated powers."

The judge's job, our nominee says, is to deliver on the promise that "all litigants, rich or poor, mighty or meek, will receive equal protection under the law and due process for their grievances."

The nominee before us understands that any judge worth his salt will "regularly issue judgments with which they disagree as a matter of policy—all because they think that's what the law fairly demands."

Fundamentally, that is the difference between a legislator and a judge. All of us should keep this in mind during the course of this hearing.

Judge, I'm afraid over the next couple of days, you'll get some questions that will cause you to scratch your head. Truth be told, it should puzzle anyone who's ever taken a civics class.

We'll hear that when you rule for one party and against another in a case, it means you must be *for* the winner and *against* the loser. Senators will cite some opinion of yours, and then we'll hear that you're *for* the "big guy," and *against* the "little guy."

You'll scratch your head when you hear this, because it's as if you judges write the laws instead of us Senators. But if Congress passes a bad law, as a judge you're not allowed to just pretend we passed a good law. The oath you take demands that you follow the law, even if you dislike the result.

So if you hear that you're *for* some business or *against* some plaintiff — don't worry. We've heard it all before. It's an old claim, from an even older playbook. You and I and the American People know whose responsibility it is to correct a law that produces a result you dislike. It's the men and women sitting up on this dais.

Good judges understand this. They know it isn't their job to fix the law. In a democracy, that right belongs to be the People.

It's for this reason that Justice Scalia said,

> "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."

Judge, I look forward to hearing more about your exceptional record. And I look forward to the conversation we'll all have about the meaning of our Constitution and the job of a Supreme Court Justice in our constitutional scheme.

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Senator Dianne Feinstein
Nomination hearing for Judge Neil Gorsuch
March 20, 2017

Thank you very much, Mr. Chairman. Judge Gorsuch, I want to welcome you and your family.

We're here today under very unusual circumstances. It was almost a year ago today that President Obama nominated Chief Judge Merrick Garland for this seat.

Unfortunately, due to unprecedented treatment, Judge Garland was denied a hearing and this vacancy has been in place for well over a year. I just want to say I'm deeply disappointed that's is under these circumstances that we begin our hearings.

Merrick Garland was widely regarded as a mainstream, moderate nominee.

However, President Trump repeatedly promised to appoint someone "in the mold of Justice Scalia" and said that the nomination of Judge Gorsuch illustrates he's "a man of his word."

For those of us on this side, our job today is not to theoretically evaluate this or that legal doctrine or to review Judge Gorsuch's record in a vacuum. Our job is to determine whether Judge Gorsuch is a reasonable, mainstream conservative or is he not.

Our job is to assess how this nominee's decisions will impact the American people and whether he will protect the legal and constitutional rights of all Americans—not just the wealthy and the powerful.

We hold these hearings not because court precedent and *stare decisis* are something average Americans worry about.

We hold these hearings because the United States Supreme Court has the final word on hundreds of issues that impact our daily lives.

The Supreme Court has the final say on whether a woman will continue to have control over her own body or whether decisions about her health care will be determined by politicians and the government.

It decides whether billionaires and large corporations will be able to spend unlimited sums of money to buy elections, and whether states and localities will be able to pass laws and make it harder for poor people, people of color, seniors and younger people to vote.

It is the Supreme Court that will have the final word on whether corporations will be able to pollute our air and water with impunity.

Or whether the NRA and other extreme organizations will be able to block commonsense gun regulations, including those that keep military-style assault weapons off our streets.

And it is the Supreme Court that will have the ultimate say on whether employers will be held accountable for discriminating against workers or failing to protect workers when they're harmed or killed on the job.

For example, last year, Judge Gorsuch sat on a case that involved a truck driver who was stranded in the freezing cold for several hours after his trailer's brakes froze. He had no heat. In fact, it was so cold that the driver was "having trouble breathing," his "torso was numb and he could not feel his feet."

Despite this, his employer directed him to wait for a repairman or else drive both the truck and the trailer. When no one came, the driver unhitched the trailer to search for assistance because driving with frozen brakes with a fully-loaded trailer would have been too dangerous.

A week later he was fired.

After hearing the case, the administrative law judge, ruled that firing the driver was a violation of the health and safety law intended to protect workers. The United States Department of Labor's administrative review board and the Tenth Circuit agreed.

Judge Gorsuch dissented and sided with the company.

In another case, Judge Gorsuch wrote a separate opinion, this time to challenge a long-standing legal doctrine that allows agencies to write regulations necessary to effectively implement the laws that Congress passes and the president signs. It's called the Chevron doctrine.

This legal doctrine has been fundamental to how our government addresses real world challenges in our country and has been in place for decades. If overturned, as Judge Gorsuch has advocated, legislating rules are very difficult.

In fact, Congress relies on agency experts to write the specific rules, regulations, guidelines and procedures necessary to carry out laws we enact.

These are what ensure the *Clean Air Act* and the *Clean Water Act* to protect our environment from pollution.

They are the specific protections put in place by the FDA and the agriculture department that safeguard the health and safety of our food supply, our water, our medicines.

And they are the details needed to support the infrastructure of our communities—our roads, highways, bridges, dams and airports.

We in Congress rely on the scientists, biologists, economists, engineers and other experts to help ensure our laws are effectively implemented.

For example, even though Dodd-Frank was passed nearly seven years ago to combat the rampant abuse that led to our country's worst financial crisis since the Great Depression, it still requires

over a hundred regulations to be implemented by the Securities and Exchange Commission, the Commodity Futures Trading Commission and other regulators in order to reach its full effectiveness, as intended by Congress when it was passed.

Judge Gorsuch's position, were it to be adopted, would take away agencies' authorities to address these necessary details. Such a change in the law would dramatically affect how laws passed by Congress can be properly carried out.

Two weeks ago, the *Washington Post* ran an op-ed written by a woman who "desperately wanted to have a baby." She described how she and her husband went to great lengths for four years trying to get pregnant and were thrilled when they finally succeeded.

Tragically, after her 21-week check-up, they discovered her daughter had multicystic dysplastic kidney disease. They were told by three separate doctors that her condition was 100 percent fatal and that the risk to the mother was sevenfold if she carried her pregnancy to term. The mother described their excruciating decision and the unforgiving process the couple endured to get the medical care they needed.

The debate over *Roe v. Wade* and the right to privacy, ladies and gentlemen, is not theoretical. In 1973, the court recognized a woman's fundamental and constitutional right to privacy—that right guarantees her access to reproductive health care.

In fact, the Supreme Court has repeatedly upheld *Roe*'s core finding, making it settled law for the last 44 years.

I ask unanimous consent Mr. Chairman to enter into the record the 14 key cases where the Supreme Court upheld *Roe*'s core holding and the total 39 decisions where it has been reaffirmed by the court.

If these judgements, when combined, do not constitute super-precedent, I don't know what does.

Importantly, the dozens of cases affirming *Roe* are not only about precedent, they are also about a woman's fundamental and constitutional rights. *Roe* ensured that women and their doctors will decide what's best for their care, not politicians.

President Trump repeatedly promised that his judicial nominees would be pro-life and quote "automatically" end quote overturn *Roe v. Wade*. Judge Gorsuch has not had occasion to rule directly on a case involving *Roe*. However, his writings do raise questions.

Specifically, he wrote that he believes there are no exceptions to the principle that, quote, "the intentional taking of human life by private persons is always wrong," end quote. This language has been interpreted by both pro-life and pro-choice organizations to mean he would overturn *Roe*.

The Supreme Court is also expected to decide what kind of reasonable regulations states and localities can implement to protect our neighborhoods and schools from gun violence. In fact,

just last month, the Fourth Circuit became the fifth appellate court to uphold a state's ban on assault weapons and large-capacity magazines under Heller.

These new cases, taken together, enable the enactment of prudent and legal legislation to restrict military-style weapons from flooding our streets.

Now while Judge Gorsuch has not written decisions on the Second Amendment, he did write an opinion to advocate making it harder to convict a felon who illegally possessed a gun. In this opinion, Judge Gorsuch argued against the court's own precedent.

Specifically, in this case, the defendant had been charged with attempted robbery in July of '09. After pleading guilty, he was given probation. However, quote, "he repeatedly, both orally and in writing, told that possession of a firearm," end quote, violated his probation, which would mean he could not, quote, "escape the consequences of his felony conviction."

Less than a year later, he was apprehended by the police holding, quote, "a fully loaded Hi-Point .380 caliber pistol with an obliterated serial number," end quote—in clear violation of his probation. Later, he argued he didn't know he was a felon.

Six circuit courts, including the Tenth, have determined that the government does not need to prove a defendant knew he was a felon to convict for this crime.

Despite this, Judge Gorsuch wrote two separate opinions that argued in favor of making it harder to convict felons who possess guns. In one he wrote that sometimes following precedent, quote, "requires us to make mistakes," end quote.

I find this concerning. Following precedent in this case was not a mistake. It lead to the conviction of a felon who should not have had a firearm.

Judge Gorsuch has also stated that he believes judges should look to the original public meaning of the Constitution when they decide what a provision of the Constitution means.

This is personal, but I find this "originalist" judicial philosophy to be really troubling. In essence, it means that judges and courts should evaluate our constitutional rights and privileges as they were understood in 1789.

However, to do so would not only ignore the intent of the framers that the Constitution would be a framework on which to build, but it severely limits the genius of what our Constitution upholds.

I firmly believe the American Constitution is a living document intended to evolve as our country evolves.

In 1789, the population of the United States was under 4 million. Today, we're 325 million and growing. At the time of our founding, African Americans were enslaved. It was not so long after

women had been burned at the stake for witchcraft. And the idea of an automobile, let alone the Internet, was unfathomable.

In fact if we were to dogmatically adhere to "originalist" interpretations, then we would still have segregated schools and bans on interracial marriage. Women wouldn't be entitled to equal protection under the law. And government discrimination against LGBT Americans would be permitted.

So I am concerned, when I hear that Judge Gorsuch is an "originalist" and a "strict constructionist."

Suffice it to say, and I conclude the issues we are examining today are consequential. There is no appointment that is more pivotal to the court than this one. This has a real world impact on all of us. Who sits on the Supreme Court should not simply evaluate legalistic theories and Latin phrases in isolation. They must understand the court's decisions have real world consequences for men, women and children across our nation.

Thank you Mr. Chairman.

Statement of Senator Orrin G. Hatch
Before the Senate Judiciary Committee
Regarding the Nomination of Neil Gorsuch to be Associate Justice
March 20, 2017

Thank you, Mr. Chairman. Judge Gorsuch, welcome back to the Judiciary Committee. This will be more of an ordeal than your last confirmation hearing, but your fitness for this appointment will be just as apparent.

I've served on this committee for 40 years, and some things in the confirmation process never change. The conflict over judicial appointments in general, and over this nomination in particular, is a conflict over the proper role of judges in our system of government.

I have long believed that the Senate owes the President some deference with respect to his qualified nominees. Qualifications for judicial service include legal experience, which summarizes the past, and judicial philosophy, which describes the present and anticipates the future.

Judge Gorsuch's legal experience is well-known. My Democratic colleagues have referred to the American Bar Association's rating as the gold standard for evaluating judicial nominees. The ABA's unanimous well qualified rating for Judge Gorsuch confirms that he has the highest level of professional qualifications including integrity, competence, and temperament.

Judicial philosophy is both the more important qualification and the more challenging to assess. It refers to a nominee's understanding of the power and proper role of judges in our system of government.

Over the last several weeks, I have addressed this issue on the Senate floor and in opinion pages around the country by contrasting what I have called impartial judges and political judges. An impartial judge focuses on the process of interpreting and applying the law according to objective rules. In this way, the law rather than the judge determines the outcome. A political judge, in contrast, focuses on a desired result and fashions a means of achieving it. In this way, the judge rather than the law often determines the outcome.

In my experience, a Supreme Court confirmation process reveals the kind of judge that Senators want to see appointed. A Senator, for example, who wants to know which side a nominee will be on in future cases, or who demands that judges be advocates for certain political interests, clearly has a politicized judiciary in mind.

The New York Times reported last week that the most prominent line of attack against this nomination will be that Judge Gorsuch is "no friend of the little guy." Something is seriously wrong when the confirmation process for a Supreme Court Justice resembles an election campaign for political office.

This dangerous approach contradicts the oath of judicial office prescribed by federal law. When taking his seat on the U.S. Court of Appeals in 2006, Judge Gorsuch swore to administer justice without respect to persons and to impartially discharge his judicial duties. His opponents today demand, in effect, that he violate that oath.

Advocates of such a politicized judiciary seem to think that the confirmation process requires only a political agenda and a calculator. When a nominee is a sitting judge, they tally the winners and losers in his past cases and do the math. If they like the result, it's thumbs up on confirmation. If they don't, well, it's thumbs down.

What if, for example, Judge Gorsuch's record on the appeals court was as follows: he voted against the plaintiff in 83 percent of immigration cases, against the defendant in 92 percent of criminal cases, denied race claims more than 80 percent of the time, and agreed with other Republican-appointed judges 95 percent of the time. I can just hear the cries of protest, accusations that he favors certain parties and is hostile to others, and threats of filibuster.

That is, in fact, the record of a U.S. Circuit Judge nominated to the Supreme Court, but not the one before us today. It is the record of Judge Sonia Sotomayor as described by Senator Charles Schumer at her July 2009 confirmation hearing. Not only did he champion her nomination, but he offered that statistical summary of her record as proof that, as he put it, "she is in the mainstream." Oh, what a difference an election makes.

Alexander Hamilton wrote about the importance of judicial independence, what Chief Justice William Rehnquist later called the crown jewel of our judicial system. Today, in a bizarre twist on that principle, Judge Gorsuch's opponents say that the only way for him to prove his independence is by promising to decide future cases according to certain litmus tests. In other words, judicial independence requires that he be beholden to them and their political agenda. If simply describing that unprincipled position is not enough to refute it, the confirmation process is in more trouble than I thought.

Judge, I know that the integrity of the judiciary, fairness to the litigants who come before you, and your own oath of office are your highest priorities. You will be in good company by resisting efforts to make you compromise your impartiality. When President Lyndon Johnson nominated Judge Thurgood Marshall to the Supreme Court, Senator Ted Kennedy, who would later chair this committee, said: "We have to respect that any

nominee to the Supreme Court would have to defer any comments on any matters which are before the Court or very likely to appear before the Court."

That was 50 years ago. When Justice Ruth Bader Ginsburg appeared before this committee in 1993, she said: "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."

In a speech earlier this year, Justice Sotomayor said this: "What you want is for us to tell you how as a judicial nominee we're going to rule on the important issues you find vexing....Any self-respecting judge who comes in with an agenda that would permit that judge to tell you how they will vote is the kind of person you don't want as a judge."

I'll close by reading from a letter we received from dozens of Judge Gorsuch's Harvard Law School peers. After describing how they were of all political, ideological, religious, geographical, and social stripes, the signers wrote: "What unites us is that we attended law school with Judge Neil Gorsuch – a man we've known for more than a quarter century – and we unanimously believe that Neil possesses the exemplary character, outstanding intellect, steady temperament, humility and open-mindedness to be an excellent addition to the United States Supreme Court."

I agree and look forward to this hearing. Thank, Mr. Chairman.

Statement of Senator Patrick Leahy (D-Vt.)
Senate Judiciary Committee
Hearing On The Nomination Of Neil Gorsuch
To Be An Associate Justice Of The Supreme Court
March 20, 2017

Today marks the first time that the Senate Judiciary Committee has met publicly to take action on the Supreme Court vacancy that resulted from Justice Scalia's death 13 months ago. Just hours after we learned of Justice Scalia's sudden passing, the Majority Leader declared that the Senate would not provide any process to any nominee selected by President Obama, despite the President having nearly a year left in his term. This was an extraordinary blockade, and one backed by then-candidate Donald Trump. Committee Republicans met behind closed doors and declared that they would surrender the independence of this Committee to do the Majority Leader's bidding, and they ignored the Constitution in the process. This unprecedented obstruction is one of the greatest stains on the two-hundred-year history of this Committee.

The Judiciary Committee once stood against a court-packing scheme that would have eroded judicial independence. That was a proud moment. Now, Republicans on this Committee are guilty of their own "court un-packing scheme." The blockade of Chief Judge Merrick Garland was never grounded in principle or precedent.

While Senate Republicans were meeting in back rooms to block President Obama's nominee, extreme special interest groups were also meeting in private – to vet potential Supreme Court nominees for then-candidate Donald Trump. I do not know of any other Supreme Court nominee who was selected by interest groups, rather than by a president in consultation with the Senate, as required by the Constitution.

Senate Republicans made a big show last year about respecting the voice of the American people in this process. Now they are arguing that the Senate should rubber stamp a nominee selected by extreme interest groups, and nominated by a President who lost the popular vote by nearly three million votes. In just his first two months in office, this President has demonstrated hostility toward our constitutional rights and values. He has levied personal attacks against Federal judges and career prosecutors who dare to see his promised Muslim ban for what it is: unconstitutional. And he called our constitutionally protected free press "the enemy of the American people." When the President's chief of staff says that the nominee before us "has the vision of Donald Trump," that should concern anyone who has read the Constitution or cares about the rights it protects.

More than perhaps any confirmation hearing for the last 30 years, I expect this nominee's judicial philosophy will play a central role. Judge Neil Gorsuch has spent more than a decade on the Federal bench. He graduated from Harvard Law School, clerked for the Supreme Court, served in the Department of Justice, and has received a unanimous "Well Qualified" rating from the American Bar Association. If all of those things were sufficient reason to confirm a nominee to the Supreme Court, Chief Judge Merrick Garland would be sitting on the Court today. That is why this nominee's judicial philosophy is so important.

In contrast to past nominees – like John Roberts, whose judicial philosophy was not clearly articulated when he appeared before this Committee – Judge Gorsuch appears to have a comprehensive originalist philosophy. This is the approach taken by jurists such as Justice Scalia,

Justice Thomas, and Judge Bork. While it has gained some popularity within conservative circles, originalism remains outside the mainstream of modern constitutional jurisprudence. It has been 25 years since an originalist has been nominated to the Supreme Court. Given what we have seen from Justice Scalia and Justice Thomas, and in Judge Gorsuch's own record, I worry that this is not just a philosophy; it is an agenda. We know that the conservative groups that vetted Judge Gorsuch, and the millionaires who fund them, have a clear agenda – one that is anti-choice, anti-environment, and pro-corporate. These groups are confident that Judge Gorsuch shares their agenda. The first person to interview Judge Gorsuch in this process explained these groups did not ask "Who's a really smart lawyer who's been really accomplished?" Instead they sought a nominee "who understands these things like we do." After all, Judge Gorsuch has been described by a former leader of the Republican Party as "a true loyalist (and a good, strong conservative)."

Because of the concerns I have about Judge Gorsuch's judicial philosophy, the process by which he was selected, and the views of the president who nominated him, I hope, Judge, that you will answer my questions, and the questions of all Senators, as clearly as possible. It is not enough to say in private that the President's attacks on the judiciary are "disheartening." I need to know that you understand the role of the courts in protecting the rights of all Americans. I need to know that you can be an independent check and balance on the administration that has nominated you, and on any administration that follows it.

Public Hearing Process for the American People

Judge Gorsuch, these hearings, occurring the week after Sunshine Week, are the first opportunity for the American people to hear your views on the role of the courts and the meaning of our Constitution. This constitutional discussion is part of our great democracy set in motion by the Founders. Like the Founders, we do not know what legal questions will be presented in the decades to come. But it is important to determine whether you understand how the Court has a profound impact on small businesses and workers, law enforcement and victims, and families and children across America. It is not contrary to the duties and obligations of a Supreme Court Justice to consider the effects of their rulings. The Court's aspiration, after all, is to provide "Equal Justice Under Law," as inscribed in Vermont marble over its front doors.

Judge Gorsuch, these hearings will help us conclude if you are committed to the fundamental rights of all Americans. Will you allow the Government to intrude on Americans' personal privacy and freedoms? Will you elevate the rights of corporations over those of real people? Will you rubberstamp a President whose administration has asserted that executive power is not subject to judicial review? It is important to know whether you will serve with independence, or as a surrogate for the President who nominated you or the special interest groups that provided him with your name.

While I approach this hearing with these thoughts in mind, I want to emphasize that I have yet to decide how I will vote on this nomination. Unlike those who blocked the nomination of Chief Judge Merrick Garland, I believe it is my constitutional responsibility to fairly evaluate a President's nominee to the Supreme Court. I have voted for Supreme Court nominees, and I have voted against others. I will base my determination on the full record at the conclusion of these

hearings – just as I have done for the 16 previous Supreme Court nominees since I have been in the Senate.

The Supreme Court is the guarantor of the liberties of all Americans. Judge Gorsuch, when you took the oath to sit on the Federal bench, you spoke the following words: "I will administer justice without respect to persons, and do equal right to the poor and to the rich." If confirmed, you must be a justice for all Americans, not for the special interests of a few. Perhaps at no time in our Nation's history is that commitment more important than now.

The stakes for the American people could not be higher.

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PREPARED STATEMENT OF SENATOR MICHAEL S. LEE

Confirmation Hearing on the Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court

Opening Statement

March 20, 2017

Thank you, Mr. Chairman.

Judge Gorsuch, welcome. Welcome to your family, your friends, and your supporters. I know they are proud of you, not just for what you've done professionally but also because of *who* you are: a man of character, integrity, and faith.

Everyone knows that Supreme Court confirmation hearings can be dramatic, even emotional, events. The stakes are high. As a Senator, there are few responsibilities that are more important than deciding whether to vote for a nominee to the Supreme Court.

These days, it seems like being nominated to the Supreme Court is a lot like running for office. As we've seen over the past few weeks, there are a lot of interest groups—both supporting and opposing your nomination—that have mobilized for this confirmation process.

Maybe that's why, on this side of the dais, it can be easy to forget that the nominee is an ordinary citizen. You are not a politician, which means that the acrimony, duplicity, and ruthlessness of today's politics are still foreign and unfamiliar to you. May that continue to be true.

In a former life, when I was a practicing attorney, I had the good fortune of appearing before you. So, I know from personal experience that you are one of the very best judges in the country. You come to oral argument prepared and you ask probing, fair questions that help you understand the arguments.

You aren't there to promote an agenda or grandstand. You're there to listen to both sides of the argument and decide the case. You write thoughtful and

rigorous opinions. They are careful and well-reasoned. And yet they're also easy – even pleasant – to read.

You have the resume of a Supreme Court justice. But I think what's most impressive – and, for our purposes, what's most important – about your legal career and your approach to the law is your fierce independence from partisan and personal influence.

The judiciary is set apart from – and, in a way, set above – the other branches of our republic because we allow it to invalidate actions of the elected branches. Our confidence in the American judiciary depends entirely on judges like you—judges who are independent and whose only agenda is getting the law right.

Now, I want to take a moment to address some of the criticisms that we're likely to hear this week.

I'm sure that during this hearing some of my colleagues will claim that you are outside of the mainstream. This will probably be the first time in your life that anyone has tried to attach that label to you. It certainly was not a description attributed to you the last time you appeared before this committee. In fact, your nomination to the Tenth Circuit was so uncontroversial that Senator Graham was the only member of this Committee who bothered to show up at your confirmation hearing, and you were confirmed unanimously on a voice vote.

I'm sure that some of my colleagues will question your independence, because in their view you haven't sufficiently criticized the President's comments about judges. Personally, I think you've made your views on this subject very clear.

I'm sure some of my colleagues will complain that you aren't providing any hints as to how you'll rule. But that's a reason *for* confirmation, not against it. In our system, judges don't provide advisory opinions, they decide cases and controversies only after each side has an opportunity to make its case before the bench. And they do so outside of political influence.

In an odd twist, some of the same colleagues who will question your independence will also push you to answer questions you simply can't.

I'm sure that some of my colleagues will pick apart some of your rulings. They'll try to say you're hostile to particular types of claims or to particular plaintiffs. I don't think it's productive to evaluate someone's judicial record by looking at who wins or loses in his courtroom. It goes without saying that, in our system, you face the same burden of convincing the court regardless of who you are, and judges don't decide cases based on their own personal preferences. But to my colleagues who go down that road: The record shows that you apply the law neutrally in all cases, without regard to the parties.

Finally, I would also urge my colleagues to keep in mind that, while Judge Gorsuch's reputation won't be affected by how we treat his confirmation, the same can't be said of the Senate.

The night Judge Gorsuch was nominated he said the U.S. Senate is the greatest deliberative body in the world. I agree. But these days, it seems like this title is more of a challenge than an observation. So, I hope we prove you right this week.

Thank you, and I look forward to hearing your answers to our questions.

PREPARED STATEMENT OF SENATOR RICHARD J. DURBIN

Opening Statement
Hearing on the Nomination of Neil Gorsuch to the Supreme Court
Monday, March 20, 2017

Judge Gorsuch, welcome to you and your family.

I often read stories about earlier Supreme Court nominations and how little politics played any role in the selection and vetting of nominees. Those of us on the Democratic side are frequently warned not to let politics be a part of our decision.

But when I consider your path to this historic hearing, this plea to ignore politics rings hollow.

Your journey began with the untimely death of Justice Antonin Scalia in February of 2016.

President Obama met his constitutional obligation by nominating Judge Merrick Garland to fill that vacancy in March of 2016.

Senate Republican Leader Mitch McConnell announced that for the first time in the history of the Senate he would refuse Judge Garland a hearing and a vote. He went further and said he would refuse to meet with him. It was clear that Senator McConnell was making a political decision hoping a Republican would be elected President. He was willing to ignore the tradition and precedent of the Senate so that you could have this opportunity.

In May and September of 2016 Republican Presidential candidate Donald Trump released a list of 21 names, including yours, that he would consider to fill the vacancy. President Trump thanked the Federalist Society and the Heritage Foundation, two well-known Republican advocacy organizations, for providing the list that included your name.

You are part of a Republican political strategy to capture our judicial branch of government at every level. That is why the Senate Republicans kept this Supreme Court seat vacant for more than a year and why they left 30 judicial nominees who had received bipartisan approval of this committee to die on the Senate calendar as President Obama left office.

Despite all of this you are entitled to be judged on your merits.

The Democrats of the Senate Judiciary Committee will extend to you a courtesy which the Senate Republicans denied to Judge Garland: a respectful hearing and a vote.

Judge Gorsuch, you have been nominated to a lifetime appointment on the highest court in the land – the court that has the final say on matters of fundamental importance affecting Americans from all walks of life. You have a lengthy record on the 10th Circuit that we will consider, and it raises many questions. Nominees are usually advised to artfully dodge the tough questions, but it is our job as Senators to seek the truth regardless.

At the nomination hearing of Justice Ruth Bader Ginsburg, my friend Senator Paul Simon set forth a standard for assessing Supreme Court nominations. I have noted this standard to each of the Supreme Court nominees who has appeared before me. Senator Simon said, quote, "You

face a much harsher judge . . . than this committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?''

Let me be clear. When I talk about expanding freedom, I don't mean freedom for corporations. "We the people" does not include corporations. Senator Simon never would have imagined that the Supreme Court would give corporations rights and freedoms that were previously reserved for individuals under our Constitution.

And yet that is where we find ourselves under the Roberts Court. It is often said that the Roberts Court is a "Corporate Court" because of its pro-business tilt. For example, a study by the Constitutional Accountability Center found that the Roberts Court has ruled for the U.S. Chamber of Commerce's position 69 percent of the time. And the Roberts Court has certainly favored big business on issues like forced arbitration, corporate price-fixing, and workplace discrimination cases, to name just a few.

But the Roberts Court has gone further than just ruling the way that corporate America wants. In the 2010 Citizens United case, the Supreme Court held for the first time that corporations have the same right as living, breathing people to spend money on elections. And that was followed in 2014 by the Hobby Lobby case, which allowed for-profit corporations to discriminate against employees based on the corporation's exercise of religious beliefs.

I don't recall ever seeing a corporation in the pews of Old St. Patrick's in Chicago. Our founders never believed that corporations were "endowed with certain unalienable rights." But we are seeing the Supreme Court expand the rights of a legal fiction at the expense of the voices and the choices of actual people. This strikes at the heart of the Supreme Court's promise to provide "Equal Justice Under Law".

You took part in the Hobby Lobby case when it was before the 10th Circuit. As I read that case, I was struck by the extraordinary, even painful lengths the court went to protecting the religious beliefs of the corporation and its wealthy owners, and how little attention was paid to the employees - to their constitutionally protected religious beliefs, their choices as individuals, and the burdens that the court's decision placed on them.

I want to hear from you about a pattern I have seen in your decisions on the 10th Circuit. In case after case, you have dismissed or rejected efforts by workers and families to recognize their rights or defend their freedoms in court against businesses.

Cases like TransAm Trucking. Alphonse Maddin, a truck driver from Detroit, was fired because he refused to wait for hours in the middle of the night on the side of I-88 in Illinois with a broken trailer in sub-zero temperatures. It was cold in that truck – Al Maddin told me it was at least 14 below – but not as cold as your dissent, which argued that his firing was lawful. You cited a strict textualist argument to make your point, but you selectively chose the text that you focused on, and the majority pointed out that common sense and the Oxford Dictionary supported the majority's view, not yours.

And there's the Compass Environmental, Inc. case. In this case, your dissent would have vacated a penalty against an employer who failed to train construction employee Christopher Carder to avoid the electrocution hazard that killed him.

And Strickland v. UPS, where your dissent would have kept Carole Strickland's sex discrimination case from going to a jury, even though your fellow judges said Ms. Strickland provided ample evidence that she was regularly outperforming her male colleagues and yet she was treated less favorably than they were.

Like other Republican nominees that have come before this Committee, you invoke the supposedly neutral philosophies of "originalism" and "textualism." But somehow time after time these doctrines lead you to the same outcome- the company wins and the worker, the victim, and the consumer lose to the corporate elite. This is why the Associated Press stated that you, quote, "often sided with employers in workers' rights cases." Reuters also described you as, quote, a "friend of business" based on your work in private practice. Lawyers have a responsibility to faithfully represent their clients, but a justice of the Supreme Court has a greater responsibility to the Constitution, the law, and the values of our nation.

I also want to hear more about your views on some of the most fundamental individual rights that the Supreme Court is tasked to defend – like the right to privacy, the right for all faiths to practice their religion, the right to vote, equal protection, and the rights of women.
The Committee has also received two letters from students who you taught last year that raise some serious concerns, and tomorrow we're going to get to the bottom of this.

We have learned that you were an aggressive defender of executive power during your time in the Bush Administration. In June 2004, after the Abu Ghraib torture scandal, I authored the first legislation to ban the cruel, inhuman, or degrading treatment of detainees. This legislation became the McCain Torture Amendment, which, despite a veto threat, passed the Senate in December 2005 by an overwhelming 90-9 vote. But when President Bush signed the amendment into law, he issued a signing statement claiming he had the authority to ignore the McCain Amendment. It turns out that you were deeply involved in this unprecedented and unconstitutional signing statement. We need to know what you will do when you are called upon to stand up to this President or any President if he claims the power to ignore laws that protect fundamental human rights.

And as we discussed in our meeting, I believe the Supreme Court is going to be challenged repeatedly by the presidency of Donald Trump. Before this presidency is over, we're going to see the limits of presidential authority and the limits of the Constitution tested, and the ultimate test will come to the Supreme Court. In only two months President Donald Trump has:

- fired an Attorney General for disagreeing with him;
- signed an unconstitutional executive order that was blocked by multiple federal courts;
- had his National Security Advisor resign over contacts with Russia;
- repeatedly attacked the intelligence community, the judiciary, and the free press; and
- repeatedly accepted unconstitutional foreign emoluments.

Clearly President Trump is going to keep the Supreme Court busy. It is incumbent on any nominee to demonstrate that he or she will serve as an independent check and balance on his presidency. With you, there are warning flags.

For example, on February 23, White House Chief of Staff Reince Priebus said, quote, "Neil Gorsuch…represents the type of judge that has the vision of Donald Trump." I want to hear from you why Mr. Priebus would say such a thing. Make no mistake - when it comes to the treatment of workers, of women who have been victims of discrimination, of people of minority religious faiths, and of our Constitution, I personally do not believe America needs the vision of Donald Trump represented on the Supreme Court.

With my constitutional responsibility firmly in mind, I look forward to questioning you tomorrow.

Sen. Ted Cruz Opening Statement
Judge Neil Gorsuch Confirmation Hearing (remarks as prepared)
March 20, 2017

February the 13th of last year was a devastating day for those of us who embrace the Constitution and the Rule of Law. On that day, we lost Supreme Court Justice Antonin Scalia.

Justice Scalia was one of the greatest justices to ever sit on the Court. He was a trailblazing advocate for the original meaning of the Constitution, and a shining example of judicial humility. His death left an enormous hole not only in our hearts, but in the Rule of Law. And it left enormous shoes to fill.

Today, there is sharp disagreement about the very nature of the Supreme Court. Some people view the Court as a hyper-powerful political branch. When they grow frustrated with the legislative process and the will of the people, they run to the courts to see their preferred policies enacted.

For conservatives, we know the opposite to be true. We read the Constitution and see that it imbues the federal judiciary with a much more modest role than the left embraces. Judges are not supposed to make law. They are supposed to faithfully apply it.

Justice Scalia was a champion of this modest view of the judicial role. But had his vacant seat been filled by Barack Obama or Hillary Clinton, Justice Scalia's legacy would have been in grave danger.

If they had filled this seat, we would have seen a Supreme Court where the will of the people would have been repeatedly cast aside by a new Supreme Court majority. We would have seen a Supreme Court majority that viewed itself as philosopher kings who had the power to decide for the rest of us what policies should govern our nation and control every facet of our lives.

That would been a profound and troubling shift in the direction of the Supreme Court and in our nation's future. That is why, after Justice Scalia's untimely death, I was proud to join my colleagues in drawing a line in the sand on behalf of the American people.

We chose to exercise our explicit constitutional authority found in Article II, Section II of the Constitution. We advised President Obama that we would not consent to a Supreme Court nominee until the people, in the presidential election, were able to choose between an originalist vision of the Constitution represented by Justice Scalia, or a progressive one represented by Barack Obama and Hillary Clinton.

During the campaign, President Trump repeatedly promised to nominate, from a specific list of 21 judges, a principled constitutionalist to fill the void left by Justice Scalia.

Issuing such a list was a move without precedent in our country's presidential history, and it created the most transparent process for selecting a Supreme Court justice that our nation has ever seen.

The voters were able to see who President Trump would nominate and were able to decide for themselves whether that is the future they wanted for the Court.

And in November, the People spoke. In what essentially was a referendum on the kind of justice that should replace Justice Scalia, the People chose originalism, textualism, and the rule of law.

Judge Gorsuch is no ordinary nominee. Because of this unique and transparent process—unprecedented in this nation's history—his nomination carries with it a super-legitimacy that is also unprecedented in this nation's history.

All of us have been able to be involved in this process from day one. For my part, I have pored through Judge Gorsuch's opinions to get a feel for the man, his writing style, and his judicial philosophy.

Like the renowned justice he is set to replace, Judge Gorsuch is brilliant and immensely talented. His record demonstrates a faithful commitment to the Constitution and the rule of law. He has refused to legislate his own policy preferences from the bench, while recognizing the pivotal role the judiciary plays in defending the fundamental liberties recognized in the Bill of Rights.

On this score, I am particularly comforted by Judge Gorsuch's own words. On the night he was nominated, Judge Gorsuch channeled Justice Scalia when he explained that "a judge who likes every outcome he reaches is very likely a bad judge, stretching for results he prefers rather than those the law demands."

These words should give comfort to the American people—and to my Democratic colleagues. With Neil Gorsuch, we have a man who respects this institution and respects the work that we do here on behalf of our constituents.

And my Democratic colleagues know it. Let's not forget that just a decade ago, Judge Gorsuch was confirmed in the Senate by a voice vote only two months after he was nominated to be a judge. He was even reported out of this committee by a voice vote. Not a single Democrat spoke even a word of opposition to him.

Not our current minority leader Chuck Schumer. Not Harry Reid or Ted Kennedy or John Kerry. Not Senators Feinstein, Leahy, and Durbin, who still sit on this very committee. Not even Senators Barack Obama, Hillary Clinton, or Joe Biden spoke out against Neil Gorsuch.

The question I would ask my Democratic colleagues is this: What has changed? Ten years ago, he was so unobjectionable that he did not merit even a *whisper* of disapproval. In the decade since, he has had an objectively exemplary record. If anything, he has shown himself to be even more worthy of the bipartisan support he received back then.

Unfortunately, that is probably not something that my Democratic colleagues can do today in light of the current political climate. Many probably believe they have no choice but to manufacture attacks against Neil Gorsuch, whether they want to or not, just to preserve their own political future.

We are seeing these baseless attacks already. Most recently, some Democrats have been slandering Judge Gorsuch as being "against the little guy" because he has dared to rule based on the law, and not on the identity of the persons appearing before him.

This is beyond absurd. For one thing, these are the same people who have spent the past eight years attacking the Little Sisters of the Poor for having the audacity to be live according to their deeply held religious beliefs. You really need to take a long look in the mirror if once day you find yourself attacking a group called the Little Sisters of the Poor. So forgive me if I don't believe these people actually care about the "little guy."

But more important than that, a judge is not supposed to care about the big guy or the little guy. A judge swears an oath to uphold the Constitution and the laws of the United States, not to give favor to particular litigants.

Unfortunately, I fear that we will see even more baseless attacks this week. But I hope I am wrong. I hope that my Democratic colleagues will give Judge Gorsuch a fair chance. I hope that those who were willing to confirm him ten years ago will treat Judge Gorsuch with the same respect that they showed him then.

Because make no mistake: Judge Gorsuch will be confirmed.

So, let me thank you for being here, Judge Gorsuch. I look forward to asking you questions, I look forward to voting for you, and I look forward to seeing you on the Supreme Court of the United States.

Gorsuch Opening Statement as Prepared for Delivery
Senator Sheldon Whitehouse
March 20, 2017

The question before us is, what happens when Republicans gain a five seat majority on the Supreme Court?

I can't help but notice the long array of 5-4 decisions, with all the Republican appointees lining up, to change the law to the benefit of distinct interests: Republicans at the polls, and big business everywhere.

Let's look at the 5-4 decisions: first, helping Republicans at the polls.
All the Republican appointees' 5-4 decisions on election law favor Republicans at the polls. Six to zero.

Helping Republicans gerrymander, paving the way for the Republican "REDMAP" plan that won the House against the American majority vote in 2012: *Jubelirer*, 5-4, all the Republican appointees.

Helping Republican legislatures keep Democrat-leaning minorities away from the polls with targeted voter suppression laws: *Shelby County*, 5-4, all the Republicans; *Bartlett v Strickland*, 5-4, all the Republicans.

Helping corporate money flood elections and boost Republican candidates: *McCutcheon*, 5-4, all the Republicans counting the concurrence; *Bullock*, 5-4, all the Republicans; and the infamous *Citizens United* decision, 5-4, all the Republicans.

In each area, the Court made new law, 5-4, and each decision predictably helped Republicans win elections. At 6-0, it's a partisan rout.

Then look at cases that pit corporations against humans: all the 5-4 Republican-appointee decisions line up to help corporations against humans.
Citizens United and the political money decisions should again count here; all three of them 5-4, all the Republicans.

Then come decisions that protect corporations who've harmed their employees: in pay discrimination, *Ledbetter*, 5-4, all the Republicans; in age discrimination, *Gross*, 5-4, all the Republicans. In harassment cases, *Vance,* 5-4, all Republicans. In anti-retaliation cases, *Nassar*, yup, you guessed it – 5-4, all Republicans.

Then there are the decisions that protect corporations from class action lawsuits: *Walmart v. Dukes*, 5-4 and *Comcast*, 5-4 -- both all the Republicans.

Then there are decisions that help corporations steer customers away from juries and into corporate-friendly mandatory arbitration: *Concepcion* and *Italian Colors Restaurant,* both 5-4, both all Republicans.

The *Iqbal* decision, 5-4, all Republicans, helped bar the courthouse door for all types of plaintiffs.
All of this helps keep corporations away from juries -- the one element of government hardest for corporations to control; indeed, tampering with a jury is a crime.

The Court also helps big business against unions: *Harris v. Quinn*, 5-4, all Republicans. Last year, *Friedrichs* was teed up as a 5-4 body blow against unions, when Justice Scalia died. With a new 5-4 Court, they'll be back.

Throw in *Hobby Lobby*: corporations have religious rights that supersede health care for their employees, 5-4, all Republicans.

Add *Heller* and *McDonald*, reanimating for gun manufacturers a legal theory a former Chief Justice once called a "fraud", 5-4, all Republicans. Help insulate investment bankers from fraud claims? Why not. *Janus Capital Group,* 5-4, all Republicans. *Chamber of Commerce v. EPA* gave corporate polluters an unprecedented victory. Again, 5-4. All Republicans.

That's an easy 16-0 record for corporations against humans.

This is no coincidence. Big business has law groups out trolling for test cases, to go get those cases before the friendly Court. The Republican politico-industrial complex piles in with amicus briefs to tell the Republicans on the Court what it wants. Republican justices are even starting to give hints, so big business lawyers can rush to get certain cases up pronto to the Court.

It's a machine: special interests set up and fund front groups; the front groups appear as amici before the Court; the amicus briefs of the front groups tell the Court what the special interests want; the Court follows the amicus briefs; the decision benefits the special interests; and the special interests pour more money into the front groups. On it goes, like turning a crank. The biggest corporate lobby of them all is winning better than 2:1 at the Court.

This 5-4 rampage is not driven by principle. Over and over, judicial principles -- even so-called "conservative" ones -- are overrun on the Court's road to the happy result.

Stare decisis: that's a big laugh. These were law-changing decisions, many upending a century or more of law and precedent.

Textualism: the Second Amendment uses the military term "arms" and talks about militias, but never mind that when the gun lobby wants something.

Originalism: there's a good one. Find me a Founding Father who planned a big role for business corporations in our elections; or one who would have countenanced the steady strangulation of the civil jury, without so much as a mention of the Seventh Amendment.

The *Citizens United* majority even fiddled with Court procedure to get to the decision it wanted to deliver, dodging its way around a record that would have belied their findings of fact; setting aside that their findings of fact were factually preposterous -- and that appellate courts are not even supposed to make findings of fact.

It's not just us who notice. Top writers and scholars describe the Roberts Court as essentially a delivery service:

- Jeffrey Toobin wrote in 2009, "Even more than Scalia, . . . [Chief Justice] *Roberts has served the interests, and reflected the values, of the contemporary Republican Party.*"

- Linda Greenhouse in 2014: "I'm finding it impossible to avoid the conclusion that the *Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda.*"
- Norm Orenstein has described what he called "the new reality of today's Supreme Court*: It is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen.*"

- Studies of the Court's decisions show it's the most corporate-friendly Court in modern history, with Justices Roberts and Alito vying to be the most corporate-friendly Justice.

- And the American public knows something's gone wrong at the Court. A 2014 poll revealed that a majority of Americans think a person won't get a fair shake in this Court against a corporation.

Now, look at where Judge Gorsuch fits in. When *Hobby Lobby* was in the 10th Circuit, he held for a corporation having religious rights over its employees' health care. His record on corporate vs human litigants comes in, by one count, at 21-2 for corporations. Tellingly, big special interests and their front groups are spending millions of dollars in dark money to push his confirmation.

We have a predicament. In ordinary circumstances, he should enjoy the benefit of the doubt, based on his qualifications. But several things have gone wrong that shift the benefit of the doubt.

One, Justice Roberts sat in that very seat, told us he'd "just call balls and strikes," and then led his five-person Republican majority on that activist, 5-4 political shopping spree. "Once burned, twice shy." Confirmation etiquette has been unhinged from the truth.

Two, Republican Senators denied any semblance of due legislative process to our last nominee -- one even more qualified. Why go through the unprecedented political trouble to deny so qualified a judge even a hearing, if you don't expect someone more amenable to come along. Those political expectations also color the benefit of the doubt.

Finally, the special interests who did so well in that 5-4 extravaganza of decisions are now spending millions and millions of dollars to push this nominee. They obviously think he will be worth their money. These special interests also supported the Republican majority keeping this seat open.

I'm afraid that all costs whoever now sits in that seat the benefit of the doubt, to answer the question, will you saddle up with the other Republicans and launch the Court, 5-4 again, on another massive special interest and Republican election rampage?

I hope we can at least agree that we can't have a Court where litigants in these 5-4 decisions can predict how they'll do based on who they are. Here's what it looks like now: If they're big Republican election interests, they'll win. If they're corporations against a human, they will win. That can't be right.

Idaho Senator Mike Crapo
Opening Statement
Confirmation Hearing of Judge Neil Gorsuch to be Associate Justice
United States Supreme Court
Monday, March 20, 2017

Thank you, Mr. Chairman.

Judge Gorsuch, welcome and congratulations on the high honor of your nomination.

Much of the discussion surrounding this nomination has centered on answering the key question, "What kind of justice should serve on the U.S. Supreme Court?"

Some want a judge in their own making--predictable, ideological and political.

Others regard the role of judge as final arbiter of justice–clothed in dark robes, unquestioned and seated on an elevated platform well above the court proceedings.

In recent years, selecting judges has become more about a numbers game with the courts, measured at least in part by comparing vacancies filled by each president. Often, we read about federal court proceedings invariably coupled with the name of the judge and the president who appointed him or her.

Because venue-shopping has become all-too-common a practice today, the individual judge can become more important than the facts of any case. In this scenario, the judge serves not justice, but politics in another form.

Whenever Congress considers a judicial nomination, people talk earnestly about the importance of "independence." For some, that word flows from the central work of the Founders of our Constitution, who crafted a separate branch of government empowered to review laws passed by the legislature and signed by the executive branch.

To others, "independence" is more about giving judges the power to issue decisions without personal consequence.

The true American vision of justice is one in which the judge is not influenced by personal opinions. The law is supreme. The facts decide the day. The judge could be substituted with another and the outcome remains the same. The president who nominated him or her is never mentioned in the article about the decision. Venue-shopping is a relic of another era.

This is the vision most Americans have of the proper judge on the federal bench.

As I reflect on the nomination of Judge Gorsuch, I think back to our meeting soon after his nomination was announced. I've met several Supreme Court nominees in my service in the Senate. All of them have impressive credentials and legal experience.

But Judge Gorsuch stands out for a notable reason. He understands and is focused on the principle that a judge is a servant of the law, not the maker of it.

One of his comments during our talk still resonates. He said, "My personal views are irrelevant as a judge."

Isn't that the ideal illustration of a judge steadfastly committed to the law?

To quote the late Justice Scalia, "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."

Judge Gorsuch recognizes that the law may be imperfect, being the product of an imperfect system.

But there is a remedy to the imperfection of law – the political system, directly accountable to the public. The people choose policy-makers, not federal judges.

The law can frustrate. In black and white, it is stark and change comes slowly and deliberately, just as our forebears designed. Law that can change in a moment and capriciously is inherently destabilizing.

An activist judge who makes law plants insecurity in our system. Rather, our Constitution provides for law to be enacted legislatively with the sanction of the American people through the ballot box. Policy changes advanced by judges can be reversed and reversed again. Law properly grounded in the democratic and political process cannot.

"Equal treatment under the law."

"Justice is blind."

These aren't just catchy phrases that echo back to our time in civic classes. These are guiding principles of our republic and reaffirmed in the 14th Amendment to our Constitution. Fundamentally, each of us should know courts will find for us when the law is on our side, whether we are rich or poor, strong or weak, or a "big guy" or a "little guy."

Now, that's principled justice.

Some may not like a particular law. That's fair and not unexpected. But, the remedy for this disagreement is not changing judges but changing the law. Fortunately, our system of government has the exact solution available to us–passing a new law through the deliberate, careful and publicly-accountable political process.

No one seriously questions Judge Gorsuch's fitness and capability to serve on the highest court in the land. His credentials are exemplary. He is widely respected for his intellect, judgement and modesty. His admirers span the political spectrum. Judge Gorsuch is intelligent and open-minded.

He is exactly the model for appointment to the Supreme Court.

Mr. Chairman, I look forward to hearing from the nominee himself. The next few days will prove extraordinarily insightful as we discuss with Judge Gorsuch his philosophy of jurisprudence, what animates him to interpret the law, and his vision for the federal judiciary.

I look forward to this hearing.

Thank you, Mr. Chairman.

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Sen. Klobuchar's opening remarks as prepared for delivery are below:

Welcome, Judge Gorsuch. We've already met once before in my office, and all of us on the Judiciary Committee are looking forward to hearing from you. We welcome your family as well.

This Committee has no greater responsibility than the one before us today. Our Constitution, our laws, and our values all depend on a Supreme Court that is impartial, fair, and just.

Your nomination comes before us during an unprecedented time in our country's history. We are witnessing a singular moment of constitutional and democratic unease. In recent months, foundational elements of our democracy—including the rule of law—have been questioned, challenged, and even undermined.

So I cannot evaluate your credentials in the comfort of a legal cocoon. Instead, I must look at your views and record in the real world of America today. You see, you come before us this afternoon, not only as a nominee sitting at a table alone, with your friends and family behind you, but in the context of the era in which we live.

From the highest levels of government, we have heard relentless criticisms of journalists.

Seventeen intelligence agencies have confirmed that Russia, an autocratic foreign government attempted to influence our most recent election.

At the same time, voting rights in the U.S. have been stripped from far too many, while dark money in extraordinary sums—adding up to an estimated $800 million in just the past six years—continues to have an outsized influence in our politics, distorting our representative democracy.

Just last month, we saw the President of the United States refer to a man appointed to the federal bench by President George W. Bush as a "so-called judge."

And we have sadly seen hate unleashed toward religious minorities from Jews to Muslims, venom directed at innocent Americans, from kids in restaurants being told to go back to where they came from, to a man gunned down while washing his car in his driveway.

The pillars of our democracy and our Constitution are at risk. You are not the cause of these challenges to our democracy but, if confirmed, you would play a critical role in dealing with them.

This is a serious moment in our nation's history, and, as representatives of the American people, it is our duty up here to determine if you will uphold the motto on the Supreme Court building itself—to help all Americans achieve "equal justice under law."

Before I was elected to the Senate, I spent eight years leading Minnesota's largest prosecutor's office. I've seen firsthand how the law has a real impact that extends far beyond the walls of a courtroom—whether it's crime victims and their families, or people who have seen a loved one sent to jail.

The decisions made from the bench affect people living right now, in the 21st century, with 21st century problems and concerns. So, though the U.S. Constitution and its Bill of Rights were written in the 18th century…though the Fourteenth Amendment's guarantee of "equal protection of the laws" was written in the 19th century…the decisions made today affect not the lives of our 18th- and 19th-century ancestors, but of all Americans today.

So Judge, these hearings will not just be about your legal experience. They are about trying to understand what you would actually do on the Court. For the law is more than a set of dusty books in the basement stacks of a law library; it's the bedrock of our society.

We need to know how you approach the law. After Judge Merrick Garland was nominated to the Supreme Court last year, we often heard about how he is a careful jurist who decides cases on the narrowest possible grounds…who builds consensus across the ideological spectrum…who doesn't inject political considerations into his rulings. We look forward to hearing what your judicial philosophy would be on the Court.

Looking at your past decisions, I have questions about how you would approach your work.

In a speech last year, you spoke about the differences between judges and legislators. You said that while "legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future," that "judges should do none of those things in a democratic society."

Judges, you said, "should instead strive … to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."

I want to understand better how those views of the Constitution square with modern-day life.

"Due process"…"equal protection of the laws"…these are general and sweeping terms. And the Supreme Court, which has the power of judicial review, has the constitutional duty to be the final arbiter of what the Constitution means—rulings that can impact voting rights, civil rights, and the right of people to marry.

Many of the issues we face today are ones that this country's founders never considered—and in fact never could have considered because of all the social change and innovation that has

taken place. We are no longer dealing with plows, bonnets, and colony debts in England—but instead driverless cars, drones, and cybercrimes—and those were just the subjects of the hearings I attended last week.

I want to understand how your judicial philosophy, which, as you suggest—looks backward, not forward—may affect the rights of our fellow citizens.

I also want to understand the implications of your views on overturning legal precedent.

One example of this occurs in the context of the Chevron doctrine.

In stating that courts should generally defer to reasonable interpretations of executive agencies, this 33-year-old case guarantees that the most complex regulatory decisions—ones judges themselves may have little or no expertise to handle—are made by the scientists and professionals best equipped to rise to these challenges. These modern agency decisions include things like rules protecting public safety, requirements against lead-based paint, and clean water protections for our Great Lakes.

Last year, in your concurring opinion to a decision that you authored in Gutierrez v. Lynch, you suggested that Chevron should be overturned.

Yet this act would have titanic real-world implications on all aspects of our everyday lives. Countless rules could be in jeopardy, protections that matter to the American people would be compromised, and there would be widespread uncertainty about our laws.

Judge, if you believe it really is time for the Court to reconsider Chevron, then we need to know with what you would replace it.

Another opinion that I want to talk about is Riddle v. Hickenlooper. In your concurring opinion, you suggest that the Court should apply strict scrutiny to laws restricting campaign contributions.

If the Supreme Court adopted that view, it could well compromise the few remaining campaign finance protections that are still on the books, and it would make it even more difficult for Congress to pass future reforms.

The notion that Congress has little or no role in setting reasonable campaign finance rules is in direct contradiction with the expressed views of the American people; in recent polls, over three-quarters of Americans have said that we need "sweeping new laws to reduce the influence of money in politics."

While polls aren't a judge's problem, democracy should be. When unlimited, undisclosed money floods our campaigns, it drowns out the people's voices. It undermines our elections and shakes the public's trust in the process.

Other questions about your views in money and politics are raised by your opinion in Hobby Lobby. In that opinion, you found that corporations were legal persons and could exercise their own religious beliefs. This ruling leaves open the troubling argument that corporations have a right to free speech equal to that of citizens, which could invalidate the prohibition on corporations donating directly to political campaigns.

To me, that may not be characterized as "following the law"—to quote my Republican colleagues today—but instead "making law," something they have said today is not a judge's role.

But these are not the only First Amendment issues at stake. I will also be asking you about New York Times v. Sullivan and the freedom of the press, as well as a subject area in which you have a lot of expertise, antitrust.

Judge, as I consider your nomination, I'm reminded of something a Justice who hailed from Minnesota, Justice Harry Blackmun, once said. "Surely," he wrote, "there is a way to teach law, strict and demanding though it might be, with some glimpse of its humaneness and basic good...There is room for flexibility and different answers, and...not all is black or white."

You see, there's a reason we have judges to apply the law to the facts. It's because answers aren't always as clear as we would like, and sometimes there is more than one reasonable interpretation. And it's this discretion that makes it so critical that Justices interpret the law evenly—without fear or favor, and with the good judgment and humility to recognize the gravity of the office, to respect the role of the judiciary, and to understand the impact of their decisions on people.

As a prosecutor, I knew that every charging decision we made, every case we chose to pursue or not pursue, had real implications. And I believe that Supreme Court Justices need to have this same appreciation for how their decisions affect Americans.

For in the end it wasn't a law professor or federal jurist who was helped by the Eighth Circuit's reliance on Chevron deference in interpreting a Labor Department rule: it was an hourly Minnesota grocery store worker who got to keep his hard-earned pension.

And when the Court stripped away the rules that opened the door to unlimited Super PAC spending—it wasn't the campaign financiers or ad men who were hurt—it was the grandma in Lanesboro, Minnesota who thought it mattered when she sent in $10 to support her Senator.

And, as the granddaughter of an iron ore miner, I can tell you it wasn't a CEO or a corporate board chair whose life was saved by mining safety rules. It was the Minnesota iron ore workers, who, like my grandpa, would go down 1500 feet every day in a cage with their black lunch buckets, all with the hopes that their own kids would one day go to college.

My dad—who ended up as the first kid in his family to graduate from high school and from there to community college and then to the University of Minnesota—still remembers as a little boy standing in front of the caskets of those mine workers lining St. Anthony's church. It was the worker protections—coupled with the ability to organize as a union—that finally made those miners' jobs safer.

Judge Gorsuch, you have been rightfully praised for your impressive academic credentials and experience.

But at these hearings, I want to hear about more than just your record—I want to know, if you are confirmed, whether your judgments and decisions would in fact reflect a respect for precedent and the law and how they would affect all Americans—from that grandma in Lanesboro to that Minnesota grocery store worker. That's not politics. That's why we have these hearings.

Thank you.

Statement from Senator John Kennedy (R-La.) at a Senate Judiciary Committee Hearing on the Nomination of Judge Neil M. Gorsuch to be an Associate Justice of the United States Supreme Court Monday, March 20, 2017

Thank you Mr. Chairman.

I walked by the Supreme Court the other day. I live nearby in an apartment that costs more than my mortgage back home. On the building are the words "Justice, the Guardian of Liberty." And that really tells us everything we need to know about the importance of the Supreme Court. Without justice, without equal treatment by the law, liberty becomes an empty promise. So even though it's easy to look to politicians, the President, Congress as the last protectors of liberty- we as Americans have actually entrusted that to the Supreme Court.

And that's why this hearing and this nomination are so very important. That's why we need go beyond politics, beyond the person who lives in the White House, beyond whatever the issue of the day happens to be - and truly understand what our role in this process is. I hope we focus on temperament. On Judicial Philosophy. On legal reasoning. On qualifications and experience. For just a minute, I hope we forget that we're all politicians and focus instead on the judiciary and the role we get to play in affecting that most American of institutions – the Supreme Court. And I have every confidence that all of my colleagues of both parties will do just that. None of us wants this hearing to turn into the Gong Show.

I've had the opportunity to meet with Judge Gorsuch and read his work. I like what I see. Anyone who knows a law book from a Sears and Roebuck catalog has to be impressed with his legal career. Judge Gorsuch appears to be exceptionally well-qualified to be a Supreme Court Justice. His time getting his Doctorate in Legal Philosophy at Oxford stuck out to me. An Oxford D. Phil. may be the most difficult terminal degree in the world. Harvard and Columbia aren't quite as preeminent as LSU, but they are satisfactory, as well.

I've read many of Judge Gorsuch's opinions. His dissent in *A.M. v. Holmes* should be required reading in every law school. All I can say is that he writes really, really well. His opinions are engaging, whether you agree with them or not. He is direct, clear, concise, and collegial, and he has a clean grasp of the law. There is no boilerplate language in his opinions that lawyers often use. Obviously, the ability to communicate complex legal issues in a way that is understandable to the people directly affected by them and to the American people is a skill that will serve him well as a Supreme Court Justice. I might add that Judge Gorsuch in his opinions also shows concern for the parties. He usually uses their names – not appellant, appellee or respondent- but their names. I like that.

Judge Gorsuch's respect for judicial independence and for precedent is apparent in all of his opinions. He is an unyielding supporter of the separation of powers. I believe that he genuinely understands and values the role of the judiciary as a check on both the legislative and executive branches. And that's extraordinarily important to me. As are we all, I'm rather fond of the constitution and the structure it creates - separating powers so no branch of government can bully another. Or bully the American people. One of the main purposes of the United States Constitution is to tell us where to stop – to reaffirm that the authority of the state over its people is limited and finite.

When I am evaluating candidates for judicial positions, I'm looking for a judge, not someone blinded by ideology. I'm not interested in people who want to use the judiciary to advance their personal policy

goals. I want them to apply the law as it is, as best they understand it, not try to reshape the law as they wish it to be. I also want a person who is intellectually curious, earnest in his desire to rule fairly, and willing to fight for his view of justice - sort of a cross between Socrates and Dirty Harry. I believe Judge Gorsuch is that person.

I look forward to getting to know Judge Gorsuch and his philosophy better through these hearings.

One last thing. None of the questions I ask you is designed to trick you. Nor are they designed to suggest that you should violate Canon 3(A)(6) of the Code of Conduct for United States Judges, which provides: "A judge should not make public comment on the merits of a matter pending or impending in any court."

Nor are my questions designed to cause you to violate Rule 2.10(A) of the American Bar Association Model Code of Judicial Conduct, which provides: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in a court."

Nor are my questions designed to ask you to violate Rule 2.10(B) of the American Bar Association Model Code of Judicial Conduct, which provides: "A judge shall not in connection with cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the judicial office."

If you think any of my questions cross these lines please say so and we will talk about it.

PREPARED STATEMENT OF SENATOR AL FRANKEN

REMARKS ON JUDGE NEIL GORSUCH'S SUPREME COURT CONFIRMATION HEARING

Thank you, Mr. Chairman and Ranking Member Feinstein. Judge Gorsuch, congratulations on your nomination. You are a man of considerable qualifications and experience, and having reviewed your decisions, I can say that you are a man of strong opinions. But the task before this Committee is not to determine whether you are a man of conviction. Rather, it is incumbent upon us to determine whether the views you espouse, and whether your interpretation of the Constitution, take proper measure of the challenges the American people face every day. We must determine whether your understanding of our founding document is one that will make real its promise of justice and equality to all Americans—black and white; immigrant and Native American; gay, straight, and transgender. We must determine whether your interpretation of our laws and Constitution will unfairly favor corporate interests over working families or limit the ability of Minnesotans to get their day in court.

The justices who sit on the Supreme Court wield enormous power over our daily lives, and so before this Committee decides whether to advance your nomination, we have an obligation to fully examine your views on these important issues, and to make sure that those views are known to the public. That's the whole purpose of these hearings—to allow the people of Minnesota, who I represent, and the American people to meet you and to decide for themselves whether you are qualified to serve. But, Judge Gorsuch, having reviewed your decisions and your writings, I have concerns. In the days ahead, I will use this hearing as an opportunity to better understand your views and, perhaps, to alleviate some of those concerns. But in order for the hearing to serve that purpose—in order for the public to determine whether you should be confirmed—you must answer the questions this Committee poses fully, candidly, and without equivocation. So I hope that's how you will approach our exchanges.

Now, with that in mind, I think it's important to acknowledge just exactly how it is that you came to be sitting before us here today—namely, this Committee's failure to fulfill one of its core functions. Immediately following the death of Justice Scalia, and before President Obama had even named a nominee, my Republican colleagues announced that they would not move forward with filling the vacancy until after the presidential election. The majority leader said, quote, "[t]he American people should have a voice in the selection of their next Supreme Court justice." The only problem with the Majority Leader's reasoning is that the American people did have a voice in this decision. Twice. Nonetheless, when President Obama nominated Chief Judge Merrick Garland, the Republican members of this Committee responded by refusing to hold a hearing—a truly historic dereliction of this body's duty, and a tactic as cynical as it was irresponsible.

As a result of my Republican colleagues' unprecedented obstructionism, Justice Scalia's seat on the Court remained vacant until President Trump was able to name a replacement. Now, during the campaign, then-candidate Trump made no secret about what kind of a nominee he would select. In fact, he openly discussed his litmus test. He said that he would, quote "appoint judges very much in the mold of Justice Scalia." During the final presidential debate, then-candidate Trump said, quote "the justices that I'm going to appoint will be pro-life. They will have a conservative bent. They will be protecting the Second Amendment. They will interpret the Constitution the way the founders wanted it interpreted."

Now, Justice Scalia was a man of great conviction and, it should be said, a man of great humor. But Justice Scalia embraced a rigid view of our Constitution—a view blind to the equal dignity of LGBT people and hostile to women's reproductive rights, and a view that often refused to acknowledge the lingering animus in laws and policies that perpetuated the racial divide. Judge Gorsuch, while no one can dispute the late Justice Scalia's love for the Constitution, the document he revered looks very different from the one that I have sworn to "support and defend." So it troubles me that at this critical juncture in our nation's history, at this moment when our country is so fixated on the things that divide us from one another, that President Trump would pledge to appoint jurists whose views of our founding document seek to reinforce those divisions rather than bridge them.

This is an important moment in our history. To my mind, our country has never been more divided. The public's trust in our government and in the integrity of our institutions is at an all-time low. But that erosion of trust didn't take place overnight, and it didn't happen on its own. The American people's loss of confidence in our public institutions was quickened by the Court. A study published in the *Minnesota Law Review* found that the Roberts Court is more likely to side with business interests than any Supreme Court since World War II. Time and time again, the Roberts Court issued decisions that limit our constituents' ability to participate freely and fairly in our democracy. Decisions like *Shelby County v. Holder*, where the Court gutted one of our landmark civil rights laws and removed a crucial check on race discrimination at the ballot box; or like *AT&T Mobility v. Concepcion*, a 5-4 decision that allows corporations to place obstacles between consumers and the courthouse door. Perhaps most egregious of all was *Citizens United*, which paved the way for individuals and outside groups to spend unlimited sums of money in our elections. It's no surprise that during the 2016 election, voters from across the ideological spectrum—Democrats and Republicans alike—described our system as "rigged." That's because it is—and the Roberts Court bears a great deal of responsibility for that.

Now, in each one of these 5-4 decisions, Justice Scalia was among the majority. So as this Committee sets about the task of evaluating his potential successor, I want to better understand the extent to which you share Justice Scalia's judicial philosophy, and I will be paying close attention to the ways in which your views set you apart.

One of the ways in which your views are distinct from Justice Scalia's is in the area of administrative law. Just this past August, you wrote an opinion in which you suggested that it may be time to re-evaluate what's known as the *Chevron* doctrine. Now, in broad strokes, the *Chevron* doctrine provides that courts should be reluctant to overrule agency experts when they are carrying out their missions, like when the FDA sets safety standards for prescription drugs. This principle, outlined by the Supreme Court, recognized that our agencies employ individuals with great expertise in the laws they are charged with enforcing—like biologists at the FDA—and that where those experts have issued rules in highly technical areas, judges should defer to their expertise.

Now, administrative law can be an obscure and sometimes complicated area of the law, but for anyone who cares about clean air or clean water, or about the safety of our food and our medicines, it is incredibly important. And *Chevron* simply ensures that judges don't discard an agency's expertise without good reason. Justice Scalia recognized this to be true.

But to those who subscribe to President Trump's extreme view, *Chevron* is the only thing standing between them and what the president's chief strategist Steve Bannon called the quote unquote "deconstruction of the administrative state"—which is shorthand for gutting any environmental or consumer protection measure that gets in the way of corporate profit margins. Speaking before a gathering of conservative activists last month, Mr. Bannon explained that the president's appointees were selected to bring about that deconstruction. And I suspect that your nomination, given your views of *Chevron*, is a key part of that strategy.

So this hearing is important. Over the next few days, you'll have an opportunity to explain your judicial philosophy and I look forward to learning more about how you would approach the great challenges facing our country. But if past is truly prologue, then I fear that confirming you would guarantee more of the same from the Roberts Court: decisions that continue to favor powerful corporate interests over the rights of average Americans. During your time on the Tenth Circuit, you have sided with corporations over workers, corporations over consumers, and corporations over women's health. What this moment in our nation's history calls for is a nominee who has earned a reputation for working to bridge the partisan divide—a nominee whose experience demonstrates an ability to set aside rigid views in favor of identifying common ground and crafting strong, consensus opinions—someone like Merrick Garland. But your record suggests that, if confirmed, you will espouse an ideology that I believe has already infected the bench—an ideology that backs big business over individual Americans and refuses to see our country as the dynamic and diverse nation that my constituents wake up in every morning.

As I said before, I see this hearing as an opportunity to learn more about your views and, perhaps, to alleviate some of my concerns. So I hope that we are able to have a productive conversation.

Thank you, Mr. Chairman.

Senator Coons
Opening statement at Judge Neil Gorsuch's confirmation hearing
March 20, 2017

Thank you, Mr. Chairman. Welcome, Judge Gorsuch, and welcome to your family and friends. I want to congratulate you on your nomination and I look forward to the opportunity to ask you questions today.

I believe my constitutional duty to advise the president on this nomination to the Supreme Court is among my most important responsibilities as a senator.

This hearing is our opportunity to ask you, Judge Gorsuch, questions in front of the American people – to better understand how you interpret the text of our Constitution and how you apply Supreme Court precedent.

We will explore how your approach to interpreting our Constitution would impact our lives in the future.

I am committed to ensuring that the consideration of your nomination by this committee is thorough and fair. And I am hopeful that, as our hearing proceeds, it will promote an important dialogue about the Constitution and the courts. Based on our meeting, Judge Gorsuch, I know that you too hope that this moment can serve as a shared civic experience.

I am considering your nomination with an open mind and I would ask that you be forthcoming in your responses to our questions. I would like this hearing to be substantive and to reflect the best traditions of the Senate.

However, I cannot let this moment, commenting on the best traditions of the Senate, pass without expressing my deep regret that Chief Judge Merrick Garland was treated with profound and historic disrespect. The disrespect shown by Senate Republicans to Judge Merrick Garland, to President Obama, and to our institutions was unprecedented and deeply damaging.

For nearly 300 days, longer than any other nominee, Chief Judge Garland's nomination to the Supreme Court sat without action. My Republican colleagues didn't afford him a hearing, and would not give him a vote.

I believe we have a responsibility to work to re-elevate our democratic institutions above these narrow, partisan politics. I will support a process worthy of its important purpose – to carefully evaluate a candidate for the highest court in the land.

The American people are entitled to see you answer probing, thorough, and challenging questions about your views on a wide range of constitutional issues, because the breadth of the issues that come before the Court cannot be overstated.

Just in the last year, the Supreme Court considered cases involving executive power, affirmative action, intellectual property, partisan gerrymandering, racial bias in the courtroom, and reproductive rights.

The seat you would fill, Judge Gorsuch, if elevated, was occupied by Justice Scalia and you've been compared to him. While it may seem at times to many that the Supreme Court is engaged in abstract

intellectual exercises about originalism, or textualism, or living constitution, even a small subset of landmark decisions Justice Scalia took part in his 30 years on the Court demonstrates otherwise.

It's because of Supreme Court decisions that gay men can no longer be criminally prosecuted for engaging in consensual relationships, that loving same-sex couples can get married in every state in our Union, that women cannot be denied attendance at one of our nation's premier military academies, and that women are entitled to a full range of reproductive health care, that juveniles and intellectually disabled people can no longer be executed, and that millions of Americans who have attained health care under the ACA have been able to keep that care, at least for now. These cases impacted the lives of millions of real Americans and Justice Scalia applied his understanding of the Constitution and dissented in every one of them.

I would like to use these hearings to explore your interpretation of the Constitution. I believe that our Constitution, which I view as our nation's secular scripture, includes guarantees of equality and privacy – hallmarks of our modern American society.

I believe in an independent judiciary that safeguards our rule of law from unlawful intrusions of the most powerful – even the president of the United States.

The legitimacy of our Supreme Court transcends the outcome of any one case. But that legitimacy rests on the unyielding responsibility of Justices to put their personal political views aside to decide cases on their merits.

Judge Gorsuch, your nomination has been championed by the ideologically driven Federalist Society and Heritage Foundation. Interests groups are already spending millions of dollars advocating for your confirmation, but as I've told you during our meetings, none of those facts will determine my vote on your nomination. I'm instead looking to you to demonstrate your ability to separate politics from constitutional interpretation.

As my colleague from Utah, Senator Hatch, once noted, "Judges that say what the law is, promote liberty. Judges say what they think the law should be, undermine liberty."

I have spent a great deal of time reviewing your record. I appreciate that you're an engaging and careful writer. I also have some serious questions based on your decisions.

What stands out to me is your tendency to go beyond the issues that need to be resolved in the case before you. I have seen a pattern in which you have filed dissents, dissents from denials of rehearing, concurrences, or even concurrences to your own majority opinions, to explore broader issues than what's necessary, to revisit long-settled precedent, and to promote dramatic changes to the law.

This pattern concerns me because these additional writings hint at an unwillingness to settle on a limited conclusion and forge a narrow consensus with your colleagues.

I want to know that you would apply the Constitution and settled precedent to reach consensus and resolve narrowly the disputes before you. And I want to know that our treasured freedoms will be safe in your stewardship.

Our Constitution, as you know, is designed to protect our diversity of views. It guarantees to all of us the freedom of expression, the right to privacy, the liberty to make our most personal life decisions, equal protection, and the ability to worship freely.

Take the freedom of religion – enshrined in the First Amendment, which says in part "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

I believe we must balance our respect for the significance of faith and free exercise with concerns about impacts on other's liberty.

As my colleagues know, I studied law and divinity in school. Some of the most formative and meaningful experiences of my life have been guided by my Christian faith. The command to care for the most vulnerable among us inspires my work as a Senator, and I value opportunities to share with my friends and colleagues in prayer.

Throughout our nation's history, religion has inspired countless acts of charity, kindness, and good work. But when I think about the Founders' wisdom to protect both church and state by ensuring their separation, I am in awe. Our United States were founded by people who came here for many reasons, seeking opportunity, freedom from oppression, and hoping in many cases to be free to practice their faith.

From Pilgrims to Mormons, from the Amish to Jehovah's Witnesses, America from its founding has been home to many faiths from many parts of the world. Part of our Founder's genius was to abandon the European practice of having a state religion, supported by state taxes.

Now today, across the U.S., Churches and Mosques, Synagogues and Temples, find their own way, recruit and raise up their own believers and funds free from state interference. The Supreme Court over decades has sought to strike and preserve a careful balance between the free exercise rights of religious minorities and the power of legislatures to compel compliance with neutral laws.

Recently, the Court has decided several landmark and controversial cases. The Hobby Lobby case, where the free exercise rights of a few were held to prevent the infringement on the personal liberty of many. And in another important line of cases in which substantive due process rights have been held to guarantee a right to privacy and self-determination, even when longstanding practices and religiously motivated statutes are challenged as a result.

Religious freedom must also be freedom to not have our values or practices pushed into the public square.

While other nations have been besieged by wars and persecution of religious minorities, inclusion and equality have been guiding lights in the success of our democracy.

However, at other times in our history, sincerely held religious beliefs have been invoked to deny millions of Americans' full equality under the law. It has been invoked in defense of laws prohibiting interracial marriage, LGBT relationships, and reproductive rights.

We live today in tumultuous times, as you know. The Supreme Court is likely to hear many important cases in the years to come. It will be important that we understand your values and framework for

interpreting the Constitution. On areas as important as executive power, national security, the independence of the judiciary, deference to agencies, and personal liberty.

There are disturbing developments that I see in our modern environment as affronts to religious freedom and personal liberty.

President Trump campaigned on putting in place a Muslim ban, and has signed unlawful, discriminatory executive orders to deliver on that promise.

The new administration's Justice Department has withdrawn guidance supporting protections for transgender individuals.

And the Attorney General testified under oath at his confirmation hearing that secular attorneys may not have the same claim to understanding the truth as religious ones.

Our next Supreme Court Justice will play a pivotal role in sustaining and defending our rights in this critical time for our country in the years to come. America needs a Supreme Court Justice who will protect the Constitution, not one who will countenance faith or fear of some, as a justification for infringing the liberty of many.

It is against that backdrop, Judge, that I will be seeking to understand your commitment to the rule of law, the guarantees of the First Amendment, and individual liberty. I look forward to your testimony.

Opening Remarks
U.S. Senator Richard Blumenthal (D-CT)
Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States
March 20, 2017

Thank you, Mr. Chairman. Thank you for being here, Judge. I live in the Western part of Connecticut. I love Colorado and my first job was on a farm in Nebraska where my grandfather raised corn and cattle. We can go into other commonalities, but I want to join in thanking you and your family and say that despite the hardships of going through this process, I suspect there are quite a few lawyers in Connecticut who wouldn't mind changing places with you.

But I also want to thank one group that, perhaps, should be given gratitude, and that is your fellow judges on the federal bench. Some of them are here. I have no doubt that many are watching. I've had the honor in the last forty years to appear before many of them and they make sacrifices that are often unappreciated by most Americans who enjoy the benefits of their service, often financial sacrifices, personal sacrifices, sometimes even physical threats, as happened when the schools were desegregated or when women's clinics were protected in the United States, and so I want to thank them and through you, express my gratitude.

The independence of those judges has never been more threatened and never more important, and a large part of the threat comes from the man who nominated you who has launched a campaign of vicious and relentless attacks on the credibility and capacity of our judiciary to serve as a check on lawless executive action. His demeaning and disparaging comments about the judiciary have shaken the foundations of respect for judicial rulings, rulings that hold the President accountable to the people and our Constitution.

Respect for the opinions of our judges is fundamental, as you well know. Without it, our democracy cannot function. Alexander Hamilton said that, "The judiciary is the least dangerous branch because it has the power of neither the purse nor the sword." Essential to its power to protect us is its respect and trust and credibility, and the President has gravely undermined it.

That is why I believe you have a special responsibility here, this week, which is to advocate and defend the independence of our judiciary against those kinds of attacks. It isn't enough to do it in the privacy of my office, or my colleagues', behind closed doors. I believe that our system really requires and demands that you do it publicly and explicitly and directly.

We meet this week in the midst of a looming constitutional crisis. Just hours ago, not far from here, the Director of the FBI revealed that his agency is investigating potential ties between President Trump's associates and Russian meddling in our election. The possibility of the Supreme Court needing to enforce a subpoena against the President is no longer idle speculation. It did so in *United States v Nixon*.

So, the independence of the judiciary is more important than ever, and your defense of it is critical. You are also the nominee of a President who set a set of litmus tests—saying that his nominee would be pro-

life and pro-Second Amendment and of a conservative bent. In fact, he said that he would nominate someone, and I'm quoting almost exactly, in one of the debates, who would automatically overturn *Roe v Wade*. If you fail to be explicit and forthcoming and definite in your responses, we have to assume that you will pass the Trump litmus test.

Your nomination also imposes on you a special burden because of the process that brought you here. The President has largely outsourced the selection process to conservative groups. He specifically referred to them on May 11th when he said that a list would be prepared by the Heritage Foundation and the Federalist Society. On June 13th, he said, "We're going to have great judges, conservative, all picked by the Federalist Society." You must be clear that your views are not theirs. And while under ordinary circumstances, this committee might be satisfied with the platitudes of "I cannot reach conclusions or state conclusions because of the possibility that I may have to consider a case before the Court," these times are not ordinary.

The rule of law is more than the pillars and judicial robes that people ordinarily associate with the United States Supreme Court. Justice has a human face and a voice, and as you know from being in the trenches, real clients with real lives, and the law has real consequences in their lives.

I met with Alphonse Maddin, the trucker who was fired by TransAm Trucking when he left his truck in subzero weather. That truck was disabled. It couldn't be driven, and he was freezing. I met with Patricia Caplinger, who was denied relief by your court after suffering very serious injury resulting from a defective product use. I met with the children of Grace Hwang, who was denied leave by Kansas State University, even though she was suffering from cancer. I'm troubled by the results in those cases for those real people, but also for the broader issues that those decisions reflect in workers' safety and consumer protection, as well as the rights of women to healthcare and reproductive decisions that are protected by the Fourth Amendment. And the right of privacy goes beyond just women's healthcare. It also relates to surveillance and government snooping and a right that is central to our democracy.

Let me just close by saying that you have a special obligation to be forthcoming about your views, not to prejudge the merits of a particular case before the Court, but to share your views on longstanding precedent that the President who nominated you indicated would be overturned. And you have an obligation to be forthcoming as well because the decision before us is not about Justice Scalia, nor is it about your confirmation ten years ago.

The Supreme Court is different. The Supreme Court is the ultimate resort of justice in this country, and as much as you may have encountered little difficulty ten years ago, you now have a record, and we are here to judge that record and to make sure that our decision, and I agree with my colleagues that it will be probably one of the most consequential and profoundly important decisions that I make as United States Senator, is the right one for the country. And that decision will, above all, make sure that the rule of law is preserved for real people with real lives, and that we assure that the independence of our judiciary will continue to protect us from overreaching, and tyranny, and the constitutional crisis that is now a real danger before us.

Thank you for being here. Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR THOM TILLIS

Gorsuch Opening Statement

Judge Gorsuch, congratulations on your nomination and welcome to you, your family, and friends who are here supporting you today. I know that your wife and your daughters are very proud of you.

Article 2, section 2 of the United States Constitution grants the Senate advice and consent authority over Presidential appointments. This authority is critical to maintaining the founding fathers' vision of checks and balances and separation of powers.

There is no question that one of the most important roles of the U.S. Senate is to advise the President on

nominations. While all nominees are important, no nomination is as consequential as filling a vacant seat on the Supreme Court of the United States.

These appointments to the Supreme Court are for life; they exist beyond the President who appointed them, and sometimes their appointments last beyond the Senators who vote for them. The decisions of the Supreme Court affect over 320 million people and set legal precedents that can last forever. It is our responsibility, as a coequal branch, to ensure that any nominee who sits on the Supreme Court will apply the law faithfully and fairly and respect Constitutional principles of separation of powers and federalism.

As others have noted today, Judge Gorsuch's impeccable qualifications suit him well to serve on the Supreme Court. He has had an accomplished career on the federal bench as a judge on the 10th Circuit for over a decade.

Through his opinions, he has shown his commitment to fair application of the law. Before his time on the bench, Judge Gorsuch was a successful attorney in private practice and at the Department of Justice. He also clerked for the Supreme Court.

While I am not a lawyer, I understand how important it is to have an independent judiciary that practices judicial restraint when carrying out its appropriate role in our constitutional republic.

When I met with Judge Gorsuch several weeks ago, I told him I don't like activist judges, regardless of whether they are liberal or conservative. It is our job as members of Congress to enact policy. If we do not do our jobs, then it is not the judiciary's job to fix it.

Judge Gorsuch assured me that he understood that his role fell within Article 3 of the Constitution and that my role fell within Article 1. In fact, when he accepted his nomination he stated that:

> *"It is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives. A judge who*

likes every outcome he reaches is very likely a bad judge stretching results he prefers rather than those the law demands."

I sincerely believe that Judge Gorsuch does not want to be a U.S. Senator any more than I want to be a federal judge, and I believe he understands the importance of respecting our coequal roles.

Judge Gorsuch has a long history of interpreting the law thoughtfully and consistently. If you review Judge Gorsuch's cases in depth, you will find one pattern; he fairly applies the law as it is written, regardless of who is before him, which is one reason why he has such

bipartisan support from so many respected attorneys and people across the country.

In fact, as far as I can tell, the only opposition to Judge Gorsuch comes from special interests groups who are not in the mainstream and will attack anyone they believe will not actively pursue and promote their ideologically-driven agenda.

During the hearing over the next several days, I am sure that some of my colleagues will ask Judge Gorsuch about questions that he will not answer—namely, how he will rule in specific cases—and they know that it is not his responsibility to do so.

Our role, as Senators, should not be to evaluate Judge Gorsuch based on what his policy preferences are or how he might come down on a specific case that may or may not come before the Court. Doing so would diminish the independence of the judiciary. Our role over the next several days is to evaluate whether Judge Gorsuch is qualified, whether he will uphold the Constitution, and whether he will apply the law faithfully and fairly.

I want to thank Chairman Grassley for moving forward with this nomination in an appropriate fashion and for giving us all sufficient time to prepare for this hearing. I am looking forward to the hearing over the next few days, and I look forward to a robust discussion so that we

can move forward with the nomination and give Judge Gorsuch an up or down vote.

Senator Mazie Hirono
Nomination hearing for Judge Neil Gorsuch
March 20, 2107

Thank you Mr. Chairman.

Judge Gorsuch, thank you as well for being here.

This hearing is about more than considering a nominee for the Supreme Court. It's about the future of our country.

It's about the tens of millions of people who work hard every day, play by the rules, but don't get ahead.

It's about the working poor who are one paycheck away from being on the streets;

It's about Muslim Americans who are victims in a renewed wave of hate crimes asking for protections from the courts;

It's about women having the choice of what to do with their bodies.

It's about LGBTQ Americans who want the same rights as everyone else.

For me, this hearing is about the people in this country who are getting screwed every single second, minute, and hour of the day.

I got into public service to help these people. And my questions over the coming days will draw on their experience, as well as my own.

My story might be unique for a United States Senator, but it is a story that is familiar for millions of people in this country.

When I was nearly 8 years old, my mom changed my life when she brought me to this country from Japan fleeing her abusive marriage.

Back then, there were no religious tests to determine who could immigrate to this country. There were no language requirements. You didn't need any special skills.

If President Eisenhower pursued the same policies President Trump would like to, it's very possible I wouldn't be here today.

I always knew I wanted to give back to my state and my country, but never thought politics would be the path I would choose.

But the Vietnam War opened my eyes to how public service could create social change.

I joined campus protests, questioned why we were sending so many young men off to die.

A small group of us decided that in order for things to change, we needed to do more than protest.

Many of us ran for office, because we needed to take a seat at the table to be able to fight to help make lives better.

It's why I'm here today.

Over the past few months, I've heard from thousands of people who are deeply worried about their families, their kids, and the future of our country under the Trump administration. Many of them are worried about what will happen if you are confirmed to the bench.

Apart from the legal analysis, whenever a case comes before a judge it invariably involves real people – people who are often there because they have experienced the worst day in their lives.

Whether they are victims of a crime, suffered a serious injury due to corporate malfeasance, or because they have lost their livelihood due to discriminatory behavior from their employer – each of them is looking to the courts to protect their interests and their rights.

During our meeting, I was encouraged when you said that the purpose of Article III of the Constitution was to protect the rights of the minority through access to the courts.

But as I have reviewed your opinions I have not seen that the rights of minorities are a priority for you. In fact, a pattern jumps out at me, you rarely seem to find in favor of the "little guy."

In TransAm Trucking [v. Administrative Review Board, U.S. Department of Labor] your dissent argued that the company was justified in firing an employee who faced a choice between operating his vehicle in an unsafe manner and freezing to death in his truck.

In a number of cases, including Thompson School District [v. Luke P.], your decisions made it more difficult for families with special needs children to get the help they needed as the law intended.

In Planned Parenthood of Utah v. Herbert, your dissent was far too deferential to the decisions of a governor who based those decisions on unverified information.

In Burwell v. Hobby Lobby, your opinion justified denying access to contraception based on the argument that corporations, like people, can hold religious beliefs.

The facts in each of these cases might be different, but there is a clear pattern to your writing: you consistently choose corporations and powerful interests over people.

But more than that, you have gone to great lengths to disagree with your colleagues on the 10th Circuit so that you can explain why some obscure or novel legal interpretation of a particular word in statute must result in finding for a corporation instead of an individual who has suffered real life harm.

This tendency demonstrates a commitment to ideology over common sense, and the purpose of the law, and is deeply troubling.

For example, in TransAm Trucking [v. Administrative Review Board, U.S. Department of Labor], you fixated on the "plain" meaning of the word "operate" despite choosing a definition out of context and using it at odds of the clear purpose of the statute.

And in Longhorn Service Company [v. Perez], you found a difference between a "floor hole" and a "floor opening" in order to side with a corporation trying to avoid a citation for a safety issue.

You found a difference in these terms that the rest of your colleagues on the 10th Circuit did not – truly a case of a distinction without a difference.

It's like arguing over whether your nomination is because of a "vacancy" or an "opening" on the Supreme Court.

These decisions affected not just the individuals who came before you. As a Supreme Court Justice, your decisions will have lasting consequences for the rest of us.

During the campaign, President Trump made it very clear that he had a series of litmus tests for his Supreme Court nominees.

Over a two year period, the President said that his nominee must favor overturning Roe v. Wade, denying women access to health care on the basis of "religious freedom," and upholding the Heller decision on guns – which the NRA believes prevents Congress, States, or local governments from passing common sense gun safety legislation.

Each of these tests would have a profound impact on the lives of every American.

Donald Trump's litmus tests for his Supreme Court nominees were clear.

In nominating you, Judge Gorsuch, I can only conclude that you met the President's litmus tests.

Your ideological perspective, or judicial philosophy, on these issues matter because, if confirmed, you will have a lifetime appointment to the Supreme Court.

In our courtesy meeting, you said you have a heart. So, Judge Gorsuch, we need to know what's in your heart.

We need to understand how you will grapple with a number of important questions the Court will be asked to consider in the years ahead:

Will the Court protect the rights of working people and our middle class or side with corporations who want to dismantle organized labor in America?

Will the Court uphold a woman's Constitutional right to choose, or upend decades of legal precedent to overturn Roe v. Wade?

Will the Court protect free and fair elections by stopping unfettered campaign spending or allow corporations and the ultra-rich to hijack our democracy with dark money?

Will the Court protect the right to vote for all Americans, or allow states to use voter fraud as an excuse to disenfranchise vulnerable communities?

Will the Court protect our land, water, and earth or gut decades of environmental regulations?

Will the Court protect access to our justice system or slam the courthouse doors to all but the wealthiest among us?

Judge Gorsuch, my colleagues: This is not merely a hearing to consider the confirmation of one Supreme Court justice.

No.

We are considering the affirmation of our country's values.

The Supreme Court does not just interpret our laws. The Supreme Court shapes our society.

Will we be just? Will we be fair? Will America be a land of exclusivity for the few – or the land of opportunity for the many?

Will we be the compassionate and tolerant America that embraced my mother, my brothers and me so many decades ago?

Make no mistake: A Supreme Court vacancy isn't just another position we must fill in our federal judiciary.

A Supreme Court vacancy is a solemn obligation we must fulfill for our future generations.

Let's treat it as such.

Thank you, Mr. Chairman.

PRESENTATION OF NEIL GORSUCH,
NOMINEE TO BE ASSOCIATE JUSTICE OF THE UNITED STATES,
BY HON. MICHAEL F. BENNET, A U.S. SENATOR FROM THE STATE OF COLORADO

It is a distinct privilege to be here today to introduce Judge Neil Gorsuch—a son of Colorado, born and raised in Denver, with a distinguished record of public service, private practice, and outstanding integrity and intellect.

And I welcome his wife, Louise, who met the Judge during their studies at Oxford, and who moved from the United Kingdom to Colorado, where they now live with their two daughters outside of Boulder.

My colleague, Senator Gardner, has done a great job summarizing Judge Gorsuch's professional background. His experience and his approach to his work has earned him the respect of the bench and the bar in our state.

Judge Gorsuch's family has deep roots in Colorado. His grandfather grew up in an Irish tenement in Denver and began supporting his family at the age of 8. His other grandfather was a lawyer who worked his way through law school serving as a streetcar conductor in Denver. His grandmother was one of the first women to graduate the University of Denver in the 1920s.

As a person and as a lawyer, Judge Gorsuch exemplifies some of the finest qualities of Colorado—a state filled with people who are kind to one another, who by and large do not share the conceit that one party or one ideology is all right and the other all wrong, and who are conscious of the legacy we owe the generations who forged our state out of a Western territory of the United States.

If confirmed, Judge Gorsuch will be the first Justice since Sandra Day O'Connor from the West. No less an authority than Justice Scalia observed this lack of representation when he wrote in dissent in *Obergefell v. Hodges* that the Court has "[n]ot a single . . . genuine Westerner," and then added in parentheses, "(California does not count)." And with respect to our Ranking Member, I think I speak for my colleague from Colorado that on this point—and perhaps on this point alone—he, I, and Justice Scalia are in agreement.

I am also here because I believe the Senate has a Constitutional duty to give fair consideration to this nominee, just as we had a duty to consider fairly Judge Merrick Garland, President Obama's nominee to fill this vacancy.

I am not naïve about the reasons the Senate majority denied Judge Garland a hearing and a vote. The Senate's failure to do its duty with respect to Judge Garland was an embarrassment to this body that will be recorded in history and in the lives of millions of Americans. And, it is tempting to deny Judge Gorsuch a fair hearing because of the Senate's prior failure.

But, Mr. Chairman, two wrongs never make a right. The Supreme Court is too important for us not to find a way to end our destructive gridlock and bitter partisanship. In my mind, I consider Judge Gorsuch as a candidate to fill the Garland seat on the Supreme Court. And out of respect for both Judge Garland and Judge Gorsuch's service, integrity, and commitment to the rule of law, I suggest we fulfill our responsibility to this nominee and the country by considering his nomination in the manner his predecessor deserved but was denied.

Mr. Chairman, there is a second cloud that hangs over this confirmation hearing. It is President Trump's reckless attacks on the judiciary. These attacks, like the President's attacks on the free press, have no precedent in the history of our Republic.

The independence of our courts is an essential strength of our democracy. Attacking the judicial branch erodes the public confidence that gives force to their judgments. It damages the very foundations of our Constitutional system. Disagreeing with a court's decision is acceptable; disparaging a judge is always wrong.

I have no doubt that, unlike the President, Judge Gorsuch has profound respect for an independent judiciary and the vital role it plays as a check on the executive and legislative branches. I may not always agree with his rulings, but I believe Judge Gorsuch is unquestionably committed to the rule of law.

Mr. Chairman, it is customary for senators to introduce nominees from their home state, and I am not here today to take a position or persuade any of our colleagues how to vote: that is a matter of conscience for each of us.

I am keeping an open mind about this nomination and expect this week's hearings will shed light on Judge Gorsuch's judicial approach and views of the law. Like many Americans, I look forward to the Committee's questions and the testimony from the nominee.

And as one of two Americans privileged to represent the State of Colorado in the United States Senate, I am here this afternoon to uphold a tradition with the hope that, in some small way, it helps restore the Senate's strong history of comity and cooperation, especially in our Nation's most difficult times.

Whatever the result of these hearings, we Senators must respond, in some way, to the expectations of most Coloradans and most Americans who are eager for us to work together and to treat each other with respect, particularly when it comes to extraordinarily important decisions like this one.

Thank you, Mr. Chairman.

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Senator Cory Gardner's remarks as prepared for delivery:

Chairman Grassley, Ranking Member Feinstein, I would like to begin by thanking you for your leadership and all the work you do on this committee.

Today, it's with great pleasure that I introduce along with my colleague and fellow Centennial state senator Michael Bennet, and share my strong support for, our outstanding Supreme Court nominee, Judge Neil Gorsuch.

If you've ever had the privilege of visiting Confluence Park in Denver, you'll notice a plaque bearing a poem by Colorado Poet Laureate Thomas Hornsby Ferril. It's a poem known as Two Rivers, describing the settlement of the West: "I wasn't here, yet I remember them, That first night long ago, those wagon people Who pushed aside enough of the cottonwoods To build our city where the blueness rested."

Where the optimistic blueness of our Colorado skies rests against the mountains and the plains, we are reminded about how incredibly diverse our great nation is—its people and its geography. Judge Gorsuch's nomination helps recognize that indeed there are highly qualified jurists west of the Mississippi River.

Judge Gorsuch is a fourth-generation Coloradan, skier, fly fisher, serving on a court that represents 20 percent of our nation's land mass.

Once confirmed, Mr. Gorsuch will join Justice Byron White and be only the second Coloradan to have served on the U.S. Supreme Court.

Should he be confirmed, Judge Gorsuch will make history as he represents the first Generation X justice of the United States Supreme Court, the emerging generation of American leadership.

Judge Gorsuch was confirmed to the 10th Circuit unanimously by voice vote in 2006.

Eleven years ago, Senator Graham presided over an empty committee dais as Neil Gorsuch faced confirmation. What a difference a court makes!

But when you look at his record, his writing, his statements, it's easy to see why Judge Gorsuch has such overwhelming appeal.

Judge Gorsuch is not an ideologue. He's a mainstream jurist who follows the law as written and doesn't try to supplant it with his own personal policy preferences.

As he said, "Personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

Judge Gorsuch is not an activist judge, but rather a faithful adherent to and ardent defender of our Constitution.

Judge Gorsuch recognizes the judiciary is not the place for social or constitutional experimentation, and that efforts to engage in such experimentation delegitimize the Court.

As he said, "This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary . . . . As a society, we lose the benefit of the give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide."

Judge Gorsuch has a deep appreciation and respect for the constitutional principle of federalism and the separation of powers prescribed by our Founding Fathers.

As he stated, "A firm and independent judiciary is critical to a well-functioning democracy."

Judge Gorsuch understands the advantage of democratic institutions and the special authority and legitimacy that come from the consent of the governed.

As he said, "Judges must allow the elected branches of government to flourish and citizens, through their elected representatives, to make laws appropriate to the facts and circumstances of the day."

Judge Gorsuch appreciates the rule of law and respects the considered judgment of those who came before him.

As he said, "A good judge will seek to honor precedent and strive to avoid its disparagement or displacement."

It's this appropriate temperament, this fidelity to the Constitution, this remarkable humility that has made Judge Gorsuch a consensus pick among Colorado's diverse legal and legislative communities.

Former Colorado Senator, Democrat Ken Salazar, in praising Judge Gorsuch's temperament, said during his circuit court confirmation, "[A] judicial nominee should have a demonstrated dedication to fairness, impartiality, precedent, and the avoidance of judicial activism—from both the left and the right. I believe that Mr. Gorsuch meets this very high test . . . ."

Jim Lyons, a prominent lawyer and former advisor to President Bill Clinton, said, "Judge Gorsuch's intellect, energy and deep regard for the Constitution are well known to those of us who have worked with him and have seen first-hand his commitment to basic principles. Above all, this independence, fairness and impartiality are the hallmarks of his career and his well-earned reputation."

Colorado's former Democratic Governor Bill Ritter and former Republican Attorney General John Suthers jointly said: "It is time to use this confirmation process to examine and exalt the characteristics of a judge who demonstrates that he or she is scholarly, compassionate, committed to the law, and will function as part of a truly independent, apolitical judiciary. Judge Gorsuch fits that bill."

Judge Gorsuch has a consistent record of applying the law fairly and his reputation among his peers and lawmakers is evidence of it.

According to the Denver Post, Marcy Glenn, a Denver attorney and Democrat, recalls two cases before Gorsuch in which she represented underdogs. "He issued a decision that most certainly focused on the little guy," Glenn said.

For all these reasons cited today, I'm certain Judge Gorsuch will make Colorado proud, and that his opinions will have a positive impact on this country for generations to come.

I look forward to Judge Gorsuch receiving a fair hearing and, after that, to working with my distinguished colleagues on both sides of the aisle to expeditiously confirm his nomination.

Thomas Hornsby Ferril wrote another poem—this one memorialized in a mural on the walls of the Colorado Capitol rotunda. It ends with these words: "Beyond the sundown is tomorrow's wisdom. Today is going to be long, long ago."

The wisdom of Neil Gorsuch, guardian of the Constitution, will serve our nation well for generations to come.

Thank you.

INTRODUCTION OF JUDGE NEIL GORSUCH
TO THE SENATE JUDICIARY COMMITTEE
MARCH 20, 2017
BY NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP PARTNER, AND
PAUL AND PATRICIA SAUNDERS PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY

Thank you, Mr. Chairman and Senator Feinstein.

It is my distinct privilege to introduce Judge Gorsuch to this honorable Committee. Unlike Senators Gardner and Bennet, I am (unfortunately) only a part-time Colorado resident, but I am very proud to see this distinguished Judge from our Tenth Circuit be nominated for this position of singular importance.

Judge Gorsuch was born in Denver, Colorado in 1967, the fourth generation of his family to hail from the state. After graduating from high school, he headed East, to Columbia and then Harvard Law School. He clerked for Judge David Sentelle and Justices Byron White and Anthony Kennedy. Judge Gorsuch then joined a law firm, where he stayed for a decade. After taking on a leadership role at the Justice Department, he returned to his native Colorado in 2006, as a judge on the Court of Appeals for the Tenth Circuit. I suppose the fly-fishing in D.C. just wasn't good enough.

In the few minutes I have, I'd like to bring you into my world of litigating before the Supreme Court of the United States. I have argued 32 cases there over the last decade or so, with two more arguments coming next month. My arguments have been on behalf of just about the most diverse client base imaginable -- death penalty inmates, states, the federal government, individual citizens, Native American Tribes, our nation's largest corporations, and everyone in between.

I can tell you that the one thing you really want, when in front of the Court, is just an opportunity to be treated fairly. To have your position listened to, not caricatured, and treated with the gravity it deserves. To have jurists who work day and night to get to the right answer – not motivated by party or politics, but by a sense of justice.

And honestly, that is how our Supreme Court works. Every time I'm there, I get a lump in my throat, because I get to see it firsthand. I wish the Court would televise its proceedings so that all Americans could see what I see.

And it is because of that deep need for fairness on the Court that I am, as so many Americans are, outraged that Merrick Garland does not sit on it today. I've had the pleasure of appearing before Chief Judge Garland in court, where he has grilled me--once for over an hour. (Come to think of it, I'm not quite sure that "pleasure" is the right word for a litigant who appears before him.) Garland's brilliance, experience,

fairness, and meticulous attention to detail make him perhaps the most qualified nominee *ever* to have been nominated to the Court. And I have no doubt that if Merrick Garland had been confirmed and another vacancy had opened up, Judge Gorsuch would sail through close to 100-0. But that isn't the world we are in. It is a tragedy of national proportions that Merrick Garland is not on the Court.

And it would take a lot to get over that. Indeed, there are less than a handful of people that the President could have nominated to even conceivably start to rebuild that loss of trust in our political branches. But in my opinion, Neil Gorusch is one. I say that knowing many in my party will disagree, and think the damage cannot be repaired, no matter who the nominee is. I can understand that conclusion. For those folks, there is nothing I can say about the nominee to make things right. But if you have not closed your mind to the possibility of a new nominee, despite the undeserved and unprecedented treatment of Merrick Garland, I'd like to tell you a bit about Judge Gorsuch.

My remarks today about the Judge should come as no surprise to anyone, they are precisely what I have said many times since the day he was nominated. And they are not prompted by any sense of whether the results in my cases or other cases that matter to my wide-ranging client base would come out one way or the other if Judge Gorsuch casts the ninth vote. I could not begin to guess. Like others who litigate in and advocate before the Court who have spoken out historically about nominees, the bottom line is that we all want a Court composed of fair people with the highest professional standards. We as members of the Bar will sometimes win, and sometimes lose; what we crave most of all is someone who will give litigants a fair shake.

So there is a reason why our Supreme Court bar has lined up behind Judge Gorsuch. There is a reason why the American Bar Association has given him the highest rating. I have seen Judge Gorsuch in action, hearing cases. And I have studied his written opinions. This is a first rate intellect, and a fair, and decent, man.

Judge Gorsuch and I serve together on the Federal Appellate Rules Committee. It's complicated work, and quite honestly, not the sort that most people find particularly interesting, but the Judge commits himself to it fully, and his work reflects his commitment to resolving disputes according to established procedures and standards. That is, the Judge's work on the committee reflects his dedication to the rule of law.

The Judge's commitment to the rule of law would endear him to the founders. Ours is a government of laws, not of men and women. That principle is the essence of constitutional government and the foundation of our freedom, and the judiciary is charged with upholding it. The courts say what the law is, and therefore determine what the government can and cannot do. And our history shows that when the tumult of politics and the power of government are kept within the bounds of the law, our country benefits.

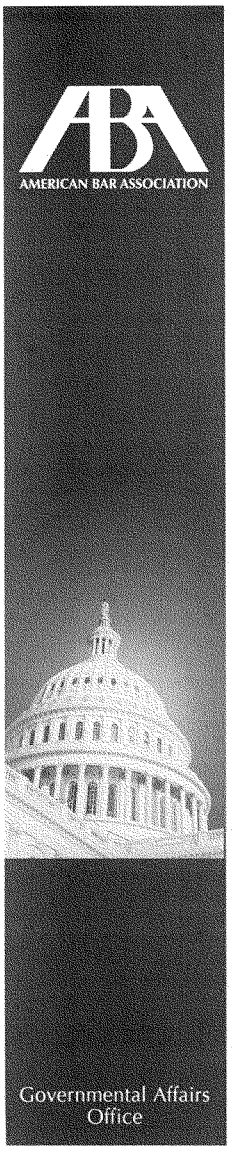
Yet if ours is to remain a government of laws, the subjects of the law must not be allowed to interpret it for themselves. No one can be a judge in his own cause — especially not Congress or the President. The founders therefore ensured that the judiciary was independent of the executive and legislative branches. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution...," Alexander Hamilton wrote in Federalist 78. "Without this, all the reservations of particular rights or privileges would amount to nothing."

We live in a unique time. The current President has in the past displayed open contempt for the courts, attacking judges who disagree with him and even questioning their legitimacy and motives. Judges who have questioned the President have had to be placed under increased security and protection because of the reaction among some members of the public. Between the President's attacks on the judiciary and his controversial policies, he seems intent on testing the independence and integrity of our court system.

And that brings me, once again, to my support of Judge Gorsuch. As a judge, he has displayed a resolute commitment to the rule of law and the independence of the judiciary. Even those who disagree with him concede that the Judge's decisions are meticulously crafted and grounded in the law and our Constitution. And when the Judge believes that the government has overstepped its powers, he is willing to rule against it.

It's incredibly difficult to make the transition to "Justice." From different vantagepoints, I have been privileged to watch two of my former bosses, Justices Kagan and Breyer, go through it. It's not just the massive power one all of a sudden wields, it is the glare of the spotlight, an awareness of becoming part of history, and – most important – getting along with 8 new colleagues who will be at your side for decades. To do this well is hard, really hard. It requires equal parts, and huge amounts, of humility and ability. That's what Justices Kagan and Breyer brought to their transitions, and what Judge Gorsuch would bring to his: In short, to make up a word, Judge Gorsuch brings copious amounts of Humability (humility & ability) and I know it will serve him, and the Court and public, very well.

In sum, Judge Gorsuch and I come from different sides of the political spectrum; we disagree about many things. But we agree on the most important things: That all people are equal before the law, and that a judge's duty is to the law, and to the Constitution above all. The Judge has upheld these principles throughout his time on the bench, and I know he would continue to uphold them as a Justice on our Supreme Court. It is therefore my honor to recommend that his nomination be reported favorably to the Senate.



STATEMENT

OF

NANCY SCOTT DEGAN

STANDING COMMITTEE ON THE FEDERAL JUDICIARY

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION

of

THE HONORABLE NEIL M. GORSUCH

to be

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

before the

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

SUBMITTED ON MARCH 19, 2017

740 15th Street, NW • Washington, DC 20005 • (202) 662-1760
www.americanbar.org

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee:

My name is Nancy Scott Degan of New Orleans, Louisiana, and it is my privilege to chair the American Bar Association's Standing Committee on the Federal Judiciary. I am joined today by Shannon Edwards of Oklahoma, our Tenth Circuit representative and the lead evaluator on the Standing Committee's investigation of Judge Neil M. Gorsuch. We are honored to appear here today to explain the Standing Committee's evaluation of the professional qualifications of Judge Gorsuch to be Associate Justice of the Supreme Court of the United States.

President Trump announced his nomination of Judge Gorsuch to be an Associate Justice on February 1, 2017. The Standing Committee began its evaluation that very day and continued its work for the next several weeks. By unanimous vote on March 9, the Standing Committee awarded Judge Gorsuch its highest rating of "Well Qualified" for appointment to the Supreme Court of the United States, and the Standing Committee published its rating that same day.

THE STANDING COMMITTEE'S EVALUATION PROCESS

The Standing Committee has conducted its independent and comprehensive evaluations of the professional qualifications of nominees to the federal bench since 1953. The fifteen distinguished lawyers who make up our Committee come from across the country, representing every federal judicial circuit in the United States. The members are from diverse backgrounds professionally, ethnically and politically--from large and small law firms, academia and corporate legal positions; they include a mix of "plaintiff" and "defense" lawyers. These leaders, who are identified on Exhibit "A," spend hundreds of hours each year without compensation conducting nonpartisan peer reviews of the professional qualifications of all nominees to the Supreme Court of the United States, all federal district and appellate courts, as well as the Court of International Trade and the Article IV territorial district courts.

The Standing Committee does not propose, endorse, or recommend nominees. Its sole function is to evaluate a nominee's integrity, professional competence, and judicial temperament, and then rate the nominee as "Well Qualified," "Qualified," or "Not Qualified." In so doing, the Committee relies heavily on the confidential, frank, and considered assessments of lawyers, academics, judges, and others who have relevant information about the nominee's professional qualifications.

The Standing Committee's investigation of a nominee to the Supreme Court of the United States is based upon the premise that the nominee must possess exceptional professional qualifications. As set forth in the ABA's publicly available manual about the Committee's work known as "the *Backgrounder*":

> To merit the Committee's rating of "Well Qualified," a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence and judicial temperament. The rating of "Well Qualified" is reserved for those found to merit the Committee's strongest affirmative endorsement.[1]

The significance, range, complexity, and nation-wide impact of issues that a nominee will confront on the Supreme Court demand no less. For that reason, our investigation of a Supreme Court nominee is more extensive than investigations conducted for nominations to the lower federal courts, and it is procedurally different in two principal ways.

First, Standing Committee members conduct investigations into the nominee's professional qualifications in every federal circuit in the United States, not only in the resident circuit of the nominee (here, the Tenth Circuit). In accordance with our procedures, and with regard to the investigation of Judge Gorsuch's qualifications, each Standing Committee member

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[1] American Bar Association, *Standing Committee on the Federal Judiciary: What it is and How it Works* ("*Backgrounder*") 10 (2014).

prepared a confidential circuit report that was included in the comprehensive confidential final report on which the Standing Committee based its rating.

Second, when examining nominees to the Supreme Court, the Standing Committee assembles reading groups of scholars and practitioners to review the nominee's written work. With regard to our evaluation of Judge Gorsuch, the University of Pennsylvania Law School and the Loyola College of Law in New Orleans formed Reading Groups which combined totaled 26 professors who are recognized experts in the substantive areas of law they reviewed. Collectively, these professors have decades of experience not only in teaching and scholarship, but also in law firms, non-profit organizations, and state and federal government.

The Practitioners' Reading Group that analyzed Judge Gorsuch's writings was composed of 14 nationally recognized lawyers with significant trial and appellate experience. All of the members are knowledgeable concerning Supreme Court practice, and most have briefed and argued cases in the Supreme Court or are former law clerks to Justices on the Supreme Court.

To facilitate a review of Judge Gorsuch's writings, an intranet site was established to house all of Judge Gorsuch's opinions and publicly available writings.

The three Reading Groups, the dedicated members of which are identified in Exhibits "B," "C," and "D" to this Statement, were guided by the same standards that are applied by the Standing Committee. Measuring only professional competence, and if evident from writings, integrity and judicial demeanor, the members of the Reading Groups independently evaluated factors such as Judge Gorsuch's analytical ability, clarity, knowledge of the law, application of the facts to the law, expertise in harmonizing a body of law, and his ability to communicate effectively. Each member of each group reduced his or her evaluation to writing, with cited examples, and each member's written evaluation was provided to the members of the Standing

Committee. Additionally, the chair of each group provided a summary of each group's work.

During their extensive investigation of the professional qualifications of Judge Gorsuch, Standing Committee members wrote to invite input relevant to our investigation from almost 5,000 people, including all federal district and appellate judges, as well as magistrate judges, Justices of the Supreme Court of the United States, state judges, lawyers, and community and bar representatives. The members of the Standing Committee solicited information from the lawyers, judges, and additional persons identified by Judge Gorsuch in response to the Senate Judiciary Committee Questionnaire as possibly having knowledge of his professional qualifications. Standing Committee members also identified people with such knowledge through their interviews; their analyses of Judge Gorsuch's writings; and sources identified through the investigative process. We interviewed many who had worked with and against Judge Gorsuch in private practice; in his capacity as Deputy Attorney General; in his capacity as a federal circuit judge; as a member of various professional organizations; and in his capacity as a law professor. Additionally, we interviewed lawyers who have appeared before Judge Gorsuch on the bench, and we interviewed those who have worked with Judge Gorsuch on various bench and bar committees.

We interviewed childhood friends and professors of the universities attended by Judge Gorsuch, as well as those where he has taught. We also interviewed judges at each level of the state and federal judiciary, and lawyers who worked with Judge Gorsuch as a law clerk, in private practice, as Principal Deputy Associate Attorney General of the United States, and as a judge on the Tenth Circuit Court of Appeals. Additionally, the Standing Committee considered its confidential evaluation conducted in 2006 when Judge Gorsuch was nominated to the United

States Court of Appeals for the Tenth Circuit.[2]

The Standing Committee followed Judge Gorsuch's career as a law clerk to the Honorable David B. Sentelle of the Unites States Court of Appeals for the Tenth Circuit, and as a law clerk for both the late Associate Justice Byron White and current Associate Justice Anthony M. Kennedy of the Supreme Court of the United States. We also interviewed those who encountered Judge Gorsuch during his private practice at Kellogg, Huber, Hansen, Todd, Evans & Fiegel, PLLC; as Principal Deputy Associate Attorney General of the United States; and as an Adjunct Professor at the University of Colorado Law School. In each case, Standing Committee members sought all views, negative and positive, regarding Judge Gorsuch's professional qualifications for service on the Supreme Court.

In total, the Standing Committee reached out to 4,997 judges, lawyers, professors community representatives and others for information regarding Judge Gorsuch's integrity, professional competence and judicial temperament, The Standing Committee received more than 1,000 responses, and the members of the Standing Committee conducted interviews with those respondents who had personal knowledge of Judge Gorsuch through their professional and/or personal dealings with him. These interviews were reduced to writing for the Standing committee's collective consideration. Many of those who responded to the Standing Committee's request for information about Judge Gorsuch also provided substantive written information from their personal knowledge, and that material was also supplied to the Committee.

The Standing Committee based its evaluation on the data received from its extensive outreach; on its own analyses of Judge Gorsuch's writings; on reports of the three Reading Groups; and on a personal interview of Judge Gorsuch that was conducted by our lead

[2] In connection with the 2006 evaluation, the Standing Committee unanimously found Judge Gorsuch "Well Qualified" to serve on the Tenth Circuit Court of Appeals.

investigator, Tenth Circuit representative Shannon Edwards and me, as Chair of the Standing Committee, on February 27, 2017. The written record of all analyses and interviews was assembled to comprise the Standing Committee's confidential final report that was distributed to each Standing Committee member. Standing Committee members were given approximately 7 days to study this material -- totaling just under 1,000 pages -- to individually evaluate Judge Gorsuch's integrity, professional competence, and judicial temperament. Thereafter, the Standing Committee unanimously voted that Judge Gorsuch is "Well Qualified" to be an Associate Justice of the United States. As Chair of the Standing Committee, I submitted that rating to the White House and you, Chairman Grassley and Ranking Member Feinstein, on March 9, 2017. The rating was also published on the website of the Standing Committee on the Federal Judiciary.

OUR EVALUATION OF
JUDGE GORSUCH'S PROFESSIONAL QUALIFICATIONS

The Standing Committee did not consider Judge Gorsuch's ideology, political views or political affiliation. It did not solicit information with regard to how Judge Gorsuch might vote on specific issues or cases that could come before the Supreme Court of the United States. Rather, the Standing Committee's evaluation of Judge Gorsuch is based solely on a comprehensive, nonpartisan, nonideological peer review of his integrity, professional competence, and judicial temperament.

1. Integrity

In evaluating integrity, the Standing Committee considers a nominee's character and general reputation in the legal community, industry and diligence.[3] The Committee also considers the extent to which there have been any findings of ethical violations or disciplinary proceedings involving a nominee, of which there have been none relating to Judge Gorsuch. The Standing

[3] *Backgrounder* at 3.

Committee found that Judge Gorsuch enjoys an excellent reputation for integrity and is a person of outstanding character.

It was clear from our interview of Judge Gorsuch that he began learning the significance of a lawyer's integrity during his early childhood. His mother, father and his father's father were attorneys, and he recalled with fondness their love of the profession and their genuine commitment to helping others through the practice of law. On weekends, he went with his father and his siblings to the family law office located in a bank building in downtown Denver. He recalls his grandfather telling him that a lawyer's purpose is "to help people solve their problems." He described his grandfather as a "legal hero in Colorado," explaining that he gave his time away to anyone who called, and citing his work on desegregation in Denver.

Likewise, Judge Gorsuch has given generously of his time on committees dedicated to the improvement of the Federal Rules governing litigation, and to Inns of Court whose mission is to promote apprenticeship, fellowship and education among law students, lawyers, and judges. Expressing great affection for the Inns of Court to which he belongs, Judge Gorsuch stated, "I see the importance of having a place where we can all break bread and have an opportunity to see people as people." He likes the fact that seasoned and well-respected attorneys interact at Inn of Court meetings on a different playing field with judges, new lawyers, and law students. He observed that the Inns fill the void left from days when judges and attorneys enjoyed collegiality outside the courtroom.

Many lawyers, judges and others who were interviewed praised Judge Gorsuch's integrity. We cite representative comments as follows:

"He is in every way an upright person."

* * *

"Neil Gorsuch approaches every case 'fairly and independently.'"

* * *

"I have known and interacted professionally with Judge Gorsuch since his appointment to the Tenth Circuit Court of Appeals. In my experience as a judge … I cannot identify a person more qualified–in every sense of the word–to serve as an Associate Justice of the United States Supreme Court. Judge Gorsuch would be an invaluable addition to the high court."

* * *

"Judge Gorsuch is always willing to undertake projects and often offers to participate."

* * *

"Judge Gorsuch is a man of great integrity. A wonderful adherent to the Canons of Judicial Ethics, he is known both inside and outside the court as a man of great character, and is held in high esteem."

* * *

"I have observed that it makes no difference to him how a case might come out if that is where the law leads him, regardless of whether that result coincides with his personal preference. He is a true judges' judge and will bring a great deal of talent to the Supreme Court upon his confirmation."

* * *

"There is no room for a self-centered approach in Neil's world. His abiding respect for legal traditions and his commitment to the law's demands will not permit it. Call it humility; or call it fortitude."

* * *

"He is neither sexist, racist, nor homophobic."

* * *

"Based on his demeanor and line of questioning [during oral argument], you may think he is leaning one way, but then he ultimately leans a completely different way. I think he seizes on oral argument as an opportunity to fully vet out every issue and make sure he is making the right choice. Most importantly, I feel like Judge Gorsuch applies the law fairly and consistently, irrespective of the outcome.

* * *

"He has the highest character."

* * *

"A fantastic guy and fantastic colleague and a hard worker."

* * *

"A wise and empathic friend who always made time for his colleagues."

* * *

Regarding his time at Georgetown Preparatory School, a former classmate remarked, "It's a small school and everyone knows each other. His reputation then was a nice guy, serious student, senior class president. Not flashy, but recognized as smart and nice."

One law school dean who knows Judge Gorsuch well described him as follows: "Judge Gorsuch is extremely smart, and is a highly talented and craftsman-like judge. He is a model of integrity, and a fierce defender of the rule of law and judicial independence. But beyond that, and perhaps most importantly, he is an extremely thoughtful, caring, and empathic person. As a litigant in his court, I would feel confident that, whatever the outcome, I had been heard, and that my position had been understood and evaluated carefully, thoroughly, and fairly. In short, whatever your politics, Judge Gorsuch is exactly what we want in our judges. He would make an excellent Justice."

On the basis of the foregoing comments and many additional comments received during our comprehensive evaluation process, the Standing Committee concluded that Judge Gorsuch possesses the integrity required to receive a "Well Qualified" rating.

2. Professional Competence

"Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience."[4] A Supreme Court nominee must possess exceptional professional qualifications, including an "especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence. [The nominee must be able] to write clearly and persuasively, harmonize a body of law, and to give meaningful guidance to the trial and circuit courts and the bar for future cases."[5] Judge Gorsuch's professional competence exceeds these high criteria.

Members of the Practitioners' Reading Group observed that Judge Gorsuch's opinions are "models of care, thoroughness, and analytical rigor in resolving the issues before him." Summarizing the analyses submitted by their Group's members, Co-Chairs, Judith Miller and Donald Ayer remarked:

> Judge Gorsuch's thoroughness and care are apparent in virtually all of his opinions, and the summaries below convey that point clearly. That thoroughness and dedication may be most striking in some of the longest and most complicated of the cases. He takes seriously the need to address the points raised by the parties, and tirelessly does so even when many less-than-promising issues have been raised. At the same time, he is usually careful to refrain from deciding issues that either have not been properly raised or preserved, or that need not be reached to decide the case. But this impulse also seems to be in competition with a parallel desire to be helpful and illuminate issues for the future guidance of those to whom they may be relevant—or, more rarely, to press a particular point of view regarding issues even if not presented by the parties. Perhaps no less notable than Judge Gorsuch's generally thorough, sound and readily understandable discussions of legal issues, are the occasions on which he engages in a careful and commonsense discussion of certain facts to resolve a legal issue. These insightful discussions of the facts appear most commonly in criminal cases, in connection with issues such as harmless error and whether a counsel's ineffectiveness offers cause for relief. Like his resolutions of legal issues, these factual discussions seem to involve no single pattern or bias, and are resolved in favor of the defendant almost as often as in favor of the government.

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[4] *Id.* at 3.

[5] *Id.* at 9.

> One large area where his dedication to the fair application of the law is most apparent is criminal law. Of the 79 published cases involving criminal and Fourth Amendment law where Judge Gorsuch wrote, his views in 21 supported the defendant's position in important ways. One theme that he expressed in several of those cases, including one where he ordered reversal on plain error review, is that '[f]ew things should give us more pause than the possibility of mistakenly sending to prison a man Congress has said should not be there.'
>
> * * *
>
> Judge Gorsuch's opinions seem to be driven by a strong impulse not only to decide the cases in the manner that he views as correct, but also to explain and illuminate the law… .

The Academic Reading Groups were equally complimentary of Judge Gorsuch's intellect and skill. Dean Lawrence Moore of Loyola College of Law stated:

> The picture that emerges of Judge Gorsuch is a careful mind whose starting point is always the text of a statute. Despite what might make for dull reading, his opinions are lively and often conversational. They are exceptionally accessible to the non-lawyers. He often begins with a provocative question. His longer opinions show a complete mastery of the opinions of other judges and often the history of an area of law. This is a scholarly judge with a first-rate mind. Reviewer after reviewer remarked on Judge Gorsuch's mastery of a particular area of law. Unlike most of us professors who become experts in two or three areas of law, he seems to have mastered most. I would be willing to hire him as a professor to teach just about any area of law. That is competence plus.

University of Pennsylvania Law School Dean Theodore Ruger added that Judge Gorsuch's writings showed that he is a judge "of formidable judicial skill and frequent judicial restraint, capable of working with care and persuasive force across a range of doctrinal and statutory fields, and skillfully applying a range of interpretive methodologies." Dean Ruger explained:

> There was a broad consensus among the Penn Law reading group members that Judge Gorsuch is a highly competent judge whose reasoning toward reaching results in his opinions was well within the professionally-accepted bounds of judicial competency. One reader described him as 'a rigorous legal technician who handles sophisticated and complex legal arguments very we… .' To other readers the judge came across as a 'skilled and sophisticated legal analyst…,' or 'a highly competent judge with strong analytical skills … [who] engages opposing

> arguments with respect…,' or 'a meticulous legal analysis.'… Even in a highly technical area … where Judge Gorsuch does not have deep professional experience, his judicial writing … was found by our own expert … to be 'well informed and his analysis ... highly sophisticated. …'

Certain members of the Reading Groups -- as well as some judges and lawyers we interviewed -- commented on Judge Gorsuch's sometimes disarmingly plain writing style. One federal district court judge stated:

> I have known Judge Gorsuch since my appointment to the bench …. He is engaging, pleasant, and the consummate gentleman. I have the highest regard for him. Judge Gorsuch's opinions set him apart. They display a degree of lucidity that few judges' opinions attain. While I am not a fan of his use of contractions, he employs a less formal style very effectively to explain in simple terms complicated concepts. This stylistic achievement is impressive enough, but what most impresses me is his legal reasoning. He has superb analytic skills. He has a knack for identifying a guiding principle from the fog of facts and arguments and using that principle to shine a light on the answer. After several years of reading Judge Gorsuch's opinions affirming and reversing my orders, I concluded something that does not happen very often--that this is a person who is Supreme Court material.

Although the vast majority of those who commented on Judge Gorsuch's writing style lauded his straightforward approach to preparing opinions, a small minority described it as at times overly dismissive, especially of the losing position:

> Every reader who commented on the judge's style described it as unusually clear and strong. [One team member] 'found all of the cases to be well reasoned and easy to follow,' and describe[d] Judge Gorsuch as 'a skilled writer, with a clear, fluid, plain-spoken style that has become even more focused and direct over his years on the bench.' … Many other readers agreed, describing his opinion prose style as 'always clear and at times beautiful,' … 'lucid, graceful and persuasive,' … and 'light and lively' and filled with 'clarity, readability and humor. ... This attribute of Judge Gorsuch's judicial skill pervades his opinions, and our reviews of them – however a handful of readers thought that the judge went too far with his unique style in some cases, at the cost of persuasive reasoning or proper respect for parties or colleagues. [One reader] wrote that occasionally Gorsuch's 'fondness for arresting prose leads him into metaphors that are perhaps too long extended. ...'

We discussed such comments during our personal interview with Judge Gorsuch. Confirming what we discerned from our many interviews, commentary from the reading groups, and the Standing Committee's own research, Judge Gorsuch remarked that most people would say

that he does not have a "poison pen," and that most lawyers and judges believe he writes "respectfully." He said he likes to write the way people talk. He uses contractions, and tries not to use too many footnotes. He sees "no reason to use a lot of legal jargon." He desires to "demystify opinions," and wants the litigants and regular people -- as well lawyers -- to be able to analyze and understand what he is saying. He noted that in order to write clearly and smart "you have to work at it, as it's much harder to write that way," He said he goes through many drafts to be as succinct as possible.

In light of Judge Gorsuch's comments, it is not surprising that the Practitioners' Reading Group observed that "Judge Gorsuch's opinions are written in an unpretentious conversational style that is easy to grasp and often quite entertaining. While his informality sometimes verges on being breezy (and he regularly uses contractions), that is no indication of unseriousness in his work." Likewise, one judge stated: "He has both affirmed and reversed decisions of mine and in each instance I have learned something, been treated with respect and appreciated his decisions. ... I think he writes better and thinks more clearly than any of the present members of the Supreme Court. I say this while not agreeing with his vaunted textualist approach to constitutional interpretation."

To reach their conclusion that Judge Gorsuch possesses the professional competence to be an Associate Justice of the Supreme Court of the United States, the members of the Standing Committee examined not only the thorough reports of the Practitioners' and Academic Reading Groups, but also the views of lawyers, academics, and Judge Gorsuch's judicial peers. Almost all of the experienced, dedicated, and knowledgeable sitting judges, legal scholars, and lawyers who have worked with or against Judge Gorsuch had high praise for his intellect and ability to communicate clearly and effectively.

Describing his professional competence, many used adjectives such as "brilliant," "thoughtful," "intelligent" and "really, really, really smart." A sampling of specific comments from a wide array of lawyers, judges and academics include:

> "One of the few people I would rate a 10 out of 10 in the area of professional competence."
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> * * *
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> "Eminently one of the most qualified persons ever nominated to the Supreme Court."
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> * * *
>
> "Highly competent, thoughtful, and knowledgeable."
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> * * *
>
> Judge Gorsuch is "extremely qualified…His breadth and depth of experience are impeccable….To have Columbia, Harvard and Oxford in one person is phenomenal."
>
> * * *
>
> "The best legal writer on the circuit court."
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> * * *
>
> "He is civil, smart, articulate and humble. He's exactly what one would hope for on the United States Supreme Court."
>
> * * *
>
> "I have known Judge Gorsuch for many years. He is highly qualified by intellect, knowledge, and hard work. He would serve with distinction…As a matter of ability and aptitude, one could scarcely do better."
>
> * * *
>
> "He is respectful and has a tireless work ethic."
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> * * *

"He is a brilliant and very analytical thinker."

One federal appellate judge who has known Judge Gorsuch professionally for several years indicated that when he encounters a particularly challenging issue or case, he asks himself, "What would Neil Gorsuch do?"

Given the breadth, diversity, and strength of the feedback we received from judges and lawyers of all political persuasions and from so many parts of the profession, the Committee would have been hard pressed to come to any conclusion other than that Judge Gorsuch has demonstrated professional competence that is exceptionally outstanding. Time and again, those with whom he has worked and those who have been involved in cases over which he has presided have applauded his intellectual acumen, thoughtful discernment, and written clarity. Based on the results of our extensive investigation and the resulting input we received from varied and knowledgeable sources, we have determined that Judge Gorsuch possesses sufficiently outstanding professional competence to be rated "Well Qualified."

3. Judicial Temperament

In evaluating judicial temperament, the Standing Committee considers a nominee's "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law."[6] Lawyers and judges overwhelmingly praised Judge Gorsuch's judicial temperament.

The following representative comments provide insight on Judge Gorsuch's demeanor as a jurist:

"As for demeanor, we could not have found someone better."

* * *

[6] *Id* at. 3.

"Measured and discreet. He has a ton of self-control."

* * *

"Very decisive and open minded."

* * *

"A terrific listener."

* * *

"Even when he disagrees with a position, he does so graciously and respectfully."

* * *

"He is a real-life Jimmy Stewart."

* * *

He is "sincere and reasonable, and acts with great judgment and thoughtfulness in all settings."

* * *

He is "very compassionate and understands the judge's role perfectly. He is as "even-keeled a judge can get; he does not lose his cool; he is courteous and unbiased."

* * *

"A pleasant person and complete gentleman."

* * *

"Totally even. I never saw him get upset at any point during the case. He was fair and reasonable, and did not take advantage of anyone."

Notably, a judge who was a front runner for the position for which Judge Gorsuch has been nominated indicated that when he was asked by the Vice President who the nominee should be if not himself, he responded, "This was the easiest question I had been asked all day. I said, without a doubt, the nominee should be Judge Gorsuch."

The Reading Groups provided helpful insight into Judge Gorsuch's judicial temperament, as well. Summarizing the views expressed by many of the group's 14 experienced advocates, the Chairs of the Practitioners' Reading Group noted that Judge Gorsuch's opinions "often seem to be addressed most directly to the parties themselves, and work hard to explain the situation and outcome in a way that will be understandable to the parties. They are also uniformly written in a civil and respectful tone. We are unaware of even a single instance in which Judge Gorsuch has engaged in an ad hominem attack or impugned the motives or conduct of any colleague on the bench, or of counsel before the court."

The Academic Reading Groups echoed this sentiment. Dean Moore of Loyola stated, "The word that describes Judge Gorsuch for me is humility. He can disagree without being disagreeable." One member of the University of Pennsylvania Reading Group added, "He is considerate and respectful of the parties, especially when he is deciding against an individual plaintiff....One distinctive feature of Judge Gorsuch's opinions is that he often gives both precedential and policy reasons to support a decision, in effect explaining the logic behind the rule he is applying."

While a few interviewees described challenging situations during oral argument before Judge Gorsuch, the overwhelming majority of those who provided input indicated that Judge Gorsuch is respectful, unbiased, and sensitive to the positions of litigants and their counsel. Additionally, when responding to our questions concerning his demeanor during oral argument, Judge Gorsuch made a point during our personal interview of acknowledging that when a lawyer appears before the court, it may already be his or her hardest day, and he does not take the opportunity to "beat up" on lawyers. He added that all he wanted from a court when he was a practicing lawyer was for the judges to be fair, and he strives to be such a judge.

Based on the information obtained from our comprehensive investigation, including our personal interview of Judge Gorsuch, the Standing Committee unhesitatingly found Judge Gorsuch's temperament to be well-suited to the job at hand and deserving of the "Well Qualified" rating.

4. Judicial Independence

We close our statement with a few words about judicial independence, not because judicial independence is itself a criterion that we individually evaluate, but because it is a quality essential to measuring integrity, professional competence and judicial demeanor. Our evaluation process provided an excellent opportunity to gain a glimpse at whether Judge Gorsuch is a judge who ascribes to the concept of an independent judiciary. Based on the writings, interviews, and analyses we scrutinized to reach our rating, we discerned that Judge Gorsuch believes strongly in the independence of the judicial branch of government, and we predict that he will be a strong but respectful voice in protecting it. As one interviewee noted with alacrity, "Judge Gorsuch has 'grit,' which he gets from being a multi-generation Westerner." Another stated, "He is dedicated to the constitutional doctrine of separation of powers and to the independence of the judiciary." Yet another observed, "In addition to his outstanding academic credentials and brilliant mind, Judge Gorsuch's demeanor and written opinions during his tenure on the Tenth Circuit Court of Appeals demonstrate that he believes unwaveringly in the rule of law and judicial independence. In my opinion, he is exceptionally well qualified to serve as a justice of the Supreme Court of the United States." We agree.

CONCLUSION

In conclusion, Mr. Chairman, I note that the goal of the ABA Standing Committee shares the goal of your Committee -- to assure a qualified and independent judiciary for the American

people. I trust that the foregoing summary of the Standing Committee's work assists the Committee in assuring that this objective is achieved. Thank you for the opportunity to present this statement concerning the professional qualifications of Judge Gorsuch as an Associate Justice of the Supreme Court of the United States.

EXHIBIT A

ABA Standing Committee on the Federal Judiciary 2016-2017

CHAIR
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Baker Donelson Bearman Caldwell & Berkowitz PC
New Orleans, Louisiana

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Bennett Law Firm PA
Portland, Maine

SECOND CIRCUIT
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M. Elizabeth Medaglia
Retired from Government Service and Private Practice
Arlington, Virginia

FEDERAL CIRCUIT
Ralph A. Taylor, Jr.
Arent Fox LLP
Washington, DC

* * *

ABA Counsel to Standing Committee
Denise A. Cardman
Washington, DC

EXHIBIT B

ABA Standing Committee on the Federal Judiciary
Academic Reading Group

University of Pennsylvania Law School Reading Team

Chair

Theodore W. Ruger	Dean and Bernard G. Segal Professor of Law

Members

Eleanor Barrett	Denise A. Rotko Associate Dean for Legal Practice Skills: Criminal, Commercial, Employment, Constitutional, Administrative, Labor Law
Stephen B. Burbank	David B. Berger Professor for the Administration of Justice: Procedure, Administrative Law
Jacques deLisle	Stephen A. Cozen Professor of Law & Professor of Political Science: Torts
Ryan David Doerfler	Assistant Professor of Law: Statutory Interpretation
Jill E. Fisch	Perry Golkin Professor of Law: Corporate and Securities Law
Jean Galbraith	Assistant Professor of Law: Constitutional Law, Criminal Law, Civil Rights
Jonathan Klick	Professor of Law: Administrative Procedure Law, Labor Law; Intellectual Property Law
Michael Knoll	Theodore K. Warner Professor of Law & Professor of Real Estate: Tax, Arbitration, Business Law, Bankruptcy
Seth Kreimer	Kenneth W. Gemmill Professor of Law: Civil Rights, Statutory Interpretation, Constitutional Law
Sarah Paoletti	Practice Professor of Law: Immigration Law, Criminal Law
Kermit Roosevelt	Professor of Law: Criminal Law, Civil Fraud, Constitutional Law

Assisted By

Paul M. George	Associate Dean and Director, Biddle Law Library

EXHIBIT C

ABA Standing Committee on the Federal Judiciary
Academic Reading Group

Loyola College of Law Reading Team

Chair

Lawrence Moore. S. J.	Interim Dean and Officio Philip and Eugenie Brooks Distinguished Professor of Law: Civil Procedure, Constitution Law, Civil Rights

Members

Mary Garvey Algero	Associate Dean of Faculty Development and Academic Affairs and Warren E. Mouledoux Distinguished Professor of Law: Civil Procedure, Federal Courts
John F. Blevins	Professor of Law: Intellectual Property, Administrative Law, Criminal Law
Dane S. Ciolino	Alvin R. Christovich Distinguished Professor of Law: Criminal Law
Nikolas A. Davrados, Ph.D	Vising Assistant Professor of Law: Property Law, Contract Law, International Law
Lloyd "Trey" Drury, III	McGlinchey Stafford Distinguished Professor of Law: Business Organizations, Federal Securities Law
Robert A. Garda, Jr.	Fanny Edith Winn Distinguished Professor of Law: Contracts, Educational Law, Disability Law
Johanna Kalb	Associate Professor of Law: Constitutional Law, International Law, Federal Courts
James Marshall Klebba	Emeritus Professor of Law: Environmental Law
Hiroko Kusuda	Clinic Professor: Immigration Law
Chunlin Leonhard	Professor of Law: Evidence, Uniform Commercial Code, Pretrial and Trial Practice
Craig Senn	Janet Mary Riley Distinguished Professor of Law: Contracts, Employment/Discrimination Law, Labor Law
Leslie Shoebotham	Victor H. Schiro Distinguished Professor of Law: Torts, Criminal Procedure, Environmental Law

Monica Hof Wallace	Dean Marcel Garsaud, Jr. Distinguished Professor of Law: Family Law, Trusts & Estates

Assisted By

Brian Huddleston	Senior Reference Librarian and Professor

EXHIBIT D

ABA Standing Committee on the Federal Judiciary

Practitioners' Reading Group

Chairs

Donald B. Ayer	Of Counsel, Jones Day, Former Principal Deputy Solicitor General
Judith Miller	Former Senior Vice President and General Counsel, Bechtel Group Inc., Former Partner, Williams & Connolly, LLP, Former General Counsel, United States Department of Defense

Members

Charles A. Bird	Partner, Dentons
Peter Buscemi	Retired Partner, Morgan Lewis
Susan Freeman	Partner, Lewis Roca
Allyson N. Ho	Partner, Morgan Lewis
Alan I. Horowitz	Member, Miller & Chavalier
Wallace B. Jefferson	Partner, Alexander Dubose Jefferson Townsend
Kenneth Polite	Attorney at Law
J. P. Schnapper-Casteras	Special Counsel for Appellate and Supreme Court Advocacy, NAACP Legal Defense and Educational Fund
Paul M. Smith	Vice President of Litigation and Strategy, The Campaign Legal Center
Danielle Spinelli	Partner, Wilmer Hale
Richard K. Willard	Partner, Steptoe & Johnson, LLP
Nancy Winkelman	Partner, Schnader Harrison Segal & Lewis, LLP

Statement
Hon. Deanell Reece Tacha (Ret.)
Duane and Kelly Roberts Dean
Pepperdine University
School of Law

Distinguished Members of the Committee:

It is a privilege to appear today to support the nomination of my former colleague and my friend, Neil Gorsuch, as an Associate Justice of the United States Supreme Court. I served with Judge Gorsuch on the United States Court of Appeals for the Tenth Circuit and was chief judge of that Circuit when Judge Gorsuch was appointed in 2006. In my brief time today I will touch on three aspects of Judge Gorsuch's qualifications--all of which I consider very important for every judge at every level.

First, Judge Gorsuch, the judge:

Judge Neil Gorsuch brings to the bench a powerful intellect combined with a probing and analytical approach to every issue. He brings to each case a strong commitment to limit his analysis to that case--its facts, the record, and the law cited and applicable. He does not use his judicial role as a vehicle for anything other than deciding the case before him. The "case or controversy" requirement for jurisdiction is, for him, a guiding principle for his judicial role. He is a student of constitutional structure and of The Federalist Papers and takes very seriously the appropriate roles assigned to each of the three branches of government. He is an elegant and accessible writer. In my judicial writing classes I assign some of his opinions to demonstrate the importance of

"narrative" to every case before the courts. His jurisprudence is informed by textualism, originalism, and precedent but not in a rigid or formalistic way--only as lenses through which to seek an appropriate resolution to an issue or a case. Judge Gorsuch is a case by case by case judge whose dedication is to serving litigants and the third branch of government.

Second, Judge Gorsuch, the colleague:

On a multi-judge appellate court, it is my view that one of the most important characteristics of an effective and efficient court is the level of collegiality among its members. This is not at all about getting along to get along. It is about improving the quality of the work of the court by careful and respectful listening to varying and divergent views, participating and engaging in robust internal debate about procedures and cases, and factoring in the diverse views of other judges. Judge Gorsuch is such a judge. His attention to the views of his colleagues informs his work. He has an acute sense for identifying those circumstances where reaching consensus is the highest value and those decision points where personal conviction and reason dictate individual judgment and independent decisionmaking. Judge Gorsuch believes in the court as an organic and flourishing entity where the views, backgrounds, and perspectives of all the judges are important to the quality of the work of that court.

Finally, Judge Gorsuch, the person:

Neil Gorsuch is my friend. He has been from the day he became my colleague in 2006. I say this advisedly because it means something that, despite our many differences in life experience, background, education, and interests, Judge Gorsuch immediately and always affirmed me and made clear his respect for me as a person and as a judge. I have watched him with all kinds of people in the courthouse, in social settings, and in the rough and tumble of judicial travel and duties. He is unfailingly kind, thoughtful, and empathetic to all. His is the kind of dignity that reflects the dignity he accords to all persons. Judge Gorsuch lives according to his values. For him, faith, family, community, nation, and his beloved Colorado define who he is. He is, for me, the gold standard in public service.

For all these reasons, I urge this Committee and the Senate to confirm Judge Neil Gorsuch as an Associate Justice of the United States Supreme Court.

CHAIRMAN GRASSLEY, RANKING MEMBER FEINSTEIN, AND DISTINGUISHED MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

It is an honor to again address this important committee that has done so much over the years to ensure the existence and independence of our third branch of government.

I am Robert Henry, President and CEO of Oklahoma City University, a former state legislator and Attorney General of Oklahoma, and former Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, a Court I had the privilege to sit on from 1994 to 2010, the last four years of that tenure as a colleague of Judge Gorsuch. Based on that personal experience working closely with him, and with maintained contact through circuit conferences, correspondence, and judicial gatherings, I am here today to speak in support of Neil Gorsuch's nomination to serve as an Associate Justice on the Supreme Court of the United States.

In Federalist 78, Publius (in this matter, a/k/a Alexander Hamilton) described the nature and virtues of the federal judiciary. As the "least dangerous" branch would have neither "sword nor purse," care would have to be taken to protect its vital independence as it would have to referee the disputes between the more powerful political branches. "Permanency in office" would be required both to promote independence and to allow for the mastery of the voluminous "strict rules and precedents" that would prevent arbitrary judgments. The granting of permanence, the importance of integrity, and the long and laborious study required to master the judicial craft led Hamilton, whose star, gratefully, has ascended again of late, to observe: "Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges."

Now as the quotation reveals, Hamilton was practical but not prescient. He, like all the other Framers, missed the necessary inclusion of women in the political process. But my guess is that Hamilton would be very impressed with the qualifications and legal scholarship of the women who have served to date as Associate Justices on the Supreme Court: Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. The point remains that the selection of federal judges in general, and certainly of Supreme Court justices in particular, is a solemn undertaking.

And that is why this committee is gathered today. Fortunately, you have before you a candidate that I believe our judicial branch's architect Hamilton would warmly embrace--and not just because they both attended Columbia. As one who has served with Neil, decided cases with him, traveled and dined with him, discussed our families together (including the menageries his daughters have maintained over the years), agreed *and* disagreed with him, I can attest to his **(1) truly remarkable intellect, (2) his oft-**

demonstrated integrity, (3) his mastery of "rules and precedents," and (4) his fine judicial temperament and collegiality.

I believe the subject of **intellect** speaks for itself and needs but summary mention: his honors degrees from Columbia and Harvard Law School; his Marshall Scholarship to Oxford (an honor he shares with Justice Stephen Breyer) which resulted in a Doctor of Philosophy degree; and his corpus of work including outstanding service awards from the State Department and the Truman Foundation, scholarly writings, and some 900 opinions that lawyers have described as "straightforward," "learned," and "well-reasoned." Deserving special mention is THE LAW OF JUDICIAL PRECEDENT which Judge Gorsuch joined with Bryan Garner, America's foremost lexicographer and legal rhetorician, and several distinguished circuit judges of quite diverse backgrounds to develop a remarkable work of legal scholarship. Impressively, all its eminent judicial coauthors, of different political and occupational backgrounds, produced a single volume, written with a single voice, and no signed sections.

As to **integrity**, in my professional dealings with him I have never found it questionable, nor have I ever heard of it being questioned. His career choices have subjected him to numerous reviews of his character and fitness for public service. His service as a law clerk for fellow Westerner the late Justice Byron White (a highly esteemed judicial figure in the Tenth Circuit where the courthouse is named for him—and not just because of his football records), as well as his clerking for Justice Anthony Kennedy attests to that integrity. His review by this committee for the position of circuit judge also attests to the thorough examination of background that has revealed a person of total integrity. I will come back to his integrity shortly.

And much of the above also speaks to Neil's **mastery of the law**. His experiences include both private and public practice of law, teaching law, and 11 years of the crafting of opinions on the Tenth Circuit. Indeed, Judge Gorsuch's service in the Tenth Circuit has contributed to our jurisprudence on cases of great importance to our country, cases largely from the Great American West from whence he hails and where he proudly lives: cases involving public lands and waters, and the law (largely crafted by Chief Justice John Marshall) of our Native American nations. I have no doubt that Judge Gorsuch's experience in these matters would be of great assistance to the Supreme Court.

Judicial temperament--which the American Bar Association defines as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice-- and **collegiality** are traits not so easy to understand if one has no experience with collegial bodies. In my view, temperament speaks primarily to a judge's interaction with litigants and the bar, and collegiality speaks to relationship with judicial colleagues. As members of the United States

Senate, you know how important it is to be respectful ***of*** and respected *by* colleagues. The smaller the group, the more important these traits become. In discussing the importance of collegiality, I often mention the example of Justice Oliver Wendell Holmes, Jr. Although a brilliant justice, he could be quite irascible, having few friends on or off the bench, and once terming his colleagues "nine scorpions trapped in a bottle." Although, at least, he included himself as a fellow arachnid, such phrases and sentiments did not help him work with colleagues and they help explain why his best work was in dissent.

Judge Gorsuch's elegant pen is not an acid one turned on his colleagues. Although in the heat of battle sometimes judicial prose may overstate a position, I think by any standard his opinions have been fair, well-reasoned, and not ad hominem.

Thus, Judge Gorsuch meets the qualities Hamilton specifically addressed in Federalist 78. He has other great traits as well. One final area deserves special mention, referring again to integrity.

While I served as Chief Judge for the Tenth Circuit, Judge Gorsuch's commitment to adequate legal representation for all parties evidenced itself in his quick and avid participation in an overhaul of the Tenth Circuit's approach to capital habeas appellate representation. Shortly after a 2008 Tenth Circuit death penalty oral argument before a panel including now Chief Judge Timothy M. Tymkovich, Judge Carlos Lucero, and Judge Gorsuch, these judges brought their concerns about the quality of capital case representation to the attention of the Court. Recognizing Congress's concern with "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation," 18 U.S.C. § 3599(d), Judges Gorsuch and Tymkovich volunteered to take charge of a thorough and systematic effort to improve the quality of legal representation of capital case appellants, and take charge they did. Within a few short months, they organized and executed a series of meetings, provided guidance and oversight in data-collection, and arranged conference calls with stakeholders. Working with the Office of Defender Services Training Branch, they reviewed a training assessment survey from meeting participants. After analyzing the data, the Judges focused on the root causes of the subpar capital representation: the staggering caseload overwhelmed the Circuit's capital habeas units and the number of qualified capital habeas panel attorneys was unfortunately low.

The Judges' proposals to improve the quantity and quality of representation in these most difficult of cases succeeded. Rather than start from scratch, they suggested expanding the use of the highly-respected appellate division of Colorado's Federal Public Defender's office – and pairing these skilled and experienced attorneys with private attorneys appointed under the Criminal Justice Act (CJA). Through this efficient team approach, the Colorado Public Defender office ka provided appellate

expertise to the CJA attorneys, resulting in immediate training and support. In 2009 and 2010, the Judges convened various training sessions and meetings in Oklahoma (from which most of the circuit's capital cases originated). The Judges designed these meetings to recruit qualified lawyers and assess training needs – and perhaps most importantly, Tenth Circuit Judges attended and participated in these sessions. The circuit even scheduled capital case oral arguments in the Homsey Courtroom at the Oklahoma City University School of law so that Oklahoma attorneys could attend and see how judges approach these most difficult cases.

The Judges also underscored the need for enhanced budgeting for both attorneys and the Court. CJA attorneys in the Tenth Circuit generally sought modest budgets, and increases in those budgets proved difficult to secure. They and the Court received updated training on capital case budgeting, which resulted in CJA attorneys allocating their budgets more efficiently. And the Judges' efforts yielded increases of staff in the Federal Public Defender offices in Colorado and Oklahoma, and an increase in the number of law clerks specializing in the death penalty.

Since Judge Gorsuch and Judge Tymkovich took this action, each CJA panel member has engaged in at least one moot court with a Capital Habeas Unit before appearing for argument before the Tenth Circuit. Unquestionably, Judge Gorsuch's efforts have been instrumental in improving the quality of representation in federal capital habeas cases, and in securing the funding to shore up the efforts of practitioners and federal public defenders specializing in death penalty representation. These measures reflect Judge Gorsuch's unwavering dedication to the need for quality legal representation in all capital proceedings to ensure fundamental fairness in the imposition of the death penalty. They underscore his integrity as a jurist.

Mr. Chairman, Ranking Member, and members of the committee, I appreciate the opportunity to speak to you about the intellect, integrity, legal knowledge, judicial temperament, and collegiality of Judge Neil Gorsuch. Thank you. I would be pleased to respond to any questions.

U.S. DISTRICT JUDGE JOHN L. KANE

Judges are no different from anybody else. Like you, we have social, political and religious views, whether the product of culture and upbringing, or the result of education, predilection or intellectual or philosophical pursuit. To don the robe, however, is to surrender the freedom to act on those views so justice may be served.

The discipline of deciding irrespective of one's personal beliefs is the essence of judicial integrity. Being consciously aware of one's views and setting them aside at the start of every case is no easy task, nor should it be. The question for any nominee is, does he or she have the discipline to do that and decide each case according to the rule of law? I believe Judge Gorsuch does, and his opinions prove it.

Long ago I gave up identifying judges as "liberal" or "conservative". Because those words seem to mean whatever the user wants, they have no common understanding and provoke no further analysis. However one might pigeonhole either of us, the fact is Judge Gorsuch and I share few of the same social, political or religious views. In evaluating fitness for the bench, the real question is, does the nominee embrace the discipline of the robe? Do his or her opinions reflect any sort of ideological bias? Is the judge fair? Judge Gorsuch is not a monk, but neither is he a missionary or an ideologue.

I read a great many appellate opinions, from circuit courts throughout the United States. To the extent that a judge can be judged by his opinions, the ones written by Judge Gorsuch tell me a great deal. His are clear, cogent and mercifully to the point. I have been both affirmed and reversed by him, and each time I thought he was fair and right. He treats the parties and the trial judge's rulings with respect; he does not ridicule them or take cheap shots, nor does he insult or

demean other judges who might disagree with him. His writing is filled with grace and wit. But does he know the difference between his personal views and those of the court?

Judge Gorsuch is the only judge of whom I am aware who has written both majority opinions and concurring opinions in the same case. The majority opinions were the opinions of a three-judge court; the concurring opinions were his separate, additional perspectives. He has done this at least twice.

Judge Gorsuch's opinions also make clear his concern for the separation of powers and his keen awareness of the judiciary's independence. He has written that legislation belongs to Congress and adjudication belongs to the courts. He has disagreed with the late Justice Scalia by suggesting there is far too much adjudicative activity in the executive branch's administrative agency rulings. He has questioned the value of the *Chevron* doctrine, which asserts the judiciary should defer to agency interpretations of statutes. The *Chevron* doctrine intrudes equally upon the authority and prerogatives of the legislative branch.

As is often the case, Justice Oliver Wendell Holmes said it best. In his dissent in *Lochner v. New York,* Holmes wrote:

> The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, <u>because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.</u>

Like Justice Holmes, Judge Gorsuch knows that his social, political and religious views have no place on the bench. In embracing the discipline of the robe, dedicating himself to the separation of powers, and consistently devoting himself to being fair, Judge Gorsuch has earned the right to be considered by you for the highest bench in the land. I hope you will judge him with the fairness and integrity with which he himself has served.

Statement of Leah Jo Bressack before the Senate Committee on the Judiciary on the Nomination of Judge Neil M. Gorsuch to the Supreme Court March 23, 2017

Mr. Chairman, Ranking Member Feinstein, and other members of the Committee:

I am deeply honored to have the opportunity to address the committee and talk about one of my mentors, Judge Gorsuch. Senator Feinstein, I grew up in California, where you and Senator Boxer were my Senators, and my family still laughs that there was a time when I believed that only women were allowed to serve in the Senate. Of course, when I left for college, I moved to Maine, which also had two women Senators, so take from that what you will.

I served as a law clerk to Judge Gorsuch from 2009 to 2011. I'd like to direct my remarks to how Judge Gorsuch approaches cases. His commitment to assess each case from all points of view, and never make up his mind until every point of view has been considered, is the quality I respect about him most.

First, Judge Gorsuch is truly independent. In deciding cases, he doesn't care what politicians or parties want. He only cares what the law says. In the two years I worked with him, never once did politics influence a decision he made. I saw the government win cases, and I saw the government lose cases. I saw each private litigant receive the same meticulous analysis of its arguments. Judges like Judge Gorsuch are the keepers of our independent judiciary.

Second, Judge Gorsuch works together with judges from all different points of view to build consensus wherever possible. In my two years clerking, the judge heard many cases together with other judges whose judicial philosophies differ from his. Yet the great majority of these cases were decided unanimously. That is no coincidence; it is a reflection of the judge's deep respect for the opinions of his colleagues and commitment to craft decisions that benefit from their reasoning. In my experience as a law clerk, the judge always pushed me to research all sides of a case, question the reasoning underlying each party's position, and give all arguments exhaustive consideration. That process more or less consumed my life for 2 years --- it's a cornerstone of how Judge Gorsuch works and he won't accept anything else.

Third, there is no question that a Supreme Court justice wields significant power. But having worked closely with Judge Gorsuch, I am confident that a change in title, from judge to Justice, would not change him. His judicial philosophy is based on the idea that the future of this country will be decided by elected representatives like the members of this committee, not by him, and that will never change.

On a personal level, some of my fondest memories of my clerkship with Judge Gorsuch were the afternoon runs he led us on through Denver. Weaving in and out of the city streets, I questioned the judge's description of these events as jogs, when to me they felt much more like a sprint. While it was easy to begin the run discussing cases with the judge, the true test was whether you could continue such conversation twenty minutes later when the judge was doing just fine and you were out of breath. I now think of those runs as a metaphor for the experience

of working with the judge; his relentless drive pushes everyone around him to try harder and reach higher.

In casual conversation in chambers, the judge always wanted to hear about our experiences exploring the Colorado outdoors. I still remember his Monday morning ritual of quizzing clerks on their adventures over the weekend. One weekend, while hiking in Rocky Mountain National Park, I found myself within a few feet of a beautiful red fox --- I knew I would have the ace among all the clerks on Monday.

We all know the saying "you are judged by the company you keep." One of the greatest gifts of clerking for two years for Judge Gorsuch is my co-clerks, whose humility, intelligence, and diligence mirror the qualities I so admire in the judge. Many of the judge's clerks (whose political views span the spectrum) have traveled to be here for this hearing, and we have recommended him as an extraordinary judge. We believe he is a judge of whom all Americans would be proud.

TESTIMONY OF

ELISA MASSIMINO

PRESIDENT AND CEO
HUMAN RIGHTS FIRST

HEARING ON

THE NOMINATION OF

JUDGE NEIL M. GORSUCH
FOR ASSOCIATE JUSTICE
UNITED STATES SUPREME COURT

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

MARCH 23, 2017

Chairman Grassley, Ranking Member Feinstein, and Members of the Committee: thank you for the invitation to testify as you consider the nomination of Judge Neil Gorsuch to the Supreme Court. I speak today on behalf of Human Rights First—an independent, non-profit, non-partisan organization dedicated to advancing American leadership on human rights. Our work is grounded in the belief that our nation is stronger—and safer—when we live up to our ideals.

In our nearly 40-year history, Human Rights First has never supported or opposed a judicial nominee, and we do not do so today. Nor do we question Judge Gorsuch's temperament or credentials, which seem exemplary and have led a number of people I respect to support his nomination. Every judicial nominee deserves a fair hearing and an opportunity to fully explain his or her background, competence, and judicial philosophy.

This is an important part of the way our government works. The framers of our Constitution didn't want any one branch of government to have too much power. That was wisdom born of experience. Our system of checks and balances is part of what sets our democracy apart from many of the countries that my organization works on every day, where strongman leaders rule with absolute authority. Our system may seem convoluted and inefficient at times: the President appoints judges and heads of government departments, but those appointments have to go through you; you can pass laws, but the President can veto them; the Supreme Court can find a law to be unconstitutional, but Congress and the States can amend the Constitution. This system depends on the independence—and interdependence—of each branch of government. It is our bulwark against tyranny.

That's why I am here today. Because despite Judge Gorsuch's professional and academic credentials, his record at the Department of Justice (DOJ) raises serious concerns about his judgment and fidelity to important constitutional principles—including checks and balances and respect for human dignity—that should be thoroughly addressed before you move his nomination forward. Especially in the current environment, the stakes are too high to get this wrong.

The Role of Checks and Balances in Protecting Fundamental Rights in the National Security Context

My testimony will focus on the dangers that arise when the executive branch claims unfettered authority in the name of national security. We know from our history that when presidents override constitutionally-mandated checks on their power, they threaten fundamental rights, the rule of law, and democratic ideals. And they weaken our security.

This is not a hypothetical concern. The president of the United States—during the campaign and now as president—has advocated serious violations of basic rights, including: torture; banning individuals from entering our country because of their faith; surveillance and registries of Muslims and their houses of worship; and detaining and deporting immigrants and refugees without due process. And he has done so while expressing contempt for judges and disdain for the judiciary more generally. Just weeks

into the new administration, there have already been suggestions that the administration does not respect the independence of the judiciary and may not comply with court orders. A key—perhaps the key—question that Senators should ask Judge Gorsuch is: how would you respond in the face of what may be unprecedented threats to basic rights, separation of powers, and the rule of law?

On these issues, Judge Gorsuch is not a blank slate. As a high-level DOJ official, Judge Gorsuch was at the epicenter of one of the most dramatic, consequential, and tragic episodes in American legal history in the last half-century: the Bush Administration's adoption of torture as a weapon of war in violation of clear and explicit U.S. and international law and contrary to our deepest national values and traditions. That the United States engaged in torture is no longer a matter of serious dispute, in this country or anywhere. Thanks in substantial part to the leadership of Senator Feinstein, the Senate Select Committee on Intelligence released a summary report on the CIA's interrogation program that revealed gruesome details of the torture that our government authorized and carried out. For example, one detainee was abused so badly during a waterboarding session that he "became completely unresponsive, with bubbles rising through his open, full mouth."[1] In other cases, detainees were stripped naked, shackled to the floor, held in painful stress positions, and subjected to sleep deprivation for days on end.[2]

This abuse was unworthy of our great nation and, as General Petraeus noted, the images of it are non-biodegradable. As both the Intelligence and Armed Services Committees found in their investigations, it also made our country weaker and compromised our ability to fight the "war on terror" effectively.

That this abuse was authorized by the DOJ is one of the greatest institutional failures in the Department's storied history. While we don't know everything about the role Judge Gorsuch played in this sorry chapter, what we have seen suggests that he was, at the least, uncurious and untroubled by the Bush Administration's torture polices and appears to have been a "team player" in helping defend them. He may not have been present when the DOJ helped create and then authorize the torture policies, but he was in the thick of the action when the torture program started to unravel.

Judge Gorsuch started at the DOJ in 2005, a watershed year on these issues. Thanks in no small measure to the principled leadership of one of the great Senators of our generation, John McCain, the Congress had started pushing back against the administration's torture policies. In that year, whether the United States would embrace torture as part of our law and national character hung in the balance.

There is a remarkable degree of consensus today that our government, in the period after the 9/11 attacks, violated basic rights by authorizing and engaging in torture based on legal theories that were well outside the mainstream, while undermining separation of

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[1] Annotated version of the Senate Select Committee on Intelligence's Summary Report on Torture, http://www.humanrightsfirst.org/senate-report-cia-torture/torture-tactics.
[2] Id.

powers and judicial independence. That consensus is reflected in an important course-correction that has occurred over the past decade. It began with the 2005 McCain Amendment (passed as part of the Detainee Treatment Act) prohibiting in federal law cruel, inhuman, and degrading treatment of detainees, continuing through the Supreme Court's ruling that detainees must be afforded basic protections under the Geneva Conventions, and culminating in the 2015 McCain-Feinstein Amendment guaranteeing access to detainees for the International Committee on the Red Cross and restricting national security interrogation techniques to those listed in the Army Field Manual.

The bi-partisan consensus against torture also reflects a consensus among national security leaders that torture and cruel treatment are not only unlawful, but undermine our security. In response to suggestions by the president that the government should return to waterboarding and other torture tactics, 176 retired generals and admirals—including 33 retired four star generals and admirals—wrote a letter to the then-president-elect, stating:[3]

> The use of waterboarding or any so-called "enhanced interrogation techniques" is unlawful under domestic and international law. Opposition to torture has been strong and bi-partisan since the founding of our republic through the administration of President Ronald Reagan to this very day. This was reinforced last year when the Congress passed the McCain-Feinstein anti-torture law on an overwhelmingly bi-partisan basis.
>
> Torture is unnecessary. Based on our experience—and that of our nation's top interrogators, backed by the latest science—we know that lawful, rapport-based interrogation techniques are the most effective way to elicit actionable intelligence.
>
> Torture is also counterproductive because it undermines our national security. It increases the risks to our troops, hinders cooperation with allies, alienates populations whose support the United States needs in the struggle against terrorism, and provides a propaganda tool for extremists who wish to do us harm.
>
> Most importantly, torture violates our core values as a nation. Our greatest strength is our commitment to the rule of law and to the principles embedded in our Constitution. Our servicemen and women need to know that our leaders do not condone torture or detainee abuse of any kind.

Beyond the issue of torture, whatever one believes about whether Guantanamo should be closed, most now agree—as the Supreme Court has ruled—that there must be judicial review and basic due process for detainees held or prosecuted there. We hope and expect that irrespective of any past role Judge Gorsuch may have played on these issues in the executive branch, he will, if confirmed, follow clearly established precedents—including

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[3] Letter to President-Elect Donald J. Trump, January 6, 2017, http://www.humanrightsfirst.org/sites/default/files/torture-generals-admirals-letter-to-trump.pdf.

in the cases of *Rasul v. Bush,*[4] *Hamdi v. Rumsfeld,*[5] *Hamdan v. Rumsfeld,*[6] *and Boumediene v. Bush*[7]—if these issues come before him. And it is essential that the Senate explores his views on these issues and ensures that Judge Gorsuch commits to following these precedents before the Senate votes on his nomination.

These were the defining legal debates of the modern era, and Mr. Gorsuch was on the wrong side of them. Records show that Mr. Gorsuch played a key role in both litigation and legislative strategy involving the detention, trial, and treatment of detainees captured during President Bush's "global war on terror."[8] Further, Mr. Gorsuch was directly involved in the Bush Administration's assertions that the president has the power to take extraordinary actions without congressional authorization, that the president can disregard statutes or treaties in the name of national security, and that the judiciary either cannot or should not review such actions. These are astonishing claims that were later rejected by the courts—unsurprisingly, since they were direct attacks on the underlying structural order of our constitutional democracy.

As James Madison recognized, the greatest protection against the gradual concentration of power into one branch of government depends on ensuring that those individuals who serve in each branch have both the constitutional means and the personal motives to resist encroachment by the other branches.[9] And with respect to the judiciary in particular, Alexander Hamilton noted that while liberty has no reason to fear the judiciary acting alone, there is everything to fear from the judiciary aligning itself with one of the other branches.[10] Can we rest assured that Mr. Gorsuch has the personal motivation to resist attempts by the political branches to encroach upon individual liberty or upon the power of the other branches? Can we rest assured that he would not align himself with a strong executive, as Hamilton warned against?

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[4] *Rasul* v. *Bush*, 542 U.S. 466 (2004).
[5] *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).
[6] *Hamdan* v. *Rumsfeld* 548 U.S. 557 (2006).
[7] *Boumediene* v. *Bush*, 553 U.S. 723 (2008).
[8] Neil M. Gorsuch, Self-appraisal, https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p32/a344094.
[9] James Madison, *Federalist Papers*, No. 51 (February 8, 1788), https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51 ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").
[10] Alexander Hamilton, *Federalist* No. 78 (Saturday, June 14), 1788, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78. ("[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.").

Judge Gorsuch's Role in Subverting the Will of Congress

After photographs surfaced in 2004 showing horrific abuses of detainees in U.S. custody at the Abu Ghraib prison in Iraq, Senator McCain led an effort to pass the Detainee Treatment Act of 2005 to prohibit cruel, inhuman, and degrading treatment of detainees held in U.S. custody. Records from the Department of Justice show that Mr. Gorsuch pushed the White House for an aggressive signing statement that included language suggesting that the President could disregard the statute to the extent it conflicted with his executive authority.[11] The final signing statement, which prompted significant public controversy, was briefer than what Mr. Gorsuch recommended but included nearly identical language on executive power as the statement urged by Mr. Gorsuch, noting that the President would construe the statute "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."[12]

As members of this Committee may recall, the "unitary executive branch" language was, in the post-9/11 context, essentially code for claiming that the executive branch has the sole and exclusive right to take action under its own discretion, without judicial review—even if such action is contrary to congressional intent or duly-enacted federal law. At that time, I called the now-infamous signing statement an "'in-your-face affront" to Congress and noted that "[t]he basic civics lesson that there are three co-equal branches of government that provide checks and balances on each other is being fundamentally rejected by this executive branch."[13]

But the signing statement was also designed to preserve the authority to use waterboarding and other acts of torture and cruel or inhuman treatment of detainees in U.S. custody, even as Congress had just acted to prohibit such abuses. As Mr. Gorsuch said in an email at the time, the signing statement was formally stating the administration's view that the McCain legislation is "best read as essentially codifying existing interrogation policies." What wasn't known by the public or Congress at the time is that months earlier, in May of 2005, a DOJ official in the Office of Legal Counsel

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[11] Neil M. Gorsuch, "Draft Signing Statement" Messages with John B. Bellinger, Steve Bradbury, John B. Wiegmann, and John P. Elwood, December 29, 2005. Email. https://www.documentcloud.org/documents/3520275#document/p44/a344885; https://www.documentcloud.org/documents/3520275#document/p112/a344895.

[12] President George W. Bush, President's Statement on Signing of H.R. 2863, December 30, 2005, https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html ("The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.").

[13] Charlie Savage, *Bush could bypass new torture ban: Waiver right is reserved*, Boston Globe, January 4, 2006, http://archive.boston.com/news/nation/washington/articles/2006/01/04/bush_could_bypass_new_torture_ban/

(OLC), Steven G. Bradbury—who later worked on the signing statement with Mr. Gorsuch—had written a legal memorandum concluding that waterboarding and other so-called "enhanced interrogation techniques" do not constitute "cruel, inhuman, or degrading treatment," and therefore would not run afoul of the international treaty obligations that Senator McCain was seeking to implement in his anti-torture legislation. The Bradbury memo was eventually withdrawn and discredited due to its faulty legal analysis. However, it was operative at the time of the signing statement, when Mr. Bradbury found a willing partner in Mr. Gorsuch in seeking to evade a clear congressional mandate that torture and cruel treatment are categorically prohibited in all circumstances.

Judge Gorsuch's Role in Undermining Independent Judicial Review

While at the Department of Justice, Mr. Gorsuch also helped draft and advocate for an amendment to the Detainee Treatment Act that would have eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo. The amendment that Mr. Gorsuch sought would have prevented courts from hearing detainees' claims entirely, including that they had been unlawfully or mistakenly detained or had been tortured or mistreated. As a fallback, he pushed for language that would eliminate court review except of final decisions rendered by military commissions and the Combatant Status Review Tribunals that designated individuals as enemy combatants.

Documents provided by the Department of Justice to this Committee show that Mr. Gorsuch celebrated as a significant victory the passage of the jurisdiction-stripping amendment that attempted to limit court review to these final decisions. In case his colleagues "needed cheering up" after Congress had acted to prohibit cruel, inhuman, and degrading treatment of detainees, he sent them articles on how the jurisdiction-stripping amendment he had pushed rendered those protective provisions "toothless" and "a right without a remedy."[14] One of these articles[15] referenced a letter by the former Judge Advocate General of the U.S. Navy, retired Rear Admiral John Hutson,[16] signed by ten retired military leaders, which called the amendment "the wrong law at the wrong time," saying "The practical effects of such a bill would be sweeping and negative."

Mr. Gorsuch's view that the jurisdiction-stripping provisions of the Detainee Treatment Act could and should apply to cases that existed at the time—not just future cases—was rejected by the Supreme Court in *Hamdan v. Rumsfeld* (*Hamdan*). According to records

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[14] Neil M. Gorsuch, Untitled, Message to Brett Gerry, December 16, 2005. Email. https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p1/a344072.

[15] Jeremy Brecher and Brendan Smith, "Ban Torture or Protect Torturers?" CBS News, December 5, 2005, https://www.cbsnews.com/stories/2005/12/05/opinion/main/1096782.shtml.

[16] John D. Hutson, Letter to Senator Arlen Specter. November 9. 2005, http://www.humanrightsfirst.org/wp-content/uploads/pdf/051111-etn-sen-arlen-specter-ltr.pdf; *See also* Roxana Tiron, "Retired military leaders, human-rights activists outraged by Graham amendment" The Hill, November 15, 2005, http://thehill.com/business-a-lobbying/2657-retired-military-leaders-human-rights-activists-outraged-by-graham-amendment.

released to this Committee, Mr. Gorsuch played a lead role in briefing *Hamdan* for the Bush Administration and preparing its litigation strategy. In that case, the Justice Department also made the troubling claim that the president has unreviewable power to determine whether the Geneva Conventions apply, and argued that his determination that the Geneva Conventions did not apply to the conflict in Afghanistan was "binding" on the courts.[17] The Supreme Court also rejected that claim, ruling that, at minimum, Common Article III of the Geneva Conventions applied and affords baseline protections against inhumane treatment to all detainees captured in armed conflict. In response to the government's defeat in *Hamdan*, Mr. Gorsuch also helped draft legislation—a version of which would end up in the Military Commissions Act of 2006—that included among its controversial provisions language attempting to strip detainees at Guantanamo Bay of the right to habeas corpus.

The Supreme Court in *Boumediene v. Bush* later struck down as unconstitutional these jurisdiction-stripping provisions sought by Mr. Gorsuch. Perhaps because of the government's litigation record over Guantanamo-related issues, Mr. Gorsuch suggested that the government should arrange for judges to travel to Guantanamo to receive tours and presentations from the military, with the hope that such trips would make the judges "more sympathetic to [the government's] litigating positions."[18]

In *El-Masri v. Tenet*,[19] another case that Mr. Gorsuch was involved in, the Bush Administration, invoking an overbroad claim of the States Secret privilege, successfully argued that El Masri—an innocent victim of mistaken identity tortured by the CIA—could not pursue restitution in the courts because it could reveal the CIA's secret torture program. Praise for the outcome was passed onto Mr. Gorsuch's department and team by David Addington, then Vice-President Cheney's lawyer—a primary driver of the Bush Administration's torture program and its radical executive power theories. Given Judge Gorsuch's record, it is critical that the Senate get clarity on his views of the appropriate role of the judiciary to review potentially unlawful actions by the executive branch.

Historical and Current Claims of Executive Power that Threaten Rights

The post-9/11 context is not the only one in which the executive branch has taken misguided actions that threaten basic rights in the name of national security. We all recall the dark chapter during World War II in which tens of thousands of Japanese Americans were interned without charge or trial, or even any suspicion of criminal activity—all with the imprimatur of the Supreme Court in the now condemned *Korematsu* decision.[20] As the late-Justice Scalia—who opposed the *Korematsu* decision—said in his dissent in *Hamdi* v. *Rumsfeld*: "[t]he very core of liberty secured by our Anglo-Saxon system of

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[17] https://www.justsecurity.org/wp-content/uploads/2017/03/Hamdan-v-Rumsfeld2-copy-1.pdf.
[18] Neil M. Gorsuch, "GTMO Trip" Message to Nicholas Carl, Henry Terry, Jody Hunt, John Cohn, Peter Keisler, and Daniel Meron, November 10, 2005. Email. https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p18/a344884.
[19] *El-Masri* v. *Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).
[20] *Korematsu* v. *United States*, 323 U.S. 214 (1944).

separated powers has been freedom from indefinite imprisonment at the will of the Executive." The issue of indefinite detention of individuals picked up inside the United States was raised again after 9/11 in the controversial case of Jose Padilla. An American citizen, Padilla was arrested in the United States in connection with allegations concerning terrorism. He was held incommunicado and without charge or trial for several years in a military brig in Charleston, South Carolina. Padilla's case was litigated while Mr. Gorsuch was coordinating national security litigation for the department, but we do not know what his views are on indefinite detention and what role the courts can and should play in reviewing it. Does Judge Gorsuch believe that *Korematsu* was rightly decided? Does he believe it is lawful to indefinitely detain individuals—including American citizens—who are picked up inside the United States?

Of course, Judge Gorsuch's role at the DOJ working on national security issues after 9/11 could reasonably be expected to include defending the administration's views, and we should not assume that he necessarily shared all of them or holds them now. That is for you to determine. But it is worth noting that the public record shows he sought out a political appointment at the DOJ—and expressed a specific interest in working on national security issues—at a time in which there was major public controversy about the actions the Bush Administration was taking and the authorities it was claiming to fight terrorism—from torture to military commissions to indefinite detention at Guantanamo, and beyond. Many within the Bush Administration—including some at the DOJ—understood that these actions were in many cases unlawful or not sufficiently grounded in law, and worked to put a stop to them or place them on firmer legal footing. For example, when judge advocates general and other lawyers at the Pentagon became aware of proposals to authorize torture or cruel treatment of detainees, they strongly objected and sought to stop such unlawful actions.

From the scant public record, it appears that Judge Gorsuch did not. Rather, Mr. Gorsuch joined the DOJ at the height of the public controversy over torture and cruel treatment of detainees, devoting his energies to defending these unlawful policies and advocating for ways the executive branch could minimize or eliminate judicial review and evade binding legal requirements. If there is a yet-to-be-revealed record of Mr. Gorsuch raising questions and concerns about these policies and the claims of executive power that were made by the Bush Administration at the time, this administration and Judge Gorsuch should make it public for Senators to consider.

Key Questions for Judge Gorsuch

As important as it is to understand the role Mr. Gorsuch played at the Justice Department, it is even more critical for Senators to ascertain whether he learned anything from his experience there and what his views are now on the following questions:

- Does Judge Gorsuch understand and agree that his former role at the DOJ—and the positions he advocated for there on behalf of the government—can and should have no bearing on the way he decides cases as a judge?

- Does Judge Gorsuch agree with seminal Supreme Court decisions and precedents in cases that he was involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will he agree to follow these precedents?
- Does Judge Gorsuch believe that the courts play an important role in reviewing and deciding on whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?
- Does Judge Gorsuch believe that any government actions are "unreviewable" by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?
- Does Judge Gorsuch believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?
- Does Judge Gorsuch believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, does he agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which Judge Gorsuch believes that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

The Senate must get to the bottom of these questions, because sooner or later—and I suspect it will be sooner—the Supreme Court will be called on to protect fundamental liberty, judicial independence, and separation of powers from a president who regards the rule of law as an annoyance.

