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NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

THE NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

JULY 12, 13, 14, AND 15, 1994

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NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 12, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:09 a.m., in room 216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order.

Judge and Mrs. Breyer, welcome. We are delighted to have you here. The first issue, when we get to questions, will be resolving what State you are really from. But you are, indeed, privileged this morning to have four of our distinguished colleagues anxious to be associated with your nomination, and one in particular maybe is considerably responsible for your nomination.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

In each of the confirmation hearings that I have had the privilege to chair, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which our Nation defines and redefines itself over time, and the means by which Government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us and most of the legal community thought had already been well settled. In the late 1980's, for example, the Nation watched to see whether the Supreme Court would limit the set of personal rights that the Court had previously deemed off limits to the Government and Government intrusion, especially the right of the individual to make certain highly intimate decisions free from Court interference, or, as Justice Brandeis had put it, the "right to be let alone."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named—the so-called unenumerated rights—in the Constitution. My blatantly stated fear at that time was, if you will, a constitutional fear.

More recently, we have seen new challenges mounted by the most powerful economic interests in America by those who want to reduce the ability of Government to protect the rights and interests of the majority of Americans.

Thus, in the hearings on Justice Clarence Thomas—and most people forget that there really were two hearings. We had had a hearing, and it had ended, on the substance before we had the second, much more celebrated hearing. But in the hearing on Justice Thomas's nomination, I was concerned at the same time the Court would limit individual freedoms, it would tell Government that it must pay a factory owner before it can keep him from dumping chemical waste in a river running through his property and then onto some adjacent farmland downstream.

At the time, many people asked why I was concerned about this arcane thing referred to as the takings clause, the takings clause of the fifth amendment. As a matter of fact, many of the press writing today wrote interesting articles about how boring the discussion was and why were we taking any interest in it, except for the Wall Street Journal, which worried me that they got it right.

That is supposed to be a joke. You are supposed to laugh a little bit.

There may be fewer questions now as to why I raised the issue of the takings clause then, since in recent cases the Supreme Court has used the takings clause to make it harder for Government to regulate polluters or developers or other economic interests and activities in the name of public welfare. In raising the level of protection afforded the rights of owners of businesses and beach-front vacation properties, the Court used language equating these property rights with personal rights, such as the first amendment guarantee of freedom of speech.

So our recent confirmation hearings have focused primarily on how the Court's direct interpretation of the Constitution shapes our life. But the focus has now changed again in academia and among legal scholars, and we are soon going to see a whole new set of questions arise in the Supreme Court that I think have far-reaching consequences based on how they will be resolved for the public at large.

The focus has now changed, and it must be remembered, it seems to me, that the Court has, in fact, two major responsibilities. The first responsibility is to interpret the Constitution, and the second is to interpret statutes passed by the Congress and signed by the President.

While the first job is more familiar to most Americans, it is not in any way more significant. Indeed, what has become quite clear over the last decade is that it is increasingly through statutory interpretation that the Court is shaping the nature and scope of basic rights of all Americans.

For example, one of the rights secured by the Constitution is the 14th amendment guarantee of equal protection of the laws. The Constitution empowers the Congress to enforce that guarantee of

equality through legislation. And, today, women, Americans with disabilities, older Americans, and others enjoy equal opportunity to work and to conduct their daily lives that are protected not by the Constitution but by statute.

In recent years, the Court has tended toward a grudging interpretation of statutes passed by the Congress, signed by the President, and supported by the American people to ensure this greater equality.

Through various interpretive rules or, as we lawyers say, canons of interpretation, the Court has raised the bar on Government by adopting unduly restrictive, in my view, rules for interpreting statutes or changing those statutory rules of interpretation midstream and frustrating Congress' intent to ensure equality to women, the disabled, and others. A classic case which I will discuss with you later, Judge, is the *Patterson* case where the Court ruled that legislation passed after the Civil War guaranteed that an employer could not deny a person employment because they were black, but concluded that if they were fired because they were black, the legislation did not cover them for other reasons.

The effect on that woman was the same. She was discriminated against because a grudging interpretation of a statute was made, not because of the failure to find a constitutional right in the Constitution.

I will discuss those cases at length with you, Judge, but I now have a second concern and a related one, equally significant in my view; that is, what values the Court will incorporate into its calculus of interpreting statutes.

In recent years, an influential group of scholars and judges, known as the Law and Economics Movement, has proposed that legal problems should be resolved from a purely economic perspective.

Some proponents of this movement are relentless in their application of this reasoning, analyzing every feature of our lives, including marriage and sex, by reference to transactions costs, search costs, and missed opportunities. Some have even said that we can explain rape by talking about the cost to the rapist of finding a sexual partner. This is a serious, serious undertaking on the part of some very, very bright individuals.

Presently, of course, we quite consciously prefer other values, including social and moral norms, when we make policy and resolve legal disputes. We choose to take into account the social values and norms whether or not they make good, purely economic sense. We do that every single day. We make those judgments on health care. It does not make purely economic sense to spend a disproportionate amount of our booty, our money, our taxes, on saving the lives of people over the age of 80. But, as a matter of value, we value—not from an economic standpoint—we, the American people, through their Congress and their President, value the lives of the elderly and conclude even though it does not make economic sense, we have decided to do it. We choose to take into account social values and norms—again, whether or not they make good, purely economic sense.

Throughout your career, Judge, you have advocated the use of economic analysis in prescribing solutions for many legal and policy

problems. As I read what you have written—and I think I have read most of what you have written—your view is very distinguishable from the school of law and economics. But I will want to know how you will use the economic model that you propose in judicial decisionmaking.

Judge Breyer, you have served ably as a judge and chief judge on the First Circuit Court of Appeals for 14 years. As a professor of law at Harvard and, to some of us here, more importantly, as counsel to this committee, you are an established expert in regulation and its reform, in administrative law and processes, and in the intersection of science and law.

I began by describing how the confirmation hearings of the past 8 years have engaged us in the constitutional debates of those times. The reason that occurred, in part, was because the nominees before us were active and influential participants in those debates.

So it is again today, Judge. You have written and spoken at length about the methods of statutory interpretation, and about the role of economic analysis in resolving legal disputes. Thus, many of the very issues that are now boiling today in the cauldrons of debate among legal scholars and judges are those in which you are considered the foremost expert.

So we welcome you here today, Judge, not merely to measure your competence to sit on the Court, but to engage us in a discussion of those important matters.

I would ask unanimous consent that the entirety of my statement be entered in the record at this moment.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF CHAIRMAN BIDEN

Today, the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

The Constitution vests authority in the United States Senate to give "advice and consent" to the appointment of women and men nominated by the President to serve as justices on the Supreme Court. "Advice and consent" has come to serve two purposes: the first is for the Senate to learn more about the qualities of a President's nominee and to determine whether to vote for confirmation; the second—a unique function that has developed more fully over the last decade—is to provide the only opportunity the Senate and the American people will have to discuss the great legal issues of the day with the nominee, to get some indication of how he or she views these issues.

In each of the confirmation hearings I have chaired, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which a nation defines and re-defines itself over time—and the means by which government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us thought had already been well settled. In the late 1980's, for example, the nation watched to see whether the Supreme Court would limit the set of personal rights that the Court has previously deemed off-limits to government intrusion—especially the right of the individual to make certain highly intimate decisions free from government interference—the "right to be let alone"—which Justice Brandeis characterized as "the most comprehensive of rights and the right most valued by civilized man."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named in the Constitution. My fear at that time was, if you will, a "constitutional" fear: I was concerned that the Supreme Court might, in the name of constitutional interpretation, constrict our right to make these highly personal decisions without interference from the government.

More recently, in the early 1990's, we have seen new challenges mounted by the most powerful economic interests in America to reduce the ability of government to

protect the rights and interests of the vast majority of the American people. We had not seen such a sustained attack on the ability of government to protect the average person since early in this century, when the Supreme Court struck down child labor laws, minimum wage laws and many others.

Thus, in the hearings on Justice Clarence Thomas's nomination, I was concerned that the Court—again interpreting the Constitution—would, on the one hand, restrict an individual's ability to make highly personal decisions without interference from the government, and at the same time make it harder for government to stop a factory owner from dumping chemical waste in a river running through his property and then onto farmland downstream—by requiring the government to pay the factory owner not to pollute.

At the time, many people asked why I was concerned about this arcane thing called the "Takings Clause" of the Fifth Amendment. What is at stake here may be harder to see, because the method of these challenges has been subtle, involving highly technical legal rules, such as those which allocate burdens of proof. There may be fewer questions now, since the Supreme Court has decided the *Lucas* case and last month's *Dolan* case, in which the Court used the takings clause to make it harder for governments to regulate polluters or developers or other economic interests and activities in the name of the public welfare. In raising the level of protection afforded to the rights of owners of businesses and beachfront vacation properties, the Court used language equating the level of protection these property rights with personal rights, such as the first amendment's guarantee of freedom of speech.

What's at stake in both these on-going debates are our individual freedoms. Our recent confirmation hearings have focused primarily on the Court's direct interpretation of the Constitution: what individual freedoms are guaranteed by the Constitution, and when may government limit those freedoms? Can the government interfere when an individual decides whom to marry? Whether to have children? How to raise children? Does the Constitution afford as much protection to economic rights as to personal rights? In other words, do we want to protect a developer's desire to build a skyscraper in a residential neighborhood as fiercely as we protect a black family's desire to buy a house in that neighborhood?

These types of decision-making are the part of the Court's work most familiar to us—but the Court has, in fact, *two* major responsibilities: to interpret the Constitution; and to interpret *statutes* passed by the Congress and signed by the President. In the first kind of case, the Court's job is to decide whether certain action taken by the Government complies with the Constitution—or in other words, is the action constitutional? Here, the Constitution serves as the touchstone for evaluating the Government's conduct. In the second kind of case, the Court's job is to decide whether and how a specific law applies to a specific case. Here, obviously, the statute itself, and not the Constitution, serves as the touchstone.

What has become clear over the last decade is that the Court confronts basic questions about individual rights, and about the tension between economic interests and the public interest, not only when it interprets the Constitution, but also when it interprets statutes. Indeed, this trend—where, by the method in which it interprets statutes, the Court makes important decisions about how Americans can lead their lives—has been demonstrated over and over again since the confirmation of Justice Scalia. Quite frankly, I wish I had appreciated, at the time of his confirmation hearings, how wedded Judge Scalia was to changing the way the Court interprets statutes—because it is increasingly through statutory interpretation that the Court is shaping the nature and scope of the basic rights of all Americans.

Now we have new questions we must ask: What is the proper role of the courts in interpreting the statues passed by the Congress and signed into law by the President—statutes that may directly affect basic individual rights? Should judges look only at the precise language of a statute, or should they also consider its purpose as reflected in what the drafters said and did in adopting it? If Congress enacts a law that accurately reflects a value judgment by the American people but that economists would deem economically unsound, should a court—may a court—use economic standards when it interprets a law to review policy choices made by elected officials? Can what economists call "the greater good" be measured merely on a mathematical scale, or should the courts respect the moral yardstick that Congress—speaking for the American people—uses to measure the public interest? Must courts recognize that the American people sometimes reach conclusions they fully understand to fall short of purely economic good sense in order to pursue a desired goal—for example, in spending large sums to make buildings accessible to the handicapped?

So what sound like mere technical questions affect, in fact, rights secured by the Constitution. Consider the fourteenth amendment's guarantee of "equal protection

of the laws." In simplest terms, this means that the government may not discriminate against people because of their race, sex and other characteristics. The Constitution empowers the Congress to enforce that guarantee of equality through legislation. For example—the right of Americans with disabilities to enjoy equal opportunities in employment, housing and other features of daily life; the right of women to work in an atmosphere uncontaminated by sexual harassment; the right of African-Americans to live in any neighborhood they choose; the right of older Americans to continue to work as long as they can do their jobs; all these rights are protected by federal statutes. If you are denied a job because you are a woman, I doubt very much whether it will matter to you whether you have been denied the job by the government, or by a private party. The Constitution protects you against the former kind of discrimination, statutes against the latter.

When a question arises about the meaning or scope of these statutes which have the intention of insuring equality, it is often the Supreme Court that resolves the dispute. If we want to know "how we're doing" with respect to equality, therefore, we must look not only at how the Supreme Court interprets the Constitution—but also at how it interprets the statutes that have equality as their aim. In deciding how to apply a statute in a specific case, the Supreme Court has two basic choices: the Court can either give the statute a generous reach to fulfill Congress's intent, or it can give it a grudging one that requires Congress to be ever more precise.

In recent years, it seems to me, the Court has too often chosen the second course—it has too often been grudging. As a consequence, some of the "constitutional" fears of the Bork and Thomas hearings have become, if you will, "statutory" fears. But to the woman denied a job because she is a woman, it matters not one bit whether the violation was constitutional or statutory—either way, she is still out of work.

In some cases the Court has been grudging by looking only at the literal language of the statute before it, ignoring the statute's history and purposes. In 1989, for example, in a case called *Patterson* v. *McLean Credit Union*, the Court was faced with the question of whether a civil-rights statute passed several years after the Civil War protected workers from racial harassment on the job. This statute guaranteed to all persons within the United States "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." The Court agreed that this law prohibited racial discrimination in hiring—but that it did not prohibit racial discrimination that occurs after a contract is made—that is, after a person is hired.

This conclusion meant that this statute did not protect employees on the job from being insulted because of their race, from being given demeaning work solely because of their race, or even from being fired because of their race, even though they could not be discriminated against in a hiring decision. The Court bolstered its hyper-literal interpretation of the statute by reference to a different law relating to job discrimination, passed almost 100 years after the law at issue in *Patterson* was passed—even though Congress had not said anything about changing the scope of the earlier law when we passed the later statute. Though it was interpreting a statute in *Patterson*, not the Constitution, the Supreme Court directly shaped the meaning that "equality" would have for a black woman named Brenda Patterson—and what it would mean for the lives of all working Americans.

In other cases, the Court's decisions have turned not so much on the language of the statutes in question as on interpretive rules that the Court itself has created. These interpretive rules are often called "canons" of statutory interpretation. In my view, these interpretive rules have sometimes operated as a thumb on the scales that tips the balance against a common-sense reading of legislation designed to protect individual women, individual blacks, and individual handicapped and older Americans against invidious discrimination.

Let me offer an example. Congress passed a law giving handicapped children the right to equal educational opportunities. The law was aimed at states and local governments, and it said specifically that a handicapped child could sue in a federal court government that failed to meet its obligations under the statute. But in a case called *Dellmuth* v. *Muth*, the Supreme Court refused to allow a handicapped child to sue New York state in federal court. Congress had the power to grant a right to sue a state, and the legislative history suggested that Congress had intended to allow handicapped children to sue states in federal court. Nonetheless, according to a majority of the Supreme Court, Congress had not used the correct words in granting the right of the family to sue the state. The Court used a "canon"—one that disfavors suits against states in federal court—to reject the common-sense reading of the statute's language, which would have permitted the suit.

As Professors Eskridge and Frickey have pointed out, these sorts of canons operate as "super-strong clear statement rules," that permit the Court to engage in a "'backdoor' version of the constitutional activism that most Justices on the current

Court have denounced." That is bad enough. But I have another problem with these two cases. When you take together what the Court did in *Dellmuth* and in *Patterson*, it seems to me the Court was not only grudging, but inconsistent. In *Patterson*, the Court said that the literal language of a statute counts for everything. In *Dellmuth*, the Court said that even if the literal language of the statute covers the case, it's not enough.

That strikes me as flatly inconsistent. But one thing was consistent about the two cases—their result. In one a black woman, in the second a handicapped child, were denied their right to equal treatment. In both of these cases, the Congress was able to undo the damage done by the Supreme Court by passing a new statute using different words. But the Court's decisions had the effect of delaying the equality intended by the original legislation.

These are just two of many recent cases in which the Court has narrowly interpreted laws protecting individual rights, but they illustrate how the Court, without saying anything about the Constitution, can affect the scope of equality by interpreting statutes. As we all well know, there will be many more such cases. To sum up these cases, it would be like me asking the Supreme Court, "do you know what time it is?" And the Court replying, simply, "yes." Now, you and I, Judge, and everyone in this room realize that what I wanted to know when I asked that question was the time of day. Instead, the Court answered my question formally, not as a request for information but as a test of the Court's cognitive abilities. The Court's answer was not untrue, but you might well call it a triumph of technical sophistry over plain common sense. That might serve as a debating point, Judge, but it does not serve the public interest.

In the coming decade, the rights of individuals and the powers of government will be affected as much by the Court's method of interpreting statutes as by its interpretation of the Constitution—and we need a Court more interested in clarifying the true intent of a law than in seeking quibbles that promote its own agenda.

I have a second, related concern. As significant as its method of interpretation is what values the Court will incorporate into the calculus of interpretation. In recent years, an influential group of scholars and judges known as the "Law and Economics Movement" has offered a new view of how policy should be made and how legal disputes should be resolved. In essence, this movement proposes that legal problems should be resolved from a purely economic perspective, now that seeks economic efficiency as its goal, so that the answer to a legal problem may be derived simply by summing columns of numbers—costs, benefits, missed opportunities and the like.

Some proponents of this movement are relentless in their application of this reasoning—analyzing every feature of our lives, including marriage and sex, by reference to transaction costs, search costs, and missed opportunities. Some have even said that we can explain rape by talking about the cost to the rapist of finding a sexual partner.

Presently, of course, we quite consciously prefer *other* values—including social and moral considerations—when we make policy and resolve legal disputes. We choose to take into account social values, *whether or not they make good, purely economic sense.*

Throughout his career, Judge Breyer has advocated the use of economic analysis in prescribing solutions for many legal and policy problems, and I will ask him how he will use the economic model in judicial decision-making, particularly relating to questions of public health and safety and to personal freedoms guaranteed to us under our laws.

Judge Breyer, you come before the committee with impeccable credentials and a host of impressive accomplishments to your credit. You have been an able judge and chief judge on the First Circuit Court of Appeals for 14 years. During that time and before, as a professor of law at Harvard and as chief counsel to this committee, you have made an enviable name for yourself as an expert in regulation and its reform, in administrative law and processes, and in the intersection of science and law.

I began by describing how the confirmation hearings of the past eight years have engaged us in the constitutional debates of those times, partly because those nominees were active and influential participants in those debates.

So it is again today, Judge. You have written and spoken at length about methods of statutory interpretation, and about the role of economic analysis in resolving legal disputes. Thus, many of the very issues that are boiling today in the cauldrons of debate among legal scholars and judges are those in which you are most expert. We welcome you here to engage us in a discussion of these important matters.

As we begin these hearings, I am concerned about the four areas I have identified here today, all of which affect our personal liberty—the scope of our most important individual freedoms guaranteed by the Constitution; the apparent emergence of economic rights as standing shoulder to shoulder with—or shouldering aside—our per-

sonal freedoms; the proper role for the Court in interpreting statutes enacted by the Congress and signed by the President; and the utility of economic analysis in judicial review of policy choices made by elected officials.

These are not small questions, Judge; how we answer them will determine, directly and intimately, how Americans can live their personal lives and pursue their personal goals. That is why this opportunity to discuss these questions is important—the result should be a Court better prepared to fulfill its constitutional responsibilities and a nation better enabled to pursue the destiny envisioned for it by its founders.

Judge Breyer, you are very welcome here.

The CHAIRMAN. I will now yield to my distinguished colleague from Utah, a man you know well, Senator Hatch.

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

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

I welcome you, Judge Breyer, and the distinguished Senators who are here to testify with you. I appreciate your willingness to go through this process.

Mr. Chairman, I congratulate the nominee, Judge Stephen Breyer, on his nomination to be Associate Justice of the U.S. Supreme Court. Judge Breyer has had a remarkably distinguished career in the law and in public service. If confirmed, he will bring a wealth of knowledge and expertise to the Court. And I might say I believe that he will be confirmed.

As an attorney in the Department of Justice, then as a professor of law, Judge Breyer developed an expertise in administrative law and antitrust, and an appreciation of the costs of excessive governmental regulation. I first came to know and admire Judge Breyer when he worked for the Senate Judiciary Committee, first as a consultant, then as chief counsel. In his work, Judge Breyer was instrumental in bringing about airline deregulation.

For the past 14 years, Judge Breyer has distinguished himself on the U.S. Court of Appeals for the First Circuit. Known for his careful, scholarly opinions on a range of difficult issues, he has defied simplistic categorization. While a judge, he also served on the U.S. Sentencing Commission and helped to draft the Federal sentencing guidelines. That was no small achievement.

That Judge Breyer has the intellect, character, and temperament to serve on the Supreme Court is not, in my mind, in question. An additional essential qualification for any Supreme Court nominee is that he or she understand and be committed to respect the role of the Supreme Court in our governmental system of separated powers and federalism. This qualification has become all the more important in recent decades, when so many voices from academia, the media, and special interest groups have been attempting to justify the view that the Supreme Court is entitled to operate as a super legislature. Under this view, Justices enshrine their own policy preferences in place of the laws passed by Congress and the State legislatures.

Under our system, a Supreme Court Justice should interpret the law and not legislate his or her own policy preferences from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and the other Federal laws according to their understood meaning when they were enacted.

Any other philosophy of judging enables unelected judges with lifetime tenure to impose their own personal views or sentiments on the American people in the guise of construing the Constitution and Federal statutes. There is no other way around this conclusion. Such an approach is called judicial activism, plain and simple. And it is wrong, whether it comes from the political left or whether it comes from the political right.

Let there be no mistake: The Constitution, in its original meaning, can be applied to changing circumstances. The fact that telephones did not exist in 1791, for example, does not mean that the fourth amendment's ban on unreasonable searches and seizures is inapplicable to a person's use of the telephone. But while circumstances may change, the meaning of the text, which applies to those new circumstances, does not change.

We often hear about the supposed needed for a living Constitution. Those who use this phrase typically mean that the Constitution should be reconstrued to give constitutional status to whatever interests they currently regard as important. But the Constitution remains living and well suited to a changing society not because its provisions can be twisted to mean whatever activist judges want them to mean. It remains living because it disperses and limits Government power and, equally importantly, because within those limits it leaves to the State legislatures and Congress primary authority to adapt laws to changing circumstances. After all, the very point of a democratic republic, its core virtue, is that the people generally decide how society will pursue its various goals and combat its various problems.

This does not mean that those liberties not specially guaranteed by the Constitution have no protection. The Constitution's real genius—what Madison recognized as its greatest protection of our liberties—lies in its dispersion of Government power among the three Federal branches and between the Federal Government and the States. It is these structural features of separation of powers and federalism that provide our most important guarantee against oppressive legislation.

In an earlier era, judicial activism resulted in the invalidation of State social welfare legislation, such as wage and hour laws. Since the advent of the Warren Court, judicial activism has, to cite a few examples, handcuffed the police in the battle against crime; interfered with the ability of communities to protect themselves from the scourges of obscenity, drug dealing, and prostitution; twisted constitutional and statutory guarantees of equal protection into vehicles for reverse discrimination and quotas; chased religious expression out of the public square; and imposed a regime of abortion on demand that is the most extreme in the Western World. The death penalty, which is, of course, expressly contemplated by the Constitution, is currently under attack by advocates of judicial activism.

Many voices will urge Judge Breyer to become a judicial activist. Indeed, one judicial activist, in a remarkable display of effrontery, has already written a newspaper op-ed appealing to Judge Breyer to grow. Funny, isn't it, how moving to the left is seen as growing? Judge Breyer can rest assured that his stature will grow by his

continuing to do what has brought him to this special point: crafting judicial opinions that support the rule of law.

While I do not agree with all of his opinions, I take considerable comfort from Judge Breyer's overall record that he will resist the siren calls of judicial activism. Judge Breyer has not displayed his sentiments on the sleeve of his judicial robe, nor has he pursued an ideological or political agenda. He has not strained to invent hypertechnical rules that benefit criminals at the expense of honest, law-abiding citizens. Instead, he has called into question what he has termed the right creation problem—that is, the misguided view that society's problems can best be resolved by recasting competing interests as rights or entitlements.

There are, undoubtedly, areas where Judge Breyer and I will disagree in our reading of the law. I do not expect to agree with any nominee, especially one chosen by a President of the other party, on every issue that will come before the judicial branch. But it has been my consistent belief that a President—and this President—is entitled to significant deference in selecting a Supreme Court Justice, and in this case he has made an excellent selection.

President Clinton and I are unlikely ever to agree on the person who ought to be nominated. But so long as a nominee is experienced in the law, is intelligent, has good character and temperament, and gives clear and convincing evidence of understanding the proper role of the judiciary in our system of Government, I can support that nominee. In this case, I have a great deal of regard and affection and experience and understanding of Judge Breyer, and I think a great deal of him, and I intend to support him. It is my hope and my firm expectation that this hearing will satisfy this committee that Judge Breyer meets the test of understanding the role of the judiciary in the constitutional processes of this Government.

Judge Breyer, we welcome you here. We compliment you for being selected. We have high expectations of your service on the Court, and I hope you will enjoy these proceedings.

The CHAIRMAN. The hearing is adjourned. [Laughter.]

Judge, I said earlier that one of the most difficult questions faced today is from what State you hail, and I have decided how to resolve that: to disregard the States and go by a time-honored tradition of the Senate, seniority.

Senator Kennedy.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Mr. Chairman, Senator Hatch, members of the committee, it is a great honor to introduce Judge Stephen Breyer, President Clinton's nominee to be Associate Justice of the U.S. Supreme Court.

We all know the fundamental role of the Supreme Court in our society. Our Nation celebrated its 218th birthday last week, proud of the fact that more Americans than ever can enjoy the fundamental rights to life, liberty, and the pursuit of happiness pledged in the Declaration of Independence.

The Constitution is designed to guarantee those rights, and it is the nine Justices of the Supreme Court who have the last word on

the meaning of that charter of our liberties. Their decisions affect the lives of all Americans today, and for years to come.

Judge Stephen Breyer is superbly qualified to serve on our highest Court. Throughout his long and brilliant career, Judge Breyer has committed himself to public service, to excellence in the law, and to the pursuit of justice for all Americans.

After graduating with honors from Stanford University, he attended Oxford as a Marshall scholar. At Harvard Law School, he was an editor of the Law Review. He served as a law clerk for Supreme Court Justice Arthur Goldberg, a renowned defender of civil liberties and one of Judge Breyer's proudest mentors and admirers in later years.

Judge Breyer next served in the Antitrust Division of the Department of Justice where he sought to enforce the antitrust laws to protect consumers from practices that drive up prices, hurt competition, or involve discrimination. In one important case, he developed the successful argument that the antitrust laws bar real estate agents from agreeing not to show homes in white neighborhoods to black families.

Judge Breyer then returned to Harvard Law School as a member of the faculty, where he earned an outstanding reputation for his scholarship in the areas of antitrust law and administrative law, focusing on the profoundly important work of improving our free enterprise system and our system of government.

In 1973, he took a leave of absence at the request of Watergate Special Prosecutor Archibald Cox to help in that historic investigation.

In 1974, he became special counsel to the Administrative Practice and Procedure Subcommittee of this committee. I was chairman of the subcommittee at the time, and I have known Judge Breyer well ever since. His competence and creativity, his leadership ability and skill at working productively with Senators, interest groups, and constituents of widely different views were evident from the start.

He was indispensable to our bipartisan effort in those years to deregulate the airline industry and the trucking industry. Judge Breyer dedicated himself to assuring that all Americans would have safe and efficient air travel at the lowest possible prices for the public, and that shippers and consumers alike would reap the benefits of lower prices in the trucking industry. Those two laws were among the most important achievements of Congress in that decade. I might add that we would have much more competition in the health care industry today if we had given Judge Breyer that assignment, too.

I asked Judge Breyer to serve as chief counsel of this committee when I became chairman in 1979. His intelligence, fairness, and his commitment to unifying common ground instead of polarizing narrow ground earned him the admiration and respect and often the affection of every member of this committee, Democrats and Republicans. Those qualities were evident in December 1980 when Judge Breyer was the only judicial nominee confirmed by the Senate after President Reagan's election.

Since then, as a member of the Court of Appeals for the First Circuit, Judge Breyer has earned a reputation as a brilliant and

fair-minded jurist. As chief judge of that court, he is well known and respected for his efforts to develop consensus and minimize dissent. His opinions are models of clarity, written, as the judge has said, so that the real people who are the parties in the cases, not just the lawyers, can understand the court rulings, too.

In his decisions, he has construed the Constitution to defend the basic rights of all Americans.

He has protected the right of women seeking family planning advice to hear about their right to choose to terminate a pregnancy.

He has protected the right of Government employees to engage in political activity and advocacy.

He has protected the right of students belonging to a church group to be recognized by a State university.

He has protected the right of every citizen to rent or buy housing, free from the threat of discrimination.

His opinions on environmental laws have been praised by environmentalists.

His opinions in criminal law cases seek to assure public safety while protecting the constitutional rights of defendants.

As one of the first members of the Sentencing Commission, he is widely credited with developing the guidelines to reduce the disparities in sentences given to defendants committing similar crimes.

As a judge, he has also continued his dedication to teaching and legal scholarship. In addition to his administrative and judicial duties, he has continued to teach courses at Harvard Law School, and he has also continued to write and publish articles and books analyzing important issues of law and Government.

Judge Breyer ranks among the country's most thoughtful scholars of the regulatory process, and his knowledge and experience in this complex area of the law will be a major asset to all the members of the Supreme Court from the day he takes his seat.

His most recent book on regulation drew praise from leading experts on all sides of the debate. He has sought to assure that the public health and safety are protected, while avoiding needless inefficiency and waste in government. Not everyone agrees with all of his views, but I suspect that everyone will agree that his views have contributed immensely to our understanding of these complex issues in our modern society.

In addition, perhaps because of his service to the Senate, Judge Breyer has emerged as one of the leading exponents of the view that laws should be construed in the manner that Congress intended. If confirmed, he will add a needed and well-informed perspective to the many important questions of statutory interpretation that come before the Supreme Court.

Finally, I want to mention Judge Breyer's extraordinary family. His wife Joanna is widely respected in Massachusetts as a psychologist at the Dana Farber Cancer Institute, where she counsels children with terminal cancer and their families.

Steve and Joanna's older daughter, Chloe, recently graduated from Harvard and now edits the magazine Who Cares?, which promotes public service by young adults. Obviously, the apple did not fall far from the tree.

Their younger daughter Nell recently graduated from Yale, and their son Michael has just completed his freshman year at Stanford.

In an address about the legal profession, another outstanding Massachusetts jurist, Oliver Wendell Holmes, wrote that "every calling is great when greatly pursued." Throughout his career, Judge Breyer has shown that the pursuit of justice can be a great calling, and I am confident that he will be a great Justice on the Supreme Court.

I commend President Clinton for this excellent nomination, and I look forward to these hearings.

The CHAIRMAN. Thank you very much, Senator Kennedy.

Senator Kerry.

STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you very much, Mr. Chairman. It is my privilege to join with my colleague, Senator Kennedy, and with the Senators from California in formally introducing Judge Breyer both to the committee and to the proceedings.

You and members of the committee know him personally and very well, and now with these hearings, the country will get to know him, too. I am confident that our fellow citizens will very quickly appreciate and respect the qualities which were at the center of the President's decision to nominate Stephen Breyer.

As this committee knows better than any entity in the country, the confirmation of a Justice of the Supreme Court is always important. It is serious business. It is the exercise of one of the Senate's most important responsibilities, with enormous transfer of power to one individual for a lifetime. So, as always, I know the committee will ask a broad set of tough questions, as Senator Hatch has said.

I also know that Judge Breyer will reconfirm the belief in those of you who hold it and convince those of you who do not, as well as convince the country, that he brings great legal skills and personal commitment to this task and a great potential to move and to help shape the Court itself.

He brings special qualities to this job, if I can add to those things that Senator Kennedy has talked about of his record. He has worked for all three branches of Government. He has taught. He has published, and he has handed down, as Senator Kennedy said, major opinions in multiple areas of the law.

He has shown himself to be an individual of extraordinary range. He is trilingual. He serves on a Federal judicial study committee that contemplates the relationship between law and the science. He reads Proust in the original French, and he has even studied architecture to help make judgments about Federal construction.

But mostly, Mr. Chairman, those who know him well have come to know that Judge Breyer is a person who remembers on a daily basis what it means to serve the people and to serve the Constitution, and he has worked hard to stay close to the reality of life in America. You will be pleased to know that that grounding in reality was even demonstrated in a statement about his alma mater, Harvard, when he said that life there is important but it does not

affect 99 percent of the people who get up, go to work, have to educate their children, and get their health insurance. And he defines his role on the Court to be "to make the average person's life better."

He has said that while the task ahead of him is an incredible challenge, he is deeply humbled in simply thinking about it.

I think it is that attitude which indicates the ways in which he has tried to stay close to the people that his decisions have an impact on. A small example of that is seen in the fact that because the court that he currently sits on has jurisdiction over Puerto Rico and because he felt that understanding a culture is deepened by an appreciation of language, he taught himself Spanish. In fact, he convinced all the judges of the first circuit to take Spanish lessons along with him.

Much of the substantive work that he has performed he already had dramatic impact on the lives of Americans. Ted Kennedy has already described much of that, and I will not repeat it except to say that his almost singlehanded deregulation, with respect to the committee, of the airline industry led to enormous change, reductions in fares, and the clear benefit to consumers in the country.

The committee will remember also that as chief counsel he helped to improve fair housing legislation by drafting a law to create an administrative mechanism for the enforcement of fair housing laws.

Most importantly, Mr. Chairman and members of the committee, throughout his career Judge Breyer has shown in his performance of judicial duty a commitment to principle and skill in resolving moral paradoxes. He opposed the removal from tenure of a professor who stated that the Holocaust was a hoax because he believed that it is more valuable to preserve the principle of tenure than to punish one disturbed individual.

When dealing with the tremendous conflicts inherent in revising the Federal sentencing guidelines, he chose what was deemed to be a brilliant, innovative, and fair route, arguing that in the absence of any one clear moral path, one should at least codify and clarify the status quo.

He summed up his view of the law once by saying, "There is a whole mass of legal material that is supposed to fit together. What it is supposed to do is allow all people"—and this he emphasizes, "all people"—"even though they have some many different views, to live and work productively together."

I believe the committee knows already but will see confirmed in the next days ahead that Steve Breyer is a person of character, which is, after all, a central issue in any nomination. From his youth as an Eagle Scout, to digging ditches for Pacific Gas & Electric in high school, to working as a janitor for San Francisco's school system, he has shared in the American experience and he has been affected by it.

Mr. Chairman, Steve Breyer comes to you a nominee with great judicial and personal skills. He has an open, inquiring mind. He can and will think in nonlinear, creative ways, but he is also principled and committed and passionate. He has learned how to serve as mediator and consensus builder, but he also knows how to press the case as an artful advocate.

It is interesting to note that the first circuit has been admired for its amazing scarcity of dissents, due in no small part to Judge Breyer's ability to encourage people to empathize with each other and to teach people with disparate views to find new ways to agree. I am confident that it is this ability that has gained him the backing of liberals and conservatives alike, not because he is a centrist or a moderate, which may prove to be inaccurate, but because he has an enormous intellectual honesty and because he is fair.

Colleagues, litigants, students, and clerks uniformly agree that Judge Breyer never wraps his ego into an issue, he never elevates politics over principle, and he has earned his reputation as a skilled jurist by being openminded and sensitive to detail. So I am confident, Mr. Chairman, that the committee will overwhelmingly agree, and I could not more strongly recommend Judge Stephen Breyer for your confirmation.

The CHAIRMAN. Thank you very much.

Now we will hear from a distinguished member of this committee, 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 and members of the committee. As one of the newer members on this committee, it, indeed, has been a great, I think, and unique experience to sit on my first confirmation to be an Associate Justice of the Supreme Court, Ruth Bader Ginsburg, and now to go through these hearings for Judge Stephen Breyer.

The CHAIRMAN. We credit you with the new-found stability on these issues.

Senator FEINSTEIN. Thank you, sir. And I must say I think both Senators from Massachusetts have well and articulately spelled out the kind of scholarship, the legal history, the common sense, the maturity, and the judgment that Stephen Breyer can bring to the U.S. Supreme Court.

For me, being a nonlawyer on this committee, the test is a little different. For me, the test is how an individual jurist can really apply what is happening on the streets of America to the Constitution of the United States and make that document work for the well-being of all of the people, not just this group or that group, because America is, indeed, a very troubled land.

I am very proud to say that Stephen Breyer hails from the great State of California. More specifically, I am proud to say that he hails from my home city, attended school at Lowell High School at about the same time as my husband. I am also proud to say that his father, Irving Breyer, was general counsel for the San Francisco Unified School District. And as mayor of San Francisco, I came to count on his good sense and judgment in many serious problems affecting the Unified School District of San Francisco.

Judge Breyer brings to the east coast really, in a sense, the best of the west coast: the best of public and private education from Lowell High School to Stanford University; the best of the streets, as Senator Kerry mentioned, whether as a ditch digger for Pacific Gas & Electric or as a waiter for the San Francisco Parks and

Recreation Department; or as a member of the Armed Forces stationed at Fort Ord, CA.

His community service is known to all of us. His legal service is also known as well. I have tried to read all of the many articles that I have seen in print about Stephen Breyer, and what I see is a man deeply dedicated to the pursuit of the law, a man prepared to struggle to do what is right by the Constitution, but a man that also understands what is important to the people and streets of this Nation.

I believe that something that he said when he was introduced by the President deserves repeating here,

> The Constitution and the law must be more than mere words, they must work as a practical reality. And I will certainly try to make the law work for people, because that is its defining purpose in a government of the people.

In a sense, I believe that says all there is to say, well and with heartfelt sense, about Stephen Breyer. So it is with a great deal of personal pride and pleasure, as a Senator and a Californian, that I am able to join with my respected colleagues in presenting to you the very distinguished nomination of Stephen Breyer to become Associate Justice to the U.S. Supreme Court.

The CHAIRMAN. Thank you very much, Senator Feinstein.

Now, last but not least, a Senator who has for some time taken a keen interest in the activities of this committee, whether or not she was on the House side or as a Senator on this side of the aisle, on this side of the Capitol, I should say, welcome, Senator Boxer.

STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman and Senator Hatch.

This is such an honor for us, and today, Massachusetts and California share the honor of introducing a very, very famous American, and I would say we are very proud, and I think all America will be proud, as these hearings proceed on you, Judge Breyer.

Certainly, you know that we are delighted to say that in those early formative years, Stephen Breyer was born and raised in San Francisco, his family put a high value on education, public service, and the important combination of the two.

I do not know whether you know, Mr. Chairman, that Judge Breyer's grandfather Samuel served with distinction on the San Francisco Board of Supervisors, where my colleague Dianne Feinstein served, and I served across the Golden Gate Bridge on the Board of Supervisors of Marin.

His mother Ann was active in the League of Women Voters and in local Democratic politics. And for more than 40 years, as you heard, his father Irving Breyer was legal counsel to the San Francisco Board of Education.

So, from the very beginning, Stephen Breyer seemed destined to carry on his family's tradition of scholarship and public service. His senior class at San Francisco's Lowell High School named him most likely to succeed. They were right. And his aunt Shirley Black explained, "He started speaking in sentences, we knew he would be something great," spoken by an aunt. But she was right, too.

Stephen Breyer comes to us today with a remarkable diversity of experiences and skills. I will not go into all of those. They have been so carefully explained by my colleagues. But perhaps what you do not know is that Stephen Breyer is not only a husband and father of three, he is a gourmet cook, he is a bird watcher and avid reader, a student of philosophy and a speed typist. I really respect that, because my mother taught me, when I was a kid growing up in the fifties, you had to learn to type, and I only thought that they said that to girls. He rides his bicycle to work and, as we know, he has taught himself Spanish. This is a well-rounded individual.

I think it is important to listen to what those who know Stephen Breyer best have said about him. Stu Pollack, a municipal judge in San Francisco, said, "Ours was the age of Kennedy. Government was there as a tool to bring about change. I don't think Steve ever had his faith in public institutions shaken." He further explained, "Steve's father spent his professional career as an attorney for the board of education. I think Steve absorbed the ethic that things of value lay in work that had some sort of public impact."

Richard Cudahy, a judge on the Seventh Circuit Court of Appeals, said, "Everyone knows he's an intelligent guy, but he also understands the human side of the law and, most important, he has got a great sense of humor."

Judge Bruce Selya, an appeals court colleague, said, "The most unusual thing about him is that he makes everyone feel at ease, despite his absolutely stunning intellect."

The San Francisco Chronicle praises this nomination, and they do not praise a lot of things. [Laughter.]

Once again, I want to say congratulations to Judge Breyer on his nomination, and to thank the Chair and the ranking Senator on the committee for allowing us to share this honor of introducing him to you this morning.

The CHAIRMAN. Thank you, Senator.

I would like the record to show that when the phrase "great sense of humor" and the phrase "well-rounded" were used, that all of his children laughed hysterically, which shows that they are a typical American family. [Laughter.]

I think the people we really should hear from, to know about Stephen Breyer, is not his wife, not his brother—by the way, sir, you could be his publicist. I watched you on television. You are incredible. If you ever decide to leave the practice of law, there is a future for you, if you could ever say the things about others you say about your brother. I will tell you what, this guy is good, Judge. You should keep him around and keep him close.

But the people we really should hear from are your children. So we are going to do something very unusual and swear in your children now and find out what the real story is here. [Laughter.]

Judge speaking of swearing in, this is the moment. As you well know, I would like you to stand to be sworn.

Judge do you swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BREYER. Yes, I do.

TESTIMONY OF HON. STEPHEN G. BREYER, OF MASSACHUSETTS, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The CHAIRMAN. With that, I would like to invite my colleagues who are members of the committee to come and take their seats, and I thank our colleagues from Massachusetts and California who are not members of the committee.

Judge while our colleagues are assuming their seats, would you be kind enough to introduce your remarkable family, and they are remarkable, to us and to the Nation.

Judge BREYER. I would like to introduce, Senator, my wife Joanna, who, as Senator Kennedy said, worked at the Dana Farmer Cancer Institute in Cambridge City Hospital.

The CHAIRMAN. Joanna, welcome.

Judge BREYER. Now, Michael, next to her, is a first-year student at Stanford, and he is going to lead a trek into the mountains of Wyoming this summer.

The CHAIRMAN. Well, he needs Simpson with him, then, and we can work something out. You do not want to wander into Wyoming without Simpson's permission, I just want you to know that.

Senator HATCH. I am not sure you want to wander in with Simpson. [Laughter.]

Judge BREYER. Nell is a recent graduate of Yale, and she is going back up to New Haven this summer. She is teaching dance to children up there in a special program.

The CHAIRMAN. Welcome.

Judge BREYER. Chloe, as you heard, has graduated from Harvard and she is down here with two young women, and the three of them are putting out a new magazine called Who Cares for public service. Now, she will give you many copies, if you want, and order blanks, probably.

The CHAIRMAN. Well, we have a tradition here of holding up documents to make people famous, so we will be delighted to hold up a copy of Who Cares before this is over.

Your brother, let us get to your brother. I mean, this guy has done you a big deal.

Judge BREYER. My brother-in-law, who is a lawyer, and, as you say, I guess he is extremely good on television. And my sister-in-law, who has run a program called City Arts, which puts on public lectures and performances in San Francisco.

The CHAIRMAN. I welcome you all.

Now the part that makes me the ogre with the women and men of the press, who do not like me doing this. I would ask the photographers to please clear the well, so that we can have the nominee make his statement and answer questions without the feeling that we are all looking at him through the lens of a camera.

Judge while we are clearing, a little bit of business here. After your statement, time permitting, and I think it will, we will ask three rounds of questioning. Three Senators will have before we break for lunch. And for the press, who are making their decisions in terms of timing, I expect we would break around 1 o'clock, and that we will resume after the cloture vote on the floor of the Senate at 2:45 p.m., with questions to resume at that period. So, roughly from 1 p.m. to 2:45 p.m., we will stand in recess.

Judge again, welcome. The floor is yours.

Judge BREYER. Thank you.

At the outset, Mr. Chairman, I would like to thank this committee really for the serious attention that you all have paid to my nomination. I appreciate the members taking the time out of enormously busy schedules to meet with me personally. And I recognize that you and your staffs have really prepared thoroughly for these hearings, and you have read the books and articles and the opinions and these things I have written. It seems to me that is some kind of new form of cruel and unusual punishment, quite a few.

Now, there are many, many other people I would like to thank today. I am obviously very much deeply grateful to Senator Kennedy, who has given me so much over the years. I have learned and continue to learn lessons of great value from him.

I really want to thank very much Senator Kerry and Senator Boxer for having come and taken the time to come here, along with Senator Feinstein, for supporting my nomination.

I am especially grateful to President Clinton for nominating me to a position that I said, and I do find humbling to think about. If I am confirmed, I will try to become a Justice whose work will justify the confidence that he and you have placed in me.

Now, I would like to begin by telling you a little bit about myself—although you have heard quite a lot—maybe, though, a few of the experience that I think have had an important effect on my life, how I think, and what I am.

I was born, as you heard, and I grew up in San Francisco. I attended public schools, Grant Grammar School and Lowell High School. My mother was from St. Paul, MN. Her parents were immigrants from East Prussia, which is now part of Poland.

My mother was a very intelligent, very practical, public-spirited kind of person, and she, like many mothers, had an enormous influence on me. She was the one who made absolutely clear to me, in no uncertain terms, that whatever intellectual ability I might have means nothing and will not mean anything, unless I can work with other people and use whatever talents I have to help them.

So, I joined the Boy Scouts, I did work as a delivery boy, I did dig ditches for the Pacific Gas & Electric Co., and I mixed salads up in the city's summer camp. It was nice, Camp Mather, because at that time you had policemen and firemen and lawyers and doctors and businessmen and their families, and they were all there together at the city camp for 2 weeks in the summer. It was great.

My mother really did not want me to spend too much time with my books. And she was right. I mean my ideas about people do not come from libraries.

My father was born in San Francisco. He worked as a lawyer and as an administrator in the San Francisco Public School System for 40 years. I have his watch, as you said, Senator. He was a very kind, very astute and very considerate man. He and San Francisco helped me develop something I would call a trust in, almost a love for the possibilities of a democracy.

My father always took me. As a child, he would take me with him into the voting booth. I would pull down the lever, and he would always say, "We're exercising our prerogative." He would take me to candidates' nights. Our school used to go up to Sac-

ramento to see the legislature in session. It was Youth in Government Day. There was Boys' State. All this led me to believe, not just that government can help people, but that government is the people. It is created through their active participation. And that is really why, despite the increased cynicism about basic government—and we have really seen vast improvement in the fairness of government—I still believe that, with trust and cooperation and participation, people can work through their government to improve their lives.

In 1957, as you said, I served in the Army for a little while. I studied in England, I returned to Harvard Law School, and then I clerked for Justice Arthur Goldberg, who became a wonderful lifelong friend. After 2 years in the Antitrust Division of the Justice Department, I went back to Harvard to teach and to Massachusetts to live. And for the last 27 years, I have been privileged to live in Cambridge and work in Boston.

I loved teaching. I loved my students. But if I were to pick out one feature of the academic side of my life that really influenced me especially, I think it would be this: The opportunity to study law as a whole helped me understand that everything in the law is related to every other thing, and always, as Holmes pointed out, that whole law reflects not so much logic, as history and experience.

Academic lawyers, practicing lawyers, government lawyers, and judges, in my opinion, have a special responsibility to try to understand how different parts of that seamless web of the law interact with each other, and how legal decisions will actually work in practice to affect people and to help them.

Working here on this committee in the 1970's, I learned a great deal about Congress, about government and about political life. There were disagreements to resolve, but everyone shared the same ground rules—basic assumptions about democracy, freedom, fairness, and the need to help others. These vast areas of widely shared beliefs are what has shaped the law of America and the lives of all Americans.

Since 1980, I have been a judge on the U.S. Court of Appeals for the First Circuit, and that is Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. Because of my colleagues and the work itself, this job is a great honor, a great privilege, and it has been a great pleasure to have.

I have tried to minimize what I think of as the less desirable aspects of the job, one that Justice Goldberg really felt strongly about—that judges can become isolated from the people whose lives their decisions affect. I have continued to teach and to participate in the community and in other activities, which are important in connecting me to the world outside the courtroom. I have been helped in this task by my wife and her work at Dana Farber and at Cambridge Hospital, which shows me and others some of the sadness in this world, as well as its hopes and its joys.

I believe that the law must work for people. The vast array of Constitution, statutes, rules, regulations, practices and procedures, that huge vast web, has a single basic purpose. That purpose is to help the many different individuals who make up America—from so many different backgrounds and circumstances, with so many

different needs and hopes—its purpose is to help them live together productively, harmoniously, and in freedom.

Keeping that ultimate purpose in mind helps guide a judge through the labyrinth of rules and regulations that the law too often becomes, to reach what is there at bottom, the very human goals that underlie Constitution and the statutes that Congress writes.

I believe, too, in the importance of listening to other points of view. As a teacher, I discovered I could learn as much from students as from books. On the staff of this committee, it was easy to see how much Senators and staff alike learn from each other, from constituents, and from hearings. I think the system works that way. It works better than any other system. And our task is to keep trying to improve it.

My law school diploma refers to law simply as those wise restraints that make men free—women, too, all of us. I believe that, too.

I felt the particular importance of all this when 2 years ago, I had the good fortune to attend a meeting of 500 judges in the new Russia. Those judges wanted to know what words might they write in a constitution, what words would guarantee democracy and freedom. That is what they were asking over a 2-day meeting. They asked me. I mean they were interesting discussions, very interesting.

My own reply was that words alone are not sufficient, that the words of our Constitution work because of the traditions of our people, because the vast majority of Americans believe in democracy. They try to be tolerant and fair to others, and to respect the liberty of each other, even those who are unpopular, because their protection is our protection, too.

You are now considering my appointment to the Supreme Court of the United States. That Court works within a grand tradition that has made meaningful, in practice, the guarantees of fairness and of freedom that the Constitution provides. Justice Blackmun has certainly served that tradition well. Indeed, so have all of those who have served in the recent past, Justice White, Justice Brennan and Justice Marshall. They leave an inspiring legacy that I have correctly called humbling to consider.

I promise you, and I promise the American people, that if I am confirmed to be a member of the Supreme Court, I will try to be worthy of that great tradition. I will work hard. I will listen. I will try to interpret the law carefully, in accordance with its basic purposes.

Above all, I will remember that the decisions I help to make will have an effect upon the lives of many, many Americans, and that fact means that I must do my absolute utmost to see that those decisions reflect both the letter and the spirit of a law that is meant to help them.

Thank you, Mr. Chairman.

I might add one thing, if I might, on a slightly different subject. I want to add this, if I may, and that is recently I know—and this is important to me—that in recent weeks there have been questions raised about the ethical standard that I applied in sitting on

certain environmental cases in the first circuit at a time when I had an investment, an insurance investment in Lloyd's.

I recognize that this question has been raised by people of good faith, and there is nothing more important to me than my integrity and my reputation for impartiality. It is obviously a most important thing to preserve public confidence and integrity in the judicial branch of government.

I have reviewed those cases again and the judicial recusal statute, and I personally am confident that my sitting in those cases did not present any conflict of interest. Of course, my investment was disclosed to the public. There has been absolutely no suggestion that Lloyd's was involved as a named party in any of the cases on which I saw. I know of no such involvement.

The judicial recusal statute does recusal, as well, if you have one case that has some kind of direct and predictable financial impact on some investment, that is to say if it is not a speculative or remote or contingent impact. The cases on which I sat did not violate this standard, either. That issue has been carefully looked into by independent ethics experts who share my view.

Mr. Chairman, as I said, I recognize the importance of avoiding conflicts of interest or even the appearance of such conflicts, and that standard is essential for all judges, and especially essential for judges of the Nation's highest court.

So I certainly promise I will do all I can to meet it, including what I shall immediately do, is ask the people who handle my investments to divest any holdings in insurance companies as soon as possible, and with respect to Lloyd's itself, I resigned in 1988. Though, because of one syndicate that remains open, I have been advised that I can leave altogether by the end of 1995, but I intend to ask the people involved to expedite my complete termination of any Lloyd's relationship. I will be out of that as soon as I possibly can be.

Finally, as I go forward, I certainly will keep in mind the discussion that has arisen over the last few days, and I will take it into account in reviewing any possible conflict whatsoever.

[The initial questionnaire of Judge Breyer follows:]

SENATE JUDICIARY COMMITTEE

INITIAL QUESTIONNAIRE (SUPREME COURT)

I. BIOGRAPHICAL INFORMATION

1. Full name (include any former names used.)

   Stephen Gerald Breyer

2. Addresses: List current place of residence and office address.

   Residence: 12 Dunstable Road
   Cambridge, MA 02138

   Office: U.S. Court of Appeals for the First Circuit
   1617 McCormack Post Office & Courthouse
   Boston, MA 02109

3. Date and place of birth.

   August 15, 1938; San Francisco, CA

4. What is your marital status? List spouse's name (including maiden name of wife), occupation, employer's name and business address(es).

   Married.

   Joanna Freda Hare Breyer (maiden name is Hare)

   clinical psychologist
   Dana Farber Cancer Institute
   44 Binney Street
   Boston, MA 02115

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Stanford University
   dates attended: September 1955 - June 1959
   degree received: A.B. Philosophy, Highest Honors
   degree date: June 1959

85-742 - 95 - 2

Oxford University, Magdalen College (as a Marshall Scholar)
dates attended: September 1959 - June 1961
degree received: B.A., First Class Honors, Philosophy, Politics & Economics
degree date: June 1961

Harvard Law School
dates attended: September 1961 - June 1964
degree received: LL.B. magna cum laude
degree date: June 1964

6. Employment record: List (by year) all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, with which you are or have been connected as an officer, director, partner, proprietor, or employee.

1955	San Francisco Recreation Department San Francisco, CA summer job as waiter
1958	Pacific Gas & Electric Co. San Francisco, CA summer job as ditch digger
1962	Heller, Ehrman, White & McAuliffe San Francisco, CA law firm summer associate
1963	Cleary, Gottlieb, Steen & Hamilton Paris, France law firm summer associate
1964-1965	U.S. Supreme Court Washington, DC law clerk to Justice Arthur J. Goldberg
1965-1967	U.S. Department of Justice Washington, DC Special Assistant to Assistant Attorney General for Antitrust (Donald F. Turner)
1967-1970	Harvard Law School Cambridge, MA Assistant Professor of Law
1970-1980	Harvard Law School Cambridge, MA Professor of Law

1973	U.S. Department of Justice Washington, DC Assistant Special Prosecutor Watergate Special Prosecution Force
1974-1975	U.S. Senate Judiciary Committee Washington, DC Special Counsel, Administrative Practices Subcommittee
1975	College of Law Sydney, Australia Visiting Lecturer on antitrust law
1975-1979	U.S. Senate Judiciary Committee Washington, DC Occasional consultant
1977-1980	John F. Kennedy School of Government Harvard University Cambridge, MA Professor
Summer 1978 Summer 1993	Salzburg Seminar Salzburg, Austria Lecturer on economics and law
1979-1980	U.S. Senate Judiciary Committee Washington, DC Chief Counsel
1980-present	U.S. Court of Appeals for the First Circuit Boston, MA Circuit Judge, then Chief Judge (since 1990)
	Harvard Law School Cambridge, MA Lecturer in Law
1985-1989	U.S. Sentencing Commission Washington, DC Commissioner
January 1993	University of Rome Rome, Italy Visiting Professor

7. Military Service and Draft Status: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received. Please list, by

approximate date, Selective Service classifications you have held, and state briefly the reasons for any classification other than I-A.

I was in the Army (Strategic Intelligence) as part of a six-month active duty, eight year reserve program. I served on active duty from June to December, 1957. My serial number was FR 19585532 and I was honorably discharged, after fulfilling my eight year reserve commitment, in 1965, with the rank of corporal. I served active duty at Ft. Ord, California and Ft. Holabird, Maryland. I served active reserve duty in a strategic intelligence reserve unit at Stanford, California.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.

Eagle Scout

General Motors Scholar at Stanford

Graduated from Stanford with great distinction (highest honors)

Marshall Scholarship

Graduated from Oxford with First Class Honors (PPE)

Graduated from Harvard Law School, magna cum laude

Articles Editor, Harvard Law Review

Honorary Degree, University of Rochester, Graduate School of Management (1983)

ABA Annual Award for Scholarship in Administrative Law (1987)

Honorary Lectures:

The Holmes Lectures, Harvard University, April 28, 1992 (revised and reprinted as Breaking the Vicious Circle: Toward Effective Risk Regulation (Harvard University Press, 1993).

The Weise Lecture (a version of the Holmes Lectures), Brigham and Women's Hospital, September 29, 1992.

The Roth Lecture, October 31, 1991, 65 Southern California Law Review 845 (1992).

The Donahue Lecture, April 12, 1990, 24 Suffolk Law Review 29 (1990).

The Kaplan Memorial Lecture, April 13, 1988, 17 Hofstra Law Review 1 (1988).

The Handler Lecture, November 15, 1986, 75 California Law Review 1005 (1987).

The Shell Lecture, February 16, 1984, 59 Tulane Law Review 4 (1984).

The Ryan Lecture, Georgetown University Law Center, October 13, 1983, 72 Georgetown Law Journal 785 (1984).

Commencement Address, Boston College Law School, May 29, 1983.

The Hagood Lecture, University of South Carolina, March 11, 1982, 34 South Carolina Law Review 629 (1983).

9. Bar Associations: List all bar associations, legal or judicial-related committees 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. Also, if any such association, committee or conference of which you were or are a member issued any reports, memoranda or policy statements prepared or produced with your participation, please furnish the committee with one copy of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee or conference which produced a report, memorandum or policy statement even where you did not contribute to it.

present memberships

Massachusetts Bar Association

Boston Bar Association

American Bar Association
Administrative Law Section, Judicial Representative
Judicial Administration Division

American Law Institute

American Bar Foundation

National Lawyers Club
(affiliated with Federal Bar Association)

Honorary Member

Administrative Conference of the United States
Judicial Delegate

Federal Judges Association

Carnegie Commission, Task Force on Science and Technology in Judicial and Regulatory Decision Making
(Report included in Appendix I)

Judicial Conference of the United States

First Circuit Judicial Council
Chairman (since 1990)

past memberships

U.S. Sentencing Commission
(Sentencing Guidelines included in Appendix I)

Federal Judges Merit Selection Panel
Massachusetts District Court

American Bar Association Standing Committee on Continuing Legal Education

American Bar Association Committee on Government Standards
Judicial Representative
(Report included in Appendix I)

Except as otherwise noted, I cannot recall, nor do my files reveal, any reports, memoranda, or policy statements prepared with my participation, but should I find any, I will provide them. The materials produced by these organizations are voluminous, and it would be very difficult to collect and compile them. Please let me know if there is additional detail on any particular matter.

10. Other Memberships: Please list all private and governmental organizations (including clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications) to which you belong or to which you have belonged since graduation from law school, or in which you have participated since graduation from law school, giving dates of membership or participation and indicating any office you held. Please describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more

detailed information may be obtained. Please indicate which of these organizations, if any, are active in lobbying before public bodies.

If any of these organizations of which you were or are a member or in which you participated issued any reports, memoranda or policy statements prepared or produced with your participation, please furnish the committee with one copy of the materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee or conference 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 and address of the organization that issued the report, memoranda or policy statement, the date of the document, and a summary of its subject matter.

present memberships

Dana Farber Cancer Institute (Trustee)
44 Binney Street
Boston, MA 02115
President: Christopher T. Walsh
research and treatment of cancer

American Academy of Arts & Science (Member)
136 Irving Street
Cambridge, MA 02138
President: Jaroslav Jan Pelikan
honorary society

Council on Foreign Relations (Member)
58 East 68th Street
New York, NY 10021
President: Leslie Gelb
organization relating to international affairs

Harvard Club (Member)
374 Commonwealth Avenue
Boston, MA 02215
President: Franklin Mead
social club

Cambridge Tennis Club (Member)
40 Willard Street
Cambridge, MA 02138
President: Susan Mead
social and athletic club

Nisi Prius Club (Member)

(no facilities)
Boston, MA
Clerk: Daniel O. Mahoney
lunch and discussion club

Lawyers' Club (Member)
(no facilities or regular meeting place)
Boston, MA
Contact: Philip Burling
informal dinner and discussion group

Saturday Club (Member)
(no facilities)
Boston, MA
Clerk: Thomas B. Adams
lunch and discussion club

Curtis Club (Member)
(no facilities)
meets at the Union Club
Boston, MA
Secretary: Robert J. Muldoon, Jr.
dinner and discussion club

<u>past memberships</u>:

Visiting Committee of the University of Chicago Law School

Dia Art Foundation Board of Trustees
(charitable private foundation supporting, among other things, contemporary art projects)

National Academy of Sciences, Committee to Study Saccharin and Food Safety
Report: Saccharin: Technical Assessment of Risks and Benefits (1978)

Board of Stearns' Village Cooperative Nursery School

Harvard-Ford Foundation Steering Committee, Inquiry into Public Policy Concerning Children in America.

Except as noted, I cannot recall, nor do my files reveal, any reports, memoranda, or policy statements prepared with my participation. Should I find any, I will provide them. I do not have a copy of the one report indicated, but will try to obtain one.

None of these groups is "active in lobbying before public bodies."

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

District of Columbia Bar (1966)

California Bar (1966)

Massachusetts Bar (1971)

Supreme Court Bar (1977)

I am not aware of any lapsed membership.

12. Writings and Speeches:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editors, editorial pieces, or other published material you have written or edited. Please supply one copy of all published material to the committee.

(i) books

Breaking the Vicious Circle: Toward Effective Risk Regulation (Harvard University Press, 1993) (Note that copies of both the first and second printings have been provided.)

Regulation and Its Reform (Harvard University Press, 1982).

Administrative Law and Regulatory Policy (with Richard Stewart) (Little, Brown, 1st ed. 1979, 2d ed. 1985, 3d ed. 1992). Also Teacher's Manual: Administrative Law and Regulatory Policy (with Richard Stewart) (Little, Brown, 1st ed. 1979, 2d ed. 1985, 3d ed. 1992).

The Federal Power Commission and the Regulation of Energy (with Paul MacAvoy) (Brookings 1974).

(ii) articles and book chapters

"On the Uses of Legislative History in Interpreting Statutes", 65 Southern California Law Review 845

(1992).

"A Tribute to Judge Coffin", 43 Maine Law Review 3 (1991).

"Administering Justice in the First Circuit", 24 Suffolk Law Review 29 (1990).

"Agency Autonomy and the Unitary Executive", 68 Washington University Law Quarterly 495 (1990).

"Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust", Deregulation or Re-regulation? Regulatory Reform in Europe and the United States (1990). Also published in Italian translation in Regolazione E/O Privatizzazione 217 (1992) (title page included).

"Clerking for Justice Goldberg", Journal of Supreme Court History 4 (1990).

"The Federal Sentencing Guidelines: A Dialogue", 26 Criminal Law Bulletin 5 (Jan.-Feb. 1990) (with Kenneth R. Feinberg, Esq.).

"Equality Versus Discretion in Sentencing", 26 American Criminal Law Review 1820 (1989).

"Comments on Airline Deregulation and Common Market Regulation", 9 Economic Policy: A European Forum 335-338, 476-481 (1989).

"In Memoriam: Paul M. Bator", 102 Harvard Law Review 1741 (1989).

"The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest", 17 Hofstra Law Review 1 (1988), reprinted in Munro & Wasik, Sentencing, Judicial Discretion and Training (London 1992).

"The Cutting Edge of Antitrust: Lessons from Deregulation", 57 Antitrust Law Journal 771 (1988) and 57 Antitrust Law Journal 777 (1988).

"Antitrust, Deregulation and the Newly Liberated Marketplace", 75 California Law Review 1005 (1987).

"Judicial Review of Questions of Law and Policy", 38 Administrative Law Review 363 (1986). Also published in Public Regulation (1987).

"Economics and Judging: An Afterword on Cooter and Wald", 50 Law and Contemporary Problems 245 (1987).

"Foreward", Independent Counsel Symposium, 25 American Criminal Law Review 167 (1987).

"In Memoriam: Charles E. Wyzanski, Jr.", 100 Harvard Law Review 707 (1987).

"Restructuring as a Competition Issue", Antitrust Conference 1987-Restructuring and Antitrust 14 (The Conference Board 1987).

"Regulation and Deregulation" (with Paul MacAvoy), in The New Palgrave: A Dictionary of Economic Theory and Doctrine (1987) (advanced stage galleys included in appendix).

"The Reform Package of 1986: The Mix of Politics, Law, and Economics", Antitrust Conference 1986-Antitrust: New Directions vs. New Backlash 15 (The Conference Board (1986).

"Airline Deregulation in America", 35 ITA Magazine 3 (May 1986).

"Economists and Economic Regulation", 47 University of Pittsburgh Law Review 205 (1985).

"Can Industries Survive . . . Part Regulated and Part Free?", Antitrust Conference 1985-Antitrust in Transition: Two Dialogues 5 (The Conference Board 1985).

"Reforming Regulation", 59 Tulane Law Review 4 (1984).

"The Relationship between the Federal Courts and the Puerto Rico Legal System", 53 University of Puerto Rico Law Review 307 (1984).

"The Legislative Veto after Chadha", 72 Georgetown Law Journal 785 (1984).

"The Terms of the Market Power Debate", Antitrust Forum 1984-Management Discretion and Antitrust 10 (The Conference Board 1984).

"Afterword", 92 Yale Law Journal 1614 (1983).

"Two Models of Regulatory Reform", 34 South Carolina Law Review 629 (1983).

"Economics for Lawyers and Judges", 33 Journal of Legal Education 294 (1983).

"Judicial Precedent and the New Economics", Antitrust Conference 1983-Changing Antitrust Standards 5 (The Conference Board 1983). (Also published as "Judicial Precedent and the New Economics", Antitrust Forum 1983-Antitrust Policy in Transition: The Convergence of Law and Economics 5 (The Conference Board 1983).

"Regulation and Its Reform", Self-Regulation 23 (Conference Proceedings of the Ethics Resource Center 1982).

"Two Models of Regulatory Reform", Distinguished Lecture Series on the National Economy (Center for Law & Economic Studies, Columbia University 1981).

"Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform", 92 Harvard Law Review 549 (1979).

"Taxes as a Substitute for Regulation", 10 Growth and Change 39 (1979).

"Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy", 91 Harvard Law Review 1833 (1978).

"Five Questions about Australian Antitrust Law", 51 Australian Law Journal 28 (1977).

"The Problem of the Honest Monopolist", 41 ABA Antitrust Law Journal 194 (1975).

"The Regulation of Genetic Engineering", 1 Man and Medicine 1 (1975) (with Richard Zeckhauser), reprinted in Lipkin & Rowley, Genetic Responsibility (1975).

"The Natural Gas Shortage and the Regulation of Natural Gas Producers", 86 Harvard Law Review 941 (1973) (with Paul MacAvoy), reprinted in Kalter & Vogely, Energy Supply and Government Policy (1976).

"The Federal Power Commission and the Coordination Problem in the Electrical Power Industry", 46 Southern California Law Review 661 (1973) (with Paul MacAvoy).

"Copyright: A Rejoinder", 20 U.C.L.A. Law Review (1972).

"The Ash Council's Report on the Independent Regulatory Agencies", 2 Bell Journal of Economics & Management

Science 628 (1971), reprinted in Noll, Reforming Regulation (1971).

"The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs", 84 Harvard Law Review 281 (1970) (reprinted in Bush, Technology and Copyright 1972).

(iii) newspaper writings

"The Economics of AIDS", review of Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective by Thomas J. Philipson and Richard A. Posner, The New York Times, sec. 7, p. 24, March 6, 1994.

"Yeltsin's Radical Plans to Reform Russia's Judiciary", The San Francisco Chronicle, p. A19, November 12, 1991.

"Russian Judges Want Real Justice", The New York Times, sec. A, p. 25, October 30, 1991.

"A Boston Driver to the Rescue!", The Boston Globe, Letters to the Editor, February 26, 1993.

Copies of the books listed above are supplied in a box. The other writings are included in Appendix II.

b. Please supply one copy of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

July 14, 1977
Testimony on Civil Aeronautics Board Regulation of the Airlines, Before the Budget Committee of the House of Representatives, reprinted in "Deregulation in the Airline Industry" (Research report for The First Boston Corp.) (1977)

April 16, 1986
Testimony on Intellectual Property Rights before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice and the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks

May 12, 1987

Remarks of Stephen Breyer Before the Senate Committee on the Judiciary (regarding the constitutional status of the United States Sentencing Commission)

June 11, 1987
Statement of Stephen Breyer before the House Judiciary Subcommittee on Criminal Justice, in respect to the Ex Post Facto application of the Sentencing Guidelines

July 23, 1987
Testimony of Sentencing Commission Member Stephen Breyer before The House Judiciary Subcommittee on Criminal Justice

October 22, 1987
Testimony of Sentencing Commission Member Stephen Breyer before the Senate Committee on the Judiciary

September 8, 1988
Testimony on Behalf of the Judicial Conference of the United States Before the Committee on Veterans' Affairs, United States House of Representatives

January 31, 1990
Testimony before the Federal Courts Study Committee: Concerning the Committee's "Tentative Recommendations" about Guideline Sentencing

April 19, 1990
Testimony before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice: On Statutory Interpretation and the Use of Legislative History

April 8, 1991
Testimony before the Joint Committee on the Judiciary [of the Massachusetts Legislature] on an Act to Improve the Administration of Justice in the Commonwealth

November 9, 1993
Testimony before the Senate Committee on Energy and Natural Resources on Risk Analysis in Environmental Policy Making

February 1, 1994
Testimony before the House Committee on Government Operations, the Subcommittee on Environment,

Energy and Natural Resources, and the Subcommittee on Legislation and National Security (regarding risk regulation)

Copies of testimony listed above are included in Appendix III.

c. Please supply a copy, transcript or tape recording of all speeches or talks, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions, by you which relate in whole or in part to issues of law or public policy. If you have a recording of a speech or talk and it is not identical to the transcript or copy, please supply a copy of the recording as well. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please 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 have reason to believe that the group has a copy or tape recording of the speech, please request that the group supply the committee with a copy or tape recording of the speech. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke. If there were press reports about the speech, and they are readily available to you, please supply them.

The list below includes all the speeches and talks that I can recall and that a search of my files has revealed. Should I recollect any other presentations, I will provide them. Also, many of these speeches have appeared in published form; they are noted, and the published versions of the remarks are included in Appendix II. Materials for unpublished speeches are included in Appendix IV.

(1) Comment on Bill Ross' paper and talk in connection with Washington & Lee University Conference on "Resolving Regulatory Issues Involving Science and Technology", Lexington, VA on April 9, 1981 (text included in appendix).

(2) "Two Models of Regulatory Reform", prepared for and published as a lecture in the Distinguished Lectures on the National Economy series sponsored by the Center for Law and Economic Studies of Columbia University, New York, NY on November 19, 1981.

Also given at Brookings Institute in connection with their "Colloquium on Regulation", Washington, DC on January 21, 1982 (no text available).

Also delivered at the University of South Carolina as the Hagood Lecture, Columbia, SC on March 11, 1982. Published at 34 South Carolina Law Review 629 (1983).

Also given at the Ethics Resource Center's "Conference on Self-Regulation" held in Washington, DC on November 16, 1982 and published as "Regulation and Its Reform", Self-Regulation 23 (Conference Proceedings of the Ethics Resource Center) (1982).

Also given at William Mitchell College of Law, St. Paul, MN on May 12, 1983 (no text available).

Revised version given as Lecture on Regulatory Reform delivered at the Inauguration of Paul MacAvoy as Dean of the University of Rochester, Graduate School of Management, Rochester, NY on November 11, 1983 (no text available).

Also given as Shell Lecture at Tulane Law School, New Orleans, LA on February 16, 1984. Published as "Reforming Regulation" at 59 Tulane Law Review 4 (1984).

Version also delivered as Olin Lecture at Olin Symposium, University of California, Los Angeles, CA, on November 15, 1984 (no text available).

(3) Comment on Marc Galanter's paper prepared in connection with "Dispute Resolution Conference" held at Harvard Law School, Cambridge, MA on October 14-16, 1982 (text included in appendix).

(4) "Economics for Lawyers and Judges", first prepared for the Association of American Law Schools and Emory University's conference on "Place of Economics in Legal Education" held in Denver, CO on October 28-30, 1982 (text included in appendix).

Also used as basis for talk at The Conference Board's "Antitrust Issues in Today's Economy" conference he'd in New York, NY on March 3, 1983 and published as "Judicial Precedent and the New Economics", Antitrust Forum 1983-Antitrust Policy in Transition: The Convergence of Law and Economics 5 (The Conference Board) (1983) and as "Judicial Precedent and the New Economics", Antitrust Conference 1983-Changing Antitrust Standards 5 (The Conference Board) (1983).

Published at 33 Journal of Legal Education 294 (1983).

(5) Introduction prepared for conference on "Impact of the Modern Corporation" held in Princeton, NJ on November 12-13, 1982 (text included in appendix).

(6) "Afterword" prepared for Yale Symposium Commemorating the 50th Anniversary of the New Deal held in New Haven, CT on February 11-13, 1983. Published at 92 Yale Law Journal 1614 (1983).

(7) "Comments on Airline Route Selection" prepared for CAB Sunset Seminar on Future Administration of the International Aviation Functions of the CAB held at a seminar at the National Academy of Sciences in Washington, DC on March 2, 1983 (summary of remarks included in appendix).

(8) Informal Remarks at Seminar on the Administration of Justice sponsored by Brookings Institution at Williamsburg, VA on March 13, 1983 (text included in appendix).

(9) "State Regulation and the Future", prepared for California Public Utilities Commission's symposium "State Regulation of Public Utilities: Today's Challenge, Tomorrow's Change" held at Stanford University, Palo Alto, CA on March 24-25, 1983 (text and utility's printed version included in appendix).

(10) Commencement Address given on May 29, 1983 at Boston College Law School, Boston, MA (text included in appendix).

(11) "Legislative Veto After Chadha", delivered as The Ryan Lecture on October 13, 1983, at Georgetown University Law Center, Washington, DC. Published at 72 Georgetown Law Journal 785 (1984).

(12) Discussion -- Intervention and Competitive Problems, at The Conference Board forum on antitrust held in New York, NY on November 22, 1983 (text included in appendix).

(13) "Copyright" -- Remarks made at Ft. Lauderdale Symposium on New Technologies, February 5, 1984; used again at Annenberg Seminar in Washington, DC on June 13, 1985 (text included in appendix).

(14) Speech given at University of Puerto Rico School of Law, Rio Piedras, PR on February 8, 1984. Published at 53 University Puerto Rico Law Review 307 (1984), as "The Relationship between Federal Courts and the Puerto Rico Legal System."

(15) Roundtable Discussion given at FTC Law and Economics Conference, Washington, DC in March 1984 (text included in appendix).

(16) Speech given at Toxicology Forum, Washington, DC on April 24, 1984 (outline included in appendix).

Also given at Cosmetic Industry Conference in Boston, MA on June 11, 1985 (no text available).

Also given at Food & Drug Symposium in Washington, DC on December 10, 1985 (no text available).

Published as "Relationship of Science, Law, and Policy in Risk Assessment and Management", Interrelationship of Toxicology and Law for Human Safety Evaluation 163 (April 1984) (presentation and discussion) (no text available).

(17) "Alternative Approaches to Regulatory Reform: Judicial Review", lecture given at U.S./U.K. Conference on Comparative Administration and Law in London, England on May 11-13, 1984 (text of paper prepared for lecture included in appendix).

(18) Remarks on administrative law at DC Circuit Conference, Williamsburg, VA on May 22, 1984 (excerpts included in appendix).

(19) "The Terms of the Market Power Debate", remarks made at The Conference Board, in New York, NY on December 17, 1984. Published as Antitrust Forum 10 (The Conference Board) (1984).

(20) Talk given to Crime Control Act Program meeting held by Crime Control Commission in New York, NY on January 14, 1985 (outline included in appendix).

Also given to the Comprehensive Crime Control Act Seminar, sponsored by the Law and Business Section of Harcourt, Brace & Jovanovich in San Francisco, CA on February 8, 1985 (no text available).

(21) "The Economist and the Regulator", outline of speech given at William Mitchell College of Law, St. Paul, MN on February 14, 1985. Published as "Economists and Economic Regulation", at 47 University of Pittsburgh Law Review 205 (1985).

Also used as basis for the Caplan Lecture at University of Pittsburgh Law School, Pittsburgh, PA on April 19, 1985 (no text available).

(22) "Market Regulation and Its Reform in the U.S.", speech given in Stockholm, Sweden, April 16, 1985 (text included in appendix).

(23) Remarks on sentencing at Second Circuit Judicial Conference, Hershey, PA on September 6, 1985 (text included in appendix).

(24) "Judicial Review of Questions of Law and Policy" paper and talk for Conference on Regulation, Airlie, VA on September 12-14, 1985. Published at 38 Administrative Law Review 363 (1986) and at Public Regulation: New Perspectives on Institutions and Policies 45 (1987).

(25) "Airline Deregulation in America", speech given in Paris, France at "Regulation and Deregulation in France and the United States" on January 27, 1986 (text included in appendix).

Published in 35 ITA Magazine 3 (May 1986).

(26) "The Reform Package of 1986: The Mix of Politics, Law, and Economics", panel member at a forum of the Conference Board in New York, NY on March 6, 1986. Published at Antitrust Conference 1986-Antitrust: New Directions vs. New Backlash 15 (The Conference Board 1986).

(27) Brookings Institution Program on Judicial-Congressional Relations in Washington, DC on November 13, 1986. New York Times article, November 23, 1986, commented on the program (article included in appendix).

(28) Comments based on Judge Wald's and Professor Cooter's papers given at Symposium on Economists on the Bench at Duke University, Durham, NC on April 11-12, 1986. Published as "Economics and Judging: An Afterword by Cooter and Wald", 50 Law and Contemporary Problems 245 (1987).

(29) "Antitrust, Deregulation and the Newly Liberated Marketplace", delivered as The Handler Lecture in New York, NY on November 15, 1986. Published at 75 California Law Review 1005 (1987).

Version also given at the Proceedings from the 26th Iowa State Regulatory Conference, Ames, IA on May 19-21, 1987 (text included in appendix).

(30) "Antitrust Issues in Today's Economy: Restructuring as a Competition Issue", remarks to The Conference Board, New York, NY on March 5, 1987 (edited remarks included in appendix).

Published as "Restructuring as a Competition Issue", Antitrust Conference 1987 14 (The Conference Board 1987).

(31) Talk given to Association of Criminal Defense Lawyers

in Washington, DC on May 1, 1987. (no text available) (Interview later published in Champion Magazine about the talk. See below.)

(32) Practicing Law Institute, New York, NY on January 15, 1988 talk on Sentencing Guidelines. Published at 26 Criminal Law Bulletin 5 (1990).

(33) "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest", delivered at Hofstra University as Kaplan Memorial Lecture, Hempstead, NY. Published at 17 Hofstra Law Review 1 (1988), reprinted in Munro & Wasik, Sentencing Judicial Discretion and Training (1992).

Also delivered, in an updated version, for Ottawa Society's Criminal Code Reform Conference held in Washington, DC, January 23, 1990 (draft paper included in appendix).

(34) Speech delivered to the American Bar Association's seminar sponsored by the ABA Section of Antitrust Law -- "The Cutting Edge of Antitrust: Lessons from Deregulation", Washington, DC on June 13, 1988. Published at 57 Antitrust Law Journal 771 (1989) (Luncheon Address); 57 Antitrust Law Journal 777 (1989) (Commentary and Analysis).

(35) "Regulation and Deregulation", written for Franco/American Judicial Exchange program held in Paris, France, July 6-7, 1988 (draft text included in appendix).

(36) "Equality Versus Discretion in Sentencing", presentation at the Proceedings of the Federalist Society's Second Annual Lawyers' Convention, Washington, DC on September 9-10, 1988. Published at 26 American Criminal Law Review 1820 (1989).

(37) "An Elementary Overview of Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust", paper prepared for conference in Florence, Italy, November 21-22, 1988 (text included in appendix).

Published as chapter in Deregulation or Re-regulation? Regulatory Reform in Europe and the United States (1990). Also published in Italian translation in Regolazione E/O Privatizzazione 217 (1992) (title page included).

(38) Tribute to Paul Bator delivered at memorial service at the University of Chicago, Chicago, IL on March 28, 1989. Published as "In Memoriam: Paul M. Bator", 102 Harvard Law Review 1741 (1989).

(39) "Comments on Airline Deregulation and on Common Market

Regulation", presented at DeMenil/Paris 1989 Conference, April 20-23, 1989. Published at 9 Economic Policy: A European Forum 335-338, 476-481 (1989).

(40) Remarks to Bankruptcy Judges Conference held in Boston, MA on November 2, 1989 (text included in appendix).

Flaschner Award Ceremony Keynote Address, given at American Bar Association Annual Meeting, Atlanta, GA, August 10, 1991 (based on Bankruptcy Judges Conference remarks) (text included in appendix).

Talk to Boston Bankruptcy Bar, based on Flaschner Award (August 10, 1991) and Bankruptcy Judges Remarks (November 2, 1989), Boston, MA on May 4, 1993 (no text available).

(41) "Keynote Address" at Proceedings of the Conference on Competition and Regulation -- Compatible Bedfellows?, in Washington, DC on January 18, 1990 (sponsored by the American Bar Association) (text included in appendix).

(42) Speech for a panel discussion sponsored by The Federalist Society: "Agency Autonomy and the Unitary Executive", Washington, DC on January 19, 1990 (text included in appendix).

Published at 68 Washington University Law Quarterly 495 (1990).

(43) Chief Judge Induction Remarks, Boston, MA on April 2, 1990 (text included in appendix).

(44) "Administering Justice in the First Circuit", delivered at Suffolk Law School as the Donohue Lecture, Boston, MA on April 12, 1990. Published at 24 Suffolk Law Review 29 (1990).

Talk based on Donahue Lecture, to American College of Trial Lawyers regional meeting held at New Seabury, MA on June 9, 1990 (notes included in appendix).

Talk based on Donahue Lecture, to Clerks of Courts conference held in Boston, MA on January 28, 1991 (no text available).

(45) "Deregulation of Electricity Production: Questions for Discussion", paper prepared for conference held in Paris, France ("Organizing and Regulating Electric Systems in the Nineties -- a Euro-American Conference") on May 28-29, 1990 (text included in appendix).

(46) Tribute given at Memorial Service for Justice Goldberg

at Supreme Court, Washington, DC on October 15, 1990. Published as "Clerking for Justice Goldberg", Journal of Supreme Court History 4 (1990).

(47) Remarks on "The State of the Circuit", given at First Circuit Judicial Conference, Kennebunkport, ME on October 29-30, 1990 (text included in appendix).

(48) Remarks made to Federal Practice Section of the Boston Bar Association, Boston, MA on November 29, 1990. Remarks made again to the Boston Bar Association Council Meeting, Boston, MA on January 16, 1991 (notes included in appendix).

(49) Comments on Role of Academics in Administrative Law made at ABA Administrative Law Section meeting held in Seattle, WA on February 8-10, 1991 (notes included in appendix).

(50) Debate with Justice Scalia on legislative history for American Bar Association in Washington, DC on March 11, 1991. Description of discussion with Justice Scalia published as Sherman, "The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer", 16 Administrative Law News 1 (1991) (included in appendix).

(51) Tribute to Ben Kaplan, Boston, MA on April 8, 1991 (text included in appendix).

(52) Remarks at Forum on the Bill of Rights held at John F. Kennedy School of Government, Cambridge, MA on April 29, 1991 (notes included in appendix).

(53) "New Federal Courthouse Site and Architect Selection Announcement", Boston, MA on June 10, 1991 (text included in appendix).

(54) "Economic Regulation in a Federal Context -- Some Problems for the EEC", talk prepared for Tulane Conference held in Siena, Italy, July 4-5, 1991 (text included in appendix).

Also basis for talk at Edinburgh/Mentor Group, Edinburgh, Scotland on August 23-29, 1991 (notes included in appendix).

(55) "On the Uses of Legislative History in Interpreting Statutes", presented as the Roth Lecture, University of Southern California, Los Angeles, CA on October 31, 1991. Published at 65 Southern California Law Review 845 (1992).

(56) Remarks on "The State of the First Circuit", given at Waterville Valley, NH, on September 29-October 1, 1991 (notes included in appendix).

(57) Talk to U.S. Court Reporters Association, Portland, ME on October 11, 1991 (notes included in appendix).

(58) Introductory Remarks at Colloquium about the new Boston courthouse, Boston, MA on November 16, 1991 (transcript included in appendix).

(59) Luncheon Address to Boston Bar Association, Appellate Section, regarding Court-Assisted Mediation Program and other matters, Boston, MA on January 13, 1992 (no text available).

(60) The Holmes Lectures, Harvard Law School, Cambridge, MA on April 28, 1992. Published as Breaking the Vicious Circle: Toward Effective Risk Regulation (Harvard University Press, 1993).

Delivered shortened version of The Holmes Lectures at National Academy of Science, Washington, DC on April 29, 1992 (no text available).

Weise Lecture at Brigham and Women's Hospital, Boston, MA on September 29, 1992. (Version of the Holmes Lectures; no text available).

Speech based on part of the Holmes Lectures at the Federalist Society Program, Symposium on Risk Regulation, held in Washington, DC on October 3, 1992 (text included in appendix).

Spoke to Toxicology Society Annual Meeting in New Orleans, LA on March 17, 1993. Based on Holmes Lectures (no text available).

(61) Federal Energy Bar Association, Washington, DC on May 21, 1992 (notes included in appendix).

(62) Talk on Sentencing Guidelines at the Fifth Circuit Judicial Conference, New Orleans, LA on May 15, 1992 (no text available).

Talk on Sentencing Guidelines at the DC Circuit Judicial Conference based on Fifth Circuit talk, Washington, DC on June 11-12, 1992 (outline included in appendix).

(63) Judge Campbell's Portrait Presentation Program, Boston, MA on October 9, 1992 (text included in appendix).

(64) Introduction of Judge Winter as The Holmes Lecturer, Harvard Law School, Cambridge, MA on October 13, 1992 (text included in appendix).