Testimony of Jameel Jaffer*

Before the United States Senate Committee on the Judiciary
On the Nomination of Neil Gorsuch for Associate Justice of the U.S. Supreme Court

March 23, 2017

Thank you for inviting me to testify concerning the nomination of Judge Neil M. Gorsuch to the United States Supreme Court. This Committee has no task more important than the one it is engaged in this week. If Judge Gorsuch is confirmed, he will likely play a central role in shaping American law and society for two or three decades or more. He will help decide the scope of individual rights, the relation of individual rights to one another, and the division of power among the three branches of government.

I am familiar with Judge Gorsuch's professional biography and have reviewed many of his opinions, and it is obvious that Judge Gorsuch has the professional competence to serve as an Associate Justice. Others have testified to Judge Gorsuch's dedication, thoughtfulness, and collegiality, and I have no reason to doubt that he possesses these qualities. His service with the Bush administration's Justice Department, however, raises important questions about his views concerning executive power and the role of the judiciary in the sphere of national security. At the time Judge Gorsuch served in the Justice Department,[1] the Bush administration was advancing extremely broad claims of executive power in the service of unlawful policies relating to surveillance, detention, military commissions, and interrogation. Judge Gorsuch was closely involved in developing and defending these claims. I urge you not to confirm him without first carefully examining his views concerning executive power and assuring yourselves that he will forcefully defend individual rights, and the authority of Congress and the federal courts, in the context of national security.

It hardly needs to be said that questions relating to executive power are especially important today. Invoking national security considerations, President Donald Trump has issued executive orders banning Muslims from six (originally seven) countries from traveling to the United States. He has said that he will consider prosecuting U.S. citizens in the military commissions at Guantánamo. He has reportedly loosened some of the restrictions that President Barack Obama adopted in relation to the use of lethal force overseas. He has promised to intensify surveillance of minority communities inside the United States. If Judge Gorsuch is confirmed, he will almost certainly be called on to consider the lawfulness of some of these policies, and his conclusions will have a profound

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* Executive Director, Knight First Amendment Institute at Columbia University; Former Deputy Legal Director, American Civil Liberties Union Foundation. I offer this testimony in my personal capacity, and not as a representative of the Knight Institute or the ACLU.

[1] He was then "Mr. Gorsuch," of course, but for simplicity I will refer to him as "Judge Gorsuch" throughout this testimony.

effect on the lives of millions of Americans and others, and on the relationship of the United States with the rest of the world.

It would be a mistake, though, to assess Judge Gorsuch's views of executive power through a partisan lens. The powers that are abused today by a Republican president may be abused tomorrow by a Democratic one. The question the Committee should ask is whether Judge Gorsuch will safeguard individual rights and the separation of powers—whoever occupies the Oval Office.

* * *

Judge Gorsuch served as Principal Deputy Assistant Attorney General from June of 2005 through July of 2006—a time when the Justice Department was advancing extremely broad claims relating to executive power. In the months after the September 2001 terrorist attacks, President Bush authorized the National Security Agency ("NSA") to conduct warrantless surveillance of Americans' international communications. He authorized the Department of Defense ("DOD") to imprison alleged "enemy combatants," including American citizens, indefinitely without charge or trial, and to prosecute foreign-citizen enemy combatants in military commissions that violated the Geneva Conventions. He authorized the Central Intelligence Agency ("CIA") to torture prisoners in secret prisons overseas.

Administration lawyers defended these policies in internal memos, white papers, and legal briefs. One thread running through their arguments was that Congress lacked authority to regulate the President's Article II war powers—i.e. that the Commander in Chief enjoyed "preclusive authority" with respect to war-making.[2] Another thread, equally controversial, was that the courts lacked authority and competence to hear challenges to the exercise of those powers.

Over the course of his tenure at the Justice Department, Judge Gorsuch helped make these arguments. In April 2006, he described himself as the "main [point of contact] on terrorism-related civil litigation for the Executive Office of the President.[3] In a November 2005 self-assessment, he described himself as having "helped coordinate litigation efforts involving a number of national security matters," including litigation relating to the abuse of prisoners.[4] Judge Gorsuch contributed to litigation and legislative strategy, drafted briefs, and helped administration officials defend their policies publicly.[5]

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[2] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 944 (2008).

[3] SJC_DOJ_Gorsuch_000034. All documents cited by Bates stamp in this testimony are available on the Committee's website.

[4] DOJ_NMG_007349.

[5] A March 8, 2017 letter from the Justice Department to Sen. Dianne Feinstein lists cases in which Judge Gorsuch played a role. *See* Letter from Ryan Newman, Acting Attorney General, to Sen. Dianne Feinstein, Ranking Member, Committee on the

I. Judge Gorsuch's Role in the Bush Administration's Efforts to Marginalize Congress

The Framers of the Constitution believed that "[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[6] Accordingly, they "built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[7] Because the Framers feared concentration of power in one branch, the Constitution "diffuses power[,] the better to secure liberty."[8]

As the Supreme Court observed in *Youngstown Sheet & Tube Co. v. Sawyer*, its seminal case concerning executive power, the doctrine of separation of powers is elemental to our constitutional structure. *Youngstown* involved President Truman's attempted seizure of the nation's steel mills during the Korean War. The Truman administration argued that the seizures were a permissible exercise of the President's authority as Commander in Chief, but the Court disagreed, finding that the President could not constitutionally disregard a duly enacted statute that implicitly prohibited the seizures. "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," the Court wrote.[9] "The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[10] Justice Jackson's celebrated concurrence observed that courts can uphold the President's actions in violation of a federal statute "only by disabling the Congress from acting upon the subject."[11] He warned: "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[12]

As Justice Jackson made clear, the claim that the Commander-in-Chief authority is "preclusive" is irreconcilable with the doctrine of separation of powers. And yet this claim is one that the Bush administration advanced in multiple contexts during Judge Gorsuch's

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Judiciary, March 8, 2017, http://fixthecourt.com/wp-content/uploads/2017/03/DOJ-Newman-letter-in-response-to-Feinstein-letter-3.8.17.pdf (hereinafter, "March 8 DOJ Letter").

[6] The Federalist No. 47 (James Madison).

[7] *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

[8] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[9] *Id.* at 587.

[10] *Id.*

[11] *Id.* at 637-38.

[12] *Id.* at 638.

tenure at the Justice Department. In *ACLU v. NSA*, for example, the Justice Department contended that the president had the authority as Commander in Chief to authorize surveillance that Congress had prohibited through the Foreign Intelligence Surveillance Act ("FISA").[13] Judge Gorsuch's role in the case was apparently "limited to monitoring its developments,"[14] but documents provided by the Justice Department to the Committee indicate that Judge Gorsuch also helped senior administration officials defend the warrantless wiretapping program publicly. For example, Judge Gorsuch drafted the prepared oral statement that Attorney General Alberto Gonzales delivered to this Committee in February 2006.[15] In that testimony, Gonzales contended that Congress had authorized the warrantless wiretapping program when it passed the Sept. 2001 Authorization for Use of Military Force—an enactment that did not mention surveillance at all. He also suggested that review by NSA personnel was an adequate substitute for review by federal courts.[16] Judge Gorsuch's draft of Judge Gonzales's statement included the claim that the president possessed "inherent" powers to conduct surveillance in wartime that "cannot be diminished or legislated away by other co-equal branches of government." Judge Gorsuch appears to have excised that line only after Paul Clement, the Solicitor General, objected to it.[17]

The Bush administration advanced related claims in *Hamdan v. Rumsfeld*, a case in which Judge Gorsuch "review[ed] . . . opinions," "participat[ed] in discussing litigation options," and "review[ed] the pleadings."[18] The administration argued that the President enjoyed the authority as Commander in Chief to authorize military commissions that were inconsistent with the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions, which had been incorporated into the UCMJ. The Supreme Court disagreed. In concurrence, Justice Kennedy observed that the government's argument, if accepted, would upset the careful balance struck by the Framers and jeopardize individual liberty.

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[13] Memorandum of Points and Authorities in Support of the United States, *ACLU v. NSA*, No. 06-cv-10204 (E.D. Mich. May 26, 2006), ECF No. 34, https://www.aclu.org/files/pdfs/safefree/nsadefs.memo.dismiss.052606.pdf. I was counsel to the plaintiffs in this case and in several of the other cases discussed below.

[14] March 8 DOJ Letter.

[15] DOJ_NMG_0152612-0152627.

[16] DOJ_NMG_0152616-0152617 ("Second, the program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization . . . . Third, to protect the privacy of Americans still further, the NSA employs safeguards to minimize the unnecessary collection and dissemination of information about U.S. persons. Fourth, this program is administered by career professionals at the NSA.").

[17] SJC_DOJ_Gorsuch_000065; *see also* email from Neil Gorsuch to Paul Clement et al., Feb. 3, 2006, available at https://assets.documentcloud.org/documents/3520275/Gorsuch-in-Camera-Documents.pdf.

[18] March 8 DOJ Letter.

"Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-party system is designed to avoid," he wrote.[19]

The Bush administration also advanced the claim of preclusive executive power in relation to the interrogation of prisoners, another issue with respect to which Judge Gorsuch played a significant role. The foundational Justice Department memos authorizing torture were of course written before Judge Gorsuch joined the Bush administration. However, the claim that the President had the authority as Commander in Chief to authorize interrogation methods that Congress had prohibited was one that the administration continued to defend during Judge Gorsuch's tenure at the Justice Department. In December 2005, Congress enacted the Detainee Treatment Act, which prohibited agencies of the U.S. government from subjecting prisoners to cruel, inhuman, or degrading treatment. Judge Gorsuch appears to have viewed this prohibition as a setback but seems to have known that the administration would not significantly adjust its policies in response to it.[20] (In a series of memos written earlier that year, the Office of Legal Counsel had concluded that waterboarding and other barbaric methods did not constitute cruel, inhuman, or degrading punishment.[21]) He argued that President Bush should issue a signing statement to "inoculate against the potential of having the Administration criticized sometime in the future for not making sufficient changes in interrogation policy" in response to the legislation.[22] Days later, when President Bush signed the bill into law, he issued a statement indicating that he would interpret the law "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limits on the judicial power."[23]

II. Judge Gorsuch's Role in the Bush Administration's Efforts to Marginalize the Judiciary

Another theme running through the Bush administration's defense of its policies was the argument that the courts lacked authority or competence to consider the lawfulness of government action undertaken in the name of national security—even in contexts implicating fundamental liberties. During his tenure at the Justice Department, Judge Gorsuch played an important role in the administration's efforts to marginalize the courts.

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[19] *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring).

[20] DOJ_NMG_0149598.

[21] Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by C.I.A.*, N.Y. Times (Apr. 16, 2009).

[22] SJC_DOJ_Gorsuch_000042.

[23] This last sentence appears to have been written by David Addington, but there is no evidence that Judge Gorsuch objected to it. Charlie Savage, *Newly Public Emails Hint at Gorsuch's View of Presidential Power*, N.Y. Times (Mar. 18, 2017).

Perhaps most significantly, Judge Gorsuch advocated for very broad legislation prohibiting federal courts from hearing habeas petitions filed by Guantánamo detainees. As noted above, the Detainee Treatment Act of 2005 barred federal agencies from subjecting prisoners to cruel, inhuman, or degrading treatment. The same legislation, however, purported to strip the federal courts of jurisdiction to consider Guantánamo prisoners' challenges to their detention and treatment. Judge Gorsuch advocated for a signing statement that would construe the jurisdiction-stripping provisions broadly.[24] Later, he drafted an op-ed defending the signing statement. The op-ed referred categorically to habeas petitions filed by Guantánamo prisoners as "frivolous lawsuits by terrorist detainees."[25] One of Judge Gorsuch's contributions to the *Hamdan* litigation was to solicit an amicus brief from Senators Graham and Kyl in support of the government's view that the DTA's jurisdiction-stripping provisions should be applied to petitions filed before the DTA was enacted, including to Hamdan's petition.[26] After the Supreme Court decided the case, rejecting virtually all of the government's arguments, Judge Gorsuch played a key role in drafting a post-*Hamdan* jurisdiction-stripping proposal.[27] (A version of the proposal was incorporated into the Military Commissions Act of 2006 but later invalidated by the Supreme Court in *Boumediene v. Bush*.[28])

Judge Gorsuch was involved in other efforts to prevent or dissuade the courts from considering the lawfulness of the government's national security policies. In *ACLU v. NSA*, discussed above, and in *El-Masri v Tenet*,[29] a case concerning the CIA's extraordinary rendition and torture of a German national whom the agency had abducted in Macedonia, the Bush administration contended that concerns relating to the disclosure of state secrets required dismissal. Judge Gorsuch "participated in discussing litigation options" in *El-Masri*,[30] and after the Fourth Circuit dismissed the case on state secrets grounds, he received an email commending him for his work.[31] Mr. El-Masri, it should be noted, was a case of mistaken identity—an innocent person abducted, transported to Afghanistan, held incommunicado, tortured brutally by CIA agents and contractors, and then released without explanation or apology.[32]

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[24] SJC_DOJ_Gorsuch_000042.

[25] DOJ_NMG_0150887.

[26] DOJ_NMG_0151350.

[27] DOJ_NMG_0163495; DOJ_NMG_0163501; DOJ_NMG_0163505; DOJ_NMG_0163525; DOJ_NMG_0163526; DOJ_NMG_0040159; DOJ_NMG_0040171; DOJ_NMG_00440177; DOJ_NMG_040178; DOJ_NMG_0164194; DOJ_NMG_0037490.

[28] 553 U.S. 723 (2008).

[29] 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

[30] March 8 DOJ Letter.

[31] DOJ_NMG_0029192.

[32] *El-Masri v. Former Yugoslav Republic of Macedonia*, ECHR (Dec. 13, 2012).

Judge Gorsuch was also involved in "developing case strategy" in *ACLU v. Department of Defense*,[33] a Freedom of Information Act suit for records concerning the abuse and torture of prisoners in U.S. custody. Among the records sought by the plaintiffs were hundreds of photographs relating to prisoner abuse in military facilities overseas. During Judge Gorsuch's tenure at the Justice Department, the administration's position was that the Defense Department was entitled to withhold the photographs because of the risk that their disclosure would lead to violence against American soldiers or civilians. The administration also contended that the CIA was justified in refusing to confirm or deny the existence of three documents that were part of the foundation for the agency's torture program—a directive in which President Bush authorized the agency to establish secret prisons, and two legal memos addressing the lawfulness of certain interrogation methods. With respect to both the photos and the CIA documents, the Justice Department urged the court to accord nearly absolute deference to the executive's assertion that secrecy was necessary.[34] The court declined.[35]

The argument that courts should defer to the executive's assessment that secrecy was necessary was an argument that the Bush administration made in other contexts as well. *ACLU v. Department of Defense* was a Freedom of Information Act case, but the administration advanced essentially the same argument in constitutional cases. To take one example, in *Doe v. Gonzales*,[36] a challenge to the constitutionality of the "national security letter" ("NSL") statute, the Justice Department defended the constitutionality of gag orders that the statute permitted the FBI to impose on NSL recipients as a matter of course. Judge Gorsuch "participated in developing case strategy and reviewed briefs."[37] In a brief filed with the Second Circuit in August 2005, approximately two months after Judge Gorsuch joined the Justice Department, the administration acknowledged that NSL recipients could challenge the constitutionality of gag orders in individual cases, but it contended that courts should essentially rubber-stamp the "predictive judgment[s]" of executive officials in recognition of the "unique competence of counterterrorism and counterintelligence officials to judge those risks [of harm] and the courts' relative lack of expertise to second-guess the executive's judgment in this area of national security."[38] The Justice Department specifically defended the constitutionality of indefinite gag orders, contending that, in terrorism and foreign intelligence investigations, "the dangers posed by disclosures do not

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[33] March 8 DOJ Letter.

[34] March 8 DOJ Letter.

[35] *ACLU v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2009) (affirming district court's order requiring disclosure of abuse photos); *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (requiring CIA to acknowledge existence of one of the two legal memos).

[36] 449 F.3d 415 (2d Cir. 2006).

[37] March 8 DOJ Letter.

[38] Brief of Defendant-Appellant at 25-26, *Doe v. Gonzales*, 05-0570 (2d. Cir. Aug. 26, 2005), https://www.aclu.org/files/nsl/legal/ReplyBrGovt082605.pdf.

end with the closing of an individual investigation or the arrest or conviction of a particular suspect."[39] The Second Circuit rejected the government's arguments.[40]

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Some of the arguments that Judge Gorsuch was associated with at the Justice Department were extreme, lacked support in precedent, and could not be reconciled with the text of relevant statutory and constitutional provisions—and eventually they were rejected for these reasons by the courts. Some of the policies that Judge Gorsuch was defending—most notably, the policies relating to extrajudicial detention, rendition, and torture—have been discredited.[41] Some of these arguments and policies have not yet been addressed by the courts, even as they continue to animate claims relating to executive power today. The question for the Committee is what Judge Gorsuch's tenure at the Justice Department can tell us about the philosophy he would bring to issues of executive power as an Associate Justice of the Supreme Court.

It is important to recognize that Judge Gorsuch might approach issues relating to executive power differently as an Associate Justice than he did as a Justice Department lawyer. It is conceivable that as an Associate Justice he would reject some of the arguments he made when he served in the Bush administration. At the Justice Department, Judge Gorsuch was a lawyer with a client. He has said that he regarded himself a "scrivener"[42] or a "scribe."[43]

It is worth noting, however, that Judge Gorsuch sought out a high-level position with the Justice Department in the fall of 2004, just seven months after *The New Yorker* and *60 Minutes* published the Abu Ghraib photos showing prisoners being abused by American soldiers, and only five months after the *Washington Post* published one of the torture program's foundational documents[44]—a memo in which the Office of Legal Counsel wrote that interrogation methods would not contravene criminal laws relating to torture unless they inflicted the kind of pain associated with organ failure or death, that in any event the statute criminalizing torture did not apply to interrogations "undertaken pursuant to [the] Commander in Chief authority," and that interrogators prosecuted for

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[39] *Id.* At 21-22.

[40] *Doe v. Mukasey*, 49 F.3d 861 (2d Cir. 2008).

[41] *See generally* Executive Summary, "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," Senate Select Committee on Intelligence (Dec. 13, 2012).

[42] SJC_DOJ_Gorsuch_000066.

[43] Matt Flegenheimer, Adam Liptak, Carl Hulse & Charlie Savage, *Seven Highlights from the Gorsuch Confirmation Hearings,* N.Y. Times (Mar. 21, 2017).

[44] Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Wash. Post (June 8, 2004).

torturing prisoners would be able to rely on the defenses of necessity and self-defense.[45] It is not the case, in other words, that Judge Gorsuch happened to be a government lawyer at a time when the government—his client—endorsed torture and a sweeping view of presidential power. The government endorsed those things first, very publicly, and then Judge Gorsuch chose his client.

It is also worth noting that Judge Gorsuch appears not to have registered any disagreement with any of the policies he defended—though other officials did.[46] Nor is there evidence that he registered discomfort with any of the broad arguments that the Justice Department advanced in support of those policies—though, again, others did.[47] The documents provided by the Justice Department to the Committee suggest that Judge Gorsuch was comfortable with the policies and with the Bush administration's defenses of them, and, indeed, that it was *challenges* to the policies that troubled him. In one email, Judge Gorsuch criticized law firms that represented prisoners held at Guantánamo, wondering why "more ha[d] not been made" of the fact that the same law firms that represented Boeing and General Dynamics were (in the words of an article attached to his email) "help[ing] alleged terrorists."[48] As we now know, many of those "alleged terrorists" were not terrorists at all, and eventually the government freed them. It is notable that Judge Gorsuch seems not to have seen a role in the American legal system for the private attorneys who represented them pro bono.

Against this background, it is crucial that the Committee question Judge Gorsuch about the perspective he would bring to issues of executive power. The Committee should not confirm Judge Gorsuch without first assuring itself that he will protect individual rights, and the constitutional authority of Congress and the courts, in the sphere of national security.

Thank you again for giving me the opportunity to submit this testimony.

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[45] Memorandum from Jay Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340S, August 1, 2002.

[46] *See, e.g.*, Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, The New Yorker (Feb. 27, 2006); Jameel Jaffer & Larry Siems, *Honoring Those Who Said No*, N.Y. Times (Apr. 27, 2011).

[47] Charlie Savage & James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, N.Y. Times, (June 27, 2013).

[48] DOJ_NMG_151368.

Testimony Before the Senate Judiciary Committee

re. Supreme Court Nomination of Judge Neil Gorsuch

Jeffrey D. Perkins

March 23, 2017

The Boy
Julie Perkins, 2000

There is a little boy, who is very dear to me.
He's trapped inside a world, that only he can see.

Some nights I hear him crying and there's nothing I can do;
My heart sorrows with him, for this way he did not choose.

He is loved by many others, not just his family.
They've helped us see a glimpse of the boy that he could be.

My prayer is as I hold his gentle hand,
That one day the love of God he will understand.

He isn't just another face or just another name,
He's the boy who makes us thankful, and this is why he came.

I am honored to give this testimony on behalf of my son, Luke Perkins. As an individual severely affected by autism, his access to an appropriate education and thus to a meaningful and dignified life were threatened by the views of Judge Neil Gorsuch, as expressed in the opinion that he authored as a judge on the U.S. 10th Circuit Court of Appeals in 2008.

Luke's Infancy and Early Childhood

My son, Luke Joseph Perkins, was born on October 29, 1994 at Johns Hopkins Hospital in Baltimore, Maryland. Luke's development seemed normal for the first several months of life. He began arm flapping at the age of 10 months, initially as a sign of excitement when watching his favorite TV character, Barney the Dinosaur. We did not realize the significance of this behavior, a common "self-stimulatory" behavior in autistic children, until later. We began noticing that his language was significantly delayed, compared to his older brothers.

On February 28, 1996, at 16 months of age, Luke underwent a Brainstem Auditory Evoked Response test – a hearing test for children unable to cooperate with the standard hearing screening. The result of the test was normal – he was not hearing impaired. At first this was great news. But then, the realization of the implications of this began to sink in. If Luke wasn't hearing impaired, there had to be another reason for his failure to talk.

After multiple evaluations, first in Baltimore and then in our new home in Colorado, Luke was diagnosed with autism by Dr. Sally Rogers on September 3, 1996, at the age of 22 months. Dr. Rogers began an

intensive early childhood intervention program, modeled on what the "applied behavioral analysis" approach. She met with Luke and Julie on a weekly basis. Julie and Luke worked one-on-one for several hours per day. In the sessions, Luke would sit across from Julie in a tiny wooden chair with substantial arms. This way, he would stay sitting forward. The concept behind applied behavioral analysis is simple: give a command, prompt the child to follow the command, and reward the child for his behavior. Luke's rewards at first were food: Fruit Loops were his favorite. When Luke started this program, he never made eye contact and did not respond to his name. He made rapid progress. Within a matter of weeks, under the expert guidance of Dr. Rogers, Julie had taught Luke to consistently make eye contact with the command, "Luke, look at me."

Over the next few years, Luke learned many things, including many commands, the names of body parts, colors, numbers and letters. By far the hardest thing for Luke was speech. Dr. Rogers pulled out all her tricks, but Luke seemed to have virtually no awareness of or voluntary control over the muscles used for speech.

In March of 1997, we hired the first of several home teachers to help with Luke's program. The hours of intense effort and concentration needed to maintain Luke's program started wearing on Julie and on our whole family. Luke was still showing no real signs of verbal communication, though there was clearly a sharp intelligence buried beneath the dense web of his autism.

Luke had only a very limited set of interests. Watching Barney videotapes was first among them. He had virtually no ability to entertain or occupy himself. Luke's older brothers, Titus and Jacob, did their best to interact with Luke. But Luke treated them, as he treated everyone else, like a piece of furniture. He even went so far at times as to arrange people in rows, just like he did with toys or food.

Public School: Preschool through 1st Grade

In March 1998, we moved into the St. Vrain School District and met Margaret Wilson, a brilliant and compassionate special educator with a special interest in autism. The focus of Luke's education gradually shifted from Dr. Rogers and home therapy to a school-based program.

Under Margaret's guidance, Luke made a successful transition into kindergarten at Niwot Elementary School in the fall of 2000. Luke loved school. It was so predictable and structured, in a way that home could not be with 3 other siblings (Luke had a baby sister in 1998). With Margaret's knowledgeable leadership, Luke was successfully integrated into a typical kindergarten classroom and accepted by his teachers and peers. Margaret and her team of para-educators went the extra mile to work with and teach Luke. Though still not talking much, he was learning every day and he was happy, especially at school. He was even beginning to use several intelligible word approximations to communicate. Somewhat frustrating from our perspective was Luke's inability to generalize much of his speech and other positive behaviors from school to home.

Home life

At home, progress was more mixed and uneven. Luke's taste in food, always limited, became gradually more and more restricted. His highly-preferred foods included crackers, mustard and yogurt. Most foods that a normal child his age would eat were steadfastly refused. His day-night cycle became ever more erratic. Ever since Luke outgrew his crib, he has had the lock reversed on his bedroom door. While the

idea of locking our son in his room at night bothered us a lot, Luke's disturbed diurnal cycle and his ever growing capacity for mischief made this decision mandatory.

Toilet training was a never-ending process. He was doing fairly well at school by 1st grade, but still had frequent accidents during the day at home. Nighttime continence was a distant dream at best. His awareness of his own internal bodily signals was virtually nonexistent.

In 2001, Luke began having more significant negative behaviors. While still happy and easygoing most of the time, he began to experience tantrums. Several medications were tried to help with sleep and tantrums, but either were ineffective or had significant side effects.

Gradually, Luke's behavior restricted his activities and the activities of his family. Trips to the store became first hard, then impossible. While Luke had grown up since infancy going to church every Sunday, his behavior in church became more and more unpredictable. Finally, people at church began volunteering to stay with Luke so that the rest of the family could worship in peace. Simple things to most families, such as dinner at a restaurant or going to a movie, took major planning and preparation.

Caring for Luke, along with the rest of our family, became too much for us to handle on our own. In order to maintain the functioning of our family, we needed some help. So, in 2001, our family of six moved in with my parents for a year. We then bought adjoining plots of land in Weld County and built two houses so that my mother could be nearby to help with Luke and the other kids.

One of the main design considerations in our new house was Luke. We had special sliding locks installed on all outside doors that Luke could not reach. There were locked cabinets built into the floor plan in the kitchen and living room. We had extra reinforcement and insulation in the floor of Luke's bedroom to withstand the jumping. We had a TV/VCR player put into his room behind thick plastic. His bedroom window was made out of safety glass. His closet door had a keyed lock. There was even a large eye bolt screwed into a reinforced beam in his ceiling from which to suspend his favorite hammock swing.

Throughout this difficult time, Luke's one consistent bright spot was school. The imposed structure and caring, competent teachers and staff seemed to bring a measure of peace and order to his tangled mind. We had bought our land in Weld County just after Luke started kindergarten. We discovered that our land was in the Thompson Valley school district. At the time, this did not seem to be a big deal. We naively assumed that all schools had someone like Margaret Wilson to guide the education of their autistic students.

The Berthoud Years: 2nd and 3rd Grade

As the end of Luke's 1st grade year at Niwot Elementary approached, we began looking toward transitioning Luke into his new school. A meeting was held between Luke's Niwot Elementary team and two representatives from the team that would be taking over his education in his new school. We were somewhat concerned by the seeming lack of interest and initiative displayed by the incoming team. For example, despite the fact that the meeting was held in a conference room less than 100 feet from Luke's classroom, neither of the new team members even asked to see Luke.

We petitioned twice to keep Luke in his former school via the open enrollment process, but were rebuffed by the Thompson School District, due to financial considerations and wanting to avoid setting a precedent for other disabled children.

So, we pressed ahead with enrollment into Berthoud Elementary. At first, things seemed to go fine. Luke still seemed to enjoy school, based on the feedback that his teacher gave in his daily notebook. However, we began noticing that Luke was losing skills. He pointed less and his limited verbal skills began slipping noticeably. Toward the end of his second grade year, his behavior began taking a significant turn for the worse at home.

Luke did not tolerate a parent observing at school. In his mind, parents were for home and teachers for school. In order to better understand what was going on at school we sought help from Diane Osaki, an occupational therapist who had worked with Luke at the beginning of his therapy and who now runs the Aspen School. As part of her evaluation, Ms. Osaki requested to visit Luke at Berthoud Elementary. When we met with Ms. Osaki after her visit, we were dismayed to hear the extent of Luke's behavioral problems at school. These included a majority of his time being spent in tantruming, oppositional activity and even throwing of computer equipment. Ms. Osaki described an environment where there was complete lack of a reasoned, consistent behavioral or educational approach. In fact, the responses of the staff to his inappropriate behavior were reinforcing and not extinguishing it. Looking back in his daily notebook on the day that Ms. Osaki visited his school, there was no notation of any behavioral problems. We realized at this point that we had been naïve in our assumption that we were being given an accurate report of his progress at school.

Considering Other Options

As he started into 3rd grade in the fall of 2003, his behavior at home deteriorated to the point that we feared that he would become a significant danger to himself, his siblings and his mother in the not too distant future. We began to investigate our options. Given Luke's difficulty generalizing skills from school to home, and his worsening behavior issues, we considered the possibility of residential schools. At first, the idea of sending our 8-year-old son to live away from home was very difficult. However, as we investigated more, we realized that placement in a school where he could be exposed to consistent behavioral and educational methods in a seamless environment might be his best chance for achieving educational and behavioral progress. It became clear quickly that there were no facilities in or around Colorado that would be able to provide an appropriate residential environment for his education.

Since our triennial IEP meeting was approaching, we decided to attempt to address our concerns with the local school district one last time at this meeting. The meeting did not go well. The educators seemed oblivious to Luke's needs, and did not suggest any significant changes to his program. After this meeting, our decision was made. We could not in good conscience continue to expose Luke to this environment that was so detrimental to his educational and behavioral development. We made the decision to enroll Luke at the Boston Higashi School, a unique school in Boston dedicated to the education of children with autism spectrum disorders.

Boston Higashi School

Boston Higashi School was founded in 1987 by Dr. Kiyo Kitahara, a Japanese educator who had experienced significant success in educating students in Japan with her method, called Daily Life Therapy. Daily Life Therapy is founded upon three major premises. First, stability of emotions is gained through the pursuit of independent living skills and the development of self-esteem. Second, extensive physical exercise is used to establish a rhythm of life. This inhibits anxiety through the release of endorphins, as well as reducing aggression, self-stimulatory behavior and hyperactivity. Physical exercise

with a group of students also serves as a bridge to the development of social skills. Third, the intellect is stimulated through instruction in language arts, mathematics and social sciences in a group academic setting with an age appropriate curriculum. Behavior is controlled through non-medical means, and students at Boston Higashi School are not allowed to take medications for the purpose of behavior control.

Luke was accepted into the Intermediate Elementary division of Boston Higashi School on December 18, 2003. He was to begin as soon after the winter break as possible.

When Luke left for Boston in January 2003, he slept in a locked room with no bed, never slept through the night and was not toilet trained. He ate a very restricted, unhealthy diet and received very little physical exercise. He had very underdeveloped gross and fine motor skills and could not dress himself or help in any of his activities of daily living. He had long since ceased to learn in his present academic environment, and was losing previously acquired skills at an alarming rate. Most alarmingly, his behavior was on a course that would soon make it impossible to stay in public school due to safety concerns, and might ultimately make it impossible for him to live at home with his family.

Leaving Luke at Boston Higashi School that first time was gut wrenching. We met with his day and residential teachers and dropping off his clothes. We were told that he would not be needing the large suitcase of adult-sized diapers at this new school. We were incredulous, given that Luke had failed so many attempts at toilet training over the years. After telling Luke goodbye, we returned to Colorado, leaving our son in the capable hands of the staff at Higashi.

Luke made astounding progress in many areas. Within a few weeks, he was sleeping in his bed through the night on a consistent basis. Toilet training also went very smoothly. In music class, he gradually learned to tolerate previously intolerable levels of noise. Within his first year, he was playing "Mary Had a Little Lamb" on a keyboard harmonica.

His progress in eating and feeding himself was truly remarkable. Due to the boundless patience and dedication of his classroom teacher, Fuyu, he was eating a wide variety of healthy foods in the dining hall every day, such as soup, salad, meat and vegetables with proper utensils.

In academics, he was in a small class, with a total of 4 to 6 students. He learned quickly to sit in a normal student desk. He learned subjects such as arithmetic, geometry and reading.

Regular physical activity is an important part of the Higashi method. He gradually learned to jog with his classmates. In addition, he learned to do such things as ride a unicycle and walk on stilts. These activities honed his underdeveloped gross motor and balance skills. On the residential side of his schooling, he learned to participate in recreational activities, such as rollerblading and bowling.

One of the most appealing features of the Boston Higashi program was three breaks during the year, totaling eight weeks, were students would go home and reconnect with their families. When Luke came home for the first few breaks, he had trouble generalizing all of his learned skills from school to home. However, with time, skills learned at school translated to home. His ability to participate in family and community life increased significantly. We could shop together, eat at a restaurant together, and even attend church together.

Legal Battles

But this improved life for Luke was costly. Despite my comfortable income as a physician, Luke's education costs rapidly depleted our reserves. My parents contributed a substantial amount from their retirement savings. However, even with this, we could not continue to pay his tuition indefinitely. In January 2005, we requested reimbursement for Luke's education under the Individuals with Disabilities Education Act.

A Due Process Hearing was held in June. This was a 5 day hearing in a conference room at the school district offices. Presiding over the hearing was the Independent Hearing Officer (IHO). The IHO found in our favor, and instructed that the Thompson School District begin paying for Luke's education at the Boston Higashi School.

Over the next few years, this decision was appealed by the school district, first to an administrative law judge and then to the U.S. District Court. Both of these appeals upheld the original decision. The IHO, administrative law judge and District Court judge all ruled that while Luke made very small gains in some academic areas, his behaviors were deteriorating, he was regressing in his communication and daily living skills, and he was not able to transfer those few academic skills outside of the classroom. Each of these judges concluded that such little educational benefit from the public school could constitute an appropriate education under the IDEA.

10th Circuit Court of Appeals

In 2007, the school district appealed to the 10th circuit. The final ruling was issued in August 2008. This decision, authored by Judge Neil Gorsuch, overturned all of these previous rulings. His legal reasoning set a new, low standard of education required under IDEA. There were two specific areas in which his ruling lowered the working definition of a free and appropriate public education.

First, taking the phrase "more than *de minimis*" from a 1996 10th Circuit decision (*Urban v. Jefferson County Schl. Dist.*), he recontextualized this phrase and added the word "merely." In articulating that a public school must provide an education under IDEA that is "merely...'more than *de minimis,*'" Judge Gorsuch changes the *de minimis* standard from one that must always be exceeded to a goal for which a school district may legitimately aim. The term *de minimis* is defined as follows: "lacking significance or importance: so minor as to merit disregard." Judge Gorsuch felt that an education for my son that was even one small step above insignificant was acceptable.

Second, Judge Gorsuch sets a novel standard in this ruling of "some progress" in the student's achievement of educational goals. Thus, despite Luke's inability to meet three quarters of his educational goals in his individualized education plan, or to use any of these skills outside the classroom, the "progress" noted on 25% of the goals was felt to be evidence that his education was appropriate. This standard, rather than a standard of "some educational benefit," makes proof of an appropriate education by a public school *pro forma.* All that a school would need to do is to document some progress on a single goal to meet this standard. Even if a child, as in Luke's case, was utterly failing to progress in any meaningful global sense, the educational plan would be judged "appropriate."

Aftermath

The 10th Circuit decision was devastating to us. By this time, Luke had been at Boston Higashi School for five years, and his overall progress was nothing short of dramatic. The possibility that Luke would lose the ability to continue in this very successful educational placement was unthinkable. However, once our petition to be heard by the Supreme Court was denied, we had no other legal avenues to challenge the Thompson School District educational plan.

We worked with the school district in 2010 to devise an acceptable program for local back home. We then enrolled Luke in this program, with careful observation of his progress. It became clear within a few weeks that nothing substantive had changed. Luke would quickly lose the progress that he had made over his several years at Higashi if he stayed with the School District's program. Rather than risk Luke's losing all of his hard-fought educational gains, we removed him from his placement in the Thompson School District and re-enrolled him at Higashi. However, we had only enough money to pay for one more year of education.

This left us with only on real option. One of Luke's parents would have to move to a school district that would better accommodate Luke's educational needs. Practically, that meant moving to Massachusetts. Since I was geographically tied to my medical practice in Colorado, the only option was for Julie to move. After much prayer and thought, my wife decided to permanently relocate to Dedham, Massachusetts. Thankfully, the Dedham School District acknowledged Luke's extraordinary needs, allowing him to finish out his time at Higashi.

Now aged 22, Luke will always need support in a world that still seems perplexing and threatening to him. But his quality of life after 13 years of appropriate education is vastly better than it would have been otherwise. He cooks and does household chores. He is able to shop, work, eat and play in the community. And he has developed a new passion– Legos. Luke's mind is uniquely attuned to this plastic brick world. He constructed a model in January 2017 of the U.S. Capitol Building with over 1000 pieces. His present life would not have been achievable without an appropriate education.

Thankfully, Luke is unaware of the price paid for his education. The financial cost pales in comparison to the human sacrifice: his mother separated from her 13-year-old daughter; his parents' marriage broken. He is also unaware of the key place that one judge, with his radically restrictive interpretation of law, played in the fight for his right to a free and appropriate public education.

In his 10th Circuit ruling, Judge Gorsuch eviscerated the educational standard guaranteed by the IDEA. His interpretation requires that a school provide a disabled child an education just above meaningless. And his novel standard of "some progress" sets the bar so low that meaningful benefit is often denied to students with impunity, even as their child's education plan is failing utterly when viewed globally. Legal philosophy and case law aside, such an interpretation clearly fails the common sense test. Why would Congress pass a law with such a trivial intent? And why would a parent settle for such an education for any of their children – regardless of their abilities or challenges?

On behalf of all children – disabled, typical and gifted – I urge you to deny confirmation of Judge Neal Gursuch to the Supreme Court of the United States.

BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

TESTIMONY OF GUERINO J. CALEMINE, III

GENERAL COUNSEL, COMMUNICATIONS WORKERS OF AMERICA

HEARING ON THE NOMINATION OF THE HONORABLE NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

March 23, 2017

Mr. Chairman and Members of the Committee:

On behalf of the Communications Workers of America (CWA), it is an honor to submit this testimony as you consider the nomination of Judge Neil Gorsuch for a seat on the United States Supreme Court. CWA represents 700,000 workers across the country in a wide array of industries, including telecommunications, manufacturing, airlines, media, government, and health care. This year, CWA celebrates its 70th anniversary advocating for workers and their rights on the job.

Our concern regarding Judge Gorsuch's nomination is grave and simple: Working people cannot be assured a fair shake from a Justice Gorsuch. His jurisprudence is a threat to our safety and health.

Just seven months ago, Judge Gorsuch issued a seven-paragraph dissent in a workplace safety and health case that amounts to a flashing red light for the Senate. This dissent, in a case called *TransAm Trucking, Inc. v. Administrative Review Board*, shows Judge Gorsuch to be an activist set on rolling back workers' rights. It provides an ominous preview of how Judge Gorsuch – if confirmed to the Supreme Court – would dismantle worker protection laws. It reveals a hostility to, and lack of understanding of, working people, their lives, and the laws that protect them. It trivializes the sometimes life-or-death issues that workers face on the job. Claiming to be guided by the text of a statute alone, it demonstrates the opposite: he picks one particular dictionary definition over another without regard to the absurdities that result and thereby eviscerates the real-world application of a health and safety law. His approach is not value-neutral. It is simply anti-worker. This dissent alone disqualifies Judge Gorsuch for the position to which he has been nominated.

My testimony will provide an overview of this case, with particular attention to the real-world facts at issue, an analysis of his dissent, including a description of the bias and activist mission revealed by the dissent – one that produces a very flawed reading of the law with a cruel and nonsensical result, and an explanation of why this matters to working people across the country.

OVERVIEW OF *TRANSAM TRUCKING*

In *TransAm Trucking, Inc. v. Administrative Review Board*, a majority of the three-judge Tenth Circuit panel denied an employer's petition for review of an Administrative Review Board (ARB) decision

under the Surface Transportation Assistance Act (STAA).[1] The majority upheld the ARB's ruling in favor of a truck driver who refused to follow his supervisor's orders to either (a) drag a trailer with frozen brakes dangerously and illegally down a highway or (b) keep his truck with its trailer dangerously parked for hours on the side of the highway in subzero temperatures, without heat, as he began experiencing the telltale signs of hypothermia. Instead, the truck driver unhitched the broken trailer and drove himself to safety. For this, he was fired. Under the STAA, however, a truck driver may not be fired for refusing to operate a vehicle when he has a reasonable fear for his or others' safety. In these circumstances, an employee is not forced to choose between his life or his job. An Administrative Law Judge, the ARB, and the Tenth Circuit majority all held that the firing was unlawful.

Judge Gorsuch was the lone dissenter. In an incredibly strained reading of the statute, Judge Gorsuch found that the STAA health and safety provision only protected the truck driver if he refused to drive his truck altogether and remained on the side of the road where he reasonably believed he was about to freeze to death.

THE FACTS OF THE CASE: A LIFE-THREATENING SITUATION UNFOLDS FOR ALPHONSE MADDIN ON I-88

Commercial long-haul truck driving is hard work. It can also be dangerous. The most recent Census of Fatal Occupational Injuries reports that 745 truck drivers were killed in 2015 – the most deaths of any single occupation. The story of Alphonse Maddin illustrates how such deaths might happen – and how they can be successfully prevented: by empowering drivers with a right to refuse unsafe operations.[2]

On January 14, 2009, Alphonse Maddin was driving a trailer full of frozen meat from Nebraska to three locations in Wisconsin and Michigan. He had been working for TransAm Trucking since the previous September. Mr. Maddin was originally supposed to start this run on January 13. But the shipper was a full 12 hours late delivering the load.

That was just the start of his problems. During the drive, Mr. Maddin's truck sputtered. His bunk heater stopped working. And then, while he was on Interstate 88 in Illinois, he could not find the company-approved fuel station. What emerged later is that TransAm had provided Mr. Maddin incorrect directions. The fuel station was off of I-39, not I-88. Unable to find the station, with his gas gauge falling below "E," he pulled over. It was 11 p.m., and the temperature outside was below zero.

During this stop, Mr. Maddin received a message that the next driver that would switch him out for this haul was no longer available and so he should continue driving to the first delivery point. He restarted his truck to once again search for the approved fueling station. But now the brakes on his

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[1] 833 F.3d 1206 (10th Cir. 2016).

[2] This rendition of the facts is pulled from the factual record in *Maddin v. TransAm Trucking, Inc.*, Arb Case No. 12-031 (Nov. 24, 2014). The Tenth Circuit decision contains a less detailed summary.

trailer were frozen in place. He stayed on the side of the road and, at 11:17 p.m., reported the problem to TransAm.

TransAm told Mr. Maddin they would send a repairman to fix the brakes. Mr. Maddin waited in his cab, where the heater did not work as the temperature outside further dropped.

About an hour later, after 12:15 a.m., Mr. Maddin had fallen asleep. Another hour later, at 1:18 a.m., he was awakened by a cell phone call from his cousin. His cousin would later recount that Mr. Maddin's speech was slurred and he sounded like he was shivering. His cousin repeatedly asked Mr. Maddin if he was alright. When he sat up straight, Mr. Maddin "realized his skin was crackling from cold, that his torso was numb, and that he could not feel his feet."

Mr. Maddin called TransAm again. He told the company his heater was not working. He told the company about the symptoms he was experiencing. Mr. Maddin asked the company about the arrival time for the repairman, and the company told him to "hang in there."

With the clock ticking and no repairman in sight, Mr. Maddin began having trouble breathing and began to grow afraid that he would lose his feet, or die and never see his family again. As he puts it: "I began having thoughts that I was going to die."[3] He decided to try to save his own life. He got out of the cab and unhitched the broken trailer from his truck. He called the company again.

This time, he spoke to his supervisor and explained the situation. His supervisor told him that he must not leave the trailer on the roadside. His supervisor gave him a choice "to either drag the trailer with its frozen brakes or to stay where he was." Over and over, Mr. Maddin described his physical state to his supervisor, and his supervisor told him to turn on the heat. Mr. Maddin had to repeatedly inform his supervisor that the heater was not working.

At 2:05 a.m., after three hours in subzero temperatures, Mr. Maddin drove his truck away, without the trailer, in search of safety. At 2:19 a.m., he got a call that the repairman had arrived. He returned to the trailer. The repairman fixed the trailer's brakes but not the truck's heater. At 3:20 a.m., Mr. Maddin's supervisor told him he would write him up for a late load. But Mr. Maddin reminded his supervisor that the shipper was 12 hours late for the initial load. Then the supervisor told him he would write Mr. Maddin up for missing his fuel stop. Later that morning, Mr. Maddin would inform his supervisor that the company gave him the wrong directions for the authorized fueling station.

The next week, Mr. Maddin was called to the company offices where he was terminated for abandoning his load that night in Illinois. Mr. Maddin filed a complaint with the Occupational Safety and Health Administration (OSHA).[4]

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[3] "Alphonse Maddin discusses how Judge Gorsach's ruling impacted him," https://www.youtube.com/watch?v=7eh0hSaWvVE.

[4] OSHA enforces STAA's whistleblower protections, as well as the whistleblower protections of dozens of other statutes.

A SAFETY AND HEALTH LAW PROTECTS ALPHONSE MADDIN

Since 1982, the Surface Transportation Assistance Act has provided truck drivers with whistleblowing and other rights against unscrupulous employers who may otherwise order them to engage in unsafe or illegal actions. One provision prohibits an employer from firing an employee who "refused to operate a vehicle because … the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." To be protected by this provision, the employee in question "must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 USC 1105(a)(2). Mr. Maddin sought protection under this provision.

An Administrative Law Judge, the Administrative Review Board, and finally the Tenth Circuit all ruled in Mr. Maddin's favor. TransAm argued that, when Mr. Maddin drove his truck, he was not "refusing to operate." But the ALJ found that "by unhooking the trailer, Maddin refused to operate the truck under the conditions set by his supervisor and that he did so because of safety concerns." The ALJ noted that driving the trailer with inoperable brakes was a violation of the law and a threat to Mr. Maddin's and other drivers' safety.

The ARB similarly found that, based on long-standing precedent, "a 'refusal to operate' may encompass actually operating a vehicle in a manner intended to minimize danger of harm or violation of law."

The Tenth Circuit majority agreed. The Tenth Circuit reasoned that there was no definition of "operate" in the statute and that the ARB's definition of "operate" – meaning not only driving, "but other uses of a vehicle when it is within the control of the employee" – was therefore permissible. In this case, "operate" encompassed the operations directed by the TransAm supervisor: either keeping the truck hitched to the disabled trailer on the roadside in subzero temperatures or driving the truck with the trailer with broken brakes down the highway, both of which gave rise to Mr. Maddin's reasonable apprehension of serious injury or death. The majority observed that TransAm could not point to "any authority for the proposition that Congress intended the refusal-to-operate provision…to be interpreted so narrowly [to only mean 'drive'], and has not explained how such a narrow interpretation furthers the purposes of the STAA."

JUDGE GORSUCH'S SHOCKING DISSENT TRIVIALIZES AND MINIMIZES THE VERY REAL HEALTH AND SAFETY CONCERNS OF MR. MADDIN

In his dissent, Judge Gorsuch engages in a game of "gotcha." With the use of one definition from a particular edition of the Oxford English Dictionary, he adopts TransAm's narrow definition of "operate" to only mean "drive." Before examining how Judge Gorsuch reaches this strained and wrong interpretation of "operate," we should consider his starting place for any analysis. His dissent reveals that starting place to be a hostile one for workers and efforts to legislate workplace safety.

First, Judge Gorsuch is dismissive of the efforts of the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) to effectuate Congress's purposes in enacting the STAA.

He calls the goals of "health and safety" "ephemeral and generic." He rhetorically asks what doesn't relate to "health and safety"? Apparently, Mr. Maddin's health and safety when operating a commercial motor vehicle in freezing temperatures is too "ephemeral and generic" for Judge Gorsuch – but not for the other decisionmakers at all three levels in the case – and not for Mr. Maddin. With this outlook, we can expect Judge Gorsuch to apply health and safety laws in the narrowest and most restrictive manner possible, straining the meanings of statutes to avoid furthering goals which he seems to believe have insufficient meaning in the real world.

Second, Judge Gorsuch exposes an anti-worker bias from the start. In explaining the options that Mr. Maddin's supervisor gave him, Judge Gorsuch writes: "He could drag the trailer carrying the company's goods to its destination (an illegal and maybe sarcastically offered option). Or he could sit and wait for help to arrive (a legal if unpleasant option)." Let's unpack the biases Judge Gorsuch reflects in these parentheticals. He tries to excuse the company's obviously illegal direction to drag the disabled trailer down the highway – as "maybe sarcastically offered." Yet he describes as merely "unpleasant" waiting for a repairman while your skin "crackles," your feet and torso go completely numb, your breathing becomes labored, you experience hypothermia and begin to fear the loss of an appendage or two and maybe your life. These short parentheticals frame Judge Gorsuch's dissent and set the stage for minimizing and denigrating the gravity of the situation to Mr. Maddin.

Third, Judge Gorsuch's dissent trivializes the risks that workers face every day on the job. Not only does Judge Gorsuch describe Mr. Maddin's potential death from hypothermia as an "unpleasant option," but he chooses a trite analogy that has nothing to do with health and safety when attacking the majority's definition of operate:

> Imagine a boss telling an employee he may either 'operate' an office computer as directed or 'refuse to operate' that computer. What serious employee would take that as license to use an office computer not for work but to compose the great American novel? Good luck.

Perhaps Judge Gorsuch's point is that, if we let Mr. Maddin drive his truck to safety, we might as well let him drive it to the beach.

In short, in seven paragraphs Judge Gorsuch manages to reveal an alarming contempt for congressional and agency efforts to protect workers' health and safety. This hostility is made further apparent when at one point he describes the possible enactment of a health and safety law as something with which Congress may one day "adorn our federal statute books," as if these protections are quaint decorations unworthy of respect.[5]

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[5] These biases are corroborated by his approach in another health and safety case. In *Compass Environmental, Inc. v. Occupational Safety and Health Administration*, 663 F.3d 1164 (10th Cir. 2011), a trench hand was electrocuted to death because his employer failed to train him about the dangers of an overhead electrical wire. The employee lost his life. And OSHA imposed a $5500 fine on the employer. While the rest of the court upheld the fine, Judge Gorsuch dissented. In the opening

JUDGE GORSUCH SELECTS DICTIONARY DEFINITIONS THAT SUPPORT ANTI-WORKER RESULTS

All of these biases lay the groundwork for his ultimate analysis in *TransAm Trucking*. He prepares us for what will be a shock to the conscience:

> It might be fair to ask whether TransAm's decision [to fire "the trucker"] 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 here is the turn to a supposedly textualist analysis of the case, which Judge Gorsuch's fans will cite as an example of his sober, "value-neutral" approach. But his values are apparent. And the analysis on its own terms is simply wrong – although it reaches his desired result of gutting a worker protection.

Let us join Judge Gorsuch for a moment in abandoning any notion of incorporating the "ephemeral and generic" statutory goals of truck driver and public health and safety into our interpretation of the statute. We shall, as he puts it, deal with the law as written, not the law we wish we had. We have only the text of the statute. And a dictionary. The Oxford English Dictionary (OED).

According to Judge Gorsuch, the STAA is unambiguous and not open to interpretation. While the term "operate" isn't defined in the statute, the term can be made unambiguous by looking at its dictionary definition.

So Judge Gorsuch turns to the OED and quotes a definition of "operate": to "cause or actuate the working of; to work (a machine, etc.)." This definition fits best with TransAm's contention that "refuse to operate" only means "refuse to drive." With this definition, Judge Gorsuch reaches the conclusion that

> the trucker…wasn't fired for refusing to operate his vehicle. Indeed, his employer gave him the very option the statute says it must: once he voiced safety concerns, TransAm expressly – and by everyone's admission – permitted him to sit and remain where he was and wait for help. The trucker was fired only after he declined the statutorily protected option (refused to operate) and chose to operate his vehicle in a manner he thought wise but his employer did not.

With this reference to the dictionary, whatever ambiguity there might be in the statute has been cleared up, and Judge Gorsuch is done. He has turned the STAA's safety provision into a very weak and narrow protection. While Congress sought to empower workers to protect their lives by

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sentence of his dissent, explaining that he would overturn the $5500 fine for the preventable death of a worker was, he writes: "Administrative agencies enjoy remarkable power in our legal order."

refusing unsafe vehicle operation, Judge Gorsuch's version of this protection will only have its intended effect where the safe thing to do is nothing – not drive at all. In Mr. Maddin's case, the safe thing to do was to drive without the trailer. Staying put was not a safe option given his worsening physical condition and uncertainty after many hours of waiting for a repairman with no sign of him in sight. For Judge Gorsuch, under these circumstances, the worker protection law simply failed to reach Mr. Maddin: his choice was either to die or lose his job. If his dissent had carried the day, the STAA would be rolled back. Workers would be less safe, and employers would have more power to direct their workforce to work in life-threatening conditions.

Now, Judge Gorsuch chose one definition of "operate" from the dictionary. It turns out that there are, in fact, multiple definitions of the word "operate" in the Oxford English Dictionary. There are also other English-language and American-English-language dictionaries. The majority found another definition in the OED and dropped it in a footnote: "to control the functioning of." According to the majority:

> This definition ["to control the functioning of"] clearly encompasses activities other than driving. For that reason, the dissent's conclusion that a truck driver is [refusing to operate] his truck when he refuses to drive it but not when he refuses to remain in control of it while awaiting its repair, is curious. The only logical explanation is that the dissent has concluded Congress use the word "operate" in the statute when it really meant "drive." We are more comfortable limiting our review to the language Congress actually used. As the dissenting judge stated during oral argument, "Our job isn't to legislate and add new words that aren't present in the statute."

In sum, while Judge Gorsuch would have us believe that he merely applied the dictionary definition of "operate" to reach his result, there are competing definitions of that word. Why this particular definition? Having dismissed health and safety goals as ephemeral and generic, having trivialized the plight of this worker, having revealed his biases in favor of the boss, one of those definitions allowed him to accomplish a key activist goal: the rollback of a worker protection statute.

From a textualist perspective, does Gorsuch's preferred definition even make sense in the rest of the statute? The word "operate" is used more than once in this STAA provision:

> (B) the employee refuses to operate a vehicle because -
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;[6]

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[6] 49 U.S.C. 31105(a)(1)(B).

If "operate" means only "drive" and "refuse to operate" means only "refuse to drive altogether" (rather than refuse to drive or otherwise operate in the manner directed by the employer) – what would (B)(i) mean?

Let's read Judge Gorsuch's preferred dictionary definition into the statute and see what happens in a real-world situation: An employer directs a truck driver to exceed the speed limit in order to make faster deliveries, putting himself and others in danger. Under Judge Gorsuch's narrow reading, the employee may be fired for driving the speed limit – since he is defying the employer's direction and is still driving, not refusing to drive altogether.

Moreover, it is not clear that the Judge Gorsuch version of the provision even protects the truck driver who refuses to drive altogether. After all, it's not driving itself that violates a regulation – but the particular manner of the driving – the particular operation of the vehicle that the employer is ordering, the speeding – that is the violation. Driving at all must be the violation, per Judge Gorsuch's reading. So Judge Gorsuch's assault on the STAA renders this section inapplicable to what must be one of the most dangerous illegal orders a trucking company might give a truck driver. Indeed, prior ARB cases have held that refusing to follow an employer's instructions regarding brake usage and maintaining speed constituted a protected refusal to operate under the STAA.[7]

And some operations of vehicles are not driving at all – but parking. If an employer instructed a truck driver to leave his truck stopped dangerously in the middle of a highway rather than moving it to the shoulder, Judge Gorsuch's interpretation would not allow the employee to move the truck to the shoulder and keep his job. The driver would be driving the vehicle from the stopped location, rather than refusing to drive it. Somehow, an unlawful and dangerous parking operation would not be covered by the STAA's worker protection, since it is not a driving operation. Again, the other dictionary meaning of operate – to control the functioning of, not simply to cause the working of – and the common sense understanding that one can refuse one manner of operating while continuing to engage in another manner of operating – would avoid the absurd result that Judge Gorsuch's reading produces.

Finally, none of the agency or court opinions focused on the definition of "vehicle" but a bit of authentic textualism here would also save Mr. Maddin's life. Let's stick with the language of the statute. The STAA defines a "commercial motor vehicle" as a "self-propelled or towed vehicle."[8] When Mr. Maddin unhitched the trailer with its broken brakes, he was refusing to operate that vehicle – the towed vehicle – out of an undisputed concern for his and other motorists' safety.

In sum, there are many ways to reach the result that protects Mr. Maddin's health and safety, even without looking beyond the text of the statute and with making sure the words of the statute are defined in a sensical way. Instead, Judge Gorsuch picked one dictionary definition that would leave

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[7] *Krahn v. UPS*, ARB No. 04-097 (ARB May 9, 2006).

[8] 49 U.S.C. 31101(1).

Mr. Maddin unprotected and render the entire worker protection hopelessly narrow and inapplicable to many real-world situations confronted by workers. It wasn't a purely textualist analysis. It wasn't value neutral. It was simply anti-worker.

Fortunately, Judge Gorsuch was a one-judge minority in this case. If he were confirmed to the Supreme Court, however, these types of strained readings obviously designed to gut worker protections become a matter of grave concern for working people.

WHY IT MATTERS

CWA members face health and safety risks on the job every day. At times, telecommunications workers have died from electrocution or suffered from asbestos or lead exposure. Health care workers confront infectious disease risks, including the danger that they might take these diseases home to their families. Workers in our manufacturing sector deal with exposures to toxic substances. What stands between them and preventable death or injury are two things: laws that we expect to be enforced, and a union to help them exercise their rights under those laws. On a very frequent basis, a worker will identify a hazard in the workplace, and the union will stand with those workers and stop work until the hazard is abated. We take these actions knowing the law – especially our right to refuse unsafe work – is on our side. Workers will not be fired. Lives are saved as a result. The vast majority of American workers, however, do not have a union backing them up, and, for them, robust enforcement of health and safety laws is all the more critical.

Judge Gorsuch's nomination represents a judicial-activist threat against the efficacy of those laws, let alone their robust enforcement. The *TransAm Trucking* dissent demonstrates a bias against workers and their efforts to win health and safety protections – but it is just the prime example of what we expect will be a broader assault by a Justice Gorsuch against worker protections. Consider Judge Gorsuch's antipathy for *Chevron* deference to agencies[9] and his apparent support for a reinvigorated non-delegation doctrine.[10]

Nearly every workers' rights law assigns enforcement, rulemaking, and initial adjudicatory powers to federal agencies. For example, the Administrative Review Board adjudicates whistleblower rights. The National Labor Relations Board adjudicates organizing and collective bargaining rights. The Occupational Safety and Health Review Commission and the Mine Safety and Health Review

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[9] *Chevron* deference is shorthand for the longstanding precedent that courts should defer to an agency's interpretation of a statute it administers when "the statute is silent or ambiguous" on the matter and the agency's interpretation constitutes a "permissible construction of the statute." *See Chevron USA v. Nat. Res. Defense Council*, 467 U.S. 837 (1984).
[10] *See United States v.* Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch dissenting). A reinvigorated non-delegation doctrine would restrict Congress's ability to delegate policymaking authority to agencies – such as by directing a Secretary to promulgate a rule to achieve some desired congressional result. This doctrine was used to assault aspects of the New Deal but has been largely rejected as impractical in the face of the increasingly complex world in which Congress must make policy. See,e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

Commission adjudicate health and safety matters. The Equal Employment Opportunity Commission adjudicates workplace discrimination matters.

Deference to these agencies' reasonable interpretations and application of the law to real-world situations is a problem for any activist judge who believes the government should not be in the business of protecting workers' rights from employer abuses. First, these bodies are part of agencies on a mission assigned by Congress – to effectuate a law that the activist judge believes should not exist. Second, because of their specialized nature, these agencies develop a strong expertise in the matter in question. The law becomes much more effective when the decisionmakers are highly familiar with how the practical world works in which that law operates. Deference to these agencies is an obstacle to anyone seeking to undermine the underlying worker protections with judicially-enacted partial repeals, thus Judge Gorsuch's hostility to *Chevron*. Better yet, if Congress can be prohibited from delegating detailed policy-making matters, even when it is essential to effectively carrying out the particulars of a piece of legislation, then the expertise at these agencies can be rendered useless, thus Judge Gorsuch's interest in the non-delegation doctrine.

We are concerned with not just how Judge Gorsuch attempted to dismantle the STAA worker protection in *TransAm Trucking*. We are concerned about how he will dismantle protections in other laws like the National Labor Relations Act, the OSH Act, the Mine Act, Title VII, and other anti-discrimination laws. The OSH Act, for example, does not contain an explicit "right to refuse work" provision in the statute. This right is the product of agency interpretation of the Act and the promulgation of regulations.[11] If Judge Gorsuch was capable of taking a sledge hammer to an explicit statutory right as he did to the STAA, we surely cannot rest assured that he will respect life-saving rights built up by agency precedents and regulation. After all, not only does he disfavor *Chevron* deference to agencies, he has raised the prospects of bringing back the long-dead non-delegation doctrine, which would forestall Congress from deputizing agencies to fill in the gaps of worker protection statutes. His jurisprudence is a danger to working people.

For the sake of workers who deserve to come home safe and sound, and for their families waiting on them to return, we respectfully urge the Committee and the Senate to reject this nomination.

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[11] *See* 29 C.F.R. 1977.12.

PREPARED STATEMENT OF JEFF LAMKEN

Thank you, Mr. Chairman and members of the Committee, for the opportunity to speak to you about Judge Gorsuch. I am an appellate practitioner and Founding Partner at MoloLamken. In 1992, I clerked for Justice Sandra Day O'Connor. Since then, I have argued 23 cases before the U.S. Supreme Court, many of those as an Assistant to the Solicitor General under Seth Waxman and later Ted Olson.

I have known Judge Gorsuch—Neil—as a colleague and friend for more than 20 years. I like to think I helped recruit him to the Kellogg Huber law firm after his Supreme Court clerkship and his time at Oxford. I think I ***may*** have edited the very first motion he wrote when he came to that firm.

From the outset, it was clear that he was not only a smart, thoughtful, and talented writer; he also had great judgment. In both the literal and figurative sense, he had gray hair from the start of his career.

I want to speak, however, about something other than Neil's incredible legal talent and acumen. I want to speak to you about his kindness, his compassion, his generosity of spirit as a person—and why those values are integral both to who he is, and to what we can expect from him, on the bench.

Since I first got to know Neil at the Kellogg Huber law firm many years ago, he has been one of my dearest friends.

We both have two daughters, his a bit older than mine. He has always been there for me—to listen, to advise, and to commiserate about the trials and travails of the often difficult project that is being a parent.

When my dad came to town from California, Neil took time from his schedule and his family to spend time with us.

I have vivid memories of standing in Neil's backyard in Colorado, after he became a judge, talking about what then seemed to me deeply difficult moments. As we spoke, we scooped horse manure, while his family's pet goat—Nibbles—made fierce attempts to ram the Judge. (I honestly never understood what he saw in that goat.)

His kindness resonated throughout his family (excluding the goat). His daughters were always so sweet to my children, even though my kids were considerably

younger. I remember his kids, and Neil, leading one of my kids by the hand through various life activities, whether trying to balance on skis or trying on hats in a department store.

If something happens to me and my wife, Neil is in line to inherit our children.

Some people say, if you want a friend in Washington, get a dog. Those people never got to know Neil Gorsuch, his wife Louise, or his family.

Simply put, Judge Gorsuch is a thoroughly decent and warm person.

So why does that matter as the Senate considers his nomination? As one of my former colleagues from the Office of the Solicitor General put it, if you have someone who is ***that good a person***, it means he listens. It means he truly hears. It means he can be persuaded.

That is, to my mind, one of the most essential attributes for a Supreme Court Justice in our system. The Supreme Court has an argument calendar, but the printed list of cases and counsel the Court prepares for each session is called the "***hearing*** list." It is the chance for people to be ***heard***. When the Chief Justice calls each case, he announces: "We'll ***hear*** argument in case number . . . ," after which he reads the case number and name. The key words there are "***hear*** argument"—not just ***have*** argument.

I know that everyone who appears before Judge Gorsuch will be ***heard***—***genuinely heard***—regardless of who they are, who they represent, their position, or the nature of the controversy. His kindness and humility make him place extraordinary value on listening—to counsel, to his colleagues, and to those with backgrounds different from his own, who may come at the matter from a different angle or wisdom born of different experiences.

I have heard a lot of speculation in the past days and months about how Judge Gorsuch would decide particular matters. I don't know how he might rule. I don't think he knows. These are often hard cases. That is why they get to the Supreme Court—not because the judges in the courts of appeals agree, but because they disagree.

But I do know Judge Gorsuch will struggle with those hard cases and difficult decisions. He will immerse himself in the law, in precedent, in the context, in the record, in the briefs and arguments. He will listen to the litigants, to his colleagues, to history and its lessons. And he will decide based on where those things lead him at the end of the case—based on the force of the better argument—not based on a preexisting intuition from the case's beginning.

That, I believe, is precisely what we should hope for from our judges and Justices. That is true whether you consider yourself a Democrat like me, or a Republican, or an Independent. If the Senate believes that as well, Judge Gorsuch should be confirmed.

STATEMENT OF LAWRENCE B. SOLUM
CARMACK WATERHOUSE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

Hearings on Nomination of the Honorable Neil M. Gorsuch
to be an Associate Justice of the Supreme Court of the United States

What is Originalism?

Thank you for the opportunity to testify today. This statement is about Judge Gorsuch's judicial philosophy. Judge Gorsuch is an originalist and a textualist, but what does that mean? The core of originalism is a very simply idea. In constitutional cases, the United States Supreme Court should consider itself bound by the original public meaning of the constitutional text. That simple idea can be broken down into its component parts.

Like Justice Scalia before him, Judge Gorsuch believes that the meaning of the constitutional text is its *public meaning*—the ordinary or plaint meaning the words had to the public at the time each provision of the constitution was framed and ratified.

The original public meaning of the text is the meaning that the words had then—and not necessarily the meaning that they have today. For example, Article Four of the Constitution refers to "domestic violence" but in the Eighteen Century that phrase did not refer to spousal abuse. It referred to riots and insurrections within a state. When we interpreted Article Four, we should understand the words as they were used at the time Constitution was written. What is called "linguistic drift" is not a valid method of constitutional amendment.

The Supreme Court today should consider itself bound by the text. The Court does not and should not have the power to amend the text on a case-by-case basis. It should

decide constitutional cases in a way that is consistent with the original public meaning of the text.

Originalist judges do not believe that they have the power to impose their own values on the nation by invoking the idea of a "living constitution." Instead, they believe that the proper mechanism for changing the Constitution is amendment through the process provided in Article Five—as has been done twenty-seven times in our nation's history.

Myths about Originalism

The basic idea of originalism is simple and intuitive. We have a written constitution that is the supreme law of the land. Why then would anyone oppose originalism? Some of the reasons for opposition to originalism are based on myths—misrepresentations of the actual practice of originalism by lawyers, judges, and scholars.

Myth Number One: Originalists Try to Channel James Madison

Originalism is about the constitutional text. No originalist thinks that we should decide contemporary constitutional bases by asking, "What would James Madison do?" What matters for originalists is what the constitutional text says. When Judge Gorsuch writes an opinion that applies the original public meaning of the constitutional text to a contemporary legal question, he does need to know anything about the mental states of the Framers.

Myth Number Two: Originalists Cannot Apply the Constitution to New Circumstances

There was no Internet when the First Amendment was written in 1791. Today, Americans can speak over the Internet. The application of the freedom of speech to a speech broadcast over the Internet is very simple. Speech is speech, whether it is in

person, amplified by speakers, or transmitted over the Internet. The Constitution was written in language that can be applied to new circumstances. There was no state of Nebraska when the Constitution was ratified, but there is no difficulty in applying the constitutional provision that grants each state two Senators to Nebraska.

Myth Number Three: Originalism Would Require that Brown v. Board be Overruled

In fact, there is very good historical evidence that segregation would have been struck down under the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. In fact, *Plessy v. Ferguson*, the decision that established the separate-but-equal doctrine was a living constitutionalist decision, one of many that nullified a now almost forgotten guarantee of equal basic rights.

Myth Number Four: Originalism is Inconsistent with Precedent

In fact, the opposite is the case. The original meaning of the judicial power in Article III is entirely consistent with the ancient doctrine of *stare decisis*. Judge Gorsuch has consistently displayed a respect for precedent in his judicial career—as did Justice Scalia. It is true that an originalist Supreme Court would gradually move the law away from precedents that are inconsistent with the constitutional text, but great movements of this kind are gradual—and they give the democratic process an opportunity to react.

Originalism is in the Mainstream of American Jurisprudence

Is originalism somehow outside the mainstream of American jurisprudence? The answer to that question is an emphatic "no." The idea that judges are bound by the constitutional text is very much in the mainstream of American legal thought.

Testimony of Lawrence B. Solum

For most of American history, originalism has been the predominate view of constitutional interpretation. There have been episodes in our history, where fidelity to the constitutional text was neglected. One such episode occurred during the Reconstruction period when living constitutionalists of that era undermined important provisions of the Fourteenth Amendment. Another departure from the mainstream occurred during the Warren Court, when the Supreme Court frequently sometimes issued opinions that decided constitutional questions without any reference to the constitutional text. But for most of our nation's history, the Supreme Court has made a good faith effort to follow the constitutional text.

Originalism is in the mainstream for another reason. Originalism can and should be endorsed by both Democrats and Republicans and by progressives and conservatives. This point is especially important to me personally. I am not a conservative or libertarian, but I do believe in originalism. Why is that? It is because I am convinced that giving judges the power to override the Constitution and impose their own vision of constitutional law is dangerous for everyone. If you are a Democrat, you should ask yourself the question. Given that the next Justice will be appointed by a Republican President and confirmed by a Republican Senate, would I prefer an originalist like Judge Gorsuch or would I prefer a conservative Justice who does not believe that she or he is bound by the constitutional text? The alternative is a Justice who believes that she or he is free to override the constitutional text in the name of her or his own beliefs about what the Constitution should be given changing circumstances and values?

There is a final reason that originalism is in the mainstream. The Supreme Court has never claimed that it has the power to override the original meaning of the constitutional text. There are cases where the Supreme Court has departed from the text, but in those cases, the Court either attempts to disguise the true nature of its decision with an implausible reading of the text, or it simply ignores the text altogether—usually by citing precedent. Indeed, if Judge Gorsuch had come before this Committee and testified the he believed that as a Supreme Court Justice, he would have the power to override the original meaning of the constitutional text, I think it is clear that he would not be confirmed.

The Case for Originalism

Originalism is the simple and highly intuitive idea that the Justices of the Supreme Court are bound by the constitutional text. The Justices, like all federal judges and the members of this Senate take an oath to perform their duties under the Constitution of the United States. There are good reasons for the obligation of constitutional fidelity represented by the oath.

First and foremost is the rule of law. John Adams is famous for insisting on the "rule of law and not of men."[1] The commitment to the original meaning of the constitutional text is the best way to ensure that the awesome power entrusted to our Supreme Court—the power to have the ultimate say in constitutional cases and declare that statutes passed by Congress are unconstitutional—is the rule of constitutional law and not the rule of the men and women appointed to the Court. What is the alternative? Living

[1] *See* John Adams, Novanglus Papers, Boston Gazette, no. 7 (1774).

constitutionalists believe that the Supreme Court has the power to amend the constitution by judicial fiat. If the constitutional text does not limit that power, what does? You might say that it is precedent, but the Supreme Court has the power to overrule its prior decisions. I have the great privilege of authoring the volume of Moore's Federal Practice that deals with the doctrine of stare decisis. In that capacity, I have read hundreds and hundreds of cases dealing with the role of precedent in the federal courts. My conclusion, and I think thank fair-minded scholar would agree, is that the Supreme Court has an inconsistent approach to precedent. When a majority of the Court believe that a prior decision is wrong, they have the power to overrule it, and that doctrine of precedent does not prevent them from so doing. Indeed, in recent years, critics of the Court have observed a pattern of what they call "stealth overruling." Even when the Court pretends to adhere to precedent, it can nullify a prior decision by distinguishing it in a way that leaves it without any true precedential force.

If the Justices of the Supreme Court are neither constrained by the constitutional text nor by precedent, then how is the rule of law to be achieved. My day job is as a law professor. In that capacity, I study the constitutional theories that are propounded by my colleagues. One of the most distinguished living constitutionalists is Professor David Strauss of the University of Chicago. Professor Strauss is the leading proponent of what is called "common law constitutionalism"—the view that constitutional law should be made by judges. What I want to call to your attention now is his remarkable candor. Professor Strauss is willing to say things that no one who aspires to judicial office would say in public. One of the advantages of being a professor and not a judge is that one can be

candid. Some constitutional amendments are passed to overrule Supreme Court decisions. The two most famous examples are the Eleventh Amendment which limit the ability of citizens to sue states and the Sixteenth Amendment that overruled the Supreme Court's decision invalidating the federal income tax. Professor Strauss believes even those amendments could be overruled by the Supreme Court through a common-law process—although he believes the Court should wait a few years before taking such a radical step.[2] It is no accident that Professor Strauss wrong a book entitled, *The Living Constitution.*[3]

The truth is that if the constitutional text does not bind the Supreme Court, then the Justices are the equivalent of a superlegislature or a perpetual constitutional convention. A committee of nine unelected judges has the power to reshape our Constitution as they see fit.

There is a second reason to prefer originalism over living constitutionalism. That reason is rooted in the idea of democratic legitimacy. Each and every provision of the United States Constitution has been ratified by a supermajoritarian process. The original constitution was ratified by the representatives of "We the People" in convention assembled. Amendments must be proposed by two-thirds of the Senate and the House and ratified by three-fifths of the state legislatures. This supermajoritarian process confers democratic legitimacy on the provisions of the Constitution. It is important to

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[2] David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 57 (2015) (implicitly rejecting the Constraint Principle by stating that "original understandings are binding for a time but then lose their force").

[3] David A. Strauss, The Living Constitution (2010).

acknowledge that this process has not been perfect. In the late eighteenth century, women, slaves and others did not have the vote. But the democratic legitimacy of the constitution must be compared to some alternative. The Supreme Court consists of nine women and men. They are not elected. They are appointed for life terms. In theory, they can be impeached by the House and tried by the Senate, but it is difficult to imagine that any Supreme Court Justice would be removed in this way on the basis that their living constitutionalist jurisprudence was out of step with popular opinion.

If we must choose between originalism and constitutional text that has been ratified by the representative of "We the People" and a living constitutionalist constitution that is ratified by majority vote of a committee of nine, there is no doubt in my mind about which constitution is the more democratic.

Objections to Originalism

My final topic concerns objections to originalism. Let me begin by noting that many of the objections are based on the myths about originalism that I have tried to dispel. Consider some of the remaining objections.

The Dead Hand

It is argued that originalism involves the rule of a "dead hand." Of course, it is true that most of the provisions of the constitution were framed and ratified long ago. We have an old constitution that has survived the test of time. But is this a reason to reject its authority? Did the members of this august body make a mistake when they swore an oath to support and defend the Constitution? Some of my colleagues in the academy do

believe that the Constitution is outmoded and outdated, but I believe they are wrong for two fundamental reasons.

First, the Constitution is not a code. The Constitution established a basic structure of government—this Senate, the House of Representatives, the President, and the judicial branch. It established procedures for legislation and appointment of judges and executive officials. There are challenges, but the fundamental structure of government has worked well for generations. The Constitution also enshrines fundamental liberties like the Freedom of Speech and the Due Process of Law. Originalists are committed to the proposition that the meaning of these liberties does not change, but that does not mean that their applications must remain frozen in time. The whole point of originalism is to respect the text, and nothing could be less respectful than to refused to apply the text to new circumstances.

Second, the Constitution can be amended. And it has been. Twenty-seven times. Our Constitution is properly changed through the amendment process when the American people form a consensus that change is necessary and desirable. The Constitution of 1789 was improved by the passage of the Bill of Rights. The great evil of slavery was cured by the Thirteenth Amendment. The Fourteenth Amendment provided a great charter of liberty and equality, not just for the former slaves, but for all Americans. The right to vote was extended to women by the Nineteenth Amendment and to all citizens over the age of eighteen by the Twenty-Sixth Amendment. Constitutional amendment is not easy; it requires a consensus of most Americans. But it is not impossible.

In this regard, it is important to remember that living constitutionalism undermines the lawful process of constitutional amendment. These days if a social movement is seeking constitutional change, they have two alternatives. They can marshal their forces for a constitutional amendment; this is a hard road. Or they can attempt to eke out five votes from the Supreme Court, the easy path. It is hardly surprising, that many choose the easy path over the hard road. But in this case, the hard road is also the high road. Constitutional change through the amendment process enable "We the People" to overcome the dead hand of the past through the rule of law.

Law Office History

Another objection to originalism is based on the idea that the Supreme Court is simply not capable of discovering the original public meaning of the constitutional text. And even if they were capable of that task in theory, they will fail in practice because their ideological preferences overcome the search for historical truth.

The first aspect of this objection is simply false. The constitutional text is old, but it is not the Rosetta Stone. Lawyers, judges, and scholars can work together to unearth the evidence of original meaning in the hard cases. And there are many easy cases, in which the original meaning is clear to any fair-minded reader who consults the historical record.

The second aspect of the objection goes to the virtue and integrity of the Justices. It is true that neither originalism nor any other constitutional theory can work if the Justices are corrupted by ideology. For originalism to work in practice, the President most nominate and the Senate must confirm Justices with the virtue of judicial integrity. They must be willing to subordinate their own political and ideological preferences to the law.

They must set aside their preconceptions and desires and engage in a search for truth—with a willingness to reach outcomes as judges that would necessarily agree if they were lawmakers.

In this regard, I take comfort from what I have read about Judge Gorsuch's reputation for integrity. The job of this committee should be to examine the record carefully. If you believe that Judge Gorsuch has the virtue of judicial integrity and that he is committed to the principle that the Supreme Court is bound by the Constitution, then I believe that your duty is to vote for the nomination.

Taking Sides

Recent discussions of the nomination of Judge Gorsuch suggest another objection to originalism. If Judge Gorsuch is committee to the law—to the original public meaning of the constitutional text and the plain meaning of federal statutes—then he may rule against persons and groups about whom we care very much. One version of this objection is based on the idea that judges should favor the little guy (or gal), the common man (or woman) against big corporations or big government. The core idea is that judges should "take sides" and favor some groups over others.

I understand this objection. I have great sympathy for the plight of Americans who struggle against poverty, bias, discrimination, and oppression. I favor legislation that attacks injustice and prejudice. But I cannot endorse the idea that the Supreme Court should take sides, if by that, you mean that the Court should override the constitutional text in order to favor one group over another. Taking sides is a "two-sided coin"—if you will excuse the pun. There is no guarantee that a Supreme Court armed with the

awesome power of overriding the constitutional text will take "the right side." More fundamentally, taking sides is dangerous, because it threatens the rule of law in a fundamental way.

If there is any lesson from the history of the judicial nomination and confirmation process over the past few decades, it is that there is a grave risk of the politicization of the judicial selection process. This Committee knows far better than I do that neither side of the aisle is blameless in this process. There has been a downward spiral of politicization, a process of escalating tit for tat that threatens the integrity and fundamental fairness of the great constitutional duty of the Senate to give advice and consent.

I cannot say what might stop the politicization of the court, but I do know this. The idea that we should select Supreme Court Justices because of what side they will take can only make the problem worse. Once we start selecting Supreme Court Justice explicitly based on ideology, it will become progressively more difficult to select women and men of integrity who respect the rule of law.

And this leads me back to originalism. The whole idea of the originalist project is to take politics and ideology out of law. Democrats and Republicans, progressives and conservatives, liberals and libertarians—we should all agree that Supreme Court Justices should be selected for their dedication to the rule of law. For this reason, I support the confirmation of Judge Gorsuch for the office of Associate Justice of the United States Supreme Court.

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University

"The Nomination of Judge Neil M. Gorsuch to be Associate Justice of the Supreme Court of the United States"

Committee on the Judiciary
United States Senate

March 21, 2017

I. INTRODUCTION

Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee, my name is Jonathan Turley and I am a law professor at The George Washington University Law School, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. In addition to teaching a course on the Constitution and the Supreme Court, I have long written about the Court as an academic and legal commentator. It is an honor to appear before you today to discuss the nomination of the Honorable Judge Neil M. Gorsuch for the United States Supreme Court. I do not agree with all of Judge Gorsuch's legal views, but I believe him to be an exceptional choice for the Supreme Court and someone who will bring intellectual depth and vigor to our highest court. Indeed, while many have focused on replacing a conservative on the Court with another conservative, the primary concern should be to replace an intellectual with an intellectual. Gorsuch is precisely that type of nominee who has the intellectual reach and vigor to sit in the chair of the late Antonin Scalia, an iconic figure in the history of the Court. He is worthy of this honor and has the makings of an outstanding justice.

Justice Scalia represented something of a rarity on the Court as someone who changed the Court more than it changed him.[1] The reason is that he came to the Court with a well-defined and coherent jurisprudence.

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[1] Jonathan Turley, *Scalia's Greatest Strength, His Steadfastness*, Wash. Post, Feb. 14, 2016.

Judge Gorsuch has the same jurisprudential foundations for the Court. He also displays the same intellectual honesty and independence. He is clearly conservative in his views and interpretative approach. Yet, presidents have historically been afforded discretion in the appointment of those with shared jurisprudential views. Among conservative candidates for the Court, Judge Gorsuch is the gold standard. Indeed, I have long been critical of the preference shown nominees who lack any substantive writings or opinions on the major legal issues of our time. This has led to what I have referred to as the era of "blind date nominees"—candidates with essentially empty portfolios when it comes to any provocative or even interesting thoughts. While such candidates present fewer potential targets for critics, they also offer theleast information on the intellectual abilitiesor inclinations of a nominee. Such individuals make for good nominees, but not great justices.

Judge Gorsuch is a refreshing departure from that trend. He has a record of well-considered writings both as a judge and as an author. This is no blind date. We have a very good idea of who Judge Gorsuch is and the type of justice he will be. He is a thoughtful conservative jurist who is guided by first principles of constitutional and interpretive analysis. That is not to say that he is predictable on future votes. He has not written directly on many issues that concern people about the Court. More importantly, he has not shown a rigidity of thought or judicial temperament. He appears driven by his view of core, structuring principles—much like the jurist he will replace. That may take him in directions that are unexpected to the left or to the right. However, if his prior writings are any guide, it will be a direction that he believes is dictated by legal principle and not personal predilection.

The Committee has assembled an impressive array of witnesses to discuss Judge Gorsuch's background and jurisprudence. I will focus my remarks on two specific areas. First, there has been a long debate over the proper standard or criteria for evaluating a nominee for the Supreme Court. Exploring many of these past criteria reveal an exceptionally strong nominee in Neil Gorsuch. Second, while many of Judge Gorsuch's views are likely to overlap with those of Justice Scalia, the one area of likely divergence would be his approach to agency decisionmaking and the *Chevron* doctrine. I will address cases that are illustrative of Judge Gorsuch's views on agency review, statutory interpretation, and more generally the Separation of Powers: *Hwang v. Kansas State University, Elwell v. Oklahoma, ex rel. Board of Regents of the University of Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012), *De Niz Robles v. Lynch*, *Gutierrez-Brizuela v. Lynch*, *United States v. Nichols,* and *TransAm Trucking, Inc. v. Administrative Review*

Board. These cases reveal a powerful intellect and voice committed to core principles of constitutional law. Judge Gorsuch's would bring valuable and needed contributions to both of these areas. We stand at a critical crossroad for the country with fundamental changes occurring in our constitutional system. There could not be a better time for the addition of a justice who has a deep understanding and fealty to the original design of our government. I believe that Judge Gorsuch is such a nominee.

II. THE ELUSIVE SEARCH FOR THE GREAT JUSTICE

There is no small degree of irony that the Supreme Court is a well-defined institution composed of members with entirely undefined qualifications. There are no mandatory standards for presidents in nominating justices or senators in confirming such nominees. Article II, Section 2, paragraph 2 of the United States Constitution simply states: "[The President] shall have Power . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court . . ." Thus, the Constitution is silent on the basis for such votes, leaving the decision (and its basis) to the conscience of each and every senator. Of course, this is no license for senators to engage in partisan or petty opposition. Senators are expected to act consistently with the text and spirit of the Constitution. This includes the recognition that the Framers afforded presidents the ability to shape the Court as the nationally elected leader of the country as a whole. That means that presidents will ideally select jurists with compatible jurisprudential views as well as exceptional qualifications. In the past, even senators from opposing parties have accepted that presidents have this inherent right and that it is not appropriate to vote on nominees solely on the basis of a litmus test on their expected votes.

Every president and senator has expressed a commitment to placing the best and the brightest on the Court, though few seem to agree on the qualitative measures for such nominees. Historically, the record is not encouraging. While the Supreme Court is rightfully held in great esteem by most citizens, the actual members of the Court have ranged from towering figures to virtual non-entities.[2] Any objective review would put the median closer to the weaker end of that spectrum. To put it bluntly, we have had far

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[2] Jonathan Turley, *The Nine Greatest Supreme Court Justices*, American History Magazine, July 29, 2007 http://www.historynet.com/the-9-greatest-supreme-court-justices.htm

more "misses" than "hits" among appointees to the Court. One reason is the political pressure surrounding the selection of nominees. The criteria that make for great justices often take a backseat to those that make for easy nominations. Top candidates are often rejected due to writings or views that might attract opposition. The most influential legal minds are rarely considered and seldom nominated. Examples of such brilliant figures on different ends of political spectrum include Guido Calabresi on the Second Circuit and Richard Posner on the Seventh Circuit. It is the expected confirmation fights of the nomination, not the expected contributions of the nominee, that too often drives decisions over vacancies. The result is a preference for nominees with "clean" records that have no public thoughts challenging conventional theories or raising provocative ideas. In other words, full resumes but empty portfolios. I have long been critical of nominees who spent decades as lawyers without engaging in substantial discussions or publications on the foundations or the meaning of the law. That is not the case with this nominee. Neil Gorsuch is widely respected for his writings on legal theory and history. He has actively participated in debating fundamental questions of the structure of government, morality in the law, and interpretive theory. This is, in other words, a full portfolio of work at the very highest level of analysis.

There are common criteria that are oft-repeated in the evaluation of nominees. Obviously first and foremost is that a nominee must be free from disqualifying conflicts or questions of good-standing in the profession. History is replete with nominees who failed due to financial or ethical concerns. One of the most surprising failures occurred in the nomination of then Associate Justice Abe Fortas to be Chief Justice. Fortas was in almost every respect an ideal candidate for the Court with broad experience, a keen intellect, and a key role in the historic case of *Gideon v. Wainwright*. His nomination for Chief Justice, however, revealed ethical concerns over speaking fees. After the Administration failed to secure enough votes for cloture to overcome a filibuster, the nomination failed. Later, Fortas' contract with Wall Street financier Louis Wolfson in 1966 for unspecified legal advice led to serious ethical questions and Fortas resigned from the Court.[3]

A nominee's temperament has also been cited as a concern in past nominations. While this criteria was denounced as inviting bias during the

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[3] Bob Woodward, *Fortas Tie To Wolfson Detailed*, Wash. Post, Jan. 23, 1977.

confirmation hearings for Sonia Sotomayor,[4] there is a legitimate question over the ability to work within such a small court. Clearly, such evaluations should be made with considerable caution. There can be sexist or prejudicial influences in the view of a nominee's temperament. Notably, Justice Sotomayor has disproven such critics and proved to be both collegial and effective on the Court. Moreover, temperament should not be an excuse to oppose a nominee who does not fit some litmus test. In the end, I will take a cantankerous genius over a gentile dolt. The area that I believe is worth considerable weight is the treatment of lawyers and parties by a judge. If a nominee has displayed contempt or arrogance before joining this Court, it is only likely to be magnified on the Court. That can be a corrosive and disruptive element on any court but can be a particularly harmful element for the Supreme Court. If a nominee has a pronounced history of abusing lawyers or litigants, the elevation to a higher court will only exacerbate that personal and professional weakness.

Another past criteria is the rejection of nominees viewed as cronies of a president with more political than legal inclinations.[5] While some strong nominees like Chief Justice Errol Warren and Hugo Black did come from political backgrounds, they were viewed as highly competent choices selected for their legal insights rather than their political loyalties. That was not the case with the nomination of Harriet Miers in 2005, who was opposed by both Republicans and Democrats after being nominated by President George W. Bush.[6] Close associates dismissed this allegation but many senators were clearly not convinced. Without casting judgment on Miers in particular, the Supreme Court is no place for lawyers who view their seat as a placeholder for a president or party.

Another accepted criteria is experience. However, such experience is not limited to either judicial posts or courtroom litigation. When I was asked to select the top justices at the turn of this century, I was struck by the diversity in background of those justices who stood out for their contributions to the law and the Court.[7] The practice of law extends across a

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[4] Jo Becker & Adam Liptak, *Sotomayor's Blunt Style Raises Issue of Temperament*, N.Y. Times, May 28, 2009.

[5] Jonathan Turley, *What Qualifies One For The Supreme Court,* USA Today, Oct. 5, 2005.

[6] Geoffrey Stone, *Cronyism and the Court*, Chi. Trib., Oct. 4, 2005.

[7] Jonathan Turley, *The Nine Greatest Supreme Court Justices*, American History Magazine, July 29, 2007 http://www.historynet.com/the-9-greatest-supreme-court-justices.htm The top justices in my view were John Marshall, Charles Evan Hughes, Earl

wide array of litigators, academics, in-house counsel, agency lawyers, and general practitioners. What stood out among these justices was the ability to see and articulate legal horizons barely perceptible to their contemporaries. They were able to lay deep conceptual and historical foundations for their decisions that have withstood the test of time.

The criteria that should be preeminent in the selection of a justice is intellect. By the time a nominee comes before the Senate, he or she should have a history of demonstrated intellectual ability and insight. This goes beyond simply "being smart," as evidenced by law school placements or promotions. To be one of nine, a nominee should be an intellectual leader who has shown both a depth and scope of knowledge of the law and its history. Quite frankly, few nominees have been particularly distinguished on this basis. The low moment for this criteria came with Nixon's nomination in 1970 of Judge G. Harrold Carswell, who was criticized as a "dull" nominee without distinction. Carswell was legitimately opposed for his lack of scholarly articles or significant decisions. Sen. Roman Hruska famously rose to his defense with the declaration that "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?"[8] The answer is, of course, "no." The highest court is a place for those who have earned the honor of confirmation through a lifetime of demonstrated and exceptional intellectual achievement. Yet, nominations often focus on resume splash rather than substantive evaluations of a nominee's scholarly or analytical talents. When such records are reviewed, it is often with a superficial and political perspective. As discussed above, insightful or inquisitive work can be viewed as a liability in a nominee. There is even a fairly new minted verb and adjective named after one notorious failed nomination: "Bork." Candidates who have challenged core theories or doctrines risked being "borked" as "outside of the mainstream" of legal thought. That characterization has too often been used to refer to nominees who are viewed as simply too liberal or too conservative despite large numbers of lawyers and citizens holding similar views. Moreover, some of our greatest justices like Louis Brandeis challenged mainstream or conventional thinking and wrote their best work in dissent.

On the basis of all of these criteria, Judge Gorsuch is a stellar nominee. I admit that I have a particularly high standard for the Court and I

Warren, Louis Brandeis, Oliver Wendell Holmes, William Brennan, John Marshall Harlan, Hugo Black, and (the top justice in my view) Joseph Story.

[8] William H. Honan, *Roman L. Hruska Dies At Age 94*, N.Y.Times, April 27, 1999.

would not have recommended the majority of current members of the the Court based on their pre-confirmation records. However, I would have easily signed off on Neil Gorsuch. His record appears free of disqualifying conflicts or ethical concerns. His demeanor and professionalism has been heralded by fellow judges and lawyers alike. His experience includes private litigation as well as brief government service. Most importantly, he is an intellectual leader who has written profoundly on questions of law and policy. One can disagree with those views, but not the honest and articulate manner in which they have been presented. I realize that many do not welcome a conservative nominee any more than they welcomed a conservative president. However, President Trump has every right to nominate someone who shares his jurisprudential values. To oppose Judge Gorsuch in the absence of some major disqualifying revelation would be to effectively declare that no conservative could pass muster with the Senate. That would reduce our nomination process to a raw political exercise. Nothing can stop a senator from voting against Judge Gorsuch, but it will have to be based on criteria detached from the qualifications and achievements of this nominee. To put it simply, Neil Gorsuch is as good as it gets.

III. THE JURISPRUDENCE OF JUDGE NEIL GORSUCH

Modern confirmation hearings often produce greater heat than light on the backgrounds of nominees. This nomination is no exception. Past opinions by Judge Neil Gorsuch has been cycled through so many partisan spins that their public discussion barely resembles the underlying cases. It is time to return to the original sources if this Committee is seeking to shed light on the views of his nominee. The jurisprudence of Judge Neil Gorsuch reflects a jurist who crafts his decisions closely to the text of a statute. That is no vice in the view of many of us. It reaffirms the power of Congress in defining legal rights, privileges, and obligations in our country. Judge Gorsuch clearly recoils at the suggested task of courts to expand on language or enforce agency interpretations that effectively rewrite such language. In *Elwell v. Oklahoma, ex rel. Board of Regents of the University of Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012), for example, Judge Gorsuch maintained "whatever *Chevron* deference we owe to an agency's interpretations and regulations when a statute is ambiguous, we are never permitted to disregard clear statutory directions in favor of administrative rules." While the case has been cited as evidence of a hostility to workers,

Judge Gorsuch not only wrote for the Court, but his reasoning followed the conclusions of Third, Sixth, and Ninth Circuits.

This approach is also evident in *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) where Judge Gorsuch wrote an opinion affirming the dismissal of a complaint filed by a teacher who had taken a six-month leave to deal with a cancerous condition. After the expiration, she sought additional leave time even though the federal law specifies only a six-month period as required for employers. Again, Judge Gorsuch wrote for the Court and followed existing case law. Judge Gorsuch and his colleagues declined to follow not the language of the statute but a guideline produced by the EEOC. He relied on Supreme Court precedent that clearly does not make such an agency guideline binding on the court. Moreover, the court noted that the guideline is not clearly supportive of the claim and contains countervailing language, even if applied. He noted that Congress did not impose an open-ended obligation on employers who, after affording the required leave, may decide when or whether to extend additional time to an employee. He stated correctly that the Rehabilitation Act "seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disable persons to work—not to turn employers into safety net providers for those who cannot work."[9] That has been taken as a harsh statement but it is a legal statement. Courts should not read into laws additional periods of required benefits that Congress did not approve. The extension of such obligatory benefits is a matter left to Congress. The extension of voluntary benefits is a matter left to employers. Judge Gorsuch does not strike me a cold person but he is a judge who seems to take to heart the words of Edmund Burke who described the "cold neutrality of an impartial judge." We do not want justices who rule by outcome or by passion. We want them to rule by law created by others.

Many of Judge Gorsuch's views appear to mirror those of the man he would replace on the Court, Justice Scalia. However, one major exception would likely be his approach to agency review. Scalia strongly supported the ruling in Chevron USA v. Natural Resources Defense Council. *Chevron* ironically was a victory for Judge Gorsuch's mother, who served as the Environmental Protection Agency Administrator under Ronald Reagan. The resulting *Chevron* doctrine has shaped administrative law and ultimately the federal system as a whole. Judge Gorsuch has warned how federal agencies "concentrate federal power in a way that seems more than a little

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[9] *Hwang v. Kansas State University*, 753 F.3d 1159, 1162 (10th Cir. 2014).

difficult to square with the Constitution of the framers' design."[10] In a line that could now become prophetic, Gorsuch declared that courts had to deal with "the behemoth" that is *Chevron*. His discussion of *Chevron* and its implications for our constitutional system is profound and honest:

> "There's 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. Maybe the time has come to face the behemoth."[11]

I share Judge Gorsuch's concerns over the basis and impact of the *Chevron* Doctrine, even though we come from sharply different political perspectives. Gorsuch could force a reexamination of the doctrine in a move that, in my view, is long overdue. I also believe that the opinions of Judge Gorsuch in some prior case have been unfairly characterized. These opinions do not reveal bias but Judge Gorsuch's deep-seated views on the role of agency interpretations and the limits of *Chevron* deference.

A. *Chevron* and The Rise Of The Fourth Branch

I have previously written[12] and testified[13] about the rise of the Fourth

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[10] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[11] *Id.*

[12] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013) (discussing the separation of powers consequences in the reduction of legislative authority).

[13] *See* United States House of Representatives, House Committee on Science, Space, and Technology, "*Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*," September 14, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States House of Representatives, House Judiciary Committee,

Branch and the growing imbalance in our governmental system. The American governmental system obviously has changed dramatically since the founding when the vast majority of governmental decisions rested with state governments. The growth in the size of the federal government resulted in a shift in the center of gravity for our system as a whole. Massive federal agencies now promulgate regulations, adjudicate disputes, and apply rules in a system that often has relatively little transparency or accountability to the public. All but a tiny fraction of these actions are (or can be) reviewed by Congress, which has relatively few staff members and little time for such reviews. As a result, it is the Administrative State, not Congress, which now functions as the dominant "law giver" in our system. The vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unseen bureaucrats. A

Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking,*" April 20, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," March 15, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf; *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of confirmation hearings to address separation of powers issues).

citizen is ten times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. As I have stated previously, this system is adopting new pathways and power centers that were never anticipated in the design of our system. This raises core challenges for our tripartite system that have gone without any significant national debate.

The carefully balanced powers of the three branches allowed inverse pressures to check abuses of power. The separation of powers doctrine was first and foremost a protection of individual rights from the concentration of power in any single branch or single person. Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison's view, "the interior structure of the government"[14] distributed the pressures and destabilizing elements of nature in the form of factions[15] and unjust concentration of power.[16] He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" and for the republican government to function in a stable and optimal fashion.[17]

The danger of the addition of the equivalent of a Fourth Branch is obvious. Social and political divisions were never meant to be resolved through an array of federal agencies, which are insulated from the type of public participation and pressures that apply to the legislative branch. We are gravitating to the de facto creation of an English ministry system in this country. Academics often treat the rise (and dominance) of the Administrative State as an inevitability and, accordingly, view those of us who cling to the Madisonian model as hopelessly naïve and nostalgic. However, until the American people decide to adopt a bureaucracy or technocracy as the principle form of government, we need to address this shift and, to do that, it must first deal with *Chevron*.

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[14] THE FEDERALIST NO. 51, at 320 (James Madison).

[15] *See* THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man.").

[16] *See* THE FEDERALIST NO. 51, *supra* note 14, at 320 (James Madison); *see also* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

[17] THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

B. *Chevron* and the Expansion of the Administrative State

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[18] addressed the question of how the Environmental Protection Agency (EPA) could treat "non-attainment" states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. The Natural Resources Defense Council challenged the EPA regulation and prevailed in court. With three justices not participating in the decision, the court voted 6-0 to reverse and order deference to the EPA's interpretation.[19]

The *Chevron* decision proved to be something of a Trojan horse doctrine that arrived in a benign form but soon took on a more aggressive, if not menacing, character for those concerned about the separation of powers. The doctrine on its face is unremarkable and even commendable for a Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy. As noted by Chief Justice John Roberts, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[20] *Chevron* put forward a simple test for courts in first looking at whether the underlying statute clearly answers the question and, if not, whether the agency's decision is "permissible" or reasonable.[21] That highly permissive standard shifted the center of gravity of statutory interpretation from the courts to the agencies, contrary to the language of the APA. With sweeping deferential language, the Court practically insulated agencies from meaningful review. In a system based on checks and balances, the Court helped create an internal system that would flourish under a protective layer of agency deference. To be sure, the Court has repeatedly recognized the right of Congress to check federal agencies. However, in practice, *Chevron* has proven a windfall for agencies in advancing their priorities and policies in the execution of federal laws. It is the administrative equivalent of *Marbury v. Madison*. Rather than declaring courts as the final arbiter of what the law means in *Marbury*, *Chevron* practically resulted in the same thing for agencies by giving them the effective final word over most administrative matters. Even though Congress can override agency

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18 *Chevron*, 467 U.S. 837 (1984).

19 Chief Justice Rehnquist, Justice Thurgood Marshall, and Justice Sandra Day O'Connor recused themselves from the case.

20 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

21 *Chevron,* 467 U.S. at 842-43.

decisions, it is unrealistic to expect millions of insular corrections to be ordered over agencies decisions.

In *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch asked a question that I also previously raised in congressional testimony:[22] "What would happen in a world without *Chevron*?"[23] Judge Gorsuch answered his own question: "If the goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce."[24] The point is that, before *Chevron*, there was not a period of utter confusion and judicial tyranny in the review of agency decisions. Courts simply applied traditional interpretive approaches that looked at whether there was an ambiguity or gap in a statute as opposed to clarity on a given question. If so, it then reviewed the agency decision to determine whether it was legal and proper. This analysis was later developed further by the decision in *Skidmore v. Swift & Co.*, where the Court articulated factors to use to decide whether to overturn the particular agency's determinations.[25] Notably, without granting sweeping deference, the Court in *Skidmore* already recognized that agency determinations would carry weight, just not controlling weight:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. Justice Jackson referred to a historical treatment of agency interpretations with due "respect" and "considerable weight." *Id.* at 140.

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22 *See generally* United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," March 15, 2016.

23 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

24 *Id.*

25 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Thus, the courts did not have a hostile or counter-agency position in such cases, but a fairly accommodating standard. Courts in the United States also have a well-understood and respected tradition of avoiding political questions and limiting judicial discretion. *Chevron* could have resulted in the very same way under this prior case law, but the Court instead created a new deferential standard that proceeded to expand as soon as the Court gave it breath.

While Justice Scalia once criticized as a "fiction" the view in *Chevron* that Congress knowingly passes vague or gap-filled laws with the intention that agencies should answer the lingering questions,[26] he continued to uphold *Chevron* deference over the course of his tenure on the Court. That "fiction" has become embedded in legisprudence and law students are often taught that agency interpretations are a part of the statutory process—as if Congress frames issues while agencies work out specific resolutions.[27] While Congress clearly at times leaves gaps due to poor legislative crafting or political impasses in statutes, it can hardly be said that those gaps are knowing invitations for agency lawmaking.

While Scalia called *Skidmore* "an anachronism"[28] the Court would rediscover the value of more serious judicial review in some cases. For example, in *Christensen v. Harris County*,[29] the Court suggested that the prior standard in *Skidmore* would apply to less formal agency decisions as opposed to those agency documents that carry "force of law." Justice Clarence Thomas drew a distinction of when an agency interprets a statute in a decision that has "the force of law" from more rudimentary decision. As noted by Harvard Professor (and my former professor at Northwestern) Thomas Merrill,[30] Thomas' proposal tracked a recommendation by the Administrative Conference of the United States.[31] Thomas described the former category including "formal adjudication or notice-and-comment

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[26] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[27] Notably, Scalia would later be highly critical of the Skidmore standard in favor of the *Chevron* deference standard in cases like *Mead*. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

[28] *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

[29] *Christensen*, 529 U.S. 576 (2000).

[30] *See generally* Thomas Merrill, Chevron *at 30: Looking Back and Looking Forward: Step Zero After* City of Arlington, 83 FORDHAM L. REV. 731 (2014).

[31] OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31-33 (1989).

rulemaking."[32] Thus, because this case involved a Department of Labor opinion letter that was merely advisory on the meaning of the Fair Labor Standards Act, there was no deference extended under *Chevron*. In applying the *Skidmore* standard, the Court rejected the interpretation. Adding to the confusion of current meaning of Chevron were differing minority opinions, including the dissenting opinion of Justice Breyer who insisted that Chevron did not create a new standard and that *Skidmore* remains the only standard for deference.[33] *Chevron,* in his view, only extended the basis for deference on the basis that "Congress had delegated to the agency the legal authority to make those determinations."[34]

The evolving and conflicting view of *Chevron* was also captured in the decision of *United States v. Mead Corp.*[35] In that case of tariff classification rulings, the eight-justice majority opinion, recognized different deference tests under *Skidmore* and *Chevron*. Consistent with *Christensen*, the Court noted the application of *Chevron* for agency interpretations that have the "force of law."[36] The Court embraced the notion of delegated authority from Congress for "the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[37] However, the condition of what is an action with the force of law remained undefined. Yet, the ruling became the basis for the concept of "Chevron Step Zero," the court first inquires into whether Congress delegated the authority before applying *Chevron* deference. If not, the less favorable standard in cases like *Skidmore* would apply.

Where *Chevron* set out a highly generalized rule for those statutes deemed "ambiguous," the *Mead* decision in 2001 created the multi-factor test for applying *Chevron*. A debate among academics and judges has continued to rage on the proper scope and implications of the *Chevron* doctrine. This debate was heightened in 2005 after the decision in National Cable & Telecomms. Association v. Brand X Internet Services where the Court allowed an executive agency to overrule a judicial precedent in favor of the agency's preferred interpretation. It was an alarming expansion of the deference afforded to agencies. Then came *City of Arlington v. FCC*.[38] The

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32 Merrill, *Chevron at 30*, *supra* note 3024, at 587.
33 *Id.* at 596 (Breyer, J., dissenting).
34 *Id.*
35 *Mead*, 533 U.S. 218 (2001).
36 *Id.* at 226-27.
37 *Id.* at 27.
38 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013).

case concerned a 1996 amendment to the Federal Communications Act mandating that local land use agencies process applications for the construction or modification of wireless transmission towers "within a reasonable period of time."[39] The statute provided an avenue with a "court of competent jurisdiction" for relief to parties who did not receive action on requests. The case perfectly captured the fluid authority and utter flexibility of agencies in exercising their interpretive powers post-*Chevron*. The Federal Communications Commission (FCC) initially disclaimed the authority under the statute, but then reversed itself and issued an order setting a 90-day limit for any tower expansion or 150-day limit for new construction under the rule. The jurisdictional authority of the FCC was challenged. For many years, it was generally thought that, no matter how expansively *Chevron* is read, the one area where an agency could not claim deference would be in the interpretation of its own jurisdictional powers. After all, as discussed above, the APA specifically leaves to the court to determine if an agency has acted "in excess of statutory jurisdiction." Nevertheless, the Fifth Circuit held that *Chevron* would apply in an agency defining its own jurisdiction. The Supreme Court agreed in a 5-4 decision with Justice Scalia joining the majority. Chief Justice Roberts (with Justices Kennedy and Alito) dissented. Five Justices found no way to distinguish jurisdictional and non-jurisdictional questions. Indeed, in his separate decision, Justice Scalia called such distinctions little more than a "mirage."[40]

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented, and expressed the view that such expanded authority raised transformative challenges for the federal system. Roberts decried the court as evading its core responsibility in drawing lines of authority within that system: "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive . . . We do not leave it to the agency to decide when it is in charge."[41] In a chilling warning, Roberts further notes that "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the Administrative State cannot be dismissed."

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[39] 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

[40] Justice Scalia saw the distinction as another attack on *Chevron* that would exploited in future cases. *City of Arlington*, 133 S. Ct. at 1873 (Scalia, J., concurring) ("Make no mistake - the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case.")

[41] *Id.* at 1886 (Roberts, C.J., dissenting).

C. Gorsuch, the Separation of Powers, and the *Chevron* Doctrine

The most obvious avenue for limiting, or even eliminating the *Chevron* doctrine is through judicial action. After all, the doctrine is the creation of the Court and, while certainly reflecting constitutional values, is not imposed directly by any constitutional provision. Indeed, many have argued that the doctrine runs against the constitutional grain, particularly in the Vesting Clause of Article I. Judge Gorsuch has written at length on the doctrine and related doctrines while on the Tenth Circuit. Some of those cases have been the focus of public debate related to his nomination. The concurrence of Judge Gorsuch in *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), has attracted some of the most heated rhetoric—and in my view some of the least informed commentary—after his nomination. I would also like to first address other cases that shed light on Judge Gorsuch's view and the depth of his analysis in this area: *De Niz Robles v. Lynch*, *Gutierrez-Brizuela v. Lynch*, and *United States v. Nichols.*

1. De Niz Robles v. Lynch

Judge Gorsuch has explored the rapidly disappearing line between legislative and agency action. This has arisen in efforts by agencies to retroactively apply policy rulings. Such was the case in *De Niz Robles v. Lynch,* 803 F.3d 1165 (10th Cir. 2015). The case itself dealt with an inherent conflict in provisions of federal immigration law. On one hand, under 8 U.S.C. § 1255(i)(2)(A), federal law allows the attorney general discretion to extend lawful resident status to noncitizens who illegally entered the United States. On the other hand, federal law under 8 U.S.C. § 1182(a)(9)(C)(i)(I), requires anyone who illegally re-enters the United States to wait 10 years before obtaining lawful residency. The Tenth Circuit in 2005 ruled that the discretion granted to the Attorney General trumped the provision on the ten-year delay for lawful residency. *See Padilla-Caldera v. Gonzales (Padilla-Caldera I),* 426 F.3d 1294, 1299-1301 (10th Cir. 2005), amended and superseded on reh'g by 453 F.3d 1237, 1242-44 (10th Cir. 2006). This set up a classic *Brand X* question when, in 2007, the Board of Immigration Appeals (BIA) reached a contrary conclusion in *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007)—that the ten-year waiting period provision trumped the attorney general discretion provision. Thus, the earlier Tenth Circuit opinion was still on the books as good law but the BIA effectively negated it with its own agency determination in 2007. De Niz Robles petitioned for

adjustment of status after the ruling in *Padilla-Caldera I* in 2005 and before the agency decision in *Briones*.

Judge Gorsuch, writing for the Court, noted dryly "[u]sually, executive agencies can't overrule courts when it comes to interpreting the law." *De Niz Robles*, 803 F.3d at 1167 n.2. However, *Brand X* "requires this court to defer to the agency's policy choice even when doing so means we must overrule our own preexisting and governing statutory interpretation." *Id.* Yet, that still left the question of retroactivity of the application against an immigrant who followed the 10th Circuit authority at the time. Judge Gorsuch raised the fundamental question of how an agency ruling should be treated for the purposes of retroactivity. The opinion lays out how legislation is generally presumed to be prospective in application as opposed to judicial rulings, which by necessity must often be backward looking. Judge Gorsuch maintains that the same presumption should apply to the retroactive application of agency adjudications making delegated legislative policy decisions: "The presumption of prospectivity attaches to Congress's own work unless it plainly indicates an intention to act retroactively. That same presumption, we think, should attach when Congress's delegates seek to exercise delegated legislative policymaking authority."

The decision evidences Judge Gorsuch's unease with the shifting lines of authority between the branches in the *Chevron* era:

> "The Constitution speaks far less directly to that peculiar question. Perhaps because the framers anticipated an Executive charged with enforcing the decisions of the other branches — not with exercising delegated legislative authority, let alone exercising that authority in a quasi-judicial tribunal empowered to overrule judicial decisions. Indeed, one might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct. . . .And whether the combination of *Chevron* and *Brand X* further muddles the muddle by intruding on the judicial function too. . ."

The decision shows a deep understanding of the dangers of retroactive application of new legislation or rules, a long-standing principle meant to prevent "the state from singling out disfavored individuals or groups and condemning them for past conduct they are now powerless to change." *Id.* at 1169. Judge Gorsuch's views of these underlying constitutional concerns

are presented in even sharper relief in a case that came before him just last year, as discussed below.

2. *Gutierrez-Brizuela v. Lynch*

The strongest language on *Chevron* from Judge Gorsuch came with the decision in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). Judge Gorsuch wrote the majority decision for the U.S. Court of Appeals for the 10th Circuit and then added a concurrence that addressed the simmering issues over *Chevron* and *Brand X*. The case dealt with the same conflicting provisions and retroactive application discussed in *De Niz Robles*, which Judge Gorsuch relies on as precedent. Hugo Gutierrez-Brizuela, a Mexican citizen, sought adjusted status under the controlling case law at the time in *Padilla-Caldera I*. However, the BIA again retroactively applied its decision in *Briones* and found him ineligible despite the fact that the controlling case law of the Tenth Circuit was not changed until 2011 in *Padilla-Caldera II*.

Pursuant to *Brand X*, Gorsuch (writing for the panel) acknowledged that it must accept that the agency's policy decision effectively overruled the federal court. *See Gutierrez-Brizuela v. Lynch,* 834 F.3d at 1144 (*citing Padilla-Caldera v. Holder* (Padilla Caldera II), 637 F.3d 1140, 1148-52 (10th Cir. 2011)). Again he clearly has great misgivings about *Brand X* (as I do) but he still faithfully applied it. However, he (and his colleagues) on the panel balked at the retroactive application of the change. He wrote that the petitioner could seek the attorney general's discretion to receive legal status in light of the controlling decision in *Padilla-Caldera* that was not overruled by the Tenth Circuit until 2011. He based this decision on the basic due process and equal protection rights of the petitioner. It was *Padilla-Caldera I* that governed the petition for adjustment in 2009—not the 2007 *Briones* decision. The *Briones* decision did not take effect until 2011 with *Padilla-Caldera II* and like legislative acts would apply only prospectively.

In his concurrence, however, Judge Gorsuch went further to say that the panel should have addressed the lingering and troubling questions raised by *Chevron* and *Brand X* in the case. Judge Gorsuch saw this Mexican immigrant as facing precisely the type of arbitrary power that our Framers sought to limit. I am going to take the liberty of quoting Judge Gorsuch at length here because his words should be read without significant abridgement or translation on this critical point:

In enlightenment theory and hard won experience under a tyrannical king the founders found proof of the wisdom of a government of separated powers. In the avowedly political legislature, the framers endowed the people's representatives with the authority to prescribe new rules of general applicability prospectively. In the executive, they placed the task of ensuring the legislature's rules are faithfully executed in the hands of a single person also responsive to the people. And in the judiciary, they charged individuals insulated from political pressures with the job of interpreting the law and applying it retroactively to resolve past disputes. This allocation of different sorts of power to different sorts of decisionmakers was no accident. To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed. To faithfully execute the laws often demands the sort of vigor hard to find in management-by-committee. And to resolve cases and controversies over past events calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be.

Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights. What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts? They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice. Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment — and raising — along the way, too, grave due process (fair notice) and equal protection problems. Conversely, what would happen if politically unresponsive and life-tenured judges were permitted to decide policy questions for the future or try to execute those policies? The very idea of self-government would soon be at risk of withering to the point of pointlessness. It was to avoid dangers like these, dangers the founders had studied and seen realized in their own time, that they pursued the separation of powers. A government of diffused powers, they knew, is a government less capable of invading the liberties of the people. *See* The Federalist No. 47 (James

> Madison) ("No political truth is . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers).

In that passage, Judge Gorsuch captured the essence of the constitutional concerns with *Chevron* and its progeny. He then focused on the implications of *Brand X* on the judicial role in the tripartite system:

> Precisely to avoid the possibility of allowing politicized decisionmakers to decide cases and controversies about the meaning of existing laws, the framers sought to ensure that judicial judgments "may not lawfully be revised, overturned or refused faith and credit by" the elected branches of government. *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948); *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410, 1 L. Ed. 436, 2 Dall. 409 n* (1792) ("[B]y the Constitution, neither the Secretary . . . nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."). Yet this deliberate design, this separation of functions aimed to ensure a neutral decisionmaker for the people's disputes, faces more than a little pressure from *Brand X*. Under *Brand X*'s terms, after all, courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-85, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005). By *Brand X*'s own telling, this means a judicial declaration of the law's meaning in a case or controversy before it is not "authoritative," *id.* at 983, but is instead subject to revision by a politically accountable branch of government.

What emerges from these opinions is a jurist who is (hopefully) a formalist rather than a functionalist in his approach to questions of the separation of powers. While many have focused on the belief that Judge Gorsuch is an "originalist," that term has lost much of its substance in academic debates. Rather, they seek the original public meaning of text in the interpretation of the Constitution. A far more important distinction is between formalists and functionalists. The rise of the administrative state roughly corresponded with the rise of functionalist reasoning in federal courts and the erosion of clear lines of separation between the branches. Formalist analysis is premised on the belief that "[a]ny exercise of governmental power, and any governmental institution exercising that power,

must either fit within one of the three formal categories . . . or find explicit constitutional authorization for such deviation."[42] Formalists like myself favor a relatively rigid separation of the branches that serves to combat the aggregation of power and protects individual rights from the danger of governmental abuse.[43] Where formalism offers predictability, functionalism offers adaptability.[44] The term "functionalist" is often used as if it has a self-evident meaning, even though it frequently appears defined largely as a rejection of formalism—allowing greater flexibility so long as the "basic purposes" of the Constitution are maintained.[45] Functionalism is seen as allowing for "workable" changes[46] in the role of the branches to reflect the new administrative state while allowing the courts to intervene where changes would fundamentally alter the functioning of the tripartite system—a generally high standard for intervention.[47] Functionalist reasoning is rampant in decisions allowing the expansion of agency power at the cost of both legislative and judicial authority. I am hopeful that Judge Gorsuch will introduce a more formalist voice to the Court and this passage is illustrative of this optimism:

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[42] Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990) ("The Separation of Powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending."). *See also* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998-99).

[43] *See generally* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U.L. Rev. 1523 (2013).

[44] Eskridge, *supra*, at 21.

[45] *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions -- A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

[46] Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990).

[47] As Professor John Manning recently noted:

> [T]he Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like. In light of that complex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.

Manning, *supra*, at 1952.

> "When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation. Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design. The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully painful process of bicameralism and presentment can be cleared. Indeed, the principle of *stare decisis* was one "entrenched and revered by the framers" precisely because they knew its importance "as a weapon against . . . tyranny." Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. Pitt. L. Rev. 695, 707 (2003). Yet even as now semi-tamed (at least in this circuit), *Brand X* still risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning prospectively, just as legislation might — and all without the inconvenience of having to engage the legislative processes the Constitution prescribes. A form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people."

At a time when our tripartite design is being fundamentally threatened, Judge Gorsuch could prove a transformative choice for the Court. As he pointedly asked in *Gutierrez-Brizuela*, "[e]ven under the most relaxed or functionalist view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government." *Id.* at 1155.

3. *United States v. Nichols*

A third decision is equally illuminating in understanding Judge Gorsuch's view of nondelegation and its importance as a protection of individual liberty. That case is *United States v. Nichols*, 784 F.3d 666, 667-7 (10 Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc). The case involved Lester Nichols, a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). One of the issues raised was SORNA's delegation of authority to the

Attorney General to determine SORNA's retroactive application is unconstitutional. Judge Gorsuch wrote a dissent to the denial of a rehearing en banc.

Article I of the United States Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. Those words and the general principle of the separation of powers led to "the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). While the Supreme Court has long reaffirmed the need for Congress to exercise such powers, it created a fluid test that allowed agencies to "fill up the details" left by legislation in the execution of laws.[48] The Court allowed delegation of rulemaking powers if there is an "intelligible principle"[49]: a standard that has proven perfectly unintelligible in allowing any statutory reference—short of utter silence[50]—to suffice for delegation.[51] The *Nichols* case presented a particularly stark and troubling example of delegation. Judge Gorsuch noted that this doctrine protects individuals from the arbitrary and abusive use of power.

In his dissent from denial of rehearing in banc in *Nichols*, Judge Gorsuch made a powerful case for the nondelegation doctrine as an essential structural safeguard of individual liberty. He stated correctly that "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *Id.* at 668. He added:

> Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving

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48 *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

49 *Loving v. United States*, 517 U.S. 748, 772 (1996).

50 *Yakus v. United States*, 321 U.S. 414, 426 (1944) ("Only if ... there is an absence of standards ... would we be justified in overriding [the congressional] choice of means for effecting its declared purpose.").

51 *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

> "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

Id. at 670. Judge Gorsuch does a masterful job in laying about the threat to individual liberty in delegating such authority in the criminal law area.

> Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one — one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.

Id. at 677. Judge Gorsuch's approach returns such cases to their proper threshold question over the separation of powers and the need to maintain core powers within the tripartite system. This view is becoming increasing rare on the Court, which seems to have tossed caution to the constitutional winds of delegation. The dismissive view of nondelegation was evident in the Court's decision in *Whitman v. American Trucking Ass'ns*,[52] when the Court noted "we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Of course, as with its *Chevron* standards, it is often hard to discern what the Court considers an "intelligible" from an "unintelligible" principle for the purposes of delegation. Justice Thomas made this point in his concurring opinion in *American Trucking* when he expressed obvious frustration on finding any meaning in the notion of "intelligible principles":

> Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. I, 1 (emphasis added). I am not convinced that the intelligible

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[52] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

> principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."[53]

Like the standard under the post-*Chevron* cases of determining those actions with "deep economic and political significance," the standard of "intelligible principles" is largely undefined. The result is ample room for agency actions while maintaining the pretense of judicial review. This is not to assign all of the blame to the courts. Clearly this history shows not just judicial abrogation of the duty to maintain lines of separation but also the willing role of Congress as an enabler of agency expansion. There have been times when Congress has turned a blind eye to the usurpation of its authority by a popular president. Congress has at times even facilitated the circumvention of its own authority. This can occur for a number of obvious reasons. A president may be enormously popular and members fear a public backlash from any action about could be seen as disloyal. Likewise, the political environment may be viewed as too risky for members to stand on constitutional principle as with periods of national security or economic crisis. The Framers well understood the wavering principles that can characterize politics. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," personal ambition can prevail over institutional interests in modern politics as members become agents of their own obsolescence.

Once again, Judge Gorsuch articulates a view of the Constitution that eschews the type of functionalism that has led to delegation of greater and greater authority to agencies and executive branch officials. The opinion evidences a deep appreciation for the lines of separation and the need to maintain those lines to defend not just the powers of the branches but individual liberty. His repeated reference to such first principles is reminiscent of the writings of the man he would replace on the Court. Gorsuch, like Scalia, tends to lay a foundation in constitutional doctrine and history before addressing the insular issues of a case. That methodological preference gives his opinions not only a welcomed depth of analysis, but a consistency in decisions across these various disputes.

4. *TransAm Trucking, Inc. v. Administrative Review Board*

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[53] *Whitman v. Am. Trucking Ass'ns, 531 U.S.* at 487 (2001) (Thomas, J., concurring).

One of the most discussed cases related to this confirmation is *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016). The case has been described by critics as evidence of everything from Judge Gorsuch's indifference to worker rights to a form of "judicial activism" (a much over-used term with dubious meaning). I believe that the *TransAm Trucking* case has been unfairly characterized and misconstrued in coverage. While I have differences with aspects of his analysis, Judge Gorsuch maintained a consistent approach to the *Chevron* issues in the case and followed a textualist methodology in the interpretation of the underlying law.[54] Textualism is not "out of the mainstream." It is a long-accepted interpretative approach. A federal judge following textualism tends to yield to the authority of Congress and minimize judicial roles in our system. That is a good thing as long as the judge is not adopting textualist arguments on an inconsistent or outcome-determinative fashion. Judge Gorsuch is very consistent in his interpretative approach, which is tied directly to his understanding of the role of courts in our tripartite system.

TransAm Trucking is a fascinating case for those of us with an interest in "legisprudence" or the proper interpretation of legislative source of authority.[55] The case involved Alphonse Maddin who was employed as a truck driver. In January 2009, Maddin was driving cargo through Illinois when the brakes on his trailer froze in the subzero temperatures. He reported the problem to the company and was told to wait for a repairman. Maddin waited for hours but, fearing for his welfare after experiencing a numbness in his feet and legs, again called the company. The company told him to sit tight and not to abandon the load. Maddin however decided to unhitch the truck and drive down the road. The repairman arrived fifteen minutes later and he returned. He filed a complaint with the Labor Department's Occupational Safety and Health Administration (OSHA) but OSHA dismissed the complaint. However, an administrative law judge (ALJ) and the Department of Labor Administrative Review Board (ARB) ruled in his favor, finding that the company violated the whistleblower provisions of the Surface Transportation Assistance Act (STAA).

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[54] This textualist approach is evident in other opinions including *Almond v. Unified School District #501*, 665 F.3d 1174 (10th Cir. 2011) ("the plaintiffs' proposed interpretation commits not one but two statutory interpretation sins — first by rendering a statutory phrase superfluous and then by failing to give effect to Congress' reference to a preexisting legal term with a well-settled meaning.").

[55] Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 Hastings Law Journal 145-275 (1992).

Judge Gorsuch notes dryly that it would be "fair to ask whether TransAm's decision was a wise or kind one."[56] However, he turned to the statutory language at the heart of the case and found an irreconcilable conflict with the ARB decision. The entire case turned on a provision, 49 U.S.C. § 31105(a)(1)(B), that forbids employers from firing employees who "refuse[] to operate a vehicle" out of safety concerns. Judge Gorsuch noted the anomaly of using the provision in a case where an employee was told not to operate the vehicle but to wait for help. (There was a suggestion in the record by the supervisor that he either wait or try to drag the trailer with the frozen brakes. The latter suggestion is not legally permitted and may have been meant in jest). Judge Gorsuch zeroed in on the basis for treating an order not to operate a vehicle as violating a provision protecting workers who "refuse[] to operate a vehicle." He raised the interesting point that "[t]he trucker was fired only after he declined the statutorily protected option (refuse to operate) and chose instead to operate his vehicle in a manner he thought wise but his employer did not."

The facial contradiction between the worker's actions and the statutory provision of course does not answer the question. The case turns on how to interpret the critical words "to operate a vehicle." Gorsuch dealt correctly with the threshold question of the extent, if any, deference that should be afforded to the agency under *Chevron*:

> "My colleagues suggest that the Department should be permitted to read the statutory phrase "refuse[] to operate" to encompass its exact opposite and protect employees who operate their vehicles in defiance of their employers' orders. They justify this unusual result on the ground that the statutory phrase is ambiguous and so we owe the Department deference under step two of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). But, respectfully, it seems to me Chevron is a curious place to turn for support given that the Department never argued the statute is ambiguous, never contended that its interpretation was due Chevron step two deference, and never even cited Chevron. In fact, the only party to mention Chevron in this case was TransAm, and then only in a footnote in its brief and then only as part of an argument that the statute is not ambiguous. We don't normally make arguments for

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[56] *TransAm Trucking, Inc. v. Administrative Review Board*, U.S. Department of Labor, 833 F.3d1206 (10th Cir. 2016) (Gorsuch, J., dissenting).

> litigants (least of all administrative agencies), and I see no reason to make a wholly uninvited foray into step two of Chevronland."

Judge Gorsuch notes that the majority had taken the position that there is ambiguity (to trigger *Chevron* analysis) whenever a term is left undefined in a statute, even terms that are plain on their face. Using standard dictionary definitions, Judge Gorsuch maintained that the meaning of "refuse" and "operate" is neither ambiguous nor supportive in the driver's case. When the law and the language is clear, there is no license to apply *Chevron* deference—an important and defensible position. Most coverage has looked solely at the outcome rather than the key *Chevron* issue identified by Judge Gorsuch. Judges are not supposed to judge cases by their outcomes and neither should judges be judged solely by such outcomes. The analysis in the dissent raises an important and, in my view, a compelling argument on the limits of *Chevron.*

Judge Gorsuch ultimately concludes that "the law before us protects only employees who refuse to operate vehicles, period." Since the employer actually told the driver not to operate the vehicle, he found the provision to be inapplicable. That is not an unreasonable interpretation. Frankly, while I agree with Judge Gorsuch on his *Chevron* position, I am not sure that I would have adopted as narrow a definition of "operate." I think that the term can be defined in modern parlance to cover this rather peculiar set of facts in favor of the driver. However, the alternative view is entirely reasonable and well supported by Judge Gorsuch in his dissent. The employer asked him not to operate the vehicle, a view that may have been reinforced later by questions of the fitness of a driver to operate the vehicle when experiencing numbness in his feet or legs. I did not find the dissent to be dismissive of the driver's interests, nor biased in the application of the standard for interpretation. It is a texualist approach to the interpretation of federal law that characterizes much of Judge Gorsuch's jurisprudence. Indeed, while I read the dissent with some skepticism given my more favorable view of the driver's case, I found myself intrigued and almost persuaded on the final interpretative conclusion. It is wrong to take such a well-reasoned opinion and adopt convenient, superficial explanations based on judicial bias. The reasons for the dissent are expressed honestly and directly for what they are: good-faith and well-considered views of the text of the federal law.

IV. CONCLUSION

Confirmation hearings often take on an almost mystical character as members and experts hold forth on what type of justice a nominee will prove to be over the course of a long tenure on the Court. For someone like Judge Gorsuch, that could prove five decades. It is an exercise that not only defies logic, but can border on the occult. In the end, only one person can authoritatively address that question and, if history is any judge, even the nominee cannot say for certain where his or her tenure on the Court will take them. These hearings always remind me of a story of Supreme Court Justice Oliver Wendell Holmes who was traveling by train to Washington, D.C. When the conductor asked for his ticket, Holmes searched high and low for it until the conductor reassured him, "Don't worry about your ticket, Mr. Holmes. We all know who you are. When you get to your destination, you can find it and just mail it to us." Holmes responded "My dear man, the problem is not my ticket. The problem is … where am I going?"

Most nominees are in a position not unlike that of Holmes. People of good-faith can evolve on the Court and even change dramatically in their new role. Liberal justices like William Brennan, Henry Blackmun, and David Souter were thought to be conservative at the time of their confirmations. Conservative justice Bryon White was considered fairly liberal when appointed by John F. Kennedy. As I mentioned, I do not expect such a transformation in Neil Gorsuch, who has deep and well-established jurisprudential views. However, I also do not expect him to be a robotic vote on the right of the Court. While conservative, he has shown an intellectual curiosity and honesty that is likely to take him across the ideological spectrum of the Court. Like Holmes, he might be wondering this week where he is going and I would be hard pressed to give a destination with absolute certainty. What I do know is that Neil Gorsuch is exceptionally well-qualified to take as a member of the United States Supreme Court.

I had great personal affection for the late Antonin Scalia with whom I shared a Sicilian background.[57] Even though I criticized his opinions and public statements on occasion, he was one of the most brilliant and engaging people I have ever met. He will have one of the most lasting legacies of any justice of the Supreme Court because of his commitment to core principles of constitutional and statutory interpretation. It is still difficult for many of

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[57] Jonathan Turley, *Scalia's Greatest Strength, His Steadfastness*, Wash. Post, Feb. 14, 2016.

us to imagine anyone sitting in that now vacant chair. However, as someone who had great affection and respect for Justice Scalia, I can think of no one more deserving of that honor than Neil Gorsuch. He is no Scalia but we are not looking for the best imitation or facsimile of Scalia. We are looking for someone who can be an intellectual force on the Court in his own right. I believe that we have found such a person in Neil Gorsuch, who just might eclipse even his iconic predecessor. In the end, I suppose I can say where Gorsuch is going after all. He will go wherever his conscience takes him regardless of whether it proves a track to the left or the right. That may make the final terminus uncertain but it will be an exciting trip to watch.

It is therefore my honor to recommend the confirmation of the Honorable Judge Neil Gorsuch for Associate Justice of the Supreme Court.

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University
2000 H St., N.W.
Washington, D.C. 20052
202-994-7001
jturley@law.gwu.edu

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

Statement for the Record of Karen R. Harned

Executive Director, NFIB Small Business Legal Center

Before the

U.S. Senate Committee on Judiciary

Hearing on: "Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States"

Beginning
March 20, 2017

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Chairman Grassley and Ranking Member Feinstein,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit this testimony to the United States Senate Committee on the Judiciary as it considers the nomination of Judge Neil Gorsuch to the United States Supreme Court.

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents hundreds of thousands of members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

As the lead plaintiff in the historic challenge to the Affordable Care Act, *NFIB v. Sebelius*, NFIB understands first-hand the importance one justice can have on the ability of small businesses to own, operate, and grow their businesses. After reviewing Judge Gorsuch's articles, decisions and public statements, we are pleased to see a judge who both applies the actual text of the law and the original meaning of that text at the time it became law rather than changing it to fit his personal views and preferences.

Specifically, small businesses are encouraged by three qualities Judge Gorsuch has brought to the bench. First, his opinions are clear and often provide bright-line rules. Second, Judge Gorsuch has a deep respect for the separation of powers. Third, Judge Gorsuch has shown a willingness to tackle the difficult legal issues of our day head on; namely, he has affirmatively questioned whether the *Chevron* doctrine should be revisited.

Judge Gorsuch's Clearly Written Opinions Minimize Uncertainty for America's Small Businesses Owners

Much has been made of Judge Gorsuch's clear writing style.[1] To be sure, as a lawyer, his opinions are a great read. But, more importantly for the regulated community, Judge

[1] Eric Citron, "Potential Nominee Profile: Neil Gorsuch," Scotusblog, (Jan. 13, 2017) http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/ ("Gorsuch's opinions are exceptionally clear and routinely entertaining; he is an unusual pleasure to read, and it is always plain exactly what he thinks and why."); Carrie Johnson, "Who Is Neil Gorsuch, Trump's First Pick for the Supreme Court," National Public Radio (Jan. 31, 2017) http://www.npr.org/2017/01/31/511850519/who-is-neil-gorsuch-trumps-first-pick-for-the-supreme-court ("Like Justice Antonin Scalia, whom he is in line to replace, Gorsuch has cultivated a reputation as a memorable and clear author of legal opinions.").

Gorsuch has demonstrated a willingness to clearly articulate what the law is. Judge Gorsuch is not known for using ambiguous or broad language that fails to settle the question before him. Rather, his decisions provide meaningful direction for district court judges, as well as businesses and ordinary individuals who may be affected by that law moving forward.

Like their larger counterparts, small business owners want – and need -- certainty. Specifically, small business owners need bright-line, easily comprehensible legal standards. If they don't know what is expected of them -- what the rules of the game are -- they may be hesitant to undertake actions that otherwise would help their business grow. As NFIB Chief Economist Bill Dunkelberg noted when NFIB debuted its Uncertainty Index[2] last October, "Being fairly confident about an outcome, good or bad, allows planning to occur. ... Having no clear direction on what to base a decision generally puts the decision on hold."[3]

Judge Gorsuch's opinions can be read and understood by lawyers and non-lawyers alike. More importantly, in his opinions Judge Gorsuch often puts himself in the shoes of the person(s) who will be impacted by a particular law or regulation, asking, on their behalf, the questions they have and providing clear answers. Small business owners want clear-cut answers to their legal questions and Judge Gorsuch takes seriously his obligation to provide that clarity whenever possible.

Judge Gorsuch's Respect for the Separation of Powers Promotes an Economy That Allows Small Business to Thrive

Judge Gorsuch has demonstrated that he truly respects, and seeks to protect, the separation of powers among branches of government. We share his belief that the separation of powers is "among the most important liberty-protecting devices of the constitutional design."[4] Yet, as George Washington School of Law Professor Jonathan Turley has testified: "Today, the vast majority of 'laws' governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats."[5]

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small business owner's ability to plan

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[2] The NFIB Uncertainty Index draws from data produced by the NFIB Small Business Economic Trends Report, the organization's flagship monthly research report relied upon by economists and business analysts all over the world as an indicator of economic health. The new research measures the degree to which business owners can anticipate future events and how that affects their behavior.

[3] Press Release -- "NFIB Debuts New Uncertainty Index" (Oct. 13, 2016) chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nfib.com/assets/10-12-16-Uncertainty-Index.pdf.

[4] Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case Western L.Rev. 905, 912 (2016).

[5] Jonathan Turley, Testimony before House Committee on the Judiciary, "The President's Constitutional Duty to Faithfully Execute the Laws," 7 (Dec. 3, 2013), available online at chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/https://judiciary.house.gov/wp-content/uploads/2016/02/113-55-85762.pdf.

for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly Small Business Economic Trends survey.[6] Not surprisingly then, the latest Small Business Economic Trends report analyzing December 2016 data had "regulations" as the second biggest issue small business owners cite when asked why now is not a good time to expand.[7] Within the small business problem clusters identified by the NFIB Research Foundation's Small Business Problems and Priorities report, "regulations" rank second behind only taxes.[8]

Despite the devastating impact of regulation on small business, federal agencies issued 4,084 rules in 2016 – more than 11 each day.[9]

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.[10] This is not surprising, since it's the small business owner, not one of some team of compliance officers who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for the business and every hour that the owner spends understanding and complying with a federal regulation is one less hour available to serve customers and plan for future growth. But without formal legal training it can be extremely difficult for small business owners to know and understand their legal obligations. And unfortunately they cannot afford to turn to outside legal counsel in most cases.

The problem of overregulation has been further exacerbated by the broad deference federal courts give to executive agencies in their interpretations of statutes passed by Congress. As a result, "the Executive Branch has broad leeway to set public policy by stretching statutory language."[11] This judicial deference to executive agencies, known as *Chevron* deference, has led to a breakdown in our constitutional system of checks and balances.

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[6] NFIB Research Foundation, *Small Business Economic Trends*, at p. 21, February 2017. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nfib.com/assets/SBET-Feb-2017.pdf.
[7] *Id.*
[8] Holly Wade, *Small Business Problems and Priorities*, p. 17, August 2016. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf.
[9] Data generated from www.regulations.gov.
[10] Babson, *The State of Small Business in America 2016*, chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.babson.edu/executive-education/custom-programs/entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.
[11] NFIB Small Business Legal Center, "The Fourth Branch & Underground Regulations," Sept. 2015, referencing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Judge Gorsuch's Willingness to Revisit the *Chevron* Doctrine Demonstrates that He Will Confront the Difficult Legal Issues of Our Day

NFIB welcomed Judge Gorsuch's concurring opinion last year encouraging the Supreme Court to address what he aptly deems "the elephant in the room" – the *Chevron* doctrine. In his concurring opinion in *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch made the case for the Supreme Court to reconsider its deference doctrines.[12]

Although generally unknown to average Americans, the *Chevron* doctrine has been a key culprit in the vast expansion of the administrative state, which permeates virtually every aspect of our daily lives. For small businesses, in particular, this doctrine has been quite problematic. To demonstrate this point, I will discuss three cases where the *Chevron* doctrine has caused serious harm to small business.

Auer v. Robbins

In *Auer v. Robbins*, the Supreme Court invoked the *Chevron* doctrine and deferred to the Department of Labor's (DOL) broad interpretation of the Fair Labor Standards Act (FLSA) and its interpretation of its governing regulations.[13]

DOL regulations specify that, for an employee to be deemed exempt from overtime pay requirements under the FLSA, he or she must pass a "salary-basis" test, under which the employee must be paid a predetermined amount on a regular pay period. DOL regulations dictate further that the "amount [cannot be] ... subject to reduction because of variations in the quality or quantity of the work performed."[14]

St. Louis police officers alleged that they had been misclassified as "exempt employees" and entitled to overtime wages and back-pay. Their argument hinged on the contention that their pay could be reduced based on disciplinary infractions.

DOL filed an amicus brief arguing that its salary-basis test should be interpreted -- consistent with the FLSA -- as prohibiting classification of public employees as exempt if their employer's policy permits disciplinary deductions in pay "as a practical matter."

The employer argued that DOL's interpretation was unreasonable because: (1) disciplinary deductions were one of the only options available to enforce compliance for public employees; and (2) were essential for maintaining order throughout police ranks.

Citing *Chevron*, the Court began its analysis by emphasizing that DOL has "broad authority" to make rules concerning the scope of the exemption from overtime requirements, and that when the FLSA text is unclear the Court defers to DOL's construction. Although the Court said that the employer's interpretation was reasonable, it affirmed DOL's interpretation because it could not say that the agency's interpretation was necessarily unreasonable.

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[12] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016).
[13] 519 U.S. 452, 457 (1997).
[14] 29 C.F.R. 541.602.

The Court also said that DOL deserved deference on any reasonable interpretation of the salary-basis test because it was interpreting its own (ambiguously crafted) regulations. Remarkably, the Court said that it did not matter that DOL had advanced its interpretation for the first time in an amicus brief. Nor did it matter that the agency's interpretation may have violated the rules governing judicial interpretation of legal text because the Court said those interpretive rules do not limit an agency's "power to resolve ambiguities in [its] own regulation."

Practical Impact for Small Business

Auer gives DOL nearly unfettered discretion to re-interpret "ambiguous" wage and hour regulations, as long as newly announced rules are not imposed retroactively. Relying on *Auer*, agencies have sought to effect substantive changes in interpretation of regulation through guidance, opinion letters, field manuals and other informal documents. Agencies have a perverse incentive to keep regulatory standards vague, so that they can fill in details as they like through subsequent amicus filings or other guidance materials.

Examples of Impact of *Auer* in the Lower Courts

- In *Nack v. Walburg*,[15] the Federal Communications Commission (FCC) filed an amicus brief to "clarify" its regulations requiring opt-out language for commercial faxes—even where the recipient has consented to receiving a fax. The U.S. Court of Appeals for the Eighth Circuit deferred to FCC's interpretation—therein exposing a small business defendant to a potential $54 million-dollar judgment for sending a fax without "opt-out" boiler-plate language.

- In *Foster v. Vilsack*,[16] a federal court of appeals deferred to a U.S. Department of Agriculture (USDA) field manual to affirm the agency's interpretation of regulations concerning the designation of wetlands in farmlands. The regulation said that if a parcel's wetland status can't be determined due to alteration of the vegetation (because of filling or tilling the land), the status should be determined by comparing the site to a similar parcel in the "local area."

  USDA took an exceedingly broad view of what "local area" meant -- to include the surrounding 11,000 square miles. Accordingly, USDA chose to compare the Foster Farm to a site over thirty miles away. USDA's determination severely limited the Foster's family use of their farm. They could not make use of the affected areas without forgoing eligibility for USDA programs -- including federal crop insurance.

[15] 715 F.3d 680 (8th Cir. 2013).
[16] 820 F.3d 330 (8th Cir. 2016).

Since the Supreme Court's decision in *Auer*, we have seen a steep escalation in amicus activity from DOL in the last 25 years. The uptick began under the Clinton and G.W. Bush Administrations, but nearly doubled under the Obama Administration.[17] This suggests that DOL is increasingly using amicus briefs as a sword -- and *Auer-Chevron* as a shield -- to advance ideological agendas.

Small businesses find this especially concerning because the tactic allows agencies to effect regulatory policy without raising public awareness (and risking political accountability), which would inevitably occur when effecting change through the more transparent notice-and-comment rulemaking process.

United States v. Riverside Bayview Homes, Inc., et al.

In *United States v. Riverside Bayview Homes, Inc., et al.* the Supreme Court relied on the *Chevron* doctrine to defer to the United States Army Corps of Engineers' (Army Corps) expansive construction of the Clean Water Act's (CWA) jurisdictional provisions.[18]

After initially construing the CWA's jurisdictional provisions as requiring permits only for the filling or dredging of traditionally navigable waters, the Carter Administration promulgated regulations re-interpreting "waters of the United States" more expansively "to include not only actual navigable waters but also tributaries of such waters" and to require permits for any dredging or filling of wetlands that may be adjacent to other waters subject to CWA regulation.

Invoking this expansive interpretation of CWA jurisdiction, the Army Corps sued a developer for building without a permit on land deemed a wetland adjacent to a traditionally navigable water. The Supreme Court granted review after the Sixth Circuit ruled that the Army Corps' regulations did not extend to adjacent wetlands and that the agency exceeded authority under the CWA.

The Supreme Court reversed the Sixth Circuit, ruling that the Corps' regulation plainly governed wetlands adjacent to other waters subject to CWA regulation. The question was then whether this was a permissible interpretation of the CWA.

The Court, citing *Chevron*, stressed that judicial review was limited because the Army Corps' interpretation was entitled to deference to the extent deemed "reasonable." After acknowledging that "on a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters[,]' the Court went on to conclude that there was ambiguity in the statutory text ("waters of the United States") because it can be difficult to say where water ends and land begins. Ultimately the Court concluded that it could

[17] *See* Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223 (2013).
[18] 474 U.S. 121 (1985).

not say the Army Corps' interpretation was necessarily unreasonable when considering the purpose of the CWA.

Practical Impact for Small Business

As a result of the Supreme Court's decision in *Bayview Homes*, small businesses and other landowners were forced to obtain exorbitantly expensive federal permits for even modest development plans within areas deemed wetlands by federal regulators, notwithstanding preexisting state regulatory standards.

In rubber-stamping the agency's interpretation of the CWA, *Bayview Homes* invited the Environmental Protection Agency and the Army Corps to issue subsequent regulations seeking even more expansive interpretations of CWA jurisdiction -- including controversial regulations in 1986 and the Waters of the United States Rule under the Obama Administration. The *Bayview Homes* decision also created tremendous uncertainty for landowners because it opened new questions about how far CWA jurisdiction could be stretched.

This is not to say that overturning *Chevron* would radically change our CWA jurisprudence. But if the Courts were to flesh-out the CWA's jurisdictional provisions on their own -- rather than defaulting to the views of federal bureaucrats -- small business owners would at least be satisfied that the courts were applying the law as written, rather than advancing an institutional agenda. Moreover, with an honest assessment of the statutory text, we believe the courts would either adopt an interpretation that provides meaningful and predictable guidance to the regulated community or else would invalidate portions of the CWA's jurisdictional language as violating due process for their lack of clear statutory standards. To be sure, this remains a painfully murky area of the law in large part because the Court chose reflexively to defer to agency views in the mid-1980s, which has contributed greatly to the very practical problems still vexing small business landowners today.[19]

City of Arlington v. FCC

In *City of Arlington v. FCC* the Supreme Court invoked *Chevron* to find that courts must defer to an agency's interpretation of its own statutory authority.[20]

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[19] It should be noted that the Supreme Court refused to afford deference to the interpretation advanced by Army Corps in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). But in that case the Court invoked the canon of avoidance to interpret the CWA more narrowly than the agency wanted, so as to avoid a constitutional problem. This means that courts should not defer to EPA and Army Corps interpretations if—in the context of a specific case—they would raise a Commerce Clause problem. But in many cases there may be legitimate questions as to the proper interpretation of CWA jurisdiction where federalism concerns are not squarely raised. And in any event, the entire body of CWA law prior to *Solid Waste Agency of N. Cook Cnty.* is predicated the deferential assumptions set forth in *Bayview Homes*.

[20] 133 S.Ct. 1863 (2013).

Under the Communications Act of 1934 (Communications Act), state and local governments must either approve or deny applications to construct wireless facilities -- such as radio and cellphone towers -- within a "reasonable period of time after the request is [] filed."[21] And FCC must ensure compliance. The FCC issued a decree that local authorities must issue a decision within 90 days for the placement of a new antenna on an existing structure and 150 days for all other applications.

The cities of Arlington and San Antonio, Texas, sought review of this Declaratory Ruling, arguing that it exceeded the FCC's authority under the Communications Act because Congress intended any dispute over delay in local permitting decisions to be reviewed in court. This meant that the FCC lacked authority to dictate permit processing times.

NFIB filed an amicus brief arguing that it was dangerous to give agencies the authority to determine the scope of their own powers without meaningful judicial oversight. Using a *Chevron* analysis, the Supreme Court held that the FCC's interpretation -- pronounced in a "Declaratory Ruling" -- was a permissible exercise of the agency's jurisdictional powers. The decision broadly endorsed the power of agencies to decide their own jurisdictional authority, with judicial deference under the *Chevron* doctrine.

City of Arlington resolved a hotly contested question of administrative law in favor of expansive assertions of regulatory power. The decision made clear that agencies are entitled to receive deference in their interpretations of both jurisdictional and non-jurisdictional language in a governing statute. Remarkably, the decision said that federal agencies possess greater expertise to determine their jurisdictional powers than do the courts.

Practical Impact for Small Business

By extending *Chevron* deference to agency determinations of its own jurisdiction, the Court set a dangerous precedent that encourages agency aggrandizement of regulatory authority – with minimal judicial oversight. By abdicating its responsibility to determine the scope of an agency's statutory authority, the Court signaled that agencies may intrude into the affairs of states and businesses with impunity – as long as their actions are justified as "reasonable" to the slightest degree.

These are just three examples of hundreds of cases upon which federal district and appellate courts, as well as the United States Supreme Court have used the *Chevron* doctrine to expand the administrative state.

Our Constitutional system of governing, and in particular, our separation of powers doctrine, plays a large role in empowering the vitality of small businesses in the United States. When this system erodes or functions less perfectly, there is an adverse impact on the ability of small businesses to have the significant impact they should have on the national marketplace and the economy as a whole. For these reasons, NFIB and the

[21] 47 U.S.C. 201(b).

small business community appreciate the focus Judge Gorsuch has given to this important issue.

Conclusion

NFIB appreciates the opportunity to share the opinions of the small business community on the nomination of Judge Gorsuch to serve on the U.S. Supreme Court. Small businesses, like every American, have an important stake in who fills Justice Antonin Scalia's seat. NFIB is pleased to support the nomination of Judge Neil Gorsuch.

Testimony of Heather C. McGhee, President of Demos
Before the Committee on the Judiciary of the United States Senate
Regarding the Nomination of Judge Neil Gorsuch to Become
Associate Justice of the United States Supreme Court
March 23, 2017

Introduction

Chairman Grassley, Ranking Member Feinstein, Senators, thank you for the privilege of testifying before the Senate Judiciary Committee today.

My name is Heather McGhee and I am the President of Demos, a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

I've come here today to urge this Committee to reject President Trump's nomination of Judge Neil Gorsuch to a lifetime appointment on the nation's highest court.

With the Supreme Court split four-to-four on so many critical issues, the stakes could not be higher. Judge Gorsuch has gone out of his way to support the wealthy and powerful over the rest of us, often breaking with his appellate court colleagues to do so.[1] On issues ranging from Wall Street accountability and workers' rights to criminal justice and the environment, he would move the country backwards.[2]

Beyond these critical topics, what's at stake today is the very shape and structure of our democracy: the way we make decisions about everything from who gets health care to whether a family with a full time worker will live in poverty; and whose voices are heard in that process.

Judge Neil Gorsuch has the potential to be the deciding vote to destroy the few remaining protections against big money dominating our democracy. His troubling record on money in politics, especially when added to the rest of his record of favoring wealthy interests over the rights of ordinary people, requires this Committee to reject his nomination to the U.S. Supreme Court.[3]

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[1] Alicia Parlapiano & Karen Yourish, "Where Neil Gorsuch Would Fit on the Supreme Court," THE NEW YORK TIMES (February 1, 2017); Elliot Mincberg, *The Dissents of Judge Neil Gorsuch: Far to the Right and Out of the Mainstream*, PEOPLE FOR THE AMERICAN WAY (February 2017).

[2] *The Gorsuch Record*, ALLIANCE FOR JUSTICE (February 2017).

[3] *Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money-in-Politics Reforms*, DEMOS & CAMPAIGN LEGAL CENTER (January 31, 2017).

I'd like to make three basic points in this testimony.

First, the way we fund our election campaigns in the U.S. enables wealthy individuals and institutions to translate their economic might directly into political power—and that is a serious problem for our democracy.

Second, putting Judge Gorsuch into a lifetime seat on the Supreme Court will make this worse, and could return us to an era in which powerful interests ran roughshod over workers, consumers, and anyone without a large checkbook and financial megaphone of their own.

Finally, there is an overwhelming bipartisan consensus supporting safeguards for our democracy, and Judge Neil Gorsuch is far outside that consensus. The public cares broadly and deeply about building a democracy where we can all be heard. Your constituents want you to stand up against big money, and your vote on this pivotal Supreme Court seat will be one of the best chances you will ever have to do so.

Our Billion-Dollar Democracy Resembles a Plutocracy

Our democracy is already under threat, with average voters convinced that their government is working not for them, but for powerful interests and the wealthy few.[4] This should not surprise us when so much of the $7 billion spent on 2016 federal elections came from so few.[5] The concentration of political spending is even more severe than the increasing concentration of wealth afflicting our broader society.[6]

Just 25 people pumped more than $600 million into last year's elections through political action committees, Super PACs, and direct contributions to candidates and parties.[7] Less than 1 percent of the population provides the majority of the funds that determine who runs for office, who wins elections, and what issues get attention from our elected officials.[8]

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[4] "Majority of Americans See Congress as Out of Touch, Corrupt," GALLUP (Sept. 2015) (reporting that 69% of respondents said the majority of Congressional members are focused on the needs of special interests, not constituents).

[5] *See* "Cost of Election," CENTER FOR RESPONSIVE POLITICS (visited Mar. 21, 2017).

[6] Research demonstrates that in 2012, the top 0.10% (the top tenth of the top 1%) of families in terms of wealth distribution controlled roughly 22% of all wealth. In the 2012 election cycle, the top 0.01% (the top one *one-hundredth* of 1%) of the adult population accounted for 25% of all fundraising to political committees. *Compare, e.g.*, Angela Monaghan, *US wealth inequality - top 0.1% worth as much as the bottom 90%*, THE GUARDIAN (Nov. 13, 2014) *with* Peter Olsen-Phillips, Russ Choma et al., *The Political One Percent of the One Percent in 2014: Mega Donors Fuel Rising Cost of Elections*, CENTER FOR RESPONSIVE POLITICS (April 30, 2015).

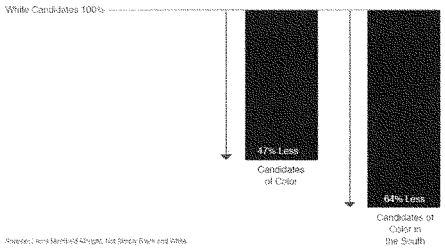
[7] "Top Individual Contributors: All Federal Contributions," CENTER FOR RESPONSIVE POLITICS (visited Mar. 21, 2017).

[8] "Donor Demographics," CENTER FOR RESPONSIVE POLITICS (visited Mar. 21, 2017).

These big donors and spenders aren't reflective of the country—they're wealthier, obviously, but they are also less likely to be women or people of color, and they have starkly different priorities when it comes to core public policies such as fair wages or debt free college.[9]

Studies show that candidates of color are less likely to run for office due to the money barrier and raise substantially less when they do.[10] This is a key reason 90 percent of elected officials across the country are white—despite the fact that nearly 40 percent of us across this great country are people of color.[11]

Figure 13. Candidates of color raise 47% less than white candidates overall, and 64% less than white candidates in the South (in 2006 state legislative races)



The result is that the deck is stacked, as Demos has shown in a series of reports with that name.[12] Our public policies are skewed towards top donors' preferences, and away from working families and people of color as a whole.

Princeton political scientist Martin Gilens has demonstrated that when the preferences of the wealthiest 10 percent of Americans conflict with those of the rest of the population, the 10 percent trumps the 90 percent.[13] He concluded that "under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the

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[9] *See* Sean McElwee, *Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections*, DEMOS (December 2016).

[10] *See* Adam Lioz, *Stacked Deck: How the Racial Bias In Our Big Money Political System Undermines Our Democracy And Our Economy*, DEMOS 27-29 (December 2014).

[11] Who Leads Us?, WOMEN DONORS NETWORK (visited Mar. 21, 2017).

[12] David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America*, DEMOS (February 2013); Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, DEMOS (December 2014).

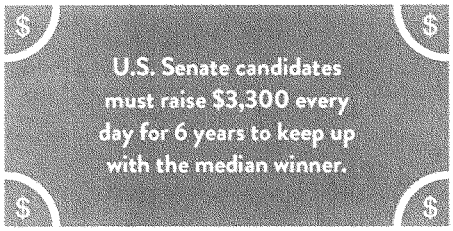
[13] MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012) at 83-84.

government does or doesn't adopt" and that "patterns of responsiveness…often correspond more closely to a plutocracy than to a democracy."[14]

This combination of disparate preferences and differential responsiveness creates a vicious cycle: the wealthy translate their economic might into political power; this allows them to write rules for our economy that keep them on top while working families struggle to stay afloat; which in turn allows the wealthiest few to pump even more money into politics each year. As we lather, rinse, and repeat in this vicious cycle, we take our democracy ever farther from the vision of political equality embodied in the principle of one person, one vote.

As senators, every member of this Committee has had to run for office in our big money system; so you know this problem better than most. You know, for example, that anyone wanting to run for a seat in the United States Senate needs to raise $3,300 *every single day for six years* just to match the median winner.[15] This equals the total income the average worker earns in a month.[16]

Figure 1.



Put another way, more than 2,000 times over the course of six years you have to be able to go out and find people who can give you $3,000 or $4,000 in just one day. And who are those contributors? Most of them are not your typical constituents. One of your colleagues, Senator Chris Murphy, was admirably frank about who he is reaching out to when dialing for dollars and the effect that has on the type of worldviews he's exposed to on a daily basis. When making fundraising appeals, he said he's "not call[ing] anyone who could not drop at least $1,000," people who he estimated make at least $500,000 to $1 million per year.[17]

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[14] *Id.* at 1; *Id.* at 234.

[15] Adam Lioz & Karen Shanton, *The Money Chase: Moving From Big Money Dominance in the 2014 Midterms to a Small Donor Democracy*, DEMOS (2015).

[16] *Median usual weekly earnings of full time wage and salary workers by sex, quarterly averages, seasonally adjusted*, BUREAU OF LABOR STATISTICS (2016).

[17] Paul Blumenthal, "Chris Murphy: 'Soul-Crushing' Fundraising is Bad for Congress," HUFFINGTON POST (May 7, 2013).

> I talked a lot more about carried interest inside of that call room than I did in the supermarket . . . [The people I'm calling] have fundamentally different problems than other people. And in Connecticut especially, you spend a lot of time on the phone with people who work in the financial markets. And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work at the mill in Thomaston, Conn., have. You certainly have to stop and check yourself.[18]

Senator Murphy is not alone. In the 2012 elections, 64 percent of the money your Senate colleagues and their election opponents raised from individual donors came in contributions of at least $1,000, from just 0.04 percent of the population.[19]

That doesn't just skew your colleagues' worldviews; it acts as a critical barrier to entry. Most Americans can't hope to raise that much money from so few people—they just aren't that well connected to the one percent of the one percent. This is one of the reasons the Senate has far fewer women than it should, and only 10 African Americans, Latinos, or Asian Americans.[20]

The Supreme Court Distorts Our Democracy

This is certainly not the democracy our Constitution *mandates*, or the one the public wants or deserves. Rather, this is the distorted democracy that Supreme Court decisions have forced upon us—a broken system where the size of our wallets determines the strength of our voices.

Supreme Court rulings have played a central role in creating and sustaining the current crisis. The justices' flawed approach to money in politics has shredded a series of common-sense protections against the power of special interests and wealthy individuals.[21]

At the heart of this flawed approach is the misguided notion that the people and our representatives may limit political contributions or spending only to fight corruption or its appearance, narrowly defined as cash-for-votes exchanges.[22] Fighting corruption is important, but clean governance is not the only value at stake when concentrated wealth meets public power. There are also critical questions at play regarding the integrity of our democracy, full participation in our political system, and the relationship between economic might and political power.

Over several decades, the Court has struck down some of the most effective common-sense protections against big money, taking the following policy options off the table: limits on how

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[18] *Id.*

[19] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, DEMOS & U.S. PIRG EDUCATION FUND (January 2013).

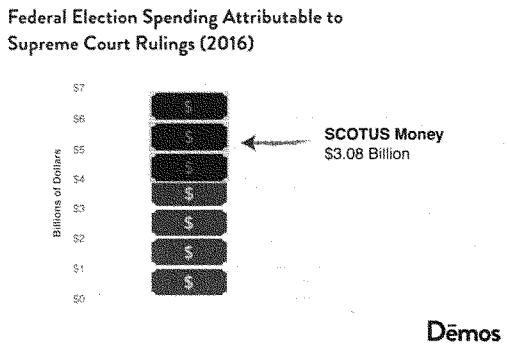
[20] Sheryl Estrada, "The 115th Congress Not a Model for Diversity," DIVERSITY, INC. (January 4, 2017).

[21] Adam Lioz, *Breaking the Vicious Cycle: Rescuing our Democracy and Our Economy by Transforming the Supreme Court's Flawed Approach to Money in Politics*, DEMOS (December 2015).

[22] *Id.*

much personal or family wealth candidates can spend on their own campaigns; limits on total candidate spending; limits on contributions to, or spending by, individuals or groups supposedly not connected to candidates' campaigns; limits on contributions to ballot initiatives; bans on corporate spending on ballot initiatives; strict contribution limits set at levels that average Americans can afford to give; bans on corporate spending on candidate elections; providing additional "matching funds" to publicly financed candidates who face big money spending by opposing candidates or interest groups; and limits on the total amount one wealthy donor can contribute to candidates, parties, and political committees in an election cycle.[23]

A recent Demos report called *Court Cash: 2016 Election Money Resulting Directly From Supreme Court Rulings* quantified the Court's impact for the first time.[24] We found that Supreme Court rulings enabled more than $3 billion in 2016 election spending, including more than three-quarters of the money spent in the most competitive congressional races.[25]

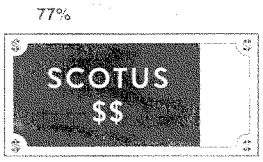


[23] *Id.*

[24] Adam Lioz, Juhem Navarro-Rivera & Sean McElwee, *Court Cash: 2016 Election Money Resulting Directly From Supreme Court Rulings*, DEMOS (March 2017).

[25] *Id.*

Portion of Competitive Congressional Race Spending
Attributable to Supreme Court Rulings (2016)



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The most damaging Roberts Court rulings have been five-to-four decisions in which the majority's basic assumptions about politics have been proven false, including the idea that so-called "independent expenditures" are actually independent of candidates and can't be corrupting, or that disclosure laws would be comprehensive or effective by themselves in reining in the influence of big money.[26] With a Supreme Court responsive to the facts rather than ideology we could end Super PACs and get corporate money back out of our elections.

Judge Gorsuch's Confirmation Would Threaten Remaining Protections

The next Supreme Court justice will have a pivotal role in ensuring our Constitution protects the rights and voices of all Americans. We need a ninth justice who understands that a true democracy cannot elevate big money over the voices of ordinary people and who will be open to reasonable limits on campaign spending. But from all we know of his record, Judge Neil Gorsuch would take us further down the Roberts Court's extreme path.

Judge Gorsuch models himself after Justice Scalia, an extreme skeptic of protections against big money, and his own record speaks volumes.[27] Judge Gorsuch has faced two directly relevant cases. In *Hobby Lobby*, he voted to expand First Amendment rights for corporations, building on *Citizens United's* troubling logic.[28] In *Riddle v. Hickenlooper*, he signaled openness to applying the harshest possible standard of review to campaign contribution limits—giving financial contributions a level of protection that the Supreme Court has not always afforded even our precious right to vote.[29]

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[26] Lawrence Norden & Iris Zhang, *Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decision*, THE BRENNAN CENTER FOR JUSTICE (January 2017).

[27] Adam Liptak, "In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style," THE NEW YORK TIMES (January 31, 2017).

[28] *Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money-in-Politics Reforms*, DEMOS & CAMPAIGN LEGAL CENTER (January 31, 2017).

[29] *Id.*

Judge Gorsuch's *Riddle* concurrence is notable because he went out of his way to write an opinion to discuss a matter—the potential for strict scrutiny—that was not necessary to decide the case; and because he cited non-majority opinions by Justice Thomas and Chief Justice Burger suggesting that all contribution limits should be subject to this type of review.[30] Given the opportunity by Senator Klobuchar to clarify his perspective on the subject during this hearing, Judge Gorusch shed no meaningful light on his views.[31]

Taken together, these opinions show that Judge Gorsuch would be receptive to the anticipated attacks on our few remaining democratic safeguards. Even a relatively narrow reading suggests he would vote to strike down the current bans on both soft money contributions to political parties and corporations contributing directly to candidates.[32] If confirmed, he could have the opportunity to do so in short order. The Supreme Court could hear a soft money challenge soon; and an ongoing case in Texas presents a challenge to the corporate ban.[33]

Judge Gorsuch's opinions also appear to take one more step towards applying "strict scrutiny" to all contribution limits. We could see jurisdictions required to supply an absurd level of evidence to justify common-sense limits—such as proving the going rate to bribe local politicians is $5,001 to support a $5,000 contribution limit. Ultimately, dozens of contribution limits could be wiped away, creating a Wild West atmosphere for donors and politicians.

In a world where Judge Gorsuch joins a majority bloc of pro-big money justices, the vicious cycle churns ever faster. Large corporations and wealthy individuals enjoy virtually unlimited ability to translate their economic might into political power. Our legislatures and other elected offices become even more skewed by race and class; policy becomes even more tilted towards the preferences of a donor class that is disproportionately male and largely excludes people of color; and working families and people of color across the nation continue to fall behind economically and be alienated politically.[34]

In this world, we could return to the scandal-plagued days of unlimited soft money contributions to political parties.[35] We could see oil companies, Wall Street banks, and secret money groups

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[30] *Riddle v. Hickenlooper*, 742 F.3d 922, 31 (10th Cir. 2014).

[31] *Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States (Day 2)*, U.S. SENATE JUDICIARY COMMITTEE (March 21, 2017).

[32] Richard L. Hasen, "Why Gorsuch could lead court in wrong direction," CNN.COM (March 1, 2017).

[33] Republican Party of Louisiana v. FEC, No. 16-865 (before the United States Supreme Court); Texas Democratic Party v. King Street Patriots, No. 15-0320 (before the Texas Supreme Court).

[34] Adam Lioz, *Stacked Deck: How the Racial Bias in our Big Money Political System Undermines Our Democracy and Our Economy*, DEMOS (2014).

[35] S. Rep. No. 105-167, at 4565-69 (1998). The report concluded "[t]he evidence indicates that the soft-money loophole is fueling many of the campaign abuses investigated by the Committee .... Soft money also supplied the

giving directly to candidates—something that hasn't happened since 1907.[36] And we could see contribution limits fall across the country, encouraging politicians to seek out only the views of the largest check-writers and ignore the middle and working classes.

Let's not forget what life was like before we banned corporations from dominating our politics in the first place. Workers were run ragged in round-the-clock shifts with meager pay, and regularly died on the job.[37] The right of laborers to form a union was not protected by state or federal law, and union organizers often faced violence.[38] The massive gap between rich and poor Americans was especially apparent to labor organizer Mary Harris ("Mother") Jones who noticed a breakout of Yellow Fever was killing predominantly poor and working class people, while wealthy individuals had the resources to avoid the disease or get proper treatment.[39] She described the conditions at the turn of the Twentieth Century that drove her organizing:

> Hours of work down under ground were cruelly long. Fourteen hours a day was not uncommon, thirteen, twelve. The life or limb of the miner was unprotected by any laws. Families lived in company-owned shacks that were not fit for their pigs. Children died by the hundreds due to the ignorance and poverty of their parents.[40]

It was against this backdrop of robber barons hoarding wealth at the expense of the poor and vulnerable that our longstanding history of limiting corporate political contributions emerged.

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funds parties used to make contributions to tax-exempt groups, which in turn used the funds to pay for election-related activities." *Id.* at 4565.

[36] *See, e.g.*, S. REP. NO. 113-223, at 9 (2014) (citing Tillman Act, 34 Stat. 864 (1907)).

[37] *See* JANNETTE THOMAS GREENWOOD, THE GILDED AGE: A HISTORY IN DOCUMENTS 57-59 (Oxford Univ. Press 2003). Author Jannette Greenwood notes:

> As late as 1907, 500,000 workers were killed or injured each year. Workers in heavy industry—such as steelmaking, mining, and rail-roads—were especially susceptible. Approximately 2,000 coal miners died every year from mine explosions and cave-ins. In 1893 alone, 433 men died while attempting to couple railway cars. Workers had little recourse for being compensated by negligent companies. Liability laws limited the responsibility of companies to such an extent that workers rarely received restitution. While industrialized nations in western Europe, such as Germany and Great Britain, provided state-funded accident insurance for workers, the United States lagged far behind.

Id. at 59. Nor were workers compensated adequately for their work: "[a]round 1900, the average wage for workers in manufacturing was around 21.6 cents an hour, and the workweek lasted six ten-hour days. Average annual earnings were $490, with no compensation for time off." *Id.* at 57.

[38] *See generally id.* at 49-65 ("Chapter Three: The Sorrows of Labor"). The author points out that while neither state nor federal laws protected laborers' right to organize, "throughout the Gilded Age government officials seldom hesitated to send state militias and federal troops to quell labor unrest." *Id.* at 50-51.

[39] *See id.* at 49.

[40] *Id.* at 57-58 (excerpting from Mary Harris Jones' autobiography).

The Public is Demanding Change

The public is counting on this Committee, and the Senate as a whole, not to let this happen again. Americans are deeply concerned about the impact of concentrated wealth on our democracy and understand the role of the Court. Ninety-four percent of voters believe that the power of big money in politics is a problem, and 90 percent say that the Supreme Court plays an important role in setting the rules.[41]

This is reflected in the fact that 110 members of Congress have taken the unusual step of writing to this Committee to request that its members press Judge Gorsuch on his record and views on money in politics.[42] This call was joined in a similar letter from 121 organizations representing millions of members concerned with democracy, civil rights, workers' rights, environmental protection, faith values, and more.[43]

Outside the Beltway, this is not a partisan issue at all. Ninety-one percent of President Trump's own voters thought it was important that he appoint someone to the Supreme Court who is open to limiting big money.[44] Seventy percent of Republicans say that Congress should reject any nominee "who will help the wealthy and privileged wield too much power in our elections."[45]

In fact, 85% of Americans believe we need fundamental changes to our system for funding political campaigns.[46] The influence of special interest money is the biggest problem voters have with politicians.[47]

The American people are demanding change to a political system that favors the already-wealthy and well-connected. Put simply, Judge Gorsuch has not shown sufficient commitment to our constitutional values of liberty, equality, and justice for all to earn Demos' support, or yours. We urge you to vote against Judge Gorsuch's confirmation, and tell your constituents that a key reason you did was to stand with them over big money. They will thank you.

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[41] *The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017).

[42] Rep. John Sarbanes, "110 House Members Demand Public Answers from Judge Gorsuch on Money in Politics" (March 14, 2017).

[43] "120 Groups Ask: Will Gorsuch Defend the Rights of Everyday People to be Heard Over Big Donors?," DEMOS & EVERY VOICE (March 14, 2017).

[44] *The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017).

[45] *Id.*

[46] Nicholas Confessore & Megan Thee-Brenan, "Poll Shows Americans Favor an Overhaul of Campaign Financing," THE NEW YORK TIMES (June 2, 2015).

[47] *Beyond Distrust: How Americans View Their Government*, PEW RESEARCH CENTER (November 23, 2015).

TESTIMONY OF FATIMA GOSS GRAVES
SENIOR VICE PRESIDENT FOR PROGRAM AND PRESIDENT-ELECT, NATIONAL WOMEN'S LAW CENTER

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE NOMINATION OF NEIL GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

March 23, 2017

My name is Fatima Goss Graves and I am Senior Vice President for Program and President-Elect of the National Women's Law Center ("Center"). The Center was founded in 1972 and has been involved in virtually every major effort to secure and defend women's legal rights over those last four decades. I very much appreciate your invitation to testify before the Committee on behalf of the Center on an issue of such profound importance – the nomination of Neil Gorsuch to be an Associate Justice of the United States Supreme Court. I ask that my full written statement and the Center's report on Judge Gorsuch's record referenced therein be submitted for the record.

Every Supreme Court Justice makes an enormous difference on the Court and a single justice can shape the court for generations to come. There is no question that Judge Gorsuch has distinguished credentials. But the inquiry does not end there. Each nominee also has the burden of demonstrating, as an affirmative matter, not only that he or she meets the necessary requirements of honesty, integrity, character, temperament, intellect, and lack of bias in applying the law, but also a commitment to protecting the rights of ordinary people, rights embedded in core constitutional principles and statutes that include protections for women's most central legal rights.

The Center has analyzed Judge Gorsuch's record, paying close attention to his writings and decisions. This record reveals a troubling pattern of narrowly interpreting the legal principles upon which women across the nation rely every day. Based on this analysis, the Center opposes the confirmation of Judge Gorsuch to the Supreme Court. A full description of the Center's analysis can be found in our report, **Judge Neil Gorsuch's Record on Women's Legal Rights Confirms Trump's Promises – and Women's Worst Fears**. In my testimony, I will summarize the report's key findings, focusing on three critical areas of the law: (1) women's health and reproductive rights; (2) antidiscrimination protections; and (3) deference to government agency interpretations of the laws they are charged with implementing.

Before delving into these concerns it is important to underscore the highly unusual and troubling process that led to Judge Gorsuch's nomination. It came after extraordinary obstruction preventing even a confirmation hearing for D.C. Circuit Chief Judge Merrick Garland. It also came following repeated and unprecedented promises from President Trump. First, President Trump guaranteed that his Supreme Court nominees would vote to overturn *Roe v. Wade*. Second, he said that he would nominate a Justice "in the mold" of the late Justice Scalia, a justice whose legal approach would limit women's legal rights in numerous fundamental ways. Third, President Trump promised to only select someone who appeared on lists approved by the Heritage Foundation and the Federalist Society – in effect, outsourcing the vetting of his Supreme Court nominees to these right-wing groups. It's worth pausing to point out that in its 45 years, the

Center has never been told, publicly or privately, that the President would limit his selection to a list we, or the coalitions of which we have been a part, approved.

I. Hostility Towards Longstanding Legal Protections for Reproductive Rights and Health.

Turning to the area of reproductive rights and health, Supreme Court decisions have an enormous impact on whether the constitutional right to privacy and liberty, including an individual's right to abortion and birth control, has true meaning in the lives of people in this country.

A review of Judge Gorsuch's writings and opinions in this area raises serious concerns. Judge Gorsuch has consistently written and ruled in ways that would undermine these rights and protections, particularly for reproductive rights and health. His record shows hostility to the constitutional right to privacy, he has criticized Supreme Court abortion jurisprudence, supported an anti-abortion politician's effort to defund Planned Parenthood without legal basis to do so, and allowed the professed religious beliefs of employers and other institutions to override women's own access to birth control and abortion.

Hostility to the Constitutional Right to Privacy. In his 2006 book, *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch evinces a general hostility towards constitutional protections of personal autonomy.[1] He argued that a broad reading of the Constitution's protections of personal and intimate decisions creates a slippery slope, which could end in allowing acts such as polygamy or consensual duels.[2] In fact, the Constitution's protection of personal and intimate decisions is the basis for the right to obtain birth control for married and single people, to enter into consensual same-sex sexual relationships, to marry, and to decide how to rear one's children, in addition to whether to have an abortion.

With respect to the right to abortion, Judge Gorsuch sought to minimize the impact of the Supreme Court's decision in *Planned Parenthood v. Casey*, which – in addition to reaffirming the central premise of *Roe v. Wade* – reaffirmed that the Constitution protects those decisions that are among "the most intimate and personal choices a person makes in a lifetime."[3] Judge Gorsuch has described core passages in *Casey* as "no more than dicta"[4] and "arguably inessential"[5] to the Court's decision. Instead, Judge Gorsuch has argued that the Court's decision in *Casey* was only the result of *stare decisis*—or respect for Court precedent, and not based on the merits of the right itself.