(65) Ford Hall Forum Program, discussing First Amendment issues, in honor of Judge David Nelson, Boston, MA on October 15, 1992 (notes included in appendix).

(66) Remarks on "The State of the Circuit", Humacao, PR on November 1992 (no text available).

(67) "Multiculturalism and Political Correctness: Anti-Semitism: Where Does It Fit In? A Roundtable Discussion", At the Anti-Defamation League National Executive Committee Meeting, Boston, MA on November 6, 1992 (ADL's printed version included in appendix).

(68) Talk on the First Amendment and the Bill of Rights at the University Club, New York, NY on December 3, 1992 (notes included in appendix).

(69) "Administrative Law -- European Survey", Lectures at Universities of Rome, Florence and Naples, Italy on January 9-24, 1993 (outline included in appendix).

(70) Introduction of Justice Souter at American Bar Association meeting held in Boston, MA on February 7, 1993 (notes included in appendi:).

(71) Statement at U.S. Judicial Conference meeting about Cost of Living Adjustments and Judges' Pay, Washington, DC on March 15-16, 1993 (text included in appendix).

(72) "Stress in the Judiciary", talk at program sponsored by American Bar Association's Administrative Law Judges Section in Washington, DC on April 2, 1993 (notes included in appendix).

(73) Salzburg Seminar participant, speaking on federalism, Salzburg, Austria on July 15-August 6, 1993 (notes included in appendix).

(74) Participant in American Bar Association "mandatory minimum" program in New York, NY on August 7, 1993 (no text available).

(75) "The Quest for Effective Risk Regulation: Lessons from the American Experience", prepared for Conference at University of Edinburgh, Scotland sponsored by Mentor Group, on August 31-September 3, 1993 (draft paper included in appendix).

(76) "The State of the Circuit" and other remarks at First Circuit Judicial Conference held at Copley Plaza in Boston, MA on September 12-14, 1993 (notes included in appendix).

(77) Keynote Speech on First Amendment issues to National Executive Committee of Anti-Defamation League, Detroit, MI on October 22, 1993 (outline included in appendix).

(78) Address to Massachusetts Historical Society in Boston, MA on October 29, 1993 (notes included in appendix).

(79) Talk to students at Pontifical Catholic University in Ponce, Puerto Rico on November 3, 1993 (no text available, but based on Anti-Defamation League speech of October 22, 1993 and on "The Relationship between Federal Courts and the Puerto Rico Legal System", 53 University of Puerto Rico Law Review 307 (1984)).

(80) Speech to Young Lawyers Section of Boston Bar Association, Boston, MA on November 18, 1993 (no text available).

(81) Brief remarks at swearing-in of Carmen Cerezo as Chief Judge, U.S. District Court of Puerto Rico, Hato Rey, PR on December 28, 1993 (notes included in appendix).

(82) Brief remarks at swearing-in of three new Massachusetts District Court Judges: Richard G. Stearns, Reginald C. Lindsay, Patti B. Saris, Boston, MA on January 5, 1994 (notes included in appendix).

(83) Statement on the Goals of High School Education - presented at hearings held by the Massachusetts Commission on the Common Core of Learning/Massachusetts Board of Education in Boston, MA on January 11, 1994 (text included in appendix).

(84) Luncheon Address to Boston Bar Association Environmental Law Section, Boston, MA on January 21, 1994 (no text available).

(85) Speech on risk to American Association for Advancement of Sciences, San Francisco, CA on February 21, 1994 (no text available).

(86) Speech on risk to Boston Harbor/Massachusetts Bay Symposium/Massachusetts Bay Marine Studies Consortium Annual Meeting held at JFK Library, Boston, MA on February 24, 1994 (no text available).

(87) Speech on risk regulation at Environmental Protection Agency by invitation of Edmund Burke Society, Washington, DC on March 29, 1994 (no text available).

(88) Talk on the future of the First Amendment at George Washington University Law School as an Enrichment Program

Speaker, Washington, DC on March 29, 1994 (notes included in appendix).

(89) Spoke at The Hotchkiss School about the First Amendment, Litchfield, CT on April 11, 1994 (no text available).

(90) Talk given at American College of Trial Lawyers Spring Meeting in Scottsdale, AZ, April 18, 1994 (videotape and transcript included in appendix).

(91) Brief remarks at swearing-in of new Massachusetts District Court Judge Nancy Gertner, Boston, MA, April 25, 1994 (transcript included in appendix).

d. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and clips or transcripts of these interviews where they are available to you.

I spoke briefly with many reporters both this year and last year regarding my potential nomination to the Supreme Court. I have not attempted to list all of those occasions.

The press materials from the interviews below are also included in Appendix IV.

"The Open Mind", shows #1446 and #1447, produced and moderated by Richard Heffner, airing on New York and Boston public television during May and June 1994 (videotape and transcript included in appendix).

"Breyer Back at Work, Praises Ginsburg Pick", Boston Globe, June 16, 1993, at METRO/REGION 1.

"Bench Conference", Massachusetts Lawyers Weekly, February 22, 1993, at 28 (interview by Barbara Rabinovitz).

"1st Circuit Reports Progress with CAMP", Massachusetts Lawyers Weekly, August 24, 1992, at 3 (interview by Barbara Rabinovitz).

"Federal Courts Eager for Action on Vacancies", Massachusetts Lawyers Weekly, October 14, 1991, at 28.

"New U.S. Appeals Judge Urges More Action by Bar", Massachusetts Lawyers Weekly, March 26, 1990, at 1 (interview by Susan Roberts Boyle). [error in title,

should be "Chief Judge"]

"Sua Sponte: Clerk-Shopping Shows Judges at Their Worst", The National Law Journal, April 4, 1988, at 13.

"Q. & A.: Stephen G Breyer: With Uniform Sentencing -- Same Crime, Same Time", The New York Times, April 19, 1987 (interview by Kenneth B. Noble).

"Proposed Federal Sentencing Guidelines: An Interview with Stephen G. Breyer", The Champion, July 1987 (interview by Alan Ellis and Scott Wallace).

13. Citations: Please provide:

(a) citations for all opinions you have written (including concurrences, dissents);

A list of all these citations is attached as Addendum A-1; the concurrences are listed separately in Addendum A-2; the dissents are listed separately in Addendum A-3. Copies of the cases are included in Appendix V.

(b) a list of cases in which appeal or certiorari has been requested or granted;

United States v. Cruz-Santiago, 12 F.3d 1 (1993), cert. denied, 1994 WL 111893 (1994).

United States v. Duque-Rodriguez, 989 F.2d 485, cert. denied, 114 S. Ct. 203 (1993).

United States v. Aversa, 984 F.2d 493 (1993) (en banc) (concurring opinion), cert. granted, decision vacated and remanded sub nom. Donovan v. United States, 114 S. Ct. 873 (1994).

United States v. Ramos-Morales, 981 F.2d 625 (1992), cert. denied, 113 S. Ct. 2384 (1993).

DeCosta v. Viacom International, 981 F.2d 602 (1992), cert. denied, 113 S. Ct. 3039 (1993).

United States v. Maldonado-Espinosa, 968 F.2d 101 (1992), cert. denied, 113 S. Ct. 1579 (1993).

United States v. Oyegbola, 961 F.2d 11, petition for cert. filed, June 25, 1992, motion to proceed in forma pauperis denied, 113 S. Ct. 47 (1992).

Stuart v. Roache, 951 F.2d 446 (1991), cert. denied,

112 S. Ct. 1948 (1992).

United States v. Dominguez, 951 F.2d 412 (1991), cert. denied, 112 S. Ct. 1960 (1992).

Howe v. Goldcorp Investments, 946 F.2d 944 (1991), cert. denied, 112 S. Ct. 1172 (1992).

Ward v. Skinner, 943 F.2d 157 (1991), cert. denied, 112 S. Ct. 1558 (1992).

Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 942 F.2d 811 (1991), cert. granted, 112 S. Ct. 1472 (1992), affirmed, 113 S. Ct. 692 (1993).

United States v. Mahecha-Onofre, 936 F.2d 623, cert. denied, 112 S. Ct. 648 (1991).

Associated Builders and Contractors of Massachusetts/Rhode Island v. Massachusetts Water Resources Authority, 935 F.2d 345 (1991) (dissenting opinion), cert. granted, 112 S. Ct. 1935, reversed, 113 S. Ct. 1190 (1993).

Sweeney v. Westvaco Co., 926 F.2d 29, cert. denied, 112 S. Ct. 274 (1991).

United States v. Wilkinson, 926 F.2d 22, cert. denied, 111 S. Ct. 2813 (1991).

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1990), cert. denied, 499 U.S. 931 (1991).

United States v. Ellis, 907 F.2d 12 (1990), cert. denied, 498 U.S. 1070 (1991).

Howitt v. U.S. Dept. of Commerce, 897 F.2d 583, cert. denied, 498 U.S. 895 (1990).

In re Allied-Signal, 891 F.2d 967 (1989), cert. denied, 495 U.S. 957 (1990).

United States v. Eaton, 890 F.2d 511 (1989), cert. denied, 495 U.S. 906 (1990).

Comite pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth., 888 F.2d 180 (1989), cert. denied, 494 U.S. 1029 (1990).

Morales-Feliciano v. Parole Board of Puerto Rico, 887 F.2d 1 (1989), cert. denied, 494 U.S. 1046 (1990).

Director, Office of Workers' Compensation Programs v. Bath Iron Works Corp., 885 F.2d 983 (1989), cert. denied, 494 U.S. 1091 (1990).

New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1989), cert. denied, 494 U.S. 1066 (1990).

Hoodkroft Convalescent Center v. State of New Hampshire, Division of Human Services, 879 F.2d 968 (1989), cert. denied, 493 U.S. 1020 (1990).

United States v. Pimienta-Redondo, 874 F.2d 9 (concurring opinion), cert. denied, 493 U.S. 890 (1989).

de Feliciano v. de Jesus, 873 F.2d 447, cert. denied, 493 U.S. 850 (1989).

In re Energy Resources Co., 871 F.2d 223 (1989), cert. granted, 493 U.S. 963 (1989), affirmed, 495 U.S. 545 (1990).

United States v. Doherty, 867 F.2d 47, cert. denied, 492 U.S. 918 (1989).

Berklee College of Music v. Berklee Chapter of the Mass. Federation of Teachers, Local 4412, 858 F.2d 31 (1988), cert. denied, 493 U.S. 810 (1989).

Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26 (1988), cert. denied, 489 U.S. 1018 (1989).

United States v. Gillies, 851 F.2d 492, cert. denied, 488 U.S. 857 (1988).

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478 (1988), cert. denied, 488 U.S. 1007 (1989).

United States v. Hastings, 847 F.2d 920 (dissenting opinion), cert. denied, 488 U.S. 925 (1988).

S.D. Warren Co. v. United Paperworkers' Int'l Union, 846 U.S. 827, cert. denied, 488 U.S. 992 (1988).

Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, cert. denied, 488 U.S. 823 (1988).

United States v. Robinson, 843 F.2d 1, cert. denied, 488 U.S. 834 (1988).

Federal Trade Commission v. Monahan, 832 F.2d 688

(1987), cert. denied, 485 U.S. 987 (1988).

Juarbe-Angueira v. Arias, 831 F.2d 11 (1987), cert. denied, 485 U.S. 960 (1988).

Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1987) (dissenting opinion), cert. denied, 486 U.S. 1044 (1988).

United States v. Lau, 828 F.2d 871 (1987), cert. denied, 486 U.S. 1005 (1988).

Massachusetts Medical Society v. Dukakis, 815 F.2d 790, cert. denied, 484 U.S. 896 (1987).

United States v. Rawwad, 807 U.S. 294 (1986), cert. denied, 482 U.S. 909 (1987).

United States v. Mazza, 792 F.2d 1210 (1986), cert. denied, 479 U.S. 1086 (1987).

United States v. Abou-Saada, 785 F.2d 1, cert. denied, 477 U.S. 908 (1986).

In re Atlantic Financial Mgmt. Securities Litigation, 784 F.2d 29 (1986), cert. denied, 481 U.S. 1072 (1987).

Massachusetts Ass'n of Afro-American Police v. Boston Police Dep't, 780 F.2d 5 (1985), cert. denied, 478 U.S. 1020 (1986).

Rose v. Town of Harwich, 778 F.2d 77 (1985), cert. denied, 476 U.S. 1159 (1986).

United States v. Guerrero-Guerrero, 776 F.2d 1071 (1985), cert. denied, 475 U.S. 1029 (1986).

Town of Belmont v. Dole, 766 F.2d 28 (1985), cert. denied, 474 U.S. 1055 (1986).

United States v. Crooks, 766 F.2d 7, cert. denied, 474 U.S, 996 (1985).

United States v. Anello, 765 F.2d 253, cert. denied, 474 U.S. 996 (1985).

Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1984), cert. denied, 471 U.S. 1029 (1985).

New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, 742 F.2d 1 (1984), cert. denied, 476 U.S. 1174 (1986).

United States v. Tapia, 738 F.2d 18, cert. denied, 469 U.S. 869 (1984).

Silva v. Showcase Cinemas Concession of Dedham, 736 F.2d 810, cert. denied, 469 U.S. 883 (1984).

Sanders v. Fair, 728 F.2d 557, cert. denied, 467 U.S. 1254 (1984).

Sundel v. Justices of the Superior Court of Rhode Island, 728 F.2d 40, cert. denied, 469 U.S. 827 (1984).

McCown v. Callahan, 726 F.2d 1, cert. denied, 469 U.S. 839 (1984).

Piper v. Supreme Court of New Hampshire, 723 F.2d 110 (1983) (en banc), affirmed, 470 U.S. 274 (1985).

United States v. Berryman, 717 F.2d 651 (1983) (dissenting opinion), reversed on rehearing en banc, 717 F.2d 650 (per curiam) (adopting dissenting opinion), cert. denied, 465 U.S. 1100 (1984).

Arruda v. Fair, 710 F.2d 886, cert. denied, 464 U.S. 999 (1983).

Wald v. Regan, 708 F.2d 794 (1983), cert. granted, 464 U.S. 990 (1983), reversed, 468 U.S. 222 (1984).

A.D.M. Corp. v. Thomson, 707 F.2d 25, cert. denied, 464 U.S. 938 (1983).

Charles D. Bonanno Linen Service v. McCarthy, 708 F.2d 1, cert. denied, 464 U.S. 936 (1983).

United States v. Bustamante, 706 F.2d 13, cert. denied, 464 U.S. 856 (1983).

United States v. Hensel, 699 F.2d 18, cert. denied, 461 U.S. 958 (1983).

Members of the Jamestown School Committee v. Schmidt, 699 F.2d 1 (concurring opinion), cert. denied, 464 U.S. 851 (1983).

Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1 (1982), cert. granted, 463 U.S. 1206 (1983), reversed, 466 U.S. 294 (1984).

Brountas v. Commissioner of Internal Revenue, 692 F.2d 152 (1982), cert. denied, 462 U.S. 1106 (1983).

Sherwin v. Secretary of Health & Human Services, 685 F.2d 1 (1982), cert. denied, 461 U.S. 958 (1983).

Keeton v. Hustler Magazine, 682 F.2d 33 (1982), cert. granted, 459 U.S. 1169 (1983), reversed, 465 U.S. 770 (1984).

N.L.R.B. v. Transportation Mgmt. Corp., 674 F.2d 130 (1982) (concurring opinion), cert. granted, 459 U.S. 1014 (1982), reversed, 462 U.S. 393 (1983).

United States v. Strahan, 674 F.2d 96, cert. denied, 456 U.S. 1010 (1982).

Jones Motor Co. v. Chauffeurs, Teamsters and Helpers Local Union No. 633, 671 F.2d 38, cert. denied, 459 U.S. 943 (1982).

Local Div. 589, Amalgamated Transit Union, v. Commonwealth of Massachusetts, 666 F.2d 618 (1981), cert. denied, 457 U.S. 1117 (1982).

N.L.R.B. v. Maine Caterers, 654 F.2d 131 (1981), cert. denied, 455 U.S. 940 (1982).

United States v. Chagra, 653 F.2d 26 (1981), cert. denied, 455 U.S. 907 (1982).

United States v. Attick, 649 F.2d 61, cert. denied, 454 U.S. 861 (1981).

(c) a list of all appellate opinions where your decision was reversed or where your judgement was affirmed;

(1) United States v. Aversa, 984 F.2d 493 (1993) (en banc) (concurring opinion), cert. granted, decision vacated and remanded sub nom. Donovan v. United States, 114 S. Ct. 873 (1994).

In this case, the en banc court held that a defendant who, with an "innocent state of mind," violates certain currency laws, cannot be convicted. I wrote a concurring opinion expressing my general agreement with this view, and pointing out that a defendant who had no knowledge of any legal duty with regard to the currency transactions at issue could not have the requisite mens rea for conviction. The Supreme Court granted certiorari and vacated the decision in light of Ratzlaf v. United States, 114 S. Ct. 655 (1994), in which the Court agreed with that view.

(2) Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 942 F.2d 811 (1991), cert. granted, 112 S. Ct. 1472 (1992), affirmed, 113 S. Ct. 692 (1993).

A retired employee of Bath Iron Works learned (after he retired) that he had a work-related hearing loss, and applied for workers' compensation. The parties disagreed as to the proper method of calculating his benefits. I wrote for the Court of Appeals that the employee's partial deafness was a "scheduled" disability (resulting in higher benefits), rather than one that became disabling only after retirement, even if he did not discover the disability until after he retired. The Supreme Court, per Justice Stevens, affirmed, accepting the view of our circuit.

(3) Associated Builders and Contractors of Massachusetts/Rhode Island v. Massachusetts Water Resources Authority, 935 F.2d 345 (1991) (dissenting opinion), cert. granted, 112 S. Ct. 1935 (1992), reversed sub nom. Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, 113 S. Ct. 1190 (1993).

The Massachusetts Water Resources Authority, a state agency, wished to enter into a prehire agreement requiring all contractors on the Boston Harbor cleanup project to abide by various union rules. In exchange, the unions would agree to labor peace for the duration of the project. The Court of Appeals held that such agreements were preempted by the National Labor Relations Act. I dissented, believing that the Act did not preempt this kind of agreement. Certiorari was granted, and in a unanimous opinion written by Justice Blackmun, the Supreme Court, agreeing with the dissent, reversed the Court of Appeals.

(4) In re Energy Resources Co., 871 F.2d 223 (1989), cert. granted, 493 U.S. 963 (1989), affirmed sub nom. United States v. Energy Resources Co., 495 U.S. 545 (1990).

The issue in this case was whether a Bankruptcy Court can require certain tax payments to be applied to the "trust fund" portion of an employer's tax liability rather than the "non-trust fund" portion, if the court believes that designation to be necessary for a successful reorganization under Chapter 11 of the Bankruptcy Code. Our Court of Appeals held that such designations were within the Bankruptcy Court's power. The Supreme Court, per Justice White, agreed with our

circuit (and rejected the contrary approach of other circuits), in an 8-1 decision. Justice Blackmun dissented without opinion.

(5) Piper v. Supreme Court of New Hampshire, 723 F.2d 110 (1983) (en banc), affirmed, 470 U.S. 274 (1985).

In this case, the district court found that New Hampshire's residency requirement for members of the New Hampshire bar violated the Privileges and Immunities Clause. The en banc court affirmed by an equally divided court. In a joint opinion, Chief Judge Campbell and I expressed our view that the rule was a reasonable means to address the state's legitimate interest in avoiding the consequences of admitting nonresidents as full-fledged members of the New Hampshire bar. The Supreme Court, however, held 8-1 that New Hampshire's reasons for its rule were not sufficient to justify the discrimination against out-of-state lawyers. Justice Rehnquist wrote a dissenting opinion.

(6) Wald v. Regan, 708 F.2d 794 (1983), cert. granted, 464 U.S. 990 (1983), reversed, 468 U.S. 222 (1984).

A Treasury Department regulation prevented persons traveling to Cuba from paying incidental travel expenses, thus making such travel nearly impossible. Our Court of Appeals held that the regulation was promulgated without statutory authority, and that it was therefore invalid. In a 5-4 decision, Justice Rehnquist wrote an opinion reversing the decision. Justice Blackmun, in a lengthy dissent, agreed with our view of the statutes at issue in the case.

(7) Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1 (1982), cert. granted, 463 U.S. 1206 (1983), reversed, 466 U.S. 294 (1984).

This case focused on Massachusetts' "two-tier" criminal trial system. The Court of Appeals (in a 2-1 decision) held that once a habeas court has found that the evidence in the defendant's "first-tier" trial was constitutionally insufficient to support conviction, the Double Jeopardy Clause barred a "second tier" retrial. The Supreme Court reversed, a majority holding that a defendant's jeopardy did not "terminate" after his "first-tier" trial. The Justices disagreed on the precise reason, but all concurred in the judgment of reversal.

(8) Keeton v. Hustler Magazine, 682 F.2d 33 (1982),

cert. granted, 459 U.S. 1169 (1983), reversed, 465 U.S. 770 (1984).

Plaintiff sued defendant for libel in New Hampshire, the only state in which the relevant statute of limitations had not run. Defendant's contacts with New Hampshire consisted of the fact that less than 1% of its magazines were sent there for circulation. The Court of Appeals held that these contacts were so small that the exercise of personal jurisdiction over defendant would violate the Due Process clause. The Supreme Court reversed, holding that because defendant sent magazines into New Hampshire for distribution, jurisdiction could be found in that state.

(9) N.L.R.B. v. Transportation Mgmt. Corp., 674 F.2d 130 (1982) (concurring opinion), cert. granted, 459 U.S. 1014 (1982), reversed, 462 U.S. 393 (1983).

In this case, the Court of Appeals issued a per curiam opinion refusing to enforce an NLRB order. The Supreme Court reversed; Justice White wrote for a unanimous Court that the Board's construction of the statute at issue was reasonable and the order should therefore be enforced.

(d) a list of and copies of all your unpublished opinions;

North Attleboro Arms Realty Trust v. Hartford Fire Ins. Co., No. 93-1685 (April 29, 1994)

U.S. v. Duque-Rodriguez, No. 91-2324 (March 31, 1993)

Narragansett Tribe v. Guilbert, No. 922-1622 (March 24, 1993)

U.S. v. McLean, No. 91-1535 (January 24, 1992)

Bergeron v. Tague, No. 90-1737 (January 10, 1991)

U.S. v. Cortese, No. 90-1570 (November 29, 1990)

Mori-Noriega v. Antonio's Restaurant, No. 90-1170 (November 1, 1990)

Mortgage Guarantee & Title Co. v. Commonwealth Mortgage Co., No. 90-1256 (September 18, 1990)

Alvira-Benitez v. Aponte-Roque, No. 87-1983 (April 23, 1990)

Menendez-Valdes v. Lopez-Soba, No. 89-1487 (April 3, 1990)

Lamphere v. Brown University, No. 89-1612 (February 20, 1990)

Howitt v. U.S. Department of Commerce, No. 89-1697 (February 6, 1990)

Monga v. Glover Landing Condominium Trust, No. 89-1716 (December 18, 1989)

Cashman v. U.S. Postal Service, No. 89-1647 (December 13, 1989)

U.S. v. Sturgeon, No. 88-1396 (August 9, 1989)

Continental Cablevision, Inc. v. Storer Communications, Inc., Nos. 88-1143, 1144 (March 21, 1989)

U.S. v. Boscio, No. 87-1103 (February 2, 1988)

U.S. v. Sawan, No. 88-1502 (December 7, 1988)

Paredes-Figueroa v. Greyhound Corp., No. 86-1309 (December 30, 1986)

Rose v. Secretary of HHS, No. 86-1010 (September 22, 1986)

English v. T-Square Resources, No. 85-1541 (April 28, 1986)

Polk v. Secretary of HHS, No. 85-1369 (March 13, 1986)

Farmer v. Dep't of Transportation, No. 85-1279 (December 10, 1985)

Barre Mobile Home Park v. Town of Petersham, No. 84-1812 (May 21, 1985)

Copies of the above opinions are included in Appendix VI.

(e) citations of all cases in which you were a panel member.

A list of these cases is attached as Addendum B.

14. Public Office: State (chronologically) any public offices you have held, including judicial offices.

Please include the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

elected office

I have never held elected office, though in 1976 I was the Cambridge "uncommitted" delegate nominee for the Democratic National Convention. (The "uncommitted" slate lost the primary election.)

appointed office, before 1980

University of Massachusetts Trustee (1974-1981)
Chairman, Presidential Search Committee

Massachusetts Public Power Commission (1973-1975)

Governor's Emergency Energy Commission (1973)

Federal Judges Merit Selection Panel, Massachusetts District Court (1977-1979)

appointed office, after 1980

I have been a federal judge since 1980. In that capacity, I have also served as a member, delegate, trustee, etc. in the following public organizations:

United States Sentencing Commission
Member 1985-1989

Judicial Conference of the United States
Member since 1990

Administrative Conference of the United States
Judicial delegate since mid-1980s

First Circuit Judicial Council
Chairman 1990-Present

I was also appointed to serve on:

President's Commission on White House Fellowships
Member, Boston Regional Selection Panel 1994-present

Kennedy Park Advisory Committee
Member 1984-1986

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. 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;

1964 - 65 Law Clerk to Justice Arthur Goldberg, United States Supreme Court.

(During the summer of 1964, Justice Goldberg lent the research services (e.g., citechecking) of my co-clerk and myself, at the request of the Chief Justice, to the Warren Commission.)

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1962 Heller, Ehrman, White & McAuliffe
San Francisco, CA
law firm summer associate

1963 Cleary, Gottleib, Steen & Hamilton
Paris, France
law firm summer associate

1965-1967 U.S. Department of Justice
Washington, DC
Special Assistant to Assistant Attorney General for Antitrust (Donald F. Turner)

1967-1970 Harvard Law School
Cambridge, MA
Assistant Professor of Law

1970-1980 Harvard Law School
Cambridge, MA
Professor of Law

1973 U.S. Department of Justice

	Washington, DC Assistant Special Prosecutor Watergate Special Prosecution Force
1974-1975	U.S. Senate Judiciary Committee Washington, DC Special Counsel Administrative Practices Subcommittee
1975	College of Law Sydney, Australia Visiting Lecturer on antitrust law
1975-1979	U.S. Senate Judiciary Committee Washington, DC Occasional Consultant
1977-1980	John F. Kennedy School of Government Harvard University Cambridge, MA Professor
Summer 1978 Summer 1993	Salzburg Seminar Salzburg, Austria Lecturer on economics and law
1979-1980	U.S. Senate Judiciary Committee Washington, DC Chief Counsel
1980-present	U.S. Court of Appeals for the First Circuit Boston, MA Circuit Judge, then Chief Judge (since 1990)
	Harvard Law School Cambridge, MA Lecturer in Law
1985-1989	U.S. Sentencing Commission Washington, DC Commissioner
January 1993	University of Rome Rome, Italy Visiting Professor

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have not had a conventional law practice, although before I became a judge, I occasionally consulted for various private law firms, most often on issues of antitrust law and regulation.

2. Describe your typical former clients and the areas, if any, in which you have specialized.

Between 1967 and 1980, I did consulting work for clients which included:

a. A steel company engaged in a merger with a smaller, failing steel company. The legal issue involved the lawfulness of the merger under the antitrust laws.

b. A chain of supermarkets seeking to engage in low price sales out of cartons directly to shoppers. The legal issue involved the lawfulness of regulations that seemed to prohibit the practice (as a matter of administrative law).

c. Tenants organizations challenging rent control regulations in Cambridge. The issue was whether the regulations effectively carried out the intent of the regulatory statute as a matter of regulatory policy and administrative law.

d. A grocery chain seeking to sell milk in Staten Island. The issue was whether administrative rulings that inhibited new entry were sound and lawful under the regulatory statute.

Most of my clients have had problems of antitrust law, administrative law, or regulatory law or policy.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

While at the Antitrust Division, I worked on briefs in federal appellate cases and argued one case in the U.S. Court of Appeals for the Sixth Circuit. After leaving the Department of Justice, in my occasional practice, I assisted in the preparation of a few briefs.

2) What percentage of these appearances was in:

(a) federal courts;

(b) state courts of record;

(c) other courts.

All briefs on which I worked were submitted to federal courts; my only argument was in federal court.

3) What percentage of your litigation was:

(a) civil;

(b) criminal.

In the Antitrust Division, my work was approximately 70% civil and 30% criminal. The two cases in which I signed the briefs were both civil cases. My work with the Watergate Special Prosecution Force involved investigation in criminal matters, the development of cases, and recommendations on whether to prosecute.

4) State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

None.

5) What percentage of these trials was:

(a) jury;

(b) non-jury.

Not applicable.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. 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 names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Identify each case you personally argued in court. Please provide a copy of all briefs on which your name appears. If copies are unavailable to you, please identify the case and court.

Note: All of these matters concern practice before I became a judge. I have answered the portion of this question relating to counsel and co-counsel to the best of my ability; however, I have not maintained detailed files on such matters.

(1) Bratcher v. Akron Area Board of Realtors, 381 F.2d 723 (6th Cir. 1967) (Edwards, Phillips, Cecil).

The Antitrust Division of the Department of Justice argued that real estate dealers violated the antitrust laws when they agreed not to show houses in white neighborhoods to African-American customers. I developed this theory, wrote the brief, and argued the case for the Department of Justice before the Court of Appeals for the Sixth Circuit. (We appeared as amicus supporting plaintiffs.) The plaintiffs prevailed. The brief is included in Appendix VII.

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(216) 535-5711

(2) Atkins v. United States, 556 F.2d 1028 (U.S. Ct. Cl. 1977) (Cowen, Davis, Skelton, Nichols, Kashiwa, Kunzig, Bennett), cert. denied, 434 U.S. 1009 (1978).

A number of federal judges contended that it was unconstitutional for one House of Congress to veto a pay raise for federal judges. They claimed that a "one-house veto" is unconstitutional. They also contended that for Congress to refuse to adjust judges' salaries with inflation over a period of many years unconstitutionally "diminished" their pay. I was the second counsel on the case, working with Arthur Goldberg, who was the lead counsel for the judges. I briefed the case in the Court of Claims (where we lost, 4-3, on the "one-house veto" issue); I briefed our position on a certified question to the Supreme Court on the issue of whether federal judges could hear this case in light of their financial interest in its outcome (which was dismissed without opinion, but the Court of Claims resolved the issue in our favor), and I briefed our petition for certiorari to the Supreme Court (which was denied). The case was significant both for the "one-house veto" issue and for the substantive question regarding diminishment of judges' pay. The briefs are included in Appendix VII.

Co-counsel: Hon. Arthur Goldberg
(deceased)

Opposing
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(3) United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)

In this case, the Justice Department argued that vertically imposed territorial restrictions should be unlawful under the antitrust laws, except for a new entrant, or, possibly, a failing company. The case was argued in the Supreme Court, which decided in our favor, but held the restrictions were unlawful in all instances. This per se rule was later overturned.

I briefed the case for the Antitrust Division, where I was

acting head of the Appellate Section. The brief, after being revised in the Solicitor General's Office, was filed in the Supreme Court by the Solicitor General.

Co-counsel: Hon. Richard A. Posner
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Opposing Counsel: Robert C. Keck
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Chicago, IL 60601
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(4) United States v. Continental Oil Co., 387 U.S. 424 (1967)

The Justice Department attacked the merger of two oil refineries in New Mexico, under Clayton Act sec. 7. The case was on direct appeal to the Supreme Court (under the Expediting Act). It involved a complex market definition question, for market share figures varied depending upon whether oil outside New Mexico, but in the New Mexico pipeline, was counted as part of the market.

I briefed the case for the Antitrust Division. It was revised by the Solicitor General and filed in the Supreme Court. The United States won the case (the decision below was vacated and remanded in light of United States v. Pabst Brewing Co., 384 U.S. 546 (1967). Its significance lies in the principles used to help define a "market" for antitrust purposes.

Co-counsel: Donald Turner
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Washington, DC 20007

Opposing Counsel: not known

(5) United States v. Penn-Olin Chemical Co., 389 U.S. 308 (1967), aff'g 246 F. Supp. 917 (D. Del.).

The Justice Department appealed from a District Court decision that held that Penn-Salt and Olin-Mathieson could form a joint venture because they were not potential competitors in the chemical business in the Southeastern

U.S. The Department claimed that the court did not use the correct criteria to determine when one firm "potentially competes" with another. It argued for an "objective," instead of a "subjective," test.

I wrote the brief for the Antitrust Division, which was filed with changes by the Solicitor General in the U.S. Supreme Court. The United States lost the case, when the decision was affirmed by an equally divided court.

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(6) & (7) United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975)(Clark, Wright, MacKinnon); United States v. Kleindienst, (unreported U.S. Dist. Ct. D.C. 1974) (Hart)

These two cases in the District Court for the District of Columbia both involved charges of perjury, the first against the former Lieutenant Governor of California, the second against the former Attorney General of the United States. Mr. Reinecke's conviction was reversed; Mr. Kleindienst was found guilty of a misdemeanor.

These cases were the eventual outcome of the work, mostly of others, for my work took place only at their initial stages. I helped organize the ITT (Dita Beard) portion of the Watergate Special Prosecutor's investigation. The work primarily involved investigation, organization of facts, development of legal cases, and a recommendation of whether the office should proceed to prosecute. The Special Prosecutor determined that the main charge in the matter -- that ITT's contribution to the Nixon Presidential campaign influenced the government's action in antitrust cases against it -- was not borne out by the evidence.

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(202) 293-6400

(8) Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199 (D. Md. 1976) (Judge Frank Kaufman), aff'd per curiam, 546 F.2d 25 (4th Cir. 1976) (Haynsworth, Winter, Butzner).

This case concerned the legality, under the antitrust laws, of a merger of two propane gas distributors. It involved an important question of market definition, which was argued in the federal district court. I helped to represent Empire and prepared sections of the brief for the case.

Co-counsel:

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Opposing Counsel:

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(9) Purity Supreme, Inc. v. Attorney General of Mass., 407 N.E.2d 297, 380 Mass. 762 (1980) (Hennessy, Quirico, Braucher, Kaplan, Liacos)

This case involved a challenge to a rule requiring disclosure of prices by supermarkets. The Attorney General's office had issued a general rule requiring that the price be marked on each item. Purity owned a special low price "warehouse type" retail food store. Customers picked items out of crates, and, while the prices were clearly marked on the crates, individual items were marked only with a UPC symbol to be scanned at the cashier. To force the store to take each item out of the crate, mark it, and put it on the shelf would have destroyed the low price advantage. Representing Purity, we challenged the rule on the ground that to apply the old rule to this new unforeseen situation required more elaborate hearings or a reconsideration of the issue. The court ruled in favor of the Attorney General.

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(10) Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (Tamm, Fahy, Bazelon), affirming 364 F. Supp. 1075 (D.D.C. 1973)

This case challenged the constitutionality of the "pocket veto" when exercised during a short congressional recess. The District Court for the District of Columbia held that a bill could not be "pocket-vetoed" during such a recess. The DC Circuit affirmed. I wrote a draft of a brief, which was revised by Senator Kennedy's staff. (Senator Kennedy proceeded pro se.)

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Opposing Counsel: Irving Jaffe
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Washington, D.C. 20007
(202) 965-7910

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation that did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any clients or organizations for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Airline Deregulation. From 1974 through 1978, I worked with Senator Kennedy and the Judiciary Committee in the effort to deregulate airlines. In this capacity, on leave from Harvard in 1974, I organized hearings investigating Civil Aeronautics Board regulation of the airline industry and wrote a detailed report of the Subcommittee's findings. The hearings and the report helped to increase public awareness of the issue. In turn, changes began within the CAB itself and, eventually, legislation which I participated in drafting was enacted by Congress to substitute competition for the previously existing regulatory system. The details of this work are contained in Chapter 16 of Breyer, Regulation and Its Reform (Harvard Press, 1982), and a copy of the report is included in Appendix I.

Trucking Deregulation. I participated in the effort to deregulate the trucking industry first as a consultant to the Judiciary Committee and later as its chief counsel. I helped to supervise and edit the Committee Report on the trucking industry, and I was involved in the drafting of new legislation and the negotiations that led to its adoption.

Other Legislation. As chief counsel of the Judiciary Committee, I supervised the drafting of legislation, helped to organize the legislative hearings, negotiations, and activities needed to enact a bill into law. Major legislative items in which I participated to a significant extent include the following:

Fair Housing. This legislation was designed to strengthen the fair housing laws by providing an administrative mechanism for their enforcement. A fair housing bill ultimately passed the Congress, although not in the exact form of the original bill.

Institutionalized Persons. The Committee developed and reported legislation that would allow the Justice Department to intervene in cases designed to protect the constitutional rights of institutionalized persons. The bill became law.

Criminal Code. This major legislative project consisted of rewriting the Criminal Code of the United States. In 1980, it was reported by both the Senate and House Judiciary Committees. It did not pass Congress, but sections, including the Sentencing Guidelines, later became law.

Stanford Daily Case. The Committee developed a bill in response to the Supreme Court's ruling in the Stanford Daily case which allowed police searches of press offices. The new law, enacted by Congress, required that information be obtained by subpoena or similar process and that searches (with warrants) be conducted only as a last resort in limited circumstances, when, for example, there was reason to believe the information would otherwise be destroyed.

Court Reform. The Committee dealt with several bills affecting the courts directly. For example, a "judicial discipline" bill was enacted into law.

Other Legislative and Regulatory Activities.

Siting legislation. In 1973, I worked as a member of the Governor's Energy Commission in Massachusetts to develop legislation that created an "energy facilities siting council." This bill became law, providing a "one-stop" procedure for obtaining permission from state agencies for the building of energy facilities.

Telephone regulations. In the late 1970s, I appeared pro bono before the Massachusetts Public Service Commission urging a change in the billing practices of

the telephone company. The company kept categories of "credit risk" and those in the higher risk categories would have their phone service terminated at very short notice upon falling only a few weeks behind in the payment of their bills. I urged that the telephone company should have to notify users of their credit categories, explain the basis of categorization, and give the users opportunities to challenge their categorization or "improve" their categories. The suggestions were adopted.

Milk Marketing. I worked as a consultant to a grocery firm, and appeared as an expert witness, before the New York Milk Marketing Board, arguing that the firm should be allowed to market milk in Staten Island. I argued that the current restrictive regulations led to higher milk prices. The application was denied.

Federal Sentencing Guidelines. I was a member of the United States Sentencing Commission from 1985 to 1989 and helped to draft the Federal Sentencing Guidelines. The Commission was created by Congress to reduce disparity in sentencing and to increase honesty in sentencing, so that the offender would actually serve the prison sentence that the judge imposed.

Law teaching activities. See answer to question 18.

I have not engaged in lobbying activities for any client or organization.

18. Teaching: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught.

A. Harvard University

I joined the faculty of Harvard Law School in 1967 as an Assistant Professor of Law. In 1970, I became a full professor, a position I held until 1980, when I became a judge. I was also a professor at the Kennedy School of Government of Harvard University during the years 1977 to 1980. From 1980 to the present, I have continued to teach at Harvard as a Lecturer in Law. I should add that many of the courses I have taught have been offered jointly by the Law School and the Kennedy School.

1. Antitrust Law

I taught a course in Antitrust Law during the following academic years: 1967-68; 1969-71; 1973-75; 1976-77; 1978-80; 1984-85; 1986-87; 1988-89. The course focused on the control of private competition under the Sherman Act, Clayton Act, Robinson-Patman Act, and Federal Trade Commission Act. It examined (1) legal and economic concepts of monopoly and monopolization; (2) modes of collaboration among business competitors; (3) "vertical restraints;" (4) horizontal, vertical, and conglomerate mergers; and (5) selected problems of price discrimination under the Robinson-Patman Act.

2. Administrative Law

I taught a course in Administrative Law during the following academic years: 1971-74; 1975-79; 1982-84; 1985-86; 1987-88; 1989-94. The course addressed (among others) the following topics: Delegation/Non-Delegation; Agency Independence; Review of Fact/Review of Law/Review of Policy; Ratemaking; Controlling Discretion; Broadcast Regulation; Following Internal Rules; Retroactivity/Estoppel; Rulemaking/Adjudication; Decision on a Record; Due Process; Agency Decision-Making Structure; Jurisdiction/Reviewability; Standing; and Timing.

3. The Regulation of Industry

I taught a course in Government and the Regulation of Industry (or substantially similar versions thereof) during the following academic years: 1976-79; 1980-82; 1983-85; 1987-94. The course addressed (among others) the following topics: The Public Interest Theory of Regulation (externalities; the control of market power, the problem of risk); Regulation as a Tool to Control Market Power; Strategic Problems in Regulation; The Regulation of Risk; Using the Contingent Valuation Method; and Issues in Environmental Regulation.

4. Other Subject Matters

In addition to the three main subject matters profiled above, I taught (1) a course in Evidence, 1968-69; (2) a course titled "Development of Law & Legal Institutions", 1968-70; (3) a course titled "Law & Public Policy: Policy Analysis", 1972-74; and (4) a course titled "Energy Policy & the Law: Electricity", 1975-76.

B. Other Teaching Positions

In 1975, I was a Visiting Lecturer at the College of Law, Sydney, Australia, teaching antitrust law. In the summers of 1978 and 1993, I taught economics and law at the Salzburg Seminar in Austria. Finally, I spent January, 1993 as a Visiting Professor at the University of Rome teaching administrative law.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List 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. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   None, but please note that I have a TIAA-CREF pension plan with Harvard that has vested, and which I would keep. Its value is disclosed in the answer to question 5.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

   If confirmed, I would seek to follow all the requirements of the Code of Conduct for United States Judges, the Ethics Reform Act of 1989, 28 U.S.C. § 455, and cases interpreting the statutory requirements.

   I currently give to the clerk of court, and to my secretary and law clerks, lists of all my investments, which they check against each case, in order to make certain that I am recused in any case in which I have a financial interest in a party to the case.

3. 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 present plans to do so, although I may, if it is consistent with my duties on the court and with the applicable ethical standards, continue to lecture, write, and teach.

4. 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, patents, honoraria, and other items exceeding $500 or more. (If

you prefer, copies of the financial disclosure report required by the Ethics in Government Act of 1978 may be substituted here.)

A copy of the Financial Disclosure Report required by the Ethics in Government Act of 1978, filed on or around May 10, 1994, for the calendar year 1993, is attached as Addendum C.

An AO-10 form for the current year is being prepared and will be supplied as soon as it is available. As of January 1, 1994, none of my children is any longer my dependent. I therefore will not include them on my 1994 disclosure report, nor will I claim any of them as a dependent on my 1994 tax return.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

Attached as Addendum D.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Please supply one copy of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a presidential transition team.

No, though in 1976 I was the Cambridge "uncommitted" delegate nominee for the Democratic National Convention. (The "uncommitted" slate lost the primary election.)

As for transition-related memoranda, in 1992, I gave a speech on the Sentencing Guidelines before the D.C. Circuit Conference (see publications listing above) and subsequently, Professor Philip Heymann, who, I believe, was working on the presidential transition, requested a copy of the speech, which I provided. I attach the cover memo to the speech as Addendum E.

III. GENERAL (PUBLIC)

1. 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 workload, 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.

A guiding principle in my professional and personal life has been a commitment to fairness. To this end, my teaching, writing, and lecturing have emphasized a commonsense approach to the law that makes justice accessible to all in our society. Since graduating from law school three decades ago, my professional life has been devoted to government service (in the Executive, Legislative, and Judicial Branches) and to teaching and education.

Throughout my career, without compensation and frequently for non-profit entities, I have participated in discussions and given lectures on a variety of public policy subjects. (See, e.g., the answer to question 12c in Section I.) I have also worked, without compensation, for and with various government entities and private foundations on particular public interest projects. For instance, I served as a member of the Harvard-Ford Foundation Steering Committee on the "Inquiry into Public Policy Concerning Children in America." As a trustee of the University of Massachusetts, I worked to ensure that educational opportunities were available to all, regardless of background. In the late 1970s, I appeared pro bono before the Massachusetts Public Service Commission to urge that the telephone company should not be permitted to cut off phone service without fairly notifying users and providing them with an opportunity to challenge their termination or to improve their credit situation.

I have also been a trustee of the Dana Farber Cancer Institute. As a member of the White House Fellows regional selection committee, I have attempted to help provide leadership in supporting success of individuals from a broad spectrum of backgrounds and providing opportunities based on merit.

I have also participated, while a judge, in numerous efforts to encourage pro bono bar activities.

2. 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, or religion. Please list all business clubs, social clubs or fraternal organizations to which you belong or have belonged since graduating from law school, and for each such club or organization, please state:

a. the dates during which you were a member and approximate number of members the club or organization had during that period;

b. the purpose of the club or organization (e.g., social, business, fraternal or mixed), the frequency with which you used the facilities, and whether you used the club or organization for business entertainment;

c. whether, while you were a member of such club or organization, it did or did not include members of all races, religions, and both sexes;

d. if the club or organization did not do so,

   (1) state whether this was the result of a policy or practice of the club or organization;

   (2) if so, describe in full the reasons for this policy or practice and any actions you took to change that policy or practice;

   (3) if you were a member of such club or organization while serving as a U.S. Circuit Judge, please give your opinion as to whether the club or organization practiced invidious discrimination within the meaning of the ABA Code of Judicial Conduct, and give the reasons for your opinion.

Harvard Club
member since 1981
number of members: approximately 6500
used for occasional meals

Cambridge Tennis Club
family membership since 1970s
number of members: approximately 300
rarely used by me

The following informal discussion groups are not "clubs" in a traditional sense of the word, and thus are not strictly called for in answer to this question, but I include them in order to give as full an answer as possible to the question.

Nisi Prius Club
member since 1981
number of members: 35
lunch and discussion

Lawyers' Club
member since 1981
number of members: 12
informal dinner and discussion

Saturday Club
member since 1985
number of members: 50
lunch and discussion

Curtis Club
member since 1993
number of members: 40
dinner and discussion

The Harvard Club has had members of all races and religions and both sexes since I have been a member. The Cambridge Tennis Club has members of all races and religions and both sexes. The Nisi Prius Club has African-American members, as well as members of various religions and both sexes. The Lawyers' Club, an informal group that meets for dinner at individuals' homes six times a year, has members of various religions and both sexes, but no African-American members. The Saturday Club has African-American members, as well as members of various religions and both sexes. When I joined in 1985, it had women members but no African-Americans. The Curtis Club has had members of all races, religions, and both sexes since I have been a member.

3. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with the White House staff or the Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications.

With regard to the Supreme Court vacancy created by Justice Blackmun's announcement of his retirement, I had one conversation with Lloyd Cutler, Special Counsel to the President, on April 15, 1994. At his request, I sent him

follow-up information about our payment of Social Security taxes for our cleaning person. On May 13, 1994, I received a telephone call from the President in which he expressed his intention to nominate me.

4. Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any 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, please explain fully. Please identify each communication you had during the six months prior to the announcement of your nomination with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the United States Supreme Court, state who was present or participated in such communication, and describe briefly what transpired.

No.

5. Please discuss your views of the judiciary in our governmental system and the following criticism of "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under our constitutional system of government, it is the task of the courts to resolve the controversies that come before them by applying the relevant law -- statutes, common law, regulations, or constitutional law -- to the facts of the specific cases they must consider. Criticism of so-called "judicial activism" raises questions of both the legitimacy and the competence of the courts in particular areas.

Historically, under our tri-partite system of constitutional government, we have assigned the initiative for proactive, affirmative, widespread reform and problem-solving to our legislatures, both federal and state, and, increasingly, to the executive branch. Nevertheless, if the legislature or the executive either acts or fails to act in a manner that results in a violation of individual rights, the courts' role must include the difficult and sensitive task of defining an appropriate judicial remedy. In deciding cases and defining remedies, courts must be always mindful of the appropriate role of the judiciary.

In addition to the question of legitimacy, the judiciary is ill-equipped to make broad reaching policy determinations. A judge seeking to solve a general social problem is less likely to have available all the relevant facts than a legislature or executive entity. Judges, moreover, do not have the resources that are available to administrators and are, therefore, less able to engage in effective management and administration.

That said, in order to be fair in this assessment, one must recognize that legislatures and executive entities have sometimes failed to address problems until constitutional violations resulted. It would be vastly preferable for all branches of government -- and for the public -- if the political branches were able to resolve such issues and render their determination through judicial adjudication unnecessary.

6. Approximately how many individuals have been employed by you as law clerks and support staff since you have been a United States Circuit Judge?

State separately the numbers, and describe briefly the duties of (1) women, (2) African-Americans, and (3) members of other racial minority groups, whom you so employed.

law clerks: 46

secretaries: 6

The law clerks include 12 women, 2 of whom are Hispanic; 2 Hispanic men; and 1 Pakistani man. As for secretaries, all 6 were women.

Of the 8 law clerks to whom I have extended circuit court clerkship offers for the next two years (and who have accepted), 3 are women (one of whom is African-American), one is an Asian-American man, and one is an Hispanic man.

1993 FEDERAL DISCLOSURE REPORT

THE HONORABLE STEPHEN G. BREYER

HOFFMAN, DYKES & FITZGERALD, P.C.

CERTIFIED PUBLIC ACCOUNTANTS

AO-19
REV. 1/94

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 1993

Report Required by the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 6, 101-111

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
BREYER, STEPHEN G.	U.S. COURT OF APPEALS 1ST CIR.	08/10/94
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full- or part-time)	**5. Report Type** (check appropriate type)	**6. Reporting Period**
CHIEF U.S.CIRCUIT JUDGE-ACTIVE	___ Nomination, Date ___/___/___ ___ Initial _X_ Annual ___ Final	01/01/93 - 12/31/93
7. Chambers or Office Address	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
U.S. COURT OF APPEALS 1617 U.S. COURT HOUSE BLDG. BOSTON, MASSACHUSETTS 02109	Reviewing Officer	Date

CLIENT COPY

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions)	
	LECTURER AT LAW	HARVARD LAW SCHOOL
	TEE	DANA FARBER CANCER INSTITUTE

II. AGREEMENTS. (Reporting individual only; see pp. 8-9 of Instructions.)

DATE	PARTIES AND TERMS
X	NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐	NONE (No reportable non-investment income)	
1993	HARVARD LAW SCHOOL - SALARY	$ 20565.64
1993	DANA FARBER CANCER INSTITUTE (SPOUSE)-SALARY	$ 0.00
1993	PSYCHOLOGY PRACTICE (SPOUSE)	$ 0.00
		$
		$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp. 12-14 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements or gifts)	
1	CONSIGLIO NAZIONALE DELLE RICERCHE	TRAVEL AND LIVING EXPENSES, JANUARY 9-24, 1993
2	SOCIETY OF TOXICOLOGY	TRAVEL AND LIVING EXPENSES, MARCH 16-17, 1993
3	COLUMBIA UNIVERSITY	TRAVEL AND LIVING EXPENSES, MARCH 27-29, 1993
4	AMERICAN BAR ASSOCIATION	TRAVEL EXPENSES, APRIL 30 - MAY 2, 1993
5	HARVARD UNIVERSITY	LIVING EXPENSES, APRIL 30 - MAY 2, 1993
6	THE BROOKINGS INSTITUTION	TRAVEL AND LIVING EXPENSES, JUNE 30, 1993

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp. 15-16 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
X	NONE (No such reportable gifts)		
1			$
2			$
3			$
4			$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of the spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp. 16-17 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities)		
1	BRITISH GOVERNMENT (S)	DEFERRED GIFT TAX LIABILITY ON GIFT	
2		TO WIFE OF MOTHER'S HOUSE	J
3			
4			
5			
6			

* VALUE CODES: J = $15,000 or less K = $15,001 - $50,000 L = $50,001 - $100,000 M = $100,001 to $250,000
N = $250,001 - $500,000 O = $500,001 - $1,000,000 P = More than $1,000,000

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical [illegible] (SP) for spouse, (DC) for [illegible]	B. Income during reporting period (1) Amt 1 Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value2 Code (J-P)	(2) Value Method3 Code (Q-V)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
1 PAINE WEBBER COMMON STOCK									
2									
3 DWG CORPORATION	A	None			SOLD	10/26	M	G	
4 WINDSOR FUND	A	None	J	T	NONE				
5 PAINE WEBBER R&D PARTNERS	A	Int	J	T	NONE				
WEST NEWTON SAVINGS BANK	A	Div			SOLD	11/24	K	A	
7 OCCIDENTAL PETROLEUM	A	Div			SOLD	10/6	K	A	
8 CHEMEX PHARMACEUTICALS	A	None			SOLD	11/24	J	A	
9 COMSTOCK PARTNERS STRATEGY FD	A	DIV			SOLD	11/24	J	A	
10 WTS CHEMEX PHARMAC. INC.	A	None			SOLD	11/24	J	A	
11 BANK OF BOSTON BOND	A	Int			SOLD	8/11	J	C	
12 GROWTH FUND OF SPAIN	A	None			SOLD	11/24	J	A	
13 MOUNTLEIGH GROUP ORD	A	None			REDEMP	12/31	J	A	WORTHLESS STOCK
14 MASSACHUSETTS GD CONS	A	Int	J	T	NONE				
15 CENTOCOR, INC	A	None			SOLD	11/24	J	A	
16 FEDERAL HOME LN MTG (PREF)	B	Div			SOLD	11/24	K	B	
17 SHARMUT MATL CP (PREFERRED)	B	Div			SOLD	11/24	J	A	
18 REST. WTS GENZYME CORP.	A	None			SOLD	12/7	J	A	

1. Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less; B=$1,001 to $2,500; C=$2,501 to $5,000; D=$5,001 to $15,000; E=$15,001 to $50,000; F=$50,001 to $100,000; G=$100,001 to $1,000,000; H=More than $1,000,000
2. Value Codes: (See Col. C1 & D3) J=$15,000 or less; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; N=$250,001 to $500,000; O=$500,001 to $1,000,000; P=More than $1,000,000
3. Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

... Page 2 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of instructions.)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J), for joint ownership or reporting individual and spouse, (S), for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt 1 Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value2 Code (J-P)	(2) Value Method3 Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
19 REST. GENENTECH WTS	A	None			SOLD	12/7	J	B	
20 WARRANTS CENTOCOR INC CL C	A	None			SOLD	12/7	J	B	
21 ALKERMES, INC. (X)	A	None			BUY	10/14	J		
22 ALKERMES, INC. (X)		None			SOLD	10/22	J	A	
23 TELE COMMUNICATIONS (X)	A	None			BUY	10/15	J		
TELE COMMUNICATIONS (X)		None			SOLD	11/24	J	A	
25 NOBLE AFFILIATES, INC. (X)	A	Div			BUY	8/19	J		
26 NOBLE AFFILIATES, INC. (X)		None			SOLD	11/24	J	A	
27 ENZON, INC. (X)	A	None			REC'D	1/1	J		
28 ENZON, INC. (X)		None			SOLD	11/24	J	A	
29 REST WARRANTS GENZYME CORP (X)	A	None	J	T	REC'D	1/1	J		
30 REST. WARRANTS GENZYME CORP (X)		None			PART	12/7	J	A	
31 CHARTER MEDICAL CORP. (X)	A	None			BUY	8/13	J		
32 CHARTER MEDICAL CORP. (X)		None			SOLD	11/24	J	A	
33 AIM CONSTELLATION (X)	A	None			BUY	2/16	J		
34 AIM CONSTELLATION (X)		None			SOLD	11/24	J	B	
35 ALC COMMUNICATIONS (X)	A	None			BUY	10/8	J		
36 ALC COMMUNICATIONS (X)		None			SOLD	11/24	J	A	

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less B=$1,001 to $2,500 C=$2,501 to $5,000 D=$5,001 to $15,000 E=$15,001 to $50,000 F=$50,001 to $100,000 G=$100,001 to $1,000,000 H=More than $1,000,000

2 Value Codes: (See Col. C1 & D3) J=$15,000 or less K=$15,001 to $50,000 L=$50,001 to $100,000 M=$100,001 to $250,000 N=$250,001 to $500,000 O=$500,001 to $1,000,000 P=More than $1,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

Page 3 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 16-26 of Instructions.)

A. Description of Assets (including trust assets) Indicate source, type, and (for rental property) real estate held for investment. (Specific instructions on reporting of interests in real estate, including multiple properties, are on page 17.) Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amount Code (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period If not exempt from disclosure (2) Date Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
INCOME (No reportable income, assets, or transactions)									
37 VTS. EXXON. INC. (X)	A	None			REC'D	1/1	J		
38 VTS. EXXON. INC. (X)		None			SOLD	11/26	J	A	
39 COLONIAL HIGH INCOME FUND (X)	A	None			REC'D	1/1	J		
40 COLONIAL HIGH INCOME FUND (X)		None			SOLD	10/22	J	A	
41 SYNERGEN, INC. (X)	A	None	J	T	REC'D	1/1	J		
42 SYNERGEN, INC. (X)		None			PART	10/22	J	A	
43 COMPRESSION LABS, INC. (X)	A	None			REC'D	1/1	J		
44 COMPRESSION LABS, INC. (X)		None			SOLD	12/7	J	B	
45 POWERSOFT CORP. (X)	A	None			BUY	1/1	J		
46 POWERSOFT CORP (X)		None			SOLD	10/12	K	E	
47									
48 OTHER COMMON STOCK									
49									
50 ZOLL MEDICAL	A	None			SOLD	10/12	K	E	
51 XYPLEX	A	None			SOLD	10/12	J	D	
52 HOLOGIC	A	None			SOLD	10/12	J	A	
53									
54 PAINE WEBBER IRA ACCOUNT									

Income/Gain Codes: (See Col. B1 & 2) E=$15,000 or less; F=$15,001 to $50,000; G=$50,001 to $100,000; H=More than $100,000

Value Codes: (See Col. C1 & 2) J=$15,000 or less; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; N=$250,001 to $500,000; O=$500,001 to $1,000,000; P=More than $1,000,000

Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash Market; U=Book Value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: BREYER, STEPHEN G.

Date of Report: 05/10/94

Page 4 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of instructions.)

A. Description of Assets (Including trust assets) Identify assets where inapplicable, owner of the asset by using the parenthetical (S) for interest of spouse, (J) for interest of joint tenant, (T) for interest of trust or other entity with beneficial interest in asset, (DC) for interest of dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt. (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value (J-P)	C. Gross value at end of reporting period (2) Value Method (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption, reorg.)	D. If not exempt from disclosure (2) Date: Month - Day	D. If not exempt from disclosure (3) Value (J-P)	D. If not exempt from disclosure (4) Gain (J-P)	D. If not exempt from disclosure (5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
55									
56 BESICORP GROUP, INC	A	NONE	J	T	NONE				
57 GNMA POOL	A	Int	J	T	NONE				
58 COUPON TREASURY REPT	A	NONE	J	T	NONE				
59 PW RETIREMENT MONEY FUND	A	DIV	J	T	NONE				
INTL BK RECONS & DEV	A	NONE	J	T	NONE				
61 COUPON INTEREST OF USTB	A	NONE	K	T	NONE				
62 CERT ACCRUAL TSY	A	NONE	J	T	NONE				
63 GLOBAL INCOME PLUS FUND	A	Div	J	T	NONE				
64 MOUNTLEIGH GROUP ORD	A	None			REDEMP	12/31			WORTHLESS SECURITIES
65 PW SHORT TERM GLOBAL FUND	A	Div	J	T	NONE				
66 COUPON INTEREST OF USTB	A	None	J	T	NONE				
67 GOVT TRUST CERTIFICATE	A	None	K	T	NONE				
69									
69									
70 IRA ACCOUNT									
71									
72 SCUDDER INCOME FUND	A	INT	J	T	NONE				

1 - Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less B=$1,001 to $2,500 C=$2,501 to $5,000 D=$5,001 to $15,000 E=$15,001 to $50,000 F=$50,001 to $100,000 G=$100,001 to $1,000,000 H=More than $1,000,000

2 - Value Codes: (See Col. C1 & D3) J=$15,000 or less K=$15,001 to $50,000 L=$50,001 to $100,000 M=$100,001 to $250,000 N=$250,001 to $500,000 O=$500,001 to $1,000,000 P=More than $1,000,000

3 - Value Method Codes: (See Col. C2) Q=Appraisal R=Book Value S=Cost(real estate only) T=Assessment U=Estimated V=Other W=Cash/Market

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

Page 5 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J), (or joint ownership or reporting individual and spouse), (S), (or separate ownership by spouse), (D), (or ownership by dependent child). Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt.1 Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value1 Code (J-P)	(2) Value Method3 Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date1 Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
73 SCUDDER CAPITAL GROWTH FUND	A	DIV	J	T	NONE				
74									
75 OTHER HOLDINGS									
76									
77 SANTA FE LAND (FRESNO, CA)									
RENTAL PROPERTY	D	RENT	M	W					
79 LAND IN CONCORD, MA (5 ACRES)	A	NONE	L	W					
80 CLAFLIN III INVESTORS ASSOC		None							
81 (PREV.CLAFLIN CAPITAL III PIS)	A	INT	K	U					
82 LLOYDS OF LONDON	A	Int	K	W	PART	12/31	J	A	
83 LAND IN PLAINFIELD, NH									
84 (160 ACRES RESIDENTIAL)	A	NONE	N	W					
85 FIRST NAT'L BANK OF BOSTON,									
86 BOSTON, MA (CHECKING ACCOUNT)	A	INT	J	T					
87 PAINE WEBBER MONEY MARKET	A	Div	J	T					
88 FIRST NATIONAL BANK OF BOSTON									
89 (GUERNSEY) CERT. OF DEPOSIT	D	Div	L	T					
90 FAIRFAX ASSOC. LTD. PTSHP	A	Int	L	U					

1. Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less; B=$1,001 to $2,500; C=$2,501 to $5,000; D=$5,001 to $15,000; E=$15,001 to $50,000; F=$50,001 to $100,000; G=$100,001 to $1,000,000; H=More than $1,000,000
2. Value Codes: (See Col. C1 & D3) J=$15,000 or less; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; N=$250,001 to $500,000; O=$500,001 to $1,000,000; P=More than $1,000,000
3. Value Method Codes: (See Col. C2) C=Appraisal; D=Book Value; R=Cost (real estate only); S=Assessment; T=Cash/Market; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

VII. Page 6 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (Including trust assets). Indicate where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, (S) for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amt. Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-U)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
91 HARVARD UNIV. PENSION PLAN	A	NONE	O	T					
92 DMC APARTMENT FUND I									
93 (PARTNERSHIP)	A	INT	K	U					
94 GREATER HARTFORD ASSOCIATES									
95 (PARTNERSHIP)	A	INT	L	U					
97									
98 THE STEPHEN G. BREYER TRUST - 1993 (X)	A	Div	M	T	NEWTRST				
99		None							
100 CHINA PARTNERS, L P (X)	A	Int	L	U	BUY	12/1	K		
101 CLAFLIN CAPITAL, VI (X)	A	Int	[illegible]	U	BUY	12/1	J		
102									
103 ASSETS OF SPOUSE									
104 (STOCKS, PTSHPS, ETC.)									
105									
106									
107 AMERICAN INT'L GROUP	A	DIV	K	T	NONE				
108 NATIONAL CITY CORP	A	DIV	K	T	NONE				

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less; B=$15,001 to $50,000; A=$1,001 to $2,500; B=$50,001 to $100,000; C=$2,501 to $5,000; C=$100,001 to $1,000,000; D=$5,001 to $15,000; D=More than $1,000,000

2 Value Codes: (See Col. C1 & D3) J=$15,000 or less; M=$250,001 to $500,000; K=$15,001 to $50,000; O=$500,001 to $1,000,000; L=$50,001 to $100,000; P=More than $1,000,000; N=$100,001 to $250,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; U=Book Value; R=Cost (real estate only); T=Other; S=Assessment; U=Estimated; T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

II. Page 7 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp 18-26 of instructions.)

A. Description of Assets (including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J), for joint ownership of reporting individual and spouse, (S), for separate ownership by spouse, (DC) for ownership by dependent child. *Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt. 1 Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
109 HUBBELL INC., CLASS B	A	Div	K	T	NONE				
110 GENERAL ELECTRIC	A	DIV	K	T	NONE				
111 MCDONALDS	A	Div	K	T	PART	5/21	J	D	
112 SCUDDER DEVELOPMENT FUND	A	None	K	T	SOLD	5/25	K	E	
113 SCUDDER MANAGED MUNICIPAL BDS	C	Div	J	T	NONE				
114 SCUDDER INSTITUTIONAL FUND									
115 (PREV. SCUDDER CASH INVEST TR)	A	Div	J	T	NONE				
116 MONTANA POWER	B	Div	K	T	NONE				
117 GENUINE PARTS CO.	A	DIV	K	T	NONE				
118 EXXON CORPORATION	A	Div	K	T	NONE				
119 SOCIETE NATIONALE ELF	A	Div	J	T	NONE				
120 SCHERING-PLOUGH CORP	A	Div	K	T	NONE				
121 SCUDDER SHORT TERM BOND FUND	B	Div	K	T	NONE				
122 U.S. TREASURY NOTES	A	Int	J	T	NONE				
123 IBM	A	None			SOLD	2/2	J	A	
124 LAWTER INTERNATIONAL, INC. (X)	A	Div	J	T	BUY	2/2	J		
125 SCUDDER GLOBAL SMALL CO. FD (X)	A	Div	K	T	BUY	5/25	K		
126 SCUDDER PAC OPPORTUNITIES FD (X)	A	None	J	T	BUY	12/21	J		

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less E=$15,001 to $50,000 B=$1,001 to $2,500 F=$50,001 to $100,000 C=$2,501 to $5,000 G=$100,001 to $1,000,000 D=$5,001 to $15,000 H=More than $1,000,000

2 Value Codes: (See Col. C1 & D3) J=$15,000 or less K=$15,001 to $50,000 L=$50,001 to $100,000 M=$100,001 to $250,000 N=$250,001 to $500,000 O=$500,001 to $1,000,000 P=More than $1,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

VII. Page 8 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp 18-26 of Instructions)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, (SI) for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt 1 Code (A-H)	(2) Type (e.g., div, rent or int.)	C. Gross value at end of reporting period (1) Value2 Code (J-P)	(2) Value Method3 Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
127 SCUDDER INTL BD FD (X)	A	Div	J	T	BUY	5/28	J		
128									
129 PEARSON ORD STOCK	F	DIV	P	T	NONE				
130 PROPERTY IN NEVIS WEST INDIES									
131 (2.5 ACRES - RENTAL PROPERTY)	D	Div	H	W					
132 PROPERTY IN LONDON -									
133 1/6 INTEREST IN HOUSE	A	NONE	Q	W					
134 BAYBANK HARVARD, BOSTON, MA									
135 (CHECKING ACCOUNT)	A	INT	J	T					
136 SCUDDER FUNDS (IRA ACCOUNT)	G	Div	J	T					
137 OMC REGENCY RESIDENCE LTD.									
138 (PARTNERSHIP)	A	INT	K	J					
139 BLAKEMAN EXPENSES FUND	A	None	J	T					
140 LAZARD BROTHERS (SAVINGS ACCT)	A	INT	J	T					
141 ROYAL BANK OF SCOTLAND									
142 (SAVINGS ACCOUNT)	A	INT	J	T					
143									
144									

1 Income/Gain Codes: (See Col. B1 & D4)	A=$1,000 or less E=$15,001 to $50,000	B=$1,001 to $2,500 F=$50,001 to $100,000	C=$2,501 to $5,000 G=$100,001 to $1,000,000	D=$5,001 to $15,000 H=More than $1,000,000
2 Value Codes: (See Col. C1 & D3)	J=$15,000 or less M=$250,001 to $500,000	K=$15,001 to $50,000 O=$500,001 to $1,000,000	L=$50,001 to $100,000 P=More than $1,000,000	M=$100,001 to $250,000
3 Value Method Codes: (See Col. C2)	Q=Appraisal U=Book Value	R=Cost(real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

VII. Page 9 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J), for joint ownership of reporting individual and spouse, (S), for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amt. Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (J-Q)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, reception)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
145 CHILDE BREYER IS NO LONGER A DEPENDENT OF STEPHEN G. BREYER.									
146 SHE IS EFFECTIVELY NO LONGER A DEPENDENT AS OF 1/1/93.									
147 THE ASSETS APPLICABLE TO HER AS LISTED ON LINES 115 TO 152									
148 OF THE 1992 FEDERAL DISCLOSURE REPORT WILL NO LONGER BE									
149 REPORTED DUE TO THE CHANGE IN HER DEPENDENCY STATUS.									
150									
151									
152 MICHAEL BREYER (DC)									
153									
154 SCUDDER TAX FREE MONEY FUND	A	DIV	J	T	NONE				
155 PAINE WEBBER MONEY MARKET FUND	A	DIV	J	T	NONE				
156 ACM GOV'T SECURITIES FUND	A	DIV	J	T	NONE				
157 OCCIDENTAL PETROLEUM	A	DIV			SOLD	10/8	J		
158 WEST NEWTON SAVINGS BANK	A	DIV	J	T	NONE				
159 CHEMEX PHARMACEUTICALS	A	NONE	J	T	NONE				
160 COMSTOCK PARTNERS STRATEGY FD	A	DIV	J	T	NONE				
161 WTS CHEMEX PHARM. INC.	A	None	J	T	NONE				
162 BANK OF BOSTON CORP.	A	Int			SOLD	8/11	J	C	

1 Income/Gain Codes: (See Col. B1 & D4)	A=$1,000 or less B=$1,001 to $2,500	B=$2,501 to $5,000 C=$5,001 to $15,000	C=$5,001 to $15,000 D=$15,001 to $50,000	D=$15,001 to $50,000 E=$50,001 to $100,000
	E=$100,001 to $1,000,000	F=More than $1,000,000		
2 Value Codes: (See Col. C1 & D3)	J=$15,000 or less K=$15,001 to $50,000	K=$15,001 to $50,000 L=$50,001 to $100,000	L=$50,001 to $100,000 M=$100,001 to $250,000	M=$100,001 to $250,000
	N=$250,001 to $500,000	O=$500,001 to $1,000,000	P=More than $1,000,000	
3 Value Method Codes: (See Col. C2)	Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market			
	U=Book Value V=Other	W=Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
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VII. Page 10 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp 18-26 of Instructions.)

A. Description of Assets (Including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (C), for joint ownership of reporting individual and spouse, (S), for separate ownership by spouse, (DC), for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt. Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
163 MOUNTLEIGH GROUP ORD	A	None			REDEMP	12/31	J	A	WORTHLESS SECURITIES
164 FEDERAL HOME LN MTG (PREF)	A	Div	J	T	NONE				
165 SHAWMUT NATL CP DEP (PREF)	A	Div	J	T	NONE				
166 ZOLL MEDICAL	A	None	J	T	PART	10/12	K	E	
167 XYPLEX	A	None	J	T	PART	10/12	J	D	
168 MOLOGIC	A	None			SOLD	10/12	J	A	
169 POWERSOFT CORP. (X)	A	None	K	T	BUY	1/1	K		
170 POWERSOFT CORP (X)		None			PART	10/14	K	E	
171 WTS. ENZON, INC (X)	A	None	J	T	REC'D	12/13	J		
172 AIM CONSTELLATION FD. INC (X)	A	None	J	T	BUY	2/16	J		
173 CHARTER MEDICAL GROUP (X)	A	None	J	T	BUY	8/13	J		
174 ALC COMMUNICATIONS, INC. (X)	A	None	J	T	BUY	10/8	J		
175 TELE COMMUNICATIONS, INC CLASS A (X)	A	None	J	T	BUY	12/21	J		
176 NOBLE AFFILIATES, INC. (X)	A	None	J	T	BUY	8/19	J		
177									
178 DMC APARTMENT FUND I PTSHP	A	INT	J	U					
179 DMC REGENCY RESIDENCE, LTD									
(PARTNERSHIP)	A	INT	J	U					

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less; B=$1,001 to $2,500; C=$2,501 to $5,000; D=$5,001 to $15,000; E=$15,001 to $50,000; F=$50,001 to $100,000; G=$100,001 to $1,000,000; H=More than $1,000,000

2 Value Codes: (See Col. C1 & D3) A=$15,000 or less; B=$250,001 to $500,000; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; O=$500,001 to $1,000,000; P=More than $1,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: BREYER, STEPHEN G.

Date of Report: 05/10/94

Page 11 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

	A. Description of assets (including trust assets) Identify each asset held for investment by a trust or other financial institution, brokerage firm, investment adviser, or similar entity in which you or your spouse or dependent child had a beneficial interest. (If the preceding does not apply, check "NONE.") Please do not use abbreviations.	B. Income during reporting period (1) Amt. Code (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period — If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
	INCOME (No reportable income, assets, or transactions)									
101										
102	PRESENT INTEREST TRUST									
103	FOR MICHAEL C. BREYER									
104										
105										
	SCHODER TAX FREE MONEY FND	A	DIV	K	T	NONE				
107	DHC APARTMENT FUND I PTSHP	A	INT	J	U					
108	PS MARIBAS 4 PARTNERSHIP	A	INT	J	U					
109	DHC REGENCY RESIDENCE, LTD.									
110	(PARTNERSHIP)	B	DIV	K	U					
111										
112	MICHAEL C. BREYER 1983									
113	TRUST									
114										
115										
116										
117	BAYBANK BOSTON (TRUST									
118	CHECKING ACCOUNT)	B	INT	K	T	NONE				

Income/Gain Codes: (See Col. B1 & D3) J=$1,000 or less; K=$1,001 to $2,500; L=$2,501 to $5,000; M=$5,001 to $15,000; N=More than $15,000

1 Value Codes: (See Cols. C1 & D3) J=$15,000 or less; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; N=More than $250,000; O=$250,001 to $500,000; P=$500,001 to $1,000,000; P=More than $1,000,000

2 Value Methods Codes: (See Col. C2) Q=Appraisal; R=Assessment; S=Cost (real estate only); T=Cash/Market; U=Book Value; V=Other; W=Estimate

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

... Page 12 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of instructions.)

A. Description of Assets (Including trust assets). Indicate where applicable, owner of the asset by using the parenthetical (J), for joint ownership of reporting individual and spouse, (S), for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amt. Code (A-H)	(2) Type (e.g. div, rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
198 PEARSON ORD STOCK	E	DIV	N	T	NONE				
200 DMC REGENCY RESIDENCE PTSHP	A	INT	J	J					
201									
202 NELL BREYER (DC)									
203									
SCUDDER TAX FREE MONEY FUND	A	DIV	J	T	NONE				
205 PAINE WEBBER MONEY MARKET FUND	A	DIV	J	T	NONE				
206 ACM GOV'T SECURITIES FUND	A	DIV	J	T	NONE				
207 OCCIDENTAL PETROLEUM	A	DIV			SOLD	10/8	J	A	
208 WEST NEWTON SAVINGS BANK	A	DIV	J	T	NONE				
209 CHEMEX PHARMACEUTICALS	A	NONE	J	T	NONE				
210 COMSTOCK PARTNERS STRATEGY FD	A	DIV	J	T	NONE				
211 WTS CHEMEX PHARM. INC	A	NONE	J	T	NONE				
212 BANK OF BOSTON CORP.	A	Int			SOLD	8/11	J	C	
213 MOUNTLEIGH GROUP ORD	A	None			REDEMP	12/31	J	A	WORTHLESS SECURITIES
214 FEDERAL HOME LN MTG (PREF)	A	DIV	J	T	NONE				
215 SHAWMUT NATL CP DEP (PREF)	A	DIV	J	T	NONE				
216 ZOLL MEDICAL	A	None	J	T	PART	10/21	K	E	

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less; B=$1,001 to $2,500; C=$2,501 to $5,000; D=$5,001 to $15,000; E=$15,001 to $50,000; F=$50,001 to $100,000; G=$100,001 to $1,000,000; H=More than $1,000,000

2 Value Codes: (See Col. C1 & D3) J=$15,000 or less; K=$15,001 to $50,000; L=$50,001 to $100,000; M=$100,001 to $250,000; N=$250,001 to $500,000; O=$500,001 to $1,000,000; P=More than $1,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book Value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

11. Page 13 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, (D) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt. Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
217 XYPLEX	A	None	J	T	PART	10/4	J	D	
218 HOLOGIC	A	None			SOLD	10/2	J	A	
219 TELE COMMUNICATIONS, INC. (X)	A	None	J	T	BUY	10/1	J		
220 WTS. ENZON, INC. (X)	A	None	J	T	REC'D	12/1	J		
221 NOBLE AFFILIATES, INC. (X)	A	Div	J	T	BUY	9/19	J		
ALC COMMUNICATIONS, CORP. (X)	A	None	J	T	BUY	10/8	J		
223 POWERSOFT CORP. (X)	A	None	K	T	BUY	1/2	K		
224 POWERSOFT CORP (X)	A	None			PART	10/2	K	E	
225 AIM CONSTELLATION FD. INC (X)	A	None	J	T	BUY	2/16	J		
226 CHARTER MEDICAL GROUP (X)	A	None	J	T	BUY	8/15	J		
227									
228 OMC APARTMENT FUND I PTSHP	A	INT	J	U					
229 PS MARINAS 4 PARTNERSHIP	A	INT	J	U					
230									
231 PRESENT INTEREST TRUST									
232 FOR NELL B. BREYER									
233									
234									

1 Income/Gain Codes: (See Col. B1 & D4) A=$1,000 or less E=$15,001 to $50,000 B=$1,001 to $2,500 F=$50,001 to $100,000 C=$2,501 to $5,000 G=$100,001 to $1,000,000 D=$5,001 to $15,000 H=More than $1,000,000

2 Value Codes: (See Col. C1 & C3) J=$15,000 or less K=$50,001 to $500,000 L=$15,001 to $50,000 M=$500,001 to $1,000,000 N=$100,001 to $250,000 P=More than $1,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal O=Book Value R=Cost (real estate only) V=Other S=Assessment G=Estimated T=Cash/Market

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

V. **Page 14 INVESTMENTS and TRUSTS -- income, value, transactions** (Includes those of spouse and dependent children; See pp. 18-26 of Instructions.)

A. Description of Assets (including trust assets) Indicate where applicable, owner of the asset by using the parenthetical (J), for joint ownership of reporting individual and spouse, (S), for separate ownership of spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt 1 Code (A-H)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value1 Code (J-P)	(2) Value Method3 Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
235 SCUDDER TAX FREE MONEY FUND	A	DIV	K	T	NONE				
236 DMC APARTMENT FUND I PTSHP	A	INT	J	U					
237 GREATER HARTFORD ASSOCIATES									
238 LIMITED PARTNERSHIP	A	INT	K	U					
239 DMC REGENCY RESIDENCE LTD									
(PARTNERSHIP)	C	Int	K	U					
241									
242 TRUST FOR CHILDREN OF									
243 JOANNA BREYER									
244									
245 SCUDDER TAX FREE MONEY FUND	A	DIV	J	T	NONE				
246 HEARTLAND RALEIGH APEX US									
247 (PARTNERSHIP)	A	INT	J	U					
248 PS MARINAS 4 PARTNERSHIP	A	INT	J	U					
249									
250 INVESTMENTS SHARED BY									
251 THE THREE CHILDREN									
252									

1 Income/Gain Codes: (See Col. B1 & D4)	A=$1,000 or less C=$15,001 to $50,000	B=$1,001 to $2,500 F=$50,001 to $100,000	C=$2,501 to $5,000 G=$100,001 to $1,000,000	D=$5,001 to $15,000 H=More than $1,000,000
2 Value Codes: (See Col. C1 & D3)	J=$15,000 or less N=$250,001 to $500,000	K=$15,001 to $50,000 O=$500,001 to $1,000,000	L=$50,001 to $100,000 P=More than $1,000,000	M=$100,001 to $250,000
3 Value Method Codes: (See Col. C2)	C=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
BREYER, STEPHEN G.	05/10/94

II. Page 15 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children, See pp. 18-26 of Instructions.)

A. Description of Assets (including trust assets) (Indicate where applicable, owner of any, based on the information (1) Filer, (2) spouse, or (3) dependent child. If spouse or dependent child is owner, (OC) Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period (1) Amt. (X-A)	(2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code (J-P)	(2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-P)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
253 CLAFLIN CAPITAL II FUND									
254 (PARTNERSHIP FORMED IN 1981)	A	INCI	J	U					
255 CLAFLIN CAPITAL IV FUND									
256 (PARTNERSHIP FORMED IN 1985)	A	INCI	K	V					
257 LAND IN PLAINFIELD, NH (160									
258 ACRES, RESIDENTIAL)	A	NONE	M	W					
259									
260									
261									
262									
263									
264									
265									
266									
267									
268									
269									
270									
271									

1 Income Gain Codes: (See Col. B1 & D3) A=$1,000 or less; B=$1,001 to $2,500; C=$2,501 to $5,000; D=$5,001 to $15,000; E=$15,001 to $50,000; F=$50,001 to $100,000; G=$100,001 to $1,000,000; H=$1,000,001 to $5,000,000; I=$5,000,001 to $25,000,000; J=Over $25,000,000

2 Value Codes (See Col. C1 & D3) K=$15,000 or less; L=$15,001 to $50,000; M=$50,001 to $100,000; N=$100,001 to $250,000; O=$250,001 to $500,000; P=$500,001 to $1,000,000; P1=$1,000,001 to $5,000,000; P2=$5,000,001 to $25,000,000; P3=Over $25,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report)

THIS REPORT WAS PREPARED BY : HOFFMAN, DYKES & FITZGERALD, P.C.
8603 WESTWOOD CTR. DR.
SUITE 400
VIENNA, VA 22182

V. REIMBURSEMENTS and GIFTS (Cont'd.)

SOURCE	DESCRIPTION
SALZBURG SEMINAR	TRAVEL AND LIVING EXPENSES, JULY 25 - AUGUST 5, 1993
AMERICAN BAR ASSOCIATION	TRAVEL AND LIVING EXPENSES, AUGUST 6-7, 1993
HARVARD UNIVERSITY	TRAVEL EXPENSES, AUGUST 11, 1993
AMERICAN COLLEGE OF TRIAL LAWYERS	TRAVEL AND LIVING EXPENSES, AUGUST 19-20, 1993
THE MENTOR GROUP	TRAVEL AND LIVING EXPENSES, AUGUST 31 - SEPTEMBER 3, 1993
ANTI-DEFAMATION LEAGUE	TRAVEL AND LIVING EXPENSES, OCTOBER 21-22, 1993

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	BREYER, STEPHEN G.	05/10/94

CERTIFICATION.

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature _____ Date _____

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, 104, AND 18 U.S.C. 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Washington, D.C. 20544

FINANCIAL STATEMENT

STEPHEN G. AND JOANNA P. BREYER

APRIL 30, 1994

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself your spouse, and other immediate members of your household

ASSETS			LIABILITIES		
Cash on hand and in banks	184,137		Notes payable to banks-secured	-0-	
U.S. Government securities - Sch 1	63,881		Notes payable to banks-unsecured	-0-	
Listed securities - Sch. 2	2,932,883		Notes payable to relatives	-0-	
Unlisted securities	-0-		Notes payable to others	6,333	
Accounts and notes receivable:			Accounts and bills due	7,825	
Due from relatives and friends	-0-		Unpaid income tax	-0-	
Due from others	-0-		Other unpaid tax and interest	-0-	
Doubtful	-0-		Real estate mortgages payable - Sch. 7	37,355	
Real estate owned - Sch. 3	3,914,500		Chattel mortgages and other liens payable	-0-	
Real estate mortgages receivable	-0-		Other debts - itemize:		
...se and other personal property	204,500				
Cash value - life insurance	-0-				
Other assets - itemize:					
Limited Partnership Invest-Sch 4	348,877				
Lloyds of London - Sch. 5	335,020				
Retirement Account - Sch. 6	862,743		Total liabilities	51,513	
			Net Worth	8 523.826	
Total Assets	6,567,341		Total Liabilities and net worth	6,567,341	
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor - Sch. 8	188,975		Are any assets pledged? - Sch. 8	225,020	
On leases or contracts	NONE		Are you defendant in any suits or legal actions?	NO - See Sch. 9	
Legal Claims	NONE		Have you ever taken bankruptcy	NO	
Provision for Federal Income Tax	0				
Other special debt	NONE				

SCHEDULE 1

STEPHEN G. AND JOANNA F. BREYER

U.S. GOVERNMENT SECURITIES

APRIL 30, 1994

		Fair Market Value
(H)	United States Treasury Bills, due 11/17/94	$73,298
(W)	United States Treasury Notes, due 8/15/99	10,583
		$83,881

SCHEDULE 2

STEPHEN G. AND JOANNA F. BREYER

LISTED SECURITIES

APRIL 30, 1994

	Fair Market Value
(H) Alkermes, Inc.	$ 115
(H) Synergen, Inc.	190
(H) Raytheon Co.	6,213
(H) Automatic Data Processing, Inc.	5,138
(H) Coca Cola Co.	8,225
(H) Sigma Aldrich Corp.	8,350
(H) Gillette Co.	6,725
(H) American Home Products Corp.	5,675
(H) Merck & Co., Inc.	6,100
(H) Kellogg Co.	10,175
(H) Johnson & Johnson	8,675
(H) American Int'l. Group, Inc.	9,300
(H) General Re Corp.	12,025
(H) Vanguard/Windsor Fund, Inc.	2,007
(H) WHX Technologies, Inc.	10,450
(H) Lexington Mass 3.8%	9,564
(H) Wayland Mass Mun Purp 3.5%	9,556
(H) Ohio St. 4.3%	9,534
(H) South Carolina State Univ. 4.4%	9,579
(H) Massachusetts St. Hefa 4.5%	9,570
(H) Andover Mass Rfdg 4.4%	9,408
(H) Massachusetts St Cons 7%	10,958
(W) Scudder Short-Term Bond Fund	21,964
(W) Scudder International Bond Fund	7,212
(W) Scudder Managed Municipal Bonds	58,329
(W) Scudder Development Fund	32,421
(W) Scudder Pac Opportunities Fund	4,472
(W) Scudder Global Small Co Fund	16,023
(W) McDonalds Corp.	12,000
(W) Schering Plough Corp.	18,300
(W) National City Corp.	21,400
(W) American Int'l. Group, Inc.	31,969
(W) Genuine Parts Co.	17,100
(W) Lawter International, Inc.	4,500
(W) General Electric Co.	28,575
(W) Hubbell Inc. Cl B	20,717
(W) Elf Aquitane Spons Adr	10,913
(W) Exxon Corp.	16,348
(W) Montana Power Co.	18,130
(W) Pearson plc	2,324,958
	$2,832,863

SCHEDULE 3

STEPHEN G. AND JOANNA F. BREYER

SCHEDULE OF REAL ESTATE INVESTMENTS

APRIL 30, 1994

Property	Owner	Date of Investment	Amount Invested	Ownership Percentage	Description	Total Fair Market Value (FMV)	Approximate Breyer's Share
4774 E. Jensen, Fresno, CA	(B)	1975	$ 18,000	20.00%	Rental property - commercial warehouse	$ 272,500	$ 54,500
Golden Rock - Nevis, St. Kitts	(B)	1980	140,000	100.00%	Rental property - residential	175,000	175,000
Concord, Massachusetts	(B)	1972	12,500	100.00%	Undeveloped land	85,000	85,000
Holland Park Residence, London, England	(W)	1985	-	16.67%	One-sixth interest in mother's residence received by gift	3,000,000	500,000
Cambridge, Massachusetts	(J)	1975	230,000	100.00%	Personal residence	800,000	800,000
Plainfield, New Hampshire	(J)	1980	129,000	100.00%	Personal residence	300,000	300,000
			$529,500			$4,632,500	$1,914,500

SCHEDULE 4

STEPHEN G. AND JOANNA F. BREYER

OTHER ASSETS - LIMITED PARTNERSHIP INVESTMENTS

APRIL 30, 1994

		Date of Investment	Limited Partner Ownership Percentage	Amount Invested	Capital Account Balance (FMV)
(H)	Paine Webber R&D Partners II, Limited Partnership	1987	.01199	$ 10,000	$ 1,446
(H)	Claflin III Associates	1983	19.8	50,000	16,279
(H)	Fairfax Associates Limited Partnership	1988	.6759	100,000	56,495
(W)	DMC Regency Residence, Ltd.	1989	1.343284	100,000	28,394
(J)	DMC Apartment Fund I, Ltd.	1989	1.65	120,000	22,143
(J)	Greater Hartford Associates Limited Partnership	1989	.5523	80,000	50,349
(H)	China Partners L.P.	1993	2.527167	50,000	64,666
(H)	Claflin Capital VI	1993	.3908	10,000	9,905
				$520,000	$249,677

The limited partnership investments have been valued based on the ending capital reported by the partnership on December 31, 1993, per Form K-1.

SCHEDULE 5

STEPHEN G. AND JOANNA F. BREYER

OTHER ASSETS - LLOYDS OF LONDON

APRIL 30, 1994

Approximate amount held on deposit by Lloyds of London	$160,000
First National Bank of Boston (Guernsey)	65,020
	$225,020

The cash represents collateral against potential Lloyds of London losses. See also Schedule 8.

SCHEDULE 6

STEPHEN G. AND JOANNA F. BREYER

OTHER ASSETS - RETIREMENT ACCOUNTS

APRIL 30, 1994

		Type	Amount
(H)	Thrift Savings Plan	Pension	$ 32,790
(H)	TIAA/CREF Retirement Annuity	Pension	364,642
(H)	TIAA/CREF Supplemental Retirement Annuity	Pension	327,154
(H)	Paine Webber	IRA	80,710
(H)	Scudder Trust Company	IRA	20,000
(W)	Scudder Trust Company	IRA	14,244
(W)	TIAA/CREF	Pension	23,203
			$862,743

SCHEDULE 7

STEPHEN G. AND JOANNA F. BREYER

REAL ESTATE MORTGAGE PAYABLE

APRIL 30, 1994

(J)	Mortgage payable, with interest at 8.5% monthly payment of $518, collateralized by first deed of trust on Cambridge, Massachusetts residence, due 2005.	$26,547
(J)	Mortgage payable, with interest at 8.5%, monthly payments of $60.60, collateralized by second deed of trust on Cambridge, Massachusetts residence, due 1995.	808
		$27,355

SCHEDULE 8

STEPHEN G. AND JOANNA F. BREYER

CONTINGENT LIABILITIES AND PLEDGED ASSETS

APRIL 30, 1994

Lloyds of London

Stephen G. Breyer was an investor in Lloyds of London Insurance until he resigned in 1988.

However, the 1985 Syndicate has not closed, and Stephen G. Breyer is still at risk for any potential losses of that Syndicate. He is insured against losses up to approximately $188,975. At this time, it cannot be reasonably estimated as to the amount of losses that will be incurred; however, conservative projections estimate a total loss of approximately $114,000.

The contingent liability for this potential loss has been reported at the total amount of insurance coverage against the loss.

In addition, the following cash is pledged against the potential Lloyds of London losses:

Approximate amount held on deposit by Lloyds of London	$160,000
First National Bank of Boston (Guernsey)	65,020
	$225,020

SCHEDULE 9

STEPHEN G. AND JOANNA F. BREYER

LEGAL ACTION

Neither I nor my wife are defendants in any lawsuit, except that I am occasionally sued by disappointed litigants as a result of decisions that I have rendered as a judge. All such suits against me have been dismissed as either frivolous or directly related to the merits of a decision, and none has any effect on my net worth.

The CHAIRMAN. Thank you very much, Judge.

Again, a housekeeping matter. As I understand it, you would rather not take a break. One of our tendencies, as you remember when you used to sit back here, is that we get to get up after we ask our questions and make our phone calls and make our visits, and you do not get to move as long as someone is up here asking you questions. So I want to be clear that we want to accommodate you. It is kind of hard sitting there all this time answering questions.

Now, as I understand it, though, you would like to proceed with one round of questioning, and then we will take a 5-minute break and come back and hear from Senators Hatch and Kennedy, and then we will break for lunch. Is that how you would prefer to proceed?

Judge BREYER. That is fine, Mr. Chairman.

The CHAIRMAN. Judge, let me begin by saying, in recent years, we have seen new challenges to the efforts of government at all levels to adopt regulations that government believes are designed to protect the environment and promote a public goal. These challenges have taken the form of asking the Court to change how it has interpreted the takings cause of the fifth amendment.

Less than 3 weeks ago, the Supreme Court of the United States decided a case called *Dolan* v. *Tigert,* where, using the takings clause, the Court rejected a local town measure intended to reduce flooding and traffic congestion caused by a business' development along a river. This decision follows a case decided 2 years earlier, *Lucas* v. *South Carolina Coastal Council,* and in these cases the Court adopted a new standard for reviewing the takings clause.

Judge, my first question is, before the *Dolan* and *Lucas* cases, how did the Supreme Court review claims that a regulation designed and stated to be designed to safeguard public welfare was the taking of property, thereby requiring the Government to pay the landowner for the so-called taking? What was the law, as you understand it, prior to *Dolan* and *Lucas*? What standard did the Court use?

Judge BREYER. Mr. Chairman, I think usually, when I go back to basics, what I often try to do is I try to keep in my mind some kind of basic, two or three basic points in different areas which are sometimes helpful.

The basic point or the basic case or the basic idea I have in my mind in this area is I go back to a case Justice Holmes decided. It is actually a very interesting case. A person owned a coal mine, and the Government said here is what you ought to do: Leave some columns of coal in that mine, because if you do not leave big thick columns of coal, the whole ceiling will collapse, and there are cities that are built on top of that coal mine and they are all going to fall down, and, therefore, we will have a regulation which tells you big thick coal columns. But the owner said I agree with you, I don't want anything to happen to anyone on the surface.

But, really, you don't have to have columns that are that thick, you don't have to have that many, and what you have done is taken my coal.

So the case presented the issue of when is it a reasonable regulation, for, after all, it is a good purpose to stop the cities from falling

into the mine. I mean that is a wonderful purpose. When does a reasonable regulation become a taking of property for which you must pay compensation? You know what Justice Holmes said. You are going to be disappointed, but what he said was this. He said, "You can regulate, you can regulate, you don't have to compensate, when you regulate. But, Government, you cannot go too far."

What is too far? Indeed, ever since that time, the courts have been trying to work out what is too far, and I don't think anyone has gotten a perfect measure of that. They look into factors, they say how important is the regulation, what kind of reliance has there been on this, has there been a physical, a physical occupation of property.

You see, in the case you have, which is very interesting, the one you mentioned, there might have been a physical taking of a piece of property, and then the Government can do less. But as I looked through these cases thereafter, you always come back to what is a kind of human judgment, what is too far. And the more reasonable what you are doing is, the less reliance there has been, the less it looks like it is taking something that historically has been considered a person's physical property, the more likely it is that you don't have to compensate.

The CHAIRMAN. Isn't the issue, Judge, what you said, whether the Government has gone too far? Most observers and legal scholars have referenced *Lucas* and then recently *Dolan* as evidence of the fact that the Court is changing that standard of how they determine what is too far. As you know better than I, Judge, in *Lucas* and in *Dolan,* but in *Dolan,* in particular, two things changed that seem to me to be different. I would like to talk with you a moment in the same general sense you discussed in the Holmes case.

In the past, if a Government agency said we are regulating for the public welfare so cities do not fall in, the burden has basically been on the property owner to say, you know, you have gone too far, Government, and here is why. Second, it has been generally speaking the Government, the Court has looked and said has the government had a rational basis for doing this, have they had a reason that comports with some sense of what seems to be related here, and, if they have, we will accept that, unless the plaintiff can prove, the property owner can prove that they have gone too far.

Well, as I read *Dolan,* two things happened. Granted, it is a case not of great moment in terms of what was at stake, in terms of a bicycle path and a flood plain and an extension of a permit to be able to make a hardware store larger, and so on, but it did two things. One, it shifted the burden of proof to the Government, and, to the best of my knowledge, I think that is the first time in 70 or 80 years the Court has done that. It has explicitly said, hey, look, Government, now you have got to prove, not the plaintiff, you have got to prove that this regulation was necessary and that you didn't go too far.

The second thing it did was it established what might be a new rule of construction, a new canon, one might argue, that says that the taking has to be roughly proportional to the needs. It took that bar and raised it just a little bit higher.

Now, my question is this: Is there any doubt in your mind, after *Dolan* and after *Lucas,* that it is at least incrementally more dif-

ficult for the Government to regulate zoning and environmental laws than it was prior, not impossible, but just incrementally at least more difficult, or am I off on that?

Judge BREYER. No, no, you are not off on that. Absolutely, the dissent you see in that absolutely thought that was so. The reason I hesitate a little bit is there is something special about that case, and what is I think a little special about the case is that it did at least arguably involve a physical occupation of a piece of property, and at the same time they didn't make all that much out of it. Then, as you just pointed out, they used this test of rough proportionality, and what exactly is that, it looks as if it is a little tougher.

So where I end up in my mind is that this is an area that is not determined forever, that there are likely to be quite a few cases coming up, that this problem of how you work out when it goes too far is something that undoubtedly will come up again in the future, and there is a degree of flexibility and flux in these opinions that I think haven't made a definite decision forever. That is basically my state of mind on them at the moment.

The CHAIRMAN. Well, mine, as well, and, therefore, it raises a series of—again, the Court did not do what I am about to say. But if you juxtapose what the Court did do, that incremental change that it made, with some of the leading legal experts and minds in this area—Professor Epstein comes to mind—it is hard, to use a phrase often used by Judge Bork, it is hard to find a principled rationale for how and where this stops, because the burden is a big deal.

Judge BREYER. Yes, it is.

The CHAIRMAN. It is a big deal in terms of outcome, whomever has the burden. We understand that in terms of criminal law. We understand that if the defendant had the burden to prove that he or she was innocent, it makes a big difference, the same facts, the same circumstances, it would make a big difference. In these cases, which affect economic rights and affect public health and welfare, whomever has the burden makes a big difference.

Now, as you know, Judge Breyer, this is not the first time the Supreme Court has of late elevated—I do not want to be pejorative here—has moved the bar on economic rights.

In the early part of this century, as mentioned by my friend from Utah, in the so-called *Lochner* era, named after the leading case of the time, the Supreme Court routinely struck down health and safety measures as unconstitutional. The Court struck down the types of regulation that everyone in this room now considers normal and appropriate. It struck down minimum wage laws, which we now take for granted, it struck down child labor laws, and it struck down workplace safety laws. The Court finally changed course and put an end to the so-called Lochner-izing toward the end of the 1930's.

Now, would our society look different today, if the Supreme Court had not gone back on *Lochner* and still gave economic rights the same level of protection that it did during the *Lochner* era? What effect would there have been on labor laws, for example, and environmental laws, had *West Coast Hotel* v. *Parrish* not come along and overruled *Lochner*? Talk to us about that. Be a professor

for a minute here. Tell us what the effect would be, as you would see it.

Judge BREYER. I think, Senator, that you would have very, very wide agreement with you across a very, very wide spectrum with what Holmes said, that the Constitution does not enact into law Herbert Spencer's social statics. What he meant by that is there is no particular theory of the economy that the Constitution enacts into law.

That does not mean property has no protection. There is a takings clause in the Constitution. It does not mean that people's clothes and toothbrushes are somehow at stake and could be swept away randomly. What it means is that the Constitution, which is a document that basically wants to guarantee people rights, that will enable them to lead lives of dignity, foresees over the course of history that a person's right to speak freely and to practice his religion is something that is of value, is not going to change.

But one particular economy theory or some other economic theory is a function of the circumstances of the moment. And if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety, the Constitution is not a bar to that, because its basic object is to permit people to lead lives of dignity.

The CHAIRMAN. I agree with your analysis, and you state it very clearly. Now, I understand that there is a significant distinction, a difference between the 5th amendment analysis engaged in *Dolan* and *Lucas* and the analysis of *Lochner* analyzing the 14th amendment, in finding the substantive due process right to freedom of contract, which is related to the 14th amendment.

Judge BREYER. Yes.

The CHAIRMAN. I understand *Lochner* went far beyond the question of takings. But if we follow *Dolan* and *Lucas* to their logical end, I do not see—I am not suggesting that the Court has done that, but if we do, I do not see how different it is from *Lochner* in its practical effect.

It is clear to me that there are some very significant legal minds who are arguing that essentially we find, in the 5th amendment in the takings clause, what had been done in the 14th amendment, which is now totally discredited.

Now, in the past, as I said, the courts gave Government the benefit of the doubt when its actions were challenged as unconstitutional. Doesn't the importance of both *Lochner* and *Dolan* lie in the fact that they refuse to give the Government the benefit of the doubt, by putting the burden of proof on the Government?

Judge BREYER. The kind of thing, Senator, that you are concerned about I think was a concern of the dissent, and I know that there are people and commentators thoughtfully reading these cases who worry about, well, how far will they go. When I think about that, I think, well, this is a matter, if you actually look at the case itself, that is still up in the air, and I think it is very widely accepted.

The CHAIRMAN. That is why I am trying to get you to talk about it, because you may bring it down to the ground.

Judge BREYER. Here I have a problem talking about things that are up in the air, for this reason, and I will be very frank with you.

Let us imagine, if I am lucky and if you find me qualified and vote to confirm me, I will be a member of the Supreme Court, and, as a member of that Court, I will consider with an open mind the cases that arise in that Court. And there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.

So I am trying both at the same time, and I will throughout these hearings—and tell me if you feel I am not striking the right balance—I will try very hard to give you an impression, an understanding of how I think about legal problems of all different kinds. At the same time, I do not want to predict or commit myself on an open issue that I feel is going to come up in the Court. The reason for that is two, there are two real reasons.

The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. And when you get the thorough briefing and thorough thought, you find, when you really look into it, that the matter somehow strikes you as not right to what you said before.

The other reason, which is equally important, is if you were a lawyer or if I was a lawyer or any of us appearing before a court or a client, it is so important that the clients and the lawyers understand the judges are really open-minded. That is why I will hesitate sometimes and——

The CHAIRMAN. So far you have been very responsive, and I am not looking for you to give me an answer of how you would rule in any one case. But I am looking to ask you to do what you have begun to do, and that is articulate for us your view of the principled way in which you think we should approach these matters of constitutional import.

What I have attempted to establish thus far is that where this balance goes is of phenomenal consequence to the Nation.

Judge BREYER. Yes.

The CHAIRMAN. Not where you are going to take it. It is of a multi-trillion-dollar consequence to the Nation.

To overstate it, if, for example, we adopted the view proposed by some very articulate, brilliant legal scholars, which says that you really have to apply a tort standard in determining whether or not a taking has, in fact, occurred, what we would find is that if tomorrow we passed any law here and said, by the way, no more CFC's can be admitted into the atmosphere, we would have every company that now manufactures CFC's come to us and say, you know, that is a great idea. But because you cannot prove if we manufactured CFC's and they deplete the ozone layer—you cannot prove that Lloyd Cutler got cancer or Joe Biden got cancer because of that—because you cannot prove that, we will stop but you have to pay us to stop, like the coal mine owner.

That is a multi-billion-dollar decision for the taxpayer. Right now it is not in question. Until *Dolan* it was not in question. No one assumed that if we said no more CFC's that we would have to go out and pay every company in America to stop manufacturing CFC's. The taxpayers, the press, the public, the Senators, including me until recently, do not fully appreciate the phenomenal economic consequence of taking a reading of the takings clause to its logical

conclusion as espoused by *Dolan,* and shifting the burden of proof and changing the standard.

Now, can you articulate or think of any principled standard to stop the movement announced in *Dolan* or *Lucas*? How does that stop? How does this shifting of the burden not automatically take you into the area that I worry most about, which is the one I have just articulated? Is there a principled way in which to say, OK, shifting the burden and requiring this relationship enunciated in *Dolan* does not automatically lead to the concern I have stated in the case I have just made up?

Judge BREYER. I think the principal concern, as I listen to you, Mr. Chairman, is the Justice Holmes' concern. As I listen to you, what you are saying is think back to those columns in the coal mine.

The CHAIRMAN. Exactly.

Judge BREYER. Are you really serious that it should impose that the law should prevent people in a practical way, through their Government, requiring columns that protect coal miners? And you are saying, of course not. And as I hear that, I think you are saying a law or an interpretation of the Constitution that would seriously impede the coal columns that protect the miners and protect the cities, that would be going too far. And I agree with you that that is what Justice Holmes would have had in mind.

That is why I think what the Court is trying to work out is, in my own mind—I cannot read other people's minds, but it is what is called a practical accommodation. Of course, there is a compensation clause in the Constitution. Of course, property is given some protection. At the same time, one must not go too far, and what too far means is imposing significant practical obstacles. It sounds to me——

The CHAIRMAN. Well, let me shift here, maybe, to another area. Maybe we can come back to this. You and I are talking now about the Constitution, the fifth amendment.

Judge BREYER. Yes.

The CHAIRMAN. Another way to affect the basic rights of individuals who do not have economic power is the way in which the Court interprets statutes passed by the legislature and signed by the President. And it is my view, I will say up front, that whether courts grudgingly interpret the wishes of elected representatives or interpret them in a generous way, obviously has significant impact.

One of the things that has arisen in the last 10 years, particularly the last 2 years, is this notion—mentioned by my distinguished colleague, who is, by the way, a fine lawyer and competent to sit on the bench himself—his point made that sometimes the cost of Government actions outweigh the benefits, economically. And I said in my opening statement we often consciously make those decisions to reflect public values, societal norms. We say we know this costs a lot of money to do this, but we are not going to put a value on human life; we are not going to put a dollar value on a particular strongly felt societal value.

Now, several years ago, the Environmental Protection Agency decided to phase out the use of asbestos because it posed many health risks, including the risk of cancer. A Federal appeals court reversed the EPA's ban on asbestos in a case you discussed in your most re-

cent book. The court decided that the statute under which the EPA acted could not possibly have been intended to allow EPA's asbestos ban because the ban cost so much money for every human life it might save.

Now, my question, Judge, is: Is it reasonable for a judge to infer what Congress intended by looking at how much it costs to implement what Congress intended?

Judge BREYER. You cannot answer the question never. It would depend very much on what you had in mind in the statute.

I wrote about that case in my book.

The CHAIRMAN. Yes, I read your book.

Judge BREYER. And I wrote really two opposite things about it, absolutely opposite. The first thing I wrote about it is I thought what was in the mind of the Court, and I thought what was in the mind of the Court is they found an example where they thought that EPA was imposing a ban that cost about a quarter of a billion dollars. And it would save hardly anybody.

The CHAIRMAN. But it would save somebody.

Judge BREYER. Yes; it was like the number of people—they used a kind of absurd example about the number of people who die from toothpicks, eating toothpicks, or something like that. But that is the first way I used it in the book, was to show that there are some EPA regulations which, indeed, seem to be very expensive ways of going about saving lives.

The second way is the opposite way I used that case in the book, because that case also provided an example of what you are suggesting; that it is not very good for courts to get involved in making that decision. That is more a decision for Congress to make. And what I said when I discussed the case for the second time is look how the judges, even if they have an example of what they think is absolutely wrong, look what they have to do. They have to say that there is a rule of law that prevents that, and the rule of law that they enunciated in that case was a rule of law that said agencies have to look at all the alternatives, or many of them, before they do anything.

But if you take that rule of law seriously, how can agencies have the time to do all that kind of thing?

The CHAIRMAN. As a friend of mine at home says, "Bingo."

Judge BREYER. Right. Well, you see, that is why the courts are not the right ones to decide. I mean, I cannot say never, because you can always think of an absurd case. You know, you can think of something. There was one that Judge Wisdom wrote called aqua slide, if you want to look at it sometime. But, I mean, you can find sometime there is an absurd case. But I basically—

The CHAIRMAN. Well, let me make sure I understand your, for lack of a better phrase, rules of construction. If Congress delegates to the EPA the authority to make a judgment about what is necessary or reasonable to protect against a particular risk and not delegate that to the Court, then doesn't the Court basically have to show that the agency acted in a capricious manner?

Judge BREYER. Yes, absolutely.

The CHAIRMAN. Now, if Congress delegates authority to an agency to consider costs and benefits in implementing the statute, your

view is, then, that the Court should, unless there is a clear disregard of that requirement, yield to the agency.

Judge BREYER. Absolutely.

The CHAIRMAN. Now, I have much more to ask, but I will end my round with this last point: What about the case where the Congress is silent about considerations of costs and benefits, as we often are? Under what circumstance may a court require an agency to balance costs and benefits when Congress is silent?

There is a friend of ours—and he is a friend of mine. I do not want to mention his name, and the reason I do not want to mention it is because I will do an injustice to his larger theory. But you wrote in Southern California Law Review about the presumption that one of your colleagues in the profession of teaching suggested, which was that if the Congress is silent, the Court should presume that the Congress intended the Court to make a cost-benefit analysis. And you wrote in that article, you said, "Can the Court legally adopt new up-to-date canons such as [this professor] has suggested? Such modern canons favor the use of cost benefit analysis in regulatory statutes, [among others,] but"—this is your quote—"but can the Court simply adopt them? Where would it find the legal authority for doing so?"

My question is: Can it simply adopt such a canon?

Judge BREYER. No, not in my opinion.

The CHAIRMAN. And where do those who suggest—your answer is it cannot simply adopt them. But where do those who suggest that it should find legal authority for doing so?

Judge BREYER. I have to say that is a question better addressed to them. The basic thing that I start out with, which I have written and I certainly have no compunction about discussing anything I have written, is as you suggest. What you suggest to me is that you are talking about an area of substantive decisionmaking, not procedure. You are talking about what is the best health policy? What is the best safety policy? What is the best environmental policy?

That is a question that you basically answer in Congress. And if you don't say anything in the statute, normally what you do is you delegate that authority to fill in the interstices to an agency. And the agency's opinion in those matters is an opinion that the courts must respect. They must do that, first for a legal reason. The power flows from the people through article I of the Constitution to the Congress and then to the agency. That is a legal reason that has to do with democracy. And there is a second, very practical reason. The very practical reason is, quite honestly, judges, who cannot phone anyone, who have a lot of cases in their offices, who do not have expertise in these areas, simply will not understand the basic practicalities of how you deal with substantive environmental health and safety policy, and, therefore, it is best that they let those whom you have told to do it do the job.

The CHAIRMAN. Well, Judge, as you no doubt know, from a personal standpoint that answer pleases me very much. But I will come back in my second round, which will be sometime next week, I suspect—no, which will be sometime tomorrow, I hope—to discuss what Professors Eskridge and Frickey refer to in their article on statutory interpretation. What they both are worried about is that the Courts' new canons of statutory interpretation, to quote them,

"amount to a back-door version of the constitutional activism that most Justices on the current Court have publicly denounced."

Now, I would like to talk with you a little bit about that. I will also discuss with you—and I will tell you ahead of time—the *Patterson* case and *Dellmuth* v. *Muth,* where the Court seemed to have used canons to reach the exact opposite conclusions. In *Patterson,* there was a statute passed in the post-Civil War period that said you cannot fail to hire someone merely because they are black. And then in the 1960's, Congress came along and said we are going to pass the Civil Rights Act. Then an action was brought. A person was fired because she was black. She was hired, but then fired. She said, "Wait a minute, that statute covers me." And the Court looked down at the words of the statute and said: We do not find any explicit reference to the 1964 statute, but we are going to infer that Congress must have, when they passed that 1964 statute, meant that it should cover it, not the Civil War statute.

Then *Dellmuth* comes along, and *Dellmuth* is about a handicapped person, and a handicapped person being able to sue a State. And when that person was denied equal access under the handicapped law, which the Senator from Utah and the Senator from Massachusetts played a great role in passing, the Court looked down at the statute and said, well, the 11th amendment basically says there is a presumption against an individual suing a State in Federal court. So since Congress did not mention explicitly that we want to discount that presumption, we are going to assume they meant let the presumption prevail.

So they looked in one case at the statute and used a rule of construction to find that Congress must have been talking about something that happened 100 years later, and in the second statute they looked at the language and said, well, it did not mention the 11th amendment so Congress must have meant that the 11th amendment prevailed. The end result was the same. A black woman got fired because she was black, and a handicapped child could not sue the State of New York. The result was the same. People without power got left out.

Totally different rules of construction. I want to talk to you about that, and a lot more. In the meantime, let's now take a break for 5 minutes, and then we will come back to Senator Hatch. I thank you very much, Judge.

Judge BREYER. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order. While we are waiting for the photographers to clear the well, I want the record to show, so I do not get graded badly by Professor Heinzerling from Georgetown, who is sitting behind me, that I do know that Ms. Patterson was not fired; she alleged racial discrimination. And I just want the record to show that, because I get graded by the visiting professors who come and help us on this. So I just want the record to reflect that.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge Breyer, throughout your career, you have set forth what can fairly be called a pragmatic, nonideological vision of the law. In your own words, you said at one time:

Law itself is a human institution serving basic human or societal needs. It is therefore properly subject to praise or to criticism in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the reasonable expectations of those to whom it applies.

Now, I would like to explore what implications if any your pragmatic vision of the law has for your understanding of the role of a Supreme Court Justice. It is, after all, one thing to have a pragmatic view of the law; it would be something quite different to believe that some or all actors in the legal system have a roving mandate to pursue their individual visions of pragmatic justice.

In your view, what constraints, formal or informal, legal or prudential, really bind a Supreme Court Justice in his or her own decisionmaking?

Judge BREYER. I think, Senator, I would start by saying this, and I have said this before, and it is something that has considerable significance to me. Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that that particular judge is not speaking as an individual. In an ideal world, the personality of the judge, the face of the judge, would not be significant because when the judge speaks with a black robe on, in no matter what court, the judge is speaking for the law. And in an ideal world, the law is the same irrespective of the personality of the judge.

That is a very different thing. It is an absolutely true thing. But it is consistent with believing that the law that the judge interprets and enunciates with his black robe on is in fact a body of rules and institutions and so forth that is supposed to work properly for people.

And so, remembering that, I would imagine that on the Supreme Court, what I would be bound by is the words, the history, the precedents, the traditions, all of those things which in fact go up to make this great body of institutions, including legal advice and how businesses and labor unions interpret it and so forth, that we call law.

The role of the subjective preference of the judge is not supposed to be relevant, and while no one can escape from his own background, from his own opinions, from his own personality, et cetera, Learned Hand once described in fact, at a speech given to commemorate Justice Cardozo, he described the judge as a runner, stripped for the race. He may have been quoting Holmes then. But in his view, what that meant was to the best ability, a judge should be dispassionate and try to remember that what he is trying to do is interpret the law that applies to everyone, not enunciate a subjective belief or preference.

Senator HATCH. Would you agree, then, that a judge's authority derives entirely from the fact that he or she is applying the law, not simply imposing his or her policy preferences?

Judge BREYER. Of course, that is true. And why it is difficult, in an important court like the Supreme Court, is of course people disagree, often, about how, in vast, uncertain, open areas of law, where there are such good arguments on both sides of such important policy issues, of course people disagree about what the proper outcome of those issues is. But in trying to find the correct solution, the helpful solution consistent with the underlying human

purpose, the judge follows canons, practices, rules, cases, procedures, all those things that help define the role of the judge, which is the same for judge A as it is for judge B.

Senator HATCH. Would you agree, then, that the meaning of the law is to be ascertained according to the understanding of the law when it was enacted?

Judge BREYER. Almost always. Almost always.

Senator HATCH. Can you think of any situation——

Judge BREYER. The reason that I hesitate a little is because of course, there are instances, particularly with the Constitution and other places, where it is so open and unclear as to just how the Framers or the authors intended it.

Senator HATCH. And I accept that. Would you also agree that separation of powers concerns mandate that courts be careful not to intrude on the terrain of the various political branches?

Judge BREYER. Yes.

Senator HATCH. All right. Those are important issues to me and I think to everybody who understands or is concerned with constitutional law.

Judge Breyer, as you know, the first liberty protected in the Bill of Rights is religious liberty. Specifically, the free exercise clause of the first amendment provides that Government shall make no law prohibiting the free exercise of religion.

In its 1990 decision in *Employment Division* v. *Smith,* the Supreme Court held that a neutral, generally applicable law need not be justified by a compelling interest even if the law has the incidental effect of severely burdening a particular religious practice. And as you may know, I was very concerned that in the aftermath of the *Smith* case, the freedoms of religious minorities in this country were vulnerable to hostile majorities. For this reason, I was the lead sponsor along with Senator Kennedy in enacting the Religious Freedom Restoration Act, which became law last year and which restored the compelling interest standard that was widely understood to be in force before the *Smith* case.

I would like to ask you about an opinion that you wrote before the *Smith* case was decided, and that was *New Life Baptist Church Academy* v. *Town of East Longmeadow,* back in 1989.

You ruled that a local school committee's proposed procedures for reviewing the adequacy of the secular education provided to students at a Fundamental Baptist Church school did not violate the free exercise clause. And as you know, your ruling in this case has been criticized as not sufficiently protective of religious liberty.

How would you respond to those criticisms about your decision in that case? Both Senator Kennedy and I are watching you very carefully.

Judge BREYER. So is Chloe. Chloe was out last summer in Los Angeles. She was working with a minority religious group, the Vietnamese Buddhists, and they were actually having a very practical problem, because they were trying to set up home temples in areas of the city where the rules and regulations had made it tough for them, and the question was could you work that out in a way that both satisfied the needs of the city and also allowed these people to practice their religion. That was terribly important. So she is also very interested in that.

Senator HATCH. Well, good for you, Chloe. When we enacted the Religious Freedom Restoration Act, we were strongly supportive of protecting religious liberty and freedom.

Judge BREYER. Of course.

Senator HATCH. Go ahead.

Judge BREYER. Of course, and the particular case, I found extremely difficult. Why? I will tell you a little bit about it. If you go back into the Constitution, even free speech, I read recently it really descends historically from the need to protect religion. There is nothing more important to a person or to that person's family than a religious principle, and there is nothing more important to a family that has those principles than to be able to pass those principles and beliefs on to the next generation.

That is why schools are so important in this area. That is why people feel so strongly about schooling. So one starts with the realization that what was at issue in the first amendment, I think both for speech and for religion, was a decision made sometime around the 17th century, that it is about time to stop killing each other because of religious beliefs, and what we are going to do is respect the religion of each other, and people are going to be free to practice that religion and to pass it on to their families. They are going to teach their children, and their children can teach their children. That is absolutely basic.

Senator HATCH. Well, as you know——

Judge BREYER. The opposite side of the coin is that, of course, the people, as organized in government, have an interest to see that you or I or any other family do not abuse our children, and they have an interest in seeing that our children, each other's children, do receive some kind of education—that they learn how to read, they learn how to write, they learn mathematics—and for that reason, it is absolutely well-established that although people can teach their children at home if they wish, because of the need to pass on their religion, it is equally well-established that the State has some interest in seeing that education is going on and that the children are being taught.

Now, in that particular case, it was a little unusual because the argument came up—and I read through that record with pretty great care—and what had gone on, I think, was everyone in the State said they could teach their children at home, that particular religious group. There were some complaints about the quality of the education—they had a special school—and everybody agreed that the school system could go in and look and see what was being done.

Indeed, the religious school itself had said at one point, We do not mind if you come in and look; what we do not want to do is we do not want to acknowledge the school board, because we believe there is no higher authority than God. And the school board, making an effort to accommodate, had said, Do not acknowledge us; we do not want you to acknowledge us. Just let us look and see what is happening, the same way as you might any visitor at all. And then the school had said, Yes, that is OK. But somehow in the legal argument in the lower court, that became a little confused, and before you know it, what had happened was that the lower court had entered a decree which said the way to go about this,

State, is to test the children after they leave school; while the State had said, no, no, it is better to go in and see.

Now, there, the question was does the Constitution require after-school testing, or does it require visits, or is it up to the State? And that is a rather narrow point, and what we held in the case, unanimously, was that the Constitution does not require after-school testing; if the State wants to do it that way, they could. But you see, some people might think that was more restrictive; others might think it was less restrictive. In other words, it was a fairly narrow technical matter growing out of the record.

Senator HATCH. I just hope that you and other members of the judicial community will recognize these important issues, and I think you do—and certainly recognize the importance of the Religious Freedom Restoration Act——

Judge BREYER. Yes, yes.

Senator HATCH [continuing]. And the overwhelming vote that it had in both Houses of Congress.

Judge BREYER. The principle is absolutely right.

Senator HATCH. Congress intended to give strong protections to religious belief and liberty.

Judge BREYER. Right.

Senator HATCH. Unfortunately, just recently, in a case involving an order to a church to return tithes made in good faith by churchgoers who later became bankrupt, we have the current administration, despite its support for the Religious Freedom Restoration Act, interpreting the act in a manner that would effectively gut it, in my opinion.

Now, I am not asking for your views on that case, because undoubtedly, that is going to come before the Court; but I hope that all of you will consider this particular act and its importance, and that religious freedom is the first of the mentioned liberties in the Bill of Rights. And I hope you will consider the overwhelming congressional intent with regard to that.

The establishment clause of the first amendment provides that Congress shall make no law respecting an establishment of religion. Under the test devised by the Supreme Court in 1971, the *Lemon* v. *Kurtzman* case, a practice satisfies the establishment clause only if it, first, reflects a clearly secular purpose; second, has a primary effect that neither advances nor inhibits religion; and third, effectively avoids an excessive entanglement with religion.

Now, I am very concerned that this abstract, arid, and ahistorical test is often applied in a manner that is insensitive to practices that are part and parcel of our political and cultural heritage. In particular, narrow reliance on the *Lemon* test ignores a richer strain of Supreme Court precedent that recognizes that interpretation of the establishment clause should comport with what history reveals was the contemporaneous understanding of its guarantees.

In Justice Brennan's words, "the existence from the beginning of the Nation's life of a practice * * * is a fact of considerable import in the interpretation" of the establishment clause.

Now, do you agree or disagree that the historical pedigree of a practice should be given considerable weight in the determination of whether a practice amounts to an establishment of religion? You

mentioned that historical precedent is important to you. Do you feel it is important in this instance?

Judge BREYER. It is important; there is no question it is important. The establishment clause has tremendous foresight, tremendous foresight, I think. The simple model—there is always in my mind, like, two or three fairly simple things—I think of the establishment clause, I think of Jefferson, and I think of a wall. And the reason that there was that wall, the reason, which has become so much more important perhaps even now than it was then, is that we are a country of so many different people, of so many different religions, and it is so terribly important to members of each religion to be able to practice that religion freely, to be able to pass that religion on to their children. And each religion in a country of many, many different religions would not want the State to side with some other religion, so each must be concerned that the State remain neutral.

Then, there are also cases arising. And when cases arise with secular institutions, the question becomes have you injected too much religion into them. You can inject some—I mean, you have chaplains in Congress. Schools—what about schools? You see teaching your own children—it becomes very important not to, in a secular school, inject much religion into a school.

What of the other side of the wall? Can the State aid religion? The answer is certainly, sometimes. Nobody thinks—nobody thinks—that you are not going to send the fire brigade if the church catches fire. Nobody thinks that the church does not have the advantage of public services. The question becomes when is it too much. And again, schools are critically important because of the importance of schools to religious people.

So that is the framework that I use, and in trying to decide whether and when, what is too much, of course you look at history, and you look at tradition, and you look at the current world as we live it in the United States.

Senator HATCH. At one time, you stated that, "Of course, the wall between church and State is not absolute."

Judge BREYER. No; no one is going to say—to use an extreme example—no one would say that if the church is on fire, do not send the fire department. No one would say that the public services of a city are not available to the church. The question becomes when have you gone too far in terms of trying to preserve a country of many different religions where Government is basically neutral as among them.

Those are very difficult questions.

Senator HATCH. Well, I think, as we have seen up here on Capitol Hill, the word "wall" of separation is a metaphor——

Judge BREYER. Yes, absolutely. That is true.

Senator HATCH [continuing]. And it leads to a lot of hostility.

Judge BREYER. Right.

Senator HATCH. And there has to be some reason brought into the system.

Judge BREYER. There is.

Senator HATCH. In *Lee* v. *Weisman* back in 1992, the Supreme Court, relying on Warren Court rulings, held by a 5-to-4 vote that a school district violated the establishment clause when it invited

a rabbi to lead a prayer at a school graduation. Now, in my view, we have reached new depths when a nonsectarian prayer by a rabbi at a school graduation ceremony is censored by the establishment clause.

Notwithstanding the fact-specific language of the Court's opinion in *Lee*, some have since tried to portray *Lee* as having invalidated all prayer at school graduation ceremonies including, for example, nonsectarian student-led prayer.

Would you consider it a relevant factor for purposes of the establishment clause whether it is a member of the clergy or a student who leads the prayer?

Judge BREYER. That is very specific, and I——

Senator HATCH. I am not asking you if the factor would be dispositive, but simply whether it would be relevant.

Judge BREYER. It sounds as if it is—as you said, it sounds as if it is a relevant factor. And I understand the point and agree that it is not absolute, these things, and I do think—it sounds as if it would be a relevant factor.

Senator HATCH. Would you consider it relevant whether the decision to have prayer at a graduation was made by school officials or students?

Judge BREYER. Well, you bring up matters, Senator, which sound as if they are relevant.

Senator HATCH. I think that is good.

Judge BREYER. Would you repeat that, what was good?

Senator HATCH. I say that is good, his discussion of that.

Judge Breyer, let me turn to the matter of copyright briefly, and on a subject upon which you have written.

Judge BREYER. That is true.

Senator HATCH. I am sure you know what I am going to ask. In 1970, you wrote a Law Review article entitled "The Uneasy Case for Copyright." It was considered quite controversial in many quarters because it questioned many of the basic assumptions upon which copyright law had long been based. In addition, you strongly argued against extending copyright to what were then new areas of protection, such as computer programs, but that was nearly 25 years ago.

Since 1970, our copyright laws, of course, have been fundamentally altered, first by the adoption of the landmark 1976 Copyright Act, which greatly strengthened Federal copyright, extending it even to unpublished works; second, by the 1980 statutory recognition of the copyright-protected status of computer software and data bases; and, finally, by the 1988 U.S. ratification of the Berne Convention for the protection of literary and artistic property, which is the principal international copyright treaty.

Now, have your views on copyright changed since 1970? [Laughter.]

Judge BREYER. Senator, the reason I laugh——

Senator HATCH. How can you get a bigger home-run ball than that?

Judge BREYER. The reason I laugh is that that article was awfully important to me, because what turned on that article for me was a job. The question was whether I would get tenure, so I put quite a lot of effort into that article.

Senator HATCH. Sure.

Judge BREYER. As you point out, Congress has passed a statute since then. The law has changed since then. I certainly would follow the statute rather than views, but I cannot resist saying this: that recently I did reread that section on the computer part, and what I thought at that time years ago—it was 25 years ago—I think a lot of the computer people thought that what we would all be doing is we would have like a big electricity plant or something in the middle of the city and everybody would be hooked up to this thing with wires, and you would have the terminal that went up to this big computer utility. And then, if that had been so, I said, well, you do not really necessarily need copyright to protect the program because the guy owning the utility, which would probably be regulated, could just charge. You would come to the same thing.

Then I put in a paragraph and said, you know, it would be different if what happened would be that everybody would have his own little computer, and the programs would be made by 100 or 1,000 different companies, and they would sell them off the shelf, and it would be really easy to copy them. And then I do not know what we would do.

So I do not know that I have to change that view because it was——

Senator HATCH. OK. With regard to the takings clause, I have to say that I find it most curious that our chairman is very protective of rights that are not enumerated in the Constitution, as are many on this committee, yet is, I hate to say it, Joe, somewhat disdainful of rights that are specifically mentioned in the Constitution. And I am very concerned, as are all Westerners and I think people all over the country, about the unlawful taking of property, whether by whole or by part, by Government and Government regulation, and taking it without just compensation. So those are matters that I just want to reemphasize a lot of us are concerned about on the other side of that issue even though I think the chairman makes some good points otherwise.

Various doctrines of justiciability, for example, standing, ripeness, and mootness, operate to help confine the Federal courts within our constitutional scheme of separation of powers, the adjudication of live claims raised by parties who have suffered concrete and particularized injuries that can be readdressed.

If these elements are diluted, the judicial power is expanded at the expense of the executive and legislative branches. Are you in agreement with the current Supreme Court case law in standing, ripeness, and mootness? And if not, what are your areas of disagreement?

Judge BREYER. The basic principles arise really out of article III. Article III of the Constitution says the judicial powers shall extend to all cases. It talks about cases, and it talks about controversies. And some of the rules that you mention are really designed to make certain that the courts decide real cases and real controversies. I think that those are principles that people agree upon.

I think there is another principle that they agree upon, and that is when you in Congress pass a statute, there are certain groups of people whom that statute means to protect. And there are also

a lot of people, when your statute is unclear in this respect, that might argue their way into protection.

Now, any of those people, if they are really hurt, should be able to bring a lawsuit, because those are people that you mean to protect, or at least arguably you mean to protect them, from the very kind of injury that you are worried about in that statute. I think most people would agree with that.

Then there are areas of what I would call gray areas in the law about whether the Court is pushing a little bit more this way or a little bit more that way in respect to how we go about making a little more concrete what I have just said generally. On those matters, I think I should like to reserve judgment, because I think that those are matters that are very much at issue in Supreme Court cases.

Senator HATCH. I thank you. I notice that my time has just about expired, but I appreciate your answers. I have really enjoyed listening to you.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Breyer, the Preamble to the Constitution makes it clear the purpose of our system of law is to enhance the lives of every American; in the Framers' words, "to secure the blessings of liberty to ourselves and our posterity." And at the White House ceremony, when you were nominated, you said quite eloquently that your goal as a Justice was to help make the Constitution and laws work for real people. So I would like to discuss with you several areas where your work made an impact on real people, on the rights of working women, on the safety of medications, on the quality of our environment, and also on the security of Americans from the threat of crime in our homes and on the streets in our communities.

Let's begin with the area of gender discrimination on the job, and one of your decisions, in particular, is a classic case involving two working women in the town of Peabody, MA, which illustrates what the law can mean in real human terms to the people involved. The case I am referring to is *Stathos* v. *Bowden.*

The plaintiffs, Stella Stathos and Gloria Bailey, worked in clerical jobs at the Peabody Municipal Lighting Commission. Both women devoted their entire working lives to the city agency, starting when they finished high school and continuing until they reached the retirement age. Ms. Stathos worked there 36 years before she retired in 1985; Mrs. Bailey worked there 41 years until she retired just last year.

In 1977, the Lighting Commission reorganized the plant where the women worked and drew up an organization chart which made it clear for the first time that men holding the positions equivalent to those held by Ms. Stathos and Mrs. Bailey were being paid about $12,000 more than the two women were receiving, and the women repeatedly asked for a pay increase to eliminate the disparity, and their requests were denied. They filed suit under two Federal antidiscrimination laws, and I am sure it took a lot of courage to sue their employer. It really was fighting city hall then. But in the end, they prevailed, and they won a jury verdict in their favor,

requiring the employer to raise their pay and pay them damages. And when the city appealed, you wrote an opinion upholding the trial court on several points of law and affirmed the award.

One line in your opinion seems to me to be particularly revealing on how you viewed the case. The defendants had argued that they were entitled to upset the verdict because the jury had not been asked to consider whether the defendants had acted in good faith. And in rejecting the claim, you wrote, and I quote, "We do not see how anyone could think that paying women less just because they were women would not constitute unlawful discrimination."

Can you tell us how this case is a reflection of your attitude toward equality, equal opportunity for women, and about your approach in interpreting the laws against sex discrimination?

Judge BREYER. Some things seem fairly obvious to me, Senator, and I think that was one of them. I suppose I was restrained in that. I guess it is fairly obvious, isn't it, that you are not going to pay a woman less for doing the same job as a man? What is very easy to me is I think of Chloe and I think of Nell, and they are going to be in the workplace. And, my goodness, I should come back and somebody should have to tell somebody that a woman is going to make less money for doing the same thing or is going to have some other onerous condition that a man would not have?

I mean, you try to explain that to Chloe or to Nell or to any other woman in the workplace. There is no explanation. And I would think in 1994 that that is rather clear to people. I would think it is rather difficult to make a defense saying, oh, dear, I did not know that. What else is there to say?

You see, I start with certain things that I assume is fairly obvious.

Senator KENNEDY. Well, I think there are many of us that would certainly agree with both your analysis and conclusion, but I think we also understand the reality in terms of the American workforce that too often that is not the case, and it is a real issue that is out there. Your response to that injustice I think was very well received.

I took the opportunity to call last night, I called Stella Stathos and Gloria Bailey, who still live up there in Peabody, and they said interesting things. They told us that after they won the case, the Lighting Commission accepted the outcome and showed them no animosity, which I thought was somewhat hopeful. And they also told me how proud they are that their case may open up the doors for other women in the same situation.

I asked each of them what they thought about you, which is rather an opening, and Mrs. Bailey said, "Did he ever do it the right way." And Mrs. Stathos said, "He really stood up for all of us," and I think that says it all.

You have been one of the leading scholarly commentators on administrative law and regulations, and while obviously these subject matters seem dry and arcane, they can be of enormous importance to every American. Americans have a right to expect that the food they eat and the water they drink and the medications they take and the air they breathe and the place where they work will be safe and free from dangerous substances or machinery. Congress passes the laws that set the broad standards in these and other

areas, but it is up to the administrative agencies like the EPA and the Occupational Safety and Health Administration and the FDA to adopt the regulations that spell out the standards to apply them in particular situations to protect health and safety.

This is an important work of administrative agencies, and a great deal has been written about your views on these subjects. Most of what has been written has been complimentary, but I would like to give you the opportunity to respond to some of the rest.

My question is: How do you respond to the suggestion some have made that you are hostile to the health and safety regulations?

Judge BREYER. I have said in my book that I think regulation is necessary in those areas. I guess if you wanted a simple statement, a simple statement, I wrote a book review not too long ago in which I tried—because it was written about the economics of AIDS. And I wanted to explain in that book what I saw as an important difference, as you have said, actually, an important difference between what you might call classical economic regulation, like airlines or trucks, and the regulation involving health, safety, and the environment.

I said as to the first, trucking, airlines, it is not really surprising that economics may help. It is not the whole story, but it tells a significant amount of the story because our object there is to get low prices for consumers. And maybe economics can help us.

When you start talking about health, safety, and the environment, the role is much more limited because, there, no one would think that economics is going to tell you how you ought to spend helping the life of another person. If, in fact, people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong? And what I ended up there saying is that in this kind of area, it is probably John Donne, the poet, who has more to tell us about what to do than Adam Smith, the economist. That is a decision for Congress to make reflecting the values of people.

So I tried to draw that distinction, and that does not mean all those areas work perfectly either. Everyone can have a lot of criticisms about every area, but, nonetheless, there is a difference in the way economics feeds into the enterprise. And that is what I have tried to spell out in that review.

Senator KENNEDY. Well, in two of the areas—one in the area of FDA and the other in the environment—you have not written many decisions on the FDA, but there is one that in particular you decided, *U.S.* v. *50 Boxes More or Less*. You voted to uphold the FDA's right to seize prescription drugs because the manufacturer had not presented adequate and well-controlled studies to demonstrate its safety and effectiveness and the conditions for which it would be prescribed.

What is significant about your opinion in this case is that you upheld the district court's grant of summary judgment to the FDA, even though the drug in question has successfully been on the market 35 years. But the manufacturer had not met the strict regulatory standards for proving the safety and effectiveness of the drug, and you upheld the drug seizure by the FDA.

It seems to me that that opinion could hardly have been written by someone who is hostile to health and safety regulations. My question is: Would you spell out the reasons for reaching that decision?

Judge BREYER. That decision reflected an administrative agency's rules and regulations that had evolved slowly over time. Those rules and regulations followed from a statute that Congress enacted. They might not have been perfect, but basically it was the administrative agency's job and the courts over time had ratified that job to work out a system that would remove dangerous drugs from the market.

The particular drug in question fell within that system, and I thought there—and I think now, and I think the law reflects that—that it is risky for courts to start monkeying around with a case-by-case deviation from a regulatory system that has been thoughtfully worked out over the years. You cannot say never with anything. But you have to remember that the basic statute designed to protect people has been worked out in Congress, delegated to the agency, and when that works fairly well over the course of time, it is not surprising that the law says follow what the agency says. That is what I think was basically going on there.

Senator KENNEDY. Your opinions in the environmental cases have earned high marks from the environmentalists in New England. One was very important in Massachusetts involving George's Bank, which is one of the most productive fishing areas. You upheld a district court ruling that former Interior Secretary James Watt could not auction off the rights to drill for oil in that fishing area because the Interior Department had not done an adequate environmental impact statement on the effect of drilling on those important fisheries.

Could you tell us about that decision and how generally your rationale basically would reflect your approach on environmental regulation?

Judge BREYER. I think that decision, again, reflects the need for courts to go back to the underlying intent of Congress, and I think it reflects our own court's view of what that intent was in respect to environmental impact statements. Basically, there had been an environmental impact statement that was going to permit—the Interior Department wanted to drill for oil off George's Bank. But between the time they first looked at it and the time it came up to our court, everybody had changed his mind about how much oil was likely to be there. They first thought billions of barrels. They second thought hardly any.

The question was: Do they have to go prepare a new environmental impact statement if they still want to drill? They did still want to drill. Our court said if you do, you better prepare a new statement. Why? Because there has been such a big change. You might want to hurt the environment if you are going to get billions of barrels, but, really, do you really want to hurt the environment for a little bit?

Now, what had been argued on the other side of that case was: Well, we will do the statement; just let us go forward with our auction in the meantime. But we said no, that is not the purpose of the environmental impact statement. The purpose of that state-

ment is to make this great bureaucracy think about this hard before the gears start in motion.

So do not go let out the bids and everything and then write the statement, because once the agency is committed to the action, it is too late to write statements.

The very purpose of the law, to protect the environment in this area, is to get the statement written before the agency becomes bureaucratically committed to a course of action that could hurt the environment. And that is what was going on in that opinion.

Senator KENNEDY. Well, it is a good example of how sound environmental regulation can protect the public interest.

I would like to introduce into the record a letter, Mr. Chairman, from Douglas Foy, who is the executive director of the Conservation Law Foundation, certainly the leading public interest environmental law group in New England. Mr. Foy writes in part:

> Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore.
>
> Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

To which I can add that the first circuit's loss is the Nation's gain.

The CHAIRMAN. Without objection, it will be placed in the record.

CONSERVATION LAW FOUNDATION,
Boston, MA, June 30, 1994.

TO WHOM IT MAY CONCERN: Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore. The Court's line of decisions on the obligations imposed by NEPA are leading precedents, reflecting a penetrating understanding of the law's requirements and of agencies' cavalier efforts to avoid its application.

Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. Much of the development of environmental law in the next decade will revolve around the application and enforcement of pivotal federal laws (such as the Clean Air Act, National Energy Act, Magnuson Act, and ISTEA), by agencies, in the states and regions. Stephen Breyer is precisely the kind of judge to whom we should entrust review of agency compliance with those laws. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

Sincerely,

DOUGLAS I. FOY,
Executive Director.

Senator KENNEDY. Turning to another area involving the criminal justice system, as you know, Senator Thurmond and I worked for many years with Chairman Biden to pass the Sentencing Reform Act of 1984, the law that abolished the Federal parole and created a sentencing guidelines system in the Federal courts. And with all the talk about truth in sentencing, it is important to remember that we created truth in sentencing at the Federal level 10 years ago.

Before that time, the sentencing system was a matter of law without order; judges in two different courtrooms sentencing two equally culpable defendants might hand down two completely different sentences. One defendant might get 10 years, another might get probation, and there was nothing the prosecutors could do about it. And because of parole, the sentence imposed by the judge had little to do with the time the defendant actually served, and many criminals served only a third of their sentences even in cases involving violent crimes.

This system led people to lose faith in the ability of the legal system to do justice and protect the interests of victims of crime. So we abolished parole in the Federal system and created a commission to write sentencing guidelines so that criminals who commit similar crimes will get similar sentences and actually serve the time they get.

You served as one of the first members of the commission. You helped forge the key agreements that got the job done. These guidelines provide for tough, no-nonsense sentences, increasing the time served by violent criminals and by white-collar corporate criminals who used to get special treatment in the Federal courts.

Could you briefly describe how the guideline system achieves truth in sentencing and why you think that truth in sentencing is an important goal.

Judge BREYER. I think that you decided, Senator, and the other Senators on this committee decided, at that time correctly, that the public was very confused about sentencing. A judge would sentence a robber to 6 years in jail, but the robber would be out after 2. Sometimes, the judge would sentence him to 18 years for a violent robbery, and he would be out after 6. Sometimes, the judge would sentence him to 8, and he would not be out until after 7. No one knew what in fact was happening, and the public's cynicism grew.

Therefore, you and this committee and the Congress decided that under the new Federal sentencing system, the sentence given by the judge would be the sentence that was served—not completely; there is 15 percent good time that could be awarded—but basically, the sentence given would be the sentence served, and that is what has happened.

The second basic objective that you had, which I think still is a worthy objective, I could describe like this: Many judges in the first circuit have a lot of experience in sentencing, and they do it well. Judge Toro, the chief judge in Massachusetts, across the hall, for many years would describe to me how he sentenced people, and it seemed very sensible. But then, a different judge in Los Angeles, let us say, an equally good judge, an outstanding judge, would sentence the same kind of person for the same kind of crime, and the results would be dramatically different.

So what you said is that the sentence should not depend on who the judge is. In New York, they would have a wheel and assign judges by lottery. Well, why would you need a wheel, unless people thought that the personality of the judge was playing a role in the sentence? Well, that should not be. And so you set up the Sentencing Commission to try to even that out. That is a hard job.

I think the Sentencing Commission has come up with guidelines that do tend to even that out. The basic philosophy of the statute,

the basic philosophy of the guidelines, is that they will write guidelines that apply to specific types of crimes and specific types of criminals, and judge, when you are sentencing a person for a particular kind of crime, a particular kind of person, you follow the guidelines. That gives you very little leeway—if you have an ordinary case. Judge, if you have an unusual case, you may depart from the guidelines. Use your own judgment there. But you have to give your reason, and it will be reviewable in a court of appeals.

Now, that is the basic theory. Guidelines, I know, are controversial. I know that these guidelines have not worked perfectly. But it does seem to me to be a step in the right direction toward more uniform justice and toward more uniform justice and toward more understandable justice so that people will understand that punishments are uniformly applied, and the punishment announced is the punishment that will be given.

Senator KENNEDY. Do you want to add anything with regard to whether the mandatory minimums have been additive and useful and helpful?

Judge BREYER. Well, what I have said publicly, Senator——

Senator KENNEDY. I was going to keep you out of controversy until that one.

Judge BREYER. This is a legislative matter. This is a legislative matter, and I think that Congress will in its wisdom determine that political matter. I have expressed in my writings sometimes some criticism of that.

Senator KENNEDY. I will include that excellent article as part of the record.

[Article follows:]

THE BREYER NOMINATION

Breyer on Mandatory Minimums

These 'Very Rotten Bananas' Should Be Discarded

Judge Stephen Breyer a founding father of the federal sentencing guidelines has not shied from openly criticizing their oft pummeled stepchild mandatory minimum sentencing statutes Breyer issued a stinging attack on mandatory minimums and the pernicious role he feels they have played in the criminal-justice system at an Aug 7 1993 panel discussion sponsored by the American Bar Association What follows are excerpts from Breyer s remarks

It s very difficult to discuss this issue because the public doesn t know the difference between the statutes and the guidelines and the other things And before you know it, it's turned into an issue of are you for crime or are you against it We re against it, OK We're against it

What I want to do is make four points from a tough anti-crime point of view The first is simply this It's important to keep in mind what statutory mandatory minimums are That s why I want you to read this report of the United States Sentencing Commission, this is not a bunch of liberal minded patsies

This is their report on mandatory statutory minimums And look at what they are What they are are about 60 statutes randomly passed by Congress from time to time when they felt, since 1790, the need to deal with a subject, a special subject

For example, if you cause a vessel to run aground by use of a false light it's a mandatory prison sentence of 10 years All right that was in 1790, that one I hope you aren t going to sell poison in China another mandatory minimum I certainly hope you re not going to engage in piracy

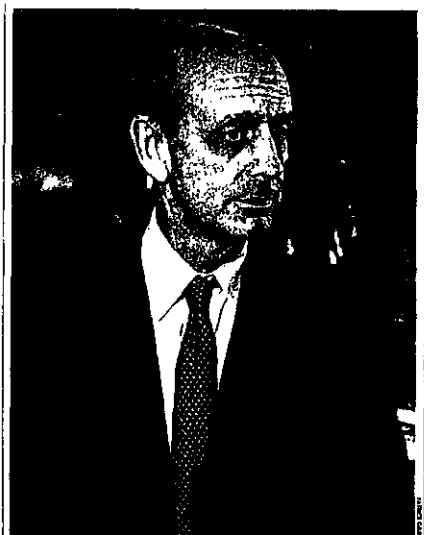
'A Mess in the Statute Books'

I mean, you know, you can look through these and they basically responded to some kind of problem Congress thought was important at the time, and the result is a mess in the statute books for which reason Congress set up the United States Sentencing Commission The United States Sentencing Commission went through every crime on the books And believe me it s an unbelievable nightmare the United States Criminal Code which I don t have to explain to you

And the commission wrote a whole bunch of penalties and they have mandatory statutory minimums for every crime Not just one every one of those things is mandatory The only difference is one it s a little bit more sophisticated so they don t quite give the dude who is paid $500 bucks to take in four kilograms of cocaine the same sentence as the big cheese In other words, they distinguish between the big cheese and the small fry And second they say Judge if you have a special case depart So there s out in the joints and that s what I want you to remember

My second point is that there are some things that are true of law since the beginning of history You cannot get a rule that has 100-percent application And that s why law, since the beginning of history has been a fight between rules called law and equity called fairness Treat like cases alike Make an exception for the special cases Different cases differently, equity

And we can ask Congress, we can ask Plato s geniuses we can ask anybody you want—no one will ever get a system of law that you don t have to have exceptions for And when we get into the criminal area where our perceptions of criminal



Judge Stephen Breyer openly criticizes mandatory minimum sentencing, in part because, he says, there always have to be exceptions.

law are supposed to comport with ordinary people's idea of what's moral and decent, you will always need the exception You will always need what we found at the commission

Ish's robbery even with toy guns a terrible thing? Of course, it's a terrible thing But what do you do with a real case when the person got a toy gun, got $400 for a bank robbery, [and] it turns out he had an IQ of about seventy His only friend in the world is his dog The dog needed an operation He went to the vet, he wouldn t do it on credit He needed the money He asked for a bank loan They wouldn't give it to him So he got his toy gun robbed $70 from the bank to give the dog the operation, turned himself in to the FBI when the dog died anyway

OK you give him life? I mean this is weird, you say That s what equity is there for That's what the discretion of the unusual case is there for That's why we don't want the statutory minimum because, because there will always be exceptions, always

Now, what happens when you stop following the guidelines which say mandatory minimum for everything but if it's an unusual case, make an exception? What happens if we say no? We're throwing that out of the window We're going to say never an exception

I'll tell you what happens, three things The first thing that happens is just what you heard, which is pathetic cases come along that nobody would think this should be the sentence, and so you get a considerable degree of unfairness The second thing that happens is examples nobody will tell you about, but they're there the opposite kind of example

Because you cannot tell human beings to do things that they feel are totally unfair, and if you tell judges or lawyers or prosecutors who are human beings to do something they think is terrible, they won't do it They'll figure a way out And, my goodness, I mean there is out in the joints of the criminal law, always out in the joints

Oil number one, the prosecutor decides not to prosecute Oil number two, the jury won't convict Oil number three, sentencing So we stop any oil in the sentencing part, well you'll just push it into the other two parts The jury won t convict, and the prosecutor won t prosecute

That's why I found what's really here of interest to me is in this commission report It says that when they looked through the presentence reports of all the people who should have gotten minimums, they found the increased penalty was not sought or obtained 63 percent of the time No weapon charge in these things with mandatory minimum, although a weapon was [found] 45 percent of the time

So I say to the people who actually are interested in tough law enforcement, what you ll get is sometimes they ll follow it and then you ll get an unfair case, and more often the prosecutors won't follow it, and then you'll discover no penalty or the jury won't convict, and [there will be] no punishment at all And if you think that s theoretical or isn't happening, what you do is read this report of the United States Sentencing Commission, and you will see that's exactly what's happening And, finally, what you'll discover as a result of this mess—because that s what I would describe it as, a mess—you'll discover not only unfairness, not only failure to punish where there ought to be some punishment, but you ll also see everybody sweeping everything under the rug Because you're not going to find prosecutors really saying publicly they don't prosecute or judges saying, well I sort of cut him a little here or there, whatever it is

Rather what grows generally is you have a law that can't really be enforced and when you have that, you have disrespect for law And you have the public feeling something is going wrong, but you're not quite sure what And you have everyone acting a little bit hypocritically

Well, I've just been to a conference in Switzerland where people were talking about what goes on in other countries And for a long time, we've seen a lot of countries that had great legal systems on paper, but, in reality, the reality does not comport with the paper

Now, you can get by with a little bit of that in any system But when you build in your criminal-law system a set of rules that people inevitably, with their ordinary human perceptions of what is just, will feel compelled to distort or ignore, and you get the unfair results

I suppose that's why I feel so strongly about it, and why I think there isn't much to be said on the other side So my last point is, well, what would you tell the congressman to say who has to deal with a public that is worried about law and order?

I'd say, first of all, we do have a system of law and order, we do have a kind of mandatory minimum maximum sentence for every crime, but it is one that has oil in the joints and allows departures and makes distinctions between males, small fry and big cheeses That's called the sentencing guidelines

Second, I'd say there isn't much need, because there's no evidence, for yet stricter laws There are departures allowed under the guidelines Only about 7 percent of the judges have departed, maybe 8, maybe 9 Compare that with the 40 to 60 percent of the prosecutors who aren't prosecuting under these mandatory minimums if you're interested in being tough on crime

'Odd Patchwork'

And I d say then go out and don't call these mandatory minimums. Call them the odd patchwork of statutory nonsense, talk about phasing them out while you give power to the commission Have the commission write reports on how it's going so you can supervise whether or not law's getting weak Think about the prison capacity and what is it going to do when everyone applies them across the board 100 percent Talk about rationality and the effectiveness of *having a criminal justice* system that does punish people who deserve to be punished and has enough oil in the joints so that it can work effectively

And, finally, if you re stuck to say anything else, remember Alfred Kahn Do you remember Alfred Kahn? He was President Carter's inflation fighter

He wasn't supposed to use the word recession, remember? You can't use the word *recession*—that was what the president said He said, "OK, I won t use the *word recession* I'll call it a banana "

All right, let's not call them mandatory statutory sentences We'll call them bananas and we'll say we've got to get rid of these bananas because they are very rotten bananas, and they're tending to infect the criminal-justice system And I think, [illegible] point of view of people who are interested in an effective system and also a rule of law that people will be able to enforce fairly it seems fairly obvious to me that we ought to get rid of them □

Senator KENNEDY. My time is almost up, Judge Breyer, but I want to offer a brief comment about your extraordinary career of public service, and that is that throughout your life, you have dedicated yourself to the public interest. You have served as a law clerk to Justice Goldberg; from there, you went to the Justice Department, where you developed creative ways to use the antitrust laws and fight housing discrimination. When you became a professor at Harvard Law School, you did not retreat into an ivory tower; you focused on the tough problems of economic regulation and making government work better. And whenever the call to public service was heard, you answered, helping Archibald Cox to investigate Watergate, helping the Senate address complex regulatory matters, and serving with great distinction as chief counsel of this committee.

And when you became an appeals court judge, your commitment to the administration of justice did not stop there; you took on the different task of adopting tough, fair sentencing guidelines, and you continued to teach law to young people and to analyze the toughest problems of the day.

That kind of work is not glamorous. It does not get you a lot of publicity or honors. But it is the kind of work that helps real people, and it is the kind of work that will make you a first-rate Justice on the Supreme Court, where you will enhance the lives of Americans for years to come.

Judge BREYER. Thank you, Senator.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. It is also the kind of work that allows me as chairman to get some of the first-rate minds like the two professors sitting behind me to come and work for little or nothing because people like you end up on the Supreme Court. So I thank you for that, for saving the taxpayers a lot of money by getting first-rate staffpersons to take cuts in salaries to come and work with us.

Judge, I thank you for this morning, and as I indicated, what we will do now, since we have a very important vote that will take place on the floor of the Senate at 2:30, we will wait and reconvene at 2:45, at which time, the first order of questioning will be Senator Thurmond and then Senator Metzenbaum.

We are recessed until 2:45.

[Whereupon, at 12:56 p.m., the committee was recessed, to reconvene at 2:45 p.m. this same day.]

AFTERNOON SESSION [2:58 P.M.]

The CHAIRMAN. Welcome back, Judge.

Judge BREYER. Thank you, Mr. Chairman.

The CHAIRMAN. We now turn to the senior member of this committee, our one and only chairman, Senator Thurmond.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman.

Judge Breyer, we are glad to have you with us.

Judge BREYER. Thank you.

Senator THURMOND. I am glad to see your fine family here with you.

Judge BREYER. Thank you.

Senator THURMOND. Today, the Judiciary Committee begins hearings to consider the nomination of Judge Stephen Breyer to be an Associate Justice of the Supreme Court of the United States.

If confirmed, Judge Breyer would be the 108th person to serve as a Justice and is the 26th Supreme Court nominee which I have been privileged to review during my service in the Senate.

A Justice on the Supreme Court occupies a life-tenured position of immense power. As members of the Judiciary Committee, we have a responsibility to our Senate colleagues and to the American people to closely examine Judge Breyer's qualifications. It is our solemn duty to ensure that a nominee to the Supreme Court possesses the necessary qualifications to serve on the most important and prestigious Court in America.

Over the years, I have determined the special criteria which I believe an individual must possess to serve on the Supreme Court, and they are as follows:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second, courage. A nominee must possess the courage to make decisions on difficult issues according to the laws and the Constitution.

Third, compassion. While a nominee must be firm in his or her decisions, mercy should be shown when appropriate.

Fourth, professional competence. The nominee must have mastered the complexity of the law.

Fifth, proper judicial temperament. The nominee must have the self-discipline to prevent the pressures of the moment from disrupting the composure of a well-ordered mind, and be courteous to the lawyers, litigants, and court personnel.

Sixth, an understanding of and appreciation for the majesty of our system of Government—its separation of powers between the branches of our Federal Government; its division of powers between the Federal and State governments; and the reservation to the States and to the people of all powers not delegated to the Federal Government.

Mr. Chairman, I have known Judge Breyer and followed his career for 20 years, since his first days as special counsel on the Administrative Practices Subcommittee. Of course, he later served as chief counsel for the Senate Judiciary Committee and was most cooperative in that role.

Since December 1980, Judge Breyer has served with distinction on the U.S. Court of Appeals for the First Circuit and as chief judge of that circuit since 1990.

In 1985, then-President Reagan appointed Judge Breyer as one of the three judge-members of the U.S. Sentencing Commission, a post he held until the expiration of his term at the end of October 1989. Under the very able, continuing leadership of its chairman, Judge William W. Wilkins, Jr., of South Carolina, the Sentencing Commission accomplished on schedule the formidable task of devising a workable set of guidelines to govern the imposition of sentences for Federal crimes.

I was pleased to coauthor the law which created the Sentencing Commission, along with Senators Kennedy, Biden, Hatch, and others. Judge Breyer is the type of individual who we envision would serve on the Commission to make our goal of effective sentencing reform a successful reality. In this regard, Judge Wilkins and others have told me of the invaluable contributions Judge Breyer made in assisting with drafting the initial guidelines and in helping to explain them to others, particularly to Federal judges who must interpret and apply them.

Sentences now imposed under the guidelines are fairer, more uniform, and certain. They are also tougher in the areas of violent crime, major white-collar crime, and major drug offenses—areas where past sentencing practices often were too lenient.

Mr. Chairman, Judge Breyer has come a long way from the summer in 1958 he spent as a ditch digger for the Pacific Gas & Electric Co. I recall his capable work on the Senate Judiciary Committee and as a Federal judge on the U.S. Court of Appeals for the First Circuit. While I may not agree with Judge Breyer on every issue, I have found him to be a man of keen intellect, and he appears to possess the necessary qualifications to serve as an Associate Justice of the U.S. Supreme Court.

Mr. Chairman, this concludes my opening remarks, and I will use the remainder of my time during this round for questioning Judge Breyer.

The CHAIRMAN. Senator, if you will yield for a moment, I would like the record to show, to emphasize what you stated at the outset. I will put it another way: One out of every four Justices who ever served on the Supreme Court in the history of the United States, you oversaw the hearing. One out of four. That is astounding.

What are you going to do the next 25 years?

Senator THURMOND. I expect to have a part in a good many more in the future. [Laughter.]

The CHAIRMAN. Good. All right. I thank you for yielding. One out of four. That is incredible. Twenty-six percent of all the Justices, you have voted on.

Senator THURMOND. Judge Breyer, I have some questions. If there are any that you feel it would be improper to answer, well, you say so. Otherwise, I will propound the questions.

The role of the judicial branch of Government is to interpret the law. Unfortunately, there are times when some judges go beyond that authority and legislate from the bench rather than interpreting the law before the Court.

Where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking?

Additionally, if confirmed, what approach could you use in resolving whether or not a decision was the type that should be made by a judge or an elected legislative body?

Judge BREYER. Thank you. I think that is a good question. I think that is an important question, and the short answer to the question is: Of course, a judge should not legislate from the bench. The difficult part of the question is how you know. How do you know when there are broad, open areas of law? And I think you

ask yourself two things. Particularly if it's a statute, you ask yourself who did Congress give the power to, to fill in the blanks?

One strong possibility is they gave it to someone else like the executive branch or they kept it for themselves.

Another question you ask is: Can I, in fact, justify this interpretation of the statute through its language and through its history? And if the answer to that question is no, then there is a danger signal that you are legislating, which you should not do.

Senator THURMOND. Judge Breyer, in *McCleskey* v. *Kemp,* the U.S. Supreme Court held that a capital defendant who contested his death sentence on the basis of racial discrimination is required to prove that the decisionmakers in his own case acted with discriminatory purposes. The Court rejected the use of statistics from unrelated cases to establish racial discrimination in the imposition of the death penalty.

Recently, the House of Representatives adopted a provision in its crime bill which would overturn the *McCleskey* decision and allow a capital defendant to challenge and avoid his death sentence based on statistics from unrelated cases.

Do you believe that statistics on race from unrelated cases should be used and, further, are reliable indicators to determine the appropriateness of the death penalty?

Judge BREYER. I would say, Senator, that there are statistics and statistics. Obviously, statistics must be reliable. Obviously, it is easy to use statistics that are not reliable to prove almost anything. I do not think there is an absolute rule that bars the use of statistics, where they are reliable, in proving a legal point.

In respect to the particular law that you are discussing, which is now legislation pending before Congress, I think that, of course, is Congress' decision, and as Congress decides it, so should the courts enforce it.

Senator THURMOND. Judge Breyer, if confirmed, you will succeed Justice Blackmun, who recently stated his belief that capital punishment is inherently flawed under the Constitution. While I disagree with his pronouncement, I want to know if you find his position reasonable in light of Supreme Court decisions in this area and your own personal reflections on whether capital punishment is constitutional under appropriate circumstances?

Judge BREYER. Senator, if a judge has strong personal views on a matter as important as the death penalty, views that he believes might affect his decision in such a case, he should, perhaps, if they are very strong—and this happens sometimes. In lower courts I have seen it happen where you feel you have a personal view that does not necessarily reflect the law, and you might take yourself out of the case. I have no such personal view in respect to the death penalty. So I would sit on such a case.

In respect to the constitutionality of the death penalty, it seems to me that the Supreme Court has considered that matter for quite a long time, in a large number of cases. And, indeed, if you look at those cases, you will see that the fact that there are some circumstances in which the death penalty is consistent with the cruel and unusual punishment clause of the Constitution is, in my opinion, settled law. At this point it is settled.

Senator THURMOND. Judge Breyer, it is likely that Justice Blackmun is most widely known to the public as the author of *Roe* v. *Wade*. What was your impression of his majority opinion in that landmark decision? In particular, give us your thoughts on where he draws the line at different points during pregnancy as it relates to the State's interest in the regulation of abortion-related services?

For instance, do you agree that the first trimester of pregnancy is distinctive and that the State should not be able to prohibit abortion during that period?

Judge BREYER. You are asking questions, Senator, that I know are matters of enormous controversy. The case of *Roe* v. *Wade* has been the law——

Senator THURMOND. Speak a little bit louder.

Judge BREYER. Yes; the case of *Roe* v. *Wade* has been the law for 21 years or more, and it was recently affirmed by the Supreme Court of the United States in the case of *Casey*. That is the law. The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.

Senator THURMOND. Judge Breyer, article I of the Constitution gives specific legislative powers to the Congress. One particular power granted to the Congress is the power to tax. Members of Congress are elected by the people and are accountable through the ballot box for their support or opposition on tax matters.

Do you believe that Federal judges who serve for life and are unaccountable to the American electorate should have the power to order tax increases or new taxes as a part of a judicial remedy?

Judge BREYER. Again, Senator, I think there it is not possible to be categorical. I think much depends upon the circumstance. I know that the Supreme Court has held that there are circumstances in which such tax orders are permissible, and, therefore, I start with the assumption that that is the holding of the Court. And since the Court has held that, there could be such circumstances. Exactly what they are, I cannot tell you at this moment.

Senator THURMOND. Then Congress, of course, would have to change it if we think it is improper.

Judge BREYER. Yes, that is correct. That is correct.

Senator THURMOND. And that is what I hope we can do.

Judge Breyer, as an original judge-member of the U.S. Sentencing Commission, you were closely involved in drafting the sentencing guidelines. Congressionally enacted mandatory minimum sentences are now applied through the sentencing guidelines.

In November 1992, while chief judge of the first circuit, you prepared a memorandum for Phil Heymann, who recently served as President Clinton's Deputy Attorney General. In that memo, you outlined major criticisms of the guidelines which you believed were valid.

The criticisms in your memorandum are as follows: First, mandatory minimum sentences in statutes distort the guidelines. Second, the guidelines insufficiently encourage departures. Third, the guidelines are too complicated. Fourth, the guidelines are not re-

sponding sufficiently to empirical research. Fifth, the guidelines pay inadequate attention to intermediate punishments.

Judge Breyer, what prompted you to prepare that memorandum, and do you consider it an accurate reflection of your current views on the guidelines?

Judge BREYER. Senator, basically that memorandum was a summary of a speech that I gave to a group of judges in Williamsburg, VA, and the memorandum was attached to the whole speech, but I thought a summary might be appropriate.

I think the actual wording of it was a little more tactful, possibly, than it was listing criticisms and was saying to some extent they are justified, to some extent they are not justified.

I think those are a list of the criticisms that have been made of the guidelines. I think to some extent they are justified. I think there is room for improvement. They are not fatal to the guideline effort, and I think Judge Wilkins would agree, frankly. I think Judge Wilkins has always been on the side, as of I—we have always seen eye to eye on this, and basically we think that we would like it, as former Sentencing Commissioners, if Congress really would delegate to the Commission the authority to create the sentence. Then if the Commission does not do a good job, then Congress would change it.

But Judge Wilkins and I, I believe, have always thought we would like to see that authority delegated to the Commission.

Senator THURMOND. I believe you also suggested here somewhere, too, that moderate judges be appointed to the Commission. Is that correct?

Judge BREYER. Yes; it seems to me that in order to build the—the Commission was given an awfully difficult job, and one of the difficulties is, of course, you are operating in a world where the judges are used to deciding all these things on their own. And it is not surprising that some are suspicious of a new entity. And to the extent that you could bring sort of moderate judges, not—you know, just judges with experience in sentencing and so forth, and you bring them on to the Commission. I think it helps win acceptability for the Commission within the world of the judiciary.

Senator THURMOND. Would you care to tell us what kind of person you consider a moderate judge?

Judge BREYER. I think a good person, Senator. I am in favor of moderate judges. I would not like to name names.

Senator THURMOND. Judge Breyer, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Judge BREYER. I basically think that the judge has to believe more and it has to be true that there is more. The judge cannot act unless there is more than a simple belief that there is a social problem. Rather, it must be the case that there is a statute or the Constitution itself that creates a law that perhaps another branch of Government would be better off implementing the sub-laws or statutes or regulation. But basically the judge's decision must be tied back to a law, just as the greatest law which has lead to the greatest change is the 14th amendment to the Constitution. And judges who implemented that great law, which promised fairness

to all Americans, were not following their own point of view. They were, rather, carrying out the basic promise of fairness that was written into the Constitution. And it is that grounding of law that I think made those decisions lawful, justified, and effective.

Senator THURMOND. Judge Breyer, I was pleased to learn of your concerns with excessive regulation. There has been criticism that, too often, regulatory bodies go beyond the issuance of regulations pursuant to a congressional delegation and actually begin legislating.

What steps, if any, do you believe that Congress and the courts each should take to curtail improper or excessive regulations?

Judge BREYER. The primary audience to which I have addressed what I have written on this subject is the Congress, the regulators, the environmentalists, the health groups, the industry—those who are affected and who have a direct stake in the regulation. And basically there I have said this is what the situation seems to be. If you agree, fine. And then it is up to you to implement that, primarily through rules and regulations and statutes, not judicial decisions. And they either will or will not agree.

Senator THURMOND. Judge Breyer, the free exercise clause of the first amendment guarantees that Congress shall make no law prohibiting the free exercise of religion. In effect, this secures to each American the ability to exercise his or her religion free of encroachment by the Government. Proponents of in-home education often do not use the State schools because of their desire to include religious instruction in their children's curriculum.

Would you discuss your views on an American's right to educate his or her children in the home as it relates to the Government's interest in regulation in-home education?

Judge BREYER. I think, Senator, that that right is an important right that, I think it is widely recognized, stems from the first amendment to the Constitution, which is designed to protect what is so very important to every American and every American's family: the right to practice your own religion, the right to pass on your religious beliefs to your children. That is there, and it is protected in the expression of free religion.

The Government, of course, has some interest to see that education is actually taking place. There is always a Government interest in making certain that there is some kind of education really going on. To balance those two things is difficult and requires fine judgments in particular cases.

When I wrote my case on the subject, the law itself, which since at the constitutional level changed, required that balancing. You in Congress have written a statute that goes back to that balancing approach. I can go no further because I think that that statute is likely to be the subject of litigation.

Senator THURMOND. Judge Breyer, under the 10th amendment to the Constitution, powers not delegated to the Federal Government are reserved to the States and the people. I have been deeply concerned that this amendment has undergone significant erosion as the Federal Government continues its expansion into every facet of people's lives.

Do you believe that the 10th amendment is an effective limitation on the expansion of the Federal Government?

Judge BREYER. I think there are two separate questions there, Senator. The simple answer is yes, but there are two parts to the answer.

To what extent does the Constitution itself and the 10th amendment prevent Congress from acting? And I think there most people would believe there is some kind of a core in respect to State activity, particularly at the governmental level, protecting, say, the State government from others saying whether it should have one house in a legislature or two houses in a legislature.

The way in which the State sets up its own governmental institutions, whether that is protected by the 10th amendment or the republican form of government clause or something else is a matter of debate. But I think it is widely accepted there is some range of constitutional protection.

Beyond that, although the Supreme Court in the *League of Cities* case began to expand the area of constitutional protection to include wages and hours of municipal employees, that sort of thing, it then retracted that view in *Garcia*. And where we stand today is, yes, there is protection, but it seems that most of the degree of protection is up to Congress. After all, Congress talks to the mayors, talks to the Governors, develops programs of cooperation, decides what the role of the State or the city will be, and thus it becomes primarily a congressional decision to tailor programs that appropriately recognize the roles of the States.

Senator THURMOND. Related to this, unfunded Federal mandates are an overwhelming financial burden upon the States. What is your opinion of unfunded Federal mandates upon the States?

Judge BREYER. I smile a little, Senator, because it seems to me that that is an excellent example of your last question. Indeed, I know there are great difficulties, and I know you are more familiar with those difficulties than I by quite a long shot. And you are the person who is very sensitive to the problems of the towns and the States and the cities that may arise from those mandates. And I do believe that those problems are best translated—indeed, I think that is the state of constitutional law at the moment, as I understand it. I am hesitant because I am not an expert on this point. But basically that is transmitted through Congress, and Congress will give appropriate recognition to that kind of concern.

Senator THURMOND. As you may know, Judge Breyer, I am the ranking member of this committee's Antitrust, Monopolies, and Business Rights Subcommittee. As a judge who has written extensively on the antitrust laws, could you please summarize your views very briefly on the purposes and goals of the antitrust laws and their importance to the competitiveness of U.S. business, both here and abroad?

Judge BREYER. Senator, I was quite lucky about, I guess, 1½, 2 years ago now and was at this conference I spoke of earlier with 500 Russian judges, and they are very interested—there I would get into a lot of private conversations. And they are very interested not only in basic constitutional protections but also economic organization. The point that I would frequently make in those conversations is that if you are going to have a free enterprise economy, if you are not going to have the Government running everything, then you must have a strong and effective antitrust law.

If you are not going to regulate airlines, you must have a strong antitrust law for airlines. The reason is that antitrust law is the policeman. Antitrust law aims, through the competitive process, at bringing about low prices for consumers, better products, and more efficient methods of production.

Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others do not. The justification lies in the fact that that kind of economy is better for almost everyone, and it will not be better for almost everyone unless the gains of productivity are spread. And the gains of productivity are spread through competition. That brings about low prices, better products, and more efficient methods of production. And that is what I think antitrust law is about, and that is what I think that policeman of the free enterprise system has to do. It is called protect the consumer.

Senator THURMOND. Judge, I believe my time is about up. I would just ask you this: I believe you attended Oxford and graduated there?

Judge BREYER. Yes, sir, I did.

Senator THURMOND. And you found that compatible with the military?

Judge BREYER. Yes, sir, I did. [Laughter.]

The CHAIRMAN. I think your time is up, Senator. I was about to say you can have as much time as you would like.

Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Judge Breyer, nice to see you this afternoon.

Judge BREYER. Thank you.

Senator METZENBAUM. Let me start off by saying where I am. I expect you to be confirmed, and I expect to vote for your confirmation.

Judge BREYER. Thank you.

Senator METZENBAUM. You are clearly a man of integrity, exceptional legal skill, high intellectual ability. You have been widely praised for your political and academic credentials. You have had some very able spokespersons speak on your behalf today, four very distinguished and well-respected Members of the U.S. Senate.

There is not much question about the fact that you have exceptional legal credentials. I must say, however, that I am concerned about your position and your views on the fair competition laws which affect the day-to-day lives of all Americans. I am talking about the antitrust laws that Senator Thurmond just raised with you, the antitrust laws that are in place in order to keep prices low and products safe for consumers, to make the competitive market work.

Those same laws protect small businesses against abusive corporate giants and prevent price-gouging monopolies and cartels from harming consumers.

You have been outspoken with respect to the consumer protection laws known as antitrust, but your record suggests, unfortu-

nately, to my mind, that you almost always vote against the very people the antitrust laws are in place to protect.

A 1991 study in the Fordham Law Review reported that in all 16 of your antitrust decisions, Judge Breyer voted against the alleged victim of antitrust abuse. You seem to see antitrust laws in terms of abstract economics. And it seems that theories of economic efficiency displayed in complicated charts, one of which I will use at a later point in the hearing, and graphs replace individual justice for small businesses and consumers.

As you well know, that is not my view of antitrust. I see it as the protector of mom-and-pop businesses and the guardian of consumer rights.

Let me be clear. To me, antitrust is not some mysterious legal theory that only lawyers can understand. Antitrust is just an old-fashioned word for fair competition. It is a word that made sense to the average American 104 years ago when the first antitrust law was passed. At that time, trusts, which were cartels of big companies, such as oil companies, railroads, and other giants, fixed prices or cut prices or boycotted small businesses or used whatever underhanded tactics it took to ruin their rivals. These trusts were so ruthless that small businesses and consumers did not stand a chance against their power.

So Congress came along and outlawed trusts and cartels and monopolies, in President Wilson's words, to protect "the little man." John Sherman, a Republican Senator from my own State, wrote the first antitrust law in 1890 to give every American a fair shot at starting a business and getting a square deal as a consumer. President Teddy Roosevelt, the Nation's legendary trust buster, used the antitrust laws as a weapon against corporate abuse.