Extreme Deference to Political Efforts to Defund Planned Parenthood for Improper Purposes. Planned Parenthood Association of Utah v. Herbert involved an attempt by the governor of Utah to strip the Utah Planned Parenthood affiliate of critical funding, which would have led to individuals losing access to STI testing, health education, and essential preventive care. The governor's move came as part of a wave of political efforts around the country to strip Planned Parenthood of funding following the release of misleading and inflammatory videos by an anti-abortion group.

A three-judge panel of the Tenth Circuit temporarily blocked the governor's attack on Planned Parenthood on the grounds that it violated the "unconstitutional conditions doctrine" – which prevents the government from withholding funds to impose a condition that creates a waiver of a constitutional right. The court granted Planned Parenthood's motion for a preliminary injunction, finding that it was likely to prevail in its claim that the governor withdrew funds in order to retaliate against Planned Parenthood for exercising its constitutional rights, under the 1st and 14th Amendments, relying largely on statements made by the admittedly antiabortion governor, including that he did not think that the videos depicted any unlawful conduct in the state of Utah.

After the panel's decision, neither party asked for the decision to be reviewed, but in a step characterized by a Tenth Circuit judge as "extraordinary" and "unusual," one judge on the Tenth Circuit called for the entire court to rehear the case.[6] In the hearing before the Senate Judiciary Committee, Judge Gorsuch said that he was the judge calling for rehearing. The Tenth Circuit refused to consider the case again, with Judge Gorsuch dissenting, arguing that the full court should have reviewed the case and deferred to the Governor's stated reasons for defunding Planned Parenthood, even though the Governor had since dropped the matter. Judge Gorsuch's willingness to take such unusual procedural steps, and to credit the demonstrably baseless reasons initially provided by the Governor for stripping funding, in order to achieve a result that would leave women without essential health care services, demonstrates how far he would stretch the law and court processes to limit women's reproductive rights and health.

Allowing Corporations' Religious Beliefs to Override Women's Insurance Coverage of Contraception. On two occasions, Judge Gorsuch has addressed challenges to the birth control benefit in the Affordable Care Act, which requires health insurance plans to ensure women have coverage of all FDA-approved methods of birth control without cost-sharing. In both cases, his opinions elevated the employer's asserted beliefs over the health needs of women workers, allowing an employer's religious beliefs to override employees' right to insurance coverage of birth control. And in both cases, his legal reasoning showed little regard for the harm imposed on the women denied coverage for contraception.

In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), Judge Gorsuch joined the decision preceding the Supreme Court's *Hobby Lobby* decision, and also wrote a separate concurring opinion. The case presented a challenge to the birth control benefit under the Religious Freedom Restoration Act (RFRA), which requires courts to determine if a person's religious exercise rights have been "substantially burden[ed]" and if so, first, whether the law both furthers a compelling government interest that can justify the burden and second, whether the law is narrowly tailored to further the interest.[7]

Citing to *Citizens United v. FEC*,[8] the Tenth Circuit held that closely-held for-profit corporations like Hobby Lobby—a commercial craft store chain employing more than 13,000 people—can be "persons" with religious beliefs and that such employers can use their asserted religious beliefs to block employees' insurance coverage of birth control, despite the burden placed on the women denied the coverage.[9] It was a fractured opinion, but Judge Gorsuch joined the decision in its entirety, including the extreme holding that promoting gender equality and public health were not compelling government interests in the majority's opinion.

Judge Gorsuch also wrote a separate concurrence focused specifically on the Hobby Lobby owners, where he argued not only that the owners had standing to bring claims against the birth control benefit, but also elaborated on the substantial burden question, giving near absolute deference to the plaintiffs' articulation of what constitutes a substantial burden. He argued the individual plaintiffs' plain assertion was determinative. Judge Gorsuch's reading would render meaningless RFRA's requirement that courts determine whether a regulation imposes a substantial burden. And here he also did not even acknowledge the impact on the women who would lose insurance coverage under his approach, and the serious financial burden on women and their families.[10]

The case went to the Supreme Court, which decided in 2014 by a 5-4 vote that certain businesses like Hobby Lobby are "persons" capable of exercising religion under RFRA and can bring religious exercise claims under that law.[11] Unlike the Tenth Circuit majority that included Judge Gorsuch, however, the Supreme Court majority opinion assumed the benefit forwarded a

compelling interest,[12] and five Justices explicitly affirmed that the birth control benefit advances a compelling interest in women's health and well-being.[13] Because the Court found that the birth control requirement was not narrowly tailored to accommodate that interest, the Court pointed to the availability of an accommodation, which allowed certain non-profit employers to opt out of the benefit by filling out paperwork to notify either their insurance plan or the federal government of their objections, finding that the effect of the accommodation on women would be "precisely zero."[14] This stands in sharp contrast to the decision by the Tenth Circuit, which disregarded the needs of the women workers, and Judge Gorsuch's additional concurrence, which gave the workers no mention at all.

Following *Hobby Lobby*, the Tenth Circuit considered *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), a RFRA challenge to that very accommodation offered to non-profit organizations. In this case, the non-profit employers who qualified for the accommodation claimed that the simple act of filling out a form opting out of coverage was too burdensome. After the Tenth Circuit decided against the objecting employers, the entire Circuit Court decided not to review the decision *en banc*. However, Judge Gorsuch joined a dissent that went far beyond the Supreme Court's *Hobby Lobby* precedent. The dissent argued that even the accommodation constituted a substantial burden on religious exercise. Eight of the nine circuit courts of appeals to consider this question found that the accommodation was not a substantial burden,[15] relying on the Supreme Court's own language in *Hobby Lobby*. Again, even after the Supreme Court in *Hobby Lobby* instructed that as part of RFRA's balancing test courts must consider the impact on women, the dissent Judge Gorsuch joined in *Little Sisters* did not address the women who would lose essential birth control coverage if their employers' claims prevailed.[16] In contrast, when the Supreme Court later considered the issue in *Zubik v. Burwell*,[17] the Court remanded the case, instructing the parties to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[18]

Judge Gorsuch's willingness to give near-absolute deference to employers making RFRA challenges – and virtually no regard to the burden on women – could have major adverse consequences for women's health and rights, and be applied to limit a broad range of rights and protections of individuals.

II. Approach Would Limit Antidiscrimination Protections.

The Supreme Court determines the reach of critical antidiscrimination protections at work, at school, in federal spending, and beyond. But just as Judge Gorsuch's record in cases involving reproductive rights elevate the rights of corporate employers and hospitals over women's rights to their own religious beliefs, health care, and personal autonomy, his approach to antidiscrimination protections, particularly in the workplace, works to the disadvantage of women.

"Backwards-Looking" Approach to Constitutional Protection Against Sex Discrimination. Judge Gorsuch has embraced an approach to judging that evokes Justice Scalia's brand of textualism and originalism – one that led Justice Scalia to vote[19] against longstanding heightened protection of women from government-sponsored sex discrimination. Judge Gorsuch wrote that

> judges should strive (if humanly and so imperfectly) to apply the law as it is, ***focusing backward, not forward*** (emphasis added), and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be. . . .[20]

This "backwards" approach, if applied to the Equal Protection Clause of the Constitution, called into question whether Gorsuch would adhere to the longstanding heightened scrutiny standard for reviewing sex discrimination if confirmed to the Supreme Court. Moreover, it is little comfort that Judge Gorsuch has accurately described heightened scrutiny for race and sex discrimination under the Equal Protection Clause as it now stands, given the narrow way he has applied these standards in practice.[21] For example, Judge Gorsuch joined an opinion summarily concluding that a public employer's decision to bar a transgender employee from using the restroom that conformed to her gender identity did not violate the Equal Protection Clause.[22]

Evidence of Endorsement of Discriminatory Practices. Before turning to Judge Gorsuch's decisions on women's legal protections in the workplace, it is important to address a recent letter submitted to the Senate Judiciary Committee. That letter, written by a former University of Colorado Law student, states that Judge Gorsuch made a series of disturbing comments in a Legal Ethics and Professionalism course that he taught in 2016: according to the student, Judge Gorsuch indicated that women commonly manipulate employers by accepting jobs without disclosing their plans to become pregnant, accepting maternity benefits from their employers, and then failing to return to work after maternity leave.[23]

Statements that companies can and indeed must ask women (and only women) about their plans in regard to family and pregnancy in order to protect corporate interests are wildly at odds with longstanding protections against pregnancy discrimination and other forms of sex discrimination at work.[24] There are two possible interpretations of Judge Gorsuch's alleged statements – and either should be considered disqualifying. The first is that employers should disregard the law, putting their own perceived financial self-interest above their legal obligations to treat female applicants and employees fairly. The second is that, given the opportunity, Judge Gorsuch would seek to overturn the long-established principle that denying women employment opportunities because they have children or because they may have children in the future, is one of the most persistent and harmful forms of sex discrimination,[25] relegating women to second-class status at work. After all, the statements certainly imply that employers should be permitted to reject female applicants based on their intention to have a family, while making no such queries or judgments as to male applicants.

Deferring to employers in discrimination claims. The reported statements by Judge Gorsuch regarding female job applicants are inconsistent with both the letter and purpose of Title VII (as well as the Family and Medical Leave Act). But they are in many ways consistent with Judge Gorsuch's record in employment discrimination cases, where he has demonstrated a repeated tendency to narrowly construe workplace antidiscrimination protections and reflexively defer to employers' stated rationales for adverse employment actions against employees, even when this means ignoring applicable precedent. Judge Gorsuch has favored employers in discrimination cases. He ruled for the employer in a full nine out of 12 published employment discrimination decisions he authored,[26] issued a mixed decision in two,[27] and ruled for the employee in only one.[28] Examples of women[29] in many workplace settings who were denied relief in cases in which he participated include:

- Betty Pinkerton alleged that in December 2002, her supervisor began to sexually harass her.[30] Over the next two months, on multiple occasions he asked Pinkerton questions about her sexual habits, her breast size, and about whether she missed being with men since her divorce, and he asked to have lunch at her house. In February 2003, Pinkerton reported his conduct. Over dissent, Judge Gorsuch joined an opinion in *Pinkerton v. Colo. Dep't of Transportation*, ruling against Pinkerton on the basis that her failure to

report the harassment for two months was unreasonable, even though discrete remarks only become a pattern of harassment over time and upon repetition. As the dissenting judge observed, it will often take multiple inappropriate statements to constitute sexual harassment under law – "a hostile environment must be intolerable, and often it may take more than one inappropriate statement for the environment to become intolerable."[31] Moreover, two months is hardly a long period of time for an employee to wait to complain. Not only did Judge Gorsuch's approach ignore the law, it ignored the nature of workplace harassment and the workplace realities that the law is designed to address.

- Carole Strickland alleged that her supervisors subjected her to continual criticism and imposed standards on her that were not imposed on the male employees in her position (at least one of whom trailed her on every sales measure).[32] She finally felt forced to leave her job. In *Strickland v. United Parcel Service*, the Tenth Circuit panel reversed and remanded the district court's judgment as a matter of law for the employer on her sex discrimination claim – but Judge Gorsuch dissented. He argued that Strickland had failed to produce evidence demonstrating that her supervisor treated her less favorably than her male counterparts. As the majority noted, however, testimony from multiple coworkers established that Strickland was treated differently from her male counterparts and subjected to requirements that were not imposed on them, even as she outperformed some of them. Judge Gorsuch's dissent demonstrates his tendency to construe facts in the light most favorable to the employer, even when, as here, the applicable legal standard demands that the facts be viewed in the light most favorable to the employee.
- When Grace Hwang was diagnosed with leukemia, she was provided six months of leave for treatment by the university that employed her. She then requested additional leave through the end of the semester, because there was a flu epidemic on campus and her immune system was compromised by treatment. She offered to work from home, including online teaching, but the university refused, claiming that employees were entitled to a maximum of six months of leave pursuant to its policy, with no exceptions.[33] Hwang argued that her employer's refusal to accommodate her disability by allowing her to work from home violated the Rehabilitation Act. Judge Gorsuch disagreed, writing in *Hwang v. Kansas State University*, that an employee who was unable to work for more than six months was categorically unable to perform the essential duties of her position, discounting her availability to work from home. In rejecting her claim, Judge Gorsuch ignored the Rehabilitation Act's requirement that employers evaluate accommodation requests on a case by case basis, rather than imposing inflexible rules about what forms of accommodation are reasonable. Indeed, other courts have declined to adopt the standard he set out, which narrows the law's protections.[34]
- Rebecca Kastl, a transgender woman, was barred from using the women's restroom at the school district where she worked until she could prove she had completed gender reassignment surgery.[35] She was then terminated. Judge Gorsuch joined a memorandum opinion in *Kastl v. Maricopa County Community College District*, finding that the employer's actions did not constitute unlawful gender discrimination. The court acknowledged its own precedent established that discrimination against a transgender individual for failure to conform to gender norms constitutes sex discrimination, but nonetheless found that Kastl had failed to demonstrate that the district's decision to ban her from the restroom in fact was based on her gender, rather than on "safety concerns." But the decision to ban her from the restroom based on her transgender status should have been considered facially discriminatory. The panel's reasoning has been rejected by the EEOC,[36] conflicts with the multiple federal courts of appeals decisions that have affirmed that discrimination on the basis of gender identity constitutes sex discrimination,[37] and relies on the outmoded, paternalistic idea that discrimination is justified by a need to protect women. The case again demonstrates Judge Gorsuch's

tendency to reflexively defer to employers' stated rationales, even in the face of legal standards and precedent that support the employee.

III. Lack of Deference to Federal Agencies When They Support the Rights of Individuals.

Federal agencies have the legal responsibility to interpret, implement, and enforce core labor and employment rights, as well as civil rights protections in the context of education, health care, and elsewhere. Through their day-to-day work fulfilling these responsibilities, agencies build deep expertise in these issues. Often agency regulations define, for all practical purposes, the contours of the protections established by statute.

A critical legal principle that respects the authority and expertise of federal agencies is "*Chevron* deference," whereby the judicial branch defers to agencies' reasonable interpretations of federal law. Judge Gorsuch has directly questioned this longstanding Supreme Court precedent requiring judicial deference to government agency interpretations of laws when Congress has granted the agency authority to interpret and implement the law in question.[38]

Eliminating or limiting such deference could result in real-world adverse consequences for women. For example, the Department of Education's Title IX regulations and guidance interpret the law's core protection against sex discrimination in education. Among other things, these regulations and guidance define and clarify school's obligations to ensure equal athletic opportunities to girls, to accommodate pregnant and parenting students, and to address sexual assault. As just one example, in 1979, the Department of Education published a policy guidance explaining how schools should promote equal athletics opportunities for girls. Today, nearly 1.5 million more high school girls participate in sports than they did the year before the guidance.[39] The lack of deference advocated by Judge Gorsuch for such guidance, however, could have made these regulations susceptible to challenge – foreclosing athletic opportunities for millions of girls.

In his jurisprudence, Judge Gorsuch has repeatedly demonstrated reluctance to defer to agency expertise in interpreting the laws that they implement and enforce, and this has often resulted in concrete adverse consequences for workers. He has instead sought to substitute his own judgment for agency interpretations and decisions, which threatens to undermine critical worker protections. For example, in *TransAm Trucking, Inc., v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), Judge Gorsuch's dissent took the majority to task for deferring to the Department of Labor's interpretation of the whistleblower provision of a workplace health and safety law, the Surface Transportation Assistance Act (STAA). A Department of Labor administrative law judge had ruled that the employer violated the STAA when it terminated a truck driver for failing to stay in his tractor-trailer awaiting a repair person after he reported that it broke down in subzero temperatures. After waiting several hours in the extreme cold, the truck driver unhitched the trailer and drove off, because he had no heat in his truck and could no longer bear the cold, and because he refused to drag the trailer with frozen brakes, as had been suggested by dispatch. The administrative law judge ruled that the refusal to drag the trailer with frozen brakes based on valid safety concerns was protected activity under the STAA, as it constituted a refusal to "operate" the vehicle because of safety concerns. The Tenth Circuit majority deferred to that interpretation of the law. Judge Gorsuch criticized the majority for deferring to the agency's interpretation that the law protected the truck driver, because the agency had not raised the issue of the legal deference to which its own interpretation of the whistleblower provision was entitled. He would instead have substituted his interpretation of the phrase "refuse to operate" for the agency's, and upheld the driver's termination.

Beyond educational opportunities and worker protections, the failure to defer to agencies would have serious implications in innumerable other areas of the law, from the environment to consumer protections to the health and safety of people in this country.

Conclusion

Every justice on the Supreme Court makes a difference, with many critical cases decided by narrow margins. Landmark decisions on women's right to equality and liberty, marriage equality, enforcement of antidiscrimination principles at work and at school, and voting rights, among many others, show why every vote on the Supreme Court counts.

The country needs justices on the Supreme Court who respect the core constitutional values of liberty, equality, and justice for all, and who respect laws designed to protect individuals against unfair and harmful actions by employers, educational institutions, and other powerful forces. Yet the kind of nominee that President Trump promised to appoint would eviscerate vital legal rights and protections for those who turn to the courts for fairness, and most especially women. Indeed, Judge Gorsuch's record demonstrates that he would fulfill the President's political promises, to women's detriment. Indeed, if Judge Gorsuch is confirmed to a lifetime position on the Supreme Court, women could suffer the devastating impact of his decisions for generations to come.

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[1] A full two chapters of Judge Gorsuch's book, which is otherwise focused on arguing against allowing medical aid in dying, are dedicated to explaining and deconstructing arguments about personal autonomy and the right to medical aid in dying. He goes so far as to argue that if personal autonomy arguments prevailed it would have "ripple effects… on social and cultural norms" and points to instances of mass suicides and cannibalism, implying incidents of this type of behavior would increase or even be made legal. NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 99-101 (Princeton Univ. Press 2006).

[2] *Id.* at 81-82.

[3] Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 851 (1992).

[4] Brief of Amicus Curiae of the American Hospital Assoc. in Support of Petitioners at *7, Washington v. Glucksberg, 521 U.S. 702 (1997)

[5] GORSUCH, *supra* note 1, at 80.

[6] Planned Parenthood Assoc. of Utah v. Herbert (Planned Parenthood II), 839 F.3d 1301, 1302 (10th Cir. 2016).

[7] 42 U.S.C. § 2000bb-1 (2012).

[8] 558 U.S. 310 (2010).

[9] The Tenth Circuit noted the impact on employees – stating "Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would have an economic burden not shared by employees of companies that cover all twenty methods" – but not did address it further, suggesting they did not consider it relevant to the outcome of the case. *Hobby Lobby*, 723 F.3d at 1144.

[10] Notably, many of Hobby Lobby employees work as retail workers – low-wage jobs disproportionately likely to be held by women. Many of these women may be unable to take on the financial burden of paying the out of pocket costs for birth control, particularly the steep up-front costs of long-acting reversible contraceptives like the IUD which can cost up to $1,000 up-front. These are the women Judge Gorsuch's opinions ignore. *See* NAT'L WOMEN'S LAW CTR., LOW-WAGE JOBS HELD PRIMARILY BY WOMEN WILL GROW THE MOST OVER THE NEXT DECADE (April 2016), *available at* https://nwlc.org/wp-content/uploads/2016/04/Low-Wage-Jobs-Held-Primarily-by-Women-Will-Grow-the-Most-Over-the-Next-Decade.pdf.

[11] Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014).

[12] *Id.* at 2780.

[13] "It is important to confirm the premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). "[T]he Government has shown that the contraceptive

coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence." *Id.* at 2799 (Ginsburg, J., dissenting).

[14] *Id.* at 2760.

[15] Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014); Geneva Coll., et al. v. U.S. Sec'y Dep't of Health &Human Servs., 778 F.3d 422 (3d Cir. 2015); Univ. of Notre Dame v. Burwell, et al., 786 F.3d 606 (7th Cir. 2015); Wheaton Coll. v. Burwell, et al., 791 F.3d 792 (7th Cir. 2015); Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al., 794 F.3d 1151 (10th Cir. 2015); East Tex. Baptist Univ. v. Burwell, et al., 793 F.3d 449 (5th Cir. 2015); Catholic Health Care System, et al. v. Burwell, et al., 796 F.3d 207 (2d Cir. 2015); Michigan Catholic Conference & Catholic Family Servs., et al. v. Burwell et al., 807 F.3d 738 (6th Cir. 2015); Grace Schs., et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al., 801 F.3d 788 (7th Cir. 2015); Eternal World Television Network v. U.S. Dep't of Health & Human Servs., No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015); Dordt Coll., et al. v. Burwell, 801 F.3d 946 (8th Cir. 2015).

[16] *See* Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting).

[17] 136 S.Ct. 1557 (2016).

[18] *Id.* at 1560.

[19] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (Scalia, J., dissenting); U.S. v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting).

[20] Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).

[21] *See* SECSYS, LLC v. Vigil, 666 F.3d 678, 686-687 (10th Cir. 2012).

[22] *See* Kastl v. Maricopa Cnty. Cmty. College Dist., 325 F. App'x 492 (9th Cir. 2009).

[23] Arnie Seipel & Nina Totenberg, *Former Student: Gorsuch Told Class That Women 'Manipulate' Maternity Leave*, NPR (Mar. 20, 2017), http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave.

[24] *See, e..g.*, Int'l Union v. Johnson Controls, 499 U.S. 187, 199 (1991) ("Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex."); *id.* at 204 (Women who are either pregnant or potentially pregnant must be treated like others 'similar in their ability ... to work.' In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."); Cal. Fed. Sav & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (describing the animating purpose behind the Pregnancy Discrimination Act as "to guarantee women the basic right to participate full and equally in the workforce, without denying them the fundamental right to full participation in family life"); Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015) ("Because Title VII 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."), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[25] *See, e.g.*, Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003).

[26] Hwang v. Kansas State Univ., 753 F.3d 1159 (10th Cir. 2014); Myers v. Knight Protective Serv., Inc., 774 F.3d 1246 (10th Cir. 2014); Roberts v. Int'l Business Machines Corp., 733 F.3d 1306 (10th Cir. 2013); Elwell v. Oklahoma *ex rel.* Bd. of Regents of Univ. of Oklahoma, 693 F.3d 1303 (10th Cir. 2012); Almond v. Unified Sch. Dist. No. 501, 665 F.3d 1174 (10th Cir. 2011); Johnson v. Weld Cnty., 594 F.3d 1202 (10th Cir. 2010); Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187 (10th Cir. 2008); Montes v. Vail Clinic, Inc., 497 F.3d 1160 (10th Cir. 2007); Young v. Dillon Companies, Inc., 468 F.3d 1243 (10th Cir. 2006).

[27] Barrett v. Salt Lake City, 754 F.3d 864 (10th Cir. 2014); Williams v. W.D. Sports, N.M. Inc., 497 F.3d 1079 (10th Cir. 2007).

[28] Orr v. City of Albuquerque, 531 F.3d 1210 (10th Cir. 2008) (reversing grant of summary judgment for employer in Pregnancy Discrimination Act case when plaintiff presented evidence that pregnant employees were required to exhaust sick time for FMLA leave and were not allowed to use compensatory leave, while employees seeking FMLA leave for non-pregnancy related reasons were allowed to use compensatory leave, vacation leave, and sick leave, in whatever manner they chose).

[29] Judge Gorsuch's narrow readings of employment laws have also harmed male plaintiffs, in decisions construing legal rules that impact women as well. *See, e.g.*, Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007) (concurring in judgment and concurring separately to affirm grant of summary judgment to employer on Title VII claim of discriminatory termination on basis of race and national origin); Bergesen v. Shelter Mutual Ins. Co., 229 F. App'x 750 (10th Cir. 2007) (writing majority opinion affirming grant of summary judgment to employer in Title VII retaliation claim premised on report of racially discriminatory conduct by employer).
[30] Pinkerton v. Colo. Dep't of Trans., 563 F.3d 1052 (10th Cir. 2009).
[31] *Id.* at 1068-69.
[32] Strickland v. United Parcel Service, 555 F.3d 1224 (10th Cir. 2009).
[33] Hwang v. Kansas State Univ., 753 F.3d 1159 (10th Cir. 2014).
[34] The Tenth Circuit has previously recognized that the Rehabilitation Act generally does not allow per se rules and that whether an accommodation is reasonable should be determined on a case-by-case basis. See Mason v. Avaya Commc'ns., Inc., 357 F.3d 1114, 1124 (10th Cir. 2004). Other Circuits have also determined that there is no per se rule against a lengthy leave under either the Rehabilitation Act or the Americans with Disabilities Act. *See* Garcia-Ayala v. Lederle Parenterals, Inc. 212 F.3d 638 (1st Cir. 2000) (reversing summary judgment against a plaintiff where the district court had not given an individualized assessment of a request for an accommodation extending a one-year leave by five months); Judge Gorsuch's ruling also contradicted EEOC guidance. *See* QUESTIONS & ANSWERS ABOUT CANCER IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA), EEOC, Examples 6, 13 https://www.eeoc.gov/laws/types/cancer.cfm (last visited Mar. 20, 2017) (recognizing the possibility of leave in excess of six months).
[35] Kastl v. Maricopa Cnty. Cmty. College Dist., 325 F. App'x 492 (9th Cir. 2009).
[36] *See, .e.g.*, Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (holding that discrimination on the basis of transgender status is sex discrimination in violation of Title VII.
[37] *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[38] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (Gorsuch, J., concurring).
[39] NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2015-2016 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf.

Written Testimony of Patrick Gallagher on the Senate Confirmation Hearings for Judge Neil Gorsuch

We need strong environmental laws to safeguard the water we drink and the air we breathe. The Clean Air Act, Clean Water Act and similar laws were enacted in the 1970s because corporate polluters had fouled our air and water so badly that Congress stepped into the breach. In the decades since, vigorous enforcement of environmental law has led to the cleanup of dangerous pollution across this country and to substantial improvements in the quality of our air and water. That progress could be undermined if Judge Gorsuch's views take hold on the Supreme Court.

The Sierra Club believes that we must protect our democracy in order to protect our air, water, and communities. Among other things, this means ensuring that corporations do not have a louder voice than citizens in any branch of our government and citizens and organizations have access to our courts. Judge Neil Gorsuch's track record shows that he cannot be relied on to guarantee either, which is why the Sierra Club opposes his nomination.

Several factors lead the Sierra Club to oppose the nomination of Judge Gorsuch. First, Judge Gorsuch has expressed a consistent willingness to close the courthouse doors to citizens and the public, even while holding them wide open for corporate and industrial interests. Second, Congress' wisdom in permitting citizens to protect clean air and water are particularly important now, in the face of an Administration that is openly hostile to duly enacted laws that secure such protection. Third, Judge Gorsuch's hostility to the *Chevron* doctrine echoes the threats of the Trump administration to dismantle the EPA and sister agencies, and bring the courts into technical and scientific disputes over any rule opposed by industry. We cannot afford to appoint another justice whose ideology favors corporate and industrial interests over the common goods of clean air, clean water and wilderness.

In 2005, then government lawyer Neil Gorsuch penned an article in the National Review entitled "Liberals N' Lawsuits." In that article, Judge Gorsuch lambasted progressive groups for resorting to the federal courtsto remedy injustice. In what now seems an ominous foretelling, Judge Gorsuch ended the article with this warning:

> Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold.

Reportedly Judge Gorsuch has stated that he wishes the National Review piece would "just disappear." https://electionlawblog.org/?p=91160. Unfortunately, the philosophy espoused in the article has not disappeared. As discussed below, a pattern has begun to emerge from Judge Gorsuch's opinions that suggests he disfavors lawsuits brought by

citizens and environmental non-profits, and will find ways to shut the courthouse doors on them.

Based on what we can glean from his writings, Judge Gorsuch holds an extremely limited view of what the Constitution allows when ordinary citizens seek to protect their rights in federal court. This view, which goes even further than the view of late Justice Scalia's, would severely restrict citizen access to the courts by imposing jurisdictional hurdles. One of these hurdles is the misinterpretation of Article III of the Constitution to create a nearly-impassable test to prove a standing to sue -- a tactic that conservative judges deployed with increasing activism under Justice Scalia to prevent environmental plaintiffs from protecting our water and air from harmful pollution.

The notion that the Separation of Powers demands a more burdensome standing test for environmental plaintiffs has been thoroughly debunked by legal scholars.[1] While Justice Scalia saw, and now Judge Gorsuch may see, an inter-branch conflict in allowing citizens to take to the courts to enforce environmental laws where the government has failed, Congress and the Executive Branch have historically encouraged citizen enforcement as a necessary supplement to government prosecution. For example, *qui tam* suits by citizens alleging fraud on the government were specifically authorized by the first Congress and continue to exist today. Congress has put citizen enforcement into almost every major environmental law. The Environmental Protection Agency, created under President Nixon, has consistently supported citizen enforcement of environmental law. All of this suggests that Judge Gorsuch's contrary tendency to deny jurisdiction for pro-environmental litigants demonstrates a different agenda than simply preserving equal branches of government .[2]

Sadly, polluters and corporations fare much better getting into federal court in Judge Gorsuch's world. In 2011, the Energy and Environment Legal Institute ("EELI") filed a lawsuit against the State of Colorado's renewable energy standard ("RES") in federal court. EELI is a non-profit organization that promotes coal and denies the existence of climate change; it was represented by David Schnare, a known antagonist of climate scientists. The Sierra Club asked Judge Gorsuch to dismiss EELI for lack of standing, as none of its members had shown actual harm from the Colorado RES. Judge Gorsuch dismissed this argument in a footnote. Contrast that with the probing opinions Judge Gorsuch issued in several cases, described below, where he denied environmental advocates access to the courthouse, and this imbalance becomes clear.

Already, the federal courts typically welcome corporate plaintiffs who allege economic impacts from the imposition of pollution controls. Conversely, the environmental non-profits or individual citizens who seek to vindicate the public's congressionally-conferred rights to protect a river or a lake from pollution are forced to jump through all kinds of hoops just to get into court, often to be turned away. That leaves the environmental plaintiffs "out in the cold," to use Judge Gorsuch's words. We fear that a Justice Gorsuch would greatly exacerbate the asymmetry between citizen and corporate plaintiff access to the courthouse.

Judge Gorsuch's limited environmental jurisprudence to date lends credence to this threat assessment. In the case *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service,* the Sierra Club and other non-governmental organizations ("NGOs") were granted intervention to defend a Forest Service rule limiting off-road vehicles in a national forest. Neither the government nor the off-road group objected to the NGO intervention. However, Judge Gorsuch objected in a dissenting opinion that, according to his interpretation of Federal Rule of Civil Procedure 24, the NGOs should not be allowed to intervene in the case because they were adequately represented by the Forest Service. The majority sharply criticized Judge Gorsuch's reasoning and allowed the citizens groups to intervene and assert their rights. The majority noted, among other faults in Judge Gorsuch's reasoning, that "the Forest Service does not contest intervention by the environmental groups, and, thus, has not stated that its interests align with those of the environmental groups or that it will represent their interests." 540 F. App'x 877, 882 n.7 (10th Cir. 2013). While not a particularly groundbreaking case, it hints at the real danger in Gorsuch's judicial philosophy: he will limit access to the courts by heightening the already significantly restrictive rules on standing, intervention, and other procedural hurdles.

In 2015, he ruled that environmental groups lacked standing to challenge the Forest Service's temporary approval of motorcycle use on forest trails, relying on the specious reasoning that the relief the organizations sought would not have helped to redress their injuries under Article III. *Backcountry Hunters and Anglers v. U.S. Forest Service*, 612 Fed. Appx. 934 (10th Cir. 2015). In 2011, Gorsuch joined an opinion denying access to federal court for several environmental organizations who challenged a Utah county ordinance that opened a large stretch of federal wilderness to off-highway vehicle (OHV) use, *The Wilderness Society v. Kane County, Utah*, 632 F.3d 1162 (10th Cir. 2011).

The most extreme and troubling aspect of Judge Gorsuch's Separation of Powers ideology relates to whether citizens should be able to enforce environmental laws in federal court *at all.* In his dissent from the majority in the case *Laidlaw v. Friends of the Earth,* 528 U.S. 167 (2000), Justice Scalia questioned whether allowing the environmental plaintiffs to proceed with a suit seeking penalties against an industrial polluter would usurp the Executive Branch's prerogative to enforce or not to enforce the law. Such an extreme view of Separation of Powers would eviscerate the enforcement of environmental laws and inevitably lead to environmental decline. Judge Gorsuch's extreme Separation of Powers ideology and antipathy to "liberal lawsuits" suggest that his issuing a ruling along these lines is a very real possibility.

The main point here is that Judge Gorsuch's cramped view of the public's right to enforce the law in federal courts allows him to throw citizens out of court, even when it becomes perfectly clear that the law is being violated. That view presents an acute danger now, when the President and EPA Administrator are openly announcing their intention to stop enforcing those laws. We are threatened with a world in which the Clean Air Act and Clean Water Act are made meaningless—a devastating form of judicial activism (and, ironically, precisely the sort of constitutional activism for which Judge Gorsuch criticized "liberals" in his National Review article).

One can easily imagine the argument that a Federalist Society "expert," as Judge Gorsuch is pegged, might assert to support such a cramped view of the Constitution. The main thrust might be along the lines of the following: a) the federal government should play a limited role in regulating pollution because the states are on the front lines (hence the $2 billion cut to EPA's budget proposed by the White House) and; b) to the extent that the federal government does enforce environmental laws, that is the President's prerogative and citizens should not be allowed to interfere.

At least three major flaws afflict Judge Gorsuch's cramped view of the courts' constitutional ability to protect citizens from air and water pollution. First, Congress made the prudent policy decision to protect our drinking water and air, and explicitly provide citizens with the ability to vindicate their rights in court. We have a long record demonstrating that absent enforcement of those federal laws, the public has little hope of protection from pollution. Much has been written about the many obstacles facing robust enforcement at the state level, including the lack of resources and expertise and "capture" by state-based industries. If the states had the will and ability to safeguard their air and water, federal environmental laws might never have been legislated in the first place. But that fact resides in the history books and cannot be changed. If environmental enforcement is now turned back to the states, we can expect "sacrifice zones" to arise in nearly every state, where industry and pollution will concentrate and people will suffer. In short, expect more, and worse, repetitions of the tragedy that has unfolded in Flint, Michigan.

Second, we now have an anti-environmental Executive Branch that has pledged to cut EPA's budget by a third, and rescind all of the major environmental safeguards adopted by its predecessor. Scott Pruitt, the new Administrator of the EPA, walks in lockstep with the White House (and the fossil fuel industry), and cannot be counted on to mount vigorous enforcement of our environmental laws. While serving as Oklahoma Attorney General, Pruitt disbanded the environmental enforcement unit and ignored the fracking-induced earthquakes that literally shook the foundations of the public he was sworn to champion. Environmental prosecutions all but disappeared under his tenure.

So who are we going to call, we citizens and environmental advocates who have been left out in the cold? If the states cannot or will not safeguard our communities from pollution, and the Executive Branch is downright hostile to environmental law, is that just a consequence of elections we must bear? Judge Gorsuch might think so. Such a fatalistic view of environmental protection, however, would be absolutely wrong and a perversion of our Constitution. Congress passed a host of laws designed to protect our air and water, and put citizen enforcement in each of those laws. Whether to enforce those laws is not optional, depending on who happens to be in the White House. Our very health depends on it.

Third and finally, as to the conceivable (while callous and cynical) counterargument that neither Congress's legislative choices nor the practical need to protect American families from real-world environmental harms can overcome a constitutional deficiency, it is important to keep in mind that the Supreme Court has repeatedly reaffirmed the constitutionality of citizen suits—not only in the environmental arena, but across a wide

variety of legal contexts. Thus, an attack on citizen access to the courts not only would disrespect Congress's legislative prerogative and discount critical public health safeguards, but would also fly in the face of the bedrock principle of *stare decisis* that our judiciary has honored since its inception.

Another dangerous aspect of Judge Gorsuch's judicial philosophy, far outside even the conservative judicial mainstream, relates to the so-called "*Chevron* Doctrine," established by the Supreme Court to guide federal court review of administrative agency actions. Briefly stated, the *Chevron* Doctrine dictates that federal courts should defer to reasonable, principled administrative agency interpretations and implementation of federal environmental statutes, if the statutory text is not already clear. This doctrine, whose theoretical legal justifications as well as policy wisdom were defended by Justice Scalia himself, rests on the correct premise that modern administrative agencies like the EPA must tackle very technical, complex problems such as the interstate transport of air pollution. The agencies are staffed with career scientists who have dedicated their public service to analyzing and solving such complex problems.

Now comes Judge Gorsuch, with another theory that would upend this well-established structure. Less than one year ago, Gorsuch called out the *Chevron* doctrine as the "elephant in the room," in the case *Gutierrez-Brizuela v. Lynch*. Gorsuch criticized it for "permit[ting] 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." 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Not even Justice Scalia held such an extreme view; in fact he affirmed his allegiance to the Chevron Doctrine several times, and recognized the need for deference to agency expertise. In a 1989 speech Justice Scalia stated that "[i]n the long run, Chevron will endure and be given its full scope" because, not only is Chevron constitutional, but it more "accurately reflects the reality of government, and thus more adequately serves its needs," while also promoting fairness and predictability by ensuring that all such questions are resolved in a principled, consistent manner.[3] Justice Alito similarly affirmed his support for the Chevron Doctrine during his confirmation hearings, stating that the Environmental Protection Agency "is the expert on environmental questions" and "is entitled to a broad measure of deference under the Chevron decision." Thus Judge Gorsuch veers to the right of even the most conservative Justices on this issue.

The notion that *Chevron* deference violates Separation of Powers echoes the current White House's anti-regulatory stance (not to mention its attack on the judiciary and its precedents). Steve Bannon described this view in a speech to the Conservative Political Action Conference, in which he professed that a White House priority is the "deconstruction of the administrative state. Judge Gorsuch's views on *Chevron*, if they became the law, would go a long way towards accomplishing that goal. *Chevron* reflects the basic reality that federal agencies, given their experience and expertise, are in the best position to apply the law to specific industries and real world problems. Congress authorized EPA to do just that, with many statutes establishing desired outcomes for clean air or clean water and then directing EPA to achieve those outcomes through highly technical rulemakings. That all gets thrown out the window should *Chevron* be overturned

or weakened. Incentivizing judges to second-guess and reverse career agency scientists would certainly slow environmental protection to a near halt. It will impose more burdens as well as inappropriate policy decisions on federal judges, will embolden regulated industries to litigate every EPA rule instead of striving to timely comply with the law, and will paralyze the agency's ability to protect our air and water.

[1] Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996).
[2] See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing*, 1921–2006, 62 STAN. L. REV. 591, 597–99, 632-47 (2010).
[3] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 DUKE L.J. 511, 521 (1989); *see also id.* at 516-17.

Written Testimony to the United States Senate Judiciary Committee
Eve L. Hill
Partner, Brown Goldstein & Levy
March 23, 2017

Good morning Mr. Chairman and members of the committee. My name is Eve Hill. I am a Partner at Brown Goldstein & Levy and was formerly a Deputy Assistant Attorney General at the U.S. Department of Justice, Civil Rights Division. As an attorney with more than 20 years of experience enforcing laws protecting the rights of people with disabilities, I have serious concerns about Supreme Court nominee Judge Neil Gorsuch's approach to, and acceptance of, America's disability civil rights laws and the most basic principles of disability rights.

People with disabilities have long experienced what former President (then candidate) George W. Bush called "the soft bigotry of low expectations." Unfortunately, Judge Gorsuch bakes exactly such low expectations into his disability rights jurisprudence, in spite of Congress' bipartisan attempts to dismantle them through the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and other laws.

For example, Judge Gorsuch's decisions on the education of our children with disabilities are troubling, both for their callousness and for their dismissiveness of the law as written by Congress. Access to quality public education is one of the greatest attributes of this country. Quality public education offers Americans the opportunity to succeed and be judged on their merits, without regard to their income, race, gender, religion, or other factors. Until the 1970s, that opportunity was largely denied to students with disabilities, who were mostly excluded from public education or required to participate without accommodations, even if that made their participation impossible.

In 1975, Congress passed the IDEA both to stop the exclusion of children with disabilities from public education, and to provide the flexibility and services those children need to succeed in education. Based on constitutional equal protection and due process requirements, the IDEA recognizes that students with disabilities must be welcome in, and benefit from, our public schools; that children's disabilities should not create a presumption that they cannot benefit from education; and that students with disabilities may need different teaching methods, different supportive services, and different means of demonstrating their knowledge than the usual

methods. The IDEA, therefore, requires public schools to provide special education and related services to ensure a "free appropriate public education" for each student with a disability through an Individualized Education Program (known as an IEP). The IDEA provides federal funding to subsidize schools' efforts and provides administrative processes to ensure parents have input into their children's education and to resolve disputes without protracted litigation.

Judge Gorsuch's opinions in the Tenth Circuit Court of Appeals have repeatedly undermined the goals of the IDEA. In 2008 in *Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143 (2008) ("*Luke P.*"), for example, he read the IDEA's requirement of a meaningful and appropriate education to require only an education that is "merely … 'more than *de minimis*.'" The notion of "merely more than *de minimis*" appears nowhere in the statutory text of the IDEA. Judge Gorsuch adopted the standard in an act of judicial activism that runs contrary to the language and purpose of the statute. He claimed to ground his ruling in a Supreme Court case (*Bd. of Educ. v. Rowley,* 458 U.S. 176 (1982)) that said the IDEA requires students to receive a meaningful benefit, but does not require their potential to be maximized. But even a non-lawyer could see the enormous distance between just above *de minimis* and maximum potential.

Moreover, Judge Gorsuch's decision ignored Congress' clear expectations for interpreting the IDEA. After the Supreme Court decision that Judge Gorsuch pointed to, but well before his ruling in *Luke P.*, Congress repeatedly updated the IDEA to raise its standards, bring them in line with the standards for all children, and elevate the expectations for educating children with disabilities. In making these changes, Congress made clear its intent to provide much more than merely a *de minimis* education to students with disabilities, stating that: "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible…."

Judge Gorsuch substituted his own opinion for that of a hearing officer, an administrative law judge, and a district court, all of whom had found that the IEP for Luke did not meet the requirements of the IDEA. For an appellate judge that claims fidelity to principles of judicial conservatism, a decision to overrule the findings of three lower court decisionmakers, in a manner that ignores statutory text and congressional intent, is deeply troubling.

Even more troubling is that Judge Gorsuch's judicial activism in that case created a result that can only be described as heartless. Luke has severe autism. By the time he was nine and in the second grade, it was clear that his school was unable to meet his needs. The school's own records showed that Luke was consistently regressing instead of progressing in his education, failing over 75% of the goals set in his IEP, and his behavioral problems were getting worse. Yet Judge Gorsuch, overruling three fact finders, found that a 25% success rate was a passing grade for Luke's school. After a little over a year at a new school that had the capacity to achieve Luke's IEP, Luke was meeting goals and generalizing his progress to areas of life outside the classroom. It was Judge Gorsuch's expectations, not Luke's capabilities, that were de minimis in this case. To suggest that a student capable of making progress should be relegated to a school demonstrably unable to meet his needs is to deny the very notion that children with disabilities have any real right to an education at all.

Judge Gorsuch's opinion in *Luke P.* has shaped the law of the Tenth Circuit for nearly the last decade, eroding the education afforded to students with disabilities in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. His decision remains in question, however, and has culminated in a case now before the Supreme Court, *Endrew F. v. Douglas County School Dist. RE-1*, 798 F.3d 1329 (10th Cir. 2015), which will answer the question of whether the IDEA's meaningful, appropriate educational benefit requirement is "merely more than *de minimis*" or whether Congress meant what it said about high expectations.

In *Luke P.* and beyond, Judge Gorsuch's decisions interpreting the IDEA consistently limit the rights of students with disabilities but inconsistently apply procedural rules and standards of review to shape the outcome. When Judge Gorsuch disagrees with a lower court decision in favor of a student with a disability, such as in *Luke P.*, he applies a standard of review under which he, as the appellate court judge, need not defer to lower courts in order to find against a student. In stark contrast, when reviewing a lower court's decision to award <u>no remedy</u> for an IDEA violation, he applies a higher "abuse of discretion" standard to defer to the lower court decision against the student. In *Garcia v. Bd. of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008), this allowed Judge Gorsuch to simply defer to the decision below that a student with a disability who was left with no IEP for a semester should have no remedy. Judge Gorsuch even blamed the victim by claiming that because the student skipped school while her

educational needs were not being met, she was unlikely to benefit from her education even if it were provided. This assumption is flatly contrary to Congress' statements in the IDEA, No Child Left Behind Act, and Every Student Succeeds Act, that students must not be assumed to be unable or unwilling to benefit from appropriate education.

Judge Gorsuch's opinions also have attempted to transform the administrative processes of the IDEA from a means to reach effective resolutions of conflicts about a child's education outside of court into a minefield that parents must navigate perfectly or lose their rights. In one case, *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), a school delayed an evaluation and services for several months while a child with learning disabilities was failing or getting Ds in all her classes. The parent filed an IDEA administrative claim in order to quickly obtain necessary services and get her child back on track. She participated in mediation and settled, successfully getting special education services for her child. Having used the right legal tool to address the immediate needs of her child, she then exercised her legal right under the ADA and Section 504 of the Rehabilitation Act to get compensatory damages, which are not available under the IDEA, for the time her child lost due to the school's failure to follow the law.

Despite the fact that the claims were for different things, and that the IDEA administrative process has no jurisdiction over the family's claims under the ADA or Section 504, Judge Gorsuch threw the family's case out because they settled rather than going through the entire IDEA administrative hearing process. Judge Gorsuch required that the family refuse to accept a mediation offer of the services their child desperately needed and, instead, take the IDEA claim to hearings, and then file a federal suit. Only then, under Judge Gorsuch's formulation, could they assert separate rights under starkly different statutes to compensatory damages. Judge Gorsuch stated that as long as the educational injuries "could be redressed <u>to any degree</u> by the IDEA," they had to be litigated (and not settled) via the IDEA process. As Judge Briscoe pointed out in dissent, "The interpretation of [the IDEA] adopted by the majority is … inconsistent with the overall statutory framework developed by Congress. Indeed, why would Congress … force a claimant to avoid resolution of her claim by mediation … and lose at both the due process hearing and administrative appeal stages? Doing so would effectively render superfluous the mediation … provisions of the statute. … It forces a claimant to choose between mediating a resolution to her IDEA claim (even if the local educational agency were

willing to admit and correct the alleged errors) and thereby obtaining some or all of the relief sought under the IDEA … or foregoing any relief at all and waiting (while the child ages and potentially continues to receive something other than the requisite 'free appropriate public education') in the hopes of later filing suit and obtaining relief under both IDEA and other statutes. That … could not have been the intent of Congress…."

Judge Gorsuch's opinions on disability rights for adults also rely on, rather than challenge, the stereotypes that Congress intended to dismantle in federal disability rights law. Congress passed the ADA (and Section 504 of the Rehabilitation Act, which applies the same standards to recipients of federal funding) to open doors to the workplace for people with disabilities. But Judge Gorsuch has seemed to go out of his way to avoid ruling in favor of people with disabilities. In 2010, for example, Judge Gorsuch held that an employee with multiple sclerosis did not have a disability under the ADA because she was still able to work. *Johnson v. Weld County*, 594 F.3d 1202 (10th Cir. 2010). Therefore, she could not challenge her employer's refusal to promote her to a job she had already been doing successfully. Both the ADA in 1990 and the ADA Amendments Act (ADAAA) in 2008 were enacted to put an end to exactly such arguments and to make clear that the ADA provides, and has always provided, protection to all disabilities, including multiple sclerosis, and that people with disabilities who can work are protected. Judge Gorsuch concluded that this case, which was filed before 2008, was not subject to the ADAAA. However, even under the ADA prior to the amendments, multiple sclerosis was the kind of impairment that was intended to be protected. Senate Statement of Managers on the ADAAA, Congressional Record S8840-8841, September 16, 2008 ("Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard. These can include individuals with impairments such as … multiple sclerosis …. The resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.")

The ADA and Section 504 are intended to address, not just animus and discriminatory treatment of people with disabilities, but also the ways employment processes, benefits, and buildings were built on the assumption that people with disabilities could not work. Therefore, they were

designed in ways that exclude people with disabilities, even though they can do the work, but do it differently, with different equipment, or on a different schedule. This is the basis for the central ADA requirement of reasonable accommodation. Leave time to recover from a disability and return to work is one type of reasonable accommodation that is required unless it causes an undue hardship for the particular employer.

Judge Gorsuch has repeatedly ruled against employees with disabilities who need extended leave time in order to return to their jobs, even when other employees are allowed to take such leave. Judge Gorsuch argues that "It perhaps goes without saying that an employee who isn't capable of working … isn't an employee capable of performing a job's essential functions – and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation."

In the case of *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014), a college professor who had worked successfully for the University for 15 years, was recovering from cancer and, therefore, more vulnerable to infection. As a result, she needed to delay her return to work because of a potentially life-threatening H1N1 outbreak on campus. The University routinely allowed certain professors to take extended sabbaticals, suggesting that granting Professor Hwang extended leave would not create an undue hardship on the employer. However, Judge Gorsuch insisted that Professor Hwang must demonstrate that other nondisabled professors at her level of seniority would have qualified for a sabbatical. Because Professor Hwang did not have tenure, she could not prove that. Judge Gorsuch wrote, "The Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work."

In reaching that decision, Judge Gorsuch ignored the legal test of the ADA, which asks whether a requested accommodation is reasonable and not an undue hardship on the employer, not simply whether the employee was already entitled to the accommodation under the employer's existing system of workplace benefits. The ADA guarantees employees with disabilities access to the same benefits nondisabled employees receive. However, it also requires reasonable accommodations. The question in a reasonable accommodation case is whether a requested accommodation (e.g., leave time) is reasonable and necessary, regardless of whether other

employees without disabilities receive the same benefit. Judge Gorsuch's approach looked only at whether Professor Hwang was being offered the same leave benefits nondisabled employees were provided. He, in essence, did not do a reasonable accommodation analysis at all.

Judge Gorsuch further suggested that Congress was wrong to require leave as an accommodation at all and that any leave of over 6 months was inherently unreasonable, no matter what other employees were given. Established law, including in the Tenth Circuit, and EEOC guidance provide that a request for leave due to a disability must be evaluated on a case-by-case basis to decide whether, on the specific facts, the request would present an undue hardship. Yet, instead of asking a jury to consider whether Professor Hwang's request was reasonable or an undue burden, Judge Gorsuch upheld a motion to dismiss, finding her request unreasonable as a matter of law. He wrote that the "leave policy here granted all employees a full six months' sick leave" and that such leave was "more than sufficient."

Judge Gorsuch took a similar approach in *Cinnamon Hills Youth Crisis Center v. Saint George City*, 685 F.3d 917 (10th Cir. 2012), holding that a group home for children with mental disabilities was not entitled to locate in a neighborhood because the commercial zoning of the neighborhood prohibited residential stays of more than 29 days. Judge Gorsuch conducted no analysis of whether the requested accommodation was reasonable or would create an undue hardship, as the Fair Housing Act would require. Instead, he decided that, because people without disabilities were not permitted to violate the 29-day rule, people with disabilities were not entitled to an accommodation allowing them to live in an area more than 29 days. Judge Gorsuch noted that the city did, in fact, allow nondisabled people – namely "law enforcement personnel and the like" – to live more than 29 days in commercial zones. Unbelievably, Judge Gorsuch found that fact irrelevant. This is simply not the reasonable modification analysis called for by the Fair Housing Act.

Judge Gorsuch wrote a concurrence in *Barber v. Colorado Dept. of Revenue,* 562 F.3d 1222 (10th Cir. 2009), in which a blind single mother sought a reasonable accommodation to a state law that required a parent or guardian to supervise mandatory driving practice for anyone under age 16 pursuing a driver's license. Because Ms. Barber was blind, she could not drive or effectively supervise her daughter's driving practice. She asked the state to allow the child's grandfather to ride along with Ms. Barber to supervise the driving practice. The state rejected the proposed

accommodation. Judge Gorsuch's concurring opinion maintained flatly that Colorado had no duty to accommodate the plaintiff because the driver licensing statute already allowed the appointment of a guardian in this circumstance. Instead of Colorado having to modify its requirement in a minor way that met its legitimate interests, Judge Gorsuch would require a parent to legally forfeit authority over her child.

Judge Gorsuch's cramped approach to disability rights, as well as a lack of respect for Congress' purposes in enacting disability rights laws, seems to be consistent with a broader set of negative attitudes toward civil rights suits generally. He has called them "bad for the country," and has questioned the value of class actions, which are a critical tool for disability rights enforcement. This general view, as well as Judge Gorsuch's approaches to deference and delegation to federal agencies, threatens the rights of people with disabilities.

One case, in particular, demonstrates this threat. In *Shook v. Bd. of County Comm'rs.*, 543 F.3d 597 (10th Cir. 2008), county jail inmates with mental illness sought certification of a class action alleging constitutional violations because the jail denied or delayed medication and mental health care and subjected them to restrictive housing, restraints, and pepper spray. Judge Gorsuch upheld the lower court's decision to deny certification of the case as a class action, finding that the class members' mental health conditions were too individual and the relief they sought was not specific enough. Even though the plaintiffs challenged the jail's lack of a system or policy and procedure for identifying and responding to mental illness and sought simply injunctive relief to create such a system, class certification was denied.

Because disabilities affect people in individual ways, this approach threatens the ability of people with disabilities to challenge any covered entity's failure to have any process to recognize and respond to them. Instead of looking at the relief as the creation of a process to identify and determine the appropriate response to inmates with mental illness, the district court and Judge Gorsuch focused on what the anticipated results of such a system might be – i.e., individualized responses to individuals' mental illnesses - even though that is not what the plaintiffs were litigating. Judge Gorsuch relied on the fact that the plaintiffs sought a system designed to provide "appropriate" and "adequate" responses to find that the relief was too individualized and not sufficiently specific.

Taking Judge Gorsuch's approach to its logical conclusion, no group of people with disabilities could challenge a school, hospital, or government agency for lacking any policy or process under the ADA because the ultimate outcome of that policy or process would need to be individualized. Judge Gorsuch suggests that plaintiffs should, instead, bring individual claims and seek damages, an approach that should worry covered entities as much as it worries the disability community, because they may face an avalanche of resource-intensive individual suits and damages awards.

In the *Shook* case, Judge Gorsuch acknowledged, but discounted, the fact that precisely this kind of class-wide systemic relief has been successfully required, implemented, and monitored by courts in cases brought by the Department of Justice. In fact, class-wide systemic relief has been particularly effective for both people with disabilities and the institutions that serve them in cases involving the integration mandate of the ADA (described in *Olmstead v. L.C.*, 527 U.S. 581 (1999)). Class-based systemic relief allows the appropriate balance, called for by the Supreme Court, between the integration interests of people with disabilities as a group and the system-wide resource limitations of state and local governments. Pursuing a series of individual actions would not allow that balance.

These views and his record of rulings in disability rights cases call into serious question whether Judge Gorsuch is qualified to be a Supreme Court justice. You may believe that a judge's role is to protect the dignity of all people and especially that of overlooked and disempowered minority groups. Or you may simply believe that a judge's role is to remain faithful to the clear intent of Congress in statutes designed to protect individual rights. Either way, Judge Gorsuch's approach to disability issues reveals a lack of fidelity to the proper role of a judge. The notion of his elevation to our nation's highest court sends fear into the hearts of the many Americans who rely on federal protections to ensure that disability is not an unfair and unjust barrier to accessing jobs, housing, and education for themselves and their children.

Testimony of Peter N. Kirsanow Before the Senate Judiciary Committee on the Nomination of Judge Neal Gorsuch to the U.S. Supreme Court

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I speak as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to study and collect information relating to discrimination or denials of equal protection because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection, and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function, and with the help of my assistant, I have examined the approximately 200 opinions related to civil rights that Judge Gorsuch drafted as a circuit judge. These opinions, summaries of which are appended hereto, include, *inter alia*, cases involving race, sex, and national origin discrimination and retaliation cases under Title VII; disability discrimination cases under the ADA, IDEA, and Rehabilitation Act; age discrimination cases under the ADEA; as well as disparate treatment and disparate impact cases under the Equal Protection Clause. Our examination shows that Judge Gorsuch's approach to civil rights cases is consistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions. None of his opinions in this area contravene governing precedent.

Several of the civil rights opinions reviewed also include religious discrimination. And religious freedom cases, including those under RLUIPA. Although First Amendment freedoms of speech and religion are the subjects of much commentary, in current practice they often have been cabined and subject to caveats. (The Commission recently issued a report on religious liberty. The witness testimony and public comments we received in the course of writing this report, in addition to the multitude of lawsuits brought as a result of Obamacare's contraceptive mandate, suggested an evolving precariousness for religious freedom.[1] Also, as Congress recognized when it passed RLUIPA, prisoners can face particular difficulty in exercising their religion because there are multiple and conflicting interests at stake in the prison context.)[2]

Judge Gorsuch's decisions take First Amendment rights seriously, regardless of whether the matter at issue appears trivial, the plaintiff seems unsympathetic, or a plaintiff's beliefs are at odds with prevailing norms.

Yellowbear v. Lampert[3] was one such case. Andrew Yellowbear was convicted of killing his young daughter.[4] Once imprisoned, he sought access to a sweat lodge as part of the practice of his Native

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[1] U.S. COMMISSION ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF.

[2] Cutter v. Wilkinson, 544 U.S. 709 (2005); U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prison (2008), http://www.usccr.gov/pubs/STAT2008ERFIP.pdf.

[3] Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014).

[4] Anthony Lane, *Defiant Yellowbear gets life sentence*, CASPER STAR-TRIBUNE, June 2, 2006, http://trib.com/news/top_story/defiant-yellowbear-gets-life-sentence/article_c0b44749-6b13-5c37-bad7-

American religious beliefs, but such access was denied. Yellowbear sued under RLUIPA, and his case came before Judge Gorsuch who determined that the case must be remanded for trial, noting that even convicted child-murderers have free exercise rights, and Yellowbear had been denied any access to a sweat lodge whatsoever, which constituted a "substantial burden" within the meaning of RLUIPA. The prison's argument that it would be too complicated and expensive to shuttle Yellowbear between the protective custody unit and the sweat lodge was too cursory to determine that this burden on Yellowbear's religious exercise was unavoidable. Furthermore, the prison failed to demonstrate that its "policy of no access, ever ... represent[ed] the least restrictive means of accomplishing that [compelling] interest."[5]

Judge Gorsuch also voted to protect the free exercise rights of Hobby Lobby, Mardel, and the Little Sisters of the Poor. He joined Judge Tymkovich's *Hobby Lobby* majority opinion that held that these corporations had demonstrated a likelihood of success on their RFRA claim, which was affirmed by the Supreme Court. Judge Gorsuch wrote a concurring opinion in which he expressed his view that the individual members of the Green family, in addition to the corporations they controlled, were protected by RFRA because they faced a "Hobson's choice" between "abiding their religion or saving their business."[6] Judge Gorsuch also joined Judge Hartz's dissent from the 10th Circuit's denial of rehearing *en banc* in *Little Sisters of the Poor*.[7]

Judge Gorsuch's concern for a citizen's interest in vindicating his First Amendment rights against the government is reflected in his free speech cases as well. In *Van Deelen v. Johnson*, plaintiff alleged that the County Board of Commissioners intimidated him into dropping a dispute over a property tax assessment, including using threats by law enforcement.[8] The district court had ruled against Van Deelen because it did not consider his dispute over property taxes to be a matter of "public concern." Judge Gorsuch reversed and remanded, writing, "the constitutionally enumerated right of a private citizen to petition the government for the redress of grievances does not pick and choose its causes but extends to matters great and small, public and private."[9]

Judge Gorsuch does not, however, mechanically side with individuals who challenge government policy. In *Ali v. Wingert*, a prisoner challenged a prison policy that required his mail to include the name under which he was committed in addition to the religious name he adopted in prison.[10] Judge Gorsuch determined that there was no substantial burden in this case because Ali admitted that his religious beliefs did not forbid any use of his former name and the prison required only that his mail include both his religious name and his committed name.[11] Judge Gorsuch held that if Ali's religious beliefs or prison policy were different there might have been a substantial burden.

Judge Gorsuch's opinions in qualified immunity cases reveal a judge who faithfully and carefully applies the law. In *Blackmon v. Sutton*, Judge Gorsuch held that officials at a juvenile detention facility were not entitled to qualified immunity when a former detainee alleged that he had been punished by being

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9b620f35cb08.html; Anthony Lane, *A troubled life cut short*, CASPER STAR-TRIBUNE, Mar. 5, 2006, http://trib.com/news/top_story/a-troubled-life-cut-short/article_2fd1dc87-fd28-55d4-bff7-ce2adb99293d.html.

[5] Yellowbear v. Lampert, 741 F.3d 48, 62 (10th Cir. 2014).

[6] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152, 1156 (10th Cir. 2013)(Gorsuch, J., concurring).

[7] Little Sisters of the Poor Home for the Aged, Denver, Colorado, v. Burwell, 799 F.3d 1315 (10th Cir. 2015).

[8] Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007).

[9] *Id.* at 1153.

[10] Ali v. Wingert,569 Fed. Appx. 562 (10th Cir. 2014).

[11] *Id.* at 564.

restrained in a chair with wrist, waist, chest, and ankle restraints when subjected to pretrial detention.[12] A corrections officer who allegedly sat on the boy's chest and officials in charge of mental health services who allegedly ignored the boy's need for mental health services similarly were not entitled to qualified immunity.[13] Judge Gorsuch determined, however, that the director of the juvenile detention facility *was* entitled to qualified immunity because plaintiff's claim against the director was that she failed to transfer him to a residential shelter as he wished, due to the fact that there is no clearly established right for a pretrial detainee to be transferred to a facility of his choice.[14] Similarly, in his dissenting opinion in *A.M. v. Holmes* Judge Gorsuch would have denied qualified immunity to a police officer who arrested a thirteen year old for disrupting his class by making belching noises.[15] In *Martinez v. Carr*, however, Judge Gorsuch held that a police officer who issued a misdemeanor citation requiring later appearance at trial was entitled to qualified immunity.[16] "We conclude that issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure".[17]

Judge Gorsuch's adherence to plain textualism is demonstrated in his dissenting opinion in *TransAm Trucking v. Administrative Review Board*[18] and his majority opinion in *Genova v. Banner Health*.[19] In *TransAm Trucking*, the panel majority concluded that a statutory provision that prohibited an employer from discharging an employee because the latter "refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition" meant that an employee could not be discharged for *operating* a vehicle in defiance of the employer's instructions.[20]

Judge Gorsuch dissented, writing:

> It might be fair to ask whether TransAm's 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. The Department of Labor says that TransAm violated federal law, in particular 49 U.S.C. § 31105(a)(1)(B). But that statute only forbids employers from firing employees who "refuse[] to operate a vehicle" out of safety concerns. And, of course, nothing like that happened here. . . .
>
> [I]t seems to me that the statute is perfectly plain – and plainly doesn't capture the conduct here – just as TransAm suggests. The term "refuse" means "[t]o decline positively, to express or show a determination not to do something." Meanwhile, "operate" means "[t]o cause or actuate the working of; to work (a machine, etc.)." Putting this together, employees who voice safety concerns about their vehicles may *decline to cause those vehicles to work* without fear of reprisal. And that protection,

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[12] Blackmon v. Sutton, 734 F.3d 1237 (10th Cir. 2013)
[13] *Id.* at 1244-46.
[14] *Id.* at 1246-47.
[15] A.M. v. Holmes, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J, dissenting).
[16] Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007).
[17] *Id.* at 1299.
[18] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206 (10th Cir. 2016)(Murphy, J.)(Gorsuch, J., dissenting).
[19] Genova v. Banner Health, 734 F.3d 1095 (10th Cir. 2013).
[20] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206, 1211-1212 (10th Cir. 2016)("under the ARB's interpretation, the refusal-to-operate provision could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer, even if that refusal results in the employee driving the vehicle.").

> while significant, just does not give employees license to *cause* those vehicles to work in ways they happen to wish but an employer forbids. Indeed, my colleagues' position would seem to require the addition of more than a few new words to the statute. In their view, an employee should be protected not just when he "refuses to operate a vehicle" but also when he refuses to operate a vehicle *in the particular manner the employer directs and instead operates it in a manner he thinks safe*. Yet those words just aren't there; the law before us protects only employees who refuse to operate vehicles, *period*. . . .
>
> [W]hen the statute is plain it simply isn't our business to appeal to legislative intentions. And it is a well-documented mistake, too, to assume that a statute pursues its putative (or even announced) purposes to their absolute and seemingly logical ends. . . . The fact is that statutes are products of compromise, the sort of compromise necessary to overcome the hurdles of bicameralism and presentment. And it is our obligation to enforce the terms of that compromise as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood.[21]

Similarly, in Genova v. Banner Health, a doctor argued that he had been fired in violation of the Emergency Medical Treatment and Labor Act (EMTALA)[22] because the emergency room where he worked continued accepting patients when he believed patients should be sent to other hospitals so they could be treated more quickly.[23] The provisions of EMTALA at issue provide: ""[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action, obtain those damages available for personal injury"[24] and "a participating hospital may not penalize or take adverse action [1] against a qualified medical person ... or physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or [2] against any hospital employee because the employee reports a violation of a requirement of this section."[25]

Judge Gorsuch found that the actions protected by the statute are almost exactly the opposite of the reason the doctor was fired.

> [T]he personal harm provision and the second clause of the "whistleblower protection" provision. . . . protect those who are directly harmed by or report a 'violation' of EMTALA. But Dr. Genova doesn't claim that he was harmed by or retaliated against for reporting a failure by the hospital to examine a patient, stabilize a patient, or transfer a patient who couldn't be stabilized – violations of EMTALA all. Instead, he claims he was retaliated against for reporting his medical opinion that patients would be better served if directed to other facilities. . . . His complaint wasn't about an EMTALA violation but more nearly its inverse.
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> The same problem repeats itself when we turn to the (remaining) first clause of the whistleblower protection provision. It protects those who refuse to authorize the

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[21] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206, 1215-1217 (10th Cir. 2016)(Gorsuch, J., dissenting)(citations omitted).

[22] For an overview of EMTALA, please see U.S. COMMISSION ON CIVIL RIGHTS, PATIENT DUMPING (2014), http://www.usccr.gov/pubs/2014PATDUMPOSD_9282014-1.pdf.

[23] Genova v. Banner Health, 734 F.3d 1095, 1096 (10th Cir. 2013).

[24] 42 U.S.C. § 13955dd(d)(2)(A).

[25] 42 U.S.C. § 1395dd(i).

> premature or improper transfer of a patient with an emergency condition. . . . Instead of complaining that Banner retaliated against him for *refusing* to transfer patients, Dr. Genova complains that Banner retaliated against him for *wanting* to send patients elsewhere. And EMTALA simply does not speak to that issue.[26]

Judge Gorsuch notes that this does *not* mean that Dr. Genova's concerns were not well-founded or that continuing to "hoard" patients might not lead to a tipping point where the hospital would begin to dump patients in violation of EMTALA.[27] But EMTALA does not include a cause of action for instances where it might be better to send patients to another hospital because of overcrowding, nor a cause of action for situations where an EMTALA violation may occur in future.[28] "When, as here, 'the statute's language is plain' and not absurd on its face, 'the sole function of the courts ... is to enforce it according to its terms.' Whatever our policy views on the question of protecting reports of prospective violations, it is Congress's plain directions, not our personal policy preferences, that control."[29]

These two cases demonstrate, Judge Gorsuch is a textualist mindful of the limits of the counts and the prerogatives of the legislative branch.

Judge Gorsuch's record shows him to be in the judicial mainstream. My assistant and I have examined almost 200 cases involving civil rights, constitutional law, or qualified immunity in which Judge Gorsuch took part. Judge Gorsuch was in the minority in only 10 of these cases. In 43 of these cases, Judge Gorsuch was on a three-judge panel where the other two judges were appointed by Democratic presidents. In 40 of those cases, Judge Gorsuch either joined the majority opinion or concurred in the result.

In short, a review of Judge Gorsuch's record indicates that he is a careful judge with great respect for our constitutional order. He respects the role of Congress and the corresponding limits on the power of the judiciary. His opinions are within the jurisprudential mainstream. It appears he will faithfully apply the law to protect the rights of all Americans.

Thank you for giving me the opportunity to testify today.

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[26] Genova v. Banner Health, 734 F.3d 1095, 1098 (10th Cir. 2013).
[27] *Id.* at 1098.
[28] *Id.* at 1099.
[29] *Id.*

Cases Cited

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014).
Prison officials denied Yellowbear *any* access to the in-prison sweat lodge because they said it would require a lockdown for security purposes for him to be escorted to the sweat lodge, which is expensive and administratively inconvenient. However, the prison never quantified the monetary costs of the lockdown, simply asserted that it would be expensive, and Yellowbear presented evidence that lockdowns happened on a daily, sometimes even hourly, basis for other reasons. The prison's claim that allowing Yellowbear access to a sweatlodge would result in a flood of requests to visit the sweat lodge is likewise unavailing. Prison officials were unable to show that they had a compelling interest in denying Yellowbear any access to the sweat lodge. Furthermore, they were also unable to meet the least restrictive means requirement, because they did not address the alternatives Yellowbear presented in his brief, but simply rejected them out of hand while saying that they would not allow him to access a sweat lodge. So the prison was unable to show that denying him any access at all to a sweat lodge was the least restrictive means of ensuring prison safety. Judge Gorsuch notes that the analysis would be different if Yellowbear were allowed some access to a sweat lodge but wanted more access, because the relative strength of the two parties' interests would be different.

Hobby Lobby v. Sebelius, 723 F.3d 1114, 1152 (10th Cir. 2013)(Gorsuch, J., concurring).
Judge Gorsuch joined majority opinion reversing grant of summary judgment to HHS, and wrote separately to explain why RFRA also protected the Greens as individuals and why the Anti-Injunction Act did not apply. He argued that the Greens' situation was similar to that in *Thomas v. Review Board* and *United States v. Lee* because all three cases turned upon the question of complicity in sin. Thus, he believed the Greens had Article III standing to pursue their own RFRA claims. Furthermore, the Greens were undeniably persons within the meaning of RFRA. Lastly, the Anti-Injunction Act did not apply because it was a waivable defense and the government had expressly waived reliance on it.

Van Deelen v. Johnson, 497 F.3d. 1151 (10th Cir. 2007).
Van Deelen had a long-running dispute with the county regarding his property tax assessment. Things became heated between Van Deelen and county officials. Van Deelen alleged that county officials and county law enforcement engaged in verbal and physical intimidation and deterred him from continuing to pursue his claims. The district court granted summary judgment on his First Amendment claims because it said his claims were not a matter of public concern, but only concerned his personal financial interests. Judge Gorsuch found that Van Deelen had alleged sufficient facts on his First Amendment claim regarding the right to petition for redress of grievances to survive summary judgment. The public concern test is applied only to the First Amendment claims of public employees, not of private citizens. The defendants then invoked qualified immunity. Judge Gorsuch found that the defendants were not entitled to summary judgment on the basis of qualified immunity, because a reasonable public official should have understood that verbal and physical threats intended to chill a person's speech would violate the First Amendment. Judge Gorsuch affirmed the district court's grant of summary judgment in regard to plaintiff's due process claims and a number of other First Amendment claims.

Blackmon v. Sutton, 734 F.3d 1237 (10th Cir. 2013).
An eleven-year old boy was sent to a juvenile detention facility while awaiting trial on charges of rape. (The charges were eventually thrown out.) While he was there, staff often confined him to a chair called the "Pro-Straint" chair to keep him from attempting suicide or banging his head into walls. However, there is evidence that at other times he was confined to the chair as a punishment. The district court found that this treatment violated the Eighth Amendment prohibition on cruel and unusual punishment.

However, Judge Gorsuch writes, existing law makes clear that under the 14th Amendment pretrial detainees cannot be subject to *any* punishment, so it is not necessary to reach the Eighth Amendment issue to determine that the officials are not entitled to qualified immunity at the summary judgment stage. Similarly, Blackmon alleged that one of the officials directed a subordinate to sit on Blackmon's chest because Blackmon did not answer a question. The official did not dispute that he had done this, and offered no further information about why he had done this. Therefore, it was impossible to rule out that this had been done to punish Blackmon, and the official was not entitled to qualified immunity at the summary judgment stage. Judge Gorsuch also held that two other officials were not entitled to qualified immunity at this stage, because they had arguably violated Blackmon's Eighth Amendment rights by not providing him with mental health care when they were aware that he was engaging in self-harm, etc.

Blackmon also claimed that the director of the juvenile detention facility violated his constitutional rights by failing to transfer him to a nearby unlocked shelter. He had previously been housed at the shelter, but had run away and a bench warrant issued for his arrest. Judge Gorsuch found that although pretrial detainees have the right to be free from punishment, there is no freestanding constitutional right to be housed in the facility of their choice. Therefore, reversing the district court, Judge Gorsuch found that the director of the facility was entitled to qualified immunity.

A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016)(Holmes, J.).

F.M., then in seventh grade, disrupted his P.E. class by fake burping. He refused to obey the teacher when she asked him to stop making the noises, and she had him sit in the hallway. He kept leaning into the classroom and making the burping noises. The teacher was unable to continue teaching the class because of the disruption, so she called the school resource officer. The school resource officer arrested F.M. pursuant to a state statute that prohibits interfering with the educational process, although he could instead have issued a citation. The school resource officer notified the principal that he was arresting F.M. She prepared a one-day suspension slip, patted down F.M. and handcuffed him, and took him to a juvenile detention facility.

The next school year, F.M. was searched at school. A student reported to a school official that he or she believed she had seen several students engaging in drug transactions. The school resource officer then looked at security camera footage and recognized five students involved in the suspicious transaction. All five were searched, including F.M. The search revealed only that F.M. had $200 in cash and a couple of dress code violations (a bandanna in gang colors and a marijuana leaf belt buckle). F.M.'s mother confirmed why he was carrying so much cash, so he was not disciplined for anything involving the suspected drug transaction. However, he was given a three-day in-school suspension for dress code violations, gang-related activity, and disruptive conduct.

The panel majority ruled that the officer was entitled to qualified immunity on the arrest because a reasonable officer could have reasonably believed he had probable cause to arrest the kid under the applicable New Mexico statute. The majority also held that a reasonable officer would not have thought he was committing a Fourth Amendment violation by handcuffing a minor pursuant to a lawful arrest. The majority also found that, given the circumstances and statements from other students, it was reasonable to search F.M. for marijuana. The principal was also entitled to qualified immunity on a retaliation claim, because there was no evidence her decision to search F.M. was substantially motivated by retaliation. The equal protection claim fails because it was unclear if F.M. was the only student directed to remove clothing, and even if he was, there is no evidence he was treated differently than *similarly situated* students.

Judge Gorsuch dissented. He believed that the officer was not entitled to qualified immunity because he should have known that these sorts of minimal disruptions did not fall within the conduct contemplated by the statute. Judge Gorsuch pointed to decisions from the New Mexico Court of Appeals and other

state courts only applied the statute to students who caused substantial disruption that interfered with the actual functioning of the school, not brief disruptions in a single classroom. The majority believed that the New Mexico decision, *Silva*, was inapplicable because it interpreted a statute regarding protests at *colleges*, but Judge Gorsuch argued that *Silva* was applicable because the relevant language of the two statutes is identical.
Judge Gorsuch did not address the qualified immunity issues regarding the search for marijuana.

Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007).
Martinez was intercepted by police officers at a fair who took him to the police substation at the fair. At that substation, Officer Carr (who was otherwise uninvolved with the incidents surrounding Martinez) wrote him a citation and told him he could either sign the citation (which meant that he agreed to appear in court) or go to jail. This was in accord with New Mexico law. Martinez signed and then sued, claiming that signing the citation constituted a Fourth Amendment seizure. The district court ruled that this did constitute a seizure and that Carr was not entitled to qualified immunity. Judge Gorsuch rejected this contention and reversed and remanded the case for entry of judgment in favor of Carr. "We conclude that issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure".

TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206 (10th Cir. 2016)(Murphy, J.)(Gorsuch, J., dissenting).
A trucker was about to run out of gas, and then the brakes on the trailer locked up due to frigid temperatures. He called for help and waited, but the heater in his truck wasn't working and it was very cold. His torso was numb and he was having trouble breathing. The supervisor at his trucking company told him to either sit there and wait for help or to drag the trailer down the road with the locked brakes. Instead, he unhitched the truck from the trailer and drove off, returning a few minutes later when help arrived. The trucking company fired him a week later for abandoning his load. After he was fired, he filed a complaint with OSHA, arguing that he was fired in violation of the whistleblower provisions of the STAA. After OSHA dismissed his complaint, he requested a hearing before a DOL ALJ, who ruled in his favor. The ALJ found that the trucker engaged in protected activity when he reported the frozen brake issue to TransAm and again when he ignored the supervisor's suggestion that he drive the truck while dragging the trailer, and that this protected activity was inextricably entwined with TransAm's decision to fire him for leaving the load. The panel majority affirmed the decision of the ARB under a different provision of the STAA that prohibits an employer from discharging an employee who "refuses to operate a vehicle ... because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." The panel majority said that deference was owed under *Chevron*, and agreed with the ARB that "the refusal to operate provision could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer." Furthermore, the STAA was enacted for health and safety reasons, and this interpretation furthers the cause of health and safety.
Judge Gorsuch dissented, arguing that *Chevron* deference is not warranted in this case because DOL never even contended that the statute was ambiguous or that *Chevron* applied. Furthermore, the statute isn't ambiguous. Even though "refuse to operate" is not defined in the statute, we can look at the dictionary definitions of words. In short, "refuse to operate" should not be read to encompass "insist on operating." Furthermore, if we say that the statute's purpose of promoting health and safety justifies a preferred interpretation, almost any interpretation is possible because everything is in some way related to health and safety.

Genova v. Banner Health, 734 F.3d 1095 (10th Cir. 2013).

Judge Gorsuch held that Dr. Genova did not have a cause of action under EMTALA for his termination. Genova claimed he was fired because he accused his hospital emergency room of hoarding patients instead of sending them to other hospitals. However, Judge Gorsuch said, EMTALA only prohibits *dumping* patients on other hospitals – in other words, the opposite of what Dr. Genova alleged was happening. The statute also protects medical personnel who refuse to sign off on transferring patients which again was the opposite of what he wanted to do. Furthermore, when he complained, no EMTALA violation had yet occurred. It was possible that hoarding patients might in the near future lead to an overwhelmed emergency room dumping patients on other emergency rooms, but there is no cause of action for possible future EMTALA violations. The doctor then retreats to an argument about statutory purpose. He argued that "we should read EMTALA as affording damages to anyone who is retaliated against for reporting imminent but as-yet unrealized statutory violations of *any* kind – not just the kind mentioned in the first clause of the whistleblower protection provision." This argument misunderstands the judicial role. When the text is plain, the judge must go with the text.

DRAFT

Testimony of

Alice S. Fisher

Partner
Latham & Watkins
March 23, 2017

Statement of Alice S. Fisher
Partner, Latham & Watkins LLP
before the Senate Committee on the Judiciary

Hearing on the Nomination of Neil McGill Gorsuch
March 23, 2017

Mr. Chairman, Senator Feinstein and Members of the Committee: thank you for the opportunity to testify today. My name is Alice Fisher, and I am a partner and Executive Committee member at the law firm of Latham & Watkins. I am pleased to be here today as a friend and former colleague of Judge Neil Gorsuch in private practice and public service at the Department of Justice.

I met Judge Gorsuch in 1991 when we were both summer associates, and we have been friends ever since. As his friend, I have been privileged to watch his career unfold, marked by impressive achievements and a longstanding devotion to service.

Judge Gorsuch possesses a keen intellect, commitment to fairness and decency, and a deep and abiding passion for the law. He has always brought a thoughtful, reasoned, and practical analysis to any issue. Further, Judge Gorsuch's stellar resume demonstrates both a life-long love of learning and an ongoing commitment to teaching and mentoring the next generation.

As a lawyer, Judge Gorsuch is exceptional. As a colleague, he is beloved and respected, with seemingly unlimited reserves of courtesy, kindness, and good humor. As a friend, he's extremely supportive and generous to all. He is a wonderful listener and a great advisor, always encouraging and eager to help. Judge Gorsuch has been driven by his devotion to his country and to public service and comports himself with deep humility. He holds himself to the highest standard of excellence and to an unwavering commitment to getting it right.

Judge Gorsuch is not just an excellent attorney and judge; he is also a steadfast, loving husband and father. He has adored Louise from the very first moment he met her, and he is a doting parent to Emma and Belinda.

These qualities, all of which I have admired in Judge Gorsuch for the past twenty-six years, are precisely those that qualify him for the new position to which he has been nominated. He is a man of the highest personal integrity, deeply dedicated to serving his country, and I cannot think of a better place for him to do so than on the United States Supreme Court.

Written Statement of Hannah C. Smith
Senior Counsel, Becket

Before the Senate Committee on the Judiciary on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States
March 23, 2017

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Chairman Grassley, Senator Feinstein, and distinguished Senators:

Thank you for the invitation to testify at today's hearing on the nomination of Judge Neil Gorsuch to the Supreme Court of the United States. My name is Hannah Smith, and I am Senior Counsel at Becket, a non-profit, public-interest law firm dedicated to protecting religious liberty for people of all faiths. At Becket, we have defended Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, Zoroastrians, and others in lawsuits around the country. This defense involves federal constitutional claims under the Free Exercise and Establishment Clauses as well as federal statutory claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In this decade, we have litigated several cases before the United States Supreme Court, all of which have resulted in favorable decisions: the Little Sisters of the Poor case *Zubik v. Burwell*,[1] *Holt v. Hobbs*,[2] *Wheaton College v. Burwell*,[3] *Burwell v. Hobby Lobby*,[4] *McCullen v. Coakley*,[5] and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[6]

When it comes to protecting the principle of religious liberty for all, we expect that Judge Gorsuch will be an excellent Associate Justice of the Supreme Court of the United States. In his words, religious liberty law "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."[7] Judge Gorsuch's track record in religious liberty cases holds true to this fundamental principle of our pluralistic American society.

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[1] 136 S. Ct. 1557 (2016).

[2] 135 S. Ct. 853 (2015).

[3] 134 S. Ct. 2806 (2014).

[4] 134 S. Ct. 2751 (2014).

[5] 134 S. Ct. 2518 (2014).

[6] 565 U.S. 171 (2012).

[7] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152-53 (10th Cir. 2013) (Gorsuch, J., concurring).

In preparation for this hearing and with the assistance of my colleagues, I have reviewed the religious liberty related cases in which Judge Gorsuch has been involved during his judicial service, either by writing an opinion or by casting a vote. This survey reveals that Judge Gorsuch approaches religious liberty cases by carefully considering the applicable statutory and constitutional provisions and the relevant governing precedents. His opinions are rigorous, meticulous, and well-reasoned. His record demonstrates an understanding of both the historical traditions and the legal imperatives that form the basis of our nation's religious liberty protections. Of the 10 cases that Judge Gorsuch himself identified to this Committee as the most significant among his 800 or so opinions,[8] he chose two about religious liberty: *Yellowbear v. Lampert*[9] and *Hobby Lobby Stores, Inc. v. Sebelius.*[10]

In his ten years of service on the U.S. Court of Appeals, Judge Gorsuch participated in 40 Tenth Circuit panels, *en banc* sittings, or votes for rehearing in cases involving religious liberty. None of his religious liberty decisions has ever been reversed by the Supreme Court. Every time the Supreme Court reached the merits in one of these cases, it vindicated Judge Gorsuch's position—even in the cases where he had dissented.[11] An examination of these cases reveals that Judge Gorsuch is also a remarkable consensus builder. When he sat together with judges who were appointed by a Democratic president, those judges unanimously agreed with him in 80% of those cases. Overall, he was part of a unanimous decision almost 90% of the time. When he actually authored the religious liberty decision for the court, he produced a unanimous decision every single time—100%. This is a striking record of coalition-building in an area of jurisprudence that can be quite contentious.

This analysis of his religious liberty jurisprudence is consistent with his broader caseload, which shows him to be a consensus builder and a mainstream jurist. An analysis by Jeff Harris, a partner at the law firm of Kirkland & Ellis, confirms this point: "Judge Gorsuch has written some 800 opinions since joining the Tenth Circuit Court of Appeals in 2006. Only 1.75% of those decisions (14 opinions) drew dissents from his colleagues."[12] In other words, over 98% of his opinions on any topic have been unanimous, a fact more significant in a circuit where, of the 12 active judges, 7

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[8] *See* Judge Neil M. Gorsuch's U.S. Senate Committee of the Judiciary Questionnaire for Nominee to the Supreme Court at 25, 30-32, https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf.

[9] 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J., joined by Baldock, J. and Jackson, J., sitting by designation).

[10] 723 F.3d 1114 (10th Cir. 2013); *id.* at 1152-53 (Gorsuch, J., concurring).

[11] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (affirming Tenth Circuit's decision in favor of Hobby Lobby); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (vacating Tenth Circuit's decision against Little Sisters of the Poor); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (adopting Judge McConnell and Judge Gorsuch's dissenting position).

[12] Editorial, *Gorsuch in the Mainstream*, Wall Street Journal, Feb. 9, 2017, https://www.wsj.com/articles/gorsuch-in-the-mainstream-1486513094

were appointed by Democratic presidents and 5 by Republican presidents.[13] This is likely one reason why the American Bar Association has given Judge Gorsuch the highest rating on its scale for evaluating a Supreme Court nominee.[14]

I. Religious Liberty Decisions in the Prison and Criminal Context

Throughout his tenure on the federal bench, Judge Gorsuch has demonstrated repeatedly that he applies the law fairly to protect the religious liberty of all Americans, including religious minorities and incarcerated persons—some of the most politically powerless in our society. Judge Gorsuch has decided numerous cases under RLUIPA's prisoner provisions, protecting Native Americans, Muslims, and Jews.

As this Committee well knows, RLUIPA passed the House and Senate by unanimous consent[15] and was signed into law by President Bill Clinton.[16] Congress enacted RLUIPA following nine hearings over three years that investigated state- and local-level burdens on religious liberty. In the prison setting, Congress observed "that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise."[17] A joint statement of RLUIPA co-sponsors Senators Orrin Hatch (R-UT) and the late Edward Kennedy (D-MA) noted that "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."[18]

Judge Gorsuch demonstrated his understanding of RLUIPA's important protections for prisoners in *Yellowbear v. Lampert*[19]—a case where a Native American prisoner had requested access to a sweat lodge for religious purposes. Judge Gorsuch authored an eloquent opinion in which he affirmed the foundational principle underlying those provisions: "While those convicted of crime in our society

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[13] Current active Tenth Circuit judges appointed by Democratic presidents include: Judge Mary Beck Briscoe (Clinton); Judge Carlos F. Lucero (Clinton); Judge Scott M. Matheson, Jr. (Obama); Judge Robert E. Bacharach (Obama); Judge Gregory A. Phillips (Obama); Judge Carolyn B. McHugh (Obama); and Judge Nancy L. Moritz (Obama). Current active Tenth Circuit judges appointed by Republican presidents include: Chief Judge Timothy M. Tymkovich (George W. Bush); Judge Paul J. Kelly, Jr. (George H.W. Bush); Judge Harris L. Hartz (George W. Bush); Judge Neil M. Gorsuch (George W. Bush); and Judge Jerome A. Holmes (George W. Bush). See Judges of the Tenth Circuit Court of Appeals, https://www.ca10.uscourts.gov/judges (last visited Mar. 14, 2017).

[14] Peter Hasson, *American Bar Association Gives Neil Gorsuch Highest Possible Rating for SCOTUS*, Daily Caller (Mar. 9, 2017, 7:06 PM), http://dailycaller.com/2017/03/09/american-bar-association-gives-neil-gorsuch-highest-possible-rating-for-scotus/.

[15] *See* S.2869, Bill Summary and Status for 106th Congress (2000).

[16] *See* Pub. L. No. 106-274, 114 Stat. 803 (2000).

[17] *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)).

[18] *Id.*

[19] 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J., joined by Baldock, J. and Jackson, J., sitting by designation).

lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them—at least in the absence of a compelling reason."[20] For a unanimous panel, he wrote that there was no such compelling reason for the government to prevent a member of the Northern Arapaho tribe from practicing his Native American religion during his life sentence.[21] Judge Gorsuch recognized that, especially in the prison context, it is "easy for governmental officials with so much power over inmates' lives to deny capriciously one more liberty to those who have already forfeited so many others."[22] Therefore, he cautioned that the compelling interest test—"the strictest form of judicial scrutiny known to American law"—cannot be satisfied "by fiat" or "the government's bare say-so."[23] On this point, Justice Sonia Sotomayor quoted Judge Gorsuch's *Yellowbear* opinion in her concurring opinion in another RLUIPA prisoner case, *Holt v. Hobbs*.[24] There, a unanimous Supreme Court ruled in favor of a Becket client—a Muslim prisoner who sought to grow a religiously required beard. In two other RLUIPA prisoner cases, Judge Gorsuch has (1) voted in favor of a Muslim prisoner seeking access to religiously required meals,[25] and (2) reversed a lower court decision failing to adequately consider a *pro se* prisoner's request for a kosher diet.[26]

In the criminal context, Judge Gorsuch has demonstrated his understanding that religious liberty claims have reasonable limits. In a drug trafficking case, *United States v. Quaintance*,[27] for example, Judge Gorsuch declared that religious liberty laws do not "offer refuge to canny operators who seek through subterfuge to avoid laws they'd prefer to ignore[, l]ike those who set up 'churches' as cover for illegal drug distribution operations."[28] There, a couple sought to raise money to make bail for her brother, who had been arrested for transporting marijuana.[29] They decided to make

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[20] *Yellowbear*, 741 F.3d at 52.

[21] *Id.* at 58.

[22] *Id.* at 53.

[23] *Id.* at 59.

[24] 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring) (quoting *Yellowbear* that the deference "extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat" because prison policies based on speculation were what motivated Congress to pass RLUIPA in the first place).

[25] *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010) (Henry, J., joined by Ebel, J., and Gorsuch, J.); *id.* at 1324-26 (Gorsuch, J., concurring) (agreeing with majority that there is a substantial burden under RLUIPA where, as here, prisoner is faced with "Hobson's choice" of being "forced to choose between violating his religious beliefs and starving to death" but writing separately to clarify that the court did not decide, among other things, whether being forced to "forgo an occasional meal" is a "*substantial* burden" proscribed by RLUIPA) (emphasis in original).

[26] *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr.*, 492 F.3d 1158 (10th Cir. 2007) (Gorsuch, J., joined by Lucero, J., and Hartz, J.).

[27] 608 F.3d 717 (10th Cir. 2010) (Gorsuch, J., joined by Henry, J., and Ebel, J.).

[28] *Yellowbear*, 741 F.3d at 54 (citing *Quaintance*, 608 F.3d at 720-23).

[29] *Quaintance*, 608 F.3d at 719.

bail by selling marijuana themselves and establishing the "Church of Cognizance," founded on the teaching that marijuana is both a deity and sacrament.[30] After the Border Patrol busted their "backpack runners" from Mexico, the couple argued that their drug-running was part of their church's religious activities and thus legally protected by RFRA.[31] Judge Gorsuch wrote a detailed opinion affirming the lower court's decision that the couple's religious beliefs were not sincere—a threshold determination in every religious liberty case—and that the "church" was a mere front for a drug operation.[32] The *Quaintance* decision shows Judge Gorsuch's understanding that insincere religious claims must be rejected if the law of religious liberty is to remain robust.

II. Religious Liberty Decisions Under the Religious Freedom Restoration Act

Two of Judge Gorsuch's best known religious liberty cases—*Hobby Lobby*[33] and *Little Sisters of the Poor*[34]—were decided under RFRA. This important federal statute was passed in the wake of the Supreme Court's 1990 decision in *Employment Division v. Smith*,[35] which cut back traditional constitutional protections for religious liberty. In the wake of *Smith*, a bipartisan coalition of elected officials, scholars, and advocacy groups united to restore protections for religious liberty. When RFRA was passed in 1993, the bill "was supported by one of the broadest coalitions in recent political history," with 66 religious and civil liberties groups, "including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations," working

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[30] *Id.*

[31] *Id.*

[32] In two other criminal cases, Judge Gorsuch addressed religious issues in different contexts. First, in *United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014), Judge Gorsuch dealt with the First Amendment ramifications of a law enforcement officer opining on religion in a criminal prosecution. *Id.* at 1108-09. The case involved whether an expert at trial could testify that a suspect's religious prayer to a Mexican folk deity called Santa Muerte was "so connected with drug trafficking as to constitute evidence that the occupants of the vehicle were aware of the presence of [hidden] drugs." *Id.* at 1095. The expert had testified that the suspect's prayer sought "protection from law enforcement," *id.* at 1099, and that the folk deity was not "recognized by the Catholic Church," which painted the suspects as "heretics," *id.* at 1109. The panel found the expert's testimony to be unreliable, saying that: "A criminal trial is no place for a theological disputation on sainthood and the power of prayer." *Id.* *Medina-Copete* demonstrates that Judge Gorsuch understands the government should not insert itself into theological disputes—such as whether Santa Muerte is heretical—because doing so would violate the principle that church and state should remain separate. Second, in *United States v. Olivares-Campos*, 276 Fed. App'x 816 (10th Cir. 2008), Judge Gorsuch went out of his way in an evidence suppression appeal to state that the mere presence of religious iconography (such as a picture of Jesus or a St. Christopher medallion) was insufficient to raise reasonable suspicion of gang activity and could just as easily have been attributable to "honest devotion." *Id.* at 823.

[33] 723 F.3d 1114 (10th Cir. 2013).

[34] *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015).

[35] *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

together across ideological and religious lines.[36] RFRA was introduced in the House by then-Representative Charles Schumer (D-NY) and in the Senate by Senators Orrin Hatch (R-UT) and the late Edward Kennedy (D-MA). RFRA passed the House by a unanimous vote[37] and the Senate by a vote of 97-3.[38] In his signing remarks, President Clinton said: "What [RFRA] basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion . . . . We believe strongly that we can never . . . be too vigilant in this work."[39]

In Becket's *Hobby Lobby* case,[40] Judge Gorsuch voted in favor of the religious objectors against government coercion.[41] The case involved the question whether RFRA prevented the government from imposing the Affordable Care Act's regulatory contraception mandate on a closely held, family-owned business.[42] The Green family objected on religious grounds to providing insurance coverage for a small subset of contraceptives covered by the mandate.[43] If they did not comply, their company would be fined $475 million a year.[44] Judge Gorsuch joined the *en banc* court's majority opinion, and wrote separately to emphasize the substantial burden on the Green family's religious exercise.[45] He wrote that the Green family was forced to choose between "exercising their faith or saving their business."[46] The Supreme Court agreed with the majority, holding that under RFRA, the HHS mandate imposed a substantial burden that was not the least restrictive means of accomplishing its goal.[47]

In Becket's *Little Sisters of the Poor* case,[48] Judge Gorsuch similarly voted in favor of the nuns in their challenge to the same HHS mandate as applied to nonprofit religious ministries.[49] When the original three-judge panel ruled against the Little Sisters of the Poor, the Tenth Circuit—in a *sua sponte* vote—decided to deny rehearing *en banc*. But Judge Gorsuch disagreed and joined a dissent from denial of

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[36] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210, 244 (1994).

[37] H.R. Rep. No. 103-88 (1993).

[38] S. Rep. No. 103-111 (1993).

[39] Statement by President on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993).

[40] 723 F.3d 1114.

[41] *Id.* at 1121.

[42] *Id.* at 1120.

[43] *Id.* at 1120-21.

[44] *Id.* at 1125.

[45] *Id.* at 1152-59 (Gorsuch, J., concurring, joined by Kelly, J., and Tymkovich, J.).

[46] *Id.* at 1152.

[47] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

[48] 799 F.3d 1315 (10th Cir. 2015).

[49] *Id.* at 1316.

en banc review, a dissent which called the opinion of the panel majority "clearly and gravely wrong."[50] Ultimately, Judge Gorsuch's position was vindicated when the U.S. Supreme Court issued a *per curiam* decision vacating the panel opinion and forbidding the government from imposing any financial penalties on the nuns.[51]

Although some have tried to frame the HHS mandate cases as an irresolvable conflict between religious liberty and women's rights, the government's recent admissions before the Supreme Court belie that view. Specifically, in the Little Sisters' case, the government conceded that, instead of forcing religious objectors to provide contraceptive services using their health plans, the government could still achieve its interest by allowing women to access contraceptive services on the government's own exchanges, through another government program, or through other insurance plans.[52] Second, the government admitted it could modify its scheme to avoid forcing religious organizations to execute documents authorizing the use of their health plans in ways that violate their religious faith.[53] These important concessions before the Supreme Court exposed the false conflict between contraceptive access and religious liberty. Thus, the Supreme Court reached unanimity in a case that was once predicted to end in division.

It is often true in high-profile litigation, like the HHS mandate cases, that the political pressure will be greatest on the government to abandon protecting unpopular religious practices in order to achieve a particular policy initiative. Especially in these cases, judges must do their job and make the government prove its case. As Judge Gorsuch put it, while religious liberty statutes like RFRA and RLUIPA "anticipate[] that [their] solicitude for religious exercise must sometimes yield to other competing state interests,"[54] the government must prove "the 'compellingness' of its interest in the context of 'the burden on *that person*'"[55] and "must of course 'refute . . . alternative schemes' suggested by the [religious objector] to achieve that same interest and show why they are inadequate."[56] As in the Little Sisters' case, this burden on the government to explain itself will often reveal that win-win solutions are in fact readily available.

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[50] *Id.*

[51] *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

[52] Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Government Claims*, Cato Supreme Court Review, 2015-2016; *see also* Brief for the Respondents at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418); *id.* at 14-15.

[53] *Id.*

[54] *Yellowbear*, 741 F.3d at 57.

[55] *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000cc-1(a)).

[56] *Id.* at 62. (quoting *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011)).

III. Religious Freedom Cases in the Establishment Clause Context

Judge Gorsuch's Establishment Clause jurisprudence shows he understands that religion is an important part of cultural expression in our pluralistic society and has been since the founding. Given this history, it is no surprise—and certainly no violation of the Constitution—that religion sometimes manifests in public life. Some militant advocacy groups have worked to scrub religion entirely from the public square, relying on an array of subjective and unworkable tests that are untethered from any historical analysis and that would erase religion wherever it might cause offense to some.[57] Judge Gorsuch has rightly rejected this approach, focusing instead on how the historical understanding of the framers should guide Establishment Clause analysis. His approach has been vindicated by the Supreme Court in recent years as the Court has moved away from problematic subjective tests and embraced a view of the Establishment Clause focused on history.

In the past, the Supreme Court has employed anti-historical and abstract constitutional tests to interpret the Establishment Clause, including the subjective *Lemon* test. This test asks whether the government's action (1) has a religious "purpose," (2) has the "primary effect" of "advancing" or "endorsing" religion, and (3) fosters "excessive government entanglement with religion."[58] This test has been heavily criticized by courts and commentators alike,[59] and has not been applied by the Supreme Court in a merits decision in over 12 years.[60] In fact, at least eight current or recent Justices have called for its rejection.[61] Justice Scalia even went so

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[57] *See generally* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, Cato Supreme Court Review, 2013-2014.

[58] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (describing *Lemon* test); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J. concurring) (first articulating "no endorsement" test).

[59] *See, e.g.*, *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbook, J. & Posner, J., dissenting from *en banc* decision) (calling *Lemon* and "no endorsement" test "hopelessly open-ended"); Gerard V. Bradley, *Protecting Religious Liberty*, 42 DePaul L. Rev. 253, 261 (1992); Richard W. Garnett, *Religion, Division, & the First Amendment*, 94 Geo. L.J. 1667 (2006); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1380-88 (1981); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118-20 (1992).

[60] *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

[61] *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535-36 (2012) (Alito, J., dissenting from denial of *certiorari*) ("Establishment Clause jurisprudence is undoubtedly in need of clarity"); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14-15, 17, 19, 21-22 & n.3 (2011) (Thomas, J., dissenting from denial of *certiorari*) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure") (quotations omitted); *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring); *Allegheny Cty. v. Am. Civil Liberties Union*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*,

far as to compare the *Lemon* test to "some ghoul in a late-night horror movie that . . . stalks [the] Establishment Clause jurisprudence."[62] Even where the Court mentioned *Lemon* in passing, the Court has treated its factors as "no more than helpful sign-posts," and many times did not apply them at all.[63]

As it has turned away from subjective and abstract tests like *Lemon*, the Court's modern trend has been to focus on the historical meaning of the Establishment Clause and the practices that have long been permitted under it.[64] Indeed, the Supreme Court recently admonished that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings."[65] Judge Gorsuch has correctly employed such historical analysis throughout his tenure as a judge.

For example, in *Green v. Haskell County Board of Commissioners*,[66] Judge Gorsuch relied on the historical and cultural significance of the Ten Commandments when he voted in favor of allowing such a monument on a courthouse lawn alongside other markers of our nation's legal and cultural history.[67] In his dissent from a decision not to revisit the ruling that would remove this monument, Judge Gorsuch correctly explained that "public displays focusing on the ideals and history of a locality" do not violate the Establishment Clause merely because they include the Ten Commandments.[68] In fact, he pointed out that in inclusive displays on courthouse lawns, the Ten Commandments can convey a message about "the primacy and

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472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting); *Comm. for Public Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

[62] *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

[63] *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

[64] *Town of Greece*, 134 S. Ct. at 1823, 1825, 1819 (engaging in a thorough review of legislative prayer practices "[f]rom the earliest days of the Nation" that have "long endured," and "become part of our heritage and tradition," concluding that the "prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183-84 (2012) (examining the history of colonial "[c]ontroversies over the selection of ministers" to determine that "[t]he Establishment Clause prevents the Government from appointing ministers"); *Van Orden*, 545 U.S. at 686 (plurality of the Court upheld Texas's Ten Commandments display, applying an analysis "driven both by the nature of the monument and by our Nation's history"); *id.* at 699-700 (Breyer, J., concurring) (looking to "national traditions" and monument's historical context); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding practice of state-paid chaplain's legislative prayer because it was "deeply embedded in the history and tradition of this country").

[65] *Town of Greece*, 134 S. Ct. at 1819 (emphasis added) (quotation marks omitted).

[66] 574 F.3d 1235 (10th Cir. 2009).

[67] *Id.* at 1243-49.

[68] *Id.* at 1248.

authority of law, as well as the 'history and moral ideals' of our society and legal tradition."[69]

Similarly, in *American Atheists, Inc. v. Davenport*,[70] Judge Gorsuch dissented from a decision to leave in place a ruling that memorial crosses displayed on the side of the highway to commemorate fallen troopers violated the Establishment Clause.[71] Ultimately, the Supreme Court declined to hear that case, but Justice Clarence Thomas wrote a 19-page dissent from denial of *certiorari*, citing Judge Gorsuch's dissent and lamenting that the court had rejected "an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles."[72]

Finally, in *Pleasant Grove City v. Summum*,[73] Judge Gorsuch joined then-Judge Michael W. McConnell's dissent from the denial of rehearing *en banc*, taking the view that the government's display of a donated Ten Commandments monument in a public park did not obligate the government to display every other monument someone might offer.[74] The Supreme Court unanimously reversed the 10th Circuit's decision and sided with Judges McConnell and Gorsuch.[75] Consistent with Judge Gorsuch's position, the Court made clear that it was permissible for government to recognize religious elements as an important contribution to a community's values, culture, and history.[76]

Government recognition of religious culture is not only historically justified, it is far preferable to the hyper-secular alternative of attempting to whitewash religious expression from our communities and our history. The Supreme Court's jurisprudence correctly recognizes the important role that many religious traditions have played and continue to play in our pluralistic American society.

IV. Conclusion

In all of his rulings touching upon religious liberty issues, Judge Gorsuch has a consistent record of closely following the relevant statutes and constitutional provisions, without regard to preference for political party or ideological outcome. Judge Gorsuch's jurisprudence demonstrates an even-handed application of the principle that religious liberty is fundamental to freedom and to human dignity, and that protecting the religious rights of others—even the rights of those with whom we may disagree—ultimately leads to greater protections for all of our rights. Thank you.

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[69] *Id.* (quoting *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment)).

[70] 637 F.3d 1095 (10th Cir. 2010).

[71] *Id.* at 1107-11.

[72] *Utah Highway Patrol Ass'n*, 132 S. Ct. at 13 (Thomas, J., dissenting from denial of *certiorari*).

[73] 499 F.3d 1170 (10th Cir. 2007).

[74] *Id.* at 1174-78.

[75] *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

[76] *Id.* at 472.

Testimony of Professor Timothy Meyer
Professor of Law and Enterprise Scholar
Vanderbilt University Law School

Before the United States Senate Committee on the Judiciary

On the

Nomination of Judge Neil M. Gorsuch to be Associate Justice of the United States Supreme Court

March 23, 2017

Mr. Chairman, Senator Feinstein and Members of the Committee. Thank you for the invitation to testify today. My name is Timothy Meyer, and I am a Professor of Law at Vanderbilt University Law School. I had the honor to clerk for Judge Gorsuch from 2007 to 2008 and I am here today to enthusiastically support his nomination to the Supreme Court. Judge Gorsuch is a brilliant, fair, principled, and independent jurist. He is also the epitome of a gentleman. You will never in your life meet a kinder public servant.

One of the biggest risks a judge takes each year is inviting a few recent law school graduates into his or her chambers. Judges use law clerks as sounding boards for ideas; to spot flaws in arguments and reasoning, including their own; and to find and help analyze past precedent. More than that, though, judges work side by side with these young lawyers every day. Judges thus often become the most important mentors young lawyers have. This mentoring role is not the most important that judges play. It does, however, provide a window into a judge's temperament and approach to the law.

I could not have hoped for a better mentor than Judge Gorsuch, and the country could not hope for a better teacher for its brightest legal minds. I could say much about Judge Gorsuch: how he welcomes his clerks to Colorado and into his family, or about the hours he has spent over the years counseling me on career choices and personal tragedies. I could talk about his love of being a lawyer, the joy he takes in the give and take of legal argument, or how much he cares for the integrity of our judicial system. Instead, though, I want to spend my time today talking about what Judge Gorsuch has taught me about writing.

By the time I arrived in Judge Gorsuch's chambers, I had been in school for 21 years and had written thousands of pages, including most of a doctoral dissertation. But I didn't learn to write until I worked for the Judge. Through conversation, reading the Judge's work, and reading his careful suggestions on my work, I learned the importance of clarity in legal writing. The Judge spends hours and many drafts on just the introductory paragraphs to his opinions. These sentences, he taught the clerks, are the most important. Lawyers need to know how the court thought the Constitution, statutes, and regulations applied to the facts of the case. But even non-lawyers, the Judge taught me, should be able to understand the stakes in a court case and the basic reason a case came out as it

did. The litigants themselves deserve an explanation that does not require a lawyer to interpret. I have taken this lesson with me at each stop along my career.

An example from my time clerking for the Judge highlights the importance he places on making the work of the courts accessible. *Dudnikov v. Chalk and Vermilion Fine Arts, Inc.*[1] involved a husband-and-wife team that earned their livelihood by selling knick-knacks on eBay. An out-of-state company asked eBay, located in California, to take down the couple's auction because some of the products allegedly infringed the company's copyrights. The husband and wife sued the company in Colorado *pro se*, seeking a declaration that their wares did not infringe the company's intellectual property rights. The district court dismissed the case for lack of personal jurisdiction over the company, agreeing with the company that it did not have any contacts with Colorado. It had no operations in Colorado and its letter to eBay had been directed to California.

Writing for a unanimous panel, Judge Gorsuch reversed and ruled for the couple. The company's letter, the Judge wrote, was like a bank shot in basketball. Just as a basketball player intends to hit the backboard only in the service of making a basket, so too the company had sent a letter to California in order to cancel the couple's auction that it knew was in Colorado. Such an intended effect satisfied the standard the Supreme Court has established for the exercise of personal jurisdiction over an absent defendant. This analogy translated a complicated area of jurisprudence into every day terms that litigants – including private citizens proceeding without the assistance of lawyers against well-represented companies, like the plaintiffs in this case – could easily understand.

Judge Gorsuch's care for writing is important in its own right, because the written word is the primary medium through which judges communicate. But the Judge's emphasis on writing is part of his broader concern for the process due litigants who seek the protection of our courts. As a clerk, I had the opportunity to observe over and over again Judge Gorsuch's respect for litigants and the care he took to make sure he fairly and fully evaluated and addressed all of their claims. The federal courts receive a very high number of *pro se* habeas corpus petitions from prisoners seeking to collaterally attack their convictions. For many of these petitioners, the Anti-Terrorism and Effective Death Penalty Act, passed by Congress in 1996, sets a bar to relief that they cannot clear. Consequently, many courts dispense with these petitions summarily.

Yet when I worked for Judge Gorsuch, he insisted that each petitioner receive a written decision explaining how the court had resolved his claim. Each inmate, he told me, is entitled to an explanation he can understand, no matter how far off the mark his claim for relief. And to be frank, many of the claims we received, prepared without the aid of counsel, were hard to understand. No matter. The Judge reminded we clerks of the courts' duty to liberally construe – that is, to give the benefit of the doubt to – the claims of those who appear on their own behalf seeking the protection of the law.

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[1] 514 F.3d 1063 (10th Cir. 2008).

In the decade since I clerked for him, Judge Gorsuch has authored several hundred written decisions and participated in hundreds more cases. His jurisprudence cannot be reduced to a few brief words. In my time working for him, and in reading much of his work since then, I see two common threads. First, Judge Gorsuch's faithful application of the law, as written by the people's representatives, to the specific facts of the case before him. Second, a concern that the average person have fair notice of the law and a meaningful chance to defend his rights.

His decisions protecting immigrants' rights are of particular note. You have no doubt had the chance to discuss his decisions in *De Niz Robles v. Lynch*[2] and *Gutierrez-Brizuela v. Lynch.*[3] In both of those cases, Judge Gorsuch ruled that the Board of Immigration Appeals could not retroactively deprive immigrants of the right to petition the government to remain in the United States. Each of these decisions found that the government owes those within its jurisdiction basic fair notice of what the law requires.

I want to tell you about a different case that raises similar themes. When I clerked for him, Judge Gorsuch authored the 10th Circuit's decision in *United States v. Hasan.*[4] That case involved a Somali teenager who came to the United States in 1997, fleeing the civil war in his home country of Somalia. Years later, the defendant, for whom English was a second language, was indicted and convicted of perjury based on his allegedly inconsistent statements about the persecution he faced in Somalia. The inconsistent statements came in two different appearances, months apart, before a grand jury. The record indicated that throughout his grand jury testimony, the defendant had expressed his difficulty with the English language and understanding the questions posed.

On appeal, Judge Gorsuch's opinion held that the district court had "plainly erred" – the most difficult standard of review for an appellant to satisfy – in not reevaluating whether the defendant was entitled to an interpreter during his grand jury testimony. Congress, the Judge wrote, had provided defendants who struggle with English the right to an interpreter in the Court Interpreters Act. And Congress had expressly made that right applicable to grand jury testimony.

The lessons I learned from working with the Judge on this case echoed those I heard throughout my clerkship. As in so many of his decisions, Judge Gorsuch paid careful attention to the arguments the litigants had actually made. Courts, Judge Gorsuch told me repeatedly, cannot reach out to decide questions not properly raised by the litigants. In our democratic system, that rule serves as a critical check on the power of the courts. At the same time, when Congress has spoken to an issue the courts must apply the law as written. Indeed, the courts must do so even when the government vigorously objects. The judge's duty is to enforce the protections against government overreach that the people's representatives have enshrined in the Constitution and statutes. I never once saw the

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[2] 803 F.3d 1165 (10th Cir. 2015).
[3] 834 F.3d 1142 (10th Cir. 2016).
[4] 526 F.3d 653 (10th Cir. 2008).

Judge shy away from doing so. The United States would be well served by someone with that kind of courage on the Supreme Court.

With that, I would be happy to answer any questions you may have.

Prepared Statement of Jamil N. Jaffer*
on the Nomination of Neil M. Gorsuch to be an Associate Justice
of the Supreme Court of the United States
before the Senate Judiciary Committee

March 23, 2017

Chairman Grassley, Ranking Member Feinstein, and distinguished Senators: thank you for inviting me to discuss the nomination of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States.

I appreciate the opportunity to talk to the members of this Committee about my experience working with and for Judge Neil M. Gorsuch.

I've known Judge Gorsuch for more than a dozen years and have worked directly with him in a number of different capacities: briefly when he was a law firm partner at Kellogg Huber, a trial litigation boutique here in Washington, DC (now known as Kellogg Hansen), while I was a new associate at the firm; as a senior Justice Department official when I was a young lawyer in the Office of Legal Policy; and as a law clerk during his first four months on the bench when he was a brand-new Judge on the United States Court of Appeals for the Tenth Circuit.

I've also seen Judge Gorsuch up-close and personal as a nominee when he was first nominated and ultimately confirmed to his current seat on the Tenth Circuit and now as a nominee to be an Associate Justice of the United States Supreme Court.

And finally, over these dozen years, I've gotten to know Judge Gorsuch as a colleague, as a boss, as a friend, and as a mentor.

And in these many and varied capacities in which I've known Judge Gorsuch, one set of key facts became apparent very quickly: Judge Gorsuch is a serious scholar of the law, a talented advocate, a brilliant writer, a fine judge, and an amazingly caring, warm, kind, and decent human being who would be a credit to our nation if he is confirmed as an Associate Justice.

By the time of this testimony, the members of this Committee will have had the chance to take the measure of Judge Gorsuch through personal meetings in your offices, through close and thorough review of his ten-year record on the bench, and through detailed and incisive questioning over the past few days. As a result, there is perhaps only a limited amount I can offer you in my testimony today beyond what you've already learned.

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* Jamil N. Jaffer currently serves as an Adjunct Professor of Law, Founder of the National Security Institute, and Director, National Security Law & Policy Program at the Antonin Scalia Law School at George Mason University, where he teaches classes on national security, surveillance, counterterrorism, and cybersecurity. Mr. Jaffer is also a Visiting Fellow at the Hoover Institution and is affiliated with Stanford University's Center for International Security and Cooperation. Among other things, Mr. Jaffer previously served as Chief Counsel & Senior Advisor to the Senate Foreign Relations Committee, as an Associate Counsel to President George W. Bush, and as Counsel to the Assistant Attorney General for National Security in the U.S. Department of Justice.

For example, by now you surely know of his sterling academic record, including his degrees from Columbia University, Harvard Law School, and Oxford University (mostly earned on scholarships), and you've almost certainly heard about his penchant for fly-fishing and skiing. You've already perused his opinions and seen his lean and mean writing style that explains the law and his analysis of the case in a way that is sophisticated and yet accessible to most lay readers. You've seen his demeanor and seen a man who is genuine, patient, and calm, while still remaining passionate about the things he cares about, whether a principle of law, a great quote, a family member, or a friend.

You've likely also heard about his deep family roots in the West, including his mom, a tough-as-nails Assistant District Attorney in Denver (one of the first women in that job) who set up a unit to go after deadbeat dads and went on to be an award-winning state legislator and the first female Administrator of the EPA; his grandfather on his dad's side who paid his way through law school working as a street car operator in Denver; his grandfather on his mother's side who grew up in an Irish tenement and who initially worked as a red cap moving bags at a train station to provide for his family; his grandmother who grew up in small-town Wyoming and was one of the first women to graduate from the University of Denver; and his other grandmother who grew up on a Nebraska farm without a refrigerator.

You've also certainly heard about Judge Gorsuch's time as a young man working a range of jobs, from shoveling snow, mowing lawns, and moving furniture, to working the night shift at a Howard Johnson's hotel. And you've heard about his decision, after completing law school and finishing his Ph.D. classes at Oxford, to turn down offers from some of the best law firms in Washington, DC and New York to instead take a risk and go to a startup law firm, where he ultimately helped win the largest affirmed antitrust verdict in U.S. history at the time (over $1 billion) and over $18 million for Columbia Hospital for Women, a community hospital in the D.C. area.

It was after all this that I entered the story and where I might (hopefully) provide some useful information for the Committee. The Neil Gorsuch that I met when I first arrived at Kellogg Huber in late 2004 was a young partner who was known for being a tough litigator who pursued his client's interests with dogged passion, but who was also unfailingly polite to his co-counsel and was widely respected even amongst his most aggressive opponents. He was, in many ways, a lawyer's lawyer, at a law firm known for its trial prowess and expertise. And, in my experience, he was the (perhaps rare) kind of law firm partner who took genuine interest in the growth and mentorship of those around him. Indeed, those who knew him felt his warmth and caring for them and their families, and I was lucky to be among that group, albeit briefly.

I remember learning about his impending departure for the Justice Department and being jealous of his unique opportunity to go to what looked to me to be a pretty cool job. I remember talking to him about the new opportunity and hearing the sheer excitement in his voice about going to the Department of Justice and about his opportunity to serve the public interest. It was, in a word, infectious.

As it turns out, Judge Gorsuch's passion for engaging in public service at the Justice Department, which I picked up in a just a couple of short conversations with him in the late spring/early summer of 2005, was so infectious that it would—just a few months later—play a critical role in my chance to head to the Justice Department, albeit in a different office.

When I arrived at the Office of Legal Policy in the late summer of 2005 to work on the

confirmation of then-Judge John G. Roberts, Jr. to the U.S. Supreme Court, I remember going to see Judge Gorsuch to get his advice on this new adventure. Once again, his passion for the job he was doing, his excitement for me about my new opportunity, and his dedication to serving the public interest was infectious.

I came out of our first set of meetings even more pumped up than I already was to work on the SCOTUS nomination and the range of other projects that OLP was working on at the time. And that passion and fire for public service—which had been instilled me from a young age by my dad—has been constantly relit and stoked by Judge Gorsuch's own passion for the same and through his advice and mentorship over the dozen years I've known him.

But it wasn't just his passion for public service that was infectious—it was the way he worked with people, the way he generated respect amongst his colleagues and those that worked for him, and the care and interest he took in the cases he worked on and the people involved in those cases, whether they were on his side or not. And while he was in a more senior management position at the Justice Department than he had been at the law firm—no longer trying cases in court—I could tell from the folks in the Associate Attorney General's office whom I met along the way that he took the same approach at the Justice Department that he was known for at Kellogg Huber.

After Judge Gorsuch was nominated for the Tenth Circuit, less than a year after he had been at the Department and at the young age of 37, I spent a lot of time talking to him about the process of becoming a judge and what that meant to him, why he was doing it, and his plans if he were lucky enough to be confirmed by the U.S. Senate. Having just come off working on the successful confirmations of Chief Justice Roberts and Justice Samuel A. Alito, Jr. to the Supreme Court, I had turned to working on various district court and appellate nominees, and I was fascinated by the idea that a lawyer just seven years older than me had been nominated to a lifetime appointment and that he actually wanted to do it.

And what I learned in those early conversations about becoming a judge was that Judge Gorsuch not only has a passion for public service, but that he has an abiding passion for justice, for ensuring that the law is applied fairly and in an evenhanded manner to all that come before our courts. It is worth noting that at the time, Judge Gorsuch had no reason to try and convince me that he'd be a good or dedicated judge; by that point he had already been nominated by the Administration, and my role wasn't to evaluate him.

At this point, we were just two friends—a mentor and a mentee—talking about why he wanted to take on this job at such an early point in his life. It was in those conversations that I realized that this was a man not just dedicated to being a great lawyer, to being a mentor and an example to those around him, and to being a strong but careful and disciplined advocate for his clients, but a man who was truly devoted to the rule of law, to the independence of the judiciary, and to the central role of the courts in ensuring the rule of law remains strong in our great nation.

After Judge Gorsuch got through the nomination process and was confirmed by the Senate, he asked me if I'd come clerk for him. Truth be told, at the time, I didn't give it much thought. After all, I had already clerked for Judge Edith H. Jones, an amazing, terrific judge if there ever was one, so dropping everything to go clerk again out in Denver, Colorado seemed like a bridge too far. As it turns out, Judge Gorsuch is a pretty convincing guy, and within a few weeks, he had gotten me to change my mind. (It

might be worth noting that the winning argument he made had something to do with ski season in Denver coming up). Looking back, I can't believe I even had that conversation.

I distinctly remember the first day my co-clerk Mike Davis and I arrived in Denver because Judge Gorsuch took us alpine sledding. Seriously. He beat us down the mountain twice and never let us forget that even with nearly a decade on us, he could beat two young whippersnappers like us.

I served as a law clerk to Judge Gorsuch for the first months he was on the bench, and in that time period, I had the chance to watch a very unique transformation. I watched as Neil Gorsuch, tough private practice trial lawyer and Justice Department senior official, became Judge Neil Gorsuch. In doing watching this transformation, I saw a man who had been a strong, passion advocate for his clients become a strong, passionate advocate for the rule of law and the independence of our courts. The transformation was near-instantaneous. It was almost like putting on those black polyester robes (as he likes to describe them) actually had the semi-mystical effect they are designed to evoke. I saw a man who had argued fervently for the positions he represented on behalf of others turn into a man who sought to apply the law as it was written, not as he wanted it to be, but as the political branches had made it. And while it is true that he and I had talked about his views on the rule of law back when he was first nominated and again after he was confirmed, it was a very different thing to watch it actually put into practice. It was an awe-inspiring moment for a young lawyer to watch.

And since that day, when Judge Gorsuch first took the bench in Denver, I haven't seen him waver from the task of being a judge's judge. He is the kind of judge you can count on to give you a fair hearing in his courtroom, the kind of judge you can expect to ask tough questions of both sides, the kind of judge who demonstrates respect for all litigants that walk in the door of the federal courthouse, the kind of judge that will fiercely protect the independence of the judiciary and its role as a co-equal branch of government, and the kind of judge who isn't looking to mold the law into his own image, but simply looking to apply the words written by the political branches in a fair and evenhanded manner to the parties before him.

And given that we are now in heat of the confirmation process for a Supreme Court vacancy, it may be worth talking for just a moment about current state of the process. On the night of Judge Gorsuch's nomination, I was near the steps of the Supreme Court and saw a group of protestors carrying signs that read, "Oppose _____," with the blank to be filled in with the name of whomever the President nominated. By this time, of course, Judge Gorsuch had been nominated and I could see his name handwritten on these signs. A troubling sign of thing to come to be sure.

And having watched the near-immediate reaction from certain camps within a day or so of the nomination and more recent events, I continue to be concerned. While it is absolutely fair to closely examine a nominee's record and judicial philosophy—indeed, it is a critical part of this august body's role under our Constitution—cherry-picking a handful of cases out over 2,000 decisions that a judge has participated in without accurately representing the numerous cases that go the other way is simply unfair.

The reality is that in his ten years on the bench, Judge Gorsuch has carefully and fairly applied the law to all litigants before him, and the fact that those who oppose to his nomination can only find a handful of cases to point to is a testament to his care and wisdom as a judge. Indeed, Judge Gorsuch's record demonstrates exactly who he will be if this body chooses to confirm him to the Supreme Court,

and that is a careful judge who applies the law fairly to every litigant and party before him and his colleagues.

While the judicial confirmation process has, to be sure, become more challenging for those who go through it (and their families), it is a testament to our great nation that highly qualified and capable men and women are still willing to serve. It is likewise a testament to the rule of law in this nation that we still have judges like Judge Gorsuch who view their role not as being politicians in robes, but as fiercely independent servants of the law itself, including our Constitution, the preeminent symbol of freedom in human history. In my view, Judge Gorsuch is just the kind of judge that we should all want to serve on our nation's highest court and I sincerely hope that this body will give him the chance to do so.

Thank you for offering me the opportunity to participate in this important hearing. I look forward to your questions.

STATEMENT OF KRISTEN CLARKE
PRESIDENT AND EXECUTIVE DIRECTOR
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
WASHINGTON, D.C.
MARCH 23, 2017

My name is Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law. Thank you for the opportunity to present testimony in connection with the nomination of Judge Neil M. Gorsuch to be an Associate Justice of the U.S. Supreme Court. The Lawyers' Committee is one of the nation's historic, non-partisan civil rights organizations and has the unique mission of mobilizing lawyers across the country to provide critical pro bono support to advance our work. Founded in 1963 at the behest of former President John F. Kennedy, we work to protect and defend the civil rights of African Americans and other minority communities in the areas of voting rights, economic justice, education, criminal justice, employment, and fair housing across our nation.

The Supreme Court occupies a central place in American democracy. For African Americans and other disenfranchised minority groups, it has been the primary forum for seeking equal justice under the law. For the last several decades, minority groups have looked to the Court to vindicate their constitutional and civil rights.

The Lawyers' Committee has reviewed the civil rights record underlying Judge Neil Gorsuch, as we have consistently done for Supreme Court nominees over the last several decades. I am not able to support his nomination to serve on the Supreme Court based on the current record. We have grave concerns about his commitment to upholding the Constitution and his ability to fairly interpret and apply civil rights laws. I have attached the Lawyers' Committee's March 2017 report to this testimony and ask to have it included as part of my testimony.

Voting Rights

The Lawyers' Committee's concerns are especially pronounced with respect to the question of whether Judge Gorsuch will fairly interpret and apply the Voting Rights Act and other voting rights laws. These concerns are based on Judge Gorsuch's identification as an "originalist" and his criticism of the use of courts to vindicate civil rights violations as well as issues that arose when he oversaw the Civil Rights Division of the Department of Justice as Deputy Associate Attorney General.

The Supreme Court's 2013 decision in *Shelby County, Alabama v. Holder*, which gutted a core provision of the Voting Rights Act, has proven to be one of the most devastating rulings of the last decade. At issue in this case was the Section 5 preclearance provision of the Act and Section 4 of the Act, which determined the jurisdictions across the country that were subject to preclearance. Prior to the decision, these Section 5 covered jurisdictions had to demonstrate to federal officials that any voting changes they proposed did not have a discriminatory purpose or effect. The effect of the opinion was to essentially render Section 5 – which had been perhaps the most effective civil rights provision of the modern era – inoperable. The Supreme Court held that Congress did not satisfy the normally-deferential rational basis test even though it had conducted dozens of hearings and compiled a voluminous record supporting the reauthorization of Section 5 and Section 4's coverage formula in 2006.

Throughout this hearing, we have heard witnesses draw parallels between Judge Gorsuch and the late Justice Scalia. These parallels are troubling. During oral argument in the *Shelby County* case, Justice Scalia referred to Congress's renewal of the Voting Rights Act as the "perpetuation of racial entitlement." That startling perspective aside, the Court ruled unconstitutional the coverage provision of the Act, a decision which eviscerated the Voting Rights Act. What is perhaps most troubling about the Court's decision in *Shelby County* is that the considered judgment of Congress was set aside. In 2006, Congress voted to renew Section 5 by a vote of 98-0 finding overwhelming evidence of ongoing voting discrimination across the country, demonstrating the continuing need for the strong protections of the Voting Rights Act.

Congress passed the Voting Rights Act pursuant to its powers to enforce the Fourteenth and Fifteenth Amendments, the Reconstruction amendments that provide Americans the rights of equal protection, due process, and the fundamental right to vote, amongst others, against state and local government action. The Reconstruction amendments provide protections against state-sponsored discrimination. It is unclear whether Judge Gorsuch appreciates the broad enforcement powers that Congress holds under the Fourteenth and Fifteenth Amendments and whether he appreciates one of our nation's most important federal civil rights laws – the Voting Rights Act. Judge Gorsuch's identification as an originalist underscores this concern. Self-professed originalists, such as Justices Scalia and Thomas, have typically interpreted the Fourteenth and Fifteenth Amendments narrowly as well as Congress's enforcement powers under those amendments. The *Shelby County* decision is but one of many examples of this. In addition, Judge Gorsuch's 2005 article in the National Review, "Liberals N' Lawsuits," criticized liberals for relying on the courts, as opposed to elected officials, to vindicate their rights. That stance is consistent with his apparent view that the application of the Fourteenth and Fifteenth Amendments should be limited.

Overall, Judge Gorsuch has a very limited record as a judge in voting rights cases. He has not authored any opinions in any voting rights cases and the one voting rights case in which he served on the panel was a straightforward case that did not raise the kind of jurisprudential issues which merit Supreme Court review. See *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012) (a case arising under the National Voter Registration Act ("NVRA") that was litigated by the Lawyers' Committee and others).

Tenure at the U.S. Department of Justice

Judge Gorsuch's tenure as Principal Deputy to the Associate Attorney General and Acting Associate Attorney General at the Department of Justice from 2005 to 2006 also raises concerns regarding his commitment to robust civil rights enforcement. Judge Gorsuch has described a component of his role at the Department of Justice as assisting in the management of the Justice Department's Civil Rights Division. As a career attorney at the Civil Rights Division during this time, I am personally aware of the inappropriate politicization of the Civil Rights Division that was ongoing in 2005 and 2006. A July 2008 report of the Department of Justice's Office of Inspector General, "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division," found that political appointees in the Division engaged in inappropriate hiring and personnel practices while Judge Gorsuch was overseeing the Division.

The Voting Section of the Civil Rights Division was particularly problematic. The Voting Section was one of the sections that were the subject of the politicized hiring practices. In addition, the substantive decisions of the Section were controversial and highly politicized. Perhaps the most prominent of those decisions was the August 2015 decision to grant Section 5 preclearance to Georgia's voter identification law despite the majority view amongst career staff that it would have a discriminatory effect on minority voters. A federal court later found the law to be unconstitutional, and the Georgia General Assembly amended the law the next year.

A central figure in the Department of Justice's decision to preclear Georgia's law was Hans von Spakovsky, who had direct oversight over the Voting Section. Von Spakovsky is widely known for his assertions that strict voter identification laws and similar provisions are needed to prevent voter fraud and has consistently downplayed the disenfranchising effects of such measures on African Americans, Latinos, and other minority groups. I am deeply troubled by the recent disclosure of a December 16, 2005 email showing that Judge Gorsuch praised von Spakovsky in connection with his appointment to the Federal Election Commission. The Senate would later decline to act on von Spakovsky's nomination, largely based on his actions while at the Justice Department, and he ultimately withdrew his nomination. We must not turn a blind eye to the fact that Judge Gorsuch oversaw the Division during this problematic period. His praise for one of the primary people responsible for the politicization of the Division's work and his frequent communications with those individuals implicated in the Inspector General's report raises questions that must be answered.

Moreover, the actions of the Justice Department in relation to voting rights during that period and Judge Gorsuch's praise for von Spakovsky raise serious questions about how he would assess and weigh arguments regarding voter fraud prevention as a justification for voting laws that impair the right to vote. There are ongoing challenges to such laws passed by North Carolina, Texas, and Wisconsin that have been the subject of recent lower federal court decisions. These cases have the potential to be among the most significant cases the Supreme Court may decide in the next term or two.

Criminal Justice

Finally, I want to speak briefly on Judge Gorsuch's record with respect to criminal justice issues. Criminal justice concerns remain at the forefront for many African American, Latino, and minority communities across our country. Judge Gorsuch generally takes a "law and order" approach to his criminal docket, adopting a narrow view on constitutional rights (particularly the Fourth Amendment). In particular, his views on criminal justice issues, such as police misconduct, present cause for concern. In many cases that we reviewed, Judge Gorsuch showed undue deference to police officers who were alleged to have used excessive force. Our review also shows that he rarely votes to reverse criminal convictions. In many of these cases, Judge Gorsuch was writing in dissent to an opinion or to the denial of *en banc* review.

With respect to cases concerning the constitutionality of searches and seizures, Judge Gorsuch typically affirms district court findings of probable cause. *See, e.g., United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010) (holding that officers had probable cause to arrest defendant); *United States v. Rochin*, 662 F.3d 1272 (10th Cir. 2011) (holding that the officer did not exceed the scope of a permissible protective frisk). He has criticized the exclusionary rule, which is settled law, and has dissented in a number of cases where the panel found a constitutional violation and ordered evidence suppressed.

Judge Gorsuch has deferred to police in a number of excessive force decisions holding that officers enjoyed qualified immunity where the Tenth Circuit panel was divided. For example, in an unpublished wrongful death decision, Judge Gorsuch (over dissent) held that an officer had qualified immunity when they tased a suspect in the head at close range. *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013). Similarly, Judge Gorsuch joined a dissent from a decision to deny *en banc* review where a panel found that an officer was not immune from suit when they returned fire by firing multiple shots. *Pauly v. White*, 817 F.3d 715, 719 (10th Cir. 2016)(Moritz, J, dissenting) (arguing that the court's decision would "second-guess[] officers' split-second judgments" and "create[] new precedent with potentially deadly ramifications for law enforcement officers"). And Judge Gorsuch dissented in part from the *en banc* decision in *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), where he concluded that the officers should have qualified immunity for the seizure and excessive force claim but concurred that there was not immunity for the wrongful arrest claim.

Moreover, in two cases where Judge Gorsuch has participated on a panel that agreed that there was no qualified immunity, Judge Gorsuch has written specially – and without support from the other judges – to question whether Section 1983 and federal court litigation is the proper way to advance claims of police misconduct. For example, in a concurrence in *Cordova v. City of Albuquerque*, 916 F.3d 645 (10th Cir. 2016), which concerned allegations that police officers filed charges in bad faith, Gorsuch suggested that malicious prosecution may not entail a constitutional violation that would allow recovery under Section 1983. *Id.* at 661-66 (Gorsuch, J., concurring). Similarly, in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), where the panel affirmed a wrongful death decision concluding an officer did not have qualified immunity where an off-duty officer crashed into the plaintiff at high speed, Judge Gorsuch took the unusual steps of writing a concurrence (to his own majority decision) commenting that "a state court could provide relief using established tort principles . . . [and] there's no need to turn federal courts into common law

courts and imagine a whole new tort jurisprudence under the rubric of Section 1983." *Id.* at 1083-84 (Gorsuch, J., concurring).

Conclusion

In closing, we must observe that the nomination of Judge Neil Gorsuch arises at a tumultuous moment in our nation's history. We have seen heightened efforts to impair the civil rights of minority communities, ongoing efforts to restrict the rights of minority voters, unconstitutional policing practices, rising xenophobia, and other issues that make clear the fragile state of our democracy. Our nation deserves a Supreme Court justice who will be truly committed to interpreting the Constitution and federal civil rights laws in a manner that recognizes that discrimination is both ongoing and a threat to democracy and a justice who brings a commitment to ensuring equal justice under law for all Americans.

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Written Testimony of Sarah Warbelow
Legal Director, Human Rights Campaign

To the
U.S. Senate Committee on the Judiciary
Nomination of the Honorable Neil M. Gorsuch to the Supreme Court of the United States
March 23, 2017

Good morning. My name is Sarah Warbelow and I serve as the legal director for the Human Rights Campaign, the nation's largest organization advocating for the civil rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. On behalf of the Human Rights Campaign and our nearly 2 million members and supporters nationwide, I am honored to be speaking to you today. However, I am disappointed and distressed to be here to discuss the nomination of Judge Neil Gorsuch to the Supreme Court.

LGBTQ people are no stranger to the Supreme Court. We intimately understand the power of the Court to affirm or deny our most basic rights. We know that the very Court that so many celebrated following the decisions from *Romer v. Evans*[1] to *Obergefell v. Hodges*[2] also issued *Bowers v. Hardwick*,[3] the decision upholding state anti-sodomy laws and providing the highest federal seal of approval for these discriminatory, marginalizing laws that targeted and victimized the LGBTQ community for a generation. We understand that just as our past has been shaped by the men and women who serve on this bench, our future will be tied to them as well. It is because of this that we hold the individuals who receive these lifetime positions to such a high standard. We know that we speak for the generations of LGBTQ people who will be impacted by their decisions. The same transgender students fighting for equal access to an education will grow into the workers who will deserve the same equal treatment on the job from their employers and from their government. If confirmed, Judge Gorsuch could easily serve until 2050 or beyond—transforming the legal and civil rights landscape to reflect the myopic indifference to basic humanity that colors much of his record thus far.

We recognize that Supreme Court Justices aren't always popular. We might not agree with every decision

[1] 517 U.S. 620 (1996).
[2] 135 S. Ct. 2584 (U.S. 2015).
[3] 478 U.S. 186 (1985).

they make. But we must believe in their commitment to reaching impartial judgments based upon fact, not political ideology, cronyism, or bias. And they must agree that LGBTQ people have fundamental rights protected by the Constitution and that we, as individuals and as a community, are entitled to equal treatment under the law. We need a Justice who recognizes our basic equality and shared humanity. Judge Gorsuch has never met this bar.

Time and again, Judge Gorsuch has employed a dangerous brand of Constitutional originalism that ignores the essential contexts and values that are woven throughout each case and the lives they touch. Judge Gorsuch's statements on originalism echo the infamous analogy made by now Chief Justice Roberts in his own nomination hearing. Chief Justice Roberts described the originalist judge's role stating that, "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules."[4] This simplistic analogy ignores that sometimes the role of the Court is to determine the scope of the rule, to interpret the law faithfully in the spirit with which it was drafted. This is far from "making" the law or engaging in the taboo of "judicial activism." Rather, such determinations actually serve the law when it is most difficult to do so—when it requires the most analysis and the most sincere, bias-free perspective. The Supreme Court is not a game. The American people need a reasoned jurist who will actively engage in Constitutional contextualism. Cases that have reached the Supreme Court are by their very nature complicated and unsettled and cannot be be resolved by applying the law by rote.

Constitutional Originalism and the LGBTQ Community

The Supreme Court has consistently recognized that LGBTQ people have Constitutionally protected fundamental rights. We have the right to build relationships without the threat of criminalization, we have the right to raise our children in loving homes, and we have the right to marry. These rights are built on a foundation of landmark privacy cases like *Griswold v. Connecticut*,[5] which held that in addition to the enumerated rights included in the Constitution, the Bill of Rights also protects liberty interests that "help give them life and substance."[6] These rights are also deeply rooted in individual autonomy and liberty cases like *Planned Parenthood v. Casey*.[7] It is here, amidst these rights, that our lives and the substance of them are most recognized and protected.

The Supreme Court's decisions on marriage equality stand on the shoulders of these foundational civil rights cases. In *Obergefell*, the Supreme Court reaffirmed that the right to marry is fundamental.[8] These cases echo a long line of decisions, including *Griswold* and *Casey*, that have informed our country's understanding of personal autonomy, individual dignity, and our relationships with the government and with each other. In *Obergefell*, Justice Kennedy cited *Loving v. Virginia*,[9] the historic civil rights case that struck down anti-miscegenation laws, to support his decision that marriage was a fundamental right, holding that "the right to personal choice regarding marriage is inherent in the concept of individual

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[4] *See* United States Cong. Senate Comm. on Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. (2005).
[5] 381 U.S. 479 (1965).
[6] *See Griswold*, 381 U.S. at 484.
[7] 505 U.S. 833 (1992).
[8] *See Obergefell*, 135 S. Ct. at 2599.
[9] 388 U.S. 1 (1966).

autonomy."[10] The landmark civil rights case, *Lawrence v. Texas*,[11] which struck down state anti-sodomy laws, also recognized LGBTQ people's fundamental right to privacy and self determination. The *Lawrence* Court acknowledged the stigmatizing and life-changing impact of these laws on LGBTQ people, citing *Casey* that, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[12]

The *Lawrence* Court also held that the Texas anti-sodomy law violated the guarantee of Equal Protection under the 5th and 14th Amendments of the Constitution.[13] Justice Kennedy's conclusion to the majority opinion spoke directly to the inclusion of LGBTQ people within these Constitutional protections:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[14]

Other landmark cases detailing the right to Equal Protection under the law for LGBTQ people were not decided in a vacuum, but rather took into account the effect that laws have on real people in their daily lives and in their place in society. In *U.S. v. Windsor*, the Court held that the so-called Defense of Marriage Act (DOMA) violated the guarantee of Equal Protection of the 5th amendment of the Constitution.[15]

Justice Kennedy has described the Constitutional evaluation involving the identification and protection of fundamental rights as "an enduring part of the judicial duty to interpret the Constitution…" continuing that "it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect… History and tradition guide and discipline this inquiry but do not set its outer boundaries."[16] Decisions like *Lawrence* and *Obergefell* illustrate the Court's longstanding ability incorporate the texture of lived experiences to make the Constitutional connections necessary to ensure true equality under the law. We must demand that any nominee for the Supreme Court exhibit a similar discipline and commitment to interpreting and applying Constitutional and legal standards impartially. We are deeply concerned that Judge Gorsuch's rote originalism makes him not only ill-equipped to engage in this Constitutional searching, but ideologically opposed to the exercise and the significant, settled case law detailing it.

Judge Gorsuch's brand of Constitutional originalism denies the complicated underpinnings of our most treasured document. In constructing the Fourteenth Amendment, the drafters were clearly focused on the

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[10] *See Obergefell*, 135 S. Ct. at 2599.
[11] 539 U.S. 558 (2003).
[12] *See Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).
[13] *See Lawrence*, 539 U.S. at 578-79.
[14] *Id.*
[15] *See Windsor*, 133 S. Ct. at 2696.
[16] *See Obergefell*, 135 S. Ct. at 2598.

greatest problem before them—dismantling the institution of slavery and the persistent systemic racism it caused—but they chose to write language that provided a promise to all. Yet many jurists who adhere to Constitutional originalism, such as Justice Antonin Scalia whose approach to Equal Protection Judge Gorsuch has praised, have refused to provide heightened scrutiny to gender discrimination or discrimination based on LGBTQ status.[17] Judge Gorsuch's record and statements place him squarely in the mold of Justice Scalia, who consistently demeaned and denied the dignity of LGBTQ people from the bench. Justice Scalia found himself in the minority opinion of many of the landmark cases discussed above, including *Lawrence,* espousing a staunch originalist ideology to dehumanize LGBTQ people and deny them rights entitled by the Constitution.

Judge Gorsuch has directly questioned the right to personal autonomy and choice articulated by *Casey*, arguing that it created too great a "risk" to state marriage laws that excluded same-sex couples.[18] I would be remiss if I did not also include that in this statement, Judge Gorsuch accepted whole cloth a quote from Justice Scalia equating marriage for same-sex couples to bestiality and made no effort to distinguish between marriage—one of our society's most sacred traditions—and criminal, anti-social behavior.[19] Despite reports that Judge Gorsuch is personal friends with individuals who identify as LGBTQ, his choice to embrace this line of reasoning as his own not only targetedly demeans a traditionally marginalized population, but also reveals a level of ignorant indifference that should be considered disqualifying for a lifetime appointment. Marriage equality is settled law and must not be undermined by a radical ideologue hostile to decades of Constitutional history and analysis.

Statutory Interpretation

Statutory interpretation is of the utmost importance to the LGBTQ community. The next person confirmed to the Supreme Court will undoubtedly play a role in assessing whether laws prohibiting sex discrimination also prohibit discrimination because someone thinks that a woman shouldn't be attracted to other women, or because someone has transitioned from male to female. Numerous federal courts[20] and agencies[21] have recognized that discrimination on the basis of sexual orientation or gender identity is

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[17] *See, e.g.*, *J.E.B. v. Alabama,* 511 U.S. 127 (1994) (Scalia, J., dissenting, joined by Justice Thomas and Chief Justice Rehnquist) (arguing that state's use of peremptory strikes on the basis of gender in jury selection did not violate Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting).

[18] Neil Gorsuch, *Liberals 'N' Lawsuits*, NAT'L REVIEW ONLINE (Feb. 7, 2005), available at http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

[19] *Id.*

[20] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, 2016 WL 1089178 (D. Conn. Mar. 18, 2016).

[21] *See, e.g.*, Dep't of Health and Human Serv., Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4 (May 13, 2016); Dep't of Def., *Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members* (Jul. 29, 2016); Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); Discrimination Based on Sex, 41 C.F.R. § 60-20.2(a) (2016); *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012).

often unlawful sex discrimination under existing federal laws including Title VII of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments.

Gorsuch's view on Constitutional originalism suggests he believes that with regard to statutory interpretation, it only matters if the drafters of Title VII specifically intended for it to apply in the manner raised. Even Justice Scalia in *Oncale v. Sundowner Offshore Services, Inc.*[22] recognized this was not the proper test for determining the application of a statute in order to effect its remedial purposes. Numerous federal courts have followed in the footsteps of the Supreme Court in *Oncale* and *Price Waterhouse v. Hopkins*[23] by holding that Title VII prohibits discrimination against LGBTQ people. Some critics of the interpretation, though, have reasoned that Congress did not intend to include these protections when the statute was drafted in 1964, which would, according to their view, limit the reach of the statute's protections today. The Equal Employment Opportunity Commission (EEOC) illuminated the flaws in this reasoning:

> Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Services, Inc.*, 'statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.' ...Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included... Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation... But the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.[24]

It is imperative that any nominee to the Supreme Court not permit his or her views of what Congress may have meant to override the the words of the statute itself, but rather embrace the reasonable approach to statutory interpretation reflected in Supreme Court precedent historically. For example, although Title VII did not originally explicitly prohibit sexual harassment or sex stereotyping at work as unlawful sex discrimination, the Court has made clear that these protections are ingrained in the fabric of the statute—regardless of the drafters' original intent.[25]

Judge Gorsuch has also shown an eagerness to carve out sweeping defenses for employers in workplace discrimination cases. This concern is clearly illustrated by a 2009 case in which he joined an opinion finding against a transgender woman alleging employment discrimination under Title VII. In *Kastl v. Maricopa County Community College*,[26] an employer refused to allow an employee to use the appropriate

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[22] 523 U.S. 75 (1998).
[23] 490 U.S. 228 (1989).
[24] *See Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).
[25] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (holding same-sex sexual harassment is actionable as sex discrimination under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)(holding sex stereotyping is a form of sex discrimination prohibited under Title VII).
[26] 325 Fed. Appx. 492 (9th Cir. 2009).

women's restroom following her gender transition despite her provision of government identity documents confirming her gender.[27] When she refused to use the men's restroom, she was terminated.[28] The court determined that the employer's argument denying the employee access to a gender appropriate facility was not discrimination because it was based on "safety concerns."[29] There was no evidence for these "concerns" at all beyond complaints that some individuals were uncomfortable around Ms. Kastl. Social discomfort does not correspond to a genuine safety concern. The Supreme Court has explicitly rejected the idea that discomfort should be a defense to discrimination.[30]

Bare animus towards the LGBTQ community must never be allowed to cloak itself in false justifications of privacy or safety or comfort. Decried by organizations that support women who have been subjected to sexual assault and intimate partner violence,[31] individuals bent on denying transgender people equal participation in society have clung to erroneous claims of safety and privacy.[32] Supreme Court Justices must be able to discern legitimate government interests from clear hostility to vulnerable minorities.

Use of Religion to Deny Others' Rights

Judge Gorsuch joined the majority opinion in the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*,[33] holding that corporations are "persons" that exercise religion for purposes of the Religious Freedom Restoration Act (RFRA) and could use RFRA to obtain an exemption from the Affordable Care Act.[34] This set the stage for the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*,[35] which altered the application of RFRA and heightened concerns that RFRA will be used to trump laws that prohibit discrimination or ensure access to health care. *Hobby Lobby* turned the concept of religious freedom on its head, creating a mechanism by which some religious beliefs can be imposed upon others, undermining religious pluralism and tolerance. The decision imbues corporations with humanity in ways that conflict with the purpose of a for-profit corporation and sets up the religious views of corporate owners to prevail over the well-founded needs of employees, patients, and customers.

The Tenth Circuit's approach to RFRA's substantial burden question was particularly troubling. It held that a corporation is substantially burdened when it claims merely that it feels "moral culpability" because following the law could allow other people to act in a way which it finds objectionable. This conclusion significantly lowered the bar for establishing a substantial burden under RFRA and morphed this legal

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[27] *See Kastl*, 325 Fed. Appx. at 493.
[28] *Id.*
[29] *Id.* at 494.
[30] *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").
[31] *See* Nat'l Task Force to End Sexualand Domestic Violence Against Women, *National Consense Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21, 2016), available at http://endsexualviolence.org/files/NTFNationalConsensusStmtTransAccessWithSignatories.pdf.
[32] *See* Brief for Law Enforcement Officers as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273); Brief for American Academy of Pediatrics, et al. as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273).
[33] 723 F.3d 1114 (10th Cir. 2013).
[34] *See Sebelius*, 723 F.3d. at 1129.
[35] 134 S. Ct. 2751 (U.S. 2014).

standard into a subjective standard defined by the claimant. The Tenth Circuit opinion also ignored that the Establishment Clause of the Constitution places important limitations on religious exemptions: the government may not carve out exemptions if they would result in real harm to others.[36] At the same time, the Tenth Circuit dismissed the notion that employees would be harmed if their employers deny insurance coverage for vital healthcare.[37] This radical departure, altering RFRA and ignoring constitutional limits, could have far reaching consequences that go even further than access to healthcare for large numbers of people, and could even threaten our nation's laws designed to promote equality and combat discrimination.

The immediate aftermath of *Hobby Lobby* raises serious questions for the LGBTQ community about what other types of health care can be denied based on the whims of employers. Judge Gorusch's vision that providing healthcare equates to moral culpability could very well open up LGBTQ people to even more discrimination. Under this logic, providers could argue that transgender people could be categorically denied access to hormone therapy, employers could pick and choose which employees have access to infertility treatments, and corporate owners could refuse to cover lifesaving medications like PrEP.

Hobby Lobby has inspired litigation around the country that undermines critical nondiscrimination protections for transgender people. Rather than solely fight the common sense legal trend towards determining that laws prohibiting sex discrimination also prohibit discrimination on the basis of gender identity, new efforts have arisen designed to circumvent our nation's laws by arguing that assertion of religious belief permits an individual to be unencumbered by complying with any provision which they consider inconsistent with their world view. The district court decisions in *Franciscan Alliance, Inc. v. Burwell*[38] and *EEOC v. Harris Funeral Homes*[39] will likely result in these claims only being the tip of the iceberg.

In a direct challenge to the regulation accompanying the nondiscrimination provision contained in the Affordable Care Act, three religiously affiliated health care providers asserted a right under RFRA to refuse to provide necessary medical care to transgender people in *Franciscan Alliance, Inc. v. Burwell*.[40] In determining that *Franciscan Alliance* and the other parties would likely prevail on their RFRA claim, the district court omitted the prevailing evidence amongst established medical experts that appropriate treatment of gender dysphoria may necessitate a range of medical interventions including hormone therapy and surgery.[41] It is troubling that *Hobby Lobby* is being read to permit the refusal of critical care

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[36] *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005) (A religious exemption "must be measured so that it does not override other significant interests" and may not "impose unjustified burdens on other[s]."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (A religious exemption may not "unyielding[ly] weight[]"religious interests "over all other interests" including coworkers who do not share the same religious beliefs.); *see also, e.g.*, *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).
[37] *See Sebelius*, 723 F.3d at 1144-45.
[38] *Franciscan Alliance, Inc. v. Burwell*, 2016 U.S. Dist. LEXIS 183116 (N.D. Tex. Dec. 31, 2016).
[39] *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016).
[40] *See Franciscan Alliance, Inc.*, 2016 U.S. Dist. LEXIS 183116, at *4. This case also involves eight states as plaintiffs: Texas, Wisconsin, Nebraska, Kansas, Louisiana, Arizona, Kentucky, and Mississippi; however, none of the states made a RFRA claim. *Id.*
[41] *See* Brief for American Academy of Pediatrics, et al. as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273).

for transgender people by entities accepting taxpayer funds for the explicit purpose of providing appropriate medical care to all who seek it.

In *EEOC v. Harris Funeral Homes*, U.S. District Court Judge Sean Cox turned a blind eye to the ways in which religiously motivated sex-stereotyping results in real harm to transgender people.[42] Aimee Stephens had worked for the funeral home for nearly six years when she informed the owner that she would be transitioning and that when she returned she would be presenting as a woman, including wearing attire consistent with the dress code for women.[43] The funeral home owner terminated Stephens' employment based on his belief that sex is an unchangeable characteristic set at birth.[44] In providing the funeral home a pass from complying with Title VII, Judge Cox cited Supreme Court's decision in *Hobby Lobby* but disregarded the cautionary note contained in the majority opinion:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction... Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[45]

Rather, Judge Cox's analysis is more consistent with Judge Gorsuch's view in the Tenth Circuit decision in *Hobby Lobby* that "moral culpability" overrides even compelling government interests. Such a reading will inevitably lead to an increase in the pervasive harms our nation's nondiscrimination laws were designed to eradicate.

Taking *Hobby Lobby* to the obvious extreme, consistent with the concept that no individual or even for-profit corporation should be required to follow a law that leads it to feel "moral culpability" for the actions of others, President Trump is considering signing a "religious freedom" executive order,[46] while Congress and state legislatures are considering the adoption of similar extreme legislation. These proposals would allows individuals, organizations, and closely held for-profit corporations to decline to recognize the marriages of same-sex couples—and in some instances the existence of transgender people—when doing so conflicts with religious or moral beliefs. To date, Mississippi is the only jurisdiction to enact such a law.[47] U.S. District Court Judge Carlton Reeves in *Campaign for Southern Equality v. Bryant III*[48] found the Mississippi law violates the both the Establishment Clause as well as the 14th Amendment.[49] It is deeply concerning that Judge Gorsuch may have the opportunity to determine the ultimate outcome in this case given his clear efforts to shape doctrine around "moral culpability."

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[42] *See Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716, at *61.
[43] *Id.* at *8.
[44] *Id.* at *24.
[45] *Id.* at *49.
[46] *See* Ian Lovett, et al., *Trump Draft Order Would Expand Religious Rights, Could Allow Denial of Services to Gays*, Wall St. J., Feb. 5, 2017, https://www.wsj.com/articles/draft-of-executive-order-proposes-expanding-legal-protections-on-religious-grounds-1486071114.
[47] *See* Protecting Freedom of Conscience From Government Discrimination Act, Miss. Code Ann. § 11-62-5 (2016).
[48] 2016 U.S. Dist. LEXIS 83036 (S.D. Miss. June 27, 2016).
[49] *See Bryant III*, 2016 U.S. Dist. LEXIS 83036, at *24.

Threats to Progress Attained by LGBTQ Community

Efforts to exploit RFRA and the First Amendment in order to establish a broad right to refuse to acknowledge the humanity of LGBTQ people reflect only a segment of the litigation working its way through the courts with the end goal of undermining the basic protections that currently exist for LGBTQ community. Areas of the law that the majority of Americans view as settled, including marriage equality, are being litigated and debated by groups who are emboldened that a Supreme Court Justice like Judge Gorsuch will re-open settled law. In short order, the Supreme Court will be asked to determine the full scope of marriage equality and the application of gender specific language to LGBTQ people.

Recently, in *Smith v. Pavan*,[50] the Arkansas Supreme Court reversed a lower court's decision directing the Arkansas Department of Health to list both same-sex parents on their child's birth certificate, the same process that applies to different-sex couples.[51] This ruling tries to limit the scope of *Obergefell*—despite the fact that the Supreme Court of the United States specifically listed birth certificates as one of the governmental rights, benefits, and responsibilities that marital status confers.[52] The ruling places burdens on same-sex couples that opposite-sex couples do not experience, including forcing same-sex couples to enter into legal proceedings to assert parental rights. Distressingly, it denies children the full benefits of parental recognition in an effort to penalize the parents.

In Texas, the state supreme court reversed itself by agreeing to hear *Pidgeon v. Turner*,[53] a case it had previously rejected. At issue is whether the City of Houston overreached by providing spousal benefits to married same-sex couples on the same terms as opposite-sex couples.[54] Two Houston residents claim that "*Obergefell* may require States to license and recognize same-sex marriages, but that does not require States to give taxpayer subsidies to same-sex couples," despite the fact that the city provides these same spousal benefits, such as healthcare, to opposite-sex couples.[55]

Though not yet passed into law, the Tennessee General Assembly is advancing legislation to require statutes to be read in gender specific terms.[56] Thus terms such as "mother", "father", "husband", and "wife" would be only understood to apply exactly as written no matter the consequences. In Tennessee, like many other states, a rebuttable presumption of parentage is established to increase the chances that a child will have two legal parents who are responsible for the child's welfare.[57] Were one of the advancing bills to pass, a child born to a mother married to a man who is not the biological father will be presumed to be the child of the man for all legal purposes, but a child born to a mother married to a woman who is not a biological parent will not automatically have the same legal protections. In addition, a woman would be responsible for the debt her husband accrued prior to the marriage but her husband would not be liable

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[50] 2016 Ark. 437 (S. Ct. Ark. Dec. 8, 2016).
[51] *See Pavan*, 2016 Ark. 437, at *10.
[52] *Id.* at *10 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (U.S. 2015)).
[53] No. 15-0688, 2017 Tex. LEXIS 554 (Tex. Jan. 20, (2017).
[54] *See* Brief for Petitioner at 3-4, *Pidgeon v. Turner*, No.15-0688 (Tex. Sep. 10, 2015).
[55] *Id.* at 5.
[56] *See, e.g.*, H.B. 33, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017)(requiring the words husband, wife, mother, and father be given their natural and ordinary meaning); S.B. 1085, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017)(requiring undefined words be given their natural and ordinary meaning).
[57] *See* Tenn. Code Ann. § 36-2-304 (2017).

for the debts she accrued. Other states are considering even more direct attacks on *Obergefell*.[58]

Approach to Civil Rights

Finally, Judge Gorsuch's categorical dismissal of the historic role of the courts to protect civil rights and promote equality is distressing. Judge Gorsuch has stated that, "American liberals have become addicted to the courtroom… as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide."[59] This statement from a Supreme Court nominee is deeply troubling. Judge Gorsuch's failure to recognize the powerful, and longstanding role of the courts to protect individual and civil rights coupled with a record that often ignores the constitutional rights and personhood of some of our nation's most vulnerable people reveals a dangerous vision of the Court. Judge Gorsuch's statement reveals that he has divided cases, issues, and plaintiffs into two categories—those who deserve justice from the courts and those who don't. While Judge Gorsuch has not hesitated to assign personhood and rights of for-profit corporations like Hobby Lobby, he has failed to recognize these same qualities in actual human beings—including those who are LGBTQ.

Demanding justice and protection of our Constitutional rights from the Supreme Court is not, as Judge Gorsuch has described it, an "addiction."[60] We are not misusing or abusing the courts when we demand that they perform their function as envisioned by our founders. We are merely acting as full citizens under the law, ensuring that the systems designed to safeguard our Constitution and our democratic way of life do just that. This "addiction" is bolstered by a century of life-changing civil rights cases whose outcomes had proven to be unachievable by any other means, including *Brown v. Board of Education*,[61] *Loving v. Virginia*, and *Roe v. Wade*. If demanding equal treatment under the law and respect for fundamental rights under the Constitution is an addiction, then it is to the betterment of our nation.

Conclusion

The American people expect and deserve a Supreme Court Justice who is committed to serving our system of Constitutional democracy and who understands the critical role of the Court in supporting it. We need a Justice who will not shy away from the facts and context that color the cases that come before the Court, but will instead embrace an expansive analysis that reflects the true spirit and intent behind the laws he or she is tasked with interpreting. Judge Gorsuch's record and testimony this week reveal that he is not this Justice. For these reasons, the Human Rights Campaign opposes his nomination.

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[58] *See, e.g.*, S.B. 64, 100th Gen. Assemb., Reg. Sess. (Ill. 2017)(creating the "Religious Freedom Defense Act" prohibiting the state government from taking action against an individual who believes or acts under a religious belief that marriage is between one man and one woman); H.B. 205, 99th Gen. Assemb., Reg. Sess. (Mo. 2017)(allowing an individual authorized to solemnize marriages to refuse to do so for marriages that conflict with the individual's religious beliefs).
[59] *See* Gorsuch, *supra* note 18.
[60] *Id.*
[61] 347 U.S. 483 (1954).

Testimony by Amy Hagstrom Miller
Founder and CEO, Whole Woman's Health

Hearing on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States

Senate Judiciary Committee
March 23, 2017

- Chairman Grassley, Senator Feinstein, and Members of the Committee, I am honored to speak with you today.

- My name is Amy Hagstrom Miller. I am the Founder and CEO of Whole Woman's Health, a group of women's health clinics that provide comprehensive reproductive services, including abortion care.

- I am here today on behalf of abortion providers, women's health advocates, and the people we serve all across the country who deserve access to quality healthcare, delivered with dignity and respect.

- We are gravely concerned about the nomination of Judge Gorsuch to the U.S. Supreme Court.

- In fact, Whole Woman's Health joined 54 other reproductive health, rights and justice organizations in a letter to the Senate opposing Judge Gorsuch's nomination.

- In our clinics we offer holistic care for women that includes caring for their heart, mind and body. We envision a world where every woman who has decided to end a pregnancy will be respected and where she will have the information she needs and the quality care she deserves.

- We were the lead plaintiff in last year's landmark Supreme Court case *Whole Woman's Health v. Hellerstedt* and witnessed how decisions made at the high court directly impact the lives of women. I know what happens when politicians find devious ways to deny women's constitutional rights, and why it is so important to have independent jurists who respect precedent and the rule of law.

- *Roe v. Wade,* the 1973 decision that guaranteed the right to abortion and the right to privacy, has been settled law for more than four decades and has been reaffirmed repeatedly by the Supreme Court.

- Nevertheless, that hasn't stopped legislators across the country from putting roadblocks in front of women seeking abortion care—more than 330 have been passed since 2010.

- Nowhere was the impact of these laws more evident than in the state of Texas, where anti-abortion legislators passed a law in 2013 that forced over half the state's clinics to shut down.

- The law forced women to drive hundreds of miles, even across state lines, to access their right to safe and legal abortion. In some cases, the hurdles were so high women simply took matters into their own hands.

- I will never forget the woman who called from South Texas right after the law went into effect. We told her our clinic was shuttered and she now had to drive 250 miles each way to San Antonio. She told us there was no way she could take two days off work, find childcare and the money to drive that far. She said "I will tell you what is in my medicine cabinet, and can you please tell me what to use to do my own abortion?"

- In our country, where abortion has been legal for more than 40 years, no woman should be forced to take matters into her own hands. Nor should she fear criminalization or jail time if she does.

- Would a Justice Gorsuch support unnecessary obstacles to our constitutional rights? We need to know.

- I also remember the woman who called from West Texas - where every single clinic had been shut down. She was a single, working mother with 3 children. We helped her find a clinic, raise money for her abortion, childcare, transportation and lost wages. By the time she made it to a Dallas clinic eight weeks later, it was too late to have an abortion in the state of Texas.

- Would a Justice Gorsuch support laws that limit our constitutional rights to our zip codes? We need to know.

- Last year we took Texas to the Supreme Court and, in its ruling, the court called out these and other clinic shutdown laws for what they are—sham laws that create obstacles to care with no medical basis behind them.

- Women need to know that if their rights are once again on trial, they will be decided by justices who are independent, and not beholden to an ideological agenda.

- Judge Gorsuch has refused to answer basic questions about his stance on *Roe, Whole Woman's Health,* or the right to privacy.

- Yet we know in the Utah Planned Parenthood case he sided with politicians using misinformation and false claims to defund women's health services.

- And in the *Hobby Lobby* contraception case, he supported the notion that corporations are people.

- Judge Gorsuch's positions raise concerns about his ability to be open-minded, fair and guided by the Constitution, not his own ideology and personal beliefs.

- Your decision on this nomination will have a profound impact on all of your constituents.

- Everyone loves someone who has had an abortion -- and we all want the people we love to be safe and treated with respect, compassion and dignity.

- I urge you to keep this in mind as you consider the awesome responsibility of entrusting a lifetime appointment to the United States Supreme Court.

- Thank you very much.

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

HEARINGS ON THE NOMINATION OF JUDGE NEIL GORSUCH TO THE SUPREME COURT OF THE UNITED STATES

MARCH 23, 2017

STATEMENT OF WILLIAM P. MARSHALL, KENAN PROFESSOR OF LAW, THE UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL

Mr. Chairman and Members of the Committee:

Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge Neil Gorsuch to the Supreme Court of the United States. My name is William Marshall. I teach constitutional law at the University of North Carolina, where I have been on the faculty since 2001. I have also served in the Office of the White House Counsel and as the Solicitor General of the State of Ohio.

The Air Force is unconstitutional. *Brown v. Board of Education*, 348 U.S. 886 (1954), was incorrectly decided. The Equal Protection Clause does not apply to women. The First Amendment does not protect speech on the internet or prevent persons from being forced to salute the flag when it conflicts with their conscientious or religious principles. The Constitution does not require one person/one vote. There is no freedom from government intrusion into such deeply personal decisions as to whether or not to have a child. There is no right to direct the raising and educating of one's own children. The Fifth Amendment does not require the police to inform persons charged with crimes that they have a right to counsel. The federal government may discriminate on the basis of race and ethnicity without constitutional constraint.

These are just some of the results to which a strict adherence to "originalism" would lead. The vacancy created by the death of Justice Antonin Scalia, the Court's most prominent proponent of organism, and the subsequent nomination of Judge Neil Gorsuch to fill that position, has once again brought the theory of "originalism" into the spotlight. It is therefore appropriate to reexamine the validity and legitimacy of originalism as a governing mode of constitutional interpretation. I will address that issue in the remarks that follow.

First some background. Originalism, as initially conceived by those who came up with the term in the 1980's, proposed that the Constitution should be interpreted according to the "original intent" of the Framers. That "original intent" approach, however, was subsequently reconfigured by some originalists to require instead that the Constitution should be interpreted according to the "original public meaning" of the text, meaning the popularly understood meaning of the text at the time of the founding. Later, other originalists modified the "original meaning" approach to include the possibility that original meaning could be abstracted to accommodate for technological change -- such as how technological advances in surveillance would apply to Fourth Amendment search and seizure law. More recently, still other originalists have argued that the text should be understood, not by how the public actually understood its meaning at the time of the founding, but by how a hypothetical, reasonable (and presumably well-educated) person *should* have understood those terms. There is not, in short, one true theory of originalism. *See* Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 Duke L. J. 239 (2009). In fact, originalists not only disagree with each other as to what an originalist interpretation of a given text means, they also disagree as to what results an originalist approach requires.

Nevertheless, despite their lack of consensus on what originalism means and what the theory requires, those who support the theory argue that originalism accomplishes three goals. First, they posit that originalism promotes fealty to a written constitution and is therefore consistent with Framers' original design. Why have a written constitution, they argue, if its meaning can change through subsequent judicial interpretation? Second, they argue that originalism normally leads to fixed and predictable results. Third, they contend that originalism presents a neutral theory of constitutional interpretation that prevents judges from inserting their political preferences into constitutional decision-making.

Originalism, however, does not achieve the goals it purportedly advances. Instead, in many ways, originalism is antithetical to them. To begin with, originalism does not have the founding pedigree that its advocates suggest. As noted above, the term originalism itself is of recent origin -- dating back only to the 1980's. More importantly, although there were some cases decided in the nineteenth century that, viewed in hindsight, might appear to have used an originalist approach, an originalist type of methodology was the not the dominant constitutional interpretive theory applied by the Court at the beginning of the Republic.

Rather, the prevalent interpretive method used by the Court during its early years rejected the notion that constitutional interpretation should be frozen in time. Thus Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819), expressly stated that the meaning of the Constitution had to be understood in the contemporary contexts in which it was applied. As he famously wrote in *McCulloch*, "we must never forget it is a *constitution* we are expounding . . . . intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." *Id.* at 407, 415. This means, as Marshall suggests, that the principles set forth in the Constitution remain constant, but their applications may change as circumstances change. The task of constitutional interpretation then is to give meaning and substance to those enduring principles in new contexts.

Chief Justice Marshall's approach to constitutional interpretation has dominated constitutional law for over two centuries. And it is no overstatement to point out that the originalists' project would not only undo the early understanding of constitutional interpretation but also would essentially also undo much of current constitutional law. This would include, as noted above, overruling *Brown*, rejecting the application of the Equal Protection Clause to women, eliminating the principle of one-person/one-vote, abolishing *Miranda* warnings, allowing the state to mandate pledges of allegiance, as well as reversing a host of other cases that have become deeply embedded in our national fabric and identity.

Further, and perhaps even more significantly given the historical focus of the originalists' claims, originalism's lack of historical pedigree is established not just by its inconsistency with the Supreme Court's interpretive history and tradition dating back to the early Nineteenth Century. Originalism is also fundamentally inconsistent with the understanding of constitutional interpretation foreseen by the Framers themselves. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985)

This is so for a number or reasons. First, the fact that the Framers did not envision an originalist approach is reflected in the constitutional text. Many of the most important provisions in the Constitution were written in intentionally broad language, suggesting that the Framers expected that the meaning of these terms would be filled in by subsequent interpretations and understandings. Terms such as freedom of speech, executive power, equal protection of the law, commerce among the several states, due process of law, and privileges or immunities, for example, have no simple or fixed definition and necessarily require interpretation in context.

Second, the Framers came from a common law tradition. They recognized that law evolved according to experience and changed circumstances. They knew that for law to be binding and for law to have authority, its meaning did not have to be fixed. Common law, to the Framers, was just as authoritative as statutory law. Adherence to the common law was adherence to the rule of law -- even if the rules of the common law evolved to allow for changed circumstances. It is therefore fundamentally incorrect to assert, as some originalists do, that non-originalist understandings of constitutional meaning are inconsistent with the rule of law. The Framers knew otherwise.

Third, the Framers were visionaries. They were not concerned only with addressing the issues of the day. They were concerned with setting forth broad principles that would be followed for generations. The irony of originalism is that while it purports fealty to the Framers, it actually demeans the Framers' enterprise because it suggests the Framers were short-sighted in their ambitions -- that they were primarily interested in crafting a Constitution fixated on the problems of 1787 and not a Constitution that, in the words of John Marshall, would "endure" so that it could address the problems of 2017.

The following hypothetical helps illustrate this point. In my classroom, I ask my students to imagine for the moment that we agree to pass a constitutional amendment on some subject -- for example, data privacy. I then ask whether they would expect or even desire that their understanding of the meaning of the text of that amendment in 2017 should decide how a court

sitting in the year 2217 interprets that provision. They invariably say no. Although they believe that the text and their understanding of the text should help guide subsequent interpretations, they do not want it to control the meaning of the amendment as it might apply to situations that those of us living in 2017 cannot even imagine. They want their amendment to work -- not to fail. Such was the case of the Framers. They wanted to create a constitution that would endure -- not one that would fade through obsolescence.

Originalism also does not serve its second professed goal of producing fixed and predictable results. To begin with, as we have seen, originalism itself has many branches, and originalists often disagree among themselves as to how cases should be resolved. Originalism, thus, fails to offer a clear path to "correct" constitutional answer even to those who subscribe to its precepts.

Further, and more fundamentally, originalism would be unable, no matter how it is cast, to consistently lead to fixed and predictable results because constitutional text is often ambiguous, and history is often unclear. *District of Columbia v. Heller*, 554 U.S. 570 (2008), the case establishing a Second Amendment right to bear arms, establishes the point. *Heller* is often cited as the high water mark in originalist theory before the Court because both majority and the dissent relied heavily on an originalist methodology in supporting their positions. But that is exactly the issue. As *Heller* emphatically shows, powerful orginalist arguments are often available on both sides of constitutional issues. *Heller* instructs that text and history are, of course, valuable tools in constitutional interpretation; but the case also demonstrates that text and history are not so fixed and invariable that they only lead to one answer.

Finally, originalists err when they claim that originalism accomplishes their third purported goal of providing a neutral theory of constitutional interpretation that prevents judges from inserting their political preferences into constitutional decision-making. Recent current conservative jurisprudence, in fact, proves otherwise. Adherence to originalism has not proved to have a constraining effect when the issue before the Court lies at the heart of the conservative legal agenda. For example, originalists have continued to adhere to the decision in *Adarand Constructors, Inc.. v. Pena*, 515 U.S. 200 (1995), in which the Court struck down a federal affirmative action program on grounds that the program improperly discriminated on the basis of race, although no theory of originalism justifies that result. Text does not support *Adarand*. The Fourteenth Amendment's Equal Protection Clause does not even apply to the federal government. History, likewise, does not support *Adarand*. The post-Civil War era, during which the Fourteenth Amendment was enacted, witnessed a number of federal programs that provided special benefits to African Americans.

Similarly, there is little evidence that the original meaning of the First Amendment justifies the Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), in which a purportedly-originalist Court majority held that corporations have a free speech right to spend unlimited funds to influence political elections. Corporations, after all, had very limited charters, were tightly regulated, and were deeply distrusted during the founding era.

Nor is there reason to believe that an originalist understanding should protect property owners against so-called regulatory takings, although many conservative jurists and theorists have strongly advocated for such protection. In fact, in the leading case on the subject, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Scalia found the right against regulatory takings to be located not in text or history but in so-called "constitutional culture." *Id.* at 1028.

There are numerous other examples. In the Eleventh Amendment cases restricting citizens' ability to sue states, originalists relied on history and not text. At the same time, in Fourteenth Amendment cases striking downstate affirmative action programs, they relied on text and not history. And in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), originalists had no reliable basis in either text or history when they struck down one of the most important pieces of legislation ever passed by the United States Congress -- § 5 of the Voting Rights. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (2016).

Originalism, then, is a doctrine of false promises. It suggests a fealty to the Framers' design when it is actually antithetical to the Framers' vision. It purports to offer a jurisprudence with fixed and predictable results when its application is nebulous and variable. It claims value neutrality when it has been erratically deployed in order to achieve specific results.

Certainly the reminder that originalism offers regarding the importance of text and history in constitutional interpretation is important. But the claim that constitutional interpretation should be controlled *only* by history and text is one that was rejected in *McCulloch* in 1819. It should continue to be rejected today.

Thank you.

I would be happy to answer any questions the Committee might have.

Testimony of Sandy Phillips

Before the Committee on the Judiciary of the United State Senate

**On the Nomination of the Honorable Neil M. Gorsuch
to be an Associate Justice of the Supreme Court of the United States**

March 22, 2017

Thank you, Chairman Grassley, Ranking Member Feinstein, and the members of the Judiciary Committee for the opportunity to speak with you today. My name is Sandy Phillips. My husband Lonnie and I are residents of Boerne, Texas, but we spend much of our time traveling around the country to advocate for gun violence prevention.

I am grateful for the opportunity to speak with you today about my efforts to protect our country from gun violence, and about the Second Amendment. In recent years, a small number of extremists have been pushing courts across the country to endorse a radical version of the Second Amendment that would call into question basic public safety laws throughout the nation. It is vitally important that anyone who replaces Justice Antonin Scalia on the Supreme Court reject this extremist view and understand—as explained in the landmark opinion in *District of Columbia v. Heller* authored by Scalia himself—that the Second Amendment is not unlimited and that it is entirely constitutional to prevent the most dangerous members of our society from inflicting carnage with deadly weapons.[1]

In the summer of 2012, my daughter Jessica was 24 years old. She was living in Denver, finishing up a college degree in journalism and sports broadcasting. That July, her best childhood friend from our hometown in San Antonio was visiting Jessi, and because he was a huge fan, they decided to go to a midnight showing of the latest Batman movie in Aurora, Colorado. About 30 minutes into the film, a deranged shooter stole Jessi's life, and changed my life forever.

Suffering from severe mental illness and armed with multiple high-powered firearms, Jessi's killer burst into the theater and fired several rounds from a tactical shotgun and a .40-caliber handgun into the crowded theater. He inflicted the most damage with a semi-automatic rifle originally designed for military and police use, which he'd equipped with a 100-round ammunition drum. We later learned that was able to purchase 4,000 rounds of green-tipped .223 high-velocity ammunition—over the Internet—without so much as showing a driver's license.

In a matter of seconds, the shooter sprayed the theater with more than 60 bullets from the assault weapon, and he would've fired dozens more if the weapon hadn't jammed. Within minutes, Jessi and 11 others were dead. Our little girl had been hit with six bullets. One tore through her leg; three more ripped through her abdomen; one shattered her clavicle; and the last tore through her left eye and left a five inch hole in her head. I live with that image every day of my life.

Besides the dozens killed, the rampage left more than six-dozen other movie-goers injured—some critically, and some with wounds that will shorten their lives and permanently affect their quality of life. And it forever and irrevocably changed the lives of countless mothers, fathers, brothers, sisters, boyfriends, girlfriends, friends and other family members.

Jessi is dead because the system failed. Jessi died because even though he repeatedly showed clear signs of severe mental illness that made him a danger to himself and the public, the shooter was easily able to amass an arsenal and thousands of rounds of ammunition. Jessi died because, in a matter of seconds, an unhinged man was able to use a weapon of war to fire dozens of bullets at a crowd of Coloradans who had gone out simply looking for a few hours of entertainment.

I am not against guns. My husband Lonnie and are proud supporters of the Second Amendment, and I am a gun owner myself.

I do not blame Jessi's death only on a gun. I blame her death, and the deaths hundreds of others killed in Sandy Hook, Columbine, Virginia Tech, Tucson, Orlando, and so many other places, on a system that allows people known to pose serious risks to the public to arm themselves with weapons that allow them to kill a maximum number of people in a minimum amount of time. But I also believe that nothing in the Second Amendment stops us from fixing the problem. I believe that we, as Americans, have the power to change the system and strengthen the laws that protect us and keep our communities safe.

After Jessi was killed, the Colorado legislature restricted access to the type of magazine that would have allowed Jessi's killer to fire 100 bullets without reloading if it hadn't jammed.[2] It closed loopholes in the state's background check system to keep guns out of dangerous hands.[3] Other legislatures, from Delaware to Oregon and 16 states in between, have done the same, strengthening background checks to make sure people like Jessi's killer can't slip through the cracks, evade a check, and acquire deadly weapons.[4]

These kinds of commonsense gun laws do not violate the Second Amendment. Throughout our country's history, robust rules to protect the public have always coexisted with the right to keep and bear arms. And they have always been recognized as constitutional.[5]

The Supreme Court's landmark opinion in *District of Columbia v. Heller* said so explicitly. In the majority opinion, the Court emphasized that the Second Amendment right is "not unlimited" and that "[i]t is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[6] In *Heller,* the majority said directly that laws aimed at keeping dangerous people like Jessi's killer from possessing guns do not offend the Constitution.[7]

But in recent years, lawyers pushing an extreme gun-lobby agenda have advanced an unlimited view of the Second Amendment that not only conflicts with our history and tradition, but also

presents an acute threat to public safety. They advocate a view of the Second Amendment that would severely weaken laws that prohibit convicted criminals and those who pose a danger to themselves or others because of mental illness from possessing guns.[8] Their extreme version of the Second Amendment would seriously undermine government's ability to keep guns out of dangerous hands through comprehensive background checks,[9] or to regulate weapons designed for military use or regulate high capacity magazines.[10] If the Supreme Court embraced their radical views, government could no longer prohibit guns in schools[11] or other sensitive places,[12] and could no longer regulate who can carry concealed handguns[13]—or openly visible assault weapons[14]—on public streets across the country.

Cases pushing these radical views are making their way through the lower courts, and several of them could make their way to the Supreme Court in the months and years to come. If the Supreme Court embraced the extremist vision pushed in this litigation, the implications would, quite literally, be measured in lives.

That is why it is crucially important that this Committee ensures that Judge Gorsuch or any other nominee the President puts forward understands that the Second Amendment is not unlimited. The committee must ensure that any nominee to our highest court recognizes the Second Amendment does not override other constitutional rights, like the right to decide whether to allow guns on one's property, or the right to peaceably assemble and engage in political debate free from armed intimidation, or, ultimately, the right to live in a safe community.

I believe the cornerstone for understanding the Second Amendment properly is the *Heller* decision. *Heller* recognized—appropriately, in my view—that law-abiding Americans have an individual right to use a handgun for defense of "hearth and home."[15] That is the same right that millions of law-abiding, responsible gun owners exercise every day. But there are two key points about *Heller* that gun extremists ignore.

First, *Heller* recognized that laws designed to keep guns from people who pose a threat because of mental illness or criminal history are consistent with centuries of efforts to protect public safety—and do not violate the Second Amendment. That is why the majority plainly recognized that nothing in the opinion should be taken to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[16] And that is why, after *Heller*, when convicted criminals charged with illegal gun possession have argued that it violates the Second Amendment to prevent them from owning guns, courts have rejected their arguments time and again.[17]

Courts across the country have also turned aside Second Amendment challenges to laws prohibiting gun possession by fugitives from the law,[18] illegal drug users,[19] and people convicted of domestic violence crimes.[20] Indeed, the Supreme Court itself has recognized the importance of keeping guns out of the hands of domestic abusers: No fewer than three times in the nine years since *Heller* was decided, the Court has rejected attempts by convicted domestic abusers to chip away at the federal law that bars them from possessing guns.[21]

Laws prohibiting gun possession by criminals and those who pose a threat to public safety because of mental illness do not threaten our democracy or Constitution—but they do save lives. If my daughter's killer had been prevented from amassing his arsenal based on the clear signs that he posed a danger because of his mental illness, for example, Jessi and the many others killed or injured at Aurora may have been spared.

But despite the consensus that keeping guns out of dangerous hands is constitutional, pro-gun zealots are filing an increasing number of lawsuits across the country arguing that criminals and the mentally ill have the same Second Amendment rights as law-abiding citizens, and that barring them from owning guns violates the Constitution. These far-fetched claims would not be cause for concern except for the fact that some judges in the lower courts have found them persuasive, and have issued rulings that are chipping away at the federal prohibitions on gun

ownership by dangerous people.[22] A petition in one of these decisions, from Third Circuit Court of Appeals, is currently pending before the Supreme Court.[23]

If the Court takes the Third Circuit case (or another, similar case), it could have significant implications for public safety. And it will present every justice on the Court with a clear choice: Do they agree with the *Heller* decision that nothing in the Second Amendment casts doubt on "longstanding prohibitions on the possession of firearms by felons and the mentally ill?"[24] Or do they side with the radical gun-lobby agenda, and invent a new right, at the public's expense, for dangerous people to own guns.

Before Judge Gorsuch is confirmed, the American people deserve to know how he would approach this question. And I would respectfully submit that it is this Committee's duty to demand that he give the American people an answer.

The second point I want to make about *Heller* is that it made clear that the Second Amendment does not stop government from responding to changing conditions by adopting rules and regulations that address evolving threats of gun violence. Besides making clear that keeping guns from criminals and individuals with severe mental health conditions passes constitutional muster, *Heller* also emphasized that throughout our history, courts have concluded that "prohibitions on carrying concealed weapons were lawful under the Second Amendment," and that it does not violate the constitution for government to prohibit guns from sensitive places like schools and government buildings, or to impose conditions on gun sales—like background checks.[25]

Since the Founding Era, local and state governments across the country have used the room granted them under the Second Amendment to adopt these types of laws to protect public safety.[26] And because local conditions and traditions differ across this great country of ours, these laws have varied from place to place, and they have evolved over time.[27] The types of gun regulations that make sense in rural communities in northwest or southeast Colorado, for

example, may differ dramatically from those that are appropriate for downtown Denver. The Second Amendment gives policy makers in these different communities leeway to regulate appropriately. And as conditions in our society—and developments in firearms technology—have changed, the types of laws needed to protect against gun violence have changed alongside them. The Supreme Court has made clear that this evolution is constitutionally permissible, ruling in the follow-up case to *Heller*, *McDonald v. City of Chicago*, that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."[28]

This Committee must ensure that any nominee to the high court appreciates that the Second Amendment does not preclude the laboratories of democracy from developing new approaches as the threats of gun violence evolve.[29]

Respected conservative Judge Frank H. Easterbrook underscored this important lesson from *Heller* and *McDonald* when, rejecting a challenge to restrictions on assault weapons passed by elected officials in suburban Chicago, he emphasized that "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment."[30] Admired judge J. Harvie Wilkinson likewise embraced this critical constitutional value when he concurred that the Second Amendment did not prevent the state of Maryland from restricting access the types of military-style weapons my daughter's killer used in Aurora, and that more recently have claimed scores of lives in Sandy Hook, Orlando, and elsewhere.[31] Judge Wilkinson concluded, consistent with *Heller* and *McDonald,* that courts should not preempt democratically elected legislatures from grappling with solutions to the serious problems of gun violence. His powerful words rejecting the idea that the judges should constitutionalize subjects better addressed through the people's representatives are worth noting at length. He wrote:

> Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and

> watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.
>
> . . . .
>
> As *Heller* recognized, there is a balance to be struck here. While courts exist to protect individual rights, we are not the instruments of anyone's political agenda, we are not empowered to court mass consequences we cannot predict, and we are not impaneled to add indefinitely to the growing list of subjects on which the states of our Union and the citizens of our country no longer have any meaningful say.[32]

Our democracy is well served when our unelected judiciary, in evaluating the bounds of the Second Amendment and the role of our elected representatives, heeds Judge Wilkinson's wise call for judicial modesty on the issue of guns.

I urge this Committee not to advance Judge Gorsuch's nomination until it is convinced that he shares this approach and recognizes that reasonable regulations enacted to protect communities from gun violence do not violate the Constitution.

Thank you for the opportunity to speak with you today; I am happy to answer any questions.

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[1] *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (affirming that the Second Amendment is "not unlimited," and does not confer a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

[2] *See* Colo. Rev. Stat. § 18-12-301 *et seq.*

[3] *See id.* § 18-12-112.

[4] *See generally* Law Center to Prevent Gun Violence, *Universal Background Checks*, at http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/ (collecting and summarizing state universal background check laws).

[5] *See generally* Robert Spitzer, *Guns Across America: Reconciling Gun Rules and Rights* (Oxford Univ. Press 2015); Adam Winkler, *Gun Fight: The Battle Over the Right to Bear Arms in America* (Norton 2011); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford Univ. Press 2006).

[6] *Heller*, 554 U.S. at 626.

[7] *Id.* at 626-627 (noting that nothing in the Second Amendment calls into question "longstanding prohibitions on the possession of firearms by felons and the mentally ill").

[8] *See, e.g., Binderup v. Att'y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc).

[9] *See, e.g., Colo. Outfitters Ass'n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014), *vacated on jurisdictional grounds*, 2016 U.S. App. LEXIS 5238 (10th Cir. 2016).

[10] *See, e.g., Kolbe v. Hogan*, 2017 U.S. App. LEXIS 2930, *46 (4th Cir. Feb. 21, 2017) (en banc); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260-64 (D.C. Cir. 2011).

[11] *See, e.g., United States v. Redwood*, 2016 U.S. Dist. LEXIS 109735 (N.D. Ill. Aug. 18, 2016).

[12] *See, e.g., GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

[13] *See, e.g., Wrenn v. District of Columbia*, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015).

[14] *See, e.g., Norman v. State*, 2017 Fla. LEXIS 448, *35 (Fla. Mar. 2, 2017).

[15] *Heller*, 554 U.S. at 635.

[16] *Id.* at 626.

[17] *See, e.g., Baer v. Lynch*, 2016 U.S. App. LEXIS 3390, (7th Cir. Feb. 22, 2016); *United States v. Shields*, 2015 U.S. App. LEXIS 10058 (7th Cir. Ill. June 15, 2015); *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012); *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015); *United States v. Rhodes*, 2012 U.S. Dist. LEXIS 76363 (S.D. W. Va. June 1, 2012); *United States v. Edge*, 2012 U.S. Dist. LEXIS 15002 (W.D.N.C. Feb. 8, 2012); *United States v. Loveland*, 2011 U.S. Dist. LEXIS 119954 (W.D.N.C. 2011); *United States v. Kirkpatrick*, 2011 U.S. Dist. LEXIS 82801 (W.D.N.C. July 27, 2011); *Baer v. Lynch*, 2015 U.S. Dist. LEXIS 113663 (W.D. Wis. Aug. 27, 2015); *State v. Eberhardt*, 145 So. 3d 377 (La. 2014); *State v. Merritt*, 2015 Mo. LEXIS 148 (Aug. 18, 2015); *State v. Craig*, 826 N.W.2d 789 (Minn. Feb. 27, 2013); *United States v. Hughley*, 2015 U.S. Dist. LEXIS 137544 (W.D. Mo. Sept. 8, 2015, Recommendation and Report adopted on Oct. 7, 2015); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015); *Wisconsin v. Pocian*, 2012 WI App 58 (2012); *People v. Spencer*, 2012 IL App (1st) 102094 (2012); *Pohlabel v. Nevada*, 268 P.3d 1264 (Nev. 2012).

[18] *See, e.g., United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012).

[19] *See, e.g., Wilson v. Lynch*, 2016 U.S. App. LEXIS 16108 (9th Cir. Aug. 31, 2016); *United States v. Emond*, 2012 U.S. Dist. LEXIS 149295 (D. Me. Oct. 17, 2012); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012).

[20] *See, e.g., Enos v. Holder*, 2014 U.S. App. LEXIS 19798 (9th Cir. Oct. 16, 2014); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011).

[21] *See Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 134 S. Ct. 1405 (2014); *United States v. Hayes*, 555 U. S. 415 (2009).

[22] *See, e.g., Binderup*, 836 F.3d 336; *Tyler*, 837 F.3d 678.

[23] *See Sessions v. Binderup, Petition for Certiorari* (No. 16-847 Jan. 5, 2017).

[24] *Heller*, 554 U.S. at 626-27.

[25] *Id.* at 626.

[26] *See supra* n.5; *see also* Duke University School of Law, *Repository of Historical Gun Laws, at* https://law.duke.edu/gunlaws/.

[27] *See* Joseph Blocher, Firearm Localism, 123 Yale Law Journal 82 (2013).

[28] *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

[29] *See, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[30] *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

[31] *Kolbe v. Hogan*, 2017 U.S. App. LEXIS 2930, *80 (4th Cir. Feb. 21, 2017) (en banc) (Wilkinson, J., concurring).

[32] *Id.* at *81 -*85.

Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, you acknowledged you worked on the Graham amendment to the Detainee Treatment Act, which sought to eliminate habeas corpus for Guantanamo detainees.

   You also acknowledged that in December 2005, after the Detainee Treatment Act was passed, there were different factions in the Administration advocating different versions of the signing statement. In an email you sent to Steven Bradbury and others you said a signing statement:

   > *"...along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime 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 that would be hard to dispute later, puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation practices."*

   This was in December 2005, just nine months after an Office of Legal Counsel memo signed by Steven Bradbury had concluded that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the standard applied under Article 16 of the Convention Against Torture.

   I read your email as saying if the Administration issued a signing statement along these lines then the passage of the McCain amendment would not require much of a change in interrogation policy than what the Department of Justice had already decided was allowable.

   a. **What did your email mean? What did you mean when you said that a signing statement would "inoculate against" being criticized in the future for "not making sufficient changes in interrogation policy"?**

2. On the first day of questioning, you told Senator Graham that the Detainee Treatment Act prohibits waterboarding. But an email you wrote when you were part of the Bush Administration Justice Department seems to say the opposite—you said that the law should be read as "essentially codifying interrogation practices," which at the time included waterboarding, stress positions, sleep deprivation, and other techniques that had been approved in the Bradbury OLC memo from 2005.

   a. **What did you mean by "codifying existing interrogation policies"?**

   b. **When did you come to the view that the Detainee Treatment Act bars waterboarding, and why in the Bush Administration did you have a different view?**

3. Do you understand and agree that your former role at the Justice Department—and the positions you advocated for while at the Justice Department on behalf of the government—can and should have no bearing on the way you decide cases as a judge?

4. Do you agree with seminal Supreme Court decisions and precedents in cases that you were involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will you agree to follow these precedents?

5. Do you believe that the courts play an important role in reviewing and deciding whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?

6. Do you believe that any government actions are "unreviewable" by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?

7. Do you believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?

8. Do you believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, do you agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which you believe that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

9. The Detainee Treatment Act contained both Senator McCain's amendment that prohibited cruel, inhuman, and degrading treatment, and Senator Graham's amendment that eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo.

   When the bill was about to be voted on, you forwarded press articles explaining what having these two provisions together meant. One article quoted a law professor who said the Graham provision would <u>not only</u> bar habeas petitions against the legality of *detention*, <u>but also</u> claims "against conditions of confinement"—such as torture. <u>In these emails, you said this was the "Administration's victory" and "the Administration's upside</u>."

   a. **Why did you see it as a victory that those who might have been tortured or who were detained unlawfully could not exercise their rights to have their habeas claims before a federal court?**

10. The President's signing statement on the Detainee Treatment Act said the Graham amendment limiting court review would apply to pending cases, not just future cases. You advocated issuing a signing statement making that point—that the Graham amendment should knock out cases by people challenging "*many different aspects of their detention and that are now pending.*"

    a. **Is that true? Yes or no.**

    b. **Is it true that you worked on the effort to use the Graham amendment to get the Supreme Court to dismiss the Hamdan v. Rumsfeld case?**

    c. **Isn't it also true that the Supreme Court, in Hamdan v. Rumsfeld, rejected the position you advocated and held that the Graham amendment did not apply to pending cases?**

11. The Supreme Court in *Hamdan* (2006) rejected the Administration's position that the Graham amendment barred review of Hamdan's case. An e-mail shows you discussed the decision with reporters, and the next day you were drafting legislation to reverse the Court's ruling.

    The legislation apparently drafted by you and a lawyer from the Office of Legal Counsel barred judicial review of pending cases, including cases challenging conditions of confinement—such as torture. (Section 7 of draft) It also would have authorized indefinite military detention of Americans and others as enemy combatants, even if they were arrested in the United States. (Section 3 of draft)

    a. **Is that true? And is it also true that, after the Military Commissions Act of 2006 barred pending habeas petitions by Guantanamo detainees, the Supreme Court found that the law was unconstitutional?** (Boumediene v. Bush, 2008)

12. 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 "*the President intended to reserve the right to use harsher methods in special situations involving national security.*" 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. (Charlie Savage, *Boston Globe*, Jan. 4, 2006)

    According to emails, you were involved in preparing that signing statement and you advocated for the issuance of the signing statement. They even show you saying to the top State Department lawyer that Harriet Miers, the White House Counsel, "*needs to hear from us, otherwise this may wind up going the other way.*"

    a. **Why did you argue so strongly for the issuance of this statement, even going so far as to push the President's Counsel to do it?**

13. One of the documents provided to the Committee by the Justice Department contains a series of questions—and we tell from the subject matter that the document was created approximately around November 22, 2005 (because it discusses the indictment of Jose

Padilla that occurred on that date). The talking points ask whether "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence?" In the margin next to this question, you hand-wrote one word: "**Yes**."

a. **Please describe the information upon which you relied to make the assessment that "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence."**

b. **Did you ever question whether they were lawful?**

c. **Do you believe that torture yields useful intelligence?**

14. As a presidential candidate, President Trump said he wanted to bring back waterboarding and a "hell of a lot worse." (The Hill, February 6, 2016)

    a. **Does the President have the authority to issue such an order?**

    b. **Would such an order be lawful?**

15. During the February 6, 2006 hearing with Attorney General Gonzales, senators from both parties raised serious concerns about his argument that the president had "inherent authority" that could not be limited by laws passed by Congress—the very argument that you had included in your draft testimony.

    Senator Graham observed at the hearing that this "inherent authority" argument could "wipe out" Congress' power and be used to justify torture. This was the same logic that John Yoo used in the torture memos—that the President's Article II powers enable him to override the laws passed by Congress.

    a. **Do you believe the President has the inherent authority to order waterboarding, as President Trump has promised, even though it is forbidden by law?**

16. On May 30, 2005, Mr. Bradbury signed a memo for the Office of Legal Counsel concluding that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture—which also is the standard set forth in the McCain amendment. You came to work at the Department of Justice in June 2005.

    a. **Were you aware of this memo while you were at the Department of Justice?**

17. You served in the George W. Bush Administration as the Principal Associate Deputy Attorney General. During this time, you defended Bush Administration positions that the President had the authority to engage in warrantless electronic eavesdropping.

    a. **Does this reflect your own views that a President has the authority to do this?**

b. **What was your view at the time of the so-called torture memos written by John Yoo and Jay Bybee that the President had the authority to redefine torture and allow it, despite the prohibition in federal law and treaties?**

18. At your hearing, Senator Lee asked you if you had ever "held any public office in a policymaking arena outside the Federal judiciary." You responded that you had served on your children's school board, but "that is as close to policy as I care to get."

    Yet during your time at the Justice Department, you were a senior political appointee, the chief deputy to the third-ranking position in the department.

    Your Senate questionnaire, which you filled out, says you ***"assisted in the development and implementation of a wide variety of initiatives and policies."***

    In fact, I sent you a letter asking about the policies and initiatives you had worked on. I received a response from the Justice Department that said that based on searches they did, they found that you worked on a series of policies and initiatives.

    a. **In your high-level political appointment, didn't you work on policy matters, as you stated in your questionnaire?**

    b. **In your experience, isn't it typical for people at the leadership levels of the Justice Department where you served to be involved in policy decisions?**

    c. **You worked on legislation while you were at the Department of Justice, right? Can you name the bills or types of legislation you worked on, beyond the Detainee Treatment Act and the Military Commissions Act?**

19. On the campaign trail, then-candidate Trump stated that based on the justices he would appoint to the Supreme Court, *Roe* would be overturned "automatically" and "go back to the states." He also said women should be punished for having an abortion, before walking back the statement.

    a. **If *Roe* were overturned by the Supreme Court, could states decide whether to legalize abortion? Yes or no.**

    b. **Without *Roe*, in states that make access to abortion illegal, could a state pass a criminal law with penalties for a woman who has an abortion? Yes or no.**

20. When asked by Senator Blumenthal whether you agreed with the result in *Brown v. Board of Education*, you testified that *Brown* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."

    a. **Is *Roe v. Wade* also "a seminal decision that got the original understanding of the Fourteenth Amendment right"? Yes or no.**

21. When Chairman Grassley asked you whether you agreed with the decision in *Bush v. Gore*, 531 U.S. 98 (2000), you testified: "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."

    But in *Bush v. Gore*, the Court wrote that the Court's "consideration [wa]s limited to the present circumstances." *Id.* at 109.

    a. **In light of the Court's instruction that its consideration in *Bush v. Gore* was "limited to the present circumstances," do you believe that the Court's decision in that case deserves the same respect as precedent of the Court that *Roe v. Wade* does?**

22. In 2015, you joined a dissent in the Little Sisters case where you argued in favor of the religious beliefs of an organization over the rights of an individual. *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). The dissent you joined argued that requiring the groups to fill out a simple form violated their religious rights, but the opinion took no account of the harm that the groups' beliefs would impose on their female employees. In fact, the dissent makes no mention of them at all.

    a. **How was your approach in this case consistent with the Supreme Court's majority opinion in *Hobby Lobby* that "courts must take adequate account of the burdens" that a religious accommodation imposes on individuals who do not benefit from the accommodation and do not share the religious belief?**

23. Last June, California passed a law permitting assisted suicide for terminally ill patients, called the End of Life Options Act. It allows mentally competent adults to make their own decisions about their end of life.

    In your writings on the subject, you suggested that one reason to ban the practice of assisted suicide was a risk of abuse. But the California law has a number of safeguards to prevent such abuse: (1) only mentally competent adults who have only six months or less to live are eligible; (2) patients must request aid three times—twice orally, and once in writing in the presence of two witnesses (3) patients must consult with two different physicians; and (4) a final attestation form is required.

    a. **Even with all these safeguards that California has put in place, do you still believe that the assisted-suicide laws are subject to abuse?**

24. One of the documents we received from the Department of Justice stood out to me as it related to this issue. In an email you wrote to Solicitor General Paul Clement, you expressed a hope that you could "*include an epilogue discussing the Court's ruling and, hopefully, remarking on the brilliant and winning performance of the SG*!" in the book you were writing on assisted-suicide.

    During the hearing, in response to a question from Senator Coons about this document, you said, "When you represent the Government, you want the Government to win."

But this email is not a general expression of support for the Administration. It is you saying that you hoped to include a discussion of the Government winning the case in your book and to highlight how well the Solicitor General did in arguing the case.

If the Justice Department had won that case, it would have meant that the federal drug laws would prohibit dispensing or prescribing a controlled substance to assist in suicide—it would, in effect, have outlawed this nationwide and wiped out state laws.

a. **So my question to you is simple: before *Gonzales v. Oregon* was decided, was it your personal hope that the Bush Justice Department's position would prevail in that case?**

25. Like Justice Scalia, you are a self-professed originalist. (*See, e.g.*, "[The Constitution] isn't some inkblot on which litigants may project their hopes and dreams...but a carefully drafted text judges are charged with applying according to its original public meaning." *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (underlining added)).

    I am interested in whether you think your approach to originalism is the same or different from Justice Scalia's. For example, Justice Scalia repeatedly said that there was no protection of privacy rights under the Constitution outside the Fourth Amendment context.

    a. **Is your theory of originalism the same as Justice Scalia's in this regard?**

    b. **The Court, as part of protecting privacy, has safeguarded the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual homosexual activity, and the right to refuse medical treatment. Under your theory of originalism, which of these rights are protected?**

26. In the case Compass Environmental Inc. v. Occupational Safety and Health Review Commission, 663 F.3d 1164 (10th Cir. 2011), the issue involved a fine imposed by the Department of Labor on an employer for failing to train an employee who died after being electrocuted on the job. The worker—who had started working later than the rest of the crew, and did not receive the same safety training that the rest of the workers did—was killed when a piece of equipment came too close to a high-voltage overhead power line.

    The majority opinion, which was joined by another Tenth Circuit appointee of President George W. Bush, upheld the Department of Labor's fine against the employer, because it found that the employer had violated the law by failing to train this worker in light of the fact the worksite included hazardous high-voltage power lines, that the employer recognized this hazard as it applied specifically to worker, and that that it had trained most of its employees on that hazard but not the worker who died.

You wrote that the fine should be overturned because the Secretary of Labor hadn't produced any evidence that a reasonably prudent employer would have anticipated this hazard or trained the worker about the hazards posed by high-voltage overhead lines.

a. **There was evidence that (1) high-voltage power lines are very dangerous, (2) the employer had identified this power line as a hazard at this worksite, and (3) the employer had decided it should train employees on this hazard but had not trained this particular person because he didn't start working until later. Why didn't you believe this was enough evidence to support the contention that a reasonably prudent employer should have trained this worker—and could be held responsible for not doing so?**

27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process—President Trump stated that "we're going to have great judges, conservative, all picked by the Federalist Society." (Donald Trump, Breitbart News Interview, June 13, 2016).

    In September, when your name was added to President Trump's second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo's role in selecting conservative Supreme Court nominees and specifically stated that "the week after the election… Mr. Leo was summoned to Trump Tower" to discuss "winnowing" the list. (Wall Street Journal, "Trump's Supreme Court Whisperer," Feb. 3, 2017)

    a. **When did you first meet Leonard Leo?**

28. I understand you sat on a panel with Mr. Leo entitled, "The Life and Legacy of Supreme Court Justice Antonin Scalia" on September 3, 2016. Your name was put on President Trump's second short list on September 23, 2016.

    a. **Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before you name was put on the list?**

    b. **Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump's list?**

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: "*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.*"

    a. **Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

    b. **Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**

c. **Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

30. During your hearing, Senator Blumenthal asked you about your interview with the President, and you said there was a mention of *Roe v. Wade*. He then asked about your interview with Steve Bannon, White House Chief of Staff Reince Priebus, and other advisors. He asked if they asked you about *Roe* and you said no.

    a. **Did they ask you about any case? If so, what cases did they ask you about?**

    b. **Did they ask about your judicial philosophy? If so, what did you say?**

31. Your questionnaire states that, on January 5, 2017, you interviewed with members of the transition team—specifically including Steve Bannon and Reince Priebus, who is now the President's Chief of Staff.

    a. **What did Steve Bannon specifically ask you? What else did he say to you?**

    b. **What did Reince Priebus specifically ask you? What else did he say to you?**

    c. **What else did you discuss?**

32. Then you were interviewed by the President-elect.

    a. **What did the President specifically ask you? What else did he say to you?**

33. During your hearing, you were asked about the outside groups that are reportedly spending $10 million in support of your confirmation. You indicated that you had no idea what individuals may be contributing to that effort. When Senator Whitehouse asked if it was a problem that the American people did not know who was funding this extraordinary campaign on your behalf—or even whether you were concerned about that fact—you declined to answer.

    a. **Please list any person, institution, corporation, or other entity that you believe to have made any contributions to this campaign.**

    b. **Have you made any attempts to learn the identity of any individuals or organizations that have made contributions to this campaign? If so, what have you learned? If you have not made any such attempts, why not?**

    c. **Will you publicly call on the Judicial Crisis Network and any other organization working in support of your nomination to disclose their donors?**

    d. **You implied during the hearing that you are "uncomfortable" with the massive amounts of money being spent on the campaign to support your nomination. Will**

you publicly call on the Judicial Crisis Network and other organizations working in support of your nomination to cease this big-money campaign?

34. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee.

35. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

36. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

37. You were previously a member of the Republican National Lawyers Association, and you chaired their Judicial Confirmation Task Force from 2001-2002.

    a. **What did your role as chair involve?**

    b. **You must have been successful in that role—the Senate Republican Conference gave you an Award for Distinguished Service based on your work. What did you do to warrant that award?**

38. While testifying during your hearing, you have at times lamented the current judicial confirmation process. You told Senator Whitehouse, in fact, "There is a lot about the confirmation process today that I regret." And Senator Lee said on Monday that "[T]he acrimony, the duplicity, the ruthlessness of today's politics are still quite unfamiliar to you. I hope that they will remain unfamiliar to you."

    In 2001, President Bush had just been elected. Republicans in the Senate had blocked over 60 of President Clinton's judicial nominees at the time and fights over the judiciary were already quite partisan.

    a. **You are obviously aware of the fact that judicial nominations can be quite contentious—you helped a partisan political organization confirm judges. What is different today than it was in 2001-2002?**

39. You have said repeatedly during your hearing that you can't comment on precedent because it would "tip your hand" to future litigants.

    Yet on several occasions you have gone out of your way in separate opinions to call for precedent to be overturned.

    One example is the *Gutierrez-Brizuela* case, where you wrote the unanimous majority ruling for the immigrant on due process grounds, but then wrote an opinion concurring with yourself to call for the *Chevron* doctrine to be reconsidered.

a. **How does answering <u>our questions</u> about precedent "tip your hand" any more than writing a separate, unnecessary opinion questioning a precedent that has been relied on thousands of times does?**

40. During your tenure at the Justice Department, or after, did you ever learn that Justice Department leadership was considering the termination of specific U.S. Attorneys? If so, what did you learn and when?

41. The Department of Justice's Office of the Inspector General report "An Investigation in the Removal of Nine U.S. Attorneys in 2006" makes clear that while the actual firing of seven U.S. Attorneys occurred on December 7, 2006—after you had left the Department of Justice—the report also found that "the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in 2004," and that substantial groundwork was laid during the time period that you served at the Department.

    a. **Did you ever communicate with Kyle Sampson or anyone else in Department leadership about the U.S. Attorney firings that occurred in 2006 and 2007? If so, what did you discuss and when? Did you have any such communications following your confirmation to the Tenth Circuit?**

42. Did you ever communicate with Monica Goodling about politicization hiring at the Justice Department? If so, what did you discuss?

43. Did you ever communicate about consideration of political background or belief in the hiring process for career positions? Did you have any such discussions following your confirmation to the Tenth Circuit?

44. Did you ever participate in any decision to overrule the recommendation of a career attorney in the Civil Rights Division? If so, please identify each occasion where you participated in any such decision.

45. Did you ever communicate regarding hiring practices in the Civil Rights Division with Bradley Schlozman or anybody else? If so, what did you discuss and when, and with whom.

46. Did anyone ever communicate to you any concern about Bradley Schlozman's conduct in the Civil Rights Division? If so, who communicated them to you, and what were the concerns that were communicated? Did you ever discuss the concerns with anyone else, either before or after you left DOJ? What actions did you take to respond to any concerns you heard?

47. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee.

48. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

49. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

Questions for the Record for Senator Patrick Leahy,
Senate Judiciary Committee,
Hearing on the Nomination of The Honorable Neil M. Gorsuch
to be an Associate Justice of the Supreme Court of the United States
March 24, 2017

1. During your hearing, I asked you whether the First Amendment prohibits the President from imposing a blanket religious litmus test for entry into this country. I was disappointed that you refused to answer this basic constitutional question. You instead stated that this relatively straight-forward tenet of constitutional law "is currently being litigated actively" and you did not want to discuss further. In my view, this question is no different than whether the Constitution permits a police officer to compel a warrantless search of one's home without an investigative justification. The question may be litigated at some point, but I suspect you would not hesitate to answer the question now.

   I also asked Jameel Jaffer, who appeared as an outside witness in connection with your nomination, whether the First Amendment permits a religious litmus test for entry into this country. He responded with an unequivocal: "Of course not." Mr. Jaffer then stated that the "bigger concern" is that you refused to answer this question. I agree.

   Does the Constitution allow the President to impose a religious litmus test for entry into the United States?

2. During your hearing, I asked you whether there was any circumstance in which the President could violate a statute passed by Congress to authorize torture or warrantless surveillance of Americans. You declined to answer my question. You stated: "[W]e have courts to decide these cases for a reason, to resolve these disputes."[1] I am troubled that you declined to express any opinion about whether the President has the power to violate laws passed by Congress.

   a. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

   b. In response to my question, you said: "I would approach it as a judge through the lens of the *Youngstown* analysis." To be clear, if confirmed, would you follow the framework outlined in Justice Jackson's concurrence in

[1] Gorusch Hearing Transcript Day 3, March 22, 2017, at 48-49.
[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Youngstown Sheet & Tube Co. v. Sawyer[3] when deciding cases regarding the scope of the presidential power in wartime?

3. In *Hamdan v. Rumsfeld,* the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."[4] Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

4. In *Hamdan v. Rumsfeld,* the Supreme Court also made clear that the Geneva Conventions applies to all enemy combatants detained by the United States. Do you agree that Common Article III of the Geneva Conventions applies to those fighting on behalf of non-state actors in any armed conflict?

5. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first Muslim ban, there were reports of Federal officials refusing to comply with court orders.

   a. If a President refuses to comply with a court order, how should the courts respond?

   b. Is a President who refuses to comply with a court order a threat to our constitutional system of checks and balances?

6. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does <u>not</u> extend to women.[5] Do you agree with that view? Does the Constitution permit discrimination against women?

7. Was Justice Scalia right when he said that the 2003 decision striking down a ban on consensual sex between men was part of the "homosexual agenda," which he said was trying to "eliminat[e] the moral opprobrium that has traditionally attached to homosexual conduct"?[6]

8. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." Do you believe the Constitution protects that personal autonomy as a fundamental right?

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[4] *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

[5] http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html

[6] *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).

9. You are a proponent of the view that the Constitution should be interpreted based on the original public meaning of its text. When faced with a case where precedent points clearly toward one outcome, but your understanding of the Constitution's original public meaning points in the opposite direction, which side wins?

10. Since I have been voting on Supreme Court nominations, I can think of only three nominees who were originalists in the same way you have been described: Justice Scalia, Judge Bork, and Justice Thomas.

    a. How do you compare your approach to interpreting the Constitution to those jurists?

    b. In what ways does your judicial philosophy differ from theirs?

11. Many originalists like Justices Scalia and Thomas, and Judge Bork, have been critical of decisions like *Roe* and *Griswold* that recognized and relied on the right to privacy. They have argued that it was not explicitly in the Constitution, and so it is not on a par with specifically enumerated rights such as freedom of speech or trial by jury. But as Justice Breyer told this Committee, the Ninth Amendment "says do not use that fact of the first eight to [conclude] that there are no others."[7]

    a. Does the Ninth Amendment mean that the Constitution protects unenumerated rights, including the right to privacy?

    b. When is it appropriate for the Court to recognize unenumerated rights?

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."[8] When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

13. When I asked you about *Citizens United* and concerns about corruption, you said, "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 be obtained on expenditure limits." You then added, "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 with expenditure limits, or whether it has to do with

[7] Nomination of Stephen G. Breyer, United States Senate Committee on the Judiciary, Hearing Transcript, at 268.
[8] *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2652 (2013) (Ginsburg, J., dissenting).

disclosure requirements." However, *Citizens United* states that "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In the *Bullock* case in 2012, the same five justices who decided *Citizens United* overturned a Montana Supreme Court ruling, and refused even to consider a record showing that "independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."

a. What "room for legislation" were you referring to?

b. What types of expenditure limits would be consistent with *Citizens United*? Or did you misstate the holding of *Citizens United*?

14. The Supreme Court is a separate and co-equal branch of government, but that does not mean it is not subject to important Congressional oversight. For example, Congress appropriates the Court's budget and requires that justices file financial disclosure reports annually. But justices are not required to adhere to the same ethics rules as Members of Congress and the President's cabinet, this includes adhering to travel and stock ownership disclosures. This raises legitimate questions about whether Justices are recusing themselves from cases where they may have outside interests.

a. Is it a problem in your view that justices are not held to the same disclosure requirements as Members of Congress?

b. Does Congress have the authority to fix it?

15. Justice Kennedy wrote in *Planned Parenthood v. Casey* that "At the heart of liberty is the right to define one's own concept of existence."[9] You have suggested that the personal autonomy rights protected by the Constitution include only those rooted in "history and custom." In cases that struck down laws discriminating against LGBT Americans, including the 2015 case upholding marriage equality, Justice Kennedy argued that while "history and custom guide" the inquiry into what fundamental rights or personal autonomy are protected, they "do not set its outer boundaries."[10] If majorities of the Supreme Court had endorsed your more limited view of fundamental rights, as expressed in your book, rather than Justice Kennedy's view, would laws discriminating against LGBT Americans still be on the books?

16. In her concurring opinion in *United States v. Jones*, Justice Sotomayor questioned the continued applicability of the third-party doctrine with respect to Americans' electronic data. She stated that this doctrine of Fourth Amendment jurisprudence is "ill-suited to the digital age" when "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Justice Sotomayor argued that Americans' digital information "can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy."[11]

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[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).
[10] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).
[11] *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

a. Do you agree with Justice Sotomayor's statement?

b. Do you believe that the third-party doctrine is a logical way to assess Fourth Amendment protections for Americans' digital information?

17. In connection with your nomination to the U.S. Court of Appeals for the Tenth Circuit in 2006, you were asked a series of questions related to medical aid in dying. Following your nomination, you published a book entitled, *The Future of Assisted Suicide and Euthanasia*, in which you concluded that "the Court's decisions seem to assure that the debate over assisted suicide and euthanasia is not yet over – and may have only begun."[12]

The contents of your book raise questions, especially considering precedent that includes the Supreme Court's unanimous decision in *Washington v. Glucksberg* that deferred to States on this issue. The Court has stated, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[13] To date, at least six states, including Vermont, have authorized medical aid in dying, and many more have continued to consider questions related to this issue.

a. Do you agree with the Supreme Court's decisions in *Washington v. Glucksberg* and *Gonzales v. Oregon*[14]?

b. Do you believe that questions related to medical aid in dying should be left to each State?

18. In *Allstate Sweeping v. Black*, you joined a unanimous decision rejecting a company's hostile work environment claim. That decision stated, "Being *offended* presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."[15] Yet in *Hobby Lobby* you joined a decision holding that large, for-profit corporations could have religious views, and that those religious views could limit health insurance access for employees.[16]

a. How do reconcile your divergent views in those cases?

b. Given that the contraception mandate is a law of general applicability, why should a woman's access to contraception be dependent not on the duly enacted law, but instead on her boss's views?

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[12] https://www.washingtonpost.com/news/morning-mix/wp/2017/02/01/neil-gorsuch-wrote-the-book-on-assisted-suicide-heres-what-he-said/?utm_term=.266f9647bee0

[13] *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

[14] *Gonzales v. Oregon*, 546 U.S. 243 (2006).

[15] *Allstate Sweeping v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) (emphasis in original).

[16] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).

19. In 2010, you wrote a unanimous panel decision in *United States v. Pope*, in which the defendant challenged the federal statute making it a felony for those convicted of misdemeanor domestic violence to own a gun.[17] You upheld a dismissal of the case on procedural grounds, yet you made it abundantly clear in your opinion that you considered it an open question whether the government can legally prevent those who commit domestic violence from owning guns. Last year, in *Voisine v. United States*, the Supreme Court held that even those guilty of reckless domestic violence can be barred from gun ownership.[18] Do you recognize *Voisine* as settled law? Or do you think it is still an open question whether domestic violence offenders can own guns?

20. In 2013, Congress passed the Leahy-Crapo Violence Against Women Reauthorization Act. Consistent with a 1978 Supreme Court decision, we granted jurisdiction to Native American tribal courts to try domestic and sexual offenses that occur on tribal land. That now means non-Indian abusers are no longer able to slip between jurisdictional cracks with impunity. They will be held accountable where they commit the offense. And we crafted the law to ensure that such defendants will have the same due process rights they have under the Constitution. In *United States v. Lara*, the Court held that that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians." In light of the Supreme Court's decision in *Lara*, do you believe that it is unconstitutional for tribal courts to have jurisdiction over non-Indians even where Congress authorizes such jurisdiction?

21. **On behalf of Senator Ron Wyden:**

In your 2006 book *The Future of Assisted Suicide and Euthanasia*, you argue that the Supreme Court's decision in *Gonzales v. Oregon* did not settle whether Oregon's Death with Dignity law violates the Constitution's equal protection guarantee.

Our Constitution guarantees the people fundamental rights, the full scope of which, as Justice Harlan once wrote, "cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." This exact concept is written into the Bill of Rights itself. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Those fundamental rights guaranteed by the Constitution were never intended to be limited to the specific terms of the first eight amendments to the Bill of Rights. The existence of additional fundamental rights not enumerated in the first eight amendments to the Constitution have also been re-affirmed by the Supreme Court.

a. Is it your view that our Constitution grants individuals the right to make decisions about their own lives and families without interference from the state?

b. Your record over the last ten years suggests that your personal beliefs often bleed into your legal analysis. Your decisions suggest that you are not able to

[17] *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010).
[18] *Voisine v. United States*, 136 S. Ct. 2272, 2277 (2016).

act independently of the conservative causes that you support. If a case were to come before you, would you be able to consider it without bias?

c. As you stated in your book, do you believe that Oregon's law fails to provide equal protection because it is not reasonable to rest legal distinctions between the terminally ill and the healthy on professional medical judgments about quality of life and life expectancy?

If so, please elaborate on why you currently believe these judgments cannot form the basis of a reasonable legal distinction between the terminally ill and the healthy. If not, please explain how your views have evolved since 2006.

Nomination of Judge Neil M. Gorsuch to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR DURBIN

1. When you recommended that the signing statement for the Detainee Treatment Act state that the Act is "best read as essentially codifying existing interrogation policies," did you know what these existing interrogation policies were?

2. Prior to making the recommendation referenced in question #1, had you read any of the following memos by the Office of Legal Counsel?

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005)

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005)

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005)

3. Prior to making the recommendation referenced in question #1, were you read into or briefed on the CIA's rendition, detention or interrogation program?

Nomination of Judge Neil M. Gorsuch, of Colorado,
to be an Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1) In your testimony, you noted that you helped draft Attorney General Alberto Gonzales's statement for a February 6, 2006 Senate Judiciary Committee hearing on the topic of the Bush Administration's Terrorist Surveillance Program. Certain statements made by the former attorney general at that hearing—specifically, with respect to disputes between DOJ and the White House over domestic intelligence activities—were later determined by the Department of Justice Office of Inspector General to have been "confusing, inaccurate, and [to have] had the effect of misleading those who were not knowledgeable about the program."

   a) In addition to drafting Attorney General Gonzales's testimony, did you help to prepare him for the February 6, 2006 Senate hearing? If so, what was involved in the preparation and what were your roles?

   b) Reports of disputes between DOJ and the White House related to aspects of the NSA's warrantless surveillance programs surfaced in the press more than a month prior to the February, 2006 hearing. What did you know about these disputes at the time of the hearing?

2) Your positions *Burwell v. Hobby Lobby* and *Allstate Sweeping v. Black* seem to directly contradict each other. In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite—namely, that "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How do you reconcile the reasoning behind the two decisions, beyond the fact that in both of the cases you voted for results that weakened anti-discrimination protections?

3) Under current law, what rights does Congress have to documents, materials, and testimony *vis a vis* claims of executive privilege?

4) The media has circulated a photo of you and Justice Scalia on a fishing trip on the Colorado River.

   a) When and where did this trip take place?

   b) Did you and Justice Scalia use your own funds to pay for the trip? If not, who paid for the trip?

   c) Who else joined you?

d) Did you take other sporting or vacation trips with him or the other Justices of the Court?

5) On Question 26 of your Judiciary Committee Questionnaire, you described your experience in the selection process and listed all interviews or communications with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign. Question 26 also asked you to list any interviews or communications with outside groups at the behest of the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign.

   a) You indicated that you communicated with Leonard Leo on December 2, 2016 and the week following January 6, 2017. Please provide more information circumstances (how those calls were arranged, who else participated) and content of your communications with Mr. Leo.

   b) Did you have any addition communication with Mr. Leo? If so, please describe the date and contents of the communication.

   c) You did not list any communication with outside groups. Is that answer still accurate? If you have communicated with outside groups, please list the names of groups, the representatives involved, the dates of the communications, and the contents of the communications.

   d) Did any outside groups assist in preparing you for your Senate Judiciary Committee hearing? If so, which groups?

6) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

   a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?

   b) Does "corruption" only encompass quid pro quo corruption?

   c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

7) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

   a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?

   b) Does "corruption" only encompass *quid pro quo* corruption?

c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

8) What is the originalist argument that *Brown vs. the Board of Education* was correctly decided?

9) You currently serve as the Chair of the Advisory Committee on Appellate Rules for the Judicial Conference of the United States. As you may know, Judges David Campbell and John Bates, who are the Chairs of the Judicial Conference Rules of Practice and Procedure Committee and the Advisory Committee on Civil Rules, respectively, recently wrote letters urging Congress not to enact legislation that would make changes to the Federal Rules of Civil Procedure. Judges Campbell and Bates raised serious concerns about Congress circumventing the Rules Enabling Act, which Congress itself wrote and which is intended to ensure that the Federal Rules are amended only after broad public participation and careful review by judges, lawyers and experts. The Judges wrote:

> The Rules Enabling Act charges the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. The Rules Committees undertake extensive study of the rules, including empirical research, so that they can propose rules that will best serve the American justice system while avoiding unintended consequences … The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act.

As a senior member of the Judicial Conference, do you agree that Congress should not directly amend the Federal Rules of Civil Procedure and whether the procedures established by the Rules Enabling Act are preferable to congressional enactment?

10) You said that no one asked you about your position on Roe v. Wade or abortion *after* the election. Did anyone associated with the Trump Campaign or an interest group ask about your position regarding *Roe v. Wade* or the legality of abortion *prior* to the election?

11) You repeatedly cited the *Youngstown* case and its reasoning and holding, yet under questions in front of the Judiciary Committee, you refused to discuss the reasoning and holding of other cases. How do you justify discussing one case and not another?

Nomination of Judge Neil M. Gorsuch, of Colorado,
to be an Associate Justice of the United States Supreme Court
Questions for the Record to
Mr. Guerino J. Calemine, III, General Counsel,
Communications Workers of America

Submitted March 24, 2017

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. In response to my question about recent Supreme Court rulings on collective bargaining and unions, you said you thought the Supreme Court is undertaking a "project" to harm workers' rights and harm workers' organizations. Can you please elaborate on what you meant by the term "project"?

Hearing before the Senate Committee on the Judiciary
The Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court
Questions for the Record Submitted by Senator Al Franken

Questions for Judge Gorsuch:

Question 1: I'd like to discuss the use of class action waivers, which are often included in forced arbitration clauses. When companies pair forced arbitration clauses with class action bans, they close the courtroom doors to individuals with small claims and shield themselves from liability.

Between 2010 and 2014, the New York Times found that only 505 consumers went to arbitration over a dispute of $2,500 or less. Verizon, for example, which has more than 125 million subscribers, faced only 65 consumer arbitrations in those five years. Time Warner Cable, which – at the time – had 15 million customers, faced just seven.

It's not that there were so few arbitrations because customers were suddenly satisfied with their telecom providers. Rather, there are so few arbitrations because consumers probably realized that they would spend far more money pursuing an individual claim in arbitration than they could ever hope to recover – and that's only if they beat the odds and actually ended up winning.

In fact, I'd suggest that there is perhaps no industry that Americans are more dissatisfied with than their internet, TV, and cell phone providers. And that's not without reason. Here are two quick examples. Last month, the New York Attorney General filed a lawsuit against Charter and its subsidiary Time Warner Cable, claiming that the company quote "conducted a deliberate scheme to defraud and mislead New Yorkers by promising internet service that they knew they could not deliver" end quote. And last year, after it received 1,000 customer complaints, the FCC fined Comcast the largest penalty in agency history for charging its customers for services and equipment that they didn't ask for.

- Judge Gorsuch, is asking hundreds, or thousands, or millions of consumers who have all been impacted by the same illegal practice to each go it alone against a powerful corporation in arbitration really a viable alternative to class actions – especially when they have little to no hope of recovering enough to justify the costs of bringing the claim?

- During the hearing, you openly discussed the expenses associated with litigation in the context of the article you wrote. Isn't one way to address the expenses through class actions? And haven't forced arbitration clauses that include class action bans eroded one critical method for individuals to achieve access to affordable justice?

Question 2: Judge Gorsuch, as an antitrust professor, I imagine you have an interesting perspective on the effect of the Supreme Court's decision in Italian Colors. This is the case of a group of small business owners – led by Italian Colors, a restaurant in Oakland, California – that sued American Express, alleging the company violated antitrust law when it charged excessive processing fees for its credit cards. Typically, vendors that accept American Express charge cards also must accept American Express credit cards. And because American Express has monopoly power with respect to charge cards, vendors have little choice but to accept those

cards and, with them, American Express' credit cards. So Italian Colors alleged that American Express used this monopoly power to force small businesses into accepting American Express products they otherwise would not have.

It turns out that in addition to requiring that vendors accept its credit cards, American Express also required vendors to accept an arbitration agreement as part of doing business with them. This agreement not only prohibited vendors from taking any disputes to court but also preventing them from forming a class.

Nobody involved in this case disputed the fact that the cost of pursuing Italian Colors' individual claim far exceeded its possible recovery. So it was up to the Supreme Court to decide whether the arbitration clause preventing Italian Colors from forming a class was enforceable under the Federal Arbitration Act, given that enforcing it would effectively prevent Italian Colors – and the rest of the small businesses – from vindicating their rights under the nation's antitrust laws. The Court ultimately sided with American Express and essentially held that the Federal Arbitration Act, which favors enforcement of arbitration agreements, trumps the goals of all other federal statutes, including the antitrust laws.

- Judge Gorsuch, setting aside whether the Court made the right call in *Italian Colors*, how – in your view – has this decision impacted private antitrust enforcement?

- Or, put another way, do you agree that there is value in private antitrust enforcement – that it serves complementary role to federal and state efforts aimed at combatting anticompetitive conduct? And do you think the *Italian Colors* decision has made it harder for individuals – and for small businesses – to challenge monopolistic conduct under the nation's antitrust laws?

Question 3: I have serious concerns about AT&T's proposed acquisition of Time Warner and how it could impact Americans' access to information. When the same company owns the programming and controls the pipes that bring us that programming, we have a problem – especially, I believe, when the programming in question is the news.

In this case, a combined AT&T-Time Warner would have both the ability and incentive to favor its own news network, CNN, over competing news networks – say Fox News, for example. And as a result, AT&T could control where its 25 million subscribers get their information and could ultimately restrict its viewers' access to alternative viewpoints.

We've seen this happen before. Soon after it purchased NBCUniversal, Comcast placed MSNBC and CNBC – its newly acquired channels – in favorable locations on the Comcast channel lineup while relegating competing networks – like Bloomberg News – to an undesirable location. It took two years – and a protracted battle at the FCC – for Comcast to finally end its anticompetitive treatment. And we may never know exactly how Bloomberg's viewership was impacted in the meantime.

I'm interested in the ways that the Supreme Court can impact Americans' access to information. 70 years ago, in United States v. Associated Press, the Supreme Court found that the First

Amendment supported aggressive antitrust enforcement. Justice Black wrote, "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

- Would you agree that one of the purposes of the First Amendment is to ensure that the government doesn't make decisions that silence citizens or restrict Americans' access to diverse viewpoints?

- Would you agree that antitrust law should protect against mergers or other anticompetitive conduct that results in depriving citizens' access to news and the free expression of information?

Question 4: In January, after AT&T and Time Warner confirmed that they would be structuring their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have been required to send to the FCC – a document that essentially demonstrates why they believe the deal promotes competition and benefits consumers.

While I'm glad they responded to me, their response does little to address my concerns and essentially asks American consumers to trust that the combined company won't engage in anticompetitive behavior, raise prices, violate the principles of net neutrality, or decrease access to diverse voices. The letter also suggested that the deal raises no competitive concerns because it is vertical in nature – meaning the companies don't currently compete head-to-head – and that the government rarely seeks to block vertical mergers. Top execs from AT&T and Time Warner wrote, "[the government] typically permits such mergers to proceed, imposes conditions to address any competitive risks, and narrowly tailors those conditions to avoid undermining the mergers' consumer benefits. Yet this merger presents no such risks at all."

We've seen the risks before, and we've seen just how successful these merger conditions have been the past. In the years since the Comcast-NBCUniversal deal was completed, the combined company has faced complaint after complaint for engaging in anticompetitive behavior and not complying with conditions that the FCC and DOJ imposed on the transaction.

- Judge Gorsuch, can vertical mergers violate antitrust law? Do you subscribe to the view that all or almost all vertical integration is efficient?

- Do you agree that one company controlling both the programming and the pipes creates incentives for that company to engage in anticompetitive behavior? And if you'd rather not discuss the pending deal, you can reference Comcast-NBCUniversal – a deal that was completed six years ago.

Question 5: In Novell, you established a pretty high standard for plaintiffs to meet in refusal-to-deal cases – or cases where monopolists harm their rivals by cutting off or restricting their access

to the market. You held that in order to find a violation of Section 2 of the Sherman Act, a plaintiff must prove that the monopolist's alleged misconduct resulted in short-term profit losses and were irrational except for the anticompetitive effect. Meaning essentially that as long as the monopolist has a reasonable business rationale, they're totally off the hook regardless of how bad it is for competition.

In this decision, you relied heavily on the Supreme Court's decision in *Verizon v. Trinko*, in which Justice Scalia explained that there are very few exceptions from the proposition that there is no duty to aid competitors.

- Judge Gorsuch, today, Sherman Act Section 2 cases are rare – and successful ones are even rarer. Why do you think that is? Is it because there are no monopolies? Or is it just that they're all perfect actors?

I am increasingly concerned about internet giants that use their positions as dominant media platforms to stifle competition and inhibit the free flow of ideas. In recent years, we've heard countless allegations of online platforms exercising their market power to the detriment of content creators and innovative startups. Google has favored its own products and services in search results while downgrading competitors' products and services. I've also heard from photographers in Minnesota that Google may be taking original content from their distributors' websites without appropriate compensation or attribution. Apple is preventing its competitors in the music streaming market from promoting lower prices to consumers on Apple iOS. And Amazon is using its dominance in the book market to impose unfair contractual terms on publishers and authors.

- Judge Gorsuch, in your view, should courts ever consider how the unilateral behavior of a monopolist might affect the free flow of ideas and content?

Question 6: During the hearing, you repeatedly said that you simply read the law as it is written. But *how* you read the law is of utmost important. For example, in antitrust law, there are at least two different philosophies as to how to read the laws. Senator Sherman and Justice Brandeis as well as many others believed the goals of antitrust should be fundamentally political – such as the preservation of individual liberty and the protection of democratic institutions from concentrated power. Robert Bork and many other members of the "Chicago School" of economics believe we should view antitrust as a sort of scientific endeavor, the main goal of which should be economic efficiency, even if the result is extreme concentration of power.

- How would you describe your own philosophy on antitrust law?

Question 7: I strongly disagree with the Supreme Court's ruling in *Citizens United*, which I mentioned to you in our meeting. Recent polling suggests that the decision is deeply unpopular with the American people as well. Part of the reason I think this opinion is held in such low regard is because in several important respects, the Court fundamentally misunderstood how the American public perceives our politics.

One of the conclusions that the Court came to in *Citizens United* was that outside money simply does not, quote "give rise to corruption or the appearance of corruption." I understand that polls and public opinion don't factor into a court's decision-making process, but I think by acknowledging that the appearance of corruption is something to be avoided, the Court also acknowledged that the public's perception really does matter.

It matters because even just the *appearance* of corruption could cause people to lose faith in our democracy. The majority in *Citizens United* recognized that this was something to be concerned about. But the majority maintained that even with outside money pouring into our elections, the public would still have faith in our system because they would *know* where the money was coming from. Here's what Justice Kennedy said, writing for the majority, quote:

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."

Part of the reason I find this so galling is that it simply does not reflect the reality that we experience in the wake of this decision. According to the Brennan Center for Justice, groups that hide the identities of their donors spent more than $800 million on federal races in 2016 alone. Let me say that again: $800 million.

- Do you agree that the election-related spending made possible by the *Citizens United* decision is capable of creating the appearance of corruption?

Money is pouring into our elections. We don't know where a lot of it is coming from. And the public thinks it stinks—Republicans and Democrats alike. As I said in my opening statement, our country is confronting a critical moment in our history. The American people's trust in our government and our institutions is in a freefall. I firmly believe that *Citizens United* is one of the root causes of that deepening distrust. I believe that *Citizens United* had a very real effect on the ability of the people's representatives to do their jobs.

One example is especially relevant today to your nomination. In March of last year, less than a week after Merrick Garland had been nominated to the Supreme Court, one of my Republican colleagues told a group of constituents that he thought the Senate should move forward and hold a hearing on Merrick Garland's nomination. Speaking at a town hall, he said, quote "I would rather have you complaining to me that I voted wrong on nominating somebody than saying I'm not doing my job. I can't imagine the president has or will nominate somebody that meets my criteria, but I have my job to do. I think the process ought to go forward."

That quote was later published in a local newspaper. This senator never committed to voting for Garland. He merely said that the Senate should do its job and hold a hearing. But that was all it took to draw the attention of well-funded groups willing to dump millions of dollars into his next race. The groups threatened to run ads against him and fund a candidate to challenge him in the primary. As a result, he changed his position. The episode sent a clear signal to every member of

the Senate, and it prevented the Senate from fulfilling one of its core functions. When people say the system is rigged, this is exactly what they are talking about.

I think the courts have an important role to play in ensuring the integrity of our democracy. I think that a big part of their job is making sure that our elections are free and fair. But in order to do that, courts need a clear-eyed view of the facts on the ground. The *Citizens United* majority didn't have that.

- In your view, what should a judge do when it becomes clear that the assumptions supporting a case like *Citizens United* prove wrong?
- You've said that a judge is supposed to decide cases on the facts and the law alone—what do the facts available now tell you about the majority's reasoning in *Citizens United*?

Question 8: I would like to better understand your views of the disparate impact standard. Generally speaking, disparate-impact claims allow a plaintiff to establish liability in a discrimination case where it can be established that a certain practice has a disproportionate impact on individuals who belong to a protected class, such as sex, race, color, national origin, or other characteristics. In other words, where a practice has a discriminatory *effect*, even if such a practice was not motivated by a discriminatory *intent*, a plaintiff bringing a discrimination claim may nonetheless establish liability.

- In your view, do our federal civil rights laws, including but not limited to Title VII and the Fair Housing Act, permit disparate impact claims?

In the 2009 case *Ricci v. DeStefano*, the Supreme Court held that an employment action based on a protected characteristic "is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable" for disparate impact discrimination. However, in his concurrence to this decision, Justice Scalia wrote that the disparate impact standard itself requires impermissible "racial decision-making" because, in his view, the standard requires private actors to "evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."

- Do you agree with the reasoning in Justice Scalia's *Ricci v. DeStefano* concurrence? If so, how?

- In your view, are civil rights statutes that prohibit disparate impact discrimination, including but not limited to Title VII and the Fair Housing Act, in tension with the Equal Protection Clause? If so, how?

Question 9: I would like to better understand your views on federal Indian law and tribal sovereignty. I am one of only two members of the Judiciary Committee who also serves on the Indian Affairs Committee.

One case that reached the Supreme Court in the last term involved a Native American boy who was sexually assaulted by a non-Indian, who managed a store owned by non-Indians on Indian land. There is also a serious problem of non-Indians perpetuating domestic violence and sexual

assault against Native American women on reservations. Additionally, there are numerous jurisdictional disputes that arise around business transactions, regulatory authority, and non-violent criminal offenders that involve non-Indians in Indian Country.

- What is the appropriate legal framework for determining whether a tribe has jurisdiction over a non-Indian in Indian Country, both in the civil and criminal context?

- What has been your impression of tribal court systems in general? Do you think that litigants in tribal courts, both Indians and non-Indians, have their rights adequately protected?

- What, if any, Constitutional limitations do you think there are on a tribe's civil or criminal jurisdiction over non-Indians?

Nomination of Judge Neil M. Gorsuch to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR COONS

1. Several recent Supreme Court cases have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record as well as relevant U.S. case law and practices in cases addressing capital punishment under the Eighth Amendment and privacy of same-sex intimacy under the Fourteenth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Is it your contention that foreign court decisions and foreign practices of democratic countries that follow the rule of law cannot be considered and cited in opinions interpreting the Constitution?

2. From documents obtained during your tenure at the Department of Justice, it appears that you were directly involved in work leading to the enactment of the Detainee Treatment Act of 2005 on behalf of the administration, as well as in discussions about whether President Bush should append a signing statement to the bill and what the statement should say.
    a. If a case concerning this act and/or President Bush's signing statement came before the Supreme Court, would you recuse yourself from hearing the case?
    b. What standard or standards would you consult when making this determination?

3. In one document released to the Senate Judiciary Committee, you wrote by hand "Yes" next to a typed question asking, "Have the aggressive interrogation techniques used by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?"
    a. When you wrote this note, what did you understand to constitute "aggressive interrogation techniques"?
    b. During your tenure at the Department of Justice, what actions, if any, did you take to defend the use of "aggressive interrogation techniques"?
    c. Do you believe that "aggressive interrogation techniques" work to yield valuable intelligence?
    d. Is it legal for U.S. officials to torture individuals?
    e. Is it legal for the President to authorize the use of torture based on a claim of national security?
    f. Would the President's authorization of the use of torture be within the scope of judicial review?

4. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures. In your hearing you said, "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."

a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?
b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?
c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

5. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. You have written about the importance of access to justice, effective representation of capital defendants, and the challenges that many parties face in obtaining affordable representation. Please describe every pro bono matter you worked on during your time in private practice.

6. Prior to the commencement of your nomination hearing, the Committee received two letters from former students that concern me. In these letters, the students describe their recollection of one session of your Spring 2016 legal ethics class. These letters assert that, following a lively class discussion about work-family balance and the difficulties of law school debt for students of all genders, you asked students about their personal knowledge of women using maternity benefits provided by a law firm and then leaving the law firm shortly thereafter. These letters assert that you told the class that law firms and other companies should ask female interviewees about pregnancy plans in order to protect the employer from financial loss, and that it is legal for companies to do so. Title VII protects against discrimination on the basis of pregnancy, childbirth, and sex, and asking a candidate for employment about her plans to become pregnant or have a family can be used as evidence in a discrimination case.

a. Please recount everything you recall concerning the conversation you had with your Spring 2016 legal ethics class on April 19, 2016.
b. Do you think it is ever acceptable for a professor or a judge to suggest that employers should ask about family planning in a job interview?

7. You have used descriptions of substantive due process that include "very much uncharted," "more than a little 'open ended,'" "murky," and something with a "paradoxical name." Given the complexity of this area of law, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

a. Would you consider whether the right is expressly enumerated in the Constitution?
b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?
d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?
e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).
f. What other factors would you consider?

8. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has exclusive jurisdiction over appeals from civil actions involving claims "arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. Because you have been at the Court of Appeals for the Tenth Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to appear before you. What specific patent law experience (such as in private practice, other governmental service, or as an inventor/entrepreneur) would you bring to bear when considering these cases?

9. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. "Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to 'provide nationwide uniformity in patent law.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97–312, p. 20 (1981)).
   a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?
   b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?
   c. Resolving circuit splits is often viewed as one of the Supreme Court's core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

10. During your nomination hearing, you spoke frequently about the "reliance interest" that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

11. During your nomination hearing, we had an exchange about your concurrence in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). I raised my concern that your characterization of the role of "complicity" in the context of determining whether a person is entitled to object to a facially neutral law under the Religious Freedom Restoration Act ("RFRA") could be expanded to allow the religious views of a few to impact the liberty interests of many, since it allows for religious objections based on the actions and choices of others. Following up on our exchange, please answer the following questions:
    a. Does the characterization of "complicity" in this question comport with what you meant when you used that term in your *Hobby Lobby* concurrence?
    b. Can any level of support that an individual finds to be objectionable constitute complicity?
    c. Can a court ever inquire into how remote this support is to determine whether a RFRA claim based on "complicity" exists, even if the claim is based on a sincerely held religious belief that the legally mandated conduct requires "complicity . . . in the wrongdoing of others"?

12. You wrote that judges should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be . . . ." You told Sen. Feinstein that it does not matter that "some of the drafters of the Fourteenth Amendment were racists, because they were, or sexist, because they were. The law they drafted promises equal protection of the laws to all persons. . . . And equal protection of laws does not mean separate in advancing one particular race or gender. It means equal."
    a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?
    b. How do you respond to the criticism of your approach that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited Mar. 24, 2017).
    c. How does your approach to judicial interpretation lead you to conclude that "equal" applies to equality across race *and gender*, even though the Fourteenth

Amendment was passed to address certain forms of racial inequality during Reconstruction?

d. If the Fourteenth Amendment has always required equal treatment of men and women, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515, that states were required to provide the same educational opportunities to men and women?
e. Does the Fourteenth Amendment require that states treat gay and lesbian couples equally to heterosexual couples? Why or why not?
f. Does the Fourteenth Amendment require that states treat transgender people equally? Why or why not?

13. Chief Justice Warren wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This approach explicitly calls on the Court to not limit its Eighth Amendment analysis to the meaning of "cruel and unusual punishments" when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Under this evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.
    a. Under your judicial approach described above, what is meant by the Eighth Amendment's prohibition against "cruel and unusual punishments"?
    b. Does the phrase "cruel and unusual punishments" have the same meaning from the Eighth Amendment's ratification in 1791 until now, or has our understanding changed?
    c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes "cruel and unusual punishments"?

14. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage about the purported negative impact of such marriages on children.
    a. When is it appropriate to consider evidence that sheds light about our changing understanding of society?
    b. What is the role of sociology, scientific evidence, and data in the Supreme Court's analysis?

15. In *Prost v. Anderson*, 636 F.3d 579 (10th Cir. 2011), you authored a majority opinion holding that federal prisoners whose convictions have been undermined by a later Supreme Court decision construing the statute under which they were convicted may not

invoke the "savings clause" of 28 U.S.C. § 2255(e) unless there are exceptional circumstances like the abolition of their sentencing court. Does your decision create a situation in which an actually innocent person could be in prison without any claim to habeas relief?

16. In *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), you dissented from a majority opinion holding that a defendant who had ineffective assistance of counsel was entitled to a more meaningful remedy than the one provided under state law. You wrote, "The Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, [the defendant] received just such a trial, at the end of which he was convicted of first degree murder by a jury of his peers. We have no authority to disturb this outcome." *Id.* You said the defendant "would have us follow him through the looking glass, to a world where a fair trial is called 'prejudice'; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer's incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there." 571 F.3d at 1110. If your dissent had been the majority opinion, would it be the case that any defendant receiving inadequate assistance of counsel on a plea agreement who subsequently has a "fair" trial would not have a remedy for the ineffective assistance of counsel claim?

Questions for the Record for Judge Neil Gorsuch
Senator Richard Blumenthal
March 24, 2017

1. During his hearing, Chief Justice Roberts said, "I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy."
    a. **Do you, like Chief Justice Roberts, believe that the liberty protected by the Due Process Clause includes the right to privacy?**
    b. **When I asked whether you agreed with Chief Justice Roberts' stated agreement with the result in *Brown v. Board of Education*, you said, "There is no daylight here." Is there any "daylight" between your views and his stated belief that the liberty protected by the Due Process Clause includes the right to privacy?**

2. In your book, *The Future of Assisted Suicide and Euthanasia*, you wrote that "one might ask: . . . How does substantive due process differ from outright judicial choice, or what is sometimes derisively labeled 'legislating from the bench'? . . . [D]oes . . . holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments . . . stretch the clause beyond recognition?"
    a. **How would you answer these questions**?

3. During your hearing, you told me that you had "gone as far as I can go ethically, with the canons that restrict me, about speaking on cases. I cannot talk about specific cases, and I cannot get involved in politics."
    a. **Were you acting consistently with your ethical obligations when you told me *Brown v. Board of Education* "corrected one of the most deeply erroneous interpretations of law in Supreme Court history," that it was "a correct application of the law of precedent," and that there was no "daylight" between you and Chief Justice Roberts' stated agreement with the holding?**
    b. **If so, when I discussed cases other than *Brown* with you, why would you not say whether you agreed with any other case or thought any other case was correct?**
    c. **Was Chief Justice Roberts acting consistently with his ethical obligations when he said at his hearing that he agreed with the results in *Brown* and in *Griswold v. Connecticut*?**

4. During your hearing, you said that *Brown v. Board of Education* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."
    a. **Is *Brown* an originalist opinion?**
    b. **Did the decision in *Loving v. Virginia* get the original understanding of the Fourteenth Amendment right?**
    c. **Did the decision in *United States v. Virginia* get the original understanding of the Fourteenth Amendment right?**
    d. **Did the decision in *Romer v. Evans* get the original understanding of the Fourteenth Amendment right?**

e. **Did the decision in *District of Columbia v. Heller* get the original understanding of the Second Amendment right?**

5. During your hearing, you said that *Brown v. Board of Education* was "a correct application of the law of precedent."
   a. **What did you mean by that?**
   b. **Was the decision in *Griswold v. Connecticut* a correct application of the law of precedent?**
   c. **Was the decision in *Planned Parenthood v. Casey* a correct application of the law of precedent?**
   d. **Like *Brown*, *Lawrence v. Texas* overturned a previous decision of the Supreme Court. Was the decision in *Lawrence* a correct application of the law of precedent?**
   e. **During your hearing, you described *Plessy v. Ferguson* as "one of the most deeply erroneous interpretations of law in Supreme Court history." Was the decision in *Bowers v. Hardwick* a deeply erroneous interpretation of law?**

6. During your hearing, you said that *Eisenstadt v. Baird* "was an application of settled equal protection principles."
   a. **Was *Romer v. Evans* an application of settled equal protection principles?**
   b. **Was *Planned Parenthood v. Casey* an application of settled due process principles?**
   c. **Was *Lawrence v. Texas* an application of settled due process principles?**

7. During your hearing, you were willing to discuss how some of the factors involved in looking at precedent applied to prior cases. For example, you told me that when it comes to *Griswold v. Connecticut*, "the reliance interest surrounding it are obvious and many and great."
   a. **Are there obvious and many and great reliance interests surrounding *Loving v. Virginia*?**
   b. **Are there obvious and many and great reliance interests surrounding *Roe v. Wade* and *Planned Parenthood v. Casey*?**
   c. **Are there obvious and many and great reliance interests surrounding *Lawrence v. Texas*?**
   d. **Are there obvious and many and great reliance interests surrounding *Obergefell v. Hodges*?**
   e. **If your answer to part (a), (b), (c), or (d) of this question is anything other than "yes," why is that answer different from what you were willing to say of *Griswold*?**

8. In 1996, you were a named counsel on an *amicus* brief to the Supreme Court in *Washington v. Glucksberg*. The brief indicated that the Court should consider the "problems of legitimacy and line-drawing inherent in the Court's abortion rulings." I understand that you were writing a brief on behalf of a client and am not attributing the language to your personal beliefs, but I would like to know what you meant to convey with that argument.

a. **What did you mean by "problems of legitimacy . . . inherent in the Court's abortion rulings"?**
b. **What did you mean by "problems of . . . line-drawing inherent in the Court's abortion rulings"?**

9. You joined an opinion in *Allstate Sweeping LLC v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) holding that a corporation could not assert a hostile work environment claim under Section 1981 and the Equal Protection Clause because it could not show that it had the subjective feeling of being "offended." The opinion included the following language: "[I]t is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. . . . Being offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."
   a. **How is it possible for an artificial entity to express a sincere religious belief, as you held in *Hobby Lobby v. Sebelius*, but not have the feeling or thought of being offended?**

10. In your concurrence in *Hobby Lobby v. Sebelius*, you led with the statement, "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."
   a. **If an adoption agency seeks a RFRA objection from a statute that requires such agencies to be willing to place children with same-sex couples, does that implicate the "problem of complicity"?**
   b. **If a restaurant owner refuses to serve a same-sex couple because of a belief that homosexuality is sinful, does that implicate the "problem of complicity"?**

11. In *Hobby Lobby v. Sebelius*, the opinion you joined held that the Affordable Care Act's birth control mandate was not the "least restrictive means" of accomplishing the government objective at issue because the government was able to provide the same accommodation to for-profit companies as it provided to religious employers.
   a. **What is your understanding of the state of the law regarding whether the "least restrictive means" the government must use needs to be practically possible or politically feasible? Could Congress's theoretical ability to pass a new law, or to appropriate new funds, to serve a government interest qualify even if there was no indication that Congress had moved to do so?**
   b. **Please explain your understanding, for purposes of the Religious Freedom Restoration Act, of what constitutes a "compelling" government interest to act, as opposed to when a government interest is merely "legitimate" or "important."**

12. During your hearing, when asked about your 2005 *National Review* article "Liberals'N'Lawsuits," you told Senator Coons that you were making two points in writing the article: first, that "one of the beauties of our courts is that they can vindicate civil rights for minorities," but second, that "there are some comparative disadvantages to resolving policy matters for courts." In the article, you refer to "gay marriage" as an item on a liberal "social agenda."

a. **Did the Supreme Court's decision in *Obergefell v. Hodges* concern the vindication of a civil rights matter or did it concern the resolution of a policy matter?**

13. In your 2005 *National Review* article "Liberals'N'Lawsuits," you wrote, "Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold." That seems at odds with your repeated statements during your hearing that judges are nonpolitical.
    a. **Why would Republican control of the presidency and the Senate lead to the appointment and confirmation of judges who are unsympathetic to "liberals pushing constitutional litigation"?**

14. You said at your hearing that an *en banc* hearing is "an extraordinary thing. We probably hear between zero and three *en bancs* a year over the course of my time." You also said that "about one of every five *en bancs*, about 20 percent of *en bancs* in our court are *sua sponte*. It is not unusual." Assuming that your descriptions are roughly accurate, the Tenth Circuit has heard a maximum of approximately 30 cases *en banc* during your tenure, with approximately six of them being *sua sponte*.
    a. **Why did you find the error you claimed was made by the panel opinion in *Planned Parenthood Association of Utah v. Herbert* rose to the level of exceptionalism shown by the six *sua sponte en banc* cases – six out of tens of thousands of cases – the Tenth Circuit has heard over the past decade?**

15. You joined an opinion in *Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) that included the statement "To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." You stated at your hearing that you wrote a separate concurrence in *Gutierrez-Brizuela v. Lynch* because you saw "an equal protection concern." You also stated at your hearing that you write separate concurrences "when I see a problem [to] raise my hand and tell my bosses I see an issue here."
    a. **Did you consider writing a concurrence in *Druley v. Patton* to raise as "an equal protection concern" or "an issue" that Tenth Circuit precedent had not recognized transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, why not? If you considered and decided not to, why did you make that decision?**
    b. **Did you call for a *sua sponte* rehearing *en banc* to determine whether the Tenth Circuit should recognize transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, what made this case a less appropriate subject for rehearing than *Planned Parenthood Association of Utah v. Herbert*?**

16. During your hearing, I asked you whether you had spoken with representatives of the Heritage Foundation about various topics. You said, "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." As you know, you were included on President Trump's list of potential Supreme Court nominees—reportedly assembled with the assistance of the Heritage Foundation—long before last year's election.

a. **Did you have any communications with representatives or employees — including employees on paid or unpaid leave — of the Heritage Foundation or the Federalist Society in 2016 or 2017?**
b. **If so, what did you discuss with such representatives or employees?**
c. **Did you discuss *Roe v. Wade*, abortion, reproductive rights, or the right to privacy with such representatives or employees? Please describe the nature and content of the conversation on any of these topics.**
d. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Heritage Foundation? Were any employees of the Heritage Foundation in the last year?**
e. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Federalist Society? Were any employees of the Federalist Society in the last year?**

17. During your hearing, Senator Feinstein referenced a document that was turned over to the Committee as part of your confirmation process. The exchange appears on page 25-26 of the hearing transcript. The document mentioned by Senator Feinstein was a set of talking points prepared for Attorney General Alberto Gonzales on the subject of torture. The document was discussed in a *Washington Post* article from March 15, 2017. You indicated you had not seen the document.
    a. **How many people helped to prepare you for your confirmation hearings?**
    b. **Did any of those people indicate in any way that you might be asked about the Gonzales talking points subsequently referenced by Senator Feinstein?**
    c. **Did anybody indicate that you might be asked about torture-related materials you worked on during your time in the George W. Bush Administration?**

18. During your hearing, Senators Feinstein and Durbin referenced email you sent during your time in the Bush Administration in which you discussed reasons to have President Bush issue a signing statement when signing the Detainee Treatment Act. These emails were the focus of—and were linked to in—a March 15 *New York Times* article. They were also mentioned in the Times and other publications over the following few days. In fact, a *Times* headline from March 19, 2017 article bore the headline, "Emails Hint at Court Pick's View of Presidential Power." You indicated at your hearing that you were not familiar with these emails.
    a. **Did anybody involved in preparing your for your confirmation hearings indicate that you might be asked about this email?**

Senator Mazie K. Hirono

Questions for the Record following hearing on March 20-23, 2017 entitled:

"On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States"

The Honorable Neil M. Gorsuch

1. During the hearing, I asked you if the Supreme Court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, whether you believed *Korematsu* would be applicable precedent. You answered "no".

    a. Does *Korematsu* have any precedential value in any case that may come before the Supreme Court?

    b. Are there other Supreme Court decisions that have not been overruled that you believe lack precentral value? And if so, which ones?

        i. For the cases listed, please explain why those cases lack precedential value.

    c. What characteristics disqualify a case from having precedential value? And who makes the determination of what those characteristics are?

2. During the hearing, you cited *Loving v. Virginia* as a seminal case. What other cases do you consider "seminal"?

    a. For cases considered "seminal" do such cases hold more precedential value than those that are not considered seminal? Why or why not?

    b. Do certain cases hold more precedential value than others? What are the qualities of a case that give it more or less precedential weight?

3. What remedies are available should the President or Executive Branch, disregard a ruling of the Supreme Court or a lower federal court?

4. Do you believe that when analyzing a statute, and choosing to use the constructional construction of original public meaning, such a choice reflects your values?

    a. Why choose to discern the original meaning rather than considering tradition, current norms, and precedent as baseline or foundation of your constitutional analysis?

    b. Why do you believe that you are able to separate ideological and partisan views when judging?

c. Do you believe that life experiences and unconscious biases play a role in judging?

5. Do you believe in the validity of laws that address not only specific problems known at the time of the legislation, but that can also arm an agency with broader remedial authority to address new problems of a similar category that arise later?

   a. Specifically, do you agree that the Clean Air Act or the Clean Water Act address not only the specific pollution problems known at the time of passage, but also provide authority for an agency to regulate additional pollutants if it agency determines they are harmful based on later-arising scientific data?

6. Do you regard the decision in *Massachusetts v. EPA* – that greenhouse gases are air pollutants under the Clean Air Act, and that EPA must regulate their emissions if it determines (as it has) that they endanger public health and welfare – as settled law?

7. Do you regard the decision in *American Electric Power v. Connecticut* – that federal common law suits over power plants' greenhouse gas emissions are displaced because EPA has the authority to regulate those emissions under Section 111(d) of the Clean Air Act – as settled law?

   a. Do you agree that if the courts determined that EPA *does not* have authority to curb power plants' greenhouse gas emissions under Section 111(d), then there would no longer be a basis for displacing federal common law remedies?
   b. Can you explain what Supreme Court precedent says about the constitutionality of citizen suits, and the significance of citizen suits in enforcing our environmental laws?

8. If President Trump were to direct Administrator Pruitt to end the Clean Power Plan, as is widely reported he plans to do, would you regard the EPA as having an obligation to develop a replacement plan to reduce greenhouse gas emissions sufficient to protect the public health and welfare?

9. How do you incorporate scientific findings into your decisions and how do you resolve the discrepancy if an agency is making decisions based on conclusions that are contrary to the weight of scientific evidence?

10. Do you hold the view that state governments, not EPA, should principally regulate environmental protection, and, if so, how do you reconcile this view with the fact that the perceived failure of states by the 1970s to protect their air and water was the genesis of the EPA, the Clean Water and Clean Air Acts, and other foundations of federal environmental law?

11. In *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause, in conjunction with the Necessary and Proper Clause, permits the federal government to control

intrastate activities when necessary as part of a "more comprehensive scheme" of economic regulation. Do you agree with the principle that Congress may regulate intrastate, non-economic activities if doing so is necessary to a broader effort to regulate commercial activity?

a. Do you believe that environmental and land use regulations are commercial activities?

12. Several times in your testimony, you asserted that the standard you set out in the *Luke P.* case was based on precedent from the Tenth Circuit. You testified: "*Luke P.* was a unanimous decision . . . . There was no dispute in my court about the applicable law, and because we were bound by circuit precedent in a case called Urban versus Jefferson from 1996 that said that the appropriate standard was *de minimis* and the educational standard had to be more than d*e minimis*, and that is the law of my circuit, Senator . . . . But the fact of the matter is I was bound by circuit precedent and so was the panel of my court, and they had been bound for 10 years by the standard in Urban versus Jefferson County." When Senator Durbin asked why you added the word "merely" to the *de minimis* standard, you replied: "Senator, all I can say to you is what I've said to you before, it was a unanimous panel of the 10th Circuit following ten-year-old circuit precedent . . . . We followed our circuit precedent . . . ." When Senator Klobuchar also asked you about the addition of the word "merely" to the *de minimis* standard, you testified: "My recollection is that the 10th Circuit precedent was very clear, that 'some' meant 'more than *de minimis*.' Some meaningful educational benefit in *Rowley* was the Supreme Court precedent and our court interpreted that to mean more than *de minimis*." However, the word "merely" is found nowhere in the Urban case. See *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996). In fact, even the phrase *de minimis* is mentioned only once: "In the context of a severely disabled child such as Gregory, 'the "benefit" conferred by the [IDEA] and interpreted by Rowley must be more than *de minimis*.'" 89 F.3d at 726-27 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)). In Luke P., you wrote: "we have concluded that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996)). You also characterized this standard as "not an onerous one." *Luke P.*, 540 F.3d at 1149. Do you agree that your opinion in *Luke P.* was the first in the Tenth Circuit to add the word "merely" before the *de minimis* standard? Do you also agree that your opinion in *Luke P.* was the first in the Tenth Circuit to characterize the standard as "not onerous"?

a. Do you also agree that your opinion in *Luke P.* was the first in any Circuit to characterize the standard as "not onerous"?

13. In May 2016, the U.S. Departments of Justice and Education released a joint guidance stating that anatomy at birth should not be the only factor considered when placing transgender inmates into men's or women's units. The guidance also stated that schools receiving federal funding may not discriminate based on a student's sex, including

transgender students under the Patsy T. Mink Equal Opportunity in Education Act also known as Title IX. Do you interpret Title IX of the Education Amendments of 1972 to ensure that transgendered students do not face discrimination in school?

14. Does the Constitution define what a "person" is?

    a. Has the Supreme Court ever ruled that the 14th Amendment confers personhood on a fetus?

    b. If a state were to enact a personhood measure by redefining a fetus as a legal person, would that not be in direct contradiction to the Supreme Court's holding in *Roe?*

15. Did *Whole Woman's Health* fully answer the remaining questions about the permissible breadth of pre-viability regulations allowed under *Casey*?

16. As you know, the 14th Amendment's Equal Protection Clause states:

    > "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

    Please explain your understanding of the current constitutional prohibitions against sex discrimination. Does the Equal Protection Clause of the 14th Amendment to the U.S. Constitution prohibit discrimination on the basis of gender or sexual orientation?

17. In a 2005 National Review piece, you criticized liberals for using the courts instead going through elected officials to advance their social agenda. In *Hobby Lobby*, the court gave closely held corporations the same rights as individuals in relying on RFRA. Please example why this was not a case of conservative overreach through the courts to affect an expansion of RFRA without legislative action?

    a. Your expansion of religious protections to a corporation in *Hobby Lobby* now creates a potential conflict between the religious freedom of the corporation and that of the individual employee. In applying RFRA, how will you address a conflict between two differing religions? Is it for the courts to rule when one religion trumps another?

18. Please what role the courts have in determining whether a burden is substantial? Is it just a rubber stamp?

    a. Is there any time when a court can make a determination that a federal law is objectively not a substantial burden on someone's religious beliefs? Under what circumstances?

19. In *Allstate Sweeping v. Black* you joined an opinion rejecting *inter alia* a claim of hostile work environment. The court wrote:

    > But Allstate cites to no cases, nor can we find any, holding that the harassment endured by the principals of an artificial entity can give rise to a racial- or gender-discrimination claim on behalf of the entity itself, absent independent injury to the entity. Indeed, it is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. Such a claim has a subjective, as well as an objective, component; there must be proof that 'the plaintiff was offended by the work environment.'"

    In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite, the Court said "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How can an artificial entity such as Hobby Lobby assert a religious belief without having the thoughts or feelings necessary in *Allstate?*

20. During the hearing, you in an exchange with Senator Cornyn that, "Too few people can get lawyers to help them with their problem," and later that, "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." At the 40th anniversary celebration of the Legal Services Corporation, Justice Scalia's said,

    > "I'm here principally to show the flag, to represent the support of the Supreme Court and I'm sure all of my colleagues for the LSC… The American ideal is not for some justice, it is, as the Pledge of Allegiance says, 'Liberty and justice for all' or as the Supreme Court pediment has it, 'Equal Justice.' I've always thought that's somewhat redundant. Can there be justice if it is not equal? Can there be a just society when some do not have justice? Equality, equal treatment is perhaps the most fundamental element of justice. So, this organization pursues the most fundamental of American ideals, and it pursues equal justice in those areas of life most important to the lives of our citizens."

Do you agree with Justice Scalia's statement?

Communications Workers of America
AFL-CIO, CLC

501 Third Street, N.W.
Washington, D.C. 20001-2797
202/434-1150 Fax: 202/434-1219

Guerino J. Calemine III
General Counsel

April 7, 2017

Sent Via Electronic Mail:

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Question for the Record from Senator Whitehouse
Hearing on the Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States

Dear Mr. Chairman:

I am writing to respond to the below Question for the Record from Senator Whitehouse submitted on March 24, 2017:

> *In response to my question about recent Supreme Court rulings on collective bargaining and unions, you said you thought the Supreme Court is undertaking a "project" to harm workers' rights and harm workers' organizations. Can you please elaborate on what you meant by the term "project?"*

A project is a plan or series of conscious efforts intended to accomplish a certain goal. The term "project" was used in the *New York Times* article referenced at the hearing by Senator Whitehouse.[1] The author of that article, Adam Liptak, correctly described as a "project" the signals sent by Justice Alito in his *Harris v. Quinn*[2] decision and the series of actions by anti-union interests triggered by those signals.

Specifically, in *Harris v. Quinn*, the 5-justice majority ruled that *Abood v. Detroit Board of Education*,[3] which upholds the right of public employers and unions to charge fair share fees to union-represented public employees to cover the cost of union representation, did not extend to home care providers, as the majority ruled these workers are not full-fledged public employees. While not applying *Abood* to the case at hand and therefore having no basis to overturn *Abood*, Justice Alito repeatedly criticized *Abood*, referring to "*Abood*'s questionable foundations" and deriding one argument as "an effort to find a new justification for *Abood*." Given the majority's finding that *Abood* was inapplicable to the case at hand, all of these comments were superfluous to the case. The

[1] Adam Liptak, "With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear," New York Times (July 6, 2015).
[2] 134 S.Ct. 2618 (2014).
[3] 431 U.S. 209 (1977).

majority opinion's not-so-subtle hints about *Abood* eventually led dissenting Justice Kagan to write: "Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so."

The readers of Justice Alito's opinion certainly included anti-union interests such as the Center for Individual Rights. The signal sent by Justice Alito was clear: I am interested in overturning *Abood*, but I need a case or controversy that would allow me to do so. As noted at the Senate hearing, the Center for Individual Rights proceeded to file a suit aimed at overturning *Abood*. Recognizing that lower courts would follow long-standing precedent and uphold *Abood*, the Center for Individual Right's case, *Friedrichs v. California Teachers Association*, was rushed through the early stages of litigation. The plaintiffs did not bother developing a factual record and asked the trial court and the Ninth Circuit to summarily rule in favor of the defendants. This litigation strategy is unusual, to say the least, but fits squarely with the notion of a "project" to overturn *Abood* – to bring the right case or controversy to the Supreme Court to establish the new law that the majority decision in *Harris* overtly suggested it wanted to establish.

This project is one to harm workers' rights and workers' organizations. Overturning *Abood* is the equivalent of imposing a "right to work" law on all of the public sector workforce. The aim of such laws is to deny resources to labor unions. Under current law in non-right-to-work states, while unions are obligated to represent all workers in a bargaining unit, those workers need not become dues-paying members. However, unions and employers, including public employers, may require those workers to at least pay fees covering the cost of their representation, i.e., pay their "fair share." Paying this fair share does not make a worker a member of the union, and the worker is protected from having to pay a fee for anything not germane to collective bargaining, such as political contributions. A "right to work" law, on the other hand, allow those workers to not pay any fees at all while obtaining the benefits of union representation. In other words, it creates a free rider problem, with unions obligated to provide representation and workers not obligated to pay for that representation.

The free rider problem created by "right to work" is intended to weaken unions. Public sector union density in non-right-to-work states is about 49.6 percent, compared to 17.4 percent in right-to-work states.[4] Weakened unions mean a weakened ability to organize and mobilize workers to protect their rights on the job. This hampering has a material effect on workers and their families, as one study found that overturning *Abood* may lead to a 9 percent reduction in public sector workers' compensation.[5] We already know that workers in fair-share states make higher wages, are more likely to have employer-sponsored health insurance, and have lower rates of workplace deaths, than workers in right-to-work states.[6]

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[4] For the period 2000-2014. Source at *infra* note 5.
[5] Jeffrey Keefe, "Eliminating fair share fees and making public employment 'right-to-work' would increase the pay penalty for working in state and local government," Economic Policy Institute (October 13, 2015).
[6] See these and other comparisons compiled from various studies at http://wrongforeveryone.org/more-facts-on-right-to-work/ (accessed April 6, 2017).

Following the death of Justice Scalia, *Friedrichs* ended in a 4-4 tie, thereby upholding Abood.[7] But the project that began with Justice Alito's signals in *Harris v. Quinn* continues. Dozens of suits attacking workers' organizing and collective bargaining rights have been filed in state and federal courts since the *Harris* decision – some of which may make their way to the justices who effectively implored the bar to bring them a case or controversy that would allow them to eliminate fair share rules for public sector workers.[8]

This project is one of many to dismantle workers' rights and workers' organizations. State legislatures are another venue for these projects. A disproportionate amount of attention is paid by some state legislators to the question of whether union-represented workers should be obligated to pay their fair share of the costs of union representation. This obsession is well-funded by rich anti-union interests. Ignored are the challenges of millions of American workers who do not have union representation and face a gauntlet of union busting intimidation and discrimination when they seek to organize a union to improve their lives at work. Thanks to these assaults on labor unions, via both legislatures and courts, the percentage of non-union workers who are unable to collectively bargain a better deal at work increases. This decrease in collective bargaining is a driving force behind the lag in workers' pay relative to their increased productivity, as well as the rise of income inequality and the middle class squeeze, all of which threaten the vibrancy of American democracy and our ability to defend other civil rights and liberties against powerful interests.

Thank you for the opportunity to help complete the record of the hearing.

Sincerely,

Guerino J. Calemine, III
General Counsel

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[7] 136 S.Ct. 1083 (2016).

[8] *See, e.g., Janus v. AFSCME Council 31*, Case No. 16-368 (filed in Northern District of Illinois on Feb. 9, 2015); *Jarvis v. Cuomo*, Case No. 16-441 (filed in Northern District of New York on Dec. 2, 2014); *Berman v. Public Employees Federation*, Case No. 1:16-cv-00204 (filed in Eastern District of New York on Jan. 14, 2016); *Cochran v. Jefferson County Public Schools Board of Education*, Case No. 3:15-cv-00751 (filed in Western District of Kentucky on Sep. 23, 2015); *Wagenblast v. Inslee*, Case No. 3:15-cv-05407 (filed in Western District of Washington on June 15, 2015); *Lamberty v. Connecticut State Police Union*, Case No. 3:15-cv-00378 (filed in District of Connecticut on March 14, 2015). These suits have generally been brought by the National Right to Work Foundation and occasionally the Freedom Foundation.

Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, you acknowledged you worked on the Graham amendment to the Detainee Treatment Act, which sought to eliminate habeas corpus for Guantanamo detainees.

   You also acknowledged that in December 2005, after the Detainee Treatment Act was passed, there were different factions in the Administration advocating different versions of the signing statement. In an email you sent to Steven Bradbury and others you said a signing statement:

   > *"...along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime 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 that would be hard to dispute later, puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation practices."*

   This was in December 2005, just nine months after an Office of Legal Counsel memo signed by Steven Bradbury had concluded that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the standard applied under Article 16 of the Convention Against Torture.

   I read your email as saying if the Administration issued a signing statement along these lines then the passage of the McCain amendment would not require much of a change in interrogation policy than what the Department of Justice had already decided was allowable.

   a. **What did your email mean? What did you mean when you said that a signing statement would "inoculate against" being criticized in the future for "not making sufficient changes in interrogation policy"?**

RESPONSE: The December 29, 2005 email chain discussed proposed versions of a signing statement to accompany the Detainee Treatment Act. As we discussed at the hearing, these events took place many years ago and my recollection "is that there were individuals in maybe the Vice President's office who wanted a more aggressive signing statement ... and that there were others, including at the State Department, who wanted a gentler signing statement." To my recollection, as I said at the hearing, "I was in the latter camp [along with] John Bellinger, among others." I did so in my role as a lawyer helping with civil litigation brought by individuals detained as enemy combatants and defended by the Department of Justice. The email chain indicates that the Legal Adviser for the State Department favored a gentler and more expansive statement for various reasons, including public and foreign relations. The email chain also indicates that the National Security Council expressed the view that the Detainee Treatment Act codified existing policies. In that light and as a lawyer advising a client, the email chain indicates that I suggested a signing statement could (1) speak about the Detainee Treatment Act positively to the public and to

foreign nations as the State Department suggested, (2) highlight aspects of the legislation helpful to litigators in the Civil Division of the Department of Justice, and (3) make transparent the client's position that the Act codified existing policies.

2. On the first day of questioning, you told Senator Graham that the Detainee Treatment Act prohibits waterboarding. But an email you wrote when you were part of the Bush Administration Justice Department seems to say the opposite—you said that the law should be read as "essentially codifying interrogation practices," which at the time included waterboarding, stress positions, sleep deprivation, and other techniques that had been approved in the Bradbury OLC memo from 2005.

   a. What did you mean by "codifying existing interrogation policies"?

RESPONSE: Please see the response to Question 1.

   b. When did you come to the view that the Detainee Treatment Act bars waterboarding, and why in the Bush Administration did you have a different view?

RESPONSE: I do not currently recall when precisely I came to that view. By its express terms, the Detainee Treatment Act prohibits cruel, inhuman, and degrading treatment. Please see also the response to Question 1.

3. Do you understand and agree that your former role at the Justice Department—and the positions you advocated for while at the Justice Department on behalf of the government—can and should have no bearing on the way you decide cases as a judge?

RESPONSE: I understand and agree that my former role at the Department of Justice has not had and will not have any bearing on the way I decide cases as a judge.

4. Do you agree with seminal Supreme Court decisions and precedents in cases that you were involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will you agree to follow these precedents?

RESPONSE: *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* are precedents of the Supreme Court due all the weight of such precedents. As Alexander Hamilton said in Federalist Paper No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."

5. Do you believe that the courts play an important role in reviewing and deciding whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?

RESPONSE: The Constitution protects liberty by dividing the federal government's powers and authority into three co-equal branches. As I explained at my hearing, in our constitutional system, the judiciary provides an important, independent forum "for vindicating the rights of unpopular voices, minority voices, the least amongst us." This is true even when the political branches are acting in the name of national security. As I acknowledged at my hearing, "Presidents make all sorts of arguments about inherent authority [regarding national security]. . . . Presidents of both parties have made arguments, for instance, about the War Powers Act, both parties. And the Congress has taken a different position on that matter, for example, with both parties. And the fact is we have courts to decide these cases for a reason, to resolve these disputes. And I would approach it as a judge through the lens of the *Youngstown* analysis." Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), sets forth a widely accepted tripartite framework for evaluating presidential power. In the first category, as I stated at the hearing, the "President [is] acting with the concurrence of Congress" and this is "when the President is acting at his greatest strength because there are shared responsibilities in our Constitution." Next, "when the Congress and the President are in disagreement," this is "the other end of the spectrum" and the President is acting "at the lowest ebb of his authority." Finally, "when Congress is silent, that is the gray area in between."

6. Do you believe that any government actions are "unreviewable" by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?

RESPONSE: As I said during my hearing, no one is above the law. The role of an independent judiciary is to consider cases and controversies based upon the law and the facts.

7. Do you believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?

RESPONSE: As we discussed at my hearing, the Convention Against Torture and implementing legislation ban torture. The Detainee Treatment Act bans cruel, inhuman, and degrading treatment. The Eighth Amendment prohibits cruel and unusual punishment.

8. Do you believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, do you agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which you believe that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

RESPONSE: Please see the response Question 5.

9. The Detainee Treatment Act contained both Senator McCain's amendment that prohibited cruel, inhuman, and degrading treatment, and Senator Graham's amendment that eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo.

   When the bill was about to be voted on, you forwarded press articles explaining what having these two provisions together meant. One article quoted a law professor who said

the Graham provision would not only bar habeas petitions against the legality of *detention*, but also claims "against conditions of confinement"—such as torture. In these emails, you said this was the "Administration's victory" and "the Administration's upside."

a. Why did you see it as a victory that those who might have been tortured or who were detained unlawfully could not exercise their rights to have their habeas claims before a federal court?

RESPONSE: As a lawyer in the Department of Justice, I worked with the Department of Defense and with Congress and others in a bipartisan effort to establish a system of rules to govern litigation brought by individuals detained as enemy combatants at Guantanamo Bay, bearing in mind the *Youngstown* formulation discussed above. Among other things, and as Senator Graham spoke about at the hearing, a process was put in place to permit detainees to challenge their status as enemy combatants in Combatant Status Review Tribunals as well as in the United States Court of Appeals for the D.C. Circuit. Some in the Administration regarded these legislative provisions as intrusions on the President's powers. In contrast, and with others, I welcomed these developments as consistent with *Youngstown*. That is what I recall I meant by "the Administration's upside."

10. The President's signing statement on the Detainee Treatment Act said the Graham amendment limiting court review would apply to pending cases, not just future cases. You advocated issuing a signing statement making that point—that the Graham amendment should knock out cases by people challenging "*many different aspects of their detention and that are now pending.*"

a. Is that true? Yes or no.

b. Is it true that you worked on the effort to use the Graham amendment to get the Supreme Court to dismiss the Hamdan v. Rumsfeld case?

c. Isn't it also true that the Supreme Court, in Hamdan v. Rumsfeld, rejected the position you advocated and held that the Graham amendment did not apply to pending cases?

RESPONSE: The Civil Division and Office of the Solicitor General of the Department of Justice advanced the position that the Detainee Treatment Act would apply to cases pending on the date of its enactment. As a lawyer for the Department, I supported that position. Ultimately, that position did not prevail in the Supreme Court, with five Justices disagreeing with the Government's position and three Justices agreeing (Chief Justice Roberts took no part in the consideration or decision of the case).

11. The Supreme Court in *Hamdan* (2006) rejected the Administration's position that the Graham amendment barred review of Hamdan's case. An e-mail shows you discussed the decision with reporters, and the next day you were drafting legislation to reverse the Court's ruling.

The legislation apparently drafted by you and a lawyer from the Office of Legal Counsel

barred judicial review of pending cases, including cases challenging conditions of confinement—such as torture. (Section 7 of draft) It also would have authorized indefinite military detention of Americans and others as enemy combatants, even if they were arrested in the United States. (Section 3 of draft)

a. **Is that true? And is it also true that, after the Military Commissions Act of 2006 barred pending habeas petitions by Guantanamo detainees, the Supreme Court found that the law was unconstitutional?** (Boumediene v. Bush, 2008)

RESPONSE: My involvement in responding to *Hamdan* was limited. *Hamdan* was decided on June 29, 2006, approximately three weeks before I was confirmed as a judge. The Military Commissions Act was signed on October 17, 2006, months after I left the Department of Justice. Your question references an early draft of the Act that I reviewed but do not recall drafting. As I read it today, that draft would not have barred judicial review but would have sought to channel cases through the judicial-review mechanism of the Detainee Treatment Act. It is true that the Supreme Court some years later in *Boumediene v. Bush* (2008) held that certain aspects of the Act did not satisfy the Suspension Clause.

12. 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 "*the President intended to reserve the right to use harsher methods in special situations involving national security*." 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. (Charlie Savage, *Boston Globe*, Jan. 4, 2006)

According to emails, you were involved in preparing that signing statement and you advocated for the issuance of the signing statement. They even show you saying to the top State Department lawyer that Harriet Miers, the White House Counsel, "*needs to hear from us, otherwise this may wind up going the other way*."

a. **Why did you argue so strongly for the issuance of this statement, even going so far as to push the President's Counsel to do it?**

RESPONSE: Please see the response to Question 1.

13. One of the documents provided to the Committee by the Justice Department contains a series of questions—and we tell from the subject matter that the document was created approximately around November 22, 2005 (because it discusses the indictment of Jose Padilla that occurred on that date). The talking points ask whether "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence?" In the margin next to this question, you hand-wrote one word: "**Yes**."

a. **Please describe the information upon which you relied to make the assessment that "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence."**

b. Did you ever question whether they were lawful?

c. Do you believe that torture yields useful intelligence?

RESPONSE: As we discussed at the hearing, clients of the Department of Justice had represented that certain interrogation techniques had yielded valuable intelligence. I have never considered or been asked to consider whether torture yields useful intelligence because, among other things, torture is expressly prohibited by federal statute.

14. As a presidential candidate, President Trump said he wanted to bring back waterboarding and a "hell of a lot worse." (The Hill, February 6, 2016)

a. Does the President have the authority to issue such an order?

b. Would such an order be lawful?

RESPONSE: No one is above the law—including the President. To the extent your question implicates issues that may arise in future cases that may come before me as a judge, it would not be proper for me to comment further. As a general matter, however, I would reemphasize that Justice Jackson's concurrence in *Youngstown* teaches that executive power is at its "lowest ebb" when undertaken in violation of a congressional statute. Please see the response to Question 5.

15. During the February 6, 2006 hearing with Attorney General Gonzales, senators from both parties raised serious concerns about his argument that the president had "inherent authority" that could not be limited by laws passed by Congress—the very argument that you had included in your draft testimony.

    Senator Graham observed at the hearing that this "inherent authority" argument could "wipe out" Congress' power and be used to justify torture. This was the same logic that John Yoo used in the torture memos—that the President's Article II powers enable him to override the laws passed by Congress.

a. Do you believe the President has the inherent authority to order waterboarding, as President Trump has promised, even though it is forbidden by law?

RESPONSE: Please see the response to Question 14.

16. On May 30, 2005, Mr. Bradbury signed a memo for the Office of Legal Counsel concluding that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture—which also is the standard set forth in the McCain amendment. You came to work at the Department of Justice in June 2005.

a. Were you aware of this memo while you were at the Department of Justice?

RESPONSE: I do not recall what I knew at the time about this then-classified memorandum.

17. You served in the George W. Bush Administration as the Principal Associate Deputy Attorney General. During this time, you defended Bush Administration positions that the President had the authority to engage in warrantless electronic eavesdropping.

    a. Does this reflect your own views that a President has the authority to do this?

RESPONSE: Positions that I took while at the Department of Justice, as an advocate for the interests of the Executive Branch, do not necessarily reflect my personal views or decisions that I have made or may make as a judge.

    b. What was your view at the time of the so-called torture memos written by John Yoo and Jay Bybee that the President had the authority to redefine torture and allow it, despite the prohibition in federal law and treaties?

RESPONSE: I had no occasion to pass upon the memos referenced in your question, which had been withdrawn before I joined the Department of Justice.

18. At your hearing, Senator Lee asked you if you had ever "held any public office in a policymaking arena outside the Federal judiciary." You responded that you had served on your children's school board, but "that is as close to policy as I care to get."

    Yet during your time at the Justice Department, you were a senior political appointee, the chief deputy to the third-ranking position in the department.

    Your Senate questionnaire, which you filled out, says you ***"assisted in the development and implementation of a wide variety of initiatives and policies."***

    In fact, I sent you a letter asking about the policies and initiatives you had worked on. I received a response from the Justice Department that said that based on searches they did, they found that you worked on a series of policies and initiatives.

    a. In your high-level political appointment, didn't you work on policy matters, as you stated in your questionnaire?

    b. In your experience, isn't it typical for people at the leadership levels of the Justice Department where you served to be involved in policy decisions?

RESPONSE: According to searches conducted by the Department of Justice (see March 8, 2017 letter from the Department), I assisted in the development and implementation of certain Departmental legal policies or initiatives while I was at the Department. Involvement in legal policy initiatives within the Department does not mean policymaking as a politician or legislator, which I understood Senator Lee to be asking about at the hearing.

    c. You worked on legislation while you were at the Department of Justice, right? Can you name the bills or types of legislation you worked on, beyond the Detainee Treatment Act and the Military Commissions Act?

RESPONSE: It is possible I worked on other legislation but, given the passage of time, I cannot currently recall other legislation.

19. On the campaign trail, then-candidate Trump stated that based on the justices he would appoint to the Supreme Court, *Roe* would be overturned "automatically" and "go back to the states." He also said women should be punished for having an abortion, before walking back the statement.

    a. **If *Roe* were overturned by the Supreme Court, could states decide whether to legalize abortion? Yes or no.**

    b. **Without *Roe*, in states that make access to abortion illegal, could a state pass a criminal law with penalties for a woman who has an abortion? Yes or no.**

RESPONSE: As we discussed at the hearing, *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court entitled to all the respect due such a precedent under the law of precedent. As a nominee, it would not be proper to speculate about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

20. When asked by Senator Blumenthal whether you agreed with the result in *Brown v. Board of Education*, you testified that *Brown* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."

    a. **Is *Roe v. Wade* also "a seminal decision that got the original understanding of the Fourteenth Amendment right"? Yes or no.**

RESPONSE: *Roe v. Wade* is a precedent of the Supreme Court that, as I said at the hearing, "has been reaffirmed many times," and is entitled to all the respect due such precedent. In *Roe*, the Court grounded a right to abortion in its understanding of "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." 410 U.S. 113, 153 (1973).

21. When Chairman Grassley asked you whether you agreed with the decision in *Bush v. Gore*, 531 U.S. 98 (2000), you testified: "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."

    But in *Bush v. Gore*, the Court wrote that the Court's "consideration [wa]s limited to the present circumstances." *Id.* at 109.

    a. **In light of the Court's instruction that its consideration in *Bush v. Gore* was "limited to the present circumstances," do you believe that the Court's decision in that case deserves the same respect as precedent of the Court that *Roe v. Wade* does?**

RESPONSE: As discussed at the hearing, there are a number of "factors a good judge looks at when deciding any challenge to a precedent," including, among other things, "how long it has

been around," "whether it has been reaffirmed," "the quality of the initial decision," and "workability."

22. In 2015, you joined a dissent in the Little Sisters case where you argued in favor of the religious beliefs of an organization over the rights of an individual. *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). The dissent you joined argued that requiring the groups to fill out a simple form violated their religious rights, but the opinion took no account of the harm that the groups' beliefs would impose on their female employees. In fact, the dissent makes no mention of them at all.

    a. **How was your approach in this case consistent with the Supreme Court's majority opinion in *Hobby Lobby* that "courts must take adequate account of the burdens" that a religious accommodation imposes on individuals who do not benefit from the accommodation and do not share the religious belief?**

RESPONSE: Respectfully, the two decisions are consistent. The Religious Freedom Restoration Act prohibits the federal government from substantially burdening a sincerely held religious belief unless its regulation is narrowly tailored to achieve a compelling government interest. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court noted, "[i]t is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest," 134 S. Ct. 2751, 2781 n. 37 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The dissent from denial of rehearing en banc in *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), had no occasion to address the Government's compelling interest and the availability of a less restrictive means to advance that interest. The dissent addressed whether the Little Sisters' sincerely held religious beliefs had been substantially burdened, and concluded that the panel erred in not finding a substantial burden. *Id.* at 1318. The dissent would have remanded the case to the panel to analyze the remaining issues under RFRA of the existence of a compelling interest and the availability of a less restrictive means of advancing that interest. *Id.* Part of that analysis on remand could have included an analysis of the burdens that a religious accommodation would impose on individuals who do not benefit from the accommodation and do not share the religious belief.

23. Last June, California passed a law permitting assisted suicide for terminally ill patients, called the End of Life Options Act. It allows mentally competent adults to make their own decisions about their end of life.

    In your writings on the subject, you suggested that one reason to ban the practice of assisted suicide was a risk of abuse. But the California law has a number of safeguards to prevent such abuse: (1) only mentally competent adults who have only six months or less to live are eligible; (2) patients must request aid three times—twice orally, and once in writing in the presence of two witnesses (3) patients must consult with two different physicians; and (4) a final attestation form is required.

    a. **Even with all these safeguards that California has put in place, do you still**

believe that the assisted-suicide laws are subject to abuse?

RESPONSE: As we discussed at the hearing, my prior writings were offered as a commentator not in my role as a judge. Many of the issues raised here implicate issues that may come before me as a judge, and my decisions as a judge are based on the facts and law of each case, not my personal views. It would not be proper for me to comment further on how I might rule in a particular case. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

24. One of the documents we received from the Department of Justice stood out to me as it related to this issue. In an email you wrote to Solicitor General Paul Clement, you expressed a hope that you could "*include an epilogue discussing the Court's ruling and, hopefully, remarking on the brilliant and winning performance of the SG*!" in the book you were writing on assisted-suicide.

    During the hearing, in response to a question from Senator Coons about this document, you said, "When you represent the Government, you want the Government to win."

    But this email is not a general expression of support for the Administration. It is you saying that you hoped to include a discussion of the Government winning the case in your book and to highlight how well the Solicitor General did in arguing the case.

    If the Justice Department had won that case, it would have meant that the federal drug laws would prohibit dispensing or prescribing a controlled substance to assist in suicide—it would, in effect, have outlawed this nationwide and wiped out state laws.

    a. **So my question to you is simple: before *Gonzales v. Oregon* was decided, was it your personal hope that the Bush Justice Department's position would prevail in that case?**

RESPONSE: As I discussed at the hearing, I was an advocate for the government at the time, and as an advocate representing the Department of Justice it was my hope that the government prevail in its case.

25. Like Justice Scalia, you are a self-professed originalist. (*See, e.g.*, "[The Constitution] isn't some inkblot on which litigants may project their hopes and dreams…but a carefully drafted text judges are charged with applying according to its original public meaning." *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (underlining added)).

    I am interested in whether you think your approach to originalism is the same or different from Justice Scalia's. For example, Justice Scalia repeatedly said that there was no protection of privacy rights under the Constitution outside the Fourth Amendment context.

    a. **Is your theory of originalism the same as Justice Scalia's in this regard?**

RESPONSE: As I said at the hearing, "I'm happy to be called [an originalist]. I do worry about the use of labels in our civic discussion . . . sometimes [leads to] ignor[ing] the underlying ideas. As if originalism belonged to a party, it doesn't. As if it belonged to an ideological wing, it doesn't." As I further said at the hearing: "I am with Justice Kagan on this. I think it is what we all want to know. I do not know a judge who would not want to know what the original understanding is of a particular term in the Constitution or a statute. That is information [that] would be valuable to any judge and considered by a judge." I also respectfully refer you to the response to Question 10 of Senator Leahy's questions for the record.

b. **The Court, as part of protecting privacy, has safeguarded the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual homosexual activity, and the right to refuse medical treatment. Under your theory of originalism, which of these rights are protected?**

RESPONSE: As we discussed at the hearing, a good judge should always give appropriate respect to precedent. As Alexander Hamilton said in Federalist Paper No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." To the extent that the Court has ruled in these areas, those cases are precedent of the Supreme Court entitled to all the respect such precedent is due.

26. In the case Compass Environmental Inc. v. Occupational Safety and Health Review Commission, 663 F.3d 1164 (10th Cir. 2011), the issue involved a fine imposed by the Department of Labor on an employer for failing to train an employee who died after being electrocuted on the job. The worker—who had started working later than the rest of the crew, and did not receive the same safety training that the rest of the workers did—was killed when a piece of equipment came too close to a high-voltage overhead power line.

    The majority opinion, which was joined by another Tenth Circuit appointee of President George W. Bush, upheld the Department of Labor's fine against the employer, because it found that the employer had violated the law by failing to train this worker in light of the fact the worksite included hazardous high-voltage power lines, that the employer recognized this hazard as it applied specifically to worker, and that that it had trained most of its employees on that hazard but not the worker who died.

    You wrote that the fine should be overturned because the Secretary of Labor hadn't produced any evidence that a reasonably prudent employer would have anticipated this hazard or trained the worker about the hazards posed by high-voltage overhead lines.

    a. **There was evidence that (1) high-voltage power lines are very dangerous, (2) the employer had identified this power line as a hazard at this worksite, and (3) the employer had decided it should train employees on this hazard but had not trained this particular person because he didn't start working until later. Why didn't you believe this was enough evidence to support the contention that a**

reasonably prudent employer should have trained this worker—and could be held responsible for not doing so?

RESPONSE: My opinion in *Compass Environmental v. Occupational Safety and Health Review Commission* was based on the legal principle that the government cannot penalize anyone without some proof of wrongdoing. The Secretary of Labor had the burden of proving that "reasonably prudent employers in the industry would have anticipated the sort of electrical hazard that [the worker] encountered in this case and provided him with more training about it." 663 F.3d 1164, 1170 (10th Cir. 2011) (Gorsuch, J., dissenting). As I explained, I discerned no record evidence suggesting that a reasonable employer would have done more to anticipate or train for the accident than Compass did. As I explained, agencies "cannot penalize private persons and companies without *some* evidence the law has been violated." *Id.* My opinion in this respect endorsed the reasoning of an Administrative Law Judge.

27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process—President Trump stated that "we're going to have great judges, conservative, all picked by the Federalist Society." (Donald Trump, Breitbart News Interview, June 13, 2016).

    In September, when your name was added to President Trump's second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo's role in selecting conservative Supreme Court nominees and specifically stated that "the week after the election… Mr. Leo was summoned to Trump Tower" to discuss "winnowing" the list. (Wall Street Journal, "Trump's Supreme Court Whisperer," Feb. 3, 2017)

    a. When did you first meet Leonard Leo?

RESPONSE: I do not exactly recall when I first met Leonard Leo, but it was many years ago.

28. I understand you sat on a panel with Mr. Leo entitled, "The Life and Legacy of Supreme Court Justice Antonin Scalia" on September 3, 2016. Your name was put on President Trump's second short list on September 23, 2016.

    a. Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before you name was put on the list?

RESPONSE: On September 3, 2016, I moderated a long scheduled panel on the legacy of Associate Justice Antonin Scalia during the Tenth Circuit Judicial Conference with Justice Elena Kagan, Professor William Kelley, and Leonard Leo. During the course of the Conference, I had conversations with Justice Kagan, Professor Kelley, and Mr. Leo about many topics, including Justice Scalia's jurisprudence and current events.

    b. Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump's list?

RESPONSE: I cannot speak for the Federalist Society or the Heritage Foundation.

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: "*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.*"

    a. **Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

RESPONSE: Prior to the 2016 election, to my knowledge, I did not have substantive conversations with someone whom I know to be employed by the Heritage Foundation about my potential nomination to the Supreme Court.

    b. **Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**

    c. **Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Some of them are affiliated with the Federalist Society and some are affiliated with the American Constitution Society, societies that provide, among other things, valuable forums for civil discussion and debate on legal questions. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

30. During your hearing, Senator Blumenthal asked you about your interview with the President, and you said there was a mention of *Roe v. Wade*. He then asked about your interview with Steve Bannon, White House Chief of Staff Reince Priebus, and other advisors. He asked if they asked you about *Roe* and you said no.

    a. **Did they ask you about any case? If so, what cases did they ask you about?**

    b. **Did they ask about your judicial philosophy? If so, what did you say?**

RESPONSE: To my recollection, they asked me about my qualifications, my family and personal history, my record as a lawyer and a judge at the Tenth Circuit, and my approach to judging, as this Committee has. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

31. Your questionnaire states that, on January 5, 2017, you interviewed with members of the

transition team—specifically including Steve Bannon and Reince Priebus, who is now the President's Chief of Staff.

a. **What did Steve Bannon specifically ask you? What else did he say to you?**

b. **What did Reince Priebus specifically ask you? What else did he say to you?**

c. **What else did you discuss?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

32. Then you were interviewed by the President-elect.

a. **What did the President specifically ask you? What else did he say to you?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

33. During your hearing, you were asked about the outside groups that are reportedly spending $10 million in support of your confirmation. You indicated that you had no idea what individuals may be contributing to that effort. When Senator Whitehouse asked if it was a problem that the American people did not know who was funding this extraordinary campaign on your behalf—or even whether you were concerned about that fact—you declined to answer.

a. **Please list any person, institution, corporation, or other entity that you believe to have made any contributions to this campaign.**

b. **Have you made any attempts to learn the identity of any individuals or organizations that have made contributions to this campaign? If so, what have you learned? If you have not made any such attempts, why not?**

c. **Will you publicly call on the Judicial Crisis Network and any other organization working in support of your nomination to disclose their donors?**

d. **You implied during the hearing that you are "uncomfortable" with the massive amounts of money being spent on the campaign to support your nomination. Will you publicly call on the Judicial Crisis Network and other organizations working in support of your nomination to cease this big-money campaign?**

RESPONSE: Respectfully, these questions are better directed to others. Over the last several weeks, I have focused on meetings with nearly 80 Senators, answering the Senate Judiciary Committee Questionnaire, completing the FBI process, interviewing with the ABA, preparing for the hearing, and answering questions for the record.

34. Please identify all individuals who assisted in your preparation for testifying before

the Judiciary Committee.

RESPONSE: In preparation for my hearing, various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Please see the response to Question 30.

35. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response Question 34.

36. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.

37. You were previously a member of the Republican National Lawyers Association, and you chaired their Judicial Confirmation Task Force from 2001-2002.

    a. **What did your role as chair involve?**

    b. **You must have been successful in that role—the Senate Republican Conference gave you an Award for Distinguished Service based on your work. What did you do to warrant that award?**

RESPONSE: My role and the award you mention are described in the letter sent by the Department of Justice dated March 8, 2017.

38. While testifying during your hearing, you have at times lamented the current judicial confirmation process. You told Senator Whitehouse, in fact, "There is a lot about the confirmation process today that I regret." And Senator Lee said on Monday that "[T]he acrimony, the duplicity, the ruthlessness of today's politics are still quite unfamiliar to you. I hope that they will remain unfamiliar to you."

    In 2001, President Bush had just been elected. Republicans in the Senate had blocked over 60 of President Clinton's judicial nominees at the time and fights over the judiciary were already quite partisan.

    a. **You are obviously aware of the fact that judicial nominations can be quite contentious—you helped a partisan political organization confirm judges. What is different today than it was in 2001-2002?**

RESPONSE: I have not sought to study what is different today from 2001-2002 regarding the judicial confirmation process, but I respectfully refer you to an article I wrote in 2002, *Justice White and Judicial Excellence*, UPI (May 3, 2002).

39. You have said repeatedly during your hearing that you can't comment on precedent because it would "tip your hand" to future litigants.

    Yet on several occasions you have gone out of your way in separate opinions to call for precedent to be overturned.

    One example is the *Gutierrez-Brizuela* case, where you wrote the unanimous majority ruling for the immigrant on due process grounds, but then wrote an opinion concurring with yourself to call for the *Chevron* doctrine to be reconsidered.

    a. How does answering our questions about precedent "tip your hand" any more than writing a separate, unnecessary opinion questioning a precedent that has been relied on thousands of times does?

RESPONSE: As a circuit judge, I am responsible for applying the precedent of the Tenth Circuit and the Supreme Court to cases and controversies before me, which required the result the panel reached in *Gutierrez-Brizuela v. Lynch*. But, as I said at the hearing, circuit judges are also in a position to "identify[] issues" for the Supreme Court "when [they] see a problem" in a case or controversy. This is exactly what I did in my concurrence in *Gutierrez-Brizuela*. As I said at the hearing and explained in that opinion, an undocumented immigrant in that case was placed in a "whipsaw" "by a change in law effected by an administrative agency," which had "overrul[ed] a judicial precedent" and effectively added four years to the time Mr. Gutierrez had to wait outside the United States. As a circuit judge, it was appropriate for me to identify the problems that I saw underlying the result that we were required to reach. Raising an issue in this capacity is fundamentally different than offering my views on specific Supreme Court precedents in the context of a hearing where there is no case or controversy to resolve. Publicly discussing preferred or disfavored precedents in the context of a confirmation hearing undermines the independence of the judiciary and the separation of powers and carries with it a risk of suggesting to future litigants that I am not approaching their respective cases with an open mind or that I have prejudged their cases in order to secure confirmation.

40. During your tenure at the Justice Department, or after, did you ever learn that Justice Department leadership was considering the termination of specific U.S. Attorneys? If so, what did you learn and when?

RESPONSE: In the Department of Justice, U.S. Attorneys report to the Deputy Attorney General and are not hired or terminated by the Associate Attorney General, to whom I reported. Further, I was not employed by the Department at the time of the removal of seven U.S. Attorneys in December 2006 and do not recall involvement in the termination of these individuals.

41. The Department of Justice's Office of the Inspector General report "An Investigation in the Removal of Nine U.S. Attorneys in 2006" makes clear that while the actual firing of seven U.S. Attorneys occurred on occurred on December 7, 2006—after you had left the

Department of Justice—the report also found that "the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in 2004," and that substantial groundwork was laid during the time period that you served at the Department.

a. **Did you ever communicate with Kyle Sampson or anyone else in Department leadership about the U.S. Attorney firings that occurred in 2006 and 2007? If so, what did you discuss and when? Did you have any such communications following your confirmation to the Tenth Circuit?**

RESPONSE: Please see the response to Question 40.

42. Did you ever communicate with Monica Goodling about politicization hiring at the Justice Department? If so, what did you discuss?

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions with Ms. Goodling.

43. Did you ever communicate about consideration of political background or belief in the hiring process for career positions? Did you have any such discussions following your confirmation to the Tenth Circuit?

RESPONSE: I did not make inappropriate political hiring recommendations for career positions at the Department of Justice.

44. Did you ever participate in any decision to overrule the recommendation of a career attorney in the Civil Rights Division? If so, please identify each occasion where you participated in any such decision.

RESPONSE: At the Department of Justice, career attorneys in the Civil Rights Division report to the Assistant Attorney General of that Division, a presidentially appointed and Senate confirmed position. In turn, the Assistant Attorney General reports to the Associate Attorney General, also a presidentially appointed and Senate confirmed position. I also reported to the Associate Attorney General. It has been more than a decade since I worked at the Department, but I do not recall instances in which the Associate Attorney General overruled the Assistant Attorney General for Civil Rights during my time at the Department.

45. Did you ever communicate regarding hiring practices in the Civil Rights Division with Bradley Schlozman or anybody else? If so, what did you discuss and when, and with whom.

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions in the Civil Rights Division with Mr. Schlozman or others during my time at the Department. In the course of preparing for the hearing, I have been shown an email that I sent, within days before the end of my tenure at the Department, alerting others to a newspaper article discussing hiring in the Civil Rights Division.

46. Did anyone ever communicate to you any concern about Bradley Schlozman's conduct in the Civil Rights Division? If so, who communicated them to you, and what were the concerns that were communicated? Did you ever discuss the concerns with anyone else, either before or after you left DOJ? What actions did you take to respond to any concerns you heard?

RESPONSE: Please see the response to Questions 43 and 45.

47. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

48. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

49. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.

Questions for the Record for Senator Patrick Leahy, Senate Judiciary Committee, Hearing on the Nomination of The Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States March 24, 2017

1. During your hearing, I asked you whether the First Amendment prohibits the President from imposing a blanket religious litmus test for entry into this country. I was disappointed that you refused to answer this basic constitutional question. You instead stated that this relatively straight-forward tenet of constitutional law "is currently being litigated actively" and you did not want to discuss further. In my view, this question is no different than whether the Constitution permits a police officer to compel a warrantless search of one's home without an investigative justification. The question may be litigated at some point, but I suspect you would not hesitate to answer the question now.

   I also asked Jameel Jaffer, who appeared as an outside witness in connection with your nomination, whether the First Amendment permits a religious litmus test for entry into this country. He responded with an unequivocal: "Of course not." Mr. Jaffer then stated that the "bigger concern" is that you refused to answer this question. I agree.

   Does the Constitution allow the President to impose a religious litmus test for entry into the United States?

RESPONSE: As we discussed, it would not be proper for a nominee to express views that touch on or could be perceived as touching on claims made in pending or impending litigation. *See, e.g.*, *Washington v. Trump* (9th Cir. 2017). Respectfully, and as we discussed, I believe this question does that. To comment further would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

2. During your hearing, I asked you whether there was any circumstance in which the President could violate a statute passed by Congress to authorize torture or warrantless surveillance of Americans. You declined to answer my question. You stated: "[W]e have courts to decide these cases for a reason, to resolve these disputes."[1] I am troubled that you declined to express any opinion about whether the President has the power to violate laws passed by Congress.

   a. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] In a time of war, do you believe that the

[1] Gorsuch Hearing Transcript Day 3, March 22, 2017, at 48-49.
[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

RESPONSE: As we discussed, no person and no institution is above the law, and Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952), provides an instructive tripartite framework for evaluating presidential power. In the first category, when "the President acts pursuant to an express or implied authorization of Congress," his "authority is at its maximum." *Id.* at 636. With congressional authorization, the President's actions enjoy "the strongest of presumptions and the widest latitude of judicial interpretation" attach. *Id.* at 637. In the second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." *Id.* Finally, in the third category, the President acts contrary to the express or implied will of Congress. It is here that the President's "power is at its lowest ebb." *Id.* at 637–38.

b. In response to my question, you said: "I would approach it as a judge through the lens of the *Youngstown* analysis." To be clear, if confirmed, would you follow the framework outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[3] when deciding cases regarding the scope of the presidential power in wartime?

RESPONSE: As we discussed, Justice Jackson's *Youngstown* concurrence sets forth a widely accepted framework instructive in evaluating the scope of presidential power.

3. In *Hamdan v. Rumsfeld,* the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."[4] Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

RESPONSE: I agree that *Hamdan v. Rumsfeld* recognized limitations on the power of the President. It is a precedent of the Supreme Court entitled to all the weight due such a precedent.

4. In *Hamdan v. Rumsfeld*, the Supreme Court also made clear that the Geneva Conventions applies to all enemy combatants detained by the United States. Do you agree that Common Article III of the Geneva Conventions applies to those fighting on behalf of non-state actors in any armed conflict?

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[4] *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

RESPONSE: I agree that *Hamdan v. Rumsfeld* recognized limitations on the power of the President. It is a precedent of the Supreme Court entitled to all the weight due such a precedent.

5. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first Muslim ban, there were reports of Federal officials refusing to comply with court orders.

   a. If a President refuses to comply with a court order, how should the courts respond?

   b. Is a President who refuses to comply with a court order a threat to our constitutional system of checks and balances?

RESPONSE: As we discussed at the hearing, one test of the rule of law is whether the government can lose in its own courts and accept the judgment of those courts. The refusal of the other two branches to comply with a court order implicates the Constitution's scheme of separate and diffuse power and authorities. It also implicates the independence of the judiciary. I expect the coordinate branches of government to respect the independent judiciary, and I have not hesitated and will not hesitate to rule accordingly as a judge and defend the independent judiciary.

6. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.[5] Do you agree with that view? Does the Constitution permit discrimination against women?

RESPONSE: In *Mississippi Univ. for Women v. Hogan* (1982) and *J.E.B. v. Alabama ex rel. T.B.* (1994), the Supreme Court held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause. This scrutiny is often referred to as "intermediate scrutiny." In *United States v. Virginia (VMI)* (1996), the Court emphasized that heightened scrutiny requires an "exceedingly persuasive justification" for sex-based classification.

7. Was Justice Scalia right when he said that the 2003 decision striking down a ban on consensual sex between men was part of the "homosexual agenda," which he said was trying to "eliminat[e] the moral opprobrium that has traditionally attached to homosexual conduct"?[6]

RESPONSE: Respectfully, the holding of the majority in *Lawrence v. Texas* is the controlling precedent of the United States Supreme Court, not the dissent.

8. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he

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[5] http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html

[6] *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).

wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." Do you believe the Constitution protects that personal autonomy as a fundamental right?

RESPONSE: As we discussed, the Constitution protects a variety of rights touching on such matters. As I said at the hearing, "[p]rivacy is in a variety of places in the Constitution. The first and most obvious place, back to the Bill of Rights, is the Fourth Amendment, the right to be free from unreasonable searches and seizures in your homes, papers, and effects." Privacy is also protected in the Third Amendment and in the First Amendment, whose protections for "the right to free expression" and "the freedom of religious belief and expression" both "require[] a place of privacy." With regard to the Fourteenth Amendment, the Supreme Court "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 *Meyer* [*v. Nebraska*], which involved parents who wished to have the freedom to teach their children German at a time it was unpopular in this country, and *Pierce* [*v. Society of Sisters*], the right of parents to send their children to a parochial school if they wish."

9. You are a proponent of the view that the Constitution should be interpreted based on the original public meaning of its text. When faced with a case where precedent points clearly toward one outcome, but your understanding of the Constitution's original public meaning points in the opposite direction, which side wins?

RESPONSE: As we discussed, precedent is the anchor of the law. In the *Law of Judicial Precedent*, judges from around the country appointed by Presidents of both parties and I offered a mainstream account about the law of judicial precedent. As outlined in that book and as we discussed at the hearing, judges consider a number of factors in analyzing precedent such as the age, reliance interests, and workability of the precedent. In assessing any case, a good judge starts with a presumption in favor of precedent.

10. Since I have been voting on Supreme Court nominations, I can think of only three nominees who were originalists in the same way you have been described: Justice Scalia, Judge Bork, and Justice Thomas.

    a. How do you compare your approach to interpreting the Constitution to those jurists?

    b. In what ways does your judicial philosophy differ from theirs?

RESPONSE: I am hesitant to suggest that originalism is associated with only certain judges or factions. As I stated at the hearing, labels are sometimes used to dismiss or ignore underlying ideas or to mistakenly suggest certain views belong to a particular ideology or party. Indeed, as Justice Elena Kagan has explained, in a real sense, "we are all originalists." Respectfully, at the hearing I attempted to convey fully how I approach the task of judging, including through the examination of the law, precedent, and the respectful exercise of the judicial process. I also respectfully refer you to Question 25(a) of Senator Feinstein's questions for the record.

11. Many originalists like Justices Scalia and Thomas, and Judge Bork, have been critical of decisions like *Roe* and *Griswold* that recognized and relied on the right to privacy. They have argued that it was not explicitly in the Constitution, and so it is not on a par with specifically enumerated rights such as freedom of speech or trial by jury. But as Justice Breyer told this Committee, the Ninth Amendment "says do not use that fact of the first eight to [conclude] that there are no others."[7]

    a. Does the Ninth Amendment mean that the Constitution protects unenumerated rights, including the right to privacy?

RESPONSE: As we discussed during the hearing, *Roe* and *Griswold* are precedents of the United States Supreme Court entitled to all the weight due such precedents. Please also see the response to Question 8 with respect to privacy and our discussions at the hearing on those particular precedents, and please also see the response to Question 5(b) of Senator Blumenthal's questions for the record.

    b. When is it appropriate for the Court to recognize unenumerated rights?

RESPONSE: In a number of opinions over many years, including many opinions we discussed at length at the hearing, the Supreme Court has recognized a number of unenumerated rights. These opinions are precedents of the Supreme Court entitled to all the weight due to such precedents. See for example the response to Question 8 above. To the extent your question implicates issues that may come before me as a judge in the future, it would not be proper for me to offer further opinions. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."[8] When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

RESPONSE: Respectfully, *Shelby County v. Holder* is a precedent of the Supreme Court entitled to all the weight due such a precedent, and it would not be proper for me as a sitting judge to critique its reasoning in these proceedings. As we discussed, to do so would risk

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[7] Nomination of Stephen G. Breyer, United States Senate Committee on the Judiciary, Hearing Transcript, at 268.

[8] *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2652 (2013) (Ginsburg, J., dissenting).

violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

13. When I asked you about *Citizens United* and concerns about corruption, you said, "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 be obtained on expenditure limits." You then added, "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 with expenditure limits, or whether it has to do with disclosure requirements." However, *Citizens United* states that "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In the Bullock case in 2012, the same five justices who decided Citizens United overturned a Montana Supreme Court ruling, and refused even to consider a record showing that "independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."

    a. What "room for legislation" were you referring to?

    b. What types of expenditure limits would be consistent with *Citizens United*? Or did you misstate the holding of *Citizens United*?

RESPONSE: As we discussed at the hearing, the Supreme Court has long recognized Congress's authority to legislate regarding campaign contributions, expenditures, and disclosures, subject to the constraints of the First Amendment. For example, in *Buckley v. Valeo*, the Court held that "contribution and expenditure limitations both implicate fundamental First Amendment interests," and that such restrictions therefore must pass heightened scrutiny. 424 U.S. 1, 23 (1976). At the same time, the Court recognized that one governmental interest sufficient to justify restrictions on contributions and expenditures is the government's interest in combatting *quid pro quo* corruption, or the appearance of such corruption. In *Buckley*, the Court upheld certain contribution limitations enacted by Congress as furthering the compelling interest in combatting corruption. Meanwhile, the Court concluded that certain limitations on independent expenditures by individuals did not sufficiently advance the compelling interest to justify the heavy restriction on speech. *Citizens United* expanded on this point, holding that certain "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 558 U.S. 310, 314 (2010). Although the Court in *Citizens United* found that the Government had not shown a compelling interest in the regulation of certain independent expenditures, the Court has not expressly foreclosed any regulation of political expenditures that might implicate the Government's interest in preventing *quid pro quo* corruption, or the appearance thereof. The Supreme Court also has recognized Congress's authority to enact disclosure requirements relating to the political process. In *Buckley*, the Court identified three governmental interests that can be served by disclosure provisions: (i) equipping the electorate with information as to where political campaign contributions come from and how they are spent; (ii) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to publicity; and (iii) gathering data to detect violations of the contribution limitations. 424 U.S. at 66-68. The Court noted that "disclosure

requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. The Court upheld certain disclosure and disclaimer requirements in *Citizens United.* 558 U.S. at 319.

14. The Supreme Court is a separate and co-equal branch of government, but that does not mean it is not subject to important Congressional oversight. For example, Congress appropriates the Court's budget and requires that justices file financial disclosure reports annually. But justices are not required to adhere to the same ethics rules as Members of Congress and the President's cabinet, this includes adhering to travel and stock ownership disclosures. This raises legitimate questions about whether Justices are recusing themselves from cases where they may have outside interests.

    a. Is it a problem in your view that justices are not held to the same disclosure requirements as Members of Congress?

RESPONSE: As discussed at the hearing, should I be fortunate enough to be confirmed, I commit to maintaining my impartiality to the best of my abilities and to recuse myself when the law suggests I should. As I stated in my Senate Judiciary Committee Questionnaire, if confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

    b. Does Congress have the authority to fix it?

RESPONSE: Respectfully, whether Congress has the authority to act in this fashion is a question that may arise in future cases and controversies, and it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

15. Justice Kennedy wrote in *Planned Parenthood v. Casey* that "At the heart of liberty is the right to define one's own concept of existence."[9] You have suggested that the personal autonomy rights protected by the Constitution include only those rooted in "history and custom." In cases that struck down laws discriminating against LGBT Americans, including the 2015 case upholding marriage equality, Justice Kennedy argued that while "history and custom guide" the inquiry into what fundamental rights or personal autonomy are protected, they "do not set its outer boundaries."[10] If majorities of the Supreme Court had endorsed your more limited view of

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[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).
[10] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

fundamental rights, as expressed in your book, rather than Justice Kennedy's view, would laws discriminating against LGBT Americans still be on the books?

RESPONSE: The Supreme Court has recognized in *Obergefell v. Hodges* the right to same-sex marriage. *Obergefell* is a precedent of the Supreme Court, and it is entitled to all the weight due such a precedent. Respectfully, when I referenced "history and custom" in my book, *The Future of Assisted Suicide and Euthanasia*, I did not suggest that it is the only test the Court has employed in due process cases.

16. In her concurring opinion in *United States v. Jones*, Justice Sotomayor questioned the continued applicability of the third-party doctrine with respect to Americans' electronic data. She stated that this doctrine of Fourth Amendment jurisprudence is "ill-suited to the digital age" when "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Justice Sotomayor argued that Americans' digital information "can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy."[11]

    a. Do you agree with Justice Sotomayor's statement?

    b. Do you believe that the third-party doctrine is a logical way to assess Fourth Amendment protections for Americans' digital information?

RESPONSE: As we discussed during my testimony before the Committee, I believe that recent Supreme Court cases, including *United States v. Jones* and *Kyllo v. United States*, demonstrate how the Fourth Amendment's historical protections can apply against technological advancements that obviously were not envisioned at the time of the Amendment's adoption. These cases show how the Court can thoughtfully use historical principles in applying the law to current realities, and I refer you to our extensive discussions at the hearing about them. To the extent your question implicates issues that may come before me as a judge, it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

17. In connection with your nomination to the U.S. Court of Appeals for the Tenth Circuit in 2006, you were asked a series of questions related to medical aid in dying. Following your nomination, you published a book entitled, *The Future of Assisted Suicide and Euthanasia*, in which you concluded that "the Court's decisions seem to assure that the debate over assisted suicide and euthanasia is not yet over – and may have only begun."[12]

    The contents of your book raise questions, especially considering precedent that

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[11] *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).
[12] https://www.washingtonpost.com/news/morning-mix/wp/2017/02/01/neil-gorsuch-wrote-the-book-on-assisted-suicide-heres-what-he-said/?utm_term=.266f9647bee0

includes the Supreme Court's unanimous decision in *Washington v. Glucksberg* that deferred to States on this issue. The Court has stated, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[13] To date, at least six states, including Vermont, have authorized medical aid in dying, and many more have continued to consider questions related to this issue.

a. Do you agree with the Supreme Court's decisions in *Washington v. Glucksberg* and *Gonzales v. Oregon*[14]?

b. Do you believe that questions related to medical aid in dying should be left to each State?

RESPONSE: As we discussed at the hearing, *Washington v. Glucksberg*'s holding permitted the debate over assisted suicide to continue in the States. That decision and *Gonzales v. Oregon* are precedents of the Supreme Court entitled to all the weight that such precedents are due. As I said at the hearing, a judge's personal views play no proper role in the discharge of the duties of a judge, for every litigant is entitled to a judgment based on the law and facts.

18. In *Allstate Sweeping v. Black*, you joined a unanimous decision rejecting a company's hostile work environment claim. That decision stated, "Being *offended* presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."[15] Yet in *Hobby Lobby* you joined a decision holding that large, for- profit corporations could have religious views, and that those religious views could limit health insurance access for employees.[16]

a. How do reconcile your divergent views in those cases?

b. Given that the contraception mandate is a law of general applicability, why should a woman's access to contraception be dependent not on the duly enacted law, but instead on her boss's views?

RESPONSE: *Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the "plaintiff was *offended*." A claim under RFRA has no such element. Rather, RFRA requires that "a person" be engaged in the "exercise of religion." The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a "person" to include corporations. In *Hobby Lobby*, the government conceded and the Supreme Court ultimately

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[13] *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).
[14] *Gonzales v. Oregon*, 546 U.S. 243 (2006).

[15] *Allstate Sweeping v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) (emphasis in original).
[16] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).

held that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

19. In 2010, you wrote a unanimous panel decision in *United States v. Pope*, in which the defendant challenged the federal statute making it a felony for those convicted of misdemeanor domestic violence to own a gun.[17] You upheld a dismissal of the case on procedural grounds, yet you made it abundantly clear in your opinion that you considered it an open question whether the government can legally prevent those who commit domestic violence from owning guns. Last year, in *Voisine v. United States*, the Supreme Court held that even those guilty of reckless domestic violence can be barred from gun ownership.[18] Do you recognize *Voisine* as settled law? Or do you think it is still an open question whether domestic violence offenders can own guns?

RESPONSE: *Voisine v. United States* is a precedent of the Supreme Court, entitled to all the weight due such a precedent.

20. In 2013, Congress passed the Leahy-Crapo Violence Against Women Reauthorization Act. Consistent with a 1978 Supreme Court decision, we granted jurisdiction to Native American tribal courts to try domestic and sexual offenses that occur on tribal land. That now means non-Indian abusers are no longer able to slip between jurisdictional cracks with impunity. They will be held accountable where they commit the offense. And we crafted the law to ensure that such defendants will have the same due process rights they have under the Constitution. In *United States v. Lara*, the Court held that that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians." In light of the Supreme Court's decision in *Lara*, do you believe that it is unconstitutional for tribal courts to have jurisdiction over non-Indians even where Congress authorizes such jurisdiction?

RESPONSE: Respectfully, this question appears to reference an active case or controversy likely to come before the Supreme Court. Accordingly, it would be improper for me to offer a further opinion. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

21. **On behalf of Senator Ron Wyden:**

In your 2006 book *The Future of Assisted Suicide and Euthanasia*, you argue that the Supreme Court's decision in *Gonzales v. Oregon* did not settle whether

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[17] *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010).
[18] *Voisine v. United States*, 136 S. Ct. 2272, 2277 (2016).

Oregon's Death with Dignity law violates the Constitution's equal protection guarantee.

Our Constitution guarantees the people fundamental rights, the full scope of which, as Justice Harlan once wrote, "cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." This exact concept is written into the Bill of Rights itself. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Those fundamental rights guaranteed by the Constitution were never intended to be limited to the specific terms of the first eight amendments to the Bill of Rights. The existence of additional fundamental rights not enumerated in the first eight amendments to the Constitution have also been re-affirmed by the Supreme Court.

a. Is it your view that our Constitution grants individuals the right to make decisions about their own lives and families without interference from the state?

RESPONSE: The Constitution expressly protects a variety of rights touching on such matters. As I said at the hearing, "[p]rivacy is in a variety of places in the Constitution. The first and most obvious place, back to the Bill of Rights, is the Fourth Amendment, the right to be free from unreasonable searches and seizures in your homes, papers, and effects." Privacy is also protected in the Third Amendment and in the First Amendment, whose protections for "the right to free expression" and "the freedom of religious belief and expression" both "require[] a place of privacy." With regard to the Fourteenth Amendment, the Supreme Court "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 *Meyer* [*v. Nebraska*], which involved parents who wished to have the freedom to teach their children German at a time it was unpopular in this country, and *Pierce* [*v. Society of Sisters*], the right of parents to send their children to a parochial school if they wish."

b. Your record over the last ten years suggests that your personal beliefs often bleed into your legal analysis. Your decisions suggest that you are not able to act independently of the conservative causes that you support. If a case were to come before you, would you be able to consider it without bias?

RESPONSE: Respectfully, I cannot agree with your characterization. My record shows that, according to my clerks, 97 percent of the 2,700 cases I have decided were decided unanimously, and I have been in the majority 99 percent of the time. In those rare cases where I have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed as a Democrat. According to the Congressional Research Service, I understand that my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

c. As you stated in your book, do you believe that Oregon's law fails to provide equal protection because it is not reasonable to rest legal distinctions between

the terminally ill and the healthy on professional medical judgments about quality of life and life expectancy?

If so, please elaborate on why you currently believe these judgments cannot form the basis of a reasonable legal distinction between the terminally ill and the healthy. If not, please explain how your views have evolved since 2006.

RESPONSE: Respectfully, the views expressed in the book speak for themselves and are more developed and detailed. As I explained at the hearing, too, the views in the book were offered as a commentator and before I became a judge. My decisions as a judge are based only on the facts and law of each case as it is presented, not my personal views.

Nomination of Judge Neil M. Gorsuch to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR DURBIN

1. When you recommended that the signing statement for the Detainee Treatment Act state that the Act is "best read as essentially codifying existing interrogation policies," did you know what these existing interrogation policies were?

2. Prior to making the recommendation referenced in question #1, had you read any of the following memos by the Office of Legal Counsel?

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005)

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005)

   Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005)

RESPONSE: The December 29, 2005 email chain discussed proposed versions of a signing statement to accompany the Detainee Treatment Act. As we discussed at the hearing, these events took place many years ago and my recollection "is that there were individuals in maybe the Vice President's office who wanted a more aggressive signing statement ... and that there were others, including at the State Department, who wanted a gentler signing statement." To my recollection, as I said at the hearing, "I was in the latter camp [along with] John Bellinger, among others." I did so in my role as a lawyer helping with civil litigation brought by individuals detained as enemy combatants and defended by the Department of Justice. The email chain indicates that the Legal Adviser for the State Department favored a gentler and more expansive statement for various reasons, including public and foreign relations. The email chain also indicates that the National Security Council expressed the view that the Detainee Treatment Act codified existing policies. In that light and as a lawyer advising a client, the email chain indicates that I suggested a signing statement could (1) speak about the Detainee Treatment Act positively to the public and to foreign nations as the State Department suggested, (2) highlight aspects of the legislation helpful to litigators in the Civil Division of the Department of Justice, and (3) make transparent the client's position that the Act codified

existing policies. I do not recall what I knew about specific interrogation policies or memos at the time.

3. Prior to making the recommendation referenced in question #1, were you read into or briefed on the CIA's rendition, detention or interrogation program?

RESPONSE: I had various national security clearances during my service at the Department of Justice, including related to detainee matters in aid of my work on litigation brought by individuals detained as enemy combatants, but I do not recall which specific programs or when I was read into them.

Nomination of Judge Neil M. Gorsuch, of Colorado,
to be an Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1) In your testimony, you noted that you helped draft Attorney General Alberto Gonzales's statement for a February 6, 2006 Senate Judiciary Committee hearing on the topic of the Bush Administration's Terrorist Surveillance Program. Certain statements made by the former attorney general at that hearing—specifically, with respect to disputes between DOJ and the White House over domestic intelligence activities—were later determined by the Department of Justice Office of Inspector General to have been "confusing, inaccurate, and [to have] had the effect of misleading those who were not knowledgeable about the program."

   a) In addition to drafting Attorney General Gonzales's testimony, did you help to prepare him for the February 6, 2006 Senate hearing? If so, what was involved in the preparation and what were your roles?

RESPONSE: While it is possible that I participated in some fashion in the preparation of Attorney General Gonzales for his testimony on February 6, 2006, as I testified my recollection of events more than eleven years ago is that my involvement related primarily to serving as a speechwriter for his opening statement, working from material supplied by others.

   b) Reports of disputes between DOJ and the White House related to aspects of the NSA's warrantless surveillance programs surfaced in the press more than a month prior to the February, 2006 hearing. What did you know about these disputes at the time of the hearing?

RESPONSE: I do not recall what I knew about those disputes at the time of the February 6, 2006 hearing, as it happened more than eleven years ago.

2) Your positions *Burwell v. Hobby Lobby* and *Allstate Sweeping v. Black* seem to directly contradict each other. In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite—namely, that "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How do you reconcile the reasoning behind the two decisions, beyond the fact that in both of the cases you voted for results that weakened anti-discrimination protections?

RESPONSE: Please see the response to Senator Blumenthal's Question 9.

3) Under current law, what rights does Congress have to documents, materials, and testimony *vis a vis* claims of executive privilege?

RESPONSE: The Supreme Court has recognized the doctrine of executive privilege but also held that such claims may give way to competing interests. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 708 (1974). The exact dimensions and scope of executive privilege—especially vis-à-vis Congress—remain matters of controversy. As these and similar issues may come before me as a judge, it would not be proper for me to comment further on them. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

4) The media has circulated a photo of you and Justice Scalia on a fishing trip on the Colorado River.

    a) When and where did this trip take place?

RESPONSE: The picture was taken during a fishing trip in Colorado after Justice Scalia's delivery of the John Paul Stevens Lecture at the University of Colorado Law School on October 1, 2014.

    b) Did you and Justice Scalia use your own funds to pay for the trip? If not, who paid for the trip?

RESPONSE: I paid my own expenses. I do not know who paid Justice Scalia's.

    c) Who else joined you?

RESPONSE: To my recollection, other judges and one of the Justice's former law clerks joined us.

    d) Did you take other sporting or vacation trips with him or the other Justices of the Court?

RESPONSE: Other than travel associated with visits to Tenth Circuit Judicial Conferences and other professional events, such as the UK-US Legal Exchange, I do not recall other sporting or vacation trips with Justice Scalia or other Justices of the Court.

5) On Question 26 of your Judiciary Committee Questionnaire, you described your experience in the selection process and listed all interviews or communications with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign. Question 26 also asked you to list any interviews or communications with outside groups at the behest of the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign.

    a) You indicated that you communicated with Leonard Leo on December 2, 2016 and the week following January 6, 2017. Please provide more information circumstances (how those calls were arranged, who else participated) and content of your communications with Mr. Leo.

b) Did you have any addition communication with Mr. Leo? If so, please describe the date and contents of the communication.

c) You did not list any communication with outside groups. Is that answer still accurate? If you have communicated with outside groups, please list the names of groups, the representatives involved, the dates of the communications, and the contents of the communications.

d) Did any outside groups assist in preparing you for your Senate Judiciary Committee hearing? If so, which groups?

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family.

6) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

   a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?

   b) Does "corruption" only encompass quid pro quo corruption?

   c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

RESPONSE: In *Buckley v. Valeo*, the Supreme Court found that concerns regarding *quid pro quo* corruption, or the appearance of such corruption, were sufficiently important to permit limitations on some contributions. 424 U.S. 1, 26-28 (1976). In *Buckley*, the Supreme Court considered whether contribution limits added anything beyond bribery laws. On this point, the Court observed that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 27-28. Please also see the response to Senator Leahy's Question 13.

7) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

   a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?

   b) Does "corruption" only encompass *quid pro quo* corruption?

c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

RESPONSE: Please see the response to Question 6.

8) What is the originalist argument that *Brown vs. the Board of Education* was correctly decided?

RESPONSE: As I have stated during my testimony, "*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.*" As I further stated during my testimony, "Justice Harlan got the original meaning of the Equal Protection Clause right the first time, and the Court recognized that belatedly. It is one of the great stains on the Supreme Court's history that it took so long to get to that decision."

9) You currently serve as the Chair of the Advisory Committee on Appellate Rules for the Judicial Conference of the United States. As you may know, Judges David Campbell and John Bates, who are the Chairs of the Judicial Conference Rules of Practice and Procedure Committee and the Advisory Committee on Civil Rules, respectively, recently wrote letters urging Congress not to enact legislation that would make changes to the Federal Rules of Civil Procedure. Judges Campbell and Bates raised serious concerns about Congress circumventing the Rules Enabling Act, which Congress itself wrote and which is intended to ensure that the Federal Rules are amended only after broad public participation and careful review by judges, lawyers and experts. The Judges wrote:

> The Rules Enabling Act charges the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. The Rules Committees undertake extensive study of the rules, including empirical research, so that they can propose rules that will best serve the American justice system while avoiding unintended consequences … The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act.

As a senior member of the Judicial Conference, do you agree that Congress should not directly amend the Federal Rules of Civil Procedure and whether the procedures established by the Rules Enabling Act are preferable to congressional enactment?

RESPONSE: Respectfully, I do not speak for the Judicial Conference, and I do not believe it is appropriate for me as a nominee to opine on questions of Conference policy.

10) You said that no one asked you about your position on *Roe v. Wade* or abortion *after* the election. Did anyone associated with the Trump Campaign or an interest group ask about your position regarding *Roe v. Wade* or the legality of abortion *prior* to the election?

RESPONSE: Not to my recollection. As I testified at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

11) You repeatedly cited the *Youngstown* case and its reasoning and holding, yet under questions in front of the Judiciary Committee, you refused to discuss the reasoning and holding of other cases. How do you justify discussing one case and not another?

RESPONSE: Respectfully, during the hearing I discussed the reasoning and holdings of many cases besides *Youngstown*. For example, in addition to discussing at length the cases I have written or joined in the Tenth Circuit (*e.g.*, *Gutierrez-Brizuela v. Lynch* and *TransAm Trucking v. Administrative Review Board*), I discussed the reasoning and holdings of several Supreme Court decisions—including *Myers v. United States*, 272 U.S. 52 (1926) (Mar. 22 Hrg. Tr. 232:21-233:4); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Mar. 22 Hrg. Tr. 232:21-233:4); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (Mar. 22 Hrg. Tr. 233:5-234:17); *Roe v. Wade*, 410 U.S. 113 (1973) (Mar. 21 Hrg. Tr. 104:25-105:19); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Mar. 21 Hrg. Tr. 104:25-105:19); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Mar. 21 Hrg. Tr. 348:24-350:2); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Mar. 21 Hrg. Tr. 348:24-350:2); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Mar. 21 Hrg. Tr. 350:8-20); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Mar. 21 Hrg. Tr. 350:8-20); *Employment Division v. Smith*, 494 U.S. 872 (1990) (Mar. 21 Hrg. Tr. 132:18-133:9); *United States v. Jones*, 132 S. Ct. 945 (2012) (Mar. 21 Hrg. Tr. 52:18-53:8); *Kyllo v. United States*, 533 U.S. 27 (2001) (Mar. 21 Hrg. Tr. 219:12-21); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Mar. 21 Hrg. Tr. 219:12-21); *United States v. Booker*, 543 U.S. 220 (2005) (Mar. 21 Hrg. Tr. 219:12-21); *Crawford v. Washington*, 541 U.S. 36 (2004) (Mar. 21 Hrg. Tr. 219:12-21).

Hearing before the Senate Committee on the Judiciary
The Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court
Questions for the Record Submitted by Senator Al Franken

Questions for Judge Gorsuch:

Question 1: I'd like to discuss the use of class action waivers, which are often included in forced arbitration clauses. When companies pair forced arbitration clauses with class action bans, they close the courtroom doors to individuals with small claims and shield themselves from liability.

Between 2010 and 2014, the New York Times found that only 505 consumers went to arbitration over a dispute of $2,500 or less. Verizon, for example, which has more than 125 million subscribers, faced only 65 consumer arbitrations in those five years. Time Warner Cable, which – at the time – had 15 million customers, faced just seven.

It's not that there were so few arbitrations because customers were suddenly satisfied with their telecom providers. Rather, there are so few arbitrations because consumers probably realized that they would spend far more money pursuing an individual claim in arbitration than they could ever hope to recover – and that's only if they beat the odds and actually ended up winning.

In fact, I'd suggest that there is perhaps no industry that Americans are more dissatisfied with than their internet, TV, and cell phone providers. And that's not without reason. Here are two quick examples. Last month, the New York Attorney General filed a lawsuit against Charter and its subsidiary Time Warner Cable, claiming that the company quote "conducted a deliberate scheme to defraud and mislead New Yorkers by promising internet service that they knew they could not deliver" end quote. And last year, after it received 1,000 customer complaints, the FCC fined Comcast the largest penalty in agency history for charging its customers for services and equipment that they didn't ask for.

- Judge Gorsuch, is asking hundreds, or thousands, or millions of consumers who have all been impacted by the same illegal practice to each go it alone against a powerful corporation in arbitration really a viable alternative to class actions – especially when they have little to no hope of recovering enough to justify the costs of bringing the claim?

RESPONSE: As we discussed during the hearing, in passing the Federal Arbitration Act in 1925 Congress "expressed a preference that people should arbitrate their disputes. [Congress] made a judgment, [a] policy judgment, in favor of arbitration because it is quicker, cheaper, easier for people." And "[i]f Congress thinks that the courts are not applying the Federal Arbitration Act as it wishes or if it wishes to revise or eliminate the Federal Arbitration Act," it may of course do so.

- During the hearing, you openly discussed the expenses associated with litigation in the context of the article you wrote. Isn't one way to address the expenses through class actions? And haven't forced arbitration clauses that include class action bans eroded one critical method for individuals to achieve access to affordable justice?

RESPONSE: As we discussed during the hearing, and as I have recognized in my writings, access to affordable justice in this country is a serious problem. During the hearing, I mentioned findings suggesting that approximately 80 percent of the members of the American College of Trial Lawyers report that pretrial delays and costs keep injured parties from bringing valid claims to court and about 70 percent of members say that cases are settled on the basis of litigation costs rather than the merits. Class actions can serve a valuable function in protecting consumers and investors. Please see also the response to Question 20 of Senator Hirono's questions for the record.

Question 2: Judge Gorsuch, as an antitrust professor, I imagine you have an interesting perspective on the effect of the Supreme Court's decision in Italian Colors. This is the case of a group of small business owners – led by Italian Colors, a restaurant in Oakland, California – that sued American Express, alleging the company violated antitrust law when it charged excessive processing fees for its credit cards. Typically, vendors that accept American Express charge cards also must accept American Express credit cards. And because American Express has monopoly power with respect to charge cards, vendors have little choice but to accept those cards and, with them, American Express' credit cards. So Italian Colors alleged that American Express used this monopoly power to force small businesses into accepting American Express products they otherwise would not have.

It turns out that in addition to requiring that vendors accept its credit cards, American Express also required vendors to accept an arbitration agreement as part of doing business with them. This agreement not only prohibited vendors from taking any disputes to court but also preventing them from forming a class.

Nobody involved in this case disputed the fact that the cost of pursuing Italian Colors' individual claim far exceeded its possible recovery. So it was up to the Supreme Court to decide whether the arbitration clause preventing Italian Colors from forming a class was enforceable under the Federal Arbitration Act, given that enforcing it would effectively prevent Italian Colors – and the rest of the small businesses – from vindicating their rights under the nation's antitrust laws. The Court ultimately sided with American Express and essentially held that the Federal Arbitration Act, which favors enforcement of arbitration agreements, trumps the goals of all other federal statutes, including the antitrust laws.

- Judge Gorsuch, setting aside whether the Court made the right call in *Italian Colors*, how – in your view – has this decision impacted private antitrust enforcement?

- Or, put another way, do you agree that there is value in private antitrust enforcement – that it serves complementary role to federal and state efforts aimed at combatting anticompetitive conduct? And do you think the *Italian Colors* decision has made it harder for individuals – and for small businesses – to challenge monopolistic conduct under the nation's antitrust laws?

RESPONSE: In *American Express v. Italian Colors* (2013), the Supreme Court held that, under the terms of the Federal Arbitration Act, courts cannot invalidate a contractual waiver of class arbitration solely because the plaintiff's cost of individually arbitrating a federal statutory claim is greater than the plaintiff's potential recovery. As I noted during the hearing, Supreme Court precedents interpreting acts of Congress invariably have effects. It is for Congress to assess the nature of the effects of any particular judicial decision and to legislate if it deems appropriate.

Question 3: I have serious concerns about AT&T's proposed acquisition of Time Warner and how it could impact Americans' access to information. When the same company owns the programming and controls the pipes that bring us that programming, we have a problem – especially, I believe, when the programming in question is the news.

In this case, a combined AT&T-Time Warner would have both the ability and incentive to favor its own news network, CNN, over competing news networks – say Fox News, for example. And as a result, AT&T could control where its 25 million subscribers get their information and could ultimately restrict its viewers' access to alternative viewpoints.

We've seen this happen before. Soon after it purchased NBCUniversal, Comcast placed MSNBC and CNBC – its newly acquired channels – in favorable locations on the Comcast channel lineup while relegating competing networks – like Bloomberg News – to an undesirable location. It took two years – and a protracted battle at the FCC – for Comcast to finally end its anticompetitive treatment. And we may never know exactly how Bloomberg's viewership was impacted in the meantime.

I'm interested in the ways that the Supreme Court can impact Americans' access to information. 70 years ago, in United States v. Associated Press, the Supreme Court found that the First Amendment supported aggressive antitrust enforcement. Justice Black wrote, "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

- Would you agree that one of the purposes of the First Amendment is to ensure that the government doesn't make decisions that silence citizens or restrict Americans' access to diverse viewpoints?

RESPONSE: Without expressing any views on the proposed acquisition, I agree that one of the purposes of the First Amendment, as interpreted by the Supreme Court, is to ensure free speech and access to diverse viewpoints.

- Would you agree that antitrust law should protect against mergers or other anticompetitive conduct that results in depriving citizens' access to news and the free expression of information?

RESPONSE: I agree that the antitrust laws serve to protect against mergers and other conduct with anticompetitive effects.

Question 4: In January, after AT&T and Time Warner confirmed that they would be structuring their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have been required to send to the FCC – a document that essentially demonstrates why they believe the deal promotes competition and benefits consumers.

While I'm glad they responded to me, their response does little to address my concerns and essentially asks American consumers to trust that the combined company won't engage in anticompetitive behavior, raise prices, violate the principles of net neutrality, or decrease access to diverse voices. The letter also suggested that the deal raises no competitive concerns because it is vertical in nature – meaning the companies don't currently compete head-to-head – and that the government rarely seeks to block vertical mergers. Top execs from AT&T and Time Warner wrote, "[the government] typically permits such mergers to proceed, imposes conditions to address any competitive risks, and narrowly tailors those conditions to avoid undermining the mergers' consumer benefits. Yet this merger presents no such risks at all."

We've seen the risks before, and we've seen just how successful these merger conditions have been the past. In the years since the Comcast-NBCUniversal deal was completed, the combined company has faced complaint after complaint for engaging in anticompetitive behavior and not complying with conditions that the FCC and DOJ imposed on the transaction.

- Judge Gorsuch, can vertical mergers violate antitrust law? Do you subscribe to the view that all or almost all vertical integration is efficient?

RESPONSE: There is limited case law regarding vertical mergers, but the Supreme Court has recognized that vertical mergers can violate antitrust law under certain circumstances in, for example, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). To the extent your questions ask me to take a position that would implicate issues that may come before me as a judge, I respectfully cannot comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

- Do you agree that one company controlling both the programming and the pipes creates incentives for that company to engage in anticompetitive behavior? And if you'd rather not discuss the pending deal, you can reference Comcast-NBCUniversal – a deal that was completed six years ago.

RESPONSE: Your question implicates issues that remain in dispute and that may come before me as a judge, and therefore I respectfully cannot comment beyond what I have offered above.

Question 5: In Novell, you established a pretty high standard for plaintiffs to meet in refusal-to-deal cases – or cases where monopolists harm their rivals by cutting off or restricting their access to the market. You held that in order to find a violation of Section 2 of the Sherman Act, a plaintiff must prove that the monopolist's alleged misconduct resulted in short-term profit losses

and were irrational except for the anticompetitive effect. Meaning essentially that as long as the monopolist has a reasonable business rationale, they're totally off the hook regardless of how bad it is for competition.

In this decision, you relied heavily on the Supreme Court's decision in *Verizon v. Trinko*, in which Justice Scalia explained that there are very few exceptions from the proposition that there is no duty to aid competitors.

- Judge Gorsuch, today, Sherman Act Section 2 cases are rare – and successful ones are even rarer. Why do you think that is? Is it because there are no monopolies? Or is it just that they're all perfect actors?

RESPONSE: As a federal circuit court judge, I am bound by the precedent of my own court and the Supreme Court. In *Novell v. Microsoft*, I relied on applicable precedent, such as *Trinko*, in holding that Novell had not met its burden of proof that Microsoft's conduct was unlawful. Government officials and private parties decide whether to bring claims under Section 2 of the Sherman Act based on their assessment of the facts and law in particular cases. As a private lawyer and with colleagues I successfully pursued what was at the time, I am told, the largest sustained Section 2 verdict in U.S. history.

- I am increasingly concerned about internet giants that use their positions as dominant media platforms to stifle competition and inhibit the free flow of ideas. In recent years, we've heard countless allegations of online platforms exercising their market power to the detriment of content creators and innovative startups. Google has favored its own products and services in search results while downgrading competitors' products and services. I've also heard from photographers in Minnesota that Google may be taking original content from their distributors' websites without appropriate compensation or attribution. Apple is preventing its competitors in the music streaming market from promoting lower prices to consumers on Apple iOS. And Amazon is using its dominance in the book market to impose unfair contractual terms on publishers and authors.

  Judge Gorsuch, in your view, should courts ever consider how the unilateral behavior of a monopolist might affect the free flow of ideas and content?

RESPONSE: Section 2 of the Sherman Act seeks to address anticompetitive conduct by monopolists, including unilateral conduct. Respectfully, I cannot comment on the particular disputes you discuss for they or similar matters may come before me as a judge.

Question 6: During the hearing, you repeatedly said that you simply read the law as it is written. But *how* you read the law is of utmost important. For example, in antitrust law, there are at least two different philosophies as to how to read the laws. Senator Sherman and Justice Brandeis as well as many others believed the goals of antitrust should be fundamentally political – such as the preservation of individual liberty and the protection of democratic institutions from concentrated power. Robert Bork and many other members of the "Chicago School" of economics believe we should view antitrust as a sort of scientific endeavor, the main goal of which should be economic efficiency, even if the result is extreme concentration of power.

- How would you describe your own philosophy on antitrust law?

RESPONSE: As we discussed at the hearing, in deciding cases that come before me, including antitrust cases, I make an effort to apply the law to the facts as impartially as I can, without respect to persons, affording equal right to the poor and rich based on the particular law and the facts applicable to the case at hand.

Question 7: I strongly disagree with the Supreme Court's ruling in *Citizens United*, which I mentioned to you in our meeting. Recent polling suggests that the decision is deeply unpopular with the American people as well. Part of the reason I think this opinion is held in such low regard is because in several important respects, the Court fundamentally misunderstood how the American public perceives our politics.

One of the conclusions that the Court came to in *Citizens United* was that outside money simply does not, quote "give rise to corruption or the appearance of corruption." I understand that polls and public opinion don't factor into a court's decision-making process, but I think by acknowledging that the appearance of corruption is something to be avoided, the Court also acknowledged that the public's perception really does matter.

It matters because even just the *appearance* of corruption could cause people to lose faith in our democracy. The majority in *Citizens United* recognized that this was something to be concerned about. But the majority maintained that even with outside money pouring into our elections, the public would still have faith in our system because they would *know* where the money was coming from. Here's what Justice Kennedy said, writing for the majority, quote:

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."

Part of the reason I find this so galling is that it simply does not reflect the reality that we experience in the wake of this decision. According to the Brennan Center for Justice, groups that hide the identities of their donors spent more than $800 million on federal races in 2016 alone. Let me say that again: $800 million.

- Do you agree that the election-related spending made possible by the *Citizens United* decision is capable of creating the appearance of corruption?

Money is pouring into our elections. We don't know where a lot of it is coming from. And the public thinks it stinks—Republicans and Democrats alike. As I said in my opening statement, our country is confronting a critical moment in our history. The American people's trust in our government and our institutions is in a freefall. I firmly believe that *Citizens United* is one of the

root causes of that deepening distrust. I believe that *Citizens United* had a very real effect on the ability of the people's representatives to do their jobs.

One example is especially relevant today to your nomination. In March of last year, less than a week after Merrick Garland had been nominated to the Supreme Court, one of my Republican colleagues told a group of constituents that he thought the Senate should move forward and hold a hearing on Merrick Garland's nomination. Speaking at a town hall, he said, quote "I would rather have you complaining to me that I voted wrong on nominating somebody than saying I'm not doing my job. I can't imagine the president has or will nominate somebody that meets my criteria, but I have my job to do. I think the process ought to go forward."

That quote was later published in a local newspaper. This senator never committed to voting for Garland. He merely said that the Senate should do its job and hold a hearing. But that was all it took to draw the attention of well-funded groups willing to dump millions of dollars into his next race. The groups threatened to run ads against him and fund a candidate to challenge him in the primary. As a result, he changed his position. The episode sent a clear signal to every member of the Senate, and it prevented the Senate from fulfilling one of its core functions. When people say the system is rigged, this is exactly what they are talking about.

I think the courts have an important role to play in ensuring the integrity of our democracy. I think that a big part of their job is making sure that our elections are free and fair. But in order to do that, courts need a clear-eyed view of the facts on the ground. The *Citizens United* majority didn't have that.

- In your view, what should a judge do when it becomes clear that the assumptions supporting a case like *Citizens United* prove wrong?
- You've said that a judge is supposed to decide cases on the facts and the law alone—what do the facts available now tell you about the majority's reasoning in *Citizens United*?

RESPONSE: In *Citizens United v. FEC* (2010), the Court held that certain restrictions on corporate and union independent expenditures could not be justified by reference to the Government's interest in preventing *quid pro quo* corruption, or the appearance of such corruption, which had been recognized as a sufficient interest to justify previous restrictions on certain types of political speech. *See Buckley v. Valeo* (1976). In approaching a case that might seek to revisit precedent, the Court would look to the various factors we discussed at the hearing. A judge would also examine the details of the case before him or her, looking at the record with deference to the fact-finder, examining the briefs, and carefully considering the arguments of the parties. I respectfully cannot comment beyond that because the matters discussed in this question may come before me as a judge. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 8: I would like to better understand your views of the disparate impact standard. Generally speaking, disparate-impact claims allow a plaintiff to establish liability in a discrimination case where it can be established that a certain practice has a disproportionate

impact on individuals who belong to a protected class, such as sex, race, color, national origin, or other characteristics. In other words, where a practice has a discriminatory *effect*, even if such a practice was not motivated by a discriminatory *intent*, a plaintiff bringing a discrimination claim may nonetheless establish liability.

- In your view, do our federal civil rights laws, including but not limited to Title VII and the Fair Housing Act, permit disparate impact claims?

RESPONSE: In *Ricci v. DeStefano* (2009), the Supreme Court confirmed that Title VII of the Civil Rights Act, as amended in 1991, which prohibits discrimination because of race, color, religion, sex, or national origin, provides a disparate-impact cause of action. In *Smith v. City of Jackson* (2005), the Supreme Court held that disparate-impact claims are cognizable under the Age Discrimination in Employment Act. More recently, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (2015), the Supreme Court held that the Fair Housing Act—Title VIII of the Civil Rights Act of 1968—prohibits certain actions that have a disparate impact on a protected class.

- Do you agree with the reasoning in Justice Scalia's *Ricci v. DeStefano* concurrence? If so, how?

- In your view, are civil rights statutes that prohibit disparate impact discrimination, including but not limited to Title VII and the Fair Housing Act, in tension with the Equal Protection Clause? If so, how?

RESPONSE: Respectfully, the holding of the majority opinion in *Ricci v. DeStefano* is the controlling precedent of the United States Supreme Court, not the concurrence. And to express a personal view agreeing or disagreeing with the concurrence or commenting further would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 9: I would like to better understand your views on federal Indian law and tribal sovereignty. I am one of only two members of the Judiciary Committee who also serves on the Indian Affairs Committee.

One case that reached the Supreme Court in the last term involved a Native American boy who was sexually assaulted by a non-Indian, who managed a store owned by non-Indians on Indian land. There is also a serious problem of non-Indians perpetuating domestic violence and sexual assault against Native American women on reservations. Additionally, there are numerous jurisdictional disputes that arise around business transactions, regulatory authority, and non-violent criminal offenders that involve non-Indians in Indian Country.

- What is the appropriate legal framework for determining whether a tribe has jurisdiction over a non-Indian in Indian Country, both in the civil and criminal context?

- What has been your impression of tribal court systems in general? Do you think that litigants in tribal courts, both Indians and non-Indians, have their rights adequately protected?

- What, if any, Constitutional limitations do you think there are on a tribe's civil or criminal jurisdiction over non-Indians?

RESPONSE: Respectfully, I refer you to my record as a judge in the Tenth Circuit, including *Fletcher v. United States*, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*.

Nomination of Judge Neil M. Gorsuch to be Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR COONS

1. Several recent Supreme Court cases have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record as well as relevant U.S. case law and practices in cases addressing capital punishment under the Eighth Amendment and privacy of same-sex intimacy under the Fourteenth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Is it your contention that foreign court decisions and foreign practices of democratic countries that follow the rule of law cannot be considered and cited in opinions interpreting the Constitution?

RESPONSE: As we discussed at the hearing, it is not categorically improper to cite international law in judicial opinions and there are circumstances when it is necessary and proper to do so. At the hearing we discussed some but by no means all examples, such as when a judge may need to interpret a contract with a choice-of-law provision that may adopt a foreign law or when a treaty, by its terms, requires a judge to look at international law.

2. From documents obtained during your tenure at the Department of Justice, it appears that you were directly involved in work leading to the enactment of the Detainee Treatment Act of 2005 on behalf of the administration, as well as in discussions about whether President Bush should append a signing statement to the bill and what the statement should say.
    a. If a case concerning this act and/or President Bush's signing statement came before the Supreme Court, would you recuse yourself from hearing the case?
    b. What standard or standards would you consult when making this determination?