Today, I am frank to say that many public officials have forgotten what the antitrust laws are supposed to do. They have let high-paid lawyers and corporate giants convince them that our only legal yardstick should be whatever is good for business. They would have us believe that antitrust lawsuits are too complicated, too difficult to understand for juries of average Americans, and that economic theory is more important than common sense and experienced business judgment. To me, that kind of thinking is simply absurd.

I can tell you from personal experience as a long-time businessperson and as chairman of the Senate's Antitrust Subcommittee that small businesses and consumers rely on the protection of our antitrust laws. I think it is important that in this hearing in some way this Senator try to sensitize you to the fact that, even today, small businesses and consumers are threatened by unfair competition from big businesses.

Fortunately, we do not need new laws to protect them. What we need are judges with the wisdom and courage to use those laws to stop corporate big-wigs from abusing their market power.

While I will begin my questioning of you by focusing on antitrust, I would like to point out another matter that troubles me. As you know, Judge, I have made clear my concerns about your participation in cases that involve environmental pollution issues, given your investments in Lloyd's of London. In your opening statement this morning, you very properly this morning promised to divest

yourself of all insurance holdings as soon as possible, and I am frank to say that I appreciate your sensitivity and willingness to respond to some concerns that I had expressed to representatives of the White House about that subject and about any appearance of impropriety.

I still have a number of questions concerning your involvement in Lloyd's and the distinctions you drew when recusing yourself from asbestos. This one I had difficulty in understanding, why you recused yourself in the asbestos cases but not other environmental cases.

Now, I am frank to tell you, Judge, that you are the first nominee to come before us who is actively involved in Lloyd's of London, and I got to tell you, I am grateful to you. I have learned more about Lloyd's of London in the last several days than I learned in my entire previous 77 years. I thought that I knew something about what was happening in the business world and even in the insurance area. But I am frank to say that by my studying that which I understand to be approximately 100 investments of yours in different syndicates at Lloyd's, that is pretty unusual for an American businessperson, because each investment involves unlimited liability that can vastly exceed the actual amount of money invested.

I am frank to tell you I am not sure whether the 100 figure is right. At one point, I heard it was 69, and at one point, I heard it was something else. But I gather sometimes one syndicate rolls over into another syndicate, and it is a question whether that is two numbers or one number.

While most of your syndicates have been closed, and an approximate amount of profit or loss ascertained, one syndicate that has become a high-profile issue—Merritt 418, which was the syndicate from 1985—cannot be closed. Merritt 418 includes extensive environmental pollution coverage that no one has been willing to take over. So, as I understand it, you remain personally liable for a portion of Merritt 418's massive losses, and we are not talking about insignificant amounts of money. We are talking about significant hundreds of thousands of dollars, as I calculate it.

You may remain liable on that investment sometime into the future, and I do not think you know how long that will be or I know, but I think you are hopeful to get out of it as soon as possible. And you made that clear in your opening statement. But I also understand it is a rather difficult one to get out of.

At a later point in the hearings, I intend to ask you about environmental decisions which might affect you financially. For today, I will go back to the subject of antitrust, but in a subsequent round of hearings, I do expect to get into that entire matter.

Coming to the question of antitrust, I must say I am extremely troubled by your reasoning in *Town of Concord* v. *Boston Edison*. You overturned a jury verdict and a district court judge's review of that verdict. As I understand the case, the jury found the consumers in Concord, MA, were overcharged on their electricity bills by $13 million. That verdict was trebled to $39 million as an antitrust penalty against Boston Edison, which sold Concord 95 percent of its electricity.

After hearing testimony for 13 days from experts on both sides, the jury found that Concord's small, municipally owned electric company could only get most of its energy from Boston Edison, a huge power company which generates, transmits, and sells electricity. Boston Edison serves the communities adjacent to Concord. The jury found that by raising Concord's wholesale rates, which Federal regulators automatically rubberstamp and only review later, Boston Edison unfairly raised Concord's costs and actually stole some of their customers as well.

In overturning the jury decision to provide the consumers of Concord $39 million, you wrote, "Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm."

Here the regulation could not bring back lost business. The district court judge found the jury had ample evidence of competitive harm. And my question is: In view of the jury verdict, the court's verdict, the position that the city of Concord and the people of that community were in, why did you disregard all of those facts and replace them with a graph and a chart that are completely hypothetical? Let me show you the graph and the chart. It says here—I do not know what the chart means. It says up there *"Town of Concord* v. *Boston Edison,"* and then it says "Total M's cost price." Down here it says, "It costs $1 to make a widget. A single monopolist M will maximize his profit by setting a price of $6, and selling five widgets, his profit is $25 [represented by the area RSTU]," and it goes on.

Now, frankly, I do not know whether the people of the city of Concord had too much interest in the widgets, but I think they were very interested in the $39 million verdict that they had and, frankly, that you took away from them. And I wonder if you could explain how you arrived at this conclusion to reverse the lower court in that case?

Judge BREYER. I think, Senator, that I should start with a general point, a negative general point, then a positive general point, and then something rather specific.

The negative general point is, of course, I don't count up how many victories are for plaintiffs or defendants and do statistics. Sometimes plaintiffs did win in antitrust cases I have had. And, as you point out, defendants often won. The plaintiff sometimes is a big business, and sometimes is not. The defendant sometimes is, and sometimes is not.

What I am interested in is is the case correct as a matter of law, and I consider the cases one at a time, and I consider the merits, the legal merits of the arguments in front of me.

My general positive point is this, where I hope and expect very much that you will agree, because, frankly, I have read what you say often on antitrust, and you are going to think that this comes from things that you have said to business people, because I have read them and I think it does.

But there is a keystone to antitrust, and you have said it before and you say it again, and the keystone to antitrust, what antitrust is all about is getting low prices for consumers, not high prices, and getting better products for consumers, not worse products, and get-

ting more efficient methods of production. And that simple three-part key which I carry around I think engraved in my brain I try to use to unlock these incredibly complex, unbelievably technical legal arguments that are brought up in an area like the one in the case that you mentioned, something called the price squeeze.

Now, in fact, as I will explain now in detail, that key does unlock that door. But in order to show how would I have thought our court's decision, our unanimous decision there, how I thought that that key, low prices, led to the technical result, what I want to do is write an opinion that will explain these technical matters, boy, this was very technical, but will explain it so that a person who is willing to put in time and effort, even without economic training, will see the point intuitively.

And the chart that you mentioned, which has a numerical example and has a graphic example, is designed to help a person who is really interested in following every bit of that, to use the chart or use the numbers or use the language three different ways to show how the key, which is the low price, unlocks the complicated door of the case.

Now, this is how in my mind it did in that case. How can I explain what a price squeeze is? My goodness. Basically, the idea is this: Electricity is made by big integrated companies. They make electricity by having turbines go around.

Let's say—and I will use a hypothetical, I don't like to use that here, because I know this isn't a classroom and I know these are serious matters and I don't like to be professorial, frankly, but I think in this instance, maybe thinking of, say, they turn this wheel around and they charged 8 cents for the electricity, and that might help.

They then transmit it across a wire. They then sell it to themselves, because they are in the retail operation, too. And they sold it, let us say, for 10 cents. So they make it for 8 cents and they sell it to themselves for 10 cents, and the price to the consumer is 10 cents.

Now, the plaintiff in this case came along and said, you see, 8 cents is what we have to pay for it, because they sold a little bit to independent retailers, too, and that plaintiff was an independent retailer. And that independent retailer was saying, wait, I buy this for 8 cents and they resell to themselves for 10 cents, that 2 cents isn't big enough as a space, I am getting squeezed.

And if he had won that case, if that plaintiff had won that case, what would have happened is, instead of that price being 10 cents for all the consumers in Massachusetts, that price would have gone up to 11 cents or 12 cents. That is how I saw the case.

So, while I know you could make theoretical arguments the other way, the practical argument was that if plaintiffs here won—by the way, the plaintiffs here were not losing an amount of money, they were making a little bit of profit—the principle under which they would win I thought, and my court thought, would drive up the price of electricity to consumers all over Massachusetts.

Now, two things: One, the State regulatory commission is holding that price down. The State regulatory commission says 10 cents is the right price. And if you have a State regulator out there protecting the citizens of Massachusetts and saying 10 cents is right, then

I do not think an antitrust court should come along with a rule of law that makes for a higher price. There is too big a risk of that happening.

But, after all, there could be a lot of special circumstances. So, we are fairly careful in that case in the opinion to say we are not saying this could never be bad. We are not saying this is absolute. We are not saying there could not be circumstances where the price squeeze would be a bad thing. But in these circumstances here, it is not good for consumers for the plaintiff to win.

By the way, all the facts in the case, the court of appeals, as you correctly point out, are assumed in favor of the plaintiff. That is because the jury found in favor of the plaintiff. Then the question is, assuming all the facts in the plaintiffs in the favor, does the antitrust law require a verdict for the plaintiff. And I absolutely grant you that is a highly controversial area. It is a difficult area, and I cannot be certain as I sit here now that we have come to the exactly correct result.

What I can be certain of is what our court tried to do. We tried to focus on where the ball really is, which is the low price for the consumer, and we tried to work our way through a very complicated area to see if antitrust law, which has as its objective, technically would come to that result. I do not guarantee I was right. I do not guarantee that others do not have good arguments the other way. What I do guarantee is what we were trying to do, how we were trying to interpret the law.

Senator METZENBAUM. Judge, I have to take issue with you about your wanting to bring about lower rates. The jury wanted to bring Concord's electric rates down and hold down rates for Boston Edison with proper regulation, and, with the jury's verdict, the rates would have been lower. But you stepped in and you said juries will be permitted to second-guess the regulators' allocation rules or its specific investment allocation decisions. What antitrust benefit would be gained by permitting juries to speculate in this way, is your question?

Let me answer your question: Congress did not give the regulators the power to make antitrust determinations. We gave antitrust determinations to the juries and the courts. This jury was protecting consumers who were gouged, and a small company, a very small company, the Concord company was a very small company, that was unfairly squeezed.

Unfortunately, as I see it, you seemed more worried about ruffling the regulators' feathers than protecting the consumers. My question is why was it appropriate for you to discount the expert testimony, disregard the jury factfinding that the district court found fully supported by the record in this case, and reverse the lower court and the jury's verdict?

That is where I have difficulty, and your answer is that you were helping to keep rates down, but here was a $39 million verdict for the city of Concord, and I have difficulty in following your line of reasoning as to how your verdict against the plaintiffs and taking way the jury verdict helped to keep prices down.

Judge BREYER. Basically, the reason, Senator, was that I think it was our obligation, in trying to interpret the antitrust law, to work out how the rule of law in that case, perhaps in that case it

would have meant lower prices for Concord, though I am not sure how, but even there the issue is what about all the citizens of Massachusetts, what happens to all the citizens who buy electricity.

And my belief was, and what we wrote in the case and tried to explain why, is if a little company—and he was small—can insist that that rate go up from 10 cents to 12 cents, everyone all over Massachusetts, not just Concord, is going to be paying 12 cents and not 10 cents, and that is higher prices, not lower prices, and the antitrust laws ought not to allow that, if we are following their basic principles. And then I trace through in the opinion why I think that is what would happen if the plaintiff won.

As I said, I do not think we took away any factfinding from the jury, and I understand that the plaintiffs in the case may disagree. I understand people who study this in very good faith may disagree. I understand that there are two sides to the issue. But I do think that what the court is trying to do in that case is trying to follow through the basic thrust of the antitrust law and to determine how that aim at low prices works out in this complicated area. And I think that the holding in the case, rather than the contrary holding, means lower prices for electricity consumers in Massachusetts and elsewhere.

I can give you another example, if you like.

Senator METZENBAUM. Judge, I only have about 5 minutes left, and may I go on?

Judge BREYER. Please.

Senator METZENBAUM. Thank you. I do not think we are going to come to an agreement.

Judge BREYER. In good faith, I think people do disagree about many of these holdings.

Senator METZENBAUM. In one of your earliest cases, *Allen Pen Co., Inc.* v. *Springfield Photo Mount Co., Inc.,* you sided with the defendant. The plaintiff was a small firm that bought school supplies from the Springfield company. The way I read the case, Springfield offered lower prices to its favored customers and everyone else had to pay more. The undisputed evidence was that when Allen Pen fell out of favor with Springfield, it had to pay 5 percent more for the same supplies. So it sued Springfield for discriminatory pricing under the antitrust laws.

The district court judge did not let the jury decide the case. Instead, he directed a verdict for the defendant. You affirmed that decision. What you said was that Allen Pen, which was a small company, could not win its case, because

> It produced no economic expert, it did not go out of business, it showed no absolute drop in the sales, the sales affected were but a tiny fraction of its total business, and there was no causal connection between any antitrust violation and any significant actual injury.

Let me ask you, does a small company have to go out of business before our fair competition laws apply? Is that the sine qua non?

Judge BREYER. No, no; I think that case was a matter of evidence, and I would guess that how much evidence there was was a matter of the court looked at it and thought there was not enough evidence. I cannot repeat to you now. I mean it is just that sometimes—look, let me give you *Cartel. Cartel* is a good case. *Cartel* is a case in which a defendant won. *Cartel* is a case in which

the big defendant won. *Cartel* is a case in which the smaller plaintiff lost. *Cartel* is a case in which that big defendant was an insurance company in the health insurance area.

What the big defendant was trying to do to the insurance company was to hold down the price of health care. The plaintiffs were people who wanted to raise the price of health care. They wanted to raise the price of health care and they thought the antitrust laws helped them do it.

It seems to me that by looking at the basic purpose of the antitrust laws, which is to keep prices down, to protect the consumer, when you do that, you get the key to a lot of these matters, and that is basically what I have tried to do, and I cannot tell you I have always done it right.

Senator METZENBAUM. Well, in this particular case we are talking about, the small company put its president on the stand to testify about how much money it lost when it had to pay higher prices. It gave the jury his best estimate of what the company's losses were, based on his knowledge of the business and the company's history. You actually criticized the company for using a businessman, instead of an economist, to show that it was injured by unfair competition.

Again, this is a case of whether a small business company has to pay for an expensive economic expert who can charge $500 or more just to get his case to the jury. What concerns to me, and I think some who have studied your record, is that you are more inclined to follow some esoteric theory of the law or maybe some regulatory approach to the law, than you are the whole concept of letting free competition work, and the whole question of protecting that small business person.

I have a number of other cases I will ask you about that come to a similar conclusion, where the little guy gets squeezed out, was not able to buy parts and has to buy a particular automobile package in order to get—I think it was Subaru cars—and, one after the other, Judge Breyer is not sensitive to the fact that the little guy does not have a chance, except for the antitrust laws, and Judge Breyer routinely—there are some exceptions. In the *Cartel* case, you are correct, you ruled with the plaintiff. But the fact is, in too many cases, time after time, as the Fordham article indicates, your hold against the little guy, the small business person, the consumer.

I do not think you did anything wrong or improper. All I am hoping to do in these hearings is maybe sensitize you enough, and when you get on the Supreme Court, maybe you will remember, gee, I remember those questions I had when I was appearing before the Judiciary Committee, maybe the milk of human kindness will run through you and you will not be so technical.

Judge BREYER. I guarantee you, I will remember. [Laughter.]

Senator METZENBAUM. I have other questions, Mr. Chairman. My time has expired, but I know we are going around.

The CHAIRMAN. Senator, I am sure at the first conference, after the first case, he will turn to Justice Scalia and say, you know, let's think how Metzenbaum would do this. [Laughter.]

Senator METZENBAUM. I know that you and Justice Scalia will work it out.

Senator HATCH. I just want to know if Howard finally got it.
Senator METZENBAUM. What did you say?
The CHAIRMAN. He wanted to know if you finally got it, he said. Senator Simpson.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

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

I am glad I was not involved in that line of inquiry there about the milk of human kindness. My friend Howard Metzenbaum and I do not always agree, but I mean sincerely I shall miss his presence. He and I have sharpened our rapiers on each other for 15 years, and it has been an experience that started I think with suspicion, and certainly ends with mutual respect. I enjoy him. As I say, we do not agree, indeed. But if he is speaking on antitrust, you want to listen.

Well, it is a pleasure to see you here. I listened intently this morning and thought I had known a great deal of your background. But when they got to the part about architecture, I want to find more about that.

It is time to talk of many things, of shoes and ships and ceiling wax. I want to find out more about that, and I shall.

It is good to see your family here, and I remember meeting them when I was a freshman on this committee. Michael, while you are out there hiking through the country, I will be astride a horse out in Wyoming. You will be walking, and I will be riding. I hope you will enjoy the Wind Rivers. It is a marvelous area, if that is where you are going. I hunch you are.

Seldom I think in these times, certainly in this century, certainly not at any time in my 15 years on this committee, have members had an opportunity to consider a nomination to the Supreme Court of a person who many of us personally know so well.

And I would note that while the consent role of the Congress has always been strictly observed, in this case of your nomination, I believe the advice provision of article II for the first time in my experience has been a significant factor, because many of us on this side of the aisle and on the other side, as well, have offered the advice that your nomination would be quite well received by the Judiciary Committee.

Nearly half of the members of this committee knew you when you served as the chief counsel of this committee. We all are personally familiar with your intellect, your ability, your professional bearing, and your sense of fairness. A term that I noted was used several times in your statement, fairness or fair. And you were very courteous and helpful to me, as a freshman Senator, never judging or measuring things with a political yardstick, interestingly enough, always grounded in fairness. That is a word I think that typifies what I know about you from my personal observation post.

And you have had a fine, remarkable education. I loved your statement about the things you learned about people which you didn't learn from books, or something to that effect, and I think that is certainly true in my life. Yet, the books took me to where

I could go into a profession that I loved, into law. And your work in academia and your work on the bench has been exemplary.

The Supreme Court is unique in both the size of its workload and in the closed and I think necessarily private environment in which it works, which is going to be a tough one for you, but you will handle that. You mentioned that, too, in your statement. I forget the term, but not to cloister yourself away. That was not the term, but I cannot see you anywhere near that, with your persona.

But to simply be able to cope with the volume of work requires a superior intellect, but, just as important, the absolute necessity to work collegially with your fellow Justices. As chief counsel of this committee you dealt with some of the most controversial issues that came before the Congress, and that was the ideal crucible to develop and display those qualities.

They say there is no proving ground like it, here in the Judiciary Committee—and I do always admire our chairman, Joe Biden. He is very fair, and he faces controversy with more patience than I do. When I get a belly full of something, it shows all over my face, and then I am in deep trouble. And our ranking member, Senator Hatch, is patient and always willing to listen. But I shan't forget when Senator Kennedy came before us in an imploring fashion, after we had dispatched the former President in 1980, and said: "How about Steve Breyer?" And we said: "no". And then Senator Thurmond, who was ranking member, interceded, the committee met and duly judged that you should pass into the ranks of the robed.

And you did, and you have had a remarkable record. And this committee is a tough audience, and there are tough inquiries. Senator Metzenbaum, others of us, Orrin, myself, Ted, and Pat Leahy, all of us do ask tough questions for which we get some tough commentary at times, and that goes with the territory.

But it is interesting that very few Senators really stand in line to serve on this committee, but when they do, they become quite riveted to what we do here and what we must do in our role, especially in this role.

I have always served, as a legislator, on the Judiciary Committee—chaired one when I was in the State legislature.

So we have seen you handle controversial issues with competence. We have watched you deal with members of both parties with fairness—that word again—and good humor, rare good humor, and patience, extreme patience. So, then, one might wonder why we are making this investment of time and energy, significant, indeed, on a nomination which seems to have general approval, why the staff has spent thousands of hours collectively poring over everything Stephen Breyer has spoken and written on the law.

I think there are several factors at play here. The first is that we want a thorough and unhurried examination of the nominee. That is always justified in the case of a lifetime appointment to a Court co-equal with and independent of the Presidency and the Congress. But there is an even more important factor, I think, which justifies the size of the investigative staffs we now see on this committee and the intensity of our scrutiny of Supreme Court nominations. We learned in the 1950's and 1960's that this co-equal branch of Government, the Supreme Court, could, would, and did

take upon itself the job of making profound changes in American society and politics when Congress was slow to act or had determined not to act. And this judicial activism on the part of the Supreme Court led to this clearly reduced pace and increased thoroughness of evaluating nominees to the Court.

It became important in the eyes of many members of this committee to attempt to learn intimately the attitudes and values of persons nominated to serve on the Court. But sometimes we, all of us, become overly zealous on the singularly posed question: How would you vote on this or that critical issue of the day?

And in my mind, a nominee who is fully qualified by education and experience and temperament should, nevertheless, be rejected if a nominee believes it is the Court's duty to act when the Congress fails to do so or to allow his or her personal views and prejudices to influence his or her decisions. And yet, conversely, I am much less concerned about a nominee's ideological bent if he or she is otherwise well qualified by education, experience, and temperament; and clearly a person who would assiduously follow the Constitution, the precedents, and the laws of the country, despite his or her strongly held personal views to the contrary.

So this great and sometimes ponderous effort to determine the social and political views of nominees reflects all of our own concerns about judicial activism, whichever side of that we happen to be on.

Some claim that this has led to the appointment of what have been called "stealth nominees," a description which assuredly would not fit you, for you have left a paper trail a mile wide and a yard deep: 91 speeches, 50 articles and book chapters, and 80 opinions. Of course, I have nearly completed my own personal exhaustive review of these various tomes and treatises. Summer reading, I call that.

And I suspect that we have sometimes overdone it in the thoroughness of our efforts to learn the ideological beliefs of nominees. And we should probably spend more time inquiring into the nominee's judicial philosophy and the analytical approach that he or she might use in deciding issues and cases.

We will, of course, also inquire in some detail about current constitutional controversies. I have some questions myself in that area in this round, and I know that you will attempt to be candid but circumspect, and respectfully and necessarily guarded in your responses. I am positive of one thing with you, as surely as anything, the lodestar, that you will not give our citizens mumbo-jumbo, legal mumbo-jumbo. You will give them justice. That I know. And that is the pleasing part of the whole process for me with my personal knowledge of you.

Now, let me ask you, I know that Senator Hatch and Senator Thurmond have talked about the *New Life Baptist Church* v. *East Longmeadow,* and I will not go into the details of that case. But until recently, the U.S. Supreme Court, not the Congress or the executive branch, has decided the standard to be used to determine whether the Government's actions have impermissibly burdened a person's ability to exercise his or her religious beliefs.

Over time, the Supreme Court developed these several standards for various types of free exercise claims. For most cases, the Court

determines whether the State's interest is compelling and whether a less restrictive means to accomplish that interest is available. In *Sherbert* v. *Werner* and *Yoder*—cases brought by prisoners against prison administrators—the Court standard was whether the restrictions on a prisoner's free exercise of religion are reasonably related to legitimate penological objectives.

But then came the Supreme Court in the *Employment Division* v. *Smith*. Two employees were convicted of smoking peyote, and they were fired from their jobs. They claimed that their peyote smoking was pursuant to their religion. The Court held that no balancing test between the State's interest and the individual's interest was necessary when a criminal law applied to all activities, religious or secular, and was not intended to target religious activities.

So last year, we enacted the Religious Freedom Restoration Act, as previously mentioned by Senator Hatch and Senator Thurmond, which overturned the Court's 1990 case standard. And, of course, that went rolling through here in high fashion. I was very disturbed by it, especially with regard to what it will do in prisons as we see people selecting what religion they may concoct in order to drive the prison administrators goofy. But that is my view—I think that will cause us great pain.

The Religious Freedom Restoration Act mandated that all free exercise claims be considered under one standard; the compelling State interest and the least restrictive means.

My question: To what extent is it constitutionally permissible for Congress to provide the courts with a substantive standard for a free exercise of religion claim? Or to what extent is it constitutionally permissible for Congress to overrule the Supreme Court's own substantive standards for review of free exercise of religion claims?

Judge BREYER. The reason that I smiled, Senator, was because you have articulated the question exactly that I would imagine is likely to be before the Supreme Court. And if I am confirmed and you decide to confirm me, then I would be a member of that Court. Therefore, I have to exercise caution on that particular question. That is going to be right there. It is going to be right there.

Senator SIMPSON. It will be right there, and it will come through this law.

Judge BREYER. Yes, it will.

Senator SIMPSON. And another one that will be right there and you need not talk about is the issue of the restriction of freedom of expression, freedom of speech with regard to demonstrations around abortion clinics. The law has a lot of ramifications that go far, far beyond freedom of speech. I happen to be pro-choice, and I supported the provision. But I can see right now the use of that law in ways which those who promoted it will blanch and shrivel when that begins to take shape. I can see some of those beginning to form, and I was part of it. But that is the interesting part of sitting on a Judiciary Committee as you work your craft.

Well, those are things that are of concern, but with regard to the *New Life Baptist Church* v. *East Longmeadow,* I would just ask several specific questions which I believe were not entirely covered in your answers to Senator Hatch and Senator Thurmond. I also

have had some which you have answered and which I will not ask you to repeat.

You were asked to determine whether the town school committee could apply the State's standards to determine the adequacy of the secular education that a religious school provides to its students. The school said that that mandatory process violated the first amendment, free exercise rights, since it believed it to be a sin to submit—and that was the word, "submit"—its educational enterprise to a secular authority for approval.

So in place of the school committee's mandatory approval requirements, the school offered up a less restrictive alternative. They said they would voluntarily give its students standardized tests to determine the adequacy of the secular education, then the school would voluntarily submit the results to the education board for evaluation.

You concluded that while the State's mandatory review requirements do burden the school's free exercise of its religious activities, such a burden was permissible. You have given some remarkable comments about the duty of Government to see that education is given to all children, and I agree. You based your decision on your finding that the school committee has a sufficiently compelling interest in seeing that the children are educated, that there is no less restrictive means available. Not even the school's suggested voluntary standardized-test approach that you felt would both accomplish the State's interest and be less of a burden on the exercise of religion. You questioned whether or not the standardized test would be an adequate measure for the process of teaching, and, of course—and there was a quote:

> Can it be certain that good results reflect good teaching, the teaching of intellectual skills, discipline, complete subject matter, rather than simply teaching the answers to the questions the teachers believe will appear on tests?

But all those kinds of tests are routinely used to measure progress in education, standardized tests. SAT, LSAT, MCAT, GRE, are all indicators of the likelihood of eventual success. I have received considerable mail from my State on the nomination on the most part from constituents writing who are parents who have their children in private, church-operated schools or parents who provide home schooling for their children, and this opinion concerns them. Some feel your decision implies that you believe it is constitutional for States to totally ban home schooling.

One wrote:

> Not only is this position unconstitutional, but it is also nonsensical, as he would give unlimited powers to an already failing public school system to regulate private and home schools, which statistically are turning out well-educated students.

I am interested in your reasoning, if you could explain for me why the school standardized tests would not be an acceptable, less restrictive means to demonstrate adequacy of its secular program, whether your decision "gives unlimited powers to an already failing public school system to regulate," but principally how you feel about home-based education and your response to that, sir?

Judge BREYER. Three general points, Senator, and then a more specific point. The three general points are:

I do not think there is a word in that opinion that suggests, you know, the kind of thing that you mentioned in that latter, that this

powerful State can do what it wants to end the ability of parents to pass on their religion to their children.

The second general point is that everything I have learned about the first amendment—and, interestingly enough, speech has something to do with it, too—is that that really grew out of the religious wars of the 17th century, and that really reflects a great compromise that runs through modern life in a lot of countries, but particularly in the United States. And, that is, people have strongly held religious beliefs, and there are synagogues and there are churches and there are mosques and there are dozens of different religious groups. And, that is, that every one of those groups will have the right to practice their own religion and to pass that religion on to their children. That is right at the heart of it.

The third general point is that the test that I was applying constitutionally in that case was before the recent *Smith* case. The recent *Smith* case said all you do is look to see if there is a secular purpose. I take it if that had been the law at the time, it would not have even been close. And what you have tried to do is go back to restore the type of balancing test that I used in that opinion.

Now, the specific thing in that balancing test really grew out of the particular facts of the case. Some States have laws which say the way that the State should go in and measure whether the home school is doing a good job or the religious school is doing a good job is give people tests. If the State has that, fine and good.

Our State in that case did not have that. And so it became a question of whether the Constitution forced the school board to do it that way rather than do it a different way.

Among the special facts in the case were there were a lot of indications through letters and so forth that the visit to the school by the school board to look and see what was happening could be worked out without infringing that religious group's basic concern that the State was not in charge, that they did not recognize State authority. And that could be worked out because the State was willing to say: Don't recognize our authority. Just let us look at the school like anyone else might off the street, or whatever. Do you mind? And they said, well, we do not mind that much.

The concern in that case, what the school board had, is: How can you really say that tests are less restraining or more restraining? Some parents might believe tests are more of an interference. After all, you are worried about submitting yourself to the authority of the State while I have to bring my child and sit them in a special room and make them take a State test. Some parents might have felt that way. Other parents might have believed that that was a better solution and that the visit was a worse solution.

It is very hard to say, and the school board had to administer some system. So, ultimately, it turned on the fact that we thought that is a reasonable system. And it does not really infringe, in general, the right of the parents any more than would have the opposite system.

Senator SIMPSON. Let me ask you a question. You may not be able to answer it, but it is just right there. Do you have a bias against home schooling or religious schooling?

Judge BREYER. Absolutely not.

Senator SIMPSON. Never have had?

Judge BREYER. I never have had.

Senator SIMPSON. I think that that is the key and, with your explanation, it will be one that will be helpful for the public to understand.

Of course, the Religious Freedom Restoration Act would change a lot of things, as you say, outcomes or reviews on that legislation, and it will be laid at your door, Justice. You will see it there one morning waif-like, writhing, all yours.

Now, the confirmation process—I see that the light is still green——

The CHAIRMAN. You are doing fine, but if you want to stop, it is OK. [Laughter.]

Senator SIMPSON. I thought you guys were going to go all day.

The CHAIRMAN. Go right ahead, Senator.

Senator SIMPSON. I am going to save one for tomorrow. I am going to ask the nominee to hone his processes, because here is one coming—immigration law. That got a little rise.

The CHAIRMAN. An audible groan.

Senator SIMPSON. You see, nobody will touch it. It is too ghastly to play with. But there are a couple of bills which amend the 14th amendment, which says:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens,

and so on.

There are statutory proposals to say that a person born in the United States is not a citizen of the United States, because they are not "subject to the jurisdiction thereof." The children are born to an illegal person and become legal citizens at the moment of birth. Some are saying that, by statute, we could amend this constitutional provision statutorily because they are not being born to a legal citizen of the United States, and therefore are not "subject to the jurisdiction thereof." It is going to be a rather knotty one for us to handle.

I am going to come back to that in my second round and just ask you some thoughts, because it is a very difficult issue. Right now we have a situation where two-thirds of the live births in a certain area of California are to illegal undocumented mothers who are giving birth to a U.S. citizen. That U.S. citizen child, when 21 years old, may petition for the mother, the father, the siblings and through the preference system—an interesting issue, one that again is something we must pursue.

It is not something that I have proposed. It is being proposed by several persons of both parties on this issue, and I will come back to that.

I thank the Chairman for your courtesy.

The CHAIRMAN. Thank you, Senator.

Judge, it may be an appropriate time to take a 5-minute break here, and then we will return. Really, let us make it 5 minutes, and we will return with Senator Leahy.

Senator LEAHY. Mr. Chairman, is there anything to the rumor that the reason they are going to me next is that the TV cameras

had so adjusted their lights for Senator Simpson's head, they want to be consistent? [Laughter.]

Senator SIMPSON. Why don't you tell them the story about what——

Senator LEAHY. No, no, I'm not going to do that.

Senator SIMPSON. Then I will. Let me tell you. Mr. Chairman, you will recall that during——

The CHAIRMAN. You go right ahead. I never talk about hair or lack thereof. [Laughter.]

Senator SIMPSON. During a hearing in this committee, a courier came to the door——

Senator LEAHY. You don't have to tell this, Alan.

Senator SIMPSON. I think I will. You have told it enough times. It is very short. It is like war stories, you have to get them out of the way.

This courier came and said to the person at the door, "I have a message here for somebody." He said, "Who is it?" He said, "I don't know. He's tall, bald, homely, and wears glasses." And this guy looked in and said, "There's two of them." [Laughter.]

The CHAIRMAN. We are recessed for 5 minutes.

[Recess.]

The CHAIRMAN. The committee will come to order.

Welcome back, Judge. We will do another hour and a half. We will do Senators Leahy, Heflin, and Grassley, and we will reconvene tomorrow at 10 o'clock, at which time, if all goes as planned, I believe the next person will be Senator Specter, I think. I am not sure. The name plates are not up, but I think that is correct.

Senator Leahy, the floor is yours.

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

Senator LEAHY. Thank you, Mr. Chairman.

Judge, I was thinking, as I was listening to you, I have had the opportunity in the years I have been in the Senate, now with your nomination, which I fully expect will go through the Senate, I will have had an opportunity to vote on all nine members of the Supreme Court. I also will have been in the hearings on eight of them. That is counting Chief Justice Rehnquist in his capacity as Chief Justice.

I have an opening statement that I was going to include in the record as though read, Mr. Chairman.

The CHAIRMAN. Without objection, it will be included.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR LEAHY

When you visit the Supreme court, and walk into the courtroom chamber, you cannot help but be struck by a special authority that exists there. I remember being affected this way when I was first there as a law student, and I remember feeling the same way when I was there just a few weeks ago.

The courtroom itself is more cramped than you might expect. It essentially consists of a broad wooden bench, behind which sit the nine justices in their high-backed chairs. Before the bench is a lectern and tables for counsel arguing cases, as well as tables for clerks and other court personnel. The rest of the chamber is devoted to rows of chairs for public seating.

Yet the importance of this room is enormous—one cannot enter that room without having a feeling about what happens in it. This is where our most precious rights

and freedoms are protected through the decisions of the justices of the Supreme Court—the right to free speech, the right to practice one's faith, the right to a jury of one's peers and to due process, the right to vote. Nowhere on the face of the globe or in the history of mankind has a nation guaranteed such liberties.

It is no wonder that this place evokes such powerful feelings, and it is no wonder that the American people place so much importance on the naming of a person to take a seat behind the bench in this courtroom.

You have been nominated to be one of the nine persons who will question and debate and judge in this room as one of the final arbiters of the meaning and application of the Constitution of the United States and the basic freedoms of us all. You follow in the path of names like John Marshall, Oliver Wendell Homes, Jr., Louis D. Brandeis, Hugo L. Black and Thurgood Marshall. Very large shoes to fill, to be sure. But we must hold such expectations of you. As a justice of the Supreme Court, if you shirk from protecting these freedoms, we have nowhere else to turn. I call upon you, if confirmed, to be a beacon of freedom and common sense.

Like other members of the Committee, I have reviewed your record extensively over these past weeks. I have been struck by its breadth and distinction. You are one of our nation's most distinguished circuit judges. You are an accomplished legal scholar. You are without question a person with the legal acumen necessary to sit on the Supreme Court.

But you are more than that, and your nomination means more than that. An essential, but sometimes overlooked, attribute of any judge is that he or she be fair. Justice requires that all litigants, regardless of their cause, can present their case and have it decided on the basis of the facts and the law, not on any predisposition of a particular judge hearing the case. My sense from reviewing your record is that you are fair—you take each case individually and decide it on its merits under the law. You do not prejudge the outcome on the basis of an existing notion or narrow political goal.

If you are confirmed, I will have participated in confirmations for each of the nine justices serving on the High Court. During the last 20 years we have had different sorts of presidents and different sorts of nominations to the Supreme Court. Some presidents have used Supreme Court nominees as a wedge to divide the American people—to promote an "us" versus "them" politics. Often these types of nominations have resulted in divisive battles, political pontificating, and intensely personal attacks during the confirmation process.

President Clinton has taken a different course. He has sought a nominee who can bring people of diverse views together and who has been near universally praised as an excellent candidate. President Clinton has chosen someone who people of all stripes—conservatives, liberals, whatever—know will provide them a fair hearing and a fair reading of the law. The President should be commended for selecting a person who can help forge our way into a new century and a new age through consensus based in commonly-shared constitutional values.

Finally, I was struck by some of your comments in the days that your nomination was first announced. You said that the law has to make practical sense to ordinary people—it has to accord with real life. I could not agree with you more. I commend you for writing opinions in a style and manner that is accessible generally rather than restricted to lawyers or legal scholars. I also commend you for the commitment you made in your opening statement in these hearings to do your utmost to see that our decisions reflect both the letter and the spirit of law that is meant to help people and to remember the effect your decision will have upon the lives of Americans.

As a justice, you are charged with making decisions that, quite literally in some cases, are of life and death significance. The Court is not a place for academic musings. I hope you will be the kind of justice who focuses on the effect your decisions have on real people—people who may not be powerful or well-connected. I want you to be the kind of justice who could take the case of Barbara Johns—a young girl who had to attend a segregated school where classes were held in tarpaper shacks—and turn it into the unanimous opinion that was Brown v. Board of Education. I want you to be the kind of justice who would take up Clarence Gideon's habeas petition, scrawled by hand on plain paper, and affirm the right of every citizen to due process of the law. It is a weighty responsibility.

I have appreciated hearing your views in these proceedings. Your family is justifiably proud of you and you of them. I hope this has not been a matter of torment for any of you but an occasion in which you can enjoy participating in a constitutional exercise involving all three branches of our federal government in a most important function.

Senator LEAHY. I would like to just mention a couple of things I say at the end of that statement. When your nomination was first

announced, you said during that period that the law has to make practical sense to ordinary people, it has to accord with real life. I could not agree with you more, and I commend you, incidentally, for writing opinions that are in a style and a manner that is accessible generally, rather than just restricted to lawyers or legal scholars.

I commend you for the commitment you made also in your opening statement today to do your utmost to see that your decisions reflect both the letter and the spirit of the law that is meant to help people, also to remember the effect your decisions are going to have on the lives of Americans.

As a Justice, you are going to be charged with making decisions that quite literally, in some cases, are of life and death significance. And the court in that regard goes way beyond being a place for some kind of academic music. So I hope you will be the kind of Justice who focuses on the effect that your decisions would have on real people, people who are not very powerful or well-connected.

I want you to be the kind of Justice who could take the case of Barbara Jones, a young girl who had to attend segregated schools where classes were held in tar-paper shacks, a young girl who had her case go all the way to the Supreme Court, where it became the unanimous opinion of *Brown* v. *Board of Education,* the kind of Justice who would take up the handwritten, poorly drafted petition of Clarence Gideon, which indeed was so well-written that Gideon's trumpet was heard and affirmed the right of every citizen due process of the law. And that is a weighty responsibility.

So I am glad to have heard your views in these proceedings. Your family has had to sit through all of this. They perhaps heard you express these views before on more than one occasion.

It is interesting, because of television and the media covering this, that the American people probably have a better view of who you are than they would have otherwise. In that regard, I might ask, when they do see a judge or a Justice at these kinds of hearings, sometimes it is the only time they ever really get to see them. They read a little bit about the Supreme Court and arguments. We hear that some judges are very good in their questioning, and some tend to pontificate, some go to the point, some appear to do legal games with the lawyers, and so on. But nobody really knows, unless you are actually sitting there.

What do you think about having television in the Supreme Court for arguments? Would you be in favor of that?

Judge BREYER. I would say this, Senator: The issue came up in the Judicial Conference of the United States, of which I was a member. They have representatives of all the circuits and also the district courts. And I voted in favor of that. We voted to have television, the question was the court of appeals and the district courts, and we would run an experimental program. It has been going on now in the district courts and also in the courts of appeals. I volunteered our first circuit, with the concurrence of the other judges, for the program, but we were not accepted as the experimental circuit.

So I have expressed a view that that is appropriate in that way in the Judicial Conference. Now, I should add that before making any decision in the Supreme Court of the United States, if that

issue arose. Obviously, I would listen to other members of the court and try to understand their points of view and what they were thinking, too.

Senator LEAHY. I understand, but I applaud you for the feeling you have, because I think that the court, like every part of the government, should be as accessible as possible, and that is one way of making it accessible. Nobody asked that these cameras be in in camera discussion or in chamber discussions where you might be determining how you are going to vote, but certainly in the arguments.

Judge, I grew up in a family where the idea of the first amendment was greatly respected, both parts of it. My parents had a printing business and a weekly newspaper and also held their religion very deeply. So let me go first to that part of the first amendment dealing with speech.

Do you think there is a core political speech that is entitled to greater constitutional protection than other forms of speech?

Judge BREYER. There is a core of political speech, but it is not the only thing at the core. It seems to me that there are a cluster of things that are at the core of the first amendment, including expression of a person as he talks, as he creates, and also including what I think of as a dialogue in a civilized society. What do I mean by that? Actually, it is Michael, my son, who really gave me a good compliment once that sat me thinking about this. I don't always get compliments from him.

What he said was, well, we did used to argue a lot at the dinner table, I mean discuss, and he said, "You know," he said, "I always felt you were listening to me." That, of course, doesn't always mean we agree. But, you see, there is something in that idea of listening that promotes the dignity of the person who is listened to.

I have noticed in court sometimes, if there are two people arguing, I will listen and then I try to repeat the argument in my own words to the other side. As you go back and forth, it promotes a good feeling, because people feel they have been listened to, even if you disagreed with them. You took in what they were saying.

Now, that kind of conversation that has to do with dignity and the way that the democracy functions, the expressive vale of speech, the political value of free speech, all of those things are a cluster of things. Then, as you move out sort of from that center in different ways, you can discover that some of those things are mixed with more conduct or some of those things are mixed with activity that could cause a lot of harm. That was Holmes' point, you can't yell fire in a crowded theater.

You could find it in some areas that the expressive value and the political value is totally gone and there is nothing. Think of child pornography. But I mean at that core there are several things.

Senator LEAHY. But do you protect nonpolitical speech like, say, a scientific debate?

Judge BREYER. Of course.

Senator LEAHY. And art and literature?

Judge BREYER. Of course.

Senator LEAHY. Let me go into another area, then, as we follow this a little bit. I have been both a prosecutor and a defense attor-

ney. You are brought up to believe you try your cases in the court room.

But it seems to me—and we have had of recent days even more of an example of this, where you have witnesses in a high-profile criminal case that are going to be out selling their story to tabloids or television or whatever else before they even go in to testify. They are obviously telling their story not under oath, but they have sold it for a great deal of money, and then they are expected to come in under oath, and certainly it is going to be awkward for them to contradict what they have just sold it for, and sometimes, as we have discovered, those buying it want to make sure that it is as spectacular as possible. A suggestion has been made that sometimes stories are changed to accommodate that.

I wonder if this kind of checkbook journalism undercuts the pursuit of justice or witnesses' credibility, or what it does to the tension between the first amendment rights and the rights of the public and the defendant to a fair trial. What would you think of the constitutionality of a statute that would prohibit persons identified as witnesses at a preliminary hearing or a trial from selling their stories prior to the time they testify? Could you write such a statute?

Judge BREYER. I am not going to be or am I in Congress. I understand the difficulty that your question is getting at. I have two reactions. Obviously, I cannot discuss the legality of that particular thing, because that could come up. But underlying your question, it seems to me that there are two important points.

The first is what you hone in specifically is likely to be a problem over the next 20 years, 30 years, maybe indefinitely, where you have two important sets of rights that all Americans value. All Americans value free speech. All Americans value the important right to a trial that is fair, so that an innocent person is not convicted. Sometimes those rights can clash, and then you are in a difficult area of how you are going to reconcile. Now, that is fairly well known, I suppose.

The other point that I would like to emphasize—and this is a little self-serving, as a judge—is also, as you recognize, not every clash of this sort need be resolved in a court. That is, I have always thought that the press, too, is sensitive to the problems of fair trial. I have always thought that lawyers, too, are sensitive to the problems of free press. And sometimes that kind of communication—this is things I have said in speeches, I am not saying anything new that I have not said before—sometimes that communication among groups outside of courts, before creating a legal issue out of everything, can help.

Those are the only two general comments which may be fairly obvious.

Senator LEAHY. Let me pursue that in a different way. I am not going to ask you to write a statute for us on this, assuming that one is needed, and then pass on its constitutionality. I also understand what you are saying is the bar and the press could spend some time and talk with each other, but I must suggest that there has not been evidence of overwhelming restraint on either side. As we end up with more and more television networks and more and more newspapers trying for the next headline, I think the kind of

restraint we may talk about may be discussed at prestigious panels of either press associations or bar associations, and the discussion will be forgotten the first time there is competition for a story.

Let me use a corollary of a case that you have been involved in, *In re Globe Newspapers* in the first circuit in 1990. As I recall, in that one, there was a question of whether the press would be accorded access to the names and addresses of trial jurors. Judge Campbell had noted the clash and constitutionally protected interests, the press' first amendment right to access to a criminal trial, a defendant's right to a fair trial, but also the jurors' interests in having their privacy protected, all major interests.

Judge BREYER. Yes.

Senator LEAHY. What kind of thinking went on? What kind of issues went on in your mind and the others, as you were discussing how to rule on that case? Or what do you see as the important issues in ruling on that case?

Judge BREYER. Eventually, the case I think turned on a rule of court, and it was how to interpret that particular rule, and I think the Globe got the names because of the rule, if I am remembering it correctly. But the considerations there are those that you identified.

You certainly do not want to close the courts off to the press. The courts belong to the public. It is a public forum. It is a public arena. The court is their court, the public's court. It is not the judges' court and it is not the lawyers' court. And that openness creates a confidence in the public that I think is necessary to maintain the institution.

At the same time, as you have just pointed out, remember that a juror, my goodness, what a public service a juror performs. And you see jurors and they are proud of being jurors. They do not get paid anything significant.

Senator LEAHY. You also see jurors in some criminal cases terrified to be jurors, too.

Judge BREYER. Well, it is an amazing thing, if you think about it, that the public will give willingly that time and commitment to this kind of important public matter. And what might they sacrifice? A lot—money, perhaps privacy, perhaps a great deal of time, perhaps a long absence from work. And it can even happen that they are absent for a long time from their families, and they may—it depends on the case—it could even happen they have to be locked up in a hotel room for a very long time, which can be very isolating.

That is an amazing public service, and I think, as well, that has to be recognized. So that is in the mind of the judges who are trying to interpret this rule, and that is why Judge Campbell said that. Eventually, you have to balance those things. Eventually, it is a question of recognizing the juror's right, recognizing the need to run the trial fairly, recognizing the importance of having the proceeding public and maintaining the confidence of the general public. Those are certainly the considerations, and working them out is a matter of judgment, what the rule says, how these different factors play out in the context of a particular case. That is simply to say it is difficult.

Senator LEAHY. It is also saying there are no absolutes either.

Judge BREYER. There are not. There are not.

Senator LEAHY. If the Government is giving out Federal funds for whatever—art, libraries, so on—can they require recipients of Federal funds to express only those views that the Government finds acceptable?

Judge BREYER. If you put it like that, it does not sound likely. I mean it does not sound that they could.

Senator LEAHY. Well, let me give you a couple of examples. Could the Government—and I have asked this of other nominees—to further a policy of protecting the public from sexually explicit material, prohibit a library receiving Federal funds from making books like Alice Walker's "The Color Purple" or J.D. Salinger's "Catcher in the Rye" available?

Judge BREYER. Yes, and, you see, then you get into very—you get into more difficult questions. Of course, one is against censorship, and you can start with very easy cases. Could they say no books? We are paying for statues for Party A, Democrats, but not for Republicans; or Party B, Republicans, not for Democrats. Could you discriminate in that way? And the answer, I think 99.99 percent of all people would say certainly not.

And then you get into more difficult areas, and you have on the one hand the ability of the Government to structure its own programs. After all, if you are going to have statues and that is your program, you do not have to pay for paintings because it is a statue program not a painting program. And then you get into all kinds of middle cases——

Senator LEAHY. Well, that is easy. That is easy when you say it only applies to statues or only applies to paintings.

Judge BREYER. That is right.

Senator LEAHY. But within the statues, shall we say we can only have statues of political figures that are acceptable?

Judge BREYER. Yes; where, of course, I am tending to agree with you——

Senator LEAHY. And if we are going to give books, can we start saying: However, we will give you a list of books that you are not allowed to buy?

Judge BREYER. In principle, in principle, censorship is undesirable. It is undesirable. And when actual cases of censorship come up, typically it is going to be some issue which is a borderline issue. And on this borderline issue, you typically decide it in reading the briefs, reading the arguments, thinking about the particular case and what the particular thing is. And the reason that I answer it in this way is I think that cases will come up like this, and I will have to think about it, and——

Senator LEAHY. Could I suggest that you may want to think—this is just the view of one Vermonter, that the further you move away from the first amendment being an absolute, the more of those cases you are going to have?

Judge BREYER. Well, that is right. That is right.

Senator LEAHY. Suppose the Government wants to protect the integrity of the Internet or new computer superhighway? Can they prevent computer users from sending each other a copy of "The Shipping News" by Annie Proux? I only mention that because another Vermonter did.

Judge BREYER. You see, what is at the bottom of it, it does seem to me—and people forget that, that it is there to protect speech and writing that we do not agree with. And how often people say, oh, it is not there to protect that. That is too bad, that is—but that is what it is there for. And that principle, I think, is exhibited in lots and lots of different ways. And I think that is a fairly absolute principle.

Senator LEAHY. I have been impressed by the current Court's adherence to free speech issues, and somewhat surprised, I might say. But I would also suggest that the first amendment gives us the guarantees of diversity that makes us such a strong democracy. And it is having to put up now and then with speech, or art, or whatever you or I might find offensive, which guarantees that that diversity stays there, and the same diversity that protects you and me.

Let's speak of the *Lemon* test. Correct me if I am wrong, but from your earlier questions, I would assume that you do not feel we should be out there applying the *Lemon* test, that there may be a better test. Am I correct in that?

Judge BREYER. I do not know if there is a test—I mean, usually in court cases there are so often two different problems. One is the problem of what is this line you try to work out what the correct result is. And then the next question, which is tied into the first, is: How do you communicate the result? How do you communicate it to lots of other judges and lawyers and people who have to live with the rules?

One way of communicating it is creating a lot of sub-rules, but there are other ways to communicate the idea. One of the best ways of all in this area I call a metaphor, the town meeting. As soon as you say an opinion, it is a New England town meeting. There are rules. Everyone knows you can have some rules. Everyone knows the town meeting runs with rules of procedure, but not rules that choke off points of view. That metaphor is an awfully good way of communicating things.

And so when I read a Supreme Court opinion, I wonder if they have an absolute, you know, sort of sounding test. Maybe what is meant is that these are indicia that normally work. You can use a lot of ways of communicating.

Senator LEAHY. Well, for example, would you use the same test if you had education regulations, for example, which might affect parochial schools? Would you apply the same rule to that as you would rules of speech that might cover religious topics? Would you not see the possibility that you may be applying a different test in those cases?

Judge BREYER. The difficult is, of course, you start in this area with the basic idea that the State is neutral. No one wants to see the Government favoring a different religion. And as long as you do not want to see the Government favoring a different religion, that means the Government cannot favor your religion either.

Then no one says that it is absolute. No one believes that the ordinary services—fire department, police, many, many such services—are not available to religious institutions as well. Of course they are.

And then the question is: Where do you draw the line? How much can the Government do without treading—without crossing that barrier and creating the kind of favoritism that the establishment clause was designed to prevent?

That is where I start in the way I think about it.

Senator LEAHY. I listened to your answers to the questions that Senator Hatch asked, which were very valid and good questions. I have always read the first amendment, the establishment clause, as saying that it does set up the way the State must remain neutral between one religion and another and that it guarantees us our right to practice our religion. But I also read it as saying it guarantees our right not to practice a religion, if we want.

Judge BREYER. That is true, yes.

Senator LEAHY. You said that the State should not side with one religion over another.

Judge BREYER. Or a religion——

Senator LEAHY. Would you also agree the State should not side with those who practice religion over those who are nonadherents to any religion?

Judge BREYER. I think that is basic. The Supreme Court has, I think, been very clear about that. Very clear.

Senator LEAHY. We have the Kiryas Joel Village School District that tried different ways to provide special education programs to the handicapped children of a religious community. They tried special education classes in an annex to the religious school. That was stopped in reaction to a 1985 Supreme Court decision. They tried busing. They tried a special school district, finally, and the Supreme Court said this violated the establishment clause.

Do we need a clearer direction from the Court about what governmental accommodation of religion is constitutionally permissible, or is Kiryas Joel as clear as we need?

Judge BREYER. I start and we do start with the basic accepted principle that the Supreme Court makes clear the basic about favoritism, as you point out, not favoring one religion over another, not favoring religion over nonreligion. At the same time, you begin with the idea as well that certainly religious schools and religious churches and synagogues are certainly entitled to basic State protection. And then you are infinitely going to find all these different cases, have they pushed it too far? Have they pushed it too far?

And I wish I had a magic formula that would answer that, and I do not have it. I do not have it.

Senator LEAHY. I have a feeling——

Judge BREYER. I think it will——

Senator LEAHY. I have a feeling you are going to be grappling with it for years to come. There are some who want a very literal, narrow aspect of the establishment clause simply saying that you can do anything you want as long as you do not actually set up a State religion, the Government religion, or simply set it there to prevent Government—well, at the time it was written, from favoring one Christian sect over another.

Would you say that it goes further than simply prohibiting the coercion of a State religion?

Judge BREYER. I think that is well established. Well established.

Senator LEAHY. On the constitutional right to privacy, do you recognize such?

Judge BREYER. I think that is well recognized. I think that is well established in the law.

Senator LEAHY. Where are the unenumerated rights such as the right of privacy? Are those in the 9th amendment, 4th amendment, 14th amendment?

Judge BREYER. That is a very good question, and I have thought about it some. I do not think it is in the ninth amendment, but it is true that Justice Goldberg wrote an opinion about the ninth amendment.

Senator LEAHY. That is why I ask.

Judge BREYER. Yes; and he said in that opinion that what the ninth amendment does is this—it is interesting, I think, if I can take a minute. Do you want me to——

Senator LEAHY. Sure; I would love to—I did not ask the question just as an academic exercise. It is something that is a real issue to me.

Judge BREYER. It says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Now, what does that mean? Well, what he wrote in that was that it is meant to prevent a certain kind of argument. This is the argument. You go back. Actually, I had read at Senator Hatch's suggestion an article that was quite interesting on this point. Go back to the Framers. They thought that they had delegated limited powers to the central Government. Therefore, that is all you needed. You see, the central Government could not trample people's free speech or religion because they did not have the power to do it.

But others said do not trust that. You better have a Bill of Rights, and in that Bill of Rights you better say specifically that the central Government cannot do that, cannot trample people's free speech or religion.

The first group then said, wait a minute, you better be careful. Once you write that Bill of Rights, people are going to get up and argue that everything that you did not put in there, they could run out and do. No, no. Here is what we will do, they all decided. We will put in the ninth amendment, and the ninth amendment will make very clear to everybody that just because we have not said—just because we have that Bill of Rights and we have said certain things—speech, religion, press—do not take our statement there as meaning nothing else is important. Do not take our statement there as meaning nothing else exists.

So there was a view in the Supreme Court for a while, really associated with Justice Black, that the only rights that were protected against the States' infringing them were those specifically listed in the first eight amendments and the word "liberty" in the 14th meant only those listed in the first eight, all of them and no others. But, said Justice Goldberg, your argument is doing just what the ninth amendment told you not to do. So do not argue that way. And once you do not argue that way, then you look at that word "liberty" in the 14th amendment, and you say it is designed to protect fundamental rights.

People have described those fundamental rights in many different ways. There are a variety of approaches to figuring out what they are. Almost every Supreme Court Justice since then has accepted the existence of some, and what they are and how you find them is a big question.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. In the meantime, there was the incorporation doctrine.

Judge BREYER. Yes.

The CHAIRMAN. Senator Grassley.

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

Senator GRASSLEY. I would like to have my opening statement inserted into the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR GRASSLEY

Congratulations on your nomination to the Supreme Court, Judge Breyer. It is readily apparent that your nomination developed from the reputation you have established over many years as a law professor and judge.

Your writings and legal opinions appear to reflect an understanding of the proper place of the Supreme Court, and courts generally, in our society. I find your approach to deciding cases to remind me of Justice Frankfurter. Time and again, when asked to find statutes unconstitutional, you have examined the language and legislative intent, and resolved all legitimate questions in favor of constitutionality. This deference to the legislature is a hallmark of judicial restraint.

In recent decades, too many judges have permitted political considerations of desired policy results to affect their legal conclusions. These decisions are based on the view that the Constitution, rather than guaranteeing specific rights, broadly protects judicially-defined liberty and dignity. More recently, the Court has focused more on legal principles, rather than personal preference. There are those who may hope that their policy goals, unattainable through the political process, can be obtained through your vote on the Supreme Court. Your record as a judge thus far gives little support to such hopes. Nonetheless, as a Supreme Court Justice, you will not be constrained to follow precedent to the same extent as a Federal judge.

The legitimacy of judicial review derives from the power to enforce the Constitution as supreme law. When judges impose their own personal views, they necessarily do not apply the law. The basis for judicial review evaporates in these circumstances, and our limited government of laws becomes a government of people.

I hope to explore with you during your testimony issues relating to the role of judges and important principles of constitutional and statutory decisionmaking. I am not looking for campaign promises, but I do hope to determine your judicial philosophy.

Judge Breyer, your objectivity, adherence to the Constitution, and your awareness of the limited power of judges and the appropriate role of the branches elected to decide policy questions are important. I look forward to addressing these issues with you during these hearings.

Senator GRASSLEY. Judge Breyer, I am glad to hear you say in your previous discussion with Senator Leahy that child pornography is not protected speech. You dealt with child pornography when you served on the Sentencing Commission, and you were making guidelines for violation of the child pornography statutes. There was a January 1987 meeting when one of the Commissioners, Judge MacKinnon, suggested adding an aggravating factor to the crime of transporting, receiving, or trafficking in child pornography. He proposed increasing the sentence when the large sums of money often correlated with organized crime involvement in child pornography were present. And he made a motion to raise

the base sentence by four levels, where the retail value of the exploitative material exceeded $25,000. It passed by a 5-to-1 vote.

The one vote against the motion was yours. I am sure you had very good reasons. Could you give me the reasons why you were the sole dissenter in a decision to impose tough sentences on the very worst child pornography producers and peddlers?

Judge BREYER. You have to understand, Senator—well, let me think about it for a second. I am thinking of the best way to explain what I am guessing now I was doing then.

It is unlikely that you can find merit in child pornography. Writing those sentencing guidelines was tough. It was very tough. The reason it was tough, in part, was because the seven Commissioners had very different views about which was the best or the worst or the medium or the best behavior or what the sentences should be for very different kinds of crimes.

So in order to create an approach, what I tried to do was this: I tried to say, with others' agreement, here is what we will do, and this gets rid of our subjective approach. Let's not try to get the right order of what is worse with what. If we do that, we will be disagreeing all the time. Let's do this. Let's get, with the help of 10,000 presentence reports analyzed in depth and 25,000 others analyzed in less depth, let's get a picture of how the sentencing system really has worked up until this point in 1987. And then what we will try to do is we will try to create sentences that mirror typical past practice, and we will try our best not to stray from that typical past practice. Sometimes we will modify, but we will have to have a very good reason.

Now, that was a principle that allowed us to write the guidelines. And as a person, as a person who pushed that principle, who felt it was an important principle, I had to live up to it myself, irrespective of how I might feel about the particular crime. So if, in fact, that typical past practice showed that whatever the sentence there was, I would resist people putting add-ons or subtractions or whatever they were, no matter how I felt about the underlying crime, because I was trying to maintain a principle. And, of course, if I deviate from that principle myself, everybody else will start to deviate, and, gosh, it is sort of difficult to know where it is going to end up.

So I tended in those guideline meetings to resist what I would call ad hoc changes, even though that ad hoc change might have been something that, from a policy point of view, would have been very good. And that is what I think you see reflected there.

Senator GRASSLEY. You saw Judge MacKinnon's motion to be extraordinary, then.

Judge BREYER. I would say probably it reflected a view that this is a very, very bad crime. And I would have shared that view. It is a very, very bad crime.

Senator GRASSLEY. I want to now talk with you about precedent on the Supreme Court. You have different considerations, obviously, than you will as an appellate judge, where you have been for 14 years. I want to relate it to a public policy issue that we deal with here in Congress and will be dealing with more in the future. And if you will bear with me, let's talk about one line of Supreme Court cases as it relates to these policy issues.

During the 1960's and 1970's, the Supreme Court issued a series of opinions striking down statutes that treated differently children born to married parents as opposed to children born out of wedlock. The Court also rejected differing treatments based on whether the out-of-wedlock child had been acknowledged through a subsequent marriage of the parents. These decisions, as you will recall, rejected differentiations in welfare benefits between the two situations.

The Court did not find that the State's interest in preserving and strengthening family life or protecting families from dissolution or discouraging bringing children into the world out of wedlock was sufficiently legitimate to justify these distinctions that the States had set up. Instead, the Court found that only moral prejudice could justify differential treatment, particularly since children could not affect their status. Such statutes were called in the *Weber* case illogical and unjust.

Instead, the Court focused on the needs of children for these benefits, and it found no rational basis for believing that illegitimacy would increase if some of these statutes were struck down. So the Court did strike them down.

We now know, 20 to 30 years later, that the Court was a very poor forecaster of future social environment. As you probably know, the Court said that it was—and this is again from the *Weber* case—powerless to prevent the social opprobrium suffered by these hapless children. And, of course, as we look back now, at least from my perspective, the Court was just plain wrong on what they saw to be the results of these decisions.

Today there is hardly any stigma in any place. In many places, there is no stigma in having out-of-wedlock births. A major reason for this is that societal disapproval of the practice can no longer be expressed through law, thanks to these cases that are involved.

To some extent, the Court reflected as well as affected social opinion. But the fact is that the Court, through these decisions, has played a role in bringing about far-reaching negative changes toward society. For instance, in 1970, the percentage of out-of-wedlock births was 10 percent; now it is 30 percent. Young people from single-parent families are two to three times more likely to have emotional or behavioral problems than those from intact families. They also face higher risk of child abuse and neglect, poor performance in school, having children on their own as teenagers, what is called kids having kids, you know, having their own marriages end in divorce, and a six times greater risk of being poor.

The absence of parents frequently leads to both illegitimacy and welfare dependency for a series of generations. Males born out of wedlock are much more likely to engage in criminal activity than their counterparts born to married parents, particularly if they live in neighborhoods that have a high concentration of single-parent families.

So, finally, Judge Breyer, State legislatures and Congress are trying to respond to this, very much in a bipartisan fashion now. It kind of makes you wonder how you could get so much unanimity all at one time. These legislatures, and even we in Congress, have decided that action is quickly needed to reduce illegitimacy and its attendant negative social consequences.

In seeking to address the problem, these legislatures and the Congress do run the risk that if the Supreme Court follows its current jurisprudence, many possible reforms could still be unconstitutional. Now, one of the reasons the Supreme Court has given for overruling decisions in the past—and I am speaking generally about decisions, not just about this line of cases—is that facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification.

If a case were before you raising whether certain of the Court's decisions involving illegitimacy should be overturned, would the societal changes that have developed over the last 30 years be relevant to your decision? Now, I am not asking you how you would rule in a certain specific case. I am just trying to get a feel from you whether you would consider these changed facts in reaching your decision.

Judge BREYER. They are relevant. I think they are relevant. I think that in applying the Constitution in general, one looks, of course, to the conditions of society. I think the Constitution is a set of incredibly important, incredible valuable principles, statements in simple language that have enabled the country to exist for 200 years, and I hope and we believe many hundreds of years more.

That Constitution could not have done that if, in fact, it was not able to have words that drew their meaning in part from the conditions of the society that they govern. And, of course, the conditions and changed conditions are relevant to deciding what is and what is not rational in terms of the Constitution, as in the terms of a statute or in any other rule of law.

Senator GRASSLEY. I think I am reading you that you would have an open mind.

Judge BREYER. Yes, I would.

Senator GRASSLEY. Yes; and I think that is pretty important because the President who nominated you, President Clinton, liberals in Congress, conservatives in Congress, are looking for solutions to the problem of the breakup of the family and strengthening the family. We see these trends of the last several years as very, very bad, and you may have some cases sometime that would cause you to look at these records and these facts that precede this now.

I appreciate very much that you would see having an open mind on that issue.

I would like to go now to the use of legislative history. You and I, I think, share a similar view on the use of legislative history in the interpretation of statutes, unlike, for instance, the way I view Justice Scalia not wanting to look at legislative history. You have written Law Review articles about it, and from a reading of your cases, I can also see that you are willing to rely on legislative history.

I want to discuss one of your cases as an example, *U.S.* v. *Maravilla.* I think it is a good example of your use of legislative history. I want to discuss it and then explore with you whether there are limits to the use of legislative history.

In *Maravilla,* you examined whether civil rights law applied to a temporary visitor to the United States. That was a case where two U.S. Customs officers had kidnapped a money launderer from the Dominican Republic. They stole his money and killed him. They

were charged with a variety of crimes, although there was not a Federal murder statute applicable. Included in the charges was a violation of the civil rights law that covered inhabitants of the United States.

You made a very thorough analysis of the statute, including reviewing the legislative history of the law, and concluded that the courier did not fall within the law's protection. Briefly, what role did legislative history play in your analysis, and would this be an example of how you might use legislative history on the Supreme Court?

Judge BREYER. Yes, yes is the answer. Briefly, it is a word. The word was inhabitant. It does not, obviously, in any obvious way, describe a person who comes to the United States for a few hours. Yet the civil rights laws are supposed to offer broad protection, and it is not absolutely out of the question. So how do you know what the people who passed that law really had in mind. The only way is to understand the context in which the statute arose and what the human being who wrote that word into the statute was thinking about. And if that was a staff person, which it would not have been at that time, but if it was now the staff person as acting with the knowledge of what the Senator believes is important and what those views are, and, therefore, what one is trying to get at is what does the Senator think about this.

Now, of course, sometimes that is all very controversial, and sometimes what has happened in some cases is what Judge Leventhal used to describe. He said, oh, it is like going to a cocktail party and looking over the crowd and picking out your friends. What he is describing is a misuse of legislative history.

Very often, by going into those debates, you can get a pretty good idea of what they had in mind, the Senators who passed that, and I think that is what—and I hope it is a good use of it. I hope you find it a good use of it. But that is the kind of thing I would tend to do. That is the kind of thing I do.

Senator GRASSLEY. This term the Supreme Court decided *Langraf* v. *USI Film*. It was an 8-to-1 decision. In that decision, the Court reviewed the 1991 Civil Rights Act and found that it was not retroactive.

Judge BREYER. Yes.

Senator GRASSLEY. The case involved a woman who claimed she was a victim of sexual harassment. She quit her job after her harasser was disciplined, and then she sued the company. The Court found the harassment did not justify her resignation, and she was not entitled to any relief under title VII.

While her appeal was pending, Congress enacted the 1991 Civil Rights Act, which allows for recovery of damages for pain and suffering. *Langraf* argued the law was retroactive and that she should recover damages for pain and suffering, and, of course, the Supreme Court, 8 to 1, disagreed. First, the Court found the statute did not contain a clear expression of retroactivity. Second, the Court reviewed legislative history, and that is the point I want to bring up here, finding it to be inconclusive and even conflicting on the issue of retroactivity.

The Court relied upon the canons of statutory construction, which included a presumption against retroactivity. So if I could

follow up with you on a discussion that you had with Senator Biden this morning, what happens when a judge has to look at conflicting statements by Members of Congress, all of whom say that they are supporting the law? It probably makes your job very difficult, right?

Judge BREYER. Yes; that is the art. That is the art, and you cannot always get it right, either. And where it is conflicting, sometimes it is absolutely inconclusive. But it helps. It helps to try through reading the documents, recognizing that this is a world in which you do not come here with a quill pen and your briefcase. A labor union does not operate just with one person, nor does a business. And there are many people involved in the legislative process that ultimately the policy decisions are yours.

And what the Court is trying to do in reading legislative history is, through reading this entire record, hearings if necessary, back to finding out where the words originated, looking at the floor debates, is to do its best—which will not always be right, but to do its best to identify the human purposes. And usually there are two or three several different ones that identify the basic purposes that are driving you. And often, but not always, that gives a key to the correct interpretation of the statute.

Senator GRASSLEY. What does it say about Congress' willingness to kind of punt to the judiciary what might be a tough legislative decision?

Judge BREYER. Sometimes Congress will.

Senator GRASSLEY. It probably says we are shirking our responsibility.

Judge BREYER. Well, normally, you know, I think it is pretty common, and if you punt to a regulatory agency, the executive branch filling in the interstices is pretty common. If you want, I mean, I think it is risky.

Senator GRASSLEY. So you would say that there is a limit to the Court's reliance upon legislative history.

Judge BREYER. Of course there is a limit. There are some problems it just does not solve. But I think it is helpful, I think it is helpful, and obviously, from what I——

Senator GRASSLEY. Congress cannot hide behind a statute by giving it to the courts to make a tough decision instead of our doing it during the drafting process.

Judge BREYER. That is true.

Senator GRASSLEY. In fact, in *Langraf,* the Court said it would not permit uncertainty in litigation if Congress has not specified whether a statute is to apply retroactively. Many of my colleagues on this committee, and I as well, have worked over the last number of years to get Congress to be clear in drafting by stating whether or not the law was intended to be retroactive, whether or not we were trying to apply a private right of action, whether or not we preempted State laws. Quite frankly, we have not been very successful in getting our colleagues to do that. But now the *Langraf* decision achieves some of what I think we have been trying to do.

The Supreme Court stated that it will hold Congress to a clear statement rule of statutory construction. If Congress clearly states in the text of the law that it is to apply retroactively, then and only then will the Court enforce it retroactively. If Congress is ambigu-

ous, then the Court will apply a default rule that the statute would apply only prospectively.

What do you think of the Supreme Court's adoption of the clear statement rules?

Judge BREYER. Well, I do not know about that particular case or not, or others that might come up. I think it is preferable, as I have written, that Congress just directly deal with the issue rather than the Supreme Court having various clear-statement rules, because those become all these different canons. And what I said as a kind of joke at one point, I said, well, you know, you can have canons to the left of them, canons to the right of them. I mean, it is very hard for people to draft and to understand what legislation is really going to turn out to be in practice if you have all these canons and there are dozens of ones and they used to conflict. That makes it—in a way, canons can make it more difficult for you, it seems to me, rather than less. It would depend what they were.

The CHAIRMAN. If the Senator would yield, retroactive canons are particularly difficult.

Senator GRASSLEY. Well, you know, as a former staff member of this committee, you surely had to deal with some of these problems as well.

Judge BREYER. Yes.

Senator GRASSLEY. And don't you think it is really better for the Court to say that if you want us to apply something retroactively, say so? Isn't that the position Congress should be in, encouraged to draft as particular a statute as they can?

Judge BREYER. That particular one—that is why I am hesitant to comment on a particular one. Maybe that would work. I am not sure. I have not thought it out.

What you have when you have like a clear-statement doctrine, then you have to go in and say what is a clear statement? And then you will find a case where nobody said anything, but it seems obvious that it ought to be retroactive.

You discover all kinds of problems with canons, all kinds of problems, and ultimately we have a system where—you see, as a staff person, I always felt that what I am supposed to do in these areas is identify for the Senator what the policy problems and issues are and then transmit that to other members of the staff and, through them, to other Senators. And that process works fairly well. Not perfectly, but it leads all the people who are affected by legislation and have representatives or try to get their voices through to you, they begin to know what to expect. That system does not work perfectly, but it is not terrible. And I have expressed a degree of concern about moving to some totally different system which I think would end up with your voice being less direct and having less effect and making it harder to understand the human purposes that move you.

Senator GRASSLEY. Some people might try to make the case that it might be the present Supreme Court trying to be a conservative activist Court, when, in fact, what the Supreme Court maybe is really trying to do is to say to Congress, do what you were elected to do, and that is make some tough choices. I think it shows in *Langraf* that clear statement rules are not a conservative judicial activism. Because here is a case where Justice Stevens wrote an

opinion setting forth a rule, denying retroactivity to a statue, overturning decisions that Stevens previously had dissented in.

Judge BREYER. Your basic point, I——

Senator GRASSLEY. Getting back to legislative history, there is another limit. Wouldn't you agree that it is inappropriate for a judge to use legislative history to reach a result not mandated by statute? I think you spoke about some inappropriateness.

Judge BREYER. Sure. Ultimately, you are there with the language of the statute, and the language of the statute is what governs. You know, history comes in where it is hard to figure out how it applies and what it really means, and so forth. But it is not the statute that is explaining the history. It is the history that is explaining the statute.

Senator GRASSLEY. By the way, in that 8-to-1 *Langraf* case, do you think that you would have been in the majority?

Judge BREYER. I have not read it with enough thoroughness to know.

Senator GRASSLEY. The reason I was asking is that Justice Blackmun was the one who dissented in that case.

You have written a lot about legislative veto. I have had a longstanding interest in that. You find the *Chadha* decision very sound. I am not sure that I agree with that, but that does not keep me from looking to see what can be done. I think you have offered some very good suggestions for Congress to maintain its check on agency power.

If I could draw your attention to the current controversy over some proposed agency regulations. I use these just as an example, because eventually these might even get to the Court, and they are something we have recently dealt with in this committee.

The EEOC has issued regulations on religious harassment. Many of us believe that the EEOC has overstepped its boundaries. The regulations could make any religious expression in the workplace almost prohibited. But we have no real check on the EEOC's power to issue regulations, other than our public relations perspective.

From your writings, it seems to me that you believe it is within Congress' power to be a firm check on agency power. Would the EEOC's actions be an illustration of agency power which we here in the Congress, if we wanted to, could appropriately check?

Judge BREYER. That would be for you to judge. That would be for you to judge. My question would be whether there is some way of—I mean you have a lot of ways of controlling the agencies, obviously through the appropriations process, through legislation, through hearings, through letters, through suggestions, through discussion. There are many, many, many ways in which Congress has power over the agencies.

The legislative veto was one way that became popular, that the agency passed a legislation, if one House vetoed it, that is the end of it. Then Congress said that was unconstitutional. So I tried in the article that you were speaking of, to think is there some other way you could get to the same result, and I think I thought of one that was not quite the same result, but close. But it is a little complicated.

Senator GRASSLEY. That is this confirmatory clause?

Judge BREYER. Yes, it was a bit gimmicky, that what you do is it would take effect only if you passed a law confirming it, but you would have a rule that it went right on a fast track, not debatable, and if one House——

Senator GRASSLEY. You wrote about that 11 years ago. Do you think you would still feel the same way today in that Georgetown Law Review article?

Judge BREYER. It is a suggestion and it would be a suggestion that I felt was a little gimmicky, and if people in Congress wanted to do it, it was explained and then it would be entirely be up to you.

Senator GRASSLEY. Well, if Congress could use a provision like that, it seems to me like it would effectively give Congress some control over the regulations of an agency like the EEOC. If you still feel the same way about that now as you did 10 years ago, that helps me to understand where you are coming from. Do you feel like you did?

Judge BREYER. I think it is a possibility.

Senator GRASSLEY. I assume, though, when you say it is a possibility, that if you wrote in the Georgetown Law Review about a possible process of what you call confirmatory law, you had given considerable thought that it was possibly as an appropriate constitutional congressional response to *Chadha*?

Judge BREYER. I would stick by what I said.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to point out for the record, Judge, that Senator Grassley, with each successive hearing, is losing his credibility in the following sense: He always makes the case that he is a nonlawyer. He brags about that at home. He knows a heck of a lot of law, for a nonlawyer, pretty impressive. Soon, no longer are you going to be able to make the claim, Senator, that you are a nonlawyer. You are beginning to sound like a lawyer.

I would also note, before I yield to Senator DeConcini, that I find it somewhat fascinating—and I would like you to keep this in mind for tomorrow—that the very Justices that have been before this committee and are now on the Court who have argued the doctrine of original intent when interpreting the Constitution are the very Justices who are the new textualists who argue, when it comes to a statute, that they do not have to go beyond the words of the statute to seek intent.

I have always found that fascinating, how, when looking at the Constitution, they have concluded that we must go look at the original intent of the drafters and stick to that, but when looking at the statute, they look only at the text of the statute and not the legislative history, which they pore through in order to find constitutional rights, whether they exist or not, but do not pore through when it comes to looking at the text, which leads me to the conclusion that all Justices, liberal and conservative, are result-oriented, whether they know it or not. But that is my prejudice.

I will yield to Senator DeConcini.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you.

Judge thank you for your understanding this process so well. If you want to take a break, I am more than happy to wait around, if necessary. I welcome you here, Judge Breyer, as so many of us do, because we know you well.

I believe your experience crosses so many different areas of government, that it is particularly encouraging to see you nominated by President Clinton for Associate Justice. You have had experience here, you have had experience in the private sector, you have had experience in academia. You have been with the executive branch, you understand accommodation and compromise. You understand the legislative history, because you wrote much of it when you were here. You have been in a policy-making role in the executive branch, which is encouraging, I think.

You served on the court, and you have had an opportunity to develop a philosophy that I think demonstrates judicial restraint during your time on the bench, which I think is very important to this Senator and many others, as you know. You have a well-rounded background, and I think that is probably why the President chose you, as well as being so handsome and articulate and intellectual, et cetera.

I am pleased to have chaired the hearings in 1980 when you were up for confirmation to the first circuit, and you did very well at that time. Judge Breyer, since I have been on this committee, this is the eighth Supreme Court Justice that I will have had an opportunity to have voted on. You will be the eighth one, the first one being the nomination of Sandra O'Connor of Arizona, the first woman to serve on the Supreme Court, as you well know. I believe that nominee was unparalleled in ability and dedication to the Constitution and real understanding, she also was a judge. This will be my last nomination. I am sorry I did not get a full house, I did not get all nine vacancies to vote on, but I am pleased that I am going to be able to support you.

Having said that, there are some questions that I would like to ask primarily for the record, Judge. First of all, I want to turn to the question of the Boston Courthouse. I do not think we can ignore that beautiful edifice, and indeed it is beautiful. For the record, all I want is confirmation, if you remember these facts, Judge.

The total funding for that building is approximately $220 million, and that was appropriated over a 3-year period, $184 million in 1991, $23 million in 1993, and another $18.6 million in 1994. Is that your recollection?

Judge BREYER. Yes, Senator.

Senator DECONCINI. Just for the record, Mr. Chairman, the vote in 1991 was 93 to 6 on the floor of the Senate appropriating, with all but six members, including both Senators from Arizona, casting votes in favor of that appropriation.

Some may wonder why that was raised. Well, it passed by such a unanimous vote or nearly unanimous vote, and this action was taken based on a report of a building project survey prepared by the General Services Administration, during President Bush's term, which was submitted to the Congress on January 22, 1990. If you do not remember that date, I am sure this refreshes your memory, Judge.

There was some discussion at that time of approximately 400,000 occupiable square feet of a building at a cost of $163 million. That was signed off by then Acting Administrator, Mr. Austin, who was later confirmed as the Bush appointee. Subsequently, there were additional designs to add 100,000 square feet, and I think you had something to do with that. That 100,000 square feet, was it not primarily to accommodate the U.S. Attorney, and not for additional court rooms or facilities for the judiciary?

Judge BREYER. That is correct.

Senator DECONCINI. It was for the executive branch, in essence. Research shows us that the Senate Environment and Public Works Committee did authorize the site and design for the project of $51 million in 1990. In fact, Senator Burdick, then chairman of that committee, gave me approval to proceed without full authorization on this courthouse. He was the chairman of the committee, and said that we could proceed, which we did. Of course, there was also a vote on that as well.

The fiscal year 1994 budget prepared by the Bush administration requested an additional $19 million, and that was appropriated at $18.6 million. Do you recall that, Judge Breyer?

Judge BREYER. Yes, sir.

Senator DECONCINI. And what is that status of that courthouse now?

Judge BREYER. I think, Senator, it is just going out for bid. I think it is just going out for bid now.

Senator DECONCINI. And are you aware that it averages approximately $5 less than the average courthouse for construction purposes?

Judge BREYER. I think that is right, Senator.

Senator DECONCINI. Thank you. I think for the record it is important, Judge Breyer, that we understand what these buildings are. Courthouses are built for long duration, not for the normal life of a commercial building, is that not correct?

Judge BREYER. Yes, Senator.

Senator DECONCINI. This building would have a lifetime of well over 50 years or perhaps 100 years.

Judge BREYER. I hope a lot longer.

Senator DECONCINI. And it can accommodate substantial growth, within your judgment of that court.

Judge BREYER. Yes, Senator.

Senator DECONCINI. Judge Breyer, turning to the equal protection clause, I have always had great interest in this subject matter and have had an opportunity to question a number of nominees. The equal protection clause and the related cases have played an integral role in the development of the advancement of women's equality. I have repeatedly asked nominees about their views on gender discrimination under this amendment, and I believe that a nominee must be committed to the principle of gender equality.

I think I know the answer, but I am going to ask you anyway, Judge. Although the 14th amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws," it is generally believed that the authors of the 14th amendment were concerned with racial discrimination and did not specifically have women or gender discrimination in mind.

In regard to cases based upon gender, the standard of review is one of intermediate or heightened scrutiny. Under this standard, a classification must serve an important governmental objective and be substantially related to that objective. This standard was developed over time and has been effective in protecting against gender discrimination.

Judge, do you believe that this standard is the proper one for reviewing gender related cases, or do you believe any expansion is necessary at this time?

Judge BREYER. I am hesitating because of the fact that this is likely to be before the Court. But I would like to say something, which is this: It seems to me that it is absolutely established that gender discrimination falls within the scope of the 14th amendment. That is clearly and totally accepted, I think, across the spectrum.

As I think of the 14th amendment, to speak generally, the 14th amendment perfected a Constitution that before it lacked something very important, and that something was a promise of basic fairness. That promise of basic fairness was not carried out, even though it was in the Constitution, for many, many years. And ever since *Brown,* the country in all of its branches of government has been trying to make real that promise of fairness.

It applies to women, too, and to many others. The test that you are talking about, having a sense of substantive part, and they have a communications part. The substantive part I might describe as this: Imagine saying to a minority person there is a rule of law here that harms you through a discrimination. Wouldn't you, as soon as you say that, think but what possible justification could there be? And that I think is what the substance is, when the Supreme Court makes its tough test.

Now think of Chloe or Nell or their equivalents all over the country going into the workplace, and think of some kind of rule that makes their life worse because they are women. Wouldn't you say but what kind of justification for that could there be?

Now, that it seems to me to be the kind of substance that is pretty widely accepted and going on. Now, the exact way in which that is communicated through the vast administrative network which is called the court system through judges to lawyers, to employers, to others, that I think is a matter of words and those words may be the subject of litigation. So it seems to me I have to stop with the statement of general principle.

Senator DECONCINI. Let me ask you this: In the recent case of *J.E.B.* v. *Alabama,* the Supreme Court used the equal protection clause to find that gender-based preemptory challenges were unconstitutional. I realize that you cannot comment on that case, and I am not suggesting that you should.

But it appears very clear to me that the Court seems to be moving closer to applying a strict scrutiny standard in cases of gender discrimination. Do not worry, I am not going to ask you how you would rule on that case or any pending cases. But do you believe in the general sense that the intermediate scrutiny for gender discrimination, do you believe it will always be sufficient to meet potentially hypothetical cases regarding gender discrimination?

Judge BREYER. It may not be, and that will be up for litigation, and I will read the briefs with care and I will listen to the arguments——

Senator DECONCINI. You are not stuck in the intermediate by any means.

Judge BREYER. Certainly not. I think those will be argued.

Senator DECONCINI. You will approach it from each case.

Judge BREYER. Those matters will be argued. They do not seem to me, as I read the cases, to be closed, and there is a communications problem and there is the substantive problem, and I think of Chloe and I think of Nell, and that is more or less the——

Senator DECONCINI. Thank you, Judge Breyer.

Let me turn to another subject. In a recent Supreme Court case, *Liteky* v. *United States,* the Supreme Court held that if the source of a prejudicial remark is a judicial proceeding or ruling, then disqualification is only necessary if the judge displays a deep-seated favoritism or antagonism that would make fair judgment impossible. I was very disturbed by that ruling, just parenthetically.

As you know, current law provides that a judge shall disqualify himself or herself in any proceedings in which his or her impartiality might reasonably be questioned. In *Liteky,* the Court seems to throw out the plain meaning of the statute and creates a very high standard for litigants to meet, if they want to raise concerns about a sitting judge.

This concerns me, Judge Breyer, because the integrity of our entire judicial system rests on the impartiality of our judges, and I believe that judges must do all they can to win the confidence of the American people that our system of justice created and protected by the Constitution is being fairly and objectively administered.

In the *United States* v. *Quesada-Bonilla,* you did not believe that the judge's prejudicial remarks constituted reversible error. What do you believe is the appropriate standard in reviewing potential prejudicial comments from the bench? Did you have a standard in mind, when you made that decision? How did you approach that, without prejudicing any case that you may have to do? I am interested in knowing, quite frankly, what a judge thinks. And I have asked some other judges that same question. They were not under oath and before this committee, obviously.

Judge BREYER. In abstract, you think you do not——

Senator DECONCINI. I will accept it as that.

Judge BREYER. Abstractly, you do not want something that looks to the public as if it is prejudiced. That is very important. That is on the one side of it. Now, in actually carrying out the case, think of the trial judge. The trial judge may have a preliminary proceeding. He may, for example, have to decide probable cause. Well, he will learn something about the case, and he might make some statement in respect to, well, there is a lot of cause here, or whatever.

Now, to administer the system, that same person has to be expected maybe to preside over the trial. Once again, that person learns a lot about it, and he may make various remarks. Then there might be a retrial or a sentence, and he will be there again. So what you are thinking of in trying to decide that case—that is

why I find it hard to find a general principle. It awfully much grows out of the situation. You have to understand the practicalities of administering a judicial system, what is it really like to be a trial judge and a lawyer in that, and then you have to see.

Senator DECONCINI. Let me give you a hypothetical. What if a judge clearly, undisputably makes an arguable prejudicial statement during the course of a trial?

Is it sufficient, in your mind, to instruct the jury to disregard that statement and still sit for the case?

Judge BREYER. The truthful answer is it depends on the statement and it depends on the trial.

Senator DECONCINI. Well, given the fact that there is just no question that this was a——

Judge BREYER. If it really prejudiced the trial, out. That is the end; new trial. If it prejudiced the trial and it is an improper statement——

Senator DECONCINI. So an instruction would not suffice, in your judgment, in such a hypothetical?