RESPONSE: As I stated in my Senate Judiciary Committee Questionnaire, if confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest. I would apply the same standards in determining whether I should recuse from any case, including a case concerning the Detainee Treatment Act or President Bush's signing statement accompanying the Act.

3. In one document released to the Senate Judiciary Committee, you wrote by hand "Yes" next to a typed question asking, "Have the aggressive interrogation techniques used by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?"
    a. When you wrote this note, what did you understand to constitute "aggressive interrogation techniques"?

b. During your tenure at the Department of Justice, what actions, if any, did you take to defend the use of "aggressive interrogation techniques"?
c. Do you believe that "aggressive interrogation techniques" work to yield valuable intelligence?
d. Is it legal for U.S. officials to torture individuals?
e. Is it legal for the President to authorize the use of torture based on a claim of national security?
f. Would the President's authorization of the use of torture be within the scope of judicial review?

RESPONSE: I do not currently recall the specific context of the document you reference in your question. As I said at the hearing, my recollection of events from approximately 12 years ago is that the handwritten answer on the document reflected the position that clients had represented to lawyers at the Department of Justice. As we discussed at the hearing, torture, as well as cruel, inhuman, and degrading treatment, is expressly prohibited by law, and no person is above the law.

4. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures. In your hearing you said, "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."
   a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?
   b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?
   c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

RESPONSE: As I said at the hearing in response to Senator Klobuchar, if confirmed I would commit to give a careful consideration to the practice of the Supreme Court on these questions, and I would want to hear what my colleagues have to say. In addition, as I stated in my Senate Judiciary Committee Questionnaire, if confirmed I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

5. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. You have written about the importance of access to justice, effective representation of capital defendants, and the challenges that many parties face in obtaining affordable representation. Please describe every pro bono matter you worked

on during your time in private practice.

RESPONSE: While in private practice, my colleagues and I took on various matters for clients that could not afford the firm's normal hourly rate. In these cases, the firm's fees were modified, were made subject to contingency arrangements, or were waived to allow the client to obtain legal representation. As a judge, I have sought to advance these same interests, including my work on the rules committees, and on our circuit's efforts to enhance representation for death row inmates. Please see also the response to Question 20 of Senator Hirono's questions for the record.

6. Prior to the commencement of your nomination hearing, the Committee received two letters from former students that concern me. In these letters, the students describe their recollection of one session of your Spring 2016 legal ethics class. These letters assert that, following a lively class discussion about work-family balance and the difficulties of law school debt for students of all genders, you asked students about their personal knowledge of women using maternity benefits provided by a law firm and then leaving the law firm shortly thereafter. These letters assert that you told the class that law firms and other companies should ask female interviewees about pregnancy plans in order to protect the employer from financial loss, and that it is legal for companies to do so. Title VII protects against discrimination on the basis of pregnancy, childbirth, and sex, and asking a candidate for employment about her plans to become pregnant or have a family can be used as evidence in a discrimination case.
    a. Please recount everything you recall concerning the conversation you had with your Spring 2016 legal ethics class on April 19, 2016.

RESPONSE: I respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

    b. Do you think it is ever acceptable for a professor or a judge to suggest that employers should ask about family planning in a job interview?

RESPONSE: I have not done so and respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

7. You have used descriptions of substantive due process that include "very much uncharted," "more than a little 'open ended,'" "murky," and something with a "paradoxical name." Given the complexity of this area of law, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
    a. Would you consider whether the right is expressly enumerated in the Constitution?
    b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?
    c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?
    d. Would you consider whether a similar right has previously been recognized by

Supreme Court or circuit precedent?

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

f. What other factors would you consider?

RESPONSE: As discussed at the hearing, some of the descriptions of the doctrine you cite at the outset of your question come from Supreme Court cases. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"); *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Respectfully, the questions posed here may come before me as a judge. Accordingly, I can promise no more than that I will endeavor to follow the law as faithfully as I am able. To offer more would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

8. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has exclusive jurisdiction over appeals from civil actions involving claims "arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. Because you have been at the Court of Appeals for the Tenth Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to appear before you. What specific patent law experience (such as in private practice, other governmental service, or as an inventor/entrepreneur) would you bring to bear when considering these cases?

RESPONSE: During my service as Principal Deputy Associate Attorney General at the Department of Justice, I had a supervisory role over litigating components that were involved in various kinds of intellectual property litigation. As a judge, I have participated in intellectual property cases, though of course not patent cases which, as you note, proceed to another circuit.

9. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. "Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to 'provide nationwide uniformity in patent law.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97–312, p. 20 (1981)).
    a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?
    b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?
    c. Resolving circuit splits is often viewed as one of the Supreme Court's core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is

the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

RESPONSE: Pursuant to Rule 10 of the Supreme Court Rules, a writ of *certiorari* is granted for "compelling reasons." Some factors that might indicate whether further review is warranted of a decision of the Federal Circuit include tension with Supreme Court decisions, the presence of intra-circuit conflicts, and the importance of the case.

10. During your nomination hearing, you spoke frequently about the "reliance interest" that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

RESPONSE: As we discussed at the hearing extensively, when evaluating precedent a judge must analyze multiple factors, and reliance often may be an important one. On this score, I also respectfully refer you to the book I coauthored, the *Law of Judicial Precedent*.

11. During your nomination hearing, we had an exchange about your concurrence in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). I raised my concern that your characterization of the role of "complicity" in the context of determining whether a person is entitled to object to a facially neutral law under the Religious Freedom Restoration Act ("RFRA") could be expanded to allow the religious views of a few to impact the liberty interests of many, since it allows for religious objections based on the actions and choices of others. Following up on our exchange, please answer the following questions:
    a. Does the characterization of "complicity" in this question comport with what you meant when you used that term in your *Hobby Lobby* concurrence?

RESPONSE: Respectfully, I used that term when describing the claimant's assertion of a sincerely held religious belief, a statutorily prescribed consideration under the Religious Freedom Restoration Act (RFRA). As we discussed at the hearing, the same concept was discussed in *Thomas v. Review Bd. Of the Indiana Employment Security Division*, 450 U.S. 707 (1981), where a Jehovah's Witness sincerely believed that directly participating in the production of armaments made him complicit in their use in a way that violated his sincerely held religious belief. Of course, whether a law substantially burdens a sincerely held religious belief is only the first part of the RFRA analysis. There is also a second part: If a law substantially burdens such a belief, the government may show that the denial of an accommodation is the least restrictive means of furthering a compelling government interest.

    b. Can any level of support that an individual finds to be objectionable constitute complicity?

RESPONSE: Respectfully, whether a particular individual can show a substantial burden on a sincerely held religious belief under the Religious Freedom Restoration Act depends on the particular facts of each case.

c. Can a court ever inquire into how remote this support is to determine whether a RFRA claim based on "complicity" exists, even if the claim is based on a sincerely held religious belief that the legally mandated conduct requires "complicity . . . in the wrongdoing of others"?

RESPONSE: Please see the response to Question 11(b).

12. You wrote that judges should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be . . . ." You told Sen. Feinstein that it does not matter that "some of the drafters of the Fourteenth Amendment were racists, because they were, or sexist, because they were. The law they drafted promises equal protection of the laws to all persons. . . . And equal protection of laws does not mean separate in advancing one particular race or gender. It means equal."
    a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

RESPONSE: As I have stated during my testimony, *Brown v. Board of Education* overturned the deeply erroneous decision of *Plessy v. Ferguson.* It took many years—almost 60 years—for the Supreme Court to recognize that Justice Harlan in his dissent in *Plessy* got the original meaning of the Equal Protection Clause right the first time. It is one of the great stains on the Supreme Court's history that it took so long to get to the *Brown* decision.

b. How do you respond to the criticism of your approach that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited Mar. 24, 2017).

RESPONSE: Respectfully, I am not familiar with this article.

c. How does your approach to judicial interpretation lead you to conclude that "equal" applies to equality across race *and gender*, even though the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction?

RESPONSE: As I discussed with Senator Feinstein at the hearing, the Fourteenth Amendment as drafted promises equal protection of the laws to all persons. The original meaning of those words, as captured by Justice Harlan in his dissent in *Plessy v. Ferguson*, is that equal protection of laws means just that—equal.

d. If the Fourteenth Amendment has always required equal treatment of men and women, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515, that states were required to provide the same educational opportunities to men and women?

RESPONSE: Whatever the reason, as I stated above the Fourteenth Amendment means equal protection of the law for all persons.

e. Does the Fourteenth Amendment require that states treat gay and lesbian couples equally to heterosexual couples? Why or why not?

RESPONSE: In *Lawrence v. Texas* and *Obergefell v. Hodges*, the Supreme Court held that gay and lesbian couples have a constitutionally protected right to engage in consensual sexual relations and to marry.

f. Does the Fourteenth Amendment require that states treat transgender people equally? Why or why not?

RESPONSE: This question appears to reference pending or impending cases likely to come before the Supreme Court, and accordingly it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

13. Chief Justice Warren wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This approach explicitly calls on the Court to not limit its Eighth Amendment analysis to the meaning of "cruel and unusual punishments" when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Under this evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.
    a. Under your judicial approach described above, what is meant by the Eighth Amendment's prohibition against "cruel and unusual punishments"?
    b. Does the phrase "cruel and unusual punishments" have the same meaning from the Eighth Amendment's ratification in 1791 until now, or has our understanding changed?
    c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes "cruel and unusual punishments"?

RESPONSE: The Supreme Court has issued several opinions discussing the Eighth Amendment and how it should be interpreted. Recently in *Miller v. Alabama*, 132 S. Ct. 2455

(2012), the Court has reaffirmed the view that the Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Id.* at 2463 (citation and quotation marks omitted). That right, the Supreme Court has instructed, "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id.* The Supreme Court also has stated that it views the concept of proportionality according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (citing *Estelle v. Gamble,* 429 U.S. 97 (1976) (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (plurality opinion)).

14. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage about the purported negative impact of such marriages on children.
    a. When is it appropriate to consider evidence that sheds light about our changing understanding of society?

    b. What is the role of sociology, scientific evidence, and data in the Supreme Court's analysis?

RESPONSE: Whether and what sociology, scientific evidence, and data a court should consider are questions that are often contested in litigation. I am unaware of a global answer to these questions. A judge can only take each case on its facts and in light of applicable law.

15. In *Prost v. Anderson*, 636 F.3d 579 (10th Cir. 2011), you authored a majority opinion holding that federal prisoners whose convictions have been undermined by a later Supreme Court decision construing the statute under which they were convicted may not invoke the "savings clause" of 28 U.S.C. § 2255(e) unless there are exceptional circumstances like the abolition of their sentencing court. Does your decision create a situation in which an actually innocent person could be in prison without any claim to habeas relief?

RESPONSE: In *Prost v. Anderson*, the Tenth Circuit sought to apply faithfully Congress's directions in 28 U.S.C. § 2255.

16. In *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), you dissented from a majority opinion holding that a defendant who had ineffective assistance of counsel was entitled to a more meaningful remedy than the one provided under state law. You wrote, "The Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, [the defendant] received just such a trial, at the end of which he was convicted of first degree murder by a jury of his peers. We have no authority to disturb this outcome." *Id.* You said the defendant

"would have us follow him through the looking glass, to a world where a fair trial is called 'prejudice'; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer's incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there." 571 F.3d at 1110. If your dissent had been the majority opinion, would it be the case that any defendant receiving inadequate assistance of counsel on a plea agreement who subsequently has a "fair" trial would not have a remedy for the ineffective assistance of counsel claim?

RESPONSE: In *Williams v. Jones*, I suggested that a defendant cannot demonstrate prejudice from a claim of ineffective assistance of counsel in the pretrial plea bargaining process if he is later convicted after a trial he concedes was fair. The Supreme Court in *Lafler v. Cooper* and *Missouri v. Frye* later addressed this question, and these decisions are the controlling precedent.

Questions for the Record for Judge Neil Gorsuch
Senator Richard Blumenthal
March 24, 2017

1. During his hearing, Chief Justice Roberts said, "I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy."

    a. **Do you, like Chief Justice Roberts, believe that the liberty protected by the Due Process Clause includes the right to privacy?**

RESPONSE: As I testified, I agree that the Supreme Court has long recognized that the liberty prong of the Due Process Clause protects privacy interests in a variety of ways.

    b. **When I asked whether you agreed with Chief Justice Roberts' stated agreement with the result in *Brown v. Board of Education*, you said, "There is no daylight here." Is there any "daylight" between your views and his stated belief that the liberty protected by the Due Process Clause includes the right to privacy?**

RESPONSE: I am unaware of daylight between my discussion of the Supreme Court's precedents and the Chief Justice's.

2. In your book, *The Future of Assisted Suicide and Euthanasia*, you wrote that "one might ask: . . . How does substantive due process differ from outright judicial choice, or what is sometimes derisively labeled 'legislating from the bench'? . . . [D]oes . . . holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments . . . stretch the clause beyond recognition?"
    a. **How would you answer these questions**?

RESPONSE: I did not attempt to answer these questions in my book; they were outside the scope of that project, which took existing legal doctrines as given.

3. During your hearing, you told me that you had "gone as far as I can go ethically, with the canons that restrict me, about speaking on cases. I cannot talk about specific cases, and I cannot get involved in politics."
    a. **Were you acting consistently with your ethical obligations when you told me *Brown v. Board of Education* "corrected one of the most deeply erroneous interpretations of law in Supreme Court history," that it was "a correct application of the law of precedent," and that there was no "daylight" between you and Chief Justice Roberts' stated agreement with the holding?**

RESPONSE: Respectfully, I believe this captures only some of my testimony, and I believe my testimony was consistent with my ethical obligations.

b. **If so, when I discussed cases other than *Brown* with you, why would you not say whether you agreed with any other case or thought any other case was correct?**

RESPONSE: As we discussed, my personal views are not relevant to my job as a judge. Expressing personal views would risk sending a mistaken signal to litigants that I would decide their cases on related matters on a basis other than the law and facts. It would also risk impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

c. **Was Chief Justice Roberts acting consistently with his ethical obligations when he said at his hearing that he agreed with the results in *Brown* and in *Griswold v. Connecticut*?**

RESPONSE: Respectfully, as I explained, I speak only for myself. I do not think it proper for me to attempt to characterize or comment on another judge's testimony. I do not and have not suggested that anyone has acted unethically.

4. During your hearing, you said that *Brown v. Board of Education* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."

a. **Is *Brown* an originalist opinion?**

RESPONSE: As I testified, *Brown* corrected a deeply erroneous decision and vindicated a dissent by the first Justice Harlan that correctly identified the original meaning of the Equal Protection Clause.

b. **Did the decision in *Loving v. Virginia* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: As I testified, *Loving* involves the Supreme Court's application of the principle recognized in *Brown* that all persons are created equal, and it is entitled to all of the respect due a precedent of the Supreme Court.

c. **Did the decision in *United States v. Virginia* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: As I testified, *United States v. Virginia* involved the Supreme Court's application of the principle that all persons are created equal, and it is entitled to all of the respect due a precedent of the Supreme Court.

d. **Did the decision in *Romer v. Evans* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: *Romer v. Evans* involved the Supreme Court's application of Fourteenth Amendment principles, and it is entitled to all of the respect due a precedent of the Supreme Court.

e. **Did the decision in *District of Columbia v. Heller* get the original understanding of the Second Amendment right?**

RESPONSE: As I testified, *Heller* involved the Supreme Court's interpretation of the Second Amendment to confer an individual right to keep and bear arms. It is entitled to all of the respect due a precedent of the Supreme Court.

5. During your hearing, you said that *Brown v. Board of Education* was "a correct application of the law of precedent."

a. **What did you mean by that?**

RESPONSE: As I explained, precedent is an important part of the rule of law in this country. Precedent has both intrinsic value, representing our collective history as a people, and instrumental value, enhancing the determinacy of the law. In the *Law of Judicial Precedent*, together with judges from around the country appointed by Presidents of both parties, we discussed a mainstream view on the application of judicial precedent. As outlined in that book, judges consider a number of factors in analyzing precedent, such as the age, reliance interests, and the workability of the precedent, among other things. *Brown* applied the law of precedent to correct one of the darkest stains in our constitutional history—*Plessy v. Ferguson*. The Equal Protection Clause promises equal protection of the laws to all persons. As Justice John Marshall Harlan recognized in his dissent in *Plessy*, the words of the Clause do not mean allowing separation to advance one particular race. They mean equal.

b. **Was the decision in *Griswold v. Connecticut* a correct application of the law of precedent?**

RESPONSE: As I testified, *Griswold v. Connecticut* guarantees married couples the use of contraceptives in the privacy of their own home. It is more than 50 years old, with obvious reliance interests and has been repeatedly reaffirmed—factors relevant to the weight of a precedent. As I testified, "I do not see a realistic possibility that a State would pass a law attempting to undo that."

c. **Was the decision in *Planned Parenthood v. Casey* a correct application of the law of precedent?**

RESPONSE: As we discussed, *Planned Parenthood v. Casey* reaffirmed the right to abortion as recognized in *Roe*. *Casey* is 25 years old, with obvious reliance interests, and has been reaffirmed—factors relevant to the weight of precedent.

d. **Like *Brown*, *Lawrence v. Texas* overturned a previous decision of the Supreme Court. Was the decision in *Lawrence* a correct application of the law of precedent?**

RESPONSE: As we discussed, *Lawrence v. Texas* is nearly 14 years old, with obvious reliance interests, and has been reaffirmed—factors relevant to the weight of precedent.

e. **During your hearing, you described *Plessy v. Ferguson* as "one of the most deeply erroneous interpretations of law in Supreme Court history." Was the decision in *Bowers v. Hardwick* a deeply erroneous interpretation of law?**

RESPONSE: As we discussed, in *Lawrence v. Texas*, the Supreme Court held that *Bowers* was incorrect when it was decided.

6. During your hearing, you said that *Eisenstadt v. Baird* "was an application of settled equal protection principles."
   a. **Was *Romer v. Evans* an application of settled equal protection principles?**
   b. **Was *Planned Parenthood v. Casey* an application of settled due process principles?**
   c. **Was *Lawrence v. Texas* an application of settled due process principles?**

RESPONSE: In *Romer v. Evans*, the Court held that a Colorado law violated the Fourteenth Amendment. In *Planned Parenthood v. Casey*, the Court stated that constitutional protection of the woman's decision to terminate a pregnancy derives from the Due Process Clause of the Fourteenth Amendment. And in *Lawrence v. Texas*, the Court rested on the liberty prong of the Due Process Clause. These decisions are entitled to all the respect due precedents of the Supreme Court.

7. During your hearing, you were willing to discuss how some of the factors involved in looking at precedent applied to prior cases. For example, you told me that when it comes to *Griswold v. Connecticut*, "the reliance interest surrounding it are obvious and many and great."
   a. **Are there obvious and many and great reliance interests surrounding *Loving v. Virginia*?**
   b. **Are there obvious and many and great reliance interests surrounding *Roe v. Wade* and *Planned Parenthood v. Casey*?**
   c. **Are there obvious and many and great reliance interests surrounding *Lawrence v. Texas*?**
   d. **Are there obvious and many and great reliance interests surrounding *Obergefell v. Hodges*?**
   e. **If your answer to part (a), (b), (c), or (d) of this question is anything other than "yes," why is that answer different from what you were willing to say of *Griswold*?**

RESPONSE: I agree that there are reliance interests implicated by each of those precedents.

8. In 1996, you were a named counsel on an *amicus* brief to the Supreme Court in *Washington v. Glucksberg*. The brief indicated that the Court should consider the "problems of legitimacy and line-drawing inherent in the Court's abortion rulings." I understand that you were writing a brief on behalf of a client and am not attributing the language to your personal beliefs, but I would like to know what you meant to convey with that argument.

a. **What did you mean by "problems of legitimacy . . . inherent in the Court's abortion rulings"?**
b. **What did you mean by "problems of . . . line-drawing inherent in the Court's abortion rulings"?**

RESPONSE: This sentence fragment is taken from a detailed and long brief prepared in my role as an advocate for a client, the American Hospital Association. That brief in full conveys the views of my client only.

9. You joined an opinion in *Allstate Sweeping LLC v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) holding that a corporation could not assert a hostile work environment claim under Section 1981 and the Equal Protection Clause because it could not show that it had the subjective feeling of being "offended." The opinion included the following language: "[I]t is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. . . . Being offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."
   a. **How is it possible for an artificial entity to express a sincere religious belief, as you held in *Hobby Lobby v. Sebelius*, but not have the feeling or thought of being offended?**

RESPONSE: *Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the "plaintiff was *offended*." A claim under RFRA has no such element. Rather, RFRA requires that "a person" be engaged in the "exercise of religion." The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a "person" to include corporations. In *Hobby Lobby*, the government conceded and the Supreme Court ultimately held that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

10. In your concurrence in *Hobby Lobby v. Sebelius*, you led with the statement, "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."
    a. **If an adoption agency seeks a RFRA objection from a statute that requires such agencies to be willing to place children with same-sex couples, does that implicate the "problem of complicity"?**

    b. **If a restaurant owner refuses to serve a same-sex couple because of a belief that homosexuality is sinful, does that implicate the "problem of complicity"?**

RESPONSE: Respectfully, these questions implicate matters that are live with dispute. As we discussed, I cannot express a view about a case or controversy that I might have to decide. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

11. In *Hobby Lobby v. Sebelius*, the opinion you joined held that the Affordable Care Act's birth control mandate was not the "least restrictive means" of accomplishing the government objective at issue because the government was able to provide the same accommodation to for-profit companies as it provided to religious employers.
    a. **What is your understanding of the state of the law regarding whether the "least restrictive means" the government must use needs to be practically possible or politically feasible? Could Congress's theoretical ability to pass a new law, or to appropriate new funds, to serve a government interest qualify even if there was no indication that Congress had moved to do so?**

RESPONSE: The Religious Freedom Restoration Act (RFRA) requires the government to identify the least restrictive means of furthering a compelling governmental interest before it may substantially burden the exercise of a sincerely held religious belief. The Supreme Court in *Hobby Lobby* explained that "[t]he least restrictive means standard is exceptionally demanding," and proceeded to explain the state of the law on that standard. *See* 134 S. Ct. 2780-83.

    b. **Please explain your understanding, for purposes of the Religious Freedom Restoration Act, of what constitutes a "compelling" government interest to act, as opposed to when a government interest is merely "legitimate" or "important."**

RESPONSE: RFRA codified the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As the Supreme Court has explained, that test requires the Court to look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

12. During your hearing, when asked about your 2005 *National Review* article "Liberals'N'Lawsuits," you told Senator Coons that you were making two points in writing the article: first, that "one of the beauties of our courts is that they can vindicate civil rights for minorities," but second, that "there are some comparative disadvantages to resolving policy matters for courts." In the article, you refer to "gay marriage" as an item on a liberal "social agenda."

    a. **Did the Supreme Court's decision in *Obergefell v. Hodges* concern the vindication of a civil rights matter or did it concern the resolution of a policy matter?**

RESPONSE: In *Obergefell v. Hodges*, the Supreme Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." 135 S. Ct. 2584, 2604 (2015). *Obergefell* is a precedent of the Supreme Court entitled to all the weight due such a precedent.

13. In your 2005 *National Review* article "Liberals'N'Lawsuits," you wrote, "Finally, in the

greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold." That seems at odds with your repeated statements during your hearing that judges are nonpolitical.

a. **Why would Republican control of the presidency and the Senate lead to the appointment and confirmation of judges who are unsympathetic to "liberals pushing constitutional litigation"?**

RESPONSE: In my 2005 National Review Online column, written before I became a judge, I offered an assessment as a commentator of a Washington Post column written by David von Drehle, a self-described liberal commentator. As I explained in my column, Mr. von Drehle argued that democratic institutions are often best suited for deciding important social issues. Through debate and compromise, legislators are able to make good policy decisions that are most likely to build strong and enduring consensus. At the same time, I also argued that courts are very important places for the vindication of individual and civil rights. This is because courts are the place where unpopular voices get heard the same as popular voices. They are also where the best arguments prevail, without compromise, regardless of whether those arguments are politically popular.

During my time on the bench, I have found my colleagues on the Tenth Circuit to be collegial and committed to the rule of law. I do not view my colleagues as Republican judges or Democratic judges, but as judges. My record as a judge is consistent with this: according to my clerks, 97 percent of the 2,700 cases I have decided were decided unanimously, and I have been in the majority 99 percent of the time. In those rare instances when I have dissented, my clerks inform me I am about as likely to dissent from judges appointed by a Republican as from judges appointed by a Democrat. And according to the Congressional Research Service, my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

14. You said at your hearing that an *en banc* hearing is "an extraordinary thing. We probably hear between zero and three *en bancs* a year over the course of my time." You also said that "about one of every five *en bancs*, about 20 percent of *en bancs* in our court are *sua sponte*. It is not unusual." Assuming that your descriptions are roughly accurate, the Tenth Circuit has heard a maximum of approximately 30 cases *en banc* during your tenure, with approximately six of them being *sua sponte*.
    a. **Why did you find the error you claimed was made by the panel opinion in *Planned Parenthood Association of Utah v. Herbert* rose to the level of exceptionalism shown by the six *sua sponte en banc* cases – six out of tens of thousands of cases – the Tenth Circuit has heard over the past decade?**

RESPONSE: As we discussed, the key issue presented by that case was an issue that cuts to the heart of an appellate court's role, namely, the standard of review it must apply when a trial court's factual findings are challenged on appeal. Normally, an appellate court must affirm a trial court's factual findings unless the trial court committed clear error—a demanding standard. In my view—a view shared by the three other judges who voted for rehearing en banc in that

case and one who did not—the panel decision deviated from that rule. It seems important to me that we abide our standards of review and do not pick and choose the areas of law to start abandoning those standards.

15. You joined an opinion in *Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) that included the statement "To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." You stated at your hearing that you wrote a separate concurrence in *Gutierrez-Brizuela v. Lynch* because you saw "an equal protection concern." You also stated at your hearing that you write separate concurrences "when I see a problem [to] raise my hand and tell my bosses I see an issue here."
    a. **Did you consider writing a concurrence in *Druley v. Patton* to raise as "an equal protection concern" or "an issue" that Tenth Circuit precedent had not recognized transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, why not? If you considered and decided not to, why did you make that decision?**

RESPONSE: During my time as a judge, I have decided over 2,700 cases and do not recall every instance in which I considered writing separately or the reasons for not doing so.

    b. **Did you call for a *sua sponte* rehearing *en banc* to determine whether the Tenth Circuit should recognize transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, what made this case a less appropriate subject for rehearing than *Planned Parenthood Association of Utah v. Herbert*?**

RESPONSE: Respectfully, I am not at liberty to discuss the internal deliberations of my court.

16. During your hearing, I asked you whether you had spoken with representatives of the Heritage Foundation about various topics. You said, "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." As you know, you were included on President Trump's list of potential Supreme Court nominees—reportedly assembled with the assistance of the Heritage Foundation—long before last year's election.
    a. **Did you have any communications with representatives or employees — including employees on paid or unpaid leave — of the Heritage Foundation or the Federalist Society in 2016 or 2017?**

    b. **If so, what did you discuss with such representatives or employees?**

    c. **Did you discuss *Roe v. Wade*, abortion, reproductive rights, or the right to privacy with such representatives or employees? Please describe the nature and content of the conversation on any of these topics.**

    d. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Heritage Foundation? Were any employees of the Heritage Foundation in the**

last year?

e. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Federalist Society? Were any employees of the Federalist Society in the last year?**

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Some of them are affiliated with the Federalist Society and some are affiliated with the American Constitution Society, societies that provide, among other things, valuable forums for civil discussion and debate on legal questions. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

17. During your hearing, Senator Feinstein referenced a document that was turned over to the Committee as part of your confirmation process. The exchange appears on page 25-26 of the hearing transcript. The document mentioned by Senator Feinstein was a set of talking points prepared for Attorney General Alberto Gonzales on the subject of torture. The document was discussed in a *Washington Post* article from March 15, 2017. You indicated you had not seen the document.
    a. **How many people helped to prepare you for your confirmation hearings?**

RESPONSE: Please see the response to Question 16.

b. **Did any of those people indicate in any way that you might be asked about the Gonzales talking points subsequently referenced by Senator Feinstein?**

RESPONSE: I understand that the Department of Justice produced or allowed access to over 178,000 pages of documents from my tenure as the Principal Deputy Associate Attorney General in 2005 and 2006. During my testimony, Senator Feinstein asked me a question regarding a specific document. As I stated during the hearing, I generally do not feel comfortable commenting on documents that are not in front of me, especially documents from over a decade ago. Senator Feinstein graciously agreed to provide me the document to allow me the opportunity to review it before questioning me about it later in the hearing. Upon review, I recognized the particular document as one put before me in preparation for my testimony. Various senators then proceeded to ask me questions about the document which I addressed at that time.

c. **Did anybody indicate that you might be asked about torture-related materials you worked on during your time in the George W. Bush Administration?**

RESPONSE: Respectfully, it is unclear what materials this question references. In preparation for my testimony before the Judiciary Committee, I was briefed on various topics from my time as Principal Deputy Associate Attorney General in 2005 and 2006, including my

work on the Detainee Treatment Act.

18. During your hearing, Senators Feinstein and Durbin referenced email you sent during your time in the Bush Administration in which you discussed reasons to have President Bush issue a signing statement when signing the Detainee Treatment Act. These emails were the focus of—and were linked to in—a March 15 *New York Times* article. They were also mentioned in the Times and other publications over the following few days. In fact, a *Times* headline from March 19, 2017 article bore the headline, "Emails Hint at Court Pick's View of Presidential Power." You indicated at your hearing that you were not familiar with these emails.

    a. **Did anybody involved in preparing your for your confirmation hearings indicate that you might be asked about this email?**

RESPONSE: Please see response to Question 17(b).

Senator Mazie K. Hirono

Questions for the Record following hearing on March 20-23, 2017 entitled:

"On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States"

The Honorable Neil M. Gorsuch

1. During the hearing, I asked you if the Supreme Court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, whether you believed *Korematsu* would be applicable precedent. You answered "no".

    a. Does *Korematsu* have any precedential value in any case that may come before the Supreme Court?

RESPONSE: As we discussed, no. When he was Acting Solicitor General, Neal Katyal confessed error by the United States in *Korematsu*.

    b. Are there other Supreme Court decisions that have not been overruled that you believe lack precentral value? And if so, which ones?

        i. For the cases listed, please explain why those cases lack precedential value.

RESPONSE: If I were to list my least favorite or most favorite precedents, I would be suggesting to litigants that I have already made up my mind about these cases and suggest how that would impact theirs. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

    c. What characteristics disqualify a case from having precedential value? And who makes the determination of what those characteristics are?

RESPONSE: As we discussed, in the *Law of Judicial Precedent*, my colleagues and I expressed a mainstream consensus view, representing the work of judges from around the country appointed by Presidents of both parties, about the application of judicial precedent. As outlined in that book, judges consider a number of factors in analyzing precedent.

2. During the hearing, you cited *Loving v. Virginia* as a seminal case. What other cases do you consider "seminal"?

    a. For cases considered "seminal" do such cases hold more precedential value than those that are not considered seminal? Why or why not?

b. Do certain cases hold more precedential value than others? What are the qualities of a case that give it more or less precedential weight?

RESPONSE: As I stated at the hearing when asked about them, *Gideon v. Wainwright*, *Brown v. Board of Education*, and *Loving v. Virginia* were seminal decisions. This is not to say these are the only seminal decisions, just an example of a few. In analyzing the precedential value of a decision, I would apply the law of judicial precedent.

3. What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

RESPONSE: As we discussed at the hearing, one test of the rule of law is whether the government can lose in its own courts and accept the judgment of those courts. The refusal of the other two branches to comply with a court order implicates the Constitution's scheme of separate and diffuse power and authorities. It also implicates the independence of the judiciary. I expect the coordinate branches of government to respect the independent judiciary, and I have not hesitated and will not hesitate to rule accordingly as a judge and defend the independent judiciary.

4. Do you believe that when analyzing a statute, and choosing to use the constructional construction of original public meaning, such a choice reflects your values?

    a. Why choose to discern the original meaning rather than considering tradition, current norms, and precedent as baseline or foundation of your constitutional analysis?

RESPONSE: When Justice Elena Kagan appeared before this Committee, she explained, "[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that way, we are all originalists." All judges are trying to discern what the words in the Constitution mean and apply them faithfully to our current circumstances. The same applies to interpreting statutes. It is a choice rooted not in personal values but in the rule of law.

    b. Why do you believe that you are able to separate ideological and partisan views when judging?

RESPONSE: I took an oath to administer justice without respect to persons, to do equal right to the poor and to the rich, and to perform faithfully and impartially all of the duties incumbent upon me as a judge under the Constitution and laws of the United States. I take that oath seriously, and respectfully suggest my record demonstrates that fact. My record shows that, according to my clerks, 97 percent of the 2,700 cases I have decided as a judge were decided unanimously, and I have been in the majority 99 percent of the time. In those rare cases where I

have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed by a Democrat. According to the Congressional Research Service, I understand that my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

c. Do you believe that life experiences and unconscious biases play a role in judging?

RESPONSE: I am a strong believer in the federal judiciary. I know many of the men and women of the federal judiciary, and I have witnessed first-hand how hard they work to perform their responsibilities with integrity every day. Those judges come from different walks of life, different experiences, but they agree overwhelmingly on the disposition of cases. They decide cases based on the facts and law and not based on their personal beliefs. Only a tiny fraction of cases heard in the federal courts ever go to the Supreme Court because the lower courts agree on the legal principles that apply. Even at the Supreme Court, the Justices agree unanimously about 40 percent of the time. The overwhelming unanimity in the federal courts—indeed, the strength of the rule of law in this country—is something of which we should all be proud.

5. Do you believe in the validity of laws that address not only specific problems known at the time of the legislation, but that can also arm an agency with broader remedial authority to address new problems of a similar category that arise later?

   a. Specifically, do you agree that the Clean Air Act or the Clean Water Act address not only the specific pollution problems known at the time of passage, but also provide authority for an agency to regulate additional pollutants if it agency determines they are harmful based on later-arising scientific data?

RESPONSE: The scope of the Clean Air Act and the Clean Water Act, and their application to a variety of contexts, is a matter of continuing litigation in the lower courts. As these issues may well come before me, it would not be appropriate for me to comment on them further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

6. Do you regard the decision in *Massachusetts v. EPA* – that greenhouse gases are air pollutants under the Clean Air Act, and that EPA must regulate their emissions if it determines (as it has) that they endanger public health and welfare – as settled law?

RESPONSE: *Massachusetts v. EPA* is a precedent of the Supreme Court, and its interpretation of the provisions and requirements of the Clean Air Act is entitled to all the weight such precedent is due.

7. Do you regard the decision in *American Electric Power v. Connecticut* – that federal common law suits over power plants' greenhouse gas emissions are displaced because EPA has the authority to regulate those emissions under Section 111(d) of the Clean Air Act – as settled law?

    a. Do you agree that if the courts determined that EPA *does not* have authority to curb power plants' greenhouse gas emissions under Section 111(d), then there would no longer be a basis for displacing federal common law remedies?
    b. Can you explain what Supreme Court precedent says about the constitutionality of citizen suits, and the significance of citizen suits in enforcing our environmental laws?

RESPONSE: *American Electric Power v. Connecticut* is a precedent of the Supreme Court, and it is entitled to all the weight such precedent is due. For another recent discussion of standing doctrine in environmental cases, please see *Massachusetts v. EPA*. Beyond that, because these issues may well come before me, it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

8. If President Trump were to direct Administrator Pruitt to end the Clean Power Plan, as is widely reported he plans to do, would you regard the EPA as having an obligation to develop a replacement plan to reduce greenhouse gas emissions sufficient to protect the public health and welfare?

RESPONSE: The Clean Power Plan is currently the subject of an active case or controversy. As these and related issues may well come before me, it would not be appropriate for me to comment on them. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

9. How do you incorporate scientific findings into your decisions and how do you resolve the discrepancy if an agency is making decisions based on conclusions that are contrary to the weight of scientific evidence?

RESPONSE: Under the Administrative Procedure Act (APA), courts defer to an agency's findings of fact so long as they are supported by substantial evidence, and accordingly the courts ascribe great weight to the factual findings of agency experts, including those with scientific expertise. The APA permits the courts, however, to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although this is a high standard, it provides relief from an agency action where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

10. Do you hold the view that state governments, not EPA, should principally regulate environmental protection, and, if so, how do you reconcile this view with the fact that the perceived failure of states by the 1970s to protect their air and water was the genesis of the EPA, the Clean Water and Clean Air Acts, and other foundations of federal environmental law?

RESPONSE: Under the statutory environmental protection regime currently designed by Congress, both the federal government and the states have important roles to play. The question whether a federal or a state regulatory agency has authority in a particular instance will depend on the relevant facts and law in each case.

11. In *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause, in conjunction with the Necessary and Proper Clause, permits the federal government to control intrastate activities when necessary as part of a "more comprehensive scheme" of economic regulation. Do you agree with the principle that Congress may regulate intrastate, non-economic activities if doing so is necessary to a broader effort to regulate commercial activity?

    a. Do you believe that environmental and land use regulations are commercial activities?

RESPONSE: In *Gonzales v. Raich*, the Supreme Court held that Congress may regulate activities "that have a substantial effect on interstate commerce." 545 U.S. 1, 17 (2005). Whether particular environmental and land use regulations qualify as such are questions that may come before me and depend on the particular facts of the case, and it would not be proper for me to comment on them.

12. Several times in your testimony, you asserted that the standard you set out in the *Luke P.* case was based on precedent from the Tenth Circuit. You testified: "*Luke P.* was a unanimous decision . . . . There was no dispute in my court about the applicable law, and because we were bound by circuit precedent in a case called Urban versus Jefferson from 1996 that said that the appropriate standard was *de minimis* and the educational standard had to be more than d*e minimis*, and that is the law of my circuit, Senator . . . . But the fact of the matter is I was bound by circuit precedent and so was the panel of my court, and they had been bound for 10 years by the standard in Urban versus Jefferson County." When Senator Durbin asked why you added the word "merely" to the *de minimis* standard, you replied: "Senator, all I can say to you is what I've said to you before, it was a unanimous panel of the 10th Circuit following ten-year-old circuit precedent . . . . We followed our circuit precedent . . . ." When Senator Klobuchar also asked you about the addition of the word "merely" to the *de minimis* standard, you testified: "My recollection is that the 10th Circuit precedent was very clear, that 'some' meant 'more than *de minimis*.' Some meaningful educational benefit in *Rowley* was the Supreme Court precedent and our court interpreted that to mean more than *de minimis*." However, the word "merely" is found nowhere in the Urban case. See *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996). In fact, even the phrase *de minimis* is

mentioned only once: "In the context of a severely disabled child such as Gregory, 'the "benefit" conferred by the [IDEA] and interpreted by Rowley must be more than *de minimis*.'" 89 F.3d at 726-27 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)). In Luke P., you wrote: "we have concluded that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996)). You also characterized this standard as "not an onerous one." *Luke P.*, 540 F.3d at 1149. Do you agree that your opinion in *Luke P.* was the first in the Tenth Circuit to add the word "merely" before the *de minimis* standard? Do you also agree that your opinion in *Luke P.* was the first in the Tenth Circuit to characterize the standard as "not onerous"?

a. Do you also agree that your opinion in *Luke P.* was the first in any Circuit to characterize the standard as "not onerous"?

RESPONSE: In *Thompson R2-J School District v. Luke P*, a unanimous panel of the Tenth Circuit was bound to and did follow circuit precedent in *Urban v. Jefferson County*. The Supreme Court denied certiorari in *Luke P.* As the controlling decision in *Urban* stated:

> Gregory's IEP was reasonably calculated to enable him to receive educational benefits. In the context of a severely disabled child such as Gregory, "the 'benefit' conferred by the [IDEA] and interpreted by *Rowley* must be more than *de minimis*." *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182 (3d Cir. 1988) . . . . The IDEA only entitles Gregory to an appropriate education, and the state "satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Gregory received and benefitted from such personalized instruction. The IDEA does not entitle him to more.

This standard was widely employed. Approximately seven other circuits to address the question reached the same conclusion the Tenth Circuit reached in *Urban*. As I explained at the hearing:

> "There was no dispute in my court about the applicable law, and there was not because we were bound by circuit precedent, a case called Urban v. Jefferson County, 1996, that said that the appropriate standard was de minimis. The educational standard had to be more than de minimis.
>
> "My recollection is that the Tenth Circuit precedent was very clear, that 'some' meant more than 'de minimis.' 'Some meaningful educational benefit' in Rowley was a Supreme Court precedent and that our court had interpreted that to mean more than de minimis, and that a number of circuits had come to the same conclusion.
>
> "And so, Senator, all I can say is I was trying faithfully, to the best of my ability, to follow Supreme Court precedent in Rowley, the Tenth Circuit opinion, as I understood it in Urban,

and a number of other circuits had interpreted Rowley in the same way. And my colleagues subsequently after me interpreted it in the same way."

Chief Judge Tacha, the author of *Urban*, agreed, stating in her testimony at the hearing that "in the Luke P. case, Judge Gorsuch was following very longstanding precedent. . . . Let me also say it was not just our circuit. I believe it was all but two circuits. All the rest of the circuits in the Nation were following the same standard in interpreting the IDEA. Further, I can say with some authority that he was following not as dicta, but as a holding in his case what I wrote in the Urban case, which he was following."

13. In May 2016, the U.S. Departments of Justice and Education released a joint guidance stating that anatomy at birth should not be the only factor considered when placing transgender inmates into men's or women's units. The guidance also stated that schools receiving federal funding may not discriminate based on a student's sex, including transgender students under the Patsy T. Mink Equal Opportunity in Education Act also known as Title IX. Do you interpret Title IX of the Education Amendments of 1972 to ensure that transgendered students do not face discrimination in school?

RESPONSE: This question implicates cases likely to come before the Supreme Court. Accordingly, it would not be proper for me to comment. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

14. Does the Constitution define what a "person" is?

    a. Has the Supreme Court ever ruled that the 14th Amendment confers personhood on a fetus?

    b. If a state were to enact a personhood measure by redefining a fetus as a legal person, would that not be in direct contradiction to the Supreme Court's holding in *Roe?*

RESPONSE: In *Roe v. Wade*, the Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973). Your question regarding the propriety of a hypothetical state law implicates issues that may come before me as a judge, and therefore it would not be proper for me to comment.

15. Did *Whole Woman's Health* fully answer the remaining questions about the permissible breadth of pre-viability regulations allowed under *Casey*?

RESPONSE: In *Whole Woman's Health v. Hellerstedt*, the Court held that certain abortion regulations violated the Fourteenth Amendment and thus were to be enjoined. It would not be

proper for me to comment further, as the question raises issues that may come before me as a judge.

16. As you know, the 14th Amendment's Equal Protection Clause states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Please explain your understanding of the current constitutional prohibitions against sex discrimination. Does the Equal Protection Clause of the 14th Amendment to the U.S. Constitution prohibit discrimination on the basis of gender or sexual orientation?

RESPONSE: By way of example, in *Mississippi Univ. for Women v. Hogan* (1982) and *J.E.B. v. Alabama ex rel. T.B.* (1994), the Supreme Court held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause. This scrutiny is often referred to as "intermediate scrutiny." In *United States v. Virginia (VMI)* (1996), the Court emphasized that heightened scrutiny requires an "exceedingly persuasive justification" for sex-based classification. In addition, in *Lawrence v. Texas* (2003) and *Obergefell v. Hodges* (2015), the Supreme Court invalidated state laws implicating sexual orientation.

17. In a 2005 National Review piece, you criticized liberals for using the courts instead going through elected officials to advance their social agenda. In *Hobby Lobby*, the court gave closely held corporations the same rights as individuals in relying on RFRA. Please example why this was not a case of conservative overreach through the courts to affect an expansion of RFRA without legislative action?

RESPONSE: Congress passed the Religious Freedom Restoration Act (RFRA) because it determined that the Supreme Court's interpretation of the First Amendment was insufficiently protective of religious exercise. In a bipartisan bill sponsored by Senator Orrin Hatch, Senator Ted Kennedy, and then-Representative Charles Schumer, Congress prohibited the federal government from substantially burdening the exercise of a sincerely held religious belief unless the government can show it is pursuing the least restrictive means to achieve a compelling governmental interest.

Hobby Lobby brought a claim under this law, and courts had to decide what Congress meant when it included the word "person" in the statute. RFRA requires that "a person" be engaged in the "exercise of religion." The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a "person" to include corporations, and Hobby Lobby is a family-

held corporation that openly exhibits its religious affiliation. For example, as I recall, it plays Christian music in its stores. It refuses to sell alcohol or things that hold alcohol. It closes on Sundays. The Supreme Court concluded that, under the law Congress wrote, Hobby Lobby had a meritorious claim.

a. Your expansion of religious protections to a corporation in *Hobby Lobby* now creates a potential conflict between the religious freedom of the corporation and that of the individual employee. In applying RFRA, how will you address a conflict between two differing religions? Is it for the courts to rule when one religion trumps another?

RESPONSE: Respectfully, the Tenth Circuit sitting en banc in *Hobby Lobby* applied the law Congress passed as best it could. Congress is free to change the law anytime. Beyond that, respectfully, these questions seek views about matters that might come before me as a judge and it would be improper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

18. Please what role the courts have in determining whether a burden is substantial? Is it just a rubber stamp?

a. Is there any time when a court can make a determination that a federal law is objectively not a substantial burden on someone's religious beliefs? Under what circumstances?

RESPONSE: The substantial burden test was expressly adopted by Congress in RFRA. The Supreme Court has discussed the history and scope of that test in *Hobby Lobby* and many other cases. *See* 134 S. Ct. at 2775-79. As a judge, I cannot prejudge when that test will or will not be satisfied. Such a decision will depend on the facts and circumstances of each case.

19. In *Allstate Sweeping v. Black* you joined an opinion rejecting *inter alia* a claim of hostile work environment. The court wrote:

> But Allstate cites to no cases, nor can we find any, holding that the harassment endured by the principals of an artificial entity can give rise to a racial- or gender-discrimination claim on behalf of the entity itself, absent independent injury to the entity. Indeed, it is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. Such a claim has a subjective, as well as an objective, component; there must be proof that 'the plaintiff was offended by the work environment.'"

In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite, the Court said "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How can an artificial entity such as Hobby Lobby assert a religious belief without having the thoughts or feelings necessary in *Allstate?*

RESPONSE: *Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the "plaintiff was *offended*." A claim under RFRA has no such element. Rather, RFRA requires that "a person" be engaged in the "exercise of religion," and the Dictionary Act, which courts must look to, defines a "person" to include corporations. In *Hobby Lobby* the government conceded and the Supreme Court ultimately found that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

20. During the hearing, you in an exchange with Senator Cornyn that, "Too few people can get lawyers to help them with their problem," and later that, "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." At the 40th anniversary celebration of the Legal Services Corporation, Justice Scalia's said,

> "I'm here principally to show the flag, to represent the support of the Supreme Court and I'm sure all of my colleagues for the LSC… The American ideal is not for some justice, it is, as the Pledge of Allegiance says, 'Liberty and justice for all' or as the Supreme Court pediment has it, 'Equal Justice.' I've always thought that's somewhat redundant. Can there be justice if it is not equal? Can there be a just society when some do not have justice? Equality, equal treatment is perhaps the most fundamental element of justice. So, this organization pursues the most fundamental of American ideals, and it pursues equal justice in those areas of life most important to the lives of our citizens."

Do you agree with Justice Scalia's statement?

RESPONSE: As discussed at the hearing, I believe that access to justice is a serious problem. Together with my colleagues, I have worked to improve access to justice while on the Standing Committee for Rules of Practice and Procedure and the Appellate Rules Advisory Committee. During my time as a judge, I have also worked alongside my colleagues, Chief Judge Tymkovich and Judge Lucero, and many others in our circuit, to promote the quality of representation of death row inmates. Together with the judges in Oklahoma, we provided training sessions, recruited additional lawyers, and sought and obtained more funds for federal public defenders. I have also written and spoken on ways to encourage greater access to justice and legal services. A good example of this work is *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 Judicature, no. 3, Aug. 2016, at 46. I have also spoken and written about

problems in the legal system that affect ordinary people, including the complexity and expense of modern civil litigation. A good example of this work is *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2014).

Congress of the United States
Washington, DC 20515

March 13, 2017

Chairman Charles Grassley
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate

Ranking Member Dianne Feinstein
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein:

We write today to ask you to seek greater clarity regarding Judge Gorsuch's views on the Constitutional basis for our nation's campaign finance laws.

The American public is greatly concerned by the increasing role of concentrated money in our politics. In fact, more than 85% of Americans believe our campaign finance system is broken and in need of fundamental reform.

Unfortunately, in our view, the Supreme Court has for decades embraced a deeply flawed approach to the laws governing money in our politics. The result has been a system that empowers the wealthy and well-connected, while drowning out the voices of everyday Americans. It is no surprise then that more than 90% of voters including 91% of Trump voters – believe it is critical that the new Supreme Court justice be open to limiting the influence of big money in our politics.

As members of Congress, like you, we know all too well how the defects of our current campaign finance law impact our democracy. The pervasive and distorting influence of concentrated money in our politics frustrates the priorities and principles that motivated us to serve in the first place and limits important voices in our body politic from being heard altogether.

For these reasons, we ask that you implore Judge Gorsuch to provide a public response to the following questions concerning money in politics and the Constitution:

- What will be your approach to evaluating common sense limits on big money in our politics and policy that empowers Americans of all incomes, races and backgrounds to have their voices heard in our political system?
- Is the prevention of bribery – so-called *quid pro quo* exchanges – the sole justification for limits on big money in our politics or do others exists? If so, what are they?
- Had you been on the Supreme Court at the time the Court ruled on *Citizens United* would you have joined the majority or the dissenting opinion? And why?
- Having never served in elected office, what value, if any, do you place on the opinions and testimonials of elected officials – both past and present about the impact of concentrated special interest money in on our democracy?

We appreciate your attention to these critical questions.

PRINTED ON RECYCLED PAPER

Sincerely,

Rosa L. DeLauro

Paul D. Tonko

Debbie Dingell

Lynda M Velázquez

Chris Bustos

Michael E Capuano

Raúl M. Grijalva

Dave Loebsack

John B. Larson

Carol Shea-Porter

Niki Tsongas

Ann McLane Kuster

Frank Pallone, Jr.

Ted W. Lieu

Elizabeth H. Esty

Pramila Jayapal

Yvette D. Clarke

Katty Cast

Bill Foster

Beto O'Rourke.

Adam B. Schiff

Rita M. Lowey

Richard M. Nolan

Jan Schakowsky

Linda T. Sánchez

Doris Matsui

Peter Welch

Hoyt Dent

Barbara Lee

David N. Cicilline

Ben R. Luján

Jerrold Nadler

Marcy Kaptur

Sheila Jackson Lee

Elijah E. Cummings

Eleanor H. Norton

Jim Langevin

Daniel T. Kilden

Julia Formery

Brendan Doyle

Brenda L. Lawrence

March 14, 2017

Senate Judiciary Committee Must Focus on Judge Gorsuch's Troubling Money-in-Politics Record

The Honorable Mitch McConnell
Senate Majority Leader
317 Senate Russell Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Majority Leader McConnell, Minority Leader Schumer, Chairman Grassley, and Ranking Member Feinstein:

As organizations representing tens of millions of Americans, we write to express our deep concern regarding the nomination of Judge Neil Gorsuch to serve on the Supreme Court of the United States because of his troubling record on money in politics.

Americans across the country are concerned about the growing influence of big money in our elections and our government.

Last year, the cost of running for federal office rose yet again, with more money than ever coming from a small group of elite donors, and a substantial amount of secret money in the system. The constant pursuit of campaign money from a relative handful of wealthy contributors skews policy outcomes and has shaken confidence in our political process. Eighty-five percent of voters say we should "fundamentally change" or "completely rebuild" the current campaign money system.[1]

The Supreme Court has been a key source of the problem by outlawing common sense limits on big money spending, most famously in the *Citizens United* decision. The challenge to our democracy is not simply the influence gained by billionaires and powerful corporations but, more deeply, it is the loss of an effective voice for the vast majority of Americans and of public confidence by ordinary Americans in their government and federal officeholders.

The next justice confirmed to lifetime tenure on the Court will likely be a tie-breaking vote in new cases addressing political money. In future decisions, the Court might erase our few remaining protections against big money influence in campaigns and policy-making, or permit a balanced political system in which all voices are heard and currently marginalized communities have a full say in the decisions that affect their lives.

Americans understand this, and 93 percent of voters think it's important that President Trump nominates a Supreme Court justice who is open to limiting the influence of big money in politics.[2] Unfortunately, Judge Gorsuch's record on money in politics and corporate power is

deeply troubling, and suggests he would support increasing the power of the wealthiest interests within the system.[3]

As the Senate Judiciary Committee considers whether Judge Gorsuch is fit to serve all Americans as a Supreme Court Justice, we ask that you vigorously pursue this essential question:

Will Judge Gorsuch's legal philosophy lead him to strike down even more protections against the use of corporate or personal wealth to influence elections, such as candidate and party contribution limits, or will he permit sensible limits on political money in order to ensure the voices and will of all Americans are fully represented within the political process?

Our country's democracy is at stake in the answer to this key question. The seat Judge Gorsuch seeks does not belong to President Trump, Republicans, Democrats, liberals, or conservatives. It belongs to the American people. As Senators it is your duty to ensure that the next member of the Supreme Court holds dear the belief that the Constitution protects all of us, not just the wealthy and the powerful. Any nominee who does not meet this standard must not occupy a lifetime seat on the nation's highest court.

In support of our shared democracy,

99Rise
Act.tv
AFSCME
Alliance for Citizenship
Alliance for Democracy
American Atheists
American Federation of Teachers
American Association of University Women (AAUW)
Americans for Democratic Action
American Postal Workers Union
Americans Against Trump
Arab American Institute
Asian Americans Advancing Justice
Association of Flight Attendants
Berkshire Environmental Action Team
Beyond Nuclear
Brave New Films
California Clean Money Campaign
Catholics in Alliance for the Common Good
Center for American Progress
Center for Emergent Diplomacy
Center for Media and Democracy
Center for Popular Democracy
Center for Science in the Public Interest
Church Women United in New York State
Citizens for Responsibility and Ethics in Washington (CREW)
Class Action
Clean Elections Texas
Coalition for Disability Health Equity

Coalition to Restore Democracy
CODEPINK
Coffee Party Savannah
Common Cause
Concerned Citizens for Change
Conscious Elders Network
Communications Workers of America
DC Emergent Diplomacy
DC Environmental Network
DC Latino Caucus
Democracy 21
Democracy Initiative
Democracy Matters
Democracy Spring
Demos
Don't Waste Michigan
End Citizens United
Endangered Species Coalition
Energy Action Coalition
EPI Policy Center
Every Voice
Fix Democracy First!
Free Speech For People
Friends of the Earth
Gender Justice Institute
Genius Hiphop
Get Money Out - Maryland
Greenpeace USA
Hightower Lowdown
Indivisible
Institute for Agriculture and Trade Policy
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW
Iowa Citizens for Community Improvement
Jobs with Justice
Just Foreign Policy
Labor Campaign for Single Payer Healthcare
Latino Victory Project
The Leadership Conference on Civil and Human Rights
League of Conservation Voters
League of United Latin American Citizens
Main Street Alliance
MapLight
MAYDAY America
Mi Familia Vota
Missouri Jobs With Justice Voter Action
National Association of Social Workers
NAACP
National Black Justice Coalition
National Center for Lesbian Rights

National Council of Jewish Women
National Education Association
National LGBTQ Task Force Action Fund
National Organization for Women
National Partnership for Women and Families
National Priorities Project
New Florida Majority
New Progressive Alliance
Northwest Atlantic Marine Alliance
Occupy.com
Occupy Bergen County
OLE - Organizers in the Land of Enchantment
Organize Florida
Other 98% Action
Our Revolution
Pachamama Alliance
Participatory Politics Foundation
Patriotic Millionaires
People Demanding Action
People for the American Way
PeopleNOW.org
People's Action
Power Shift Network
Pride at Work
Represent.US
ReThink Media
Reverb Press
RootsAction.org
SEIU
Sierra Club
Sierra Student Coalition
Small Planet Institute
Stamp Stampede
Student Debt Crisis
TakeAction Minnesota
The Rootstrikers Project of Demand Progress
The Workmen's Circle
Union For Reform Judaism
Voices for Progress
Voto Latino
West Virginia Citizen Action Group
Wisconsin Democracy Campaign
Working Families Party

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[1] Nicholas Confessore and Megan Three-Brennan, "Poll Shows Americans Favor an Overhaul of Campaign Financing," THE NEW YORK TIMES (June 2, 2015).
[2] *The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017).
[3] *Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money in Politics Reforms*, DEMOS & CAMPAIGN LEGAL CENTER (January 31, 2017).

19 FAITH-BASED AND NONTHEISTIC ORGANIZATIONS EXPRESS SERIOUS CONCERNS REGARDING THE NOMINATION OF JUDGE NEIL GORSUCH TO THE US SUPREME COURT

March 16, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national faith-based and nontheistic organizations, including secular, ethnic, and community-based groups, share a commitment to individual liberty and the separation of religion and government — two of the tenets on which this country was founded. **We are united in our serious concerns regarding the nomination of Judge Neil M. Gorsuch to the United States Supreme Court.**

Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, demonstrate that he is a judge with an agenda. His frequent dissents and concurrences show he is out of the mainstream of legal thought and unwilling to accept the constructs of binding precedent and *stare decisis* when they dictate results he disfavors. If confirmed to the Supreme Court, which is closely divided on many critical issues, Judge Gorsuch would tip the balance in a direction that would undermine many of our core rights and legal protections. He lacks the impartiality and independence the American people expect and deserve from the federal bench.

President Trump outsourced the selection process of a Supreme Court justice to the ideologically-driven Federalist Society and Heritage Foundation. Never before has a president so blatantly curried favor with partisan organizations for a Supreme Court nomination. In addition, as a presidential candidate he pledged to appoint Supreme Court justices who would overturn *Roe v. Wade*. Litmus tests in judicial selection subvert the most critical qualities of a judge: open-mindedness and independence.

In a 2005 article published in the conservative *National Review*, Judge Gorsuch wrote, "American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education. This overweening addiction to the courtroom as the place to debate social policy is

bad for the country and bad for the judiciary."[1] Throughout our nation's history, the federal courts have been a critical bulwark in ensuring the rights and liberties of all Americans, especially minority groups whose numbers mean they have less influence at the ballot box. Judge Gorsuch's hostility to the valid use of courts by victims of discrimination in all forms to enforce their rights under the US Constitution and federal law demonstrates his ideological agenda and has been reflected in his decisions during his decade on the bench.

Erosion of the Establishment Clause

As a judge on the Court of Appeals for the Tenth Circuit, Judge Gorsuch has written or joined dissents that would dramatically weaken the Establishment Clause of the First Amendment. In *American Atheists, Inc. v. Duncan*,[2] a panel of three Republican-appointed judges ruled against the Utah Highway Patrol Association's construction and maintenance of a series of 12-foot crosses on public land near roads to memorialize deceased officers, explaining that the crosses had the "impermissible effect" of appearing to endorse the Christian religion. Judge Gorsuch wrote an opinion for himself and several other judges that dissented from the decision of the full court of appeals not to rehear the case. Gorsuch asserted that the "endorsement" test should not be applied, and criticized the "reasonable observer" standard that the circuit court used to determine that the crosses were religious symbols. Judge Gorsuch wrote that the intent of the person who displayed the religious symbol weighs more than the impression that such a symbol leaves on the person who views it.[3] The Supreme Court denied review of the case; Justice Thomas alone wrote a vigorous dissent,[4] making some of the same arguments as Judge Gorsuch.

In *Green v. Haskell County Board of Commissioners*,[5] another case involving Christian symbols on public property, a three-judge panel of all Republican-appointed judges concluded that an Oklahoma county's decision to approve the construction of and maintain a Ten Commandments monument on its courthouse lawn violated the Establishment Clause. Judge Gorsuch again wrote an opinion for himself and other judges that dissented from a decision by the full court of appeals not to rehear the case. He argued that the court should not expect that a reasonable person would infer a religious endorsement when a government official appearing in that capacity appears and/or speaks at a religious unveiling ceremony[6]. As the panel decision explained, however, the endorsement test remained the law in the Tenth Circuit (and elsewhere), and the monument

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[1] Neil Gorsuch, *Liberals ' n ' Lawsuits,* NATIONAL REVIEW (Feb. 7, 2005), *available at* http:// www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.
[2] 616 F.3d 1145 (10th Cir. 2010).
[3] *Am. Atheists, Inc. v. Dunc*an, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting).
[4] *Utah Highway Patrol Association v, American Atheists, Inc.*, 565 U.S. 994 (2011) (cert denied) (Thomas, J., dissenting).
[5] 568 F.3d 784 (10th Cir. 2009).
[6] *Green v. Haskell County Bd. of Comm 'rs*, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting).

clearly had the "primary effect of endorsing religion."[7] The Supreme Court denied review of the case.[8]

Religious Views Imposed on Women's Health

Judge Gorsuch has written or joined opinions that would restrict women's health care, including allowing religious beliefs to override women's access to birth control and defunding Planned Parenthood. In *Hobby Lobby Stores, Inc. v. Sebelius*,[9] he signed on to an opinion allowing certain for-profit employers to refuse to comply with the birth control benefit in the Affordable Care Act. Citing *Citizens United v. FEC*,[10] the decision held that corporations can be "persons" with religious beliefs and that employers can use those religious beliefs to block employees' insurance coverage of birth control. In *Little Sisters of the Poor Home for the Aged v. Burwell*,[11] Judge Gorsuch dissented from the majority's decision approving the accommodation in the birth control benefit that allows non-profit employers to opt out of the benefit but makes sure the employees get birth control coverage. Judge Gorsuch joined a dissent that argued the simple act of filling out the opt-out form constitutes a substantial burden on religious exercise. In *Planned Parenthood Association of Utah v. Herbert*,[12] Judge Gorsuch dissented from the majority's decision to keep in place a preliminary injunction that stopped the state of Utah from blocking access to health care and education for thousands of Planned Parenthood's patients. If the policy had gone into effect, it would have cut off access to an after-school sex education program for teens and STI testing and treatment for at-risk communities.

Rejection of Aid-in-Dying

Judge Gorsuch wrote a dissertation that rejects laws that provide aid-in-dying to terminally ill persons.[13] He calls such laws "assisted suicide" and wrote "all human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong."[14] However, Gorsuch declined to discuss capital punishment or death during war, saying those issues brought "unique questions."[15] The Supreme Court upheld Oregon's death with dignity law in 2006, explaining that "[r]ather than simply decriminalizing assisted suicide, [the Oregon law] limits its exercise to the attending physicians of terminally ill patients[.]"[16] Now six states[17] and the District of Columbia permit aid-in-dying. Judge Gorsuch wrote that such aid-in-dying laws would "tend toward, if not require, the legalization not only of assisted suicide and euthanasia,

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[7] 568 F.3d 784, 788 (10th Cir. 2009).
[8] Haskell County Bd. of Comm'rs v. Green, 559 U.S. 970 (2010) (cert denied).
[9] 723 F.3d 1114 (10th Cir. 2013).
[10] 558 U.S. 310 (2010).
[11] 799 F.3d 1315 (10th Cir. 2015).
[12] 839 F.3d 1301 (10th Cir. 2016).
[13] Neil Gorsuch, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2009).
[14] Gorsuch, "Introduction," paragraph 13.
[15] Gorsuch, "An Argument Against Legislation," paragraph 3.
[16] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).
[17] California, Colorado, Montana, Oregon, Vermont, and Washington.

but of *any* act of consensual homicide" including "sadomasochist killings, mass suicide pacts, duels, and the sale of one's own life."[18] In Oregon, where aid-in-dying has been closely research and studied for more than a decade, there have been no reports of any such instances.[19] Judge Gorsuch's position denies terminally ill individuals basic human dignity at the end of life, and it is not his role as a judge to make personal medical decisions for a patient.

The Supreme Court is the final arbiter of our laws, and its rulings dramatically impact the lives and rights of all Americans. We urge all senators to carefully examine Gorsuch's nomination. They must fully exercise their "advise and consent" responsibilities by engaging in a thorough review of Judge Gorsuch's record and judicial philosophy. The Senate Judiciary Committee must engage in full and fair hearings in which all requested documents are produced and examined, committee members are permitted to adequately question Judge Gorsuch and receive full and complete answers, and enough outside witnesses are permitted to testify regarding Judge Gorsuch's record. **Before the full Senate considers acting on the nomination of Judge Gorsuch, the American people have a right to know precisely how his confirmation to the Supreme Court would impact their rights, freedoms, and liberties.**

Thank you for your consideration of our views. If you would like to discuss the matter further, please contact Caroline Ostro, Judicial Nominations Campaign Organizer, National Council of Jewish Women, at caroline@ncjwdc.org or Amanda Knief, National Legal and Public Policy Director, American Atheists, at aknief@atheists.org.

Sincerely,

African American Ministers In Action
American Atheists
American Humanist Association
Bend the Arc Jewish Action
Catholics for Choice
Cedar Lane Unitarian Universalist Church
Center for Inquiry
Congregation of St. Joseph
Keshet
Moishe Kavod House
National Coalition of American Nuns
National Council of Churches
National Council of Jewish Women
National LGBTQ Task Force Action Fund
New Ways Ministry
Religious Institute
Sisters of the Most Precious Blood (Gospel Justice Committee member)
Unitarian Universalist Women's Federation
Women's Alliance for Theology, Ethics and Ritual (WATER)

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[18] Gorsuch, "8.2 Posner's and Epstein's Libertarian Case for Assisted Suicide," paragraph 3.
[19] "Death with Dignity Act," Oregon.gov, https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx

March 16, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: National LGBT Groups Oppose Confirmation of Judge Gorsuch to Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and people living with HIV, oppose the nomination of Judge Neil Gorsuch to be an Associate Justice on the United States Supreme Court. After a comprehensive review of Judge Gorsuch's record, we have concluded that his views on civil rights issues are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law.

We wish to call to your attention the following aspects of Judge Gorsuch's record and philosophy that are of particular concern to our organizations and our constituents, and that raise crucial questions of grave consequence to LGBT people, everyone living with HIV, and anyone who cares about these communities.

- *The Dangers of "Originalism."* Judge Gorsuch professes to be an "originalist."[1] This philosophy treats the Constitution as frozen in time, meaning that, unless the Constitution has been amended to explicitly protect certain rights, individuals have no more rights today than they did in 1789.[2] This philosophy essentially writes LGBT people out of the Constitution. A few examples of how Judge Gorsuch's approach would manifest itself in specific areas of the law illustrate why we believe that Judge Gorsuch poses such a grave threat to our community:

[1] *See* Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905 (2015).

[2] *See* Erwin Chemerinsky, *What Could Gorsuch Mean for the Supreme Court?: A backward jurist*, POLITICO (Feb. 1, 2017), available at http://www.politico.com/magazine/story/2017/02/neil-gorsuch-supreme-court-future-214724 ("Under originalism, no longer would there be constitutional protection for privacy, including reproductive freedom, or a right to marriage equality for gays and lesbians, and or even protection of women from discrimination under equal protection. None of these rights were intended by the framers.").

- *Fundamental Rights.* We are concerned that Judge Gorsuch's writings, including his book on assisted suicide,[3] reveal his open hostility toward the very existence of constitutionally protected fundamental rights. No one can read that book and come away with any reasonable doubt that Judge Gorsuch is deeply skeptical that our Constitution protects any fundamental rights beyond those expressly enumerated in the Bill of Rights. Among these unenumerated, yet well-established, fundamental rights are the rights to privacy, autonomy and self-determination, the right to parent, the right to procreative freedom, the right to engage in private consensual adult relationships, and the fundamental right to marry.

  Although these rights are important to everyone, they are essential for the LGBT community. These are the rights that have been the lynchpin of our legal progress and that underlie the series of decisions—from *Lawrence* to *Windsor* to *Obergefell*[4]—that have transformed the place of LGBT people in our society. Based on his extensive record, there can be no doubt that, had he been on the Court, Judge Gorsuch would have rejected each of these basic rights. Indeed, as discussed further below, he has been openly critical of same-sex couples for even seeking to vindicate their constitutional rights, including the right to marry, through litigation.

  We urge the Committee to press Judge Gorsuch to explain on his views about fundamental rights. For example:

  - Does he believe that there is a fundamental right to privacy, and if so, does the right as he understands it protect consensual adult sexual relationships?
  - Does he believe that the Constitution protects a fundamental right to marry? The right to access contraception? The right to decide whether to continue a pregnancy?

  Judge Gorsuch's articulated judicial philosophy is far outside the legal and social mainstream, and would significantly disrupt Americans' expectations about the rights that they enjoy under the Constitution. His views should be as frightening to others as they are to the LGBT community. The Committee should require Judge Gorsuch to explain what he means when he describes himself as an "originalist."

- *Equal Protection.* An originalist view is hostile to the notion that laws targeting historically disfavored groups warrant any form of heightened scrutiny, with the exception of laws that discriminate on the basis of race. Because, in his view, the drafters of the Fourteenth Amendment did not intend to prohibit sex discrimination, Justice Scalia

[3] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (2009).

[4] *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

regularly voted against heightened constitutional protections for women.[5]

Judge Gorsuch has praised Justice Scalia, and presumably shares the late Justice's view that laws targeting women for discrimination should receive nothing more than so-called "rational basis review." In a 2016 article, Judge Gorsuch praised Justice Scalia's approach to equal protection, and agreed that "judges should . . . strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[6]

The suggestion that sex-based classifications should not trigger heightened judicial scrutiny discrimination is far outside the mainstream, and has been rejected by the Supreme Court on numerous occasions.[7] If Judge Gorsuch adheres to Justice Scalia's view that laws discriminating on the basis of gender should not be subjected to heightened scrutiny, then Judge Gorsuch would certainly find nothing wrong with laws that single out LGBT people for discrimination, so long as someone somewhere could conjure up some other reason for passing such a law.

On numerous occasions, the Supreme Court has struck down laws that were passed to make LGBT people "strangers to the law"—an anti-gay ballot initiative in Colorado,[8] discriminatory state marriage laws,[9] and a federal law prohibiting recognition of same-sex couples' marriages.[10] What level of scrutiny would an "originalist" like Judge Gorsuch apply to such laws? Judge Gorsuch should be asked to state his views on the record and required to explain how this approach can possibly be squared with existing Supreme Court precedents striking down laws that single out LGBT people for harmful, unequal treatment.

- *Role of Courts.* Compounding the damage that would result from such a narrow view of the Constitution, Judge Gorsuch has expressed disapproval of people resorting to the courts at all to vindicate their civil rights. For example, in 2005, Judge Gorsuch wrote that "American liberals have become addicted to the courtroom . . . as the primary means

[5] *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Scalia, J., dissenting, joined by Justice Thomas and Chief Justice Rehnquist) (arguing that state's use of peremptory strikes on the basis of gender in jury selection did not violate Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting).

[6] *See Of Lions and Bears, supra* note 1.

[7] *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)); *see also United States v. Virginia*, 518 U.S. 515 (1996) (referring to the Court's "skeptical scrutiny" and the "demanding" burden of justification on the State).

[8] *See Romer v. Evans*, 517 U.S. 620 (1996).

[9] *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[10] *See United States v. Windsor*, 133 S. Ct. 2675 (2013).

> of effecting their social agenda on everything from gay marriage" to other issues.[11] He has also called private civil rights litigation "bad for the country."[12] How can any members of historically persecuted groups, including LGBT people, have confidence that Judge Gorsuch would approach their specific cases with an open mind? The Committee should press these issues in the hearing, as this appointment would last long beyond the term of this particular President. Rather, the damage that could be done by this nominee could span generations.

In numerous other areas as well, Judge Gorsuch poses a significant threat to the LGBT community. In fact, his views are even more extreme and outside the mainstream than Justice Scalia's, whom Judge Gorsuch is proposed to replace.

- *Approach to Statutory Construction.* Justice Scalia was a strict textualist, which meant he viewed as irrelevant whether Congress intended a particular understanding and application of the law. Instead, he focused simply on the words of the law as written. Consequently, Justice Scalia found that Title VII's prohibition on sex discrimination applies to same-sex sexual harassment even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII."[13] Justice Scalia also observed, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[14]

  As set forth in the letters of other civil rights groups, Judge Gorsuch has taken an extremely narrow view of civil rights laws.[15] Indeed, one *Stanford Law Review* article analyzing his civil rights jurisprudence concluded:

  > Judge Gorsuch presents himself as a restrained judge. But that "restraint" often translates to extreme results when applied to legal rights open to interpretation. By attempting to hew to the narrowest reading of rights-creating text, Judge Gorsuch creates new understandings of the law, leaving

[11] Neil Gorsuch, *Liberals 'N' Lawsuits*, NAT'L REVIEW ONLINE (Feb. 7, 2005), available at http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

[12] *Id.*

[13] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998).

[14] *Id.* at 79-80.

[15] *See, e.g.*, Letter from The Leadership Conference on Civil and Human Rights to Charles Grassley & Dianne Feinstein (Feb. 15, 2017) ("Leadership Conference letter"); Letter from the Nat'l Educ. Ass'n to U.S. Senate Comm. on the Judiciary (Mar. 9, 2017); Letter from the Nat'l Council of Jewish Women to Mitch McConnell, Charles Schumer, Charles Grassley & Dianne Feinstein (Mar. 9, 2017); Letter from the People for the Am. Way to Mitch McConnell, Charles Schumer, Charles Grassley & Dianne Feinstein (Mar. 9, 2017); and Letter from the Bazelon Ctr. for Mental Health Law to Charles Grassley & Dianne Feinstein (undated).

> litigants with limited access to courts and restricting the reach of constitutional and statutory protections.[16]

Although he claims to be an adherent of Justice Scalia's philosophy, would Judge Gorsuch agree that laws like Title VII "often go beyond the principal evil to cover reasonably comparable evils," or would he, true to his Court of Appeals record, adopt an artificially narrow reading of the statute's text in order to achieve his preferred, backwards-looking policy outcome? The Committee should press him on this point, as the civil rights of millions of Americans hang in the balance.

- *Religious Exemptions from Laws that Someone Believes Would Make Them "Complicit" in Actions of Others.* In *Employment Division v. Smith*, Justice Scalia wrote that the First Amendment has never given individuals a right to opt out of laws that, in their view, burden their exercise of religion.[17]

  Yet, in his 10th Circuit decision in *Hobby Lobby*, Judge Gorsuch insisted instead that any individual should be able to opt out of any law that, in that person's view, makes them "complicit" in conduct of another considered to be immoral, regardless of how compelling the state's interest in enforcing the law.[18] In *Hobby Lobby*, that meant a large for-profit corporation could ignore the requirement in the Affordable Care Act that employer-provided health insurance for employees must include coverage for birth control among basic care options. Fortunately, the Supreme Court did not adopt Judge Gorsuch's extreme approach, and made clear that an individual's claim of religious liberty may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[19]

  The Committee should interrogate Judge Gorsuch on his position in this area, as his views on "religious complicity" go well beyond anything that currently exists in American jurisprudence. For example:

  - Does employer-provided health care that includes infertility care make an employer "complicit" in a decision of a non-married couple to have children out of wedlock?
  - Would a law requiring that gender transition-related health care not be excluded from employee health plans make the employer "complicit" in an employee's decision to undertake a gender transition?
  - Does providing health insurance coverage for an employee's same-sex spouse make an employer "complicit" in that employee's same-sex relationship?

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[16] Maria Buxton, Hannah Kieschnick & Robyn D. Levin, *Judge Gorsuch and Civil Rights: A Restrictive Reading*, 69 STAN. L. REV. ONLINE 155 (2017), available at https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/03/69-Stan.-L.-Rev.-Online-155.pdf.

[17] 494 U.S. 872 (1990).

[18] *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1152-56 (10th Cir. 2013) (Gorsuch, Kelly, Tymovich, J.J., concurring).

[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

- Does providing coverage for medications such as PrEP, which prevents HIV infection, make an employer "complicit" in the employee's private sexual conduct?

The American people are entitled to know more about Judge Gorsuch's views on these subjects, so that they can understand how his approach could potentially impact their rights and their daily interactions with employers, physicians, and other service providers.

Finally, there are other areas where Judge Gorsuch's views appear to be far outside the mainstream, and to warrant vigorous inquiry:

- *Relevance of Science to Legal Decision-Making*. Judge Gorsuch signed onto an opinion holding that a transgender woman in prison whose hormone therapy was interrupted did not suffer irreparable harm.[20] And yet that conclusion flies in the face of the internationally-recognized Standards of Care of the World Professional Association of Transgender Health.[21] We would urge the Committee to ask Judge Gorsuch to clarify whether and when he thinks that medical or social science standards are relevant to legal decision-making. For example:

  - Would Judge Gorsuch credit the three decades of social science scholarship confirming the parenting skills of LGBT people, or would he disregard these facts?
  - What about current public health understanding of how HIV is transmitted? Would Judge Gorsuch require some basis in fact for state laws concerning HIV transmission, or would he allow states to legislate based on fear and ignorance?

  The Committee should insist that Judge Gorsuch explain his judicial philosophy in general on this question and how he would approach these and similar cases.

- *Employer Defenses to Claims of Discrimination*. Numerous other groups have identified examples of Judge Gorsuch's reluctance to enforce civil rights laws that protect workers.[22] One example in particular raises unique concerns for our community. In *Kastl v. Maricopa County Community College District*,[23] Judge Gorsuch signed onto an opinion rejecting a transgender woman's claim of discrimination. In that case, the school denied her access to the women's restroom, and claimed that it had a non-discriminatory reason for doing so unrelated to her "sex"—"safety concerns" due to the discomfort-based complaints of other students.

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[20] *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015).

[21] WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 68 (7th ed. 2012) ("The consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy when medically necessary include a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria, and/or suicidality.").

[22] *See, e.g.*, Leadership Conference letter, *supra* note 15.

[23] 325 F. App'x 492, 493 (9th Cir. 2009).

> The notion that the discomfort of co-workers or customers is sufficient to defeat a claim of discrimination is not only incorrect, it is wholly inconsistent with decades of jurisprudence.[24] The suggestion that vague concerns about "safety," privacy" or "discomfort" could be enough to satisfy an employer's burden of proof in a discrimination case not only suggests a hostility to victims of discrimination generally, but also undermines any confidence that one might have that an LGBT person could receive a fair hearing before Judge Gorsuch. The Committee should insist that Judge Gorsuch answer these and other important questions about his approach to labor and employment law.

The American people have a right to know how the appointment of Judge Gorsuch to the Supreme Court would impact the rights of LGBT Americans, people living with HIV, and other at-risk communities who are entitled to rely upon the Constitution's guarantees of equality, liberty, dignity and justice under the law. We urge the Committee to demand complete answers from Judge Gorsuch to the important questions that we and others have raised. Only by insisting that Judge Gorsuch answer these questions will the Committee fulfill its responsibility to the American people, and reveal the extent to which his nomination jeopardizes rights and liberties that many Americans believe are secure.

Thank you for considering our views on this important issue.

Very truly yours,

Lambda Legal
CenterLink: The Community of LGBT Centers
Equality California
Equality Federation
Family Equality Council
GLBTQ Legal Advocates and Defenders (GLAD)
GLSEN
Human Rights Campaign
National Black Justice Coalition
The National Center for Lesbian Rights
National Center for Transgender Equality
National LGBTQ Task Force Action Fund
National Queer Asian Pacific Islander Alliance
OutServe-SLDN
PFLAG National
Pride at Work
Services and Advocacy for GLBT Elders (SAGE)
Transgender Law Center
Transgender Legal Defense & Education Fund

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[24] *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

The Trevor Project
Victory Institute

cc: United States Senate Judiciary Committee Members

March 14, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the National Latina Institute for Reproductive Health, In Our Own Voice: National Black Women's Reproductive Justice Agenda, the National Asian Pacific American Women's Forum and the 43 undersigned organizations dedicated to achieving reproductive justice for women of color and all people, we are writing to express our opposition to the confirmation of Judge Neil M. Gorsuch for Associate Justice of the Supreme Court of the United States. Gursuch's record on human rights and justice issues is deplorable, and is especially detrimental and hostile towards women of color, youth, LGBTQ people and immigrants. It is clear that if nominated to the highest court in the land, he will take the country backwards not forward. As advocates for reproductive justice, we implore you to stand up for the rights of all people and block the nomination of Judge Gorsuch.

Reproductive Justice will be attained when all people have the economic, social, and political power and means to make decisions about our bodies, sexuality, health, and family, with dignity and self-determination. Our health, safety and wellbeing are intrinsically linked. Nothing about Judge Gorsuch's record indicates that he will uphold these basic human rights. As reproductive justice advocates, we are deeply concerned that President Trump will fulfill his promise and only put forward Supreme Court nominees who would seek to overturn *Roe v. Wade*.

In too many cases to recount here, Judge Gorsuch ruled against the health and wellbeing of people and personal autonomy in favor of corporations or political interests. For example:

- In *Hobby Lobby Stores, Inc. v. Sebelius,* Judge Gorsuch signed on to an opinion that held that corporations can be "persons" and thus can exercise religious rights allowing them to refuse to comply with the Affordable Care Act mandate requiring that all health insurance plans for employees include contraceptive coverage.[i]
- In *Little Sisters of the Poor Home for the Aged v. Burwell*, Judge Gorsuch dissented against the majority's ruling that had approved a reasonable accommodation for religious non-profits while still allowing women to obtain contraceptive coverage from their regular insurance plan.[ii]
- In *Planned Parenthood Association of Utah v. Herbert,* Judge Gorsuch supported legislation that would have allowed the Utah Governor to defund Planned Parenthood, a critical safety-net provider that our communities rely on for life-saving preventative care.[iii] For many women of color, Planned Parenthood health centers are the only healthcare providers they will see.

In every instance, Judge Gorsuch supported decisions that added barriers to accessing care under the guise of religious freedom. When religious freedom is used as a license to discriminate, particularly when it comes to health care as in these decisions, people of color are disproportionately harmed.

Women of color, across all races and ethnicities, disproportionately have poorer reproductive health outcomes as compared to white women. This is as a result of both human right offenses and bad policies. As advocates for full equality for all communities, we need to ensure that every person is able to make personal decisions about their health, their families, and their futures without discrimination. Religious exemptions such as these misuse religion to harm and discriminate against others and fall hardest on marginalized communities. It is for this reason that we reject Judge Gorsuch's record in this area.

Gorsuch has consistently not stood for women or vulnerable communities. In case after case, when sexual harassment or employee discrimination was alleged, Gorsuch either refused to allow the case to go to jury or ruled in favor of the employer. A few such examples include:

- In *Pinkerton v. Colorado Department of Transportation,*[iv] Gorsuch sided with the Colorado Department of Transportation on an employee's claim that she had been sexually harassed and fired when she complained. In part Gorsuch agreed with the majority opinion that job performance, not discrimination, resulted in her termination and that Pinkerton had waited an unreasonably long time to report the harassment.
- Gorsuch agreed with the majority opinion in *Zamora v. Elite Logistics, Inc.,*[v] a case in which a Mexican-born employee was fired after he complained that the company had made excessive requests for work-authorization documentation from him in a discriminatory fashion. Gorsuch found that the employee had not presented sufficient evidence of discriminatory motive and wrote separately to chastise the courts application of the Immigration Reform and Control Act anti-discrimination provision.

The work environment should not be a hostile environment. According to the *Center for American Progress*, "in 2010, 13.1 percent of women in the workforce were black, 4.7 percent were Asian, and 12.8 percent were Latina."[vi] Most of the women are parents, and in many cases the sole breadwinner.[vii] We need judges that protect them, not corporations, so that they can provide for themselves and their families.

When it comes to transgender rights, Gorsuch has consistently favored corporations or government over human rights. For example:

- In *Druley v. Patton,*[viii] Judge Gorsuch rejected the claim made by a transgender woman who was incarcerated and who was denied medically necessary hormone treatment and the right to wear feminine clothing. Judge Gorsuch concurred with the Tenth Circuit's ruling that rejected the claims that the denial of health care was cruel and unusual punishment under the Constitution.
- In *Kastl v. Maricopa County Community College,*[ix] a transgender woman was banned by her employer from using the women's restroom until she showed proof that she had undergone sex reassignment surgery and then was denied the renewal of her teaching contract. Gorsuch agreed with the panel decision that the College had not discriminated but rather had legitimate "safety reasons" for banning her from the women's restroom.

These decisions concern all of us, as transgender and gender nonconforming individuals face severe discrimination and violence. Due to increased stigma and discrimination, the transgender community is more vulnerable than ever, and needs their rights confirmed and protected by the judiciary system. The 2015 U.S. Transgender Survey showed that transgender people of color were three times more likely to live in poverty in comparison to the U.S. population and experienced greater health inequities.[x] Sadly,

Judge Gorsuch's views signal to the transgender community that their lived realities do not merit protection under the law.

Gorsuch is equally bad when it comes to immigrant rights and criminal justice. People of color are disproportionately represented in our criminal justice systems. Whether it be the prison industrial system or immigrant detention centers, our communities are overrepresented, more severely and harshly prosecuted and less likely to receive a fair trial. This has resulted in the decimation of our communities and families. There is nothing in Judge Gorsuch's record to indicate that he will protect the rights of the accused or incarcerated. For example:

- In *Bhattarai v. Holder*,[xi] Gorsuch denied "a motion to reopen the removal proceedings of a Nepalese citizen who feared persecution because of his political opinions," and denied asylum in his opinion. In this case and others, Gorsuch has upheld the decisions of the Board of Immigration Appeals to the detriment of immigrants.
- In the case *Wilson v. City of Lafayette*,[xii] a 22-year-old man possessing marijuana was fleeing arrest when a police officer shot him in the head with a stun gun from a short distance (10-15 feet), even though that was contrary to the police department's training manual. The young man, Ryan Wilson, died. Judge Gorsuch held that the officer was entitled to qualified immunity from an excessive force claim, because the use of force was reasonable for someone who was fleeing arrest. The dissent in this case criticized Judge Gorsuch's analysis and stated: "In the present case, it would be unreasonable for an officer to fire a taser probe at Ryan Wilson's head when he could have just as easily fired the probe into his back."

All of these are just a few of the examples available that testify to the fact that Judge Gorsuch's decade-long record on the federal bench, as well as his writings, demonstrate that he will not only fail to protect but will be hostile to those who are seeking the full recognition of their constitutional rights—communities of color, low income people, LGTBQ people and women. Our communities thrive when we have opportunity, resources, and support to make the personal decisions that are best for our reproductive health, economic stability and personal safety, and that of our families. **We urge you to use every available option to block the nomination of Neil Gorsuch to the Supreme Court.**

Sincerely,

Abortion Rights Fund of Western Massachusetts
Access Reproductive Care-Southeast
ACCESS Women's Health Justice
Advocates for Youth
BiNet USA
Black Women's Health Imperative
BLUE RIDGE Abortion Assistance Fund, Inc.
California Latinas for Reproductive Justice
Carolina Abortion Fund
Center on Reproductive Rights and Justice
Central Florida Women's Emergency Fund
Chicago Abortion Fund

Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)
Desiree Alliance
Forward Together
Fund Texas Choice
If/When/How
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Jane Fund of Central Massachusetts
Mississippi Reproductive Freedom Fund
National Advocates for Pregnant Women
National Asian Pacific American Women's Forum
National Center for Transgender Equality
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Network of Abortion Funds
Network for Reproductive Options
New Orleans Abortion Fund
New Voices for Reproductive Justice
NYU School of Law Reproductive Justice Clinic
Options Fund Inc.
Positive Women's Network
Pro-Choice Resources
SisterLove, Inc.
SisterReach
SisterSong
SPARK Reproductive Justice Now!
TEWA Women United
The Afiya Center
The Freedom Fund
Third Wave Fund
URGE: Unite for Reproductive & Gender Equity
West Fund
Women's Health Specialists of California
Women's Medical Fund, Inc.
WV FREE

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[i] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).
[ii] Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10 Cir. 2015).
[iii] Planned Parenthood Ass'n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016).
[iv] Pinkerton v. Colorado Department of Transportation, 563 F.3d 1052 (10th Cir. 2009).

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[v] Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007).

[vi] Sophia Kerby, "How Pay Inequity Hurts Women of Color." Center for American Progress, 2013, available at https://www.americanprogress.org/issues/economy/reports/2013/04/09/59731/how-pay-inequity-hurts-women-of-color/.

[vii] *See id.*

[viii] Druley v. Patton, 601 F. App'x 632 (10th Cir. 2015).

[ix] Kastl v. Maricopa County Community College District, 325 F. App'x 492 (9th Cir. 2009).

[x] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. 2016; 4. The Report of the 2015 U.S. Transgender Survey: Executive Summary. Washington, DC: National Center for Transgender Equality. Available at: http://www.transequality.org/sites/default/files/docs/usts/Executive%20Summary%20-%20FINAL%201.6.17.pdf

[xi] Bhattarai v. Holder, 408 F. App'x 212 (10th Cir. 2011).

[xii] Wilson v. City of Lafayette, 510 F. App'x 775 (10th Cir. 2013).

55 ORGANIZATIONS URGE SENATORS TO PROTECT REPRODUCTIVE FREEDOM AND KEEP NEIL GORSUCH OFF THE SUPREME COURT

March 14, 2017

Dear Senators:

We are 55 reproductive rights, health, and justice organizations writing to express our strong opposition to President Trump's nomination of Judge Neil Gorsuch to the Supreme Court. **We implore senators to do everything necessary to block this nomination.** Gorsuch has demonstrated he will go to extraordinary lengths to reach a result that would block women's access to basic reproductive healthcare. Moreover, Trump established an outrageous litmus test for his Supreme Court nominees: they must be committed to overturning *Roe v. Wade*. By selecting Gorsuch, a candidate put forward by the Federalist Society and the Heritage Foundation, Trump made it clear he believes Gorsuch passes this dangerous test and earned the applause of anti-abortion groups – including Americans United for Life, Susan B. Anthony List, and the extremist group Operation Rescue. Based on his record, writings, and the circumstances of his nomination, we believe Gorsuch would put reproductive freedom in grave danger and pose an imminent threat to our constitutional rights.

As a judge on the Tenth Circuit Court of Appeals, Gorsuch ruled on numerous cases related to reproductive freedom, and has been on the wrong side of every one of these decisions:

- In *Planned Parenthood Association of Utah v. Herbert*, Gorsuch sided with a politician who defunded Planned Parenthood in Utah, denying people access to STI tests, cancer screening, sex education, and other preventive care.[i] Gorsuch took the highly unusual step of voting to rehear the three-judge panel's decision that entered a preliminary injunction, even though neither the parties nor any judge on the panel requested a rehearing and the time for such a request had expired. In his dissent, he suggested he would give politicians more leeway than other judges would, accusing the panel's decision of being "at odds with the comity federal courts normally afford the States and their elected representatives."[ii] In this case, Gorsuch showed how far he will go for a ruling that puts limitations on reproductive health.

In three cases, Gorsuch voted in favor of the refusal of reproductive health care:

- Gorsuch joined the decision that laid the groundwork for the Supreme Court's now infamous decision in *Hobby Lobby v. Sebelius*. Citing *Citizens United*, the Tenth Circuit held that corporations like Hobby Lobby – a craft store chain employing more than 13,000 people – can be "persons" with religious beliefs under the Religious Freedom Restoration Act (RFRA) and employers can use those religious beliefs to block employees' insurance coverage of birth control.[iii] Gorsuch wrote a separate concurrence with a reading of RFRA that was extreme in how far it would apply the legislation and in the near absolute deference it would give claims of religious exercise.[iv] Gorsuch's reading went further than either the Tenth Circuit or the Supreme

Court.[v] Since the Supreme Court's *Hobby Lobby* decision, there have been attempts to use RFRA to challenge laws that: protect women, LGBTQ individuals, and students from discrimination; promote public health by requiring vaccinations; and require pharmacies to fill lawful prescriptions.[vi] If Gorsuch's reading had won the day, it would have opened the door even wider to allow individuals and companies to claim any number of laws do not apply to them.

- In *Little Sisters of the Poor v. Burwell*, Gorsuch sided with employers who challenged the accommodation to the birth control benefit, which allows certain employers to opt out of paying for insurance coverage but is designed to ensure employees receive birth control coverage through their regular insurer.[vii] Contrary to the overwhelming number of courts of appeal that ruled to uphold the accommodation, Gorsuch joined a dissent that argued even the accommodation – which simply requires filling out a form to opt out – is a substantial burden on religious exercise under RFRA.[viii] Despite the fact that this case was about whether a woman has birth control coverage, the dissent claimed that the issue "has little to do with contraception."[ix]

- In *Druley v. Patton*, Gorsuch concurred with the Tenth Circuit's ruling against a transgender woman who was denied consistent access to hormone therapy while incarcerated. The ruling upheld the lower court's decision, which rejected the claims that the denial of health care was cruel and unusual punishment under the Constitution.[x]

Gorsuch has also indicated hostility towards constitutional rights in his work off the bench:

- In his book The Future of Assisted Suicide and Euthanasia, Gorsuch indicates he does not believe the Constitution should protect personal autonomy. The Supreme Court's decision in *Planned Parenthood v. Casey* rested in part on the plurality's argument that abortion is fundamental to principles of individual autonomy and "the right to define one's own concept of existence, of meaning, of the universe and of the meaning of human life."[xi] *Casey* also affirmed that the Constitution protects those decisions that are among "the most intimate and personal choices a person may make in a lifetime."[xii] This language has been cited in numerous Court decisions since then, and now protects some of our most cherished rights, including the right to access birth control, to marry, to make decisions about how to rear one's children, to same-sex marriage, and to decide whether to have an abortion. Despite this legal precedent, Gorsuch argued in his book that the result in *Casey* was mainly due to *stare decisis*, or respect for settled law[xiii], and that the autonomy passage was "arguably inessential" to the decision[xiv]. Gorsuch wrote this despite the Court having recently relied on *Casey* to protect the right to consensual adult sexual intimacy in *Lawrence v. Texas*.[xv]

- In an article for the National Review Online, Gorsuch criticized "the Left" for advancing too many constitutional lawsuits and described marriage equality as part of the liberal social agenda, writing, "American liberals have become addicted to the courtroom . . . as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education."[xvi]

Now, more than ever, the courts must be an independent check on the other branches of government to protect constitutional rights. The Trump administration has already demonstrated it will take extreme, unprecedented, and discriminatory executive actions. Moreover, reproductive rights are under intense attack in Congress and in the states. Together, Gorsuch's rulings and writings show he will undermine, not protect, reproductive rights.

This nominee is not an independent or consensus candidate and would put reproductive freedom in danger. **We urge you to vigorously oppose the nomination of Neil Gorsuch to the Supreme Court.**

Sincerely,

Abortion Care Network
Access Reproductive Care-Southeast (ARC-Southeast)
Advocates for Youth
American Medical Student Association
California Women's Law Center
Catholics for Choice
Civil Liberties and Public Policy Program
Emergency Medical Assistance
Feminist Majority Foundation
Forward Together
In Our Own Voice: National Black Women's Reproductive Justice Agenda
International Women's Health Coalition
IntraHealth International
Lady Parts Justice League
Legal Voice
Mabel Wadsworth Center
Ms. Foundation for Women
Muslim American Women's Policy Forum
NARAL Pro-Choice America
National Abortion Federation
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights
National Council of Jewish Women
National Health Law Program
National Institute for Reproductive Health
National Latina Institute for Reproductive Health
National Network of Abortion Funds
National Organization for Women
National Partnership for Women & Families
National Women's Health Network
National Women's Law Center
New Voices for Reproductive Justice
Physicians for Reproductive Health
Planned Parenthood Federation of America
Population Connection Action Fund
Positive Women's Network - USA
Pro-Choice Resources
Raising Women's Voices for the Health Care We Need

Religious Institute
Reproductive Health Access Project
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Shift
SisterReach
SisterSong Women of Color Reproductive Justice Collective
SPARK Reproductive Justice Now!
The National LGBTQ Task Force Action Fund
URGE: Unite for Reproductive & Gender Equity
Washington Peace Center
Western States Center
Whole Woman's Health
WIN (Women's Information Network)
Women's Health Specialists of California
Women's Media Center
Young Women United

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[i] Planned Parenthood Ass'n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016).
[ii] *Id.* at 1311.
[iii] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).
[iv] *Id.* at 1152 (Gorsuch, J., concurring) ("Neither can there be any colorable question that the Greens face a 'substantial burden' on their 'exercise of religion")(emphasis added).
[v] *Id.* Unlike the 10th Circuit and the Supreme Court, Gorsuch argued in his concurrence that the religious exercise of the individuals who own Hobby Lobby was also burdened, although the birth control benefit requirements apply to the corporation, not the individual.
[vi] Nat'l Women's Law Ctr., The Hobby Lobby "Minefield": The Harm, Misuse, and Expansion of the Supreme Court Decision 1 (2015), *available at* https://nwlc.org/wp-content/uploads/2015/08/nwlchobbylobbyreport2015.pdf (last visited Feb. 28, 2017). *See also* Supplemental Brief For Appellees at 1-10, Stormans, Inc. v. Wiesman, No. 12-35221 (9th Cir. Jul. 28, 2014); Plaintiff's Response To Presence Hospitals PRV's Mot. To Dismiss The Complaint, George v. Kankakee Cmty. Coll., No. 14–CV– 2160 (C.D. Ill. Jul. 28, 2014); Comments from United States Conference of Catholic Bishops to Office of Federal Contract Compliance Programs (Mar. 30, 2015), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-SexMarch-2015.pdf; Letter from Casey Mattox, Alliance Defending Freedom, et al. to the United States House of Representatives (Feb. 5, 2015) (on file with Nat'l Women's Law Ctr.).
[vii] Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10 Cir. 2015).
[viii] *Id.* at 1316.
[ix] *Id.*
[x] Druley v. Patton, 601 Fed. Appx. 632 (10th Cir. 2015).
[xi] Planned Parenthood v. Casey, 505 U.S. 833, 851(1992).
[xii] *Id.*
[xiii] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2006). at 80.
[xiv] *Id.*
[xv] Lawrence v. Texas, 539 U.S. 558, 573-574 (2003).
[xvi] Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review Online, Feb. 7, 2005, http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

March 15, 2017

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Neil Gorsuch
Associate Justice of the Supreme Court Hearing,
March 20, 2017

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Committee on the Judiciary,

We write today with grave concerns about the nomination of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States. We are seventy-two of the individual women lawyers who exercised our constitutional right to abortion and who jointly submitted an amicus brief about our abortions in support of the petitioners in *Whole Woman's Health v. Hellerstedt*, a case decided last term in which the Supreme Court affirmed that the Constitution strongly protects the right to abortion. As we explained in our amicus brief, our right to terminate a pregnancy—to exercise personal autonomy in decision-making and bodily integrity—was critical to our ability to participate equally in "the economic and social life of the Nation"[1] as liberty guarantees.

We are very concerned that President Trump has repeatedly committed to nominate justices who would overturn *Roe v. Wade* and undo the crucial constitutional protections on which two generations of women have relied for over four decades.

Any nominee for the Supreme Court must be able to express his or her support and respect for this right, for the precedent set by *Roe*, and for the rule of law. We had the courage to speak publicly about what this right has meant to us personally, despite the stigma associated with abortion, including for us as women lawyers. Judge Gorsuch, in contrast, could try to obscure his views—as others have in the past—in order to avoid this difficult discussion.

We thus urge you to thoroughly question Judge Gorsuch about his understanding and interpretation of abortion jurisprudence, about his commitment to the rule of law and respect for precedent, and about his analysis of substantive due process rights to bodily autonomy. Full-scale questioning of judicial nominees—including questions relating to the nominee's views on the constitutional right to contraception and abortion—aims to elicit important aspects of their understanding of the Constitution and the role of the courts, which they will carry with them into a lifetime appointment. Before any new justice is confirmed to the Supreme Court, the Senate and the American people have the right to understand their judicial philosophy and views about the right to abortion. It is

[1] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

particularly necessary for the Judiciary Committee to probe Judge Gorsuch on this issue, given that the President promised to select a nominee who would vote to overturn *Roe*.

Failure to pursue questions about such a settled, yet contentious, body of law creates uncertainty about whether Judge Gorsuch will protect this critical right and the constitutional values of dignity, autonomy, equality, and bodily integrity it reflects. While Judge Gorsuch has never heard an abortion challenge, his record—in particular on contraception—raises significant concerns about his ability to be open-minded, fair, and guided by the Constitution and rule of law.[2]

As you know, constitutional protection for abortion rights has been a matter of contentious political debate for decades—despite the fact that the Supreme Court has long held that the decision to end a pregnancy is "central to the liberty protected by the Fourteenth Amendment"[3] and that "implicit in the meaning of liberty"[4] is a woman's right to "retain the ultimate control over her destiny and her body."[5] Further, less than a year ago, the Supreme Court reaffirmed the constitutional protection for the right to abortion and clarified that the standard under which courts must evaluate restrictions on the right is a robust one.[6] There is simply no justification for Judge Gorsuch to refuse to answer questions on this topic. If he refuses to speak about issues that could come before the Court, he should be asked how he would have decided past cases including *Roe*.

We are united in our strongly held belief that we would not have been able to achieve our personal or professional aspirations, as diverse as they are, were it not for the ability to obtain safe and legal abortions. Meaningful access to reproductive choice has allowed us to become, remain, and thrive as women, as lawyers and as equal members of society. As lawyers who have participated in all aspects of the legal profession, including at private law firms, corporations, multinational governmental organizations, nonprofit organizations, and law schools, we have taken personal and professional risks to publicly disclose our abortion stories to the justices of the Supreme Court, the members of the U.S. Senate, and the American people. We did so because the right to make decisions for ourselves, our health, and our families is *so* critical for millions of women that it was worth the risk.

We ask nothing less of Judge Gorsuch than to be forthcoming on his views about this constitutional right. He cannot refuse—at barest minimum— to discuss his understanding of Supreme Court precedent and stare decisis as it relates to abortion jurisprudence before he is granted a lifetime appointment to the highest court in the land. Studied silence on this subject is not acceptable.

We urge you to press Judge Gorsuch on these matters. Judge Gorsuch owes the same openness to the Senate and the American people that we offered willingly.

Sincerely,

Janice Mac Avoy, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP
Emma Claire Alpert, Public Defender, Brooklyn, NY

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[2] Brief of Amici Curiae American Hospital Association, *State of Washington v. Glucksberg*, et al, 1996 WL 656278 (U.S.); see also *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir.) (panel opinion), and 799 F.3d 1315 (10th Cir. 2015) (dissent from en banc rehearing joined by Judge Gorsuch); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).
[3] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[4] *Id.* at 869.
[5] *Id.*
[6] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016).

Judy Appel, Trustee Berkeley Unified School District and Executive Director of the California School-Based Health Alliance
Natasha Lycia Ora Bannan, President, National Lawyers Guild
Patricia Bauman, President, Bauman Foundation
Kathyrn Boulton, Staff Attorney, Center for HIV Law and Policy
Rhonda Brownstein, Legal Director, Southern Poverty Law Center
Heather Busby, Executive Director, NARAL Pro-Choice Texas
Emily Camin, Litigation Committee, National Lawyers Guild, Massachusetts Chapter
Cynthia Carr, Deputy General Counsel, Yale University
Monica A. Ciolfi, Director of Policy and Advocacy, Fedcap Rehabilitation Services, Inc.
Lorraine A. Clasquin, Co-founder and President, The KLE Foundation, Austin, Texas
Brenda H. Collier, CollierLaw, Austin, Texas
Andrea M. Diaz, Staff Attorney, Immigrant Defenders Law Center
Farah Diaz-Tello, Senior Counsel, SIA Legal Team
Victoria L. Eastus, Visiting Professor of Law, New York Law School
Jenny Egan, Assistant Public Defender, Maryland Office of the Public Defender
Tiffany M. Femiano, Staff Attorney, Civil Action Practice, the Bronx Defenders
Elise C. Funke, J.D. Candidate, Columbia University School of Law
Katusha Galitzine, Office of Diversity and Pluralism, Michigan State University
DeNora M. Getachew, Executive Director, Generation Citizen NYC
Emily Jane Goodman, Justice, New York State Supreme Court (ret)
Hayley Gorenberg, Deputy Legal Director, Lambda Legal Defense and Education Fund
Sharlyn Grace, National Lawyers Guild of Chicago
Julie Hamos, President, Hamos Consulting; Illinois House of Representatives (1999-2010)
Alicia Handy, Attorney
Lori Jo Hansel, Lawyer, Austin, Texas
Susan Katz Hoffman, Shareholder, Littler Mendelson, P.C.
Sarah Marie Honig, Assistant Public Defender, Cuyahoga County Public Defender
Priscilla Huang, Consultant
Deena R. Hurwitz, Visiting Professor of Law and Director, International Human Rights Law Clinic, American University of Washington College of Law
Andrea L. Irwin, Executive Director, Mabel Wadsworth Center
Stephanie L. Johnson, Partner, Hunter & Johnson, PLLC
Terry Horwitz Kass, Pro-Choice Activist
Eileen B. Hershenov, Board member, Women Lawyers En Garde!
Margaret Klaw, Partner, Berner Klaw and Watson LLP
Karen Kramer, Legal Consultant, Change Lab Solutions
Dorchen A. Leidholdt, Director, Center for Battered Women's Legal Services, Sanctuary for Families
Judith Liben, Attorney
Amy Judd Lieberman, J.D. Candidate, Class of 2017, University of California, Irvine
Star Lightner, Senior Counsel, Miller Starr Regalia
Virginia S. Longmuir, Executive Vice President, Business and Legal Affairs, RatPac Entertainment
Julie Lowenberg, Retired from Private Practice, Dallas, Texas
Nancy Marcus, Senior Law and Policy Advisor, Lambda Legal Defense and Education Fund

Chris Ann Maxwell, Independent Consultant and Entertainment Lawyer, previously Senior Vice-President, Legal Affairs at 20th Century Fox, Fox Searchlight Pictures
Michele Coleman Mayes, Vice President, General Counsel & Secretary, the New York Public Library
Amelia J. Meier, Public Interest Attorney
Three Merians, The Law Offices of Three Merians, P.C.
Carlin Meyer, Professor Emeritus, New York Law School
Amy E. Millard, Partner, Clayman and Rosenberg LLP
Kathleen S. Morris, Associate Professor of Law, Golden Gate University School of Law
Shirim Nothenberg, Senior Appellate Attorney, Lawyers for Children
Jennifer L. Nye, Lecturer in Law and Social Justice, History Department / Honors College, University of Massachusetts
Amy Oppenheimer, Law Offices of Amy Oppenheimer, Retired Administrative Law Judge, State of California
Susan Orlansky, Of Counsel to Reeves Amodio LLC
Laura Paley, New York State Court Attorney
Erin Panichkul, J.D. received from Thomas Jefferson School of Law
Claudia Polsky, Assistant Clinical Professor of Law & Director, Environmental Law Clinic, UC Berkeley Law
Gowri Ramachandran, Professor of Law, Southwestern Law School
Carmen Maria Rey, Deputy Director, Immigration Intervention Project, Sanctuary for Families
Deborah Rimmler, Senior Vice President and General Counsel, Nexant, Inc.
Karen Robson, Partner, Pryor Cashman LLP
Jamie Rebecca Rowen, Assistant Professor of Legal Studies and Political Science, University of Massachusetts Amherst
Laure Ruth, Legal Director, the Women's Law Center of Maryland
Janie Schulman, Co-Chair, Employment and Labor Group, Morrison & Foerster LLP
Bianca Victoria Scott, Human Rights Attorney, New York City
Courtney Smith, Board of Directors, Planned Parenthood of New York City
Molly Stark, Assistant General Counsel, Rainforest Alliance, Inc.
Robin G. Steinberg, Executive Director, The Bronx Defenders
Nomi Maya Stolzenberg, Professor of Law, USC Gould School of Law
Alison Tanner, J.D. Candidate, Georgetown University Law Center; National Board Member If/When/How
Brenda Wright, Vice President, Policy & Legal Strategies, Demos

PRESIDENT
NAN ARON
CHAIR
KEN GROSSINGER

March 10th, 2017

The Honorable Chuck Grassley
Chairman, U.S. Senate Judiciary Committee

The Honorable Dianne Feinstein
Ranking Member, U.S. Senate Judiciary Committee

CC: Members of the United States Senate

Dear Senators Grassley and Feinstein,

On behalf of the Alliance for Justice, a national association of over 100 organizations committed to the creation of an equitable, just, and free society, I write to urge you to reject the nomination of Neil Gorsuch to the United States Supreme Court.

AFJ has recently completed a comprehensive report on Judge Gorsuch's career, The Gorsuch Record. We have explored his rulings and his writings in areas including workers' rights, reproductive rights, LGBTQ rights, consumers' rights, criminal justice, immigration, First Amendment rights, and other critical areas of the law. Our review has left us deeply concerned about Judge Gorsuch's commitment to upholding the rights, legal protections, and freedoms of everyday Americans, especially when they are harmed by such powerful entities as large corporations or employers.

In short, we believe Judge Gorsuch would be a judge for the one percent, for wealthy corporations and special interests, for the privileged and the powerful. Meanwhile hardworking Americans – men and women whose lives and livelihoods literally depend on fair access to our justice system – would be forgotten and left behind.

Our research shows that Judge Gorsuch has repeatedly sided with large corporations and government officials that abuse their power. He has dismissed claims brought by workers trying to enforce their rights under anti-discrimination, labor, and disability rights laws. He has ruled against people harmed by police brutality, including a nine-year-old child. He has worked to undermine access to reproductive health care, and narrowed protections for persons with disabilities, including children trying to exercise their right to a quality education. He has written harshly about Americans who go through the courts to ensure constitutional rights, like LGBTQ couples who secured legal protections for the right to marry. And he has advanced radical positions rejected by even Justice Scalia that would undermine the ability of the federal government to protect clean air and water, safe food and medicine, and consumer and investor protections.

We also have serious questions about Judge Gorsuch's ability to maintain the independence of the judiciary from the executive branch. His record shows he has been willing, far too often, to countenance overreach and even constitutional abuses by an executive or government authority. In fact, as our report documents, Judge Gorsuch has consistently ruled against people who seek to hold government officials accountable. This is alarming at a time when the administration has shown willingness to continually test

Eleven Dupont Circle NW, Second Floor | Washington, DC 20036 | www.allianceforjustice.org | t: 202-822-6070 | f: 202-822-6068
Field Offices
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the limits of its authority, under an executive who has publicly disparaged the federal courts as an institution and federal judges as individuals.

In conclusion, AFJ believes that a lifetime appointment to the Supreme Court should not be conferred on a person if there are any doubts about his or her support for core constitutional values. In Judge Gorsuch's case, these doubts are too serious to overlook.

If there are any questions about AFJ's research or position, I and my staff stand ready to help you at any time.

Sincerely,

Nan Aron

Eleven Dupont Circle NW, Second Floor | Washington, DC 20036 | www.allianceforjustice.org | t: 202-822-6070 | f: 202-822-6068
Field Offices
Oakland, CA | Los Angeles, CA | Dallas, TX

AMERICANS
AGAINST
GUN VIOLENCE

Americans Against Gun Violence
P.O. Box 661252
Sacramento, CA 95866
(916) 668-4160 / (888) 286-8122
www.aagunv.org / info@aagunv.org

17 FEB 15 AM 11:31
FEINSTEIN
WASHINGTON, D.C.

February 6, 2017

The Honorable Dianne Feinstein
One Post Street, Suite 2450
San Francisco, CA 94104

Dear Senator Feinstein:

I'm writing on behalf of Americans Against Gun Violence to express our concerns about Donald Trump's nomination of Judge Neil Gorsuch to replace the late Antonin Scalia on the Supreme Court. As you undoubtedly know, Gorsuch, who is currently a judge on the Tenth Circuit Court of Appeals, has scant history in ruling on cases touching on the gun violence, gun control, and the Second Amendment. The parallels that have been drawn, however, between his judicial philosophy and Scalia's, along with his own praise of Scalia during his nomination press conference as a "towering" justice and a "lion of the law," are concerning. Also of concern is the fact that he was nominated by a president who during his presidential campaign expressed opposition to even the most basic gun control measures, including gun free school zones, universal background checks for gun purchases, and bans on assault weapons. Finally, the fact that the NRA endorsed Gorsuch immediately and enthusiastically suggests that the gun lobby knows more about Gorsuch's views on gun control and the Second Amendment than the rest of us do and that Gorsuch is likely to endorse the NRA's "individual rights" version of the Second Amendment, a version that the late Supreme Court Chief Justice Warren Burger called "one of the greatest pieces of fraud on the American public" that he had seen in his lifetime.[1]

Antonin Scalia claimed to be an "originalist," basing his decisions on the original intent of the constitution.[2] He also railed against "judicial activism," the practice of judges changing the interpretation of laws to conform with their own ideology. In his majority opinion in the 2008 *Heller* decision, though, in which a narrow 5-4 majority of the Supreme Court struck down Washington DC's freeze on new handgun acquisition on the basis that it violated the Second Amendment, Scalia was clearly engaging in the flagrant judicial activism, substituting his own ideology for the original intent of the founders of the country.[3]

The *Heller* decision represented the first time in U.S. history that the Supreme Court had ever ruled that the Second Amendment guaranteed an individual right to own guns. Prior to 2008, it had been repeatedly established in Supreme Court decisions,[4] in decisions of lower courts,[5] and in reviews by legal historians[6] that the Second Amendment, which

begins with the phrase, "A well regulated militia, being necessary to the security of a free state," was intended to protect the rights of states to maintain well regulated armed militias, such as the current day National Guard, and that it did not confer a right of individual citizens to own firearms. In particular, the Supreme Court ruled in 1939 in *United States v. Miller*[7] and reiterated in 1980 in *Lewis v. United States*[8] that "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" In his majority opinion in the *Heller* decision, Scalia effectively deleted the phrase, "A well regulated militia," from the U.S. Constitution.

Although strictly speaking, the *Heller* decision applies only to handguns kept in the home "for protection," it is a major obstacle to the adoption of definitive gun control laws in the United States. The *Heller* decision led to a flood of over 1,000 lawsuits by gun control opponents against all sorts of firearm regulations.[9] Over 90% of those lawsuits have been unsuccessful. In particular, gun control laws that require background checks for firearm purchases, that prohibit open carrying of firearms in public places, that impose restrictions on who may carry concealed weapons, and that ban the possession of assault weapons have withstood post-*Heller* challenges. On the other hand, *Heller* has put gun control activists on the defensive, particularly with regard to handgun regulations. In the United States, 70-80% of all firearm related deaths are due to handguns.[10] If the we are ever to reduce our extraordinarily high levels of gun violence to rates comparable to those in other high income democratic countries, we are going to need to adopt comparable gun control regulations, including stringent restrictions, if not complete bans, on private ownership of handguns. In order to accomplish this goal, the *Heller* decision must first be overturned.

Judge Gorsuch, like the late Antonin Scalia, claims to be an originalist. In his nomination press conference he also spoke of the need to avoid judicial activism, stating:

> ...it is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives.

Judge Gorsuch's dissenting opinion in the case of *United States v. Games Perez*[11] is the only objective evidence presently available concerning his views on the Second Amendment, and it raises concerns as to whether he will stay true to his stated judicial philosophy of "originalism" when it comes to firearm related cases, or whether he will instead follow the example of the late Antonin Scalia, and revert to judicial activism in order to impose his own ideology. A detailed analysis of the *Games Perez* case is posted on the "Facts and FAQ's" page of the Americans Against Gun Violence website. In the interest of brevity, I won't include that analysis in this letter. In brief, though, since the Second Amendment was not directly at issue in *Games Perez*, it's difficult to read much into Judge Gorsuch's statement in his dissenting opinion that gun possession is "sometimes even protected as a matter of constitutional right."

Probably the most concerning aspect of Trump's nomination of Neil Gorsuch from our point of view is the NRA's enthusiastic endorsement of the nomination. NRA executive vice president Wayne LaPierre was sitting beside Donald Trump, smiling broadly, at the press event on February 1 when Trump exhorted members of the Senate to promptly confirm Gorsuch. The NRA apparently had advance knowledge of Trump's pick for the

Supreme Court vacancy. It's lobbying arm, the Institute for Legislative Action, issued a press release immediately following Trump's announcement of Gorsuch's nomination on in which its executive director Chris Cox stated:

> President Trump has made an outstanding choice in nominating Judge Gorsuch for the U.S. Supreme Court. He has an impressive record that demonstrates his support for the Second Amendment.

The NRA's early and enthusiastic endorsement of Neil Gorsuch strongly suggests that the gun lobby knows something about his views on gun control and the Second Amendment that the rest of us don't.

Americans Against Gun Violence does not currently have a position on whether Judge Gorsuch's nomination as a Supreme Court justice should be confirmed. We firmly believe, though, that prior to a vote being taken on his confirmation, he should answer the following questions, and that his answers should be made public:

1. Do you believe that gun violence is a serious problem in the United States and that rates of firearm related deaths and injuries in our country are much higher than in every other high income democratic country of the world?

2. Do you believe that in order to reduce rates of gun violence in our country to levels comparable to those in other high income democratic countries, we must adopt comparable gun control laws, including stringent regulation, if not complete bans, on private ownership of handguns and assault weapons?

3. Do you agree with the late Supreme Court Chief Justice Warren Burger who said in an interview on the PBS News Hour on December 16, 1991, that the misrepresentation of the Second Amendment by special interests as guaranteeing an individual right to own guns was "one of the greatest pieces of fraud on the American public" that he had seen in his lifetime?

4. Do you agree that in 1939, the Supreme Court ruled in the case of *United States v. Miller* that the Second Amendment did not confer an individual right to own firearms unless such ownership bore "some reasonable relationship to the preservation or efficiency of a well regulated militia?"

5. Do you agree that in 1980, the Supreme Court reiterated in *Lewis v. United States* that, "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia?'"

6. Do you agree with the distinguished historians and legal scholars, including Carl Bogus, Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer, Fred Anderson, Carol Berkin, Paul Finkelman, R. Don Higginbotham, Stanley N. Katz, Pauline R. Maier, Peter S. Onuf, Robert E. Shalhope, John Shy, and Alan Taylor who presented extensive evidence in their *amici curiae* brief in the case of *District of Columbia v. Heller*[12] that the

framers of the U.S. Constitution never intended for the Second Amendment to be interpreted as conferring an individual right to own any kind of a firearm outside of service in a well regulated militia?

7. Do you agree that articles published in the legal literature between the time of the 1980 *Lewis* decision and the 2008 *Heller* decision arguing that the Second Amendment was intended to confer an individual right to own guns were written by a small group of individuals with financial ties to the gun lobby?

8. Do you agree that there is no net protective value from private ownership of handguns?

9. Do you agree that the 2008 *Heller* decision, in which five of nine Supreme Court justices, including the late Antonin Scalia, ruled that Dick Heller had a constitutional right to possess a handgun in his home "for protection" represented a radical reversal of over 200 years of prior legal precedent, including the Supreme Court's rulings in *Miller* in 1939 and *Lewis* in 1980?

10. Do you agree that the late Justice Antonin Scalia was guilty of "judicial activism" in writing the majority opinion in the *Heller* decision, effectively deleting the phrase, "A well regulated militia," from the U.S. Constitution?

11. Do you agree that *Heller* was wrongly decided?

12. If you were confirmed as a Supreme Court justice and plaintiffs were to apply for a *writ of certiorari* in a case seeking to overturn the *Heller* decision, would you vote to hear the case?

As the ranking member of the Senate Judiciary Committee, Senator Feinstein, you are in an ideal position to pose at least some of these questions to Judge Gorsuch. These 12 questions may seem to be unusually pointed ones for a Supreme Court nominee, but questions 1-11 address issues on which any candidate for the position of a justice on the Supreme Court in 2017, and particularly anyone who professes to be familiar with the career of the late Antonin Scalia, should be well informed. It's almost certain that Justices Breyer, Ginsburg, Souter, and Stevens, who dissented in the 2008 *Heller* case, would answer yes to all 12 questions without hesitation, and that Justice Sotomayor, who replaced the retiring Justice Souter in 2009, and who dissented in the related case of *McDonald v. Chicago* in 2010, would also answer all 12 questions in the affirmative. To answer in the negative to any of the questions 1-11 is to deny the truth, and to answer "no" to question 12 is to deny the need to right a serious wrong.

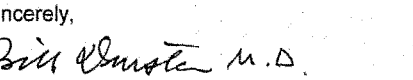
Of course, there are many other issues other than gun control and the Second Amendment on which Judge Gorsuch should be carefully vetted. There is no other issue, however, that is more immediately life threatening, and more preventable, than gun violence. As noted above, the 2008 *Heller* decision stands in the way of the adoption of definitive gun control laws in the United States comparable to regulations that have long been in place in every other high income democratic country of the world. For example, the rate of firearm related deaths in the United States is nearly 50 times higher than the

rate in Great Britain, where private ownership of handguns is banned. Assuming that the adoption of firearm regulations in the United States comparable to those in Great Britain would result in similar rates of firearm related deaths, approximately 33,000 senseless firearm related deaths could be prevented in our country every year.[13]

In his nomination acceptance speech on January 31, Judge Gorsuch pledged to be a "faithful servant of the Constitution" and to serve with "impartiality and independence, collegiality and courage." Assuming that Judge Gorsuch is a man of his word and is informed on the issue of gun violence, he should have no hesitation in responding in the affirmative to all 12 of the above questions. If he does not respond in the affirmative to all 12 questions, we believe that his nomination as a Supreme Court justice should not be confirmed.

Thank you, Senator Feinstein, for your longstanding leadership in the field of gun violence prevention, and thank you for taking the time to read and consider our concerns about the nomination of Judge Gorsuch for the position of Supreme Court justice.

Sincerely,



Bill Durston, MD
President, Americans Against Gun Violence
(916) 202-0567

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[1] Warren Burger, PBS News Hour, December 16, 1991, https://vimeo.com/157433062.
[2] Mary Wood, "Scalia Defends Originalism as Best Methodology for Judging Law," *University of Virginia School of Law*, April 19, 2010, http://content.law.virginia.edu/news/2010_spr/scalia.htm.
[3] Erwin Chemerinsky, "Judicial Activism by Conservatives," *Los Angeles Times*, June 27, 2008, http://www.latimes.com/la-oe-chemerinsky27-2008jun27-story.html.
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[5] See, for example Quilici v. Village of Morton Grove, 695 F. 2d 261 (Court of Appeals, 7th Circuit 1982).
[6] Carl T. Bogus, "The Hidden History of the Second Amendment," *U.C. Davis Law Review* 31, no. 2 (Winter 1998): 309–408; Michael Waldman, *The Second Amendment: A Biography* (New York: Simon & Schuster, 2014); Michael Waldman, "How the NRA Rewrote the Second Amendment," *POLITICO Magazine*, accessed December 30, 2015, http://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856.html.
[7] *Miller*.
[8] *Lewis*, 445.
[9] "Post-Heller Litigation Summary | Law Center to Prevent Gun Violence," accessed February 2, 2017, http://smartgunlaws.org/gun-laws/the-second-amendment/post-heller-litigation-summary/.
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[11] United States v. Games Perez, No. 11–1011 (U.S. Court of Appeals, Tenth Circuit January 23, 2012).
[12] Carl T. Bogus et al., "Brief of Amici Curiae in the Case of District of Columbia v. Heller," accessed February 2, 2017, http://www.scotusblog.com/wp-content/uploads/2008/01/07-290_amicus_historians.pdf.
[13] "Guns in the United Kingdom — Firearms, Gun Law and Gun Control," accessed September 23, 2016, http://www.gunpolicy.org/firearms/region/united-kingdom; "WISQARS."

BAKER ARENA

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

My name is Baker Arena. I am an attorney in Denver, Colorado and a University of Colorado Law School graduate from the class of 2016. I am a former student of Judge Gorsuch's and I was present in the Legal Ethics class during which Judge Gorsuch allegedly made sexist comments. I write to you not to undermine the credibility or malign the reputation of the accusing student, of whom I have and will continue to have a tremendous amount of personal and professional respect for, but rather to bring clarity to the misunderstanding at issue.

In the Legal Ethics class I took from Judge Gorsuch, the textbook we used contained numerous hypothetical ethical dilemmas that attorneys could potentially face in their practice. Judge Gorsuch would use these dilemmas in the textbook in his lectures to illustrate the fact that there are few black and white solutions to the ethical issues attorneys face daily. Adept at challenging the views of students (and sometimes frustratingly so), Judge Gorsuch would use the Socratic method and play devils advocate in his lectures as the class debated the appropriate course of action to confront the ethical issues at hand. If a valid point was made in favor of one course of action, he would present counterfactual points to illustrate the compelling arguments in favor of another course of action. Through the constant debate of ethical dilemmas that semester, we left with a greater appreciation of the nuances attorneys must account for in making ethical decisions consistent with our code of professional responsibility.

I was present in the class at issue and sat directly in front of the accusing student. I recall the hypothetical ethical dilemma discussed in the lecture that day. In that hypothetical ethical dilemma, a female law student, suffering financial hardship, is asked at an interview if she planned on having children and using the firms maternity leave policies. The female student in the hypothetical was planning on having children but nervous to tell the potential employer, for fear she might not get the position. Judge Gorsuch began to lead the class in debate as to what the appropriate course of action should be for the female law student. Judge Gorsuch made compelling points about the numerous issues and subtle discrimination women face in the workplace that many men are oblivious to. In fact, as a man, I had never really considered the extent of pregnancy related discrimination that women face in the workplace until this very class. True to form (and

the Socratic teaching style), Judge Gorsuch also presented counterarguments presenting the hardships employers face due to paid maternity leave policies, which I, as a liberal feminist Democrat, as well as the majority of my colleagues rejected.

During Judge Gorsuch's presentation of such counterarguments, I do not recall him accusing women of taking advantage of paid maternity leave policies, much less espousing such accusations as his personal beliefs. In class and in our conversations outside of class, Judge Gorsuch was always extremely respectful, inclusive, tolerant and open-minded. Additionally, Judge Gorsuch's never shared his personal views on legal or ethical matters in class and was somewhat of an enigma. Had he made the statements he is accused of making, I would have surely noticed as they would be out of his character and had he said such things, I potentially would have even said something to him concerning these statements. That is not the Judge Gorsuch I know.

The Judge Gorsuch I know is supportive and accommodating. As a student who suffers from learning disabilities, I reached out to Judge Gorsuch in the beginning of the semester to ask permission to use my laptop for word-processing in class (the use of which was against his class policies). He replied that he was happy to accommodate any disabilities, and I was free to use my laptop. From our first interaction, I felt welcome and accepted for who I was in his class. His respectful embrace of his students fostered a collegial atmosphere that promoted the sharing of ideas. Moreover, Judge Gorsuch never shared his personal beliefs for fear of advocating instead of teaching. In fact, only time I was able to get Judge Gorsuch to share his personal views was when he chided me for not de-barbing my hooks while fly fishing.

As I stated earlier, I write you not to undermine the credibility or the reputation of the accusing student. Rather, I believe these accusations are a result of a simple classroom misunderstanding that occurred during an engaging and important debate about discrimination women face, and continue to face, in the legal profession. Although I may disagree with some of Judge Gorsuch's rulings and positions, I have a tremendous amount of both personal and professional respect for him. Based on my experience in that class and my first hand interactions with Judge Gorsuch, I believe that these accusations are a result of a misunderstanding and nothing more. I am happy to answer additional questions about the events in issue.

Respectfully,

Baker Arena
2960 Inca Street #102
Denver, CO 80202
f.baker.arena@gmail.com
404.906.5110

Mr. Scott S. Barker
2143 S. Clayton Street
Denver, CO 80210

February 2, 2017

Senator Michael Bennet
1127 Sherman St., Suite 150
Denver, CO 80203

Dear Senator Bennet:

I write to urge you to vote to confirm Judge Neil Gorsuch as an Associate Justice to the United States Supreme Court.

I am a long time Colorado Democrat who has voted for you each time you have stood for election and have made financial contributions to support your campaigns. I am also a practicing attorney in Denver, where I spent 30 years at Holland & Hart (six of which were as the Chair of the firm) and have been a partner at Wheeler Trigg O'Donnell since 2010. I think it is fair to say I know the Denver legal community and its judges well.

There is no question that Judge Gorsuch is qualified to be on the Supreme Court. He has a stellar academic record and a distinguished career as a private and government attorney in a number of capacities. He has performed admirably as a Tenth Circuit appellate judge. He is also a decent human being with the highest standards of integrity. You would have to look long and hard for someone in the Colorado Bar who would say a disparaging word about Judge Gorsuch.

To my dismay, certain Democratic Senators have already started beating the "tit for tat" drums: "the Republicans stonewalled Judge Garland and we should return the favor." In my view, that is small-minded and unconstitutional. I know Judge Gorsuch is a conservative, but I don't see anywhere in the Constitution that says that disqualifies him. I could go on at length, but you get the point. He at least deserves a vote without a bunch of stalling maneuvers in the process.

I know you will be under tremendous pressure to vote with the Democratic leadership against Judge Gorsuch. Please don't knuckle under.

Respectfully,

Scott S. Barker

BEND THE ARC
jewish action

March 7, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510
Cc: Members of the United States Senate

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Bend the Arc Jewish Action Opposes the Confirmation of Judge Neil Gorsuch to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

As the Director of Bend the Arc Jewish Action, I write to share our opposition to the confirmation of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States.

Bend the Arc Jewish Action is the largest national Jewish social justice organization focused exclusively on domestic policy, bringing together Jews from across the country to advocate and organize for a more just and equal society. The Supreme Court hears cases on the full range of issues of concern to Bend the Arc and the American Jewish community more broadly. Additionally, a Supreme Court capable of serving as a check on the executive branch and committed to protecting the Constitutional rights and freedoms of all Americans has never been more crucial. As such, the decision of who is confirmed to a lifetime appointment on the Court has far-reaching implications.

Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career are cause for much concern. His troubling history of deference to executive power and to corporations indicates that he will not be the independent jurist our country and its people need. Further, Judge Gorsuch has demonstrated hostility toward: victims of police brutality, women's right to access reproductive health care, and those who turn to the courts to defend LGBTQ rights. His history of anti-worker rulings are also profoundly troubling and raise serious questions about his ability to rule fairly on our highest Court.

Thank you for your consideration.
Sincerely

Rabbi Jason Kimelman-Block
Director, Bend the Arc Jewish Action

ALLIANCE PARTNERS

ACCE
Advancement Project
Asian Americans Advancing Justice
Asian Pacific Environmental Network (APEN)
Black Women for Wellness
Breast Cancer Fund
California Budget & Policy Center
California Calls
California Domestic Workers Coalition
California Employment Lawyers Association (CELA)
California Environmental Justice Alliance
California Labor Federation
California Immigrant Policy Center
California League of Conservation Voters
California NOW
California Pan-Ethnic Health Network
California Reinvestment Coalition
Child Care Law Center
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Consumer Attorneys of California
Council on American-Islamic Relations, California Chapter (CAIR-CA)
Courage Campaign
Drug Policy Alliance
Ella Baker Center for Human Rights
Environment California
Equality California
Equal Rights Advocates
Health Access
Lutheran office of Public Policy
Mobilize the Immigrant Vote
Mujeres Unidas
NARAL California
PICO California
Planned Parenthood Affiliates of CA
PolicyLink
Progressive Era Project (PEP)
SEIU California
Sierra Club of California
Voices for Progress
Western Center on Law & Poverty

BUILDING THE CALIFORNIA
DREAM ALLIANCE
www.cadreambuilder.org

February 22, 2017

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

We write on behalf of California's working families, communities of color, women, students, LGBT community, immigrant, environmentalists and many others to express our strong opposition to Judge Gorsuch for a lifetime position on the Supreme Court. The recent extreme executive orders and attacks on the judiciary make it more important than ever for our nation's highest court to be independent. Judge Gorsuch's refusal to denounce President Trump's extremist actions makes it clear his appointment is inconsistent with our vision for a just society where every family and community can thrive.

As ranking member on the Senate Judiciary Committee you are well aware of what is at stake. In just the next few years, the Supreme Court is likely to decide on fundamental issues of basic human rights, dignity and justice:

- Working people's ability to join together at work and have a voice in a union is at risk;
- Immigrant families are in danger of being torn apart;
- The hard-fought right to vote is under attack;
- Environmental and wildlife protections are at grave risk;
- Women's reproductive health is in jeopardy;
- Basic rights for LGBT people are under threat.

Our nation's highest court must be an independent check on unlawful actions by the other branches of government, including the President. In the last several weeks, everyday people have had their lives thrown into turmoil by a series of extreme executive orders. Unfortunately, Judge Gorsuch has not given our nation confidence that he can fulfill the constitutionally required role to protect our most basic civil rights.

The Building the California Dream Coalition formed in 2015 to advance a unified policy agenda that would enable the next generation of Californians to thrive with opportunities for education, health care, economic justice, a healthy environment, and freedom from discrimination. Today, our shared values are under threat from the White House and Republicans in Congress who share a corporate agenda that seeks to undermine our voice and our vote. We are counting on you to lead in the Senate to ensure this agenda is not elevated to a swing vote on our nation's highest court.

Over the next few weeks, our organizations will be mobilizing an unprecedented grassroots drive to demand the Senate reject Judge Gorsuch under the 60-vote threshold. In the absence of clear assurances that Judge Gorsuch will act independently from the White House, protect the civil rights of women, people of color and LGBTQ Americans, uphold the Voting Rights Act, affirm the right of working people to stand together in a union, and maintain our nation's commitment to inclusion for immigrants, we respectfully and strongly urge you to oppose his confirmation.

Sincerely,

Building the California Dream Alliance

March 17, 2017

4224 NE Halsey Street
Suite 335
Portland, OR 97213
800 247 7421 phone
503 360 9643 fax
CompassionAndChoices.org

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Compassion & Choices Opposes Confirmation of Judge Gorsuch to Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of Compassion & Choices, we write to oppose the confirmation of Judge Neil Gorsuch as an Associate Justice to the United States Supreme Court.

Compassion & Choices is the nation's oldest, largest and most active nonprofit organization committed to improving care and expanding choice at the end of life. Our vision is a society where people receive state-of-the-art care and a full range of choices for dying in comfort, dignity and control. We aim to ensure individuals understand the risks and rewards of all feasible treatment options, treatment decisions are fully respected, and that care reflects a person's values and priorities for life's final chapter.

As you are aware, Judge Gorsuch's 2006 book, *The Case Against Assisted Suicide and Euthanasia*, speaks at length about his opposition to medical aid in dying. Medical aid in dying, a medical practice wherein a terminally ill, mentally competent, adult can request medication from a physician they may self-administer if their suffering becomes too great, is now an explicitly authorized medical practice in six jurisdictions, California, Colorado, Oregon, Vermont, Washington, and the District of Columbia. 18% of the adult population in the United States now has access to this important and compassionate medical option.

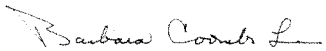
Judge Gorsuch makes it clear he doesn't believe laws that allow for such an option are capable of passing constitutional muster despite almost 20 years of data and thoughtful debate by voters and policy makers across the nation. He also is quite candid that, although the Supreme Court has shown deference to states in this matter, he does not believe the rational distinctions drawn by the states that allow terminally ill patients to access medical aid in dying are sufficient to withstand a court challenge.

Judge Gorsuch's views harken back to a view of the world where government knows best and is allowed to meddle in the most intimate moments of human life. Allowing confirmation of a justice who is willing to impose his own personal beliefs on terminally ill patients as they wrestle with the most profound healthcare decisions of their life would have dire consequences for generations to come.

On behalf of our 450,000 supporters, Compassion and Choices urges you to oppose Judge Gorsuch's confirmation.

Thank you for considering our views on this critical issue.

Respectfully,



cc: Senator Leahy

March 9, 2017

RE: Demos Urges Senators to Oppose Judge Gorsuch's Confirmation to the U.S. Supreme Court

Dear Senator:

Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. We write to urge you to reject President Trump's nomination of Judge Neil Gorsuch to a lifetime appointment on the nation's highest court.

With the Supreme Court split four-to-four on so many critical topics, the stakes could not be higher. Judge Gorsuch has gone out of his way to support the wealthy and powerful over the rest of us, often breaking with his appellate court colleagues to do so.[1] On issues ranging from Wall Street accountability to workers rights to criminal justice, he would move the country backwards.[2]

Here, Demos highlights one important issue that requires rejection of President Trump's nominee: Judge Gorsuch's troubling record on money in politics and his potential to be the deciding vote to gut our few remaining protections against big money dominating our democracy.

The next Supreme Court justice will have a pivotal role in ensuring our Constitution protects the rights and voices of all Americans. For four decades, the Court's flawed approach to money in politics has shredded a series of common-sense protections against the power of special interests and wealthy individuals, and shaped a system where the size of our wallets determines the strength of our voices.[3]

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[1] Alicia Parlapiano & Karen Yourish, "Where Neil Gorsuch Would Fit on the Supreme Court," THE NEW YORK TIMES (February 1, 2017); Elliot Mincberg, *The Dissents of Judge Neil Gorsuch: Far to the Right and Out of the Mainstream*, PEOPLE FOR THE AMERICAN WAY (February 2017).

[2] *The Gorsuch Record*, ALLIANCE FOR JUSTICE (February 2017).

[3] Adam Lioz, *Breaking the Vicious Cycle: Rescuing our Democracy and Our Economy by Transforming the Supreme Court's Flawed Approach to Money in Politics*, DEMOS (December 2015).

DEMOS.ORG COMM@DEMOS.ORG

NEW YORK
80 BROAD STREET, 4TH FLOOR
NEW YORK, NY 10004
212.633.1405

WASHINGTON DC
740 6TH STREET, NW, 2ND FLOOR
WASHINGTON, DC 20001

BOSTON
1340 CENTRE STREET, SUITE 209
NEWTON CENTER, MA 02459
617.232.5885

The public is deeply concerned about the impact of concentrated wealth on our democracy and understands the role of the Court. Ninety-four percent of voters believe that the power of big money in politics is a problem, and ninety percent say that the Supreme Court plays an important role in setting the rules.[4] In fact, 85% of Americans believe we need fundamental changes to our system for funding political campaigns.[5]

We need a ninth justice who understands that a true democracy cannot elevate big money over the voices of ordinary people and who will be open to reasonable limits that protect the rights and influence of all Americans. The vast majority of Americans agree – including 91 percent of Trump voters.[6]

Unfortunately, Judge Gorsuch's record on money in politics have convinced us that he will not be the type of open-minded justice we need to rescue our pro-democracy Constitution.

In the two directly relevant cases Judge Gorsuch faced, he voted to expand First Amendment rights for corporations and went out of his way to signal openness to applying the harshest possible standard of review to campaign contribution limits.[7] Taken together, these opinions suggest that Judge Gorsuch would be receptive to attacks on our few remaining protections against big money—specifically the current bans on "soft money" contributions to political parties and corporate contributions directly to candidates.[8] Please see the accompanying fact sheet for more details.

In a world where Judge Gorsuch forms a majority block of pro-big money justices, large corporations and wealthy individuals would enjoy virtually unlimited ability to translate their economic might into political power. Our legislatures and other elected offices will become

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[4] *The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017).

[5] Nicholas Confessore & Megan Thee-Brenan, "Poll Shows Americans Favor an Overhaul of Campaign Financing," THE NEW YORK TIMES (June 2, 2015).

[6] *The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017).

[7] *Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money-in-Politics Reforms*, DEMOS & CAMPAIGN LEGAL CENTER (January 31, 2017).

[8] Richard L. Hasen, "Why Gorsuch could lead court in wrong direction," CNN.COM (March 1, 2017).

DEMOS.ORG COMM@DEMOS.ORG

NEW YORK
80 BROAD STREET, 4TH FLOOR
NEW YORK, NY 10004
212.633.1405

WASHINGTON DC
740 6TH STREET, NW, 2ND FLOOR
WASHINGTON, DC 20001

BOSTON
1340 CENTRE STREET, SUITE 209
NEWTON CENTER, MA 02459
617.232.5885

even more skewed by race and class; policy will become even more tilted towards the preferences of the white, wealthy donor class; and people of color and working families across the nation will continue to fall behind economically and be alienated politically.[9]

Judge Gorsuch's troubling record on money in politics and other issues is sufficient reason to oppose his confirmation. But in these extraordinary times there is an additional concern: we are not convinced that Judge Gorsuch has the requisite independence to stand up to President Trump when necessary to protect our democracy and communities.

From the unconstitutional Muslim travel ban to direct attacks on our independent judiciary to deliberate attempts to undermine respect for freedom of the press and the very concept of the truth, we face a new, alarming threat from the Trump Administration every day. An independent judiciary is more critical than ever in this context. Yet, Judge Gorsuch has shown troubling deference to unfettered executive power, and Trump's advisors have assured his supporters that Gorsuch and Trump "support each other."[10]

For all of these reasons, Demos urges you to do everything in your power to defeat Judge Neil Gorsuch's confirmation to the U.S. Supreme Court—including applying a 60-vote threshold for moving to a final vote.

Put simply, Judge Gorsuch has not shown sufficient commitment to our constitutional values of liberty, equality, and justice for all to earn Demos' support, or yours.

Sincerely,

Heather McGhee, President
Brenda Wright, Vice President of Policy & Legal Strategies
Adam Lioz, Counsel and Senior Advisor for Policy & Outreach

---

[9] Adam Lioz, *Stacked Deck: How the Racial Bias in our Big Money Political System Undermines Our Democracy and Our Economy*, DEMOS (2014).

[10] *Planned Parenthood Association of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016); Paul Gordon, "Judicial Independence Does Not Equal Crumbling Under Trump's Pressure," PEOPLE FOR THE AMERICAN WAY (February 10, 2017).

DEMOS.ORG COMM@DEMOS.ORG

NEW YORK
80 BROAD STREET, 4TH FLOOR
NEW YORK, NY 10004
212.633.1405

WASHINGTON DC
740 6TH STREET, NW, 2ND FLOOR
WASHINGTON, DC 20001

BOSTON
1340 CENTRE STREET, SUITE 209
NEWTON CENTER, MA 02459
617.232.5885

March 17, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC

RE: Earthjustice Opposition to Supreme Court Nomination of Judge Neil M. Gorsuch

Dear Chairman Grassley and Ranking Member Feinstein:

Earthjustice opposes the confirmation of Judge Neil M. Gorsuch to a lifetime seat on the Supreme Court of the United States. The Supreme Court is the final arbiter of our laws, and its rulings dramatically impact the lives and rights of all Americans. Judge Gorsuch is an extreme and unacceptable choice for the Supreme Court, and we urge the Senate Judiciary Committee to reject his nomination.

Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, reveal a deep hostility to government and the crucial role it plays in safeguarding public welfare, as well as an alarming determination to close the courthouse doors to those seeking to defend their rights under the Constitution and laws that protect essential values from clean air and water to fair labor practices to bedrock civil rights. As his dissents and concurrences make clear, he is seeking to advance a highly political, radically ideological agenda that cannot be squared with the core attributes that the American people correctly expect and deserve from any Supreme Court justice — impartiality, moderation, and a profound commitment to justice for *all*.

Throughout his time on the bench, Judge Gorsuch has consistently sided with corporations, the wealthy, and the powerful, while working to erode the rights of women, workers, and the disabled, among other groups. It is essential that whoever is given the honor of a seat on the Supreme Court upholds the right of access to the courts for all, and honors the Constitutional obligation to provide an impartial check on the power of Congress and the President. Given his extreme views, Judge Gorsuch is unsuited to provide that check, which is at the very heart of our democracy.

II. Judge Gorsuch's Environmental Record

A review of Judge Gorsuch's writings and decisions indicate that he would seek to overturn well-established Supreme Court precedents and undermine the federal government's ability to enforce bedrock environmental laws such as the Clean Air Act and Clean Water Act. Judge Gorsuch's record indicates that he would take the Court in a far-right direction, doing irreparable

WASHINGTON, DC OFFICE 1625 MASSACHUSETTS AVENUE, SUITE 702 WASHINGTON, DC 20036

T: 202.667.4500 F: 202.667.2356 DCOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

harm to the health of communities, failing to protect wildlife and our public lands, and restricting efforts to combat climate change.

In *United States v. Nichols*, Judge Gorsuch wrote a lengthy dissent that tried to revive an obscure legal doctrine — the non-delegation doctrine — that would stymie the federal government in implementing its core functions and could further provide the basis for striking down our bedrock environmental laws. This dissent, among other opinions written by Judge Gorsuch, shows a general hostility to regulatory agencies and regulatory safeguards that protect our air, water and natural heritage. His stated desire to overrule the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council* is another such example.

In *Wilderness Society v. Kane County*, Judge Gorsuch concurred with a decision to dismiss a claim brought by several environmental organizations who were seeking to protect public lands. As the dissent in that case observed, the majority's holding "will have long-term deleterious effects on the use and management of federal public lands."

III. Judge Gorsuch and Access to Courts

Judge Gorsuch is an opponent of litigation in the public interest, even suggesting in an article written for the *National Review* that groups seeking to defend their constitutional rights — to marriage equality, for example — are "addicted to litigation" and should seek recourse at the ballot box rather than the courts. Of course, this view is completely at odds with the essential role that courts play in defending civil liberties and securing the constitutional and legal rights of individuals in the face of majority rule.

In the environmental arena, these views would eviscerate vital protections, as all of our core environmental statutes from the Clean Water Act to the Clean Air Act depend on public interest litigation for their enforcement. Congress has repeatedly included "citizen suit" and private attorney general provisions in environmental, civil rights, and other laws to ensure that essential legal safeguards are upheld and enforced where there is insufficient will or resources on the part of the federal government to take on corporate polluters. These provisions are among the most important and successful innovations of modern environmental law. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized in the *Friends of the Earth, Inc. v. Laidlaw* case that, "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."[1]

Hostility to environmental litigants is apparent in Judge Gorsuch's recent rulings and dissents. For instance, in a 2013 dissent, he argued that an environmental group should not have been allowed to intervene in an action brought by off-road vehicle advocates against the Forest Service because they would be "adequately represented" by the government.[2] If adopted, his test

[1] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).
[2] *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, 540 Fed. Appx 877 (10th Cir. 2013) (unpublished opinion)

for intervention would effectively slam the courthouse door to conservation groups and others seeking to protect their interests in intervening on behalf of the government unless the groups could definitively prove that the federal government intended to undercut them.

In 2015 he ruled that environmental groups lacked standing to challenge the Forest Service's temporary approval of motorcycle use on forest trails.[3]

I. Judge Gorsuch Is Hostile to Giving Real People Relief in the Courts

Judge Gorsuch is a friend of big business, demonstrated by his lengthy record of decisions that seek to benefit corporations and restrict the federal government's regulatory responsibilities. In a working paper for the Washington Legal Foundation, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, Judge Gorsuch argued that the legislature and courts should make securities fraud class-action lawsuits more difficult to achieve.

Judge Gorsuch has a history of rulings against workers' rights. In *Compass Environmental Inc. v. OSHRC,* Judge Gorsuch voted to overturn a Department of Labor fine against a company whose failure to properly train a worker caused his death. In another case, Judge Gorsuch dissented from a decision upholding a National Labor Relations Board order that an employer pay back wages that were owed after the worker's wages were improperly reduced.

Judge Gorsuch has shown hostility to the rights of the disabled. In *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, Judge Gorsuch ruled that a student with autism did not have a right under the federal Individuals with Disabilities Education Act (IDEA) to an education that would provide the opportunity to develop intellectual and social skills outside the classroom.

Judge Gorsuch has shown repeated antipathy to reproductive rights. In *Hobby Lobby Stores, Inc. v. Sebelius*, Judge Gorsuch agreed with the majority opinion that corporations are persons and should not be required to pay for contraceptive coverage under the Affordable Care Act.

Judge Gorsuch has also shielded police officers charged with excessive force. In *Wilson v. City of Lafayette*, Judge Gorsuch held that a police officer was entitled to qualified immunity from an excessive force claim. The officer had used his stun gun and killed a young man who fled after admitting that he owned marijuana plants that were growing in the area. The police officer did not suspect the victim of any violent crime.

Conclusion

Earthjustice is committed to using the power of law to protect people's health, to preserve magnificent places and wildlife, to advance clean energy and combat climate change. We are

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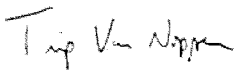
[3] *Backcountry Hunters and Anglers v. U.S Forest Service,* 612 Fed. Appx. 934 (10th Cir. 2015) (unpublished opinion)

deeply committed to promoting a federal judiciary and Supreme Court that safeguard the rights of everyone in our country.

Based upon our review of Judge Gorsuch's record, we respectfully urge you and your colleagues to exercise your power to reject his nomination to a lifetime seat on the United States Supreme Court. We appreciate your consideration of our views.

Sincerely,



Trip Van Noppen
President
Earthjustice

epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

March 20, 2017

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the nomination of Judge Neil Gorsuch as the next Associate Justice of the Supreme Court. We urge you to explore his views on the right to privacy, on government transparency, and on the doctrines of Article III standing and *Chevron* deference. Judge Gorsuch's views on these issues could have far-reaching implications for consumer protection and the future of privacy in the digital era.

We write on behalf of the Electronic Privacy Information Center. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues.[1] We participate in a wide range of activities, including research and education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy. EPIC regularly files *amicus* briefs in the U.S. Supreme Court,[2] and EPIC routinely shares its views with the Senate Judiciary Committee regarding nominees to the Supreme Court.[3]

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[1] EPIC, *About EPIC* (2017), https://epic.org/epic/about.html.
[2] *See, e.g.*, *amicus curiae* briefs of EPIC in *Packingham v. North Carolina*, No. 15-1194 (U.S. argued Feb. 27, 2017) (arguing that the state cannot restrict the news and social media websites that a released offender may read); *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the search of a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques); *Sorrell v. IMS Health Inc.*, 564 U.S. 52 (2011) (arguing that the privacy interest in medical records justifies regulating datamining of prescription records). *See generally* EPIC, *EPIC Amicus Curiae Briefs: Supreme Court* (2017), https://epic.org/amicus/?c=Supreme+Court.
[3] *See, e.g.*, Letter from EPIC to Senator Patrick Leahy, Chairman, & Senator Jeff Sessions, Ranking Member (June 28, 2010) (concerning the nomination of Justice Elena Kagan), https://epic.org/privacy/kagan/EPIC_Kagan_Ltr.pdf; EPIC, *1972 Alito Princeton Privacy Report* (2005), https://www.epic.org/privacy/justices/alito/princeton/; Letter from EPIC to Senator Arlen Specter, Chairman, & Senator Patrick Leahy, Ranking Member (Sept. 9, 2005) (concerning the nomination of Chief Justice John Roberts), https://epic.org/privacy/justices/roberts/0905letter.pdf.

Defend Privacy. Support EPIC.

Although EPIC takes no position for or against a judicial nominee, we urge you to scrutinize Judge Gorsuch's view on the role of the Court and Congress, privacy rights, government transparency, and judicial doctrines relevant to privacy protection.

These issues could not be more timely. The President has recently alleged that he was the target of government surveillance. Although the Chairman and Ranking Member of both the Senate and House Intelligence have found no basis to this charge,[4] Americans are rightly concerned about the scope of surveillance, the impact of new technologies, and new business practices.[5] They are perhaps even troubled by the prospect that the incoming administration could use the vast powers of the federal government against journalists, critics, political opponents, and others. Indeed, many of the most important privacy laws in the United States, including the Privacy Act of 1974 and the Foreign Intelligence Surveillance Act ("FISA") of 1978, came about precisely in response to the excesses of those in the White House.[6] Critical to the effective protection of constitutional liberties and the Acts of Congress that safeguard the rights of the people is judicial independence.

The Senate Judiciary Committee should consider these issues as it begins the nomination hearings for Judge Neil Gorsuch.

Judge Gorsuch Should Be Asked About the Role of Congress and of the Court in Safeguarding Privacy

The Supreme Court has decided many important cases concerning privacy and new technologies. Recent decisions include *Riley v. California*[7] (concerning the search of a cell phone incident to arrest) and *United States v. Jones*[8] (concerning the attachment of a GPS tracking device to a vehicle).[9] Several of the justices have spoken to the institutional roles that Congress and the Courts play in addressing these emerging challenges to basic freedoms.[10] Justice Kagan

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[4] *Joint Statement from Senate Intel Committee Leaders on Wiretapping Evidence at Trump Tower*, U.S. Senate (Mar. 16, 2017), http://www.warner.senate.gov/public/index.cfm/pressreleases?ID=8ABB94B7-ECC4-4E2A-9F2D-00B493295400.

[5] Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, Pew Res. Ctr. (May 20, 2015), http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/.

[6] *Privacy Act of 1974, 5 U.S.C. § 552a*, Justice Information Sharing (Aug. 16, 2013), https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1279; James G. McAdams, III, Dep't of Justice, *Foreign Intelligence Surveillance Act (FISA): An Overview* (2006), https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf.

[7] 134 S. Ct. 2473.

[8] 565 U.S. 400.

[9] *See also City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (concerning whether hotel guest registries should be made available for inspection absent judicial review); *Sorrell*, 564 U.S. 52 (concerning a state law limiting the disclosure of certain types of private medical data); *Herring v. United States*, 555 U.S. 135 (2009) (concerning whether evidence obtained due to an error in a criminal justice database should be suppressed).

[10] State attorneys general also play a crucial role in protecting privacy. *See generally* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 748 (2016).

emphasized in a public speech that privacy "will be one of the most important issues before the Court in the decades to come."[11] Justice Alito, in his concurring opinion in *Jones*, highlighted the important role that Congress plays in regulating "that complex subject" of wiretapping, noting that "concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions."[12] And Justice O'Connor wrote in a widely cited concurring opinion:

> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.[13]

Law enforcement today is presented with opportunities to use "stingray" devices, collect and test DNA samples for personal characteristics, mine social media platforms and "Big Data," deploy drones with facial recognition, and access camera and recording devices remotely.[14] The public should feel confident that Judge Gorsuch understands the role that these technologies and law enforcement techniques play in individual lives, and respects the need to govern law enforcement use of them wisely.

Given the rapid pace that technology is developing, EPIC believes it is critical for the Supreme Court, as well as Congress, to safeguard fundamental rights.[15] Accordingly, the Committee should discuss with the nominee the role of the Supreme Court and of Congress in addressing the challenges that new technology presents.

Judge Gorsuch Has a Commendable Record on the Fourth Amendment

Following in the tradition of Justice Scalia, Judge Gorsuch has authored several Fourth Amendment decisions that protect individuals against intrusive searches. As a privacy organization, EPIC strongly supports constitutional limitations on the scope of government

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[11] Tal Kopan, *Elena Kagan Talks Diversity and (Dis)agreement on the Supreme Court*, Politico (Dec. 14, 2012), http://www.politico.com/blogs/under-the-radar/2012/12/elena-kagan-talks-diversity-and-disagreement-on-the-151963.html.

[12] *Jones*, 565 U.S. at 427; *see also Riley*, 134 S. Ct. at 2497 (Alito, J., concurring) ("While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.").

[13] *Ariz. v. Evans*, 514 U.S. 1, 17–18 (1995) (O'Connor, J., concurring).

[14] *See generally*; EPIC, *EPIC v. FBI - Stingray / Cell Site Simulator* (2017), http://epic.org/foia/fbi/stingray/; EPIC, *Genetic Privacy* (2017), https://epic.org/privacy/genetic/; EPIC, *Social Networking Privacy* (2016), https://epic.org/privacy/socialnet/; EPIC, *Domestic Unmanned Aerial Vehicles (UAVs) and Drones* (2017)), https://epic.org/privacy/drones/

[15] *See* Marc Rotenberg & David Brody, *Protecting Privacy: The Role of the Courts and Congress*, 39:3 A.B.A. Hum. Rts. Mag. (2013), http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/may_2013_n2_privacy/protecting_privacy_courts_congress.html.

surveillance. Still, we encourage the Committee to question the nominee on several aspects of Fourth Amendment doctrine.

Search, Seizure, and New Technologies

In *United States v. Ackerman*, Judge Gorsuch authored an opinion holding that the National Center for Missing and Exploited Children (NCMEC) had violated the defendant's Fourth Amendment rights by conducting a warrantless search of his email.[16] AOL, the defendant's email provider, had an automated filter which could detect images previously identified as child pornography. When that system flagged one of the defendant's emails, AOL forward the message to NCMEC. The center opened the message and established that the attachments did, in fact, contain child pornography.

Writing for the court, Judge Gorsuch determined the NCMEC, which receives funding from the government and has special powers under federal law, was a state actor. Thus, it had violated the Fourth Amendment by opening the defendant's email.[17]

Judge Gorsuch dissented in *United States v. Carloss*. In that case, the court determined that—despite the presence of "no trespassing" signs—police officers acted reasonably when they approached and knocked on the door of a defendant's house.[18] Judge Gorsuch concluding that a reasonable officer would not have believed that they were welcome on the property and that police should have obtained a warrant. Both opinions suggest that Judge Gorsuch favors a robust interpretation of the Fourth Amendment, reflecting the intent of the framers, as did Justice Scalia.[19]

The Committee should ask Judge Gorsuch how the Fourth Amendment should apply in a digital context. How should the intent of the framers apply to the world of digital technology that makes possible the vast collection of personal, sensitive information? Does the advance of technology necessarily mean a diminished expectation of privacy? Will individuals have the same expectation of privacy in their digital communications as they have had in their physical communications?[20]

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[16] *U.S. v Ackerman,* 831 F.3d 1292, 1308–09 (10th Cir. 2016).
[17] *Id.* at 1300.
[18] *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir. 2016).
[19] *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1989 (2011), (Scalia, J., dissenting) ("Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.").
[20] *See Olmstead v. United States*, 277 U.S. 438, 475–76 (1928) (Brandeis, J., dissenting) ("The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.").

The Committee could also ask the nominee how the Fourth Amendment doctrine may evolve as technology evolves. In *United States v. Denson*, Judge Gorsuch, writing for the majority, found that the government's use of a radar device to determine whether someone was inside a building constituted a warrantless search under the Fourth Amendment.[21] But in 2012, Judge Gorsuch declined to exclude evidence from a GPS device that had been placed on the defendant's car without a warrant.[22] Because police had conducted their investigation prior to the Supreme Court's ruling that use of a GPS tracker constitutes a search,[23] the Tenth Circuit determined that officers had acted in good faith and that the GPS evidence was admissible.[24] That outcome was contrary to the unanimous holding of the Supreme Court in *United States v. Jones,* suggesting perhaps that Judge Gorsuch was behind the curve of the evolving doctrine of the Fourth Amendment.

The Third-Party Doctrine

EPIC also proposes that the Committee ask Judge Gorsuch about the Fourth Amendment's "third-party" doctrine, which has diminished the privacy protections for individuals whose personal information is held by third parties, such as banks, Internet Service Providers, and medical companies.[25]

In *Kerns v. Bader*, Judge Gorsuch, writing for the majority, determined that an officer who had requested the plaintiff's medical records from a VA hospital had not violated the Fourth Amendment.[26] Judge Gorsuch applied the third-party doctrine, which dictates that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities, even if the information revealed [to the third party] on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[27] This doctrine currently applies to financial information and, as Judge Gorsuch noted, "at least some courts have indicated the same analysis applies to personal medical records entrusted by patients to hospitals or care providers."[28]

However, the third-party doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[29] As Justice Sotomayor has explained, even deeply private information disclosed to third parties—such as "a list of every Web site . . . visited in the last week, or month, or year"—will lack constitutional protection "unless our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy."[30]

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[21] *United States v. Denson*, 775 F.3d 1214, 1218–19 (10th Cir. 2014).
[22] *United States v. Mitchell*, 653 F. App'x 651, 653 (10th Cir. 2016).
[23] *United States v. Jones*, 565 U.S. 400 (2012).
[24] *Mitchell*, 653 F. App'x at 654. *See generally United States v. Knotts,* 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984).
[25] Bruce Schneier, *Data and Goliath* 67–68, 180 (2015).
[26] *Kerns v. Bader*, 663 F.3d 1173, 1184 (10th Cir. 2011).
[27] *Id.* (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)).
[28] *Id.*
[29] *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring).
[30] *Id.* at 418.

The failure of the Constitution to safeguard personal information held by third parties is an ongoing concern for many Americans and an issue that increasingly arises in federal courts.[31] The Committee should ask Judge Gorsuch his views of the third-party doctrine and whether he believes it should be modified or eliminated.

Judge Gorsuch Has a Spotty Record on the Constitutional Right to Anonymity

The Constitution protects the right to anonymity—the right not to disclose one's identity as a condition of exercising First Amendment freedoms.[32] This right of anonymity is all the more important in the connected age: "As the means by which we can be contacted increase, so too do the means by which we can be retaliated against."[33]

The risks to anonymity arise also from new policing techniques, such as body-worn police cameras that may improve police oversight but also raise concerns about the use of techniques for mass surveillance.[34] For example, the constitutional right of the people to peacefully assemble and petition the government for redress of grievances is immediately implicated by police officers with body-mounted cameras moving through crowds and using facial recognition techniques to identify individuals.[35] Such issues are likely to be before the courts in the next few years and will require justices and judges who fully comprehend the risks to constitutional freedoms of such surveillance methods.

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[31] *E.g.*, *In re Google Inc. Gmail Litig.*, No. 5:13-md-02430 (N.D. Cal. filed Sept. 14, 2015) (concerning Google's interception and scanning of emails sent by non-Gmail users); *In re Facebook Biometric Information Privacy Litig.*, 3:15-cv-03747 (N.D. Cal. filed Aug. 17, 2015) (concerning Facebook's collection and retention of facial data from user-uploaded photographs); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016 (N.D. Cal. 2014) (concerning Yahoo's interception and scanning of emails sent by non-Yahoo Mail users).

[32] *NAACP v. Alabama ex. Rel. Patterson*, 357 U.S. 449 (1958); *McIntyre*, 514 U.S. 334; *Talley v. California*, 362 U.S. 60, 64–65 (1960), *Buckley v. ACLF*, 525 U.S. 182 (1999); *see also* Brief of *Amicus Curiae* EPIC at 12–21, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stanford L. Rev. 1373, 1425 (2000) ("The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition."). *See generally* Harry Lewis, *Anonymity and Reason*, *in Privacy in the Modern Age* 104, 105–11 (Marc Rotenberg et al. eds., 2015).

[33] Brief of *Amicus Curiae* EPIC at 1–2, *Peterson v. NTIA*, 478 F.3d 626 (4th Cir. 2007) (Nos. 06–1216, 06–15480). *See generally* Caitriona Fitzgerald et al., *The Secret Ballot at Risk: Recommendations for Protecting Democracy* (EPIC 2016), http://secretballotatrisk.org (explaining how e-voting technology places secret ballot, and therefore right to vote anonymously, at risk).

[34] *Body Cameras: Can Technology Increase Protection for Law Enforcement Officers and the Public: Hearing Before the S. Judiciary Comm., Subcomm. on Crime and Terrorism* (May 19, 2015) (statement of EPIC), https://epic.org/privacy/testimony/EPIC-Body-Camera-Statement-05-19-15.pdf.

[35] Vivian Hung, Esq. et. al, *A Market Survey on Body Worn Camera Technologies* 8-404 (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/250381.pdf ("[V]endors are developing and fine-tuning next-generation BWC features such as facial recognition and weapons detection.").

In 2010, Judge Gorsuch joined a decision by the Tenth Circuit[36] limiting the First Amendment right to anonymous speech.[37] The Utah legislature had enacted a statute requiring released sex offenders to disclose all "Internet identifiers and the addresses [used] for routing or self-identification in Internet communications"[38] along with the passwords for those identifiers.[39] An offender challenged the statute on the grounds that the law unconstitutionally chilled his online speech.[40] Yet the court, including Judge Gorsuch, held that the law did "not unnecessarily interfere with his First Amendment freedom to speak anonymously."[41]

Judge Gorsuch also sided with the government in two other cases concerning the compelled disclosure of identity. In 2014, the nominee wrote an opinion in a religious freedom lawsuit brought by an inmate.[42] The plaintiff, a Muslim man who had legally changed his name for religious reasons while incarcerated, alleged that the prison officials were violating his Free Exercise rights by requiring him to list his former name when sending and receiving mail.[43] The court rejected the plaintiff's challenge, concluding that the prison's policy was "neutral toward religion and generally applicable."[44]

In 2015, Judge Gorsuch joined the Tenth Circuit's decision in an air traveler's lawsuit against police.[45] An Albuquerque police officer had arrested the plaintiff after he declined to stop filming at a security checkpoint and refused the officer's demand to show identification.[46] But the court held that the officer was entitled to qualified immunity from the plaintiff's Fourth Amendment claim, as "a reasonable officer could have believed that an investigative stop for disorderly conduct at an airport security checkpoint required the production of some physical proof of identity."[47] The court also declined to address whether there is "First Amendment protection for creating audio and visual recordings of law enforcement officers in public places"—a right recognized by numerous other circuits.[48]

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[36] *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010).
[37] *See McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").
[38] *Shurtleff*, 628 F.3d at 1221 (citing Utah Code Ann. § 77–27–21.5(14)(i) (West 2008)).
[39] *Id.* (citing Utah Code Ann. § 77–27–21.5(12)(j) & (29) (West 2008)). Identifiers used for employment or financial accounts were exempt from the law. *Id.*
[40] *Id.* at 1224.
[41] *Id.* at 1225.
[42] *Ali v. Wingert*, 569 F. App'x 562 (10th Cir. 2014).
[43] *Id.* at 564.
[44] *Id.* at 565.
[45] *Mocek v. City of Albuquerque*, 813 F.3d 912, 927 (10th Cir. 2015).
[46] *Id.* at
[47] *Id.* at 927.
[48] *E.g.*, *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

Judge Gorsuch's position on the right to anonymity could have significant influence on the Supreme Court, which is already considering a case about digital privacy rights under the First Amendment.[49] It would be appropriate to ask the nominee about his views on this subject.

Judge Gorsuch's Views on FOIA and Government Transparency Are Opaque

Government transparency, and in particular the Freedom of Information Act, are critical to ensuring accountability and meaningful oversight.[50] Public disclosure of government records and proceedings ensures that the nation is fully informed about the activities of the federal government. This past week Sunshine Week recognized the importance of transparency, and last year we celebrated the 50th anniversary of the FOIA and the enactment of amendments to strengthen our open government law.[51]

Judge Gorsuch has not authored any opinions concerning FOIA.[52] He has joined just one Tenth Circuit opinion interpreting the statute, in which the court briefly explained that "FOIA and the Privacy Act govern document requests of federal agencies, not state agencies."[53]

Judge Gorsuch's record is similarly limited on judicial transparency. In 2016, the nominee authored an opinion concerning civilian access to court martial proceedings. Though the plaintiffs had previously attended court martial proceedings at Fort Carson, Colorado, the base commander barred the plaintiffs from attending future hearings. The plaintiffs contended that this order interfered with their "right to observe court martial proceedings in violation of the First Amendment," an argument which Judge Gorsuch and the Tenth Circuit rejected.[54]

Given Judge Gorsuch's sparse history on these issues, it would be prudent to ask him about his views on FOIA and government transparency. The Committee should question Judge Gorsuch about the excessive withholding of "working law"[55] under FOIA's deliberative process exemption,[56] the overuse of FOIA's law enforcement exemption[57] to withhold records not

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[49] *Packingham v. North Carolina*, No. 15-1194 (U.S. argued Feb. 27, 2017); *see also* Brief of *Amicus Curiae* EPIC et al. in *Packingham v. North Carolina*, *supra* note 2.
[50] EPIC, *EPIC Open Government* (2017), https://epic.org/open_gov/.
[51] EPIC, *FOIA Gallery 2016* (2016), https://epic.org/foia/gallery/2016/.
[52] 5 U.S.C. § 552.
[53] *Jimenez v. Fourth Judicial Dist. Attorney's Office*, No. 16-1239, 2016 WL 4523971, at *3 (10th Cir. Aug. 29, 2016).
[54] *Alvarez v. Grosso*, No. 15-1398, 2016 WL 6087648, at *2 (10th Cir. Oct. 18, 2016).
[55] *See, e.g.*, Brief for Appellant at 12, *EPIC. v. Dep't of Homeland Sec.*, Nos. 13-5113, 13-5114 (D.C. Cir. voluntarily dismissed Jan. 21, 2014) ("While deliberative documents may be withheld, this privilege 'clearly has finite limits.' Materials discoverable in civil litigation are typically not protected, especially factual materials." (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).
[56] 5 U.S.C. § 552(b)(5).
[57] 5 U.S.C. § 552(b)(7).

connected to any specific investigation,[58] and the problem of over-classification.[59] Because these practices threaten to make FOIA "more a withholding statute than a disclosure statute,"[60] it is essential to learn the nominee's views on them.

Judge Gorsuch's Views on Article III Standing Are Encouraging but Not Fully Known

Article III of the Constitution grants the federal courts judicial power over "cases" and "controversies."[61] Over time, the Supreme Court has developed the doctrine of standing to ensure that federal court jurisdiction is limited "to *actual* cases or controversies."[62] The chief requirement of standing doctrine is that a plaintiff must have suffered an "injury-in-fact"—that is, an "invasion of a legally protected interest" which is (1) "concrete and particularized" and (2) "actual or imminent, not conjectural or hypothetical."[63]

In recent years, some defendants—particularly companies in privacy and consumer protection cases—have sought to manipulate standing doctrine by insisting that plaintiffs must show consequential harm above and beyond their legal injuries.[64] That pattern has continued since the Supreme Court's recent standing decision in *Spokeo, Inc. v. Robins*,[65] which several lower courts have misread as endorsing a consequential harm theory.

This corruption of standing doctrine is deeply concerning, as it prevents plaintiffs from vindicating rights created by Congress, state legislatures, and the common law. These decisions implicate specifically the Acts of Congress that seek to protect Americans from the growing problems of data breach, identity theft, and financial fraud. Also, when a company violates consumers' legal rights by failing to prevent a data breach of their personal information, it is often impossible for those consumers to know whether or how their data was misused by a third party. Demanding that these consumers allege some additional harm, beyond the violation of an

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[58] *See, e.g.*, Petition for Writ of Certiorari at 3, *EPIC v. Dep't of Homeland Sec.*, No. 15-196, *cert. denied*, 136 S. Ct. 876, 877 (2016) ("[T]he Court of Appeals for the D.C. Circuit construed Exemption 7(F) so broadly that it threatens to conceal from public access all records in the possession of any federal agency upon a mere assertion that the record concerns security procedures.").

[59] *See, e.g.*, U.S. Dep't of Justice Office of the Inspector Gen. Audit Div., *Audit of the Department of Justice's Implementation of and Compliance with Certain Classification Requirements* at i (Sept. 2013) ("[O]ver-classification of information interferes with accurate and actionable information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information."); *see also Nomination Hearing for Sen. Dan Coats as Director of National Intelligence Before the S. Select Comm. on Intelligence* (Feb. 28, 2017) (statement of EPIC), https://epic.org/testimony/congress/EPIC-SSCI-Coats-Feb2017.pdf.

[60] *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quoting *Mink*, 410 U.S. at 79) (quotation marks omitted).

[61] U.S. Const. art. III, § 2.

[62] *Spokeo*, 136 S. Ct. at 1547 (emphasis added).

[63] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[64] *E.g.*, *Attias v. Carefirst, Inc.*, No. 16-7108 (D.C. Cir. docketed Sept. 8, 2016); *Gubala v. Time Warner Cable, Inc.*, No. 16-2613, 2017 WL 243343 (7th Cir. Jan. 20, 2017); *In re SuperValu Customer Data Security Breach Litigation*, No. 16-2378 (8th Cir. docketed May 26, 2016).

[65] 136 S.Ct. 1540 (2016).

Act of Congress, to invoke federal court jurisdiction thus bars them from seeking relief, even though they have suffered a legal injury.[66]

Judge Gorsuch has not taken part in any standing cases since the *Spokeo* ruling, but his prior standing decisions suggest a relatively broad view of injury-in-fact. In 2010, he wrote that an employee of a medical practice searched by state authorities had sufficiently alleged injury-in-fact by complaining that "records from inside his personal desk were searched and seized" in violation of his "reasonable expectation of privacy in his office."[67] Later that year, Judge Gorsuch wrote that the "out-of-pocket cost to a business of obeying a new rule of government" suffices for injury-in-fact, "whether or not there may be a pecuniary loss associated with the new rule."[68] And in 2015, the nominee wrote that a coal company had properly alleged injury-in-fact necessary for a dormant Commerce Clause challenge where (1) the company sold coal in Colorado, and (2) the challenged state law reduced coal demand and limited the portion of the market that the company could serve.[69]

Judge Gorsuch has signed on to several other notable standing decisions. In 2014, he joined the Tenth Circuit in holding that "[f]or a procedural injury, the requirements for Article III standing are somewhat relaxed, or at least conceptually expanded. . . . It suffices that the procedures are designed to protect some threatened concrete interest of [the person] that is the ultimate basis of standing."[70] He also twice joined the court in holding that plaintiffs could establish injury-in-fact solely by alleging that their First Amendment rights had been violated.[71] These cases suggest that Judge Gorsuch is willing to infer injury-in-fact even in the absence of additional harm.

Still, it is unclear whether Judge Gorsuch believes that legal injury is sufficient to confer standing in *all* cases, or whether he would graft a consequential harm requirement onto the doctrine in some instances. The Committee should question the nominee on this area of law. The standing doctrine has enormous implications for privacy protection, consumer protection, and access to the federal courts.

Judge Gorsuch Should Be Asked to Clarify His Views on* Chevron *Deference

EPIC urges the Committee to ask Judge Gorsuch about the *Chevron* doctrine[72] and whether he would seek to modify it if appointed to the Court.

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[66] *See* Brief of *Amicus Curiae* EPIC, *Attias v. Carefirst, Inc.* No. 16-7108 (D.C. Cir. docketed Sept. 8, 2016), https://epic.org/amicus/data-breach/carefirst/EPIC-Amicus-Brief-Carefirst.pdf.
[67] *Lewis v. Tripp*, 604 F.3d 1221, 1224 n.1 (10th Cir. 2010).
[68] *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1144–45 (10th Cir. 2010).
[69] *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1175 n.1 (10th Cir.), *cert. denied*, 136 S. Ct. 595 (2015).
[70] *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014).
[71] *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir. 2012); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182–84 (10th Cir. 2010).
[72] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

In *Gutierrez-Brizuela v. Lynch*, the nominee wrote a concurring opinion stating that *Chevron* "permit[s] 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. Maybe the time has come to face the behemoth."[73] Judge Gorsuch further worried that "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)."[74]

The *Chevron* doctrine is one of the most significant pillars of administrative law, and changes to it could have a major impact on judicial review, consumer protection, and public safety. For example, as the Internet of Things (IoT) continues to grow and more connected devices are incorporated into everyday life, the resulting risks to consumers are also increasing.[75] EPIC has urged the Federal Trade Commission to regulate the IoT and safeguard the privacy and security of consumers and businesses.[76] If a court is asked to review a privacy-enhancing FTC action on the IoT, the vitality of the *Chevron* doctrine will be enormously consequential: will the court defer to the agency's expertise in interpreting its Section 5 authority,[77] or will the court substitute its own reading of the statute?