Judge BREYER. The reason I am being hesitant is that I think these things are very fact-specific, and sometimes an instruction will cure it and sometimes it won't, and so what you do so often on appeal is you look at that case and you look and see—this is where the judgment comes in and it is tough, often, but you look and see, okay, what was the remark; what was the context; to what extent could it be cured; to what extent, in fact, is a curative instruction impossible.

I have seen cases where it could be cured, I have seen cases where it couldn't be cured. I have seen cases, I think, in the middle where I really find it awfully tough. They come in many shapes and sizes.

Senator DECONCINI. The problem I have with the *Liteky* case is that it appears that the Court says, unless there is a deep-seated favoritism or antagonism that makes a fair judgment impossible, you can't disqualify the judge. So, given my hypothetical, just an arguably prejudicial statement, clearly, without any dispute that it was that—unless it became a deep-seated favoritism or antagonism—an instruction would suffice to the jury and would not be grounds for disqualifying the judge.

I don't expect an answer, but that decision, I think, greatly undermines if, in fact, it is strictly enforced, and is, no question about it, an intimidating factor on members of the bar to raise concerns over a judge's statements during a trial that might be extremely prejudicial, but fail to demonstrate a deep-seated favoritism or antagonism.

Judge, turning to judicial temperament, how do you, with all the experience you have, manage to keep an even keel after you are on the Court, given the successes you have had, the fact that everyone calls you Your Honor and will do just about anything you ask them to do within the confines of your office? What do you do to attempt to keep a balance as an individual so you don't feel that you are somebody other than Steve Breyer, who worked hard and earned his way to the career he has had? Do you ever think about that?

Judge BREYER. Yes, I do. I do think about it.

Senator DECONCINI. What do you do?

Judge BREYER. I find help, of course, from my family in that respect because I wouldn't dare think anything, that I was somehow preferable with this particular family, and they are helpful.

But the other thing, and Joanna actually tells me this sometimes, is remember you are sitting there and people up in front of you are arguing; think of the advantage that you have over them, be careful. When they make an argument—a person makes an argument you don't think is too sound, so what? He is being—he is helping a litigant, he is helping a litigant. That is his job; listen.

And if people are being flattering or whatever, beware, beware, and that is where the robe helps because every time—if somebody is being flattering, you can think to yourself, they are not flattering me, they don't care what I think. It is this robe, it is this robe, and you try pretty hard to keep your own personality out of things and you just do your best to remain connected with the world, to understand that there are men and women and children whom your decisions will affect, to remember who those people are. You think about it. You try to get out of your office, you try to find other contexts. You have your family; you do your best. But I couldn't agree with you more that it is an incredibly important thing to remember.

Senator DECONCINI. Judge, if you don't want to answer this, it is OK. It is not that important, but have you ever just taken a phone call from a citizen since you have been on the bench? Somebody just calls in that is not related to a case and says, I just want to talk to the presiding judge.

Judge BREYER. Yes.

Senator DECONCINI. Have you?

Judge BREYER. Well, of course, because—I mean, you started with the courthouse. I would guess in respect to that courthouse that somewhere between 50 and 100 meetings of the sort that you are so familiar with—you go to a citizen's group, you listen.

Senator DECONCINI. You went yourself?

Judge BREYER. Absolutely, and it was so wonderful for me.

Senator DECONCINI. And you took the criticism that I am sure there was as with any public building?

Judge BREYER. Yes; I mean, you worry about——

Senator DECONCINI. You didn't wear your robe?

Judge BREYER. I don't think it would have made a difference to anyone in any of those groups if I had worn five robes.

Senator DECONCINI. I am sure that is true.

Judge BREYER. And that is a good thing. I will tell you day and night it is a very, very good thing.

Senator DECONCINI. Thank you, Judge. Judge, let me turn to the Sentencing Commission. You are indeed an expert. You have been a very influential voice in the area of criminal law through your service on the U.S. Sentencing Commission which developed the Federal sentencing guidelines. These guidelines have been the subject of some criticism, however. They also have their proponents, you being one of them.

In 1989, you wrote in the American Criminal Law Review that it was too soon after the implementation of the guidelines to evaluate them and determine if they had achieved their goal. You have repeatedly stated that the goals behind these guidelines were to

perpetuate honesty in sentencing and to reduce the unjustifiably wide disparity in sentencing.

Now, 5 years have passed since the 1989 article and you can evaluate the guidelines, I think, far more effectively. In your judgment, have they achieved the two stated goals?

Judge BREYER. The first, yes; honesty in sentencing is there.

Senator DECONCINI. You think it is there?

Judge BREYER. It is there; that is, the sentence given is the sentence served, and I think that that has helped in the Federal system; that is, I think people who understand the differences between the Federal and the State systems have begun to understand that the sentence that is given is the sentence that will be served, with very few—15-percent leeway. That has helped.

The second has also moved in the right direction, but there are many, many rocks on that road. It is bumpy, and I think that it was a very great experiment that the Congress asked to have created. I think there is no one who will say it is perfect. There is no one who will say it has been 100 percent achieved. There is no one in this whole area of criminal sentencing or the criminal law that agrees about everything. I mean, there is lots of disagreement, but I think, in general, if I think about it, it is an experiment that is still worth running.

Senator DECONCINI. Do you think it has been more positive than negative?

Judge BREYER. Of course, I was part of it.

Senator DECONCINI. I understand.

Judge BREYER. But I do think that, still; I do think that, on balance, yes.

Senator DECONCINI. It has improved the system?

Judge BREYER. On balance, yes, and more to come, more to come.

Senator DECONCINI. One of the criticisms of the guidelines, as you know, is that they remove flexibility and require the court to follow a rigid formula in determining sentencing. I know that you disagree with this argument and, in fact, I found your holding in *U.S.* v. *Rivera* to be particularly illustrative of the court's ability to depart from the guidelines when justifiable.

I assume that *Rivera* supports the assumption that you believe that flexibility must be maintained in regard to any sentencing formula or guidelines that are implemented. Is that correct? Is that what that is all about?

Judge BREYER. Yes.

Senator DECONCINI. Well, I am a firm believer that the courts should be vested with a certain amount of discretion, particularly in regard to sentencing. Despite your holding in *Rivera,* one of the criticisms of the sentencing guidelines is that they give too much authority to the prosecutor. When you were on that Sentencing Commission, how did you wrestle with how much authority to give the prosecutor, and, in your opinion, does the prosecutor have too much authority under these sentencing guidelines that are in place today?

Judge BREYER. This has been an awfully big argument. In my own personal opinion, the increased authority of the prosecutor has come primarily because of the existence not of the guidelines, but of mandatory minimum sentences in statutes because that gives

the prosecutor weapons that the prosecutors did not have before. I think that that is the primary source of the contention. I am not positive about that because there are people who disagree with that, but in my personal opinion, that is what it primary is.

Senator DECONCINI. Is that good for the system, or do you think that should be continually reviewed?

Judge BREYER. Well, what I have written on this—and, remember, you are dealing with a person who spent a lot of times on the guidelines, and Judge Wilkins, who was the chairman of the Sentencing Commission, and I and most of the other Commissioners would like to see Congress delegate the authority on sentencing to the Commission so that the Commission can create guidelines which judges can depart from in unusual circumstances.

So it isn't surprising that the Commissioners tend to believe that they would prefer not to have that rigid, absolute mandatory in the statute, but that Congress would say to the Commission, please, we gave you this authority, now carry it out, and we will give you the flexibility necessary to do it; you have tough sentences, your sentences are usually followed; there is a little bit of flexibility in the joints through the power to depart and that is the way we would like you to go. Now, as a former Commissioner, I guess that is the view I have.

Senator DECONCINI. Well, knowing your criticism of mandatory minimums, would it be softened at all by inclusion of a so-called safety valve which would allow a judge to prevent nonviolent first offenders from serving the full sentence?

Judge BREYER. Yes.

Senator DECONCINI. Do you think it should be expanded to anything further than nonviolent first offenders from your standpoint?

Judge BREYER. These are basically decisions for Congress, and you are taking me out of my role as a judge and you would have to understand that in anything I do as a judge I follow, and would follow and intend to follow and have followed the decisions that are made by Congress in these areas which are embodied in statutes.

But putting me back in my role as a former Sentencing Commissioner—and what I have written on this is that the sentencing guidelines are pretty tough, fairly—you know, they are significant sentences. No one has criticized them for being too lenient.

Senator DECONCINI. That is correct.

Judge BREYER. Yet, they do have a bit of flexibility in the joints, and if you look at that flexibility and you say how often is it used, it isn't used that often; it is used sometimes. The Sentencing Commission did a study of mandatory minimums and found there was really more departure, more, whether there should have been or not, and so all those arguments—the Sentencing Commission has written it a lot better than I have, so I would say they have reports on this and I would probably sign on to those reports.

Senator DECONCINI. A safety valve would be beneficial, in your judgment, for nonviolent offenders?

Judge BREYER. Yes.

Senator DECONCINI. Thank you, Mr. Chairman. Thank you, Judge Breyer.

Senator LEAHY. Mr. Chairman, I couldn't help but think, listening to Senator DeConcini's first area of questions on prejudicial

statements, I had for years back when I was practicing law a wonderful New Yorker cartoon which you probably have all seen at one time or another. Twelve members of the jury are sitting there, their hair standing straight on end, the judge blithely saying, the jury will disregard that last remark.

Senator DECONCINI. Mr. Chairman, I would like my full opening statement regarding the Judge put in the record.

The CHAIRMAN. Without objection, it will be done.

[The prepared statement of Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DECONCINI

Judge Breyer, I would like to join my colleagues in welcoming you before the Senate Judiciary Committee. While throughout my Senate career I have always afforded great deference to each President's judicial nominations. I was elated when President Clinton chose to nominate you with your keen intellect and vast experience with the law.

I believe that your experience in all three branches of Government provides you with a unique insight into the respective roles of the administration, Congress and the judiciary. Your understanding of these separate and distinct functions of our government—that often overlap and occasionally conflict—provide you with a valuable perspective on the separation of powers that are so essential to our system of democratic government.

Hopefully, your firsthand knowledge of the workings of Congress, particularly this committee, has given you an appreciation for the complexities of the legislative process. As you know, legislation cannot always be drafted to accommodate every potential fact pattern or every possible ambiguity. Therefore, the legislative history of a provision cannot be overlooked. It must be explored to give additional clarity to the drafters' intent.

Your Justice Department experience has given you insight into the policy making role of the executive branch of Government which has hopefully enhanced your understanding of when deference to an agency decision is deserved and when it is not.

Your considerable experience as a judge on the Court of Appeals for the First Circuit has provided you with the opportunity to develop a judicial philosophy that has served you well in your decisions. You have demonstrated judicial restraint during your time on the bench that assures this Senator that you are not coming before us today with a hidden agenda that you intend to bring to the Supreme Court.

As a result of your well-rounded judicial background and your numerous professional accomplishments, you come before us today to be confirmed to the highest court in this Nation. Throughout your life you have repeatedly exhibited the intellect, desire and commitment to excel in each and every endeavor you have undertaken. It is these characteristics which have brought you here today, and it is these characteristics which will enhance your role as Associate Justice of the Supreme Court of the United States—a role that will require you to make difficult decisions that will affect not only the way the Government operates, but more importantly, will profoundly affect the fundamental rights and liberties of individuals.

I have followed your career closely over the years. In fact, I had the opportunity to chair your confirmation hearing before this committee when President Carter appointed you to the First Circuit Court of Appeals. Just as in 1980, these hearings will explore your judicial philosophy, and as required by the advice and consent clause of the Constitution, the Senate will determine whether or not you should be entrusted with this considerable honor and daunting responsibility.

Judge Breyer, at the end of this Congress I will have had the opportunity to participate in the confirmation of eight Supreme Court Justices beginning with the nomination of Sandra Day O'Connor, an Arizonan and the first woman on the Supreme Court. Just as I was honored to participate in the O'Connor hearing because of the nominee's unparalleled abilities and dedication to the Constitution, I take great satisfaction in knowing that your nomination, which may be the last Supreme Court nomination of my Senate career, also exemplifies exceptional legal scholarship. I believe you will be an outstanding addition to the Supreme Court. I look forward to your views on a wide range of topics, and just as in 1980, I know your responses will be thoughtful and informative.

The CHAIRMAN. Judge, before we let you go, let me ask you, is there a correlation between delegating to the Commission and the need to have nonjudges on the Commission?

Judge BREYER. I haven't thought about that, I haven't thought about that.

The CHAIRMAN. Well, at some point, unrelated to this hearing, when you are confirmed—because I am sure you will still take phone calls—when you are confirmed, I would like to talk to you about that because that is an area of some discussion right now.

Well, Judge, thank you, and I thank your family for your cooperation this first day. We have a number of patient and very knowledgeable members of this committee, like Senator Moseley-Braun, who have been here the whole time and will be, because of our seniority system, down the line some time tomorrow.

If we convene at 10 tomorrow and each Senator takes his or her half hour, which I assume and hope they will, to explore areas of their concern, that is 4½ hours to finish one round. I imagine there may be additional questions. I will confer with you and with the ranking member tomorrow, mid-afternoon, to determine whether or not we attempt to finish up your public testimony tomorrow or go into the next day.

As you have observed, there is no desire to rush this. There is no desire to keep people here late. There is no urgency to get it done. We are talking about a matter of 24 hours one way or another, finishing this. But if we could finish your testimony, if that is the will of the committee, and it means you stay another hour or so, I would like you to begin to think tonight whether you would rather do that than come back.

Senator LEAHY. Mr. Chairman.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. Yes, gentlemen.

Senator DECONCINI. Mr. Chairman, there is a vote tomorrow at 10. We will meet after that vote?

The CHAIRMAN. There is a vote at 10?

Senator DECONCINI. I believe so.

The CHAIRMAN. I was unaware of that.

Senator DECONCINI. I believe it is a cloture vote.

The CHAIRMAN. I was under the impression that that might be vitiated.

Senator DECONCINI. OK.

The CHAIRMAN. I will be here by 10:10 to start the hearings if the vote is at 10. We will vote at the front end and we will begin then. I understand from Senator Metzenbaum in the discussion I had with him today that it is another cloture vote. There is a possibility that that vote may not take place, so let us keep it at 10 and if there is a vote at 10 we will start as shortly after that vote as we can, no later than 10:15.

Yes, Senator.

Senator LEAHY. Mr. Chairman, by a previous unanimous consent agreement, I am going to be managing a bill on the floor starting tomorrow.

The CHAIRMAN. Yes.

Senator LEAHY. Unfortunately, this was done before we knew about this. I just would like the Chairman to know that there are some followup questions, especially on a couple of the answers in my earlier questions. I will want a second round. I will try to keep it as short as possible.

The CHAIRMAN. Yes; I am confident that other members will, and I know you have the Foreign Operations——

Senator LEAHY. Yes, Foreign Operations, so I will not be here during part of this, but I will come back at an appropriate time to ask those questions.

The CHAIRMAN. So I am confident we can accommodate everyone, but we want to accommodate your physical constitution as well, and I just want you to begin to think about if it is possible—I am not pressing to do that tomorrow—if it is possible to finish up tomorrow night. When I said that, your whole family went like this behind you, except for your wife. She likes seeing you on the hot seat, I think, here. All kidding aside, we will make that judgment tomorrow afternoon.

We will reconvene at 10 unless there is a cloture vote. If that is the case, it will be as close to 10 as we can make it. Thank you for your cooperation. We are adjourned until tomorrow at 10.

Judge BREYER. Thank you, Mr. Chairman.

[Whereupon, at 6:23 p.m., the committee was adjourned.]

NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 13, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:13 a.m., in room SH–216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Heflin, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order.

In the interest of keeping this moving and accommodating the votes that will take place on the Senate floor, let me very, very briefly explain how I intend to proceed today. We will proceed with three Senators in a row asking questions, and then we will take a break for a few minutes to give the witness a chance to stretch his legs. I will announce in the next hour for the press, who have to file, when we will break for lunch. My guess is that we will break for lunch around 1 o'clock, but we will see how this gets moving. And I do not intend on going late tonight. I would look to break, and possibly end Judge Breyer's required presence before the committee, sometime this evening. I would shoot to end by 6 o'clock unless it looks like we could finish with the witness; in which case, if it takes another hour or so, we would do that. But my intention is to break relatively early.

There are only a few minutes left on this vote which I am about to make. I thank Senator Specter from Pennsylvania for coming over to accommodate the committee.

What I am going to do is a dangerous thing for any Democratic chairperson to do; that is, yield to the only Republican present to take over the committee and begin his questioning. But I have absolute, complete trust in the man, so not to worry.

All kidding aside, I will yield now to Senator Specter for Senator Specter's round of questioning, and I will be gone for about the 10 minutes it takes me to get over and vote and come back.

Thank you very much for helping, Senator, and for coming over. I appreciate it.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. It should be noted that there is not a whole lot I can do in your absence.

The CHAIRMAN. Well, I will not say anything.

Senator SPECTER. Or in your presence, for that matter. [Laughter.]

Senator SPECTER [presiding]. But it is a powerful feeling, Judge Breyer, to be the entire Senate Judiciary Committee. For those who may wonder why I am the only one present, it is because a vote was scheduled at 10 o'clock, and I was there at the start of the vote to vote early and be able to proceed, because there are a great many Senators who are waiting to question.

Judge Breyer, in my opinion, the Senate has no more important responsibility than the confirmation of a Supreme Court nominee under its advise and consent constitutional duty. The Court, with its 5-to-4 decisions, has made a practical reality of great power for that fifth vote, touching the lives of virtually all Americans in many important cases and sometimes people around the world. And the nominees, unlike the Presidents who serve for 4 or 8 years, once they are confirmed sit for decades and have a very profound impact on the life of Americans.

The concern which many of us feel turns on the expanding role of the Court in taking on decisions of public policy which really move across the line, I think, very frequently into legislative rules—really a superlegislature. And that is why I think it is very important to find out as much about a nominee as we can, and the experience which I have seen in the 14 years I have been in the Senate—and this is the ninth confirmation hearing since 1981—the experience has been the nominees answer about as many questions as they feel they have to to win confirmation. That is a practical fact of life on the so-called tension between Senators and nominees.

I am sorry my colleagues are not here to hear just a little bit of criticism. We do that to one another occasionally, publicly and privately. I think it is unfortunate that Senators commit themselves in advance, because I think that makes confirmation a virtual certainty, and it has been expressed by many of my colleagues, even in the course of these hearings and more frequently in the media, and I think that is unfortunate, because I think that Senators, like Justices and judges, ought to reserve judgment until they hear all the witnesses. And there will be some witnesses—there always are—who will testify in opposition to the nomination.

I do not want to take too much time on a preliminary statement. I want to get right down to the issues, and I want to start with the issue of the relative responsibilities of a judge versus the legislators. And I want to start with the case of *Rust* v. *Sullivan,* which I personally consider to be a matter of judicial legislation.

When the provisions on Planned Parenthood were passed in 1970, there was a regulation issue which gave the counselors latitude to counsel women on the abortion option. And that was changed by regulation 17 years later, although Congress had really, by implication, given its imprimatur of approval to that interpretation. And in a 5-to-4 decision written by Chief Justice

Rehnquist, one of his reasons was a "shift in attitude against the elimination of unborn children by abortion."

I am at a loss to understand what bearing a shift in attitude has on the subject, but here we have legislation, a regulation, stands for 17 years; Congress could have changed it if Congress disagreed with it. And then along comes the Court and says the new regulation stands; there cannot be any more counseling of women on the abortion option, in part because of a shift in attitude.

My question to you, Judge Breyer: Isn't that really a legislative determination by the Supreme Court?

TESTIMONY OF STEPHEN G. BREYER, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge BREYER. Senator, as you probably know—I do not know if you know or not, but my circuit had a case that was very, very similar to that case.

Senator SPECTER. Same case. Similar case. I know.

Judge BREYER. And our circuit decided—and I joined the opinion—that came out the other way.

Senator SPECTER. But your circuit also said that the absence of congressional action did not determine the case. You had about the same view. You did not write the opinion.

Judge BREYER. No, I did not.

Senator SPECTER. As you say, you joined in the opinion. But the first circuit said that it really was not determinative, that Congress had let this regulation stand for 17 years.

Judge BREYER. And we did not go into that in any depth. We did not go into that in depth and——

Senator SPECTER. Well, you mentioned it. It is there.

Judge BREYER. That is true. But what you are asking me to do and why it is difficult is, of course, a judge from a lower court that decides a case one way is always tempted to think, my goodness, how right I was. And then the higher court that reverses the lower court, one is tempted to think that the judges on that court were wrong.

Now, in fact, we wrote the case, I joined it, and the Supreme Court had a different view. On the particular issue you are talking about, which is a complicated issue, I would have to say that the way in which the case was argued in our court did not flag that issue in the way that you have put it. And so I am hesitant to talk about that only for the reason that it is not something I have thought through in that context.

I know the issue in a general context, but I really have not thought it through in the context of that specific case.

Senator SPECTER. Well, Judge Breyer, there are a couple of cases which I may come to in a later round where you rendered a judgment outside of the scope of the arguments. And I compliment you on your background and your capabilities. It does not really have to be presented head on for you to grasp the import of it.

The question I have to you is really one of probing your consideration of this in a future issue. Isn't there not only enormous weight but a virtual conclusion that, if a matter is a longstanding interpretation, Congress has an opportunity to change it, Congress does not change it—and there are many cases, and I hope to come to some

of them later—that that ought to be it? That the Court ought not to say there is a shift in opinion on the abortion issue and turn the law around? Isn't that judicial legislation?

Judge BREYER. It is—I mean, you have raised a complicated and rather difficult general issue, and I am tempted to say yes, in general, but then I have a reservation. The question that you raise in the most general terms is: Suppose Congress delegates to an agency, any agency in the Federal Government, suppose it delegates to the agency the power to have a regulation or the power to interpret the statute? And what I think about that is, Congress having done that and the agency having interpreted the statute through a regulation, the Court will later pay a lot of attention to what the agency says.

And there are really two different reasons. One reason, which you are focusing on, is because the Court knows that the agency, having been involved in the legislative process, probably through testimony and maybe exchange of staff or being more expert about it, is likely to know, perhaps better than the Court, what Congress had in mind. And that kind of reason, the longer that regulation is in effect, the more exactly what you are saying is true.

There can be—and this is my reservation—a different kind of case where Congress quite clearly delegates to the agency the power both to interpret and to change its mind. Now, if you found in the statute that that was the situation, of course, the agency could change its mind because Congress would have said that it could.

So I am quite tempted to agree with a lot of what you say, but I am worried because I have not thought it through in the context of that particular case.

Senator SPECTER. Well, would you do this? Because I want to move on to another line. Think about it, and we will come back to it.

Judge BREYER. Yes.

Senator SPECTER. Because I would be interested in your reflected views.

There were a couple of questions asked yesterday on the death penalty, but I want to pursue that subject in some detail, because this is an area where the Court is moving, perhaps, to eliminate the death penalty in America. At the outset, I would disclose my own position being in favor of the death penalty, having experience as a district attorney, and I think it is a deterrent. And I am working to try to preserve it both in the State and in the Federal system. And this is an area where I think we see a marked erosion of legislative authority by what the Supreme Court has done.

I want to get your views, not as to how you are going to decide some future case, but to see your thinking on this subject, both as it illustrates your approach as a prospective Supreme Court Justice and also as it would give us some insights into your views on the death penalty.

This really illustrates the standards which the Supreme Court has said and articulated which moves really not close to but I think beyond the legislative line.

Justice Marshall, in his dissent in *Furman,* outlines some of the standards for evolving Supreme Court conclusions, and he says

this, articulating the law as he see it. And it is just not a dissenting opinion. There is a lot of background in the Court decisions for what Justice Marshall has said, and I refer to him with the greatest respect.

In *Furman,* he says:

> The cruel and unusual language must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

And then in another point in his opinion, he says:

> Time works changes and brings into existence new conditions and purposes. In the application of the Constitution, our contemplation cannot be only of what has been, but of what may be.

Now, you can see from this kind of language that there is a demarcation away from the text and the precedents and an evolving consideration of public policy which goes really very, very close to what a legislature does, if not really into the legislative area.

Justice Brennan, also in *Furman,* comes to the conclusion that the death penalty is not a deterrent. And he also comes to the conclusion that the death penalty, "Its rejection by contemporary society is virtually total." That is his conclusion in coming to the judgment that the death penalty is barred in all cases—all cases—by the eighth amendment prohibition against cruel and unusual punishment.

Justice Marshall goes back and says that, "Cruel and capital punishment is morally unacceptable to the people of the U.S."

Now, the comments by Justice Marshall and Justice Brennan that, as Justice Brennan puts it, "Its rejection by contemporary society is virtually total," and Justice Marshal, "The death penalty is morally unacceptable to the people of the U.S.," flies in the face of not only public opinion polls but that fact that 37 States reenacted the death penalty after it was struck down in *Furman* and that more than 70 Senators consistently vote for the death penalty in the U.S. Senate and about the same on the House.

Then Justice Marshall, dissenting in *Gregg* v. *Georgia,* says, referring to an observation from his in *Furman,* that, "The American people are largely unaware of the information critical to a judgment on the morality of the death penalty," and concluded that if they were better informed, they would consider it shocking, unjust, and unacceptable.

Beyond Justice Marshall and Justice Brennan, Justice Blackmun made an opinion, rendered an opinion, saying that, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." And he said in a dissent on a cert case, in *Callins* v. *Collins,* that he would no longer uphold the death penalty. And Justice Powell has recently been quoted as saying that he would be against the death penalty were he still sitting there.

Now, my question to you is: Given what you have already testified that there ought not to be a subjective determination by a Justice, what standing does—take the elements of its being morally unacceptable to the American people. How proper is that as a basis which Justice Marshall and Justice Brennan articulate in the face of the reenactment of the death penalty and in the face of the congressional votes 70-percent-plus strong in reenacting it?

Judge BREYER. I want to reveal to you my thinking without actually predicting or expressing a view on a particular case that might come up. And that, as you have said very well, is a question of drawing the line. And you will correct me, I hope, if you feel I am not drawing it properly. I want to reveal to you as much as I can without making that—without crossing the line to decide a particular case. For reasons of fairness later on and making people understand, I will——

Senator SPECTER. I respect that, Judge Breyer. I know you cannot comment on how you will decide a pending case. But what this question looks to is: Is it appropriate given the text of the Bill of Rights, which refers to the death penalty, and the longstanding use to rule out the death penalty in all cases on the judgments of individual Justices that it is not a deterrent and that the American people have rejected it? Which I think is factually not so.

Judge BREYER. First, I think it is fair that I certainly agree—and I think the vast majority of people would agree—that judges should not legislate. That is your job. It is not the job of a judge.

Second, looking at the death penalty, I have said—and I think this is the case—that it is settled law that applying the death penalty in some circumstances does not violate the cruel and unusual punishment clause.

Third——

Senator SPECTER. May I just interrupt you for one quick point?

Judge BREYER. Yes.

Senator SPECTER. Do I understand you to say that in some circumstances you think the death penalty can be constitutionally imposed?

Judge BREYER. Yes, I think that is settled law.

Senator SPECTER. So that you would reject the Marshall and Brennan view that it is, on its face, violative of the eighth amendment?

Judge BREYER. What I have said: in my opinion that is settled law.

Senator SPECTER. Thank you.

Judge BREYER. That settled law is surrounded by what I think of as a cluster of less firmly settled matters, such as how old the person has to be, though there is case law on it; such as the procedures; such as the types of crimes, the exact details. And in those areas of detail, it seems to me that I cannot properly go because it seems to me those are coming up again and again.

The question, the deep question that you raise, the deep question that you raise is the question, you would say or as I hear you saying, Fine, everyone is against judges legislating. How do you, Judge, know whether what you are doing is improperly legislating, improperly putting in your own subjective views, or quite properly trying to interpret the law in an area where the question is broad, open, and important?

That is difficult. And in my own mind, I cannot say the text is what answers the question, because in these difficult questions often it does not, though it certainly is a starting place.

I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent. That is normal.

The history is important as well, both because it reflects an intent of the framers and because it shows how, over the course of 200 years, that intent has been interpreted by others.

The present and the past traditions of our people are important because they can show how past language reflecting past values, which values are permanent, apply in present circumstances. And some idea of what an opinion either way will mean for the lives of the people whose lives must reflect those values, both in the past, in the present, and in the future, is important. And that is what judges like Harlan, the second Harlan, Frankfurter, who were not viewed as legislators, would put within the phrase like "concept of ordered liberty" or "those values that the traditions of our people review as fundamental."

Now, you——

Senator SPECTER. Well, there is always—I want to ask you one related question and then move to another subject, because there is not a great deal of time. That is a line which is hard to draw.

Judge BREYER. Yes, it is.

Senator SPECTER. One of the current major concerns in Congress and the conference committee on the crime bill is the issue of whether there will be the application of a quota system on the death penalty, where my own view expressed on the floor of the Senate is that the essence of American jurisprudence is individual justice. What is the nature of the offense, and what is the nature of the offender?

Judge BREYER. Yes.

Senator SPECTER. As opposed to having the death penalty invalidated on a statistical analysis as to how many other like people of a given group have been subjected to the death penalty.

Now, the Supreme Court decided this matter, as you know, 5 to 4 in the *McCleskey* v. *Kemp,* and now it is back in Congress. And the Senate rejected in substantial numbers, and the House passed it narrowly, and it is now on the front burner of legislation. And it seems to me that this is a matter which is properly the determination of public policy, belongs in the Congress, and we ought to decide it.

Do you have a settled view on that question? Is *McCleskey* determinative of that issue?

Judge BREYER. I think that matters of policy—and this sounds like a matter of policy for Congress. This came up yesterday, and I think no judge, I do not think at all, would say statistics are never relevant. But you have to be careful with statistics and you have to be careful because they have to really show what they are supposed to show. And it is so easy for them to show, appear to show what they do not show.

Senator SPECTER. But that is a question of reliability of statistics. This is a different issue. This is an issue of whether statistics are relevant on what happens to others in a given group contrasted to a determination of the nature of the offense and the nature of the offender.

I know this was mentioned briefly yesterday, but I just wanted to understand your position that you consider the matter resolved as a constitutional issue by the *McCleskey* v. *Kemp* decision and,

appropriately, in the legislative range where we are now wrestling with it in the crime conference committee.

Judge BREYER. *McCleskey* is precedent for the particular—you know, the kind of statistics that were presented there are not making the case, and that was decided and that is a precedent.

Senator SPECTER. It can always be revisited.

Judge BREYER. Well, yes, but you have to be careful revisiting precedents. Your question is——

Senator SPECTER. Oh, my next question?

Judge BREYER. No, I was not thinking that. I was thinking that there are—what you are concerned about, there are a couple of checks, I think, on this subjective view of the judge.

Senator SPECTER. Judge Breyer, in the few minutes I have remaining, I would like to pick up a question which has received a lot of attention, and that is your ruling on the case of *U.S.* v. *Ottati and Goss*. It raises the issue where you had been so careful, as I understand the facts—and I would like you to confirm them—that you had not handled any cases involving Lloyd's of London and you had not been involved in any cases involving asbestos liability; but that the case of *U.S.* v. *Ottati and Goss* did potentially touch one of the syndicates, Merritt 418, which involved the underwriting of toxic waste cleanup.

I would like your comment on the underlying facts and your observation. And I have no question at all about your integrity, but I think it is a matter that has to be put on the public record. Also, we need to learn from it as to what judges who have investments can do to find out more about what their investments reach to on matters which come before them.

Judge BREYER. Yes; I, of course, disclosed all my investments, including my investment in Lloyd's. And I have three screening systems, now four, to make certain that I never sit on a case in which any firm in which I have an investment, including Lloyd's, including that syndicate, including any part of Lloyd's, is a party in that case.

The clerk checks everything, all the names that he can find on those briefs, against the names on my disclosure form.

My secretary has the same list and sees if anything slips through that sieve.

I have the list, and I have been putting it up in my clerk's office, too, my personal clerks.

In that case, and in no other case that I am aware of, did anything slip through that sieve. So, to my knowledge, Lloyd's did not have any direct interest in *Ottati and Goss*.

A different issue, I think, was raised about *Ottati and Goss,* and the seven or eight pollution cases that I sat on. The different issue is that sometimes, of course, if you have an investment in company *A,* even though company *A* has nothing to do with this case, maybe the holding in the case, even though it is quite a different case, could affect your investment in company *A*. And there the standard is: Is it a real effect, a direct effect. "A substantial effect" is the word of the statute. And the reason that those words are used is that if you are in—if you have many different stocks, virtually any case could have some theoretical connection to something.

So what I do is bells go off in my mind if I am sitting on a case and I begin to think that the holding in that case, even though no investment is a party, but the holding in that case could affect my own pocketbook, no such holding went off—no such bell went off in my mind in respect to *Ottati and Goss,* nor any of the other seven pollution cases that I sat on. That is to say, the label is the same. There is a label called pollution case, and it is true that Lloyd's and these syndicates and any insurance company can be involved in any insurance anywhere, and there always can be similarity of label. But I saw no direct, proximate connection, let alone a substantial connection, between the holding in that case and my own pocketbook. And that, I think, in recent days has been confirmed by lots of people who have read those cases with care, who are experts in the area, and who have looked to see if my initial judgment—and I cannot tell you my initial judgment is always correct. I can tell you it is something that I am very, very sensitive to and that I will remain sensitive to.

And my reasons are personal because what I really have, after my own family, is my integrity. And my reasons are institutional, because it is terribly important that the public understand and respect the integrity of the judicial system. And, therefore, the way I proceed is full disclosure, three to four screening systems, and then what I hope is extreme sensitivity to the possibility that a holding in one case could somehow, through some set of interconnections, really affect my pocketbook. And there I will say I made that judgment call. I thought it would not directly affect my pocketbook in any direct, proximate, substantial way.

And I will say that others in the last few days, ethics experts, various kinds of experts looking at this, agree—though I must add that reasonable people could disagree, and there are some who do. And I respect that, and I think it is important to raise such a question. And it is important, though I do not want to be repetitive, it is important for the very reason you raise it. It is very important that people understand the integrity of the judicial system.

Senator SPECTER. Judge Breyer, I accept your conclusion, and I fully appreciate the importance of integrity to you personally and institutionally for the Court. The last question I have on it is the factual matter, and I understand that there was no reason to see the connection. But was there a hidden problem that, in fact, the investments in Merritt 418, which did have liability underwriting in toxic waste cleanup which touched Superfund could factually have been involved in your ruling in *Ottati and Goss,* even though, as I agree with your statement, you had no reason to know it at the time?

Judge BREYER. You mean that they had somehow insured that very toxic waste dump?

Senator SPECTER. Well, or the precedent from your decision in Superfund would have had an impact on the liability of a company in which you had an investment. Factually, did it get there, even though you had no reason to know about it?

Judge BREYER. As to the first part, were they factually involved in that very toxic waste dump, I believe the answer is no. As of this moment, I have no reason to think that answer is any different. As to the second question—that is, could my holding in that case have

had a direct impact on my pocketbook, that is, that syndicate?—I believe the answer is no, though that is judgmental. And what that means is you have to look at the particular case. And I did look at that case, and I have thought about it, and I have looked at it really again and again in the last few days, believe me. And I still think that there is no direct, proximate money in my pocket through 418 because of what was or might have been held in that case.

That is my belief. That is judgmental. I think many, many others who have looked at it agree with me. And I recognize that reasonable people could differ on the point.

Senator SPECTER. Thank you very much.

The CHAIRMAN. Thank you very much, Senator Specter.

Senator Heflin.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Judge Breyer, we are delighted to see you back with the Judiciary Committee. It was a pleasure to serve with you when you were the staff director and the chief counsel. From that association, which involved many thorny issues, we developed certain evaluations relative to your personality, your intellect, and your integrity. And I think they were the highest.

We had many nonharmonious issues that were raised during that time, and you were a great consensus builder. However, you failed in regards to a consensus builder when it came to the codification of the Criminal Code. I think that is such a thorny issue which was tried twice to try to do it. You and Ken Feinberg and others worked on that to get a consensus of that. But from our association, we developed a friendship. We developed the highest regard for your integrity, the highest regard for your abilities, and for your ability to inform everyone.

We were pleased when we learned that you and a great other lawyer who was representing the other side, Emory Sneeden, would meet for breakfast every morning, and you all would do these things.

But sometimes, you know, as we think about these friendships and things, we do not want to let that prevent us from asking some hard questions. And I think we have that function here.

To follow up on Senator Specter about Lloyd's, you have mentioned your mechanical approach, your technical approach to trying to determine whether or not there could be an interest of Lloyd's of London in any case that you had. When did you start that procedure by which you had three check mechanisms that you would follow relative to that when you went on the bench?

Judge BREYER. That is when I started, Senator.

Senator HEFLIN. When you started. All right.

Judge BREYER. Yes; I cannot tell you every year, but, I mean, I would say very close to when I started, probably when I started.

Senator HEFLIN. Now, when you practiced law, I supposed you tried cases in which there were insurance companies involved but not named. That happens frequently. And the jury is qualified either by the attorneys or the judge relative to whether or not there might be a member of the jury venire who has an interest in or

is a shareholder in a certain insurance company, and that appears in the record.

Did you in part of your mechanism endeavor to try to look at transcripts to determine whether or not Lloyd's of London might have some interest in any case?

Judge BREYER. I would look through the briefs. That is, if I came—I read the briefs in every case, and if, in fact, it appeared from the brief, if, in fact, it appeared in the record, or if, in fact, I learned it from a brief, then I take myself out of the case. And that was basically—and that would be true of any investment. You know, it was not special with Lloyd's. It is that if you learn as a judge that a firm in which you have an investment has a direct interest in the case, you take yourself out. It is simple. Everyone understands that. Everyone understands that, and the only risk in such a thing is that something slips through the net. And you try to cast the net what I would call reasonably wide.

Senator HEFLIN. Well, now, under the Federal Rules of Appellate Procedure, in many instances you do not have the full transcript. You have designated portions of it, what you could do. But I think it is wise to sort of look back relative to the transcript and the jury venire questioning to determine whether or not there could be. That is something you might consider adding. I think your mechanisms that you have listed are good, but that is a method by which generally it will show up, because lawyers are very diligent and want juries asked the question: Do you have stock? That is the only way some lawyers get into the jury's mind that there is insurance in a case relative to that.

Now, I have read various letters that have been presented to us, and one is from Geoffrey Hazard, who was the Sterling Professor of Law at Yale and then I believe is now at the University of Pennsylvania, and who I have a great regard for and is probably one of the leading authorities on judicial ethics and legal ethics. He was the chief draftsman of the Code of Judicial Ethics when it was drafted in 1972, and I happened to be on the court at the time and worked with him. My State was one of the first to adopt the American Bar Association models of judicial ethics.

I have read his letter, and I think his letter goes to the point and is excellent, and I want to just point out that he says that, "I am advised that Judge Breyer as judge participated in a number of cases" involving CERCLA, which is Superfund.

> None of these cases involved Lloyd's as a party or by name in any respect. None appear to have involved issues that would have material or predictable impact on general legal obligations under the Superfund legislation.

And then he says:

> In my opinion, Judge Breyer's participation in the foregoing cases did not entail a violation of judicial ethics. None of the cases involved Lloyd's as a party or as having an interest disclosed in the litigation. None could have had a material effect on Judge Breyer's financial interests. None had a connection direct enough with Judge Breyer as to create a basis on which his impartiality might reasonably be questioned * * *

Then he goes on and says that, "There is a close analogy between the kind of investment as a Name"—and, of course, "Name" is meaning that it is under Lloyd's. That is the way a person participates.

There is a close analogy between the kind of investment as a Name and an investment in a mutual fund. A mutual fund is an investment that holds the securities of operating business enterprises. Ownership in a mutual fund is specifically excluded as a basis for imputed bias under [the code] and the Code of Judicial Ethics. This exclusion was provided deliberately, in order to permit judges to have investments that could avoid the inflation risk inherent in owning Government bonds and other fixed income securities but without entailing direct ownership in business enterprises.

Now, Chief Justice Roger Traynor of the Supreme Court of California, who worked on the Code of Judicial Ethics, went on to say that the idea of a common fund or a similarity to a mutual fund is because of the impossibility of keeping track of the portfolio of such a fund. But if a mutual fund had only insurance companies, that might raise a flag of caution.

Now, when you consider Lloyd's, Lloyd's is known nationwide as insuring anything. They say, all right, if you want—insurance companies will not insure this, but you can get it under Lloyd's of London. So the idea of having an investment in Lloyd's of London raises some sort of an issue pertaining to this as to whether or not, after going on the bench, you ought to divest yourself of any interest in Lloyd's.

Now, what is your feeling relative to that? Did that enter your mind, the fact that Lloyd's of London is such a widely known and the fact that you—of course, you filed disclosures all during the time that you were there, so it was publicly known. But there is that issue of whether or not that raises a red flag.

Judge BREYER. As I understood it, it was like a mutual fund. I would go over and visit my mother-in-law and family over there, Joanna's family, in the summer. And what it consisted of, my investment, is you would go and spend an hour's lunch with this person who was the agent, who would tell you we have various—we are proceeding for the next year, and anything in the world can be insured. And when you read about losses, remember, losses in some areas have gains in another. You will never know. You will never know how the insurance all works out. You will never know what is insured. You will never know whether there is a gain or a loss. What can be a gain for one company can be a loss for another. If there are a lot of losses, that can be good because then more people want to buy insurance. So in a sense, it was a good investment like a mutual fund because it is all over the place and there is no way to predict whether any case would help you or hurt you if you tried.

On the other hand, that word "insurance," as I have learned in the last few weeks, that word "insurance" does ring bells. And basically what I decided—it takes a long time to get out of Lloyd's. You have to resign, and then it takes 3 years. So when I first became a judge, I put it down. I knew it would take 3 years, and I did not immediately resign. By 1988, I had reached a conclusion such as you suggest, and I resigned. That is partly why I did. That is partly what I wrote.

I think the thing to do now is—given the issue that has come up, I am not interested in having an investment in an insurance company. It does not affect—I mean, that is why I said yesterday I would like to simply get rid of it.

Senator HEFLIN. Well, now, there are other experts in the field of judicial ethics and legal ethics. Professor Stephen A. Gillers at New York University Law School comes out and says:

I see no evidence that the decisions in Judge Breyer's case would have had a direct or substantial effect on his interest as a syndicate that has insured against risk of liability for environmental pollution.

He supports you.

John Frank, who worked on these issues when they were being formulated and worked as a consultant, and others, have written letters, and I think they ought to be introduced into the record, all of these—I believe they were addressed to Mr. Lloyd Cutler—pertaining to these matters; I think they ought to be in the record.

But Professor Hazard does say this:

In my view, it was possibly imprudent for a person who is a judge to have such an investment because of the potential of possible conflict of interest and because of the possible appearance of impropriety.

Now, what do you say to that statement by Professor Hazard?

Judge BREYER. I would say at the time that I entered into this investment in the 1970's, and my keeping it through the mid-1980's, I thought basically it is like being in the Dreyfus Fund, or it is like being in a big stock fund, although it is a fund of insurance risks. And I did not think beyond that. So it seemed the diversity was OK and probably a good thing for a judge, because you have a tiny little bit of risk everywhere, and therefore it is not going to affect you directly in any way, unless they are involved in the case.

Having listened to what you have said, and having become acquainted with Professor Hazard's view, I accept that view, and I think if there are a substantial number of people who believe it is imprudent, that that is an added reason why I should be out of this investment, and I will be out of it as absolutely soon as I possibly can. That is what I will do.

Senator HEFLIN. Let me go to another subject that have briefly been asked about you, and that is sentencing guidelines; and they are controversial. I have to admit that I was not that enthusiastic about them; I thought there were other ways of handling disparity of sentences other than the sentencing guidelines. I think Senator Mac Mathias and I were the only ones who raised questions about this. I think that some of the States have come up with better systems, rather than the system that we adopted at the Federal level.

But there are a lot of them today—here is a statement that Professor Albert Alschuler of the University of Chicago Law School points out: "You scratch the guidelines anywhere, and you get a horror story. Judge Stephen Breyer is as responsible for the mess as anybody else." Now, of course, he is looking at it from his viewpoint that they are all a mess. There are others who feel like the guidelines are working, but the question of the mandatory minimum sentences—in a recent article that you wrote, you made this statement:

All right. Let us not call them mandatory statutory sentences. We can call them bananas, and we will say we have got to get rid of these bananas because they are very rotten bananas, and they tend to infect the criminal justice system. I think, frankly, it is a kind of mess, and from the point of view of people who are interested

in an effective system and also a rule of law that people will be able to enforce, it seems fairly obvious to me that we ought to get rid of them.

Now, I do not think this is going to be necessarily a judicial question. Do you have any advice that you would give Congress pertaining to this issue as Congress proceeds and as it is proceeding today on the crime bill, in which there are more and more mandatory minimum sentences, that are being formulated in the crime bill?

Judge BREYER. Senator, the rather colorful statement that you read was not made in a judicial context. The view that I was expressing and said yesterday that I thought perhaps it would be understandable that I would have this view because after all, Judge Wilkins and I and others on the Commission were sentencing commissioners, and we naturally thought that it was an advisable thing for Congress to give to the Sentencing Commission the power to write guidelines which are fairly tough guidelines, but which have a little oil in the joints for unusual cases, where, if there is an unusual case, the judge can depart, though the Court of Appeals will review that for reasonableness.

Now, being a commissioner—a former commissioner—it is not surprising that I would hope that Congress would continue to delegate authority to that Commission, see how they exercise it, and if you feel they are exercising it badly, then change that authority. But that seemed to me to be consistent with your general hope to remove some of this from the political arena and to try to make it consistent and coherent.

So for that reason, I have expressed the view, sometimes colorfully, sometimes not, that to have a somewhat random or different assortment of mandatory minimum sentences is not consistent with that and would not work well. That was the view that I expressed, and it is not surprising that I have that view. I think it does not work well from the point of view of criminal law enforcement. That was the view that I have publicly expressed; that is true.

It is a legislative question, and however it is decided in Congress, the courts will enforce the determination that Congress makes.

Senator HEFLIN. Well, I am not asking you to judge on this; I am asking your view relative to giving advice to Congress. You are still of the opinion that there ought to be a very few mandatory sentences; I assume that is your position?

Judge BREYER. That was the view of the Sentencing Commission. They prepared a study, and what the studied showed was when they write guidelines, the departure rate is low; it is about 7 percent, 8 percent downward and a couple of percent upward.

Senator HEFLIN. Let me ask you another tough question. Supposedly—this has been brought out by David Garrow's book, "Law and Sexuality," and he suggests that you wrote the first draft of Justice Goldberg's concurrence in *Griswold* v. *Connecticut*. Will you give us information pertaining to your participation in that opinion?

Judge BREYER. If you had worked for Justice Goldberg as I did, you would be fully aware that Justice Goldberg's drafts are Justice Goldberg's drafts. It was Justice Goldberg who absolutely had the thought, that his clerks implemented, and both my coclerk Stephen Goldstein and I did—there were two at that time—and we worked

on that draft. I might have worked on it a little more than he. But it is Justice Goldberg's draft.

Senator HEFLIN. Well, as a clerk, you generally follow the directions of your judge——

Judge BREYER. That is correct.

Senator HEFLIN [continuing]. Or you cease to be a clerk.

Judge BREYER. That is correct, that is correct.

Senator HEFLIN. Much has been said about your ability to be a consensus builder, and the collegiality of the Court. Do you think that the collegial atmosphere of the John Marshall Supreme Court is preferable to the more—or at least it appearing—to the appearing contentious atmosphere of the Court today; and what do you think are the advantages of collegiality and consensus, and what role do you think you can play to help bring this about?

Judge BREYER. That is a very big question. John Marshall's Supreme Court played a major role in building the United States of America. It made real the constitutional promise that there would be one Nation. It did that through the decisions that we all know.

I think the consensus was critical there to the fact that we have a United States with limited government, with great freedom, that allows us to live together. It is a remarkable thing, that Court. No court could live up to that Court—maybe the Brown Court—but really tough to do.

Consensus is important. Consensus is important for a number of reasons. One is the effort to obtain consensus tends to downplay the individual ego of the individual judge, and that makes it more likely that there will not be subjectivity, and there will not be personal views, and everyone will put his mind or her mind to the more important task of determining the law.

Consensus is important because law is not theoretical; law is a set of opinions and rules that lawyers have to understand; judges have to understand them; lower court judges have to understand them. And eventually, the labor union, the business, small business, everyone else in the country has to understand how they are supposed to act or not act according to law. And consensus helps produce the simplicity that will enable the law to be effective.

Now, how do you achieve that consensus? That is hard. It is not a question of bargaining—I will give you that, or I will give you that—believe me, it is not that kind of a question. It is a question of trying to listen to other people. It is a question on our Court of each judge listening to the other. And I bet you found that on yours as well. And you think it is so much more important to another person. You listen to the argument, and even if you say, "In the opinion, it might be argued that, but we reject that," the other judge is much happier. The point of view is taken into account, and that tends to draw people together. And then, when the different judges understand that their own ego is less at stake, you do not stick on every little minor thing; try, and try to get a view in the opinion that is straight, that is clear, that pays attention to the different arguments and that treats them fairly, then I think consensus comes along. It is pretty general, but I think it is important.

Senator HEFLIN. Charles Evans Hughes once wrote that dissents are vital to a living Constitution because they appeal "to the brooding spirit of the law, to the intelligence of a future day, when a

later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." You, however, have commented favorably on the fact that your circuit produces very few dissenting opinions. Don't we make bad decisions worse by discouraging dissenting opinions? Should Justice Harlan have been encouraged not to write his now famous dissent in *Plessy* v. *Ferguson*?

So now I am asking you—a consensus builder, when and in what circumstances do you feel that dissents ought to come from the members of the Court?

Judge BREYER. In my own court, and I am sure in yours, Senator, there is no problem—there was no problem—if people felt strongly, they dissented. The thing that you would like to have the judges feel, and that is why I feel we were quite lucky in the first circuit, is look, this is not a matter of your own ego, this is not a matter of being picky that it does not say exactly what you want on minor things. Use common sense about this. Remember that you are writing for lawyers and judges and others who are going to have to apply this opinion and live under it. Remember all that. Now, if you think that this majority opinion is wrong on a significant point, you file a dissent. That happens. That happens in our court. It is the right thing.

Senator HEFLIN. Before joining the Supreme Court, Justice Ginsburg said that she felt the Supreme Court judges wrote too many memorandums and held too few discussions. Do you agree with her assessment, and in encouraging consensus in the first circuit, did you find it easier to encourage consensus by speaking as opposed to writing to each other?

Judge BREYER. That is interesting. I agree with her about quite a lot, but not on that. It actually helps to put it in memoranda. It is interesting, you know, in our court, Judge Torruella is in San Juan, Puerto Rico; Judge Cyr is in Maine; Judge Bownes and Judge Stahl now are up in New Hampshire; Judge Campbell and I and now Judge Boudin were in Massachusetts; Judge Selya is down in Rhode Island. That is where we are most of the time, and we most of the time communicate through memoranda; and actually, the memoranda help, because you start talking about a complicated case in a discussion, and then people get—"I cannot remember exactly; was it this point, or was it that point, and what did I actually think about it?"—and before you know it, the discussion gets a little confused. But if you get into the habit of do not worry about your English, do not worry about it being perfectly phrased—if you have an idea, put it on a piece of paper, sit there, write it out, send it around. And you get into the habit of reading each other's views and realizing nobody is wedded, but this is what he is thinking at the moment, and we will change that. That actually helps. So I am more on the side of written, actually, than oral; I have learned that.

Senator HEFLIN. Well, does that give you more of a wedding, though, sometimes, rather than discussing it?

Judge BREYER. No; you can discuss it——

Senator HEFLIN. There are a lot of Justices with a prima donna approach, and there are a lot of prima donnas on the bench who

have an idea that they have a pride of authorship and a pride of language that is difficult to make them change.

Judge BREYER. Oh, yes, but you have to get the habit that this is really tentative. You know, another interesting thing is people get into the habit, they have an idea, and the other person incorporates it into the opinion; so you have helped the other person write the opinion. Interesting. That can——

Senator HEFLIN. I see my time is up.

The CHAIRMAN. Is that spoken as a former chief justice or as a Senator?

Senator HEFLIN. Well, maybe more as a former justice; I would say that they are not wedded as much around here because it is generally written by staff. [Laughter.]

The CHAIRMAN. Senator Brown.

OPENING STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BROWN. Thank you, Mr. Chairman.

Judge Breyer, we all admire not only your outstanding record, but your perseverance in surviving this deliberation. We trust that you will be kinder to the people who appear before you at Court than we are to you.

I have been particularly intrigued with the opportunity to read some of your writings—I have not read all of them, but I have read some—and to listen to your responses. You strike me as an individual who is not only a legal scholar but as someone who combines it with a scientific approach to examining facts. I sense in you a willingness to go beyond a doctrinaire political philosophy and look at facts in making up your mind. Is that a fair judgment?

Judge BREYER. Goodness, I hope so. I am a little biased, but I hope so. Thank you.

Senator COHEN. I think the judge indicated he does not like flattery.

Senator BROWN. Well, I think we can take care of that, too. But I find it intriguing and refreshing that someone would have that orientation. That scientific, nonideological approach to judging is much needed in our judicial system.

You spoke earlier today about the courthouse in Boston. Senator DeConcini addressed the expenditures and walked through some of the factors with you. There were several items that were not covered, and I just wanted to clear those up.

First, it would be helpful if you would outline the responsibilities you, as the chief judge of the First U.S. Circuit Court of Appeals, had with regard to that courthouse. What was your responsibility? What did you control and not control?

Judge BREYER. We came in—I say "we," because Judge Woodlock of the district court and I were basically the judges' representatives—and we worked with primarily the people in the General Services Administration. And where we entered in the process, the demand for the courthouse—the need for it had been there for many years before I became chief judge, and eventually, through a normal governmental administrative process, the demand led to a GSA study, which led to show the need for the court, which led to funding, all of which goes according to rules, and I think all of

the funding was provided according to rules. The amount of the funding is set according to rules, and all that I think was applied right across the board in normal way.

Where we really entered was that what Judge Woodlock wanted to do and what I wanted to do was to use with this what I think a perfectly straightforward appropriation for a courthouse that has a straightforward need; could that money be spent in a way that would be of benefit to more than judges and more than litigants and more than lawyers. We had a very attractive site. We spent a long time trying to choose the right architect. We narrowed it to seven. Certainly, I think those seven, most of them would be on anyone's list of the best architects in the United States. Eventually, we chose an architect, Harry Cobb, and I will tell you what he did to us that is so interesting to me.

He showed us a picture of a courthouse in Virginia, a courthouse that was built I think in the 17th or early 18th century. And what you saw in that courthouse was not expense. It was made of inexpensive material. It had one room, and it had a portico in front. And in that portico, you could see it was the center of the town. Not just lawyers and not just judges, but everyone in that town would gather there, because that building, as so many courthouses in the 18th century and in the 19th century in this country, in the North, the South, the East and the West, they were symbols, and they were used as symbols; they were used in reality as centers of places. Government is part of the community in many ways, and——

Senator BROWN. My question was really more focused on whether you, as chief judge, were the one who made the decision on which architect was hired? Were you the one who made decisions on the plan? What I wanted to pin down was specifically what your responsibilities were in that process.

Judge BREYER. We had a committee, and the committee was GSA, and GSA has the legal authority, and the legal authority was always with GSA. But GSA was extremely cooperative, and GSA worked with us and brought the architects in, and we worked together, and we would meet every, single week, and we worked with community groups, we worked with all the groups in the city that had an interest in this. I would call it in practice a cooperative process; in law, it was a legal process under the control of GSA.

Senator BROWN. So they looked to you for advice, but for example, you were not the one who set the budget for the courthouse?

Judge BREYER. No; that is correct.

Senator BROWN. The newspaper reports indicate a cost of $285 a square foot cost for the building and estimate that it is triple the average courthouse. Are those two assessments correct as far as you know—the $285 a square foot figure, and that it is three times the average of a normal courthouse?

Judge BREYER. The number—I do not know how they calculated it—but the number that I usually think, which is a GSA calculation, was somewhere around $212, $214, somewhere in that range, and that it was right in the middle of the price of Federal courthouses; that is, there were quite a few more expensive, and there were quite a few less expensive. It is right in the middle range.

That is my impression. You could check directly with GSA. They have all the numbers.

Senator BROWN. The Washington Post and another one of the Washington papers indicated that the courthouse included a $450,000 appropriation for a boat dock associated with the courthouse.

Senator GRASSLEY. Does that mean the judges lost their moorings? [Laughter.]

Senator BROWN. Well, I think it is probably in the interest of the Senate not to talk about people who have lost moorings.

I am wondering first of all if the boat dock was in your recommendations and if it is something you approved of?

Judge BREYER. We have no choice. That is to say, it is built on a piece of land that had a boat dock there already, and I think, under the rules and regulations of GSA, that that boat dock must remain suitable for water transport. It was going to be used for public water transport in the city. The hope, I think, of GSA there is that this could be used for public water transport of all different sorts; the Park Service might use it. But the requirement that it be restored and retained was there under normal rules and regulations. We had no choice about that.

Senator BROWN. And $789,000 for original art work?

Judge BREYER. In every public building under the rules and regulations of GSA, I think under the Senate and congressional law, one-half of 1 percent, I believe it is, of the construction budget must be set aside for works of art, and this was done according to that rule, regulation and law, and I think it helps that.

Senator BROWN. $1½ million for a floating marina?

Judge BREYER. That must be the same as the first.

Senator BROWN. In combination with the dock.

Judge BREYER. There is only one dock there. There is only one dock, and that is a restoration of the dock that was there already.

Senator BROWN. Thank you.

Let me draw your attention for a moment to an interesting area of law. With your broad experience, you ought to have some interesting comments for us. We have been fortunate enough to pick up some of the tenets of common law as we develop our own law. One of the more interesting common law concepts that Blackstone recited in his works is the idea that the sovereign can do no wrong, or the king can do no wrong. It has been modified over the years. The British have found areas where they make exceptions to it.

The Framers of the Constitution found something in this concept to model on, and they created areas of congressional immunity. The Constitution, in the speech and debate clause, seems to grant Congress some immunities. We have also exempted ourselves from a variety of statutes, whether it is civil rights, or OSHA, or fair labor standards, and a variety of others.

Over the years, I have seen disclosure requirements simply ignored when Members of Congress did not comply.

We have made some progress in the last few years in changing this. The U.S. Supreme Court said in *U.S.* v. *Lee* in 1982 that no man is so high in this country that he is above the law.

I want you to reflect for a moment on what you consider to be the constitutional basis for legislative immunity from the law.

Judge BREYER. The most obvious place is the speech and debate clause. Let me see if I can find it readily. But the speech and debate clause does basically mean that you, during your speeches and debates in the floor of the Senate or in the House of Representatives, have an immunity, and that immunity, for hundreds of years, has been seen in the law not just as a protection of you, but as a protection of your constituents, those who vote for you, to make certain you are completely free to say what you want on the floor of this House. That is protecting them, and I think that you are protected in order to protect them.

Senator BROWN. Do you see exemptions other than relating to speech and debate that would exempt us from criminal prosecution or civil legal action if the underlying action is not related to speech and debate and not related to a specific exemption in law?

Judge BREYER. In the Constitution itself, I cannot—nothing immediately comes to mind. There may be a range that I am missing, that just is not coming into my mind, but that I——

Senator BROWN. I appreciate that sometimes we are hitting you cold with these things, and you need time to reflect.

Judge BREYER. Yes.

Senator BROWN. What basis you find in the Constitution for judicial immunity.

Judge BREYER. There is a judicial immunity. It is well established that there is a judicial immunity from suit. Whether that is a constitutional basis, many of these—what I do not know in answering your question, since that is such a well established thing, and how interesting you ask me a question, something I know, basically, that that is well established, and you are saying does it rest on the Constitution, or does it just rest on this long tradition that was a common law tradition and then picked up in the Federal system—that is a good question, and I do not know the answer to that. I do not know the answer to that.

Senator BROWN. Obviously, our practices are somewhat mixed, because they rest not only on the Constitution and the common law, but specific statutes as well. In *Nixon* v. *Fitzgerald,* the Court considered Presidential immunity. The Court decided that the President has absolute immunity from civil damage liability arising from his official acts, in the absence of explicit congressional action indicating the contrary.

What do you consider the constitutional basis for Presidential immunity.

Judge BREYER. I do not know how article I and article II really interact with what this long tradition has been. There is a famous statement by Learned Hand—and now, having referred to it, I am sure I will get it wrong—but basically, he talks——

Senator BROWN. He is not here to contradict you.

Judge BREYER [continuing]. That is true—but he talks about this tradition of immunity and explains it very well how many officials do have immunity, and the reason—a policeman, for example, in certain areas, or prosecutors in certain areas, or judges—the reason is basically to permit a public official to act so that Government can function without thousands and thousands of lawsuits; then, what is the nature of the immunity, and under what circumstances, and is it qualified, and where is it absolute. Those are

the subjects of dozens of cases, dozens and dozens—indeed, we have had an awful lot in our circuit arising—a lot of them have arisen in Puerto Rico, actually.

Senator BROWN. Do you see an immunity for the President that extends beyond his official acts?

Judge BREYER. That, I do not know.

Senator BROWN. Do you see a basis in the Constitution for the President to order a Federal judge to dismiss a private suit filed against him if that suit is not related to his official acts?

Judge BREYER. Those are the kinds of questions that have never come before me. If they ever came, I would read the briefs, consider the arguments and think about them, and try to get the correct decision.

Senator BROWN. I can appreciate that as a proper approach and one we would hope you would take. My question is, Do you know of a provision of the Constitution that would grant the President the power to order the dismissal of a suit against the President if it did not relate to official acts?

Judge BREYER. There are the cases that I know and the cases that I do not know. The cases that I do know—as you began, I suddenly realized that while I am quite familiar with a lot of law involving immunity, I have never had to face the question, or never thought through, or it has never arisen, what the constitutional, common law, or statutory source is for the fundamental immunity. And then the area I do not know really at all, because it has never come up, is this question involving the President.

Senator BROWN. Thank you.

Let me refer you now to the field of property rights. You have talked with several members of the committee about property rights. One of the intriguing things in this area has been the phenomenon of the classification of some rights as being property rights and some rights being personal rights and, in our discussion of them, separating them into different categories. My own perspective has been that it is very difficult to separate the two; it is an artificial distinction. Someone's ability to own property is a personal right in that someone's person is affected by what happens to their property. Whether you would agree with me that that is an artificial distinction or not, I want to direct your thinking to the different ways we treat specifically enumerated rights and other rights that are unenumerated, or implied by the Constitution.

The fifth amendment is an enumerated right that prohibits private property from being taken for public use without just compensation; or article I, section 10, "No State shall pass any law impairing the obligation of contracts." Those are rights spelled out specifically in the Constitution. They tend to relate to property rights.

Then there is another set of rights that are implied by the Constitution, under the due process clause for example. We apply different tests to these rights. Specifically enumerated property rights in substance get a lower test or lower protection than some of the unenumerated rights which are not even mentioned in the Constitution.

In the *Dolan* case, the current Court had an interesting phrase; I will read it to you:

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances.

What are your thoughts on the sentiments that quote expresses?

Judge BREYER. I do not think I see these things in tiers. I think I see, or at least I start out by seeing—and I might learn more later—but I start out by seeing the individual words of the Constitution that start talking about rights as trying to identify certain basic values or clusters of values, and those values are obviously different, and they lend themselves to different kinds of potential regulation or State interference, depending on what they are.

But you, I thought, said which is there is a sense in which a person's own personality can be mixed with a material thing—think of your old sofa, or mine, or our house; we live in it for a while, and think of how it becomes part of us. And there is something in also being able to earn a living that is terribly important to everyone. And those kinds of things—what the Court said in *Roth*—it is the purpose of the ancient institution of property to protect people in those rights which they rely upon in their ordinary lives. You see, it is driving at something that is important under that term "property"—a different thing than under free speech and so forth, but still something that is important to people. How that interacts with the needs of the rest of society to function will be different, because it is a different kind of thing. That is why the Constitution does not enact some particular theory of the economy. That is why the Constitution recognizes, and Holmes, again, recognized, you know, the need, that it is perfectly necessary for the Government to say to a coal mine operator: Coal mine operator, you must leave columns of coal in the mine so it does not collapse. That is called regulation.

Balancing what is at the heart of the matter in the case of property and the need for society to function through regulation is different in that area than in some other area, but that is because different things are involved, and because, quite clearly, as we said yesterday, no particular theory of the economy is written into the Constitution.

The CHAIRMAN. Senator, would you yield on that point?

Senator BROWN. I would be glad to yield.

The CHAIRMAN. We do not balance in the same way whether or not a black man or woman can move into a neighborhood.

Judge BREYER. No; absolutely not.

The CHAIRMAN. Explain the distinction, please.

Judge BREYER. There is a basic promise of fairness written right into the Constitution in the 14th amendment.

The CHAIRMAN. So there is a tier—the Senator's point is correct, though—there is a tier.

Judge BREYER. Seen that way, there is a tier. Seen that way, there is a tier. Seeing—you start talking about taking away a toothbrush—I am saying there can be something basic, but there is a tier, of course.

The CHAIRMAN. And you do see that tier?

Judge BREYER. Yes; I do.

The CHAIRMAN. OK. Thank you.

I thank you for the interruption.

Senator BROWN. I wanted to go back to an aspect of this, but you have intrigued me with your response. As I understand it, you have talked with leaders of other countries who are in the process of drafting constitutions. You observed that not only was the Constitution important, but the customs and traits and accepted practices were perhaps equally as important.

Do you look to those in helping to determine what the Constitution means when you interpret it?

Judge BREYER. The way in which people live and how they live—yes. The basic values in the Constitution are supposed to apply in this society.

Senator BROWN. Perhaps there is no alternative. Perhaps that has to be part of it. I am wondering how is it that some specifically enumerated rights have received a lower level of protection than a number of unenumerated rights have received. How do you justify it in your own mind if you look at the Constitution?

Judge BREYER. Well, if you are thinking of—I think the answer I gave yesterday is an easier way for me to make the point. What I had said—when you say that, when I see directly what you are thinking about, it seems to me what you are thinking about is the protection accorded property as compared, say, to the protection accorded free speech. And I think what people learned over the course of time was that when the Supreme Court in the early part of this century began to say these are exactly the same thing, they ran into a wall. And the wall that they ran into was it will not work. And the reason that it will not work is that when you start down that track, you see that what you are reading into that word "property" is a specific kind of economic theory, the very kind of theory that Holmes said the Constitution did not enact. And therefore the Constitution being a practical document has of necessity given the Government greater authority to regulate in the area of property than it has given the Government to regulate in the area of free speech. That I think is the simplest way to look at it. That is how I look at it.

Senator BROWN. And that is a line of reasoning that you are not uncomfortable with.

Judge BREYER. No; I think that is well-established. I think it would be—I mean, I do not know that everyone accepts it—but it seems to me a rather traditional—that does not mean there is no protection for property, as you point out. There are specific parts of the Constitution that deal with it.

Senator BROWN. You have talked with several Senators about religious rights. I am intrigued that the effect of our rulings has been not simply to protect people's right of religious freedom, but seems in some cases to have gone to the point of protecting people from religion—that is, restricting an ability to give a prayer at commencement and so on. In effect, we have almost elevated the cause of an agnostic or an atheist to a status above someone who has a religious belief.

How do you view the rights of agnostics or atheists to impact a public ceremony where a prayer is at issue?

Judge BREYER. These cases have to rise under the establishment clause. I will stay away from any specific case. I think it is fairly well established as case law that the establishment clause means

at bottom that the Government of the United States is not to favor one religion over another, nor religion over nonreligion, so that people's area of personal belief is their area. They can practice it themselves, and they should, and it is terribly important, and they certainly can pass it on to their children, and that is terribly important.

But persons who are agnostic, persons who are Jewish, persons who are Catholic, persons who are Presbyterians, all religions, all religions and nonreligion, too, is on an equal footing as far as the Government is concerned. That is the basic principle.

How you apply that, how you apply that is often complicated, because everyone believes, everyone believes, I, and I think I am not alone, that religion itself, a church receives some assistance from the State. No one is going to allow the church to burn down, without sending the fire department. And there is a whole range of assistance that churches can receive, and properly so.

Then when does that cross the line to become too much, to become a kind of government establishment? That is what the cases in the Supreme Court try to address.

Senator BROWN. When the Court rules that you cannot offer a prayer at graduation, doesn't the Court find itself in a position where it is choosing between religious beliefs and an atheistic belief?

Doesn't the Court find itself favoring one over the other, once it makes decisions in that area?

Judge BREYER. Well, certainly people have written and talked about the very kind of problem that you raise. As I see that kind of problem, it is not a problem of aiding a religious institution. Really, it is a problem of a secular institution and the extent to which you can inject religion into that secular institution, at one point, is it de minimis or really why not, and so forth.

I think as the Court has approached that, it has approached it with a recognition that the great religious wars of 300 years ago were fought over not just the religious principle for an individual, but also the right of an individual and his family to pass on his own principles to the next generation, that is over teaching. And so it is not surprising to me that the rules become stricter and stricter, the more the education of children is involved. And that is how I see what has happened in the Court, and I understand that there are difficult line-drawing problems.

Senator BROWN. Let me follow up just briefly on that. One of the fun things that I do during the regular school year is teach a class at Georgetown, to graduate students. It is a fascinating time. They are very, very bright young people. I learn a lot from them.

But one thing I find is their sense of history, their sense of background, frankly, is not up to their abilities in other areas. I suspect that because some want to avoid any potential problems with an establishment of religion question, that society's response has been to simply ban or restrict or prohibit or not teach anything relating to religion. In other words, out of fear of someone accusing them of fostering, or pushing, or assisting a particular religion, we have almost banned the discussion of religion, religious backgrounds, and religious history from our curriculums in school.

Is this what you think is necessary to prevent the establishment of religion?

Judge BREYER. Teaching history of religion, teaching history, history which involves religion, I do not know of any opinion that says you cannot teach history. The question suggests to me what I very much believe, which is the importance of clarity, the importance of the Court making clear and separating what can be done from what cannot be done, and understanding that a Court opinion is going to be read by lawyers, other judges, school administrators, and those who have to live under it.

And what your question to me suggests is a concern that people take an opinion that says don't do *X*, and then they incorrectly interpret it to say we can't do *Y*. I think that that shows need for the kind of clarity that will allow people to do what they are permitted to do.

Senator BROWN. I think you have hit the nail on the head. You have described exactly what has happened. There are many who are concerned that the way the Court has interpreted the establishment clause in this country has led to a government establishment of secularism. That is not my interpretation of what the Constitution means.

The CHAIRMAN. Senator, you have hit the time over the head—we are over a few minutes.

Senator BROWN. Thank you, Mr. Chairman. I will wind up with that. If the judge has any comments on that particular observation, I would appreciate it.

Judge BREYER. Thank you.

The CHAIRMAN. Judge, what we will do, we have gone now for a little over an hour and a half, we will break until 12. Before we do, let me explain what we will do after that. The schedule, after consulting with my colleagues, is that we will then come back and go from 12 until 1, with Senators Simon and Cohen, and then from 1 until 2 we will break for lunch, and we will come back. If Senator Pressler is able to be here, we will start with him. If not, we will then go to Senators Kohl, Feinstein and Moseley-Braun, last, but not least, and then make a judgment of how we will proceed from there.

So we will now recess for 6 or 7 minutes until noon, and we will come back with Senator Simon.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge.

Judge BREYER. Thank you.

The CHAIRMAN. I now yield to Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

I might mention I speak with some prejudice, because back in 1972 I lost a race for Governor in Illinois, and in the spring semester of 1973, I was a guest lecturer at Harvard and met a young law professor and his wife and, as I recall, two of the three members of his family sitting here. I was very impressed then and have been impressed through the years.

I would like to enter into the record the letter from John Frank on the whole question of ethical conduct. John Frank has testified before us on several occasions.

The CHAIRMAN. I think on every occasion we have ever had a nominee.

Senator SIMON. That is just about right. It makes very clear that Judge Breyer's conduct has been within ethical bounds.

The CHAIRMAN. Without objection, it will be placed in the record.

[The letter referred to follows:]

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Our File Number

July 12, 1994

Lloyd N. Cutler, Esq.
Counsel to the President
The White House Counsel's Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Judge Stephen G. Breyer

Dear Mr. Cutler:

In connection with the pending hearings on Judge Stephen G. Breyer for the Supreme Court, I submit the attached statement requested by you on a problem of disqualification of judges.

Yours very truly,

John P. Frank

John P. Frank

JPF/lld
Enclosure

AFP13526

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July 12, 1994

JUDGE STEPHEN G. BREYER DISQUALIFICATION MATTER

I. Identification – John P. Frank.

Mr. Frank is a partner at the law firm of Lewis and Roca, Phoenix, Arizona, who has been heavily involved in disqualification matters over the decades. He is the author of the seminal article on that subject in the 1947 Yale Law Journal. He was subpoenaed by the Senate Judiciary Committee to testify as an expert on disqualification in connection with the nomination of Judge Haynsworth to the Supreme Court in 1969. In the aftermath of that episode, the Congress took to rewrite the Disqualification Act, creating the present statute, 28 U.S.C. § 455. Simultaneously, a commission under the chairmanship of Chief Justice Roger Traynor of California for the American Bar Association was rewriting its canon of judicial ethics. Mr. Frank became, informally, Senate representative in negotiations with the ABA Traynor Commission to achieve both a canon and a new statute which would be nearly the same as possible. Senator Bayh and Mr. Frank appeared before the Traynor Commission. Mr. Frank worked out a mutually satisfactory canon/bill with Professor Wayne Thode of Utah, reporter for the Traynor Commission. The canon was then adopted by the Traynor Commission and essentially put into bill form by Senators Bayh and Hollings. Major witnesses for the bill on the Senate side were Senators Bayh and Hollings, and Mr. Frank. On the House side, Judge Traynor and Mr. Frank jointly lobbied the measure through. Mr. Frank is intimately acquainted with the legislative history and well acquainted with subsequent developments.

The foregoing outline is my final conclusion on this subject. I am aided not merely by numerous attorneys in my own office, but also by Gary Fontana, a leading California insurance law specialist of the firm of Thelan, Marrin, Johnson & Bridges of San Francisco.

II. Issue.

In his capacity as an investor, Judge Stephen G. Breyer has been a "Name" on various Lloyds syndicates up to a maximum of 15 at any one time over an 11-year period from 1978 through 1988. This means, essentially, that he is one of a number of investors who have put their credit behind the syndicates to guarantee that claims arising under certain insurance policies directly written or

reinsured by the syndicates are paid. If the premiums on the policies and the related investment income outrun the losses, expenses and reinsurance,there is payment to the Names. If there is a shortfall, the Names must make up the difference. For an extensive description of the Lloyds system, see Guide to the London Insurance Market, BNA 1988, and particularly chapter 3 on underwriting syndicates and agencies. As the full text shows, this is a highly regulated enterprise, a matter of consequence in relation to views of Chief Justice Traynor expressed below.

The syndicates commonly reinsure North American companies against a vast number of hazards. Among these probably are certain hazards arising in connection with pollution which may relate to the "superfund," a financing mechanism of the United States for pollution clean-up. A question has been raised as to whether, in any of the various cases in which Judge Breyer has sat involving pollution, he may have been disqualified. The identical question could arise in connection with any number of other cases in which Judge Breyer has sat because the syndicates have infinitely more coverage than pollution. The selectivity of the current interest is probably due to nothing but the colorful nature of pollution or the failure of some inquiring reporter to see the problem whole.

A very significant factor is that the Lloyds syndicates are not merely insurers or re-insurers. They are also investment companies and much of their revenue comes from investments in securities.

III. Answer.

Should Judge Breyer have disqualified in any pollution cases in which he participated because of his Name status?

Answer: No.

IV. Disqualification Standards As Applied To This Situation.

A. Party Disqualification.

Under the statute, if a judge has an interest in a party, no matter how small, he must disqualify. Knowledge is immaterial; a judge is expressly required to have such knowledge so that he can meet this responsibility. Since the statute, judges have had to narrow their portfolios; "I didn't know" is not even relevant.

We may put this strict criteria of disqualification aside because neither Lloyds nor any of the syndicates is a party to any of these cases. This is of vital

importance because this is the one strict liability disqualification criterion in this situation.

B. The Common Fund Exception.

Congress in § 455 did not mean to preclude judges from investing; this was fully recognized both in § 455 and the canons; H.R. Rep. No. 1453, 93d Cong., 1st Sess. at 7 (Oct. 9, 1974). Judges have a range of income expectations and an investment is quite appropriate. Investment is restricted only where it would lead to needless perils of disqualification.

In that spirit, § 455(d)(4)(i) recognizes that judges may invest in funds which are themselves investment funds and while the judge cannot sit in any case which involves the fund, he is exempted from a duty of disqualification in matters involving securities of the fund unless he participates in the management of the fund, Sen. Hrg. 1973 at 97, which Judge Breyer did not do. "Investments in such funds should be available to a judge," *id.* This section was intended to create "a way for judges to hold securities without needing to make fine calculations of the effect of a given suit on their wealth," *New York Develop. Corp. v. Hart*, 796 F.2d 978, 980 (7th Cir. 1986). As Chief Justice Traynor said of this exception, it is "because of the impossibility of keeping track of the portfolio of such a fund," Sen. Hrg. 1973, House of Rep. Subcomm. Jud. Com. on S. 1064, May 24, 1974 (hereafter H.R. Hrg. 1974), p. 16.

The relevant section is as follows:

> (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

1. A large Lloyds syndicate is a "common investment fund." There is a definition in Reg. § 230.132 of "common trust fund," which is a particular type of bank security specifically exempted from the Securities Act of 1933 pursuant to Section 3(a)(2). The only useful portion of that definition is "maintained exclusively for the collective investment and reinvestment of monies contributed thereto by one or more [bank] members. . ." A "common enterprise" is one of the four elements of an "investment contract" as set forth in the *Howey* case:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person

> [1] invests his money, [2] in a common enterprise, and [3] is led to expect profits, [4] solely from the efforts of a promoter or third party . . .

SEC v. W. J. Howey Co., 328 U.S. 293, 298 (1946). The common enterprise requirement is usually satisfied by a number of investors who have a similar stake in the profitability of the venture.

2. While the precise form of common fund involved here was not contemplated in the statute, functionally a Lloyds investment is the same as any other common fund investment. It is an investment in a common fund in which the judge has no practical way of knowing on what he may make a return.

V. The Non-Party Exception Criteria.

Under § 455(d)(4), "financial interest" covers "ownership of a legal or equitable interest, however small" and then moves on to an additional thing, "or a relationship as director, advisor, or other active participant in the affairs of a party." This, too, is under the "however small" criterion, Sen. Hrg. 1973 at 115. This disqualifies the judge if he is a creditor, debtor, or supplier of a party if he will be affected by the result; but this only applies to a party, *id.* 115. A different standard is applied under § 455(d)(4)(iii) to any "proprietary interest" similar to mutual insurance or mutual savings. Here the disqualifying interest must be "substantial"; the "however small" standard is inapplicable. There is more latitude here than in the other relationships and these can be usefully described as the "non-party" involvement of the judge. I have elaborated on this topic in Commentary, 1972 Utah Law Review § 77, which has reflected the views of Professor Thode of the Utah Law School, reporter on the canon, and which is referenced in the legislative history of § 455, Sen. Hrg. 1973 at 113.

This covers the relationship of the judge not in terms of his direct financial interest in a party (as to which his disqualification is absolute and unawareness is not relevant)[1] but rather covers non-party interest. For classic illustration, if the home of a judge is in an irrigation district and if he is passing on the validity of the charter of the irrigation district itself, the answer to that

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[1] *See, In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1313 (9th Cir. 1982) (judge was disqualified when his wife had a minor investment in a party, "After five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70.").

question may affect the value of this home. As owner, he is not at all a party to the case and he has no financial interest in the irrigation company, but he is affected. The distinction in these non-party cases is that here the interest, instead of being measured by the "however small" criteria must be "substantial" and also in converse to the direct financial interest, must be knowing. Statement of Prof. E. Wayne Thode, Hearing, Subcomm. Sen. Jud. Com. on S. 1064, July 14 and May 17, 1973 (hereafter Sen. Hrg. 1973), pp. 95, 97, 103, and the illustration given is shareholder a domestic bank where decision concerning another bank will have "substantial in effect on the value of all banks." For a comprehensive discussion of the "direct and substantial" approach to nonparty interests, *see Sollenberger v. Mt. States Tel. & Tel. Co.*, 706 F. Supp. 780-81 (D.N.M. 1989).

If "a judge owns stock of a company in the same industry as one of the parties to the case," he is not "substantially affected" by the outcome and is not disqualified, as the Fifth Circuit held in *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986), *reh'g den.*, 805 F.2d 1030 (5th Cir. 1986). The judge in *Placid Oil* owned stock in a bank and was not disqualified from hearing a case that could affect the banking industry.

In *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. den.*, 464 U.S. 814 (1983), and *Ogala Sioux Tribe v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983), *cert. den.*, 466 U.S. 907 (1982) both judges' interests in land adjoining the land in litigation was held not to be a disqualifying interest. The parties seeking disqualification in both cases argued that all land within the territory would be directly affected by the outcome of the litigation, which was a title dispute. That argument was rejected in both cases because the disposition of the litigation would not affect the judges' title in any way.

A rare case involving insurance in a disqualification controversy is *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1107 (5th Cir. 1981). The judge in *Weingart* owned three life insurance policies, "representing mutual ownership" in a corporation which wholly owned the defendant corporations. Based in part on Advisory Committee Opinion No. 62, that a judge insured by a mutual insurance company is not disqualified to hear cases involving that company unless he was also a stockholder, the court held "the judge's mere ownership of three life insurance policies, representing mutual ownership, in the parent corporation of a party to the suit does not demonstrate that the outcome of the proceeding could have substantially affected the value of the ownership interest." *Id.* at 1107.

In *Department of Energy v. Brimmer*, 673 F.2d 1287 (Temp. Emerg. Ct. of Appe. 1982) the court held a judge hearing a case involving an Entitlement Program, who had stock ownership in other Entitlement Programs, was not disqualified. In reaching this conclusion the court used a two step analysis; 1) did the judge have a financial interest in the subject matter in controversy, and, if not, 2) did the judge have some other interest that could be substantially affected by the outcome of the litigation.

The court held the judge did not have a financial interest in the subject matter of the litigation, with a brief analysis:

> The use of the term "subject matter" suggests that this provision of the statute will be most significant in *in rem* proceedings. *See* E. Wayne Thode, Reporters Notes to A.B.A. Code of Judicial Conduct, 66 (1973). We hold that the judge does not have a direct economic or financial interest in the outcome of the case, and thus could hear it without contravening the constitutional due process.

Here is where Judge Breyer drops completely out of the disqualification circle. In the financial relationship of any of his cases to the totality of his dividend potential, his Name is utterly trivial and, in any case, he not only does not know that a litigant is insured with the syndicates but, realistically, has no practical way of finding out. As the legislative history clearly shows, it is intended in these situations, generally speaking, that for a judge not to be kept currently informed is an affirmative virtue, or else the persons controlling the investments, as in a common fund situation, would have the power to disqualify a judge by making an investment and forcing the knowledge on the judge. This was deliberately considered in the legislative history as a hazard and was guarded against. An opinion, closely analogous, shared by several district judges, is whether Alaskan district judges must disqualify in cases claiming "amounts for the Alaska Permanent Fund, from which dividends can flow to, among others, district judges. Held, no disqualification; the amounts are too remote and speculative, *Exxon Corp. v. Heinze*, 792 F. Supp. 77 (D. Ala. 1992). For perhaps the leading case that a judge should not disqualify for a contingent interest where he is not a party but, speculatively, might get a small dividend some day, *see In re Va. Elec. Power Co.*, 539 F.2d 357 (4th Cir. 1976).

VI. Appearance Of Impropriety.

This leaves the generalized provision of § 455(a) that a judge shall disqualify where "his impartiality might reasonably be questioned." This is commonly caught up in the phrase which has a long history, pre-§ 455 ABA and

U.S. Supreme Court opinions. The amorphous quality of the phase makes it hard to deal with decisively. However, the phrase has gained technical meaning in both the legislative history and the cases; categorically it does not mean that pointing a finger and expressing dismay is enough. Moreover, when, as developed above, certain types of investment are expressly allowed under the statute, it will be difficult to make them "improper."

The 1974 Act eliminated the "duty to sit," permitting the judge to disqualify where his impartiality may reasonably be questioned. Both Justice Traynor and Mr. Frank advised the Senate committee that this disqualification was to be determined by "what the traditions and practice have been," Sen. Hrg. 1973 at 15. These do not authorize disqualification for "remote, contingent, or speculative interest," or "indirect and attenuated interest"; *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, *reh'g den.* 869 F.2d 116, *cert. den.* 490 U.S. 1102 (1988); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077 (D. Colo. 1991).

It is here that the common fund exception has great bearing by analogy. Such an investment involves the same factors which motivated the common fund exception. That is to say, the statutes mean to preserve the right of judges to invest and clearly except from the rigorous disqualification standards investments in common funds where the judge has no effective way of knowing precisely what interests may be within the scope of the investments. Functionally an investment in Lloyds is the same as an investment in any common fund with general holdings. In these circumstances, there cannot be an "appearance of impropriety" in an investment which is just the same, functionally, as those expressly protected.

VII. The Disqualification Claim, If Accepted, Would Produce Unreasonable and Unintended Results.

As noted in the preliminary observations to this memorandum, the concern here is grossly excessive. The syndicates have a broad reach. The returns to the Names could be affected by numerous other matters beside pollution claims. For a comprehensive discussion of the proposition that there is no ground for disqualification because a case may affect general rules of law, *see New York City Develop. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1986) ("Almost every judge will have some remote interest of this sort.")

Almost any case relating to the business community could relate to Lloyds in some remote way, and any number of cases can relate to other reaches of the business community. Even the criminal cases, in at least some instances, can have significant business fallout, as for example, the RICO cases. To say that

Judge Breyer should have recused himself from all pollution cases would logically be to say that judges should not invest in a business generally.