Somewhat different questions arise when an agency fails to take action required by Congress. Consider, for example, the failure of the FAA to undertake a drone privacy rulemaking. Despite a mandate from Congress,[78] the Federal Aviation Administration failed to establish privacy rules for commercial drones. EPIC has petitioned the Court of Appeals for the D.C. Circuit to hold that failure unlawful,[79] given the significant risks to privacy and civil liberties of aerial surveillance, a petition to the agency for a privacy rule, and the FAA Modernization and Reform Act of 2012.[80] Were the *Chevron* doctrine revised or eliminated, the court would have a freer hand to interpret the FAA's obligations under the 2012 law. In an earlier case, EPIC correctly argued that the TSA had failed to comply with the Administrative Procedures Act when it failed to give the public the opportunity to comment on the agency's decision to deploy airport body scanners, which allowed agency officials to view travelers as if they were stripped naked.[81]

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[73] *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1149–58 (10th Cir. 2016).
[74] *Id.*
[75] EPIC, *Internet of Things (IoT)* (2017), https://epic.org/privacy/internet/iot/.
[76] EPIC, *Comments of the Electronic Privacy Information Center to the Federal Trade Commission on the Privacy and Security of the Internet of Things* (June 1, 2013), https://epic.org/privacy/ftc/EPIC-FTC-IoT-Cmts.pdf.
[77] 15 U.S.C. § 45.
[78] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (codified at 49 U.S.C. § 40101 note).
[79] Petition for Review, *EPIC v. FAA*, No. 16-1297 (D.C. Cir. filed Aug. 22, 2016).
[80] *See* EPIC, *EPIC v. FAA*, https://epic.org/privacy/litigation/apa/faa/drones/.
[81] *EPIC v DHS*, 653 F3d. 1, 1 (D.C. Cir. 2011)

EPIC is far from alone in raising questions about Judge Gorsuch's views on *Chevron* deference.[82] Given the implications of the *Chevron* doctrine for privacy, consumer protection, and public safety, the Committee should question the nominee extensively on this subject.

Judge Gorsuch's Should Be Asked About DNA Collection and Health Privacy

New technologies also pose significant threats to medical privacy. Methods for identification, such as rapid DNA analysis, offer the prospect of improved law enforcement. At the same time, the reliability of these techniques, as well as the equal application of these method, remains a concern.[83]

In *United States v. Deiter*, Judge Gorsuch joined the Tenth Circuit in holding that a trial judge had not abused his discretion by refusing a criminal defendant's request to compel DNA samples from two arresting officers. The court noted that "the collection of DNA samples from the officers implicates important privacy interests."[84]

We recognize the important privacy interests of law enforcement officials and at the same time are aware that there is an ongoing concern in the criminal justice system that new forensic techniques, such as DNA matching, are used almost exclusively to establish guilt and not made equally available for exculpatory purposes.[85] DNA data collection has expanded dramatically over the past decade. As of January 2017, the National DNA Index (NDIS) contains over 12,732,925 "offender" profiles, 2,608,768 arrestee profiles and 752,508 forensic profiles.[86] The profiles are heavily skewed toward low-income and minority communities.[87] In the coming years, the Supreme Court may be asked to rule on whether law enforcement can use government or private DNA databases (such as Ancestry.com) to conduct "familial searches."[88] These

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[82] *E.g.*, Jonathan H. Adler, *Should Chevron Be Reconsidered? A Federal Judge Thinks So.*, Wash. Post (Aug. 24, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/should-chevron-be-reconsidered-a-federal-judge-thinks-so/; Timothy B. Lee, *How Neil Gorsuch Could Rein In Regulators Like the EPA and the FCC*, Vox (Feb. 2, 2017), http://www.vox.com/new-money/2017/2/2/14473728/neil-gorsuch-chevron-deference.

[83] FBI, *Frequently Asked Questions on Rapid DNA Analysis* (2017), ("As of January 1, 2017, there is no Rapid DNA system that is approved for use by an accredited forensic laboratory for performing Rapid DNA Analysis."), https://www.fbi.gov/services/laboratory/biometric-analysis/codis/rapid-dna-analysis.

[84] *United States v. Deiter*, 576 F. App'x 814, 816 (10th Cir. 2014). This ruling is commendable in its recognition that DNA sampling implicates serious privacy issues. To the extent that it fits a larger pattern of minimizing the importance of DNA testing of evidence when requested by a defendant, it may be troubling. *See, e.g.*, *United States v. Roberts*, 417 F. App'x 812 (10th Cir. 2011); *Garcia v. Lind*, 574 F. App'x 857 (Mem.) (10th Cir. 2014).

[85] Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 149–50 (2015); *see also* EPIC, *Algorithms in the Criminal Justice System* (2017), https://epic.org/algorithmic-transparency/crim-justice/; EPIC, *Genetic Privacy* (2016), https://epic.org/privacy/genetic/.

[86] *CODIS - NDIS Statistics*, Fed. Bureau of Investigation (Jan. 2017), https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics.

[87] Murphy, *supra* note 85, at 258–59; *see also* Shaun L. Gabbidon & Helen Taylor Greene, *Race & Crime* at Ch. 1 (4th ed. 2016), https://books.google.com/books?id=gq1iCgAAQBAJ&pg=PT26&lpg=PT26#v=onepage&q&f=false.

[88] Murphy, *supra* note 85, at 189–214.

searches look at DNA databases "not for the person who left the crime-scene sample, but rather for a relative of that individual."[89] The Court may also be asked to rule on whether genetic privacy protects employees from having to choose between paying a penalty or sharing their genetic information with their employer.[90]

In considering the growing use of new techniques for tracking, profiling, and matching the Committee should be aware of these developments. EPIC favors a comprehensive approach to privacy protection for new law enforcement techniques that recognizes also the risk that laws and practices may tend to favor or disfavor the rights of certain groups.

Judge Gorsuch's early views on medical privacy are encouraging. As a student at Columbia University, he was interviewed by the *Columbia Daily Spectator* during his bid for a student council seat on whether "AIDS patients [should] be required to report their illness to the University Health Service." Judge Gorsuch replied, "It would be, to my mind, a violation of AIDS patients' rights and privileges of privacy to demand that they report their illness."[91]

However, we are troubled by Judge Gorsuch's more recent conclusion in *Kerns* that a police demand for medical records from a hospital did not violate the Fourth Amendment.[92] Federal law—including HIPAA—has not protected the right to health privacy, causing the majority of the public to mistrust health technology and physicians and to withhold information from their doctors, putting their health and life at risk.[93] In 2002, HIPAA regulations eliminated a patient's longstanding ethical and legal right of consent, legalizing corporate use and sales of personal data and the global health data broker industry.[94] With the public increasingly aware that their health data is not private,[95] it is critical to press Judge Gorsuch on his views concerning the future of health privacy.

Judge Gorsuch Should Be Asked About the Electronic Communications Privacy Act ("ECPA") and Other that Safeguard Privacy

As we suggested above, privacy protections for personal communications remain a key concern for many. According to a recent survey from the Pew Research Center, "A majority of

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[89] Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 297 (2010).
[90] Janet Burns, *GOP Bill Could Force Employees To Undergo DNA Tests Or Pay Huge Fines* (Mar. 14, 2017), https://www.forbes.com/sites/janetwburns/2017/03/14/gop-bill-could-force-employees-to-undergo-dna-testing-or-pay-thousands/#48a6b2aa71fe.
[91] *At-Large Candidates*, Colum. Daily Spectator, Mar. 19, 1986, at 7, 12, http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19860319-01.1.11&e=-------en-20--1--txt-txIN-%22Neil+Gorsuch%22+%26+privacy-----#.
[92] 663 F.3d at 1184.
[93] Black Book Market Research, *Healthcare's Digital Divide Widens, Black Book Consumer Survey* (Jan. 3, 2017), https://blackbookmarketresearch.newswire.com/news/healthcares-digital-divide-widens-black-book-consumer-survey-18432252.
[94] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,183 (Aug. 14, 2002) (to be codified at C.F.R. pts. 160, 164); *see also* Mark A. Rothstein & Laura Rothstein, *How Genetics Might Affect Real Property Rights*, J. L. Med. & Ethics, Spring 2016, at 216, 216–221.
[95] Black Book Market Research, *supra* note 93.

Americans (64%) have personally experienced a major data breach, and relatively large shares of the public lack trust in key institutions—especially the federal government and social media sites —to protect their personal information."[96]

Under the Electronic Communications Privacy Act, the government may demand stored communications and transaction records from third-party service providers simply by offering "specific and articulable facts showing that there are reasonable grounds to believe that the ... records or other information sought[] are relevant and material to an ongoing criminal investigation."[97] This is a markedly lower standard than the showing of probable cause required for a warrant.

On two occasions,[98] Judge Gorsuch has rejected the argument that a government violation of ECPA warrants the exclusion of the resulting evidence—the same remedy that would ordinarily be available for a Fourth Amendment violation. "Subscriber information provided to an Internet service provider is not protected by the Fourth Amendment's privacy expectation," Judge Gorsuch wrote in *United States v. Swenson*.[99] "Neither do violations of the Electronic Communications Act warrant exclusion of evidence."[100] The Committee should ask Judge Gorsuch whether he believes that ECPA offers sufficient privacy protections for emails and other stored communications, particularly if individuals lack a remedy for unlawful searches.

* * *

Finally, we note with concern the treatment of Chief Judge Merrick Garland by the Committee and the United States Senate. Judge Garland was nominated by President Obama to the U.S. Supreme Court on March 15, 2016. Judge Garland is one of the preeminent jurists in the country, known for his thoughtfulness, collegiality, and moderate views. President Obama said of Judge Garland, he "is widely recognized not only as one of America's sharpest legal minds, but someone who brings to his work a spirit of decency, modesty, integrity, even-handedness, and excellence."[101]

For 293 days, the nomination of Judge Garland was pending before the Senate. Yet, no hearing was ever held. No vote was ever taken. He was never even given the opportunity to appear before the Committee. The nomination simply expired on January 3, 2017.[102]

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[96] Kenneth Olmstead & Aaron Smith, *Americans and Cybersecurity*, Pew Res. Ctr. (Jan. 26, 2017), http://www.pewinternet.org/2017/01/26/americans-and-cybersecurity/.
[97] 18 U.S.C. § 2703(d).
[98] *United States v. Perrine*, 518 F.3d 1196, 1202 (10th Cir. 2008) (holding that violations of the ECPA do not warrant exclusion of evidence); *United States v. Swenson*, 335 F. App'x 751, 754 n.1 (10th Cir. 2009) (same).
[99] *Swenson*, 335 F. App'x at 754 n.1.
[100] *Id.*
[101] Michael D. Shear, Julie Hirschfield Davis, & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. Times (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html.
[102] Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires: Garland's nomination languished for 293 days as Republicans declined to give him a hearing,* Wall Street J. (Jan. 3,

The Senate's refusal to act on the nomination of Judge Garland was an abdication of constitutional responsibility by the "world's greatest deliberative body,"[103] and of concern to groups such as EPIC that participate in the work of the Court.

As Judge Gorsuch has himself lamented, "The judicial confirmation process today bears no resemblance" to the confirmations of 50 years ago.[104] "Today, there are too many who are concerned less with promoting the best public servants and more with enforcing litmus tests and locating unknown 'stealth candidates' who are perceived as likely to advance favored political causes once on the bench. . . . Whatever else might be said about the process today, excellence plainly is no longer the dispositive virtue."[105] Judge Gorsuch has even expressed frustration at how Chief Judge Garland—one of the "finest lawyers of [his] generation"—was "mistreated" during his lengthy nomination process for the D.C. Circuit.[106]

Given that Judge Gorsuch has expressed views on the nomination process and the qualifications of Chief Judge Merrick Garland, he could be asked about the Senate's handling of Judge Garland's nomination.

We ask that this letter from EPIC be entered into the hearing record.

As always, EPIC appreciates your consideration of our views and would be pleased to provide the Senate Judiciary Committee with any additional information you request.

Sincerely,

Marc Rotenberg
President, EPIC

Steven Aftergood
Project Director, Federation of American Scientists

Anita Allen,
Vice Provost for Faculty, University of Pennsylvania

James Bamford
Author

2017), https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952.

[103] Paul Kane, *On the death of the Senate and its long history as the world's greatest deliberative body*, Wash. Post (Jan. 31, 2017), https://www.washingtonpost.com/powerpost/on-the-death-of-the-senate-and-its-long-history-as-the-worlds-greatest-deliberative-body/2017/01/31/b99fcbda-e73a-11e6-bf6f-301b6b443624_story.html.

[104] Neil Gorsuch, *Justice White and judicial excellence*, UPI (May 4, 2002), http://www.upi.com/Justice-White-and-judicial-excellence/72651020510343/.

[105] *Id.*

[106] *Id.*

Ann Bartow
Professor, Pace Law School

Francesca Bignami
Professor of Law, George Washington University School of Law

Christine L. Borgman,
Distinguished Professor and Presidential Chair in Information Studies, UCLA; Director, UCLA Center for Knowledge Infrastructure

Ryan Calo
Assistant Professor, University of Washington School of Law

David Chaum
Chaum, LLC

Danielle Keats Citron
Morton & Sophia Macht Professor of Law, University of Maryland School of Law

Julie E. Cohen
Professor, Director of the Center on Privacy and Technology, Georgetown University Law Center

Dr. Whitfield Diffie
Consulting Scholar, Stanford Center for International Security and Cooperation

Cynthia Dwork
Gordon McKay Professor of Computer Science, Radcliffe Alumnae Professor at the Radcliffe Institute for Advanced Study, and Affiliated Professor, Harvard Law School.

David J. Farber
Distinguished Career Professor of Computer Science and Public Policy, Carnegie Mellon University

Philip Friedman
Executive Director, Consumers Count

Harry R. Lewis
Gordon McKay Professor of Computer Science, Harvard University

Anna Lysyanskaya
Professor of Computer Science, Brown University

Aleecia M. McDonald
Non-resident fellow, Stanford Center for Internet and Society

Mary Minow
Library Law Consultant

Dr. Pablo Garcia Molina
Adjunct Professor, Georgetown University

Erin Murphy
Professor of Law, New York University

Dr. Peter G. Neumann
Computer Science Laboratory, SRI International

Helen Nissenbaum
Professor, Director of the Information Law Institute, New York University

Dr. Cathy O'Neil
Founder, O'Neil Risk Consulting and Algorithmic Auditing

Dr. Deborah Peel, M.D.
Founder and Chair, Patient Privacy Rights

Ronald L. Rivest
Professor of Electrical Engineering and Computer Science, MIT

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law, Berkeley Law School

Bruce Schneier
Fellow and Lecturer, Harvard Kennedy School

Dr. Barbara Simons
Founder and Former Chair, USACM, the ACM U.S. Public Policy Committee

Robert Ellis Smith
Publisher, Privacy Journal

Frank Tuerkheimer
Professor of Law Emeritus, University of Wisconsin Law School

Sherry Turkle
Abby Rockefeller Mauzé Professor of the Social Studies of Science and Technology, MIT

James Waldo
Gordon McKay Professor of the Practice of Computer Science

Christopher Wolf
Board Chair, Future of Privacy Forum

Shoshana Zuboff
Charles Edward Wilson Professor of Business Administration (emeritus), Harvard Business School

(Affiliations are for identification only.)

Equality California | eqca.org

March 15, 2017

To the Honorable Members of the United States Senate
Washington, DC 20510

Dear Senators,

RE: Nominee Neil Gorsuch for U.S. Supreme Court

In the weeks since his nomination to the U.S. Supreme Court, a narrative has been advanced that Mr. Gorsuch's conservative views largely align with those of mainstream America.

But Mr. Gorsuch's originalism-based philosophy does not reflect mainstream thinking. On the contrary, it is radically to the right of most Americans who support reproductive rights, the separation of church and state, the fundamental right to privacy, marriage equality for same-sex couples, and equal protection under the law.

Indeed, the very process by which Mr. Gorsuch was selected is disquieting. President Trump outsourced the search for Supreme Court judicial candidates to the Heritage Foundation, an extreme far-right organization.

On behalf of our 800,000 members, Equality California is deeply concerned about Mr. Gorsuch's judicial rulings and philosophy and his zeal to expand religious liberties, as demonstrated by his signature argument in the *Hobby Lobby* case. In his opinion, Mr. Gorsuch supported the denial of birth control coverage for employees in their company-provided health plans if an employer claims that denying such coverage is based on "religious beliefs." Merely signing an ACA opt-out form, Gorsuch wrote, posed a moral dilemma for such employers because it made them 'complicit' in something they found 'sinful.'

Expansive exemptions on religious grounds are being advanced by opponents of LGBT equality across the country in a false premise that Christians are persecuted for their religious beliefs and their conservative social values in an era of rapid change. Christians in this country are not endangered. Our Constitution protects religious expression. It is, in fact, civil rights protections that are endangered when blatant discrimination is allowed if someone merely contends they are acting on their "sincerely held beliefs." Employers, including religiously affiliated contractors, are not allowed to discriminate based on race, color, national origin, sex, or disability, no matter what the employer's beliefs. The civil rights of LGBT people should not be different. Religious exemptions to civil rights laws would effectively gut LGBT legal protections because any person who has a desire to discriminate can merely raise religious beliefs as an excuse and a justification. Judge Gorsuch's views in this area are a direct and significant threat to LGBT equality and LGBT civil rights protections.

Mr. Gorsuch's passion to expand religious exemptions would likely extend far beyond the matter of birth control in *Hobby Lobby*. Millions of LGBT Americans would face discrimination if all it took were for someone to state that providing in health care, public accommodations, insurance, and employment to LGBT people conflicted with their religious beliefs.

Key Supreme Court rulings in recent years have confirmed the equality of LGBT Americans in the eyes of the law. Based on his rulings, it seems clear that if Mr.

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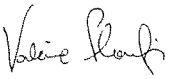
Gorsuch had been on the bench when the landmark *Romer, Lawrence, Windsor* and *Obergefell* cases were considered, he likely would not have been in the majority. This is worrisome because states are already beginning to chip away at recently-won marriage equality. The Arkansas Supreme Court recently held that *Obergefell* does not require equal treatment of married same-sex couples with respect to their children's birth certificates. Similarly, state officials argued before the Texas Supreme Court that *Obergefell* does not require equal employment benefits for same-sex spouses.

Given the country's sharp political polarization and highly charged climate, it is important that of the Supreme Court be universally perceived as impartial and committed to equal protection. The danger is clear, and so is Equality California's position: we urge you to oppose the nomination of Neil Gorsuch to the U.S. Supreme Court.

Sincerely,

Rick Zbur
Executive Director



Valerie Ploumpis
National Policy Director

Equality California is a 501(c)(4) nonprofit organization. Your contribution is non tax-deductible as it supports our advocacy and lobbying efforts.

ADVANCING FAITH, FAMILY AND FREEDOM

March 16, 2017

Senator
U.S. Senate
Washington, DC 20002

Dear Senator:

On behalf of the Family Research Council (FRC) and the hundreds of thousands of families we represent, I urge you to support the nomination of Tenth Circuit Judge Neil Gorsuch to serve as a Justice on the Supreme Court of the United States of America. Judge Gorsuch has a strong record on life and religious freedom, but most importantly, he's an originalist in the likes of the late Justice Antonin Scalia, who Gorsuch will replace on the High Court.

Judge Gorsuch wrote a book in 2006 called *The Future of Assisted Suicide and Euthanasia.* In Gorsuch's book, he says human life is "intrinsically valuable and that intentional killing is always wrong." While Judge Gorsuch has not ruled directly on the constitutionality of abortion, principles regarding the value of life and its intentional taking apply from the moment of conception to natural death. In addition, Judge Gorsuch did rule at the Tenth Circuit in the abortion-related cases of *Hobby Lobby v. Sebelius* and *Little Sisters v. Burwell.* While these cases were religious liberty-focused, Judge Gorsuch found in both cases that requiring a person to provide drugs the person believes cause abortion is a substantial burden on that person's sincerely held religious beliefs.

Judge Gorsuch has a very strong record on other religious freedom cases as well. In *Yellowbear v. Lampert,* Judge Gorsuch upheld the religious rights of a convicted murderer who sought to visit a sweat lodge for religious reasons through a Religious Land Use and Institutionalized Persons Act (RLUIPA) claim. He also dissented in a Tenth Circuit Establishment Clause case regarding the display of a Ten Commandments monument. The Supreme Court largely adopted his reasoning when overturning the Tenth Circuit to allow the monument on public grounds.

Judge Gorsuch is a textualist in the likes of Justice Scalia. He analyzes the text of a statute and constitutional provision, while ignoring his personal preferences in the adjudication of cases. Judge Gorsuch understands it is the role of the legislature to create law and of the judiciary to apply the law as it was constructed. Judge Gorsuch is a stellar choice for filling Justice Scalia's vacant seat. FRC supports the confirmation of Judge Gorsuch and urges your support as well.

Sincerely,

David Christensen
Vice President of Government Affairs

FAMILY RESEARCH COUNCIL
801 G STREET NW, WASHINGTON, D.C. 20001 • 202-393-2100 • 202-393-2134 FAX • (800) 225-4008 ORDER LINE • FRC.ORG

FEMINIST MAJORITY FOUNDATION

Working for Women's Equality

Eleanor Smeal
President

Peg Yorkin
Chair of the Board

Katherine Spillar
Executive Director

Washington DC
1600 Wilson Blvd
Suite 801
Arlington, VA 22209
703 522 2214
703 522 2219 fax

West Coast
433 S. Beverly Dr
Beverly Hills, CA
90212
310 556 2500
310 556 2509 fax

Web Site:
www.Feminist.org

March 10, 2017

Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Feminist Majority Foundation, a national organization dedicated to women's equality, reproductive health, and non-violence, we write to express strong opposition to the nomination of Judge Neil Gorsuch to serve as an Associate Justice of the U.S. Supreme Court.

Judge Gorsuch's record as an appellate judge raises significant concerns about his ability to hear and decide cases free from ideological bias. Any nominee to the Supreme Court must demonstrate an ability to be open-minded and impartial, and have a record that exhibits an evenhanded application of the law consistent with our constitutional values of liberty, equality and justice for all. A review of Judge Gorsuch's record, however, gives reason for alarm.

Throughout his career, Judge Gorsuch has shown hostility to women's equality and reproductive rights. As a judge on the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch joined the majority opinion in ***Hobby Lobby Stores, Inc. v. Sebelius***,[i] holding that closely-held, for-profit corporations are persons that can exercise "religious freedom" to refuse coverage for birth control as part of their employer-sponsored health insurance plans, coverage that was made mandatory as part of the Affordable Care Act (ACA). Although this view was narrowly upheld by the Supreme Court,[ii] the Tenth Circuit went further than the Supreme Court in its decision. In particular, the appellate court, joined by Judge Gorsuch, shockingly found that in the context of the ACA birth control benefit, the government's interest in promoting gender equality was not compelling,[iii] a question that the Supreme Court majority in *Burwell v. Hobby Lobby* thought unnecessary to reach.[iv]

Judge Gorsuch also wrote a separate opinion in in the *Hobby Lobby* case that went even further than both the Tenth Circuit majority opinion and the Supreme Court ruling. In his concurring opinion, Judge Gorsuch explained that he would allow any individual—not just religious institutions or closely-held, for-profit corporations—to challenge the birth control mandate on religious grounds. In explaining his position, Judge Gorsuch wrote:

> 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*. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. . . .Understanding that is the key to understanding this case.[v]

In these few sentences, Judge Gorsuch suggests an enormous amount of deference to religion over the rights of women, not just with respect to accessing basic reproductive healthcare, but with respect to any statutory right that women, or for that matter LGBTQ individuals, might enjoy. If there is to be democracy for all, there cannot be theocracy for women, with any individuals' religious views dictating which rights women can enjoy.

Further, Judge Gorsuch's words ignore our nation's troubling history of using religion to suppress the rights of others, in particular women and minority groups.[vi] Although respect for religious freedom is deeply rooted in our constitution and history, as a society, we also take seriously our commitment to protecting the basic rights of every person. Judge Gorsuch's broad statement, which characterizes the lawful use of birth control as "wrongdoing," and then goes on to sympathize with the interests of just one party to a dispute, ignoring the government's interest in ensuring that women have equal access to preventive health services as men, should give us pause. Such a statement does not reflect a judge serving free from ideological or personal bias.

Unfortunately, the *Hobby Lobby* decision and concurring opinion are not outliers in Judge Gorsuch's record. Two years after the *Hobby Lobby* case, Judge Gorsuch joined a dissent from an opinion denying en banc review in ***Little Sisters of the Poor Home for the Aged v. Burwell***.[vii] In that case, a Tenth Circuit panel had upheld the accommodation to the ACA birth control benefit for religiously-affiliated non-profit organizations. The accommodation completely relieves religiously-affiliated nonprofits of their obligation to provide insurance coverage of birth control to their employees. All these organizations have to do is inform the Department of Health and Human Services, their health insurance issuer, or in the case of the Little Sisters of the Poor, their third party administrator, of their intent to opt-out by signing a simple one-page form. The accommodation allows the employee and their dependents to receive coverage of birth control, but ensures that the objecting employer does not pay for that coverage.

Again, showing wide deference to religion, Judge Gorsuch joined a dissenting opinion arguing that the mere act of signing a form substantially burdened the free exercise of religion. Judge Gorsuch would have forced the Tenth Circuit to rehear the case, an outcome not even sought by the plaintiffs who had already petitioned the Supreme Court. In 2015, the U.S. Supreme Court granted certiorari to *Little Sisters of the Poor*, which was one of the seven cases consolidated in *Zubik v. Burwell*. During its last term, however, the Court returned these cases to the lower courts where they are still pending.[viii] These cases could return to the Supreme Court at a later date.

Judge Gorsuch also wrote a troubling dissent in a case involving the defunding of Planned Parenthood of Utah based on widely discredited, misleading videos that falsely accused Planned Parenthood of selling fetal tissue. In ***Planned Parenthood Association of Utah v. Herbert***, a Tenth Circuit panel granted a preliminary injunction that prevented defunding.[ix] The Tenth Circuit then considered whether to rehear the case en banc, even though neither the state of Utah nor Planned Parenthood requested a rehearing or review. The Tenth Circuit denied the rehearing, but Judge Gorsuch vehemently disagreed.[x] Judge Mary Briscoe, writing in support of the denial, said Judge Gorsuch had "mischaracterize[d] this litigation and the panel opinion at several turns" in reaching his result.[xi] Judge Gorsuch's dissent raises serious concerns about his judgment and about the lengths to which he would go to reach a result to block women's access to reproductive health care.

These three cases show a callous disregard for women's constitutional right to birth control, something fundamental to women's health, dignity, economic security, and basic equality. Judge Gorsuch does not have a track record as a judge on the right to abortion, but if his treatment of birth control access is any guide, women have much to fear.

President Donald Trump, of course, has promised to nominate judges committed to overturning ***Roe v. Wade***.[xii] This outrageous litmus test puts women's lives on the chopping block and shows deep disrespect for women's constitutionally protected rights and liberties. Yet, Judge Gorsuch's record suggests that he would stop at nothing to carry out President Trump's political agenda and overturn *Roe* if given the opportunity.

Not only has Judge Gorsuch's opinions, so far, on reproductive rights been questionable, but his nomination has been praised by several anti-abortion groups, including Americans United for Life,[xiii] Susan B. Anthony List,[xiv] and the extremist group Operation Rescue,[xv] whose head, Troy Newman, served as a founding board member and advisor to the Center for Medical Progress, the group responsible for the malicious videos at the center of *Planned Parenthood Association of Utah v. Herbert*.

Judge Gorsuch's writings also suggest that he does not respect the basic foundations of our constitutional right to abortion, the same foundations that undergird the right to access birth control, the right to love whomever you choose, and the right to marriage equality. These principles were clearly articulated in ***Planned Parenthood v. Casey***, in which a plurality of the Court explained that abortion is fundamental to individual autonomy safeguarded by the Fourteenth Amendment, and that the constitution protects each of our right to decide for ourselves matters "involving the most intimate and personal choices a person may make in a lifetime," including decisions about procreation, marriage, and family.[xvi]

In his writings, however, Judge Gorsuch wrote that there was a "colorable argument" that the discussion of individual autonomy in *Casey* was "inessential" to the decision.[xvii] In other words, Judge Gorsuch did not think, as Justices O'Connor, Kennedy and Souter did, that "the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and the mystery of human life."[xviii] Instead, Gorsuch indicated that *Casey* was decided in favor of

abortion rights because of the technical precedent set by the decision in *Roe*—not because the Constitution protects this kind of liberty, and therefore protects the right to abortion.[xix]

Simply put, Gorsuch's understanding of *Casey* calls into question whether Gorsuch accepts that the right to abortion is actually rooted in the Constitution. If it is not, then nothing would prevent Gorsuch from attempting to overturn *Roe*. Even more alarming is that the same principles that underlie the constitutional right to abortion underlie many other rights enjoyed by millions of Americans, including birth control, and form the basis of the opinions in *Lawrence v. Texas*, recognizing the right of lesbians and gay men to make intimate, personal decisions, and *Obergefell v. Hodges*, recognizing the right of same-sex couples to marry.[xx]

Justices on the Supreme Court, the most powerful court in our nation, must display the greatest respect for our constitutional rights and values, and must serve the interests of all, including women and millions of everyday people. As the final arbiter of justice in the United States, the Supreme Court serves as an important backstop against erosion of our constitutional and statutorily protected rights. The Court is specifically designed to be immune to majoritarian rule so that it can protect the rights of those most vulnerable in our society, including women, people of color, immigrants, people with disabilities, and LGBTQ individuals.

Judge Gorsuch, however, has shown open disdain for people attempting to assert their civil and constitutional rights. In an article published in the National Review Online, Gorsuch wrote that "liberals" have "an overweening addiction to the courtroom as the place to debate social policy," including gay marriage, assisted suicide, and private-school vouchers.[xxi] A judge who believes that individuals should not bring their claims of discrimination to the courts, is a judge who does not belong on the Supreme Court. That Gorsuch reserved his rancor for those he defined as "liberals," is even more alarming.

The public deserves a Supreme Court Justice who will uphold the constitution, protect the rights of all people, and be an objective voice, independent from the President and free from personal bias and ideology. Neil Gorsuch is not that judge. His record shows hostility to women's equality and reproductive rights; disrespect for our constitutional values; and disdain for those who seek justice. We urge you to oppose this nomination.

Sincerely,

Eleanor Smeal
President

Gaylynn Burroughs
Director of Policy & Research

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[i] 723 F.3d 1114 (10th Cir. 2013) (en banc).
[ii] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).
[iii] 723 F.3d 1114 at 1143-44.

[iv] Writing for the majority, Justice Samuel Alito explained that the court need not adjudicate whether the government had asserted a compelling interest that would satisfy the Religious Freedom Restoration Act, 134 S.Ct. at 2779-80, but nonetheless the majority in its analysis assumed that the government had satisfied this requirement, *id.* at 2759.

[v] 723 F.3d at 1152 (emphasis added).

[vi] *See e.g.*, Zaid Jilani, How Religious 'Liberty' Has Been Used to Justify Racism, Sexism and Slavery Throughout History, *Alternet* (Apr. 6, 2015), http://www.alternet.org/belief/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history; Matt Baume, Blast From The Past: States Using 'Religious Freedom' to Justify Segregation, *The Huffington Post* (Mar. 26, 2015), http://www.huffingtonpost.com/matt-baume/states-using-religious-freedom-to-justify-segregation_b_6946658.html.

[vii] F.3d 1215 (10th Cir. 2015).

[viii] *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (per curiam).

[ix] *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016).

[x] *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016).

[xi] *Id.* at 1303.

[xii] Dan Mangan, Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case, *CNBC* (Oct. 19, 2016), http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

[xiii] Americans United for Life, *AUL Says Public Record Shows Neil Gorsuch, "a Jurist in the Tradition of Antonin Scalia,"* Jan. 31, 2017, http://www.aul.org/2017/01/aul-says-public-record-shows-neil-gorsuch-a-jurist-in-the-tradition-of-antonin-scalia/.

[xiv] Susan B. Anthony List, *SBA List Praises Neil Gorsuch as Supreme Court Pick: President Trump Fulfills Promise to Nominate Pro-Life Supreme Court Justice*, Jan. 31, 2017, https://www.sba-list.org/newsroom/press-releases/sba-list-praises-judge-neil-gorsuch-supreme-court-pick.

[xv] Operation Rescue, *Operation Rescue Applauds Trump's Nomination of Gorsuch to the U.S. Supreme Court*, Jan. 31, 2017, http://www.operationrescue.org/archives/operation-rescue-applauds-trumps-nomination-of-gorsuch-to-the-u-s-supreme-court/.

[xvi] 505 U.S. 833, 851 (1992). *See also id.* at 923 (Blackmun, J., concurring).

[xvii] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2006) at 80.

[xviii] 505 U.S. at 851.

[xix] *See* Alliance for Justice, *The Gorsuch Record* (Feb. 1, 2017) at 20, http://www.afj.org/wp-content/uploads/2017/02/The-Gorsuch-Record.pdf.

[xx] Nancy Northup and Rachel B. Tiven, If Abortion Rights Fall, LGBT Rights Are Next, *Washington Post* (Feb. 22, 2017), https://www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61_story.html?utm_term=.b91b21477c4c.

[xxi] Neil Gorsuch, Liberals'N'Lawsuits, *National Review Online* (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3215
(202) 326-7900
FACSIMILE:
(202) 326-7999

February 2, 2017

VIA HAND DELIVERY

The Honorable Charles E. Grassley
Chairman

The Honorable Dianne Feinstein
Ranking Member

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Re: Nomination of Neil M. Gorsuch as Associate Justice, Supreme Court of the United States

Dear Chairman Grassley and Ranking Member Feinstein,

We are present and former partners in the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. We are Democrats, independents, and Republicans. Many of us have served in government, some during Republican and some during Democratic administrations; some of us have served in both. We have clerked for Supreme Court justices and appellate and district court judges appointed by Democratic and Republican presidents. We represent a broad spectrum of views on politics, judicial philosophy, and many other subjects as well. But we all agree on one thing: our former colleague, Neil M. Gorsuch – our associate – and then partner for more than a decade – is superbly qualified for confirmation to the position of Associate Justice of

the Supreme Court of the United States. He is a man of character, decency, and accomplishment who merits this appointment.

We know Neil well. We worked closely with him, on a daily basis. Throughout his time with us, Neil demonstrated both a powerful intellect and a sterling character. In every aspect of his private practice, Neil excelled. He was a skilled and creative trial lawyer, a legal draftsman of concision and wit, and above all else a wonderful colleague who devoted himself fully to the best interests of our clients and was a pleasure to work with.

We saw Neil in times of professional triumph as well as in times of disappointment. Through highs and lows he was steadfast: courteous, collegial with co-counsel and adversaries, respectful of courts and the rule of law itself. He was as considerate and respectful of the night guard at our trial office in Paducah, Kentucky, as he was of captains of industry. He never displayed bias or hostility against anyone, and earned friends and admirers wherever he went.

Neil's equal regard for everyone extended to his work as a litigator. He zealously represented all of his clients – plaintiffs and defendants, individuals and corporations, nonprofits and small businesses, paying clients and pro bono clients – without regard to ideology. For Neil, each client deserved the best arguments that could be mustered, consistent with the facts and the law.

Outside the courtroom and the office, we saw Neil as a wise and empathetic friend, who always had time for his colleagues. He was and is devoted to his wonderful family, but he formed close and warm ties with his "work family" as well – his partners but also his associates, paralegals, researchers, administrative assistants, and other firm employees.

Neil is not only a good and humble man, he is also an outstanding jurist. We are fully confident that he will decide cases on principled grounds; that he will work tirelessly to get each case right, on its particular merits; that he will be thoughtful about the views of his colleagues, and will deliberate respectfully and productively to reach consensus where that is possible; and that he will demonstrate the integrity and ability that we all saw in our years as his colleagues.

Several of us did not have the privilege of working directly with Neil, but have joined in this letter on the basis of the uniformly positive recommendations of our colleagues.

We understand the important responsibilities of the Committee, and we hope that our intimate knowledge of Neil, as a lawyer and as a person, will provide useful insight. As we stated at the outset, we are a diverse partnership; we do not address political issues or historical issues regarding prior nominations. We say only that Neil M. Gorsuch, our friend and close colleague for more than a decade, is exceptionally qualified to serve his country as an Associate Justice of the Supreme Court.

Very truly yours,

Antonia M. Apps, Former Partner
Scott H. Angstreich, Partner
Steven F. Benz, Partner
Rebecca A. Beynon, Partner
Daniel G. Bird, Partner
Joshua D. Branson, Partner
William J. Conyngham, Partner
Courtney S. Elwood, Partner
Mark Evans, Former Partner
Kenneth M. Fetterman, Partner
Reid M. Figel, Partner
David C. Frederick, Partner

Andrew E. Goldsmith, Partner
Michael J. Guzman, Partner
Joseph S. Hall, Partner
Mark C. Hansen, Partner
Derek T. Ho, Partner
Peter W. Huber, Former Partner
Kevin B. Huff, Partner
Michael K. Kellogg, Partner
Wan J. Kim, Partner
Geoffrey M. Klineberg, Partner
Jeffrey Lamken, Former Partner
Evan T. Leo, Partner
Sean A. Lev, Partner
Kevin J. Miller, Partner
Michael N. Nemelka, Partner
Aaron M. Panner, Partner
Gregory G. Rapawy, Partner
David E. Ross, Former Partner
John Christopher Rozendaal, Former Partner
Austin Schlick, Former Partner
David L. Schwarz, Partner
Andrew C. Shen, Partner
Colin Stretch, Former Partner
Silvija A. Strikis, Partner
John Thorne, Partner
K. Chris Todd, Partner
James M. Webster, Partner

March 20, 2017

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are former female law clerks to Judge Neil M. Gorsuch. We have already informed the committee that we strongly support his confirmation as the next Associate Justice of the Supreme Court. We feel compelled now to write separately to convey our unanimous experience that Judge Gorsuch has treated us—as he has all his law clerks—with abiding respect during our clerkship years and beyond. He also has been an important mentor to each of us in our professional pursuits. Any suggestion that he would do anything less because of our gender is categorically false. The undersigned are every single one of the Judge's former female law clerks.

We each have lived long enough and worked long enough to know gender discrimination when we see it. Some of us have experienced it professionally on occasion. When we collectively say that Judge Gorsuch treats and values women fairly and without preference or prejudice based on their gender, we do not say that in a vacuum. We say it with the perspective of those who know that unfortunately, even in 2017, female lawyers are not always treated as equals. Judge Gorsuch by his conduct, his tone, his work assignments, his casual remarks, his advice, his mentorship, his humor, his pursuits, and even the most simple gestures, values and treats women equally. We simply cannot put it any more plainly than that.

Judge Gorsuch's mentorship has been instrumental in our professional careers, and set forth are some examples we think illuminating.

- Leah Bressack spent two years working for the judge. During that time, she never once felt that she was treated differently than her co-clerks due to her gender. She was in chambers consistently for two years and never heard a sexist remark made by anyone; the judge wouldn't have tolerated it. When introducing his law clerks to friends or colleagues visiting chambers, she remembers the judge always made a point of mentioning the accomplishments of all his clerks.

- Heather Kirby Lyions recalls his support for her choice to jump off the corporate ladder. Offered the opportunity to join a small family office as in-house counsel immediately after her clerkship with him, Judge Gorsuch patiently talked her through the potential career and family trade-offs of making an unorthodox choice early in her career, championing her decision either way. And several years later, when she decided to re-enter the full-time work force, he helped her brainstorm her reentry and sent her postings for opportunities he thought might be of interest to her particularly. Mrs. Lyions is now Senior Legal Counsel to a major orthopedics company.

- Jane Nitze recalls that it was Judge Gorsuch who encouraged her to become an associate at his former law firm in Washington, D.C., emphasizing in particular the firm's small size as well-suited to fostering professional development. She also recalls that it was the Judge who later persuaded her that she had a shot at a Supreme Court clerkship, and that only with his support and recommendation did that opportunity arise. Weeks ago, long before this letter was drafted, Ms. Nitze spoke publicly of the Judge as a valued mentor, noting that he is usually the first person she goes to for career advice. And that the first words he has for her when she does are: "What can I do to help you?"

- Allison Turbiville recalls that it was Judge Gorsuch who encouraged her to begin applying for jobs only two months after she started her clerkship, emphasizing in particular the importance of finding a position where she could obtain valuable professional development experiences early in her career. She also recalls that Judge Gorsuch encouraged her to take the time she needed to network and to travel to job interviews, and she was able to do so because Judge Gorsuch fostered a flexible working environment and distributed work among his clerks fairly.

- Theresa Wardon recalls seeking the Judge's advice when she was deciding between joining a trial boutique in Denver or going to a larger firm. Inspired and encouraged by the Judge, she sought to be a trial lawyer and chose the Denver firm. Since then, she's gotten seven trials under her belt and has made partner. Through these years, she continues to seek out Judge Gorsuch's wisdom and advice on her career and life. She has never doubted that she has a lifetime supporter and mentor in Judge Gorsuch.

As a female attorney in a law firm, one of the undersigned received unwanted advances from outside counsel—unbeknownst to any other attorney at the firm. She recalls that Judge Gorsuch was the first person she called for advice; not other attorneys at the firm, not her friends, and not even her family. The Judge treated the situation with compassion and care, and advised her appropriately. This story is telling, we hope, of the the Judge's character and the trust that we all have placed in his guidance.

Judge Gorsuch has also served as a model for us in the way he balances his personal and professional life. He is a devoted husband and loving father to two daughters. He works hard. But he also ensures that he is present for his family. The judge has spoken of the

struggles of working attorneys to juggle family with work obligations; not once have we heard him intimate that those struggles are, or should be, shouldered by one gender alone.

These are our personal experiences with Judge Gorsuch, with whom each of us worked day in and day out during our clerkships. We hope that they shed light on a man that we know values all persons equally—within and outside the workplace. We are available to speak to any member of the Senate or their staff about Judge Gorsuch.

Sincerely,

Leah Bressack
Clerk for Judge Gorsuch, 2009-11

Jessica Greenstone
Clerk for Judge Gorsuch, 2006-07

Tess Hand-Bender
Clerk for Judge Gorsuch, 2011-12

Jessica Black Livingston
Clerk for Judge Gorsuch, 2012-13

Heather Kirby Lyions
Clerk for Judge Gorsuch, 2006-07

Marissa Miller
Clerk for Judge Gorsuch, 2013-14

Jane Nitze
Clerk for Judge Gorsuch, 2008-09

Allison Jones Rushing
Clerk for Judge Gorsuch, 2007-08

Allison Turbiville
Clerk for Judge Gorsuch, 2015-16

Theresa Wardon
Clerk for Judge Gorsuch, 2008-09

Katherine Crawford Yarger
Clerk for Judge Gorsuch, 2009-10

February 25, 2017

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We write in support of Neil M. Gorsuch's nomination to become an Associate Justice of the Supreme Court of the United States. Each of us served as a law clerk to Justice Kennedy. Many of us have had the opportunity to work with Judge Gorsuch or observe his work as a judge, a public servant, and a lawyer.

Each of us believes that Judge Gorsuch would be an outstanding Justice. He personifies the legal excellence, collegiality, and personal character to be expected of Justices of the Supreme Court and the fairness, impartiality, and judicial temperament that we observed in the Justice for whom we clerked.

Respectfully,

Bertrand-Marc Allen
Law clerk to Justice Kennedy, OT 2003

David L. Anderson
Law clerk to Justice Kennedy, OT 1991

Randy Beck
Law clerk to Justice Kennedy, OT 1990

James F. Bennett
Law clerk to Justice Kennedy, OT 1999

Andrew Bentz
Law clerk to Justice Kennedy, OT 2014

Bradford A. Berenson
Law clerk to Justice Kennedy, OT 1992

Stephanos Bibas
Law clerk to Justice Kennedy, OT 1997

Patrick Borchers
Law clerk to Judge Kennedy, 1986-87

William A. Burck
Law clerk to Justice Kennedy, OT 1999

Christopher L. Callahan
Law clerk to Judge Kennedy, 1984-85

Adam H. Charnes
Law clerk to Justice Kennedy, OT 1992

Stephen Cowen
Law clerk to Justice Kennedy, OT 2007

Jeffrey B Crockett
Law clerk to Judge Kennedy, 1981-82

Edward C. Dawson
Law clerk to Justice Kennedy, OT 2003

Joshua Deahl
Law clerk to Justice Kennedy, OT 2009

Grant M. Dixton
Law clerk to Justice Kennedy, OT 2000

John P. Elwood
Law clerk to Justice Kennedy, OT 1996

Gregg L. Engles
Law clerk to Judge Kennedy, 1982-83

Miguel A. Estrada
Law clerk to Justice Kennedy, OT 1987 and 1988

Ward Farnsworth
Law clerk to Justice Kennedy, OT 1995

Allen Ferrell
Law clerk to Justice Kennedy, OT 1996

Brett Gerry
Law clerk to Justice Kennedy, OT 2000

Steven J. Horowitz
Law clerk to Justice Kennedy, OT 2010

Timothy G. Hoxie
Law clerk to Judge Kennedy, 1985-86

Thomas G. Hungar
Law clerk to Justice Kennedy, OT 1988

Peter Keisler
Law clerk to Justice Kennedy, OT 1987 and 1988

Ashley Keller
Law clerk to Justice Kennedy, OT 2008

Scott A. Keller
Law clerk to Justice Kennedy, OT 2009

J. Clark Kelso
Law clerk to Judge Kennedy, 1983-84

Orin S. Kerr
Law clerk to Justice Kennedy, OT 2003

Kelly M. Klaus
Law clerk to Justice Kennedy, OT 1995

Randy J. Kozel
Law clerk to Justice Kennedy, OT 2005

Matthew H. Lembke
Law clerk to Justice Kennedy, OT 1992

Travis D. Lenkner
Law clerk to Justice Kennedy, OT 2008

Gregory E. Maggs
Law clerk to Justice Kennedy, OT 1989

C.J. Mahoney
Law clerk to Justice Kennedy, OT 2007

Kevin J. Miller
Law clerk to Justice Kennedy, OT 2000

Katherine Moran Meeks
Law clerk to Justice Kennedy, OT 2013

Eric E. Murphy
Law clerk to Justice Kennedy, OT 2006

Stephen M. Nickelsburg
Law clerk to Justice Kennedy, OT 1999

Howard C. Nielson, Jr.
Law clerk to Justice Kennedy, OT 1998

John C. Neiman, Jr.
Law clerk to Justice Kennedy, OT 2001

Christopher R.J. Pace
Law clerk to Justice Kennedy, OT 1992

Eugene M. Paige
Law clerk to Justice Kennedy, OT 2000

Josh Patashnik
Law clerk to Justice Kennedy, OT 2012

R. Hewitt Pate
Law clerk to Justice Kennedy, OT 1988 and 1989

Jeffrey Pojanowski
Law clerk to Justice Kennedy, OT 2005

Richard M. Re
Law clerk to Justice Kennedy, OT 2010

Kathryn Haun Rodriguez
Law clerk to Justice Kennedy, OT 2004

Nicholas Quinn Rosenkranz
Law clerk to Justice Kennedy, OT 2001

John Christopher Rozendaal
Law clerk to Justice Kennedy, OT 1998

Eric H. Schunk
Law clerk to Judge Kennedy, 1981-82

Michael E. Scoville
Law clerk to Justice Kennedy, OT 2004

Michael Scudder
Law clerk to Justice Kennedy, OT 1999

Steven M. Shepard
Law clerk to Justice Kennedy, OT 2008

James Y. Stern
Law clerk to Justice Kennedy, OT 2010

Lisa Grow Sun
Law clerk to Justice Kennedy, OT 1998

Igor V. Timofeyev
Law clerk to Justice Kennedy, OT 2002

Misha Tseytlin
Law clerk to Justice Kennedy, OT 2009

Caroline S. Van Zile
Law clerk to Justice Kennedy, OT 2014

Justin Walker
Law clerk to Justice Kennedy, OT 2011

Lauren S. Willard
Law clerk to Justice Kennedy, OT 2012

Michael F. Williams
Law clerk to Justice Kennedy, OT 2002

Alexander J. Willscher
Law clerk to Justice Kennedy, OT 2001

Christopher S. Yoo
Law clerk to Justice Kennedy, OT 1997

March 15, 2017

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Each of us has had the pleasure and privilege of having Judge Neil M. Gorsuch as a law professor at the University of Colorado Law School, where Judge Gorsuch serves as the Thomson Visiting Professor. We, his current and former students, hold varied political views, hail from different parts of the country (and even the world), and have followed different career paths. We all strongly support Judge Gorsuch's nomination to be the next Associate Justice of the United States Supreme Court and enthusiastically recommend his confirmation by the Senate.

We are confident endorsing Judge Gorsuch because we know him to be a genuinely kind and brilliant person, dedicated to the rule of law and the Constitution. He is not beholden to politics. His love for the law is a core belief, instilled in his many students over the years through word and deed.

Judge Gorsuch was an excellent and innovative professor who always made us feel like valuable participants in the learning process. He encouraged student involvement in the classroom and consistently fostered truly collaborative classroom discussion. He required us to take handwritten notes to minimize other distractions and so encourage us to engage actively and openly with our peers. One of the undersigned former students recalls that Judge Gorsuch "always made sure to take the additional time to be inclusive and thus incorporate a wide variety of views into classroom discussion. Whatever his own personal politics or beliefs, Judge Gorsuch listened to, and included, every student."

As a teacher, Judge Gorsuch had a unique ability to convey information in a clear and engaging manner, a quality that will serve him well as a Justice. For many of us, Judge Gorsuch made legal ethics — a compulsory course for every law student — one of our favorite classes. Judge Gorsuch possesses the enviable ability to convey the solemnity of the subject at hand, while still injecting appropriate levity. Stated in the straightforward language Judge Gorsuch appreciates, he took the traditionally dry and boring subject of legal ethics — one all about rules

and "thou shalts" and "thou shalt nots" — and made it fun. We all came away with a deep appreciation for a subject that is crucial to every lawyer's practice.

His lessons extended beyond the classroom and into his chambers for the many students Judge Gorsuch taught as externs. One of the undersigned former student externs remembers the following story:

> While serving as an extern, I helped him in drafting an opinion rejecting a prisoner's appeal. The prisoner had no lawyer and very weak arguments, so I turned in a draft that explained very briskly why the prisoner's claim lacked merit. The Judge then asked me: "Where are the responses to the prisoner's arguments?" I told him I didn't see the need to address those because they were so weak. That didn't go over well. Judge Gorsuch said: "We owe this man the kindness of stating his arguments as fairly as we can and then responding with clear answers in plain English. We owe him the kindness of explaining to him, in a way that he can understand, why he lost. Ruling against this man doesn't relieve us of our obligation to show him that kindness."

There are a great many law professors, even phenomenal ones, who might know half of their students' names after the completion of a law school course. Judge Gorsuch knew us all and invested significant time and energy to developing genuine and caring relationships with us. And his commitment to us as students and future lawyers did not end after he graded our final exams. For many of us, Judge Gorsuch has become a lifelong mentor, meeting with us after class ended, and after graduation, to discuss our careers and our lives. For a few of us, he even administered the oath to practice law.

One of us summed up our feelings exceedingly well. "Judge Gorsuch was an outstanding professor at the University of Colorado Law School: he was brilliant, engaging, thoughtful, considerate, and invested in his students' success. Particularly so on that last point — despite his busy schedule and full-time job at the Tenth Circuit, he always made time for us when we needed it. Judge Gorsuch plainly has the qualifications, legal acumen, and writing talent to serve on the Court. But even more so, he has demonstrated that he has the character and temperament to make a great Justice."

We, his students, hope the Senate will agree and quickly confirm Judge Gorsuch as the next Associate Justice of the United States Supreme Court.

Thank you for your consideration.

Sincerely,

Abell, Ben - Class of 2011
Adams, Anna - Class of 2017
Arenan, F. Baker - Class of 2016

Bechel, Andrew - Class of 2011

Bechel, Taylor Perodeau - Class of 2011
Bennett, David R. - Class of 2013
Boxer, Jeffrey - Class of 2010
Brass, Jaclyn S. - Class of 2017
Brown, Adam A. - Class of 2014
Brown, Arielle L. - Class of 2014
Bush, Kristi - Class of 2018

Camerucci, David - Class of 2016
Campos, Craig - Class of 2010
Carlson, Bryce D. - Class of 2018
Cheng, CiCi - Class of 2012
Chrobak, Kara Lyons - Class of 2011
Chu, Maureen - Class of 2018
Cook, John H. IV - Class of 2015

Delva, John S. - Class of 2014

Edwards, Stephen McCarty Jr. - Class of 2010

Fonta, Adam - Class of 2016
Forcinito, Vincent - Class of 2018
Frazier, James - Class of 2015
Fuller, Charles E. - Class of 2011

Garnett, Megan Rose - Class of 2014
Gibson, Mark - Class of 2012
Gillespie, Stuart C. - Class of 2010
Goatson, Derik - Class of 2017
Goff, Ruthie - Class of 2016
Gregory, Robert N. - Class of 2010
Griffin, J. Hope - Class of 2017
Griffiths, Duncan - Class of 2010

Harvey, Steve - Class of 2010
Hass, Tacy - Class of 2012
Hauptman, Will - Class of 2017
Hearing, Greg S. II - Class of 2012
Henry, Jordan - Class of 2018
Holtgrewe, Catherine - Class of 2011
Hunter, Jessica R. - Class of 2015

Kaiser, André - Class of 2016
Keegan, Cobun - Class of 2016
Kennedy, Carol - Class of 2018
King, Miles R. - Class of 2015

Klekas, Casey - Class of 2017

Lawrence, Robert T. - Class of 2014
Leeser, Holly - Class of 2016
LeMonte, Kerry - Class of 2010
Lieber, Erica - Class of 2018
Little, David - Class of 2010
Livinston, Jessica Black - Class of 2009
Lubarsky, Emily - Class of 2018

Magnum, David - Class of 2011
Marski, Jennifer - Class of 2010
Martinez, Tyler - Class of 2010
Martino, Max - Class of 2018
Masana, Rich - Class of 2011
Matthews, Glen - Class of 2016
McAdam, Kevin C. - Class of 2010
Montgomery, Matthew A. - Class of 2011
Myers, Larry - Class of 2016

Nicoud, Michael J. - Class of 2010
Nuñez-Lafontaine, Gabriel - Class of 2017

O'Brien, Erin - Class of 2011
Oldberg, Colin J.A. - Class of 2017

Polley, Shannon - Class of 2018

Richardson, Mike S. - Class of 2015
Rogers, Erica - Class of 2017
Rothberg, Andrew - Class of 2013
Ruhland, Trina - Class of 2010
Ryan, Rebekah - Class of 2017

Savage, Louis B. - Class of 2011
Schler, Benjamin - Class of 2010
Seligman, Sam - Class of 2017
Shockey, Kelton - Class of 2017
Slothouber, Jason - Class of 2010
Sperlbaum, Roger - Class of 2012
Stegman, Mike - Class of 2017

Van Arsdale, Lucas - Class of 2010
Vassar, Nathan - Class of 2011
Venkatraj, Karthik - Class of 2017
Vilner, Dmitry - Class of 2011

Webster, Anjali D. - Class of 2011
Westling, Jeffrey - Class of 2017
Wilson, Bryce - Class of 2016

Zehner, Michael - Class of 2017
Zenger, Adam P. - Class of 2018
Zimmerman, Paul M. - Class of 2012

Mr. Hugh Q. Gottschalk
5050 Aspen Drive
Littleton, CO 80123

February 16, 2017

Senator Michael Bennet
1127 Sherman St., Suite 150
Denver, CO 80203

Dear Senator Bennet:

I am writing to urge you to vote to confirm Judge Neil Gorsuch as an Associate Justice to the United States Supreme Court.

As you know, I am a long time Colorado Democrat who has voted for you and made financial contributions to support your campaigns. One of the reasons I have been such an enthusiastic supporter is because you have always been a thoughtful, bipartisan politician who is looking for solutions, not headlines. In what may be the most polarizing political event in years, I ask you to demonstrate those same attributes with respect to Judge Gorsuch's nomination.

I have practiced law in Denver for 35 years, and I have been the President of Wheeler Trigg O'Donnell, a 100 lawyer litigation firm, for the past 16 years. I think it is fair to say I know the Denver legal community and its judges very well, and I have never heard anyone say a bad word about Judge Gorsuch. He has a distinguished academic record, an extraordinarily successful career as a private and government attorney, and he has performed with distinction as a judge on the Tenth Circuit Court of Appeals. Of equal importance, he is a man of character and integrity, with an incredible sense of humility given his success and accomplishments.

Notwithstanding the lack of any meritorious basis to vote against Judge Gorsuch, various Democratic Senators have suggested that because the Republicans stonewalled the nomination of Judge Garland, they will vote against Judge Gorsuch. I strongly urge you to reject that view, and to urge your fellow Democratic Senators to do the same. Even though I understand that Judge Gorsuch is a judicial conservative and would probably not be your first choice (or mine) for the Court, he is eminently qualified, and should be confirmed.

As you and I have discussed at various times, our political system seems to be broken, with partisan fury getting in the way of solutions to our most pressing problems. Please don't let that partisan fury prevent you from evaluating Judge Gorsuch on the merits, which I am certain will lead you to vote for his confirmation.

Respectfully,

Hugh Q. Gottschalk

March 1, 2017

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, Majority Leader McConnell and Minority Leader Schumer,

We are Democrats, Republicans, Libertarians and independents; progressives, conservatives and moderates; religious and non-observant; married, single and divorced; men and women; straight and gay. Our group includes citizens residing abroad and a U.S. resident holding a green card. We live in big cities, rural America and places in between. Some of us supported Hillary Clinton, others voted for Donald Trump, while some of us supported third-party or write-in candidates. Some signatories believe in a more active judiciary, while others believe in judicial restraint. What unites us is that we attended law school with Judge Neil Gorsuch—a man we've known for more than a quarter century—and we unanimously believe Neil possesses the exemplary character, outstanding intellect, steady temperament, humility and open-mindedness to be an excellent addition to the United States Supreme Court.

From the days we first met Neil when we attended Harvard Law School to today, Neil Gorsuch's decency and character have always been unmistakable. Neil's intellectual curiosity, respect for divergent opinions, diversity of interests, willingness to consider all sides of an issue, generosity of spirit and genuine caring and interest in others have remained consistent.

Neil was a superb student who received numerous academic awards. Yet Neil was always interested in the views, feedback and comments of everyone in our class, regardless of their class standing, political philosophy or background.

This diverse group's unanimous support for Judge Neil Gorsuch is not unique. Neil sailed through Senate confirmation to the U.S. Court of Appeals for the 10th Circuit in about two months on a voice vote in 2006, when President Bush's other circuit nominees faced controversy, and even filibusters, recess appointments, the Gang of Fourteen deal and razor-thin confirmations. We respect and understand the hard feelings of many in the Senate given the election outcome and the handling of President Obama's appointment of Judge Merrick Garland. Yet we also hope that all Senators can appreciate that Neil Gorsuch deserves to be considered on his own merits; indeed, press reports have indicated that Judge Gorsuch called Judge Garland immediately upon receiving the nomination, a gracious and sympathetic act that is characteristic of the man we know.

You meet a lot of people over more than 25 years. We are privileged to have worked with and known people in all walks of American life, including in some cases U.S. Presidents, other Supreme Court Justices, Senators, Representatives, business leaders and Americans from a broad array of backgrounds and perspectives. With this quarter-century vantage point, we know that Judge Gorsuch is the real deal. His character is sterling. Judge Gorsuch is a loyal husband and father. You can always tell a lot about a public figure by how he or she treats people on a daily basis when others are not watching. The security guards, court clerks, janitors and others who work with Judge Gorsuch every day sing his praises. He treats them as colleagues and with genuine respect – and they remember and appreciate that.

Judge Neil Gorsuch is a person for all seasons. For Republicans, Neil personifies a disinterested philosophy that respects judicial modesty combined with compassionate appreciation of the lives impacted by his decisions. For Democrats, he is a reasonable, qualified, intelligent person who will give each case fair and impartial consideration on its merits with sensitivity to our nation's history, values, aspirations and constitutional traditions. For all Americans, he is a person of integrity who respects the rule of law and will ensure that it applies equally to all.

Signed:

George Anhang
Washington, DC

James Arnone
Los Angeles, CA

Barbara Barrett
Saint Louis, MO

Christopher Bartolomucci
Washington, DC

Bradford A. Berenson
Sunapee, NH

Philip C. Berg
New York, NY

Sean M. Berkowitz
Chicago, IL

Michael Bopp
Washington, DC

Lance Bultena
Arlington, VA

Jayne P. Bultena
Arlington, VA

Paul Campos
Danville, CA

Tom Cervantez
San Francisco, CA

Adam Charnes
Dallas, TX

Edward X. Clinton
Chicago, IL

Jorge L. Contreras
Salt Lake City, UT

Gregory C. Cook
Birmingham, AL

Keith DeLeon
Ridgewood, NJ

Joel Delman
Los Angeles, CA

Christopher Edel
New York, NY

Amb. (ret.) Norman L. Eisen
Washington, DC

Jeffrey B. Ellman
Atlanta, GA

Jonathan P. Ferrando
Fort Lauderdale, FL

Kathryn Ford
Greenwich, CT

Michael Friedland
Irvine, CA

Martin W. Gitlin
Westport, CT

J. William Goodwine
Granger, IN

David H. Harper
Dallas, TX

Steven G. Heinen
Tulsa, OK

Matthew A. Kairis
Columbus, OH

Jeffrey S. King
Boston, MA

Judy Kline
Los Angeles, CA

Bob Kroll
Austin, TX

J. Michael Locke
Western Springs, IL

Thaddeus J. Malik
Elmhurst, IL

Darin P. McAtee
Brooklyn, NY

Scott S. Megregian
London, UK

Kenneth A. Mehlma
New York, NY

Moises Melendez
Fort Lauderdale, FL

Charles M. Oellerm
Columbus, OH

Janet M. Richmond
Sacramento, CA

Ellen S. Robbins
Los Angeles, CA

Carl Roth
Los Angeles, CA

William J. Ryan
Chicago, IL

Rebecca Scharf
Las Vegas, NV

J. Scott Scheper
San Diego, CA

Sara G. Schwartz
Andover, MA

Richard M. Segal
San Diego, CA

Kent Sevener
New York, NY

Daniel Slifkin
New York, NY

Douglas P. Solomon
Burlingame, CA

Adam A. Studnicki
Phoenix, AZ

Jeffrey A. Taylor
Detroit, MI

Brian Timmons
Los Angeles, CA

Nicholas Vardy
London, UK

Kenneth Vermeulen
Grand Rapids, MI

Judith Windhorst
New Orleans, LA

Jesse A. Witten
Washington, DC

HISPANIC LEADERSHIP FUND™
Our values, our community, our nation.

March 17, 2017

The Hon. Chuck Grassley, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Hon. Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The Hispanic Leadership Fund is a non-partisan advocacy organization dedicated to strengthening working families by promoting free market policy solutions that foster individual liberty, opportunity, and prosperity. I write to express our support for confirmation of Judge Neil Gorsuch to the Supreme Court of the United States.

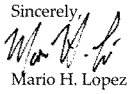
Judge Gorsuch has an incredibly strong academic record and professional experience. His background includes graduating from Harvard Law school, being a Marshall Scholar, and working as a Supreme Court clerk for both Justice Anthony Kennedy and Justice Byron White.

Judge Gorsuch has an exceptional record of defending the Constitution and our fundamental rights such as the 2nd amendment and the right to religious liberty. He also has great respect for Congress and the rule of law. As he has written, "statutes are a product of compromise" and their text must be respected.

In 2006, Judge Gorsuch was confirmed without objection to serve on the U.S. Court of Appeals for the 10th Circuit. Senate Democrats called Gorsuch "a very talented, gifted judge," "very ethical," "very smart," and "thoughtful and fair-minded." We applaud Sen. Feinstein for supporting Judge Gorsuch's 2006 nomination, along with 11 of her Democrat colleagues—including current Minority Leader Chuck Schumer.

We have faith that Judge Gorsuch's confirmation to the Supreme Court will help strengthen the direction of the United States. He will be a committed justice and protect the Constitutional rights of all Americans, allowing individuals the chance to prosper and live the American dream. We respectfully urge the committee to take our statement into consideration and vote to confirm Judge Neil Gorsuch as the next justice of the Supreme Court of the United States.

Sincerely,



Mario H. Lopez
President

1001 G STREET, N.W. ♦ SUITE 800 ♦ WASHINGTON, D.C. 20001

CENTRAL COUNCIL
Tlingit and Haida Indian Tribes of Alaska
Edward K. Thomas Building
9097 Glacier Highway • Juneau, Alaska 99801

March 16, 2017

Honorable Lisa Murkowski
United States Senate
709 Senate Office Building
Washington, DC 20510-0203
Greg_Bringhurst@murkowski.senate.gov

Honorable Dan Sullivan
United States Senate
702 Hart Senate Office Building
Washington, DC 20510
Kate_Wolgemuth@sullivan.senate.gov

Dear Senators Murkowski and Sullivan:

I am writing on behalf of the Central Council of Tlingit and Haida Indian Tribes of Alaska, a federally recognized tribal government, to indicate our support for prompt confirmation by the U.S. Senate of the president's nomination of Judge Neal Gorsuch to the U.S. Supreme Court.

Central Council Tlingit Haida has reviewed Judge Gorsuch's jurisprudential record and has concluded that his decisions evidence respect for tribal sovereignty, self-government, and territorial authority. We hope you can persuade your colleagues in the Senate to move quickly to a vote and early confirmation.

Sincerely,

Richard J. Peterson

President

cc:
Senator John Hoeven, Chairman, Committee on Indian Affairs
Senator Tom Udall, Vice Chairman, Committee on Indian Affairs
Senator Jon Tester, Committee on Indian Affairs
Senator Maria Cantwell, Committee on Indian Affairs
Senator Al Franken, Committee on Indian Affairs
Senator Brian Schatz, Committee on Indian Affairs
Senator Heidi Heitkamp, Committee on Indian Affairs
Senator Catherine Cortez Masto, Committee on Indian Affairs

JAMES M. LYONS
1200 17TH STREET, SUITE 3000
DENVER, COLORADO 80202
(303) 628-9546

February 7, 2017

via E-mail only ted_lehman@judiciary-rep.senate.gov

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate

Dear Senator Grassley:

I write this letter in strong support of the nomination and confirmation of Judge Neil Gorsuch for Associate Justice of the United States Supreme Court.

Judge Gorsuch has been known to me professionally for over twenty years, and his family even longer. In the mid-nineties, we were counsel together in successfully representing co-defendants in a major securities matter involving class action and derivative lawsuits in several jurisdictions across the country as well as SEC and Congressional investigations. Over the course of that complex representation in the following years, I came to observe first-hand his considerable lawyering skills, intellect, judgment and temperament. He was one of the finest trial lawyers with whom it has been my pleasure to be associated in my career. We also became personal and good friends which continued during the following years at his firm, later during his time at the Department of Justice and since returning to Denver to serve on the bench.

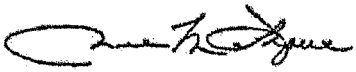
I was delighted by his appointment to the U.S. Court of Appeals for the Tenth Circuit based here in Denver. (He honored me by having me be one of two lawyers to introduce him to the court at his formal investiture.) Over his years of service on that court, he has distinguished himself with his work ethic, keen and thorough understanding of the case under review, his formidable analytical ability, and the clarity of his opinions. I have read many of his opinions and watched him in oral argument. He is engaging, courteous to counsel and demonstrates a full and unusual appreciation for the human impact of his decisions on the people involved. These are the qualities of an outstanding jurist.

The Honorable Chuck Grassley
February 7, 2017

Judge Gorsuch has been active and an important voice in the legal community and academy. He has written extensively, lectured and taught in continuing legal education seminars and served on the important federal Rules Committee, among others. He also has found time to sit on student moot courts and teach both ethics and federal jurisdiction at the University of Colorado Law School. He is regularly regarded by his students as one of their very best law professors--effective, challenging and personable.

Judge Gorsuch's intellect, energy and deep regard for the Constitution are well known to those of us who have worked with him and have seen first-hand his commitment to basic principles. Above all, his independence, fairness and impartiality are the hallmarks of his career and his well-earned reputation.

Sincerely,



James M. Lyons

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
senator@feinstein.senate.gov
J_duck@feinstein.senate.gov

March 17, 2017

The Honorable Charles Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee,

I am writing today to share my personal experiences as a law student who took Legal Ethics and Professionalism from Judge Gorsuch during the spring semester of 2016. His values shared during that class were concerning and should be explored further during his confirmation hearings for the United States Supreme Court.

On the evening of April 19th, 2016, we had our second to last class of the semester. The assigned material for that class session focused on stressors found in the practice of law, especially how such issues as race, gender, and long work days could affect professionalism.

As was the norm for the class, Judge Gorsuch had a handful of people assigned to be on panel for the reading material for that day's class. Judge Gorsuch would call on those students to explain any cases assigned for class and to walk through any hypotheticals presented in the reading material. The discussion would then open to the wider class. For the bulk of the semester Judge Gorsuch had welcomed many opinions of what the right answer to an issue was, encouraging back and forth discussion. However, at the end of these discussions Judge Gorsuch would sum up what he saw to be the correct answer.

In our reading to prepare for class for April 19th, there was a hypothetical of a law student interviewing for law firm jobs. The female student had large debt and wanted to work at a firm to pay back her loans. She also intended to start a family with her husband in the near future. The hypothetical raised the question of what she should tell future employers about her plans. I do not remember how many classmates spoke about what the female student should say or their exact views on what the female student should disclose in her interview. I do remember a lively student discussion about work-family balance and the difficulties of law school debt for all student, regardless of gender.

At some point Judge Gorsuch stopped this discussion about the hypothetical and work life balance in the legal profession. Instead, he asked the class to raise their hands if they knew of a female who had used a company to get maternity benefits and then left right after having a baby. Judge Gorsuch specifically targeted females and maternity leave. This question was not about parents or men shifting priorities after having children. It was solely focused on women using their companies.

I do not remember if any students raised their hands, but it was no more than a small handful of

students. At that point Judge Gorsuch became more animated saying "C'mon guys". He then announced that all our hands should be raised because "many" women use their companies for maternity benefits and then leave the company after the baby is born. Judge Gorsuch focused on women having babies, not men expanding their families. Judge Gorsuch argued that because many women left their companies we all knew women who purposefully used their companies. Judge Gorsuch's comments implied that women intentionally manipulate companies and plan to disadvantage their companies starting from the first interview.

The discussion continued after that. Several students, including some male students, raised their own concerns about a work-life balance and the challenges of excelling at both work and raising a family. However, Judge Gorsuch continued to steer the conversation back to the exclusive issue of females having children. Judge Gorsuch outlined how law firms, and companies in general, had to ask female interviewees about pregnancy plans in order to protect the company. At least one student countered that an employer could not ask questions about an interviewee's pregnancy plans. However, Judge Gorsuch informed the class that that was wrong.

Instead Judge Gorsuch told the class that not only could a future employer ask female interviewees about their pregnancy and family plans, companies must ask females about their family and pregnancy plans to protect the company. Judge Gorsuch tied this back to his original comment that companies need to ask these questions in order to protect themselves against the female employees.

Throughout this class Judge Gorsuch continued to make it very clear that the question of commitment to work over family was one that only women had to answer for. There was no discussion of the reasons women may leave employment when having children or the difficulties in raising young children and meeting the high billable hours required in law firms. Instead, Judge Gorsuch continued to steer the conversation back to the problems women pose for companies and the protections that companies need from women.

I was distressed by the tenor of this conversation. I was surprised and upset that a bright, articulate, and educated federal judge could think so little of female attorneys, even more so considering that in that class half of the students were female. I raised my concerns about Judge Gorsuch's comments to the administration at University of Colorado Law School shortly after Judge Gorsuch made them in the spring of 2016. I also voiced my frustration with his opinions the next day on a facebook group for female lawyers. It concerned me that a man educating female lawyers would be discounting their worth publicly. Now it concerns me that a man who is being considered for our highest court holds views that discounts the worth of working females.

Respectfully,

Jennifer R. Sisk

Jennifer R. Sisk, Esq.
Denver, Colorado

March 17, 2017

Hon. Mitch McConnell, Maj. Leader
U.S. Senate
S230 U.S. Capitol
Washington, D.C. 20510

Hon. Charles Schumer, Min. Leader
U.S. Senate
S221 U.S. Capitol
Washington, D.C. 20510

Hon. Chuck Grassley, Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Hon. Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW'S STATEMENT REGARDING THE NOMINATION OF JUDGE NEIL GORSUCH TO SERVE AS ASSOCIATE JUSTICE OF THE SUPREME COURT

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein:

We, the undersigned members of the Board of Directors and Trustees of the Lawyers' Committee for Civil Rights Under Law, write to express our concern regarding the nomination of Judge Neil Gorsuch to serve as an Associate Justice of the United States Supreme Court. Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States. While we have seen significant progress in America, the challenges of unlawful discrimination remain. Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that the Court plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Court to determine whether the nominee demonstrates views that are consistent with the core civil rights principles for which we have long advocated.

During every term, critical cases come before the Supreme Court concerning issues of great public importance, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court, the Lawyers' Committee has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. We are concerned that there is an inadequate record to determine whether Judge Gorsuch has a commitment to protecting and safeguarding civil rights. Therefore, we cannot conclude that the second prong of our requirement for endorsement is satisfied. Based upon our review of Judge Gorsuch's record, we are concerned by both his narrow understanding of the rights that are protected by the

Constitution and his skeptical view about the importance of the federal courts' role in protecting those rights.

In his criminal justice decisions, Judge Gorsuch takes a narrow view of constitutional rights, including particularly Fourth Amendment rights. The judge's record also raises concerns given his views on educational opportunities and students with disabilities. Lastly, Judge Gorsuch has written a number of opinions on employment law issues in which he has disproportionately affirmed district court decisions dismissing claims asserted by people of color, women, and disabled people.

During his tenure as Deputy Assistant Attorney General at the U.S. Department of Justice, Judge Gorsuch assisted in managing the Civil Rights Division. We urge you to ask Judge Gorsuch to provide details about his involvement in the enforcement work and operations of the Division during his tenure. In addition, we also urge you to examine Judge Gorsuch's views regarding the importance of *stare decisis* in deciding constitutional issues, given the centrality of *stare decisis* to Supreme Court constitutional jurisprudence.

The U.S. Supreme Court stands at the helm of one of our most important institutions. Every term, critical cases come before the Court involving core areas of American life. Thus, a new Justice must be someone who will enhance the standing of the Court, while bringing true independence to the role. We look forward to working with the Committee to ensure that a full examination of Judge Gorsuch's record takes place, including a careful examination of his views concerning the interpretation and enforcement of civil rights laws. We reserve the opportunity to amend our position on this nominee based upon the hearing record.

Respectfully,

Executive Committee

John Nonna, Co-Chair	New York, NY
James P. Joseph, Co-Chair	Washington, DC
Kristen Clarke, President and Executive Director	Washington, DC
Nicholas Christakos	Washington, DC
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The Leadership Conference on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

February 15, 2017

Civil and Human Rights Organizations Oppose Confirmation of Judge Gorsuch to Supreme Court

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promote and protect the civil and human rights of all persons in the United States, and the 107 undersigned national organizations, we are writing to express our opposition to the confirmation of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States. The Supreme Court is the final arbiter of our laws, and its rulings can dramatically impact the lives and rights of all Americans. Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, demonstrate he is a judge with an agenda. His frequent dissents and concurrences show he is out of the mainstream of legal thought and unwilling to accept the constructs of binding precedent and *stare decisis* when they dictate results he disfavors. If confirmed to the Supreme Court, which is closely divided on many critical issues, Judge Gorsuch would tip the balance in a direction that would undermine many of our core rights and legal protections. He lacks the impartiality and independence the American people expect and deserve from the federal bench.

This nomination must be assessed in context. In light of the shameful, nearly year-long blockade of Judge Merrick Garland – President Barack Obama's nominee to the current Supreme Court vacancy – we believe President Trump had an obligation to put forward a mainstream nominee. He failed to do so, instead outsourcing the selection process to the ideologically driven Federalist Society and Heritage Foundation. In addition, as a presidential candidate he pledged to appoint Supreme Court justices who would overturn *Roe v. Wade*. Litmus tests in judicial selection subvert the most critical qualities of a judge: open-mindedness and independence.

President Trump's first weeks in office further demonstrate the need for a strong and independent judiciary to serve as a bulwark against the White House's abusive and autocratic approach to governance, underscoring the significance of appointing justices with a proven track record of independence and objectivity. President Trump's *ad hominem* attacks on judges who have ruled against him – on Judge Robart in Washington State for halting his Muslim travel ban, and last year on Judge Curiel in California for ruling against Trump University – threaten judicial independence and the separation of powers that form the fabric of our democracy. His unprecedented firing of Acting Attorney General Sally Yates for not being willing to defend the President's travel ban is another disturbing example. Independent and impartial federal judges are needed now more than ever. Judge Gorsuch has demonstrated in his opinions

and writings that he is results-oriented and would be highly unlikely to show independence from a President who shares his ideological agenda.

Discrimination Claims: In a 2005 article published in the conservative *National Review*, Judge Gorsuch wrote: "American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education. This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary."[1] Throughout our nation's history, the federal courts have been a critical backstop in ensuring the rights and liberties of all Americans. Judge Gorsuch's hostility to the use of courts by discrimination victims to enforce their rights under the Constitution and federal law demonstrates his ideological agenda and has been reflected in his judicial decisions, particularly dissents and concurrences, during his decade on the bench.

Take, for example, the case *Strickland v. UPS*.[2] In this case, the majority held that Carole Strickland, a UPS account executive, could proceed with a sex discrimination claim under Title VII based on evidence that she was treated worse than male colleagues despite her outperforming them in sales. Judge Gorsuch dismissed the evidentiary record and dissented; he voted to throw the victim's discrimination claim out of court. In *Weeks v. Kansas*,[3] writing for a conservative panel, Judge Gorsuch threw out another case of sex discrimination where the plaintiff, Rebecca Weeks, was fired in retaliation for her advocating on behalf of two colleagues who had been discriminated against. In his opinion, Judge Gorsuch declined to consider a superseding Supreme Court decision that might have benefitted the plaintiff simply because she did not raise it in her briefs, a troubling approach because judges have a duty to consider relevant case law regardless of whether the parties have cited it.

Workers' Rights: Judge Gorsuch's favorable treatment of employers and corporate defendants can also be seen in his reflexive rejection of workers' rights claims, and he's often a dissenting voice in such cases. In *Compass Environmental, Inc. v. OSHRC*,[4] the majority held that the employer must pay a fine for disregarding an internal policy and failing to train a worker who was electrocuted to death by high-voltage lines located near his work area. Judge Gorsuch issued a dissent and voted to throw the case out of court because he didn't believe the employer was negligent.

In *TransAm Trucking, Inc. v. Administrative Review Board*,[5] the majority held that a trucking company unlawfully fired an employee in violation of federal whistleblower protections. The employee, Alphonse Maddin, was a truck driver whose brakes broke down in the middle of a freezing January night in Illinois. The truck heater didn't work either, and he got so cold that he couldn't feel his feet or torso, and he had trouble breathing. Nonetheless, his boss ordered him to wait in the truck until a repairperson arrived. After waiting for three hours, Mr. Maddin finally drove off in the truck and left the trailer behind, in search of assistance. His employer fired him a week later for violating company policy by abandoning his load while under dispatch. The panel majority said the firing was unlawful, but Judge Gorsuch dissented and said the employee should have followed orders even at the risk of serious injury.

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[1] Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review, February 7, 2005.
[2] 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part).
[3] 503 F. App'x 640 (10th Cir. 2012).
[4] 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting).
[5] 2016 U.S. App. LEXIS 13071 (10th Cir. July 15, 2016) (Gorsuch, J., dissenting).

In *NLRB v. Community Health Services, Inc.*[6] Judge Gorsuch again dissented from a majority opinion that found in favor of employees, where a hospital was required to award back pay to 13 employees whose hours had been reduced in violation of the National Labor Relations Act. His recurrent dissents in workers' rights cases suggest a refusal to follow binding case law when it leads to results that favor workers rather than businesses and employers.

Immigration: In the closely-divided *en banc* decision in *Zamora v. Elite Logistics, Inc.*,[7] Judge Gorsuch voted to affirm the district court's granting of summary judgment which blocked a Title VII national origin discrimination case from going to trial despite evidence of animus, unlawful reverification, and document abuse by the employer. The lead concurrence in this case, which Judge Gorsuch joined, reflects an approach that insulates employers from liability for discrimination against immigrant workers so long as they claim that they were unaware of the law or took their actions due to a fear of sanction by federal immigration authorities – even where those actions themselves violated immigration law. Judge Gorsuch's record suggests that if he were confirmed as a Supreme Court justice, he would give great leeway to immigration enforcement strategies that use the fear of sanction against employers as a principal mechanism, and would condone employers hiding behind federal immigration laws to justify unlawful workplace practices.

Women's Health: Judge Gorsuch has written or joined opinions that would restrict women's health care, including allowing religious beliefs to override women's access to birth control and defunding Planned Parenthood. In *Hobby Lobby Stores, Inc. v. Sebelius*,[8] he signed on to an opinion allowing certain for-profit employers to refuse to comply with the birth control benefit in the Affordable Care Act. Citing to *Citizens United v. FEC*,[9] the decision held that corporations can be "persons" with religious beliefs and that employers can use those religious beliefs to block employees' insurance coverage of birth control. In *Little Sisters of the Poor Home for the Aged v. Burwell*,[10] Judge Gorsuch dissented from the majority's decision approving the accommodation in the birth control benefit that allows non-profit employers to opt out of the benefit but makes sure the employees get birth control coverage. Judge Gorsuch joined a dissent that argued the simple act of filling out an opt-out form constitutes a substantial burden on religious exercise. And in *Planned Parenthood Association of Utah v. Herbert*,[11] Judge Gorsuch dissented from the majority's decision to keep in place a preliminary injunction that stopped the state of Utah from blocking access to health care and education for thousands of Planned Parenthood's patients. If the policy had gone into effect, it would have cut off access to an after-school sex education program for teens and STD testing and treatment for at-risk communities.

LGBT Rights: As noted previously, in his 2005 *National Review* article Judge Gorsuch expressed disdain for those seeking to use the courts to enforce their rights under the law, and he specifically criticized LGBT Americans who have relied on federal courts in their quest for equality. The rationale he employed in the *Hobby Lobby* case – a license to discriminate for private corporations – has also been used by several states to justify discrimination against LGBT Americans.[12] And his skepticism about

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[6] 812 F.3d 768 (10th Cir. 2016) (Gorsuch, J., dissenting).
[7] 478 F.3d 1160 (10th Cir. 2007) (Gorsuch, J., concurring).
[8] 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, J., concurring).
[9] 558 U.S. 310 (2010).
[10] 799 F.3d 1315 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[11] 839 F.3d 1301 (10th Cir. 2016) (Gorsuch, J., dissenting).
[12] http://www.hrc.org/blog/anti-lgbt-bills-introduced-in-28-states.

LGBT claims is also demonstrated in a 2015 case, *Druley v. Patton*,[13] where he voted to reject a claim by a transgender woman incarcerated in Oklahoma who alleged that her constitutional rights were violated when she was denied medically necessary hormone treatment and the right to wear feminine clothing. Other federal courts have reached the opposite conclusion in such cases.[14]

Police Misconduct: In the case *Wilson v. City of Lafayette*,[15] a 22-year-old man possessing marijuana was fleeing arrest, and a police officer shot him in the head with a stun gun from a distance of 10-15 feet away, which was contrary to the police department's training manual. The young man, Ryan Wilson, died. Judge Gorsuch held that the officer was entitled to qualified immunity from an excessive force claim, reasoning that the use of force was reasonable because the young man was fleeing arrest. The dissent in this case criticized Judge Gorsuch's analysis and stated: "In the present case, it would be unreasonable for an officer to fire a taser probe at Ryan Wilson's head when he could have just as easily fired the probe into his back. The taser training materials note that officers should not aim at the head or throat unless the situation dictates a higher level of injury risk. Nothing about the situation here required an elevated level of force."[16]

Students with Disabilities: Judge Gorsuch has consistently ruled against students with disabilities seeking educational services to which they were entitled under the Individuals with Disabilities Education Act (IDEA). In *A.F. v. Española Public Schools*,[17] he dismissed a claim brought under the Americans with Disabilities Act because the school district had previously settled a lawsuit with the student for IDEA violations. A dissenting judge in this case criticized Judge Gorsuch's reasoning and observed: "This was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect."[18] In *Garcia v. Board of Education of Albuquerque Public Schools*,[19] Judge Gorsuch held that a student who left the school out of frustration with the school's failure to follow the IDEA was entitled to no remedy. And in *Thompson R2-J School District v. Luke P.*,[20] he held that a student with autism did not have a right under the IDEA to attend a private residential program, even though the district court and a Colorado Department of Education hearing officer determined that such a placement was necessary for Luke and that public schools had been unsuccessful in addressing his educational needs.

Corporate Bias: Judge Gorsuch's judicial activism was on display last year in the case *Gutierrez-Brizuela v. Lynch*,[21] where he issued a lengthy concurrence to an opinion he himself had written – a signal that his colleagues refused to sign on to his ideological agenda. In his concurrence, he questioned the constitutional legitimacy of a decades-old binding precedent, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[22] The *Chevron* doctrine requires deference to federal agencies' interpretation of ambiguous laws as long as the interpretation is reasonable, which has resulted in the safeguarding of workers' rights, environmental protection, consumer protections, food safety, and many other protections for people's health and well-being. Judge Gorsuch believes that judges should make these decisions

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[13] 601 F. App'x 632 (10th Cir. 2015).
[14] *See, e.g.*, Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011).
[15] 510 F. App'x 775 (10th Cir. 2013).
[16] *Id.* at 787 (Briscoe, J., concurring in part and dissenting in part).
[17] 801 F.3d 1245 (10th Cir. 2015).
[18] 801 F.3d at 1251 (Briscoe, J., dissenting).
[19] 520 F.3d 1116 (10th Cir. 2008).
[20] 540 F.3d 1143 (10th Cir. 2008).
[21] 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring).
[22] 467 U.S. 837 (1984).

instead of agencies with the relevant expertise, which would lead to a dramatic expansion of the power and role of the judiciary. He would relegate this vital precedent to the dustbin of history because it disfavors the corporate interests he championed as a lawyer and as a judge. As several commentators have noted, Judge Gorsuch's cramped view of the *Chevron* doctrine is even more extreme than the views of Justice Antonin Scalia.[23]

Money in Politics: For four decades, the Supreme Court's flawed approach to money in politics has gutted common sense protections against the power of special interests and wealthy individuals – most recently in *Citizens United* and *McCutcheon v. FEC*[24] – that has shaped a system that 85% of Americans believe needs fundamental change. In his only opinion directly addressing money in politics, Judge Gorsuch expressed openness to providing a higher level of constitutional protection to a donor's right to make political contributions than the Court at times has provided the right to vote. In *Riddle v. Hickenlooper*,[25] he wrote a separate concurrence that suggested courts should afford strict scrutiny, the highest constitutional protection, to political contribution limits. That view puts Gorsuch among the ranks of judges who are extremely hostile to campaign finance reform measures and would essentially gut the ability of Congress and the states to set any reasonable limits on money in our elections.

Environmental Protection: Judge Gorsuch's rejection of the binding *Chevron* decision, which prevents judges from substituting their judgment for that of federal agencies with expertise, betrays a general hostility to regulatory agencies and regulatory safeguards that protect our air, water, lands, and wildlife. In *United States v. Nichols*,[26] he wrote a lengthy dissent that tried to revive an obscure legal doctrine that could strike down many significant environmental laws. And in *Wilderness Society v. Kane County*,[27] he concurred with a decision to dismiss a claim brought by several environmental organizations asserting that a county ordinance that opened a large stretch of federal land to off-highway vehicles was preempted by federal law. The dissent in this case observed that the majority holding "will have long-term deleterious effects on the use and management of federal public lands."[28]

Voting Rights: In 2006, when he was nominated to the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch stated in his Senate questionnaire that between June 2005 and July 2006, he served as the Principal Deputy to the Associate Attorney General, a job in which he managed several litigating components at the Justice Department, including the Civil Rights Division. On Gorsuch's watch, political appointees ran roughshod over career attorneys who sought to lodge Section 5 objections under the Voting Rights Act to Georgia's photo ID law. This disgraceful practice was exposed in a November 2005 *Washington Post* article: "A team of Justice Department lawyers and analysts who reviewed a Georgia voter-identification law recommended rejecting it because it was likely to discriminate against black voters, but they were overruled the next day by higher-ranking officials at Justice, according to department documents.... The plan was blocked on constitutional grounds in October by a U.S. District Court judge, who compared the measure to a Jim Crow-era poll tax."[29] Gorsuch should be questioned about his role in supervising the Georgia photo ID litigation and the extent to which he was involved in

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[23] Elliot Mincberg, *Gorsuch is to the Right of Scalia on the "Chevron Doctrine" – Here's Why it Matters*, Huffington Post, February 1, 2017; Richard Primus, *Trump Picks Scalia 2.0*, Politico Magazine, January 31, 2017.
[24] 572 U.S. ___ (2014).
[25] 742 F.3d 922 (10th Cir. 2014) (Gorsuch, J., concurring).
[26] 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[27] 632 F.3d 1162 (10th Cir. 2011) (Gorsuch, J., concurring).
[28] 632 F.3d at 1180 (Lucero, J., dissenting).
[29] Dan Eggen, *Criticism of Voting Law Was Overruled*, Washington Post, November 17, 2005.

supporting the use of photo ID laws by Georgia and other states, and about his role in overturning the recommendations of career attorneys to object to such laws.

Politicized Hiring in Civil Rights Division: In addition, during the year in which Gorsuch helped manage the Civil Rights Division, political appointees there engaged in unlawful hiring discrimination against lawyers with liberal affiliations, and this became the subject of a 2008 Inspector General report entitled "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division."[30] Gorsuch should be questioned by Senators about his knowledge of and role in these activities, which constituted an unlawful attempt to exclude lawyers from the Department of Justice who had a civil rights background and who would have aggressively enforced federal civil rights laws. He should also be questioned about his role in the 2005 appointment of Bradley Schlozman – whom the Inspector General concluded committed the most infractions – to be the Acting Assistant Attorney General for Civil Rights.

The Leadership Conference urges all Senators to oppose the Gorsuch nomination. They must exercise their full "advice and consent" responsibility by engaging in a searching and thorough review of Judge Gorsuch's record and judicial philosophy. The Senate Judiciary Committee must engage in full and fair hearings in which all requested documents are produced and examined, committee members are permitted to adequately question Judge Gorsuch and receive full and complete answers, and enough outside witnesses are permitted to testify regarding Judge Gorsuch's record. Before the full Senate considers acting on the nomination of Judge Gorsuch, the American people have a right to know precisely how his appointment to the Supreme Court would impact their rights, freedoms, and liberties. When this review is complete, we are confident that the Senate will reject this nomination.

Thank you for your consideration of our views. If you would like to discuss this matter further, please contact Wade Henderson, President and CEO, or Nancy Zirkin, Executive Vice President, at (202) 466-3311.

Sincerely,

The Leadership Conference on Civil and Human Rights
9to5, National Association of Working Women
A. Philip Randolph Institute
Advocates for Youth
African American Ministers In Action
The African American Policy Forum
Alliance for Citizenship
Alliance for Justice
American Association of People with Disabilities
American Atheists
American-Arab Anti-Discrimination Committee
Americans for Democratic Action (ADA)
Americans United for Separation of Church and State
Asian Americans Advancing Justice - AAJC

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[30] https://oig.justice.gov/special/s0901/final.pdf.

Asian Pacific American Labor Alliance, AFL-CIO (APALA)
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Bazelon Center for Mental Health Law
Bend the Arc Jewish Action
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Black Women's Roundtable
Catholics for Choice
Center for Health and Gender Equity (CHANGE)
Center for Law and Social Policy (CLASP)
Center for Responsible Lending
Coalition of Black Trade Unionists
Coalition of Labor Union Women
Coalition on Human Needs
Communications Workers of America
Congregation of Sisters of St. Agnes
Democracy Initiative
Demos
Earthjustice
EMILY's List
Equal Justice Society
Equal Rights Advocates
Every Voice
Family Equality Council
Farmworker Justice
Feminist Majority
Four Freedoms Forum
Friends of the Earth
GLMA: Health Professionals Advancing LGBT Equality
Global Justice Institute
GLSEN
Hispanic Federation
Housing Choice Partners
Human Rights Campaign
Immigrant Legal Resource Center
Institute for Science and Human Values
Labor Council for Latin American Advancement (LCLAA)
Lambda Legal
LatinoJustice PRLDEF
League of Conservation Voters
League of United Latin American Citizens
Legal Aid at Work
Main Street Alliance
Mi Familia Vota

MomsRising
NARAL Pro-Choice America
National Abortion Federation
National Action Network
National Asian Pacific American Women's Forum
National Asian American Pacific Islander Mental Health Association
National Association of Human Rights Workers
National Association of Social Workers
National Bar Association
National Black Justice Coalition
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Coalition for Asian Pacific American Community Development
National Coalition on Black Civic Participation
National Council of Asian Pacific Americans (NCAPA)
National Council of Jewish Women
National Council on Independent Living
National Education Association
National Employment Law Project
National Fair Housing Alliance
National Health Law Program
National Hispanic Media Coalition
National Immigration Law Center
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
OCA - Asian Pacific American Advocates
Partnership for Working Families
People For the American Way
Planned Parenthood Federation of America
Policy Link
Population Connection Action Fund
Pride at Work
Pride Fund to End Gun Violence
ProgressNow
Religious Institute
Service Employees International Union (SEIU)
Sierra Club
Southeast Asia Resource Action Center (SEARAC)
Southern Poverty Law Center
Transgender Law Center

The Trevor Project
URGE: Unite for Reproductive & Gender Equity
US Women and Cuba Collaboration
Voices for Progress
Voting Rights Forward
Women Employed
Women's Voices Women Vote Action Fund
Woodhull Freedom Foundation

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March 17, 2017

The Honorable Chuck Grassley
135 Hart Senate Office Bldg.
Washington, D.C. 20510

The Honorable Dianne Feinstein
331 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Grassley and Senator Feinstein:

On behalf of the Major Cities Chiefs Association, representing the 69 largest local law enforcement agencies in the Nation, we are writing to support the nomination of Judge Neil Gorsuch to the Supreme Court of the United States.

We applaud his distinguished career in public service, a record of achievement that began with his work as a judicial clerk on the U.S. Court of Appeals for the D.C. Circuit. During those early years as a judicial clerk, Neil Gorsuch earned high marks from law enforcement. He has been praised by those who worked at his side on criminal cases as well as officials who have taken cases to his courtroom in later years.

His record as a judge shows a commitment to public safety and sensitivity to the needs of the community. He has made decisions that are both tough and compassionate. Additionally, his record shows respect for laws and cases that enable law enforcement to do their job.

American law enforcement has always looked to you for leadership, and we again turn to you to move the nomination of Neil Gorsuch quickly through the confirmation process.

Sincerely,

J. Thomas Manger
Chief of Police
Montgomery County Police Department
President, Major Cities Chiefs Association

March 1, 2017

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We write to express our strong support for Judge Neil Gorsuch's nomination to be an Associate Justice of the Supreme Court of the United States. The undersigned are members of the Supreme Court bar with substantial experience before the Court. Collectively, we have argued more than 500 cases before the Court. Many of us, moreover, worked with Judge Gorsuch (or litigated against him) when he was in private practice; served alongside him in the Justice Department; or have appeared before him in the Court of Appeals. We hold a broad range of political, policy, and jurisprudential views. But we are unified in offering our support of Judge Gorsuch's nomination.

Fairminded, dedicated, smart, and unfailingly polite, Judge Gorsuch is someone all of us would be pleased to appear before. He is principled in his approach to the law, but also keenly aware of practical consequences. He is a thoroughly kind and decent person. Respectful of colleagues and counsel alike, Judge Gorsuch has the unusual combination of character, dedication, and intellect that would make him an asset to our Nation's highest court.

We hope this information will be of assistance to the Committee in its consideration of Judge Gorsuch's nomination. We thank you for your time and attention, and urge you to support his confirmation.

Very truly yours,

Lisa Blatt
Richard P. Bress
Michael A. Carvin
John P. Elwood
Roy Englert
Miguel A. Estrada
Mark Evans
H. Bartow Farr, III
David C. Frederick

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Kathleen M. Sullivan
Amir C. Tayrani
Christopher J. Wright

March 21, 2017

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6050

Dear Members of the Senate Judiciary Committee:

On behalf of the Ms. Foundation for Women, the longest-standing public women's foundation in the country, I write to express our opposition to the confirmation of Judge Neil Gorsuch as Associate Justice of the United States Supreme Court.

For 44 years, the Ms. Foundation for Women has supported women- and women of color-led grassroots movements for justice across the country. We were one of the earliest institutions to fund efforts to protect women from wage discrimination, theft, and unsafe working conditions, and we were among the first funders to provide resources and capacity-building support to organizations on the frontlines of the fight for reproductive justice. Today, we continue to speak out for economic security, health, and safety for *all* women. We understand the vital role the judiciary plays in protecting rights that enable all women to live with dignity and free from harm.

Given Judge Gorsuch's record as a jurist, we believe his confirmation to the Supreme Court would cause serious harm to women, in particular low-income women and women of color.

In fact, Judge Gorsuch's rulings have already harmed these communities. His consequential opinion in *Hobby Lobby v. Sebelius* enabled companies to withhold insurance coverage for birth control on religious grounds, effectively limiting access to health care. More recently, his dissent in *Planned Parenthood Association of Utah v. Herbert* upheld a statewide ban on funding for Planned Parenthood. This ban, put in place after deceptive videos of Planned Parenthood employees were released, would have compromised the health, safety, and economic security of tens of thousands of women and men in Utah. At a time when low-income communities' access to comprehensive health care services, including reproductive care, is under threat, we need to be sure that the next Associate Justice will not politicize their health. Unfortunately, it seems clear that Judge Gorsuch privileges 'religious freedom' over access to care.

We are equally concerned about Judge Gorsuch's potential rulings on police officers' use of excessive force. He has repeatedly ruled in favor of police officers in these cases, including one in which an officer put a 67-pound, 9 year old boy in an arm twist lock and handcuffed him. Judge Gorsuch absolved the officer of any wrongdoing, calling the actions "regrettable." What we find deeply regrettable is Judge Gorsuch's apparent callousness toward police violence. The

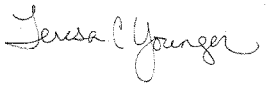
12 MetroTech Center, 26th Fl, Brooklyn, NY 11201 P 212 742 2300 F 212 742 1653 **forwomen.org**

grassroots organizations we support know firsthand the threats that communities of color, especially transgender women of color, face every day in this country, and we urge the committee to consider the impact of confirming an Associate Justice who has failed, at nearly every opportunity, to honor their safety.

In addition to Judge Gorsuch's troubling record, the allegations that he made statements last year condoning pregnancy discrimination are disturbing and deserve serious scrutiny. One of Judge Gorsuch's former law students has written to you describing these sexist remarks, which she also reported to the University of Colorado. At the time of this writing, at least one classmate has corroborated this characterization of Judge Gorsuch's statements. These allegations suggest that Judge Gorsuch may not only find fault with existing workplace protections against sex discrimination but also harbor his own gendered biases against women in the workplace – discriminatory beliefs which should have *no* place on our country's highest court. Taking into account Judge Gorsuch's judicial record, including his dismissal of a UPS employee's sex discrimination case, we urge you to seriously examine Judge Gorsuch's views on the legality of workplace protections.

Time and again, Judge Gorsuch has favored corporations over people. His history of siding with powerful interests over communities with the least power should be concerning to anyone who believes in justice for all. We urge you to oppose his confirmation as Associate Justice. If we can be a resource, or should you need additional information, please contact Alyson Silkowski at asilkowski@ms.foundation.org or 212-709-4423.

Sincerely,



Teresa C. Younger
President and CEO
Ms. Foundation for Women

12 MetroTech Center, 26th Fl, Brooklyn, NY 11201 P 212 742 2300 F 212 742 1653 **forwomen.org**

March 13, 2017

Chairman Chuck Grassley
Senate Judiciary Committee
United States Senate

Ranking Member Dianne Feinstein
Senate Judiciary Committee
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the National Abortion Federation (NAF) and our President Vicki Saporta, I am sharing a statement of opposition for the Senate Judiciary Committee hearing on the nomination of Judge Neil Gorsuch to the Supreme Court.

NAF is the professional association of abortion providers. Our members include private and nonprofit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals who together care for approximately half the women who choose abortion in the U.S. and Canada each year. Our mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women.

I kindly request that this statement be submitted for the record.

Thank you,

Shivana Jorawar
Federal Policy Director
National Abortion Federation

President
Leslie Richards-Yellen
New York, NY

President-Elect
Angela Beranek Brandt
St. Paul, MN

Vice President
Sarretta C. McDonough
Los Angeles, CA

Treasurer
Kristin D. Sostowski
Newark, NJ

Secretary
Karen S. Morris
San Antonio, TX

Assistant Secretary
Sharon E. Jones
New York, NY

Immediate Past President
Marsha L. Anastasia
Stamford, CT

Members-at-Large

Peggy Steif Abram
Minneapolis, MN

DeAnna D. Allen
Washington, DC

Diane E. Ambler
Washington, DC

Kristin L. Bauer
Dallas, TX

Jennifer A. Champlin
Rogers, AR

Lauri A. Damrell
Sacramento, CA

Susan L. Lees
Northbrook, IL

Elizabeth A. Levy
Cambridge, MA

Suzan A. Miller
Santa Clara, CA

Leslie D. Minier
Chicago, IL

Sheila M. Murphy
New York, NY

Suzette Recinos
Stamford, CT

Carol A. Robles-Román
New York, NY

Sandra Yamate
Chicago, IL

Executive Director
Jenny Waters
Chicago, IL

March 16, 2017

Via Federal Express

U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

The National Association of Women Lawyers ("NAWL") Committee for the Evaluation of Supreme Court Nominees ("Committee")[1] has completed an extensive review of the qualifications and background of the Honorable Neil Gorsuch, the Presidential nominee for the United States Supreme Court to fill the vacancy created by the death of Justice Scalia.

Consistent with the stated mission of the Committee, our assessment focused on Judge Gorsuch's personal integrity, professional competence, and judicial temperament, with "an emphasis on laws and decisions regarding women's rights or that have a special impact on women."[2] Our review of over 500 opinions, concurrences, and dissents written by Judge Gorsuch and articles and books he authored or coauthored led the Committee to conclude that Judge Gorsuch has outstanding legal ability consistent with service on the Supreme Court. Similarly, our interviews of several dozen litigants, former law clerks, former and current colleagues, and others who have interacted with Judge Gorsuch during the last three decades persuaded the Committee that he has the highest reputation for integrity and generally demonstrates a sound judicial temperament. However, the Committee's standards require review of each nominee under several separate evaluation criteria, and the prospective nominee is found "not qualified" when "the Committee has determined that the prospective nominee does not meet the Committee's standards with respect to one or more of its evaluation criteria - integrity, professional competence, judicial temperament <u>or</u> he or she does not demonstrate a commitment to women's rights or issues that have a special impact on women." [3] Judge Gorsuch's writings in or about several cases that implicate women's rights or interests caused the Committee significant concern. Based on those writings, in light of the quoted language contained in the Committee's standards, the Committee finds that Judge Gorsuch, to date, does not have a "demonstrated commitment to women's rights or issues that have a special impact on women."[4] Because such a demonstrated commitment is a pre-requisite for a nominee to receive a "qualified" or "well qualified" ranking from NAWL, the Committee ranks Judge Gorsuch "not qualified."

The key issues of concern identified through the Committee's review of Judge Gorsuch's writings fall into two key categories. First, the Committee is concerned by Judge Gorsuch's expansive view of religious rights and of the rights of corporate entities, which has led him to conclude that the religious rights of individuals and corporations take precedence over women's liberty interests,

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[1] NAWL's Supreme Court Committee is comprised of distinguished law professors, appellate practitioners, corporate counsel, and current and former federal law clerks.
[2] National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees, p. 1 (attached).
[3] *Id.* at p. 5 (emphasis added).
[4] *Id.*

including women's reproductive rights. Second, the Committee is concerned by Judge Gorsuch's narrow reading of the holdings in key cases where the application of substantive due process was held to protect individual liberties of women and minorities.

In our view, Judge Gorsuch has taken an overly expansive view of religious rights that unnecessarily compromises women's reproductive rights in cases where both are at issue. To illustrate the point, the Committee offers the following examples:

- In a concurring opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), Judge Gorsuch held that an expanded application of religious freedom operates to invalidate the contraception coverage mandate of the Affordable Care Act ("ACA"), limiting a woman's reproductive health choices. This opinion expanded the theory of religious rights to include corporate decision-making and, in so doing, limited the rights of women employees to make their own health care decisions.[5]

- In *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315, 1317 (10th Cir. 2015), the Tenth Circuit Court of Appeals upheld the ACA accommodation allowing religiously-affiliated non-profit organizations to submit a form opting out of birth control coverage through employer provided health plans while ensuring women could nevertheless obtain coverage from those insurance plans. In a *sua sponte* poll for rehearing, Judge Gorsuch joined a dissent from the denial of rehearing, which argued that the act of submitting the form, itself an attempt to balance an organization's religious freedom and women's access to contraception, violated the plaintiffs' religious freedom.

In another case, Judge Gorsuch favored what the majority considered an "unusual procedural move" in an attempt to reverse the entry of a temporary injunction favoring Planned Parenthood. In *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1302 (10th Cir. 2016), a Tenth Circuit Court of Appeals panel preliminarily enjoined an order issued by the Governor of Utah that would have defunded Planned Parenthood. In his dissenting opinion Judge Gorsuch continued to argue for an *en banc* hearing, despite the fact that an initial poll of the judges had failed, neither party had requested an *en banc* hearing and the litigants had agreed to a preliminary injunction in favor of Planned Parenthood.

Judge Gorsuch's writings also exhibit a reluctance to recognize precedent that applies substantive due process to protect the rights of women and minorities.[6] In Chapter 5 of his 2006 book titled *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch argues that the portions of the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and the majority opinion in *Loving v. Virginia,* 388 U.S. 1 (1967) that rely on a due process fundamental liberty interest can be read as dicta. Judge Gorsuch's narrow reading of *Casey* and *Loving* is belied by other Supreme Court opinions that also rely on the existence of a fundamental liberty interest of protecting individual rights to maintain control over private decisions without government interference, including those of women and minorities. *See, e.g., Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015) (acknowledging the right of same sex couples to marry); *Lawrence v. Texas*, 539 U.S. 558, 564, 123 S. Ct. 2472, 2476, 156 L. Ed. 2d 508 (2003) (protecting private sexual choices); *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L.Ed.2d 349 (1972) (affirming the right of unmarried individuals to possess birth control); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) (affirming the right to privacy of married couples in intimate decision making). The views Judge Gorsuch articulated in this chapter raise the concern that he interprets abortion rights as resting on little more than *stare decisis*, and that his approach to substantive due process will otherwise mirror the most restrictive views asserted by members of the modern Supreme Court.

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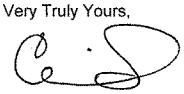
[5] NAWL joined in the National Women's Law Center's Amicus brief filed in the Supreme Court on appeal from the Hobby Lobby decision. That brief argued for the reversal of the Tenth Circuit opinion.
[6] *See* Gorsuch, Neil, *The Future of Assisted Suicide and Euthanasia*, Ch. 5: "Casey and Cruzan: Do They Intimate a Right to Assisted Suicide and Euthanasia," (2006).

Judge Gorsuch has authored several decisions in gender discrimination cases and regarding general principles of statutory anti-discrimination law. In general, his opinions in these cases are written thoughtfully and respectfully and recognize the difficulties encountered by cisgender[7] anti-discrimination claimants even in his opinions issuing adverse rulings. He has reached defensible positions both in favor and against women based upon the specific facts of each case. *See Strickland v. United Parcel Service*, 555 F.3d 1224 (10th Cir. 2009) (*en banc* concurrence in part and dissent in part) (finding basis for new trial on FMLA claim but not on Title VII sexual harassment claim); *Orr v. City of Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (finding factual issues regarding pretext to support a trial on FMLA and Title VII claims). Yet, on issues of law, his plain-meaning approach to statutory interpretation and his reluctance to defer to administrative agencies has caused him to reject interpretations of anti-discrimination statutes that are favorable to women. *See Elwell v. State of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012) (holding under the ADA that employment discrimination claims cannot be brought under Title II); *Almond v. Unified School District*, 665 F.3d 1174 (10th Cir. 2011) (limiting Lily Ledbetter Act's long statute of limitations to claims for unequal pay, as opposed to all compensation-based claims).

The Committee finds that Judge Gorsuch consistently displayed both a superior intellect and a comprehensive understanding of the issues with which he was presented. The Committee found his opinions well written, his analytic abilities impressive, and his judicial reasoning accessible. Interviewees also affirmed his dedication to "getting it right," while also acknowledging the impact of his deeply conservative legal perspective. Additionally, the Committee's interviewees said that the Judge is thoughtful, hardworking, highly prepared, and thorough. Most interviewees described him as an engaged boss who supported his colleagues and employees regardless of gender. With a few exceptions, the interviewees described Judge Gorsuch as intellectually capable of assuming the role of Supreme Court Justice and his temperament as appropriate for such an esteemed position. The Committee finds that Judge Gorsuch has demonstrated the intellectual and analytical talent, judicial temperament, and professional demeanor required to serve on our Nation's highest court.

Nevertheless, because the Committee has found that Judge Gorsuch has not "demonstrate[d] a commitment to women's rights or issues that have a special impact on women,"[8] we find that he is not qualified under NAWL's standard to assume the position of Justice of the Supreme Court of the United States.

Very Truly Yours,



Camille A. Nelson, Co-Chair
NAWL Supreme Court Committee

Ramona E. Romero, Co-Chair
NAWL Supreme Court Committee

cc: The White House
Judge Neil Gorsuch

The mission of NAWL is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

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[7] However, Judge Gorsuch participated in decisions issued by panels of the Ninth and Tenth Circuits that declined to recognize transgender women as women and, as such, denied them rights that would be afforded to other women. *See Kastl v. Maricopa County Community College*, 325 Fed. Appx. 492 (9th Cir. 2009) (sitting by designation); *Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015). These opinions reflect a departure from the approach Judge Gorsuch has shown in other discrimination matters involving women, and cause the Committee significant concern.

[8] National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees at p. 5.

March 24, 2017

Senator Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Support for Confirmation of Judge Neil Gorsuch

Dear Chairman Grassley and Ranking Member Feinstein:

We write on behalf of the National Congress of American Indians and the Native American Rights Fund to offer our support for the confirmation of Judge Neil Gorsuch to become Associate Justice on the Supreme Court of the United States. Judge Gorsuch hails from the West, with the Tenth Circuit encompassing the territory of 76 federally-recognized Indian tribes. Our organizations, and the Indian tribal governments we represent, have long sought the nomination of Justices with knowledge of federal Indian law, and more generally with experience on western issues such as federal lands and natural resources.

As noted repeatedly during the hearing, Judge Gorsuch has significant experience with cases involving the interests of Indian tribes and Indian people. His opinions recognize Tribes as sovereign governments, and address issues of significance to Tribes, including state police incursion onto tribal lands, sovereign immunity, religious freedom, accounting for trust funds, exhaustion of tribal remedies, and Indian country criminal jurisdiction. Judge Gorsuch appears to be both attentive to the details and respectful to the fundamental principles of tribal sovereignty and the federal trust responsibility.

Judge Gorsuch was one of the Tenth Circuit Judges who accepted NCAI's invitation to our 2007 Annual Meeting in Denver, CO, and engaged in an insightful dialogue with tribal leaders regarding the status of federal Indian law in the courts. Tribal leaders greatly appreciate the outreach and communication with judges, like Judge Gorsuch, who are willing to take time out of their busy schedules to learn more about Indian country.

Based on this experience and his record, we have confidence that Judge Gorsuch will be open-minded to all perspectives. It is our hope that his confirmation will help to preserve bi-partisan cooperation on the judicial selection process. Please contact NCAI General Counsel John Dossett, jdossett@ncai.org, or NARF Staff Attorney Richard Guest, richardg@narf.org, if we can provide any additional information.

Sincerely,

Brian Cladoosby

Brian Cladoosby, NCAI President

John E. Echohawk

John Echohawk, NARF Executive Director

NCJW®

National Council of Jewish Women

New York Office
475 Riverside Drive, Suite 1901
New York, NY 10115
Tel 212 645 4048
Fax 212 645 7466
Email action@ncjw.org

Washington Office
1707 L Street, NW Suite 950
Washington, DC 20036-4206
Tel 202 296 2588
Fax 202 331 7792
Email action@ncjwdc.org

Israel Office
NCJW Research Institute for Innovation in Education, Room 267
Hebrew University Mt. Scopus
Jerusalem, Israel 91905
Tel 972 2 5882 208
Fax 972 2 5813 264
Email ncjwisrael@gmail.com

Web www.ncjw.org

March 9, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
S230 US Capitol
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
S221 US Capitol
Washington, DC 20510

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein:

The National Council of Jewish Women (NCJW) writes to express its strong opposition to the confirmation of Judge Neil Gorsuch to the US Supreme Court. NCJW believes that only those committed to upholding constitutional rights and fundamental freedoms should be confirmed to our nation's highest court. Judge Gorsuch, through his opinions and essays, has made it clear that he has no respect for the constitutional principles that have supported the progress made by women and people of color throughout our country's history. The Supreme Court is the final arbiter of our laws, and its rulings dramatically impact the lives and rights of all Americans. **Nonetheless, Judge Gorsuch has demonstrated, time and time again, that he prioritizes corporations and the wealthy over the people most in need of the Court's protection.**

Senator Grassley, in 2009, **you said**:
Because Supreme Court Justices have the last say with respect to the law and have the ability to make precedent, they do not have the same kinds of restraints lower court judges have. So we need to be convinced these nominees have judicial restraint—in other words, the self-restraint to resist interpreting the Constitution to satisfy their personal beliefs and preferences… The preservation of our individual freedoms depends on limiting policymaking to legislators rather than on elected judges who have a lifetime appointment.[i]

These words ring true today. Unfortunately, Judge Gorsuch's record on the Court of Appeals for the Tenth Circuit demonstrates his lack of judicial restraint. Indeed, Gorsuch has a clear agenda; his rulings do not reflect the impartiality and independence the American people expect and deserve from the federal bench.

Throughout his tenure on the bench, Judge Gorsuch has repeatedly demonstrated the exact lack of self-restraint against which Senator Grassley warned. Perhaps most notably, Judge Gorsuch joined the Tenth Circuit's majority opinion in *Hobby Lobby Stores, Inc. v. Sebelius*,[ii] which allowed for-profit employers to refuse to comply with the contraceptive coverage benefits of the Affordable Care Act — policy properly made by legislators — without any regard for the constitutionally-guaranteed rights of women and families or the integrity of the legislative process. He went even further in his concurring opinion, essentially prioritizing individual business owners' personal religious views over those of female employees.[iii]

Judge Gorsuch has repeatedly shown hostility to nearly every population with rights at risk, from women and workers to the environment and beyond. **His extensive writings reveal his identity as an ideological warrior, not an open-minded jurist.** While on the Tenth Circuit, Judge Gorsuch has argued against agency-imposed company fines when the company's lack of safety training led to an employee's death;[iv] protected medical device companies from liability when patients were harmed by the companies' products, which were neither FDA-approved nor proven to be safe and effective;[v] and upheld the denial of long-term benefits to a disabled employee despite the employee's physician's determination that the employee was, indeed, fully disabled.[vi]

Our next Supreme Court justice must be a fair and independent individual who will stand up for constitutional values and protections for everyone — not just corporations and the wealthy. Judge Neil Gorsuch is not this individual. Accordingly, we strongly **urge the Senate Judiciary Committee to vote against the confirmation** of Judge Gorsuch to the US Supreme Court.

Sincerely,

Nancy K. Kaufman
CEO, National Council of Jewish Women

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[i] 155 Cong. Rec. S8923 (2009) (statement of Sen. Charles Grassley).
[ii] 723 F.3d 1114 (10th Cir. 2013).
[iii] *Id.* (Gorsuch, J., concurring).
[iv] Compass Environmental, Inc. v. OSHRC, 633 F.3d 1164, 1170 (10th Cir. 2011) (Gorsuch, J., dissenting).
[v] Caplinger v. Medtronic, Inc., 784 F.3d 1335 (10th Cir. 2015).
[vi] Lucas v. Liberty Life Assurance Co. of Boston, 444 F.App'x 243 (10th Cir. 2011).

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Lily Eskelsen Garcia
President

Rebecca S. Pringle
Vice President

Princess R. Moss
Secretary-Treasurer

John C. Stocks
Executive Director

March 9, 2017

United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator:

On behalf of the three million members of the National Education Association and the 50 million students they serve, we wish to express our strong opposition to the nomination of Judge Neil Gorsuch to the United States Supreme Court. In the overwhelming majority of cases, he has ruled against disabled students and expressed personal reservations about their constitutional rights. His record as a whole shows a lack of regard for the struggles and rights of students with disabilities. If the Supreme Court were to adopt Judge Gorsuch's views on disability and education, the Individuals with Disabilities Education Act (IDEA), along with complementary civil rights laws and protections, could be hollowed out.

Of specific concern:

- First, Judge Gorsuch has erected technical legal barriers against the legal claims of students with disabilities — barriers of the type that the Supreme Court has subsequently rejected unanimously. For example, in *A.F. v. Española Public Schools*, he would not allow a student to assert her rights under the Americans with Disabilities Act because she had previously reached a settlement under IDEA.
- Second, Judge Gorsuch has repeatedly ruled that students with disabilities are owed only a bare minimum of education — for example, his opinion in *Thompson R2-J School District v. Luke P.*, asserts that IDEA requires educational progress that is "merely ... more than *de minimis*." This finding has been rejected by other courts and is now being reviewed by the Supreme Court in *Endrew F. v. Douglas County School District*.
- Third, Judge Gorsuch has joined deeply troubling opinions that hold the constitutional rights of students with disabilities are not violated even when they are segregated and subjected to abusive confinement — for example, in *Muskrat v. Deer Creek Public Schools* and *Couture v. Board of Education*.
- Fourth, Judge Gorsuch appears to favor dismantling the power of administrative agencies to enforce regulatory protections, including those for students with disabilities. Under the *Chevron* doctrine enunciated in 1984, the Supreme Court defers to agencies' interpretation of ambiguous statutory language. In *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch calls the *Chevron* doctrine a "behemoth" that "swallow[s] huge amounts of core

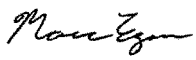
judicial and legislative power" and in *Caring Hearts Personal Home Services, Inc. v. Burwell*, he mocks federal agencies as so-called "experts."

In addition to deeply troubling rulings in numerous cases involving students with disabilities — fully detailed in NEA's report, "Judge Neil Gorsuch's Record on Students with Disabilities" (available at http://bit.ly/2nb1hFo) — he has consistently sided with big business at the expense of working people. Judge Gorsuch has embraced extreme views that could endanger workers' rights on issues like employment discrimination, worker safety, and wages.

The next Supreme Court justice could cast the deciding vote in cases involving students with disabilities, as well as other critical issues: public education funding, educators' ability to negotiate collectively for wages and benefits, and much more. An independent Supreme Court is a check on abuse of executive power, which is more important now than ever. It is essential for the next Supreme Court justice to be fair and impartial — not influenced by politics, parties or the president.

NEA supports the rights of students with disabilities to receive a high quality education, to live free from discrimination, and to be vindicated by the courts when those rights are violated. Providing students with disabilities the opportunity to succeed academically is a moral and professional responsibility of the educator community and the nation as a whole. As you prepare for a hearing and a vote, we strongly urge you to oppose the nomination of Judge Neil Gorsuch to the Supreme Court.

Sincerely,



Marc Egan
Director of Government Relations
National Education Association

March 13, 2017

Submitted Via Email:
Ted_lehman@judiciary-rep.senate.gov
Paige_herwig@judiciary-dem.senate.gov

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, I write to express our strong opposition to the nomination of Judge Neil M. Gorsuch to the United States Supreme Court.

NELA is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and envisions a workplace in which employees will be paid at least a living wage in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employees' safety and livelihood will not be compromised for the sake of corporate profit and interests; and individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to trial by jury.

As a member of the Tenth Circuit Court of Appeals, Judge Gorsuch has demonstrated a troubling propensity to both draw inferences against plaintiff-employees and make improper determinations regarding the credibility of the respective parties when deciding whether an employee should be permitted to present her claims to a jury (the procedural posture in most employment cases on appeal). This practice runs afoul of the applicable provisions of the Federal Rules of Civil Procedure and rulings from the Supreme Court. Judge Gorsuch has shown an affinity for deploying legal reasoning unsupported by the text and purposes of the particular employment laws at issue, and adopting inappropriately narrow readings of both the facts and law in ways that operate to the detriment of employees seeking to vindicate their statutory rights.

National Office • 2201 Broadway, Suite 402 • Oakland, California • 94612 • TEL 415.296.7629
Washington DC Office • 1828 L Street, NW, Suite 600 • Washington DC • 20036 • TEL 202.898.2880
email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521

This pattern gives rise to the question of whether Judge Gorsuch places the interests of employers over the rights of employees, which should be fully explored during his confirmation hearing.

Judge Gorsuch's tendencies as described above are made more troubling by his much-discussed skepticism regarding the doctrine of *Chevron*[1] deference. Administrative regulations, as well as other interpretations and enforcement guidance from administrative agencies such as the Equal Employment Opportunity Commission (EEOC) and National Labor Relations Board (NLRB) provide invaluable guidance to employers and employees regarding the nature of their rights and responsibilities, and are an essential tool for judges and advocates in resolving employment disputes. One can imagine many ways in which a Supreme Court Justice with Judge Gorsuch's apparent tendencies regarding employment cases, further unencumbered by any responsibility to defer to authoritative interpretations developed by the agencies charged with interpreting and enforcing our workplace laws, could undermine profoundly the effective enforcement of the employment laws passed by Congress.

The case descriptions that follow constitute representative examples of the ways in which Judge Gorsuch's jurisprudence in employment cases has manifested itself in cases arising under a number of different employment statutes.

A. *Hwang v. Kansas State Univ.*[2] (Disability Discrimination)

After she was diagnosed with cancer, Professor Grace Hwang requested and received a six-month leave of absence covering the fall semester to recover from a bone marrow transplant. As she was preparing to return to teaching the following January, a flu outbreak erupted on campus. Because her doctor advised her not to subject her compromised immune system to such an environment, she sought further leave, during which she could have worked from home. This request contravened the employer's rule capping all leave requests to a maximum of six months.

Judge Gorsuch ruled that Professor Hwang's request for an additional leave of absence was unreasonable and affirmed the dismissal of her case. Applicable law requires that requests for accommodations be evaluated on a case-by-case basis, and in *U.S. Airways, Inc. v. Barnett*,[3] the Supreme Court suggested that a reasonable accommodation may require an employer to modify an otherwise neutral rule (such as this employer's six-month cap on leave). Judge Gorsuch's reasoning also contravened EEOC Enforcement Guidance, and conflicted with rulings from numerous other Circuit Courts of Appeals.

B. *Roberts v. Int'l Bus. Machines Corp.*[4] (Age Discrimination)

In affirming summary judgment in favor of the defendant-employer in this case, Judge Gorsuch demonstrated a number of troubling propensities that employee rights advocates understand all too well: he both drew inferences against the non-moving party and improperly weighed the evidence in a manner that Supreme Court law requires be done by a jury.

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[1] Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).
[2] 753 F.3d 1159 (10th Cir. 2014).
[3] 535 U.S. 391 (2002).
[4] 733 F.3d 1306 (10th Cir. 2013).

In a text message conversation, two of the defendants' human resources employees were quoted as referencing the plaintiff's "shelf life" in deciding whether to eliminate his position (they subsequently did). In deciding that the phrase could not constitute direct evidence of discrimination, Judge Gorsuch concluded that "the instant message conversation unmistakably suggests that 'shelf life' was nothing worse than an inartful reference to Mr. Roberts's queue of billable work."

He then moved to the question of whether the phrase, in conjunction with conflicting evidence regarding the plaintiff's performance record, could demonstrate that the defendant's alleged reasons for firing the plaintiff were a pretext for age discrimination. Judge Gorsuch held that the plaintiff could not demonstrate that changes in his performance reviews were a pretext for discrimination unless he could "advance evidence that IBM's changed evaluation of his performance, whether wise or mistaken, wasn't honestly arrived at."

The only way in which Judge Gorsuch could reach such conclusions about the meaning of statements such as "shelf life" and the credibility of the defendant's asserted reasons for terminating the plaintiff was by drawing a series of inferences in the defendant's favor, and by avoiding a more common interpretation of the phrase "shelf life" when applied in conversation to an older employee. Longstanding Supreme Court precedent holds that judges must avoid drawing such inferences when deciding whether a case should be dismissed or proceed to trial.[5]

C. *TransAm Trucking, Inc. v. Administrative Review Board*[6] (Whistleblower Retaliation)

Alphonse Maddin worked as a truck driver for the defendant-employer. He was driving a tractor-trailer down an Illinois freeway on a subzero night in 2009 when he noticed that his truck was nearly out of gas. He pulled over because he could not find a fuel station, and ten minutes later, the trailer's brakes locked up due to the frigid temperatures. Mr. Maddin was unable to resume driving the tractor-trailer and reported the truck's unsafe condition to a dispatcher. The dispatcher told Mr. Maddin that a repairperson would be sent to fix the brakes.

Mr. Maddin dozed off briefly and awoke to find that his torso was numb and he could not feel his feet. He told the dispatcher about his physical condition and asked when the repairperson would arrive. "[H]ang in there," the dispatcher responded.

Approximately one half hour later, Mr. Maddin called his supervisor, Larry Cluck, and told Mr. Cluck that his feet were going numb and that he was having difficulty breathing. Mr. Cluck told Mr. Maddin not to leave the trailer and gave him two options: drag the trailer with inoperable brakes, or stay put until the repairperson arrives. Mr. Maddin knew that dragging the trailer was illegal, but concluded that he might not live much longer if he were to wait for a repairperson. Consequently, Mr. Maddin unhitched the trailer and drove off.

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[5] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")

[6] 833 F.3d 1206 (10th Cir. 2016) (Gorsuch, J., dissenting).

Fifteen minutes after Mr. Maddin left—more than three hours after he first notified TransAm that he was stranded in subzero temperatures—the repairperson arrived. Mr. Maddin drove the truck back to meet the repairperson, who then fixed the trailer's brakes. Less than a week later, TransAm terminated Mr. Maddin for abandoning the trailer. Mr. Maddin filed suit, as the applicable law prohibits an employer from firing an employee who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition."

An Administrative Law Judge, a panel of the Department of Labor's Administrative Review Board (ARB), and a majority of the Tenth Circuit Court of Appeals panel that reviewed this case agreed that Mr. Maddin had engaged in protected activity and was retaliated against. Judge Gorsuch, however, dissented, and went out of his way to disregard the ARB's statutory interpretation, adopt an unnecessarily narrow interpretation of the term "operate" to conclude that Mr. Maddin had not engaged in protected activity, and belittle the applicable statute's health and safety goals as "vague and generic."

D. *Strickland v. UPS, Inc.*[7] (Retaliation Under the Family and Medical Leave Act and Gender Discrimination)

In this case, the plaintiff was subjected to intense and unwarranted scrutiny of her performance after returning from a protected and approved two-week leave under the Family and Medical Leave Act. She was required to attend additional meetings that took her away from her responsibilities, was required to commit to unrealistic performance goals, and was prevented from raising concerns regarding her treatment in line with applicable company policy. Multiple co-workers testified that the plaintiff was treated differently than her all of her co-workers after her return from leave. The treatment worsened to the point where the plaintiff left the company, though she never officially quit and it was unclear whether she intended to return to work.

A majority of the Tenth Circuit Court of Appeals panel reversed the district court's grant of judgment as a matter of law on the plaintiff's constructive discharge claims (as applied to her retaliation claim), as there was conflicting evidence as to whether the plaintiff intended to return to work. The panel also reversed the district court on the plaintiff's gender discrimination claims, finding that there was evidence that she was treated worse than her male co-workers.

Judge Gorsuch dissented, and would have affirmed the district court's ruling on the plaintiff's gender discrimination claim. Despite the evidence presented that indicated that the plaintiff was treated less favorably than her male co-workers, Judge Gorsuch concluded that the supervisor in question treated both male and female employees poorly. In reaching this conclusion, Judge Gorsuch disregarded evidence from a male co-worker that he was not subjected to the same scrutiny as the plaintiff, despite trailing her in all relevant sales categories. He also relied in part on evidence that another female employee did not also face differential treatment, despite applicable law holding that the fact that the defendant does not discriminate against *every* employee of the plaintiff's protected class is no defense to a discrimination claim.

[7] 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., dissenting).

E. *Weeks v. Kansas*[8] (Retaliation)

Judge Gorsuch held that in-house counsel did not engage in protected opposition to alleged unlawful discrimination when she advised a fire marshal to take seriously an employee's complaints of discrimination, and he affirmed the district court's grant of summary judgment.

This ruling is problematic for its adoption of an exception to existing anti-retaliation laws. This judge-created exception is not included in the text or supported by the purposes of Title VII of the Civil Rights Act. Pursuant to his approach, employees in positions that require them to monitor an employer's compliance with the law (such as in-house counsel) must engage in *special* forms of opposition or participation activity to demonstrate that they have taken a position truly "adverse to their employer." Absent proof of this higher level of opposition, employees who hold positions such as that of a general counsel, who in many cases will be the employee best equipped to learn about and oppose unlawful workplace discrimination, are not protected against subsequent retaliation.

In affirming summary judgment and dismissing the plaintiff's case before trial, Judge Gorsuch also refused to resolve the question of whether the exception at issue conflicted with the Supreme Court's decision in *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*,[9] which suggested that all one must do to "oppose" unlawful workplace behavior and be protected against retaliation is to "antagonize ...; contend against; ... confront; resist; [or] withstand" it. Judge Gorsuch did so because the plaintiff failed to cite *Crawford* in her briefs, even though that fact does not prevent a judge from resolving an apparent conflict with binding Supreme Court precedent.

Employees who have been treated unlawfully in the workplace deserve a full and fair opportunity to prove their claims in our federal courts. Reasoning of the type found in many of Judge Gorsuch's opinions undermines workers' ability to vindicate their rights and undercuts the promise of a fair and just American workplace that is embodied by the employment statutes enacted by Congress. Judge Gorsuch's treatment of both the law and facts in the cases cited above, and in others that we reviewed, suggests an ideological perspective which is unsympathetic to workers and too solicitous of employers, and belies his reputation as a committed textualist. As such, we respectfully urge you to oppose Judge Neil M. Gorsuch's confirmation to the United States Supreme Court.

Sincerely,

Terisa E. Chaw
Executive Director

[8] 503 Fed.Appx. 640 (10th Cir. 2012).
[9] 555 U.S. 271 (2009).

NELA/Illinois
Advocates for employee rights
A proud affiliate of the National Employment Lawyers Association

401 S. LaSalle St.
Suite 1302g
Chicago, IL 60605
www.nela-illinois.org

March 20, 2017

Via Email

The Honorable Chuck Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of the Honorable Neil Gorsuch to the United States Supreme Court

Dear Senator Grassley and Senator Feinstein:

We write to oppose the nomination of Neil Gorsuch to the United States Supreme Court. We submit this letter on behalf of NELA-Illinois, the National Employment Lawyers Association Illinois Affiliate. We ask that you share it with members of your committee.

We are a bar association of over 150 employment lawyers who practice employment law in or around Illinois. Our members and clients range across the political spectrum. Our members' employment law practice is mostly on behalf of employees or individuals (not employers or companies), but our members' clients include businesses, as well as workers of all stripes – laborers, professionals, executives and even CEOs and business owners. NELA-Illinois is concerned about the impact that Judge Gorsuch's ideological positions will have upon Supreme Court jurisprudence and the economic and civil rights of all American employees.

The Supreme Court must have Justices who, whatever their political views, will serve as neutral checks on the power and views of the Executive and Legislative branches, uphold the spirit of the Constitution, and protect the rights of individual Americans that Congress grants them. We have serious reservations about Judge Gorsuch's ability to do so.

Although it has been suggested that Judge Gorsuch is a "strict constructionist" who is guided by the intent of drafters of legislation, his judicial opinions demonstrate a propensity to engage in judicial activism when doing so advances his worldview. Nowhere is Judge Gorsuch's judicial activism more pronounced than in his concurrence in the Tenth Circuit's *en banc* decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152-59 (10th Cir. 2013) ("Hobby Lobby").

As Members of the 103rd Congress are aware, the intent of the Religious Freedom Restoration Act ("RFRA") was to preserve the religious rights of Americans who are human beings, in particular Americans who are members of religious minorities. RFRA's authors never intended the law to extend religious protection to for-profit corporations. Judge Gorsuch's concurrence, which espouses extending religious rights to corporations, not only disregards the intent of RFRA's drafters, but also displays a fundamental bias favoring the rights of companies over the rights of human beings. That mindset, if applied to employment laws, could have a devastating effect on laws affecting the workplace.

Judge Gorsuch also expressed views regarding women in the workplace that are incompatible with a host of individuals' rights Congress determined warrant protection. As Jennifer Sisk's and Barry Roseman's letters to this Committee explain, Judge Gorsuch made comments to law students reflecting beliefs that women take advantage of employers to obtain health insurance before leaving the workforce after pregnancies and that employers should be able inquire about female employees' family plans to protect the company.

Those beliefs are fundamentally inconsistent with the purposes and language of Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and The Family and Medical Leave Act. Those laws express Congress's repeated determination that such antiquated beliefs do not belong in America's workplaces. Through that legislation, Congress protected women's (and men's) rights to start and grow families without fear of losing their employment.

In making such comments as a teacher of law students, Judge Gorsuch demonstrated that his personal beliefs may influence how he may use power bestowed upon him. While not part of his judicial record, Judge Gorsuch's comments regarding the role and rights of women in the workplace are more likely to accurately reflect his personal beliefs. This Committee owes it to working women to investigate and examine those beliefs.

The American dream is founded on the ideal that people – men and women – can do anything they set out to do, however, the reality is that employment choices are often constrained by family, community, and social ties, as well as education and training. Consequently, many Americans must accept the employment they can find and have little bargaining power, if any, over the terms of their work.

Once workers find jobs, they can be fired for any reason, no reason, a bad reason, or an immoral reason -- and severance payments are the exception, not the norm. But employers covered by the above-referenced laws cannot fire or retaliate against employees for deciding the fulfill a portion of the American Dream by starting a family.

As health insurance is usually tied to employment, this means that employees can lose their families' health insurance for any reason, no reason, a bad reason, or an immoral reason. Honest, hard work does not guarantee job security or basic health insurance.

The law provides only limited employee rights: basic health and safety protections, minimum wage protection, some protection against discrimination, and extremely limited whistleblower protections. Those narrow rights, however, become meaningless without judicial enforcement.

Judicial enforcement is impossible when judges believe that corporations and individuals have equal bargaining power, or when judges ignore the gross disparities between individual workers and the corporations on which workers' livelihoods depend. This is why Judge Gorsuch's concurrence in the *Hobby Lobby* decision and his other decisions are so troubling. And his comments to laws students suggest he disagrees with Congress's intent as expressed Title VII, the Pregnancy Discrimination Act and The Family and Medical Leave Act.

Although Judge Gorsuch writes movingly about the religious beliefs of the owners of *Hobby Lobby*, the opinion ignores the religious beliefs and health needs of the over 20,000 individuals who work for the company. Most employees depend on employer provided health care and 62% of women of childbearing age use birth control. IUDs are among the most reliable and most expensive methods of birth control. The question unanswered by the *Hobby Lobby* decision is why low-wage workers, with little economic bargaining power, should bear the burden of paying for their employer's religious beliefs. And his comments to law students call his beliefs about the equality of women in the workplace into question.

Our members are concerned that Judge Gorsuch's jurisprudence will continue to strengthen the rights of corporations at the expense of individuals – particularly working women. We worry about economic discrimination against members of the LGBTQ community and members of religious minorities.

Our members remember a time when businesses could discriminate on religious grounds against pregnant women, interracial couples, Jews, and Catholics. American workers became freer, and our economy stronger, when our country outlawed that discrimination. The appointment of the next Supreme Court Justice will set a tone for the future. We believe that Judge Gorsuch will roll back, rather than advance, the economic rights of individual Americans.

We encourage members of the Judicial Committee to thoroughly investigate these views and therefore oppose his confirmation. We urge the Committee, and the Senate, to carefully and thoroughly consider these issues and ask Members to vote against Judge Gorsuch's confirmation to the United States Supreme Court.

Thank you for your consideration of our views.

Very truly yours,

Matthew D. Lango

Matthew Lango
President, NELA-Illinois

c.c.
Hon. Dick Durbin
Hon. Tammy Duckworth

The National Voice for Direct-Care RNs

WASHINGTON DC
8630 Fenton Street
Suite 1100
Silver Spring MD 20910
phone: 800-287-5021
fax: 240-235-2019

OAKLAND
155 Grand Avenue
Oakland CA 94612
phone: 800-287-5021
fax: 510-663-1625

March 23, 2017

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

RE: Judge Neil Gorsuch
Nominee for the Supreme Court of the United States

Dear Senator Feinstein:

We write on behalf of the more than 150,000 registered nurse members of National Nurses United to urge you to vote against referring the nomination of Judge Neil Gorsuch to the full Senate for consideration. Many organizations have weighed in against Judge Gorsuch's nomination, and so we are brief, rather than exhaustive, in outlining the reasons for our very serious concerns.

Our members work as bedside healthcare professionals throughout this country. We work in every hospital setting, from small rural facilities to large urban public health systems, in prominent research hospitals affiliated with prestigious public and private universities, as well as Veterans Affairs hospitals and clinics. We care for Americans on every point of the demographic spectrum, at their most vulnerable. We provide the best care we possibly can, without regard to race, gender, national origin, religion, socioeconomic circumstances, or other identifying characteristic. Unfortunately, Judge Gorsuch has not embodied these same principals in his time on the bench. Instead, he has been consistently dismissive of Americans' rights to meaningful equality and workplace justice, and the need for robust enforcement of those rights. And he has cultivated a jurisprudence that promotes business interests at the expense of the average American. To advance his nomination to the highest court of the United States would abdicate your responsibility to provide the oversight necessary to ensure that basic legal rights are enforced evenhandedly and for the protection of all people.

Dismissive of Minority Rights

Judge Gorsuch has opposed the ideal that people who face, and who have historically faced, formal discrimination should be able to rely on the courts to enforce the Constitution's guarantee of due process and equal rights under the law. For example, in 2005, Judge Gorsuch wrote that "American liberals have become addicted to the courtroom . . . as the primary means of effecting their social agenda on everything from gay marriage" to other issues. Judge Neil Gorsuch, *National Review*, Feb, 7, 2005.

The idea that members of the LGBT community have a constitutional, as well as unalienable, right to equality is not some liberal social agenda. It is simply a call to enforce the Fifth and Fourteenth Amendments of the United States Constitution. In fact, it is the Constitution's guarantee of minority protection from unequal treatment by an insular majority that makes our democracy a unique and precious embodiment of the principles that all people "are created equal," endowed "with certain unalienable Rights." And sadly, Judge Gorsuch's dismissive attitude toward minority rights is not just academic. It has also colored his time on the bench. *E.g., Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015) (Judge Gorsuch joined in ruling that a prison did not violate the rights of a transgender woman by housing her in an all-male facility, as well as denying her hormone therapy and her request to wear women's underclothing).

Privileges Business Interests Over Workers' Rights

Judge Gorsuch has also rejected the ideas that Americans have the right to be free from discrimination at work, and that this encompasses the right to reasonable accommodations. For example, in *Hwang v. Kansas State University*, Judge Gorsuch rejected a professor's assertion that his request for extended leave to deal with cancer qualified as a reasonable accommodation. 753 F.3d 1159 (10th Cir. 2014). Congress enacted the ADA not only to protect the rights of Americans with disabilities, but also to ensure that this country benefits from the full potential contribution of people who are struggling with a mental or physical condition that substantially limits a major life function. The requirement that employers provide reasonable accommodation is a key part of how the Congress designed the ADA to meet these goals. The Rehabilitation Act similarly requires employers who receive federal funds to provide reasonable accommodations to their employees.

As nurses, we see everyday how effectively patients, including many cancer patients, overcome their illnesses and return to productive work lives when properly supported. As anyone who has struggled with a major mental or physical limitation knows, leave to take care of disability-related medical needs is often the accommodation needed to make continued participation in the workforce possible. The stress of job loss on top of a devastating period of illness is not therapeutic, to say the least. Employers can often provide this accommodation with no undue hardship. For example, with a professor, a university might substitute in an adjunct or simply hold on offering a class. In fact, many universities now employ more adjunct faculty than tenured professors.[1] These non-tenure track professors are generally paid (modestly) by the class.[2] Many adjunct professors are so desperate to pick up enough classes to make a living that they work at more than one institution.[3] In such circumstances, it would be an unusual, rather than a typical, case in which it would impose an undue hardship on an employer to allow a professor the additional leave necessary to win his battle with cancer by assigning his classes to adjunct faculty hungry for work. With such nominal accommodation, Mr. Hwang's career might have continued on track despite his battle with cancer.

Likewise, it will often be of no serious impact for a major employer to hold a position for an employee needing additional leave. For example, many retailers, frequently have near constant openings in such high turn-over positions as cashier, stock person, bagger, or cart runner.[4] In

such circumstances, it would be very unusual for additional leave to impose undue hardship on a business. But Judge Gorsuch doesn't see it that way. Instead, he frames the question as "[m]ust an employer allow employees more than six months' sick leave or face liability"? Which he answers "[u]nsurprisingly, the answer is almost always no." 753 F.3d 1159.

Sadly, this disregard of workers' needs for accommodation is typical of Judge Gorsuch's general disregard of workers' right in favor of the idea that employers' actions should rarely be checked by the law. For example, in *NLRB v. Community Health Services*, Judge Gorsuch dissented from a decision upholding the NLRB's calculation of backpay damages for workers whose federal rights had been violated by their employer. 812 F.3d 768, 780 (10th Cir. 2016). Judge Gorsuch wanted to prioritize ensuring that the worker did not receive any net benefit from suffering this illegal action, rather than prioritizing that the employer was held accountable for its illegal action. This twisted priority carries the dangerous potential to undermine the deterrent effect of most workers' protections in the country.

Similarly, in *Little Sisters of the Poor*, Judge Gorsuch dissented from his court's denial of en banc review of a decision holding that an employer's religious interests were not substantially burdened by a requirement that it obtain an exemption from the requirement that employee health insurance includes contraceptive coverage. 799 F.3d 1315 (10th Cir. 2015). In other words, Judge Gorsuch voted in favor of prioritizing an employer's beliefs over workers' access to healthcare. Like the laws of physics, the facts of life are immutable. According to the Guttmacher Institute,[5] there are 61 million women of childbearing age (15-44) in the United States, of which approximately 43 million are sexually active and at risk of an unwanted pregnancy if they fail to use contraceptives consistently. A report on use of contraceptives issued in 2015 by the U.S. Department of Health and Human Services Centers for Disease Control and Prevention confirms that virtually all sexually experiences women in the United States have used contraception at some point in their lives.[6] While there is some debate over precise numbers,[7] it is undisputed that, on average, women of childbearing age incur considerably greater out-of-pocket healthcare costs than men in that age group, in large part attributable to doctor visits and pharmacy costs, including co-pays and deductibles, associated with the 30-year family planning effort most women are faced with. Any nurse can attest to the fact that financial pressures associated with healthcare expenses have a very real impact on all but the wealthiest healthcare consumers. You do not have to be a nurse to understand that it is fundamentally unfair to burden 43 million women and their families with the threat of an exemption from coverage of an essential healthcare need.

This ideological decision to give short shrift to workers' rights in order to afford businesses carte blanche is a dominant theme in Judge Gorsuch's jurisprudence. *See also, e.g., Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198 (10th Cir. 2014) (denying union's request to hold employer's lockout of employees unlawful because the employer had threatened to hire permanent replacement workers); *Weeks v. Kansas*, 503 F. App'x 640 (10th Cir. 2012) (held that in-house counsel was not protected by law when she was fired after taking complaints made to her by employees to the fire marshal); *Compass Envt'l, Inc.* v. O.S.H.R.C., 663 F.3d 1164 (10th Cir. 2011) (dissented from ruling upholding a fine against a company that failed to adequately train a worker who was, as a result, electrocuted.); *Young v. Dillon Companies, Inc.*, 468 F.3d 1243 (10th Cir. 2006) (held that employee's race discrimination claim failed even though

employer's proffered reasons for termination were false).

Contemptuous of Agencies' Subject Matter Expertise

Moreover, Judge Gorsuch disinclined to defer to the obvious expertise of the federal agencies that are charged with enforcing the laws that protect American workers. He has repeatedly opined *against* affording deference to these neutral law enforcement agencies. *E.g., Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (concurred, suggesting that it is time to reconsider the Supreme Court's earlier decision, *Chevron v. Natural Resources Defense Counsel*, which provides for deference to federal agencies' interpretations of statutes that they are charged with enforcing); *TransAm Trucking, Inc. v. Admin Review Bd., U.S. Dep't of Labor*, 833 F.3d 1206 (10th Cir. 2016) (dissented, criticizing the majority for deferring to Department of Labor's expert opinion).

This disregard for agency expertise is particularly troubling because federal judges are generalists by design, hearing cases on hundreds of different and unrelated issues. Federal appellate judges, like Judge Gorsuch, are necessarily removed from the actual facts on the ground because they never hear evidence at all. Federal agencies, on the other hand, are not generalists and are steeped in factual understanding. These agencies specialize in enforcing one area of law, and through that law enforcement, develop deep experiential understanding of the realities on the ground.

For example, the National Labor Relations Board ("NLRB") enforces just one narrow set of federal laws: those regulating workers' rights to organize and act collectively, free from intimidation and harassment by the employer. And the NLRB investigates thousands of cases involving these laws every year.[8] As a result, the NLRB possesses a deep, factual understanding of how workers' rights to organize actually play out in the workplace, how employers violate such rights, and the remedies necessary to protect these critical statutory guarantees of workplace freedoms. The Equal Employment Opportunity Commission ("EEOC") likewise possesses a unique understanding of realities relevant to the laws it enforces. The EEOC is the federal agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. It investigates tens of thousands of charges of discrimination a year.[9] And because of its decades of experience enforcing this very narrow set of laws, the EEOC has unique expertise on the realities of how discrimination manifests itself in the workplace, what worker rights these laws protect, and what these laws require from employers. Other federal agencies possess similar expertise in their special areas of enforcement.

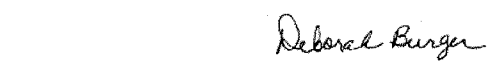
Contrast this fact-based expertise with the experience of a federal judge like Neil Gorsuch. What does a federal judge like that, who went from an Ivy League undergraduate school, to an Ivy League law school, to a career of elite legal positions know about the realties facing American workers? Why on earth would it be appropriate for such a judge to decline to defer to the reality based expertise developed by federal agencies that have boots on the ground dealing with thousands of actual fact-based cases?

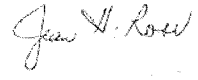
But this is exactly what Judge Gorsuch wishes to do. He would rather federal judges be free to follow their own ideological dictates, instead of deferring to agencies' reality-based expertise, regardless of how necessarily disconnected judges' independent ideas are from the realities on the ground. And in Judge Gorsuch's case, this freedom to substitute judicial intuition for agency expertise would be used to give effect to the far right ideology that workers' rights should be subordinate to business interests. *Compare Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) (Judge Gorsuch opining that the law will rarely require employer's to provide extended leave as a reasonable accommodation); to EEOC Guidance, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016) (explaining that the law will often require employer's to provide extended leave as a reasonable accommodation). Ultimately, this ideological contempt for agency expertise stems from, and gives effect to, ideological opposition to the many federal laws these agencies enforce — the laws that Congress passed to defend workers' rights, consumer protections, and the environment all Americans depend on for a healthy quality of life.

In sum, as Judge Gorsuch's publicly expressed opinions and judicial rulings thoroughly demonstrate, he is a man driven by ideology: Minority rights should not be jealously protected by the courts, but rather subject to the political will of insular majorities. Workers' rights should be given very narrow readings so that business interests can rule the day. And federal judges should be able to substitute their ideology for actual agency expertise, to minimize the effect of federal laws that protect the average American.

Our country is better than this. The Constitution requires more from the judiciary. And as nurses, we demand more. For all these reasons, as the gate keeper to the nomination process, we urge you to use your power to prevent such a judge from being given a life time appointment to this nation's highest court by declining to advance Judge Gorsuch's nomination.

Sincerely,





Deborah Burger, RN
Co-President
National Nurses United

Jean Ross, RN
Co-President
National Nurses United

[1] Elizabeth Segran, *The Adjunct Revolt*, THE ATLANTIC, Apr. 28, 2014, *available at* https://www.theatlantic.com/business/archive/2014/04/the-adjunct-professor-crisis/361336/ (noting that adjuncts now make up 76.4% of college faculty).
[2] Cabrillo College Federation of Teachers, *Adjunct Faculty Awareness*, Feb. 28, 2015, *available at* http://www.ccftcabrillo.org/february-2015-adjunct-faculty-awareness-some-facts-we-should-all-know/.
[3] *Id.*
[4] E.g., Krystina Gustafson, *Retail's Turnover a Plus for Economy but Challenge for Stores*, CNBC, Sept. 23, 2014, *available at* http://www.cnbc.com/2014/09/23/retail-turnover-rates-on-the-rise.html (noting that "median turnover rates for part-time retail workers jumped back up to

74.9 percent in 2013").

[5] Guttmacher Institute September 2016 Fact Sheet on Contraceptive Use in the United States, available at https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

[6] Centers for Disease Control and Prevention, National Health Statistics Reports No. 86, Current Contraceptive Use and Variation by Selected Characteristics Among Women Aged 15-44: United States, 2011-2013 (2015).

[7] The oft-cited statistic and the one Justice Ginsburg referred to in her dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 537 U.S. ___, 2014 U.S. LEXIS 4505 (2014), is that women of childbearing age on average incur 68 percent higher out of pocket healthcare cost.

[8] For example, in fiscal year 2013, the NLRB investigated 24,046 cases. See Agency Report to Congress, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1706/NLRB%20FY%202015%20CJ%20Narrative%203-07-14%20-%20FINAL.pdf.

[9] For example, in fiscal year 2015, the EEOC handled over 90,000 charges of discrimination. See Agency Report to Congress, *available at* https://www.eeoc.gov/eeoc/plan/2017budget.cfm#_Toc442168124.

March 17, 2017

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the National Partnership for Women & Families, I write today in strong opposition to the nomination of Judge Neil Gorsuch to the United States Supreme Court.

I submit for the record our report on how the nomination of Judge Neil Gorsuch poses a clear threat to the rights and laws that protect women, workers and others who seek to vindicate their civil rights in court. **"The Nomination of Judge Neil Gorsuch to the U.S. Supreme Court: A Threat to Women, Workers and All Those Who Face Discrimination"** finds that, whether the issue is sex discrimination or worker safety, Judge Gorsuch has regularly sided with corporations. He also has ruled to undermine the rights of immigrants and LGBTQ individuals, among others, has voted to allow for-profit corporations to use religion to discriminate and deny women birth control coverage, and has consistently criticized the Supreme Court's abortion rights jurisprudence.

Gorsuch's confirmation could lead to an America in which corporations are allowed to excuse themselves from basic civil rights protections and safety measures; well-resourced employers are permitted to defeat a person's right to present evidence of discrimination to a jury; any so-called religious objections shield corporations that have infringed upon people's equal rights under the law; and women, once again, are denied autonomy over their own bodies and futures.

The full report is available here: http://www.nationalpartnership.org/research-library/judges-supreme-court/judicial-nominations/the-nomination-of-judge-neil-gorsuch-to-us-supreme-court.pdf

Sincerely,

Debra L. Ness
President

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539
email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

Consumer Action
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability and Safety
Courage Campaign
Housing and Economic Rights Advocates
Public Good

March 8, 2017

Honorable Dianne Feinstein
United States Senate
Senate Hart Office Building, Room 331
Washington, DC 20510

RE: Nomination of Judge Neil Gorsuch to U.S. Supreme Court

Dear Senator Feinstein:

On behalf of the organizations listed above, which together represent millions of California consumers and workers, we strenuously urge you to question Judge Gorsuch in detail regarding his commitment to upholding the United States Constitution *in its entirety, including the Seventh Amendment,* which guarantees the right to a civil trial by jury; and unless he fully and openly commits to preserving that right, that you OPPOSE his nomination.

Many companies that profit tremendously from California's vast consumer market have engaged in widespread patterns of illegal activities, costing California consumers billions of hard-earned dollars and eroding their privacy, while evading accountability due to forced arbitration clauses that deprive their customers and employees basic, precious Constitutional rights.

Wells Fargo alone cost millions of its customers hundreds of millions of dollars in illegal charges, including over 2 million Californians, and also harmed over 650 members of the United States Armed Forces serving our nation at a time when we face very serious and real threats at home and abroad.

When Wells Fargo victims attempted to seek justice, that justice was denied under decisions rendered by a sharply divided 5-4 Supreme Court. To this day, Wells Fargo refuses to allow its consumer victims and whistleblowers who were fired when they reported wrongdoing, to have their day in court – even regarding accounts that were established without the consumers' knowledge or permission, through identity theft, forgery, and fraud.

Companies that engage in widespread illegal activity stand to benefit at the expense of the American public if Judge Gorsuch is confirmed. That is because he is likely to perpetuate the anti-

Seventh Amendment imbalance on the Court. Those who advance his nomination hail him for being "in the mold of the late Justice Antonin Scalia," who is notorious for penning the decisions in highly controversial, anti-consumer cases such as *AT&T Mobility vs. Concepcion* and *Italian Colors vs. American Express*, denying access to justice for consumers, small business owners, and workers.

Judge Scalia's opinions were radical, extreme departures from settled law. It was disgraceful and extremely harmful for the Republican-appointed majority on the Supreme Court to render those decisions. The 1925 Federal Arbitration Act was clearly and plainly intended to apply solely to businesses and other entities that had equal bargaining power, not to disputes between individual consumers and employees versus giant corporations.

As the current Chairman of the United States Senate Judiciary Committee, Senator Charles Grassley (R-Iowa), stated in presenting legislation in Congress to restore protections from forced arbitration for auto dealers, granting them a special exemption from the Federal Arbitration Act and restoring their right to sue whomever they please:

> **"When mandatory binding arbitration is forced upon a party, for example when it is placed in a boiler-plate agreement, it deprives the weaker party the opportunity to elect another forum. As a proponent of arbitration I believe it is critical to ensure that the selection of arbitration is voluntary and fair. The purpose of arbitration is to reduce costly, time-consuming litigation, not to force a party to an adhesion contract to waive access to judicial or administrative forums for the pursuit of rights under State law.**
>
> **"This legislation will go a long way toward ensuring that parties will not be forced into binding arbitration and thereby lose important statutory rights. I am confident that given its many advantages arbitration will often be elected. But it is essential for public policy reasons and basic fairness that both parties to this type of contract have the freedom to make their own decisions based on the circumstances of the case."**[1]

Clearly the same principles apply to individual consumers and workers, who have vastly unequal bargaining power when entering into contracts with corporations, particularly when they need a product or service, or a job, to survive. However, as the *Sacramento Bee* editorialized last December:

"As if the rip-off of some 2 million customers weren't enough for Wells Fargo & Co., it turns out that the bank is trying to deprive its victims of their days in court....Wells Fargo has been arguing in federal and state courts that the wronged customers should have to argue their cases, not in public, but in private arbitration.

"It's a cynical ploy, and destructive to the public trust and the legal system. Forced private arbitration...often tilts contractual arrangements in favor of corporate interests and deprives the public of important consumer information and case law.

"Companies like it because it keeps bad publicity out of the public record, stymies potential class actions and improves the odds of favorable decisions; private paid judges know that companies often give repeat business to arbitrators who give favorable rulings. Consumers are at a disadvantage in what has come to amount to a shadow system of civil justice....

---

1 Statements on Introduced Bills and Joint Resolutions, United States Senate, June 29, 2001. Statement by Senator Grassley of Iowa.

"In the Wells Fargo case, the push is particularly reprehensible...the bank claims that those [arbitration] waivers apply to the legitimate accounts, and to the fake ones, even though the signatures were forged in many cases. It's a scam on top of a scam..."[2]

It is important to note that California has more to lose than any other state. Under Proposition 64, which passed thanks largely to support by former Governor Schwarzenegger, the ability of non-profits who had been able to hold lawbreakers accountable was severely curtailed. Budget cuts and numerous pressing priorities also limit the resources our Attorney General, City Attorneys, and District Attorneys have to provide protections to consumers and workers. With rare exceptions, consumers, workers, and small businesses are on their own. Yet because of Judge Scalia's radical decisions, they are barred from being able to assert their rights, even for flagrant and blatant violations of the law, due to forced arbitration.

Among the millions of your constituents who are victimized by forced arbitration:

- Employees who are victims of discriminatory pay schemes, based on race, gender, age, or other protected characteristics
- Employees who are victims of wage theft and overtime pay theft
- Employees who are victims of sexual harassment or gender discrimination
- Employees who are fired for being whistleblowers
- Military Servicemembers and their families who are denied protections afforded by the Servicemembers Civil Relief Act
- Consumers who are victims of fraud, forgery, and identity theft
- Consumers who are victims of unfair and deceptive acts and practices
- LGBT people who are denied protections under the law, including basic human rights
- Others who are victims of illegal discrimination
- Students in private schools who are denied protections under state and federal law
- Elderly and disabled people who enter nursing home facilities
- Consumers who use cell phones or other consumer products
- Consumers who purchase new or used vehicles from auto dealers who engage in odometer fraud, violate the warranties, or engage in forgery, "loan packing," or other illegal acts / fraud
- Patients of doctors who engage in illegal activity, including assaulting them while they are sedated
- Credit-card users whose privacy is violated and whose identities are stolen due to security breaches arising from corporate negligence
- Small business owners who are victims of anti-trust violations

As former Justice (and Reagan appointee) Sandra Day O'Connor observed, even before the post-2005 conservative bloc stretched the law to its current extremes, the Court has "abandoned all pretense" of faithfully applying the text and legislative history of the Federal Arbitration Act, "building instead … an edifice of its own creation."[3]

---

2 Editorial: "Wells Fargo victims deserve day in court," *Sacramento Bee*, December 9, 2016. Posted at: http://www.sacbee.com/opinion/editorials/article119768343.html

3 "I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass….over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." Justice Sandra Day O'Connor, Allied-Bruce Terminix Cos. v. Dobson (93-1001), 513

The late Justice Scalia himself revealed the dubious motivation behind the conservative bloc's contorted, activist doctrine —condemning "class arbitration" because it "greatly increases risks to [corporate] defendants." That is precisely why class litigation is needed. Otherwise, crime pays.

In sum, we strongly urge that you raise these important issues in your questioning of Judge Gorsuch, including whether he believes that victims of illegal practices should have the freedom to assert their right under the Seventh Amendment of the Constitution of the United States to have their day in court; and that unless he fully commits to preserving that right, you OPPOSE his nomination.

Our nation needs and deserves to have a more balanced court, not one that continues to tilt in favor of the powerful interests that subvert our laws, at the expense of working people, consumers, and the American public.

Thank you for your consideration of your views. Should you or your staff have any questions regarding this matter, please do not hesitate to contact us directly, by contacting Rosemary Shahan, President of Consumers for Auto Reliability and Safety, based in Sacramento.

Sincerely,

Consumer Action
Consumer Watchdog
Consumer Federation of California
Consumers for Auto Reliability and Safety (CARS)
Courage Campaign
Housing and Economic Rights Advocates
Public Good

U.S. 265 (1995).

March 9, 2017

The Honorable Mitch McConnell, Maj. Leader
United States Senate
S230 US Capitol
Washington, DC 20510

The Honorable Charles Schumer, Min. Leader
United States Senate
S221 US Capitol
Washington, DC 20510

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Senator Feinstein:

On behalf of the hundreds of thousands of members of People For the American Way, I write to express our strong opposition to Neil Gorsuch's nomination to the United States Supreme Court.

The Supreme Court is a vital and necessary component of our carefully balanced separation of powers, one of the Constitution's key structural mechanisms that protects our rights and liberties. In times when key underpinnings of our democracy have been under attack from within, the Supreme Court has played a vital role in protecting and maintaining the system the founders bequeathed to us. Most famously, for instance, a unanimous Supreme Court ruled in 1974 that President Nixon had to surrender the Watergate tapes. Nixon believed that if the president orders something, that makes it legal. The Supreme Court emphatically rejected that view and restored the rule of law and our constitutional protections.

At this moment in our nation's history, it is vital that the Supreme Court act independently of the political branches. We must be fully confident that any nominee will respond strongly should one branch overreach its authority. And there must be no doubt that the next justice recognizes that our Constitution and laws were adopted to protect people's rights, not to empower large corporations and others to strip us of those rights.

As indicated by his record, as well as the Administration's own statements, Judge Gorsuch does not meet these important qualifications.

The president has virulently attacked courts that rule against him or his administration. He does more than attack the rulings: He attacks the legitimacy of any court directing him to stop doing something he wants to do. As reported by Politico in January, a key Trump adviser made it clear that the president plans to prevent such rulings in the future by nominating judges who are loyal to him:

> "If Trump is going to be a transformational president, not a transitional president, he needs a supportive court," said Roger Stone, a longtime Trump adviser. "Not a conservative court, not a right-wing court — a Trump court."

One is left to wonder how it is that President Trump became so confident that he'd found his man in Neil Gorsuch.

1101 15th Street, NW ♦ Suite 600 ♦ Washington, DC 20005
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

But it is Gorsuch himself, rather than his benefactor, who has indicated he subscribes to a twisted concept of judicial independence. In a 2005 *National Review* article called "Liberals 'N' Lawsuits," he condemned Americans who turn to the courts when they believe their constitutional rights have been violated—but only Americans who present progressive constitutional arguments that the conservative Gorsuch apparently disagrees with in areas such as marriage equality and church-state separation. He also criticized judges who carefully consider the competing legal arguments before them in such cases and rule differently from how he would rule:

> [This] politicization of the judiciary undermines the only real asset it has — its independence.

The idea that judicial independence means being a conservative (or a liberal) is not only inaccurate, it is also dangerous. Gorsuch also demonstrated at best a fundamental misunderstanding of the very purpose of courts in our constitutional system. The beliefs he openly professed in that article disqualify him from sitting on the nation's highest court.

Unfortunately, Gorsuch's record as a judge is equally disturbing. He routinely favors large corporations and other powerful authorities, while harming the interests of workers and of people who have suffered abuse by government officials. He is perhaps best known for joining the majority Tenth Circuit's *Hobby Lobby* case before it went to the Supreme Court. Judge Gorsuch ruled that large for-profit corporations are people that not only exercise religion, but which can also cite their religion as an excuse to deny vital healthcare coverage that their women employees are legally entitled to. But *Hobby Lobby* is far from the only example:

- In a dissent, he would have upheld the right of a company to fire an employee for not obeying instructions to remain parked in an unheated truck in sub-zero weather, possibly for hours, even though he had already been waiting for hours, felt numbness in his extremities and torso, and had difficulty breathing; Gorsuch wrote that a law giving truckers the right not to put their own lives at risk did not apply. (*TransAm Trucking, Inc. v. Administrative Rev. Bd.*).
- In another dissent, he would have struck down a Department of Labor fine against a company that had failed to adequately train a worker, resulting in his death by electrocution. (*Compass Environmental v. OSHRC*)
- Gorsuch wrote an opinion for a split panel concluding that a police officer had not used unconstitutionally excessive force when he used a Taser and shot a young man named Ryan Wilson in either the back of the head or neck. The man was being chased only because he owned some marijuana plants. The Taser training manual specifically warned against aiming at the head or throat, the Taser had a targeting function, and the officer had fired from a mere 10-15 feet away. Nevertheless, Judge Gorsuch ruled that the man's grieving family could not sue the officer who recklessly killed their son. (*Wilson v. City of Lafayette*)
- In a dissent in a criminal case, he would have upheld the conviction of a man whose lawyer gave him terribly bad advice about plea bargaining and even threatened to quit if the man accepted the offered 10-year plea. As a result, he rejected the plea, went to trial and was sentenced to life in prison without parole. Unlike his colleagues, including other Republican appointees, Judge Gorsuch wrote that the verdict should stand, because the constitutional right to effective assistance of counsel only really applies to the trial itself (*Williams v. Jones*)

- He wrote for a split panel in a case ruling in favor of a medical equipment maker Medtronic, which had persuaded Patricia Caplinger and her doctor to use one of the company's devices in an off-label and unsafe way. The results were disastrous for Caplinger, who developed substantial neurological complications. Notably, while all of the judges on the panel agreed that her legal briefs could have been written more clearly, the dissenting judge interpreted them in a way that made sense in the case and would have allowed the legal questions to be considered. Gorsuch, however, chose to interpret them in such a way as to ensure that her case could not go forward. (*Caplinger v. Medtronic*)

Judge Gorsuch's decade on the bench is rife with cases where he somehow manages to interpret a wide variety of laws and constitutional provisions in such a way as to benefit large corporations and other powerful figures, while harming the individuals who those laws and provisions were designed to protect. A number of these individuals' often-heartbreaking stories are told in a PFAW report, Real People, Real Lives: The Harm Caused By Judge Gorsuch. And People For the American Way's report: The Dissents of Judge Neil Gorsuch: Far to the Right and Out of the Mainstream, provides a particularly important view of his jurisprudence that consistently favors big business and the powerful Even on a court that until recently had a majority of its judges nominated by Republican presidents, Gorsuch's dissents stand out in their sharp far right ideology that goes too far for his fellow GOP-nominated judges.

America needs an independent, apolitical justice who will protect the rights and liberties of every American, not just those of the mighty and powerful. Unfortunately, Judge Gorsuch's record makes clear that he would be the opposite of what we need. Especially in these unusual times, a judge with a record like Gorsuch's simply must not be allowed to sit on the Supreme Court.

We urge you to oppose this nominee and to hold his confirmation to a 60-vote standard.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 310-F
New York, NY 10012-1099
Telephone: (212) 992-8829
Fax: (212) 995-4881
Email: rachel.barkow@nyu.edu

Rachel E. Barkow
Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

March 16, 2017

Dear Chairman Grassley and Senator Feinstein:

Thank you for asking me to testify at the hearing on Judge Neil Gorsuch's nomination to be an Associate Justice of the Supreme Court of the United States. Because I will be out of the country and unavailable to attend the hearing, I am submitting this written testimony in lieu of a personal appearance.

I have known Judge Gorsuch for more than 18 years. During that time, no matter what lofty professional heights he has reached – whether as a law firm partner, a high-ranking lawyer in the Department of Justice, or a Judge for the United States Court of Appeals for the Tenth Circuit – he has remained the same warm-hearted, humble, decent person I first met those many years ago. He is a person of great integrity, honor, intelligence, and empathy. He is thoughtful and principled. I have always been struck by how someone with such a wealth of talent can be so genuinely modest and unassuming, but that is who Judge Gorsuch is. (I should note that if it were up to him, I would be referring to him throughout this letter as Neil, because he has never insisted on a title or any other formality.)

I first met Judge Gorsuch in 1998 when I joined the law firm then known as Kellogg, Huber, Hansen, Todd, & Evans, P.L.L.C., as an associate. The firm was quite small in those days (I believe it fell well short of three dozen lawyers in total), so we all saw each other fairly

frequently. Judge Gorsuch was a partner when I joined the firm, but he is not a person who sees the world in hierarchical terms. He treated me as an equal and with the utmost respect. He always took the time to see how I and others were doing and would never hesitate to offer to help in whatever way he could. Whenever I saw him, he was upbeat and calm. I would sometimes learn later that he was in the midst of an intense period of litigation or facing a deadline in his case, but his personality never shifted. He was unfailingly polite and unflappable.

Put another way, Judge Gorsuch has an innate judicial temperament. He is level-headed and analytical and not prone to extremes. He also cares deeply about others. He was as attentive to the issues in his cases as he was to the lives of the people with whom he worked and interacted.

I have witnessed these same qualities in Judge Gorsuch's judicial opinions. He has written numerous opinions in the fields I teach – criminal and administrative law – that have come to my attention through academic colleagues because they are so well written, intellectually honest, and balanced in their portrayal of the arguments. His criminal law opinions, for instance, demonstrate that he is as attuned to the specific factual details as he is to the broader separation of powers implications that are often at stake. Whether he ultimately rules for the defendant or the government, his opinions show the care with which he analyzes all sides of the issues and the open-mindedness he brings to the task.

His approach in administrative law reflects similar values. The starkest example comes from a contested issue among administrative law scholars: the proper scope of the *Chevron* doctrine. I take no position here on what the right answer to that question should be, but the question received a characteristically thoughtful analysis by Judge Gorsuch that reflected his strong commitment to safeguarding the appropriate balance of power among the three branches and to making sure the courts are not sidelined from playing a critical role. He has shown an unflagging commitment to protecting the independence of the judiciary, and his devotion to the rule of law comes through in everything he does, including this complicated question of administrative law doctrine.

I should also add that Judge Gorsuch has a prodigious talent for making even the most complicated legal issue accessible to anyone, even those without legal training. You can pick up one of his opinions and know exactly what is at stake, what the strongest arguments are for and against his position, and why he reaches the decision he does. His opinions are hallmarks of transparency and integrity, and the result is that the majesty of our constitutional government becomes more accessible to all of us, whether you end up agreeing or disagreeing with his bottom line. Along with temperament, integrity, intelligence, and devotion to the rule of law, the ability to communicate clearly and effectively should be a key metric by which we assess prospective judges. And on this – as with all the other measures – Judge Gorsuch is a standout.

Writing this letter is bittersweet for me. The seat Judge Gorsuch would occupy on the Court belonged to my former boss, Justice Scalia. I miss him greatly, and it remains difficult for me to see the Court without him on it. At the same time, I have been dismayed to see the process for filling that seat become even more politicized than previous vacancies on the Court. I believe that all nominees to our nation's courts should be afforded a timely hearing and an opportunity to be considered on the merits by the United States Senate. We are blessed in this country to have many dedicated, talented judges, and when a president

nominates one of them to serve on the Supreme Court, he or she should be considered based on his or her qualifications.

Judge Gorsuch's qualifications speak for themselves, and it has been my honor to amplify them here. He is an outstanding jurist and person, and he represents the very best of Article III.

Sincerely,

ROSEMAN LAW OFFICES, LLC

ATTORNEYS AT LAW
1120 LINCOLN STREET, SUITE 1306 • DENVER, COLORADO 80203
(720) 917-1300 • FAX (303) 861-9214

BARRY D. ROSEMAN BARRY@ROSEMANLEGAL.COM

SENT BY E-MAIL, FAX AND OVERNIGHT DELIVERY

March 17, 2017

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington DC 20510
Fax: (202) 224-9102

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington DC 20510
info@judiciary-dem.senate.gov

Re: Judge Neil Gorsuch

Dear Senators Grassley and Feinstein:

I have enclosed a copy of a declaration I have received from a person who was a student in a legal ethics class taught by Judge Neil Gorsuch. Since the author of that declaration has requested that his or her identity remain confidential, I am providing this explanation about that document and about how I obtained a copy of it.

On February 1, 2017, one of my colleagues – an associate in another law firm – advised me that one or more of her classmates had posted a message or messages on Facebook about that student's or those students' experience with Judge Neil Gorsuch in an Ethics class at the University of Colorado Law School. I later learned that one of those students was Jennifer Sisk. I have seen Ms. Sisk's Facebook post about that Ethics class.

I also learned from my colleague that another student recalled that Judge Gorsuch had made statements in that class that were similar to those discussed by Ms. Sisk in her Facebook post. That colleague gave me that other student's name and telephone number.

I spoke to that other student, who confirmed the information I had received from my colleague. I prepared a declaration for that student's signature, using the information I had gathered from my

discussion with that student. Since that student was concerned about the potential negative ramifications of providing negative information about Judge Gorsuch, especially given Judge Gorsuch's seat on the Tenth Circuit, I offered to protect the confidentiality of that student's identity if and when I might disclose the contents of that student's declaration.

That student signed the declaration I had drafted. I am providing the Senate Judiciary Committee with a copy of that declaration. I have redacted only that student's name and signature from the document.

The person who signed that declaration is the same student with whom I had spoken earlier. I sent a draft of that declaration to the e-mail address that that student had given me in a telephone call. I received a signed copy of the declaration from that same e-mail address.

I request that this letter and the enclosed declaration be entered into the hearing record and circulated to the Senate Judiciary Committee members in connection with the nomination of Judge Gorsuch to be an associate justice of the United States Supreme Court.

Sincerely,

ROSEMAN LAW OFFICES, LLC

Barry D. Roseman

Barry D. Roseman

Enclosure

cc: Senate Judiciary Committee members

DECLARATION

I, [name withheld for confidentiality purposes], state as follows:

1. I was a student in Judge Neil Gorsuch's Legal Ethics class at the University of Colorado Law School during the spring semester 2016. There were approximately 40 to 50 students in that class.

2. Towards the end of that semester's class, Judge Gorsuch began discussing with the class what it's like to be a lawyer.

3. One of the topics he discussed was strongly gendered. Judge Gorsuch told our class that female lawyers get divorced at twice the rate of male lawyers. He also said that many female lawyers became pregnant, and questioned whether they should do so on their law firms' dime. He asked the female students in my class what they would do if they became pregnant and about the impact of their pregnancies on their law firms. He also asked how they would take care of their children after those children were born.

4. In addition, Judge Gorsuch asked the students in that class whether they wanted to become district attorneys or public defenders, since, as he told the class, students who took the career path of public service would not be able to climb the ladder to get better jobs.