I reiterate that neither the canon nor § 455 meant to preclude investment by judges. The focus on the pollution cases is excessively sharp because, if there were disqualification here, there would necessarily be disqualification as to too many other aspects of investment. This would defeat the purpose of the canons and the statute.

VIII. Conclusion.

Judge Breyer properly did not disqualify in the pollution cases which came before him.

John P. Frank

JPF:cc

Senator SIMON. There is one question that has not been clarified completely in connection with Lloyd's of London. You have talked about the dates, and in 1988 you started to close those ties, and in the 1970's purchased your interest. What is not part of the record, and I think should be clarified by you for the record, is that you were not on the court when you purchased your initial interest. Is that correct?

Judge BREYER. That is correct, and when I became a judge in 1980, I disclosed it to the committee. That is correct.

Senator SIMON. But the purchase was not at that point.

It is interesting that next to the first amendment, the amendment that has come up for questioning and referred to more often than any other is the ninth amendment. One former appellate court judge has called it an ink blot on the Constitution. You referred to the history yesterday. James Madison originally had 12 amendments he wanted on the Bill of Rights, but in sending them around, he sent them, among other people, to Alexander Hamilton, and Alexander Hamilton said if you spell these rights out, people say these are the only rights people have. And so the ninth amendment was added, which I think is an extremely important amendment.

We had a nominee before us a few years ago who said 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. And he said that when they say "retained by the people," that the Framers probably meant retained by the States. That is a very different meaning. And as you look at the following amendment, the 10th amendment, it differentiates between States and the people.

What is your construction? When the Constitution says "retained by the people," what does it mean?

Judge BREYER. Retained by the people, that is what I think it means.

Senator SIMON. Right. Then when it talks about unenumerated rights, how do you, as a Supreme Court Justice, how do you determine what those unenumerated rights are?

Judge BREYER. A very good question. It says that there are others. It says don't construe the Constitution in such a way to deny the existence of others. The word that protects the others is the word "liberty" in the 14th amendment.

What is the content of that word "liberty"? The general description given by Justices like Frankfurter or Harlan and others, those rights that through tradition our people view as fundamental. That is a phrase used. Concepts of ordered liberty, that is another. Over time, the precedents have achieved a virtual consensus that almost all the rights listed in the first eight amendments are part of that word "liberty." And almost every Justice has said that there are others, sometimes described as rights of privacy, and in various other ways.

Where does it come from? In deciding how to interpret that word "liberty," I think a person starts with the text, for, after all, there are many phrases in the text of the Constitution, as in the fourth amendment, that suggest that privacy is important.

One goes back to history and the values that the Framers enunciated. One looks to history and tradition, and one looks to the precedents that have emerged over time. One looks, as well, to what life is like at the present, as well as in the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future.

Text, history, tradition, precedent, the conditions of life in the past, the present, and a little bit of projection into the future, that is what I think the Court has done and virtually every Justice. That is not meant to unleash subjective opinion. Those are meant to be objective, though general ways of trying to find the content of that word.

Senator SIMON. But the subjective enters into this, and there is what Learned Hand called the spirit of liberty that has to pervade things.

Judge BREYER. That is true.

Senator SIMON. I do not mean to be putting words in your mouth, but yesterday you talked about borderline cases, and that is what you will be deciding to a great extent, will be borderline cases. When we get to borderline cases in this area of liberty, it seems to me if we are to err, it should be on the side of freedom. You are nodding your head, but that cannot get into the record here.

Judge BREYER. You do not want to err, but you have to understand—I do have to understand, and I think everyone understands that the Constitution was written to protect basic freedoms, which are basic values, which are related to the dignity of the human being. That dignity of the human being is not something that changes over time. The conditions that create the dignity may change. The needs of the country for whatever conditions that will permit the dignity may change, but the dignity is what stays the same. And how to interpret the Constitution, that is the challenge. That is the challenge.

Senator SIMON. You have answered in response to several members on questions of religious liberty. It has been about 5 years since you have had to make a decision in this arena.

Judge BREYER. That is true.

Senator SIMON. You have relied on the *Lemon* criteria, the *Lemon* case, which the majority of the Court has relied on for some time, and I believe are basically sound criteria. But there are two members of the Court who differ with that conclusion. Obviously, you cannot indicate how you might rule on anything, but since you have used the *Lemon* criteria, you are familiar with it.

Do you find the *Lemon* criteria basically sound criteria in line with the spirit of the first amendment?

Judge BREYER. What I have always thought is that perhaps the disagreement is a disagreement more about communication than it is about substance.

The *Lemon* criteria say look to see if the Government has as its purpose aiding religion. Look to see if the effect of the statute will have a substantial aid to religion. Look to see if the courts or the government becomes too entangled with religion.

Those seem to me to be three helps, three things people might want to look to, and that, I would suspect, is widely, widely shared.

I suspect the argument comes in when the people want to say, well, those are the only possible things. Are they always determinative? Should it be communicated in the form of an absolute test? Should it be communicated in the form of, well, these things help you identify? That is where I think the area of disagreement likely lies.

Senator SIMON. But the basic no excessive entanglement, that there is a secular purpose, and it does not have the primary effect of advancing or inhibiting religion, those criteria are not offensive to you, if I can put it that way?

Judge BREYER. No, no; they seem important criteria, and it seems to me that what will happen—I am guessing here, but I suspect their exact shape, how absolute they are, how helpful the test is, that perhaps is an area of disagreement; but that those are important factors. I suspect—I am suspecting now, because I am not certain—that there is widespread agreement that those are helpful ways of identifying constitutional problems. And there may be other ways, and those ways may not always apply. But that is what I think is the area of disagreement. That they are helpful, I suspect there is a lot of agreement about it. I am not positive.

Senator SIMON. Jeff Rosen wrote in an article in the New Republic, commenting on Justice Blackmun's departure more than on your ascendancy, but obviously including that, said that for the first time since the 1920's the Court will not have someone who is consistently speaking out for the least fortunate in our society. And I quote him, "Ever since Brandeis, at least one Justice has felt instinctive sympathy for people on the fringe of the political process."

If Steve Breyer is approved, which I am confident you will be, will there be someone who will speak for those who are least fortunate in our society?

Judge BREYER. I hope so. I hope so. I am not—normally, when I write an opinion—and it may be different on the Supreme Court, if I am there. Judge Wisdom gave me some good advice. He said:

> If you feel you want to write a purple passage because you feel so strongly, write it, and do not use it. Because people want your result, they are not necessarily interested in your feelings.

It does make me unhappy when I see an individual who is getting a very bad deal. That does make me unhappy. I think it makes everyone in this room unhappy. And as a judge, mostly what you have as an appellate judge to give to that person is your time and your effort. So if you think that is happening in an opinion or in a case, you can read through the record with pretty detailed care. And if it confirms that is what happened, what I will try to do is set out the facts as dispassionately as possible, for the facts will speak for themselves. And that can have an impact, too. That is how I have approached it.

Senator SIMON. In that connection, in the process of writing an opinion, you said earlier today Arthur Goldberg's opinions were Arthur Goldberg's opinions.

Judge BREYER. Yes, that is true.

Senator SIMON. Judges are a little bit like Senators. A staff person can write a speech, and we can go over and deliver a speech on the floor of the Senate, and it may be very little of the Senator. A judge can have a clerk, for all practical purposes, write the opinion.

I am interested in knowing how you go about writing an opinion. Are the opinions that bear your name, are they Steve Breyer's product? If you can comment just on the process because—and you mentioned one other thing that is important, and perhaps because of my background in journalism, every once in a while I read a court decision that is so lacking in clarity, it is baffling to people who read it. I would be interested in the process you go through in writing an opinion.

Judge BREYER. For better or for worse, my opinions are mine. I do sit at the word processor. I do spend most of the day at the word processors. I have learned the life of a Senator is different, and I have learned some of the pressures that you are under. That is not the life of a judge.

Both the job itself—when I write an opinion, I have my law clerks read the briefs before oral argument. I read the briefs before oral argument. We sit down and we discuss the case. I send them off to get any material I think will be relevant, like a statute that I want underlined because I want to be able to read it if it is key to the parties at oral argument.

At the oral argument, you listen to both sides. And, interestingly enough, most judges will tell you that the oral argument matters. The law clerks often think it does not. But it does to the judge, because the attorneys know their case a lot better than I do, and you learn what is important to them.

Afterwards, when the opinion is assigned, I will send my clerks out to do a long memo, and I tell them we both can do research and we both can think. But in a pinch, I will do the thinking, you see. Their job is to get that research done. And they get it done.

And they come back in whatever form they want, a draft, a memo, whatever. I take that. I read the briefs. I do not want them to follow what they think I think. I want them to give me extra input.

Then I take their input, I take the briefs, I take the record. I sit down at the word processor, and I write a draft. That draft is then given back to the clerk, and we go back and forth like an editing process. And, eventually—I would say it is rare that it is less than 3 drafts; on occasion, it has reached maybe 25. But, eventually, we reach an opinion, a draft, which is basically my draft, edited, reedited, reedited back and forth maybe four, five, or six times. That is the process. And I have to be completely comfortable with every word in my opinion before it goes out for circulation to the other judges.

Senator SIMON. And that strikes me as a very good process. Do you intend to follow that process if you are approved by the Senate?

Judge BREYER. I do; yes, I do.

Senator SIMON. We face a problem occasionally, a question on whom does the Constitution and the law protect. One of the worst decisions in the history of U.S. Supreme Court was the *Korematsu* decision which in large part dealt with Japanese-Americans, but also dealt with those who were in this country legally but not American citizens.

We tend to face these problems in times of national passion. When our hostages were held in Iran, President Carter issued a di-

rective that Judge Green said was contrary to the law, that the Constitution protects those who are here as guests of our country legally, as well as American citizens.

The appellate court—and, again, a little bit like the *Korematsu* decision—in a time of passion ruled 2 to 1 against Judge Green. I happened to think it was the wrong decision.

But you have a decision in the case of *U.S.* v. *Maravilla* that touches on this a little. I am interested in your perspective. Does the Constitution, do our laws protect not just citizens of the United States, but those who are not citizens who are here legally?

Judge BREYER. The issue in that case, if I am remembering it correctly, dealt with the word "inhabitant" in a statute. And I think that the reason—am I remembering the right case? Was that the——

Senator SIMON. I do not remember whether that——

Judge BREYER. Yes; I think it was.

Senator SIMON. It was the case of a courier, someone who was——

Judge BREYER. The courier, that is it.

Senator SIMON. The courier who was in the United States just for a day.

Judge BREYER. That is right. That is right, exactly. The question in the case was—so the answer to your question is yes, because the problem with the case arose out of the fact that most of the civil rights statutes use the word "person." And I think it was conceded that if they had used in Congress, when they enacted that, that word, there would have been protection for the courier who came in in this case.

The problem was that in a particular provision they used the word "inhabitant," and so could you say—and that was the legal issue. Could you say that a person who is only here for 2 or 3 hours, who is coming in as a courier and just leaving, was an inhabitant? And that was what created all the agony and the difficulty in the case.

But I think it was conceded by everyone that if Congress had used the word "person"—and Congress does normally use the word "person"—there would have been protection.

Senator SIMON. And as far as you are concerned—first of all, I would be interested in your reflections on the *Korematsu* case, if I may.

Judge BREYER. Of course, I think when there are pressures of that sort, that is the time for a judge to stand up. I know it is difficult. That is what I always admired about Holmes. Holmes believed lots of deference is due the legislature. Pay a lot of attention to the legislature. Let's have a lot of restraint on the judge's part. But then when the right of free speech was infringed, suddenly Holmes said, That is it, stop. And he stood up, even though it was in dissent. So I think that is important in the case of a judge.

The irony about *Korematsu,* of course, I have always thought—and I have rather always admired Justice Murphy's opinion. I think it was Murphy. Because the majority was obviously worried in the case because it was a time of invasion or people were afraid there would be an invasion from Japan. And so the Court was saying, but could we as a Court really stand up to the public with the

military and people worried about invasion? And that led them to interpret the law a certain way.

And what Murphy said was, wait a minute, I think this is 1944. That is not 1941. Nobody thinks we are going to be invaded now. So what is going on here and now. And if you want to say the law might have been different then, say it. But what is going on right now?

Now, I may not remember that correctly, but I have always thought that that was an important view because it says do what you can. Even if somebody did something wrong before, that is no need to follow it. He was in dissent, unfortunately.

Senator SIMON. Your recollection is correct, and one of the ironies, as you look back on this history, one of the people who said that we should not issue that directive of February 1942 was J. Edgar Hoover.

Judge BREYER. That is right.

Senator SIMON. One of the persons you would least expect to do that.

Judge BREYER. That is true.

Senator SIMON. But your point that a judge should be willing to do what is unpopular, just as Senators should be willing to do what is unpopular, tell me something in the background of Judge Breyer that indicates a willingness to stand up to do what is unpopular.

Judge BREYER. Nothing that I could compare with those really dramatic figures of the past. But many of the things I was engaged in here—well, you listened to the discussion about sentencing guidelines, or listened to some of the discussion about the airline deregulation, or listened to the discussion about the book, and you would not think I was moved by popularity in order to get into that.

But some of instances in the Commission or some of the instances that occurred here are ones where I think people who knew me at the time would say you can push me to a point, but not beyond. Not beyond. And once you get to that point, well, that is what it is. That is what it is.

Senator SIMON. And if we get to the point where the popular passion is on the one side and the Constitution is on the other——

Judge BREYER. It is the Constitution.

Senator SIMON. There is no question in your mind where Steve Breyer——

Judge BREYER. There is no question. That is what judges are there for. That is why they are independent. That is why they are there.

Senator SIMON. Mandatory minimums has been talked about a little bit here. Senator Heflin and Senator Kennedy, and I believe Senator Brown also asked about them. You are correct. This is a legislative responsibility, but it is also true that sometimes we need judges to stand up and tell us to do what maybe we even instinctively know is the right thing to do, but we get caught up in this desire to do what may get us a few votes in the next election rather than what is desirable.

I just read yesterday a statement by Norman Carlson, you may remember, former Director of the Bureau of Prisons under Democratic and Republican administrations.

Judge BREYER. Yes, I do.

Senator SIMON. Highly respected. He says—this is in testimony before the House:

> I believe that most individuals who seriously examine the Federal criminal justice system would conclude that minimum mandatory sentences have produced results which have not served the public interest and are costing the taxpayers a tremendous amount of money.

I happen to concur with that. Chief Justice Rehnquist has spoken out on this.

You are in a situation today, these 3 days, where you do not want to offend any of us, and I understand that. I hope the time will come when you may think it appropriate, if you feel a situation is one that is deteriorating, where you will feel free at some judicial conference or on some occasion to speak out on this issue. I just pass that along because I think this is an area where we need the judiciary to speak to us.

Senator COHEN. If the Senator would yield, I believe Justice Scalia is doing that on a frequent basis.

Senator SIMON. And I welcome that, even though in the case of Justice Scalia, I differ with just about everything he has to say.

But I do think that you should not be—if you see a need, you should feel free to speak out on it without entering into partisan politics.

You mentioned also in your opening statement—I thought it was an excellent opening statement—that it is important for a judge to be connected to the outside world, to understand the real world. That is not easy for an appellate court justice. It is even more difficult for a Supreme Court Justice.

Have you thought about how, as a member of the Court, you can maintain contact with the real world? I mean the world that suffers.

Judge BREYER. Indirectly, of course, Joanna works with these people all the time at Dana Farber, in the cancer hospital. Directly, people have real problems, real problems.

Justice Blackmun tried to work out ways of doing that. On my part, the will is there, and I have worked out some ways of doing that where I am in my present job. In the new job, if I am confirmed, the will being there, I would look for the possibilities, and I would have to try to work out what I can do and what not. I would try to do my best to get out a little bit of what I call the cloistered chamber. I have been fairly imaginative, I think, at finding ways. So I suspect I will find them.

Senator SIMON. And I really think that is important, and meaning no disrespect to those cancer patients, I think it means more than that. I think it means reaching out to people who are unemployed, who are hurting in our society. And somehow, because of our system of campaign contributions and everything else, we are not responding to them as effectively as we should.

This is not something you are going to have to decide in a court, but since your present jurisdiction includes Puerto Rico—and you are testifying before us—my observation has been that on the legislative side and on the executive side, Puerto Rico gets the short end of the stick, for obvious reasons. There are not two U.S. Senators representing 3.7 million people. And so when we go through

everything from minimum wage to health care legislation, to you name it, it becomes very easy to ignore that side of things. And in terms of appointments to the executive branch, again, Puerto Rico gets the short end of the stick. And this is true in any administration. I am not faulting this administration.

We have a system that we call a commonwealth, but it is a colonial system, and one of these days Puerto Rico either is going to become a State or is going to become an independent nation.

But you have a chance to observe the judicial side, and my impression is that the deficiencies we have on the executive and legislative side, as far as Puerto Rico is concerned, are not there to the same extent on the judicial side. Is that accurate? Or any observations you have in terms of how we are serving 3.7 million Americans in Puerto Rico in the judiciary, I would be interested in hearing them.

Judge BREYER. It has been an enormous privilege for me to have had Puerto Rico in the first circuit. You have no idea what a pleasure, a privilege, it is. Puerto Rico is part of our circuit, and after 14 years, I feel part of Puerto Rico. That is the sort of place it is. I mean, you are part of it. It is wonderful. And I think that the need, the obligation, to pay attention to the people there is an important one. Their judicial system is an independent system. It is a fine system. It is a system that rests on the civil code, as does Louisiana, rather than the common law.

We have a special obligation in the courts to become familiar with that code so that in diversity cases, we can get the law right, as the Supreme Court of Puerto Rico would decide it, and we try to fulfill that obligation.

I think on the judicial side, as well as on the executive side and the legislative side, I feel both emotionally and logically and in every other way that it is very important to pay attention to the people of Puerto Rico. They are part of us; we are part of them.

Senator SIMON. Let me just follow up very briefly. But in terms of our service to them on the judicial side, are we providing the same service to the people of Puerto Rico that we would to the people of Massachusetts or Illinois?

Judge BREYER. The Federal district court there I think is. It is a fine Federal district court. There are seven judges. I think that it is an excellent court, and the facilities are supposed to be in every way—and as far as I know, they are—comparable.

There is also a different—an independent commonwealth system of courts, which we as a Federal court interact with, because we get to know the judges, and we understand their work, and there are cases that go back and forth. But that seems a fine independent system. But our Federal court system in Puerto Rico with its seven judges in the District of Puerto Rico is a fine system. The present chief judge, a woman, Carmen Cerezo, is an excellent chief judge, and there are some vacancies down there now which I think are in the process of being filled.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. It is always a source of debate among Puerto Ricans, who are American citizens, as to whether or not the Federal courts are sensitive enough to their Spanish culture. As you

well know, one of the issues in every plebiscite that has been discussed is whether or not the courts should be Spanish speaking. Federal courts are not; State courts are. It is a big deal, it is a big issue. So the Federal courts do not in the eyes of most Puerto Ricans meet the needs of Puerto Rico in the sense that they do not take into consideration the Spanish culture, which the rest of the Government of Puerto Rico and the rest of the court system does. And it is always used as one of the red herrings in the debate that takes place on statehood.

And it is nice to hear that you have joined the Republican Party, because only the Republican Party has suggested statehood for Puerto Rico. The Democratic Party has not. I happen to think you are probably right. But it is a very convoluted and controversial and emotional debate, and the plebiscite last time was perilously close, depending on how you view it. But the Federal courts are a main source of contention in terms of whether or not they are Spanish speaking. They would be the only Spanish-speaking courts in the Federal system were they allowed to be, and as you know, they are not.

I yield to my friend from Maine.

OPENING STATEMENT OF HON. WILLIAM S. COHEN, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COHEN. On that note, perhaps I should begin by saying, "Como esta usted, Mr. Chairman." [Laughter.]

Yesterday you indicated that you were leery of flattery, so I will dispense with allowing any to flow from this side of the bench, but I might say that I found you to be enormously forthcoming, in stark contrast to some of the nominees who have come before this committee in the past.

On my first day of law school, at the conclusion of the day, my law professor said that any connection between law and justice is purely coincidental. I thought he was engaging in some sort of professorial cleverness at the time, until I went out to practice law, and I found, as I started to lose all my cases, that I had justice on my side, and my opponents had the law on their side.

I raise this in connection with Judge Hand, of whom you are a great fan. I was looking through his book, "The Spirit of Liberty," and he was talking about his relationship with Holmes, whom you are also a great devotee of, in terms of his writings and decisions. And Holmes used to frequently say, "I hate justice." Of course, Hand would go on to say he really did not mean that, but he tried to make the point that on one occasion when they were driving in an automobile past the Supreme Court, when Holmes was going to a weekly conference, Hand tried to pique him a little bit, and he said, "Well, sir, goodbye. Do justice."

Holmes turned around and snapped at him and said, "That is not my job. My job is to play the game according to the rules."

I listened to your opening statement about the need for the Justices, the court system, to strike some sort of a harmonious balance in the lives of such a diverse population, to preserve liberty for as many as possible, all if possible. At no time did you say that you intended to do justice. I take it that your reluctance to do that was the same for Holmes as well, of not seeking to do justice in the

sense of intervening into an area that was properly before that of the Congress or the State legislature. Is that how you would interpret Holmes' statement that, "My job is not to do justice, but to play the game according to the rules"?

Judge BREYER. In part, yes, but I think that Holmes means more than that. I think Holmes—and it is another reason I do admire him—I think that he sees the rules from the time he wrote the common law up through his Supreme Court career, I think he sees all this vast set of rules as interrelated. And I suspect, although I am not positive, that he sees ultimately the vast object of this vast interrelated set of rules including rules that say whose job is what as working out for society in a way that is better for people rather than worse.

I suppose when you say "Do justice," or you say, "No, no; I am just following the rules," what you worry about is someone trying to decide an individual case without thinking out the effect of that decision on a lot of other cases. That is why I always think law requires both a heart and a head. If you do not have a heart, it becomes a sterile set of rules, removed from human problems, and it will not help. If you do not have a head, there is the risk that in trying to decide a particular person's problem in a case that may look fine for that person, you cause trouble for a lot of other people, making their lives yet worse.

So it is a question of balance, and I would say both.

Senator COHEN. Judge, yesterday, you indicated that the black robe had great symbolic significance, that when you placed that robe around your shoulders, you were no longer speaking as an individual, and that you would convey to the litigants that the decisions that were reached or rendered were done so irrespective of personality, the personality of the judge. And then I think you quoted Hand's speech about Cardozo in describing a judge as a runner who is stripped for the race.

I was interested in that, because Hand himself has written, in this wonderful biography of Gerald Gunthers—he says, "A man does not get to be a Justice of the Supreme Court chiefly because he can detach himself from the convictions and prejudices of his class or his time." Furthermore, Justice Cardozo, in his wonderful book, "The Nature of the Judicial Process," also said, "In the long run, there is no guarantee of justice except for the personality of the judge."

So both Hand and Cardozo would seem to contradict the notion that once you put on the black robe, you in fact are one of these blind oracles that simply dispassionately rule upon the law.

I mention this in connection with who you are as a person. I think that one of the goals of this type of hearing is to try to gauge you as a person. In that connection, again I would turn to Hand, because you have turned to him so many times during the course of these proceedings. Hand said,

> I venture to believe that it is as important to a judge called upon to pass upon a question of constitutional law to have at least a bowing acquaintance with Acton and Maitland, with Thucydides and Gibbon and Carlyle and Homer and Dante, Shakespeare, Milton, Machiavelli, Montaigne, Rabelais, Plato, Bacon, Hume, Kant, as with the books that have been so specifically written on the subject, for

and the key words

in such matters, everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will.

I think that is a terribly important statement that Hand made, and I have listened to the introductions that were given yesterday on your behalf, and I know that you are a learned individual who has studied Spanish and is fluent in French and apparently reads about architecture in his spare time and quotes from John Donne.

If I went into your library and asked you to point at the 10 most important books that you have there, what would you point to?

Judge BREYER. Oh, my goodness.

Senator COHEN. By the way, Holmes had 14,000 books in his library at the time he died.

Judge BREYER. My goodness. My reading—people may exaggerate this a little bit in respect to me—my reading is not like the list you just read.

Senator COHEN. But the point that I make——

Judge BREYER. Where do you start? I mean, tell me your favorite books—where do people start? They start with Shakespeare. They say, "Why Shakespeare?" This is what I tell students. A lot of them come from some different school, and they will come from someplace, and they ask, "What is in Shakespeare for me?" You say, well, if you are willing to put in the time, it is a little bit archaic, the language, but if you put in the time, what you see there is you see every different person, you see every different kind of person, you see every situation there is in the world. You see people saying things that they would say if only they had that ability to say them, and you see the whole thing in poetry. That is why people turn to that, and they turn to that a little bit in literature to get some of the things that Senator Simon was talking about, I think, which is what is in the heart of that person who is leading that different kind of life. And sometimes you can find some of that in literature.

I like Conrad very much. Why? I think because I am moved often by the way in which he talks about the need for people—all of us—to learn from the past and then to give something to the future, whether that is through our families or whether that is through our careers. We do learn from our parents. We do learn from the past. We do try to transmit things of value. And I think he finds value in human communities. I think he finds human communities to be, ultimately, the source of obligations and values toward each other.

I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontes, Emily Bronte, I think, or "Jane Eyre" that she wrote. He said if you want to know what that is like, you go and you look out at the city, he said—I think he was looking at London—and he said, you know, you see all those houses now, even at the end of the 19th century, and they look all as if they are the same. And you think all of those people are out there, going to work, and they are all the same. But, he says, what Emily Bronte tells you is they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about

human passion. Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book.

So sometimes, I have found literature very helpful as a way out of the tower.

Senator COHEN. Judge, the reason I have taken the time to at least touch on this however briefly is that I think that the people who serve on the Supreme Court should be more than those who are simply adept at a sort of mechanistic application of formulas and rules, but who bring to that Bench a breadth of not only experience but of intellect and scope and depth, so that when they render those decisions, they will carry that much more in the way of impact and consequence.

I would like to now turn to something more specific in terms of issues that have been raised with you. You indicated before that the death penalty, under certain circumstances, is not cruel or unusual. The Court has ruled that, and you accept that as settled law.

Judge BREYER. I do.

Senator COHEN. The question I wanted to ask you, however, is whether you believe the death penalty to be cruel under any circumstances, or only under some.

Judge BREYER. Oh, I would say it is equally settled that there are some circumstances where it is cruel and unusual; for example——

Senator COHEN. No, no, that is not what I am asking.

Judge BREYER. You want my personal view.

Senator COHEN. I want your personal view, not whether it is settled or not, but what you believe.

Judge BREYER. The reason that I hesitate to say what I think as a person as opposed to a judge is because down that road are a whole host of subjective beliefs, many of which I would try to abstract from, because as you have had and I have had from Learned Hand and other great judges, there are some to both sides of this. I was pointing out those things where he says try to be dispassionate. And you must remember that the law that you are trying to find as a judge in your own mind, think that what you have found, you must be satisfied that other people would find the same—not every other person, but lots of other people.

Where the subjective belief may come in, and that happens sometimes where it is either relevant to the law, or it is not. If it is relevant to the law, decide it as a matter of law. If you know it is not relevant to the law, then the only time at which it enters is if you think the law is one way, and you think your own subjective belief is the other way, and you feel that you cannot follow what you believe the law to be because of your subjective belief, then do not try; then do not try. You can remove yourself from the case.

Senator COHEN. Well, the other option, however, is to overturn the prior decision.

Judge BREYER. No, but you see——

Senator COHEN. I am going to come to this in a moment. We will talk about stare decisis, and I will quote from Holmes about rules that are laid down at the time of Henry IV, and that we ought to have something more substantive than the fact that it was laid

down years in the past, so that you do not have the dead hand of the past controlling, and that type of line of argument.

But I would like to know your personal view, because that becomes important. You may find yourself somewhere down the line in which this kind of an issue may come up. And the question is are you going to subordinate your personal views in terms of what you believe, what you in your heart—you talked about the mind and the heart—believe to be the right thing to do under the circumstances, whether it amounts to cruel punishment under any circumstances. The fact is you have a choice. You can either, if you feel so passionately about it, remove yourself from the case, or say I think the Court that decided such-and-such a case was wrong, and I am now voting to overturn that. That is another option you can pursue, and a lot will depend upon how you view stare decisis, whether it is a decision that was reached 50 years ago, or 5 years ago, or 5 days ago.

But I think that you cannot simply say that, well, I would always apply the rule as established by the Court in 1850, or 1950.

Judge BREYER. Yes, that is right.

Senator COHEN. So I think your personal view is relevant in this case, and I do not think you have stated it yet.

Judge BREYER. That is true, and I think that the law itself provides ways of departing from past law. There are circumstances in which it is appropriate according to the law to depart from the prior decision. Those have been listed by the Supreme Court recently. You look to the earlier decision and you ask how wrong was that decision. You look to see the ways and the extent to which the law has changed in other related ways. You look to see the extent to which facts have changed. You look to see how much difficulty and trouble that old rule of law that seems badly reasoned has created as the courts have tried to apply it. And then, going the other way, you look to see the extent to which there has been reliance on that old past law.

The reason I say this is because I think the law has ways of overcoming prior decisions, and those ways, too, permit a judge to abstract from a belief that he would think is highly personal and not relevant.

Sometimes, of course, the belief is totally relevant. After all, if you think there is some terrible injustice, maybe there is. And that is not just an abstract belief of yours. That is not just something subjective. Maybe there is. And if you see there is, that suggests there is something odd about this law that requires thought.

Senator COHEN. Let me turn in that vein to *McCleskey* v. *Kemp.* You are familiar with that decision.

Judge BREYER. Yes, yes.

Senator COHEN. I want to just ask you to tell us whether or not you agree with the rationale of the five-member majority, or the dissent, characterized by Justice Stevens. Let me just summarize the finding of the majority, that the study that was submitted by the plaintiffs in this particular case at most indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias affecting Georgia's capital sentencing process, and thus did not violate the eighth amendment. So the study

in that particular case was given rather short shrift by the majority.

In the dissent, Justice Stevens said:

> The studies demonstrate a strong probability that McCleskey's sentencing jury, which expressed the community's outrage, had sensed that the individual had lost his moral entitlement to live, was influenced by the fact that McCleskey is black, his victim was white, and that this same outrage would not have been generated had he killed a member of his own race. This sort of disparity is constitutionally intolerable. It flagrantly violates the Court's prior insistence that capital punishment be imposed fairly and with reasonable consistency, or not at all.

So I would like your opinion as to whether you agree with the reasoning of Justice Stevens or that of the majority.

Judge BREYER. The case was decided. It is the opinion of the Court. I have not read it with enough care and thinking it out thoroughly to know the rights and wrongs of if I were deciding it afresh, but it would not be afresh, and to be—I know this is a big issue in Congress. I know that you are considering legislation——

Senator COHEN. Before we get to Congress, I do not want to talk about Congress. I want to talk about the use of statistical information before the Court. For example, in *Massachusetts Association of Afro-American Police, Inc.* v. *Boston Police Department*—I believe that was a case you decided in 1985——

Judge BREYER. Yes.

Senator COHEN [continuing]. You allowed an affirmative action program to stand because the plaintiff had shown a consistent pattern of discrimination within the department. So there, you found a statistical analysis to be substantive, persuasive, and therefore allowed the affirmative action program to stand.

Judge BREYER. That is right.

Senator COHEN. Now, in that case, Congress is not involved.

Judge BREYER. That is right.

Senator COHEN. So what I am asking you is if you have the same sort of statistical analysis prepared in a case involving racial disparity in capital cases, does it need an act of Congress, in your judgment, to set the law?

Judge BREYER. The question of statistics, as I have said, is their danger is that they are not really good statistics and do not prove what they say. That means when you have good statistics, they can be used to prove what they say.

Senator COHEN. I know you said there are statistics, and there are statistics.

Judge BREYER. Exactly.

Senator COHEN. Let me turn instead to Holmes who, instead of that, said that the history of the law is not logic, but experience; or a page of history is worth more than a volume of logic. Is there no doubt in your mind that there is a deep-seated racism that has existed in this country for many, many years; that there has been great disparity in terms of the capital punishment that has been inflicted upon those who are in the minority versus those in the majority? Has that not been the experience of this country, historically?

Judge BREYER. Historically, in the simplest way, the Constitution was written; the Constitution provided a limited central government that was meant to secure liberty, and a Bill of Rights was added to guarantee liberty. And one thing was missing. What was

missing was what the 14th amendment added, which was a promise of fairness. And what had existed before could not have been more unfair. After that promise was made in the 14th amendment, decades went by before people tried to keep the promise.

With *Brown*—and it is a legal reason, as well as a moral, practical and every other reason—the country decided we will try to keep our promise. It is hardly surprising to me, given the prior situation and given the years of neglect, that it will be decades, decades before that promise is eventually kept. But we are trying, and the trying is absolutely correct.

Senator COHEN. I come back to the point with the use of statistical information combined with the history of the practice in this country. Do you feel that the Court, in *McCleskey* v. *Kemp,* reached the right result?

Judge BREYER. Yes; and I think you are absolutely fair to ask the question, and I think it is so closely tied up with the particular legislation and the particular political debate, and so forth, that I am uncomfortable with——

Senator COHEN. Let me ask you a different way, then. In the event that the anticrime bill passes with the Racial Justice Act intact, which is a big question, does that settle the issue? In other words, is the Court then precluded from examining the statistical viability or accuracy of the information at that point?

Judge BREYER. There I am stuck, because I don't know. I don't know what the bill says. I am not being coy at this point. It is that I don't really know.

Senator COHEN. But you said yesterday that the Congress will decide it and the Court will accept it.

Judge BREYER. The Court then will go and accept what Congress does, and unless there is some constitutional problem—and I don't know, I mean at this stage maybe somebody will come along and say there is one, I don't know what it is—sure, it is up to Congress. I reserve a lot on that, because I don't know what the argument is.

Senator COHEN. Let me turn quickly to habeas corpus. This also is a matter of considerable debate here in the Congress. Back in 1988, the Judicial Conference was then headed by Chief Justice Rehnquist, and he commissioned the conference to make a study that was chaired by Justice Powell. Justice Powell concluded that habeas corpus was being used frivolously as a tactic to postpone the imposition of death penalty, rather than review the constitutionality of the trial.

There is considerable debate here in the Senate and the House on trying to strike the balance between finality and fairness of the process and between the two issues that frequently come up, namely, retroactivity and full and fair hearing. I would like your view on whether or not you feel the habeas corpus process has been abused to frivolously appeal convictions and delay decisions and sentences. And I know you come from a circuit that does not have many cases which are capital cases.

Judge BREYER. In our circuit, I have never sat on a capital case. I think the only State that has the death penalty is New Hampshire, and it has not applied it, at least not in any cases, so I have never had any experience with this in the death penalty context.

In the other context, the normal nondeath penalty context, I have no reason to think there is a particular problem. It seems to work OK. It seems to work OK.

Senator COHEN. One of the suggestions that has been made is that perhaps if defendants had competent counsel in the first instance, then there would be fewer reasons to have these habeas corpus petitions. I frankly take issue with that. I think a person could have the best counsel possible, and whenever someone is convicted, the first thing they are going to do is file a petition for habeas corpus, alleging incompetent counsel. That was my experience when I was practicing law, and I think it will be the experience from now into the future.

But do you have any views about whether having a cadre of professional litigants, defense counsel, would do anything to reduce the flow of petitions for habeas corpus in capital cases?

Judge BREYER. I really don't, because of my lack of experience in that area. I think that you correctly identified what I think are the two basic considerations.

Senator COHEN. Let me turn quickly—I keep saying quickly, as the lunch hour is approaching and past—to the fourth amendment. I am not sure who earlier touched upon the notion of losing perspective on what is going on. But we know that ours has become an increasingly more violent society and, as a result of that violence, we are taking and perhaps compromising some of the rights that we cherish most.

Recently—and I will yield to my colleague from Illinois in a moment—to cite as an example: all Chicago public housing leases contain a clause that grants law enforcement officials the right to search an apartment. Interestingly enough, some of the residents who are directly affected favor it most. But I would like to read again from a letter that Holmes wrote to his friend Polly.

He said:

> The tendency seems to be toward underrating or forgetting the safeguards and Bills of Rights that had to be fought for in their day and they are still worth fighting for. I have had to deal with cases that made my blood boil, and yet seemed to create no feeling in the public or even most of my brethren. We have been accountable for so long, that we are apt to take it for granted that everything will be all right, without taking any trouble.

Then he went on to note "all of which is but a paraphrase that eternal vigilance is the price of freedom."

I mention this, because there is again concern that we are moving into a more repressive area, that because of the violence in our society, the pervasive fear that is generated, we may tend to allow the Government in the form of the police, the FBI, or any other law enforcement agencies to perhaps do things that in the past we would say, hold it, that violates our right of privacy.

I mention this in connection with—is it *Irizzary,* the case that you decided, I-r-i-z-z-a-r-y? Anyway, you will be familiar with it. It was *U.S.* v. *Irizzary* in 1982. It involved an individual who was in a motel room.

Judge BREYER. Yes, I remember that.

Senator COHEN. You remember that case?

Judge BREYER. Yes.

Senator COHEN. In that case, the majority held that the police, who conducted a warrantless search, had violated the defendant's fourth amendment rights. You dissented in that case, believing that the defendant had no such right of privacy, or he had a diminished right of privacy by virtue of being, first, in a motel room, and, second, by the fact that he had punched a hole in the ceiling to hide some illegal substance, and, therefore, his right of privacy was not as expansive as it ought to be.

I mention all of this in conjunction with what is taking place today, because I think that we are losing sight of the fact of what is happening to our fundamental rights. The case I really want to talk about is the case, if I can pronounce it correctly, *California* v. *Sarola,* in which the police were hovering above in a helicopter, as I recall, being able to detect the growing of marijuana at a person's residence, in a fenced-in yard.

The court ruled that he did not have a legitimate expectation of privacy under those circumstances, because it was visible from an aerial viewpoint. It raised a question in my mind, as we and Senator Biden and others who have served on the Intelligence Committee have come to appreciate the tremendous technology that is available to us. We can from distant space spot a soccer ball on a field. We can read a license plate from outer space, practically.

The impact of technology upon fundamental rights is in danger of being eroded, unless we insist that technology cannot intrude in that area. That is why I was concerned about the rationale in the *California* v. *Sarola* case, that the expectation of privacy was unreasonable, because something was observable from an aerial viewpoint. With satellites we can pick out almost anything from outer space now.

I was wondering what your views are in terms of this so-called zone of privacy. The First Lady has complained that she had expected some de minimis zone of privacy that might be allowed her, as First Lady, and she found that that was a false expectation. But there is quite a difference between a public person and a private citizen in terms of what is a reasonable expectation of privacy and an era in which technology is proceeding in such a pace that we will approach the Orwellian nightmare that literature provides for us.

Judge BREYER. Insofar as you are suggesting that you have to remember that privacy is what Brandeis said is the most civil and the most important right of civilized people, and so forth, is a right that really is protected by the fourth amendment against unreasonable searches, unreasonable seizures.

Insofar as you are suggesting beware of fixed rules interpreting that, because if you just follow fixed rules, you will discover that technology outdates the rules, and remember to protect the basic value which might be threatened by some kind of technology that we have not heard of, or that we have heard of but we didn't know could get that far. I agree with that.

Senator COHEN. Could you explain the case, if you can recall it——

Judge BREYER. Yes, I do remember. I thought that the case, as I recall it—I might not be recalling it correctly—I think what I was not in disagreement about was the nature of the right. I think I

was in disagreement about the circumstance. I think what happened was that there were some police staking out a hotel or a motel, and they looked through the window and they see these people in there with guns that are pointed out. You know, these were some drug guys. I think it was a drug bust. And they were pointing the guns out the windows, so the police said we had better be careful about this.

The man was sitting—I think there was one man and he was inside, and they burst in and they found him sitting on the bed and they handcuffed him to the bed, and they looked for the gun and they didn't see it. But the knew the gun was there, because they had seen it through the window. Indeed, in the bathroom, I think up above the toilet there was a hole, and what the police had done is one of them went into the bathroom and reached up and there, sure enough, was the gun.

Basically, we were in agreement about the rule of law that the police had a right, even without a warrant, to go look for that gun, if they reasonably thought they were in danger. And the majority thought, no, no, they are not in danger, because, after all, this guy is handcuffed to the bed. I thought, well, a handcuff, you know, a lot can happen. I mean they might say, "I want to go to the bathroom," and they unlock it, he knows the gun is up there, they do not, I don't know how strong the bed is, and so in my mind is that the police were reasonable in thinking that there was a danger, and they knew there was a gun there and so they ought to look for it. In a factual matter, the others came out the other way.

Senator COHEN. I have exhausted my time, Mr. Chairman. I have other questions in the second round, and I will defer them. Thank you.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

With regard to schedule, we have necessarily gone over—Senator Cohen has not gone over, but because of the timing, we did not finish this round at 1. We will come back at 2:15, unless you all want it to be longer. We will come back at 2:30.

Second, I would like to ask staff present here if they would survey their bosses to find out whether those who have already had a first round, and four or five have not, whether they have an interest in asking a second round of questions, and, if so, how long.

Because I would like, if it is reasonably possible, to finish with the witness tonight, since tomorrow we will go into what I initiated in the last hearing. It is now standard operating procedure that there is a closed session that every nominee who will come before this committee will participate in, where we go over, under rule 26 of the Senate, those matters that we are not able to discuss in public, that is, the FBI report. And we are going to, in every Supreme Court nomination that I chair, go into that hearing, whether we need it or not, so that is the forum in which we will be able to discuss openly, without fear of inadvertently violating the law, the contents of FBI reports.

What is in an FBI report, for those of you who are new covering this or listening, every nominee is required to have an FBI report done, and so we are going to discuss that tomorrow morning, which will require the presence of the nominee. But I would hope that we

would finish the public testimony tonight. Obviously, there is no need to rush it. If people have second rounds and they wish to go, we will have to go tomorrow afternoon in finishing. So I would ask the staff to check with their principals, if they have a second round.

We will adjourn now, Judge, until 2:30, at which time we will come back and begin with Senator Kohl. He has to be downtown at a meeting, but either Senator Kohl or Senator Feinstein.

Judge BREYER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[Whereupon, at 1:22 p.m., the committee was in recess, to reconvene at 2:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. I realize it was a short lunch break, but I hope you at least got something to eat.

Our next questioner is Senator Pressler.

Senator PRESSLER. No, Mr. Chairman.

The CHAIRMAN. Excuse me. Let me make sure I am correct.

Senator PRESSLER. I think my colleague over there——

The CHAIRMAN. I beg your pardon. Senator Kohl. I am sorry.

OPENING STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

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

Judge Breyer, as you know, John Adams once said that we are a government of laws and not men. But this is, at most, a half truth, for ultimately it is men and women who give meaning to the law. And so it follows that character matters, and matters a great deal.

Character is not only to be found in the lines of your very impressive resume, Judge Breyer; it is also to be appreciated in the exchange of ideas and values and viewpoints that began yesterday and which we are continuing today.

I have first a few open-ended questions that I would like to throw at you.

Judge Breyer, yesterday you said that your mother did not want you to spend too much time with your books, and because of her urgings, you said that your ideas about people do not come from libraries. So I want to ask you something about people, the American people, and the problems that we face today as a Nation. And I hope that you will very much take this opportunity to speak openly and frankly, and perhaps not as a nominee for the Supreme Court but as an American citizen who is intelligent and thoughtful and who has, I know, thought long and hard about the problems that we face as a country.

Judge Breyer, what do you think are the major challenges that we face today as an American society, our problems, whether it be racism, poverty, crime, or drugs, the growing disparity between the rich and the poor in our country? What are some of our major problems? And as we look ahead, how do you think we are going to face and resolve one or two of these major problems as a society?

Judge BREYER. I think, Senator, this document, which is a kind of miracle, the Constitution, has enabled so many different people in this country to produce a government that is reasonably effective, that is democratic in its origin, that permits them individual liberty, and that moves in the direction of fairness.

You know and I know that over the course of the 19th century and the 20th century, our country has become ever more diverse in terms of the groups of people who are here. And the problem at one level is what it has always been: How do these very, very different groups of people manage to live together in a spirit of tolerance, understanding, freedom, fairness, and cooperation that will permit them to build better lives for each other?

That requires a degree of trust in government, because government is the people working together to solve their problems. It requires not too much delegation of authority to government, lest that government turn on them and deprive them of liberty. It requires people working together to produce an economy that can feed them all and give them decent standards of living, while at the same time they share the fruits of that economy so no one is left out.

What tremendous problems, when there are so many people who are left out. What tremendous problems, when, in fact, we are in a world where we have to work so very hard to have that economy working, producing. What tremendous problems, when, in fact, we are so far from the ideal of fairness that the Constitution prescribes. The need for trust, the need to compete in this technical, scientific world where it is so hard to produce a productive economy, the need to share around the results so that people are not left out. And to do all that while maintaining the basic liberty that this document promises.

Those are all the basic problems that I see underneath your words, the words of crime in the cities, lack of education, groups of people that do not enjoy prosperity, the need to keep jobs so that people are at work. All those are symptoms of what I see as those four or five basic problems. That is a challenge for everyone in government, in your branch as well as in the judicial system. And it is a challenge for everyone who is not in government because every single American—I say "us." We are all in this together. We are all in this together.

That is how I respond, briefly, to what you put.

Senator KOHL. Well, perhaps you can say a few more words. I appreciate your willingness to talk openly and frankly about this. I think those of us that are listening and watching wonder, other than what I believe what you said is that we must look to the Constitution and try to figure out ways together as a people—and maybe that is what you are saying. Let's talk about the growing inequality between the rich and the poor. That is a statistical measure. It is not an opinion.

How do you see us as a society responding to that problem, if you see it as a problem? Again, this is not as a Supreme Court nominee. This is more as a person who may well sit on the Court and may have to confront these questions in a larger way. So maybe as a nominee, but it certainly is as a thoughtful American and as

a person who we are all interested in, what are your thoughts in addition to constitutional issues?

Judge BREYER. I do not claim any special thought or any deeper thought or any special privilege for thought in this area any more than any other American in this country. Every American is trying to earn a living. They are trying to raise a family. They look out and see a lot of crime in the streets. They see a lot of people who are really badly off. They see promises of fairness that are not fulfilled.

They are concerned about their Government. They have to write the check for the car and they have to write the check for the rent, and they have to get their children educated. Life is not necessarily easy for many, many people. And the problem of the country, I do not know, more than that, that is what you would get out of reading a newspaper and out of opening your eyes and looking around.

I think that the challenge for us is to try to make that a little bit better.

Senator KOHL. Well, there are some people who would look at the statistical difference in terms of wealth between those who are extremely well off and most everybody else in our society and resolve this growing disparity as something that is just a fact of life and that these things come and go. There are some who would look at it and say this is not a positive trend in our country.

How would you look at it?

Judge BREYER. It is not a positive trend. I have known—some people are better off than other people. I understand that. And those who are better off, in my view, including me, frankly, have an obligation with every additional penny to give back something to other people, because it is there in a kind of trust. And the only reason we have a society of differences between rich and poor at all is because, in principle, that is supposed to work out, so that even those who are worse off are better off than they would be in some other society.

And that is why I spoke rather strongly about antitrust because then you are getting back into my area of law, and why I felt so strongly about it, because unless you have a policeman like that, then those who are better off are just going to be better off and that is the end of it. But you cannot have that. You have to have a society in which those who are better off understand their obligations towards those who are worse off. And that is what I think.

Senator KOHL. All right. Well, we will get to antitrust a little later.

Judge Breyer, I would like to ask you this: In your opinion, what do you think are the three most important Supreme Court cases of the 20th century? And why?

Judge BREYER. Well, the first is easy. I mean, the first is *Brown* v. *Board*. And why that is so easy is because, to me, it was clear. I mean, you know, here is the promise in this document, and the promise is the country will be fair. And they wrote it sometime in the middle, last part of the 18th—you know, in the 19th century, and then it was not done. How shocking. How shocking to write a promise like that into the Constitution and it is not done. And it seems to me that *Brown* was a decision of courage, in a sense, but

the courage was do what the law says. Read it. That is what it says. We are going to do it.

I think the judges and everyone else involved in that, good, they were behaving like judges and they were following the law.

Now, a second one, I will tell you, is a little bit, perhaps not as—but I have always felt this is awfully important, and I said this, actually, to the group of Russians: *Cooper* v. *Aaron*. Why do I say *Cooper* v. *Aaron*? It is interesting. *Cooper* v. *Aaron*, which you may or may not remember, was the case in Arkansas where paratroopers were sent to enforce school desegregation. Every judge on the Supreme Court signed his own name to that opinion. What that said is we mean it. But, of course, they are only nine human beings. Nine human beings cannot stand up against a mob of people, particularly if they are led by armed people who do not want them to do it.

So what it required was that the President of the United States, representing the entire country, said they said it and it will be done. And the paratroopers were sent down to see that it was done. And the reason that I think that is so important is because that means that, as a Nation, these words on paper are not words on paper. They are real. And that was a definite, firm commitment to that principle. And I think that is a very important decision, the way that was carried out, for that reason.

Then if you want to go to third, I tend to think of Holmes and Brandeis, as you know, and the dissents in the first amendment area, though they are not decisions, they are dissents. But those dissents played an enormously important role in making certain that freedom, freedom of speech was real.

So those are the things that come into my mind.

Senator KOHL. I think those are three very good choices.

Judge Breyer, I would like to turn to questions on a few specific topics. There are many judges and lawyers today who believe that the sole purpose of the civil justice system is to settle disputes between private parties. Others, including your colleague, Judge Mikva, say that because the courts are public institutions, they must also consider and look out for the public interest, to the extent that it is affected by civil litigation.

You yourself alluded to this yesterday when you told Senator Leahy, and I quote, that "the courts belong to the public."

Where do you come down on this question, Judge Breyer? Is our civil justice system simply about private disputes, or is there more to it than that?

Judge BREYER. More to it than that. I mean, that is my short answer. The object is dispute resolution. Dispute resolution is important. There are other methods of dispute resolution. But dispute resolution on what terms? Dispute resolution on terms of what is fair. Then you get back into the court system.

You have to be careful of saying it is just resolving disputes, because you might be resolving disputes on terms that are not fair. You do not want the stronger party always to win. That solves it, but it is not fair.

Senator KOHL. OK; I am glad we share that belief, because courts cannot afford to ignore the public interest in civil litigation, and we agree on that.

My concern, however, Judge Breyer, is that courts are not striking the right balance today between the public and the private interest. Consider, for example, the troubling use of protective orders and confidentiality orders by courts today. In some cases, these orders shield the public and regulators from crucial information about dangerous and defective products that are discovered in the course of litigation. Court secrecy has prevented the public and regulators from learning about many dangerous products, for example, silicone breast implants, defective heart valves, automobiles, and playground equipment.

Now, obviously, courts need to balance the need for privacy against the need for openness and disclosure, but in many cases today's balance seems less a balance than a knee-jerk preference for privacy and private parties and against the public interest and disclosure.

And so, Judge Breyer, I would like to ask you whether or not you share my view that some judges today are too quick to sanction confidentiality without looking carefully enough at the public interest in disclosure of information regarding dangerous products. Shouldn't the courts at the very least be required to consider public health and safety before allowing for secrecy in civil litigation?

Judge BREYER. What you are focusing on specifically is not when a Government agency or a State agency tries to obtain information about public health and safety, for, obviously, there are broad discovery powers as there should be in the hands of any governmental agency.

Really you are focusing upon two private individuals who are in a private dispute, and sometimes, in the course of that dispute, something will turn up, and the question is: When should it be made public even though one of the parties where it came from does not want it made public?

Now, that kind of answer to that kind of question obviously requires weighing the very important interests that you talked about against the interests of privacy. I do not guarantee it is always done properly. It would be amazing if it were always done properly. It would be the only aware that I am aware of—I mean, always, always, there can be mistakes in that area. But I really think it is up to you in Congress to review this kind of thing systematically. And if you think the line is now not being drawn properly as a general matter, then you can change that line.

Senator KOHL. All right. If I may just ask the question again and answer if you want—I said, Don't you believe that courts should be required—required—to consider the public health and safety before allowing for secrecy in civil litigation? Consider, if courts should be required to consider public health and safety.

Judge BREYER. The reason I was putting it in terms of line-drawing is perhaps it seems obvious to me that in terms of some level of health and safety, of course, of course, no court can or should stand silent when they see an immediate, serious risk to some third party's health or safety. No lawyer can remain silent. No doctor can remain silent.

Senator KOHL. But as you know, there have been several, if not numerous, cases where two parties in a court dispute before a judge will make a secret court settlement involving a product being

used widely but having affected just that one person. It has happened many times—heart valves, automobiles, silicone breast implants—where a court allowed a settlement to be made between two parties in court, full well knowing that that settlement meant that tens of thousands, if not millions of people who were similarly involved with the defective product would, therefore, not know of the defective product.

You are, of course, I am sure, fully familiar with this. And what I am saying is: Don't you believe that a judge should be required to consider public health and safety before that judge allows a secret court settlement of this sort to occur in his court or her court?

That is somewhat of a departure from what you know is the present norm.

Judge BREYER. Yes, and why I am being hesitant is really because I suspect it is a question of changing a legislative standard in general. And I worry that this is somehow going to be coming in front of the Court in terms of an appropriate court rule or in terms of balancing privacy interests. And so I am hesitant to go beyond the general statement. Do you see why I am hesitant to go beyond that? Because it is not something I know enough about to be confident that I am not expressing a view there on something that is likely to come up. That is my hesitancy.

So I sort of feel the general principle, that, of course, when you are a judge, as any other person, of course when you are a judge and you see a real threat to health and safety, of course you have to tell people about it. You cannot let—I mean, that seems to me absolutely clear. And then going beyond that, as to just in what cases and how you draw that line and so forth, that is something I have to hesitate. I have to hesitate.

Senator KOHL. Well, I think I hear you saying you agree, but. But you agree.

Judge BREYER. I agree, but.

Senator KOHL. And I understand that. I understand what you are saying. All right.

I would like to ask a couple questions or thoughts about first amendment and TV violence, Judge Breyer. As you may know, Congress and the American people, including myself and Senator Simon and others, have been looking at the effects of media violence on children. Clearly, media violence, whether it is on our TV screens or in our contemporary music or in video games that we purchase for our children, clearly media violence contributes to violence in our society.

While other things are also factors, like the breakdowns in our society with respect to crime and drugs and families, the fact that these conditions are present does not excuse the excesses of those in the media who peddle violence to our children. And when I talk to people, they agree, and they ask me why Congress or Government is not doing something about it.

It is not always easy to explain the problems associated with the effort to regulate media violence without threatening free speech. However, freedom of speech is not absolute, for, after all, you cannot yell "Fire" in a crowded theater.

Judge Breyer, we all know that it is sometimes appropriate and necessary to enact and uphold reasonable restrictions on speech, and I am sure that you agree.

Suppose that Congress passed a law to ban or restrict the broadcast of TV violence during non-news programs or to set time limits on when violent programs could be shown. If you were called upon to review such a statute or a regulation, what kinds of issues would you consider in your analysis, and what methodology would you use?

Judge BREYER. It is apparent you understand I am concerned with the problem of TV violence. What you are asking is how do I approach this kind of problem in the first amendment area. That is a fair question. And the way I approach it is that I think at the core of the first amendment are what I have described as a kind of cluster of things.

There is political speech. There is also at that core the need to communicate and talk to each other and have conversations where we listen, like around the dinner table, which I described yesterday, which is critical to intelligent discussion and democracy, and there are concerns of expression, expressing—expressing a personality, expressing through art, or through science. There are all those things at the core.

Then you move out from the core. That core is very important and virtually inviolable. As you move out from the core, what you discover in different directions is that sometimes we are concerned with something that seems almost like conduct, and the closer it is to conduct, well, the further it is from the core.

We are concerned with instances where a particular kind of speech might have an immediate harmful impact to society that is tangible and real. That is your example—fire in a crowded theater—or, you cannot solicit a person to commit a crime although you do so in words. Then you discover there are areas where in fact we are talking about the impact on younger people. Imagine the control that society exercises in a grammar school or in a high school.

And then, in another direction yet, you run into instances where the expressive value is totally gone; it is not really communication at all, though it in fact has a negative societal impact. I talked about child pornography.

So as you move out from that core, you look at how far away, you look at whether there are simply rules of procedure—time, manner and circumstance. A town meeting can be run by that. But if you are beyond that, you look to society's needs, and you look as well to the spillover problem, that is to say, have you got a statute that is really narrowly tailored to those needs and will not intrude into the core, or there is a risk that you will chill what is closer to the core.

Those are a few of the things, and the metaphor in my mind is a kind of core of several different things, and the further away you get in a number of different directions, the more you pay attention to society's demands to come in and impose rules and regulations.

Senator KOHL. To what extent would it make a difference if the evidence demonstrated that TV violence caused specific and long-term harm to children? Would that make a difference in your concern?

Judge BREYER. Certainly, as I said, I do not like to discuss it in the context—I am nervous about discussing it in that particular context, for the very reason that it is possibly the subject of litigation; it is possibly the subject of the statute, and my goodness, if I am confirmed, that would come right before us.

But I think as a general matter, your point is a fair point, that the more serious real, tangible harm, the further from the core, the more it is possible to devise or try to devise an appropriate——

Senator KOHL. Are you imagining—and this is just an imagination, I recognize that—but is it conceivable to you, Judge Breyer, that restrictions on media violence could ever pass constitutional muster?

Judge BREYER. That, I think I must stay away from, because I imagine that should legislation pass, one of the arguments that will be made will be the negative of that, and the other side will argue the affirmative of that; and it seems to me very, very important that one approach that concrete problem, if I am on the Supreme Court, with a very, very open mind.

Senator KOHL. OK; and finally in this area, Judge Breyer, does government's ability to protect children from explicit material vary according to the medium, whether print, movie, video game, or information highway, in which it is presented?

Judge BREYER. Media, different media, have in the case law sometimes been treated differently. But I know also there are arguments in particular contexts that they should not be. So it is hard for me to answer that, other than in that unsatisfactory general way.

Senator KOHL. All right. Judge Breyer, yesterday you said that televising Supreme Court oral arguments might be a good idea. I have been a supporter of more radio and TV coverage in the Federal courts. I believe that if we had C–SPAN, a channel for the Supreme Court, that it would help Americans better appreciate their legal system.

So, Judge Breyer, on this area, did you watch any of the O.J. Simpson hearing on TV, and if you did, what are your thoughts on whether televising a hearing of this sort will have a negative effect on the defendant's right to an impartial jury?

Judge BREYER. Let me not talk about the particular case, and let me think about things that were in my mind a year ago or 2 years ago, well before that particular matter arose.

At that time, I voted in favor in the Judicial Conference of experimenting with television in the courtroom. That has been carried out. The results are being evaluated. In Massachusetts, television is in the courtroom. The Massachusetts judges I have spoken to seem generally satisfied. The results of that are being evaluated in the Federal system.

My particular appeals court was not part of the experiment, but not for want of willingness; it was because they could only have a small number. That is the circumstance in which I think my vote in favor of the experiment is right as of this moment, abstracting from this particular case and putting myself back in the frame of mind I was 2 or 3 months ago in respect to this.

That is basically my view. It has not changed.

Senator KOHL. And I appreciate that comment. But are you saying you do not want to answer the question on televising a hearing—do you think that televising a hearing might conceivably have a negative impact on a defendant's right to a fair jury trial?

Judge BREYER. The question, of course, that you are raising there, which is an important question, is the publicity and the publicity on the difficulty of selecting jurors.

Senator KOHL. That is correct.

Judge BREYER. That is a problem, and how that is balanced is not something I have looked into. That is not something I have looked into. It is something that I have read enough and heard enough about to know it is a problem. And that is where you start from, and that is where I start from, too. You are worried about the fairness of the trial. You are worried about the maintenance of a free press. And somehow, the balancing of those things is terribly important—and is not necessarily just for judges.

Senator KOHL. OK; finally, I would like to get back to antitrust for a minute, Judge Breyer. Senator Metzenbaum covered some of the antitrust matters with you, and your answers were very good, but I do have a few followups and some general questions to ask.

Recently, we celebrated the centennial of the Sherman Act. For over 100 years, this landmark measure has protected the principles that we hold most dear—competition, fairness, and equality. I believe that the people who wrote the Sherman Act were driven by a variety of beliefs. They wanted to encourage economic efficiency. They wanted to help the little guy, the small businessman, by preventing large concentrations of corporate power. And ultimately, they wanted to help consumers.

The antitrust laws are important because they ensure that competition among businesses of any size will be fair and that consumers will pay lower prices for their goods. And these laws are nonpartisan; they have been vigorously enforced by both Republican and Democratic Presidents.

Judge Breyer, I am concerned that some judges would disregard the legislative intent of the antitrust laws and substitute their own ideological agenda. Let me read you two statements about the Sherman Act. The first is by Judge Posner of my own seventh circuit, and I quote:

> If the legislature enacts into statutory law a common law concept as Congress did in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle, in which event the values of the Framers may not be controlling at all.

The second quote is by Justice Souter, speaking before this committee:

> When we are dealing with antitrust laws, we are dealing with one of the most spectacular examples of delegation to the judiciary that our legal system knows. Certainly, a respect for legislative intent has got to be our anchor for interpretation.

Judge Breyer, which statement reflects the better view in your opinion? Should the courts ever interpret the Sherman and the Clayton Acts without exploring the legislative intent of its authors?

Judge BREYER. I discussed that, actually, in a debate that I had with Judge Bork where we took opposite sides to a degree on that question, and I think I publicly there side with the second view.

Senator KOHL. OK; I would like to talk for a minute about price-fixing because it is of particular concern to me. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits manufacturers from setting the retail price of their products by independent retailers. But some people have begun to argue that we should treat vertical price-fixing differently from horizontal price-fixing.

As Robert Bork wrote in "The Antitrust Paradox," it should be completely lawful for a manufacturer to fix retail prices. Do you agree with this sentiment?

Judge BREYER. I can say the debate was quite interesting. This was in the same debate. And basically, Judge Bork—in my recollection of the debate, we were talking about the Robinson-Patman Act, and he was arguing about that, and in that context I think I made fairly clear that if Congress had the intent of doing something that one might think was not necessarily according to price theory principles, well, then, it did, and it is our job to carry it out.

In that same debate, we discussed retail price maintenance, and it was my own view, that I believe I expressed fairly clearly, that the laws against resale price maintenance were good, sound antitrust law. I think the example that I used was that years and years ago when I was a student, there were economist professors—somebody, I think, at the University of London, a Professor Yamey, had written a book and had said here are the pros, and here are the cons; what it boils down to is laws against retail price maintenance help the consumer. They bring about lower prices.

And what I asked Judge Bork is what has changed; what has changed. Now, I understand people have different views on that issue, but I think I have expressed my own fairly clearly, quite some time ago.

Senator KOHL. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pressler.

OPENING STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

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

Judge Breyer, I am particularly happy to welcome you here. Having once been your student in law school, I take particular delight in seeing you.

Judge BREYER. Thank you.

Senator PRESSLER. And I very much appreciated your remarks during yesterday's hearing when you said that when you deal with cases, you listen to the party, and then try to repeat back the argument in your own words to the other side. I frequently do that in dealing with constituents—repeat back their position. I think it is a wonderful way to proceed.

We have in my State of South Dakota and throughout America, a subject that has not been brought up yet here today in this hearing. Many other subjects have been covered, but I do not believe we have talked about fee-owned land in Indian country.

I know that Indian jurisdictional questions are very complex, and a lot of these matters come to the Supreme Court; in fact, someone

told me that there are more cases involving Indian tribes, jurisdiction, and water rights than any other subject category that comes to the Supreme Court.

Putting it in layman's language, as you said, you put yourself in each person's shoes. I recently was at the Standing Rock Indian Reservation and the Cheyenne Indian Reservation in South Dakota. You can talk to a white rancher, and he will tell you that his grandfather bought this land after the U.S. Government advertised it, and he bought it from the U.S. Government, and maybe it has been resold since, but the chain of title traces back, and it is very legal and logical. You can talk to the Indian citizen, and he will say that his great-grandfather was given this land by the U.S. Government, and he feels that it has been illegally taken, and he seeks compensation.

In fact, I have tried to settle a lot of this, or I thought I was making a contribution, back when I was in the House of Representatives in the mid-1970's, and I was quoted by the Supreme Court—only in a footnote—because I had sponsored legislation to open up the question to waive res judicata. And in 1980, the Court made a ruling in *U.S.* v. *Sioux Nation of Indians,* in which it gave a substantial amount of compensation to the Sioux Nation, which they have not accepted because they do not feel it is adequate.

But in any event, I have a long question here about fee-owned land in Indian country where the white ranchers or the white businessmen who have been there are essentially regulated by the laws of the reservation, and they are sometimes taxed by the reservation, and they feel that this is a violation of what they had agreed to or what the agreement is, and they come to me with that problem. If you put yourself in both shoes, you can find many legal arguments and many emotional feelings depending upon whose shoes you are in.

I know at Harvard Law School there have been a number of professors—I think a couple right now are helping one of the tribes out there with a water rights case where they are seeking hunting and fishing rights, but in addition to that they are also seeking payment for hydropower. And it is not just in South Dakota; in California, for example, the Indian tribes have asserted a claim on 25 percent of all the hydropower that has been generated, and back payments. These types of issues are coming into the courts.

May I ask you, first of all, what is your perception of all of this? Have you worked on some of these cases? Have you a perception of this issue?

Judge BREYER. Let me divide it into two parts—more basic and more recent. The more basic, which I have mentioned—and I hope you would be the expert on this—is that I do remember, of course, when you were a student, and I do not know if you remember in the course that Charlie Nessen and I developed, we spent about 20 percent of that course tracing the history of the Cherokee Indians in Georgia. And as you may remember, the Indians in the 1930's and 1940's were given by treaty—they were given by treaty—a section of that State, and when gold was discovered, the Georgians basically ignored them and said goodbye. And the Indians did an unusual thing—they hired a lawyer who was called William Wirt, something like that, I think. And they said we will bring a law

case; the treaty protects us. And they went to the Supreme Court, and they were first thrown out on what I would think of as a technicality. And then somebody from Massachusetts went down and was put in jail and forced the issue to be raised. They went back to the Supreme Court in a case called *Wister* v. *Georgia,* and the Supreme Court said Indian tribe is right; they are right under the law. And though it may be apocryphal, I think that was the case in which Andrew Jackson said, well, John Marshall has made his law; now let him enforce it. And it really was not enforced. And that I call former, not recent, because I think luckily, recent law is that the Indian tribes and others can go into the court, and the courts respect their claims, and the Government enforces them.

Now, what I have seen in this area, which is only a peripheral connection, is that a number of different difficult issues tend to arise. Sometimes, there is a treaty. Of course, Congress has the legal authority to abrogate a treaty, like any treaty. But sometimes there are cases because the Indian tribe says we had a treaty, and Congress did not really abrogate it. And then you have a difficult question, looking into the history about what Congress intended, but basically, the rule is that the Indians have their treaty, and where that treaty is there, the courts will assume that it is not abrogated unless they are very strongly convinced to the contrary.

Then, another kind of case arises which you begin to talk about, which is terribly difficult, and that, of course, is a case where there was tribal land, and then some of that land has passed through a history and story of different connections into people who are not members of the tribe. And then the issue is what kind of authority does the tribe exert. And it is particularly difficult where that could include, say, some kind of criminal prosecution, where then the person who was not a member of the tribe would say: What about my basic rights guaranteed under the Constitution?

Those are the kinds of issues that arise, and on the one hand, you have to respect very much the sovereignty of the tribe; and on the other hand, you have to recognize the claim to say basic rights of protection. And I am very glad to hear you say that indeed, you often look to other ways than solely court ways of resolving these things, because I do think, for example, that sometimes, say, the tribal authorities and the other authorities might decide to have tribal powers that are the same in terms of protection as other powers. If that is so, that would be a matter worked out through Congress or worked out through your good offices, or worked out through meetings; it would not necessarily be worked out in the courts.

Senator PRESSLER. One issue that will probably wind its way to the Supreme Court in future years involves fee-owned land in Indian country. I will just state this question because I think it summarizes much of the conflict.

Under the General Allotment Act of 1987, known as the Dawes Act, Congress began to allot to individual Indians tracts of land on the reservations. Title to the land was to be held in trust for 25 years, after which the land would be conveyed to the Indian allottee by means of a patent. Originally, Indian individuals had to apply for these allotments, but later the law was changed to allow the Secretary of the Interior to issue fee patents to Indians regard-

less of whether they had applied for an allotment. These were known as forced fee patents.

Over the years, many of these Indian allotments were then sold to non-Indians, advertised by the Federal Government in some cases; maybe they were trying to raise revenue—I do not know—but they sold them to white settlers.

Furthermore, various acts of Congress, such as the Cheyenne River Act of 1908, opened the reservations to non-Indian settlers, which actually was a reversal of what Congress had originally done.

We now have the situation where there are many acres of non-Indian fee-owned land lying within the borders of the Indian reservations. This has created a checkerboard ownership pattern with non-Indians owning some land, Indians owning other parcels, and other land held in trust by the Federal Government for the tribes. This situation has prompted many court cases, which often must resolve the question of whether the State or the tribe has jurisdiction over non-Indians or non-Indian lands.

Now, some tribes assert a complete right to regulate the lives of all people living within the boundaries of their reservation, even when the reservation encompasses all this checkerboard land and regardless of whether they are Indian or non-Indian.

Last year, the Supreme Court decided in *South Dakota* v. *Bourland* that the Cheyenne River Sioux Tribe could not regulate the hunting and fishing rights of non-Indians on Federal lands previously owned by the tribe. And I think some of your colleagues at Harvard Law School were on one side of that brief; I cannot remember for sure.

Now, Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries. So you have this situation of non-Indians living and owning property within a reservation subject to the jurisdiction of the tribal courts and the tribal police and so forth, but they cannot vote in the tribal elections. So they come to me, and they will come to you in the courts, seeking some kind of relief.

Nonetheless, tribes in my State have imposed licensing fees on liquor stores owned by non-Indians on fee-owned land located within the boundaries of the Indian reservation.

Well, anyway, that is the complete bundle of the problem, and I have struggled with this as a Congressman and as a Senator from South Dakota over the years, and later, I am going to ask you about one piece of legislation that we have tried, but I guess my question—if I have one, because you could answer so many different aspects of it—is given the fact that non-Indians have no right to participate in tribal governments, do you see any constitutional problem when a tribe taxes a business owned by a non-Indian located on fee-owned land but within the boundaries of the reservation? Or, stated another way, is it constitutional for tribes to tax and regulate those who have no ability to influence how their taxes will be acquired and spent?

Judge BREYER. I think that is an aspect of the broader problem that you state. And I think that could well be a matter in litigation, and it is not a matter that I am really expert on. It seems to me the most difficult part of what you say is where, on the one

hand, the tribe has sovereignty, and that sovereignty must be respected.

On the other hand, those people who now perhaps unwillingly are subject to the tribe sovereignty feel they lack a basic right that they would have, if that sovereignty were not there. And there it sounds to me as if what you are trying to do is to encourage people to get together to the point where, at least from the point of view of the person who is there, he gets the rights either way. Of course, that is the best situation.

If whether the Indian tribe has the sovereignty or whether the State has the sovereignty, that person is basically just as well off. I don't know if you can bring that about. That is really a political matter and a matter of negotiating and learning and meetings of all kinds that aren't necessarily judicial meetings. I understand that that is what you try to do, and I can just say, from the point of view of the judicial aspect of the problem, it sounds very difficult, with important interests on both sides.

Senator PRESSLER. Now, the Indian tribes have found a great source of revenue in gambling, and reservation gambling is provided for by the U.S. Congress. Several States have tried to find a way to tax or get a portion of gaming proceeds, and several tribes have gotten very wealthy. There is a sort of irony in all of this. Indeed, some of the smaller tribes on the east coast have become very wealthy.

The point is that the States in which these gambling casinos are located cannot tax tribal gaming proceeds. Do you have any feeling about that subject?

Judge BREYER. I know that is the subject of a congressional statute, and I know the statute tries to create a situation where certain defined tribes—and there is a definition, and I know there are sometimes arguments about where tribes and which tribes and under what circumstances tribes—but where you pass that problem, I think the statute requires a negotiation, and then the negotiation between the State and the tribe over the details of the gambling that the statute permits is designed to work that out in part. That is my guess and understanding.

I also understand that issues can arise about whether or not negotiation is in good faith, the extent to which the court gets involved in supervising the negotiation. In other words, I see the issues and I understand the importance of it, and I am not certain legally really how they actually work out. That would depend upon a particular case.

Senator PRESSLER. In *Santa Clara Pueblo* v. *Martinez,* a 1979 U.S. Supreme Court case, the Court held that suits against a tribe for violation of the Indian Civil Rights Act may not be brought in Federal court, that is they have to be brought in the tribal courts. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court system. Many tribal governments do not provide for a court system independent of the executive, creating the possibility of intimidation by the executive leadership.

Several years ago, I cosponsored legislation, which was not successful, with my friend Senator Hatch, who is not here now, and others, I believe in the early 1980's, which would have permitted

individuals who had exhausted their remedies in tribal courts for violations of the Indian Civil Rights Act to bring an action in Federal court. Now, that measure did not become law, so today people exhaust their rights under the Indian Civil Rights Act in tribal courts.

Now, do you believe the Federal courts should be immediately open to anyone who alleges an Indian tribe has deprived him or her of a Federal constitutional right? And should Native Americans be entitled to the same constitutional protection afforded to all Americans in our Federal courts? On this question of jurisdiction, may an Indian tribe require non-Indians living on a reservation to exhaust their remedies in the tribal court system, before appealing in Federal court, even though non-Indians do not enjoy the constitutional protection in tribal courts? Wouldn't such a requirement deprive non-Indians of their due process rights?

To throw all those questions together, should litigants in Indian Country be able to appeal to the Federal district court at the end of their journey through the tribal courts? There is a case I think that will come up to the Supreme Court again on that, or it will try to come up. Do you have any feeling on that?

Judge BREYER. Well, my substantive instinct is, of course, that if the procedures and protections in the tribal court can be brought to match those in the Federal court, the problem will tend to go away, because then, of course, you would have the same protection in both places. And that is not a judicial question. That is a question of people meeting and understanding and talking to each other and trying to work out appropriate procedures.

When you turn to the legal question, which is premised on that not having been done, as you point out, that might come up to the Supreme Court, and I am on that Court, I would have to decide that question and, therefore, I couldn't really express as view about it.

I think that your instinct that if it comes out the way that you think is not appropriate, the solution would be legislative. I think that is a correct instinct.

Senator PRESSLER. That concludes my questions on Indian jurisdiction. But as I read your statement again, your statement yesterday, saying that you try to repeat the argument back in your own words to the other side, I thought that was very much what we have to do with the Indian/white problems, to work for reconciliation. And, indeed, as you do change shoes, you can find arguments just about as strong on each side, and you will have to deal with a lot of those.

Back in that class you taught me a long time ago, your mentioning Andrew Jackson and the Cherokee Indians march to Oklahoma leads me to this question. When was the last time the President of the United States refused to back up the Supreme Court in a matter that the Supreme Court ordered? I mean our whole constitutional system could have broken down.

Judge BREYER. Yes.

Senator PRESSLER. The second part of the question is do you feel that the executive and legislative branches back up the court system today? I mean that is almost unheard of. Our whole system

would not work, if we did what Andrew Jackson did in that instance, is that not correct?

Judge BREYER. Absolutely; that is why I said in response to Senator Kohl that I thought *Cooper* v. *Aaron* was such an important decision, because it is the absolute verification of what you said, that the executive and legislative branches would stand behind the decisions of the Federal courts.

Senator PRESSLER. I think one of the concerns that some of us have in the antitrust area and the deregulation area can be summarized this way: In inner cities and in small cities and rural areas, a lot of big companies don't want to provide service. They would rather provide it in the wealthy suburbs. For example, telecommunications is something I work on a great deal, and we find that the new information highway is going to be abundantly available in wealthy suburbs and larger cities, but not necessarily in inner cities or in small cities or rural areas. The same is true of air service. The same is true of railroad service.

I know you have done a lot of work on deregulation. But I have found myself representing a small city rural State constantly struggling to preserve air service or train service or trucking services, or indeed long-distance telephone rates that are reasonable.

Now we are on the verge of fiber optics cable and broad-band and providing computerized information in the home. If somebody is not on this informational superhighway by the time they are 15, they are never going to be on it, if they are not into putting information into the computer and getting information back out.

You will be making a lot of rulings on antitrust and responsibilities of companies. Of course, we do not have the 1934 act any more that said if you take some rich routes, you have to take some poor routes, and so forth. But, in general, how do you see the Humboldt, South Dakotas, and indeed every State, upstate New York and Massachusetts, smaller cities and towns, not so much on the east coast, because you have so many people, but, indeed, parts of California—Fresno and those small towns that stretch from there to Bakersfield—getting serviced by companies not eager to provide as much air service or as much fiber optic cable or all the miraculous developments in telecommunications.

My basic concern is your philosophy of deregulation is going to leave a lot of people out of the superhighway of information and knowledge and all the good things that are coming. What are your thoughts on that?

Judge BREYER. I think you are addressing really my thoughts as a matter of policy, rather than my thoughts as a judge. Of course, as a judge, one tries to follow the law as it is written.

When I was involved in airline deregulation, this problem arose. It is true that the general thrust of airline deregulation was that prices would go down for the vast majority of Americans. At the same time, I believe when that statute that was written, your point was a valid point, that in terms of infrastructure, it is important that the entire Nation be seen as a single nation and people not be left out.

Therefore, written into that statute was a subsidy that Congress at the time believed would be adequate to maintain service at smaller rural airports, the idea being that no rural community cur-

rently at that time having scheduled service would lose all its service. There would be some lifeline there.

Now, whether that subsidy was adequate, whether it worked out in practice, that is a matter for history and possibly criticism. But the intent of the movement was not totally to sacrifice the needs of those who are not in the populous communities. It was to recognize those needs and to try to provide for them, especially so that there would be interconnections everywhere. That is basically the principle, though one could criticize from that point of view the execution.

Senator PRESSLER. Let me ask a question on the exclusionary rule. I know you covered this to some extent. There was a crime bill written here in the Senate that would have made more evidence admissible to the jury. One perhaps good thing coming out of the O.J. Simpson publicity is that a lot more people across the country are thinking about the exclusionary rule, and I think it is going to become an issue in future political debates, and maybe that's where it should be.

If legislatures were to pass a law saying that more evidence that police pick up at the scene of a crime without a search warrant can be given to the jury or the fruits of the search can be given to the judge or the jury, it is said this would be found unconstitutional, because the fourth amendment provides quite a bit of protection.

Yet, our citizens are getting angry at hearing stories, when you do have a search warrant and you find something else or the fruits of the search are not related to the search warrant, then it is thrown out, it cannot be brought before the jury. Or if policemen upon the scene of a crime go into other rooms or pick up evidence, the argument is it should not be admitted, because the policemen could have gotten a telephonic search warrant or something like that.

In other words, a lot of evidence never gets to the jury or the judge, in the feeling of the public, and I think this is going to be a very big issue in future campaigns in this country. I think we are going to focus on the exclusionary rule. But it is said that even if a statute enacted by Congress broadening what the police can pick up and present, it would be declared unconstitutional. What is your view of that?

Judge BREYER. My guess is it would depend upon the statute. You have to look into the detail.

Senator PRESSLER. Do you have any feelings about what the exclusionary rule should be? Do you think it is about where it should be, or do you think it is too restrictive?

Judge BREYER. I cannot say as a matter of policy, because that is so much a judgment for others. That is, the basic idea, of course, is that it is very puzzling to people, very puzzling, what Cardozo said. He said, "Well, why should the criminal go free, because the constable has blundered?" And the answer to that is, over the course of time and a long period of time, people learned that the protection in the fourth amendment, totally innocent people wouldn't be broken into in the middle of the night, that confessions wouldn't be extracted through violence, that the only way to make those meaningful in practice was to have this exclusionary rule. And it has become I think fairly widely accepted.

The exact contours of it and the shape and size and on the border how it should look, and so forth, I recognize, but that is a matter of considerable controversy and debate, and Congress or others might well criticize or want to do it this way or that way or the other way.

Senator PRESSLER. On the issue of habeas corpus, the average citizen looking at this system sees appeal after appeal sometimes. Would you be satisfied with one thorough appeal that a judge took a look at and said that was a thorough complete appeal? Would that be satisfactory to you?

Judge BREYER. When you say satisfactory to me, the great debate, as you recognize in this area, particularly with the death penalty, is involved, is habeas corpus tells us we don't want to have this or any person have a penalty particularly of this sort, if the trial was fundamentally unfair. Of course, people keep coming on again and again and they say, well, it was fundamentally unfair, and then the courts say no, it was OK, and then they have a new reason and a new reason, and so the problem is this problem of delay.

At the same time, people might sometimes come up with reasons that they for good cause couldn't present before. So I understand how you are trying to balance those two things, the need for fundamental fairness and the need to avoid unreasonable delay. How it works out in the statute again is going to be up to Congress. My guess is you will get one final procedure and some cases will come along where something was discovered later, and you will say, well, the procedure couldn't have taken that into account. So I think you will improve the situation. I am sure there are all kinds of ways of improving it. This is such a fundamental tension, that I doubt it will ever be perfectly solved.

Senator PRESSLER. My final question involves tort reform. Again we hear much argument. We are told that our revolutions in this country have been in the courtroom and not in the streets with guns. Through suing, a small person or a poor person can get at a large corporation that has wronged them. On the other hand, we have so many lawsuits, we are told that the cost of our products has risen substantially.

If you could implement tort reform for the United States tomorrow, what would you do?

Judge BREYER. I am glad sometimes that I am not in the Congress of the United States, and this is not a matter on which I am expert and I am really very pleased to leave that for you to decide.

Senator PRESSLER. It may well be that the Supreme Court will have to decide some of it, especially on punitive damages and issues of that kind. You are not going to give us any glimpse of——

The CHAIRMAN. Do you want to go back to being chief counsel of the committee? [Laughter.]

Judge BREYER. It was a wonderful job.

Senator PRESSLER. Thank you very much, and congratulations.

Judge BREYER. Thank you.

The CHAIRMAN. Judge, I might point out for the record what my recollection is, and this is not correcting you or anyone else, that, on habeas corpus, in 40 percent or thereabouts of the petitions filed

in capital cases, the courts feel they have merit, so they are not all frivolous.

At any rate, there is a vote on, Judge. We have about I guess 7 minutes in which to vote. Rather than take the break after the next questioner, who will be Senator Feinstein, why don't we break now for 10 minutes and then resume about 10 minutes of.

Judge BREYER. Perfect.

The CHAIRMAN. Thank you.

We will recess to vote.

[Recess.]

The CHAIRMAN. Judge, welcome back.

Judge BREYER. Thank you.

The CHAIRMAN. I have not had a chance to speak with your people about this, but we can speak about this scheduling in the open here.

One of the things is that I do not think we are going to be able to finish tonight. I do not think there are a lot more questions, but most members have several more questions. It would push us well into the late evening, and then I am not sure we could finish.

So what I would propose—and this is tentative until I have a chance to check with Senator Hatch, but I think this will be agreeable to him—is we will go until about 6 p.m. tonight, which means that Senators Feinstein and Moseley-Braun will ask their first round. I will ask a second round, probably not a full round but a second round of questions. Senator Hatch may or may not wish to go tonight and ask a second round, in which case we will start tomorrow with what, as I indicated earlier, is a pro forma closed session. There are probably going to be a series of votes stacked around 11:30 tomorrow, by which time we will probably be finished with the closed session anyway. We will do the votes and convene the open hearing again tomorrow at 1 o'clock. I fully expect we will be able to finish in early evening, late afternoon, with your testimony.

Based on the witness list and the way things appear to be going—and you and I have been doing this long enough, and you are familiar enough with this to know, no one ever knows anything for certain—but I expect we would have no problem going through the entire witness list, giving the witnesses their full opportunity to make their cases on Friday, and the hearing would close down at a reasonable hour on Friday.

It would be my intention, with the cooperation of my colleagues, to have an executive session early in the week. As my grandfather Finnegan used to say, "with the grace of God and the good will of the neighbors," by the end of next week the nomination, if all continues as it is, would be on the floor.

If that is generally agreeable with you, that would be my judgment as to the most orderly way in which to proceed. But I will discuss that in more detail with my colleagues, and in the meantime, I will yield to my distinguished colleague from California, whose patience is exceeded only by her equally distinguished colleague from Illinois, Senator Moseley-Braun, who have both been waiting patiently here.

I yield the floor now to Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman. We are known as what is the caboose on this train. We kind of bring up the rear.

The CHAIRMAN. Well, you know those trolley cars where the engine is sometimes in the back and sometimes in the front. I think the committee has learned that you may be the caboose, but you are the engine.

Senator FEINSTEIN. That is very generous of you. Thank you.

The CHAIRMAN. It is also true. When you decide something is important—I remember saying to you, no, we cannot possibly pass the assault weapons ban. If you can talk Henry Hyde into it, good luck. And, Lord, if you did not go over and talk Henry Hyde into it. So you are an engine, Senator.

Senator FEINSTEIN. Well, thank you. Thank you very much. That is very nice.

The CHAIRMAN. The floor is yours.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Mr. Breyer, I just want to make a comment on the proceedings so far. I really want to compliment you. First of all, I believe wholly in your credibility and your integrity. But what came through today I think to me was your ability as a teacher, because you did what so many people, particularly around here, do not do. You reduce things to their basic, elemental, simple truth. And when you talked about the coal columns as an example of appropriate regulation, I think you showed all America exactly what it is.

Many times I have found things get so mired down in cases here, and no one really knows what we are talking about. So I really appreciate this, and I think you have made a lot of things clear. I think you have done extraordinarily well, and I just wanted to say that before I begin.

I notice, too, that there has not even been a yawn from your family. So on all scores, it is doing well.

Judge BREYER. Thank you very much.

Senator FEINSTEIN. I want to talk to you about two things, and hopefully talk to you rather than really question you. The first is individual versus societal rights under the Constitution.