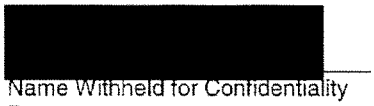
5. I am familiar with the difference between a law professor's expressing his or her own views on a subject, as opposed to a law professor's making provocative or controversial statements as a way to generate student comments and debate. Judge Gorsuch presented his discussions on the issues of female lawyers' pregnancies, the

impact of those pregnancies of their law firms, and the impact of students' choosing public interest careers as the way he personally felt about those subjects.

6. Despite the way that he framed those issues, Judge Gorsuch made it clear that he wanted to make sure that everyone in my Legal Ethics class would be heard.

The statements in this Declaration are based on my personal knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Name Withheld for Confidentiality Purposes

Sarah Mitchell
2737 W. 23rd Ave. Apt. 2
Denver, CO 80211

March 21, 2017

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley,

My name is Sarah Mitchell. I took ethics from Judge Gorsuch in Spring 2016. I was in class on April 19, 2016. I don't recall him making any negative statements about maternity leave, or any negative comments about women's rights in general. He may have posed a hypothetical question concerning an ethical issue relating to maternity leave, but he did not make a personal statement about maternity leave. As a politically engaged feminist, I believe that I would have heard and taken issue with any such comment. Judge Gorsuch was an excellent professor. He made a dry subject interesting. He treated male and female students equally.

Sincerely,
Sarah Mitchell

March 8, 2017

The Honorable Charles E. Grassley
Chairman
U.S. Senate Committee on Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

On behalf of the two million members of the Service Employees International Union (SEIU), I am writing to express our opposition to the President's nomination of Judge Neil Gorsuch to be an Associate Justice on the Supreme Court of the United States. The next Associate Justice will play an incredibly important role in shaping constitutional precedent for the next generation. Based on Judge Gorsuch's record of siding with corporations and the wealthy over working people, a disturbing attitude towards police brutality, and his atrocious rulings on women's health and reproductive rights, we urge the Senate Judiciary Committee to reject the Judge's nomination and call upon the President to put forth a candidate with mainstream views of constitutional precedent and jurisprudence.

Judge Gorsuch's record on cases when it comes to the rights of working people is greatly troubling and his rulings and findings consistently display a judge with a reflexive rejection of worker's rights. In *Compass Environmental, Inc. v. OSHRC*, the majority opinion of the 10th Circuit Court ruled that the employer must pay a fine for disregarding an internal policy and for not providing training to a worker who was electrocuted to death near his work area. Judge Gorsuch dissented from the majority and voted to throw out the case because he didn't believe the employer had any responsibility in the worker's death. Such a ruling represents a real fear for workers that protections in the workplace would be gutted should Judge Gorsuch be confirmed.

Siding with corporations over workers isn't a one-time instance for Judge Gorsuch. In *TransAm Trucking, Inc. v Administrative Review Board*, a case decided last year, the majority of the 10th Circuit Court ruled that a trucking company had unlawfully fired a worker in violation of federal whistleblower protections. Alphonse Maddin, the truck driver involved in the case, had the brakes of his trailer fail during a very cold January night. The heater in the truck didn't work either, resulting in a truck that was so cold Mr. Maddin began to have trouble breathing. Despite the possible life-threatening situation Mr. Maddin unfortunately found himself in, his employer ordered him to stay in the truck until a repairperson had arrived on scene. After three hours in the

MARY KAY HENRY
International President

GERRY HUDSON
International Secretary-Treasurer

NEAL BISNO
Executive Vice President

LUISA BLUE
Executive Vice President

HEATHER CONROY
Executive Vice President

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Executive Vice President

VALARIE LONG
Executive Vice President

ROCIO SÁENZ
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

1800 Massachusetts Ave., NW
Washington, DC 20036

202.730.7000

www.SEIU.org

harsh cold of his truck, Mr. Maddin left the trailer behind and drove to search for help in his truck. He was fired a week later for violating company policy for abandoning the trailer. The majority of the Court found that the firing of Mr. Maddin, given the conditions he found himself in, was unlawful and that he should be given his job back. Despite the majority opinion, Judge Gorsuch dissented, arguing that the employee should've followed orders despite the risk of possible injury or even fatality.

In a separate case, *NLRB v. Community Health Services, Inc.*, Judge Gorsuch once more ruled against working people and dissented from a majority opinion that ruled in favor of workers. In the case, the majority opinion upheld a National Labor Relations Board ruling that a hospital had to pay back pay to thirteen employees whose hours it had reduced in violation of the National Labor Relations Act. But Judge Gorsuch dissented, arguing that the employees' back pay awards should have been reduced by the amount of income that they earned from other jobs during the period when their hours were reduced.

Judge Gorsuch has ruled against working people numerous times during his time on the 10th Circuit Court, making it clear that his sympathies lie with big corporations rather than with the ordinary people whose rights they violate. His recurring dissents in cases involving workers show that Judge Gorsuch would refuse to follow binding case law in cases involving workers, and would instead give a blank check to corporations to take advantage of their workers.

Judge Gorsuch's questionable record goes beyond his support for corporations over protections for the American worker and includes his record on a case involving police brutality. In *Wilson v. City of Lafayette*, a 22-year-old man possessing marijuana was fleeing arrest when a police offer shot him in the head and killed him with a stun gun from a distance between ten and fifteen feet away, contrary to the procedures described in the police department training manual. Judge Gorsuch held that the office was entitled to qualified immunity from an excessive force claim, saying that the use of force was reasonable because the young man was fleeing arrest. The Judge disregarded not only the loss of the young man's life, but also the stun gun training materials which said that officers should not aim at the head or throat unless the situation dictates a higher level of injury risk. Judge Gorsuch's ruling in this case demonstrates a disturbing disregard for law enforcement accountability, and a record that can't be trusted by working people who often find themselves at the mercy of a criminal justice rigged against them.

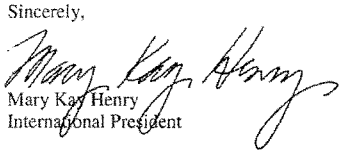
What also gives working people great concern is Judge Gorsuch's total disregard for women's health and protection of women's individual rights in the court room. Judge Gorsuch notoriously signed onto the decision in *Hobby Lobby Stores, Inc. v. Sebelius*, which allowed certain for-profit employers to refuse to comply with the birth control benefit in the Affordable Care Act. The decision cited *Citizens United v. FEC*, which held that corporations can be "persons," and therefore can have religious beliefs and that employers can use those religious beliefs to block employees' insurance coverage of birth control. The disastrous decision of *Hobby Lobby* has left women, many of whom are economically disadvantaged, without access to proper and necessary healthcare.

Judge Gorsuch's extreme view in the *Hobby Lobby* decision is compounded by his opinion in *Little Sisters of the Poor Home for the Aged v. Burwell*. Judge Gorsuch dissented from the majority and joined an opinion that stated that the simple act of filling out an opt-out form that ensures employees still get birth control coverage constituted a substantial burden on religious exercise. The extremist view of the dissent in this case gives great concern to working women who expect the next Associate Justice to have an independent view of the law and to not project their own ideology onto the law.

Finally, in light of the ongoing legal battles over President Trump's discriminatory and ill-conceived Muslim ban, we are deeply troubled by Judge Gorsuch's dissent last summer in *Planned Parenthood Ass'n of Utah v. Herbert*. The Governor of Utah acted to prevent state agencies from passing along federal funding to Planned Parenthood, claiming he was acting based on concern about illegal activity because of the misleadingly edited hidden camera videos falsely portraying a different Planned Parenthood affiliate as selling fetal tissue. The Ten Circuit panel granted a preliminary injunction for Planned Parenthood, concluding it was likely to succeed on its claim that the Governor was actually retaliating against it for its involvement with abortion. But Judge Gorsuch dissented to say he would have deferred to the Governor's implausible explanation for his actions and allowed his executive action to stand. Another judge accused Gorsuch of "mischaracterize[ing] this litigation and the panel opinion at several turns to reach its desired result." Especially now, our country needs a Justice who will courageously stand up, not defer, when an Executive acts in disregard for our cherished Constitutional values.

In examining Judge Gorsuch's record in cases involving workers' rights, police brutality, women's reproductive health, and deference to Executive actions, we have found that he falls tremendously short of the independence and constitutional adherence required of the next Associate Justice on the Supreme Court. We therefore strongly and respectfully ask the Senate Judiciary Committee to reject Judge Gorsuch's nomination and instead call upon the President to put forth a nominee with mainstream views and who will be an independent arbiter of the law. If you need any additional information please contact John Gray, Legislative Director, at john.gray@seiu.org or (202)-730-7669.

Sincerely,



Mary Kay Henry
International President

MKH:JG:jf

cc: Members of the Senate Judiciary Committee

opeiu#2
afl-cio, clc

February 6, 2017

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of our 2.7 million members and supporters, I write to strongly oppose President Trump's pending nomination of Judge Neil Gorsuch to the Supreme Court of the United States. As members of the highest court in the country, Supreme Court Justices must be fair, even-handed, and uphold the sanctity of our environmental laws and Constitution before their own personal ideology. Unfortunately, Judge Gorsuch doesn't meet that standard and must be rejected.

Judge Gorsuch's record shows that he disfavors public interest litigation and will limit the access of everyday Americans to the courts. His stance against the well-established Chevron doctrine will prevent agencies like the United States Environmental Protection Agency from fulfilling their mission to protect our air, water, and health. This is a dangerous view that will favor polluters and industry over the rights of the people.

Justices have the final say on cases that shape every facet of our daily lives, from landmark environmental protections such as the Clean Power Plan, to civil liberty protections such as the Voting Rights Act, to basic rights like allowing women to control their bodies with *Roe v. Wade*. Judge Gorsuch's record of extreme positions proves he is far too outside of the mainstream for this critically important position. As an example, Judge Gorsuch ruled in *Hobby Lobby Stores, Inc. v. Sebelius* that corporations are persons and should not be required to pay for contraceptive coverage under the Affordable Care Act.

We can't let our Supreme Court further open the door to big polluters, corporate interests and attacks on women's and human rights. For decades, concerned community members have rallied, signed official public comments, testified in public hearings, and fought to expand protections for our environment. An extreme conservative like Judge Gorsuch could undermine the ability of grassroots activists to have a say, undoing everything we've worked so hard to protect.

In order to protect our environment, we must protect our democracy. That means having three functioning branches of government where the people's interests are represented. Judge

50 F St NW, Washington, DC 20001 TEL: (202) 547-1141 FAX: (202) 547-6009 www.sierraclub.org

Gorsuch has proven through his record that he is willing to limit access to the courts, a dangerous view that will only embolden polluters and hamper citizens when they try to protect their communities.

I urge you to reject Judge Neil Gorsuch for the Supreme Court of the United States

Sincerely,

Michael Brune
Executive Director

50 F St NW, Washington, DC 20001 TEL: (202) 547-1141 FAX: (202) 547-6009 www.sierraclub.org

February 1, 2017

Via Certified Mail & Email

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510
senator@mcconnell.senate.gov

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510
chuck_grassley@grassley.senate.gov

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
437 Russell Senate Office Building
Washington DC 20510
senator_leahy@leahy.senate.gov

Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, South Carolina, Texas, Utah, Wisconsin, and Wyoming regarding the nomination of Judge Neil Gorsuch to the Supreme Court of the United States

Dear Senators McConnell, Schumer, Grassley, and Leahy:

As the chief legal officers of our States, we write to urge the U.S. Senate to promptly hold a hearing on and confirm the nomination of Judge Neil Gorsuch to the Supreme Court of the United States. Judge Gorsuch is an outstanding jurist with a proven commitment to upholding the U.S. Constitution and the rule of law. We have no doubt that he possesses the qualifications, temperament and judicial philosophy to be an excellent Associate Justice.

President Trump campaigned on the promise that he would fill the seat formerly occupied by Justice Antonin Scalia with a jurist who shared the late Justice's commitment to interpreting the Constitution as written, rather than as judges might wish it were written. Now that he has been elected, President Trump has fulfilled that campaign promise through the nomination of

Judge Gorsuch, a committed constitutionalist. The Senate should respect the will of the voters in this last election by confirming President Trump's choice without delay.

Confirmation of Judge Gorsuch to the Supreme Court will have a profound and positive impact on the people in our States. Over the past eight years, the people have suffered from the massive federal overreach in Washington, D.C. as all three branches of government have at times exceeded the limits placed on their authority under the Constitution. In particular, the executive branch has placed onerous and unlawful regulatory burdens on consumers, employees, investors, and businesses. Judge Gorsuch will help reverse that trend by ensuring that the legislative and executive branches, whether controlled by either party, act within their constitutionally assigned roles.

Over the past eight years, federal agencies have also impermissibly intruded on the regulatory authority of the States and commandeered state governments to carry out President Obama's agenda. As the chief legal officers of our States, we have a special interest in ensuring that the federal government respects our role in enforcing policies on matters of local concern reserved to the States under the Constitution. It is imperative that the States and their Attorneys General be able to make and enforce their own environmental, educational, and consumer protection policies, among other things, free from interference from the federal government, unless Congress or the President acts within their specifically enumerated powers.

Judge Gorsuch is particularly well-suited to enforce the Constitution's structural limitations and protect the institutional prerogatives of the States. Judge Gorsuch was confirmed to the Tenth Circuit by a bipartisan, unanimous "voice vote" in the Senate in 2006 and has vindicated the Senate's trust in him in his ensuing decade on that court. In a speech last year commemorating Justice Scalia, he eloquently said that "an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function" and identified himself as a "believer that the traditional account of the judicial role Justice Scalia defended will endure." On the Tenth Circuit, Judge Gorsuch has written about the judiciary's obligation to act as a meaningful check on federal agencies that exceed their authority and to interpret the Constitution according to its original public meaning. He has also championed the judiciary's critical role in protecting religious beliefs from government interference.

In short, we are convinced that, as the next Supreme Court Justice, Judge Gorsuch will be committed to resisting unlawful government overreach, respecting the democratic process, and protecting individual liberties. We strongly urge all Senators—and particularly the home-state Senators of the undersigned Attorneys General—to express their public support for the prompt confirmation of Judge Gorsuch to the U.S. Supreme Court.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Luther Strange
Alabama Attorney General

Mark Brnovich
Arizona Attorney General

Leslie Rutledge
Arkansas Attorney General

Pamela Jo Bondi
Florida Attorney General

Christopher M. Carr
Georgia Attorney General

Curtis T. Hill, Jr.
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

Jeff Landry
Louisiana Attorney General

Bill Schuette
Michigan Attorney General

Josh Hawley
Missouri Attorney General

Timothy Fox
Montana Attorney General

Doug Peterson
Nebraska Attorney General

Adam Paul Laxalt
Nevada Attorney General

Wayne Stenehjem
North Dakota Attorney General

Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Brad D. Schimel
Wisconsin Attorney General

Peter Michael
Wyoming Attorney General

CC:

President Donald J. Trump
Vice President Michael R. Pence

STEPHEN R. BRUCE LAW OFFICES
1667 K ST., NW, SUITE 410
WASHINGTON, D.C. 20006
202-289-1117
FAX: 202-289-1583

March 22, 2017

Submitted Via Email:
Ted_lehman@judiciary-rep.senate.gov
Paige_herwig@judiciary-dem.senate.gov

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I write to relate my experience as counsel for a class of over 3,000 employees in *Wade Jensen, et al. v. Solvay America*, 721 F.3d 1180 (10th Cir. 2013), with Judge Neil Gorsuch changing the facts in our case on appeal in order to reach a policy result he preferred.

The glaring error in Judge Gorsuch's decision in *Jensen* was that it held the ERISA notice violation that a different panel found in 2010 (*see* 625 F.3d 641 (10th Cir.) was "accidental, no more than an oversight in the process of drafting a complex statutorily mandated notice." 721 F.3d at 1183. The passage where Judge Gorsuch stated that the violation was "accidental" and "no more than an oversight" was not accompanied by any citation to the record below. In fact, after a six-day bench trial, the District Court in Wyoming had found that the employees had "carried their burden" of proving the notice violation was "intentional" if a "general intent" standard applied, but not if specific intent was required. JA at 37-38 (in Case No. 11-8092).

Although the decision was unanimous, Judge Gorsuch had a unique familiarity with the case, having been the only member of the three-judge panel to hear the previous appeal. It is a basic tenet of appellate judging that the judge must accept the facts found below, and not alter them or reshape them by "its own interpretation of testimony." *Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985); *accord, Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1180 (10th Cir. 2010). This is not something that I am just now expressing. We filed a petition for rehearing and rehearing en banc and a petition for certiorari in *Jensen* on this same basis.

As a result of recent listserv postings I have now found other lawyers who have had the same experiences with Judge Gorsuch. In another ERISA case involving disability benefits,

McClenahan v. Metropolitan Life Ins., 416 Fed. Appx. 693 (10th Cir. 2011), Judge Gorsuch found "no evidence of radiculopathies [conditions due to a compressed nerve in the spine that can cause pain, numbness, tingling, or weakness] present on or after" a certain date, even though there was a positive test four days earlier and radiculopathies do not disappear in that time span. A third employment lawyer who is reluctant to come forward relates how Judge Gorsuch rewrote the facts in order to affirm summary judgment against employees. As in the *Jensen* case, Judge Gorsuch was pleasant and polite during oral argument, and wrote the opinions in a folksy, story-telling way without citations, which obscured that the decision had altered the facts in the cases.

Citing the *Jensen* decision, the *Trans Am Trucking* case, and *Hwang v. Kansas State* by name, a 2/25/2017 article by the Associate Press' National Investigative Team found that Judge Gorsuch "has sided with employers 21 out of 23 times in disputes over the U.S. pensions and benefits law, the Employee Retirement Income Security Act, or ERISA." http://bigstory.ap.org/article/9ae590166f114d9b9907ea4e3c75d04b/gorsuch-often-sided-employers-workers-rights-cases

It was only in the two months since Judge Gorsuch's nomination that I learned he had strong philosophical objections to a general intent standard. By finding that the violation was "accidental, no more than an oversight." Judge Gorsuch ruled for the company and against the employee class while avoiding a direct legal ruling that a specific intent standard applied. In September 2011, Judge Gorsuch gave a talk on "Intention and the Allocation of Risk" that was made into a chapter for John Keown and Robert P. George, eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (2013). In line with the natural law philosophy of Professor Finnis, his mentor and dissertation advisor at Oxford, Judge Gorsuch's talk and chapter offer a powerful attack against liability based on general intent standards (which he believes are epitomized by the utilitarian views of Judge Richard Posner in the Seventh Circuit). Here are extended quotes from Judge Gorsuch's chapter (at 413, 419-20):

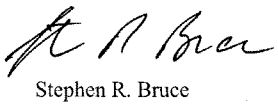
> "[T]here are still other normative justifications for the special emphasis the law places on intentional conduct. One has to do with human equality. When someone intends to harm another person, Finnis encourages us to remember, "[t]he reality and fulfillment of those others is radically subjected to one's own reality and fulfilment, or to the reality and fulfilment of some other group of persons. In intending harm, one precisely makes their loss one's gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource." People, no less than material, become means to another's end. To analyze *Bird v. Holbrook* as the challengers [like Judge Posner] to extant law would have us, we ask merely whether superior collective social consequences are produced by ruling for the plaintiff or defendant. On this account, there is nothing particularly special about the individual. Like any other input or good, it gives way whenever some competing and ostensibly more important collective social good is at stake. But it is exactly to prevent all this that the law has traditionally held, in both crime and tort, that one generally ought not choose or intend to harm another person,

> and that failing to observe this rule is a particularly grave wrong. This traditional rule "expresses and preserves each individual person's…dignity…as an equal." It recognizes that "to choose harm is the paradigmatic wrong; the exemplary instance of denial of right." It stands as a bulwark against those who would allow the human individual to become nothing more than another commodity to be used up in aid of another's (or others') ends.
>
> Not only does Finnis help us to see that the traditional intent-knowledge distinction in law bears analytical power overlooked by its critics. He also helps expose the undergirding normative reasons for the law's traditional cognizance of intention. He reminds us, for example, that some of the law's harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to intend something is to endorse it as a matter of free will--and freely choosing something matters. Our intentional choices reflect and shape our character--who we are and who we wish to be--in a way that unintended or accidental consequences cannot. Our intentional choices define us. They last, remain as part of one's will, one's orientation toward the world. They differ qualitatively from consequences that happen accidentally, unintentionally....
>
> This is a view, of course, that has long and deeply resonated through American and British jurisprudence, and indeed the Western tradition. It is precisely why the law treats the spring gun owner who maims or kills intentionally so differently from the negligent driver whose conduct yields the same result. As Roscoe Pound once put it, our "substantive criminal law is," at least at minimum, "based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong."

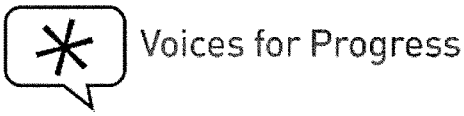
Employees who have been the victims of violations of labor standard violations in the workplace, including disclosure violations related to their health and retirement benefits, deserve to have their claims decided by appellate judges who are committed to enforcing the laws Congress has enacted based on the factual records developed in the trial court. Judge Gorsuch's actions in changing the facts in employment cases on appeal represent an appalling elevation of the interest of companies and his own philosophical interests over the laws Congress has enacted and the rights of employees to earn a living, including decent benefits and retirement income.

I respectfully ask that this letter be made part of the Judiciary Committee's record.

Sincerely,



Stephen R. Bruce



March 9, 2017

Dear Senator Feinstein:

As philanthropists, business owners, investors, entrepreneurs, and others also concerned about the public interest, the undersigned members of Voices for Progress write to express our opposition to the confirmation of Judge Neil Gorsuch.

Supreme Court rulings can dramatically impact the lives and rights of all Americans. Judge Gorsuch's record on the bench, as well as his writings, speeches, and other activities, demonstrate he is a judge who aims to rule in ways that advance his ideological agenda, is outside the mainstream of legal thought and unwilling to accept the constructs of binding precedent when they dictate results he disfavors. If confirmed to the Supreme Court, which is closely divided on many critical issues, Judge Gorsuch would tip the balance to undermine many of our core rights and legal protections. He lacks the impartiality and independence the American people expect and deserve.

Now more than ever, we need open-minded, fair, and independent judges who will stand up for our Constitutional values and protections for everyone and serve as a check on President Trump when he violates the law or the Constitution.

After the nearly year-long blockade of Judge Merrick Garland, Democrats allowing this seat to be filled with a right-wing ideologue would be telling Republicans that they can always block Democratic nominees with impunity and wait for the next time they have a Republican in the White House. Furthermore, the way in which Pres. Trump politicized this appointment before the election, and the ideological litmus tests he promised to apply, vitiated the deference that normally should be extended to a judicial nominee.

Under these circumstances, Democrats responsibility to "*advise* and consent" requires that they thoroughly review Judge Gorsuch's record and judicial philosophy. Before the full Senate considers this nomination, the American people have a right to know how his appointment to the Supreme Court would impact their rights, freedoms, and liberties. When this review is complete, we encourage Senators to assure that Judge Gorsuch does not receive the 60 votes required to confirm a Supreme Court nominee, and insist that only a non-ideological nominee in the mainstream of American judicial philosophy will be confirmed.

Sincerely,

Naomi Aberly Boston, MA	Kathleen Barry Berkeley, CA	Marc Baum New York, NY
Betty Bardige Cambridge, MA	Alec Bash San Francisco, CA	Elwyn Berlekamp Piedmont, CA

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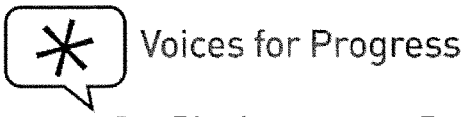

Laurie Black
San Diego, CA

Loren Blackford
New York, NY

Jabe Blumenthal
Seattle, WA

Robert Burnett
Berkeley, CA

Nina Chen
New York, NY

Polly Cleveland
New York, NY

Marcia Cohen
San Francisco, CA

Michael Connolly
New York, NY

Debra Cooper
New York, NY

Tony Crabb
Healdsburg, CA

Harriett Crosby
Cabin John, MD

Alan Davis
San Francisco, CA

Shirley Dinkins
Pleasanton, CA

Mitch Draizin
New York, NY

Cathy Duvall
Washington, DC

Doug Edwards
Los Altos, CA

Ethan Eldon
New York, NY

Lauren Embrey
Dallas, TX

Christian Ettinger
San Francisco, CA

Andrew Faulk
San Francisco, CA

Mark Ferron
Mill Valley, CA

Tracy Ferron
Mill Valley, CA

Christopher Findlater
Naples, FL

Robert Friedman
Hillsborough, CA

Alison Fuller
San Rafael, CA

Page Gardner
McLean, VA

Ron Garret
Emerald Hills, CA

Judy Gibbons
Setauket, NY

Barbara Grasseschi
Healdsburg, CA

Karen Grove
Menlo Park, CA

Eva Grove
Los Altos, CA

Carol Hamilton
Beverly Hills, CA

R. Elaine Hanson MD
San Deigo, CA

Jay Harris
San Francisco, CA

Lawrence Hess
San Diego, CA

Suzanne Hess
San Diego, CA

Anne Hess
New York, NY

Arnold Hiatt
Boston, MA

Steve Hopkins
Rye, NY

Joan Huffer
Alexandria, VA

Kim Coco Iwamoto
Honolulu, HI

Philip Jensen
Sebastopol, CA

Frank Jernigan
San Francisco, CA

Rochelle Kaplan
Salt Lake City, UT

Barry Karas
Washington, DC

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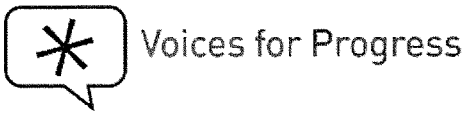

David Keller
San Francisco, CA

Michael Kieschnick
Palo Alto, CA

Ethel Klein
New York, NY

Felix Kramer
Berkeley, CA

Betsy Krieger
Baltimore, MD

Rochelle Lefkowitz
Berkeley, CA

Art Lipson
Salt Lake City, UT

Stephanie Low
New York, NY

Carla Meyer
Boston, MA

Paulette Meyer
San Francisco, CA

Laurie Michaels
Woody Creek, CO

Nancy Mutterperl
Beverly Hills, CA

Bill Mutterperl
Beverly Hills, CA

Sandy Newman
Takoma Park, MD

Lawrence Ottinger
Chevy Chase, MD

Carl Page
Palo Alto, CA

Frank Patitutcci
Pleasanton, CA

Morris Pearl
New York, NY

Zach Polett
Little Rock, AR

Carl Pope
San Francisco, CA

Lisa Renstrom
Washington, DC

Elaine Reuben
Washington, DC

Charles Rodgers
Boston, MA

Marsha Rosenbaum
San Francisco, CA

Marjorie Roswell
Baltimore, MD

Francesco Scattone
New York, NY

Daniel Schlozman
Baltimore, MD

Ben Schwartz
West Springfield, MA

Claire Silberman
Brooklyn, MA

Daniel Simon
New York, NY

James Simon
New York, NY

Daniel Solomon
Bethesda, MD

Marc Stanley
Dallas, TX

Mary Ann Stein
Bethesda, MD

Gene Stone
New York, NY

Sandor Straus
Lafayette, CA

Faye Straus
Lafayette, CA

Ted Strickland
Columbus, OH

Ritchie Tabachnick
Pittsburg, PA

Rachel Tabachnick
Pittsburg, PA

Anne Taft
Binghampton, NY

Valerie Tarico
Seattle, WA

Kate Villers
Concord, MA

Phil Villers
Concord, MA

Scott Wallace
Bethesda, MD

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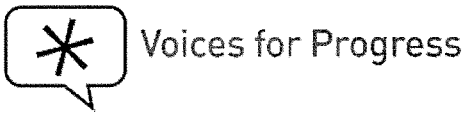

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The Washington Post

Opinions

Supreme Court nominees should weigh in on these rulings. You're up, Judge Gorsuch.

By Vikram Amar March 19

Vikram Amar is the dean of the law school at the University of Illinois at Urbana-Champaign.

There is a lot of talk these days about judicial independence, given President Trump's criticisms of recent judicial rulings and — more problematically — judges themselves. Judicial independence is undeniably one of the pillars of the Constitution, but it is also sometimes distorted to impede another constitutional structural element: the Senate's assessment of Supreme Court nominees. Too often, nominees — by both parties, it should be emphasized — refuse to comment on past Supreme Court cases during Senate questioning on grounds that such comments could compromise judicial independence once someone joins the court.

The best way to discern where a nominee may move the nation's jurisprudence is to get him or her to weigh in on particularly contentious cases. Platitudes about originalism, textualism, activism or states' rights mean little until you get someone to apply these notions to actual disputes that have divided the justices in recent times. When William Brennan and Antonin Scalia would offer the same basic answer to a question about judicial meta philosophy (as is often true of the queries senators pose), that question is not very helpful.

The idea that a nominee should not give views about actual cases because doing so might force a prejudging of issues that may come before the nominee later makes no sense. Of course nominees should not make — or be asked to make — promises about future rulings. But the disclosure of specific, albeit provisional, views about past cases does not commit nominees to rule in any particular way in the future. They remain free to refine their thinking or even change their minds altogether, as sitting justices are free to do, even if they have spoken publicly on these matters in deciding earlier cases. Surely no one thinks current justices are conflicted because they have opined on similar issues in prior decisions.

Which cases should modern nominees such as Judge Neil Gorsuch be required to weigh in on? There are many to choose from, but here are five particularly telling ones, all of which were decided by a narrow majority:

***Obergefell v. Hodges*:** In 2015, the court invalidated state laws that prohibited same-sex marriage. Discussion of *Obergefell* would provide insight into a nominee's views not only on how to apply equality principles in the LGBT setting, but also on whether and when "substantive due process" — the foundation of modern sexual privacy and abortion protections — is appropriately invoked.

***Citizens United v. Federal Election Commission*:** The 2010 ruling striking down a federal law prohibiting nonprofit corporations from making independent campaign expenditures bears not only on the hugely important question of money in politics, but also on the legitimacy of many modern freedom-of-speech protections that may not always be supported by originalist evidence.

***Fisher v. University of Texas*:** This 2016 decision upheld the University of Texas' s use of race in admissions. A nominee's thoughts on this case could signal whether he or she thinks the equal protection clause provides asymmetrical protection to racial minorities, and — importantly — what kind of originalist the nominee is (insofar as the originalist evidence against the permissibility of affirmative action strikes many analysts as thin).

***Printz v. United States*:** In 1997, the court struck down the federal Brady Law provision requiring local law enforcement to conduct gun-purchase background checks. The case could be a useful platform to explore how much protection a nominee thinks state and local executive officials constitutionally enjoy from "commandeering" by the feds.

***Employment Division, Oregon Department of Human Services v. Smith*:** This 1990 holding that the free exercise clause of the First Amendment does not confer a right for someone practicing a religion to be presumptively exempt from generally applicable laws (in this case, peyote consumption laws) remains the biggest recent ruling on religious liberty and the Constitution. Hearing a nominee's views on this case would be particularly important today, given that issue's enduring importance.

From what I know of Gorsuch thus far, I would favor his confirmation, but if senators cannot unearth and examine his views about these and other key cases decided in recent years, I might feel differently and the hearings will largely be a waste of time for the senators, the nominee and the public.

Read more on this issue:

James Robertson: The judicial nomination war started with Bork. End it with Gorsuch.

Matt Witt: My opposition to Neil Gorsuch is personal

Jason Murray: Liberals should welcome Gorsuch. Like Kagan, he puts law first.

Jonathan H. Adler: Gorsuch's judicial philosophy is like Scalia's, with one big difference

The Post's View: How not to pick a Supreme Court justice

The Washington Post

Senate Democrats focus on Gorsuch's defense of Bush-era terrorism policies

BY Robert Barnes and Ed O'Keefe, Mar. 15, 2017

Senate Democrats are requesting more information about Supreme Court nominee Neil Gorsuch's role defending the George W. Bush administration in lawsuits over terrorism policies and interrogation of detainees.

Sen. Dianne Feinstein, the ranking Democrat on the Senate Judiciary Committee, said the information provided by Gorsuch about his 2005-2006 employment at the Justice Department has raised more questions.

"With your hearing only six days away, it has come to my attention that your response via the Department of Justice to my letter of February 22 is incomplete and must be supplemented immediately," Feinstein (Calif.) wrote, setting a deadline of 5 p.m. Thursday.

Hundreds of thousands of document pages provided cryptic descriptions of the work of -Gorsuch, who served as a high-ranking Justice Department official before he was confirmed to the U.S. Court of Appeals for the 10th Circuit in July 2006.

Feinstein requested documents covering "all litigation -related to the Bush administration's anti-terrorism, intelligence, detention, interrogation, military, or related efforts in which you drafted or reviewed a legal filing."

The request signaled a potential new avenue of questioning for Gorsuch by the committee's Democrats and came as the partisan and ideological battle over Gorsuch's nomination began to heat up on Capitol Hill.

Senate Minority Leader Charles E. Schumer (D-N.Y.) held a news conference with people who said they had been harmed by Gorsuch's rulings, and the senator accused President Trump's nominee of enacting a "right-wing, pro-corporate, special-interest agenda" as a judge.

"Given the chance, I have no doubt he'll do it again on the Supreme Court," Schumer said.

Schumer also called out Gorsuch's ties to conservative businessman Philip Anschutz, detailed this week in a New York Times article. Gorsuch represented Anschutz as a private lawyer, and Anschutz has contributed to the Heritage Foundation and Federalist Society, two groups that recommended Gorsuch and 20 others to Trump as potential Supreme Court nominees.

Besides portraying Gorsuch as harmful to the "little guy," Democratic senators and aides have also explored his involvement with issues of executive privilege and terrorism-related cases.

Feinstein said Tuesday that she was sending a team of Democratic staffers to the Justice Department to review about 11,000 pages of documents that department officials said were too sensitive to be copied or sent to Capitol Hill.

Sen. Patrick J. Leahy (D-Vt.) said that "on areas of surveillance and torture, what I've seen so far, his views are a lot different than mine."

"When Judge Gorsuch was working for the administration, at least based on the initial things I've looked at, he appears to be a cheerleader for President Bush's views on executive powers," Leahy said, declining to specify which documents he had seen.

But Sen. Charles E. Grassley (R-Iowa), who leads the Judiciary Committee, disputed accusations that Gorsuch or the Trump administration have been withholding information on the nominee.

"They're asking things of Gorsuch that they didn't ask of Kagan," Grassley said, referring to Justice Elena Kagan's tenure as solicitor general in the Obama administration.

Grassley said that Democrats should be "satisfied" with the amount of information released so far.

In the documents released to the committee, Gorsuch provides a list of the work he did at the Justice Department in the form of a self-evaluation.

"Helped coordinate litigation efforts involving a number of national security matters — including the Darby photos litigation and FOIA case seeking a poll of Guantanamo Bay detainees," he wrote, referring to the 2004 release of graphic pictures of prisoners being abused by U.S. military personnel in Iraq's Abu Ghraib prison.

Gorsuch said he also "drafted speeches on terrorism and national security efforts for the Attorney General" and helped draft the motion to dismiss the first set of suits by detainees authorized by a Supreme Court decision.

Feinstein was also interested in a reference to a proposal for a "seminar on torture policy" at the Council on Foreign Relations. "Please provide to the committee any materials related to any involvement you had in the issue of torture (including so-called 'enhanced interrogation techniques'), including this proposal," she wrote.

The hundreds of thousands of pages submitted by the Justice Department has provided intriguing glimpses of the nominee, but its sheer volume has frustrated researchers.

The documents do show that, if confirmed, Gorsuch would become the first justice to have visited the detention facility at Guantanamo Bay. He wrote a thank-you to his hosts:

"I was extraordinarily impressed," he wrote. Being able to "see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier."

Gorsuch also took an active role in developing talking points for the administration on detainees, including whether "enhanced interrogation" works.

"Yes," is handwritten next to a typed question: "Have the aggressive interrogation techniques employed by the Admin yielded any valuable intelligence?"

At the top of the page, which contains actual or anticipated questions from Sens. John McCain (R-Ariz) and Lindsey O. Graham (R-S.C.) is written: "TO DO — Examples of Intell" relating to "GTMO."

Gabe Roth, whose organization Fix the Court filed a lawsuit after receiving no action on a Freedom of Information Act request for Gorsuch's records, said the documents appear incomplete.

"The picture these documents paint is that from the outset of his agency tenure, Judge Gorsuch was intimately involved in a range of administration initiatives, from detainee treatment to surveillance to judicial nominations," Roth said. "I'm looking forward to the release of additional documents, whether in response to the senator or to our FOIA lawsuit."

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A Note on Senatorial Consideration of Supreme Court Nominees

Charles L. Black Jr.
Yale Law School

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A Note on Senatorial Consideration of Supreme Court Nominees

Charles L. Black, Jr.†

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded far enough to enable me to make that pretense.[1] I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or

† Henry R. Luce Professor of Jurisprudence, Yale University. B.A. 1935, M.A. 1938, University of Texas; LL.B. 1943, Yale.

1. I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten; for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Irwin; I have also had the benefit of talking to him about the piece after it was written.

HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953) came to my attention and hands after the present piece had gone to the printer. This excellent and full account of the entire function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

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vague, of where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why"? I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . . ."[2] Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

2. U.S. CONST. art. II, § 2, cl. 2.

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Procedurally, the stage of "advice" has been short-circuited.[3] Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textual reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration, and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not; I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than that a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent

3. Even this short-circuiting is not complete. First, the President's "appointment," *after* the Senate's action, is still voluntary (Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

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to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his worldview will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the lifeview and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved

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on July 21, 1787,[4] and was carried through into the draft of the Committee of Detail.[5] The change to the present mode came on September 4th, in the report of the Committee of Eleven[6] and was agreed to *nem. con.* on September 7th.[7] This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

> But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. 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 could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.
>
> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and 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. In addition to this, it would be an efficacious source of stability in the administration.
>
> It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an

4. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (M. Farrand ed. 1911).
5. *Id.* at 132, 146, 155, 169, 183.
6. *Id.* at 498.
7. *Id.* at 539.

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> entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.[8]
>
> * * * * * *
>
> If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If by influencing the President be meant restraining him, this is precisely what must have been intended* [emphasis supplied]. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils.[9]

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterized, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

8. THE FEDERALIST No. 76, at 494-95 (Modern Library 1937) (Alexander Hamilton).
9. *Id.* No. 77, at 498 (Alexander Hamilton).

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When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than these. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.[10] John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.[11] Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.[12] There is the celebrated Parker case of this century.[13] The perusal of Warren[14] will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, except arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the

10. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 364 (rev. ed. 1926).
11. 1 *id.* at 704.
12. *Id.* at 413.
13. L. PFEFFER, THIS HONORABLE COURT, A HISTORY OF THE UNITED STATES SUPREME COURT 288 (1965).
14. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

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Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

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Stephen Bannon's nationalist call to arms, annotated
The Washington Post
February 23, 2017
By Aaron Blake

If there is one man believed to be pulling the strings behind the scenes in the White House right now, it's Stephen K. Bannon. The former head of Breitbart News's influence on President Trump is an endless source of fascination in Washington right now.

But Bannon's public comments are pretty few and far between. There was a speech he gave at the Vatican a few years ago, and then an interview with the Hollywood Reporter last year. And then, on Thursday, the Trump strategist spoke at the Conservative Political Action Conference in suburban Washington.

Bannon participated in a panel discussion with White House Chief of Staff Reince Priebus and Matt Schlapp, the head of the American Conservative Union. And Bannon's rhetoric was chock-full of the kind of nationalist, anti-news-media rhetoric for which he has become known. He cast the next four years as a constant battle with the media. "If you think they're going to give you your country back without a fight, you're sadly mistaken," he said.

It was a window into the worldview of a man whose worldview very much aligns with Trump's own. Below, we're posting the conversation in full, with our annotations. To see an annotation, click on the yellow, highlighted text.

SCHLAPP: CPAC is known for having important moments, and I think it's safe to say by a full room and just a couple of cameras that this is one of those moments.

And I — I think the first thing that would be appropriate after 30 days of running a continual sprint is to thank these two guys for what they've been doing.

(UNKNOWN): Thank you, thank you, well...

SCHLAPP: On that front — on that front, I also think it's a perfect moment to thank all of you for helping us elect what will be one of the greatest presidents that ever served this country. It's because of your work..... that he made it happen.

BANNON: And Matt, I want to thank you for finally inviting me to CPAC.

SCHLAPP: Yeah, there's no — the — what was the name of the — the...

BANNON: The uninvited.

SCHLAPP: The uninvited.

BANNON: I know there are many alumni out here in the audience.

PRIEBUS: I didn't like the uninvited.

SCHLAPP: Here's what we decided to do at CPAC with the uninvited. We decided to say that everybody's a part of our conservative family.

PRIEBUS: That's right.

SCHLAPP: And that's what Donald Trump has done to so many of us around the country politically. And you guys have put together an amazing operation. You know, I know you all know this, but the last time a president came to CPAC in his first year, it was Ronald Reagan.

Saint Ronald in 1981. And you've put together this — the president has put together the most conservative Cabinet we've ever seen according to our CPAC ratings, and I think a few of us are pretty happy about what looks like is going to happen on the Supreme Court too, so it's a...

Now, let me ask you two. I'm looking in the back of the room as well, but let me ask you two.

PRIEBUS: Is that the opposition party?

SCHLAPP: Let me ask you two, we read a lot about you two.

BANNON: It's all good.

SCHLAPP: But I bet not all of it's accurate — I bet not all of it's accurate. I bet there's some things that don't get written correctly. Let me ask each one of you, what's the biggest misconception about what's going on in the Donald Trump White House?

PRIEBUS: Well, in regard to us two, I think the biggest misconception is everything that you're reading.

We — we share an office suite together. We're basically together from 6:30 in the morning until about 11:00 at night.

BANNON: I have a little thing called the war room; he has a fireplace with nice sofas.

PRIEBUS: And it's — it's actually something that you all have helped build, which is, when you bring together — and what this election showed and what President Trump showed, and let's not kid ourselves, I mean I can talk about data and ground game and Steve can talk about big ideas, but the truth of the matter is Donald Trump — President Trump brought together the party and the conservative movement.

And I've got to tell you, if the party and the conservative movement are together, similar to Steve and I, it can't be stopped. And President Trump...

... was the one guy — he was the one person, and I can say it after overseeing 16 people kill each other, it was Donald Trump that was able to bring this — this party and this movement together. And Steve and I know that and we live it every day. Our job is to get the agenda of President Trump through the door and on pen and paper.

BANNON: You know, but we've known it since August 15th, and I think if you look at the opposition party and how they portray the campaign, how they portrayed the transition and now they're portraying

the administration, it's always wrong. I mean, on — on the very first day that Kellyanne and I started, we reached out to Reince, Sean Spicer, Katie.

It's the same team that, you know, every day was grinding away on the campaign, the same team that did the transition, and if you remember, you know, the campaign was the most chaotic — by the media's description, most chaotic, most disorganized, most unprofessional, had no earthly idea what they were doing and then you saw them all crying and weeping that night on — on the 8th when..... when — and the reason it worked — the reason it worked is President Trump. I mean, Trump had those ideas, had that energy, had that vision that could galvanize a team around him of disparate — look, we're a coalition. You know, a lot of people think — have strong beliefs about different things, but we understand that you can come together to win, and we understood that from August 15th and — and we never had a doubt and Donald Trump never had a doubt that he was going to win. And — and I think that that is the power of this movement.

PRIEBUS: And — and on top of that — first of all, President Trump laid out his vision — what was it? -- four or five years ago here at CPAC.

SCHLAPP: That's right.

PRIEBUS: And it was that vision — it's nothing different. If you go back and watch the tape of President Trump four or five years ago, that was the Trump agenda.

One of the things that I used to say all the time — and Governor Walker and everyone gets sick of me saying it, but I think that President Trump found it — which is what this country, what all of us, were starving for the whole time because we're so sick of politics and politicians.

In spite of the fact that we love being here, we — we actually hate politics. But what we were starving for was somebody real, somebody genuine, somebody that was actually who he said he was.

BANNON: Yep — yep.

PRIEBUS: And the — the — the media attacked us on the campaign; remember, attacked me, you can't spend the money on Trump, go give it to the Senate. Attacked us on the transition, we — President Trump put in the best Cabinet in the history of Cabinets I think.

Now — feed ridiculous stories and all we do every day and all President Trump does every day, is hit his agenda every single day, whether it's TPP, whether it's deregulation, whether it's Neil Gorsuch, whatever it is, his promise is coming through every day.

SCHLAPP: He's even — he's even leaving bathrooms alone, that's kind of a nice, refreshing thing for a lot of people as well.

BANNON: They happen to think it's a state issue.

SCHLAPP: Of course.

BANNON: But — but — I think — let's go back to the point that Reince made for a second. President Trump, when he was running, he made a — and this is the other thing that the — the mainstream media or opposition party never caught is that if you want to see the Trump agenda it's very simple.

It was all in the speeches. He went around to these rallies, but those speeches had a tremendous amount of content in them, right? I happen to believe, and I think many others do, he's probably the great public speaker in those large arenas since William Jennings Bryan. This was galvanized.

And remember, we didn't have money. Hillary Clinton and these guys had over $2 billion. We had a couple hundred million dollars. It was those rallies and those speeches, all he's doing right now is, he's laid out an agenda with those speeches for the promises he made. And our job every day is just to execute on that. It's to simply get a path to how those get executed.

And he's maniacally focused on that, and I think that's one of the powers of the transition where many, many people try to come in and try to convince President Trump, hey, you won on this but this is what you want to do.

And he's like, no, I promised the American people this, and this is the plan we're going to execute on. And Reince said — and by the way that's what you've seen; the executive orders, what the Supreme Court — the way he's gone through the Supreme Court. And by the way the other 102 judges that we're eventually going to pick, it's just a methodical — and that's what the mainstream media won't report.

Just like they were dead wrong on the chaos of the campaign and just like they were dead wrong in the chaos of the transition, they are absolutely dead wrong about what's going on today because we have a team that's just grinding it through on President Donald Trump promised the American people. And the mainstream media better understand something, all of those promises are going to be implemented.

SCHLAPP: That's awesome. It's been a...

You know, Steve you're a really likable guy. You should do this more often.

PRIEBUS: He's not so bad.

SCHLAPP: He's not so bad.

PRIEBUS: Most of the time.

BANNON: Yes, exactly.

SCHLAPP: So, what are 30 days of action, and you guys have touched on some of that action. Each one of you, tell me the one or two things that have happened the last 30 days that you think are the most critical. And what is the one thing that you just — like you said Steve — maniacally focused, that has just got to happen early in the administration to really turn this country around? Start first with the first 30 days and then what's that focus after that.

PRIEBUS: So, I mean, there's a lot that — that's happened...

SCHLAPP: A lot.

PRIEBUS: ... in the — in the first 30 days. Whether, you know — and you look at the our — the world — our world order and — and some of the things that are going on that I think are — will be dealt with soon, but the first thing I think is Neil Gorsuch, for a couple things.

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. But more important than that — more important to that, it established trust. It established that President Trump is a man of his word. We always knew that. But when he said here's 20 names on a piece of paper back in July, remember? And he said I'm going to pick my judge out of these 20 people that are on this piece of paper and he did it, that's number one.

PRIEBUS: Because Neil Gorsuch represents a conservative — represents the type of judge that has the vision of Donald Trump and it fulfills the promise that he made to all of you and to all Americans across the country. Second thing, deregulation, what hasn't been talked about a lot is that President Trump signed an order that puts in place a constant deregulatory form within the federal government. And what it says is, for every regulation presented for passage that Cabinet secretary has to identify two that person would eliminate. And that's a big deal.

And then lastly, immigration: protecting the sovereignty of the United States, putting a wall on the southern border, making sure that criminals are not part of our process. These are all things that 80 percent of Americans agree with, and these are all things that President Trump is doing within 30 days.

SCHLAPP: Steve?

BANNON: I think the — I think the same thing; I think if you look at the lines of work, I kind of break it up into three verticals of three buckets. The first is kind of national security and sovereignty, and that's your intelligence, the Defense Department, Homeland Security.

The second line of work is what I refer to as economic nationalism, and that is Wilbur Ross at Commerce, Steven Mnuchin at Treasury, Lighthizer at — at Trade, Peter Navarro, Stephen Miller, these people that are rethinking how we're gonna reconstruct the — our trade arrangements around the world.

The third, broadly, line of work is what is deconstruction of the administrative state. And if you...

So I think — I think the three most important things, I think one of the most pivotal moments in modern American history was his immediate withdraw from TPP. That got us out of a...

... got us out of a trade deal and let our sovereignty come back to ourselves, the people. The mainstream media don't get this, but we're already working in consultation with the Hill. People are starting to think through a whole raft of amazing and innovative, bilateral relationships — bilateral trading relationships with people that will reposition America in the world as a — as a fair trading nation and start to bring jobs. High-value-added manufacturing jobs back to the United States of America.

On the — on the national security part, it was certainly the first — I think the first two E.O.s that you start to see implemented here of the last couple of days under General Kelly. And that is, do rule of law is going to exist when you talk about our sovereignty and you talk about immigration. General Kelly...

... and Attorney General Sessions are adamant — you know, that and you're gonna start to see I think with the defense budget we're going to talk about next week when we bring the budget out and also with certain things about the plan on ISIS and what General Mattis and these guys think I think you'll start to see the other part of that.

But the third, this regulation...

SCHLAPP: Yeah.

BANNON: ... every business leader we've had in is saying not just taxes, but it is — it is also the regulation. I think the consistent, if you look at these Cabinet appointees, they were selected for a reason and that is the deconstruction, the way the progressive left runs, is if they can't get it passed, they're just gonna put in some sort of regulation in — in an agency.

That's all gonna be deconstructed and I think that that's why this regulatory thing is so important.

SCHLAPP: We had Dr. Larry Arnn (ph) on the..... stage earlier today. And he brought up the fact that we're promulgating more laws and regulations that we ever had before. And most of that are from these independent agencies that are just on autopilot. You guys can stop that.

And also, coming from the federal bunch as conservatives, we know that a lot of times we fight out the political wars over issues we care about, and then all of a sudden, liberals on the bench, like a lightning bolt out of the sky, just change things.

And so what you guys are saying about changing that order is amazing. You know, we all — we all consume a lot of news; we watch and read a lot of things, there's been a great democratization in news. People get their news now from literally hundreds and thousands of sites.

What — what would each of you say, what is the — there's all these polls that are being put out again, is Donald Trump doing a good job, is Donald Trump doing a bad job. I know what you all think. We've been hearing it all — all day.

What is it that they keep getting wrong? And do you think it ever gets fixed? What does the media keep getting wrong about this Trump phenomena and what's happening out there in the country? And is there any hope that this changes?

PRIEBUS: I think there's hope that it's going to change. I mean we — we sit here, every day and — and the president pumps out all of this work and — and the executive orders and the punching through of the promises that he made to the American people.

So we're hoping that the media would catch up eventually. But we're so conditioned to it, I'm personally so conditioned to hearing about why President Trump isn't going to win the election. Why one — why a controversy in the primaries going to take down President Trump.

I lived through it, as chairman of the party. And — and it really hit me because it was maybe the summer of 2015, and you remember, the media was constantly pounding President Trump. And the polling kept getting better and better and better for President Trump.

But it was when I went home and got out of this town. And I went back to Kenosha and I talked to my neighbor and I said, "Bob, what do you think?" And he goes, "Man, I really love that Trump."

PRIEBUS: And I said, "Sandy — Sandy, what do you think?" She says, "We're for Trump."

And it was, as you all lived through it too, because you all had different people you were for, but you kept running into your neighbors and you kept running into people that you know. And what did they keep telling you? They kept telling you "Trump, Trump, Trump."

And so...

AUDIENCE: Trump, Trump, Trump...

SCHLAPP: So tomorrow — tomorrow, okay? Just be patient.

PRIEBUS: But I knew, and so it was back then, with my family and my sister, who is a doctor out in San Diego. And it just kept — everyone around me — that nothing — it was impenetrable. Because it goes back to what I said before, which is that the country was hungry for something far more — far bigger than one story or on-off issue. It was something that people wanted in this country, that was real, something that was going to change the direction that we were heading. And it was President Trump that was the answer.

BANNON: The reason Reince and I are good partners is that we can disagree: It's not only not going to get better. It's going to get worse every day.

And here's why. By the way, the internal logic makes sense. They're corporatist, globalist media that are adamantly opposed — adamantly opposed to an economic nationalist agenda like Donald Trump has. President Trump really laid this out, as Reince said, many years ago at CPAC. It's really CPAC that really originally gave him the springboard. It's the first time at Breitbart, we start seeing him, and saw how people, you know, his speeches resonated with people.

And then he would go out to these smaller town halls later and really he got traction with the same message he's bringing today. Here's the only — here's why it's going to get worse: Because he's going to continue to press his agenda. And as economic conditions get better, as more jobs get better, they're going to continue to fight. If you think they're going to give you your country back without a fight, you are sadly mistaken. Every day — every day, it is going to be a fight. And that is what I'm proudest about Donald Trump. All the opportunities he had to waver off this; all the people who have come to him and said, "oh, you've got to moderate." Every day in the Oval Office, he tells Reince and I, "I committed this to the American people; I promised this when I ran; and I'm going to deliver on this."

How novel.

SCHLAPP: How interesting. I remember I was being asked by some reports — they were like, "Why is Trump doing X, Y or Z?" And I said, "Because he said he would do it on the campaign trail."

It's really not that complicated, is it?

But no, there are — there are...

SCHLAPP: ... Okay, I like that one. There are some — there are some parts of this, though, that are fitful. The American Conservative Union, which puts on CPAC, was created after Barry Goldwater lost in 1964, in an effort to take all different kinds of voices from the right in the conservative movement and bring them together.

So there is this question. There are those folks that consider themselves, you know, classical liberals or conservatives or Reagan conservatives. There are other folks that consider themselves libertarians. There are other folks that are part of this new Trump movement. And Trump brought a lot of new people. There's probably in this — people in this crowd that wouldn't have been in this crowd before.

So there's a lot of diversity here. We all know it when we're at the bar at the end of the day. And can this Trump movement be combined with what's happening at CPAC and other conservative movements for 50 years? Can this be brought together? And is — this is going to save the country?

PRIEBUS: Well, first of all, it has to, and we have to stick together as a team. I think that what you've got is an incredible opportunity. We've got an incredible opportunity to use this victory that President Trump and all of us, and you, and everyone that made this happen, put together.

And work together. Continue to communicate. It's very similar. Some of the core principles of President Trump are very similar to those of Ronald Reagan. When you look at peace through strength and building up the military, I mean, how many times have you heard President Trump say, "I'm going to build up the military; I'm going to take care of the vets; I'm going to make sure that we don't have a Navy that's decimated, and planes that are nowhere to be found."

Peace through strength, deregulation. You think about the economy, the economic boom that was created. And some of it is going to take a little time, I mean, to get the jobs back; to get more money in people's pockets. Those things are going to happen.

And in the meantime, we have to stick together and make sure that we've got President Trump for eight years. And he's somebody that we know that we're going to be very proud of as these things get done. But it's going to take all of us working together to make it happen.

BANNON: You know, I've said that there's a new political order that's being formed out of this. And it's still being formed. But if you look at the wide degree of opinions in this room — whether you're a populist; whether you're a limited government conservative; whether you're libertarian; whether you're an economic nationalist — we have wide and sometimes divergent opinions.

But I think we — the center core of what we believe, that we're a nation with an economy, not an economy just in some global marketplace with open borders, but we are a nation with a culture and a — and a reason for being.

And I think that is what unites us and I think that is what is going to unite this movement going forward. President Trump tomorrow is coming, I think, really to express his appreciation.

SCHLAPP: Absolutely. The vice president's coming tonight.

BANNON: The vice president's coming tonight, and the reason he understands in CPAC, there are many, many, many voices, but he's here to say appreciation and to drive this movement forward. This is really where he got his launch, you know, with his ideas in the conservative movement...

SCHLAPP: Absolutely.

BANNON: ... what seven, six years ago — five years ago, and he wanted to show his appreciation.

We're at the top of the first inning of this. And it's going to take just as much fight, just as much focus and just as much determination. And that one thing I'd like to leave you guys today with is that, we want you to have our back. But more importantly...

We know — by the way, President Trump — we never doubted that for a second, but also and more importantly, hold us accountable. Hold us accountable to what we promised, hold us accountable for delivering on what we promised.

SCHLAPP: Let me just ask as we — as we close this out. It's time for — you know you guys have been so sort of Kumbaya here, it's kind of time for a little bit of a group hug.

Let me ask you — okay, I'm sorry I'm going to do the Barbara Walter's thing for those of you who remember Barbara Walters.

Let me ask you, what do you — you've worked really closely with Steve.

PRIEBUS: Right.

SCHLAPP: You say your offices — I know what two offices they are, they are really close to each other. What do you like the most about him?

Hold on, let him think.

PRIEBUS: I love how many collars he wears, interesting look.

One thing — we're different, but where we're very similar is that I think that he is very dogged in making sure that every day the promises that President Trump has made are the promises that we're working on every day, number one.

Number two, he's incredibly loyal. And number three, which I think is a really important quality as we were working together to see to it that President Trump's vision is enacted is that, he's extremely consistent.

That, as you can imagine, there are many things hitting the president's ear and desk every day. Different things that come to the president that want to move him off of his agenda and Steve is very consistent and very loyal to the agenda and is a presence that I think is very important to have in the White House and I consider him..... but — and secondly — and a very dear friend — a very dear friend and someone that we — that I work with every second of the day in — and actually we cherish — I cherish his friendship.

BANNON: Yeah, you know, I can run a little hot on occasions.

And — and Reince is indefatigable; I mean, it's low key, but it's determination. The thing I respect most and the only way this thing works is Reince is always kind of steady, he's got Katie and some other people around him, it's very steady.

But his job is, by far, one of the toughest jobs I've ever seen in my life. To make it run every day, and to make the trains, and you only see the surface. What's going on underneath it, planning what's three weeks down the road to the — to the degree that we're planning it, of all these E.O.s and legislation and — you know, whether it's the tax reform bill, Reince is indefatigable in saying, we've got to drive this forward, we've got to drive this forward.

And I think it's one of the reasons we have such a — and by the way this started back in August when we had this campaign where we were outgunned, outmanned, you know, outspent. And it was because President Trump had a message, he had this charisma, and he had people like here at CPAC and we just put our heads down and that when we — and Reince has been unwavering since the very first moment I met him.

SCHLAPP: Well it's a great honor to have you both here.

I think — I think the best thing we could do is to let these two guys get back to work, what do you think?

PRIEBUS: That's right.

SCHLAPP: Thanks for being here.

PRIEBUS: Thank you, Matt.

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United States Supreme Court

LAIRD v. TATUM, (1972)

No. 71-288

Argued: Decided: October 10, 1972

Memorandum of Mr. Justice REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here. 1

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings on 'Federal Data Banks, Computers and the Bill of Rights,' and because of other statements I made in speeches related to this general subject, I should have [409 U.S. 824 , 825] disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. 455 which provides:

'Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.'
Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration. 2

Respondents in their motions summarize their factual contentions as follows:

'Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.'
Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an 'expert witness for the Justice Department' on the sub- [409 U.S. 824 , 826] ject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my 'intimate knowledge of the evidence underlying the respondents' allegations' seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

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'As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . ..' Hearings, p. 619.
There is one reference to the case of Tatum v. Laird in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a [409 U.S. 824 , 827] colloquy with Senator Ervin. The former appears as follows in the reported hearings:

'However, in connection with the case of Tatum v. Laird, now pending in the U.S.Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.'
The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of Laird v. Tatum, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print- out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter. [409 U.S. 824 , 828] At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in Laird v. Tatum, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government's conduct of the case of Laird v. Tatum.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. 455. The so-called 'mandatory' provisions of that section require disqualification of a Justice or judge 'in any case in which he has a substantial interest, has been of counsel, (or) has been a material witness . . ..'

Since I have neither been of counsel nor have I been a material witness in Laird v. Tatum, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of Mr. Justice White shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or 'if he actively participated in any case even though he did not sign a pleading or brief.' I agree. In both United States v. United States District Court for Eastern District of Michigan, 407 U.S. 297 (1972), for which I was not officially responsible in the Department [409 U.S. 824 , 829] but with respect to which I assisted in drafting the brief, and in & E Contractors v. United States, 406 U.S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of Laird v. Tatum, the application of such a role would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge 'is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.' The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale Law Journal 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

'Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection.' Frank, supra, 35 Law & Contemporary Problems, at 47.
Indeed, different Justices who have come from the Department of Justice have treated the same or very [409 U.S. 824 , 830] similar situations differently. In Schneiderman v. United States, 320 U.S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U.S., at 207 .

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the

defense of the case of Laird v. Tatum does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

'And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position.' Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. [409 U.S. 824 , 831] (1943), quoted in Frank, supra, 56 Yale Law Journal, at 612.
My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the 'Black-Connery Fair Labor Standards Act.' Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S.Rep.No.884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v. Darby, 312 U.S. 100 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.3 But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurther had, prior to coming to this Court, written extensively in the field of labor law. 'The Labor Injunction' which he and Nathan Green co-authored was considered a classical critique of the abuses by the fed- [409 U.S. 824 , 832] eral courts of their equitable jursdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

'The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it.' Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed. 1964).
Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101- 115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v. Hutcheson, 312 U.S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v. Kristensen, 340 U.S. 162 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S., at 176 . Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled 'Liberty, Property, and Social Justice' he discussed at some length the doctrine expounded in the case of Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394 (1922). I think that one [409 U.S. 824 , 833] would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209-211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), in which a closely divided Court overruled Adkins. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

'In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no.' Frank, supra, 35 Law & Contemporary Problems, at 50.
Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms

of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case be- [409 U.S. 824 , 835] fore a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson;4 that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v. Judicial Council, 398 U.S. 74, 137 , 90 S. Ct. 1648, 1681 (1970), strikes me as being equally true of the Justices of this Court:

'Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this [409 U.S. 824 , 835] when they appraise the quality and image of the judiciary in their own community.'
Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, e.g., the opinion of Mr. Justice Harlan, joining in Lewis v. Manufacturers National Bank, 364 U.S. 603, 610 , 350d 323 (1961). Indeed, there is weighty authority for this proposition even when the cases are [409 U.S. 824 , 836] the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v. Worcester Consolidated Street R. Co., 196 U.S. 539 (1905), reviewing, 182 Mass. 49, 64 N. E. 581 (1902); Dunbar v. Dunbar, 190 U.S. 340 (1903), reviewing, 180 Mass. 170, 62 N.E. 248 (1901); Glidden v. Harrington, 189 U.S. 255 (1903), reviewing, 179 Mass. 486, 61 N.E. 54 (1901); and Williams v. Parker, 188 U.S. 491 (1903), reviewing, 174 Mass. 476, 55 N.E. 77 (1899).

Mr. Frank sums the matter up this way:

'Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way.' Frank, supra, 35 Law & Contemporary Problems, at 48.
The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification. 5

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself [409 U.S. 824 , 837] simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification.

Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. Edwards v. United States, 334 F. 2d 360, 362 (CA5 1964); Tynan v. United States, 126 U.S.App.D.C. 206, 376 F.2d 761 (1967); In re Union Leader Corporation, 292 F.2d 381 (CA1 1961); Wolfson v. Palmieri, 396 F.2d 121 (CA2 1968); Simmons v. United States, 302 F.2d 71 (CA3 1962); United States v. Hoffa, 382 F.2d 856 (CA6 1967); Tucker v. Kerner, 186 F.2d 79 (CA7 1950); Walker v. Bishop, 408 F.2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the 'equal duty' concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, e.g., Tinker v. Des Moines etc. School District, D.C., 258 F.Supp. 1971, affirmed by an equally divided court, 383 F.2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U.S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an [409 U.S. 824 , 838] equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances. 6 Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instance is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down 'one rule in Athens, and another rule in Rome' with a vengeance. And since the notion of 'public statement' disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U.S.C. 453 which is taken by each person upon becoming a member of the federal judiciary requires that he 'administer justice without respect to persons, and do equal right to the poor and to the rich,' that he 'faithfully and impartially discharge and perform all the duties incumbent upon (him) . . . agreeably to the Constitution and laws of the United States.' Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the [409 U.S. 824 , 839] practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is denied. 7

Motion denied.

Footnotes

[Footnote 1] In a motion of this kind, there is not apt to be anything akin to the 'record' which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the mainthrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

[Footnote 2] See Executive Report No. 91-92, 91st Cong., 1st Sess., Nomination of Clement F. Haynsworth, Jr., pp. 10-11.

[Footnote 3] See denial of petition for rehearing in Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 897 (1945) (Jackson, J., concurring).

[Footnote 4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in Kristensen does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

[Footnote 5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

[Footnote 6] Branzburg v. Hayes, In re Pappas, and United States v. Caldwell, 408 U.S. 665 (1972). Gelbard v. United States and United States v. Egan, 408 U.S. 41 (1972). Evansville-Vanderburgh Airport Authority District v. Delta Airlines Inc. and Northeast Airlines Inc. v. New Hampshire Aeronautics Commission, 405 U.S. 707 (1972).

[Footnote 7] Petitioners in Gravel v. United States, 408 U.S. 606 (1972), have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case. Because respondents' motion in Laird was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in Gravel, insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it relates to disqualification verges on the frivolous. While my peripheral advisory role in New York Times Co. v. United States, 403 U.S. 713 (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in Gravel, a different case raising entirely different constitutional issues.

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OPINION | LAW

Democrats' Misguided Argument Against Gorsuch

Judges should stand up for the law, not for the "little guy."

By Noah Feldman
March 15, 2017, 8:30 AM EDT

Boom. *Photographer: Alex Wong*

I'm not sure who decided that the Democratic critique of U.S. Supreme Court nominee Judge Neil Gorsuch would be that he doesn't side with the little guy <https://www.nytimes.com/2017/03/13/us/politics/democrats-judge-gorsuch-confirmation-hearing.html>. It's a truly terrible idea. Like other liberals, I'm still shocked and upset that Judge Merrick Garland never got the vote he deserved after his nomination by President Barack Obama, and I'd rather have a progressive justice join the court. But the thing is, siding with workers against employers isn't a jurisprudential position. It's a political stance. And justices -- including progressive justices -- shouldn't decide cases based on who the parties are. They should decide cases based on their beliefs about how the law should be interpreted.

Let's start at the beginning. Way back in the beginning, in fact. The Hebrew Bible, which sides with the little guy a great deal, has something to say about parties to a case. Specifically, Deuteronomy 16:19 says judges shouldn't "respect persons," which is the King James Version's translation of the Hebrew phrase that literally means "recognize faces." Justice -- which is mentioned in the famous next verse ("Justice, justice shalt thou pursue") -- requires judges to decide cases under the law, not based on preferences for individuals.

QuickTake

<https://www.bloomberg.com/news/videos/2017-02-01/quicktake-u-s-supreme-court-nominee-neil-gorsuch>

If the Bible doesn't convince you, consider the whole point of a rule-of-law system: It establishes rules so that people can be confident in advance of how decisions are made. That creates regularity and predictability. And in the long run, it protects the little guy a lot better than a system rigged to favor one side, because such systems will naturally tend to favor the rich and powerful, not the poor and downtrodden.

Assuring that the rule of law is followed is in fact the specific role of appellate judges, like Gorsuch. Trial judges find facts and also interpret the law. Appellate judges aren't supposed to revisit facts determined by the trial court. They're supposed to make sure the legal rules are applied consistently.

Looking at the Gorsuch decisions that the Democrats have made into their touchstones demonstrates how misguided their strategy is, legally speaking.

One of them, TransAm Trucking Inc. v. Administrative Review Board <https://www.ca10.uscourts.gov/opinions/15/15-9504.pdf> , involved the agency's determination that a trucker had been wrongfully fired after refusing to stay with his truck on a cold winter night as directed by a dispatcher. The majority of the panel on the U.S. Court of Appeals for the 10th Circuit upheld the agency on highly creative grounds. The relevant law said the driver couldn't be fired for refusing to operate his vehicle under the conditions set by the trucking company. The judges held that the driver, who drove away in his cab, had arguably refused to operate the vehicle -- because the term "operate" in the statute was vague.

Gorsuch dissented. The panel had relied on the so-called Chevron doctrine, a special bugaboo <https://www.bloomberg.com/view/articles/2017-02-03/get-ready-supreme-court-fans-brush-up-on-your-chevron-doctrine> of Gorsuch's, in which judges defer to agencies' interpretations of unclear laws. Gorsuch said the law wasn't ambiguous as required by Chevron, because the driver was fired for failing to stay with his truck full of cargo, not for driving away.

I'm not sure Gorsuch was right -- but his view was perfectly defensible, and it certainly didn't seem to be driven by dislike of the driver. Rather, Gorsuch followed his preference for reading the law on its own terms and against Chevron. There's nothing troubling about it.

Another case that progressives are citing <https://www.aclu.org/blog/speak-freely/supreme-court-nominee-neil-gorsuch-has-troubling-history-when-ruling-disability> involved denial of state funding for placement of an autistic child under the Individuals with Disabilities Education Act. Gorsuch wrote the opinion <http://caselaw.findlaw.com/us-10th-circuit/1246149.html> , reasoning that under binding Supreme Court precedent, the boy's existing school placement was legally sufficient because he was making progress.

As it happens, the law regarding the proper standard to apply in such cases is uncertain -- so much so that the Supreme Court is considering <https://www.bloomberg.com/view/articles/2017-01-11/supreme-court-gets-between-schools-and-parents> it this term. The 10th Circuit standard, which Gorsuch helped craft, may be too narrow; I certainly think so. But it's a plausible reading of the existing precedent.

It would be nice if Gorsuch had pushed for a more inclusive, and arguably more progressive, standard. But it doesn't show a lack of sympathy for autistic kids -- especially when you consider that wealthier parents are better placed to go to court and challenge state determinations of what resources should go to their disabled kids.

The last case being mentioned, Hwang v. Kansas State University <https://www.ca10.uscourts.gov/opinions/13/13-3070.pdf> , raised the question of whether it's a reasonable accommodation under the Rehabilitation Act to stay out of work beyond the term of six months' leave granted by the employer. Grace Hwang, a professor at KSU, got the university's maximum of six months' leave as she underwent cancer treatment. She was about to return to work when a flu epidemic hit the campus. Concerned that she might get sick while immunocompromised, she requested further leave as a reasonable accommodation.

Gorsuch wrote for a unanimous panel that staying out of work beyond the six months wasn't an accommodation at all, because accommodation requires you to do the job, and not coming to work isn't doing the job. He reasoned that she could go on disability leave. As he

put it, "Ms. Hwang's is a terrible problem, one in no way of her own making, but it's a problem other forms of social security aim to address."

That may sound somewhat harsh, but legally speaking, it isn't shocking -- and it might even be correct. Accommodation isn't an endlessly flexible standard and, at some point, inability to work becomes a basis for disability. The statute could require longer sick leave but, as written, it doesn't.

It's perfectly fine to resist Gorsuch for not adhering to a progressive jurisprudence that takes seriously the government's duty to regulate the market <http://www.nytimes.com/2010/06/27/magazine/27Court-sub-t.html> . But it isn't fine to say he should side with workers against employers or parents against school districts. The rule of law isn't liberal or conservative -- and it shouldn't be.

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To contact the author of this story:
Noah Feldman at nfeldman7@bloomberg.net

To contact the editor responsible for this story:
Stacey Shick at sshick@bloomberg.net

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San Francisco Chronicle

Judge Gorsuch failed our family

BY Frank, David and Katherine Hwang and Jean Hwang Carrant, Mar. 14,2017

When Judge Neil Gorsuch ruled against our family member battling cancer, Grace Hwang, almost three years ago, his decision was heartless. It removed the human element from the equation. It did not bring justice.

This total lack of a human perspective is absolutely not what we want to see in a judge, and we find it disturbing, especially when you think about the power a judge has to affect people's lives. Given how Gorsuch ruled as a federal circuit judge, he should not be confirmed to the U.S. Supreme Court.

Grace was mother to two of us and sister to the other two. After coming to America from Taiwan at a young age, Grace grew up to become a fighter for the rights of minorities and women. She always kept an upbeat, positive attitude, no matter how hard things became. She died last summer at age 60.

Grace had a passion for justice. We saw this throughout her life when she was a political science undergrad at Kansas State University, a Fulbright scholar in Sweden, a law student at Georgetown University, a corporate lawyer and board member of the Asian American Legal Defense and Education Fund in New York, a parent and, after returning to Kansas, a successful fundraiser of millions of dollars for the Kansas State University Foundation and a professor there.

Grace was in her early 50s when she was diagnosed with breast cancer. It came as a huge shock to her and for us, who considered Grace invincible. She got treatment, and finally her doctors said she was in remission.

Then came several episodes of poor health, a couple of misdiagnoses, and ultimately, the doctors said Grace had leukemia. She was teaching leadership studies at the time (she was passionate about that, too) and underwent a stem cell transplant. Even when she was in the hospital, she was in contact with fellow teachers and students.

Grace had a six-month paid leave from work. She wanted to go back to work afterward, but her doctors advised her not to, because there was a flu epidemic on campus and her immune system was compromised. So she asked for her sick leave to be extended. The university rejected that request and said she couldn't work from home either.

Grace lost her job. We felt the university had betrayed our trust.

But Grace wasn't a quitter. She sued Kansas State. Her complaint said the university had violated the law, because federal law says people with disabilities must be reasonably accommodated at work. In May 2014, Gorsuch sided with Kansas State.

In writing his decision, Gorsuch said the purpose of federal law is "not to turn employers into safety net providers for those who cannot work." He said that Grace's six months of leave were "more than sufficient," and that attendance was a basic expectation of employees. But Grace wasn't asking for a vacation. She was asking for what the law provides: a reasonable accommodation so she could work from home instead of going to campus and potentially dying.

When she heard about the court's ruling, she couldn't believe it. We couldn't either.

Our hearts were broken by the way our justice system failed Grace. Key to that failure was the ruling written by Gorsuch, with its callous disregard for Grace and her condition. We don't want other people facing disabilities to suffer in the same way. We need judges who will think about the real people at the center of cases such as Grace's, more than anything else.

Judge Gorsuch does not appear to be that kind of person. For our family, it would be very disheartening to see him granted a lifetime seat on the Supreme Court.

David and Katherine Hwang are Grace Hwang's children. Frank Hwang and Jean Hwang Carrant are her siblings.

The Washington Post

Opinions

There is no principled reason to vote against Gorsuch

By David C. Frederick March 8

David C. Frederick is a lawyer at the firm Kellogg, Hansen, Todd, Figel & Frederick who specializes in Supreme Court and appellate practice.

As a longtime supporter of Democratic candidates and progressive causes, I understand the anger at the Republicans' mistreatment of Judge Merrick Garland after he was nominated to the Supreme Court by President Barack Obama. Partisan advantage reigned over fairness of process, and an exceptionally fine jurist was treated shabbily.

But as Judge Neil Gorsuch — President Trump's choice for the court seat that Garland would have filled — approaches his confirmation hearings, I fear that the lingering resentments of the past year will cloak a fair consideration of him as a nominee. Gorsuch — my former law partner and longtime friend — is brilliant, diligent, open-minded and thoughtful. He was the only Supreme Court candidate considered by this administration that I could support. The Senate should confirm him because there is no principled reason to vote no.

As a private-sector attorney, Gorsuch could have practiced with any large corporate law firm in the United States, but he instead chose a small firm in its very early days — a riskier path, to be sure. Over the course of his 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 filed (and prevailed with) class actions on behalf of consumers. We should applaud such independence of mind and spirit in Supreme Court nominees.

As a judge on the U.S. Court of Appeals for the 10th Circuit, Gorsuch has not been the reflexive, hard-edged conservative that many depict him to be. He has ruled for plaintiffs and for defendants; for those accused of crimes as well as for law enforcement; for those who entered the country illegally; and for those harmed by environmental damage.

Anyone who sees Gorsuch as automatically pro-corporation should talk to the officers at Rockwell International and Dow Chemical, against whom he reinstated a $920 million jury verdict for environmental contamination at the Rocky Flats nuclear facility. Executives at U.S. Tobacco Company might also be wringing their hands at the moment, given that Gorsuch, as an attorney, helped to attain one of the largest antitrust verdicts in history against the company.

Gorsuch's approach to resolving legal problems as a lawyer and a judge embodies a reverence for our country's values and legal system. The facts developed in a case matter to him; the legal rules established by legislatures and through precedent deserve deep respect; and the importance of treating litigants, counsel and colleagues with civility is deeply ingrained in him.

Some years ago, he called me about a case he had reviewed on the 10th Circuit's motions docket involving an Arab Muslim incarcerated in a state prison. The guards allegedly called the inmate "9/11" and mistreated him during his confinement. The district court had rejected the inmate's claim that his constitutional rights had been violated and dismissed his lawsuit.

Over the phone, though, Gorsuch explained that he thought the plaintiff prisoner might have a valid claim, but couldn't tell for sure. He asked our law firm to represent the inmate, which I agreed to do so long as a younger colleague could be the principal lawyer on the case and argue under my supervision.

Gorsuch agreed and then recused himself from the case to avoid an appearance of conflict. My associate, Janie Nitze, later won a reversal by the 10th Circuit, which reinstated the prisoner's claims. That man got his day in court because of Gorsuch's conscientious approach to judging.

I have no doubt that I will disagree with some decisions that Gorsuch might render as a Supreme Court justice. Yet, my hope is to have justices on the bench such as Gorsuch and Garland who approach cases with fairness and intellectual rigor, and who care about precedent and the limits of their roles as judges. The Supreme Court's work is complex and varied, and we need those qualities of mind and judicial temperament for all cases.

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Michael Gerson: Gorsuch's so-called weakness is really his greatest strength

I'm a moderate for Gorsuch: Former law clerk

www.usatoday.com /story/opinion/2017/02/13/moderate-former-law-clerk-for-gorsuch-column/97823362/

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I'm a moderate for Gorsuch: Former law clerk

He pushed us for research and didn't bring preconceptions into the courtroom.

I am a moderate, like many Americans. I have more often than not voted for Democrats rather than Republicans, and I deeply believe that our government has a necessary and active role in righting the many injustices present in our society and the world. But I can't help wondering, are we asking the right questions about nominees to the Supreme Court?

Shortly after I posted a *New York Times* column supportive of Judge Neil Gorsuch on Facebook, I received queries and demands asking about his opinion on "LGBTQ rights, abortion, science over religion, climate change, gun control," among other pressing social issues. One commenter vented frustration that despite having read numerous articles about Gorsuch, he could not find specifics on his views.

Although I worked closely with Gorsuch for a year as one of his law clerks, and spent social hours with the judge, his family and other clerks, I also struggled to come up with an answer. And then I smiled because I realized the judge lives by the principle that "justice is blind." He did not bring preconceived positions on social issues into the courtroom. Rather, he pushed us to thoroughly research all sides of each case that came through his chambers.

From personal experience, I can add that the judge deliberately sought clerks with diverse perspectives and encouraged open debates to reach the best conclusion. I recall one such experience in particular where my co-clerk and I were at odds on a legal issue in a case. The judge indicated that he was more convinced by my colleague but rather than rejecting my position outright, he challenged me — "prove to me you are right." Several hours and many coffees later, I came back with the best I had. And this time he agreed.

The judge's commitment to being objective and deliberating on all issues before him is further demonstrated by the support he has received from his left-leaning colleagues who have worked with him. These respected liberal colleagues specifically note his commitment to understanding the diverse perspectives on an issue, and his collegiality.

As a culture, our obsessive focus on the political views of a potential Supreme Court justice could be reflecting back towards us some key information about what's really going on. Namely, that despite having democratically elected representatives at the local, state and national levels, whose duty it is to address our social concerns, we nevertheless feel disenfranchised from the political process. It is the job of legislators to faithfully make laws that better society, and we must hold them to account if this duty is not being adequately fulfilled.

On the other hand, the role of the judiciary is quite different but critically complementary in a democracy. Legislators cannot be expected to always take into account the minority view in a culture. Although the minority may participate in the political process, because their views are not held by the mainstream, they run the risk of being trampled. Our political and legal systems are designed to protect the core rights and freedoms of all peoples. This is the beauty of our constitutional system and a principal reason that it is emulated the world over: Our system preserves the essential liberties of all, no matter how unpopular their views are and even if others are more powerful.

This is the great contribution of the judiciary. It does not create policies or agree with the politics of the current progressive majority in society. It does preserve and protect as inviolate the core rights enshrined in our Constitution

so that no one may be deprived of them — among them our rights to freedom of religion, liberty, self-determination and self-expression.

It is with this view in mind that we should be critically evaluating Judge Gorsuch and asking whether he can be faithfully counted upon to defend the core rights contained in the Constitution, despite the prevailing popular sentiment. The testimonies of those who have worked with him and his judicial record are a unanimous yes. By way of example, the judge has ruled in support of rights to religious freedoms (*Hobby Lobby Stores*) and to privacy (*United States v. Carloss*).

The judge also takes seriously the solemn duty of applying the law with rigor. Soon after he took the bench on the 10th Circuit, he took all of his clerks and office staff (myself included) to visit several federal prisons. He wanted to see for himself, and for us to all understand, the importance of applying justice in every case — for the lives of others depended on us doing the best job we possibly could. Judge Gorsuch is a sincere, humble and devoted steward of the law who has a demonstrated record of faithfully upholding our constitutional rights. He deserves our support.

Jessica Greenstone clerked for Judge Neil M. Gorsuch of the U.S. Court of Appeals for the 10th Circuit from 2006 to 2007. She currently serves as World Wildlife Fund South Africa's Marine Science & Policy Lead.

The Des Moines Register

Gorsuch would endanger most vulnerable: persons with disabilities

BY Sen. Tom Harkin and Eve Hill, Mar. 21, 2017

As the chief Senate sponsor of the Americans with Disabilities Act, and as an attorney enforcing the ADA for over 20 years, respectively, we have grave concerns that Supreme Court nominee Neil Gorsuch has repeatedly ignored critical disability rights laws and hurt children and workers who rely on those laws.

One of the most disturbing areas of that record involves the education of children with disabilities. Until the 1970s, that opportunity was largely denied to students with disabilities.

In 1975, Congress opened the doors to public education for children with disabilities by passing the Individuals with Disabilities Education Act (IDEA). While the Supreme Court has interpreted this to mean that schools must provide a "meaningful" educational benefit, Judge Gorsuch has held that the law is satisfied if a student with a disability receives "merely … 'more than de minimis'" educational benefit.

This has real-world consequences. As just one example, in a case involving a student with autism — Luke P. — who needed placement in a residential school program due to his lack of progress in school, Judge Gorsuch substituted his own opinion for that of an impartial hearing officer, an administrative law judge and a district court judge. He found that the school was meeting its obligations even though Luke had made progress on less than a quarter of his goals, was regressing; and was unable to carry any progress he made into his life outside the classroom. Because of Judge Gorsuch's opinion, students like Luke are not getting the education they need and to which they are entitled.

Judge Gorsuch's opinions on disability rights for adults are equally troubling. For example, he flatly ignored Congress's direction that multiple sclerosis was intended to be protected under the ADA and held that an employee with multiple sclerosis did not have a disability because she was still able to work.

Congress has also provided that persons with a disability are entitled to leave time as a reasonable accommodation, unless it causes an undue hardship for the employer. Yet Judge Gorsuch again ignored Congress to rule against a person with a disability. In Hwang v. Kansas State University, Grace Hwang, a college professor, had had breast cancer, and was recovering from leukemia. After she took leave to have a stem cell transplant, she was ready to return to work. However, there was a flu outbreak on campus and her doctor told her not to return to work because of her weakened immune system. So, she asked her employer for a few extra weeks of leave; a request that was denied.

When Professor Hwang sought to exercise her rights under the Rehabilitation Act, Judge Gorsuch went out of his way to rule against her. Judge Gorsuch held that Hwang's request was unreasonable and the amount of leave she had already used was "more than sufficient." He opined that the Rehabilitation Act should "not turn employers into safety net providers for those who cannot work," ignoring that this was precisely the type of situation Congress intended to remedy, and cruelly implying that Grace Hwang was someone trying to game the system as opposed to a cancer survivor whose doctor told her if she returned to work immediately she might die.

Judge Gorsuch similarly gutted protections under the Fair Housing Act. In Cinnamon Hills Youth Crisis Center v. Saint George City, he held that a group home for children with disabilities was not entitled to a reasonable modification of a local rule prohibiting residential stays of more than 29 days. Judge Gorsuch conducted no analysis of whether the accommodation was reasonable or would create an undue hardship, as the Fair Housing Act requires. Instead, he determined that, because people without disabilities were not permitted to violate the 29-day rule, people with disabilities were not entitled to a modification of the rule. Judge Gorsuch discounted the fact that the city did, in fact, exempt some nondisabled people (including law enforcement personnel and others) from the rule.

Judge Gorsuch's decisions and writings demonstrate an insensitive and uncaring view of the discrimination faced by people with disabilities, as well as a callous disregard for Congressional intent in enacting disability rights laws. A person should not be confirmed to a lifetime appointment to the Supreme Court whose record shows a lack of commitment to applying acts of Congress and ensuring that our most vulnerable citizens — persons with disabilities — are afforded every opportunity to lead full and productive lives. Judge Gorsuch has repeatedly shown he will not protect the rights of persons with disabilities.

Former U.S. Sen. Tom Harkin served Iowa in the Senate from 1985 to 2015. Eve Hill formerly served as deputy assistant attorney general for the Civil Rights Division at the Justice Department. She was responsible for oversight of disability rights enforcement.

Crying wolf over Neil Gorsuch

www.chicagotribune.com/news/opinion/commentary/ct-neil-gorsuch-moderate-supreme-court-perspec-0209-md-20170208-story.html

Dennis J. Hutchinson

Two principal arguments have emerged for opposing the confirmation of Neil Gorsuch to the U.S. Supreme Court. First, because Senate Republicans refused to provide a hearing to Judge Merrick Garland, President Barack Obama's nominee, Democrats should use whatever mechanism necessary to prevent a hearing for Gorsuch. The second argument is that Gorsuch is a judicial soul mate of the late Justice Antonin Scalia, whose seat he would assume, and thus is not in the "mainstream" of American legal thought.

I have known Neil Gorsuch for almost 25 years, although we are not close. Politically, I am a lifelong registered Democrat and have been for almost 50 years.

The first opposition argument amounts to "two wrongs make a right." That is simply a continuation of the shameless schoolyard level of debate that deeply marred the presidential campaign. Tit for tat may be politically tempting, but as a principle of evaluating judicial nominees, it goes nowhere, except as an excuse for all sides to ignore principle altogether.

The second argument is little more than the first argument dressed up in more theoretical terms. The logic runs like this: Merrick Garland was a moderate, the GOP stole his seat, therefore, to be legitimate, the new nominee should also be a moderate. But "moderate," like "mainstream," is entirely in the eye of the beholder. Your moderate is my radical, and vice versa. There is no definition of "moderate" that any two friends of different political parties could agree on, much less any two senators across the aisle from each other, much less any actual judge in an actual case.

Comparing these two very distinguished public servants with extraordinary credentials is difficult because their judicial records are based in two very different federal appellate courts. Garland sits on the District of Columbia Circuit with a docket that is almost exclusively administrative; he sees very few criminal cases. Gorsuch's court covers six western states inhabited by more than 17 million people. The court, based in Denver, has cases involving almost every conceivable category of federal law.

Gorsuch has written a number of opinions on the scope of the Fourth Amendment, for example. In some cases, he holds that the evidence must be suppressed because of an illegal search; in others, he finds that the alleged violation doesn't require suppression as a matter of law. In other words, his decisions are made on a case-by-case basis, and not on reflex. Many other examples could be cataloged.

So far, the most substantive worry that has been raised about Gorsuch's record is that he is dubious about so-called Chevron deference, a 1984 Supreme Court instruction that tells courts to accept the interpretations of laws and rules that come from the various federal agencies in charge of carrying out those laws and writing those rules. The deference doctrine was born out of suspicion that courts might otherwise meddle with agencies' work and override the agencies' superior expertise.

There are two sides to deference, however. My guess is that pro-Chevron advocates will soon be begging federal courts *not* to defer to the interpretive findings of agencies headed by men and women whose stated goal is to undermine the mission of the very bodies they head (say, perhaps, an official Environmental Protection Agency finding that "global warming is a hoax").

And that leads to a final point that should be foremost in the minds of those considering this nomination. The greatest risk to individual freedom now is excessive executive power. And the question for judges is, who can stand

up to it and who will simply ratify it? Judge Gorsuch's record is one of acute skepticism toward complacent exercises of executive power. He has demonstrated himself as someone committed to the rule of law.

Cynics may scoff at the concept, but it is absolutely crucial to the integrity of the American constitutional system. In case after case, Gorsuch has asked, what is the law, how is it being applied and does it square with the constitutional basis of authority?

Others will argue these points in more, and undoubtedly numbing, detail. Some will reach for poignant fact situations with strong emotional appeal but minimal relevance to legal wisdom. (John Roberts was pilloried over upholding the prosecution for someone eating a french fry on the Metro.) Others will paint decisions as boons or banes to special interests. When they do, they will be back in the moderate trap, preaching only to their own faithful.

But there is a darker question hovering over the Gorsuch nomination. When someone so scrupulously formal in his treatment of the Constitution is treated as a radical, "outside the mainstream," what happens when a genuine radical is nominated? Someone who is more than happy to reinterpret the Constitution on a daily basis to vindicate his or her political convictions? Someone who thinks the rule of law is simply a matter of who has the votes?

The risk of crying wolf is a frightening children's story. It may cast a chilling constitutional shadow now.

Dennis J. Hutchinson is a professor of law at the University of Chicago and edits The Supreme Court Review.

University of Colorado Boulder

Jennifer Sisk <jesi9832@colorado.edu>

Follow up to conversation re class discussion

2 messages

Whiting Dimock Leary [redacted] Thu, Apr 28, 2016 at 5:09 PM
To: Jennifer Robin Sisk <Jennifer.Sisk@colorado.edu>

Jennie,

Thank you for meeting with me and sharing your experience. I am so sorry you had to hear all of that. I just talked with Dean Weiser about the experience, and he still would like to meet with you next week. As discussed, there will be no follow up before grades are done, but after that, one of us will talk with Judge Gorsuch (and of course, keep your identity confidential).

Again, thank you. I look forward to seeing you next Saturday if not before!!!

Dean Leary

Jennifer Robin Sisk <Jennifer.Sisk@colorado.edu> Fri, Apr 29, 2016 at 2:50 PM
Reply-To: Jennifer.Sisk@colorado.edu
To: Whiting Dimock Leary [redacted]

Thank you Dean Leary for following up. I'll plan to keep my meeting with Dean Weiser next Friday.

See you at graduation.

Jennie
[Quoted text hidden]

--
Jennifer Sisk
JD Candidate 2016
Chair - Jim R. Carrigan Cup Tournament
External Competition and Outreach Chair - CU Law National Mock Trial Team
Member - CU Law National Moot Court Team

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Jennifer Sisk

To/dr rant patriarchy

In my finals hours of law school I'm grateful for the professor who spends the entire lecture bemoaning the workaholic, alcohol, mental health problems in the profession yet argues the only jobs worth taking are biglaw jobs with starting salaries at 120,000. Who reminds us that public service jobs are a waste of time because you "just burn out after 5 maybe 6 years" and where's the paycheck plus what law firm will hire you after one of those? And then ends the lecture with a class hypo about women who are asked if they plan to start families soon in their interviews and then uses our answers to talk about how poor firms hire these women and then "many" end of getting pregnant, taking full maternity leave and then just quitting right away

I'm truly grateful for rich white men reminding me the true purpose of the law is money, except for women lawyers where the true purpose is money until you are lucky enough to find a man willing to knock you up

[redacted]

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there will be an opening at your school...
Like Reply 8

[redacted] To the extent you can, make a list of each thing he said and exactly what he said. If you can gather together other people from your class to co-sign, that's even better.
Like Reply 3

Jennifer [redacted] Thanks for the support and suggestions. It was an adjunct teacher whose day job is as a federal judge. Becca- Gorsuch. I'm reaching out to speak to both our Dean, who is leaving, and Dean of Students, who is staying. He's been pretty firmly white-shoe-is-the-worthy-career all semester which is grating and at odds with the reality of our school. However the comments about women attorneys is just inexcusable.
Like Reply

[redacted] Argg. I'm frustrated with you.
Like Reply

[redacted] To save everyone else from Googling this toolbox: https://en.wikipedia.org/wiki/Neil_Gorsuch

Neil Gorsuch - Wikipedia, the free encyclopedia

Neil McGill Gorsuch (born August 29, 1967 in Denver, Colorado) is a federal judge on the United States Court of Appeals for the Tenth Circuit.[1] He is the son of Anne Burford, the first female head of the United States Environmental Protection Agency.

Like Reply

[redacted] Ugh. This guy is in my circuit. What are your recording consent laws like? Maybe the media would like to know about this?
Like Reply 2

[redacted] Of course it was--we just had a judge fired midsemester for her harassing comments towards the women in her trial ad class. She was my evidence prof and she was batshit.
Like Reply

[redacted] His mother was an attorney and Republican politician. Apparently she had a career and kids.
Like Reply

[redacted] Jesus. I do NOT want to think about him bringing those biases to the bench.
Like Reply

[redacted] I'm pretty sure I know someone who clerked for him. He was a real jerk to work for as well.
Like Reply

[redacted] And on a side note, I work in one office of the 9 office NH Public

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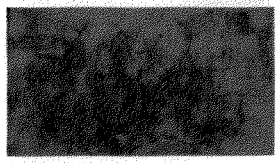

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Supreme Court nominee Neil Gorsuch is a home run

helenair.com/news/opinion/guest/supreme-court-nominee-neil-gorsuch-is-a-home-run/article_500d9261-1516-53db-acb4-18b0d953aa15.html

In my last "Ask the Judge" column I pointed out how important Supreme Court nominations are. Since that time, President Trump has nominated Judge Neil Gorsuch to the Supreme Court. Let's take an objective look at Judge Gorsuch's qualifications.

Gorsuch's educational background

Judge Gorsuch grew up in Denver, Colorado, but graduated from Georgetown Preparatory School, received a B.A. from Columbia in three years Phi Beta Kappa (which only recognizes students in the top 10 percent of their class). Gorsuch then attended Harvard Law School, graduating cum laude (top 25 percent of the class). Not one to rest on his laurels, Gorsuch then received a Doctor of Philosophy degree from Oxford. Clearly, Gorsuch checks all the boxes in the education department.

Gorsuch's legal career

Gorsuch first clerked for a judge on the U.S. Court of Appeals (D.C. Circuit) and then clerked for U.S. Supreme Court Justices Byron White and Anthony Kennedy. I once heard a quip that "the US Supreme Court is the place where the best and brightest lawyers in American go.....and clerk." For the next ten years Gorsuch practiced law with a Washington, D.C. law firm, making partner after three years. Gorsuch was then appointed Principal Director to the Associate Attorney General in the Department of Justice, before he was appointed to the U.S. Court of Appeals for the Tenth Circuit by President Bush, where he has served the past ten years. Gorsuch was deemed "well qualified" by the American Bar Association, and was confirmed to the 10th Circuit by a unanimous voice vote by the Senate. Clearly, Judge Gorsuch has checked all the boxes for a stellar legal career.

I am not sure how a U.S. Senator decides how to measure the qualifications of a judicial candidate. If it is on tangibles like education and legal career, Gorsuch would be hard not to support. It would be difficult to find finer education and career credentials.

Gorsuch's legal philosophy

While it is sometimes risky to look at a few decisions over a ten year judicial career and come to conclusions, several of Judge Gorsuch's opinions tell us something about his judicial philosophy. Judge Gorsuch's most famous decision is Hobby Lobby Stores v. Sebelius (2013), where Gorsuch concurred in an opinion finding the Affordable Care Act's contraceptive mandate on a private business violated the Religious Freedom Restoration Act. This indicates Gorsuch believes in religious freedom. This ruling was affirmed by the U.S. Supreme Court 5-4 in Burwell v. Hobby Lobby (2014).

In an interesting case where Justice Scalia and Justice Ginsberg agreed with Gorsuch in a dissenting opinion together, Reynolds v. United States (2012), Gorsuch argued a federal act possibly violated the non-delegation doctrine, essentially finding federal agencies cannot be delegated too much power by Congressional fiat.

I have a good college friend who has a plaintiff's civil practice in Colorado. He is a staunch Democrat. He praised Judge Gorsuch as "a mainstream conservative who follows the law, and is known as a nice guy."

Summary

Judge Gorsuch believes judges should follow the law, not make it. That policy decisions are up to Congress, not

Courts. Gorsuch favors state's rights over federal rights, and believes the Constitution should be given its original intent, not to be changed based on today's mores. Importantly for Montanans, Gorsuch is a fellow Westerner. In the end analysis, I believe the selection of Judge Gorsuch is a home run. He will make an excellent Supreme Court justice and should be confirmed without delay.

Judge Russell Fagg has been a State District Court Judge for 22 years, handling over 25,000 cases. Fagg served two terms in the Montana Legislature and is past president of the Montana Judges Association.

California LAWYER

Antonin Scalia

Jan. 2011

Video Highlights

Last October marked the 24th anniversary of Justice Antonin Scalia's appointment to the U.S. Supreme Court. Well known for his sharp wit as well as his originalist approach to the Constitution, Justice Scalia consistently asks more questions during oral arguments and makes more comments than any other Supreme Court justice. And according to one study, he also gets the most laughs from those who come to watch these arguments. In September Justice Scalia spoke with UC Hastings law professor Calvin Massey.

Q. How would you characterize the role of the Supreme Court in American society, now that you've been a part of it for 24 years?

I think it's a highly respected institution. It was when I came, and I don't think I've destroyed it. I've been impressed that even when we come out with opinions that are highly unpopular or even highly-what should I say-emotion raising, the people accept them, as they should. The one that comes most to mind is the election case of *Bush v. Gore*. Nobody on the Court liked to wade into that controversy. But there was certainly no way that we could turn down the petition for certiorari. What are you going to say? The case isn't important enough? And I think that the public ultimately realized that we had to take the case. ... I was very, very proud of the way the Court's reputation survived that, even though there are a lot of people who are probably still mad about it.

You believe in an enduring constitution rather than an evolving constitution. What does that mean to you?

In its most important aspects, the Constitution tells the current society that it cannot do [whatever] it wants to do. It is a decision that the society has made that in order to take certain actions, you need the extraordinary effort that it takes to amend the Constitution. Now if you give to those many provisions of the Constitution that are necessarily broad-such as due process of law, cruel and unusual punishments, equal protection of the laws-if you give them an evolving meaning so that they have whatever meaning the current society thinks they ought to have, they are no limitation on the current society at all. If the cruel and unusual punishments clause simply means that today's society should not do anything that it considers cruel and unusual, it means nothing except, "To thine own self be true."

In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?
Yes, yes. Sorry, to tell you that. ... But, you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It

doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.

What do you do when the original meaning of a constitutional provision is either in doubt or is unknown?

I do not pretend that originalism is perfect. There are some questions you have no easy answer to, and you have to take your best shot. … We don't have the answer to everything, but by God we have an answer to a lot of stuff … especially the most controversial: whether the death penalty is unconstitutional, whether there's a constitutional right to abortion, to suicide, and I could go on. All the most controversial stuff. … I don't even have to read the briefs, for Pete's sake.

Should we ever pay attention to lawyers' work product when it comes to constitutional decisions in foreign countries?

[Laughs.] Well, it depends. If you're an originalist, of course not. What can France's modern attitude toward the French constitution have to say about what the framers of the American Constitution meant? [But] if you're an evolutionist, the world is your oyster.

You've sometimes expressed thoughts about the culture in which we live. For example, in *Lee v. Weisman* you wrote that we indeed live in a vulgar age. What do you think accounts for our present civic vulgarity?

Gee, I don't know. I occasionally watch movies or television shows in which the f-word is used constantly, not by the criminal class but by supposedly elegant, well-educated, well-to-do people. The society I move in doesn't behave that way. Who imagines this? Maybe here in California. I don't know, you guys really talk this way?

You more or less grew up in New York. Being a child of Sicilian immigrants, how do you think New York City pizza rates?

I think it is infinitely better than Washington pizza, and infinitely better than Chicago pizza. You know these deep-dish pizzas-it's not pizza. It's very good, but … call it tomato pie or something. … I'm a traditionalist, what can I tell you?

Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, co-produced by California Lawyer and UC Hastings College of the Law.

The New York Times https://nyti.ms/2jTjW96

The Opinion Pages | OP-ED CONTRIBUTOR

Why Liberals Should Back Neil Gorsuch

By NEAL K. KATYAL JAN. 31, 2017

I am hard-pressed to think of one thing President Trump has done right in the last 11 days since his inauguration. Until Tuesday, when he nominated an extraordinary judge and man, Neil Gorsuch, to be a justice on the Supreme Court.

The nomination comes at a fraught moment. The new administration's executive actions on immigration have led to chaos everywhere from the nation's airports to the Department of Justice. They have raised justified concern about whether the new administration will follow the law. More than ever, public confidence in our system of government depends on the impartiality and independence of the courts.

There is a very difficult question about whether there should be a vote on President Trump's nominee at all, given the Republican Senate's history-breaking record of obstruction on Judge Merrick B. Garland — perhaps the most qualified nominee ever for the high court. But if the Senate is to confirm anyone, Judge Gorsuch, who sits on the United States Court of Appeals for the 10th Circuit in Denver, should be at the top of the list.

I believe this, even though we come from different sides of the political spectrum. I was an acting solicitor general for President Barack Obama; Judge Gorsuch has strong conservative bona fides and was appointed to the 10th Circuit by President George W. Bush. But I have seen him up close and in action, both in court and on the Federal Appellate Rules Committee (where both of us serve); he brings a

sense of fairness and decency to the job, and a temperament that suits the nation's highest court.

Considerable doubts about the direction of the Supreme Court have emerged among Democrats in recent weeks, particularly given some of the names that have been floated by the administration for possible nomination. With environmental protection, reproductive rights, privacy, executive power and the rights of criminal defendants (including the death penalty) on the court's docket, the stakes are tremendous. I, for one, wish it were a Democrat choosing the next justice. But since that is not to be, one basic criterion should be paramount: Is the nominee someone who will stand up for the rule of law and say no to a president or Congress that strays beyond the Constitution and laws?

I have no doubt that if confirmed, Judge Gorsuch would help to restore confidence in the rule of law. His years on the bench reveal a commitment to judicial independence — a record that should give the American people confidence that he will not compromise principle to favor the president who appointed him. Judge Gorsuch's record suggests that he would follow in the tradition of Justice Elena Kagan, who voted against President Obama when she felt a part of the Affordable Care Act went too far. In particular, he has written opinions vigorously defending the paramount duty of the courts to say what the law is, without deferring to the executive branch's interpretations of federal statutes, including our immigration laws.

In a pair of immigration cases, De Niz Robles v. Lynch and Gutierrez-Brizuela v. Lynch, Judge Gorsuch ruled against attempts by the government to retroactively interpret the law to disfavor immigrants. In a separate opinion in Gutierrez-Brizuela, he criticized the legal doctrine that federal courts must often defer to the executive branch's interpretations of federal law, warning that such deference threatens the separation of powers designed by the framers. When judges defer to the executive about the law's meaning, he wrote, they "are not fulfilling their duty to interpret the law." In strong terms, Judge Gorsuch called that a "problem for the judiciary" and "a problem for the people whose liberties may now be impaired" by "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule

the day." That reflects a deep conviction about the role of the judiciary in preserving the rule of law.

That conviction will serve the court and the country well. Last week, The Denver Post encouraged the president to nominate Judge Gorsuch in part because "a justice who does his best to interpret the Constitution or statute and apply the law of the land without prejudice could go far to restore faith in the highest court of the land."

I couldn't agree more. Right about now, the public could use some reassurance that no matter how chaotic our politics become, the members of the Supreme Court will uphold the oath they must take: to "administer justice without respect to persons, and do equal right to the poor and to the rich." I am confident Neil Gorsuch will live up to that promise.

Neal K. Katyal, an acting solicitor general in the Obama administration, is a law professor at Georgetown and a partner at Hogan Lovells.

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U.S.News News

By Michael E. Kenneally , Matt Owen and Eric Tung

Feb. 13, 2017, at 6:00 a.m.

In choosing a successor to Justice Antonin Scalia, the president could not have made a better choice than Judge Neil Gorsuch. We can say that with confidence because we have had the honor to serve as law clerks to both men.

For each of us, Justice Scalia was a hero. By the time we clerked for him, he had already left an indelible mark on the law. Through the force of his intellect and the power of his pen, Justice Scalia changed the way all lawyers and judges think and write about the law. He championed the view that, in a nation governed by the people, the Constitution should be interpreted according to what it meant when it was written and ratified, not changed to suit the judiciary's preferences. And Congress's statutes likewise mean what they say, not what a judge thinks would produce a good outcome. Justice Scalia advanced those ideas through clear, forceful and memorable writing. You could disagree with Justice Scalia – and sometimes we did – but you could not ignore him.

Judge Gorsuch sincerely believes judges can and must decide cases fairly and independently based on the law, without consulting their private views.

Although no one can replace the Justice, we can think of no one more worthy of his seat than Judge Gorsuch. He is a brilliant thinker, a fair and independent judge and a clear and effective communicator of important ideas.

For starters, Judge Gorsuch's qualifications to serve on the Supreme Court are beyond question. He attended Columbia University and Harvard Law School and earned a doctorate in legal philosophy from Oxford. He clerked for two Supreme Court Justices, Byron White and Anthony Kennedy, and had a distinguished career as a lawyer, including high-level service at the Department of Justice. And in his ten years on the bench, Judge Gorsuch has earned the respect of lawyers and judges of all stripes.

Judge Gorsuch's opinions reflect the principle Justice Scalia spent his career defending: that in a democracy, the people's elected representatives, not judges, get to decide what laws we should have. In a lecture last year, Judge Gorsuch paid tribute to that "great project of Justice Scalia's career," reminding us of "the differences between judges and legislators" and of judges' duty "to apply the law as it is . . . not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best." Justice Scalia couldn't have said it better himself.

There is a kind of popular cynicism today in sophisticated legal circles that principled judicial decision-making of that kind does not exist – that judges are just politicians in robes. We know better. We know from our time in Denver that Judge Gorsuch sincerely believes judges can and must decide cases fairly and independently based on the law, without consulting their private views. His chambers are infused with that principle.

It is no surprise, then, that Judge Gorsuch has gained a wide reputation as a principled and deep-thinking judge. On occasion that has even led him to disagree with the late justice. For example, Justice Scalia was a longtime defender of Supreme Court precedents that require courts to defer to federal agencies about the meaning of statutes passed by Congress. Judge Gorsuch, however, recently called for a rethinking of those cases – for a reason Justice Scalia would have found familiar. Judge Gorsuch objected that judicial deference to executive agencies is "more than a little difficult to square with the Constitution of the framers' design" because it effectively allows executive bureaucracies to "swallow huge amounts of core judicial and legislative power," which are supposed to be located in separate branches of government.

That is a powerful argument about the original meaning of the Constitution. Justice Scalia would have respected it and could not have ignored it. But we also suspect that, with a twinkle in his eye, he would have delighted in arguing with Judge Gorsuch about it. Our lips are sealed about who we think would have won.

Justice Scalia's death has been difficult for his law clerks. Not only did we lose our patriarch, a mentor and a friend, but with the entire country we also lost a mighty champion for the Constitution. Judge Gorsuch's nomination to his seat on the Court, however, gives us tremendous comfort and excitement. The judge may not prove as boisterous as his predecessor; that is not his style. But he will be as principled, as courageous and as committed to the Constitution and our country. The American people could not ask for more of a Supreme Court justice than that.

Tags: Antonin Scalia, Neil Gorsuch, Supreme Court, Constitution, Department of Justice

Michael E. Kenneally CONTRIBUTOR
Michael E. Kenneally clerked for Judge Neil M. Gorsuch from 2013-2014 and for Justice Antonin Scalia from 2015-2016.

Matt Owen CONTRIBUTOR
Matt Owen clerked for Judge Neil M. Gorsuch from 2008-09 and for Justice Antonin Scalia from 2010-11.
Eric Tung CONTRIBUTOR
Eric Tung clerked for Judge Neil M. Gorsuch from 2010-2011 and for Justice Antonin Scalia from 2012-2013.

POLITICO

Gorsuch recommended to Justice Dept. that federal judges visit Gitmo

BY Seung Min Kim, Mar. 18, 2017

More than a decade ago as a lawyer in the George W. Bush Justice Department, Neil Gorsuch recommended that federal judges visit Guantanamo Bay as a way of becoming "more sympathetic" to the Bush administration's defense of its detainee policies.

"If the DC judges could see what we saw, I believe they would be more sympathetic to our litigating positions," Gorsuch wrote to other DOJ officials in a Nov. 10, 2005 e-mail, included in new documents sent to the Senate Judiciary Committee on Friday in advance of the Supreme Court nominee's confirmation hearing next week.

Gorsuch continued: "A visit, or even just the offer of a visit, might help dispel myths and build confidence in our representations to the Court about conditions and detainee treatment."

The e-mails shed further light on Gorsuch's involvement in the national security policies of the George W. Bush administration – a major focal point for Democrats on the Judiciary Committee as they prepare to meticulously scrutinize Gorsuch's record in the four-day confirmation hearing kicking off Monday.

Gorsuch served as principal deputy associate attorney general for about a year, until he was elevated to the Denver-based 10th U.S. Circuit Court of Appeals.

California Sen. Dianne Feinstein, the top Democrat on the Judiciary Committee, requested earlier this week that the additional DOJ documents be made public.

Acting assistant attorney general Sam Ramer wrote to Feinstein in a letter accompanying the new documents that while nearly 175,000 pages connected to Gorsuch have been released, and although some of the paperwork has confidentiality concerns, DOJ was releasing the documents because of the "extraordinary circumstances involving a Supreme Court nomination."

"The department does not anticipate making any further productions regarding this matter," Ramer told Feinstein.

The disclosure of Gorsuch's 2005 trip to the U.S. detention facility at Guantanamo Bay came in a separate trove of Justice Department documents released by the Senate Judiciary Committee earlier this month that detail the Supreme Court nominee's time at DOJ. Gorsuch wrote to then-Brigadier Gen. Jay Hood, the U.S. commander at Guantanamo Bay, that he was "extraordinarily impressed" with the conditions at Gitmo.

"You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see firsthand all that you have managed to accomplish with such a difficult

and sensitive mission makes my job of helping explain and defend it before the courts all the easier," Gorsuch told Hood.

The 120 pages sent to the committee on Friday included more details about Gorsuch's visit to the U.S. military facilities at Guantanamo. For instance, Gorsuch also recommended in the Nov. 10, 2005 email that Camp X-Ray, a temporary detention facility within Gitmo, "serves no current purpose, is overgrown and decaying."

"Gen Hood would understandably like to tear it down," Gorsuch wrote to other DOJ officials. "Of course, there may be some evidentiary concerns with this, but can we at least tee this up for a prompt resolution?"

Separately, the newly released e-mails show Gorsuch pressed other Bush administration officials to release a detailed signing statement when former President George W. Bush signed a hotly debated torture ban pushed by Sen. John McCain (R-Ariz.) into law in late December 2005.

The anti-torture proposal pitted McCain, who was tortured as a prisoner of war during Vietnam, against the Bush White House for months. But when the McCain measure was about to become law, Gorsuch advised other Bush administration officials to draft a signing statement to help spin it in their favor, as well as help lawyers in the "inevitable lawsuits that we all see coming," according to a Dec. 29, 2005 e-mail from Gorsuch to other Bush administration officials.

Another advantage, in Gorsuch's view, was that a signing statement would make clear the Bush administration's view that the anti-torture measure "is best read as essentially codifying existing interrogation policies."

Gorsuch wrote that he saw little downside to making the Bush administration's positions known in this way. In the e-mail, he wrote: "While perhaps not common, neither is it unprecedented to use signing statements in this fashion to advance the executive's interests and indeed, some statements have been cited by the courts as a persuasive sources of authority in efforts to divine statutory intent."

Dēmos
AN EQUAL SAY AND AN EQUAL CHANCE FOR ALL

Money in Politics, Racial Equity, and the U.S. Supreme Court

BY ADAM LIOZ

Big-money politics is a key barrier to people of color achieving equal representation. Building a democracy where the strength of our voices doesn't depend upon the size of our wallets, and where people of all incomes and backgrounds can effectively run for office and lobby our elected representatives, requires keeping Judge Neil Gorsuch off the United States Supreme Court.

The Supreme Court Created Our Racially Biased Big-Money System

- Over four decades, the Supreme Court has gutted many of our strongest protections against big money dominating our democracy, such as:
  - Limits on how much billionaire candidates can spend trying to buy elected office;
  - Bans on direct corporate spending on elections, in the famous *Citizens United* case;
  - Caps on the amount a single wealthy donor can give to all candidates, parties, and political committees (PACs) combined.
- Despite the fact that our democracy is based on equal citizenship and the principle of one person, one vote, the Supreme Court says the people and our elected representatives *are not allowed* to limit big money in order to give us all an equal voice over the decisions and policies that affect our lives.
- This is part of the Supreme Court's broader "color-blind" ideology that gutted the Voting Rights Act and sees no problem with discriminatory voter ID requirements.

The Court is at a Crossroads on Money in Politics

- The Roberts Court's worst money-in-politics rulings were 5-to-4 decisions.
- The Supreme Court is now split 4-to-4 on this and many other issues.
- With an open-minded ninth justice, we could end Super PACs, get corporate money back out of our elections, and prevent billionaires from trying to buy elected office.
- But with a justice more concerned with protecting the privileges of the donor class than the rights of voters, we'll see attacks on the few remaining protections we have left, like contribution limits and the ban on corporations giving directly to candidates.

Trump's Nominee Will Likely Side With Big Money

- Judge Neil Gorsuch's record on money in politics suggests that he'll side with big money over ordinary voters.
- Instead of helping to build a fairer democracy, Judge Gorsuch will move us backwards and threaten the few remaining protections against big money.

Big-Money Elections Sustain Racial Bias

- Centuries of racist policies have created a staggering racial wealth gap—and big-money politics translates this gap in economic power into a similar gap in political voice.
- Nearly 95 percent of federal election donors who give $5,000+ are white, whereas small donors are not necessarily skewed by race.
- Large donors, on the whole, have different priorities than do people of color and the public at large, and are less progressive on key economic issues such as creating jobs and ensuring affordable college.
- Ninety percent of elected officials are white, even though people of color make up nearly 40 percent of the U.S. population. Fewer candidates of color run due to the fundraising barrier, and those who do raise substantially less money than their white counterparts (47 percent less in one study).
- Elected officials who are disproportionately white and more responsive to the white donor class than to ordinary voters produce public policies and practices that are skewed against people of color on issues from housing policy to mass incarceration to fair wages.

Dēmos

Dēmos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

Media Contact
SKD Knickerbocker
DEMOS@SKDKNICK.COM

demos.org
80 Broad Street, 4th Fl.
New York, NY 10004

In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary
New York Times
March 18, 2017
By Eric Lipton and Jeremy Peters

WASHINGTON — Deep into the Senate's 68-page questionnaire of Judge Neil M. Gorsuch, the Supreme Court nominee was asked to describe how he had come to President Trump's attention.

The first thing he wrote was, "I was contacted by Leonard Leo."

Most Americans have probably never heard of Leonard A. Leo, who has long served as executive vice president of the Federalist Society, an organization of conservatives and libertarians who "place a premium on individual liberty, traditional values and the rule of law." But as Mr. Trump begins the process of filling what could be the most federal court vacancies left to any president in nearly a half-century, Mr. Leo is playing a critical role in reshaping the judiciary.

He sits at the nexus of an immensely influential but largely unseen network of conservative organizations, donors and lawyers who all share a common goal: Fill the federal courts with scores of judges who are committed to the narrow interpretation of the Constitution that they believe the founders intended.

"The Supreme Court needs to be an institution that helps to undergird limited constitutional government," said Mr. Leo, 51, whose cerebral, unassuming demeanor belies the enormous clout he has developed in Washington.

It is a worldview that has brought Mr. Leo and his allies together with a range of conservative players. In addition to major corporate backers such as Google and Chevron, the Federalist Society's supporters include well-known industry-oriented and libertarian-minded business leaders like Charles G. and David H. Koch; the family foundation of Richard Mellon Scaife; and the Mercer family, which gave significantly to Mr. Trump's presidential campaign and helped start Breitbart News.

This judicial reformation is being coordinated from Washington by a relatively small team closely aligned around Mr. Leo, who is on leave from the Federalist Society while he helps the White House shepherd the Gorsuch nomination. The network includes John G. Malcolm of the Heritage Foundation and Ann Corkery, a Washington lawyer who along with her husband, Neil, oversees the Judicial Crisis Network and related dark-money groups that also support the cause.

While a free-market agenda and the desire to place judges who will be more skeptical of federal and state regulations is a driving force, several central players in the group are also motivated by intense religious beliefs.

"We can have an incredible impact," said Carrie Severino, chief counsel of the Judicial Crisis Network. Ms. Severino counts among her clients Sisters of Mary, Mother of the Eucharist, a group of Catholic nuns who participated in a lawsuit that reached the Supreme Court alleging that Obamacare limited their religious freedom.

Judge Gorsuch, 49, is their first test case, with his confirmation hearing set to begin on Monday — but the conservative activists say more is at stake than just the Supreme Court.

"Make no mistake," Mr. Leo said in a speech last month at the Ronald Reagan Dinner at the Conservative Political Action Conference. "How we deal with this vacancy now, the strength that we as the pro-Constitution movement demonstrate in this fight, will determine the extent to which we are able to both nominate and confirm pro-Constitution judges as we move forward."

Mr. Trump already has 124 judgeships to fill — a backlog created by Senate Republicans who blocked the confirmation of many of President Barack Obama's nominees. That includes 19 vacancies on the federal appeals courts.

Because of the age of many judges today, the White House expects between 70 to 90 appeals court positions to open up over the next four years. That would give Mr. Trump the opportunity to fill anywhere from one-third to half of all appellate seats — a profound impact considering that those courts are often the final word on thousands of cases that never reach the Supreme Court.

The scale and sophistication of the right's judicial confirmation efforts would seem to portend a dark period ahead for the left, which, despite having made great strides under Mr. Obama, finds itself outmaneuvered.

"The right wing, very purposely and methodically, has built a stable of nominees that fit their ideological profile, and it's been a national movement, well organized and strategized," said Senator Richard Blumenthal, a Connecticut Democrat, who serves on the Judiciary Committee. "Frankly, I think the progressives of the Democratic Party have been less vigilant and vigorous than the right."

Hitching to Trump

There was little question to whom Mr. Trump would turn when he was putting together his list of possible Supreme Court nominees last year: Mr. Leo, who has spent almost his entire legal career at the Federalist Society, after graduating from Cornell Law School in 1989.

The father of seven children and fond of speaking in biblical allusions, he rose to prominence more than a decade ago as the Republican Party's co-chairman of Catholic outreach. At Justice Antonin Scalia's funeral last year, he read from the Old Testament.

When President George W. Bush made his two nominations to the Supreme Court in 2005, picking Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., Mr. Leo assumed the responsibility of coordinating outside campaigns to buttress their Senate confirmations. It is a role — which he has described as analogous to running a political campaign — that he has reprised with the Gorsuch confirmation.

Mr. Leo has an exalted reputation among conservatives, including Scott Pruitt, the former Oklahoma attorney general who is now head of the Environmental Protection Agency. Mr. Pruitt recalled in a speech last year at the conservative bastion Hillsdale College how he was in

Washington for a Federalist Society meeting in 2013. Mr. Leo asked him to stay an extra night for dinner, without giving a hint of who might show up.

"Any time that Leonard asks you to go to dinner, you stay, because he feeds you well," Mr. Pruitt said. But it was not only the menu that was impressive. Mr. Pruitt arrived to see Justices Scalia and Clarence Thomas at the table.

"We spent three hours talking about the Constitution and things that we were involved in as attorneys general," Mr. Pruitt recalled. "It was a fabulous time."

Mr. Leo has been at the center of Mr. Trump's judicial selection process since last spring, when Donald F. McGahn II, Mr. Trump's campaign lawyer and now the White House counsel, introduced them. It helped enormously that Mr. Leo came to the campaign at a critical time of need.

Mr. Trump's relationship with the conservative moment was tenuous at best. Last March, a prominent group of Catholic leaders in the United States, including several with close ties to Mr. Leo, published an open letter in National Review, a conservative magazine, declaring Mr. Trump "manifestly unfit to be president of the United States." It was the type of rejection that was becoming all too worrisome for Mr. Trump. At the same time, a faction of delegates threatened to block his nomination.

So in May, in an unprecedented move for a presidential candidate, Mr. Trump shrewdly released the first of two lists of people he was considering to fill the Supreme Court vacancy left by the death of Justice Scalia, at first with help from Mr. Malcolm of the Heritage Foundation. Judge Gorsuch's name was added in a second version of this list, with Mr. Trump thanking the Federalist Society and Heritage for their help.

Polls showed this published list of 21 names was a significant factor in the election. Of the one-fifth of voters who said the Supreme Court was the most important issue in their decision, 57 percent voted for Mr. Trump.

Mr. Trump gave broad discretion to Mr. Leo and his colleagues. Mr. Trump's most important criterion, these lawyers said, was that he wanted judges who were "not weak" and of "high quality."

Their approach in coming up with candidates was similar to President Ronald Reagan's. "They had this very sophisticated, detailed frame of reference from which they could begin to say, 'O.K., well, who understands these things like we do?'" Mr. Leo said in an interview, referring to the Reagan era. "As opposed to an administration that might sit around and say, 'Who's a really smart lawyer who's been really accomplished?' Or, 'Hey, what about my frat buddy from 1964?'"

And as Reagan did by nominating Justices Scalia and Anthony M. Kennedy, Mr. Leo and his conservative colleagues have looked for judges who can serve as long as possible. "Young is good," Mr. Leo said. "There will be an opportunity for a transformation of the federal bench."

A Small Network

Even before Mr. Trump walked into the East Room of the White House on Jan. 31 to name Judge Gorsuch as his first Supreme Court nominee, the public relations campaign to confirm him had started.

"Neil Gorsuch's talent and skill would make for a great #SupremeCourt Justice," said a post sent out on Twitter by the Judicial Crisis Network on the afternoon before the announcement.

By that point, television and radio advertisements about Judge Gorsuch were already on their way to stations across the country. The campaign focused on five states picked for a very explicit reason: Each had a Democratic senator up for re-election next year, and all the states had voted to elect Trump.

This more public part of the push — Mr. Leo has never been particularly comfortable in the spotlight — has been handled by Ms. Severino, 40, a Harvard Law School graduate who served as a clerk to Justice Thomas and is a frequent speaker at Federalist events. Ms. Severino said the group's efforts to secure Judge Gorsuch's confirmation reflected the consensus of American voters, who picked Mr. Trump in part because of the Supreme Court choices he said he would make.

But an examination of the Judicial Crisis Network's operations and financial records suggests that the group, in fact, has an incredibly narrow base. In 2015, the last year that tax records were available, the Judicial Crisis Network's entire budget of $5.7 million appears to have come from a single donor, an organization called the Wellspring Committee, based in Manassas, Va., that describes its mission as advancing "limited government and free markets." Judicial Crisis and a sister organization, the Judicial Education Project, reported in tax returns that they had a total of only two employees and no volunteers, and instead largely relied on outside consultants, like CRC Public Relations, a Virginia firm that also lists the Federalist Society and other conservative groups as clients.

Ms. Severino, asked whether her group was simply a shell to secretly move money on behalf of others, said the Judicial Crisis Network should not be judged based on the size of its staff.

"We are not trying to be a large membership organization," Ms. Severino said in a written statement, sent by CRC, which asked that the remarks be attributed to her. "There are others who excel at that type of work, and we are happy to support them as allies."

It is clear that there are close personal ties among the leaders of the push to confirm Judge Gorsuch. Ann and Neil Corkery help run a network of nonprofit organizations like Catholic Voices USA, an organization that promotes the church's views. They also help Mr. Leo in managing the National Catholic Prayer Breakfast, tax records show.

There are even overlaps with the funding. Mr. Corkery is listed as treasurer of the Judicial Crisis Network. A separate Internal Revenue Service filing shows that Ms. Corkery is president of the Wellspring Committee. Tax records from the past two years also show that Mr. and Ms. Corkery

were paid nearly $600,000 to help run 15 nonprofit groups, including the Judicial Crisis Network. They declined requests to discuss their overlapping roles in these organizations.

The impact of this intertwined network can also be seen in a number of state-level efforts to appoint more originalist judges.

Last year, the Judicial Crisis Network and a second organization it donated money to bought political advertisements in two Supreme Court races in Arkansas, which are decided directly by voters. The advertising by the groups, which spent far more than the candidates themselves, attracted widespread attention to what has normally been a low-profile race.

The intervention was considered disturbing enough that the Republican-controlled state legislature held a special hearing last year where those targeted by the groups testified.

"I suppose some with misplaced or contorted egos might be flattered these shadowy groups would spend over a half-million dollars directed to keep one off the court," said Clark W. Mason, a Little Rock, Ark., lawyer who was one of the candidates for the Supreme Court. "But I am outraged. They are attempting to shift the scale of justice."

The legislature this year failed to pass a law that would require a group like Judicial Crisis to disclose the source of its funding if it wants to play a similar role in future elections in the state.

Judicial Crisis has also donated more than $2 million to the Republican Attorneys General Association — making it the single largest contributor in the 2016 election cycle, as it sought to elect top state law enforcement officers who could bring conservative-inspired cases to state or federal courts with judges the group also helped put into place.

Mark Holden, general counsel of Koch Industries, a donor to the Federalist Society, said in an interview that the efforts of these conservative legal activists were necessary to overcome a bias favoring judges who put their agendas before the law.

"It's very important that we have the right people in place, people who will follow our laws, judges who will follow our laws as they have been written and not as they wish they were written," Mr. Holden said.

One point all the parties agree on: Mr. Trump must not repeat the mistake that Mr. Bush made in moving slowly to fill the many vacancies in the federal court system.

Mr. Leo is ready to play his part.

"Those nominations to the lower federal courts are a high priority to the president and for senior administration staff," Mr. Leo said in an interview last month that was broadcast on C-Span. He said the number of vacancies was historic. "It is something that is very much on the president's mind."

14 Key Supreme Court Cases Reaffirming Central Holding of *Roe v. Wade*

1. *Planned Parenthood v. Danforth* (1980)
2. *Harris v. McRoe* (1979)
3. *City of Akron v. Akron Center for Reproductive Health* (1979)
4. *Bellotti v. Baird* (1983)
5. *Colautti v. Franklin* (1986)
6. *Thornburgh v. American College of Obstetricians and Gynecologists* (1989)
7. *Webster v. Reproductive Health Services* (1990)
8. *Ohio v. Akron Center for Reproductive Health* (1990)
9. *Hodgson v. Minnesota* (1990)
10. *Planned Parenthood v. Casey* (1992)
11. *Stenberg v. Carhart* (2000)
12. *Ayotte v. Planned Parenthood of Northern New England* (2006)
13. *Gonzales v. Carhart* (2007)
14. *Whole Woman's Health v. Hellerstedt* (2016)

39 Supreme Court Decisions Reaffirming *Roe v. Wade*

1. *Doe v. Bolton* (1973)
2. *Danforth v. Rodgers* (1973)
3. *Louisiana State Board of Medical Examiners v. Rosen* (1975)
4. *Connecticut v. Menillo* (1975)
5. *Planned Parenthood of Central Missouri v. Danforth* (1976)
6. *Singleton v. Wulff* (1976)
7. *Bellotti v. Baird I* (1976)
8. *Gerstein v. Coe* (1976)
9. *Sendak v. Arnold* (1976)
10. *Guste v. Weeks* (1977)
11. *Bowen v. Gary-Northwest Indiana Women's Services* (1977)
12. *Beal v. Doe* (1977)
13. *Maher v. Roe* (1977)
14. *Poelker v. Doe* (1977)
15. *Colautti v. Franklin* (1979)
16. *Ashcroft v. Freiman* (1979)
17. *Bellotti v. Baird II* (1979)
18. *Harris v. McRae* (1980)
19. *H.L. v. Matheson* (1981)
20. *City of Akron v. Akron Center for Reproductive Health* (1983)
21. *Planned Parenthood v. Ashcroft* (1983)
22. *Simopoulos v. Virginia* (1983)
23. *Thornburgh v. American College of Obstetricians and* Gynecologists (1986)
24. *Babbitt v. Planned Parenthood of Central and Northern Arizona* (1986)
25. *Hartigan v. Zbaraz* (1987)
26. *Webster v. Reproductive Health Services* (1989)
27. *Hodgson v. Minnesota* (1990)
28. *Ohio v. Akron Center for Reproductive Health* (1990)
29. *Rust v. Sullivan* (1991)
30. *Planned Parenthood v. Casey* (1992)
31. *Bray v. Alexandria Women's Health Clinic* (1993)
32. *Madsen v. Women's Health Center* (1994)
33. *Schenck v. Pro-Choice Network* (1997)
34. *Lambert v. Wicklund* (1997)
35. *Mazurek v. Armstrong* (1997)
36. *Stenberg v. Carhart* (2000)
37. *Ayotte v. Planned Parenthood of Northern New England* (2006)
38. *Gonzales v. Carhart* (2007)
39. *Whole Woman's Health v. Hellerstedt* (2016)

The Leadership Conference on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

March 23, 2017

Mr. Chairman, Ranking Member Feinstein, and members of the Committee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States.

We strongly oppose the confirmation of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States. The Supreme Court is the final arbiter of our laws, and its rulings can dramatically impact the lives and rights of all Americans. Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, demonstrate he is a judge with an agenda. His judicial dissents and concurrences show he is out of the mainstream of legal thought and unwilling to accept the constructs of binding precedent and *stare decisis* when they dictate results he disfavors. He lacks the impartiality and independence the American people expect and deserve from the federal bench.

This nomination must be assessed in context. In light of the shameful, nearly year-long blockade of Judge Merrick Garland – President Barack Obama's nominee to the current Supreme Court vacancy – we believe President Trump had an obligation to put forward a mainstream nominee. He failed to do so, instead outsourcing the selection process to the ideologically driven Federalist Society and Heritage Foundation. In addition, as a presidential candidate he pledged to appoint Supreme Court justices who would overturn *Roe v. Wade*. Litmus tests in judicial selection subvert the most critical qualities of a judge: open-mindedness and independence.

President Trump's first months in office further demonstrate the need for a strong and independent judiciary to serve as a bulwark against the White House's abusive and autocratic approach to governance, underscoring the significance of appointing justices with a proven track record of independence and objectivity. President Trump's *ad hominem* attacks on judges who have ruled against him – on the district court and circuit court judges who have halted his Muslim travel ban, and last year on Judge Curiel in California for ruling against Trump University – threaten judicial independence and the separation of powers that form the fabric of our democracy. His unprecedented firing of Acting Attorney General Sally Yates for not being willing to defend his travel ban is another disturbing example. Independent and impartial federal judges are needed now more than ever. Judge Gorsuch has demonstrated in his opinions and writings that he is results-oriented and would be highly unlikely to show independence from a President who shares his ideological agenda.

Discrimination Claims: In a 2005 article published in the conservative *National Review*, Judge Gorsuch wrote: "American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their

social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education. This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary."[1]

Throughout our nation's history, the federal courts have served as a critical backstop in ensuring the rights and liberties of all Americans. Judge Gorsuch's skepticism about the use of courts to safeguard our rights under the Constitution and federal law demonstrates his ideological agenda and has been reflected in his judicial decisions, particularly dissents and concurrences, during his decade on the bench. Perhaps this shouldn't be a surprise, because in his 2005 article Judge Gorsuch also wrote: "Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold."

In the case *Strickland v. UPS*,[2] the majority held that Carole Strickland, a UPS account executive, could proceed with a sex discrimination claim under Title VII based on evidence that she was treated worse than male colleagues despite her outperforming them in sales. Judge Gorsuch dismissed the evidentiary record and dissented; he voted to throw the victim's discrimination claim out of court. In *Weeks v. Kansas*,[3] writing for a conservative panel, Judge Gorsuch threw out another Title VII case where the plaintiff, Rebecca Weeks, was fired in retaliation for her advocating on behalf of two colleagues who had been discriminated against. In his opinion, Judge Gorsuch declined to consider a superseding Supreme Court decision that might have benefitted the plaintiff simply because she did not raise it in her briefs, a troubling approach because judges have a duty to consider relevant case law regardless of whether the parties have cited it.

Workers' Rights: Judge Gorsuch's favorable treatment of employers and corporate defendants can also be seen in his reflexive rejection of workers' rights claims, and he has been a dissenting voice in such cases. In *TransAm Trucking, Inc. v. Administrative Review Board*,[4] the majority held that a trucking company unlawfully fired an employee in violation of federal whistleblower protections. The employee, Alphonse Maddin, was a truck driver whose brakes broke down in the middle of a freezing January night in Illinois. The truck heater didn't work either, and he got so cold that he couldn't feel his feet or torso, and he had trouble breathing. Nonetheless, his boss ordered him to wait in the truck until a repairperson arrived. After waiting for three hours, Mr. Maddin finally drove off in the truck and left the trailer behind, in search of assistance. His employer fired him a week later for violating company policy by abandoning his load while under dispatch. The panel majority said the firing was unlawful, but Judge Gorsuch dissented and said the employee should have followed orders even at the risk of serious injury. This case provides an example of Judge Gorsuch's judicial activism in rejecting the findings of an administrative agency – the Department of Labor – where four different

[1] Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review, February 7, 2005.
[2] 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part).
[3] 503 F. App'x 640 (10th Cir. 2012).
[4] 2016 U.S. App. LEXIS 13071 (10th Cir. July 15, 2016) (Gorsuch, J., dissenting).

administrative judges ruled in favor of the truck driver in a dispute that hinged on the meaning of the word "operate" in the applicable statute. The Tenth Circuit majority opinion stated: "[T]he dissent's conclusion that a truck driver is 'operating' his truck when he refuses to drive it but not when he refuses to remain in control of it while awaiting its repair, is curious. The only logical explanation is that the dissent has concluded Congress used the word 'operate' in the statute when it really meant 'drive.' We are more comfortable limiting our review to the language Congress actually used."[5]

In *Compass Environmental, Inc. v. OSHRC*,[6] the majority held that the employer must pay a fine for disregarding an internal policy and failing to train a worker who was electrocuted to death by high-voltage lines located near his work area. Judge Gorsuch issued a dissent and voted to throw the case out of court because he rejected the finding of an administrative agency that the employer had violated industry safety norms.

In *NLRB v. Community Health Services, Inc.*[7] Judge Gorsuch again dissented from a majority opinion that found in favor of employees, where a hospital was required to award back pay to 13 employees whose hours had been reduced in violation of the National Labor Relations Act. His multiple dissents in workers' rights cases suggest a refusal to follow binding case law when it leads to results that favor workers rather than businesses and employers.

Immigration: In the closely-divided *en banc* decision in *Zamora v. Elite Logistics, Inc.*,[8] Judge Gorsuch voted to affirm the district court's granting of summary judgment which blocked a Title VII national origin discrimination case from going to trial despite evidence of animus, unlawful reverification, and document abuse by the employer. The lead concurrence in this case, which Judge Gorsuch joined, reflects an approach that insulates employers from liability for discrimination against immigrant workers so long as they claim that they were unaware of the law or took their actions due to a fear of sanction by federal immigration authorities – even where those actions themselves violated immigration law. Judge Gorsuch's record suggests that if he were confirmed as a Supreme Court justice, he would give leeway to immigration enforcement strategies that use the fear of sanction against employers as a principal mechanism, and would condone employers hiding behind federal immigration laws to justify unlawful workplace practices.

Women's Health: Judge Gorsuch has written or joined opinions that would restrict women's health care, including allowing religious beliefs to override women's access to birth control and defunding Planned Parenthood. In *Hobby Lobby Stores, Inc. v. Sebelius*,[9] he signed on to an opinion allowing certain for-profit employers to refuse to comply with the birth control benefit in the Affordable Care Act. Citing to *Citizens United v. FEC*,[10] the decision held that corporations

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[5] 2016 U.S. App. LEXIS at *12 n. 4 (10th Cir. July 15, 2016).
[6] 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting).
[7] 812 F.3d 768 (10th Cir. 2016) (Gorsuch, J., dissenting).
[8] 478 F.3d 1160 (10th Cir. 2007) (Gorsuch, J., concurring).
[9] 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, J., concurring).
[10] 558 U.S. 310 (2010).

can be "persons" with religious beliefs and that employers can use those religious beliefs to block employees' insurance coverage of birth control. In *Little Sisters of the Poor Home for the Aged v. Burwell*, [11] Judge Gorsuch dissented from the majority's decision approving the accommodation in the birth control benefit that allows non-profit employers to opt out of the benefit but makes sure the employees get birth control coverage. Judge Gorsuch joined a dissent that argued the simple act of filling out an opt-out form constitutes a substantial burden on religious exercise. And in *Planned Parenthood Association of Utah v. Herbert*, [12] Judge Gorsuch dissented from the majority's decision to keep in place a preliminary injunction that stopped the state of Utah from blocking access to health care and education for thousands of Planned Parenthood's patients. If the policy had gone into effect, it would have cut off access to an after-school sex education program for teens and STD testing and treatment for at-risk communities.

LGBT Rights: As noted previously, in his 2005 *National Review* article Judge Gorsuch criticized those seeking to use the courts rather than the legislative process to safeguard their rights under the law, and he specifically mentioned gay marriage litigation as an example of liberals' "overweening addiction to the courtroom." The rationale he employed in the *Hobby Lobby* case – a license to discriminate for private corporations – has also been used by numerous states to justify discrimination against LGBT Americans.[13] And his skepticism of LGBT claims is also demonstrated in a 2015 case, *Druley v. Patton*,[14] where he rejected a claim by a transgender woman incarcerated in Oklahoma who alleged that her constitutional rights were violated when she was denied medically necessary hormone treatment and the right to wear feminine clothing. Other federal courts have reached the opposite conclusion in such cases.[15]

Police Misconduct: In the case *Wilson v. City of Lafayette*,[16] a 22-year-old man possessing marijuana was fleeing arrest, and a police officer shot him in the head with a stun gun from a distance of 10-15 feet away, killing him. Judge Gorsuch held that the officer was entitled to qualified immunity from an excessive force claim, reasoning that the use of force was reasonable because the young man was fleeing arrest. The dissent in this case criticized Judge Gorsuch's analysis and stated: "In the present case, it would be unreasonable for an officer to fire a taser probe at Ryan Wilson's head when he could have just as easily fired the probe into his back. The taser training materials note that officers should not aim at the head or throat unless the situation dictates a higher level of injury risk. Nothing about the situation here required an elevated level of force."[17]

Students with Disabilities: Judge Gorsuch has consistently ruled against students with disabilities seeking educational services to which they were entitled under the Individuals with

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[11] 799 F.3d 1315 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[12] 839 F.3d 1301 (10th Cir. 2016) (Gorsuch, J., dissenting).
[13] http://www.hrc.org/blog/anti-lgbt-bills-introduced-in-28-states.
[14] 601 F. App'x 632 (10th Cir. 2015).
[15] *See, e.g.*, Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011).
[16] 510 F. App'x 775 (10th Cir. 2013).
[17] *Id.* at 787 (Briscoe, J., concurring in part and dissenting in part).

Disabilities Education Act (IDEA). In *A.F. v. Española Public Schools*,[18] he dismissed a claim brought under the Americans with Disabilities Act because the school district had previously settled a lawsuit with the student for IDEA violations. A dissenting judge in this case criticized Judge Gorsuch's reasoning and observed: "This was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect."[19] In *Garcia v. Board of Education of Albuquerque Public Schools*,[20] Judge Gorsuch held that a student who left the school out of frustration with the school's failure to follow the IDEA was entitled to no remedy.

And in *Thompson R2-J School District v. Luke P.*,[21] he held that a student with autism did not have a right under the IDEA to attend a private residential program, even though the district court and a Colorado Department of Education hearing officer determined that such a placement was necessary for Luke and that public schools had been unsuccessful in addressing his educational needs. Under Judge Gorsuch's opinion in *Luke P.*, a school district complies with the law so long as they provide educational benefits that "must merely be 'more than *de minimis*.'" On March 22, 2017, during Judge Gorsuch's nomination hearing, the Supreme Court issued a decision in *Endrew F. v. Douglas County School District* rejecting this standard. Writing for a unanimous Court, Chief Justice Roberts wrote: "When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all."[22]

Corporate Bias: Judge Gorsuch's judicial activism was on display last year in the case *Gutierrez-Brizuela v. Lynch*,[23] where he issued a lengthy concurrence to an opinion he himself had written – a signal that his colleagues refused to sign on to his ideological agenda. In his concurrence, he questioned the constitutional legitimacy of a decades-old binding precedent, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[24] The *Chevron* doctrine requires deference to federal agencies' interpretation of ambiguous laws as long as the interpretation is reasonable, which has resulted in the safeguarding of civil rights, workers' rights, consumer rights, environmental protection, food safety, and many other protections for people's health and well-being. Judge Gorsuch believes that judges should make these decisions instead of agencies with the relevant expertise, which would lead to a dramatic expansion of the power and role of the judiciary. He would relegate this vital precedent to the dustbin of history because it disfavors the corporate interests he championed as a lawyer and as a judge. As several commentators have noted, Judge Gorsuch's cramped view of the *Chevron* doctrine is even more extreme than the views of Justice Antonin Scalia.[25]

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[18] 801 F.3d 1245 (10th Cir. 2015).
[19] 801 F.3d at 1251 (Briscoe, J., dissenting).
[20] 520 F.3d 1116 (10th Cir. 2008).
[21] 540 F.3d 1143 (10th Cir. 2008).
[22] No. 15-827, slip op. at 14 (S. Ct. March 22, 2017).
[23] 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring).
[24] 467 U.S. 837 (1984).
[25] Elliot Mincberg, *Gorsuch is to the Right of Scalia on the "Chevron Doctrine" – Here's Why it Matters*, Huffington Post, February 1, 2017; Richard Primus, *Trump Picks Scalia 2.0*, Politico Magazine, January 31, 2017.

Right to a Fair Trial: In the case *United States v. Benally*,[26] Judge Gorsuch voted to deny a petition for rehearing en banc by a Native American defendant who was convicted by a racially biased jury. The foreman of the jury "told the other jurors that he used to live on or near an Indian Reservation, that '[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent."[27] A second juror said she agreed with the foreman. In light of these troubling statements, the district court threw out the jury verdict, concluding that the defendant's Sixth Amendment right to a fair trial had been violated. The Tenth Circuit disagreed and upheld the conviction. Although Judge Gorsuch was not a member of the original panel, his vote to deny rehearing en banc was a vote of support. Judge Gorsuch's approach to this issue was recently rejected by the Supreme Court in *Pena-Rodriguez v. Colorado*,[28] where the Court ruled that anti-Hispanic statements during jury deliberations constituted a Sixth Amendment violation.

Voting Rights: Between June 2005 and July 2006, Gorsuch served as the Principal Deputy Associate Attorney General, a job in which he managed several litigating components at the Justice Department, including the Civil Rights Division. On Gorsuch's watch, political appointees ran roughshod over career attorneys who sought to lodge Section 5 objections under the Voting Rights Act to Georgia's photo ID law. This disgraceful practice was exposed in a November 2005 *Washington Post* article: "A team of Justice Department lawyers and analysts who reviewed a Georgia voter-identification law recommended rejecting it because it was likely to discriminate against black voters, but they were overruled the next day by higher-ranking officials at Justice, according to department documents.... The plan was blocked on constitutional grounds in October by a U.S. District Court judge, who compared the measure to a Jim Crow-era poll tax."[29] Gorsuch should be questioned by Senators in writing about his role in supervising the Georgia photo ID litigation and the extent to which he was involved in supporting the use of photo ID laws by Georgia and other states, and about his role in overturning the recommendations of career attorneys to object to such laws.

Judge Gorsuch was asked by Senator Leahy at his hearing about whether he agreed with Justice Scalia's description of the Voting Rights Act at the oral argument of *Shelby County v. Holder*[30] as a "perpetuation of racial entitlement." Judge Gorsuch refused to renounce or distance himself from Justice Scalia's statement, instead saying merely that "I don't speak for Justice Scalia."

Politicized Hiring in Civil Rights Division: In addition, during the year in which Gorsuch helped manage the Civil Rights Division, political appointees there engaged in unlawful hiring discrimination against lawyers with liberal affiliations, and this became the subject of a 2008 Inspector General report entitled "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division."[31] Gorsuch should be questioned by Senators in writing about his knowledge of and role in these activities, which

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[26] 560 F.3d 1151 (10th Cir. 2009).
[27] 560 F.3d at 1152 (Briscoe, J., dissenting from denial of rehearing en banc).
[28] 2017 U.S. LEXIS 1574 (March 6, 2017).
[29] Dan Eggen, *Criticism of Voting Law Was Overruled*, Washington Post, November 17, 2005.
[30] 133 S. Ct. 2612 (2013).
[31] https://oig.justice.gov/special/s0901/final.pdf.

constituted an unlawful attempt to exclude lawyers from the Department of Justice who had a civil rights background and who would have aggressively enforced federal civil rights laws. He should also be asked about his role in the 2005 appointment of Bradley Schlozman – whom the Inspector General concluded committed the most infractions – to be the Acting Assistant Attorney General for Civil Rights.

If confirmed to the Supreme Court, which is closely divided on many critical issues, Judge Gorsuch would tip the balance in a direction that would undermine many of our core rights and legal protections. After carefully reviewing Judge Gorsuch's extensive record, including his judicial opinions, writings, speeches, and testimony this week before the Senate Judiciary Committee, we believe he will undermine the rights and liberties of the American people. We urge all Senators to oppose Judge Gorsuch's nomination.

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ESSAY

A Personal Reflection on Judge Neil M. Gorsuch From a Former Colleague

Michael W. McConnell*

I served with Judge Neil Gorsuch on the Court of Appeals for the Tenth Circuit for over three years, before I left the bench to teach constitutional law at Stanford. I sat with him in about fifty cases. Sometimes we disagreed, strongly. More often, we agreed. I want to share my impressions of Judge Gorsuch because I assume that most Americans are fair-minded enough to evaluate him on the basis of his character, his ability, and his judicial temperament. In my opinion, based on my personal knowledge of Neil Gorsuch as a judge, the President could not have made a finer appointment.

I will not dwell on Judge Gorsuch's sterling credentials—Columbia B.A., Harvard J.D., Oxford D.Phil, successful private practice, unanimous confirmation by the Senate. Those are on the public record. Nor will I parse his many well-crafted opinions as a judge. Those are being analyzed, and spun, by advocates on both sides. I want to discuss Judge Gorsuch as a colleague and a human being and offer some more speculative thoughts about where his constitutional views may fit in these crazy times. I actively worked in favor of the confirmation of Justice Elena Kagan, wrote in support of Justice Stephen Breyer, and testified in support of Judge Robert Bork, so I do not think these comments will be read as one-sided or partisan.

I first met Judge Neil Gorsuch in 2006. I was immediately struck by his intellectual seriousness and open and gracious personality. He treats everyone with respect. Not just fellow judges, but also lawyers, law clerks, and court personnel—everyone. When discussing a point of law, Judge Gorsuch listens and learns. He does not act as if he always knows the answers. I have seen him change his mind as a result of discussion.

This quality of mind is particularly evident during oral arguments in court. Unlike some judges who treat oral arguments as a chance to make their own points, Judge Gorsuch actively engages with the lawyers, listens carefully to their positions, asks penetrating questions, and reflects fair-mindedly on what

* Professor of Constitutional Law, Stanford Law School. Professor McConnell served as a judge on the U.S. Court of Appeals for the Tenth Circuit from 2002-2009.

they have to say. Afterward, in the conference room with the other judges on the panel, he would similarly engage in a mutually respectful exchange of ideas. Never did I hear him speak dogmatically, or lose his temper, or allow any considerations to intrude other than good faith interpretations of the law.

These qualities also inform his opinions. Many have commented on Judge Gorsuch's writing skill, and it is true that he is one of the best writers in the judiciary today. More important than style, though, is that he sets forth all positions fairly and gives real reasons—not just conclusions—for siding with one and rejecting the other. And he does it in language that is accessible to nonlawyers. Courts have awesome power over people's lives, and it is important that they give reasons that all citizens can understand (even if they do not agree).

Judge Gorsuch is unfailingly cordial and collegial—not as a mere matter of etiquette, but as a deeply held value of intellectual engagement even with, or perhaps *especially* with, colleagues with whom he might not be in agreement. Justice Antonin Scalia, whom Judge Gorsuch is nominated to replace, was a pugnacious lover of intellectual battle, often caustic in rhetoric and inclined to sharpen differences. Based on my experience, Judge Gorsuch has the opposite temperament. He inclines toward finding common ground and is scrupulously respectful of the other side, in tone and in substance.

Judge Gorsuch also is deeply committed to following precedent as a central feature of the rule of law. Many was the time he and I would debate the exact meaning of a prior decision or lament instances when we thought our colleagues were transgressing the line. In fact, he literally wrote the book on the subject—he is one of the contributing authors of a legal treatise entitled *The Law of Precedent.*

From his first days on the court, Judge Gorsuch was an independent thinker, never a party-liner. I asked my research assistant to examine every case in which Judge Gorsuch sat with a mix of Republican- and Democratic-appointed judges and reached divided conclusions. In the past five years, in almost one-third of those cases, Judge Gorsuch voted with his liberal colleagues, not with the conservatives. That is the record of a moderate, fair-minded, nonpartisan jurist.

This is not just my opinion. Liberal and progressive law professors all over the country, not caught up in the politics of the day, have come to the same conclusion. No one agrees with all of Judge Gorsuch's opinions. I certainly don't. But they are without exception thoughtful, moderate, and independent.

Judge Gorsuch is undoubtedly conservative, but he has not the slightest touch of the extreme. Those who describe him as "outside of the mainstream" would have to say the same of any Republican appointee. He is about as "far right" as Justice Elena Kagan is "far left" (though, to be fair, some Republicans said that about her, with as little basis). The best description of Judge Gorsuch is that he is a constitutionalist rather than a partisan. In the years ahead of us, when a set of issues will arise that the country has never seen before, this is exactly the kind of Justice Americans of all political stripes should hope for.

The Washington Post

Opinions

Liberals should welcome Gorsuch. Like Kagan, he puts law before politics.

By Jason Murray

Jason Murray is a partner at the law firm Bartlit Beck Herman Palenchar & Scott in Denver.

Many liberals will be tempted to instinctively oppose Supreme Court nominee Neil Gorsuch's confirmation — because he is a self-proclaimed conservative, or because he was nominated by a divisive (even dangerous) president, or because of the shameful way that President Barack Obama's nominee for the same vacancy was denied fair consideration.

Succumbing to this impulse, though understandable, would be a mistake. 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 is remarkably similar on these metrics to Supreme Court Justice Elena Kagan.

I had the pleasure of serving year-long stints as a law clerk for both Gorsuch (at the U.S. Court of Appeals for the 10th Circuit) and Kagan (at the Supreme Court). Putting the two of them in a room together would be a recipe for vigorous — though congenial — political disagreement. But despite these differences of politics, both my former bosses share a profound commitment to the rule of law. That commitment means that all litigants before them are treated evenhandedly, and that the cases they hear are judged only on the strength of the legal arguments, without regard to partisan politics.

It is not hard to find examples of Gorsuch reaching politically liberal results, including upholding environmental regulations (*Energy and Environment Legal Institute v. EPEL*), protecting the autonomy of tribal governments (*Ute Indian Tribe v. Utah*) and upholding the Fourth Amendment protection against unreasonable searches (*United States v. Carloss*). In his commitment to law over politics, he is similar to Kagan, who famously sided with conservatives to invalidate portions of the Affordable Care Act.

Both Gorsuch and Kagan consistently emphasized to us law clerks that, if we weren't telling them when we thought their instincts on a case were wrong, we weren't doing our jobs. For both, the goal was to reach the correct legal result, rather than advance any political party's agenda. As Gorsuch has said, "A judge who likes every outcome he reaches is very likely a bad judge, stretching for results he prefers rather than those the law demands."

This zeal 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. For instance, in one notable case, Gorsuch ruled against the government when it denied legal status to an undocumented immigrant by retroactively applying new rules that contradicted prior judicial interpretation of the immigration laws. He cautioned that "when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history [have] sought to exploit ambiguous laws as a license for their own prerogative." Gorsuch's opinion is a much-needed clarion call against executive usurpation of the judicial power to interpret the law.

In times like these, liberals should welcome a nominee like Gorsuch — who is honest, principled and committed to safeguarding the rule of law.

Read more here:

Radley Balko: In Gorsuch, Trump gave Democrats a gift. They should take it.

Robert P. George: Ignore the attacks on Neil Gorsuch. He's an intellectual giant — and a good man.

Eugene Robinson: Fighting Gorsuch is hopeless. Democrats should do it anyway.

The Post's View: Gorsuch deserves a hearing. These are the questions he should answer.

E.J. Dionne Jr.: It's time to make Republicans pay for their supreme hypocrisy

Neil Gorsuch: A Threat to Fundamental Freedoms

The National Abortion Federation (NAF) opposes the nomination of Judge Neil Gorsuch to the Supreme Court. As the professional association of abortion providers, we understand the real-life implications of Supreme Court decisions on women and health care providers across the country. NAF is deeply concerned that Judge Gorsuch would vote to weaken or even overturn fundamental freedoms, given his judicial record and President Trump's promise that he would appoint justices who would overturn *Roe v. Wade*.

A majority of voters support access to safe, legal abortion care as protected by *Roe v. Wade*. Despite this fact, President Trump and Vice President Pence have made it clear they will pursue an agenda that is hostile to reproductive health and will do all they can to eliminate abortion access. The nomination of Judge Gorsuch to the Supreme Court is part of this strategy. We implore Senators to closely examine his judicial philosophies on privacy and reproductive rights, and do everything possible to block his confirmation to the Supreme Court.

PRESIDENT TRUMP PROMISED AN ANTI-ABORTION NOMINEE

- Time after time, President Trump promised to put forth a nominee who would "automatically" overturn *Roe*, and there is nothing in Gorsuch's record to suggest that he will not do exactly that. Trump reiterated this commitment numerous times.

- Trump and Pence have made it clear that they want to eliminate abortion access, and the nomination of Gorsuch to the Supreme Court is part of this strategy.

GORSUCH IS A THREAT TO WOMEN'S HEALTH AND SAFETY

- We cannot go back to the era before *Roe,* when women died or experienced serious medical complications because they could not access the abortion care they needed.

- In stark contrast to today—when abortion care is one of the safest medical procedures provided in the U.S.—before *Roe*, women often made desperate and dangerous attempts to induce an abortion and risked their lives and health to terminate an unwanted pregnancy. Women were seen in emergency rooms with serious complications—perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene that resulted in sterility or even death.

GORSUCH HAS A CONCERNING RECORD ON REPRODUCTIVE HEALTH

- Judge Gorsuch joined a Tenth Circuit decision affirming that corporations are people, and therefore can refuse to provide their employees with health insurance coverage for birth control based on the religious views of the corporation's owner.[1]

- Judge Gorsuch joined a dissent from the denial of further review in *Little Sisters of the Poor Home for the Aged v. Burwell*, also dealing with contraception.[2] In that case, a three-judge panel held that the accommodations for organizations refusing to cover contraception under the ACA did not substantially burden their religious beliefs. However, Gorsuch disagreed and argued that the mere signing of a form substantially burdened organizations' free exercise of religion.

- Judge Gorsuch voted to rehear a case that blocked the Governor of Utah from defunding Planned Parenthood and would have allowed defunding to move forward, even though neither Planned Parenthood nor the State of Utah sought for the case to be reviewed. In this instance, Judge Gorsuch was willing to ignore court practice and custom to ensure that Utah's Governor could eliminate funding for Planned Parenthood.[3]

GORSUCH'S WRITING SHOWS AN AVERSION TO *ROE*

- In his book The Future of Assisted Suicide and Euthanasia, Gorsuch indicates he does not believe the Constitution should protect personal autonomy. The Supreme Court's affirmation of *Roe* in *Planned Parenthood v. Casey* rested in part on the argument that abortion is fundamental to principles of individual autonomy and on "the right to define one's own concept of existence, of meaning, of the universe and of the meaning of human life."[4] *Casey* also affirmed that the Constitution protects decisions that are among "the most intimate and personal choices a person may make in a lifetime."[5] Despite this precedent, Gorsuch argued that the result in *Casey* was due to *stare decisis*, or respect for settled law, and that the autonomy passage was "arguably inessential."[6]

- Gorsuch has said cases should be decided "looking backward, not forward" and should depend on what the law was understood to mean at the time it was written. He also believes that "in *Roe v. Wade* the Court did of course endorse a new right in the face of substantial contrary history." Together with his judicial philosophy, this statement indicates Gorsuch believes *Roe* was wrongly decided.

GORSUCH WILL NOT BE AN INDEPENDENT VOICE

- An independent Supreme Court is the final safeguard against abuse of power by the President and others. Congress and the Judiciary must remain independent branches of government and provide the appropriate checks and balances to the Trump/Pence agenda; an agenda which clearly includes rolling back women's access to abortion care.

- In an article for the *National Review*, Judge Gorsuch criticized what he sees as over-reliance on constitutional litigation, arguing that "American liberals" have "become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda. . ."[7] Judge Gorsuch is not the type of justice we need during an Administration that is willing to push the boundaries of the Constitution.

Women deserve a fair and independent judiciary. If Judge Gorsuch is confirmed, his judicial philosophy and opinions could have grave consequences for women's lives and health for decades to come. His record and narrow, conservative legal philosophies are unacceptable for a Supreme Court Justice, a lifetime position of enormous power and influence. **We urge the Senate to block this nomination through any means possible, including through use of the filibuster.**

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[1] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).
[2] 799 F.3d 1315 (10th Cir. 2015).
[3] *Planned Parenthood Ass'n of Utah v. Herbert* 839 F 3d 1301, 1302 (10th Cir. 2016) (Gorsuch, J., dissenting).
[4] *Planned Parenthood v. Casey*, 505 U.S. 833, 851(1992).
[5] *Id.*
[6] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2006) at 80.
[7] Neil Gorsuch, Liberals'N'Lawsuits, NATIONAL REVIEW ONLINE (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

Judge Neil Gorsuch's Record on Students with Disabilities

Introduction

The National Education Association supports the rights of students with disabilities to receive a high quality education, to live free from discrimination, and to be vindicated by the courts when those rights are violated. Providing students with disabilities the opportunity to succeed academically is a moral and professional responsibility of the educator community and the nation as a whole. The Trump Administration, and its nominee to the Supreme Court, Judge Neil Gorsuch, appear not to share that sense of responsibility. He has ruled against students with disabilities in numerous cases and his record, when considered as a whole, shows a lack of regard for the struggles and rights of students with disabilities. Based on our review, Judge Gorsuch has sided with a disabled student without expressing his personal reservations in only one case.[1]

Specifically, his decisions raise at least four concerns:

- First, Judge Gorsuch has erected technical legal barriers against the legal claims of students with disabilities — barriers of the type that the Supreme Court has subsequently rejected unanimously.
- Second, Judge Gorsuch believes that students with disabilities are only owed an education that is barely more than *de minimis*, a view that has been rejected by other courts, and that the Supreme Court appears poised to reject as well.
- Third, Judge Gorsuch believes that the constitutional rights of students with disabilities are not violated even when such students are segregated and subjected to abusive confinement.
- Fourth, Judge Gorsuch believes in dismantling the power of administrative agencies to enforce regulatory protections, including those for students with disabilities.

Given this record, the hard-won protections for students with disabilities could be in peril should Judge Gorsuch be confirmed to the Supreme Court.

Background

For much of our history, disabled students' access to education — let alone a quality education — was nonexistent. Just four decades ago, state laws prohibited children with disabilities from attending public schools altogether.[2] Those laws prevented four out of every five students with a disability from receiving *any* public education.[3] Instead, students with disabilities were warehoused in "restrictive settings [that] provided only minimal food, clothing, and shelter."[4]

But two landmark cases, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), struck down laws like these as a violation of equal protection and due process under the U.S. Constitution.

Congress responded to these rulings and passed § 504 of the Rehabilitation Act in 1973, which prohibits public entities from discriminating against persons with disabilities.[5] And relying on *Mills*' holding that the Constitution guarantees students with disabilities an appropriate education, Congress passed the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act (IDEA)) in 1975.[6] In 1990, Congress passed the Americans with Disabilities Act (ADA), which extended the antidiscrimination protections of § 504 to many private institutions.[7] These three laws — the IDEA, § 504, and the ADA — provide the bulwark of civil rights protections for students with disabilities.

The Constitution also offers some protections for students with disabilities, largely in the context of school discipline. Most courts recognize a right under the Fourth Amendment for students to be free from unreasonable seizures in school,[8] and even more have recognized the substantive due process right to be free from discipline that "shocks the conscience."[9] The Equal Protection clause also includes the right of equal access to education for students with disabilities.[10]

Of these protections, the IDEA is the most robust. It proclaims that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[11] To that end, it requires all schools receiving federal funds to provide a "free appropriate public education"[12] to students with disabilities, as well as to comply with various procedural protections, such as preparing an annual, goal-driven Individual Education Program (IEP).[13]

Although Congress has never fully funded IDEA,[14] the Act nonetheless has produced impressive results for students both with and without disabilities, results largely caused by the law's emphasis on inclusive education.[15] When students with disabilities are educated alongside their non-disabled peers, they score higher on literacy measures, perform better on standardized tests, get better grades, and are more likely to master their IEP goals.[16] Even students without disabilities experience similar, improved academic growth when they are taught in integrated classrooms.[17] This remarkable progress, however, was not won without key decisions from the federal courts vindicating the rights of students with disabilities to achieve dignity and parity from our public education system.[18]

But if the Supreme Court were to adopt Judge Gorsuch's views on disability and education, the IDEA and its complementary civil rights laws and protections could be hollowed out.

Individuals with Disabilities Education Act (IDEA)

Judge Gorsuch has written or participated in several cases about the IDEA that limited students' access to the courts, or otherwise limited their access to relief. In *A.F. v. Española Public Schools*,[19] the mother of a student with disabilities filed a complaint for an impartial due process

hearing. Through mediation with the school district — an alternative administrative procedure under the IDEA[20] — she and the school district reached a settlement on the IDEA violation. Wishing to receive relief for violations of § 504 and the ADA as well, the mother filed suit in federal court. Judge Gorsuch ruled that reaching a settlement through mediation did not amount to proper "exhaustion" of administrative procedures under the IDEA to allow the mother to vindicate her rights under the ADA or § 504. Judge Gorsuch claimed that the IDEA's "plain text" forced him to arrive at such an unfair result.[21]

There are numerous problems with that reasoning, the most significant of which is that it would effectively bar students from pursuing discrimination claims under § 504 and the ADA for a denial of educational services, even though Congress plainly intended those statutes to create educational rights separate from the IDEA. A vigorous dissent by then Chief Judge Mary Beck Briscoe in *A.F.* considered Judge Gorsuch's "plain text" reasoning unsustainable, pointing out that Judge Gorsuch's "interpretation is inconsistent with the very purpose of the IDEA. It forces a claimant to choose between mediating a resolution to her IDEA claim . . . and thereby obtaining some or all of the relief sought under IDEA, . . . or forgoing any relief at all and waiting . . . in hopes of later filing suit and obtaining relief under both IDEA and other statutes."[22]

A federal court later facing the same issue agreed with the dissent and characterized Judge Gorsuch's reasoning as "nonsensical."[23] The court concluded, contra to Judge Gorsuch's view, that "it makes little sense to require parents and disabled students, who have been successful in mediation with regard to their IDEA claims for compensatory education, to pursue a due process hearing and appeal for related but non-IDEA claims seeking compensatory damages — damages that are not even allowed for under the IDEA."[24]

And on February 22, 2017, the Supreme Court, in an 8-0 decision, made clear, again contrary to Judge Gorsuch's view, that students may assert their rights under the ADA and § 504 in federal court without exhausting the IDEA administrative process. In *Fry v. Napoleon Community Schools*, Justice Kagan wrote for a unanimous Court that "[a] complaint seeking redress for . . . other harms, independent of any [IDEA violation], is not subject to [the IDEA's] exhaustion rule because, once again, the only 'relief' the IDEA makes 'available' is relief for denial of a FAPE [free appropriate public education]."[25] In dismissing A.F.'s claims in *A.F. v. Española Public Schools*, Judge Gorsuch summarily concluded that her earlier IDEA claim was "the same" as that in her ADA and § 504 claims.[26] The Supreme Court's *Fry* decision makes clear that that approach is contrary to "the diverse means and ends of the statutes covering persons with disabilities."[27] Rather, a court's examination of a disabled student's complaint "should consider substance, not surface."[28]

In another line of cases, Judge Gorsuch has dismissed the ability of students with disabilities to receive remedies from the court, even when the student's IDEA rights had clearly been violated. In *Garcia v. Board of Education of Albuquerque Public Schools*,[29] the school district admittedly violated the IDEA by failing to revise the IEP of Myisha, a student with a learning disability who frequently skipped class. By the beginning of the following school year, the school district still had not completed an IEP for her, and Myisha dropped out. Judge Gorsuch held that Myisha was not entitled to any relief, holding that her behavior — not the school district's violation — was

the primary cause of her lost educational opportunities. And in *Sytsema v. Academy School District No. 20*,[30] the school district likewise conceded that it had violated the procedures in the IDEA. Judge Gorsuch this time joined an opinion holding that the lower court improperly gave too much weight to that procedural violation in awarding judgment to the student.

In *Chavez v. New Mexico Public Education Department*,[31] the panel, joined by Judge Gorsuch, agreed that there was no question that the plaintiff, a high-functioning autistic student, had been denied services under the IDEA. The student refused to go to school, but the school and the local education agency made no attempt to address the problems that led the student to that point, and eventually pretended that he was not even enrolled. Given the local education agency's delay in remedying its violation, the student sought redress from the State instead. The panel held that the State was not obligated to substitute services for the local education agency, even if that agency had "blocked [the plaintiff's] educational progress for perhaps an unconscionable time . . . ."[32]

Even when Judge Gorsuch has allowed suits by students with disabilities to proceed, he has construed the meaning of an "appropriate education" so narrowly as to render this key IDEA right essentially meaningless. The Supreme Court is currently deliberating exactly what level of education the IDEA requires in *Endrew F. v. Douglas County School District*[33] — a case that came through the Tenth Circuit, and that is reviewing the very low standard that Judge Gorsuch has set out in many of his IDEA cases.

In *Thompson R2-J School District v. Luke P.*,[34] Judge Gorsuch's opinion helped establish that low bar in the Tenth Circuit. Luke P. was an autistic student who claimed he had been denied an appropriate education under the IDEA. Although Luke was able to get by with assistance in school, the school did not prepare him for functioning at home, where he continued to struggle, manifesting in problems such as using the toilet. Based on this, his parents — and several other experts in autism, psychology, and occupational therapy[35] — believed that the most appropriate placement for him would be in a residential facility. Judge Gorsuch disagreed. He held that the IDEA only required educational progress that was "merely . . . more than *de minimis*."[36]

The ability of a student to function intellectually and socially outside of the classroom (also known as "generalization") was not an IDEA requirement, Judge Gorsuch asserted, despite the fact that the IDEA itself says one of the law's core purposes is to foster "full participation, independent living, and economic self-sufficiency for individuals with disabilities."[37] Judge Gorsuch arrived at this result only after taking the extraordinary step of overturning the findings of an impartial hearing officer, an administrative law judge, and the district court, all of whom ruled for Luke P. The Supreme Court's decision in *Endrew F.*, on the underlying issue of the level of educational benefit that the IDEA requires, is not expected till later this spring but at argument the Justices expressed significant skepticism over the very low bar that Judge Gorsuch's opinion espouses.[38]

In *Sytsema v. Academy School District*,[39] yet another ruling joined by Judge Gorsuch that rejected claims brought by a disabled student, the court held that a school's tenuous and unspecified generalization plans for the plaintiff, Nicholas, were sufficient for IDEA purposes.[40] What's more, even though it was uncontested that a teaching technique in Nicholas's IEP had

proven "ineffective" for him, Judge Gorsuch's panel held that the IEP was still capable of providing Nicholas with "some" educational benefit, and thus did not violate the IDEA.[41]

Another case that lays bare Judge Gorsuch's skepticism of the school's role in promoting intellectual and social functioning outside the classroom is *Jefferson County School District R-1 v. Elizabeth E.*[42] In that case, Judge Gorsuch joined a panel decision ruling in favor of the disabled student: he called the decision "undoubtedly right and easily arrived at."[43] But he nonetheless wrote a lengthy concurrence to opine that the IDEA does not entitle students to *any* services that are not "educational."[44] He wrote that "educational" needs and "social, emotional, or medical needs" are dichotomous for IDEA purposes, and the IDEA covers *only* the former.[45] This, despite the fact that the educator community has long known that segregating educational needs from socio-emotional ones in children is fruitless.[46]

Judge Gorsuch asserted that "*all* of our sister circuits agree" with him on this point — a contention that is, at best, misleading.[47] For instance, the case Judge Gorsuch cites from the Third Circuit to support his concurrence, *Kruelle v. New Castle County School District*,[48] is actually skeptical of attempting to disaggregate a child's socio-emotional and medical needs from her educational ones: "the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning."[49]

§ 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA)

Judge Gorsuch is no more solicitous when it comes to other federal protections for disabled students. In *Miller v. Board of Education of Albuquerque Public Schools*,[50] he joined an opinion that created technical legal barriers to disabled students. In *Miller*, a student's parents had presented evidence that their child's school had not complied with promises to teach him in accordance with a proven reading program that would address some of his severe learning disabilities. An administrative appeal officer agreed with the parents that this failure had resulted in their son being denied an appropriate education, and Gorsuch's panel did not reconsider this issue on appeal. However, the parents pressed that the failure amounted to discrimination under the ADA and the Rehabilitation Act as well. The court refused to consider those other claims, even though evidence that a school has violated the IDEA represents some evidence that it may have violated the ADA and § 504 too.[51]

Constitutional Rights of Students with Disabilities

Judge Gorsuch has joined several opinions that cast doubt on the ability of disabled students to assert settled constitutional claims as well. In *Muskrat v. Deer Creek Public Schools*,[52] the school placed a student with developmental disabilities in a small timeout room at least 30 times over the course of two school years. The school continued to use the timeout room, despite understanding that the student did not have the mental maturity to understand the timeout room's purpose, and that he was showing signs of increasing stress, including sleeplessness, vomiting, and a frequent urge to urinate. Judge Gorsuch joined a decision rejecting a Fourteenth Amendment "shocks the conscience" constitutional claim by the student, and upholding the district court's decision. The decision reasoned that the treatment did not constitute a "brutal and inhumane abuse of official power."[53]

The panel, however, did not stop there. It further speculated that the Tenth Circuit would never entertain a Fourth Amendment "unreasonable seizure" claim — an easier constitutional standard to meet — in the context of discipline used against students with disabilities.[54] If the Tenth Circuit actually adopted such a sweeping foreclosure of constitutional claims, it would be in the minority.[55] Indeed, even the conservative-leaning Eleventh Circuit has accepted the usefulness of a Fourth Amendment analysis in this context.[56]

Judge Gorsuch joined a similar decision in *Couture v. Board of Education*,[57] which reversed a district court ruling that concluded that a school's use of a virtually windowless timeout room had violated a disabled student's Fourth Amendment, Due Process, and Equal Protection rights. In that case, the plaintiff was a student with disabilities who had exhibited aggression, threats, and oppositional defiance, leading teachers and administrators to conclude that he required extensive behavior modifications. For a two-month period, the school decided to place the student in a "'closet'-like time-out room, with nothing in it, no exterior window, dim light, and black construction paper over the window" in response to his concerning behaviors.[58] Despite evidence that the timeout room actually exacerbated the student's problematic behaviors, the court did not find the use of the room "unreasonable." And even though the student was at times locked in the room, alone, for nearly two hours, the court refused to hold that the use of the room deprived him of his right to an education.

Administrative Law and Regulations that Protect Students with Disabilities

Beyond Judge Gorsuch's rulings dealing directly with students with disabilities, he also expresses a view of administrative law that would compromise federal agencies' abilities to enforce the rights of disabled students. The Supreme Court gives deference to an agency's interpretation of a statute when Congress has delegated rule making authority to the agency and the statute's language is ambiguous; this is known as the *Chevron* doctrine. But in *Gutierrez-Brizuela v. Lynch*,[59] Judge Gorsuch wrote a lengthy concurrence criticizing the *Chevron* doctrine, calling it a "behemoth" that "swallow[s] huge amounts of core judicial and legislative power . . . ."[60] And in *Caring Hearts Personal Home Services, Inc. v. Burwell*,[61] Judge Gorsuch criticized the very existence of agency regulations, mocking federal agencies as so-called "experts" of the laws they must promulgate.[62]

Administrative agencies carry out the bulk of the work protecting students with disabilities: they enforce civil rights laws for disabled students, but they also enforce social programs that provide enormous assistance to students and adults with disabilities alike, including, for example, Social Security Disability Insurance. If the Supreme Court adopted Judge Gorsuch's inimical views towards agencies and their work, students with disabilities stand to lose civil rights protections, healthcare coverage, and basic economic securities.

Conclusion

Judge Gorsuch's record on students with disabilities raises serious questions about whether he, as a Supreme Court justice, would understand and stand up for the rights of disabled students. It is critical that the Senate review this record and demand that Judge Gorsuch explain how he would respect the rights of students with disabilities on the Supreme Court — in the face of an

overwhelming body of cases demonstrating his hostility towards this already vulnerable population.

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[1] *See M.S v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016) (Murphy, J.) (holding that the lower court improperly delegated to the student's IEP team the decision of where to place blind, hearing impaired, autistic student after finding that same team had failed to provide student with FAPE under IDEA).

[2] U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

[3] U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

[4] U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

[5] 29 U.S.C. § 794 *et seq.*; *see also* Derek W. Black, Education Law: Equality, Fairness, and Reform ch. 6, at 468 (2013).

[6] 20 U.S.C. § 1400 *et seq.*; *see also* Derek W. Black, Education Law: Equality, Fairness, and Reform ch. 6, at 468 (2013) (citing S. Rep. No. 94-168, at 6, 8 (1975)).

[7] 42 U.S.C. § 12101 *et seq.*; *see also* Derek W. Black, Education Law: Equality, Fairness, and Reform ch. 6, at 468 (2013).

[8] *See Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175 (9th Cir. 2007) (holding that beating, slapping, and head-slamming a four-year-old preschooler with disabilities violated the Fourth Amendment's prohibition against the use of excessive force); *see also Campbell v. McCalister*, 162 F.3d 94, No. 97-20675 (5th Cir. Oct. 20, 1998) (unpublished); *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).