Let me begin by reading a quick statement from someone I have admired from what is called the other House here. His name is Sam Ervin, and he said this in 1973.

> The twin evils of criminal and political violence stand as a threat to our liberty in two ways. Liberty cannot survive an anarchy, but neither can it survive if our Nation's leaders and people come to feel that the only path to security lies in suspending constitutional freedoms for the duration.

And, in a sense, that is the delicate balance with which I would think a jurist must grapple. What are the rights of the few when they come in conflict with the rights of the many?

In a sense, today I want to talk to you about the rights of the few versus the rights of the many.

Last week, in California, I spent a lot of time in the communities, and I have in other cities as well. And I think violence in this Nation has reached such a state of epidemic proportions and concern for everybody. Regardless of race, creed, color, social or economic status, people are looking over their shoulder, regardless of whether they live in the suburbs or the big cities.

One school, I will give you an example, fourth-grade class, Hollywood, CA, had written to me because of their fear of violence. So I went to the school, and I talked to a fourth-grade class, I guess about 40 youngsters. In the course of the conversation, I asked the question: How many of you hear gunshots at night? And how many of you wake up to them in the morning? Every hand in the class went up.

I asked the question: How many of you have seen people getting beaten up? And 70 percent of the class, their hands went up. How many of you are afraid to go to school? About the same number of the class went up.

Now, you could ask any class that in your hometown and my hometown. One of our newspapers just did a study. Twenty-two percent of the youngsters admit to bringing guns to schools. Big problem in our society.

My question is this: I know that the Bill of Rights of our Constitution was designed to protect Americans against the enormous powers of the Government, also provided by the Constitution, in effect to protect the few from the many. And this is, I think, true in special circumstances: free speech, the free exercise of religion, protection from discrimination, regulation. But it is clear to me that in matters of public safety and perhaps other fundamental areas, we really need to protect the fabric of our society for the majority from the few among us who have the power to destroy it.

I read an article in the paper of one Governor imposing a curfew, again, to protect the rights of the many. Also, I suppose, it limits the rights of the few.

If you could talk just as a teacher, as a scholar, for a few moments before I got into something direct, about where you see this coming down, how you would see this as a jurist?

Judge BREYER. I do not have special insight. As a human being, when I hear that one real child is killed every hour through violence, of course, I react like every human being reacts to that in this country. I mean, absolutely intolerable.

Then when you say as a jurist, I think of the Preamble to the Constitution, as a jurist. Why the Preamble? Well, because it has always seemed to me that the Preamble has stated there what the goals are, simply, so any person can understand it. And the rest of the Constitution is a few understandable instructions for reaching those goals.

And I see right in that Preamble, it says,

> Establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and assure the blessings of liberty to ourselves and our posterity.

It says both assure domestic tranquility and provide the blessings of liberty.

Then the rest of the Constitution, being a set of instructions to reach those goals, must be interpreted in a way so that both can be reached. And then you pose the terribly difficult question: How do you choose among them?

I have no magic answer to that question. Sometimes I have done the following in a case where, in fact, say there is a question of the fourth amendment interpretation and the right not to be seized il-

legally, the right not to be searched illegally, and what does that amount to, and is it this or is it that?

Sometimes I go back and try in my own mind to remember that those rights are there to protect innocent people. And we protect guilty people because that is absolutely necessary if we are going to protect innocent people.

And so I ask myself: What would an innocent person think about what is going on? The case that came up, you see, was a case about whether a policeman could say to a person at the airport, who was acting very suspiciously: Excuse me, do you mind if I ask a few questions? And the man said yes.

Now, did that violate the fourth amendment? Though the question was a close one, I thought no. And my reason for thinking no was because I thought most innocent people do not mind answering questions when posed by the police where they are not put in custody, where they are not subject to restraint, but they are politely asked, Do you mind answering a question?

So that notion of what do innocent people actually fear is an unreasonable restraint on their liberty, I have found sometimes helps reconcile those two things in the context of a real case. I do not know if that is helpful. I see the need to pursue both.

Senator FEINSTEIN. Let me give you an example. Some of us, I think, on the Elementary and Secondary Education Act that will be coming up, will put an amendment or try to place an amendment that will say that any school that accepts Federal money must have a zero tolerance for guns in schools; that if a youngster brings a gun to school, that youngster is expelled for 1 year. Otherwise, I go home, and all people are talking about are metal detectors in schools. Metal detectors should not have to be in schools.

Judge BREYER. I agree with you.

Senator FEINSTEIN. And I think we reach that point where we really need to protect the general welfare.

Now, let me go to where it gets tricky. The second amendment,

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Arms is in a capital, State begins with a capital, and Militia begins with a capital.

I think it is probably true to say that the Framers of the Constitution provided no guidance as to whether the amendment was intended to secure the rights of individuals to own guns, to provide exclusively for a well-regulated militia, like the National Guard, or both.

Proponents of gun control argue that, although challenged, restrictions on the sale and ownership of guns have never been struck down by the courts on the basis of the second amendment. Indeed, in the *United States* v. *Miller,* the U.S. Court of Appeals for the Ninth Circuit expressly rejected a second amendment argument in upholding California's 1989 assault weapons ban. The National Rifle Association, which had challenged the ban, elected not to appeal the ninth circuit's ruling to the U.S. Supreme Court.

Former Chief Justice Warren Burger, not, I think, considered a political liberal, accused the NRA of perpetrating the greatest constitutional fraud in history for its repeated reference to the second amendment as a bar to gun control legislation.

Now, as the chairman of the committee said, I have just authored legislation on assault weapons. I have seen them become the gun of choice of youngsters, of grievance killers, and it appeared to me that the public well-being is served by not having what is crafted as a military weapon, first and foremost, available on the streets, homes, and workplaces of our cities and our counties and our Nation.

Whether that will be challenged or not, I do not know. I almost hope it would be so that we could settle, much like the coal mine, what is an appropriate role for government regulation.

I cannot forget the faces of the youngsters who raised their hands, every one in a class, that I go to sleep every night to the sound of gunfire. And to me, it is the rights of the many to feel safe that come into conflict with the rights of the few to possess and bear weapons.

I would appreciate any comment that you might care to give as to the *Miller* case, as to the second amendment, and how you might see it.

Judge BREYER. As you recognize, Senator, the second amendment is in the Constitution. It provides a protection. As you also have recognized, the Supreme Court law on the subject is very, very few cases. This really has not been gone into in any depth by the Supreme Court at all.

Like you, I have never heard anyone even argue that there is some kind of constitutional right to have guns in a school. And I know that every day—not every day, I do not want to exaggerate, but every week or every month for the last 14 years, I have sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons; that is to say, there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress, often by overwhelming majorities, has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.

In all those 14 years, I have never heard anyone seriously argue that any of those was unconstitutional in a serious way. I should not say never because I do not remember every case in 14 years. So, obviously, it is fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth, that there is a very, very large area for government to act. At the same time, as you concede, and others, there is some kind of protection given in the second amendment.

Now, that is, it seems to me, where I have to stop, and the reason that I have to stop is we are in a void in terms of what the Supreme Court has said. There is legislation likely to pass or has recently passed that will be challenged. And I, therefore, if I am on that Court, have to listen with an open mind to the arguments that are made in the particular context.

Senator FEINSTEIN. Well, would you hold that the 1939 decision is good law?

Judge BREYER. I have not heard it argued that it is not, but I have not reviewed the case, and I do not know the argument that would really come up. I know that it has been fairly limited, what

the Supreme Court has said, and I know that it has been fairly narrow. I also know that other people make an argument for a somewhat more expanded view. But nobody that I have heard makes the argument going into these areas where there is quite a lot of regulation already.

I should not really underline no one, because you can find, you know, people who make different arguments. But it seems there is a pretty board consensus there.

Senator FEINSTEIN. Would you attach any significance to the Framers of the second amendment where it puts certain things in capital letters?

Judge BREYER. I am sure when you interpret this, you do go back from the text to the history and try to get an idea of what they had in mind. And if there is a capital letter there, you ask, Why is there this capital letter there? Somebody had an idea, and you read and try to figure out what the importance of that was viewed at the time and if that has changed over time.

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

The CHAIRMAN. Thank you.

Senator Moseley-Braun.

OPENING STATEMENT OF HON. CAROL MOSELEY-BRAUN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator MOSELEY-BRAUN. Thank you very much.

Senator Feinstein is the caboose. I guess that makes me the flag. When you are No. 18 on a panel like this, you learn a lot, Judge Breyer, and I have certainly learned a lot listening to my colleagues and their questions and certainly to your very clear responses. And I have been, frankly, very much impressed by the clarity of your thinking, the preciseness and succinctness of your answers to the question, and they have been difficult questions. They have ranged just about the gamut. So I am kind of bringing up the rear here on the first round, but I did have an area that I wanted to discuss with you a little bit today that, in my years, certainly in law school but later in practice, that was very near and dear to my heart and that is no doubt near and dear to yours insofar as you have written in the area of administrative law quite a bit. And I, frankly, feel that these cases and these issues in administrative law are so important because, the big-picture issues notwithstanding, the administrative process is often where the rubber meets the road insofar as the rights of the little guy are concerned.

Judge BREYER. I agree.

Senator MOSELEY-BRAUN. The cases that come out of the agency decisionmaking very often impact on real people in their day-to-day lives in a more direct fashion than many of the other more esoteric and philosophical issues. And so while I would like to get to the esoteric and at some point, if I get a chance, I would like to start by asking you about your philosophical decisions and your decisionmaking in terms of administrative law.

It is particularly true since the time of the New Deal that Federal administrative agencies have played a major role in the development of policies that regulate the personal lives of American citizens and the commercial life of this Nation. And in reviewing some

of your cases, in fact, at least three cases which you have written—one had to do with a death claim for asbestosis by a pipefitter in a shipyard, and another a bead-stringer, whether or not the 17 years as a dollmaker qualified that person for employment disability, and whether or not a highway bypass could be constructed. And, of course, the Supreme Court recently ruled in a case involving my home, Chicago, with regard to the treatment of municipal waste.

And so we have got this line of cases, and the central issue really comes down to the role of the courts in regulating the regulators, and whether or not the judicial review of agency decisionmaking actually forms an adequate check on the power of the agency vis-a-vis the individual.

The Supreme Court had acknowledged the oversight function in *Abbott Laboratories* v. *Gardner,* and as you know, that was a case that involved a challenge by pharmaceutical companies to a regulation issued by the FDA. In deciding whether or not there was authority for judicial review of the agency decisionmaking, the Court held that judicial review would be improper only upon a showing of clear and convincing evidence that Congress intended to preclude judicial involvement.

Lately, however, the Court seems to have lowered that standard, backing away from that standard, and making it less likely that agency decisions will be subject to judicial scrutiny. In a case decided last term, *Thunder Basin Coal* v. *Wright,* the Court appeared to replace the *Abbott* clear and convincing standard with a standard that would prevent judicial review of an agency action in any case in which the intent on the part of Congress is—"fairly discernible in the statutory scheme."

While the Court in *Thunder Basin* attempted to distinguish itself from the opinion in *Abbott Labs,* I am not quite sure that the distinction is as clear as they said it was in *Thunder Basin,* and I fear that the *Thunder Basin* decision might signal a willingness of the Court to remove itself from—to retrench from the review of decisions of administrative agencies.

So I would pose the question to you: Do you agree that there has been a trend away from judicial review of administrative decisionmaking, and therefore do you agree that it holds the troubling prospect that the rights of the individual little people vis-a-vis these agencies which have so much power over their lives, that those rights might be less protected in the future than previously?

Judge BREYER. I think I would say three or four things. I think first, if there is such a trend, it is troubling. Second, the reason that I think it is troubling is I understand all these constitutional rights are very important—believe me, we all think they are incredibly important—but one thing also that is very important is just the area that you are talking about. And the reason that I think that to myself is because if you are dealing with whether a man or a woman is getting a Social Security disability check, you do not just think to yourself: That check is as important to that man or woman as a whole business is to its owner. You think it is more important, because that man or woman has nothing else.

And I think, too—when I was walking about 4 months ago with Judge Woodlock somewhere in Boston, and he pointed out a build-

ing, and in that building, they had worked out a series of part-time people, lawyers, who give a little bit of their time for a very low price—I believe this is how it works—so that people who have little complaints—little complaints—that just means a complaint that maybe, compared to some other complaint, is little; it is not little to the person—and they have a way of coming in and getting some kind of proceeding to see that they have been treated fairly in respect to a sidewalk, or snow removal, or a parking ticket, or whatever—that is terribly important.

Why is it so important? That is really my third point. The reason it is so important is it is important to that individual, and it is really quite a wonderful, marvelous thing to have a society that treats those complaints properly.

And my fourth point is I guess when I was with these judges in Russia which, as you can tell—I will slow down a little, because I am feeling strongly about it——

Senator MOSELEY-BRAUN. I am glad.

Judge BREYER. We were talking about it, and I said do not forget—you see, we have a meeting of the administrative law people and the American Bar Association—we sometimes say we are administrative law buffs—we believe it is important, too, and how many, and so forth. Well, I said to the Russian people there: Please do not forget this part of the law, because one wonderful thing that happened in that part of the law was that one time, it was decided that we would write everything down. That does not seem that important, but it is so important. It was something as a result of a Supreme Court case where somebody could not find the regulation, and after that, Congress said if that regulation is not written down, if you do not have that in the Code of Federal Regulations, if there is not a place where a person can go without a lawyer, if necessary, to find out what he is supposed to do, then it is not a rule, and it is not a regulation. I thought to the Russians that, too, is an enormous protection against arbitrary behavior, against people who are in the Government saying, "Well, this is what you have to do, and tomorrow, we will tell you why you have to do it."

So all of those are reasons why I agree with you, I think this is a very important area of law.

Senator MOSELEY-BRAUN. I think we share the same view, and you have made the point very well, I think, Judge, that this really does serve as a check and balance in the system that frankly, the Framers of the Constitution almost did not have to think about; but following the explosion of the administrative agencies, the far-reaching consequences of that decisionmaking, clearly, the rights of the individual vis-a-vis that kind of array of power can only be protected if the courts are vigilant in regulating the regulators and providing that backdrop of protection of personal rights and individual liberty versus the agency decisionmaking in cases in which it may be arbitrary—which raises a second set of concerns, namely the ability in present time of the courts to exercise that function adequately.

We have seen, with the explosion of litigation and with the overburdening of the courts—everybody reads articles about how overworked the courts are and how they are cutting back on activity, and in fact, in my State of Illinois just a month ago, the Supreme

Court promulgated a rule that limited the number of opinions that the appellate courts could issue every year on the grounds that the courts were overburdened and that there could only be a finite number of opinions, a finite number of written decisions.

Well, these two factors coming together may well mean that we are confronted with a limitation or a retrenchment or a retraction of the capacity of the courts to look out for the rights of that beadstringer or that pipe fitter or that individual who many have a claim for medical services, and someone has decided that they cannot have it.

How would you address the challenge that the court overload or the allocation of judicial resources poses for us now? How do we get around having the courts retrench in this very important area? Can you shed any guidance or light on how you would suggest going forward?

Judge BREYER. I have said a couple of things which may help a little but not a lot. One is a positive thing, and one is a negative thing. The positive thing is that probably, it is worth, when Congress passes laws, when State legislatures pass laws, when agencies have rules and regulations, a human being thinking about the process of translating that statute, rule, law, regulation into reality. And that means think through when and whether court process, administrative process, mediation process, or some combination thereof will be the most effective way of making that right in the statute real.

I do not know how you would come out, but I am reasonably convinced it is worth trying to give someone the job of thinking through that problem every time some statute that affects people is or is not going to be passed or modified.

The negative thing is this. Beware of door-closing in the courts. Beware of it in the following sense. Remember that the Social Security case to the person who needs the Social Security really is as important as any other case involving a lot more money.

No one will say that the court procedure as it is now set up is the perfect procedure. It may be, as some have suggested, that some cases of different kinds should go to mediation or so forth. But if that is to happen, the people involved must be convinced that that is a better process, and an escape route must be maintained so that there still remains the possibility of some access.

Now, that has happened sometimes, like where Congress has set up special courts like veterans' courts, so that both you have a specialty which will process the case more quickly, but an escape route is maintained so it is possible for a person who is hurt by that process to get back into Federal court. In other words, tailoring of different kinds I think is possible. I am sure it is worth thinking about, and I am sure that it cannot send a message that some people's cases are worth less than others.

Senator MOSELEY-BRAUN. Well, I am just so delighted to hear you say that, because quite frankly, in the context of, again, scarce judicial resources, the movement toward limiting judicial oversight, the values that you express here today really stand in danger of being lost, and if those values are lost, then those doors will be closed, and those individuals will not have the kind of protection

against the power of the agencies across the board that I believe, and I am delighted to hear that you believe, they ought to have.

Talking about how one looks at administrative law, statutory law, you have written in your writings regarding the use of legislative history, and there has been some discussion of this already, but you cited different circumstances in which the history behind a statute can help to reach the proper result. And I must say I was delighted again that it is a very pragmatic standard; it is a standard that suggests that people look at avoiding an absurd result, for example, and to correct an error, to take into full account any specialized meaning that the statutory word may have, to identify reasonable purpose, or to choose among reasonable interpretations of a politically controversial statute.

That is actually also encouraging because, again, getting back to *Thunder Basin*, in that case Justices Scalia and Thomas objected to the majority reliance on legislative history as an indication of congressional intent. Justice Scalia wrote there, and I quote: "I find this discussion unnecessary to the decision. It serves to maintain the illusion"—he calls it an illusion—"that legislative history is an important factor in this Court's deciding of cases."

Just for a moment, if you would share with us whether you believe that it is an illusion, that legislative history is an illusion, or if in fact legislative history is something that is important, and should be looked at by the Court.

Judge BREYER. The answer is I do not think it is an illusion. I think it is very important to look at. I once debated Justice Scalia in the Hall of Justice on this point, and we debated about whose view was the illusion. They were opposite views, and I doubt that we convinced each other. But nonetheless I did think and do think that legislative history is very, very important.

Senator MOSELEY-BRAUN. I agree with you there, also. I would now like to ask you to focus in on the role that you think that real life history, real history, should play in a court's decision, if any, and specifically, to explore your thoughts on some of the recent Supreme Court cases in the area of voting rights.

We have had a couple of cases—*Presley* v. *Atoka County*, not to mention *Shaw* v. *Reno*—cases in which the history surrounding the enactment of the Voting Rights Act might have led—I am not prejudging whether it would have—but might have led to a different conclusion.

So I would like your view in general on to what extent should real life history, whether it is the civil rights history in this country or the history of women in this country or the history of workers in this country, that history, to what extent do you see history as a guide to decisionmaking?

Judge BREYER. At a general level, at a statement of generality, of course, I think the more realism, the better. I do think that laws are supposed to, when fitted together, work according to their purposes. I do not think a court can know whether an interpretation is correct until it understands both the purpose and how the interpretation is likely in light of that purpose to work out in the world, in the actual world. And history and real fact is important, often, to make a sensible judgment. So at a general level, I think it is important.

Senator MOSELEY-BRAUN. Specifically with regard to the Voting Rights Act cases, and there are several—and in fact, I was delighted, Judge Breyer, in a decision that you wrote in Latino Political Action Committee, where you referenced a case that I tried, or at least was one of the group, the *Rybicki* case that came out of Illinois; I was involved with that redistricting case—without going into the facts or the circumstances around *Rybicki* specifically, I would like to ask you a question in general, that under the 13th and 14th and 15th amendments, which have been referenced here, the interests of minorities in this society stand to be—the Court has an obligation to eliminate forms of racial discrimination and talk the step forward whether or not the specific words of the language of the statute suggest that result.

Judge BREYER. Such is very often likely to be the purpose of the civil rights statute, and one normally interprets language in light of its purpose. I am hesitant to go into the details of voting rights, because if there is one case that is bound to come back to the Supreme Court, and if I am on it, I would have to get involved, is *Shaw* v. *Reno*. That is my problem in that.

Senator MOSELEY-BRAUN. I think that the Voting Rights Act area, you are right, is a contentious and controversial one, but I think it is important, again, to have a sense of how you would approach these issues.

Yesterday, when we were talking, you said—and I am going to quote a little bit, or at least paraphrase—you said the need for dignity does not change, but the conditions that impact on dignity do. And I would like to explore with you for a moment questions pertaining to the whole notion of dignity and the rights of privacy and to explore for a moment the constitutional basis that you see the right of privacy as coming out of.

The different Justices that have written about privacy, frankly, have seen it as coming out of different parts of the Constitution. In the *Griswold* v. *Connecticut* case, the right to privacy was seen by Justice Goldberg, your mentor, as emanating from the ninth amendment's limitations. In *Roe* v. *Wade,* Justice Blackmun saw it as coming out of the 14th amendment's concept of liberty. Justice Brandeis has suggested that a right to privacy comes out of the fourth amendment.

From where do you see the right of privacy emerging? I believe you have said previously that you believe a right to privacy exists in the Constitution. In your constitutional analysis, how do you see that the right of privacy emerges?

Judge BREYER. Basically, I think that word "liberty" in the 14th amendment has been recognized by most—almost all—modern judges on the Supreme Court, and is pretty widely accepted, that that word "liberty" includes a number of basic, important things that are not those only listed in the first eight amendments to the Constitution.

And the ninth amendment helps make that very clear, because it says do not use that fact of the first eight to reason to the conclusion that there are no others.

So it is not surprising to me that there is widespread recognition that that word "liberty" does encompass something on the order of privacy. People have described those basic rights not mentioned in

words like "concept of ordered liberty," that which the traditions of our people realize or recognize as fundamental, and in looking to try to decide what is the content of that, I think judges have started with text, and after all, in amendments to the Constitution, there are words that suggest that in different contexts, privacy was important. They go back to the history; they look at what the Framers intended; they look at traditions over time; they look at how those traditions have worked out as history has changed, and they are careful, they are careful, because eventually, 20 or 30 years from now, other people will look back at the interpretations that this generation writes if they are judges, and they will say: Were they right to say that that ought permanently to have been the law?

If the answer to that question is yes, then the judges of today were right in finding that that was a basic value that the Framers of the Constitution intended to have enshrined. That is a kind of test of objectivity. But the source I think is the 14th amendment and that word "liberty."

Senator MOSELEY-BRAUN. The notion of liberty arises, obviously, in a number of different areas, and I think there has been some examination here on this committee, but I just would like for my own edification to really get a specific response from you. This goes to the issue of a woman's right to choose.

Justice Ginsburg a year ago said that she believed that a woman's right was part of the essential dignity of the individual; and of course, the notion of privacy has also been referred to as the right to be left alone. And I guess my specific question is whether you would believe that a woman's right to be left alone means the right to be left alone with regard to as intimate a decision as whether or not to be pregnant.

Judge BREYER. That is the determination of *Roe* v. *Wade. Roe* v. *Wade* is the law of this country, at least for more than 20 years, that there is some kind of basic right of the nature that you describe.

Recently, the Supreme Court has reaffirmed that right in *Casey* v. *Planned Parenthood.* So, in my opinion, that is settled law.

Senator MOSELEY-BRAUN. Good. OK.

I want to move along to talk about privacy because, again, this is such an important area. Judge, you joined in a decision in the case of *Daury* v. *Smith,* which purported to recognize that individuals have a right to informational privacy. It has been touched on here in this committee previously because in this information age, with all the technologies that put more and more of our personal information "on-line," the individual's interest in avoiding disclosure of personal matters is and will be a more and more important issue.

So, briefly, do you believe that there is, in fact, a constitutional right to informational privacy, privacy about one's person? And how do you see that right emerging? Do you see that as coming out of the 14th amendment or otherwise? Do you see it as a fundamental right, the right not to distribute personal information about oneself, whether it is to credit bureaus or, E-mail readers or others?

Judge BREYER. There I cannot talk about settled law because that is not settled. And I am quite certain that the scope of the

right to privacy that is within that word liberty, I am quite certain that that will be a matter that is going to be litigated.

That there is a privacy interest of the sort that you suggest I think is clear. How that interplays with other rights and how that ends up being decided in a particular court case is something I think I have to leave to the briefs and the arguments and thinking about the particular case as it might come up.

Senator MOSELEY-BRAUN. You are right, this is an emerging area.

Judge BREYER. Yes, it is.

Senator MOSELEY-BRAUN. And it is a very important one.

Judge BREYER. It is important.

Senator MOSELEY-BRAUN. But, specifically, we run into with regard—Congress has legislated in this area on kind of an ad hoc basis. There has not been any comprehensive protection to informational privacy. We are moving to create an information superhighway. We have not yet put up any stop signs.

The question is whether or not—and this is a hypothetical I would like to explore with you—whether or not you believe that the protections, the privacy protections in the Constitution, would extend to private action with regard to, again, informational privacy, with regard to one's capacity to control specific information about oneself?

Judge BREYER. Control it in respect to State efforts to uncover it and so forth?

Senator MOSELEY-BRAUN. Well, that is the other side of it.

Judge BREYER. Do you mean with respect to other private——

Senator MOSELEY-BRAUN. Well, let's start with—no, I think you started on the right tack. Let's talk first about control with regard to State action, which obviously is the Orwellian kind of specter that people are, frankly, probably more attuned to and on guard about than with regard to private action. But both, obviously, can be of vital importance, particularly in a time when the private action will in all probability outpace anything that the Government might do in this area.

Judge BREYER. I cannot give you a really good answer. The reason is that normally what would happen—and I think it is what I hear reflected in your question—is the first thing that happens is that many, many people across the country recognize problems in this area. Then having recognized the problems, they turn to you or your part of the recognition, and you say, look, there are these different interests involved. There are interests in spreading information around rapidly. There are interests in protecting something very important to people, which is their own basic information and that which makes them an individual. And these things might conflict in the face of new technology. We are not quite certain how they will conflict. So you listen to the technology people, you identify the interests, and then you pass laws.

Then normally what happens to the judiciary is we decide whether there is a constitutional protection, but only in the context of the particular law. And it is because that latter decision would arise in a particular context that I find it difficult to go further.

Senator MOSELEY-BRAUN. Mr. Chairman, I understand my time is up, but I would just like to ask a quick Matthew question, if that is all right.

The CHAIRMAN. Sure.

Senator MOSELEY-BRAUN. It would end up this line.

My son is 16 and he plays with his computer, and he came in about a month ago complaining that he was in one of these bulletin boards. I have not gotten there yet. I just use it for word processing. But he was playing in one of the rooms on one of these electronic bulletin boards, and he came back and said: "Somebody changed my message. Somebody changed my"—he was really upset and aggravated. "Somebody changed my message."

Then he proceeded to describe for me that there is a policy that you cannot use obscenity and the like. And he says, you know, they will censor, whoever they are, somebody out there in the electronic miasma somewhere. They will bleep out obscenity and things for which they have already given their subscribers notice that these things cannot go over the wires—well, they are not even wires, but over this, whatever it is, the circuits. And he said that is one thing, he said, and I understand that and that makes sense. But nobody has a right to change my message on the bulletin board and I am going to write them.

And we discussed it for a moment, and it became clear that there was no way, first, to know who had done the changing. Someone who is involved with regulating what goes on the bulletin boards in these rooms, these electronic places, makes these decisions. And talking about informational privacy and all the kinds of new issues that come up in this area, I was, frankly, appalled that this could happen. Then I raised the question, well, what protection does the individual user have against this sort of thing happening?

We do not really have a lot of answers. How would you look at that situation? Would you react as vociferously as Matthew did about someone changing his message in this electronic room on the bulletin board or whatever?

Judge BREYER. Michael and I have been communicating by E-mail back and forth from Stanford. I have been trying to learn it a little bit, and I think I would be rather upset—and I know he would be—if somebody were distorting his message. My message is distorted enough without some other person.

So I do see it is a problem, and it does seem to me that I would react by trying to ask the questions that you are trying to ask, and then trying to find out how this all works and how you protect people's interest. And as I say, my guess is it would end up in legislation of some kind.

Senator MOSELEY-BRAUN. Do you see the courts as having a role in providing that protection?

Judge BREYER. I would have to say it would depend on how it got in. It is an area of such lack of knowledge to me as to the technical part that I begin with, my goodness, why would somebody be monkeying with my message. Then I would have to see how it arose to know whether the courts would have a role or not.

It is reflecting ignorance on my part, but I see the importance of the problem.

Senator MOSELEY-BRAUN. I do not think so. I think we are all kind of flailing around in this area. Again, I just want to thank you very much for your responses, and I thank the chairman for his graciousness in allowing me to go past the red light. When you are last, I guess you can—you get so anxious to ask your questions. Thank you again, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge, one of the most interesting little treatises I ever read was Patterson's "The Forgotten Ninth Amendment." I am not going to quiz you on it. I just was curious whether you had ever read "The Forgotten Ninth Amendment," the rights retained by the people. It's a skinny little book in every law library.

Judge BREYER. It rings a bell. It rings a bell. If I did, it was quite a while ago.

The CHAIRMAN. Well, you know, I am going to sound a little bit like Paul Simon, who it is not bad sounding like, by making a suggestion that you can totally disregard. I would recommend it to you for your edification. It is not very cumbersome, and it gives a perspective that I think all Supreme Court Justices need. I think it accurately reflects the fear and trepidation that they all have—and the self-restraint they all have exercised in looking at the ninth amendment and its applicability to the notion of unenumerated rights. But I just cite it. You may find it at least interesting.

Let me pick up where I left off yesterday, and not merely because a professor at my alma mater who has been helping me out, Bill Banks, sitting behind me, spent a lot of time helping me put this together. You know, you are always intimidated by your professors from your law school. Only Bill is younger than I am, so I am not intimidated by him. But I would like to follow up on a couple things that we started on yesterday.

We were discussing—and I do not expect you to remember this, you have had so many questioners. But to refresh your recollection, we were discussing statutes where the Congress delegates to an agency, one of the alphabet agencies, the decision of how best to regulate. We very often, as you know from your days here, will say we would like to clean up the environment and we would like it to be cleaned up to a certain extent, but we are not scientists so we are going to give that responsibility to the Environmental Protection Agency, which has a battery of scientists and experts, to tell us when it has been cleaned up sufficiently to guarantee the public health and safety or whatever.

We do that all the time. We do that not just in environmental legislation but in areas like, for example, this area you were discussing with the distinguished Senator from Illinois. There are a few of us, very few, who are experts on the computer age and the information highway, and we will delegate certain responsibilities to the Federal Trade Commission. We will delegate certain responsibilities to the Federal Communications Commission, in part because if we did not, we would be hamstrung here. We would spend the entirety of our time, 365 days a year, dealing with the minutiae, scientific, and quasi-scientific information that we are not equipped to deal with, notwithstanding our competent staffs. And so I would like to talk with you about this notion of delegation and where courts come in and where they can interject their own views.

More specifically, we were talking about whether it is appropriate for a judge to second-guess the agency's regulators, the agency's regulations as promulgated, because the judge thinks that the cost of the regulation outweighs the benefits.

Now, in discussing the case overturning EPA's ban on asbestos, you said, and I quote, "It is not a very good idea for courts to get involved in making that decision." And I subscribe to that view. But in *United States* v. *Ottati and Goss,* you upheld a lower court's decision rejecting the Environmental Protection Agency's judgment as to what level of cleanliness was appropriate as it related to how much of the hazardous waste on a particular site had to be cleaned up or to what degree the site had to be cleaned of hazardous waste.

More specifically, the site in question was contaminated with PCB's, and the area was zoned for—although the homes were not built—single-family homes.

The EPA wanted a high level of cleanup to, in their view, adequately protect children who might live and play on that site in the future. And the cleanup—I know you know all this, but for the record, the cleanup EPA believed was necessary cost $9 million above what the developer felt was necessary to sufficiently clean up the site.

The lower court judge said that the additional $9 million to ratchet up the cleanliness of the site was too much. And as I read the case and read your opinion, that was based on the lower court judge's own view of the cost and benefits.

Now, you approved the lower court decision, which was appealed up to you in the first circuit, saying that from the record in the case—"one might conclude that this amounts to a very high cost for a very little extra safety."

Now, why do you think that the question of how much it cost to clean up a site was a decision for the court instead of the EPA in this case? It seems to contradict your earlier statement.

Judge BREYER. The case was rather special in that respect, very special. As the beginning of the case points out, to put it in its simplest terms, when I wrote it, as far as the standard of review is concerned, what courts should do when an agency decides something is to respect the view of the agency and to overturn the agency only if it is arbitrary or capricious.

Then I listed three ways in the statute that in a normal case the agency would make that determination. The agency has lots of procedures. They go in three different ways through those procedures. And they end up with something called an order. And the court may enforce the order, and when it does, the issue is: Was the agency right or not? And you play the agency's game. That is to say, you overturn it only if it is arbitrary, capricious, abuse of discretion.

In that particular case, the agency did something that was very unusual, I thought. I do not know. I cannot tell you by actual experience how unusual, but I have never seen another one in our court. Instead of playing what I would call the agency's game where they went through their own procedure, they never finished their own procedure. Instead, 10 years earlier, they had come into court and asked the court to weigh the evidence and to issue an injunction according to court procedure. And basically what that

decision says is well, of course, if you or anyone else comes in and plays the court's game in setting the facts, you follow the court's rules. I do not think that interferes with your ability to do something because you have loads of authority to go make the decision over in the agency.

The CHAIRMAN. Let me make sure I understand this, and I think I do. The agency has two routes to go.

Judge BREYER. Yes; four, actually.

The CHAIRMAN. At least two that you have mentioned.

Judge BREYER. Absolutely.

The CHAIRMAN. The first route was to issue an order based on its findings and tell the developer, whomever, clean up the site, spend the extra $9 million. Then if he refuses to do that, the agency can go to court and say, "Enforce our order", or the builder can go to court and say, This order is capricious, or whatever argument they wish to make, do not make me do it.

Judge BREYER. That is right.

The CHAIRMAN. The second route, in this case, is for the agency to come along and say we have assembled—and I think it was about 40——

Judge BREYER. Oh, enormous.

The CHAIRMAN [continuing]. 40,000 pages of documentation to sustain why we think the court should make the owner clean up this site and spend an extra $9 million. But the agency did not issue an order. Is that correct?

Judge BREYER. That is right.

The CHAIRMAN. They made a request to the court, "You tell them to do it, you issue the order."

Judge BREYER. That is right.

The CHAIRMAN. OK; now, I in no way mean to nor do I suggest you should have belittled the difference in the process there. So as I understand what you are saying to me, the EPA, notwithstanding they had these 40,000 pages of documents making their case why they thought the extra $9 million was necessary to be spent, did not issue an order, technically, and said, "You tell them, Judge. You look at it, you tell them we are right, you issue the order."

What would have happened had the agency issued the order? A procedural difference. They have issued the order, and either the property owner, the builder, or developer says, "I will not do it" and starts to build, and they seek the court to shut him down. Or the builder came in and said, "they are trying to make me pay an extra $9 million to be able to begin to build. I do not want to do it."

What would have come into play, if anything, that did not in terms of the way the case did proceed?

Judge BREYER. I believe, as I have written the case, that under those circumstances the court would not have reviewed the record afresh. It would have reviewed what was in back of that order under the ordinary deferential agency standard. And it would have said it is up to the agency, unless it is arbitrary, capricious, abuse of discretion——

The CHAIRMAN. So they would have looked at, theoretically, the 40,000 pages or thereabouts of the documentation that the EPA presented, and unless they found some reason other than it seemed awfully high, they would, in your view—or you would have as an

appeals court judge, had they come back and used the same language, it just seems to high, you would have been more inclined to overrule the agency. Is that correct?

Judge BREYER. That is right. The court.

The CHAIRMAN. The court, I meant to say. I meant to say the court.

Judge BREYER. That is correct.

The CHAIRMAN. All right.

Judge BREYER. That is correct.

The CHAIRMAN. Now, when the Congress wants to require that hazardous wastesites be cleaned up—and as you know better than I do, from your experience you are well aware of it, it is an area we are going to be confronted with. Every Army base we shut down, I mean, we are finding these cleanup costs are by anybody's standards staggering, even no matter what level we are talking about cleaning up. If the Congress wants to require the hazardous wastesites be cleaned up to a level that EPA thinks is safe, must it explicitly tell the court, "Do not substitute your own judgment?" Or does the arbitrary and capricious standard in your view still prevail?

Judge BREYER. That is the normal rule. The normal rule, the Administrative Procedures Act.

The CHAIRMAN. OK; the reason I asked is because, as you know, some of your colleagues, who, I might add, have an incredible amount of respect for you, your colleagues in academia, have written—and I mentioned two of them yesterday, Eskridge and Frickey. Both, I think you would agree, are well-respected, well-known legal scholars.

Judge BREYER. Yes.

The CHAIRMAN. They are of the school that there is an emerging school of thought within the Supreme Court as presently constituted that is looking for—I think their phrase is—I am not positive of this exact phrase—I think it is "super-clear rules of construction." So that they think, at least if I have accurately read two of their publications, one by Eskridge on "The New Textualism" and the other one by Eskridge and Frickey entitled "Statutory Interpretation as Practical Reasoning." They and others are making the argument that the Court is, in fact, injecting the notion of law and economics as an appropriate measure for lower courts to take into consideration, not just merely where the agency was arbitrary and capricious.

Let me give you a concrete example. As you well know—and you have expressed, I think, very well here today and yesterday—by quoting Holmes and others, "the life of the law is not merely logic." It is a reflection of societal values. Those values do not always lend themselves to, what we used to say 30 years ago, slide rule computations. Today we would say computer computations.

The law is life and life ain't precise, and we up here legislate and attempt to reflect societal values, which don't always lend themselves to easy weighing and computation.

We are about to begin, at least I think we will in the next couple of months, a major debate about health care in America. Many of us have become much more aware of the nature and the present functioning of the present health system. I was surprised to learn—

although intuitively I guess I knew it—that 25 percent, one-quarter of all the health care costs in the United States of America are spent on the last 3 months of a person's life. Your wife knows this probably better than either one of us do, or any of us in this room.

It is a societal value we have made a judgment about. Rather than take a quarter of those almost trillion dollars we spend and spend somewhere between $150 billion and $250 billion on the young and immunization, which might very well, if you were looking at it purely from a utilitarian standpoint, provide for the greater good for a greater number and the collective better health of all America, we as a society have decided we do not have the view that has been expressed in some early cultures where, when you get old enough, your requirement is to crawl off into the bushes and die, so you don't impact on the tribe, on the society. We have consciously made a decision, no, we are willing to do the economically imprudent thing, spend one-quarter of all our resources on the last 3 months of a life, the average life expectancy of men and women roughly 70 years of age.

Now, when and if we continue to make that decision—there was an interesting article in my hometown paper on Sunday, unrelated to your confirmation hearing. There was a big article about these difficult choices. Dr. Frederick Plum, who is probably the finest neurologist in all of America, probably the best known, has written about this, as well.

There was a man who was asked by a reporter, well, how do you feel about spending an incredible amount on your grandmother, who is very old, who lived only an additional short period of time. And the man answered, it was worth it all to see the look on her face when she got to see her great-grandchild.

Now, it sounds corny, but they are the kinds of judgments we are making as a society.

What does Congress have to do to make sure that when we make those kinds of decisions, if we do, that we do not raise the bar on the societal judgments made by Congress and signed by the President on Government actions by putting into effect a new rule of construction, a canon of construction, like one of our witnesses who will testify on Friday has written about, and that is the presumption that is argued by some very bright people that the Court should presume, if the Congress does not specifically mention do not weigh the cost, that this effectively requires the Congress to anticipate that the courts should presume that they, the Congress, wanted the courts to do this balancing test on the economy. How do you respond to that whole school of thought? I am not asking you to respond to any specific case. Discuss that with me a little bit.

Judge BREYER. It is foreign to me. I mean, it is foreign to me. What I have written about it is that that is the kind of decision—my goodness, it is health, it is safety. There is no economics that tells you the right result in that kind of area. There is no economics that tells you or me or all of us how much we are prepared to spend or should spend on the life of another person. There is nothing that tells us the answer to that in some kind of economics book that I am aware of.

And also, that is so much a decision that people will make through their elected representatives. It is a democratically made decision. Judges are not democratically elected. I mean, it is exactly the kind of reason, in my own view, that it is very important for courts—and I have written this, I have written this—it is so important for courts, which are not good institutions to make those kinds of technical choices because judges are cut off from information that would be relevant, among many other reasons, and they do not have the time, among many other reasons, and they do not have the contact with the people, among many other reasons, and there are just dozens of reasons which I have spelled out why they are not good institutions to make those kinds of decisions.

So that reinforces what I have tended to write, that it is important for courts to go back to try to understand the human purposes that are moving those in Congress who write these statutes when they interpret them.

The CHAIRMAN. I appreciate the answer, and I have read your Law Review article where you essentially say that, and you have cleared up for me—just as I frankly thought you would—the apparent—apparent—inconsistency in the *Ottati and Goss* case, where that was based upon the manner in which the agency brought the matter before the Court.

Now, my staff is urging me to go to the end, because my time is running out, and speak about another area, but since I am chairman and have such a wonderful cochairman here, I am sure he will let me run over a little bit, and I will ask both my questions.

Senator HATCH. Sure; go ahead, Joe.

The CHAIRMAN. It comes with being here 22 years.

All kidding aside, let me quickly try to touch these last two areas, and I do not think I will have any more questions for you.

I mentioned, again, my concern about raising the bar, and we talked a little bit about that today. Senator Brown raised issues that related to this, and balancing tests, and stages, and I interjected and asked about the distinction between the test of whether or not as a black person, I can live in a neighborhood, and whether or not I can build a 20-story building in the neighborhood. They are very different things, and you explained that you in fact did see gradations and requirements as a judge to look at them slightly differently.

But one of the ways to raise the bar, to use the expression I have been using again, is by the Court requiring Congress to speak in a super-plain, super-clear way when they interpret the statutes we write and signed by the President. And it is argued by the textualists—and these phrases change all the time, but I am in your territory here, and I need not explain any of this to you—that you look only at the literal language—not you, but some, like Justice Scalia, very articulately argue you just look at the literal language, ignoring the context and history. And Senator Moseley-Braun asked you about context and history as well.

I mentioned yesterday the *Patterson* case as an example of a case where the Court looked at a statute, a statute passed by the Congress after the Civil War, over 100 years ago, to guarantee citizens of all races equal rights. The Court held that the statute's language, which gave all citizens the same right to "make and enforce

contracts," did not protect the black employee from racial discrimination after she was hired. The irony is she could be demeaned after she was hired, but she could not be demeaned during the job interview process while she was being considered. And I think the average person would think that is not a very common sense reading.

The Court read the literal language of the statute very narrowly and supported doing so by looking outside the statute to another law passed 100 years later. It said that, well, in 1964, the Congress passed the Civil Rights Act, which really is the area where this case should be brought. So therefore, we are going to assume, by reading the literal language of this post Civil War statute, that they did not mean to cover this because 100 years later, Congress came along and explicitly covered it. But they did not look at the legislative history of the action in the 1960's, which specifically said in the legislative history we do not mean in any way to overrule or affect or change the statute passed in the 1870's.

Now, if you will, how would you have approached the *Patterson* case had you been on the Court?

Judge BREYER. I do not want to discuss the particular case, but I can say from what I have said and what I have written, it is a fair assumption that I would have looked at the legislative history, because I think when you read statutes, and you are trying to understand what is the human purpose that you and Congress have in mind, a very good way to do it is you look at the legislative history. That does not always give you the answer, but very often, it helps.

The CHAIRMAN. Well, let me skip, then, quickly to *Dellmuth* v. *Muth,* where it seems to me the Court, in the name of doing the same thing, reached an exact opposite conclusion interpreting another statute. That statute, as you well know, was passed through the work—and I do not want to get them in trouble—but through the work of Senators Kennedy, Hatch, Dole, and others. We passed a law relating to—we all voted for it—passed a law relating to the handicapped. And we said that if a handicapped person's rights are being denied, as written under this legislation, by a State—we did not say it explicitly, but at least we implied—that the individual whose rights were not being guaranteed under the legislation could sue the State in Federal court for money damages.

I think *Patterson* and *Dellmuth* were decided the same day; I think they were handed down the exact same day. I remember in *Patterson,* they said we are going to look at the literal language, and we are going to read into the language that they must have meant look 100 years hence and see if that statute that passed in any way affects the reading of this statute.

In *Dellmuth,* they looked at the statute and said, you know, there is a presumption that has existed in the law, a canon if you will, in legislative interpretation, against allowing individual citizens to sue States in Federal court. They looked at the 11th amendment and other areas to conclude that. And they said notwithstanding the fact—in my words; I am paraphrasing—notwithstanding the fact that a common sense reading of *Dellmuth* might lead you to believe that a citizen had a right to sue the State in Federal court, we are going to presume that the Congress meant

to do something other than that, because they must have known that there is an existing presumption against that, and because they did not explicitly say in the statute you are able to sue notwithstanding previous presumptions in the law, we are going to rule that that person cannot sue the State of New York in Federal court.

The end result was the same. In one case, a black woman's equity rights were diminished. In the other case, a handicapped person's rights were denied in terms of suing.

You did not write either case, and I am not asking you how you would have decided it, but how do you reconcile those two cases in terms of statutory interpretation?

Judge BREYER. What I have said that is, I think, relevant in writing, what I have said which I think is relevant to the question that you posed, are really two things—that, one, if you are not certain about what the statute means—in all of these open, big, important cases, in any court, language rarely resolves it; otherwise, why is it in court—but go look at the legislative history. The dissents in both cases did look at the legislative history. The dissents felt that the legislative history showed that the interpretation of the majority was incorrect.

So on the basis of what I have written there, I have said, well, sometimes legislative history helps, and I guess my instinct would have been to go look at it.

The other thing, which is—I understand that other people may disagree, and all of this is very debatable—but I have said beware of these canons. Why do I say beware? Well, the clear statement canons have a very respectable pedigree. In countries that do not have written constitutions, very important countries, they have served as protection of human liberty, because judges have sometimes said in those countries: We are not going to interpret a statute to infringe on a basic human liberty unless the legislature is very clear. And that has served in those countries sometimes as a substitute for a written constitution. We do not find that here as often because we have a written Constitution.

But the danger with the clear statement rule which I saw and wrote about is you can proliferate these rules, and as you proliferate them, as you get into something called "you have to state the matter clearly if Congress wants to legislate a departure from traditional equity powers," I begin to think: What is this; who will know it; how will people understand it; how will drafters know what to draft; how will ordinary lawyers and those who must take their advice know to interpret the statute? It becomes also very complicated.

The CHAIRMAN. Or, as Brennan said in dissent in *Patterson*, that Congress would need "a particularly effective crystal ball."

Judge BREYER. Well, I have argued that it is easier, simpler, more accessible; despite the fact that use of legislative history can be abused and should not be, it is still simpler to go and look to that in many cases where it is helpful.

Now, other people present very strong arguments for the other point of view, and they cannot be just dismissed, those arguments. But that is basically——

The CHAIRMAN. No; I am not just dismissing them——

Judge BREYER. No; I know you are not.

The CHAIRMAN [continuing]. But then again, they are not before us, and they are not asking to go on the Court. Others who share the opposite view than I do are already on the Court. I just wish I had been smarter then and known what was coming and understood just how strongly Mr. Justice Scalia felt about some of these things. I think he is one of the finest men I know, but it is the vote I most regret ever having cast out of over 10,000 I have cast—not because of his character, but we have such a difference of views—and I have told him that. I mean, we joke about it. I told you he found out I was teaching constitutional law at Widener Law School, and he said, "Oh, my God, I had better come to protect those students." So he shares the same view about me.

At any rate, let me close with two short questions on one last subject. That is this notion of unconstitutional conditions. I would like to return to the first case I asked you about, *Dolan* v. *Tigert*—and I hope I am pronouncing "Tigert" correctly—the takings clause case. But I would like to look at a slightly different question.

The majority in *Dolan* rejected the town's measure because it imposed what they referred to as an unconstitutional condition when it said that the business owner could only get a permit to expand her store if she agreed to give up the use of part of her land. An unconstitutional condition, as you know, occurs, to oversimplify it, when the Government forces us to give up a right voluntarily in exchange for getting something we badly need or want or are otherwise entitled to.

Now, you considered the question of unconstitutional conditions in the case of *HHS* v. *Massachusetts*. A Federal regulation forced doctors in family planning clinics to agree not to give certain medical advice as a condition to accepting Federal funds. You joined an opinion ruling that this was an unconstitutional condition on free expression, the first amendment—basically, that doctors were not allowed to give advice about alternatives to women.

The Supreme Court, when up on appeal, disagreed; one of the few cases in which you were in the majority on the first circuit that I am aware of that the Supreme Court disagreed with. In the case testing the same regulation, *Rust* v. *Sullivan*, the Supreme Court found no violation of the first amendment. And I think, quite frankly, the Court, from my perspective—it will come as a great shock to you, I know—I think the Court got both *Rust* and *Dolan* wrong. In one case, it gave a businesswoman's economic interest more protection than it gave a doctor's freedom of expression stated in the first amendment.

Now, what do you make of these results? Can you reconcile the cases? You were not in either one of them. I am not asking you how you would vote had you been there. But can you reconcile finding an unconstitutional condition as it related to a property owner's right relative to a bicycle path and not finding an unconstitutional condition where the first amendment was at least in question.

Judge BREYER. You obviously, Senator, find them difficult to reconcile——

The CHAIRMAN. I do.

Judge BREYER [continuing]. And of course, I wrote one of the opinions the other way, and if you went to a district judge on my

court that had an opinion that was reversed by a panel that I was on, and you asked, do you think that that condition is consistent with some others, he would say absolutely not. So I am sort of in a sense a party in interest, so I do not think I will go beyond——

The CHAIRMAN. Well, no; I think it is fair to ask you, not what your view—obviously, I know what your view is relative to *Rust.* You thought the first amendment was implicated, and it was an unconstitutional condition.

What I am trying to ask you is not whether you think the other should have been decided, but how are they different, how are they the same? I mean, has something changed? Is there something in the Supreme Court right now that is able to find an unconstitutional condition relative to a property right affecting essentially a zoning regulation, and not find an unconstitutional condition in the first among our amendments? Play professor with me for a moment.

Judge BREYER. I try to resist that temptation, Senator.

The CHAIRMAN. Oh, go ahead. Let yourself go. It is OK.

Judge BREYER. I am not certain you are asking me to guess what other people would say.

The CHAIRMAN. No; I am just trying to—how would you explain it to a class?

Judge BREYER. I am not sure—you would say in one case, you are talking about a Government program; in the other case, you are talking about regulation of property. In the regulation case, the Court feels it went too far. It was like those pillars of coal, and the Court felt it went too far, and they did not show enough justification, and they felt that was important because of the underlying interest that they thought was a very important interest, and you have shown more since there was some kind of possession of physical property.

In the other case, they would say, well, I guess, that the impact on this, on whatever right is involved, is not as significant or is changed because of the funding nature of the program, because it was a program the Government did not have to create in the first place.

Those are the lines of reasoning that it is trying to take.

The CHAIRMAN. Let me end—I have trespassed on everyone's time too much—let me just end with this. In an age where, rightly or wrongly, citizens depend on government to provide many needed services—wealthy citizens as well as indigent citizens—doesn't *Rust* show that the Court can significantly limit our personal rights through indirect and more subtle means?

Judge BREYER. It just seems to me that I probably, if I am confirmed, will have to deal with a lot of cases that try to go into this. And they are difficult cases, and the Court disagrees about a lot of issues that come up, and you have to try to work them out and try to figure them out in light of the briefs and the arguments——

The CHAIRMAN. Well, I will let you go on it, but I want to make it clear this is not about choice, this is not about abortion. This is about the notion which has been raised here on every matter that the Government is involved. There are those among us, left and right, in the Senate who are going to say because Government money is involved, we want to attach a condition. I predict to you

that you will be faced with a myriad of cases in your long tenure on the Court where you are going to have to come up with, if you will, various rules of construction to make a judgment about where it is appropriate and inappropriate. You are going to have liberal Senators who are extremely well respected, like Senator Simon and others, considering whether or not we condition the ability to get a license for broadcasting on whether or not they show violence on television. I doubt whether he will do that, but others will raise that question.

You will find that conservatives suggest that in order to get money for the arts, there must be a certain standard that is met. This has been raised. I put *Rust* in that context.

I think the problem we have—and I will end with this—is we become—we, on this side of the bench—are somewhat myopic. We look at the subject matter that is being debated rather than the substance of what is being debated. *Rust* does not concern me because it relates to the ability of a doctor to talk about the availability of something other than birth. It concerns me because it seems to set a precedent that suggests that a condition can be placed on a fundamental constitutional right—freedom of expression, freedom of movement—it can be anything.

So I, like all of us, am going to end up having to take a chance on what we think your instincts and methodology are. I am prepared to take that chance, and I am confident you will think a lot about this, and I am also confident—not because I said it, but because it is a'coming, Judge, in a big way in this Congress and succeeding Congresses, and it is something no one is writing very much about now, but I predict to you it will be written about; it will fill volumes before this decade is over.

Senator MOSELEY-BRAUN. Will the chairman yield just for a moment, just for a hot moment, because I know everyone is anxious to go, and Judge Breyer has been more than patient.

The CHAIRMAN. I yield the floor.

Senator MOSELEY-BRAUN. My question in that regard is would you see the possibility of unconstitutional conditions coming in areas other than first amendment—because the first amendment is such a slippery slope, and that gets us into all of these kinds of questions the chairman has just raised on arts and violence on television—but other than the first amendment, would you see the possibility of an unconstitutional condition arising in other areas?

Judge BREYER. My guess is—and it is a guess—that there could arise conditions that people would argue violate a host of different amendments—fair trial—I do not know—there are lots of different parts. I think the answer is yes, but it is a guess.

Senator MOSELEY-BRAUN. Yes.

The CHAIRMAN. I cannot think of a single amendment that would not qualify except the ninth, and that is only because the folks who are applying these unconstitutional conditions do not believe there is a ninth amendment. But that is another question.

Senator MOSELEY-BRAUN. But Mr. Chairman, again, the reason I raise the question—I think it came up—I do not know who it was—Senator Cohen may have raised it earlier today—the issue of the leases in public housing in my own State comes immediately to mind. Again, I think this is an area where, right, there has not

been a lot done in this area, but it certainly is one that will no doubt in Judge Breyer's long tenure on the court come up before the Court.

Again, I apologize for interrupting, and I thank the chairman.

The CHAIRMAN. Thank you, and I thank Senator Hatch for letting me go over. I will have no more questions for the remainder of this hearing. I will yield to Senator Hatch, and we will close with Senator Hatch's questioning.

Would you like a break?

Judge BREYER. No; I am fine.

The CHAIRMAN. Then we will finish with Senator Hatch.

Senator HATCH. Judge, after hearing Senator Biden's predictions of how tough it is going to be on the Court, maybe you want to withdraw.

Judge BREYER. No, thanks.

Senator HATCH. Actually, when you are talking about the *Rust* case, you are talking about a funded speech case instead of a free speech case. Basically, it should be pointed out that the case——

The CHAIRMAN. That is the whole point.

Senator HATCH [continuing]. You made the point; I thought you did make it rather well—that the case involved regulations governing Federal funding of title X family planning programs. And those regulations did not bar any speech; they simply prevented the use of Federal Government dollars to fund pro-abortion counseling and referrals.

Now, it was a perfect illustration of how the Court ruled one way and the Congress of the United States overruled the Court in an appropriate way, according to the majority. I happen to disagree with that, but it was the way the democratic system should work. So I would submit it is a funded speech case instead of a free speech case. Nothing would have prevented the doctor from speaking as freely as the doctor wanted to. He just could not use Federal dollars to do it under the Court's ruling.

I would feel very badly if I did not say a few words about Justice Scalia, because I think there are some misinterpretations here that conservative jurists like Justice Scalia are inconsistent in their approaches to statutory and constitutional interpretations. Some are arguing that. But let me quote from a Law Review article that is critical of Justice Scalia's method of statutory interpretation, but an article which is also critical of many of his critics as well. It says:

> Many of Justice Scalia's critics point to an apparent inconsistency in his approach to constitutional provisions as opposed to statutes. While he takes a "textualist" approach to statutes and criticizes the use of legislative history to establish legislative intent, they argue, he takes a sharply originalist turn in constitutional adjudication, basing his arguments on the intentions of the Framers. Justice Scalia does indeed consider himself an originalist in constitutional adjudication, but his brand of originalism does not rest on the intent of the Framers as revealed in the proceedings of the Philadelphia Convention. Instead, he relies upon the original understanding of constitutional terms, based on arguments similar to those he uses in interpreting statutes. These include arguments from text, context, purpose, contemporaneous usage of language, and the structure of the constitutional scheme, including separation of powers and federalism.

I think that is a more accurate description of Justice Scalia. In other words, Justice Scalia's statutory interpretation and constitu-

tional jurisprudence of original meaning are really consistent. And you have pointed that out.

Now, you would go farther, and perhaps I would also, in looking at what the Senators and Congresspeople have said from the standpoint of statutory construction and also legislative history and examine that. I see nothing wrong with that, either.

But you, having been upon Capitol Hill and realizing that this sausage that we call legislation, how it is made sometimes, you have to very carefully—and I think this is what Scalia is saying—look behind, really, what the words are to really find what was really meant, because as you know, sometimes they just throw whole statements into the record that nobody debates at all. All they have got to do is sign it and put it in the record, and they can skew any legislative history any way they want to.

So I think you would agree, would you not, that you have to be very careful when you look at legislative history, that you just do not buy all the words that are put there by Members of Congress or members of State legislatures or Federal bureaucrats or the President; right?

Judge BREYER. Yes; you use it; you do not abuse it.

Senator HATCH. That is right, and I think you have made that pretty clear, and I want to compliment you for doing that as well.

I have some differences with Senator Biden on the takings issue also, and I have to say I also differ with Chairman Biden on *Patterson* v. *McLean.* In that case, in my view, the Supreme Court resisted legislating from the Bench to reach a feel-good result. The Court respected the differing roles of the judiciary and the legislature and properly left to the Congress the role of revising the statute in question, rather than injecting the Court's own policy preferences in the matter. In *Patterson,* the primary issue was whether section 1 of the Civil Rights Act of 1966, also known as section 1981, prohibited racial harassment on the job. And frankly, we have to note that it is not an employment discrimination statute. It reads in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right, in every State and Territory, to make and enforce contracts.

Now, the Court said that the statute does not reach conduct occurring after the contract has been made. The statute does not cover the "terms, conditions, or privileges of employment," as title VII of the 1964 Civil Rights Act does. Indeed, the absence of such a broad statute was one reason that title VII became necessary in the first place. So the Court ruled maybe too narrowly, certainly in the eyes of the Congress, which later in a sense overruled that, but nevertheless ruled properly because that was the language of the statute; it was the meaning at the time. And we were able to correct that, and I participated in doing so, as a statutory result.

Isn't that a correct——

Judge BREYER. Not discussing the merits of the case; that is, I did think that probably my instinct would have been to look at the legislative history, but I have not looked at it and do not know what I would have found.

Senator HATCH. Well, that is right. And I think sometimes we get too caught up in this Scalia debate on whether or not he means anything with regard to looking at original meaning and what

those original words meant and what the context of those original words actually meant, when actually, he means a lot more than just trying to interpret the law on a very narrow basis. And I think you know that; right?

Judge BREYER. I have attended lectures that he has given; they are very interesting, and I think it is more. I agree with you. He has a theory——

Senator HATCH. I wish I could be in some of those meetings, listening to you and Scalia, because I believe that you and Scalia are going to become very good friends. I am going to encourage him. [Laughter.]

And I believe you will be very good for each other. You are two brilliant intellects, and both of you are excellent lawyers, and both of you are, in my opinion, very, very fine people. So I suspect you are going to really like each other, although you will differ from time to time. And we will just have to see what happens. I will be carefully reading and watching, however.

Now, let me just return briefly to the subject of the establishment clause—and I do not want to keep you too late; I know this is very tiring, and I know that you have had a long day, but these are really important issues, and I apologize for keeping you a little longer. But in your testimony yesterday, you stated that "when I think of the establishment clause, I think of Jefferson, and I think of a wall."

Now, I was a little bit surprised by your use of the wall metaphor, because it seems to me in tension with your fine concurrence in the case called *Members of Jamestown School Community* v. *Schmidt,* back in 1983, in your circuit. As you will recall, in that case, the first circuit largely upheld a Rhode Island statute providing bus transportation for nonpublic school children, including children attending religious schools. And in your concurrence, you found that the majority opinion was too hostile to neutral State programs that provide proportionate benefits to students who attend religious schools. In particular, as I read the case, you stated that you "believe the establishment clause calls for a more practical approach to this type of problem than the comparatively theoretical approach taken by the majority."

Now, it seems to me that the wall metaphor—which, incidentally, is not derived from the Constitution itself, or from ratification debates, but rather from a private letter written by Thomas Jefferson years later—reflects the very type of impractical theoretical approach that you criticized in your concurrence in that case. It certainly is not a metaphor that assists analysis, in my opinion. And moreover, it is most often used by those who are hostile to governmental accommodation to religion.

So I think it is an overused metaphor, between you and me, and I think you pretty well stated that in your concurring opinion in that case. And as you know, Supreme Court opinions clearly appear to uphold the constitutionality of a school voucher system that enables students to choose among various schools, including religious schools.

Now, some people think that introducing competition into our school system would—and I personally believe that—promote a much needed improvement in quality. So I was encouraged by your

Jamestown concurrence to believe that you would also support such a voucher system against establishment clause challenge.

Now, without asking your views on a voucher system, I might just mention maybe in predicate to that, vouchers, it seems to me, would eliminate many of the thorny issues that arise because many students as a practical matter are compelled to attend public schools. And a lot of these issues you have been grappling with, both as a judge and in these hearings, it seems to me might be eliminated if a voucher system were used. But without asking your views on a voucher system, I would like to know whether you adhere to the views that you gave in your *Jamestown* concurrence.

Judge BREYER. Yes.

Senator HATCH. Well, I thought you would. And do you think I have misstated it?

Judge BREYER. No; I think that the point of the practical approach is you have instances in which the question under the establishment clause is has the Government injected religion too far into a secular institution. That is not what you are talking about now.

Senator HATCH. That is right.

Judge BREYER. You are talking about the other issue, which is to what extent can the Government aid a religious institution. And there, I have said several times, and I certainly think that the answer is zero. Everybody understands that the fire department will go put out the fire in the church. Everyone understands that the church will benefit in many ways from all kinds of public services. Everyone understands that the church school will.

But the question becomes—and this is what I think is a practical question—when does it go too far and suddenly become what looks like the State support of one religion against another, or religion against nonreligion. If the State would support my synagogue, I might think: Fine. If they are going to support somebody else's church, I might think: Hmm. And each church might think: The other, no, but mine, yes. But we live in a society of so many different groups that it is important that those groups do not see the State as supporting the religion of another, or religion versus—I mean, that is the basic theory, and I think these are practical questions about when the age when the church is——

Senator HATCH. So you have an open mind with regard to these establishment questions.

Judge BREYER. I would hope so. I would hope so.

Senator HATCH. Well, I believe you do. But let me just introduce an institutional question of how a Justice should decide a constitutional question where the relevant constitutional clause is unclear. It has been suggested by one of my colleagues on the other side of the aisle that a Justice should err on the side of freedom. Putting aside the fact that virtually every case involves competing freedoms, it seems to me that just as the Constitution does not enshrine an economic theory of unbridled free enterprise, it also does not enshrine a political theory of radical libertarianism, either.

Now, you agreed with me yesterday that a judge's legitimacy derives solely from the fact that the judge is applying the law. Where the Constitution is unclear on an issue, what authority then does a Justice have to override the result reached by the political

branches whose members, it must not be forgotten, are also sworn to uphold the Constitution? Stated differently, if the meaning or application of a relevant constitutional clause in a particular case is at bottom unclear, how can that unclear clause provide a Justice the mandate needed to strike down a law as being in conflict with it?

Judge BREYER. Where a clause is unclear, there is no escaping the requirement to find its meaning. The meaning, once found, might be consistent with the legislative enactment, or it might not. Obviously, in finding its meaning, a Court is also guided by the Constitution's own division of authority into three separate branches, and its understanding that legislation is given to the legislature to enact, that is, Congress.

But one does have to find the meaning; otherwise, there is no way to know how to decide the case. To find the meaning, you begin with the text, but as you say, the text is very unclear in the example you are thinking of. You go back into history, and you look at what the Framers are likely to have intended. And often—or sometimes, anyway—that will not answer the question, because they may have intended the meaning to encapsulate certain important values, which values may stay the same, but the conditions in which they are applied may have changed. So you look to precedent, and you look to tradition, and you look to history if the case is really difficult. And you have to have some understanding of the practical facts of how people live. And all those are meant to be not unleashing the subjective opinion of the judge, but rather, as factors that inevitably in these tough cases, judges have to look to.

Senator HATCH. Would you look to just making a guess?

Judge BREYER. No, you cannot just make a guess.

Senator HATCH. Why should that become constitutional law?

Judge BREYER. You cannot; you cannot just make a guess, and there are certain chains, there are certain safeguards. I always think an intellectual safeguard is the safeguard of the judge thinking to himself: Remember, the decision you make has to be one that you believe other judges would also make if they understand the law and do not have your personality. And remember, too, that the decision that you make, if you are interpreting the Constitution of the United States, is a decision that Congress cannot change. So be careful of trying to remake the boat while it is in the middle of the ocean. Be careful.

Senator HATCH. All right.

Judge BREYER. And remember, too, that 20 or 30 years from now, you had better be thinking to yourself right now that people who study this with care—and those are not necessarily scholars; that can be any man, woman, child in the United States—people who look back at this with care will think, yes, that decision interpreted the Constitution in a way that ought permanently to be the law.

Those are intellectual checks that try to make the factors that I mentioned factors that do not unchain the personality of the judge, that hold the judge back from legislating, but permit the Constitution to adapt to changing circumstances in a way that I believe the Framers intended.

Senator HATCH. Let me move to just a couple of cases. You are familiar with *Washington* v. *Davis,* which is of course an equal protection clause case.

Judge BREYER. Yes, yes.

Senator HATCH. Let me just say this. In *Washington* v. *Davis,* the Supreme Court held that in order to trigger the strict scrutiny standard of review under the equal protection clause, a plaintiff must establish that a Government practice or policy with a disparate impact upon minorities was instituted with a discriminatory intent. That is basically what *Washington* v. *Davis* said.

Only if such intent is shown must the Government have a compelling interest in order to justify its policy. Now, in the absence of any showing of discriminatory intent under *Washington* v. *Davis,* a challenged practice is subject to the rational basis standard of review.

Do you believe that *Washington* v. *Davis* is settled law; and second, do you believe it was correctly decided?

Judge BREYER. I know that in most of these areas—I think what you are saying—the part that I am uncertain of—I know that when you look at the equal protection clause pure and simple, without a statute, I believe that that discriminatory intent test is the one that has been applied. I think most of these areas by Congress have been turned into statutory areas, and once you get into statutes like title VII and a number of other areas, you discover the tests, as you have tried to implement the equal protection clause, expand into disparate impact analysis as well.

So I suspect that most of these cases arise in the statutory context rather than—at least racial discrimination, and much gender discrimination, too, in the area of employment practices and so forth. So I am more familiar with the statutory test. When you go back to the equal protection clause, I think there were the three tier analyses we were talking about, and that middle tier is up in the air, and I tried to answer that question yesterday.

Senator HATCH. Let me take the *Croson* case and the constitutionality of set-asides. Do you agree with the Supreme Court's holding in *Croson* v. *City of Richmond* that all racial discrimination by government, including discrimination against whites as well as discrimination against racial minorities, is to be judged by the same standard of strict scrutiny under the equal protection clause?

Judge BREYER. They said strict scrutiny, and that is a very, very difficult area, because that, very straightforward, if the area called affirmative action, and that affirmative action area is an area where the Court in a variety of ways has said affirmative action is appropriate, but you had better be certain you are remedying a real past wrong. That is necessary, in light of the real wrongs that were committed. Then when you look at that program, if you are righting a real past wrong, remember that affirmative action programs also have the ability to adversely affect people who themselves did nothing wrong, so please be certain that it is tailored carefully.

Then I know the courts made distinctions between taking something away from the person who did nothing wrong, like losing a job, which they have tended to frown upon, indeed, and not giving a person something that he never had, like a promotion, and work-

ing out what constitutes a proper tailoring in light of the possibility of hurting an innocent person, but in light of the need to correct past wrongs. That has all been considered in a group of cases which is complicated and difficult, as you can see the broad outlines, and *Croson* is one of those cases in which the Court has tried to decide what standard or how do we know if this is really to correct a past wrong. And in *Croson* they decided that they didn't think it was shown really this is necessary to carry a past wrong.

That is my understanding of how it is working.

Senator HATCH. I think your emphasis of people who did no wrong is very appropriate, because we are talking about reverse discrimination against people who really did not participate in the discrimination.

Judge BREYER. Yes.

Senator HATCH. It is a very serious matter and should only be used in only the most stringent of cases, which you have also pointed out, and some believe shouldn't be used at all, because there is no reason for somebody to lose because of something in the past that may have been wrong, but they didn't participate in it. So I appreciated that distinction.

Just two last areas, and they are both important. Judge Breyer, let me return to the subject of the ninth amendment. Senator Biden has raised that a number of times. Advocates of judicial activism often cite the ninth amendment as though it were a font of unenumerated and undefined constitutional rights to be spelled out at the whim of Federal judges. In fact, the natural meaning of the ninth amendment and the historical evidence lead to a very different conclusion, in my opinion.

As the law review article that I called to your attention and that you were so kind to read discusses, the Framers understood that the Constitution protects individual rights in two very different ways. First, and most importantly, it delegates only certain powers to the Federal Government. Matters beyond the powers of the Federal Government are thereby residually protected as a matter of right.

Second, the Constitution specifically enumerates certain other rights. As the historical evidence makes clear, the ninth amendment was adopted in response to the fear that the enumeration of certain rights in the first eight amendments of the Bill of Rights would be misconstrued to suggest that the Federal Government had general and unlimited powers. In other words, many thought that the inclusion of the Bill of Rights was not only unnecessary, but positively dangerous.

Under this reasoning, the first amendment guarantee of free speech, for example, was not necessary, since, if the Constitution were properly construed, the Federal Government had no enumerated power that enabled it to restrict speech. So that was their reasoning. The unnecessary listing of rights was dangerous, because it would invite the erroneous conclusion that the Constitution otherwise vested general powers in the Federal Government.

The ninth amendment was, therefore, adopted to make clear that the people retained other rights by virtue of their nondelegation of infringing powers to the Federal Government. Now, are you open to the historical evidence that supports the view that the ninth

amendment is not itself a source of affirmative rights against the Federal Government, but is, instead, a reminder that the people retain rights residually protected by virtue of the fact that the Federal Government is limited to the enumerated powers spelled out elsewhere in the Constitution?

Judge BREYER. Yes, I am open to that, because I think that in Justice Goldberg's concurrence, what Justice Goldberg said is that the ninth amendment is not itself a source of rights. Rather, it suggests that you shouldn't make a certain kind of argument, you shouldn't make the argument, just as you said, that the very fact that there is a Bill of Rights here with amendments listed means there aren't any others.

You can't make that argument, and since you can't make the argument, I think he was addressing himself to Justice Black. Since you can't make that argument, now let's go on to see if there are others, and he found the others not really in the 9th amendment at all, but found them in the 14th and the word "liberty."

Senator HATCH. Second, do you agree that the ninth amendment does not itself apply against the States? Do you not also agree that the 9th amendment is not incorporated against the States through of the due process clause of the 14th amendment?

Judge BREYER. Well, it seems to me that the ninth amendment is like a rule of construction, so I don't know what it would mean to be incorporated. I don't know how that could take place. I have never thought of how that could be. It doesn't sound as if it is the kind of thing. It sounds like it is a rule of construction, basically, since I have not heard the argument to the contrary.

Senator HATCH. Well, let me go further. While I disagree with the methodology adopted by Justice Goldberg in *Griswold,* that methodology in no way supports the view that such things as abortion and homosexual conduct are constitutionally protected.

Judge BREYER. It said look to the 14th amendment, and the case involved the right of marital privacy.

Senator HATCH. That is right. Justice Goldberg's reasoning was carefully confined to the marital relation and the marital home.

Judge BREYER. Yes.

Senator HATCH. As I recall, he expressly stated that his opinion did not call into question State laws regarding homosexual conduct.

Judge BREYER. He didn't say that expressly, I don't think, those words, but I think that is a fair interpretation.

Senator HATCH. Moreover, as I view it, his reasoning, which looks to whether a right is so rooted in the traditions and conscience of our people, would plainly not have extended to abortion, which has been prohibited in most instances for much of our history. Now, I am not asking you for an opinion on that. I am just making that comment. I think it has been a stretch by some to try and use *Griswold* to justify that particular opinion.

Let me just ask one final question, and these are constitutional questions that I think are of considerable import. In doing this, I am asking them so that they will be out on the table, so they will have been asked, so that nobody can say that you haven't discussed them with the committee. So I apologize for keeping you.

Judge BREYER. That is all right, Senator.

Senator HATCH. Let me just ask a few questions about the principle of stare decisis, the common law or prudential doctrine of adherence to precedence. Some have argued that a vastly different rule of stare decisis should operate for precedent that creates a new constitutional right, on the one hand, versus precedent that declines to create a new constitutional right, on the other.

Specifically, some have expressed the view that precedent, no matter how incorrect, that creates a new right should rarely, if ever, be overturned, while precedent that declines to create a new right should be freely overturned. Some have argued for this.

Now, under this view, for example, many liberals will argue that cases like *Roe* v. *Wade* and *Miranda* are sacrosanct precedent, but precedents like *Bowers* v. *Hardwick,* which held that there is no constitutional right to engage in homosexual sodomy, and cases upholding the death penalty should be overturned.

Now, what is your view of the theory of stare decisis?

Judge BREYER. My view is that stare decisis is very important to the law. Obviously, you can't have a legal system that doesn't operate with a lot of weight given to stare decisis, because people build their lives, they build their lives on what they believe to be the law. And insofar as you begin to start overturning things, you upset the lives of men, women, children, people all over the country. So be careful, because people can adjust, and even when something is wrong, they can adjust to it. And once they have adjusted, be careful of fooling with their expectation. Now, that is the most general forum.

When I become a little bit more specific, it seems to me that there are identifiable factors that are pretty well established. If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law, that is, how badly reasoned was it?

You ask yourself how the law has changed since, all the adjacent laws, all the adjacent rules and regulations, does it no longer fit. You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice, has it proved impossible or very difficult to administer, has it really confused matters. Finally, you look to the degree of reliance that people have had in their ordinary lives on that previous precedent.

Those are the kinds of questions you ask. I think you ask those questions in relation to statutes. I think you ask those questions in relation to the Constitution. The real difference between the two areas is that Congress can correct a constitutional court, if it is a statutory question, but it can't make a correction, if it is a constitutional matter. So be pretty careful.

Senator HATCH. Unless they pass a constitutional amendment to do that.

Judge BREYER. Yes, that's true. It is very hard to do.

Senator HATCH. Let me just ask one last question. Does stare decisis operate differently with respect to constitutional and statutory rights?

Judge BREYER. In principle, I think the questions are the same, questions that one would ask. I think that one would recognize the difference that you just mentioned and I did about the comparative difficulties of correcting a mistake.

Senator HATCH. I am very concerned that giving substantial deference to prior erroneous rulings on a broad range of constitutional issues, in effect, just permits the Supreme Court to amend the Constitution, without complying with the amendment procedures spelled out in article V. I am concerned about that. There may well be certain rulings that are so long standing and that are so imbedded in the way that governmental institutions have developed that they are entitled to deference. But this category should be a narrow exception, or else the Supreme Court is able to usurp power through erroneous rulings. So I am concerned about that.

Judge, this has been a long day. These 2 days have been long days, but I personally believe that you have acquitted yourself quite well.

Judge BREYER. Thank you.

Senator HATCH. We have appreciated the way that you have handled these matters, and I certainly want to compliment your family for enduring this. Please feel free to get up and walk around or leave any time you want to. We know how difficult this is from time to time. But it is a very important constitutional process.

Judge BREYER. Yes, it is.

Senator HATCH. And I want to compliment my colleagues for the questions that they have asked during this process. I think you have seen a lot of sincerity, a lot of dedication, a lot of desire to try and explore some of these areas with you. But I, for one, feel very good about most everything that you have answered here.

Judge BREYER. Thank you.

Senator HATCH. I hope you can go have a nice evening and get a good night's rest. What we are going to do is we are going to resume tomorrow morning at 9:30 a.m., and we will immediately thereafter go into closed session, as Chairman Biden previously announced.

With that, we will recess the hearings until 9:30 in the morning.

[Whereupon, at 6:19 p.m., the committee was in recess, to reconvene on Thursday, July 14, 1994, at 9:30 a.m.]

NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, JULY 14, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:53 a.m., in room SH–216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, and Cohen.

The CHAIRMAN. Under the Senate rules, we are required to meet in open session to seek consent to go into closed session to accommodate the change in the committee procedure on Supreme Court nominees that we initiated last time around.

So I ask unanimous consent that, pursuant to rule XXVI, the committee proceed to vote to go into closed session to review the FBI report in the committee's investigation of Judge Stephen Breyer, a nominee to be Associate Justice of the U.S. Supreme Court.

I move that the committee proceed to closed session.

Senator HATCH. I second the motion.

The CHAIRMAN. There is no need for a rollcall vote, unless someone wishes to have one. If there is no wish to have one, all those in favor of going into closed session, signify by saying "aye".

[A chorus of ayes.]

The CHAIRMAN. All those opposed?

[No response.]

The CHAIRMAN. The ayes have it. We will proceed to the conference room behind us here. The committee will go into closed session. We will reconvene the committee at 1 p.m. in open session.

Now, we have a little bit of a scheduling problem. There is another very important issue that is percolating in the Senate; that is, the health care legislation, and Senators Kennedy, Metzenbaum, and Simon are all required to be at a meeting that is supposed to end by 1 p.m. but may run a little beyond that. So I would say to my friend from Utah, I don't know who is next on the list to ask questions——

Senator HATCH. It would be Kennedy.

The CHAIRMAN. Well, we could proceed with Senator Thurmond, if he wishes to, at 1 p.m., if that is appropriate.

Senator THURMOND. Very briefly, yes.

The CHAIRMAN. Then, by that time, if you aren't back, we will just recess for a moment or move to someone else.

Senator METZENBAUM. Mr. Chairman, are we still following the half-hour rule?

The CHAIRMAN. We are still following the half-hour rule.

Senator METZENBAUM. And if any of us wish to go beyond that, there would be a third round?

The CHAIRMAN. Yes; we will not cut off anyone as long as there is any reasonable—and I am sure it would be in your case, Senator—reason to continue the questioning. So I have no intention of cutting anyone off.

Senator SIMON. You shouldn't laugh when you say that. I am sure that we will be reasonable here.

The CHAIRMAN. That is true. I shouldn't. It would be reasonable, and I know that there is much to worry about when, in an op ed piece in the Wall Street Journal, the most glowing report about any Senator I have read in years is one about Senator Metzenbaum. The Wall Street Journal actually put his picture in the paper, an etching, and it was all favorable. So I know the world is changing. I don't know what is going to come next.

At any rate, with that, we will go into closed session.

[The committee retired to closed session, to reconvene in open session at 1 p.m. this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

While we are waiting for the nominee, and he has just been told to come in, I want to share with the press and others covering this what our schedule is.

In a moment, we will officially come out of our closed session, which is now a routine part of the process. I expect we will finish with Judge Breyer today—welcome, Judge—I do not anticipate having any public witnesses today. It will be my intention to start tomorrow, in the morning, and finish, I anticipate, based on the number of witnesses, and close the hearing sometime, hopefully at a reasonable hour, tomorrow.

Second, in the next order of questioning, Senator Kennedy was to question, but Senator Kennedy is involved in a matter on the floor, although he is on his way. What I will do to keep this moving along and accommodate everyone's schedules is in a moment yield to the distinguished Senator from South Carolina who has some additional second-round questions.

The Senator from South Carolina, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Breyer, we are back with you again.

TESTIMONY OF STEPHEN G. BREYER, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge BREYER. Yes, Senator.

Senator THURMOND. Judge, in the recent *Weiss* v. *United States* decision, the Supreme Court stated:

In determining what process is due, courts must give particular deference to the determination of Congress made under its authority to regulate the land and naval forces.

What is your view of the appropriate role of the judiciary in reviewing the terms and conditions of military service?

Judge BREYER. In the law, the military has always had a somewhat special role, because courts have recognized the importance of its running its own affairs, and they have recognized the importance that running their own affairs has to the well-being and the defense of the Nation. That is well-established in law; it is widely recognized, and I accept that widely recognized view.

Senator THURMOND. Judge Breyer, as a general matter, if two companies believe it is in the best interest of their business to combine their organizations through a merger, do you think that they should be allowed to do so unless the Government has good reason to prevent them from merging?

Judge BREYER. Senator, the good reason is typically—or not always, but quite often—a question of whether the antitrust law is violated, because the antitrust law prevents some mergers, though it permits others. So I believe any such merger should be scrutinized carefully under the antitrust laws and applicable laws, and if it passes that test, it would be permitted.

Senator THURMOND. Judge Breyer, as you may know, the Supreme Court held in 1922 that professional baseball was not in interstate commerce, and therefore was not covered by the Federal antitrust laws. When the applicability of the antitrust laws to professional baseball was again considered in 1953 and 1972, the Supreme Court held that baseball is in interstate commerce, but refused to apply the antitrust laws, stating that the decision to eliminate the antitrust immunity should be left to the Congress.

Do you believe that it was necessary or appropriate for the Supreme Court to defer to the Congress rather than take judicial action in circumstances of this type?

Judge BREYER. Senator, if I can depart directly, from a nonlegal point of view, I have always thought that baseball was special, ever since my grandfather used to take me to Seals stadium, where we would pay 50 cents for the bleachers or $2.50 for a box seat. It seems to me that the Supreme Court——

Senator THURMOND. Now you pay about $20.

Judge BREYER [continuing]. Well, they pay more, yes, that is true—from a legal point of view, from a legal point of view, I know there are those cases that have said in an antitrust context that baseball is special. I know that is now being considered by Congress, and I think that the courts will follow whatever Congress decides in that matter.

Senator THURMOND. Judge Breyer, could you please discuss your views on the proper scope of the extraterritorial application of our antitrust laws—very briefly.

Judge BREYER. Well, I am glad you said "briefly," Senator, because briefly, I know it is an enormously complex matter. There used to be a case called *Timberlane*. There were conferences that were set up with the Justice Department. They would negotiate a variety of things. I can promise that in any case that raised that issue before a court that I was on, I would examine it carefully, I

would keep an open mind, and I would look into the complexity and understand it as best I could.

Senator THURMOND. I might say we are working with the Justice Department now on some legislation.

Judge Breyer, do you believe that U.S. antitrust laws should apply equally to U.S. and foreign business, or should they seek to favor U.S. companies compared to foreign business?

Judge BREYER. The normal rule is when firms behave similarly, they are treated similarly; and where firms have an adverse impact on this country, they are treated similarly in terms of what they intend to do and what the effect is. I would start from that assumption that the law applies to both alike, but there might be special circumstances.

Senator THURMOND. Judge Breyer, I am aware that in the past, you have lectured on the use of legislative history and touched on it during the hearing. Could you please summarize your current views on the proper use of legislative history in statutory construction?

Judge BREYER. In summary form, I have thought that there are many instances, indeed most, where an open question in a statute is best understood through the use of legislative history. By using that history carefully and not abusing it, I think a court can better understand what the human purposes are that led Congress to enact a particular statute, and once one understands those purposes, technical matters often fall into place; you understand them better, too.

There are instances where courts have used legislative history to reject absurd interpretations of statutes, to find out whether there are technical meanings, to discover whether there was some kind of drafting error, to decide whether there are special meanings of a statute that the parties and Senators wanted to use, to understand better what the purposes were. All those are instances where I think it is very appropriate. I recognize sometimes it can be abused, and it should not be.

Senator THURMOND. Judge, those are all the questions I have. I think you are an able man and a fair man, and I hope you enjoy your career on the Supreme Court.

Judge BREYER. Thank you very much, Senator.

The CHAIRMAN. Senator Kennedy is next to question. He is on the telephone, I am told, right now; if staff would check to see if he is ready to go. [Pause.]

Thank you.

We are just not accustomed to someone not using his whole time.

Senator KENNEDY. Thank you very much, Mr. Chairman, and I appreciate your accommodating some of those on this committee who are also on the Labor and Human Resources Committee, who have been meeting with the leader on some of the health issues.

But I welcome the opportunity just to ask Judge Breyer a few questions on your work of areas of interest to many Americans, including the rights of persons with disabilities, and housing discrimination. These have been areas that this committee has been particularly interested in; the Americans with Disabilities Act is something that the Committee on Labor and Human Resources is very much interested in; and also the questions of crime.

We talked earlier about your role on the Sentencing Commission and the importance that that truth-in-sentencing really means to Americans and also to the integrity of the whole criminal justice system.

There is another area that I wanted to hear your views on, and that is the area of bail and bail reform. You had a chance, as I mentioned earlier, to talk about your role in the Sentencing Reform Act of 1984. At the same time we passed that law, we also passed the Bail Reform Act of 1984 in an effort to improve different aspects of the criminal justice system.

The Bail Act, of which I was the prime sponsor, permits judges to consider whether the defendant is dangerous in deciding whether he or she will be released or kept in custody before the trial and to deny bail to suspects who are likely to pose a danger in the community. It also created a presumption that defendants charged with the most serious, violent crimes, and drug crimes, are at risk of fleeing before the trial.

You have had several opportunities to interpret that law as a judge, including one, the *Jessup* case, in which you upheld the constitutionality of the law's presumption that major drug offenders pose a danger to the community.

So in your experience as a judge, has the Bail Reform Act helped judges, been useful in deciding which defendants need to be detained before the trial?

Judge BREYER. In looking over the act and applying it over the years, Senator, I recognize that the act is an effort to balance two separate things. One is the ordinary right of the person accused of a crime to have bail before he is actually convicted. The other is the problem that there are some defendants who might run away, and they really might; they will never be seen again. And there are others who might be particularly dangerous, and if they are out on bail, they will commit crimes.