[9] *See Hatfield v. O'Neil*, 534 Fed. Appx. 838 (11th Cir. 2013) (unpublished) (holding that striking an intellectually disabled student in exact spot on the head where student had undergone brain surgery shocked the conscience); *see also Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). *See generally Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (holding that liberty interests are implicated within meaning of Fourteenth Amendment where a school "decide[s] to punish a child for misconduct by restraining the child and inflicting appreciable physical pain").

[10] *See, e.g.*, *James S. v. Sch. Dist. of Philadelphia*, 559 F. Supp. 2d 600, 626 (E.D. Pa. 2008) (holding that complaint properly "allege[d] that the District's treatment of [the plaintiff] deprived him of equal access to the education granted to children without disabilities").

[11] 20 U.S.C. § 1400(c)(1).

[12] 20 U.S.C. § 1412(a)(1).

[13] 20 U.S.C. § 1414(d).

[14] Christina Samuels, *Supporters of IDEA 'Full Funding' Try Again with New Bill*, EDUC. WEEK (Jan. 27, 2015), http://blogs.edweek.org/edweek/speced/2015/01/supporters_of_idea_full-fundin.html.

[15] *See* 20 U.S.C. § 1412(a)(5) (defining inclusion as the "least restrictive environment" for students with disabilities).

[16] *See* Kathleen Whitbread, *What Does the Research Say About Inclusive Education?*, WRIGHTSLAW (1998-2016), http://www.wrightslaw.com/info/lre.incls.rsrch.whitbread.htm.

[17] Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 FUTURE OF CHILDREN 77, 91 (1996), https://princeton.edu/futureofchildren/publications/docs/06_01_04.pdf; U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 8–9 (Nov. 2010), https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf ("Mrs. Blake was pleased to see not only that Katie's reading ability improved but also that many of [her non-disabled] students were benefiting from the techniques.").

[18] *See, e.g.*, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (holding that parents have the right to pursue claims on their own behalf under the IDEA); *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999) (holding that a continuous nursing service is a "related service" under IDEA, and therefore mandatory if student needs it to receive "meaningful access" to education); *Honig v. Doe*, 484 U.S. 305 (1988) (holding that IDEA's "stay put" provision — where students remain in their educational placement during due process proceedings — was required).

[19] 801 F.3d 1245 (10th Cir. 2015).

[20] *See* 20 U.S.C. § 1415(e) (outlining the mediation process for disputes); 20 U.S.C. § 1415(f)(1)(B)(i) (discussing mediation as an administrative alternative to an impartial due process hearing).

[21] *A.F.*, 801 F.3d at 1248.

[22] *A.F.*, 801 F.3d at 1256-57 (Briscoe, C.J., dissenting).

[23] *R.M. v. City of St. Charles Pub. Sch. Dist.*, No. 4:15-CV-706 CAS, 2016 WL 2910265, at *6 (E.D. Mo. May 19, 2016).

[24] *R.M. v. City of St. Charles Pub. Sch. Dist.*, No. 4:15-CV-706 CAS, 2016 WL 2910265, at *6 (E.D. Mo. May 19, 2016).

[25] *Fry v. Napoleon Cmty. Sch.*, 580 U.S. __ , slip op. No. 15-497, at 13 (2017).

[26] *A.F.*, 801 F.3d at 1246, 1248.

[27] *Fry v. Napoleon Cmty. Sch.*, 580 U.S. __ , slip op. No. 15-497, at 14 (2017).

[28] *Fry v. Napoleon Cmty. Sch.*, 580 U.S. __ , slip op. No. 15-497, at 14 (2017).

[29] 520 F.3d 1116 (10th Cir. 2008).

[30] 538 F.3d 1306 (10th Cir. 2008).

[31] 621 F.3d 1275 (10th Cir. 2010).

[32] *Chavez*, 621 F.3d at 1288.

[33] 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (Sept. 29, 2016) (Memorandum).

[34] 540 F.3d 1143 (10th Cir. 2008).

[35] *Thompson R2-J Sch. Dist. v. Luke P.*, No. 05–cv–2248–WDM–CBS, 2007 WL 1879981, at *3 (D. Colo. June 28, 2007). Conveniently, Judge Gorsuch neglects to mention this testimony favoring a residential placement from a host of experts who testified on Luke P.'s behalf, all of whom the hearing officer found credible. *See id.*

[36] *Luke P.*, 540 F.3d at 1149 (10th Cir. 2008) (internal citations and quotation marks omitted).

[37] 20 U.S.C. § 1400(c)(1).

[38] Amy Howe, *Argument analysis: Justices grapple with proper standard for measuring educational benefits for children with disabilities*, SCOTUSBLOG (Jan. 11, 2017, 6:12 PM), http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities/ (The Court "seemed sufficiently unhappy with the 'more than merely de minimis' standard that they are likely to strike it down.").

[39] 538 F.3d 1306 (10th Cir. 2008).

[40] *Sytsema*, 538 F.3d at 1318.

[41] *Sytsema*, 538 F.3d at 1317.

[42] 702 F.3d 1227 (10th Cir. 2012).

[43] *Elizabeth E.*, 702 F.3d at 1243 (Gorsuch, J., concurring).

[44] *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J., concurring).

[45] *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J., concurring).

[46] *See* Lisa Trei, *Academic Performance and Social Behavior in Elementary School Are Connected, New Study Shows*, STAN. NEWS SERV. (Feb. 15, 2006), http://news.stanford.edu/pr/2006/pr-children-021506.html ("Children's social behavior can promote or undermine their learning, and their academic performance may have implications for their social behavior."); NAT'L ASS'N FOR THE EDUC. OF YOUNG CHILD., POSITION STATEMENT: DEVELOPMENTALLY APPROPRIATE PRACTICE IN EARLY CHILDHOOD PROGRAMS SERVING CHILDREN FROM BIRTH THROUGH AGE 8, at 7 (2009), https://www.naeyc.org/files/naeyc/file/positions/position%20statement%20Web.pdf ("Of course, children's social, emotional, and behavioral adjustment is important in its own right, both in and out of the classroom. But it now appears that some variables in these domains also relate to and predict school success.").

[47] *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J. concurring) (emphasis in original).

[48] 642 F.2d 687 (3d Cir. 1981).

[49] *Kruelle*, 642 F.2d at 694.

[50] 565 F.3d 1232 (10th Cir. 2009).

[51] *See Miller*, 565 F.3d at 1246.

[52] 715 F.3d 775 (10th Cir. 2013).

[53] *Muskrat*, 715 F.3d at 788.

[54] *Muskrat*, 715 F.3d at 789-92.

[55] *See, e.g.*, *Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906 (9th Cir. 2003); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001); *Campbell v. McCalister*, 162 F.3d 94 (5th Cir. 1998); *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).

[56] *See T.W. v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588, 613 n.14 (11th Cir. 2010).

[57] 535 F.3d 1243 (10th Cir. 2008).

[58] *Couture*, 535 F.3d at 1255 (quoting the District Court's language).

[59] 834 F.3d 1142 (10th Cir. 2016).

[60] *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

[61] 824 F.3d 968 (10th Cir. 2016).

[62] *Caring Hearts Personal Home Servs.*, 824 F.3d at 978 ("This case has taken us to a strange world where the government itself — the very 'expert' agency responsible for promulgating the 'law' no less — seems unable to keep pace with its own frenetic lawmaking.").

The Washington Post

If abortion rights fall, LGBT rights are next

BY Nancy Northrup and Rachel B. Tiven, Feb. 22, 2017

Nancy Northup is the president and chief executive of the Center for Reproductive Rights. Rachel B. Tiven is the chief executive of Lambda Legal.

We represent the organizations that won leading Supreme Court cases in recent years on sexual and reproductive rights: Obergefell v. Hodges in 2015, which secured legal protections for the marriage of same-sex couples, and Whole Woman's Health v. Hellerstedt in 2016, which struck down Texas's attempt to use sham health regulations to shut down 75 percent of the state's abortion clinics.

President Trump has taken sharp aim at the rights affirmed in those cases. During the campaign, he attacked the Obergefell opinion and repeatedly and unambiguously promised to put justices on the Supreme Court who would overturn Roe v. Wade. According to the president, it's the government, not each individual, that should hold the power to decide who can get married and whether women can terminate a pregnancy.

In a post-election interview on "60 Minutes," Trump reaffirmed that Roe v. Wade should be reversed and then deflected questions about his view of the Supreme Court's marriage equality decision. He declared the issue "already settled," explaining: "It's law. It was settled in the Supreme Court. It's done." Was this a tactic to divide and conquer? To throw under the bus the tens of millions of American women who have had an abortion and hope marriage equality supporters would stand by in silence?
Perhaps the president simply does not understand the foundations of these constitutional law decisions. Whatever the reason for the president's view of what is and is not settled Supreme Court precedent, the fact of the matter is that the court cannot reverse the cases guaranteeing access to safe and legal abortion and leave recognition of lesbian, gay, bisexual and transgender rights unharmed.

Obergefell and Whole Woman's Health are part of a long line of Supreme Court cases elucidating the bedrock principle of our individual rights guaranteed by the 14th Amendment: that highly personal decisions about our family and personal lives — decisions central to our equal dignity and rights of conscience — are for each of us, not the government, to decide.

One of the earliest cases began almost a century ago, when Nebraska, swept up in anti-German sentiment after World War I, banned the teaching of foreign languages to anyone under high-school age in any school, public or private. The court struck down the law, reminding us in words worth remembering today that "the protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue." Subsequent decisions protected parental rights to educate their children and couples' rights to get married and use contraception to plan their families.

This right to personal decision-making was summed up in *Planned Parenthood v. Casey*, a 1992 follow-up to Roe in which the Supreme Court affirmed the right to access legal abortion. It is the right firmly rooted in the

14th Amendment's promise that there is "a realm of personal liberty which the government may not enter." That realm of personal liberty protects our autonomy to decide for ourselves in matters "involving the most intimate and personal choices a person may make in a lifetime" — including decisions about love, marriage, procreation and family.

Casey's articulation of the liberty at stake was quoted a decade later in 2003's *Lawrence v. Texas*, Lambda Legal's landmark case ending the criminalization of sodomy. *Lawrence* then showed up in 2013, cited in the court's decision to strike down the *Defense of Marriage Act in United States v. Windsor*.
This long chain of case law means that both *Obergefell* and *Whole Woman's Health* rest on a shared foundation of legal precedent, which is the often unseen root structure of the law that guides the decisions of judges at all levels.

What is at stake is more than LGBT rights or abortion rights. It's our right under the Constitution to decide who we are and to make the most intimate and personal decisions in our life without government interference — and to do so with dignity.

The Senate Judiciary Committee needs to know if Trump's Supreme Court nominee, Judge Neil Gorsuch, stands with precedent and with each of us. Given the president's promise to take our rights away, we must ensure that full, detailed questions are asked of this nominee and that we get the answers we deserve. We will not allow ourselves to be divided. The rights of all here in this nation — not just women, not just same-sex couples — depend on our vigilance.

THE WALL STREET JOURNAL

Trump's Supreme Court Whisperer

The man who advised the president on picking Judge Gorsuch explains what his elevation means for the law and America.

By KYLE PETERSON, Feb. 3, 2017

The barrage began virtually the moment Donald Trump spoke the words "Judge Neil Gorsuch." Shortly after 8 p.m. Tuesday, in front of a TV audience of 33 million, the president announced he would nominate Mr. Gorsuch, a dapper 49-year-old Coloradan, to the Supreme Court.

By 8:17, a Democratic super PAC had dropped a 78-page dossier, full of misspellings, calling Judge Gorsuch an extremist who had "argued that the courts should not be used to litigate a 'social agenda.' " Meantime, protesters outside the high court yelled into the dark and waved fill-in-the-blank signs: "STOP," under which they had hastily markered "Gorsuch." On Twitter, Oregon Sen. Ron Wyden hyperventilated that "Gorsuch represents a breathtaking retreat from the notion that Americans have fundamental Constitutional rights."

But as Democratic opposition goes--a grand tradition in a party that made bork a verb--it all felt a little forced. By Wednesday afternoon, as Leonard Leo returns to his office from a post-announcement huddle at the White House, the mood is cautiously optimistic. "In the first 24 hours," says Mr. Leo, a lawyer advising Mr. Trump on the court, "it appears as though the nominee has been defined very, very well, and that the left has not done a particularly good job of sowing seeds of confusion and doubt. So there is that. But the fact of the matter is that the process can still turn in the other direction."

Mr. Leo is one to know. A decade ago, he helped usher George W. Bush's two Supreme Court appointees, John Roberts and Samuel Alito, to confirmation. Now Mr. Leo is on leave from his day job, as executive vice president of the Federalist Society, to do the same for Judge Gorsuch. On a table near Mr. Leo's desk sits a bottle of Trump Winery champagne, as yet unopened.

President Trump keeps close counsel, but he seems to be listening to Mr. Leo. Last spring, not long after Justice Antonin Scalia died unexpectedly amid a presidential campaign, Mr. Trump hit on an idea: posting a public slate of people he would consider for the vacancy if elected. The candidate's counsel, Donald McGahn, introduced Mr. Trump to Mr. Leo, and together the two lawyers drew up the list. A few months later, Mr. Trump was proclaiming: "We're going to have great judges, conservative, all picked by the Federalist Society."

When the initial 11 names were floated in May, Judge Gorsuch wasn't among them. "We were hastily putting a list together of the first bunch, and we knew certain judicial records really well," Mr. Leo says. "We didn't know Judge Gorsuch." As the campaign wore on, the net was widened--eventually to 21 names--and the extra time for vetting revealed Judge Gorsuch's stalwart record.

The week after the election, when Mr. Leo was summoned to Trump Tower for the winnowing, he says Mr. Trump showed "an extraordinary level of engagement." The president-elect wanted a nominee with impeccable credentials who would be "respected by all," someone "not weak." And, importantly, Mr. Trump wanted a justice who would interpret the law as Scalia had done.

"He would say, 'One of the things I really want is a justice who's going to interpret the Constitution the way the Framers meant it to be,' " Mr. Leo says. "I think that's a great way of phrasing it. Maybe not for your sophisticated lawyer crowd--but for the general public? They get that. And he gets it."

The implication is that if Mr. Trump doesn't share Scalia's deeply considered originalism, his instincts at the least run in that direction. "He would never use the terms 'originalism' and 'textualism,' but we have talked about going wherever the law takes you," Mr. Leo says. "It is an understanding that there is something important about being moored to the written law."

He cites a conversation with Mr. Trump last spring. "I'll always remember this," Mr. Leo recounts. "He said, 'So what do you think about the ObamaCare case?' " This was the 2012 ruling in which Chief Justice Roberts's switch in time saved a fine, allowing ObamaCare's penalty for failing to buy health insurance to be construed as a tax. Mr. Leo continues: "I said, 'Well I'm curious, why do you ask?' And he said, 'Because I think they made it up.' "

That isn't a bad formulation either. A commitment not to "make it up" is what the Federalist Society has been advocating since it was founded 35 years ago. In some sense, Judge Gorsuch's elevation represents the success of that project, the passing of the torch from a first generation of originalists, such as Scalia, to the next.

Originalism was once such a minority taste that Scalia joked it was viewed as a "kind of weird affliction that seizes some people--'When did you first start eating human flesh?' " Today, Mr. Leo says, all of the high court's justices engage in textualism and originalism to some degree. "There is a recognition that those are important and appropriate tools of interpretation--by everybody," he says. "That is an amazing development as compared to the 1970s and the early 1980s." To Mr. Leo, the single most important thing Judge Gorsuch will do on the Supreme Court is to "continue the trajectory."

But first he must get past Senate confirmation--and a potential Democratic filibuster. Mr. Leo is hopeful it won't come to that. Ten Senate Democrats up for re-election in 2018 come from states Mr. Trump carried, and the Judicial Crisis Network is planning $10 million of pro-Gorsuch advertising.

Mr. Leo also says that President Trump "has taken unprecedented steps to try to be bipartisan and to try to be reasonable." To start, four days after being inaugurated he brought Sens. Chuck Schumer and Dianne Feinstein--the minority leader and ranking Judiciary Committee Democrat, respectively--to the White House to talk about the court.

Then the president chose not only a jurist from the public list, but a highly regarded one. No doubt, Judge Gorsuch is in the Scalia mold: His opinions cite the "original public meaning" of constitutional provisions, and he confessed to having cried on the ski slopes when the news reached him that Scalia had died. But Judge Gorsuch is also an intellect, a droll writer and well within the legal mainstream. "Neil Gorsuch," Mr. Leo says, "is a judge who sends law clerks to Justices Sotomayor and Kagan"--both Obama appointees. "He's a man who is being supported by Obama's solicitor general," Neal Katyal.

Even so, Mr. Schumer is indicating that Judge Gorsuch will need 60 votes to be confirmed--a hint of filibuster. This has sent Republicans to Defcon 1, readying the launch codes for the "nuclear option"--using 51 votes to override the Senate rules and eliminate the filibuster on Supreme Court picks for good, as the Democrats did for all other nominations in 2013. Nostalgia aside, Mr. Leo says that "most conservatives would not shed a tear" for the filibuster. "It's a practical device. It's a rule of procedure, OK? It's not some sacrosanct, holy writ."

Moreover, the thinking seems to be that keeping the nuke siloed only gives Democrats the chance to launch it first. "The idea," Mr. Leo says, "that somehow if we offer to give them 60 votes here as a matter of comity and

courtesy, that when they control the White House they'll do the same thing? That's absurd. Their behavior has never evidenced that kind of give and take. They have a selfish, self-centered, one-sided view of the process." A moment later he adds: "The only thing that history and experience shows is that they relent and they are accommodating in the face of brute force, and that's about it."

The rancor is equally high on the Democratic side, which accuses the GOP of "stealing" the Scalia seat by blocking President Obama's nominee last year. Mr. Leo insists there's no comparison. "There was an 11th-hour vacancy on the U.S. Supreme Court in the midst of a presidential election," he says. "I think it was, under those circumstances, entirely appropriate to say: Let the people decide how they want this seat filled." Besides, he points out: "No one knew who was going to win. In fact, a lot of money was on Hillary Clinton winning. So the idea that this was a partisan decision, I think, is not borne out by the facts."

Still, what's the endgame? If the nuke is dropped, if the bitterness rises past hazardous to truly irradiating, will Supreme Court seats simply be left vacant for years at a time, whenever the White House is controlled by one party and the Senate by the other? That's a question Democrats should contemplate, Mr. Leo says. If a nominee as good as Judge Gorsuch can't get an up-or-down vote, then "this process is forever doomed."

Republicans' message is that, one way or another, Judge Gorsuch is going to become Justice Gorsuch. What does that portend for the law?

To some degree that depends on how open he is to overturning precedent. "What I think you see in his body of work is a willingness to raise questions about old doctrines. But you also see in his writings a sense of some degree of cautiousness. He recognizes that law has to have some degree of stability," Mr. Leo says. "What I sense in Judge Gorsuch's work is an approach to precedent and stare decisis that is not all that far off from Justice Scalia's."

One point of chatter is so-called Chevron deference, named for a 1984 case, which holds that judges should give federal agencies--the Environmental Protection Agency, for instance--the benefit of the doubt when interpreting ambiguous laws. "The idea was, let's vest this discretion with the political branches rather than with the courts," Mr. Leo says. "What has happened since is that the doctrine has been twisted in ways that provide superdeference to administrative agencies." In an opinion last year, Judge Gorsuch suggested tightening the bureaucrats' leash, and Mr. Leo wouldn't be surprised to see the court slowly walking back Chevron.

Also looming, as always, is Roe v. Wade. "He hasn't taken a position on the abortion issue," Mr. Leo says. "He has a couple of cases where he feels politics affected other judges' decision in that arena. So, for example, there was a Planned Parenthood defunding case where he felt that the liberal members of the panel were imposing standards of review that normally wouldn't be applied."

So why should pro-lifers back Judge Gorsuch? True, the judge wrote a book opposing assisted suicide, and it includes passages like: "To act intentionally against life is to suggest that its value rests only on its transient instrumental usefulness for other ends." But beyond that, Mr. Leo asks pro-lifers to "put their confidence in a judge who believes in textualism and originalism. Because at the end of the day, that is how we make sure the courts reach right answers."

He continues: "I can't tell you whether that will always result in what, politically, people may or may not want. But I feel much safer having a judge who follows those principles than a judge who's going to just put their finger in the wind."

All that being said, replacing one conservative justice with another won't swing the Supreme Court's balance. For that, Republicans will have to look to President Trump's second pick--a prospect perhaps not as remote as it

sounds. Judge Gorsuch once clerked for Justice Anthony Kennedy, who turned 80 last year, and some have speculated that Mr. Trump's choice is an attempt at signaling Justice Kennedy that it's safe to retire.

Mr. Leo dismisses this, shaking his head even before the question gets out. "That's just not the way these things work. It would be demeaning to any other justice on the court to try to make a pick as a way of trying to force their hand," he says. "It's a foolish enterprise to start guessing when people are going to retire."

Which isn't the same thing, exactly, as putting the prospect out of mind. "There's always the chance," Mr. Leo says, "that you could have one or two or even three vacancies on the court." If so, will Mr. Trump stick to the list? No guarantees--at least from Mr. Leo. "It's hard to know," he says. "And I think the president, frankly, ought to keep his options open."

Mr. Peterson is the Journal's deputy editorial features editor.

Written Testimony of Planned Parenthood Federation of America

Dana Singiser, Vice President, Public Policy and Government Affairs

Submitted to the Senate Judiciary Committee

Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States

March 24, 2017

Planned Parenthood Federation of America ("Planned Parenthood") and Planned Parenthood Action Fund ("the Action Fund") have a long-standing history of working to protect reproductive rights and strongly oppose the nomination of Judge Neil Gorsuch to the U.S. Supreme Court.

Planned Parenthood is the nation's leading provider and advocate of high-quality, affordable health care for women, men, and young people, as well as the nation's largest provider of sex education. With over 650 health centers across the country, Planned Parenthood health centers provide affordable birth control, lifesaving cancer screenings, testing and treatments for STDs and other essential care to nearly three million patients every year. Nearly 78 percent of Planned Parenthood patients have incomes at or below 150 percent of the federal poverty level, and are among the most vulnerable, facing limited access to reliable and affordable health care.

The nation's courts, particularly the United States Supreme Court, play a vital role in the fight for equal rights for women and for protecting reproductive and individual freedoms. Given the attacks on women's health taking place at the federal and state level which unfortunately represent a whole new stage of extremism, it is imperative that any nominee to the Supreme Court is ready to respond to unconstitutional attempts to restrict women's access to health care.

The right to safe and legal abortion has been the law of the land for more than 40 years, and is a part of the fabric of American jurisprudence. Nominees to the highest court in the land must make clear that they will protect our fundamental rights -- including the right of a woman to control her body without interference. There has never been a more important Supreme Court nomination. It has become crystal clear that the courts are going to be the last -- and sometimes only -- line of defense against dangerous and unconstitutional attacks on basic rights. Support for *Roe vs. Wade* is at a record high. The majority of Americans support access to safe and legal abortion, about seven in ten[1] Americans oppose *Roe v. Wade* being overturned.

President Trump's Supreme Court nominee Judge Neil Gorsuch, currently serving on the Tenth Circuit Court of Appeals, has an alarming history of interfering with reproductive rights and health, including women's access to birth control and care at Planned Parenthood.

In *Planned Parenthood Association of Utah v. Herbert,* Judge Gorsuch sided[2] with a politician who "defunded" Planned Parenthood in Utah and wanted to deny thousands of people access to STD tests, health education, and other preventive care at Planned Parenthood. Judge Gorsuch took the highly unusual step of asking the full court to rehear the panel decision in Planned Parenthood's favor, despite that neither the parties nor any judge on the panel requested a rehearing and the time for such a request to be made had expired. Judge Gorsuch lost that vote and authored a dissent in which he suggested that he would give politicians more leeway than other judges would, accusing the panel's majority decision of being "at odds with the comity federal courts normally afford the States and their elected representatives." Judge Gorsuch's role in this case demonstrates a troubling activism -- reaching out in a way that would have limited access to basic reproductive health care.

In *Hobby Lobby* and *Little Sisters of the Poor Home for the Aged*, Gorsuch voted to authorize employers to use their religious beliefs to impede their employees' access to birth control.

In a 2013 opinion in *Hobby Lobby Stores, Inc. v. Sebelius*[3], Judge Gorsuch joined a majority opinion holding that corporations can be "persons" with religious beliefs under the Religious Freedom Restoration Act (RFRA) and can use those religious beliefs to block employees' insurance coverage of birth control. Judge Gorsuch also wrote a separate concurring opinion that went even further, underscoring that the owners of Hobby Lobby would be "complicit in an immoral act" if the company allowed their employee's health insurance to cover contraception.

Thereafter, in *Little Sisters of the Poor Home for the Aged*[4], Judge Gorsuch went even further siding with employers over women's access to birth control. There, again, Judge Gorsuch stressed that the Tenth Circuit's decision in favor of birth control access had shown insufficient deference to the employer's articulation of the tenets of its religious beliefs. In total, seven federal courts of appeal, including the Tenth Circuit, ruled against non-profit employers (like Little Sisters) challenging the accommodation, with only one court of appeals ruling the other way. Contrary to the overwhelming number of courts that ruled to uphold the accommodation, Judge Gorsuch believes that the accommodation imposes a substantial

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[1] Fingerhut, Hannah for the Pew Research Center. (2017) "About seven-in-ten Americans oppose overturning Roe v. Wade" available at: http://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/

[2] Basset, Laura. (2017) "Neil Gorsuch's Nomination is Bad News for Planned Parenthood."Huffington Post. available at: http://www.huffingtonpost.com/entry/neil-gorsuch-planned-parenthood_us_5891f13ce4b0522c7d3e27c3?section=politics

[3] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013)

[4] *Little Sisters of the Poor v. Burwell,* No. 13-1540 (10th cir. 2015)

burden on the Little Sisters' free exercise of religion because they "believe that they will be violating God's law if they execute the documents required by the government" to register their objection.

In addition to these rulings, Judge Gorsuch has spoken approvingly of the "originalist" judicial philosophy of the late Justice Antonin Scalia, who wanted to allow states to end safe and legal abortion, who opposed marriage equality and the voting rights act, and who believed that corporations are people and a woman's employer should be able to decide whether or not she has access to birth control. It seems that President Trump has made good on his pledge[5] to appoint anti-abortion judges to the Supreme Court in the mold of Justice Scalia.

Judge Gorsuch's answers about a woman's right to choose at his nomination hearing were insufficient. During past nomination hearings, judges hostile to reproductive rights have acknowledged *Roe* as precedent before, and then gone on to support extreme restrictions on abortion access. For instance, Judge Roberts acknowledged *Roe* as precedent in his confirmation hearings, but then voted to uphold the Texas restrictions struck down by the Court last summer. The reality is, for too many women in this country, *Roe* remains a right in name only. That's especially true for women with low incomes, those who live in rural areas, and women of color. Already, women have been forced to travel hundreds of miles[6], cross state lines to access abortion, if they can at all. There is no doubt that Judge Gorsuch would do everything in his power to increase those barriers and put safe abortion out of reach.

Opinions like those of Judge Gorsuch's are not what the American people want. People simply don't believe that politicians or judges should be making decisions for women about their birth control or their pregnancies. Individual rights and freedom go to the heart of who we are as a country, including the right to access safe and legal abortion.

Judge Neil Gorsuch has an alarming history of interfering with reproductive rights and health. We call on every United States Senator to uphold a fundamental standard: If you have not clearly stated your support for *Roe v. Wade* and continue to deny women access to birth control, you are not fit to sit on the bench. You are not fit to defend the rights and freedoms of Americans. Planned Parenthood Federation of America and the Planned Parenthood Action Fund urge Senators to oppose the nomination of Judge Neil Gorsuch to the United States Supreme Court.

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[5] Letter from Presidential Candidate Donald Trump to "Pro Life Coalition" September 2016, available at: https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf

[6] Moser, Laura (2016) "Long Road Ahead" Slate, available at: http://www.slate.com/articles/double_x/doublex/2016/03/women_in_texas_have_to_drive_hundreds_of_miles_to_reach_an_abortion_clinic.html

The Stanford Daily

TUESDAY, NOVEMBER 23, 1971 — STANFORD, CALIFORNIA — VOLUME 160, NUMBER 42

—Daily photo by Joe Berman
DOLLY BOARD—Juan Flores, Doug DuPenn, and Iris Brest (l to r) comprised the grievance hearing board which yesterday voted to recommend that fired hospital worker John Dolly be rehired.

Grievance Panel Unanimously Recommends Dolly Rehiring

By FRANK MILLER

The three-man grievance board hearing the case of fired hospital worker John Dolly unanimously recommended yesterday that Dolly be immediately rehired, and suspended any more hearings in the case.

Grievance Board Chairman Doug DuPenn said last night that "we will be recommending the reinstatement of John Dolly and have suspended future hearings on the basis of evidence presented." He said that he hoped to formally present the board's recommendations to President Lyman within the next few days.

He said the board had not discussed their reasons for recommending the reinstatement and had only taken the vote late yesterday afternoon after a closed hearing. The board still must consider the issue of Dolly's back pay in the four and one-half months he has been fired, the entire background to the report, and the basis for the reinstatement.

The Administration had presented its case to the board by brief and Dolly was half-way through his defense through the first five hearings when the Board made its decision yesterday.

President Lyman can overrule the recommendations of the board, although this is considered by many unlikely.

Dolly was fired along with four other University workers last June for his alleged participation in the April 9 sit-in at the Medical Center and the violence that followed.

Before a written statement is released by himself and the grievance board, Dolly would say only that the decision to recommend that he be reinstated is "a victory for the working people and the movement."

The University originally fired Dolly for "unacceptable behavior by an employee," according to former Director of Personnel Robert Nelson.

Dolly's defense maintained that the demands at the time of the sit-in were reasonable attempts to redress long-standing grievances and that no alternative channels were given to provide redress.

In testimony last week he also argued that he did not willingly remain in the occupied administrative offices before police cleared the area. He said that he was concerned about the safety of his wife, who was two months pregnant at the time, and went to the sit-in to tell her he would be working late. By the time they decided to leave, the exits had been barricaded by the demonstrators and there was no way out, he claimed.

At the same time, however, he emphasized that, "If Jeanie (his wife) wasn't pregnant and I had known the police were coming, I probably would have stayed" in the Medical Center.

His hearings have been fraught with bickering and problems since they began. The actual hearing did not begin until November 4, four and one-half months after he was fired.

Dolly had urged originally that his grievance hearings be delayed until after his case in state court on criminal charges arising from the sit-in was decided. He protested that making his case public before his appearance in court would hamper his ability to present an adequate defense.

The committee agreed and recommended during the summer that Dolly be reinstated until his hearings were able to begin. Acting President William Miller would not accept the recommendation.

Seale Explains Increased Programs To Aid Black Community Survival

By LARRY LIEBERT

Black Panther Party Chairman Bobby Seale insisted last night that the Panthers will make real the "pig politicians'" pledge of "a chicken in every pot."

He told an audience of over 500 in Memorial Church that guns are only "a tool" to defend Panther "survival programs" in case of attack "by the pigs."

Seale said that the Panthers' "concrete" programs include free food, shoes, and medical care for ghetto blacks.

The black revolutionary repeatedly called for "humanism" and opposed indiscriminate animosity toward whites. "Running around hating a white person just because of the color of his skin, it just don't make sense. It's the same thing the Ku Klux Klan did."

The audience gave Seale a standing ovation at the beginning and end of his speech. The church was quiet during his comments, except for occasional applause and repetition of Seale's chant, "Power to the People."

—Daily photo by Harvey Russell
SURVIVAL—Black Panther Party Chairman Bobby Seale told a crowd of about 500 in Memorial Church last night that the Panthers will make the promise of "a chicken in every pot" a reality through community programs.

Black Expression

Seale commented that the "black expression" movement of the last ten years was "very necessary." But he said making "black ice cream cones that taste just like vanilla" is less important than "feeding a hungry child in the black community."

Seale, a co-founder of the Party, told the crowd the Panthers "need hammers and nails to build free medical clinics. We keep the guns handy to defend the right to pick up the hammer."

The Panthers earn support in black communities, Seale said, by actually giving away "1000 bags of groceries and 100 pairs of shoes" during a rally.

Algiers

In an obvious reference to Eldridge Cleaver's Panther faction in Algiers, Seale criticized those who "tell you some wild stuff about coming back for guerilla warfare."

Citing the slogan, "power grows out of the barrel of the gun," Seale said, "We have a few defectors in the black community who believe that power actually is the gun."

People are learning to support the Panthers as a group rather than through specific, well-known leaders, according to Seale.

He said the Party is attempting to eliminate hierarchical titles, including his own: "We're working now to see if in the next three years we can get rid of the title, 'Chairman.'"

Seale, who was acquitted this summer of murder charges in Connecticut, said that police brutality on college campuses has given students "a crash course" in the oppression faced by blacks.

Seale's speech was sponsored by the Black Students Union and the Intercommunal Survival Committee, a group of radicals organizing local "survival programs."

Second Speech

The speech was Seale's second Stanford appearance this month. November 9, he was a surprise substitute for the ailing Georgia Jackson.

Seale was accompanied by five Panther leaders, who stood around him during the speech and acted as watchful bodyguards.

Before Seale was introduced, the audience heard "ghetto music" by the visiting Eddie Gale jazz group and a lengthy speech on sickel cell anemia, a hereditary disorder afflicting blacks.

Medical student Don Williams said the Midpeninsula Sickle Cell Anemia Foundation is setting up research programs and "screening" facilities to detect those with the disease.

In a Daily interview before his speech, Seale commented that he still has "constant contact with the observer team" which is investigating Attica Prison.

Seale said the deaths at Attica, when police charged a prison rebellion, would "definitely" have been avoided if the charge had been delayed until he could have additional meetings with prisoners.

Seale charged the rebellion was ended just before he could return to prisoners with "a whole big machinery" to end the uprising.

Tensions Still Present

Ravenswood Still Beset By Problems

By GARY ATKINS
Second of two parts

People at Ravenswood High School in East Palo still talk about this year's "white invasion" of the school—but its still too early for them to tell how successful the "invasion" has been.

Until this year, Ravenswood was virtually all black. Then, this fall, the school became the key to success in an innovative attempt to make voluntary desegregation work throughout the Sequoia Union district.

So far, both Ravenswood and desegregation seem to be doing fine—over 500 whites have transferred into a school that until this year could count no more than 15 whites among its students.

However, the voluntary integration hasn't succeeded completely yet. School officials are quick to point out that there are still serious problems to be overcome and, as one official says, voluntary desegregation may at best turn out to be only temporarily successful.

New Promise

Much depends upon Ravenswood, where white students were attracted by a promise that the traditional high school curricula could be ditched and an innovative program created in its place.

This year, in place of the standard college preparatory program at other high schools, Ravenswood offers flexible scheduling and a variety of classes that range from "War Criminals" to "Mountaineering."

The problems fall in three categories:

—tensions between blacks and whites arising from integration itself, along with a lingering debate about Ravenswood being a community-controlled and community-oriented school;

—a potential gap in the types of blacks and whites attending Ravenswood; and

—the yardstick by which Ravenswood's success will be measured.

Little Tension

On the first point, Ravenswood principal Clarence Cryer notes that "We had a lot of very enthusiastic white kids transferring in from the hills to a school that's already inhabited. At first, I thought blacks might be fighting to maintain their identity, their leadership. But that hasn't happened."

So far, both whites and blacks have kept primarily to themselves. There have been a few incidents but, Cryer says, nothing that could not be handled by the school itself.

"Many people felt it was really going to be hell for us the first couple days of school," he says. "And I suppose I felt that if I could just make it through those first few days, we'd make it."

"So far though, we've had [illegible] more [illegible] than in any other school, or in any other year."

Several students interviewed said the same thing. "At first there was the usual, typical hassle," one said. "But it's cooled down a lot. It's been a lot worse in other places. I think relationships between blacks and whites here are improving."

And, a white associate editor of the school newspaper, Mike McCurry says, "You had a lot of liberal white students—in some cases knee-jerk liberals—transferring in from the hills. Of course black students were going to be suspicious. Now though, I think many are trying to put it all together."

But, he adds, "It'll take time. The black students obviously had a very strong identification with the school. You can detect a real love for Ravenswood in them. And now that whites are here, it's a completely different school."

The blacks are not unanimous in their reaction to the whites.

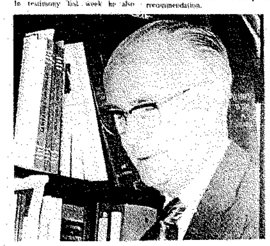
Whites Curious

"You have a lot of white students who are trying to find out what blacks are all about here," Sherry Mitchell, the Commissioner of Cultural Affairs for the Ravenswood student government, says. "And they seem disgusted that we're not trying to make friends with them."

"They're trying to force us to mix and we'd much rather are in organization, a black family created."

She opposed the desegregation plan for

(Please turn to page six)



—Daily photo by Bill Cooke
SHOUTED DOWN—Engineering professor William Shockley was prevented from speaking at Sacramento State University last night by blacks angered by Shockley's controversial genetic theories.

Sacramento St. Blacks Halt Shockley Speech

SACRAMENTO (AP) — A group of black students forced cancellation of a scheduled speech by Nobel Prize winner William Shockley at Sacramento State College yesterday, charging he is a racist.

The demonstrators, saying they were members of the college's Pan-African Students Union, took over the speakers platform and demanded the firing of those who invited the Stanford University engineer to speak.

Despite some shoving and fighting on the stage, there were no arrests or injuries reported.

An overflow audience of about 550 was on hand for the speech, arranged by a faculty-student committee using student fees.

Shockley, co-winner of the 1956 Nobel Prize for physics for development of the transistor, had just begun to speak when the disruption occurred. He left the campus immediately.

He has been the target of young activists since a 1965 speech in which he said he believes the "genetic potential for intelligence" among blacks has deteriorated in the past 30 years because of the welfare system's encouragement of large Negro families.

One unidentified black who took over the microphone said "there is no freedom for racists at Sacramento State College, Nobel Prize winner or not."

Later the demonstrators marched to the administration building and presented a list of demands including a prohibition against using black students' fees for "racist" speakers, hiring of additional black faculty and administrators and more financial aid to black students.

Darrell Inabnit, administrative vice president who met with the blacks, said the incident was "very unfortunate" and "breaches the entire matter of freedom of speech."

Today In The 'Daily'

Today is Tuesday, November 23, 1971. On this date in 1934, the Daily reported that Secret Service agents had solved "the mystery surrounding the ingredients of hash."

Our journalistic ancestors explained that the Feds were investigating a Turkey hash served to FDR when he visited Nashville. Freaks everywhere.

Hash out news stories with our fact-freaks, 321-2300, ext. 4632. Our business turkeys are at ext. 4630.

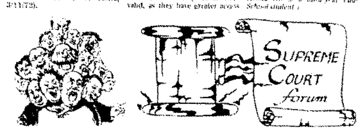
Staff lunch today.

Conservative Nominee...

Rehnquist's Law Interpretation Favors Government

...By Linda Ho

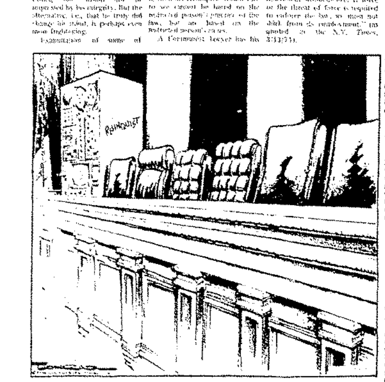
'...Rehnquist (is) the kind of man who jealously guards his government from the assaults of its citizens, justified or unjustified.'



Post Warren Era ...

Stasis Predicted In High Court

...By Herbert Packer



Judicial Opinions...

Supreme Court Justices And Their 'Philosophies'

...By Allan Dershowitz

Senate Should Consider Nominees' Judicial Views

This article by Assistant Attorney General William H. Rehnquist, one of President Nixon's two nominees to the Supreme Court, originally appeared in its entirety in the Harvard Law Record, Oct. 8, 1959 and then in the New York Times, Nov. 11, 1971. When Mr. Rehnquist wrote about the standards for the Supreme Court in the law school's newspaper, he was in private practice in Phoenix, and the Chief Justice was Earl Warren.

By WILLIAM H. REHNQUIST

The Supreme Court of the United States is now in the midst of one of the storms of criticism which have periodically assailed it. Bills have been introduced in Congress to limit the jurisdiction of the high court, to overrule some of its controversial non-constitutional decisions, and to declare the sentiment of the Senate as to the necessity of judicial background on the part of a nominee to the Court. It has been urged that the "advice" of the Senate be sought by the President before any nomination to the Court is made.

Criticism of the Supreme Court can easily become frustrating to the critics, because the individual justices are not accountable in any formal sense to even the strongest current of public opinion. Nonetheless, it ill behooves the critics of the present Court to seek imposition of new curbs on it until such controls as now exist are fully tested and found wanting. Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Dearth of Inquiry

As of this writing, the most recent Supreme Court Justice to be confirmed by the Senate was Charles Evans Whittaker. Examination of the Congressional Record for debate relating to his confirmation reveals a startling dearth of inquiry or even comment over the views of the new Justice on constitutional interpretation. . . .

If any interest in the views of Mr. Justice Whittaker on important cases was manifested by the members of the Senate, it was done either in the cloakroom or in the meeting of the Judiciary Committee. The discussion of the new Justice on the floor of the Senate succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower Federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri his nomination honored two states.

Given these facts the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism.

Less than thirty years before, the Senate had made no bones about its concern with the judicial philosophy of a Supreme Court nominee.

The labor injunction, the strike as a conspiracy, and the "yellow-dog" contract were in their heyday. When, in February, 1930, President Hoover sent to the Senate the name of Circuit Judge John J. Parker, he sparked one of the most remarkable battles over a judicial nomination in the history of the upper chamber.

The most surprising fact about this great debate of 1930 was that none of the protagonists on either side doubted that the question should be: What were Parker's views on labor injunctions and yellow-dog contracts? The New York World, in opposing Parker's confirmation, probably spoke for both sides when it said editorially on April 23, 1930:

"... The Senate has every right, if it so chooses, to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion in the country as a whole, and every right on this premise to object that the presence of Judge Parker on the bench would increase, rather than lessen, the top heavily conservative bias of the Supreme Court as now constituted."

Opposition

The forces opposing confirmation were led by Senator William E. Borah of Idaho.

During the debate on Parker's confirmation, Borah said, "The Supreme Court of the United States passes upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions."

Again, during the debate he said:

"Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental policies are involved."

Surely the first part of this last quotation epitomizes the Senate's attitude as manifested in discussion on the floor, toward the confirmation of Mr. Justice Whittaker. His integrity, his learning, his success at the bar, would be the only necessary subjects of inquiry in the case of a judge appointed to a lower court. He is not there to apply his own judicial philosophy, willy-nilly, to the litigants before him but rather to decide the case of those litigants by application of the principles laid down by higher courts. Such a process involves the use of the same ability to reason by analogy as lawyers call on constantly, and therefore the legal ability of an appointee to a trial court is of paramount importance.

Similarly, in the case of the judge who actually tries the case, we do not expect a decision between individual litigants strictly in terms of popular sentiment. The people through their legislative representatives enact what laws they will, subject to constitutional limitations. But once a law is written, neither the people nor their representatives are further consulted as to what was meant by it; the written words, together with relevant background material, are interpreted by a presumably impartial judge. Democracy ends at the courthouse door, and Joe Doaks is not to be imprisoned simply because a majority of the people sitting in the jury box or on the courthouse steps think he should be.

These reasons suggest that the primary concern with an appointee to an inferior Federal court should be his ability to apply rules laid down by more authoritative sources, rather than his feeling as to whether this material is right or wrong. But in the case of the Supreme Court, the "something more" which Borah spoke of comes into play. I would prefer to interpret this phrase, not as meaning that it takes more ability to be a Justice of the Supreme Court than a judge of the lower Federal courts, but rather that there are additional factors which come into play in the exercise of the function of a Supreme Court Justice.

The Supreme Court, in interpreting the Constitution, is the highest authority in the land. Nor is the law of the Constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court, in Brown v. Board of Education, *supra*, held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

letters letters

Rolling Along

Editor, THE DAILY:

The grievance procedure just keeps rolling along. Despite the fact that not one employee organization favors the new procedure, which is supposed to benefit the employee, President Lyman has just appointed his own board of arbiters from a list compiled by a selection panel which has had no contact with workers. Workers don't pick the panel. Workers don't pick the list of arbiters. Workers can't initiate the grievance procedure against the administration without administration permission.

Seem like a stacked deck? Workers are even considered guilty until proven innocent, and the administration retains the right to refuse any worker the chance to prove him or herself innocent in front of the administration's own hand-picked arbiter. And so our grievance procedure becomes a more and more permanent fixture of employer-employee relations.

The only place workers find themselves in agreement with the administration is when it chides workers for not having an effective union with which the administration can deal. Until we do have a union which represents all workers at Stanford, the administration will continue to operate in its high-handed and arbitrary manner.

Michael Bacon
Library Worker

McCloskey Response

Editor, THE DAILY:

The author of the article in Friday's Daily entitled "The Real Pete McCloskey" apparently went through my voting record in search of any items that would appear to contradict my "liberal image." In doing so, he not only failed to present a balanced picture, but he also knowingly or unknowingly misinterpreted or misrepresented several of my votes.

In regard to the House Internal Security Committee, for example, I have supported Congressman Waldie's legislation to seal the Committee's files and place its legitimate security operations with the Judiciary Committee, which has proper jurisdiction. I was bothered by the no-knock and preventive detention provisions of the 1970 District of Columbia Crime Bill, but voted for the whole bill in the belief that, on balance, it would help fight crime.

The 1969 bill on demonstrations in Washington D.C. did not limit at all the Constitutional right to demonstrate. It simply prohibited overnight camping and required the posting of a bond prior to potentially destructive activities. This was in response to the $2,000,000 costs of cleaning up after Resurrection City.

Many of the votes cited in the areas of health, nutrition, housing and education were actually votes on amendments or procedural matter, and do not reflect my basic positions. For instance, I have voted to sustain and expand the food stamp program. On some occasions I have opposed appropriation increases in the belief that we must hold down the size of the budget in order to discourage inflation.

As did most of the anti-war members of the House, I voted in November, 1969 to commend the President's intention to bring an end to the war in Vietnam. Insofar as President Nixon takes action to bring peace, I support him. This is not inconsistent with my repeated efforts over the years to persuade Presidents Johnson and Nixon to move more quickly and decisively to end our involvement in Indochina.

Finally, I do not deny my differences with Former Congressmen Cohelan and Brown and now-Senator Tunney. I am not a Democrat. I am a Republican who believes that the present Administration's policies on Vietnam, truth in government and civil rights must be changed. These are the main issues on which I base my candidacy.

Paul N. McCloskey, Jr.

The ROTC Vote

Editor, THE DAILY:

Though many opponents of military recruiting on campus have made the mistake of considering such policy to be the domain only of people fortunate (?) enough to be members of the Stanford community, Ray White does them a disservice by raising the Spring, 1970 referendum on ROTC. According to White's letter, "The majority voting wanted ROTC on campus without credit."

Comparison of the following statistics (reprinted from the Mann Committee's report to the Academic Council) with Stanford's current plans for ROTC should shed some light on the subject. Whether or not the Department of Defense will try to set up a voluntary students organization (maybe FCMROTC), as suggested by 32% of those voting is an open question, depending, of course, on how long they are able to maintain ROTC credit courses.

Lenny Siegel

VIII The Role of ROTC on the Stanford campus		Student	Faculty
A.	ROTC should remain on campus as an organized activity WITH ACADEMIC CREDIT for ROTC-taught courses	19%	19%
B.	ROTC should NOT receive credit, but SHOULD be allowed to remain on campus as an organized, official activity of the University	17	23
C.	ROTC should NOT be allowed on campus, EXCEPT as a "voluntary student organization"	32	34
D.	ROTC should NOT be allowed on campus at all even as a "voluntary student organization"	16	17
E.	No opinion	<1	<1
F.	No organized military training at Stanford	16	7
		100%	100%

Students—6200 responses, 32 no response
Faculty—642 responses, 8 no response

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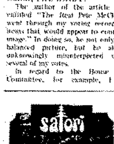

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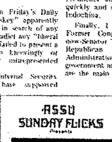

The Rolling Stones
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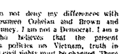
NOV 28 MEM AUD



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ONCE AROUND THE QUAD

TODAY

AFRICAN STUDENTS. Meeting at [illegible] house.
ALCE II. New music classified. Music [illegible] Big Dance, Mike Anderson, others. [illegible] Free.
SARNE CLUB. Meeting to plan trip for Thanksgiving weekend. 7:30 p.m. [illegible]
AWID BOOK EXCHANGE. Details [illegible]
BABE RUTH OBSS. [illegible]
BOOKSALE. Some Club books and [illegible]
BRIDGE CLUB. All players welcome.
CHRISTIAN SCIENCE ORGANIZATION. Testimonies meeting. Visitors always welcome. 7:30 p.m. Memorial Chaplaincy.
CURRENT EVENTS COFFEE CLASH. Public forums. Public Issue Wagons presentations by Mrs. Alexia de Tocqueville and Mr. Sergio Tarragona, students. Prize. [illegible] will offer participants. Provide readings in Spanish and English. 1:15 p.m. at the [illegible]
DAVID MOLTHROP. Speaking on Free Enterprise, and the Rights to Work Laws. Thurs. 8 p.m., TMU main lounge.
ERIC ROULEAU. Middle East [illegible] committee. 7:15 p.m. in Chicanos house.
CANTERBURY EPISCOPALIANS. Eucharist, supper, and discussion. Earlier Jan will be with us again this week. 5:30-7:30 p.m. in Chicanos' [illegible] House.
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GROUP MEDITATION. 5:45 p.m. at the Bridge, 658 Salvatierra.
LITERARY MAGAZINE: SEQUOIA: Noon at the Junipero Office. Bring photographs, [illegible].
PAPER BANK. Have you written any interesting papers of which you are particularly proud? If so, come into ACME for info. on the Paper Bank which, forwards student papers to prospect during the first centuries, suggestions, or comments.
PHOTO CLUB. Mr. Bernet will show us around his darkroom for lab tours. Meet Bernet Wilkes at 7:30 p.m. All relating to power wind sign up on the bulletin board.
PROJECT INFORMATION CENTER: Discussion group meets weekly to discuss work with only students with learning disabilities who need to develop techniques and academic skills. Have Wilmman Preparatory School, Mtn. View. Contact Hal Zuckerman at 363-7253 between 8 a.m. and 4 p.m.
SKI CLUB CABIN: Reservations will be taken for 11/29 - 12/2 to Alpine Meadows [illegible].
THE KITCHEN: In Jacobs Wed.-Sat. 8 p.m. 50 the "Arena", Mrs. Jack Valens needed, free shows in return. Call [illegible], Palo Alto. Nov. 26, Dec. 3-4, 9-11, at 8 p.m. Matinee Dec. 5 at 2 p.m.
TOWN HALL: Open to all, staff, students, etc. Now open the Dynamo office room 7 30 a.m. to 8 p.m. Main Lounge.
TRANSCENDENTAL MEDITATION: Free introduction to hear for people interested in TM. Wilbur Berlin speaking on "Transcendental and Unitedness." 8 p.m. in 1315 274.
URBAN CAMPUS: Meeting for students interested in the urban program planned for spring, and its culture [illegible], 2 p.m. in the SERP Office, 500 Old Union.

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Off-Campus Interns Learn By Field Work

Twenty-two Stanford students have enrolled for academic credit in five off-campus internship public service programs.

The internships, under the auspices of the University's Program on Urban Studies, range from two to three quarters in length.

They include helping train underskilled or "unemployable" people with the Menlo Park office of the Opportunities Industrialization Center West (OICW), working with officials in local city governments, auditing attorneys at the Legal Aid Society of San Mateo County, working with the Stanford Mid-Peninsula Urban Coalition, and serving as "earliers" aides to the bilingual programs of Alviso and Union City.

Program director is Henry van der Voort, senior in psychology, who works under the sponsorship of the Dean of Undergraduate Studies, James Gibbs.

In van der Voort's words, "the internship program has two purposes: one, to provide the student with sufficient practical experience to both guide and evaluate his studies, and two, to provide a service requested by the community."

The internships are open by interview to juniors, seniors and graduates, who must make a weekly commitment of 10 to 15 hours of service during at least two quarters.

KZSU Tonight

Public Affairs Director Robert Fine announces the following programming. Tonight at 7 p.m. on KZSU our bi-weekly open conference with Pres. Richard Lyman and a sampling of student press. Then at 7:30 hear a special documentary prepared from KZSU interviews with Congs. Paul McCloskey, Congs. Don Riegle, John Kemp, Billie Moore, and Larry Seidman of Berkeley concerning "Students and Prospects for 1972."

KZSU can be heard on 880 kc AM in the dorms and 90.1 megahertz on FM receivers.

Interest on savings notes at the Palo Office of Palo Alto, California, ended on Act of March 3, 1879.

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Who, What, When And Where

TUESDAY NOVEMBER 23

Goodbye Columbus is presented by Stanford-In-Washington in Bishop Auditorium. 7 and 9:30 p.m. Tickets: $1.

ALEA II — The Ensemble for New Music under the direction of John Chowning and Ivan Tcherepnin performs in Dinkelspiel Auditorium. They will present two new works by Michael Ardus and Richard Brodsky in addition to works by Joseph Haver and Frederick Rzewski. 8:30 p.m. Free.

Vince Guaraldi at In Your Ear in Palo Alto. 9 p.m. Tickets: $2.

LA Philharmonic Orchestra performs Mozart, Prokofiev and Brahms at Flint Center at De Anza College in Cupertino. 8:15 p.m. Tickets: $5.50, $6.50 and $7.50.

"Man ... The Measure of All Things" — Part 3 of Civilisation Series will be screened in Menlo College's Moore Auditorium. 8 p.m. Free.

Send the 'DAILY' home!

San Francisco Opera's production of Il Tabarro and Carmina Burana at the Opera House. 8 p.m. Tickets: Standing Room Only at $3.

Neil Simon's The Gingerbread Lady at the Curran Theatre in San Francisco. Performances: Monday through Saturday at 8:30 p.m. with Wednesday and Saturday matinees at 2:30 p.m. Tickets: $4-$6.50 (weeknights), $4.50-$7 (Friday and Saturday nights) and $3.50-$6 (matinees). Runs through December 4.

ACT Production of The Tavern at the Geary Theatre in San Francisco. 8:30 p.m. Repeated Friday night at 8:30 p.m. Tickets: $4.90-$6.90 (Tuesday) and $5.90-$7.90 (Friday). Student rush tickets at $3 sold 15 minutes before curtain if available.

The Trial of the Catonsville Nine continues at the New Committee Theatre in San Francisco. Performances: Tuesday through Saturday at 8:30 p.m. and Sunday at 7:30 p.m. Tickets: $5.50-$6.50 (weeknights) and $6.50-$7.50 (Friday and Saturday nights). $1 student discount on all shows and half-price student rush tickets are sold 15 minutes before curtain if available.

The Committee continues performing its revue at 622 Broadway in San Francisco. Performances: Tuesday through Friday nights at 9 and 11 p.m. and Saturday night at 8:30, 10:30 p.m. and 12:30 a.m. Tickets.

Berkeley Repertory Theatre production of Angel Street continues at 2980 College Ave. in Berkeley. Performances: Tuesday through Friday nights at 8 p.m. and Saturday night at 7 and 9:30 p.m. Tickets: $3 and $2 (students, weeknights) and $3.75 and $2.50 (students, Friday and Saturday nights).

WEDNESDAY NOVEMBER 24

A Day In The Country, The Goat and Wedlock House: An Intercourse are presented by the International Association in Geology 320. 7:30 p.m. Tickets: $1.

ACT production of Caesar and Cleopatra at Geary Theatre in San Francisco. 2:30 p.m. Repeated on Thursday at 8:30 p.m. and on Saturday at 2:30 p.m. Tickets: $3.90-$5.90 (matinees) and $4.90-$6.90 (Thursday). Student rush tickets at $3 sold 15 minutes before curtain if available.

ACT production of Antony and Cleopatra at Geary Theatre in San Francisco. 8:30 p.m. Repeated on Saturday at 8:30 p.m. Tickets: $4.90-$6.90 (Wednesday) and $5.90-$7.90 (Saturday). Student rush tickets at $3 sold 15 minutes before curtain if possible.

Cat Stevens plus Mimi Farina and Tom Jans at the Berkeley Community Theatre. 8 p.m. SOLD OUT. San Francisco Opera's production of Maria Stuarda at Opera House. 8 p.m. Tickets: Standing Room Only at $3.

Larry Coryell at In Your Ear in Palo Alto. 9 p.m. Tickets: $2.50.

THURSDAY NOVEMBER 25

The Fifth Dimension at the Circle Star Theatre in San Carlos. 8:30 p.m. Tickets: $3.75, $4.50, $5.50 and $6.50. For the Friday 8:30 p.m., Saturday 7:30 and 10:30 p.m. and Sunday 3 and 7:30 p.m. shows only scattered single tickets remained on Monday morning.

Sha-Na-Na, Elvin Bishop, Ballin' Jack and Kimberley at Winterland in San Francisco. Performances: Thursday through Saturday at 8 p.m. Tickets: $4.

San Francisco Opera's production of Il Trovatore at the Opera House. 8 p.m. Tickets: $5, $8, $12, $15 and $16. $3.50 student rush for available seats 30 minutes before curtain and usual $3 standing room.

FRIDAY NOVEMBER 26

8 Comedy Classic films including W.C. Fields, Charlie Chaplin, Buster Keaton and Little Rascals presented by Stanford Advocates at Bishop Auditorium. 7:15 and 9:30 p.m. Tickets $1.

Cat Stevens with Mimi Farina and Tom Jans at the Santa Clara County Fairgrounds. 8 p.m. Tickets: $3.50 in advance and $4.50 at the door.

Rock and Roll Revival featuring Chuck Berry, Bill Haley & The Comets, Shirelles, Bo Diddley, Dovells, Gary U.S. Bonds and Bobby Comstock & The Comstock Limited at the San Jose Civic Auditorium. 8:30 p.m. Tickets: $3.50, $4.50 and $5.50.

Canada College production of Hamlet at Main Theatre, Canada College in Redwood City. 8 p.m. Repeated Saturday at 8 p.m. Tickets $1.

Mike Nock at In Your Ear in Palo Alto. 9 p.m. Also Saturday at 9 p.m. Tickets: $2.

San Francisco Opera's production of Il Tabarro and Carmina Burana. Tickets: Standing Room Only at $3.

Country Joe MacDonald, Goldie and Homespun at Friends and Relations Hall in San Francisco. 7:30 p.m. Tickets: $2.50.

Chamber Music concert at Oakland Museum featuring members of the Oakland Symphony. 3 p.m. Tickets: $2.

Van Morrison at the Lion's Share in San Anselmo. Performances: Friday through Sunday at 8 p.m. Tickets: $2.50.

Dickens Fair at the Wharfside Complex in San Francisco. Open: Thursday and Friday 5-11 p.m., Saturday 12-11 p.m. and Sunday 12-8 p.m. Tickets: $2.50 and $1.50 (children under 12).

SATURDAY NOVEMBER 27

The Band and Taj Mahal at Civic Auditorium in San Francisco. 8 p.m. Tickets: $3.50, $4.50 and $5.50.

Stars of Lawrence Welk Show including Myron Floren and Burgess & King at Flint Center at De Anza College in Cupertino. 8 p.m. Tickets: $3.50, $4.50 and $5.50.

SUNDAY NOVEMBER 28

Gimme Shelter is presented by ASSU Sunday Flicks in Memorial Auditorium. 7 and 9:30 p.m. Tickets: 50c.

Organists Porter Heaps, Michelle Marran and Sophie Pierson in concert at St. Mark's Episcopal Church in Palo Alto. 3 p.m. Free.

San Francisco Opera's production of Il Trovatore at the Opera House. 2 p.m. Tickets: Standing Room Only at $3.

Ravi Shankar, Ali Akbar Khan and Alla Rakha at the Berkeley Community Theatre. 8 p.m. Tickets: $3.50, $4.50, $5.50 and $10.

'Il Tabarro,' 'Carmina Burana'

Two Wonderfully Complementary Works

By GARY SCHMIDGALL

A song of innocence and a song of experience, this sums up the impact of two wonderfully complementary works now in the S.F. Opera repertory. The goal of innocence is pleasure, sensualism and orgasm, and these are celebrated as never before in Carl Orff's propulsive "Carmina Burana" (1936).

And if the end of experience is oppression and death, then Puccini's taut little shocker "Il tabarro" (The Cloak — 1916) is the perfect representative of this darker side of life.

Artistically, the powers of darkness seemed better served on this occasion. "Tabarro's" crux, vital versus moribund passion, seemed more powerfully conveyed and its cast and conductor more congenial to the music. "Carmina," though impressively rendered, lacked the ultimate charismatic thrust of a perfect performance.

"Opera," however, poorly describes both pieces. "Tabarro" is really an emotional tone-poem, Puccini's finest mood-setting. It is full of acrid orchestration which paints a picture of the *Lumpenproletariat* who run the barges on the Seine worthy of Zola. The plot is simple: Giorgetta, married to a barge-master twice her age, falls in love with a young stevedore. When the old man realizes this, he strangles his rival.

Black Hopelessness

Puccini called "Tabarro" his "black" piece and such it certainly is. The dark, impersonal, ceaseless Seine figures prominently in the music, and in this production a bridge across the river broods crushingly over the action. The mood is one of black hopelessness of an oppressed class, a terrible kind of ennui. Emotion surfaces just enough to show that, somewhere in the darkness, blood is seething.

All the singers rose to the high level of dramatic intensity which the very condensed score demands. Leontyne Price is here performing the role of Giorgetta for the first time, though she has already recorded it (If this sounds like the cart before the horse, you are right).

Price clearly finds this mid-range role grateful to her voice, and she is well into its vocal drama. She knows how to let the rough edges of passion show through a vocal line. Visually, however, Price's tendency to walk through a role is increasing. Her hands seem to have a mind of their own.

Stunning Debut

As the aging husband, Gabriel Bacquier made a stunning if rather odd S.F. debut. Stunning in the power and inner engagement of his dark-timbred baritone and the intelligence of his acting; odd in that this is such a small role for a man famous for his Don Giovanni, Iago, and Scarpia. We should be thankful for such extravagant casting and hope for Bacquier's return.

Aldo Bottion looked perfect as the virile young stevedore and sang with perhaps more intensity than finesse. Newcomer Betty Allen made a fine impression with her rounded and solidly produced mezzo. She, also, was given a role too small for her abilities.

Conductor Santugini was in his element. He kept the somber mood appropriately dominant, while giving the passionate outbursts and inbursts their due. Paolo Bregni's new set is simply superb.

Delightfully Vigorous

If the dominant color of "Tabarro" is black and its accessory shades of grey, "Carmina Burana" is an exhilarating spate of reds, pure whites, rich purples — a feast for the senses. And this is the Opera's approach to the work, which is essentially a plotless setting of various poems (in Latin and medieval German) written by the wandering scholars of the 12th century. Jacob Burckhardt thought these poems the greatest of this period, and indeed they are delightfully vigorous, uninhibited, witty and often moving poems by and about those who loved living.

Rhythm is life: it is the vital force of music. And rhythmic power and inventiveness are the overwhelming features of Orff's style ("Carmina" requires *five* percussionists!). "Carmina" stands beside Stravinsky's "Rite of Spring" in this respect. The music is a perfect instance of the medium as the message. It is an evocation of the life forces, of ribaldry, of blasphemy toward social conventions, of sex-passion. There is not a bar of that musty, pedantic invention of the Age of Reason, counterpoint.

What makes "Carmina" unique, however, is its fidelity to the medieval world-view and musical idioms. The piece is parenthesized by the great chorus *Fortuna imperatrix mundi*, the wheel of fortune which begins and ends all. Within this framework the three sections (Springtime, The Tavern, the Court of Love) unfold their typically medieval subject-matter. Both Orff and this production capture the essential medievalism of the poetry.

Spectacular Effect

Huge chorus, large corps de ballet, brilliant costumes and an eye-filling set give S.F.'s "Carmina" a spectacular effect.

Except for roughness in the soprano section and a few jagged edges in attack, the chorus sang well though falling below their high standards for this season. Raymond Wolansky hefted a rich and agile baritone into his two thrilling numbers, and Shigemi Matsumoto, though shrill in the higher reaches, was a pleasing Burgundian Lady. Tenor Bruce Brewer, for what it is worth, is the Roasted Cygnet for our time.

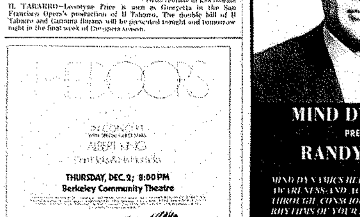
Santugini found the change from Puccini to Orff a bit heady (what conductor wouldn't?) and could not keep the orchestra on pinpoint accuracy. A little more daring-do and charisma could happily have been added.

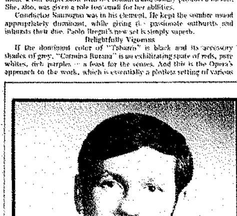
Ghita Hager's direction was basically good, with a few instances of preciousness (especially with the six boy-sopranos). The ballet was imprementionaly conceived and performed by dancers to match.

(This double bill will be repeated tonight and Friday at 8 p.m. at the Opera House in San Francisco. Standing room only will be available at $3.)

Photo courtesy of Ken Howard

IL TABARRO—Leontyne Price is seen as Giorgetta in the San Francisco Opera's production of Il Tabarro. The double bill of Il Tabarro and Carmina Burana will be presented tonight and tomorrow night in the final week of the opera season.





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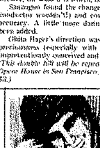

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VARSITY 456 University PALO ALTO
Bless the Beasts and Children plus They Shoot Horses, Don't They ?

Associated Press News Summary 11/22/71

Israelis Prepared

TEL AVIV — Israeli troops were reported ready for any eventuality along the Suez Canal front yesterday following weekend war talk by President Anwar Sadat of Egypt.

"We have been taking Sadat at his word for some time and have taken the necessary precautions," military sources said.

They added, however, that there has been no unusual activity by Egyptian forces dug in across the waterway.

But, as one expert commented, Israeli troops "are ready to fire at any time" and their present deployment would not require any early warning signs.

If there was increased preparedness throughout the Israeli network of frontline bunkers there was no excitement or concern visible in the civilian rear.

"We have heard Egyptian shouting before," one Israeli worker said.

Some Israelis see Sadat's announcement of an Egyptian "decision to fight" as a dangerous game of brinkmanship designed to draw more international and particularly American pressure on Israel to make political concessions.

Pakistan Attacked

RAWALPINDI, Pakistan — Pakistani reports said yesterday that India had launched a massive attack on East Pakistan, sending 12 regular divisions and other forces into battle in four sectors with air and armored support.

Pakistan radio said India launched an "all-out offensive" without declaration of war and added that it had made "dents" in Pakistani defenses.

The radio account claimed 159 Indians were killed and perhaps 500 wounded in fighting around Jessore on the western border with Indian West Bengal. Pakistani casualties were put at 7 killed and 40 wounded.

The report said the battle included tank units on the ground and India's homemade Gnat jets and Russian-supplied MiG fighters in the air.

At the United Nations in New York, Indian Ambassador Samar Sen denied the reports of an Indian attack. He said the fighting involved Pakistani regulars and East Pakistan rebel forces.

A Pakistani spokesman at the United Nations said he had been told by telephone from Islamabad, Pakistan, that 12 regular Indian divisions supported by 38 battalions of Indian border security forces had assaulted Jessore, Chittagong, Sylhet and Rangpur.

Pakistan's U.N. delegation said it was considering asking for an emergency meeting of the Security Council to deal with the situation.

Sexism Court Ruling

WASHINGTON — In a landmark ruling the Supreme Court yesterday unanimously barred arbitrary discrimination against women by legislators everywhere in the nation.

The startling decision, announced by Chief Justice Warren E. Burger, was the first by the high court cloaking women with the equal-protection clause of the Constitution, the basis for earlier rulings advancing the rights of Negroes.

Burger said legislatures may treat women differently from men only when the purpose is reasonable.

The decision came in a relatively obscure case from Idaho in which the father and mother of a deceased son had sued for the right to administer his estate of less than $1,000. Under state law the father had been named the administrator.

"We have concluded," Burger said, "that the arbitrary preference established in favor of males by . . . the Idaho code cannot stand in the face of the 14th Amendment's command that no state deny the equal protection of the laws to any person within its jurisdiction."

War Toys Banned

SACRAMENTO — A ban on so-called "torture toys" and toy bombs and grenades won final legislative approval yesterday on a 45-0 Assembly vote and was sent to Gov. Reagan.

Assemblyman John Burton, the bill's author, said it is the first of its kind passed anywhere in the nation. It is scaled-down version of a blanket war toy ban which Burton has proposed unsuccessfully each of the past five years.

Burton said he amended his bill (AB 1184) this year to outlaw the manufacture or sale of toys he saw advertised depicting "mad scientists torturing young women in dungeons with racks, bed coals and guillotines.

"How anyone could label these kinds of things as toys is beyond me," Burton said.

He sid his bill would not affect toy sales for this Christmas, but added tha he hopes it would influence merchants not to stock such toys. If signed into law, it would give merchants until next July 1 to rid their stocks of the banned toys.

—Daily photo by Harvey Russell

ARMY JUDGE—Major General Harold Parker, acting Judge Advocate General of the United States Army spoke on military justice to a Law Forum audience yesterday. He fielded difficult questions from Venceremos members in the audience.

Army Advocate General Discusses Legal System

The military justice system is "at a legislative crossroads," the Acting Judge Advocate General of the U.S. Army, Major General Harold Parker, said yesterday in a lecture at the Law Forum.

Parker, a Stanford graduate, identified efforts by Senators Bayh and Hatfield as "crucial" in determining the future form of the military system.

After a brief description of the system, concentrating on an analysis of the role of the convening authority, Parker opened the lecture to questions from the audience. He faced aggressive inquiries from a number of Venceremos members and supporters, who had passed out a leaflet on the case of Private Billy Smith; an enlisted man accused of fragging 2 officers in Vietnam.

The authority for the military system of justice stems from Congress, according to Parker, and the system is not subject to civilian review at any level, including the Supreme Court.

In the military system, the convening authority—the officer in charge of the unit involved—is essential. He chooses, at least formally, the judge, panel of officers, defense counsel, and prosecutor in any court-martial. He also decides whether charges should be brought against an individual, and reviews the decision of the court-martial.

In fiscal 1971, the military held 2,300 general court-martials (comparable to a felony trial), and 31,900 special courts-martial (similar to a misdemeanor proceeding, with a maximum six month sentence).

Parker advocated a change in the role of the convening authority, removing him from the processes selecting members of the panel, and from review of issues of fact in the trial.

He commented briefly on the Calley case, estimating appeal time at a minimum of one year, and commending the military lawyers who represented the prosecution and defense.

Consumers Ask Fair Labelling

A Palo Alto-based consumers' group is mailing letters today to 500 manufacturers, asking them to voluntarily reform their labelling and packaging practices.

The polite plea for a "standard of candor and fair dealing between producers and consumers" was issued by Consumer Alliance, which has several hundred members across the country.

Biology Professor and ecologist Paul Ehrlich and an assistant organized the project five months ago.

Consumer Alliance President Roy Kiesling said the consumer movement is tied to the ecologists' "pressure to sell us products that last, that can be repaired and recycled.

"We inform them politely, and then it's their move."

The letter asked that a "tag or insert" be included with each product, listing: the address of its manufacturer, the complete ingredients of foods and household chemicals, how the product performed in tests and whether it has caused any injuries, how to repair it, and the date it was made or packaged.

The group promised to publicize the efforts of companies cooperating with the program and to "buy your product instead of someone else's."

Problems Loom In Ravenswood Future

(Continued from page one)

Ravenswood when it was developed and still does. "It didn't look like it was designed to meet the needs of the black students, and it still doesn't. It seemed to me that since this was a black school, in a black community, it should meet the needs of blacks. But the integration plan was designed only to reach white students."

Indeed, school officials admit blacks were perhaps not as involved in the development of the plan as they should have been.

Still, some students who initially felt as Mitchell does have since modified their views. Craig Taylor, who has attended Ravenswood for three years, and who was a candidate for student body president, says his first reaction to the plan was that "it was a sort of divide-and-conquer program aimed at the blacks."

But, he says, "after a week or two of hearing the plan, I thought it was an excellent idea. School is supposed to prepare you for life after high school, and life isn't all black or white, so this plan helps put it right on the line."

As for the second difficulty Ravenswood faces, the possibility of a large academic gap between whites and blacks, Cryer notes that the problem may exist but says it's too early to tell yet.

All Volunteers

What it amounts to is that everyone at Ravenswood, both teachers and students, is a volunteer—except possibly many of the black students. Though they were free to volunteer out, they may have stayed more out of convenience than choice.

So, there may be highly motivated whites seeking new educational experiences at Ravenswood, and less motivated blacks who may simply have not wanted to transfer to a strange school.

The only problem is that Ravenswood itself is now a strange school, compared to what it was a year ago.

"We have tremendously good students here," Cryer says. "But it does make sense that if a black student had trouble in junior high school, he is going to go to high school where he feels most comfortable." Up until this year, that school may have been Ravenswood.

Academic Gaps

"If this were true, and it continued to be true," he says, "we could have serious academic gaps if the white coming in is the type who feels he has a better chance to achieve here while the black is unmotivated.

"We feel we can meet the needs of all," Cryer says, "both those who are academically talented and those who are not.

"We think we have enough options available to handle students at any level. If we can stimulate interest by giving an unmotivated student a unit of folk rock, then maybe we can lead him into political science. If we can get him involved in community action, then we may be able to get him involved in looking at government processes.

"We have to start somewhere with him. We just can't say 'Take American Government or forget it and get out.'"

Measuring Stick

On the third question, that of measuring Ravenswood's success, Cryer says evaluating the school's success and in turn the success of the voluntary desegregation program will be rather simple. "It'll depend on how many students want to stay here next year and how many are lined up outside the door trying to get in," he says.

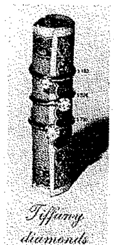
Yet, at the same time there is another measuring stick which creates something of a dilemma for the school, the question of how many of the several hundred blacks who left Ravenswood will want to come back.

"If the school is as successful as is hoped, we should attract all those blacks back here," Cryer says. "If we do, if we reverse the flow, we will have succeeded, yet failed, since the percentage of black students might go back up."

Only with spring then, will the district get its first indication of just how well the program has worked.

Some students though are not waiting that long to proclaim results.

"For myself," McCurry said, "it's already been a big success. The real test after all is going to come for the whites when we get out of school. It's going to be in how we relate to blacks. Because of Ravenswood, we should be in a far better position to deal with life later on."



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Eligibility: Qualified students of any major (juniors, seniors, graduates) with the necessary competence in German (to be determined by an examination); participation limited to fifteen.

Academic Program: Participants will be simultaneously enrolled at Stanford (2 quarters) and fully matriculated at the University of Cologne (April 1 — August 15) with the permission to attend lectures and seminars at the nearby University of Bonn also; regular Cologne and Bonn courses will be complemented by colloquia and tutorials and supervised by the resident program director.

Costs: The Cologne-Bonn Program is jointly sponsored by the Dept. of German Studies and the Overseas Campuses Office and operates on the same financial principle as the other overseas campuses: Participants pay regular tuition and room and board fees for two quarters. Stanford, in exchange, provides for, and covers the costs of, transportation from S.F. to Cologne; room, board, and local transportation; courses at Cologne and Bonn; additional colloquia and tutorials; field trips, etc., and maintains a center on the Cologne campus for classes and social meetings.

For further information (applications not later than December 10) please contact the program director
Joschi Hutschneider
Dept. of German Studies
No.212P, ext. 2566 as soon as possible!

"To forget pain is to be painless;
To forget care is to be rid of it;
To go abroad is to accomplish both."
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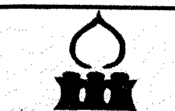

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Statement of Vicki Saporta
President & CEO, National Abortion Federation
Opposing the Nomination of Judge Neil Gorsuch to the Supreme Court
March 10, 2017

The National Abortion Federation (NAF) strongly opposes the nomination of Judge Neil Gorsuch to become an Associate Justice of the United States Supreme Court. If confirmed, we believe Gorsuch would be a vote to overturn or considerably weaken the longstanding precedent of *Roe v. Wade*, thereby jeopardizing the lives and health of women and their families.

NAF is the professional association of abortion providers, and was founded in 1977. After *Roe*, abortion providers recognized the need for a national professional organization to set medical standards, increase women's access to abortion care, and give support to the pioneers of this new branch of medicine. Our groundbreaking founders included providers from across the country, faculty from medical schools, and abortion advocates. Since 1996, NAF has worked with our members to ensure compliance with our evidence-based *Clinical Policy Guidelines*, which set the standards for quality abortion care in North America. Today, our work supports the dedicated health care professionals who make reproductive choice a reality, as well as their patients.

For over forty years, *Roe* has protected the health and well-being of millions of women across our nation. Today, support for *Roe* is at a record high: seven in ten Americans oppose overturning *Roe*.[1] Despite this reality, the President and lawmakers across the country continue to push an anti-abortion agenda, which includes the nomination of Judge Neil Gorsuch.

President Trump created an ideological litmus test[2] for his judicial nominees, promising to only put forth Supreme Court nominees who would "automatically" overturn *Roe*.[3] There is nothing in Gorsuch's record to suggest he will not do exactly that. In fact, in every case regarding women's health he has considered, he has reached an outcome that undermines reproductive freedom. Based on Judge Gorsuch's judicial philosophy, writings, record, and the circumstances of his nomination, it is clear Judge Gorsuch is a threat to safe, legal, and accessible abortion care.

"Looking Backward, Not Forward"

Gorsuch is an originalist who has said cases should be decided "looking backward, not forward" and should depend on what the law was understood to mean at the time it was written. He also believes that "in *Roe v. Wade* the Court did of course endorse a new right in the face of substantial contrary history."[4] Together with his judicial philosophy, this statement indicates Gorsuch believes *Roe* was wrongly decided.

Unlike Gorsuch, we believe Supreme Court rulings should protect and even expand access to abortion care. Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care.

Prior to *Roe*, countless women died or experienced serious medical problems as a result of illegal abortion. Criminalization did not reduce the number of women who sought abortion care, but it did cause women to risk their lives and health to end an unintended pregnancy. Gorsuch's philosophy would send us back to a time when women made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments or in unsanitary conditions. Before 1973, women streamed into emergency rooms with serious complications — perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene — that resulted in sterility or even death in many cases.

One woman, Rita Mattia, recounted her experience during college after helping her friend access abortion before *Roe*:

> *"The next evening we feigned ignorance as we carried her limp body into the school infirmary; her fever was 104 and she had lost a great deal of blood. Looking back, I'm sure the nurse knew what had happened; I'm equally sure it was not nearly as rare an event as it should have been."*
>
> *"The doctors did manage to save her life, but our helpless and frightened friend lost her uterus at age 20 — 10 years before Roe v. Wade."*[5]

Physicians were also impacted and often had to respond to emergency medical situations created by the criminalization of abortion care. Although many decades have passed, there are still some physicians who can recall what it was like before abortion became legal across the country. Dr. David Grimes, who performed his first abortion in 1972, has written:

> *"When I was in medical school in North Carolina, I got a page one night to tend to a patient with a 106 degree fever. I assumed that number was made in error. It wasn't. When I examined her I found a red rubber catheter protruding from her cervix. Another day, I was paged for a young co-ed in septic shock with barely any blood pressure. There was a fetal foot protruding from her cervix. The first had gotten an illegal abortion, the second had tried to do it herself.*[6]

Dr. Warren Hern recalls the desperate attempts at abortion many women made before 1973:

> *"As a medical student in the early '60s, I was regularly taking care of women who were suffering and dying from the complications of illegal abortions. There was a woman who had been turned down for an abortion at a nearby hospital. She went home and shot herself in the uterus and then drove herself back to the hospital."*[7]

Reflecting on his time treating women before *Roe*, Dr. Eugene Glick wrote that:

> *"I think the image that I retain was that of a 31-year-old Mexican-American woman who died of endotoxic shock with her husband and four or five children around," he says. "And that scene is in my mind and has been in my mind coming back all the time. I see the bed, I see the kids crying and I see the husband crying."*[8]

Beginning in 1970, four states repealed their anti-abortion statutes. In 1972, according to an analysis by the Guttmacher Institute, an estimated 50,000 women traveled more than 500 miles to obtain a legal abortion in New York City.[9] This already burdensome option was only available to the small proportion of women who were able to pay for the procedure in addition to the expense of travel and lodging. Moreover, having to travel long distances often resulted in delaying the procedure, and if a complication occurred, the woman might already be in her home state, where it was likely that she would receive care from a physician with no abortion experience.

An anti-choice justice like Gorsuch would return women to the days when they had to deal with unimaginable and sometimes horrific conditions to receive abortion care. If *Roe* is reversed and the states

are allowed to set abortion policy, twenty-one states are likely to ban abortion almost immediately and nine states would be battlegrounds, effectively turning back the hands of time and sending women in those states to a bygone era.

The Retreat from *Roe v. Wade*

The importance of the Supreme Court at this time cannot be overstated. If Gorsuch is confirmed, the current flood of anti-abortion bills and resulting litigation would likely mean that numerous Supreme Court cases would be heard by this anti-choice judge during his lifetime appointment, which could have devastating consequences for decades to come.

Since abortion opponents have been unable to reverse *Roe* in its entirety, they have resorted to passing laws that chip away at the precedent — making it meaningless in many parts of the country. Even with the Supreme Court precedent in place, a woman's ability to access abortion care often depends on where she lives and whether she has the financial resources to afford the procedure in addition to the costs of travel and lodging, should they be necessary.

Since 2010, when anti-choice lawmakers took control of many state legislatures, abortion access has been under an unprecedented attack. Between 2011 and 2014, state lawmakers enacted 231 abortion restrictions. In 2016 alone, twenty-six states enacted 56 anti-choice measures. In part due to the recently enacted laws, at least 162 providers have closed from 2011 to 2016.[10] Several states currently have just one abortion provider.

At a time when the core principles of *Roe v. Wade* are being eroded by elected officials, it is ever more important that the next Supreme Court justice be a candidate who will respect Supreme Court precedent and women's access to safe, legal abortion care.

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court issued an important decision in June 2016 that protected women's access to abortion care. This case challenged the constitutionality of HB2, a sweeping Texas measure that imposed numerous restrictions on access to abortion care, including requiring doctors to obtain admitting privileges at local hospitals no farther than 30 miles away from the clinic, and mandating that every health care facility offering abortion care meet building specifications to become ambulatory surgical centers. These requirements unfairly singled out abortion providers and did not apply to other comparable medical procedures or practices. HB2 resulted in the immediate closure of many facilities, and could have resulted in the closure of nearly 75 percent of the clinics in Texas — forcing some women to drive up to 300 miles one-way to obtain safe, legal abortion care.

The Supreme Court held that these restrictions were unconstitutional. As a result of the *Whole Woman's Health* decision, many clinics will be able to stay open. As this case clearly demonstrates, the Supreme Court is critical for maintaining women's access to abortion care.

Judge Gorsuch's Record

Planned Parenthood v. Utah: Gorsuch has demonstrated he will go to extraordinary lengths to reach a result that would block women's access to basic reproductive health care.[11] In 2015, Utah's Governor ordered that the state strip funding from the Planned Parenthood Association of Utah. A panel of the Tenth Circuit Court of Appeals granted a preliminary injunction to block the defunding efforts. Gorsuch took the highly unusual step of voting to rehear the three-judge panel's decision, even though neither the parties nor any judge on the panel requested a rehearing and the time for such a request had expired. In this instance, Judge Gorsuch was willing to ignore court custom to ensure that Utah's Governor could eliminate funding for Planned Parenthood.

Hobby Lobby v. Sebelius: Gorsuch joined the decision that laid the groundwork for the Supreme Court's decision in *Hobby Lobby v. Sebelius*. The Tenth Circuit held that corporations like Hobby Lobby — a craft store chain employing more than 13,000 people — can be "persons" with religious beliefs under the Religious Freedom Restoration Act (RFRA) and employers can use those religious beliefs to block employees' insurance coverage for birth control.[12] Gorsuch wrote a separate concurrence with a reading of RFRA that was extreme in how far it would apply the legislation and in the near absolute deference it would give claims of religious exercise,[13] more extreme than either the Tenth Circuit or the Supreme Court.

Little Sisters of the Poor v. Burwell: In this case, Gorsuch sided with employers who challenged the accommodation to the birth control benefit, which allows certain employers to opt out of paying for insurance coverage, but is designed to ensure employees receive birth control coverage through their regular insurer.[14] Contrary to the overwhelming number of courts of appeal that ruled to uphold the accommodation, Gorsuch joined a dissent that argued even the accommodation —which simply requires filling out a form to opt out — was a substantial burden on religious exercise under RFRA.[15]

Gorsuch's Writings off the Court

On personal autonomy: In his book, *The Future of Assisted Suicide and Euthanasia*, Gorsuch indicates he does not believe the Constitution should protect personal autonomy. The Supreme Court's decision in *Planned Parenthood v. Casey* rested in part on the plurality's argument that abortion is fundamental to principles of individual autonomy and "the right to define one's own concept of existence, of meaning, of the universe and of the meaning of human life."[16] *Casey* also affirmed that the Constitution protects those decisions that are among "the most intimate and personal choices a person may make in a lifetime."[17] This language has been cited in numerous Court decisions since then. Despite this legal precedent, Gorsuch argued in his book that the result in *Casey* was mainly due to *stare decisis*, or respect for settled law, and that the autonomy passage was "arguably inessential" to the decision.[18]

A deference to elected officials: In an article for the *National Review Online*, Gorsuch criticized "the Left" for advancing too many constitutional lawsuits and "relying on judges and lawyers rather than elected leaders and the ballot box."[19] Additionally, in the Planned Parenthood defunding case *Herbert*, Gorsuch suggested he would give politicians more leeway than other judges would, accusing the panel's majority of being "at odds with the comity federal courts normally afford the States and their elected representatives."[20] Gorsuch's approach is especially troubling during a time when Congress is dominated by anti-abortion members, and when the Trump administration continues to pursue an agenda that pushes the boundaries of the Constitution. The courts are often the final safeguard against abuse of power. Therefore, any nominee to the Court must be an independent check when necessary on the President and on Congress. We do not believe Gorsuch will be the independent check women and families need and deserve.

Conclusion

The next Supreme Court justice will enter the reproductive health and justice debate at a critical time. Women deserve access to safe, high-quality abortion care and any nominee who cannot show with certainty that they will uphold Constitutional protections is not fit to sit on the bench. A Supreme Court seat is a lifelong appointment and comes with enormous power and influence. If Judge Gorsuch is confirmed, there will be grave consequences for women's lives and health for decades to come.

We call upon Senators to oppose the nomination of Neil Gorsuch and block his confirmation to the Supreme Court.

[1] Pew Research Center, *About seven-in-ten Americans oppose overturning Roe. v. Wade* (January 3, 2017), http://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/.
[2]When asked by Jake Tapper on CNN whether opposing abortion would be a litmus test for his Supreme Court nominees, Trump responded "It is." CNN, Donald Trump on CNN's State of the Union: "I'm in it to win it…I will make our country great again," (June 28, 2015), http://cnnpressroom.blogs.cnn.com/2015/06/28/donald-trump-on-cnns-state-of-the-union-im-in-it-to-win-it-i-will-make-our-country-great-again/.
[3]During his third Presidential debate, Trump was asked by Chris Wallace, "Do you want to see the Court overturn Roe v. Wade?" and he responded "Well, if we put another two or perhaps three justices on, that's really what's going to be -- that will happen. And that'll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination." Aaron Blake, The final Trump-Clinton debate transcript, annotated, The Washington Post (October 19,2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/?utm_term=.f322094dec65.
[4] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2006) at 79.
[5] Rita Mattia, Letter to the Editor, *Tragedy Occurred 20 Years Before Roe.* RICHMOND TIMES-DISPATCH, Saturday City Edition, Feb. 22, 2003, at A-12.
[6] Alex Ronan, *The First Legal Abortion Providers Tell Their Stories*, NEW YORK MAGAZINE, Oct. 13, 2015, *available at* http://nymag.com/thecut/2015/10/first-legal-abortionists-tell-their-stories.html.
[7] *Id.*
[8] Felicia R. Lee, *Think Tank; Doctors who Performed Abortions Before Roe v. Wade*, THE NEW YORK TIMES, Oct. 4, 2003, at 9.
[9] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, GUTTMACHER INSTITUTE (March 1, 2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.
[10] Meaghan Winter, *Why it's so hard to run an abortion clinic–And why so many are closing*, BLOOMBERG BUSINESS WEEK (February 24, 2016), https://www.bloomberg.com/features/2016-abortion-business/.
[11] Planned Parenthood Ass'n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016).
[12] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).
[13] *Id.* at 1152 (Gorsuch, J., concurring) ("Neither can there be any colorable question that the Greens face a 'substantial burden' on their 'exercise of religion")(emphasis added).
[14] Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10 Cir. 2015).
[15] *Id.* at 1316.
[16] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
[17] *Id.*
[18] *See supra* note 4, at 80.
[19] Neil Gorsuch, *Liberals 'N' Lawsuits*, NATIONAL REVIEW ONLINE (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.
[20] *See supra* note 13, at 1311.

The New York Times

Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies

BY Charlie Savage, Feb. 15, 2017

WASHINGTON — In December 2005, Congress handed President George W. Bush a significant defeat by tightening legal restrictions against torture in a law called the Detainee Treatment Act. Soon afterward, Neil M. Gorsuch — then a top Justice Department official — sent an email to a White House colleague in case he needed "cheering up" about the administration's setback.

The email from Judge Gorsuch, nominated by President Trump to fill the vacancy on the Supreme Court caused by the death of Justice Antonin Scalia, linked to articles about a less-noticed provision in the act that undercut the rights of Guantánamo Bay detainees by barring courts from hearing their habeas corpus lawsuits.

"The administration's victory is not well known but its significance shouldn't be understated," wrote Judge Gorsuch, who had helped coordinate the Justice Department's work with Congress on the bill.

The email about the court-stripping provision — which the Supreme Court later rejected — is among more than 150,000 pages of Bush-era Justice Department and White House documents involving Judge Gorsuch disclosed by the Trump administration ahead of his Senate confirmation hearings next week.

Judge Gorsuch's time in the executive branch was brief. He joined the Justice Department in June 2005 as the principal deputy associate attorney general, meaning he was the top aide to the No. 3 official in the department. He left in August 2006, when Mr. Bush appointed him as a federal appeals court judge in Denver.

But those 14 months were tumultuous ones for the Bush administration amid controversies over detainee abuses, military commissions, warrantless surveillance and its broad claims of executive power. Judge Gorsuch's job put him at the center of both litigation and negotiations with Congress over legislation about such topics.

References to those efforts may offer clues to Judge Gorsuch's approach to the sort of national-security and executive power issues that rarely come before his appeals court but can be crucial at the Supreme Court.

In November 2005, for example, Judge Gorsuch visited Guantánamo for a briefing and tour. Afterward, he wrote a note to the prison operation commander, offering a glowing review.

"I was extraordinarily impressed," Judge Gorsuch wrote. "You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier."

During the negotiations with Congress over the Detainee Treatment Act, Judge Gorsuch helped persuade lawmakers to weaken a provision that permitted a civilian appeals court to review decisions by military

tribunals. The original draft let judges scrutinize whether a tribunal had "applied the correct standards," but the revised one only let them look to see whether the tribunal had applied standards set by the Pentagon.

The change, "in response to our concerns," Judge Gorsuch wrote, "reduces significantly the potential for judicial creativity."
In June 2006, the Supreme Court issued a landmark ruling that not only struck down the administration's military commissions system, but also implied that officials involved in abusive interrogations might be vulnerable to prosecution for war crimes. Judge Gorsuch helped draft a proposal for legislation that would address both matters, the files show, although he left before the eventual bill, the Military Commissions Act, was enacted.

He was also part of teams that helped draft speeches on national security for Attorney General Alberto R. Gonzales and an op-ed published by USA Today, under his supervisor's byline, defending President Bush's warrantless surveillance program and his use of a signing statement to claim a right to bypass the Detainee Treatment Act's provision banning torture.

And, in his role overseeing the department's Civil Division, Judge Gorsuch handled all "terror litigation" for his office, an email from a colleague said. Such national security cases included the government's defense against a lawsuit seeking disclosure of photographs of detainee abuses after the Abu Ghraib scandal, he wrote in a description of his work for a performance review.

They also included a lawsuit by a German man, Khaled el-Masri, against the former C.I.A. director and companies suspected of being involved in the agency's so-called extraordinary rendition flights. The plaintiff said the agency had abducted him, beaten him and taken him to a "black site" prison in Afghanistan, and then let him go after realizing it was a case of mistaken identity. But the Bush administration argued that the case must be dismissed lest it endanger "state secrets."

When the district court judge overseeing the rendition lawsuit agreed to dismiss it, David Addington, the counsel to Vice President Dick Cheney, sent a congratulatory email to his former deputy, Courtney Simmons Elwood, who had since become a counselor to Mr. Gonzales.

Ms. Elwood — who is now President Trump's nominee to be C.I.A. general counsel — forwarded it to Judge Gorsuch and a few other top officials on the team handling the case.

"Your department did a great job with" the C.I.A. case "in protecting the ability of the institution of the presidency to protect the American people under the Constitution in the war on terror," Mr. Addington wrote. "Well done."

But while Judge Gorsuch spent those 14 months immersed in executive power and national security disputes from the Bush administration's perspective, his own comments in the documents rarely sounded overtly ideological notes like Mr. Addington's.

Peter Keisler, who worked with Judge Gorsuch on several such matters as the head of the Civil Division at the time, argued that his role during that period should be understood as representing a client: He helped shape arguments and litigation strategy, but not the underlying national security policy decisions which "had already been made."

"The emails just reflect the fact that he was gratified when the department would win and disappointed when it would lose, which is not surprising because these were cases he was working on as an attorney for the government and advancing its positions," Mr. Keisler said.

The files have not yet been systematically examined, and Democrats on the Senate Judiciary Committee have complained that they appear to be incomplete. Senator Dianne Feinstein of California, the panel's ranking Democrat, sent a letter to Judge Gorsuch this week saying that the committee needs additional documents by 5 p.m. on Thursday.

For example, her letter noted, one document in the tranche indicated that Judge Gorsuch made a "proposal for a seminar on torture policy" to the Council on Foreign Relations, but the proposal itself was not included in the documents given to the committee.

"Please provide to the committee any materials related to any involvement you had in the issue of torture (including so-called 'enhanced interrogation techniques'), including this proposal," she wrote.

The New York Times

Newly Public Emails Hint at Gorsuch's View of Presidential Power

BY Charlie Savage, Mar. 18, 2017

Washington — In December 2005, when Congress enacted the Detainee Treatment Act, tightening restrictions against torture but barring lawsuits by Guantánamo detainees, Neil Gorsuch stood at the center of the internal debate about whether President Bush should issue a signing statement about the bill.

Judge Gorsuch, whose Supreme Court confirmation hearing is set to start on Monday, was then a senior official in the Justice Department. He pushed strongly for a signing statement — in part, he wrote in an email, because it could make clear the Bush administration's view that the new torture ban was "best read as essentially codifying existing interrogation policies."

An email chain about the development of Mr. Bush's eventual signing statement, which attracted critics because it also claimed a right to bypass the torture ban under his powers as commander in chief, was among more than 100 pages of emails and documents from Judge Gorsuch's 2005-2006 tenure at the Justice Department that the Trump administration provided to the Senate late on Friday.

The executive branch had previously withheld those pages from nearly 175,000 documents it provided to Congress because it considered them covered by a privilege for confidential internal deliberations. But it waived that privilege after Senator Dianne Feinstein of California, the top Democrat on the Senate Judiciary Committee, requested their disclosure. Previous disclosures showed that Judge Gorsuch helped to defend and advance the Bush administration's positions related to Guantánamo detainees, military commissions and other policy disputes arising in the war on terrorism, although those policies had been set by others.

That same caveat applies to the newly available documents. Still, they could provide further clues to Judge Gorsuch's approach to defining the scope and limits of a president's power in national-security matters.

Disputes about the legality of Bush-era interrogation and surveillance policies arose in December 2005, and each came to involve Judge Gorsuch. First, Congress enacted the Detainee Treatment Act. Most of the attention given to the legislation focused on its creation of a new law, championed by Senator John McCain, Republican of Arizona, that barred officials from inflicting cruel, inhuman or degrading treatment on detainees anywhere in the world.

The Bush administration, which was running a torture program for terrorism suspects in overseas C.I.A. "black site" prisons, opposed Mr. McCain's efforts. At the same time, Judge Gorsuch was working with Senator Lindsey Graham, Republican of South Carolina, to include an amendment cutting off Guantánamo detainees' access to the courts, which the administration supported. Both the torture ban and the court-stripping components made it into the final bill, setting up the internal debate about whether to have Mr. Bush issue a signing statement, an official document laying out a president's understanding of a bill as he signs it into law.

Judge Gorsuch argued for a signing statement for several reasons, including that such a statement would help advance the view that the court-stripping measure applied to existing lawsuits and not just to future ones — a view the Supreme Court later rejected — and that it could set the stage for interpreting the torture ban in a limited way.

Although his email did not mention it, the context was that earlier in 2005, the Justice Department's Office of Legal Counsel, in a then-secret memo, had already concluded that C.I.A. interrogation tactics like waterboarding and sleep deprivation did not amount to cruel, inhuman or degrading treatment. Judge Gorsuch wrote that issuing a statement "would help inoculate against the potential of having the administration criticized sometime in the future for not making sufficient changes in interrogation policy in light of the McCain portion of the amendment."

Importantly, the email chain also shows that the most disputed part of Mr. Bush's signing statement — a line that implied the president could bypass the new statute under his purported constitutional powers — was drafted not by Judge Gorsuch but by David Addington, the counsel to Vice President Dick Cheney.

Another controversy that broke out in December 2005 stemmed from the revelation that Mr. Bush had authorized the National Security Agency to wiretap Americans' international phone calls and emails without warrants, despite a 1978 law that required warrants. The Bush administration argued that its program was legal in part because the president had inherent power to conduct warrantless surveillance for national security. Critics responded that even if the president may do something in the absence of a legal limit, it does not necessarily follow that he can still do it after a law forbids it.

In March 2006, Judge Gorsuch helped to draft a statement for Attorney General Alberto Gonzales at a hearing about the program. An initial draft said the president wielded "inherent" powers to conduct warrantless surveillance in wartime that "cannot be diminished or legislated away."

But, the internal emails show, Paul Clement, the solicitor general at the time, objected that the suggestion Congress cannot encroach upon how presidents conduct surveillance was unconvincing, so Judge Gorsuch took that line out.

Still, in an email distributing the revised draft, Judge Gorsuch made clear that he did not endorse either view. "I am but the scrivener looking for language that might please everybody," he wrote, "and I have tried to accomplish that in the attached latest draft."

The New York Times

Neil Gorsuch Has Web of Ties to Secretive Billionaire

BY Charlie Savage and Julie Turkewitz, Mar. 14, 2017

WASHINGTON — The publicity-shy billionaire Philip F. Anschutz inherited an oil and gas firm and built it into an empire that has sprawled into telecommunications, railroads, real estate, resorts, sports teams, stadiums, movies and conservative publications like The Weekly Standard and The Washington Examiner.

Mr. Anschutz's influence is especially felt in his home state of Colorado, where years ago Judge Neil M. Gorsuch, a Denver native, the son of a well-known Colorado Republican and now President Trump's nominee for the Supreme Court, was drawn into his orbit.

As a lawyer at a Washington law firm in the early 2000s, Judge Gorsuch represented Mr. Anschutz, his companies and lower-ranking business executives as an outside counsel. In 2006, Mr. Anschutz successfully lobbied Colorado's lone Republican senator and the Bush administration to nominate Judge Gorsuch to the federal appeals court. And since joining the court, Judge Gorsuch has been a semiregular speaker at the mogul's annual dove-hunting retreats for the wealthy and politically prominent at his 60-square-mile Eagles Nest Ranch.

"They say a country's prosperity depends on three things: sound money, private property and the rule of law," Judge Gorsuch said at the 2010 retreat, according to his speaker notes from that year. "This crowd hardly needs to hear from me about the first two of the problems we face on those scores."

With the Senate Judiciary Committee set to take up Judge Gorsuch's nomination next week, Democrats have based much of their criticism of him on the argument that his judicial and economic philosophy unduly favors corporations and the wealthy. But his relationship with Mr. Anschutz, 77, whose fortune is estimated by Forbes to be $12.6 billion, has received scant attention.

The Federalist Society and the Heritage Foundation, which developed the list of potential Supreme Court nominees from which Mr. Trump selected Judge Gorsuch, receive funding from Mr. Anschutz. But it is not clear how well the two know each other, in part because the mogul and those around him keep a low profile.

When a reporter called Mr. Anschutz's company and asked for a press officer, a woman who answered said, "We do not respond to media requests." She hung up when asked her name.

But he has connections with others who work with the Colorado billionaire. For nearly a dozen years, Judge Gorsuch has been partners in a limited-liability company with two of Mr. Anschutz's top lieutenants. Together, they own a 40-acre property on the Colorado River in the mountains northwest of Denver, where they built a vacation home together.

Judge Gorsuch began representing Mr. Anschutz and his companies when he was working for the Washington law firm then known as Kellogg Huber. Mark Hansen, a senior partner at the firm, said he assigned the future judge, then a junior partner, to help on various cases involving the Anschutz Company "both because of his skills and experience and because he had expressed to me an interest in getting involved in things relating to his home state."

A 2004 case was typical. A teachers' retirement fund that owned shares in the Regal Entertainment theater chain sued over its decision to issue a debt-financed dividend that would permit Mr. Anschutz, who owned 58 percent of the company, to extract $368 million. The plaintiffs said this amounted to self-dealing.

Judge Gorsuch helped win a ruling in Regal's favor by arguing that it could handle the extra debt, telling a judge, "This company is what some analysts call a cash cow."

Another set of shareholder lawsuits in which Mr. Gorsuch represented Mr. Anschutz involved Qwest Communications International, whose stock price had collapsed amid an accounting fraud scandal after Mr. Anschutz, a Qwest board member, had sold off a large stake. Mr. Hansen said a judge dismissed Mr. Anschutz from the case, although Qwest paid a settlement.

In 2005, Judge Gorsuch left private practice to work at the Justice Department. But soon afterward, a seat on the federal appeals court in Denver became vacant, and Mr. Anschutz sought to secure it for him.

In January 2006, a top lawyer for Mr. Anschutz sent a letter on the billionaire's behalf to President George W. Bush's White House counsel, Harriet E. Miers, suggesting that he nominate Judge Gorsuch. The letter said Mr. Anschutz had spoken to Colorado's only Republican senator at the time, Wayne Allard, about his idea.

"I have had the pleasure of knowing Mr. Gorsuch for several years, as we worked closely together on several complex federal cases," wrote the lawyer, Bruce Black, who is now the executive vice president and general counsel of the Anschutz Company. "I have found Mr. Gorsuch to be an exceptionally talented lawyer."

When he was named to the appeals court, Judge Gorsuch sought to recuse himself from numerous Anschutz-related cases "because my former client" was involved, according to a list he submitted to the Senate.

In 2007 he did participate in a case involving a firm that had merged with Qwest. The disability fund of the old firm, not Qwest, was named as the defendant, although the opinion, written by another judge, noted the old firm was "now Qwest."

Liz Johnson, a spokeswoman for Judge Gorsuch, portrayed his participation in that Anschutz-linked case as inadvertent, explaining that he did not include the old firm's name in a recusal list he filed with the court clerk because "it did not exist as an independent company" when he became a judge.

Steven Lubet, a Northwestern University law professor who has written about judicial ethics and recusals, said that so long as Judge Gorsuch disqualifies himself on a case-by-case basis from Supreme Court cases that are too involved with Mr. Anschutz's interests, his ties to the billionaire should not be a problem.

But the judge appears to be leaving the door open to participating in Anschutz-related cases on the Supreme Court.

Ms. Johnson said his recusal practices at the appeals court went further than what is required on the Supreme Court. The Supreme Court's procedure is that individual justices decide for themselves whether any particular case meets a vague standard for recusal set by a 1974 statute. It does not address whether cases involving former clients raise an improper appearance of a conflict of interest.

James Sample, a Hofstra University law professor who has studied Supreme Court recusals, said, "It's very reasonable to ask a Supreme Court nominee for a more thorough answer" about how he will weigh such decisions, especially since "it seems as though there is a kind of continuous relationship — this is not just a past client."

One of the Anschutz executives Judge Gorsuch represented in a Qwest lawsuit was Cannon Harvey, the head of the venture capital investment arm of Mr. Anschutz's empire. In 2005, a company called the Walden Group filed paperwork with the Colorado secretary of state that listed Mr. Harvey as the company's registered agent, but did not disclose any other partners' identities.

But when he was nominated for the appeals court, Judge Gorsuch disclosed in his Senate questionnaire that he was a partner, too. The Walden Group attracted little attention until his nomination to the Supreme Court, when American Bridge, a liberal research group, identified public records about it that linked Judge Gorsuch to Mr. Harvey.

Days after its formation, the Walden Group purchased a 40-acre property along the Colorado River's headwaters in the mountains northwest of Denver. The group then built a 2,923-square-foot log house there overlooking "the quiet seclusion of the private fishery," including both sides of 2,000 feet of the river, according to a real estate listing.

Ms. Johnson said the Walden Group has three partners: Judge Gorsuch, Mr. Harvey and Kevin Conwick. The judge befriended Mr. Harvey while representing Anschutz companies, and Mr. Conwick was a friend of the judge's late father, a Denver lawyer, she said.

Mr. Conwick is also another important member of Mr. Anschutz's network. His law firm profile focuses on his work through the years as the billionaire's counsel in deals to buy sports teams and develop stadium and entertainment district projects, like the Staples Center in Los Angeles.

Ms. Johnson said Judge Gorsuch contributed $360,000 to the Walden Group, giving him a 20 percent stake; Mr. Harvey and Mr. Conwick each own 40 percent. She said the partners divide the time when each has a right to vacation on the river property, as well as taxes and utilities, based on their respective shares.

Although the judge's stake is smaller than his partners', county records direct correspondence about the property to him at the federal courthouse in Denver.

A longtime friend of Judge Gorsuch's whom Ms. Johnson made available to discuss the property said the partnership had its origin years ago, when Judge Gorsuch's father and a dozen friends — including Mr. Conwick — bought an adjoining property to be a timeshare they called the Walden Hollow Fishing Club. When the 40-acre property became available, the judge persuaded Mr. Harvey and Mr. Conwick to partner with him to buy it for a similar timeshare, the friend said.

Mr. Conwick and Mr. Harvey declined to discuss the partnership, but since 2015, the Walden Group has been trying to sell the property, and few neighbors know who owns it.

"They're very protective of their fishing," said Dawn Murphy, 46, who said she was one of only a few year-round residents nearby.

But down the gravel road from Ms. Murphy's cabin, a man outside a ranch house identified himself as the river property's caretaker.

"I'm one of maybe half a dozen people in this valley who know of Neil Gorsuch," he said.

Then, emphasizing that he was a former law enforcement official, he asked a reporter to leave.

Correction: March 16, 2017

Because of an editing error, an earlier version of this article mischaracterized the origin of Judge Neil M. Gorsuch's partnership with two other men to buy a 40-acre property. Judge Gorsuch proposed the arrangement, not his father.

Feb 13 2008 -

FLOOR STATEMENT OF SENATOR JOHN McCAIN ON CIA INTERROGATIONS AND ARMY FIELD MANUAL

Mr. President, I oppose passage of the intelligence authorization conference report in its current form.

During conference proceedings, conferees voted by a narrow margin to include a provision that would apply the Army Field Manual to the interrogation activities of the Central Intelligence Agency. The sponsors of that provision have stated that their goal is to ensure that detainees under American control are not subject to torture. I strongly share this goal, and believe that only by ensuring that the United States adheres to our international obligations and our deepest values can we maintain the moral credibility that is our greatest asset in the war on terror.

That is why I fought for passage of the Detainee Treatment Act, DTA, which applied the Army Field Manual on interrogation to all military detainees and barred cruel, inhumane and degrading treatment of any detainee held by any agency. In 2006, I insisted that the Military Commissions Act, MCA, preserve the undiluted protections of Common Article 3 of the Geneva Conventions for our personnel in the field. And I have expressed repeatedly my view that the controversial technique known as ``waterboarding'' constitutes nothing less than illegal torture.

Throughout these debates, I have said that it was not my intent to eliminate the CIA interrogation program, but rather to ensure that the techniques it employs are humane and do not include such extreme techniques as waterboarding. I said on the Senate floor during the debate over the Military Commissions Act, ``Let me state this flatly: it was never our purpose to prevent the CIA from detaining and interrogating terrorists. On the contrary, it is important to the war on terror that the CIA have the ability to do so. At the same time, the CIA's interrogation program has to abide by the rules, including the standards of the Detainee Treatment Act.'' This remains my view today.

When, in 2005, the Congress voted to apply the field manual to the Department of Defense, it deliberately excluded the CIA. The field manual, a public document written for military use, is not always directly translatable to use by intelligence officers. In view of this, the legislation allowed the CIA to retain the capacity to employ alternative interrogation techniques. I would emphasize that the DTA permits the CIA to use different techniques than the military employs but that it is not intended to permit the CIA to use unduly coercive techniques--indeed, the same act prohibits the use of any cruel, inhumane, or degrading treatment.

Similarly, as I stated after passage of the Military Commissions Act in 2006, nothing contained in that bill would require the closure of the CIA's detainee program; the only requirement was that any such program be in accordance with law and our treaty obligations, including Geneva Common Article 3.

The conference report would go beyond any of the recent laws that I just mentioned--laws that were extensively debated and considered--by bringing the CIA under the Army Field Manual, extinguishing thereby the ability of that agency to employ any interrogation technique beyond those publicly listed and formulated for military use. I cannot support such a step because I have not been convinced that the Congress erred by deliberately excluding the CIA. I believe that our energies are better directed at ensuring that all techniques, whether used by the military or the CIA, are in full compliance with our international obligations and in accordance with our deepest values. What we need is not to tie the CIA to the Army Field Manual but rather to have a good faith interpretation of the statutes that guide what is permissible in the CIA program.

This necessarily brings us to the question of waterboarding. Administration officials have stated in recent days that this technique is no longer in use, but they have declined to say that it is illegal under current law. I believe that it is clearly illegal and that we should publicly recognize this fact.

In assessing the legality of waterboarding, the administration has chosen to apply a ``shocks the conscience'' analysis to its interpretation of the DTA. I stated during the passage of that law that a fair reading of the prohibition on cruel, inhumane, and degrading treatment outlaws waterboarding and other extreme techniques. It is, or should be, beyond dispute that waterboarding ``shocks the conscience.''

It is also incontestable that waterboarding is outlawed by the Military Commissions Act, and it was the clear intent of Congress to prohibit the practice. The MCA enumerates grave breaches of

Common Article 3 of the Geneva Conventions that constitute offenses under the War Crimes Act. Among these is an explicit prohibition on acts that inflict ``serious and non-transitory mental harm," which the MCA states ``need not be prolonged." Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard. Indeed, during the negotiations, we were personally assured by administration officials that this language, which applies to all agencies of the U.S. Government, prohibited waterboarding.

It is unfortunate that the reluctance of officials to stand by this straightforward conclusion has produced in the Congress such frustration that we are today debating whether to apply a military field manual to nonmilitary intelligence activities. It would be far better, I believe, for the administration to state forthrightly what is clear in current law--that anyone who engages in waterboarding, on behalf of any U.S. Government agency, puts himself at risk of criminal prosecution and civil liability.

We have come a long way in the fight against violent extremists, and the road to victory will be longer still. I support a robust offensive to wage and prevail in this struggle. But as we confront those committed to our destruction, it is vital that we never forget that we are, first and foremost, Americans. The laws and values that have built our Nation are a source of strength, not weakness, and we will win the war on terror not in spite of devotion to our cherished values but because we have held fast to them.

I yield the floor.

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Sen. Orrin Hatch (R-Utah)
Posted Thu, February 9th, 2017 2:56 pm

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Worried about the separation of powers? Then confirm Judge Gorsuch

Hatch is the senior member of the Senate Judiciary Committee.

Last week, President Donald Trump nominated Judge Neil Gorsuch to replace Justice Antonin Scalia on the U.S. Supreme Court. Judge Gorsuch is an ideal choice to fill this seat: He has impeccable credentials and a decade-long record on the bench demonstrating a keen understanding of the proper role of a judge. Given the increasingly contentious nature of the confirmation process, it is no surprise that many Democrats are stretching to find anything objectionable about Judge Gorsuch, no matter how ridiculous. In the current political environment, they have focused much of their criticism on one particularly strained argument: their claim that Justice Gorsuch would not serve as an independent check on the executive branch.

Fortunately, we do not have to speculate about how Justice Gorsuch would decide these kinds of cases. Judge Gorsuch has consistently demonstrated in his judicial opinions and other writings that he deeply values the constitutional separation of powers between the three branches of the federal government. Judge Gorsuch understands that the Constitution gives each branch distinct roles: Congress makes the laws, the President enforces those laws, and the courts interpret those laws and the Constitution. The branches may act only according to the powers the Constitution grants them, with the remaining powers and rights reserved to the states and, ultimately, to the people.

With respect to the power of the executive branch, Judge Gorsuch has a strong record of reining in unlawful overreach. For instance, in *Gutierrez-Brizuela v. Lynch*, the Attorney General had attempted to apply a new agency rule retroactively to prohibit a noncitizen from receiving relief under federal immigration law. Writing for the U.S. Court of Appeals for the 10th Circuit, Judge Gorsuch concluded that such action exceeded the executive's power to enforce the law. In a separate opinion, he went one step further and expressed concerns about how judge-made doctrines that require judicial deference to federal agency actions—namely, *Chevron* deference and its progeny—"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." Judge Gorsuch then proceeded to provide a textbook explanation of the proper separation of powers between the three branches, concluding that "[i]t was to avoid dangers like these, dangers the founders had studied and seen realized in their own time, that they pursued the separation of powers. A government of diffused powers, they knew, is a government less capable of invading the liberties of the people."

Nor is Judge Gorsuch a supporter of federal judges who go beyond their constitutional role in interpreting the law. As Judge Gorsuch has eloquently explained, "judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome, and engaged perhaps in some Benthamite calculation of pleasures and pains along the way." It is not judges' role to make or change laws by imposing their own policy preferences instead of what Congress actually passed. It is not their role to look beyond the text of the law to consider their personal views and feelings. And it is not their role to choose winners and losers based on subjective beliefs that favor one group over another. Judge Gorsuch's opinions reinforce his judicial philosophy of restraint and humility and his proper understanding—to borrow from Alexander Hamilton—that the judiciary should be the "least dangerous" branch.

Consider, for example, *United States v. Games-Perez*. There, the 10th Circuit upheld a conviction for possession of a firearm by a felon. The criminal defendant argued that he was unaware that he was a convicted felon, but the court rejected this argument as foreclosed by the court's prior precedent. Judge Gorsuch penned a separate opinion. He agreed that the court was bound by its own precedent, but he wrote separately to urge the court to reconsider its precedent in light of the plain text of the statute that requires the government to prove the defendant knew he was a convicted felon. As Judge Gorsuch explained, "we might be better off applying the law Congress wrote than the one [the court] hypothesized. It is a perfectly clear law as it is written, plain in its terms, straightforward in its application." He continued: "Of course, if Congress wishes to revise the plain terms of [the statute], it is free to do so anytime. But there is simply no right or reason for this court to be in that business."

Sometimes a judge is asked to consider the proper separation of powers between all three branches. For instance, in *Hobby Lobby Stores, Inc. v. Sebelius*, the 10th Circuit considered whether certain regulations issued by the U.S. Department of Health and Human Services under the Patient Protection and Affordable Care Act violated the plaintiffs' rights under the Religious Freedom Restoration Act. In particular, the plaintiffs argued that the regulations' health insurance mandate for employers violated RFRA's statutory protections on religious freedom by forcing employers to provide health insurance coverage for abortion-inducing drugs and devices. Judge Gorsuch's opinion explained why the owners of one of the plaintiff companies were entitled to relief under RFRA. As an initial matter, he noted that the owners' "religious convictions are contestable" and that "[s]ome may even find [their] beliefs offensive," but that RFRA "does perhaps its most important work in protecting unpopular religious beliefs."

Judge Gorsuch then turned to the statutory interpretation question at issue and noted that the case was a "tale of two statutes." Wrote Judge Gorsuch: "The ACA compels the [plaintiffs] to act. RFRA says they need not. We are asked to decide which legislative direction controls." To decide which statute

controlled, he did not defer to the executive branch's position on the matter. Nor did he seek to impose his own policy preferences. To the contrary, he noted that "[t]he tie-breaker is found not in our own opinions about good policy but in the laws Congress enacted." Because "Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty," and "because the government identifies no explicit exclusion in the ACA to its dictates," Judge Gorsuch concluded, RFRA's directive prevailed.

Even a casual review of Judge Gorsuch's opinions should eliminate any concerns my Senate colleagues may have concerning his commitment to the Constitution's separation of powers. In his opinions, Judge Gorsuch has resisted executive branch efforts to make laws as opposed to merely enforcing those laws as written. Indeed, his opinions and other writings cogently make the case for this approach to separation of powers in a way that finds few rivals on the federal bench and reminds me much of the case Justice Scalia made during his time on the Court. Judge Gorsuch, moreover, has been a model of respect for the proper judicial role, a judicial philosophy under which "judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences."

To be sure, that Justice Gorsuch would be a fierce defender of the separation of powers and the rule of law does not mean his rulings will match his policy preferences, much less mine. In fact, in his tribute speech to Justice Scalia last year, Judge Gorsuch embraced Justice Scalia's philosophy of judicial restraint: "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach." That is precisely why Judge Gorsuch is the right choice for the Supreme Court.

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Rights, Facts, and Relevant Inquiries: Surveying Judge Neil M. Gorsuch's Employment Law Jurisprudence

Camille E. Peeples*

Introduction

What consequences will the 2016 election have for employment and labor law? President Trump's potential policies are uncertain, especially given Andrew Puzder's withdrawal and Alexander Acosta's nomination as Labor Secretary. Consequently, Supreme Court nominee Judge Neil M. Gorsuch's past Tenth Circuit decisions may be increasingly of interest. This Essay presents a brief overview of Judge Gorsuch's employment jurisprudence before predicting how he may rule in future cases if confirmed. Part I discusses workplace issues, including accommodations, discrimination, and workers' compensation. Part II analyzes Judge Gorsuch's rulings about union relations and unfair labor practices. Finally, Part III assesses how he might address an upcoming case regarding class action waivers in employment contracts.

I. Addressing Issues in the Workplace

In cases involving workers' compensation and workplace accommodations, discrimination, and safety, Judge Gorsuch's record shows continued affinity to law and facts rather than particular groups or interests.

Judge Gorsuch has ruled in favor of workers with discrimination claims involving disability accommodations,[1] age,[2] gender,[3] and religion and national

* J.D. Candidate, Stanford Law School, 2018.

1. *See, e.g.*, Lowe v. Indep. Sch. Dist. No. 1, 363 F. App'x 548, 554-55 (10th Cir. 2010) (Brorby, J.) (finding a genuine issue of material fact and remanding where the employer failed to adequately negotiate in good faith about accommodations).

2. *See, e.g.*, Ridgell-Boltz v. Colvin, 565 F. App'x 680, 687 (10th Cir. 2014) (McKay, J.) (holding enough evidence regarding age and gender discrimination was presented to merit review by the lower court).

3. *See, e.g.*, Chapman v. Carmike Cinemas, 307 F. App'x 164, 170-71 (10th Cir. 2009) (Ebel, J.) (finding that the employer was not entitled to summary judgment when an employee

origin.[4] By way of example, he upheld findings of discrimination where an employer required pregnant employees to use sick days for maternity leave while other employees could use vacation time for different types of family leave.[5] In other cases Judge Gorsuch also affirmed rulings for employees but respectively questioned an aspect of jurisdiction[6] and one of several underlying claims in his concurrences.[7] In employer retaliation cases, he ruled for employees who were fired because of their political affiliations,[8] who were threatened after bringing sexual harassment claims,[9] and who helped coworkers bring similar claims.[10]

However, Judge Gorsuch has also ruled against employee discrimination claims.[11] In these cases, he upheld findings that no pretext or discriminatory intent existed where employees were respectively fired for consistent poor performance,[12] logging hours not worked,[13] or exhausting maximum sick leave

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sexually assaulted the plaintiff at work and remanding for further consideration); Lowber v. City of New Cordell, 298 F. App'x 760, 762 (10th Cir. 2008) (holding the plaintiff alleging sex discrimination did not waive her claim by later introducing a new sexual harassment claim).

4. *See, e.g.*, Gad v. Kan. State Univ., 787 F.3d 1032, 1038 (10th Cir. 2015) (Tymkovich, J.) (holding the court can review an employees' Title VII claims without notarized complaint).

5. Orr v. City of Albuquerque, 531 F.3d 1210, 1212, 1219 (10th Cir. 2008).

6. Flitton v. Primary Residential Mortg., Inc., 614 F.3d 1173, 1181 (10th Cir. 2010) (Gorsuch, J., concurring in part and dissenting in part) (arguing the court had jurisdiction regarding appellate attorney fees in a gender discrimination and retaliation case).

7. Strickland v. United Parcel Serv., Inc., 555 F.3d 1224, 1231-32 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part) (agreeing regarding a Family and Medical Leave Act claim but arguing the Title VII gender discrimination claim was wrongly remanded because no similarly situated male employee existed with which to compare the plaintiff's treatment, and other non-similarly situated male employees were also treated equally poorly).

8. Walton v. Powell, 821 F.3d 1204, 1214 (10th Cir. 2016).

9. Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1093 (10th Cir. 2007); *see also* Eisenhour v. Weber County, 744 F.3d 1220, 1235-36 (10th Cir. 2014) (Bacharach, J.).

10. Barrett v. Salt Lake County, 754 F.3d 864, 866 (10th Cir. 2014) (finding an employer retaliated against an employee who helped his coworker bring a sexual harassment claim).

11. *See, e.g.*, Myers v. Knight Protective Serv., Inc., 774 F.3d 1246, 1248-49 (10th Cir. 2014); Roberts v. Int'l Bus. Machines Corp., 733 F.3d 1306, 1310-11 (10th Cir. 2013); Elwell v. Okla. *ex rel.* Bd. of Regents of Univ. of Okla., 693 F.3d 1303, 1316 (10th Cir. 2012); Almond v. Unified Sch. Dist. No. 501, 665 F.3d 1174, 1183-84 (10th Cir. 2011); Johnson v. Weld County, 594 F.3d 1202, 1215 (10th Cir. 2010); Iverson v. City of Shawnee, 332 F. App'x 501, 504 (10th Cir. 2009) (O'Brien, J.); Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187, 1201, 1205 (10th Cir. 2008); Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1166, 1177 (10th Cir. 2007).

12. Kaiser v. Colo. Dep't of Corr., 504 F. App'x 739, 741 (10th Cir. 2012).

13. Young v. Dillon Cos., 468 F.3d 1243, 1250-51 (10th Cir. 2006).

for a job the employee could not perform, even with full disability accommodations.[14]

Regarding workers' compensation and workplace safety, Judge Gorsuch ruled favorably for coal miners seeking workers' compensation for Chronic Obstructive Pulmonary Disease (COPD) caused by dust inhalation.[15] While Judge Gorsuch deferred to agency determinations in these COPD cases, he typically shows little deference to agency determinations in this area, especially when they contradict clear statutory language[16] (and sometimes market considerations[17]).

II. Unfair Labor Practices and Union Relations

Judge Gorsuch had also demonstrated limited deference to agency decisions regarding labor practices and union relations.[18] He says a judge's role is not to please the judge's own convictions.[19] Judges should not allow politically motivated decisionmakers to pursue "whatever policy whim may rule the day" at the expense of parties' rights.[20] However, Judge Gorsuch has affirmed agency findings of fact in several decisions favorable to union employees.[21] In one case,

14. Hwang v. Kan. State Univ., 753 F.3d 1159, 1161, 1165 (10th Cir. 2014).

15. *See* Energy W. Mining Co. v. Oliver, 555 F.3d 1211, 1218-19 (10th Cir. 2009); Energy W. Mining Co. v. Johnson, 233 F. App'x 860, 863 (10th Cir. 2007).

16. *See* Compass Envtl., Inc. v. Occupational Safety & Health Review Comm'n, 663 F.3d 1164, 1173 (10th Cir. 2011) (Gorsuch, J., dissenting); *see also* TransAm Trucking, Inc. v. Admin. Review Bd., 833 F.3d 1206, 1217 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing neither courts nor agencies can supplant clear statutory language with their own preference of what the law should mean).

17. *Compass Envtl.*, 663 F.3d at 1172 (arguing it would contradict statutory language and also create bad employer incentives to hold an employer liable for failing to meet self-set guidelines that were beyond statutory scope).

18. *See, e.g.*, NLRB v. Cmty. Health Servs., Inc., 812 F.3d 768, 785-86 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing the NLRB cannot develop new rules regarding backpay without evidence or reasoning to explain divergence from eighty years of long-held agency policies affirmed by the U.S. Supreme Court).

19. Judge Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 CASE WESTERN RES. L. REV. 905, 906 (2016) ("[J]udges should . . . strive . . . to apply the law as it is . . . not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.").

20. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). Judge Gorsuch has also shown a preference for deciding employment issues as narrowly as possible. *See* Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1183-84 (10th Cir. 2007) (Gorsuch, J., concurring).

21. *See* Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1202 (10th Cir. 2014) (affirming the NLRB's decision for employees after illegal lockout and threats to hire permanent staff by the employer during collective bargaining negotiations and affirming the NLRB's denial of damages beyond backpay); Pub. Serv. Co. of N.M. v.

he upheld an NLRB decision against an employer for unfair labor practices where the employer discharged and threatened union employees with physical violence.[22] In another case, a union asked an employer to fire a union member for failure to pay dues but did not provide information or time for him to pay them; Judge Gorsuch found for the employee.[23]

III. Predictions for Future Employment Law Decisions and Employment Contracts' Class Action Waivers

Judge Gorsuch's nomination may affect union and nonunion employees alike. One upcoming Supreme Court case carries particular relevance: *Epic Systems Corp. v. Lewis*.[24] Circuit courts have disagreed as to whether mandatory arbitration clauses in employment contracts containing class action waivers violate the National Labor Relations Act.[25] In effect, the case asks whether employers can require individual employees to give up their ability to litigate claims as groups. If confirmed, Judge Gorsuch could cast the deciding vote. Several factors hint at how Judge Gorsuch may decide the issue. Consider recent Supreme Court cases on mandatory arbitration clauses in consumer contracts,[26] Judge Gorsuch's limited deference to administrative agencies,[27] and his previous opinions on arbitration.[28] Given these factors, it is possible a Justice Gorsuch

NLRB, 692 F.3d 1068, 1072, 1079 (10th Cir. 2012) (affirming the NLRB's decision against employer's unfair labor practices).

22. Leiser Constr., LLC v. NLRB, 281 F. App'x 781, 790-92 (10th Cir. 2008) (Parker, J.).

23. Laborers' Int'l Union, Local 578 v. NLRB, 594 F.3d 732, 739 (10th Cir. 2010).

24. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016). The Supreme Court should hear oral argument sometime this fall. Lawrence Hurley & Robert Iafolla, *Supreme Court Nominee Gorsuch Could Decide Class Action Waiver Cases*, INS. J. (Feb. 9, 2017), http://www.insurancejournal.com/news/national/2017/02/09/441351.htm.

25. The Seventh Circuit and Ninth Circuit ruled against mandatory class action waivers. Morris v. Ernst & Young, LLP, 834 F.3d 975, 990 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016). The Fifth Circuit ruled in their favor. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015).

26. *See generally* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010). It is worth noting these cases deal with mandatory arbitration in a different context, so they are likely not determinative.

27. *See generally* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016); TransAm Trucking, Inc. v. Admin. Review Bd., 833 F.3d 1206, 1215-17 (10th Cir. 2016) (Gorsuch, J., dissenting).

28. *See generally* Ragab v. Howard, 841 F.3d 1134, 1139-41 (10th Cir. 2016) (Gorsuch, J., dissenting); Genberg v. Porter, 566 F. App'x 719 (10th Cir. 2014); Howard v. Ferrellgas Partners, L.P., 748 F.3d 975 (10th Cir. 2014). Judge Gorsuch was also on the panel in *Sanchez v. Nitro-Lift Techs., LLC*, 762 F.3d 1139 (10th Cir. 2014). For the sake of further reading, Judge Gorsuch wrote about minimizing frivolous lawsuits in the context of securities fraud class action suits, but this does not correlate to the subject matter of *Lewis v. Epic Systems Corp.* Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud*

would rule for class action waivers in employment contracts. However, it is difficult to predict this with any certainty.

Conclusion

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. What they reveal is a deep-seated commitment to facts and law when evaluating employment disputes; he has decided for each group when circumstances demand it. While no interested group should definitively speculate victory or defeat in his nomination, parties can rely on a record of fair analysis and resistance to simply rubber-stamping business interests or executive agency decisions.[29]

Class Actions: Improving Investor Protection 2-5 (Wash. Legal Found. Critical Legal Issues, Working Paper No. 128, 2005), http://www.wlf.org/upload/0405WPGorsuch.pdf.

29. Interested parties may also appreciate past calls by Judge Gorsuch to increase access to affordable justice. *See* Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, JUDICATURE, Autumn 2016, at 47, 53 ("Lowering barriers to entry, ensuring judicial resolutions come more quickly and at less cost . . . share the common aim of increasing the supply and lowering the price of legal services.").

Gorsuch Not Easy to Pigeonhole on Gay Rights, Friends Say

www.nytimes.com/2017/02/11/us/politics/gorsuch-gay-rights.html

By SHERYL GAY STOLBERG

WASHINGTON — Phil Berg was nervous as he prepared to tell Neil Gorsuch he was gay.

AIDS was still in the headlines at the time, the early 1990s, and same-sex marriage was a far-fetched notion. Some of Mr. Berg's other friends had not reacted well to his news. So he moved with caution, slipping the word "boyfriend" casually into conversation with Mr. Gorsuch, his dear friend and Harvard Law School classmate.

"He didn't skip a beat," Mr. Berg, now a corporate lawyer in Manhattan said, recalling how that conversation led to a "special bond" between the two men. "It was a huge deal for me, and it made a lasting impression."

Now President Trump has named Judge Gorsuch, 49, of the Federal Appeals Court in Denver, his nominee to the Supreme Court at a time when the clash between gay rights and religious freedom is one of the most contentious questions on the court's agenda.

Democrats and their progressive allies are marching in lock step to oppose Judge Gorsuch, whose record they find deeply troubling, and gay pundits are painting him as a homophobe. But interviews with his friends — both gay and straight — and legal experts across the political spectrum suggest that on gay issues, at least, he is not so easy to pigeonhole.

In nominating Judge Gorsuch, Mr. Trump has picked a man with impeccable legal credentials and cast him in the mold of the justice he would succeed, the late Antonin Scalia, who once accused the court of being swayed by a "homosexual agenda" and voted against legalizing same-sex marriage. Judge Gorsuch has said he cried when he learned of Justice Scalia's death.

Like Justice Scalia, Judge Gorsuch regards himself as an originalist, meaning he tries to interpret the Constitution based on the text as written by the founding fathers. But he is three decades younger than Justice Scalia was when he died. He has had two openly gay clerks, and he lives with his wife, Louise, and their two daughters in liberal Boulder, Colo., where his church, St. John's Episcopal, welcomes gay members.

That leads some friends to wonder if his jurisprudence might be closer to that of Justice Anthony Kennedy, who has carved out a name for himself as the court's conservative defender of gay rights. Justice Kennedy wrote the landmark 2015 opinion in Obergefell v. Hodges, which found a constitutional right to same-sex marriage — a decision some analysts trace to his upbringing in tolerant California.

"Everybody's got him pegged as being more Scalia," said Christian Mammen, a Democrat and intellectual property lawyer in San Francisco, who grew close to Judge Gorsuch when they were pursuing doctoral degrees at Oxford two decades ago. "I'm not sure I see that."

Judge Gorsuch's nomination comes as some lesbian, gay, bisexual and transgender people think their very right to exist is threatened by the election of Mr. Trump.

While the president has said he is "fine with" same-sex marriage, and regards the Obergefell decision as "settled law," he has also toyed with repealing an executive order by his predecessor, President Barack Obama, barring federal contractors from discriminating against gays. And with states like Texas seeking to limit the scope of the Obergefell decision, some activists and gay pundits warn of a coming war against same-sex marriage.

Part of the mystery around Judge Gorsuch is that his record on gay rights is thin and thus difficult to parse. It suggests a deference to religious freedom and a strong skepticism toward using the courts to find a new constitutional basis for L.G.B.T rights. But Judge Gorsuch has never ruled on a case involving whether gays can legally marry.

He declined, through a spokesman, to be interviewed.

"There's not an enormous amount to work with there; there are not many decisions to go on," said Rachel B. Tiven, the chief executive of Lambda Legal, which represents gay plaintiffs and expects one of its cases, involving bathroom access for transgender people, to come before the Supreme Court this year.

Like other gay rights groups, Lambda Legal took what it called the "unusual step" of opposing the Gorsuch nomination even before the Senate confirmation hearings.

"It was unprecedented for Lambda Legal," Ms. Tiven said, "but we are living in times that are not ordinary."

Just this past week, the gay author and blogger Michaelangelo Signorile published a piece in The Huffington Post headlined: "Why Neil Gorsuch Likely Believes It's Perfectly Fine to Ban Gay Sex." In it, he argued that Judge Gorsuch "may be all mild-mannered and cuddly, but that doesn't mean he wouldn't in a heartbeat deny your very existence under the Constitution if you happen to be queer."

Against that backdrop, the judge's gay friends — both Democrats and Republicans — find themselves vouching for him.

"I said, "Listen, I'm a liberal gay Jew from New England and you were appointed by George W. Bush, and I want to make sure I'm not going to be uncomfortable here,'" said Joshua Goodbaum, a former clerk of Judge Gorsuch, recalling his 2008 job interview.

And when Mr. Goodbaum married his longtime partner in 2014 — the year before the Supreme Court's landmark decision on same-sex marriage — he said, "The judge was thrilled for us."

"He was actually kind of syrupy about it. I remember him saying, 'You're going to see how wonderful this is for your relationship.'"

If Judge Gorsuch is confirmed, the composition of the court that made up the Obergefell majority will be unchanged. Michael Dorf, a law professor at Cornell who knows Judge Gorsuch in passing — they were both clerks to Justice Kennedy and run into each other at clerk reunions — says gay rights advocates "have reason to be afraid," based on the existing evidence about Judge Gorsuch.

In 2005, before Mr. Gorsuch became a judge, he wrote in an essay in National Review that liberals had become "addicted to the courtroom" to enact their social agenda "on everything from gay marriage to assisted suicide to the use of vouchers in public schools." (At Oxford, he wrote his Ph.D. thesis on assisted suicide and published it as a book.)

In 2015, Judge Gorsuch sided with the Oklahoma Department of Corrections in rejecting arguments by a transgender woman who said the Constitution guaranteed her a right to hormone treatment and to wear feminine clothing. And in two prominent cases, both of which reached the Supreme Court, he sided with employers who had religious objections to providing contraception coverage.

Critics of Judge Gorsuch frequently cite one of those cases, involving Hobby Lobby Stores, the retail arts and crafts chain, which challenged a section of the Affordable Care Act that required closely held, for-profit secular corporations to provide contraceptive coverage as part of their employer-sponsored health plans. Judge Gorsuch joined in an opinion by the full Court of Appeals rejecting that notion, a decision that was upheld by the Supreme

Court in a 5-4 decision in 2014.

Gay rights groups draw inferences from Hobby Lobby — Ms. Tiven calls the case "particularly telling" — to argue that Judge Gorsuch would err on the side of religious freedom in cases involving discrimination against gays. But Laurence Tribe, a law professor at Harvard, is unconvinced.

"I do not agree that Hobby Lobby is a death knell that proves Judge Gorsuch would say that people can, on religious grounds, violate anti-discrimination laws," Mr. Tribe, who said he did not have Judge Gorsuch as a student, said in a recent interview. He called the case "an indicator" but not "a slam-dunk predictor."

In picking Judge Gorsuch, Mr. Trump has put forth a candidate with a fine Republican pedigree — his mother, Anne Gorsuch Burford, was an official in the Reagan administration — and impeccable academic credentials. His class at Harvard included Mr. Obama as well as Ken Mehlman, who went on to head the Republican National Committee under President George W. Bush.

Mr. Mehlman, who guided Mr. Bush to re-election in 2004 despite his platform opposing same-sex marriage, has since come out as gay and has worked aggressively to advance gay rights at the state and federal level. He declined to be interviewed, but he is circulating a letter of support for the judge and posted a congratulatory message to Judge Gorsuch on his Facebook page. So did Mr. Berg.

"Since Ronald and I married," Mr. Berg wrote on Facebook, referring to Ronald Riqueros, "we have had a standing invitation to stay with Neil and Louise in Denver. And just last week, Neil told me that if they should move to D.C., 'Our guest room will be waiting.'"

Neil Gorsuch is the kind of judge our framers envisioned

www.washingtonpost.com/opinions/neil-gorsuch-is-the-kind-of-judge-our-framers-envisioned/2017/03/17/89cb54b0-0a8a-11e7-b77c-0047d15a24e0_story.html

By Deanell Reece Tacha and Robert Henry By Deanell Reece Tacha and Robert Henry March 17

Deanell Reece Tacha is dean of Pepperdine University School of Law and former chief judge on the U.S. Court of Appeals for the 10th Circuit. Robert Henry is president and chief executive of Oklahoma City University and a former chief judge on the U.S. Court of Appeals for the 10th Circuit.

As the country prepares to watch the hearings on a nomination to the Supreme Court, predictions abound as to how Judge Neil Gorsuch — if confirmed — would lean or even vote on this or that case. Indeed, toward the end of the presidential campaign, both Hillary Clinton and Donald Trump detailed their ideal Supreme Court justice in debates by predicting how she or he would vote on a given issue or case. But these essentially political discussions tend to distort the role of judges in our government.

Our primary Framer for the courts was none other than Alexander Hamilton, of recently renewed fame. Describing the judiciary in Federalist 78 as the "least dangerous" of the three branches of government, Hamilton emphasized that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution." This "independence of the judges" is a most sacred tradition in U.S. constitutional law, requiring all judges to have no obligations to those who nominated or confirmed them.

Besides — as history has revealed — it is not even possible to select Supreme Court justices based on how they might rule on given topics. Detailed discussions during the confirmation process on issues that might come before a judge are not proper; in fact, they would in all likelihood require recusals from the cases discussed. Litmus tests are not acceptable. Furthermore, the controversies that go before the court often bring unique and complicated facts that could completely change a judge's sincerely espoused view.

Another critically important input into judicial decisions is precedent. Our common-law system venerates precedent, most specifically when that precedent is old and long-settled by many judicial cases. Precedent might override previously held views or even logical interpretations of legal text.

These factors — tradition, independence, precedent and unique facts — often combine to lead judicial nominees to change their views when confronted with specific cases, which may conflict with the interests of the appointing administration.

We are both former chief judges on the U.S. Court of Appeals for the 10th Circuit. One of us is a lifelong Republican; the other, a lifelong Democrat. We both had the opportunity to serve with Gorsuch for several years on the 10th Circuit. He was, like most good judges, assiduously attentive to the facts and law in each case. All of the matters mentioned above (and others) should influence — or even change — a judge's decision dealing with the specific set of facts in any case before him or her.

Gorsuch's body of work is surely informed by both textualism and originalism, but he was, in our experience, always open to consideration in the proper cases of precedent, history, tradition and the "bones" of our federal republic's structure. Other important traits of Gorsuch that are not likely to change: his fair consideration of opposing views, his remarkable intelligence, his wonderful judicial temperament expressed to litigants and his collegiality toward colleagues.

Justice Oliver Wendell Holmes once described his fellow justices as "nine scorpions in a bottle." Having that view

was not a good way to win friends and influence people, and does much to explain why Holmes's best work was often expressed in dissent. Gorsuch, in contrast, writes beautifully and accessibly; he will find no need to wield an acid pen or improperly characterize his colleagues.

If we seek to confirm to the Supreme Court a noted intellect, a collegial colleague, and gifted and eloquent writer — as well as a person of exhibited judicial temperament — Gorsuch fits that bill. He represents the best of the judicial tradition in our country. We think that Hamilton would concur.

9 questions for Neil Gorsuch: Our view

The Editorial Board , USA TODAY Published 6:18 p.m. ET March 19, 2017 | Updated 1:22 p.m. ET March 20, 2017

Every Supreme Court nominee in recent memory has taken the 'judicial fifth,' but that still leaves a lot of room for answers about legal questions.

(Photo: Mark Wilson, Getty Images)

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Monday marks the moment when supreme optimists believe they will find out in great detail how Supreme Court nominee Neil Gorsuch thinks about the law.

But if Gorsuch, a federal appeals judge in Colorado, follows the path of his predecessors, he'll sidestep and slip artfully away from attempts by the Senate Judiciary Committee to pin him down on the important legal issues of the day.

Every nominee in recent memory, conservative or liberal, has taken the "judicial fifth," refusing to answer meaningful questions on the grounds that it would violate the judges' code of conduct. True, the code admonishes against speaking publicly about a "matter pending or impending" before the court. Yet that still leaves a lot of room for answers about legal questions that aren't in litigation or poised to be.

There's nothing to stop a judge from talking about his previous cases, his legal thinking or past Supreme Court rulings. In that spirit, here are some questions that the senators ought to ask and that Gorsuch ought to answer:

Q. Judge Gorsuch, you would not be here if Senate Republicans hadn't obstructed Merrick Garland, the eminently qualified federal judge that President Obama nominated a year ago to succeed the late Antonin Scalia. Did Judge Garland get a raw deal?

Q. It's unheard of in modern times for a president to fail to comply with an order by a federal judge. If a president did not comply, what should happen next? Should the Supreme Court always have the last word on what is and isn't constitutional?

Q. In your 2006 book on assisted suicide and euthanasia, you wrote that human life is inviolable and that the "intentional taking of human life by private persons is always wrong." Do you believe that this inviolability applies to the unborn, and at what stage of development would it apply to a fetus? How does your thinking on this affect your view of the 1973 *Roe v. Wade* decision that guaranteed the right to an abortion?

Q. In a 2005 *National Review* piece, you wrote that the political left has an "overweening addiction" to using courts, rather than the ballot box, to bring about social change "on everything from gay marriage to assisted suicide." You called this bad for the country and the judiciary. Sen. Richard Durbin, D-Ill., said that during your recent visits to senators, you told him the article was one of the "biggest mistakes" you "ever made." Why was it a mistake?

Q. You have rarely ruled in gun rights cases, but the Supreme Court held in 2008 and 2010 that there is a right to keep handguns in the home for self-defense. In the 2008 decision, Justice Scalia, one of your legal idols, wrote that the court was not upholding "a right to keep and carry any weapon whatsoever in any manner

whatsoever and for whatever purpose." Are there some limits on gun ownership that could pass constitutional muster? If so, what are those limits?

Q. The Supreme Court in recent years, pointedly in *Citizens United,* has opened the floodgates to political spending by corporations and unions, giving special interests an outsized role in electing Congress and the president. In a 2014 concurring opinion on the 10th Circuit Court of Appeals, you suggested that the right to contribute to campaigns is as fundamental a constitutional freedom as free speech or free association. Do you believe that any limits on what individuals can give to candidates or parties could pass constitutional muster?

Q. In cases before the 10th Circuit, you've often taken a narrow view of how far schools or employers must go to accommodate disabled children or even a frozen trucker with a broken-down trailer. Can you describe a case you've ruled on where you held for a worker or disabled person?

Q. In the *Hobby Lobby* case, the Supreme Court narrowly upheld the right of deeply religious business owners not to be forced by the government to violate their beliefs, upholding a 10th Circuit ruling you joined and, in a separate opinion, expanded on. One dissenting justice wrote that the ruling could unleash "havoc," if more individuals and businesses refuse to obey laws that apply to everybody. Where do you believe the limits lie on religious freedom?

Q. Based on your work in the Justice Department during the Bush administration on interrogation techniques used in the war on terror, do you believe that what was called "enhanced interrogation" on detainees ever works or is ever legal?

This just scratches the surface of questions senators should ask Gorsuch, who, at 49, could influence the nation's laws for more than three decades. Like all nominees, the judge deserves a fair hearing to determine whether he falls within the broad judicial mainstream and has a healthy respect for precedent. That standard will be impossible to assess if the witness ducks or parries every question he is asked.

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The Washington Post

I had an abortion to save my baby from pain. In my state, that didn't matter.

BY Robin Utz, Mar. 10, 2017

My husband and I desperately wanted to have a baby. We looked extensively into adoption and tried to get pregnant for four years with the help of fertility specialists — enduring two in-vitro procedures and multiple failed embryo transfers. We were thrilled when our most recent in-vitro fertilization proved successful.

Unfortunately, we discovered after my 21-week anatomy scan that our daughter — Grace Pearl — had bilateral multicystic dysplastic kidney disease. Her kidneys were not functioning, she had no amniotic fluid and her lungs would never develop properly. Three doctors told us our daughter's condition was 100 percent fatal due to the early onset of her disease. She would either be stillborn or would not survive long after birth. My own risk would increase sevenfold if I continued to carry her.

We made the excruciating decision to terminate the pregnancy at 21 weeks and five days — nearly six months. We did this out of love: Terminating was the least painful and most humane thing we could do for her. We did all we could to take on the physical and emotional suffering ourselves, instead of allowing her to feel it. The physician cut her umbilical cord prior to the termination to ensure that her heart would stop beating and that she'd have as peaceful of an experience as possible. Her pa-thol-ogy report confirmed the doctors' fatal diagnosis.
But the process to get that abortion in Missouri — the state where we live — was one of the most callous and insulting experiences we have ever endured.

My husband and I had to wait 72 hours after consenting to the abortion so we could "consider what we were doing." I had to sign a statement affirming that I heard my baby's heartbeat (a sound that brought tears of joy to my eyes when I first heard it) and that I saw an ultrasound (I had asked for more than what is routinely provided to reassure myself, having experienced a miscarriage in the past). We were given a packet explaining that we were terminating "the life of a separate, unique, living human being." There are no exceptions to these protocols, even for people terminating for fetal anomaly.

Missouri doesn't allow private insurance to provide coverage for abortions except in cases of life endangerment — patients have to purchase riders for abortion coverage at an additional cost. That can make it extremely expensive to obtain one even at Planned Parenthood, which is not able to use federal funds for abortions. There are exceptions for this rule in the case of rape, incest or the health of the mother, but the health of the fetus is not considered.

In fact, had we done the procedure a mere two days later, we would have had to leave the state to have the termination due to Missouri's late-term abortion law. In that sense we were lucky, but what would happen to a single parent who couldn't get off work, save the needed money or find someone to watch her children before the deadline? What if she didn't live in a metropolitan area with such excellent doctors and facilities?

I'm sharing this so you know who is affected if we further defund Planned Parenthood, totally outlaw abortions or prohibit late-term procedures. Indeed, Missouri is considering a 20-week abortion ban with no exceptions for cases of fetal anomalies.

If you believe you wouldn't make the same choice we did, be grateful that you will probably never have to. But no one should force such a decision on anyone. This should be between you, your partner, your medical professionals and your higher power, if you believe in one. It felt utterly terrible to realize that politicians — who knew nothing about our circumstances, or worse, wouldn't care if they did because their supporters are so dogmatically pro-life — have such control over our options.

Imagine for a moment that the political situation was reversed. Imagine how you would feel if churches and people in government thought the most humane route for a fatal diagnosis was to immediately terminate the fetus against your wishes. Imagine that multiple doctors advised you to continue with the pregnancy, but that you couldn't take their advice or follow your own instincts because a law prohibited you from doing so.

I know I won't change every mind with our story, but I beg everyone to consider the full impact of outlawing abortion or making it more difficult to obtain one. Know that people like us would be hurt and that babies like Grace would suffer. Thankfully, we were able to do what we believed was best for our beloved baby girl. Please don't make it so others can't do so in the future.

LAW

3 Things We Learned While Clerking For Neil Gorsuch

We hold opposite political views and hail from different regions. Yet we stand united in our support of Neil Gorsuch's nomination to the Supreme Court.

We are female litigators practicing in Denver, Colorado. We both had the pleasure of clerking for Judge Neil Gorsuch early in our careers. Despite these similarities, we are quite different: we hold opposite political views, experienced very different upbringings, and hail from different regions of the country. Yet we stand united in our strong support of Gorsuch's nomination to the U.S. Supreme Court.

In reflecting on this, many factors come to mind: chiefly, Judge Gorsuch's brilliance, integrity, work ethic, and his exceptional mentorship. These characteristics inform the many lessons we learned throughout the course of our clerkships: absorbed in the heat of debate in chambers, over lunch, on the hiking or ski trail, or on an afternoon run with the judge.

These lessons shaped us as lawyers. For that, we are forever grateful. We share a few below.

1. Literature, Not Just Law

Judge Gorsuch reinforced the importance of accessible and clear writing, devoid of legalese. His opinions are analytically rigorous *and* enjoyable to read. "Writing takes work," he taught us, but we should never aim to "write like a lawyer."

Good writing, Gorsuch instructed, is the product of continual practice and reading great books. He encouraged us to read widely, and often drew on the classics when drafting his opinions. For example, in *In re C and M Properties L.L.C.*, Gorsuch stated, "This is a case whose duration and complexity might induce a faint feeling of familiarity in the wards of Jarndyce and Jarndyce," and then quoted directly from Charles Dickens's "Bleak House."

In another case, the judge employed linguistic flare to enliven an opinion about a discovery issue. Gorsuch wrote, "We view challenges to a district court's discovery sanctions order with a gimlet eye. We have said that district courts enjoy 'very broad

discretion' . . . ." (*Lee v. Max Intern., LLC)*. As advocates, who now write to advance a position, we may not have as many opportunities to quote Dickens, but we still strive to make our writing clear, accessible, and enjoyable to read.

2. Don't Blind Yourself to Your Case's Weaknesses

Gorsuch was a trial lawyer, and he often shared entertaining trial "war stories" from his earlier days. He emphasized the importance of stepping back from the law and facts on your side to analyze the holes in your case and the facts and law supporting the other side. He cautioned that failure to do so would inevitably blind a lawyer to her case's potentially fatal flaws, leaving her unprepared to address them.

As clerks, we saw examples of this in oral arguments before the Tenth Circuit. An advocate, passionately arguing his or her case, would be asked a question that he or she simply had not considered. The ensuing silence, followed by an admission that he or she "just doesn't know," or attempt to pivot to another topic, caused a lost opportunity.

Judge Gorsuch's adeptness at seeing both sides of a case was a skill he learned as an advocate, but one that he also applies as judge. As a judge, he does not have a client or a side. His role is to view both sides with an open mind and do what the law commands.

3. Dig, Dig, Dig

Judge Gorsuch encouraged us to read and research until we could read and research no more. He demonstrated an endless desire to reach the crux of each legal issue before him. He warned against shortcuts and urged us to pursue a fulsome understanding of the nuance and complexity of the legal and factual issues in each case.

This strive for excellence and thoroughness influences our approach to lawyering today. Just as we learned to be prepared to answer Gorsuch's inquiries, "Well, have you thought about this?" or "What about that?," we now are prepared to answer the same questions from our colleagues and clients.

This discipline and drive that Judge Gorsuch employed so effectively as a trial lawyer and advocate has certainly influenced the way we practice. It is also one of the traits that makes him such a fair-minded judge—one who seeks to understand the history, scope, complexity, and differing viewpoints of the legal issue before him.

Because of these lessons, and many more, we are grateful to have worked for such a fine jurist. We hope Judge Gorsuch will become the next associate justice of the Supreme Court.

Theresa Wardon is a partner at Wheeler Trigg O'Donnell LLP. She graduated from Northwestern Pritzker School of Law and clerked for Gorsuch from 2008 to 2009. Katherine Yarger is an associate at Gibson Dunn & Crutcher LLP. She graduated from Duke University School of Law and clerked for Gorsuch from 2009 to 2010, and Justice Thomas of the Supreme Court from 2013 to 2014.

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NATIONAL REVIEW

Fellow Students Refute Student's Claim of Sexist Gorsuch Comments

By Ed Whelan — March 21, 2017

NPR reported yesterday that Jennifer Sisk, a "former law student of Judge Neil Gorsuch, … alleges that that in a course she took from Gorsuch at the University of Colorado Law School last year, the judge told his class that employers, specifically law firms, should ask women seeking jobs about their plans for having children and implied that women manipulate companies starting in the interview stage to extract maternity benefits."

But a slew of students who took the same ethics course from Gorsuch—some in the same class as Sisk—are powerfully refuting her claim. From their accounts, it seems quite clear that Sisk (who has Democratic ties) was misunderstanding Gorsuch's devil's-advocate posturing of hypotheticals.

In a letter to the Senate Judiciary Committee, Baker Arena, a student in the same class as Sisk and a self-described "liberal feminist Democrat," explains:

> In the Legal Ethics class I took from Judge Gorsuch, the textbook we used contained numerous hypothetical ethical dilemmas that attorneys could potentially face in their practice. Judge Gorsuch would use these dilemmas in the textbook in his lectures to illustrate the fact that there are few black and white solutions to the ethical issues attorneys face daily. Adept at challenging the views of students (and sometimes frustratingly so), Judge Gorsuch would use the Socratic method and play devils advocate in his lectures as the class debated the appropriate course of action to confront the ethical issues at hand. If a valid point was made in favor of one course of action, he would present counterfactual points to illustrate the compelling arguments in favor of another course of action. Through the constant debate of ethical dilemmas that semester, we left with a greater appreciation of the nuances attorneys must account for in making ethical decisions consistent with our code of professional responsibility.

> I was present in the class at issue and sat directly in front of the accusing student. I recall the hypothetical ethical dilemma discussed in the lecture that day. In that hypothetical ethical dilemma, a female law student, suffering financial hardship, is asked at an interview if she planned on having children and using the firms maternity leave policies. The female student in the hypothetical was planning on having children but nervous to tell the potential employer, for fear she might not get the position. Judge Gorsuch began to lead the class in debate as to what the appropriate course of action should be for the female law student. Judge Gorsuch made compelling points about the numerous issues and subtle discrimination women face in the workplace that many men are oblivious to. In fact, as a man, I had never really considered the extent of pregnancy related discrimination that women face in the workplace until this very class. True to form (and the Socratic teaching style), Judge Gorsuch also presented counterarguments presenting the hardships employers face due to paid maternity leave policies, which I, as a liberal feminist Democrat, as well as the majority of my colleagues rejected.
>
> During Judge Gorsuch's presentation of such counterarguments, I do not recall him accusing women of taking advantage of paid maternity leave policies, much less espousing such accusations as his personal beliefs. In class and in our conversations outside of class, Judge Gorsuch was always extremely respectful, inclusive, tolerant and open-minded. Additionally, Judge Gorsuch's never shared his personal views on legal or ethical matters in class and was somewhat of an enigma. Had he made the statements he is accused of making, I would have surely noticed as they would be out of his character and had he said such things, I potentially would have even said something to him concerning these statements. That is not the Judge Gorsuch I know.

Ruthie Goff, who took Judge Gorsuch's legal ethics class in 2015, writes (link to come):

> I purposefully took Ethics with [Judge Gorsuch], because I wanted to be pushed and challenged on the difficult questions I would face as a woman entering the legal community. That's exactly what his class did. Judge Gorsuch asked tough and sometimes uncomfortable questions, and I appreciated every one of them....
>
> One such scenario asked us to consider whether or not an employer can ethically ask a female applicant if she plans to have a family soon. At first, I

> thought absolutely not because that's not fair nor can that be ethical. The discussion proceeded much in that way until Judge Gorsuch finally revealed employers are not prohibited from asking that question but only from making the final decision based on that answer. That's the rule and the law. As much as I disagreed, I understood why the Judge pushed us so hard. The point was to get us to understand that the law will challenge us to resolve difficult issues in ways that we may not agree with, but in a way we have a legal and ethical duty to do so. During this discussion, I never felt as though he was expressing his personal belief regarding the scenario but was doing his job in remaining neutral and guiding us to an understanding of how we must sometimes divest ourselves of personal beliefs in order to apply the rules of ethics and the rule of law."

Will Hauptman, who was also in the same legal ethics class as Sisk, has also written to the Committee to "refute the … veracity" of Sisk's claim:

> Although Judge Gorsuch did discuss some of the topics mentioned in [Sisk's] letter, he did not do so in the manner described. The judge frequently asked us to consider the various challenges we would face as new attorneys. Among those challenges were balancing our desire to perform public service with our need to pay off student loan debt, and the tension between building a career in a time-intensive profession and starting a family and raising children—especially for women. The judge was very matter-of-fact in that we would face difficult decisions; he himself recalled working late nights when he had a young child with whom he wished to share more time. The seriousness with which the judge asked us to consider these realities reflected his desire to make us aware of them, not any animus against a career or group. And despite the soberness that these topics sometimes imparted on the class, our conversations were always respectful and cordial.
>
> It is clear that my classmate and I have a different account of what happened in class. But had Judge Gorsuch truly made the statements described in the letter, I would remember—the statements would have greatly upset me. And I would not be writing you in support of the judge if I felt he would not treat all people with equal dignity.

Jordan Henry, a female student who took Judge Gorsuch's ethics class in the fall of 2016 (one semester after Sisk), tells the Committee that Sisk's allegations "in no way reflect my

experience with Judge Gorsuch as a professor and a mentor." In what seems like a discussion of the same textbook hypothetical, Henry writes:

> I recall a day in class that was devoted to diversity and some of the issues that face women and others in the profession. The textbook noted that there is a lot of attrition among women lawyers. Judge Gorsuch encouraged discussion on this point and asked students to share their experiences. I shared an experience where I was asked about family planning in a job interview and the overriding concern seemed to be whether I would need maternity leave. Judge Gorsuch thanked me for sharing my experience and used it to demonstrate that gender inequality in the profession was not just theoretical, but something that may occur to the classmate sitting next to us. He prepared us to confront these issues when they arise.

Catherine Holgrewe, who took Judge Gorsuch's ethics class, has issued this statement (link to come):

> Judge Gorsuch was an exemplary professor and treated every student with absolute respect. He took an active interest in our educational and professional success. Judge Gorsuch always made time in his busy schedule to further discuss class materials and offer professional advice and support. I have never heard Judge Gorsuch ever speak disrespectfully to or about anyone. As a former student, I am a witness to the respect that he showed towards his female students and fellow professors at Colorado Law. The supposed remarks he made in his 2016 Legal Ethics class are completely out of character and I find very hard to believe are accurately relayed.

Nathan Davis, another student in Sisk's class and "a life-long Democrat," attests (link to come):

> I have no recollection of Judge Gorsuch acting in the manner described in the letter, nor do I remember Judge Gorsuch making any insensitive or chauvinistic remarks at any point during the semester. I was fully aware that my professor was a federal judge and am certain that I would recall such outlandish behavior. Nothing I witnessed at any point gives me any reason to question Judge Gorsuch's moral fitness to serve on the Supreme Court.

Kate Waller, who took classes in both legal ethics and antitrust from Judge Gorsuch, states (link to come):

> [Judge Gorsuch] never demonstrated anything but the utmost respect and integrity for all students and viewpoints. Judge Gorsuch believed in unbiased, well-reasoned arguments, and never appealed to emotions or politics.
>
> While I was not in the class during which the alleged incident occurred, I can unequivocally say that I never witnessed him make any discriminatory statements about women or other minorities, nor demean or belittle anyone. He expected his students to appeal to logic and he demonstrated the same levelheaded, apolitical focus on reason over emotion.

Glen Matthews writes (link to come) of Judge Gorsuch's ethics course:

> Every week Judge Gorsuch did what was expected from him in the Ethics class he taught at the University of Colorado School of Law. I was a student in his class my final semester of law school. During each class, he posed provocative legal ethical questions and hypotheticals to his class. The class at issue was no different in that we explored difficult issues and topics that affect nearly all parents in the legal profession: specifically, how will the obligations of being an attorney impact my ability to effectively parent? Additionally, we discussed the ethical implications, if any, of applicants applying for jobs while knowing they were soon planning to start or expand their families.
>
> The tone and tenor of that discussion seemed similar to ethical discussions we had about disclosing a client's secrets after their death, or how the rising cost of a legal education creates a disincentive to enter public service. The point of this class was to explore difficult ethical questions—questions with no easy answers. Judge Gorsuch's comments in this instance were in keeping with the dilemmas posed, which were admittedly difficult, and were not inappropriate or demonstrating bias.

NewsRoom

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Section: /opinions

My opposition to Neil Gorsuch is personal
His opposition to "death with dignity" should disqualify him from the Supreme Court.

Matt Witt

My problem with the nomination of Neil Gorsuch to the U.S. Supreme Court is not political. It's personal. It's about my father and mother. And it's about one of our most sacred rights as human beings.

As The Post recently reported, Gorsuch wrote a book in 2006 opposing state laws that allow people with terminal illnesses to decide the timing and terms of their final days.

In the book, he laid out why he believes judges should be able to prevent families such as mine from making our own choices, arguing that "all human beings are intrinsically valuable" and that legal recognition of a dying person's right to make end-of-life decisions could create a slippery slope to legalization of "sadomasochist killings," "mass suicide pacts" or even the "sale of one's own life."

Gorsuch certainly is entitled to apply that view to his own life, but given the experience of families such as mine, he should not be elevated to the Supreme Court, where he could impose his personal beliefs on those who do not share them.

My father was in his 90s when he was diagnosed with a fatal disease that would make him progressively less able to function. The news made him fearful — not so much of death, but of spending an extended time confined to a chair or bed, enduring increasing pain and being unable to do the things that, to him, made life worth living.

He decided to move in with my wife and me in rural Oregon, a state that for 20 years has recognized that end-of-life choices should be made by the individual, not the government. Under Oregon's Death with Dignity Act , when my father had less than six months to live he had the right to ask his doctors to prescribe medication that would end his life at his discretion. He knew his doctors would respect his wishes (although under the law they had the right to refer him to other doctors if writing that prescription would violate their own beliefs).

My father died before he needed to use his Death with Dignity rights. But knowing he had access to such medication gave him great peace of mind and allowed him to focus on enjoying his final days instead of worrying about what was to come.

His experience is typical of many others in our state. While an average of only 59 people per year in Oregon have ended their life under the Death with Dignity law, countless others find comfort in knowing they are in control, even if they never have to take that step.

Gorsuch writes in his book that while he would not allow people such as my father the right to take end-of-life medication, he would graciously permit patients to refuse food or medicine that would prolong their life. My family, unfortunately, has experience with that too.

When my mother was in her late 80s, she was hospitalized after a risky surgery. When it became clear that she was not going to recover, she told her doctor and family that she wanted to spend her remaining time at home.

By law at that time in California, where she was living, she could ask her doctor for painkillers — but not medication to end her life. Instead of leaving that decision to her, the state dictated that she had to continue to live, regardless of the pain she would suffer.

Deprived of that choice, my mother took the only path she saw open. She refused to eat and spent her final days enduring the devastating effects of starvation.

If Gorsuch chooses not to go that route when it is his time, that should be up to him. But he should not be in a position to dictate what such people as my mother can and cannot do as they are dying.

As I enter old age, I don't know what terminal condition I will someday face, but I too take comfort knowing that I live in a state where I can have some say over the terms and timing of my final days. Unless, of course, Gorsuch and a new Supreme Court majority take my rights away. Or unless death-with-dignity opponents in Congress such as Rep. Jason Chaffetz (R-Utah) figure out a way to override the end-of-life rights that an increasing number of states protect.

For decades, we have heard conservative public figures rail against what they say is too much government interference with individual liberty. But it it turns out they only want to protect individual liberties that are consistent with their own religious beliefs. The arrogance of Gorsuch's position on this issue alone ought to disqualify him from serving on our nation's highest court, which has the sacred duty to ensure liberty and justice for all.

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News Subject: (Euthanasia (1EU98); Family Social Issues (1FA81); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

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REVIEW & OUTLOOK

Neil Gorsuch Is a Supreme Court Pick

An originalist judge in the Antonin Scalia mold.

Updated Feb. 1, 2017 8:25 a.m. ET

No one can replace Antonin Scalia on the Supreme Court, but President Trump has made an excellent attempt by nominating appellate Judge Neil Gorsuch as the ninth Justice. The polarized politics of the Court guarantees a confirmation fight, but based on his record the 49-year-old judge is a distinguished choice who will adhere to the original meaning of the Constitution.

Judge Gorsuch is a leading light on the Tenth Circuit Court of Appeals, where he was appointed in 2006 by George W. Bush. He is well known in legal circles for his sharp prose, as well as for his arguments for religious liberty and his skepticism toward judicial doctrines that give too much power to the administrative state. He is also noted for a Scalia-like approach to criminal law that takes a dim view of vague statutes that can entrap the innocent.

This paper trail is important, especially given Mr. Trump's relatively recent embrace of conservative judicial principles. Every recent Republican President has disappointed supporters with at least one of his Supreme Court picks. Sandra Day O'Connor and Anthony Kennedy drifted left over the years as they were feted by Washington elites, while David Souter was a disaster from the start.

Judge Gorsuch's judicial record makes such a transformation on the High Court unlikely. When the Tenth Circuit heard *Hobby Lobby v. Sebelius*, a case that eventually went to the Supreme Court, Judge Gorsuch wrote a powerful concurrence supporting religious freedom and the right of a company to opt out of ObamaCare's contraception mandate based on conscience. While the religious convictions at issue may be contestable or unpopular, Judge Gorsuch wrote, "no one disputes that they *are* sincerely held religious beliefs."

Once such sincere beliefs are demonstrated, he added, we know the Religious Freedom Restoration Act applies. "The Act doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."

This defense of a core First Amendment right is especially important today when so many progressives want to subjugate religious practice to the will of the state.

Judge Gorsuch has also shown skepticism toward the judicial doctrine known as " Chevron deference" that encourages the courts to defer to an administrative agency's rule-making. In *Gutierrez-Brizuela v. Lynch* in 2016, he wrote in a concurrence that requiring courts to defer to executive agencies "seems no less than a judge-made doctrine for the abdication of the judicial duty."

He added that "Chevron invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law." This judicial logic also has current relevance because the Obama Administration

routinely invoked the Chevron doctrine to defend any regulation, no matter how distant from the text of the statute being interpreted.

Judge Gorsuch has also displayed a crisp approach to cases attempting to discover ill-defined constitutional rights. In a concurrence in 2016's *Cordova v. City of Albuquerque*, he took issue with a plaintiff's vague argument that he was the subject of a malicious prosecution. "Ours is the job of interpreting the Constitution," he wrote. "And that document isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning."

At a 2016 speech to honor Justice Scalia's legacy at Case Western Reserve Law School, Judge Gorsuch noted that "an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function." While the Founders debated a role for the judiciary that would have given them some quasi-legislative powers, he said, they instead "quite deliberately chose one that carefully separated them."

Mr. Trump nominated Judge Gorsuch from the list of 21 potential nominees he released during the campaign, and his choice will be popular among GOP voters of all stripes. The nomination is also a chance for the White House to rebound from some of its early blunders. But it will also be an acute and painful reminder for Democrats of the price of Hillary Clinton's defeat.

As qualified as he is, Judge Gorsuch ought to be confirmed at least as easily as President Obama's appointees Elena Kagan and Sonia Sotomayor. But Democrats won't forgive Republicans for declining to vote on Mr. Obama's nomination of Merrick Garland last year, though Democrats would have done the same to a GOP nominee in the last year of a presidential term.

Republicans have a 52-seat Senate majority, and without some revelation the presumption will be to confirm Judge Gorsuch. Democrats could attempt a filibuster, but then the GOP will have to be prepared to break it. Mr. Trump won in major part because he promised to appoint judges in Justice Scalia's mold, and in Neil Gorsuch it appears he has.

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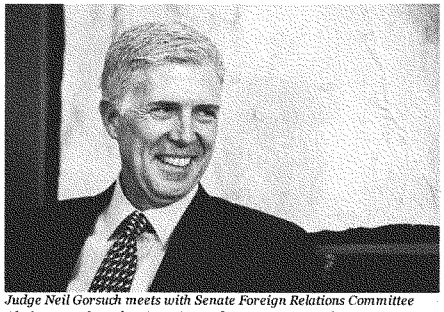
Judge Gorsuch Is Just Right For The Scalia Seat

GUEST POST WRITTEN BY
Evan Young
Mr. Young clerked for Justice Scalia in 2005-2006 and is partner and chair of the litigation department with Baker Botts L.L.P.

Today, February 13, marks a year since Justice Antonin Scalia's death. That sudden personal tragedy for the justice's family and friends also shook the entire nation by creating a major vacuum in the federal judiciary and playing a significant role in the presidential election. With the election decided, President Trump named Judge Neil Gorsuch two weeks ago as his choice to succeed Justice Scalia—and thus to be the latest occupant of a seat on the Supreme Court that has produced some of its most extraordinary justices. Few could fill it as well as Gorsuch will.



Judge Neil Gorsuch meets with Senate Foreign Relations Committee Chairman Bob Corker (R-TN) on February 2, 2017. (Chip Somodevilla/Getty Images)

Any position on the Supreme Court is precious; every justice holds it in trust for the American people. Justice Scalia never intended to do so forever. His readiness to depart this life at a time of God's choosing was a testament to his deep faith that our time on earth is just a flicker

compared to what comes next. He and Mrs. Scalia imparted that same depth of belief to their nine children. At his wake, funeral and memorial events, the Scalia family consoled the rest of us, not the other way around.

Watch On Forbes: *Supreme Court Upholds Insider-Trading Convictions For Family And Friends*

But after spending his life committed to our country and its Constitution, Justice Scalia could hardly have been indifferent about who his successor would be—just as, I am sure, *his* predecessors hoped that the seat would remain in worthy hands. Those predecessors, starting with Justice Scalia, make the seat that Justice Gorsuch will occupy—if the Senate exercises its constitutional authority as wisely as the president exercised his—a truly special one.

Justice Scalia, just past 50 when President Reagan nominated him in 1986, was only months older than Gorsuch is now. The seat became vacant because of then-Justice William Rehnquist's promotion to Chief Justice. Rehnquist, a brilliant lawyer and later a prolific author, had been only 47 when President Nixon nominated him to take over from Justice John Marshall Harlan II.

Justice Harlan—a gracious, generous, old-style conservative—was the grandson of Justice John Marshall Harlan I, famous as the lone dissenter in *Plessy v. Ferguson*, the 1896 case that stained American legal history with the phrase "separate but equal." Harlan (the grandson) replaced Justice Robert Jackson, whom Rehnquist once had served as a law clerk, and who remains one of the greatest thinkers and writers in Supreme Court history. Reminiscent of Scalia's term beginning with Rehnquist's elevation, Jackson

took the seat when Harlan Fiske Stone (a former Columbia Law School dean and U.S. Attorney General) vacated it to became Chief Justice.

Neil Gorsuch is the perfect next Justice to occupy this special seat, just as Antonin Scalia was the perfect next occupant in 1986.

On Oct. 2, 2013, Supreme Court Justice Antonin Scalia speaks at Tufts University in Medford, Mass. (AP Photo/Josh Reynolds, File)

As a former clerk for Justice Scalia, that's not an easy thing to say. Imagining *anyone* else sitting in his seat is painful. But the Boss, as we called him, never thought of it as "his." He relinquished it too soon and too suddenly, but he certainly knew that, either at a time of his or of God's choosing, he would give it up.

He would have been thrilled that the next occupant of his seat will be someone who will spend the next 30, 40 or even—as the president suggested when introducing Judge Gorsuch to the nation—50 years building on Justice Scalia's jurisprudential foundations, rather than working to tear them down. Next to losing the Boss so early, my regret is that he wasn't able to be here and congratulate the new nominee in person.

As a justice, Gorsuch will pick up where Scalia left off. Their conclusions in any given case may not be identical. But he'll continue the Scalia legacy in a more significant way—by using the same tools that Justice Scalia wielded so powerfully and in service of the same purposes.

Most importantly, Justice Scalia was a humble judge—humble in that he never sought to exalt himself beyond the judicial role. He interpreted the Constitution by honoring the original understanding of its text—a method that ensured that our fundamental law means what it says, and not what a judge wishes it said.

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This humility is no small thing. Justices of the Supreme Court are often tempted, even invited, to transform themselves into our rulers. One need not disparage their motives—few mortals could steadfastly resist the raw power to convert into binding law their deep views of what is right for our country. Yet for 30 years, Justice Scalia resisted that ever-present temptation. He did not want to rule the American people by imposing even his most cherished personal beliefs on us. He wanted the American people to rule themselves, something that he could facilitate by being a relentlessly principled judge—telling us what the law required, and then letting the country make its own choices.

Maintaining such judicial humility requires a truly awesome force of will. Judge Gorsuch is disciplined in this way. He has studied and admired this supreme virtue that Justice Scalia exemplified. And he emulates Scalia in the way that matters most—by using the tools of originalism and textualism to ensure that he never confuses the law's commands for his own ideas of what the law *should* command.

Judge Gorsuch is a worthy heir to Justice Scalia in another way. Judicial opinions by both men typify a clear, evocative style possible only from writers who possess the deepest understanding and grasp of the law. Previous occupants of their seat on the Court—especially Justices Jackson and Rehnquist—likewise exhibited the ability to express sophisticated concepts and reasoning without jargon or vacillation.

Good judges are good writers, leaving nothing hidden, willing for their analysis to be exposed to any critic. Like Scalia, Gorsuch combines the

poet's art with the logician's rigor. Their work withstands the fiercest rage, and because their opinions are simultaneously so well reasoned and so well written, they will stand the test of time.

Justice Scalia's death touched Judge Gorsuch deeply. His tributes to the justice, both at the White House and in many other places since the Boss's death a year ago, make clear his profound sense of loss. He knows what it will mean to sit where Justice Scalia once sat. It will be the honor of his life to take that seat, and he is well aware of that. But he is equal to the task, and over the coming decades, he will make that seat even more special than it is today.

The views expressed here are the writer's own.

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ADDITIONAL SUBMISSIONS FOR THE RECORD

A list of material and links can be found below for Submissions for the Record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee:

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