So I know that Congress tried to balance those two things in the act that you sponsored. I know it created special circumstances for dangerousness and likelihood to flee, where the person could be kept in jail without bail. We have a set of presumptions. We interpreted them in the first circuit as other circuits did, and in seeing cases come up thereafter, it seems to me that they are working reasonably well—that is, it seems to me the cases where you see the person put in prison or jail before, without bail, before trial, looking through a record, they look like people who really might run away, or they look like people who really are dangerous and would engage in other crimes, drug crimes.

And I have not really seen successful appeals, or many of them, from that. So it seems to be working reasonably well on that basis.

Senator KENNEDY. We tried to provide some additional flexibility for the judges also, on the ability of those who might be accused, and where there was at least some understanding and awareness that they would be present, taking into consideration their ability to make bail. There were a number of circumstances where people did not have the wherewithal, even though there was not the presumption that they were dangerous or that they would flee, and they were being held I think in a way which was an injustice, versus those who were going to flee, particularly those involved in

drug crimes, as well as who had a repeated record of convictions for violence against individuals. It was primarily targeted to deal with the individuals who had a very strong and continuing record of violence and who, on the basis of that record, presented a real danger to the community.

In the second area of disability, in the *Wynne* v. *Tufts University* case, you dissented from an en banc opinion holding that a trial was required to resolve a medical student's Rehabilitation Act claim that Tufts University Medical School was required to alter its testing methods to accommodate the student's learning disability. The medical student had failed eight of the first-year courses; two of the eight, for a second time, and one for a third time. The district court granted summary judgment to the medical school because the student was not otherwise qualified under the Rehabilitation Act, since his inability to pass the multiple choice test indicated that he would not be qualified to analyze complex written materials as a physician.

The court majority reversed, stating that there was insufficient evidence that the medical school had considered alternative means of evaluating the medical student's performance. You dissented, because you believed that an affidavit from the dean of the medical school demonstrated that satisfactory performance on the multiple choice exam was the only way to assure that the medical students would be able to analyze complex written material that is necessary for the safe and responsible practice of modern medicine.

If the rights of persons with disabilities to have reasonable accommodations made to enable them to participate in all aspects of our society is to be meaningful, then those who are subject to the law must make a serious inquiry to determine whether procedures that hurt persons with disabilities can be replaced with less burdensome procedures.

My question is, Will you construe the laws forbidding discrimination on the basis of disability in a manner that protects the rights of persons with disabilities to obtain the reasonable accommodation of their disabilities?

Judge BREYER. The first part of my answer is that particular case was, in my mind, an extremely close question as to the amount of evidence. It went back, and summary judgment was granted again; and it came back again. I do not know on those close questions; they are very difficult.

The answer to your second question, the second half of your answer, is yes; I understand in that act, and also in more recently legislation, that Congress has passed important laws that recognize the importance of persons with disabilities being treated both fairly and properly, and of people making an effort to those people who do have disabilities. I understand that purpose, and I will interpret those laws with that in mind.

Senator KENNEDY. Well, I think we have had a good deal of talk about the Boston courthouse, but I know just from visiting with many of the disability groups up there who visited with you, that your sensitivity on the issues of access, availability in all parts of that courthouse was something that was enormously impressive, certainly to all of the people who worked with you on that.

There was one other case, *Doe* v. *Anrig,* that related to the reimbursement of tuition for private school education. As I understand, you ruled that what was then called the Education for All Handicapped Children Act, which required parents be reimbursed for the cost of educating their child in private school while their lawsuit was pending, to force the State to provide him with an appropriate education. Writing for the court in 1984, you upheld their right to obtain the reimbursement, so that the act's broad purpose of assuring that all children with disabilities receive an appropriate education be preserved. I think that was certainly an important decision.

In many respects, housing discrimination is one of the most insidious forms of bigotry, since racial separation fosters the ignorance that perpetuates racism. I know you are familiar with the 1968 Housing Act which we passed, which was not effective, did not have adequate remedies. We came back after the election of 1980, and in that session, we tried to pass a Fair Housing Act, and we failed to get cloture on it by I believe it was three votes; and then, in 1987, we passed a Fair Housing Act which prohibited discrimination not only on the basis of race, but also disability, as well as with children. There was increasing evidence of discrimination against families in those areas.

But now, on the issue of discrimination on the basis of race, in *NAACP* v. *HUD,* you authored a 1987 opinion for the first circuit, ruling that HUD has a statutory duty to enforce the Fair Housing Act and to ensure that localities participating in Federal housing programs eliminate discrimination. You ruled that persons aggrieved by HUD's failure to do so could sue the Department under the Administrative Procedures Act to force the Department to enforce the law.

My question is would you describe for us how you reached the conclusion that persons aggrieved by HUD's failure to enforce the Fair Housing Act could go to court to obtain relief. This was prior to the time that we took Federal action, so it was an enormously significant and important decision, which I think in an important way really made an important difference in terms of the need for congressional action in this area, which subsequently followed.

Judge BREYER. It is a decision, Senator, that really gave me enormous satisfaction as a person and as a judge. And the reason I felt it important both was is that you only have to look around in this country, and you see terrible social problems of poverty and discrimination, and no housing and no reading, and violence, and so forth. Everyone knows the long list of terrible problems.

Then Congress does address those matters in statutes, and in this case, the statute had a very important purpose which I would describe as social justice.

Then a case arose in the court of appeals, and the district court had thought that a series of very complicated technical doctrines prevented the district court from carrying out that purpose in this instance. So it was a case where I felt knowledge of the technical part of the law helped the court and helped me analyze those technical doctrines fairly, with an idea of what they had in mind, and enabled us, I think, to cut through the technical doctrines, to show to the district court that they were not the obstacle that the district

court had thought and that the technical doctrines permitted the district court to get to the heart of the matter, which was discrimination in housing, and to create appropriate relief.

So I felt that it was an instance where knowing the technical doctrine, using it, understanding it, allowed the possibility of removing it as an obstacle to the social justice that the basic statute passed by Congress aimed at.

Senator KENNEDY. Well, it was a recognition, it seems, in any fair reading of that case, that it really was not the kind of remedy, and you came up with what was a very creative, legitimate remedy for action, which resulted in eliminating the kinds of discriminatory procedures that were being followed at the time. And Congress in the year afterward followed that precedent, and that was enormously important.

That really completes my questions. I would just like to add, Mr. Chairman, that I think that this has been, over the period of the past 2 days, an enormously important hearing on the qualifications of the nominee. I think all of us on this committee, as has been stated before, have benefited from the personal association with the nominee for the most part—there have been new members added, obviously—and many of us I think on this committee, and hopefully the American people, have been finding out what those of us who have observed Judge Breyer as the chief judge of the first circuit—the keen intellect, the broad understanding of constitutional issues, the kind of thoughtful judicial temperament which I think is so important in reaching these decisions and a real awareness and understanding of the importance of applying constitutional principles to real life situations that affect our fellow citizens' everyday lives. I think that will be a distinguishing mark, among others, of this nominee's service on the Supreme Court.

Judge Breyer, I look forward to voting for you, both in this committee and on the floor of the Senate, at an early time.

Judge BREYER. Thank you very much.

The CHAIRMAN. Thank you, Senator.

One thing on which there is no disagreement—and I do not disagree with a single thing the Senator said—as I kidded you in the closed session, thoughtful you are. I indicated, and I will say this publicly, that I thought you were the judicial version of Paul Sarbanes.

Judge BREYER. That is very complimentary.

The CHAIRMAN. The only thing that Paul does, though, is he spends time going like this, rubbing his face, and you just sort of give a studied pause. In both cases, you communicate what is in fact true; both of you are very thoughtful.

I turn to my thoughtful colleague from Maine, the poet laureate of the Senate, Senator Cohen.

Senator COHEN. Judge Breyer, would you explain to us the difference between affirmative action and quotas?

Judge BREYER. No, because I am trying to decide in the—generally speaking, I think affirmative action means you make an enormous effort, you make a really serious effort. A quota is an absolute number that you have to meet. Affirmative action means you take this seriously and you really look. That is the general accepted version I think in a lay person's terms.

Senator COHEN. In other words, if there is no numerical figure that is either set in law or policy, then it really is not a quota, but an affirmative action program?

Judge BREYER. Then you are on the edge. I mean as I understand it—and I am not saying how you would measure a person's real effort—internally, internally, when a person makes an affirmative action effort, it means what it says. It means you really look, you really understand the situation. You understand that a lot of people haven't had the opportunities that other people have had. You think to yourself, why aren't there the persons of this race or whatever, why.

Remember why. Remember the history. And then taking all that into account, remembering the history, remembering the discrimination that may exist, remembering that some people have a lot less opportunity than others, then you go out and look and say I'm going to find these people who may not have thought of coming, and you really try very, very hard, and that is subjective. It might fail, but if it does fail, you better be able to tell yourself that you really looked very, very hard.

A lot of that is subjective, but that is the subjective difference that I think of in my own mind.

Senator COHEN. If you have a situation such as the congressionally established policy of affirmative action programs in the absence of a change in that policy, is there any merit to a contention on the part of an individual that he or she is equally qualified to be admitted to a medical school, a law school, a position, and is denied that opportunity based upon his or her race? Is there a constitutionally protected argument here that that is a denial of equal protection of the law?

Judge BREYER. What has happened I think, Senator, in the affirmative action cases legally in the Supreme Court is that the Supreme Court basically has recognized two things. The first thing that it has recognized is that there are injustices that need remedying, and those injustices stem from that long history, and the long history before the 14th amendment and the long history after the 14th amendment, where the injustice was perpetuated.

So they begin with the first point, which is we have to see a need rooted in that history of past discrimination. And the second point is, once the first point is there, once we see that need, then the program has to be carefully tailored. Why carefully tailored? Because it is quite clear that an affirmative action program seeking to remedy past injustice can in fact adversely affect other people who themselves did not discriminate. Of course, those people are upset and, therefore, you can absolutely understand that.

Now, looking into the way in which those two problems are to be balanced, it seems to me that the Supreme Court has looked at a number of individual factors and they have distinguished, for example, in terms of that other third person, between taking away from that person what he or she already have, like a job, or not giving to that person something he or she did not ever have, like a promotion. And while there is a problem in both cases, the second is a little bit less harmful than the first. And they have looked at how long the program will last, and they have looked at how tai-

lored it is to the problem, and they have looked at is it going to expire, is it coming along well.

It seems to me there are a number of factors they have looked at, as they have tried both to remedy and to balance, in order not to work too much harm to others.

Senator COHEN. The question I have is, if Congress were to change the policy itself, so that there is no longer an affirmative action policy, and yet either companies or institutions were to pursue such a policy on their own or its own, is there a constitutional argument to be made on the part of an individual who maintains that he or she has been discriminated against based upon either sex, gender, race, or some other factor?

Judge BREYER. If you go beyond——

Senator COHEN. In the absence of a congressional policy is what I am asking.

Judge BREYER. If you go beyond those cases you know where the Supreme Court has spelled out what is permissible in terms of these two sets of factors, and you were to pass a law doing something like a quota, is that what you are thinking of?

Senator COHEN. I am saying that you simply do not have an affirmative action program mandated by Congress.

Judge BREYER. You don't have one.

Senator COHEN. Assuming it is taken off the books.

Judge BREYER. Assuming it is taken off the books, then there are still cases like *Weber,* for example, where the Supreme Court will permit employers to adopt these programs to remedy past discrimination. There are cases like *Bakke,* where the Supreme Court has said, you know, that universities can do it. So there are circumstances, and indeed courts can as part of a remedy.

Senator COHEN. Is there ever a statute of limitations in terms of past injustices, or is that something the court makes a determination on as to whether the past injustices have been either rectified, if that can be the case, or that this no longer should be a policy to be pursued privately or by public institutions? Who determines when the past injustice has been remedied?

Judge BREYER. Well, if it is a court case, I suppose that there are now standards, which I am not totally familiar with, frankly, which the Supreme Court has tried to promulgate in a number of cases, saying, well, it is time and the problem is over in the school area, for example. I haven't looked at those, but if it arises in the court case, in the court circumstance, I suppose the court, when faced with a challenge, would look to see if this is still really necessary or not. Suppose it has been complied with. Suppose it has been met. I suppose that is a judgment that a court would make, but it has to be careful.

Senator COHEN. Is that policymaking?

Judge BREYER. It isn't, if it is following the legal standard. But one has to be careful.

Senator COHEN. I know you have talked quite a bit about legislative history. I just want to go back over it for a few moments. In your article on the uses of legislative history in interpreting statutes, you say that critics maintain that it is constitutionally improper to look beyond the statute's language or that searching for congressional intent is a semimystical exercise like hunting the

snark. Of course, Justice Scalia has been perhaps the biggest critic of legislative intent, and you have debated him on this subject and you are familiar with what his written statements are on the matter.

But he has called legislative history an omnipresent make-weight for decisions arrived at on other grounds, and referred to its use as "the Conan Doyle approach to statutory construction." In his view, the Court's task is not to enter the minds of the Members of Congress who need have nothing in mind in order for their votes to be lawful and effective. I might point out he often thinks that we have nothing in mind, without the qualifier about being lawful and effective, but, rather, to give fair and reasonable meaning to the text of the United States Code.

You point out that the problem is not with the use of legislative history, but its abuse—care must be taken. The question I have is that the Supreme Court recently, I believe, has ruled in cases where legislative history has been discounted. I must say that I have questions in my own mind as to what extent any court should take into account what we say and how we say it.

For example, the managers of a bill bring a measure to the floor. We debate it openly and toward the conclusion of that debate, after everyone has long since departed, the managers will insert colloquies which are not read to the other members, but are simply inserted in the record so that many members have virtually no idea what the colloquy is until long after the measure has been passed.

I took this into account, because on a certain piece of legislation I stood on the floor with some colleagues and I read the colloquies into the record, so at least to put everyone on notice that this is the interpretation that we were giving to this legislation.

But in the absence of an open declaration or reading of it, I would dare say that most members have little idea of the colloquies that are inserted in the record as a matter of course. So I think there is some merit to the question of challenging what Congress intended, when something is not as clear as it ought to be on the face of it, in the statutory language.

I would like to ask you your opinion. Would it make a difference—perhaps on a constitutional basis—but would it make a difference from your interpretive analysis as to whether or not this had been widely discussed in an open forum, or simply inserted in the record where members are not aware of it? Does it make a difference, or is it sufficient if I simply put a colloquy in the record?

Judge BREYER. The answer in my mind is, of course, it is different, but that is a difference that courts should take into account, and it doesn't make it useless.

Suppose, for example, you, after the Senators are all thinking about a bankruptcy law, it is easiest with a law that isn't too controversial, and you all get together and all the Senators who are working on this bill work out a set of words that is going to distinguish which kind of cases can be brought by consent before the bankruptcy judge and which cases there is a right to bring before the bankruptcy judge even without consent. That is awfully technical, and the words that describe that are pretty technical, too, and they can refer to another case in the Supreme Court which is filled with technicality.

Well, might or you might read that statute and read those technical words that everybody really agrees to as a matter of policy, because you have thought about it as a matter of policy. Yet, one might still scratch his head and be puzzled. And if you have decided to help by putting a statement in the record, even though it came after the debate was over, that is something a court might look to and lawyers might look to for enlightenment, because it might be apparent that there is no policy disagreement among you or your colleagues about what you are trying to do. But it is important to explain what you are trying to do.

That is why I say it depends. If there is a huge disagreement, beware of that later admitted statement. If it is simply a kind of explanation, it can help guide.

Senator COHEN. The only point I would make is that many times members are unaware of these declarations of intent, and for the court to rely upon those declarations of intent which are not shared by a majority of the members and, in fact, are unknown until after the bill is passed, I think would be a misreading of the legislative intent.

In that connection, you wrote an article in 1992 in Southern California Law Review on legislative history and interpreting statutes, and you point out if the history is vague or seriously conflicting, don't use it. That was your advice. I mention this, because about 9 years earlier you decided a case, *Wald* v. *Regan,* if you are familiar with that.

Judge BREYER. Yes.

Senator COHEN. You struck down a Treasury Department regulation—I will not go into the details of it—but, in any event, you relied upon legislative history in striking down that particular regulation, because it didn't comply with the International Emergency Economics Powers Act. The Supreme Court reversed you in a 5-to-4 decision. They looked to the legislative history and came to a completely different conclusion.

Judge BREYER. They did.

Senator COHEN. What is interesting about it is that the dissent pointed out that the majority was confused about the legislative history. So, I was wondering if the legislative history has been thrown out by both the majority and yourself under those circumstances?

Judge BREYER. I don't think so, actually. I understand that legislative history can point in different directions and I understand it can be complicated and confused, but I think it is worth trying. I think it is like you do your best, you do your best. You look at it, you try to draw information from it, you try to help understand the human purpose. People can still disagree about it and it isn't always done properly, but I think it is worth trying.

Senator COHEN. I would like to turn quickly to the subject of hate crimes. We have had in 1992 more than 7,000 hate crimes reported in this country, most of which were motivated by racial bias. In 1992, the Supreme Court struck down a Minneapolis law which imposed punishment for the display of inflammatory symbols. I think it was *RAV* v. *City of St. Paul.* Are you familiar with that case?

Judge BREYER. Yes.

Senator COHEN. The defendant had burned a cross inside the fenced yard of a black family, and the Court held that because the State had not criminalized all fighting words, the law isolated certain words based on their content or viewpoint and, therefore, violated the first amendment. I am not exactly clear how the Court came to that conclusion by burning a cross inside of a black family's fenced-in yard amounts to protected expression.

Nonetheless, in 1993, the Court then had another case, *Wisconsin* v. *Mitchell,* in which it upheld the constitutionality of a Wisconsin statute that enhanced the maximum penalty for crimes that were committed by those who intentionally selected the victim because of that victim's race, religion, color, disability, sexual orientation, national origin, or ancestry.

I was wondering, from your perspective, because of your work on the Sentencing Commission, do you see any difficulties in the lack of any universally accepted definition of a hate crime or problems in trying to determine an offender's motivation?

Judge BREYER. What I have said on this publicly really are two things. One is in response to your question directly. Of course, it is difficult in instances, but there are instances where it isn't difficult. And like many matters of law in tough areas, you can say, all right, I understand that there are difficult borderline calls, but that doesn't mean stay away from the main thing which isn't so difficult. So there will be some that are difficult and some that are not. The not is not. In other words, there are many cases where it isn't too hard to figure out.

The other thing which you point out is, of course, from a first amendment point of view, it is easier, if you are enhancing the penalty of conduct, it is already illegal, than if you do get right into an area where there isn't such conduct and only expression. That thought doesn't decide cases, but, nonetheless, the actual decisions I am sure will come up again and again. I know that *RAV* is a very controversial case.

Senator COHEN. Yesterday, you talked about the Boston courthouse. Let me come back to it for a moment. I see that Senator Kennedy is not here, but I am sure that he is aware of the controversy and has touched upon it himself. You have mentioned that, in looking through your architecture books and perhaps through your own empirical research, you came across one town, I can't recall what it was now, that had the century or two-century old structure which really became the town meeting place. I assume from that that you were implying that you wanted this new courthouse to also have that kind of attraction to the community.

Judge BREYER. Yes.

Senator COHEN. It struck me that Boston doesn't really need that kind of an attraction to be a meeting place. If you look at the tremendous development that has taken place in the city of Boston, there are many, many places that one can go in that city, a beautiful city, to attend a variety of functions. For me, somehow, the courthouse has always remained very much a singular symbol in our society.

I would say, for example, if you were talking about designing a courthouse for the Supreme Court, you would not look to see whether or not you could make it compatible or attractive to a vari-

ety of either enterprises or other types of activities that could take place there. It is the place for the dispensing of justice.

So I was curious about the impact of the past upon your thinking for the future as far as that courthouse was concerned. And I raise it in conjunction with matters that were brought up before the Governmental Affairs Committee, in which I and other members also serve. What we found is that there seems to be a disparity, or at least the GAO has found that the Federal judiciary has overestimated its space needs over a 10-year period by more than 3 million square-feet, which means that the Government may be building 1.1 billion of unneeded court space. That is what the GAO has determined.

They have also determined that there seems to be a great disparity between the construction costs of Federal courthouses versus those of State courthouses, almost double the amount. So it raised questions in our minds in terms of whether we were building edifices that were either unneeded, that the goal could have been achieved in a much less expensive way, still comporting with the needs of having a structure that would stand the test of time and stand for future generations, as well, and that these costs were very excessive, compared to State courts.

I suppose you can make a case that Federal courts are more important and need to be more lasting than State courts, but I suggest that State justices and judges might take great issue with that. By the way, I might point out that the GSA, the Administrative Office of the U.S. Courts, and the Congress all share responsibility in this. You have to come before us, we have to give the authorizations and appropriate the dollars, so it is not just picking out the judiciary and trying to point fingers and blame.

But it does raise questions as to why Federal courthouses cost much more than State or local facilities. Are you aware of any activities surrounding the selection site for the Boston courthouse that could be considered in any way either improper, extravagant, or unnecessary?

Judge BREYER. No, I think we followed all the rules.

Senator COHEN. As you know, a lot has been made of the fact that you have got 63 private bathrooms, 37 separate law libraries, 33 private kitchens, spiral staircases, and so forth. In your judgment, those were necessary or would you consider them to be extravagant?

Judge BREYER. The bathrooms, it is a general rule that a judge does have a bathroom in his chambers, and there are a lot of people working there and——

Senator COHEN. How many judges in that building?

Judge BREYER. I think there is room for somewhere close to 30, and there is the U.S. attorney, and there are a number of others. Whatever the normal rules were, we followed them.

In respect to the law libraries, I feel that it is very important that each judge has a library, and that library should be close. A law book is to a judge what a scalpel is to a surgeon, and you don't want the judge very far from the book, because maybe the judge won't look into the book, and nobody wants that. So it is normal that books are near judges, and I think that is proper.

The kitchens consist of a small area where a judge, at his own expense, not government expense, can go and buy a small refrigerator and bring in a little microwave, which he would purchase, in order to have lunch, say, with his clerks or the other people in the chambers.

Senator COHEN. What was the total cost you recall of this facility, $220 million?

Judge BREYER. I think Senator DeConcini gave the cost yesterday. I think it is 750,000 square-feet. It is a big building, and I think the cost, with land purchase and everything, was around $218 million or somewhere around there.

Senator COHEN. I might point out that we are familiar with the cost of expensive buildings. You are in one right now. As a matter of fact, when it was first built, it was I believe the most expensive building in the city of Washington at that time, the Hart Building.

As a matter of fact, most Senators were reluctant to move into this building, and by congressional fiat, the Senate leadership ordered the younger members to vacate the premises that they were then occupying and move in here, because the senior members were unwilling to take the public reaction to the costs of this Taj Mahal.

The CHAIRMAN. I want the record to show that my office is not in this building. [Laughter.]

Senator COHEN. You were then a senior member at the time.

Just a couple of more questions, Judge. I want to go back to the book that you wrote that Senator Biden had on his desk yesterday, called "Breaking the Vicious Cycle." In the books, you talked about the vicious cycle of public demand and said that the excessive regulatory response is the product of several factors that work in tandem. At the root is an ill-informed public, with skewed perceptions of the risk, fed by unsystematic media reports, a distrust of experts, and low levels of mathematical understanding. I believe I have summarized your basic analysis of this vicious cycle that you have talked about.

You point out that Congress is susceptible to public concerns; it contributes to the distortions of priorities. The public fears are picked up and translated into policy by a Congress that does not have the institutional resources to resist draconian legislation establishing rigid objectives with little room for adjusting priorities within limited budgets or balancing costs against benefits.

Then you go from Congress to the regulators, who compound the problem, as bureaucrats respond with overly conservative assumptions in order to forestall charges of inattention or neglect, and the regulators also aim their rules narrowly to deal with one problem while worsening another. For example, proposed rules concerning disposal of sewage sludge designed to save one statistical life every 5 years would encourage waste incineration likely to cause two statistical cancer deaths annually.

What you recommend, as I recall, in this particular book is to create a small, centralized administrative unit within the executive branch, with a mandate to rationalize risk policies across agencies. Critics have pointed to that and suggested that it is unrealistic in the United States of America to establish a sort of platonic administrative group of wise men, circle of wise men, who would in fact

be an elite, top-down policy coordination group, that would be unthinkable in a society that prizes open debate, diversity of opinion, and easy access to Government.

In other words, they suggest, this is a proposal that might work well in Singapore, but not a Seattle, or indeed, a Washington, DC.

How do you respond to that?

Judge BREYER. Thank you, Senator. The response is three. The first is you put in half, I think, when you say too far; and the other half is too little. The problem that the book is aimed at is spending a lot of money over here to save a statistical life that may not even exist, at the same time that there are women with breast cancer who would live, but who do not because they cannot afford or find the place for the mammograms; and there are children who do not have the vaccines that will save them from death for a lot of diseases. And I think there are two pages in that book that summarize, one sentence after another, all those things that might be done but that are not done.

So the book is a plea—though it is put in technical terms—it is put in a plea not to cut back by 1 penny this Nation's commitment to health, safety, and the environment. But please, let us think about the possibility of reorganizing that commitment so that there are fewer women and children who are dying of things they really will die of because the money was not there, when there are moneys being spent on the statistical life that might not exist. That is the first point.

The second point is there is a plan there for reorganization. The point about the reorganization is not really to create a new bureaucracy that will take power from the people. Rather, the people have delegated already to the bureaucracy power to do particular things. And there, it seems to me wise, or at least I suggest it, that the people who are already there—in, let us say, parts of the Office of Management and Budget—not be trained solely as cost-cutters, not be trained solely as people who do policy analysis, but perhaps take on a career where they learn what really goes on at EPA for part of their career; where they come over to Congress and work for a while and learn something about that; where they go out into the field and maybe learn what people are really thinking, and then come back and have, with that experience, more ability to transfer resources from one program to another that a pure cost-cutter might lack.

And the third problem, which is a real problem for democracy and is a tremendous problem for you and a tremendous problem for me, is I think I have a guess of what people want in that area, and may guess is that what they want is more life saved. And my guess is that is what you want, too.

So a lot of what I have written about in that book is should statutes try to do that, or should they go into such detail as dioxin-FO20 to the 14th degree in three molecules, et cetera. That is the problem of delegation. That is the question of what level of specificity do you delegate.

I absolutely think that people want more safety, and that is the basic power that should be delegated. I think it becomes very, very, very difficult to expect people to become experts on risk analysis, or how many molecules there ought to be in what kind of sub-

stance. And that is the kind of concern that I am worried about that leads me to think there are ways of organizing the bureaucracy better to save more human life, with the same commitment of resource that we now have.

Senator COHEN. But you say the root of it is an ill-informed public with skewed perceptions of risk——

Judge BREYER. Yes.

Senator COHEN [continuing]. Fed by systematic media reports and a distrust of the experts.

Judge BREYER. Right.

Senator COHEN. How do you propose to break that—and compounded by Congress, which is also contributing to the distortions of priorities—how do you break that cycle by having the small group of experts in the field, or in OMB or some of the other agencies, who will then do what—better inform the public? Better inform Congress?

Judge BREYER. And this, you might say is utopian, I know. But you realize what it is I think the public is informed about. I do not think they are not informed about what they want. I do not think they are not informed about there being a problem. I think they do know what they want, and I think the public does know that there is a problem. And I think they are right.

What is very hard to get public consensus about is the right number of molecules, or the right chemical substance exactly where. That is the problem of information. And what is perhaps a little utopian, I would call the biggest problem that I find from a policy point of view—the problem of building trust in the Government. And my suggestion there has been a little bit like this: Suppose the President of the United States—this is what I have said before—had somewhat broader authority to take money or resources from one program and to move it to another, and that he was under a mandate to meet the following condition—come back and prove to us that in doing so, you have saved more human life. And suppose that began to be done. Then, you might gradually—you might gradually—build public trust in that kind of circulating career path where people come to Congress and EPA and OMB and create this institution, and people in the country begin to understand that more life is being saved, a little at a time. You might gradually build some confidence in that institution, hard though it is to break into a mode of public trust. And if you could do that, you would end up saving more life, and that is the thrust of the book.

Senator COHEN. I think that sort of outcomes analysis is probably unrealistic in view of the life cycle of any President of this country; that by the time one were able to demonstrate that, then he or she would certainly long be out of office. So I am not sure that is going to be a practical solution.

I see my time is up, and I appreciate your answers, Judge.

The CHAIRMAN. Judge, I hope that was spoken as a political scientist——

Judge BREYER. Absolutely.

The CHAIRMAN [continuing]. And not as a judge——

Judge BREYER. Absolutely.

The CHAIRMAN [continuing]. Because we make those judgments every day. The American people have no doubt that more people die from coal dust than from nuclear reactors, but they fear the prospect of a nuclear reactor more than they do the empirical data that would suggest that more people die from coal dust, from having coal-fired burners.

They also know that more lives would be saved if we took that 25 percent we spend in the intensive care units in the last few months of the elderly's lives, that more children would be saved. But part of our culture is that we have concluded as a culture that we are going to, rightly or wrongly, we are going to spend the money, costing more lives, on the elderly. We made that judgment.

I think it is incredibly presumptuous and elitist for political scientists to conclude that the American people's cultural values in fact are not ones that lend themselves to a cost-benefit analysis and to presume that they would change their cultural values if in fact they were aware of the cost-benefit analysis.

I have no doubt that more people know that more people die of cigarettes than they do of other substances, but they have concluded they would rather have the money spent on research in other areas. We make those decisions every day, and I am delighted that as a judge, you are not going to be able to take your policy prescriptions into the Court.

I yield to Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Breyer, I would like to ask you a few questions about your decision in the *Ottati* case. As I understand the *Ottati* case, you upheld a ruling that allowed a company responsible for polluting 43 acres in Kingston, NH, to clean up that site about one-tenth as much as EPA determined was necessary to protect Kingston's residents from 439 cases of cancer over their lifetimes.

I do not want to question you about the merits of your decision in that case. What concerns me, however, Judge, is that you decided a case that reduces polluters' and their insurance companies' liability for cleaning up hazardous waste at a time when your investment at Lloyd's of London included environmental liability insurance policies.

In retrospect, Judge, do you feel that possibly you should have recused yourself from hearing that case?

Judge BREYER. Senator, I looked at this very carefully. There was no party that I had invested in in the case. It had been fully disclosed. The issue to me, and I think the issue under the canons, is whether there would flow from that investment a substantial effect on my investment from that decision in that case. That is not a speculative effect, it is not a remote effect, it is not a contingent effect. It is a real, substantial effect. And having looked at that case before and looked at it again, it seems to me that it was correct under the canons that I could sit in that case. I do think that, though I understand in fact the various problems you have raised.

Senator METZENBAUM. Well, I know that there are some who think that it was proper under the canons; there are some who disagree. Justice Scalia—whom I did not think I would ever be quoting in connection with the law—but he says that 455(a) covers all forms of partiality and requires them all to be evaluated on an

objective basis so that what matters is not the reality of partiality, but its appearance.

He goes on to say: "Quite simply and quite universally, recusal was required whenever impartiality might reasonably be questioned." He is not addressing himself to this matter as such, but that is a quote from him.

Now, in your response to Judge Heflin, you acknowledged that, as Professor Hazard said, it was possibly imprudent for you as a Federal judge to invest in Lloyd's. Isn't the corollary of that reasoning that it was possibly imprudent for you to decide the *Ottati* case since your Lloyd's syndicates included environmental pollution liability?

Judge BREYER. What he said was imprudent, Senator, he believes that it is ethical, that no ethical canon was violated, and he is concerned—and I have since read this—whether or not it is prudent for a judge to have an investment in an insurance company. And having listened to your concerns, which I realize were in very good faith and were very, very important to address thoroughly, I have come to the conclusion that it would be best not to have such an investment, and that is a matter of prudence; it is not a matter of ethics. But having listened to that, that is how I feel about it.

Senator METZENBAUM. Having said that it would probably be prudent not to have such an investment, isn't the corollary of that equally true, and that is that were similar matters to come before you in the future, matters that might have some impact upon your Lloyd's investment, would it not be prudent in those cases to recuse yourself from hearing those cases?

Judge BREYER. I think that I must have a very, very careful system to achieve the very objective you are announcing and enunciating and I have listened to. What I think that system is is that it must be absolutely disclosed fully, in whatever court I am in, just what that investment is, and indeed, the parties have to be directed, their attention directed to it, and the parties have to be able to—anonymously, so I do not know which party—either orally or in writing, point out how there might be a real impact on that investment from a holding in the case. And then I think that must be communicated to me in a way that I do not know which party raised the issue, and I must evaluate that with great care and then, having done so, if I come to the conclusion that there would be a direct, a real impact on my investment, then I recuse myself.

Senator METZENBAUM. I think you said a direct, real impact. What we are talking about in the *Ottati* case is not a question of whether or not your investment in Lloyd's was being affected by your judgment in the *Ottati* case, but whether or not your judgment in the *Ottati* case might set precedents, might set certain standards in the law——

Judge BREYER. That is right.

Senator METZENBAUM [continuing]. That could affect your investment.

Judge BREYER. Yes.

Senator METZENBAUM. There is no question Lloyd's was not on the *Ottati* liability. Now, as a matter of fact, environmental law experts tell me that as a practical matter, the *Ottati* case does make it more difficult for EPA to pressure polluters into speedy hazard-

ous waste removal under stringent cleanup standards; second, it reduces EPA's ability to clean up more hazardous waste sites because EPA must use its own limited resources to clean up these sites, rather than making the polluters clean them up immediately; and it allows the district courts to weaken EPA's cleanup requirements to one-tenth—one-tenth—of EPA's standard when the agency seeks a preliminary injunction.

Is that not the practical effect of your decision in *Ottati*?

Judge BREYER. The question, from my point of view, is was there a real, direct impact on the investment. And I think the question of whether there is a real, direct impact on the investment by those who have looked at it—the answer is no. And I think that what I would like to do in the future is to look to see, after having been advised by the parties or anyone who wants to, is there a real impact on the investment from the holding in the case.

Senator METZENBAUM. Well, it should be pointed out that *Ottati* did have a direct and predictable effect on pollution insurance, particularly like Merritt 418, which was your investment, because all polluters and their insurers stand to benefit from that ruling, by less hazardous waste cleanup and weaker cleanup standards. So I think that the *Ottati* case is relevant to your investment, but indirectly, not directly, and to what extent, neither you nor I know.

Would you agree with that?

Judge BREYER. If I thought there were a substantial, that is, a direct, effect, I would have taken myself out, and that would be the correct thing to do. If, judgmentally, I think that the effect is remote or speculative or contingent, then I think the thing to do is to sit. And in making my judgment on that case, I concluded that any effect on my investment was remote or speculative or contingent, not substantial, not direct.

I think that was a correct judgment. What I am trying to do is, in the future, make certain that I am fully informed so I can make similar judgments with complete information, with the parties fully understanding the problems, the likelihoods.

The CHAIRMAN. Would the Senator yield on *Ottati*? I am confused. Since I asked about the case, Judge, I thought the facts in *Ottati* were that the EPA chose a procedural route that allowed the district court judge to make a judgment that the judge otherwise would not have been able to make had the EPA proceeded and attempted to enforce its own judgment. Is that correct?

Judge BREYER. That is correct.

The CHAIRMAN. What I am confused about is how does that affect any insurance case, on anybody. I am confused about that.

Judge BREYER. I could not find a way. I think it does not. I think it does not. And I suppose there are people who have thought of some way, but I think any way people might think of would be speculative. I personally cannot think of a real way.

The CHAIRMAN. If you had ruled—if the EPA had gone directly to the district court judge under a different procedure, and the district court judge substituted his or her judgment as to what was sufficient under the statute for EPA, then I can understand how it could be argued that you have changed the rules of the game and put district court judges, who could be more or less stringent than EPA, in the driver's seat. But that was not the case, was it?

I thank the Senator for allowing me to yield, because I am confused about this.

Senator METZENBAUM. Well, I would just say that I do not think I want to debate the substance of the *Ottati* case with my friend, the chairman, and I will ask him to give me additional time by reason of the interruption.

But the fact is under the conclusion you reached, it was necessary for the EPA to go back to get a final order, which could take an additional 2, 3, 4, 5 years, which would be very costly to EPA, and in the interim, fewer waste sites would be cleaned up, and there would be less cleanup as a result of *Ottati.* As a matter of fact, in the *Ottati* case, you say additional cleanup will cost an added several million dollars, and then you say:

International Mineral and Chemical has already spent about $2.6 million, all for very little purpose, since 1 part per million is not significantly safer than 5 or 10.

That is your language.

Just prior to that statement, you note:

Evidence suggests that a one part per million standard would reduce the risk of 439 human cancers from lifetime exposure to about one in a million.

You then stated that

Allowing 10 times more contamination would lead to 10 times as many cases of cancer.

How could you conclude that by allowing 10 times more pollution, that causes 10 times more cancers, you are making the environment significantly safer? I have trouble following that, and I have to say that with respect to the chairman's inquiry on the question of when the decision is made, following your order, there was to be something like a 2-, 3-, 5-year delay, at substantially additional cost to the EPA, and I do not think any of the EPA lawyers or the EPA questions the fact that your decision was a major setback to their efforts.

Judge BREYER. I did not see it that way, Senator. I thought that the case involved fact-related matters growing out of a particular waste dump, and I think those fact-related matters were viewed under the standard of whether the district court was clearly erroneous.

It is very difficult for an appellant to get an appeals court with a 40,000-page record on a fact-related matter to achieve a reversal under a clearly erroneous standard. EPA did, indeed, achieve such a reversal on one of the matters before us. We decided in favor of the EPA on one of those fact-related points, and we decided on the other fact-related points that the district court's decision was not clearly erroneous.

That is basically, in my mind, what was at issue in that case in the area you are talking about.

Senator METZENBAUM. That case, I think, had been dragged out for about 10 years up until the time it got to you.

Judge BREYER. Yes.

Senator METZENBAUM. I think you added maybe another 5 years to the matter of getting the matter resolved. And I think that does help the defendants in those cases, the polluters, and it certainly does not help the EPA. But let me proceed.

I do not know if you realize that the polluters' own experts admitted that their cleanup fell far short of their own proposed lenient standards. As a matter of fact, the records before you show that up to 280 times more contamination was involved than EPA considered safe or 28 times more contamination than even the polluter acknowledged would be dangerous.

My question is: In view of that additional exposure and risk, why did you disregard the data on the need for more thorough hazardous waste cleanup?

Judge BREYER. On the issue of volatile organic compounds, one of the fact-related issues, after reading through many thousands of pages, we all came to the conclusion that the district court was wrong, and we supported EPA and sent it back for more thorough cleanup on that point. On the other fact-related points, we decided there was enough evidence to support the district court.

Quite honestly, when I finished, I thought maybe EPA has won on this aspect of the case, because it is very difficult to achieve a reversal on that fact-related type of issue. It won some, the important one of VOC. It lost others. I thought the whole matter is fact-related, fact-specific. I went through it conscientiously, reading thousands of pages of records. And on the basis of those thousands of pages, I came and my colleagues came to the fact-related conclusions that we wrote in the opinion.

Senator METZENBAUM. Well, in a recent book, you express actually pretty much disdain for EPA's approach to cleaning up the environment. In *Ottati,* when you say,

> The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million. How much extra safety did the $9.3 million buy?

That is your language.

> Without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt, but there were no dirt-eating children playing in the area, for it was a swamp.

Judge Breyer, I think in that situation you were not actually correct. The record before the district court indicates that the land in dispute in *Ottati* was not a swamp, but the land in dispute was zoned residential. And the record shows the land is partially surrounded by a residential neighborhood where children play, and, therefore, the children did have an exposure. It was not just a swamp.

But let me go on to——

Senator KENNEDY. Are you going to let him answer? Do you want to answer?

Judge BREYER. From my appearance of reading the records, Senator, the area was the way I described it, and there was—but the point that I want to make is what I have written in the book and the decision in the case are two totally separate things. I have gone in my mind, thinking that case is decided as a judge. It is decided, recognizing as I wrote that when the EPA decides something in an administrative context rather than coming into a case in court, all presumptions are for the EPA. It did appear in a book written on a policy basis, having nothing to do with my role as a judge, pointing out a variety of things that I have tried to point out, for other

people—environmentalists and many others—to read and to accept or to reject as they wish.

My object, purely as a person who is interested in public policy, was to write matters down so that other people could consider them, question them, criticize them, say they are absolutely wrong. That is fine with me. I like that. I think that is important to get that kind of criticism as a policymaker, and, indeed, to get it as a judge as well.

But I want to be very, very clear that that book does not have to do with my role as a judge.

Senator METZENBAUM. I hope the Chair will continue to allow me additional time for questions that are not mine.

Judge, the *Ottati* case becomes very relevant because you were a major investor in Lloyd's. I have recently come to know an investment in Lloyd's is unusual. A Lloyd's investor puts up only a very small deposit, and the investor's real investment is his or her personal guarantee.

If the syndicate loses money, the investor's personal assets pay the losses. It makes investing in Lloyd's very, very risky. A Lloyd's investor can be wiped out, lose everything right down to his home, his car, his total assets. A Lloyd's investment is totally different than a purchase of stock, whether in a mutual fund or an insurance company or any other kind of business investment.

So your decisions having to do with *Ottati* and seven other environmental cases is particularly relevant to our hearing, because you have had and continue to have a very substantial exposure to Lloyd's.

Now, do you have any disagreement with the description that I gave of Lloyd's investors?

Judge BREYER. I do, rather. That is to say, I do not know if you are speaking theoretically or practically.

When I went into Lloyd's, I viewed it as a very conservative investment in which, in fact, you are exposed to insurance companies that sell and insure and buy anything in the world. And all these things over time, whether there are earthquakes in Japan or whether there are tidal waves or whether there is maritime losses or these kind of loses—there can be losses in everything, anything. You never know what your own syndicate may be winning, may be losing, whatever it is. It is done in a conservative way so that whether a particular case there is a loss or does not balances out somewhere else, and you do not know.

Now, as a practical matter and as a theoretical matter, as a practical matter I believed and I still believe that my risks and benefits would consist of several thousand dollars in income each year, and sometimes several thousand dollars—by that I mean under $10,000 or $12,000 certainly, possibly having to write a check. There was a deposit at Lloyd's that possibly was meant for the worst case that went up to about $150,000.

Theoretically—theoretically—if worse had come to worse, and it was stressed to me at the time that over 300 years in conservative syndicates, worse did not come to worse. But if worse came to worse, luckily because I am in a very fortunate economic situation, about 20 percent to 25 percent of our family assets would have been lost. That is the worse, theoretically, coming to worse.

Senator METZENBAUM. And that would have been about how much money?

Judge BREYER. It would have been an awful lot of money. It depended on the year. It depended on the year.

Senator METZENBAUM. We are talking about something in excess of——

Judge BREYER. We are talking about several hundred thousand dollars.

Senator METZENBAUM. Or maybe $1 million.

Judge BREYER. I do not think it could have gone that high, but it is possible.

Senator METZENBAUM. But neither you nor I nor any of us know what the loss will be in connection with this one particular syndicate you went into, which was 418, which had exposures in asbestos where you have already recused yourself in those cases, and also had pollution exposures. And it seems to be arguable as to exactly how much the risk could be, but everyone seems to agree that Merritt 418 was probably one of the worst of the Lloyd's of London exposures or syndicates.

Judge BREYER. Senator, what I do if I have a lot of money at stake or if I have a little money at stake, if there is a big investment or if there is a small investment, it is the same question. The question is: Look at those cases, see if there is anyone from the investment that is a party in that case. If so, you are out of it. If not, look again. Look again at that case to see if the decision in that case could substantially affect your pocketbook. If so, you are out of it. If not, fine.

I apply that test with alarm bells to whatever investment I have, big or small. And in that case, no alarm bell went off, and the reason that no alarm bell went off is I thought judgmentally that there was no substantial effect on a small investment, on a big investment, on a medium-sized investment, on any investment. And I think that that conclusion has been verified by others.

Senator METZENBAUM. In retrospect. You are saying it has been verified by others. You mean that the White House asked some ethics professors for their opinion, and one said it was imprudent, others said that it was entirely proper, and some other professors apparently have said it was totally inappropriate.

Judge BREYER. What I must do as a judge is I must make up my own mind on a case-by-case basis whether there is a substantial impact or whether there is not.

Senator KENNEDY [presiding]. Would the Senator yield on that point? I think we ought to put into the record, at this point in the record, exactly what those letters contained. And I dare say they are not as described by the Senator from Ohio. I think in fairness to this nominee we ought to put into the record what those legal scholars and ethicists that have been called on by this committee under Republicans and Democrats alike and who are some of the most distinguished, thoughtful, and profound individuals that write on this subject matter. We will just put that in the record. I think that is what is important, rather than characterizations about some——

Senator HATCH. And all but one found in your favor and said there was nothing unethical.

Senator METZENBAUM. Well, as a matter of fact——

Senator HATCH. Let's get with it.

Senator METZENBAUM. I did not think that I was in a debate with my colleagues on this committee.

Senator KENNEDY. We want an accurate statement of what has been characterized in the record.

Senator METZENBAUM. Well, the fact is I have no problem about putting it in the record. Also put into the record the indication by Professor Hazard that the matter of hearing the case was imprudent. Also put in the fact, I believe, that there is a letter coming from a Professor Freedman, who teaches ethics at Hofstra, in which he comes to the conclusion, as I am informed, that it was inappropriate and was unethical. But I want to make it clear here.

Senator KENNEDY. Well, he did not say it was imprudent.

Senator HATCH. No, he did not say that.

Senator KENNEDY. That is what we are getting at. He did not say it was imprudent. He said because a potential for possible conflict of interest, a possible appearance of impropriety, in light of the facts, no conflict of interest or appearance of conflict materialized. And I do not think it is fair to go on and mischaracterize it.

Senator METZENBAUM. What does he say about the word imprudent?

Senator KENNEDY. I have put it in the record, Senator.

You have asked for my opinion whether Judge Breyer has committed a violation of judicial ethics in investing in Lloyd's name and insurance underwriting while being a Federal judge. In my opinion, there was no violation of judicial ethics. In my view, it was possibly imprudent for a person who is a judge to have such an investment because of the potential for possible conflict of interest and because of possible appearance. However, in light of the facts, no conflict of interest or appearance of conflict materialized.

Senator METZENBAUM. I have no objection putting that in.

Senator KENNEDY. Well, that is different from what was stated.

Senator HATCH. It certainly was.

Senator METZENBAUM. I want to ask the Chair also, there is a letter coming from Professor Freedman, who indicates, as I understand it, that he considers it was unethical. But I want to make it clear: I am not challenging the ethical propriety of your conduct because I believe you conducted yourself in a manner that you considered to be ethical and still do.

I am concerned about what happens tomorrow when cases come before you, and I think we are entitled to your view on that, Judge Breyer.

[The letters referred to follow:]



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Stephen Gillers
Professor of Law

Via Fax and
Express Mail

July 8, 1994

Lloyd Cutler, Esq.
Counsel to the President
White House Counsel's Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Cutler:

You have asked me to answer the following question: Did Judge Stephen Breyer violate section 455 of title 28 of the United States Code ("§455") by sitting on eight cases involving CERCLA when he was a "name" in a Lloyd's of London syndicate that insured against environmental pollution among other risks?

I have been asked to assume (a) that Judge Breyer did not know and could not have known the identities of the syndicate's insureds or the terms of their policies; (b) that Judge Breyer did know or could have known that environmental pollution was one of the risks against which the syndicate insured; and (c) that Judge Breyer was exposed to a possible loss of 25,000 pounds, had insurance against additional loss of up $180,000, and that reasonable estimates are that his actual loss will not exceed the insurance coverage though they could.

In answering your question, I am going to disregard the assumption in (c) and assume instead that at the time Judge Breyer sat on the eight CERCLA cases he had at least 25,000 of financial exposure and possibly more.

I have reviewed the eight CERCLA cases. In my opinion, Judge Breyer did not violate §455.

A judge may not sit in a case in which the judge or certain family members have a "financial interest, however small" in a "party" or in the "subject matter in controversy." §455(b)(4), (d)(4). Judge Breyer had no financial interest in the parties to the CERCLA case nor in their subject matter. An example of the latter would be a judge's stock ownership in a company that, though not a party to a proceeding, was the subject of control between the actual parties.

Where the judge has an interest other than a "financial interest" in a party or in the subject matter in controversy, different rules apply. The judge is not then disqualified "however small" his or her interest. The size of the judge's "other interest" then matters: It must be "substantia[l]." §455(b)(4).

This difference recognizes two truths: the public is less likely to suspect a judge's impartiality when the judge's interest is other than in a party or the subject matter in controversy; and if any "other interest," even insubstantial ones, could disqualify judges, the scope of disqualification would be too broad with no public gain. "[W]hen an interest is not direct, but is remote, contingent, or speculative, it is not

the kind of interest which reasonably brings into question a judge's impartiality." In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)(construing §455(a), discussed below).

Section 455(b)4) and (b)(5)(iii) recognize the different policies when a judge's interest is not in a "party" or in the "subject matter in controversy." These provisions require recusal only when the judge (or certain family members) have "any other interest that could be substantially affected by the outcome of the proceeding." §455(b)(4).

This different standard has two distinguishing elements. First, the effect on the judge's interest must be substantial. Second, the word "could" has been repeatedly construed to require that the effect of "the outcome of the proceeding" on the judge's interest must be not be "indirect" or "speculative." In re Placid Oil Co., 802 F.2d 783, 786-77 (5th Cir. 1986). Construing §455(b)(4) in Placid Oil, the Court wrote: "A remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute...nor does it create a situation in which a judge's impartiality might reasonably be questioned." Id. at 787.

The Court's last reference, to "impartiality," brings us to §455(a), which requires recusal when a judge's "impartiality might reasonably be questioned." While §455(a) and §455(b) overlap, they are not congruent. Liteky v. United States, 114 S.Ct. 1147 (1994). Nevertheless, here, I reach the same conclusion under both provisions.

Placid Oil is an instructive case. It was brought against 23 banks, seeking recision of credit agreements and other relief "based on a number of alleged wrongful acts of the Banks." Id. at 786. Plaintiffs sought recusal of the district judge, who was alleged to have "a large investment in a Texas bank that may be affected by rulings in this case." Plaintiffs argued that "any rulings adverse to the Banks will have a dramatic impact on the entire banking industry and thus on [the judge's] investment as well," thereby giving the judge a "financial interest in the litigation." Id. The Circuit rejected the recusal effort:

> We find no basis here for requiring recusal. We are unwilling to adopt a rule requiring recusal in every case in which a judge owns stock of a company in the same industry as one of the parties to the case.... Id.

This position was followed in Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co., 996 F.2d 282 (11th Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

I see no evidence that the decisions in Judge Breyer's CERCLA cases "could" have a direct and substantial effect on his interest in a syndicate that has insured against the risk of liability for environmental pollution. Without parsing every case here, I found their holdings to be relatively narrow, some quite limited. For most of the cases, it would be impossible to say how the holding could affect Judge Breyer's own interests or those of the syndicate in which he invested. For all of the cases, the Judge's interest is "not direct, but is remote, contingent, or speculative." In re Drexel Burnham Lambert, supra at 1313.

Given the twin requirements of substantiality and the caselaw definition of "could" as used in §455(b), Judge Breyer did not have to recuse himself in the eight CERCLA cases. He did not violate §455.

Sincerely yours,

Stephen Gillers

Geoffrey C. Hazard, Jr.
Law School
University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104

July 11, 1994

Hon. Lloyd N. Cutler
Special Counsel to the President
White House
1000 Pennsylvania Avenue
Washington, D.C. 20500

Re: Judge Stephen Breyer

Dear Mr. Cutler:

Your have asked for my opinion whether Judge Stephen Breyer committed a violation of judicial ethics in investing as a "Lloyd's Name" in insurance underwriting while being a federal judge. In my opinion there was no violation of judicial ethics. In my view it was possibly imprudent for a person who is a judge to have such an investment, because of the potential for possible conflict of interest and because of possible appearance of impropriety. However, in light of the facts no conflict of interest or appearance of conflict materialized. I understand that Judge Breyer has divested from the investment so far as now can be done and will completely terminate it when possible.

1. I am Trustee Professor of Law, University of Pennsylvania, and Sterling Professor of Law Emeritus, Yale University. I am also Director of the American Law Institute. I have been admitted to practice law since 1954 and am a member of the bar of Connecticut and California. I am engaged in an active consulting practice, primarily in the fields of legal and judicial ethics, and have given opinions both favorable and unfavorable to lawyers and judges. I was Consultant and draftsman for the American Bar Association Model Code of Judicial Conduct promulgated in 1972, on which the rules of ethics governing federal judges are based. I have also been Reporter and draftsman of the American Bar Association Model Rules of Professional Conduct, promulgated in 1983, and before that consultant to the project for the ABA Model Conduct of Professional Responsibility. I am author of several books and many articles on legal and judicial ethics and write a monthly column on the subject.

2. I am advised that Judge Breyer made an investment as a "Lloyd's Name" some time in 1978. He has since terminated that investment except for one underwriting, Merrett 418, that remains open. He intends to terminate that commitment as soon as legally permitted. I have further

assumed the accuracy of the description of a Lloyd's Name investment set forth in the memorandum of July 3, 1994, by Godfrey Hodgson. My previous understanding of the operation of Lloyd's insurance, although less specific than set forth in the memorandum, corresponds to that description.

3. I have assumed the following additional facts:

(a) As a "Name" Judge Breyer did not have, and could not have had, knowledge of the particular coverages underwritten by the Merrett 418 syndicate. It would have been possible for a Name to discover through inquiry that environmental pollution as a category was one of the risks underwritten by the syndicate.

(b) Judge Breyer had "stop-loss" insurance against his exposure as a Name, up to $188,000 beyond an initial loss of 25,000 pounds. This is in substance reinsurance from a third source against the risk of actual liability.

(c) A reasonable estimate of the potential loss for Judge Breyer is approximately $114,000, well within the insurance coverage described above. However, there is a theoretical possibility that his losses could exceed that estimate.

(d) The Merrett 418 syndicate normally would have closed at the end of 1987. It remains open because of outstanding liabilities to the syndicate that were not later adopted by other syndicates. These outstanding liabilities include environmental pollution and asbestos liability.

4. I am advised that Judge Breyer as judge participated in a number of cases that one way or another involved the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the Superfund statute. None of these cases involved Lloyd's as a party or by name in any respect. None appear to have involved issues that would have material or predicable impact on general legal obligations under the Superfund legislation. Most of the cases are fact-specific and all involve secondary or procedural issues. I have assumed that the description of these cases in the attached list is fair and accurate.

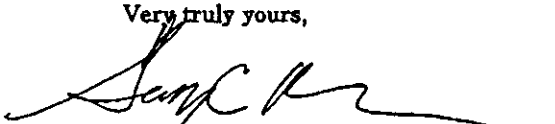
5. In my opinion, Judge Breyer's participation in the foregoing cases did not entail a violation of judicial ethics. None of the cases involved Lloyd's as a party or as having an interest disclosed in the litigation. None could have had a material effect on Judge Breyer's financial interests. None had a connection direct enough with Judge Breyer as to create a basis on which his impartiality might reasonably be questioned, as that term is used in Section 455 and in the Code of Judicial Ethics.

6. There is a close analogy between the kind of investment as a Name and an investment in a mutual fund. A mutual fund is an investment that holds the securities of operating business enterprises. Ownership in a mutual fund is specifically excluded as a basis for imputed bias under Section 455 and the Code of Judicial Ethics. This exclusion was provided deliberately, in order to permit judges to have investments that could avoid the inflation risk inherent in owning Government bonds and other fixed

income securities but without entailing direct ownership in business enterprises. A Names investment is similarly an undertaking in a venture that in turn invests in the risks attending business enterprise. Just as ownership in a mutual fund is not ownership in the securities held by the fund, so, in my opinion, is investment as a Name not an assumption of direct involvement in the risks covered by the particular Lloyd's syndicate.

7. In my opinion it could be regarded as imprudent for a judge to invest as a Lloyd's Name, notwithstanding that no violation of judicial ethics is involved. The business of insurance is complex, sometimes controversial, and widely the subject of public concern and suspicion. The insurance industry is highly regulated and insurance company liability often entails issues of public importance. In my opinion it was therefore appropriate for Judge Breyer to have withdrawn from that kind of investment so far as he could legally do so, simply to avoid any question about the matter. That said, I see nothing in his conduct that involves ethical impropriety.

Very truly yours,



Geoffrey C. Hazard, Jr.

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JUDGE BREYER'S "CERCLA" (SUPERFUND STATUTE) CASES

Judge Breyer has participated in eight cases involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Superfund statute. None involved Lloyds as a party or by name in any other respect. Moreover, none involved the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations, much less on Lloyd's itself.

The cases address a variety of matters. Most are highly fact-specific. Included among them are decisions that enforce an EPA penalty against a chemical company; apply the judicial doctrine of res judicata (which bars relitigation of the same matter); and confirm the federal government's sovereign immunity from state requests for civil penalties on CERCLA claims.

A summary of the cases is attached.

1. Waterville Industries, Inc. v. Finance Authority of Maine, 984 F.2d 540 (1st Cir. 1993). The issue in this case was the "security interest exception" in CERCLA, which exempts from the statute's definition of "owner" a "person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." In an opinion by Judge Boudin, joined by Judge Breyer, the court interpreted the provision and unanimously agreed with the Finance Authority of Maine that it met the requirements of the provision.

Particularly because there is no reason to think that a lender, a borrower, or a property owner is more or less likely to have insurance, the case does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations.

2. State of Maine v. Dept. of Navy, 973 F.2d 1007 (1st Cir. 1992). In this case, the state of Maine sued the United States Navy because one of the Navy's shipyards had not complied with Maine's federally-approved hazardous waste laws. The only CERCLA-related issue was whether the CERCLA statute waives the federal government's traditional sovereign immunity against suits by states for civil penalties. Judge Breyer's opinion held that the CERCLA statute does not waive the federal government's sovereign immunity.

3. Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (en banc). The issue in this case was whether landowners are entitled to notice and an opportunity to be heard before the EPA is allowed to place a lien on their property. In an opinion by Judge Torruella, joined by Judge Breyer, the First Circuit applied a recent Supreme Court precedent, which had found a Connecticut attachment lien statute violated due process. The First Circuit held that CERCLA's lien provision had a similar flaw.

The case thus gives people the right to notice and an opportunity to be heard before a lien is put on their property. It concerns the timing of procedures, and in no way eliminates, lessens, or affects the liability of landowners who are responsible for clean-up costs.

4. All Regions Chemical Labs v. EPA, 932 F.2d 73 (1st Cir. 1991). In this case, Judge Breyer's opinion upheld the EPA's imposition of a $20,000 penalty against a chemical company that failed to

notify the EPA immediately about the release of hazardous substances from its property.

In this highly fact-specific case, the decision upholds the EPA's penalty, over the private company's objection.

5. Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991). Judge Brown's opinion, joined by Judge Breyer, applies the judicial doctrine of res judicata, which prohibits relitigation of the same matter. It does not address CERCLA or Superfund issues.

6. United States v. Kayser-Roth, 910 F.2d 24 (1st Cir. 1990). In an opinion by Judge Bownes, joined by Judge Breyer, the court agreed with EPA that a parent company could be found to be an "operator" liable for clean-up costs even if the site was nominally run by a subsidiary. The court also agreed with the EPA that the trial court properly found that the parent company was an "operator" in this case.

The decision does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. (In many CERCLA cases, there are numerous private parties with conflicting allocation claims, and imposing liability on parent corporations might have different effects on different insurers at different times).

7. United States v. Ottati & Goss, 900 F.2d 429 (1st Cir. 1990). In this decision by Judge Breyer, the court agreed with the district court that, when EPA requests a preliminary injunction under a particular CERCLA provision, the district court has discretion and is not, contrary to EPA's submission, obliged to defer to EPA's request for an injunction unless it is "arbitrary or capricious." The First Circuit emphasized that "to read the statute in this way does not significantly handicap EPA" because the agency may receive full administrative deference at a subsequent stage of the proceedings. The Court of Appeals also reviewed the district court's factual findings, agreed with EPA that the district court should further consider one matter, and found that the district court's other findings were supported by the record. The court also ruled on various miscellaneous issues, including one in which it agreed with EPA that the district court should further consider whether EPA should be entitled to recover certain costs.

None of the holdings in the case presents the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. The standard for district court consideration of requests for preliminary injunctive relief concerns only district court discretion at a preliminary stage of the proceedings. The factual issues, moreover, are highly case-specific and dependent on the record in the particular case.

8. Dedham Water Co. v. Continental Farms Dairy, 889 F.2d 1146 (1st Cir. 1989). In this opinion by Judge Bownes, the First Circuit agreed with other courts that a plaintiff need show only that a defendant's release of hazardous wastes caused it to incur response costs, not that the wastes actually contaminated the plaintiff's property. Particularly because either side in such a dispute might have insurance, the case does not present the kind of issue that would have a material or predictable impact on the insurance industry's Superfund obligations. (A subsequent opinion in the case specified that a new trial was required. Judge Breyer dissented, arguing that the district court should have discretion to further consider the matter. The issue was unrelated to CERCLA or Superfund. In re Dedham Water Co., 901 F.2d 3 (1st Cir. 1990)).

July 13, 1994

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
DC 20510

Dear Senator Biden,

As one who has worked in the field of lawyers' and judges' ethics for almost three decades, I write to oppose the confirmation of Chief Judge Stephen Breyer as a member of the Supreme Court. My opposition is based upon Judge Breyer's violation of the Federal Disqualification Statute, 28 U.S.C. §455.

We have heard much in recent years about a "litmus test" for judges. The reference has been to the nominees' positions on substantive issues, and the test has fluctuated with the politics of the moment. If there is one test that should be constant, however, it is that the record of a nominee for judicial office should not be tainted by a serious violation of judicial ethics. Judge Breyer fails that test.

The Disqualification Statute (§455)

The Federal Disqualification Statute (§455) was enacted by Congress to ensure respect for the integrity of the federal judiciary. Discussing the statute in the Liljeberg case, the Supreme Court said that "We must continuously bear in mind that to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"·

The problem, the Supreme Court explained, is that

· Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. 2194, 2205 (1988), quoting In re Murchison, 75 S.Ct. 623, 625 (1955).

"people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."[2] Section 455(a) was therefore adopted to "promote confidence in the judiciary" and to eliminate those "suspicions and doubts."

Accordingly, §455(a) expressly requires that every federal judge "shall" disqualify himself from any case in which his impartiality "might" reasonably be "questioned."[3] This statutory language is intentionally broad, requiring the judge to avoid the "appearance of impropriety whenever possible."[4]

Writing for the Supreme Court just this year, Justice Scalia said that §455(a) covers all forms of partiality, and "require[s] them all to be evaluated on an objective basis, so that what matters is not the reality of [partiality] but its appearance."[5] And Justice Scalia added: "Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.'"[6]

This objective standard -- which is to be applied "universally" and "whenever possible," -- means that the judge cannot remain in a case on the ground that he, personally, is a person of integrity who would not be affected by a personal financial concern. Rather, the question is whether the "average judge" would be offered a "possible temptation" not to "hold the balance nice,

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[2] Id.

[3] 28 U.S.C. 455(a).

[4] Liljeberg at 2205, citing legislative history.

[5] Liteky v. U.S., 114 S.Ct. 1147, 1153-1154 (1994) (emphasis in the original).

[6] Id. The Supreme Court was unanimous on these points.

clear and true."[7]

That last quotation goes back to cases decided even before §455 was enacted -- cases like Tumey, Murchison, and Lavoie.[8] Those cases hold that constitutional due process requires the judge to disqualify himself unless his interest is "so remote, trifling, and insignificant" as to be "incapable of affecting" an individual's judgment.[9]

Judge Breyer's Violation of the Statute

I have quoted at some length from controlling Supreme Court cases like Liteky, Liljeberg, Tumey, Murchison, and Lavoie, because, so far, they have been virtually ignored in these hearings. Neither Professor Stephen Gillers nor Professor Geoffrey Hazard has discussed these cases in their letters to the Committee in which they conclude that Judge Breyer did not violate the Statute.[10]

Judge Breyer was a member, or Name, in the Lloyd's Merrett syndicate 418 in 1985, insuring asbestos and pollution losses.[11] His exposure to liability continues to this day. As of 1993, the total losses on that account were $245.6 million. Other Names have had their fortunes wiped out in total Lloyd's liabilities

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[7] Liljeberg, at 2205, n. 12, quoting previous cases.

[8] Tumey v. State of Ohio, 47 S.Ct. 437 (1927); In re Murchison, 75 S.Ct. 623 (1955); Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986).

[9] The quote goes back to Justice Cooley's treatise, Constitutional Limitations.

[10] Professor Gillers cites Liteky only for the point (which is immaterial to his conclusion) that "[w]hile §455(a) and §455(b) overlap, they are not congruent."

[11] The information was first revealed publicly in an article in Newsday on June 24, 1994.

approaching $12 billion. For years, therefore, the Names have been understandably jittery.

The New York Times has described Judge Breyer's membership in Lloyd's as "A Tricky Investment."[12] Although Judge Breyer has assured this Committee that he will get out of his membership as soon as possible, this is a questionable pledge. He himself has testified that he has been trying to extricate himself for years. And according to Richard Rosenblatt, who heads a group of hundreds of American Names who are "afraid of being wiped out," it would cost Judge Breyer more that $1 million to insure himself against his personal share of his syndicate's losses.[13] Even then, he would remain liable if his insurer could not pay.[14]

Judge Breyer and the White House have assured this Committee and the public that Judge Breyer's reasonably anticipated liability is negligible. And the ethics experts who have "cleared" Judge Breyer have based their opinions on just such misleading assumptions. As Professor Hazard says, he was told to assume that Judge Breyer's possible losses are well within "stop-loss" insurance coverage that the Judge already has. For similar reasons, Professor Gillers has commented that his own opinion is "rather narrow."[15]

But consider Mr. Rosenblatt's estimate that insurance coverage of Judge Breyer's liability would cost more than $1 million. That reflects the calculation of hard-headed actuaries, not overly optimistic politicians eager to minimize the true dimensions of the Judge's difficulties.

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[12] N.Y.Times A:1, A16, July 13, 1994.

[13] Id.

[14] Id.

[15] Gillers to Freedman, Lexis Counsel Connect E-mail, July 10, 1994.

Having said that, let me emphasize that my opinion is not dependent upon the precise size of Judge Breyer's liability.[16] As Professor Hazard said in his opinion, the business of insurance is complex, sometimes controversial, and "widely the subject of public concern and suspicion." Unfortunately, Professor Hazard did not recognize that his own description of Judge Breyer's position as an insurer echoes the Supreme Court's description of the purpose of §455 -- to avoid public "suspicion and doubts." Predictably, and properly, "public concern and suspicion" have been focused on the integrity of the judiciary because of Judge Breyer's failure to disqualify himself when the Statute required him to do so.

As the White House has admitted, Judge Breyer "knew" or "could have known" that environmental pollution was one of the risks he was insuring as a Name. (In fact, he was notified of this by his syndicate.) But, they contend, he did not know precisely which of his cases involved those risks. In effect, they argue that Judge Breyer could not know for sure whether a particular pollution defendant standing before him was carrying the Judge's blank check in his pocket.

But under §455(c) of the Disqualification Statute, the Judge had an absolute responsibility to "inform himself about his personal ... financial interests."[17] (Professors Gillers and Hazard ignore this requirement in their opinion letters.) Thus, the bizarre defense of Judge Breyer is that he violated his statutory duty to know the details of his personal financial interest, and therefore he didn't violate his statutory duty to disqualify himself.

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[16] See the original article in Newsday, June 24, 1994.

[17] This is in contrast to the second clause of the same subsection, which requires only that he make a "reasonable effort" to inform himself about the financial interests of members of his household.

In fact, Judge Breyer did violate the statute in failing to disqualify himself. Take, for example, United States v. Ottati & Goss, Inc.[18] Two years after Liljeberg explained the broad scope of §455(a), Judge Breyer failed to disqualify himself from Ottati & Goss -- even though the case involved the Environmental Protection Agency's powers to impose liability on polluters like those the Judge knew he was insuring.

In Ottati & Goss, the issue was whether the EPA could impose remedies against polluters, subject to judicial revision only on a finding that the EPA had arbitrarily and capriciously abused its powers. Lower court decisions were split on the issue. A decision by the First Circuit would be an important precedent.

Judge Breyer expressly recognized this in his opinion in Ottati & Goss, saying that the case raised a question with "implications for other cases as well as this one." And he said again: "The EPA's ... argument [has] implications beyond the confines of this case."

That was enough to require that Judge Breyer disqualify himself. In effect, he was in the position of deciding his own case, or, at least, of setting a precedent that could affect his own liability.

How the Judge ultimately decided the case has no effect on his duty to disqualify himself. His decision in Ottati & Goss compounds the appearance of impropriety that the Statue forbids, because the Judge wrote an opinion weakening the power of the EPA to impose liability on polluters. And his opinion, predictably, has been influential, causing the EPA to change its own regulations.

Similarly, Judge Breyer participated in Reardon v. United States,[19] where the First Circuit again made it more difficult for the EPA to impose liability on

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[18] 900 F.2d 429 (1990).

[19] 947 F.2d 1509.

polluters. In Reardon, the EPA had removed tons of contaminated soil and put a lien on the property to secure payment of its costs. The loss represented by that lien is the same kind of loss that Judge Breyer was liable to reimburse as an insurer. And the decision held that the EPA did not have the power to impose the lien.

Is it not clear that Judge Breyer's impartiality "might" reasonably be "questioned" in Ottati & Goss and in Reardon? Would not his participation cause "suspicions and doubts" about the integrity of judges? Is that not precisely the problem that the Congress intended to resolve with §455(a) of the Disqualification Statute?

One contention put forth by the White House is that Judge Breyer was not asked to disqualify himself by a litigant. That is irrelevant. The Statute does not permit a judge to wait to see whether a litigant has smoked out his interest and makes a motion for disqualification. Rather, the Statute is "self-executing," requiring the judge to take the initiative. As Justice Scalia said for a unanimous Court in Liteky, the Statute "placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit."[20]

Another contention is that the Judge's membership in Lloyd's is "analogous" to being an investor in a mutual fund, and therefore is exempt from the statute under §455(d)(4). There are two important differences between being a name in Lloyd's and being an investor in a mutual fund. One is that mutual funds are typically highly diverse. But Lloyd's is solely involved in insurance, and the Judge knew that one or more of his insurance liabilities related to environmental pollution. Another major difference is that an investor in a mutual fund cannot lose more than the principle invested. In Lloyd's, on the contrary, one's entire fortune is at risk, as hundreds of Names have found to their dismay in

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[20] Liteky at 1153.

recent years.

It has also been argued that §455(a) is not the right section to apply. The contention is that the correct section is §455(b)(4), which (on one reading) requires that the judge's interest "could" be "substantially affected by the outcome of the proceeding." There are three answers to that argument.

First, those who make that contention have been assuming, contrary to fact, that the Judge's potential liability is negligible. (See discussion above).

Second, §455(b) does not require that the Judge's interest be "substantial" if it is an interest in the "subject matter in controversy." In that event, the judge must disqualify himself "however small" his interest might be. §455(d)(4). And some read the phrase "subject matter in controversy" to include the remedy -- such as the lien in Reardon -- if that is what the litigation is about. One could similarly say that the subject matter of the controversy in Ottati & Goss was the enforcement powers of the EPA. Thus, Judge Breyer was required to disqualify himself under §455(b)(4) in both those cases "however small" his financial interest in the outcome might be.

Third, the "substantially affected" provision of §455(b)(4) does not preclude application of the basic provision, §455(a). And §455(a) can require disqualification when the Judge's impartiality "might reasonably be questioned" even when the amount of financial interest is not in fact substantial. In Liljeberg, for example, the Supreme Court relied principally upon §455(a) even while recognizing that §455(b)(4) also applied.

Ignoring the Supreme Court cases in point, Professor Gillers has placed his primary reliance on In re Placid Oil Company.[2] But Placid Oil is obsolete, having been decided two years before Liljeberg (discussed above).

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[2] 802 F.2d 783 (5th Cir., 1986).

With no analysis whatsoever, the appeals court in Placid Oil said in a single conclusory sentence that the judge's interest in that case did not create a situation in which a judge's impartiality might reasonably be questioned. The court also said that the judge's interest at issue was, in fact, "remote, contingent, and speculative" -- unlike Judge Breyer's position in Ottati & Goss and Reardon. Professor Gillers' reliance upon the obsolete and limited holding in Placid Oil, while ignoring Liljeberg and all of the other Supreme Court authorities, renders his opinion highly questionable.

The court in Placid Oil also says that a judge is not automatically disqualified if he has any stock at all in a company that is in the same industry as a litigant. That certainly remains true. But Judge Breyer has much more than a minor interest in a company in the same industry. He is an insurer with a potential liability that he cannot avoid for less than $1,000,000.

In addition, Judge Breyer, with his wife, holds investments of over $250,000 in chemical and pharmaceutical companies. Moody's Investors Service says that these are "among the highest risks" for Superfund liability.[22]

Judge Breyer has also held significant long-term investments in several liability insurance carriers that, according to the Financial Times, have been "haunted by the prospect of big claims for environmental liability," especially Superfund.[23]

In 1994 his biggest single U.S. investment is American International Group. According to Best's Review -- an industry trade magazine and investment adviser -- A.I.G. is "depending on ... judicial trends" on Superfund

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[22] I am relying here upon the reporting and analysis of Bruce Shapiro in The Nation, p. 76, July 18, 1994.

[23] Id.

for its future financial health.[24]

The Judge also owns stock in General Re Corporation. That company's 1994 annual report warns investors that their future earnings could be affected by "new theories of liability and new contract interpretations" by judges on Superfund.[25]

Judge Breyer appears to have been accommodating these concerns. And his investments in such companies -- unlike that in Lloyd's -- are investments that a judge with ethical sensitivity could, and would, have gotten out of and stayed away from.

Conclusion

Chief Judge Stephen Breyer has more than once violated the Federal Disqualification Statute -- a Statute that was designed to ensure the constitutional requirement that "justice must satisfy the appearance of justice." In violating that Statute, he has, predictably, caused the very "suspicions and doubts" about the integrity of judges that the Statute was enacted to avoid.

These violations of his judicial responsibilities raise serious doubts about how Judge Breyer would conduct himself as a Justice of the Supreme Court. And his refusal to recognize anything more serious than "imprudence" reinforces those doubts.

In addition, Judge Breyer's violations, and his insistence that he has done nothing improper, raise the concern that as a member of the Supreme Court, Judge Breyer would vote to weaken the Federal Disqualification Statute, thereby encouraging other federal judges to disregard the intent of Congress in enacting that law.

For these reasons, I oppose confirmation of Judge

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[24] Id.

[25] Id.

Stephen Breyer to the Supreme Court of the United States.

Very truly yours,

Monroe H. Freedman
Howard Lichtenstein Distinguished Professor
of Legal Ethics



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Stephen Gillers
Professor of Law

July 15, 1994

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Biden:

The White House Counsel's Office has given me a copy of Professor Monroe Freedman's letter to you of July 13, 1994, and asked me to reply to it. Since the letter takes issue with my July 8, 1994 letter to the White House Counsel, I appreciate having this opportunity to do so. The issue, of course, is whether Chief Judge Stephen Breyer violated 28 U.S.C. §455 when he sat in certain pollution cases while he was also a "Name" in a Lloyd's syndicate. I will assume general familiarity with the facts and the prior correspondence.

Professor Freedman is in my opinion in error when he charges Judge Breyer with illegal conduct. Professor Freedman has misconstrued the governing rules and ignored governing precedent. I shall explain how presently. First, though, the Committee should be aware of a critical doctrine that has not yet been identified.

Section 455, which derives from the 1972 ABA Code of Judicial Conduct, states the Congressional rules for recusal of a federal judicial officer. The section has two kinds of rules: categorical rules and standards. The categorical rules require no judgment. They either apply or they do not. The standards, by contrast, require judgment.

An example of a categorical rule is §455(b)(5)(i), which would require a judge to step aside if the judge's "spouse, or a person within the third degree of

relationship to either of them...Is a party to the proceeding...." This circumstance either exists or it does not. If it does, recusal is required.

The two provisions of §455 that have been cited in connection with Judge Breyer (until Professor Freedman injected a third, discussed below) contain standards, not categorical rules. The first standard is that part of §455(b)(4) that requires recusal if the judge (as an individual or fiduciary) or certain relatives of the judge have "any other interest that could be substantially affected by the outcome of the proceeding." The second standard is §455(a), which requires recusal if the judge's "impartiality might reasonably be questioned."

As should be clear, these two standards require a judge to interpret imprecise words like "could," "substantially affected," "might" and "reasonably." The meaning of these words (and the standards that contain them) are, of course, clarified as cases construe them, but they have never, and were not intended to, become fixed categories.

When we deal with standards, we deal with a continuum. In some matters, it will be self-evident that a judge's "impartiality might reasonably be questioned" or that a proceeding's "outcome" could "substantially" affect a judge's interests. In other matters, the opposite will be clear. But in many cases, different judges will apply the standards differently.

That doesn't mean that one judge is right and the other judge wrong. It means only that as with all flexible standards there will be room for disagreement. The way that the judicial system accommodates this reality is pertinent to the questions before the Judiciary Committee.

Appellate courts routinely defer to a judge's decision regarding application of a standard by upholding the decision unless it was an "abuse of discretion." Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1460 (1st Cir. 1992); Pope v. Federal Express Corp., 974 F.2d 982, 985 (8th Cir. 1992). This test recognizes that there is significant room for

disagreement in the application of a standard. Reasonable minds may differ and neither will be wrong.

While Professor Freedman holds that Judge Breyer should have recused himself in certain of his pollution cases, I and others who study the law of judicial disqualification have reached an opposite conclusion. That difference of opinion is rather strong evidence that the situations confronting Judge Breyer did not self-evidently require his recusal, but were instead situations in which reasonable minds might differ on the application of the standard. Judge's Breyer's conduct was not, therefore, an abuse of discretion and Judge Breyer did not violate §455 notwithstanding that another judge might have elected differently.

Not only do I believe that Judge Breyer's decision to sit in the pollution cases was reasonable, I believe it was right. In the balance of this letter, I will explain why §455 did not disqualify Judge Breyer and where I think Professor Freedman goes wrong.

I have already quoted from §455(b)(4). A judge must not sit if the judge (including certain relatives) has "any other interest that could be substantially affected by the outcome of the proceeding." The words "any other interest" are to be distinguished from a separate basis for recusal if a judge has a "financial interest in the subject matter of the proceeding or in a party to the proceeding." Such a "financial interest" requires recusal "however small." Section 455(d)(4).

No one has suggested that Judge Breyer had a "financial interest" in a party to proceedings before him. Professor Freedman has rhetorically asked, however, whether Judge Breyer had a "financial interest" in the "subject matter" of proceedings before him. (Freedman letter at p. 8.) This suggestion is wrong, as I shall discuss below.

In order to trigger §455(b)(4)'s reference to "any other interest," several facts must be true (and the judge's failure to recognize their truth must be an abuse of discretion). These facts are that the (i) the judge has an "other interest" that (ii) "could be" (iii) "substantially affected" by (iv) "the outcome of the

proceeding."

Judge Breyer had an investment in Lloyd's. I assumed in my letter to Mr. Cutler that he had unlimited financial exposure on that investment. That satisfies factor (i). However, it does not satisfy factor (iii), even though I am assuming that Judge Breyer's financial exposure is unlimited.

The word "substantially" refers to the effect on the "interest" that the "outcome of the proceeding" "could" have. Professor Thode, the Reporter for the ABA Judicial Conduct Code from which this part of §455(b)(4) was drawn, has written: "Here the issue is not whether a judge has a 'substantial interest,' but whether the interest he has could be substantially affected by a decision in the proceeding before him." E. Thode, Reporter's Notes to Code of Judicial Conduct 66 (1973)(hereafter "Thode").

In measuring the possible effect of the "outcome of the proceeding" on the judge's interest, we must construe the word "could." As stated, "could" is not a precise word. "Could" could mean "could conceivably" or it could require a closer nexus between the outcome of the proceeding and the effect on the judge's interest. The courts have construed "could" to require a closer nexus.

My letter to Mr. Cutler cites two cases that require a "direct" connection between the outcome of a proceeding and the judge's interest. By contrast, a "remote, contingent, and speculative interest" will not suffice. In re Placid Oil Co., 802 F.2d 783, 786-77 (5th Cir. 1986); Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co., 996 F.2d 282 (11th Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

While Professor Freedman suggests (p.9) that Placid Oil is "obsolete," because of the Supreme Court's decision in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), two year later, this is wrong. First, the Eleventh Circuit cited Placid Oil in 1993 for the very point made here. Other courts have cited it, too, after Liljeberg. See, e.g., McCann v. Communications Design Corp., 775 F. Supp. 1535 (D. Conn. 1991).

Second, the facts of Liljeberg are dramatically different form those in Placid Oil. In Liljeberg, a university with which the judge had a fiduciary relationship would (as a result of contractual obligations and real estate values) gain millions of dollars if the judge awarded the rights to a certificate of need for a hospital to the defendant. That gave the judge, as fiduciary, an interest "however small" in the subject of the litigation (the certificate) and also an interest that could be substantially affected by the outcome of the proceeding. The facts of Liljeberg show a "direct" effect on the judge's interest as a fiduciary, and of course the effect was substantial.

Permit me to make this clearer with an example. Assume that the outcome of a case will nearly certainly cause a $100 decline in the value of the judge's stock interest. The effect, then, is "direct," but the judge's financial interest is not "substantially affected" because the amount is too small. Now assume an omniscient observer could tell us that the outcome of a proceeding will have 1/1000th of a chance of causing the judge's stock interest to decline by $100,000. There, the effect is substantial but it is not "direct."

Professor Freedman cites two cases in which he concludes Judge Breyer should not have participated. Did the Judge abuse his discretion by concluding that the decisions in these cases could not have a direct and substantial affect on his financial interest in Lloyd's? That is the question.

One issue in United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990), the issue Professor Freedman cites, was whether a federal judge had to grant the EPA the precise injunction it requested (so long as the request was not arbitrary) or whether instead the judge had broader discretion. Judge Breyer held that the judge had broader discretion.

Professor Freedman writes that Judge Breyer should not have properly decided that case because it "involved the [EPA's] powers to impose liability on polluters like those the Judge knew he was insuring." (Freedman letter at p. 6.) This is just wrong. It is not the standard. Professor Freedman cannot say with any degree of

confidence that the decision in Ottati & Goss would have a direct and substantial effect on the judge's interests. Furthermore, Professor Freedman leaves out an important part of the case. The EPA had two routes for seeking judicial injunctions. It had proceeded under one of them. Judge Breyer expressly acknowledged that if it had proceeded via the other route (seeking enforcement of a nonarbitrary EPA order[1], "the court must enforce it." Id at 434.

Now think about the chain of events one would have to envision to get from the holding in Ottati & Goss to the conclusion that Judge Breyer's interests could be directly and substantially affected. One would have to say that because a trial judge will have discretion whether to grant an EPA injunction when the EPA proceeds along one route rather than another, it could happen that in another case the EPA would elect that first route in an action against an insured of Judge Breyer's Lloyd's syndicate, that the judge in that case will deny EPA the injunction it seeks (relying on the discretion Judge Breyer's opinion affords), that the syndicate would not have to pay to comply with the particular injunction EPA wanted, and that the effect from all this on Judge Breyer's pro rata financial interest in the syndicate would be "substantial." That chain of events is what the caselaw means when it uses the words "remote, contingent, and speculative."

Professor Freedman also cites Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991). Reardon is even a more farfetched example than Ottati & Goss. Judge Breyer sat on an en banc court that held that, absent exigent circumstances, due process required "notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed." Id. at 1522. Professor Freedman wrongly says that the decision "held that the EPA did not have the power to impose the lien." (letter at p.7.) It did, so long as it gave notice of its intention to do so and afforded a hearing thereafter.

Professor Freedman connects Reardon to the situation at hand this way: "The loss represented by that lien is the same kind of loss that Judge Breyer was liable to reimburse as an insurer." (letter at p. 7.) This is

beyond "speculative." What "loss" is Professor Freedman referring to? Think about the extended chain of events one would have to describe to get from the Reardon holding to Judge Breyer's interests. The EPA would have to give notice of an intent to impose a lien on property of an insured of the Judge's Lloyd's syndicate. Then, before the EPA could file its lien, the recipient of the notice would have had to defeat that effort by making a quick disposition of the property, thereby defeating the EPA's security interest. As a result of that disposition, somehow (I'm not clear how) the syndicate would escape its insurance responsibility and the pro rata savings to Judge Breyer in particular would have to be substantial. Reardon simply does not support Professor Freedman's conclusion.

Before I leave §455(b), I want to recognize that a "remote, contingent, and speculative" interest is not the same as no conceivable interest whatsoever. A system of judicial recusal must balance between the risk of real or apparent personal interest, on the one hand, and an unduly broad standard that disqualifies a large number of judges (or severely limits their investments), on the other. A broad standard would lead cautious judges to step aside no matter how improbable an effect on their interests. I believe the courts have struck the right balance. But the line will sometimes be unclear, calling on the judge to exercise discretion.

On occasion, by definition, even a remote interest will become a reality. Today's issue of Newsday reports that a loser in a case before Judge Breyer sued a Lloyd's syndicate for reimbursement of its expenditures under an insurance policy the loser had with Lloyd's. The syndicate may or may not have been Judge Breyer's syndicate. Let's assume it was Judge Breyer's syndicate. That is part of the price of a balanced rule. A rule that prohibited a judge from sitting if a decision could have any conceivable effect on his or her interests would have its own (in my view less appealing) price.

In addition, I have been asked to assume that Judge Breyer did not and could not have known the particular insureds under his Lloyd's syndicate. Section 455(b) quite clearly requires knowledge.

Professor Freedman also relies on §455(a), which requires recusal if a judge's "impartiality might reasonably be questioned." Apparently, Professor Freedman believes it to have been an abuse of discretion for Judge Breyer not to recuse himself under this provision.

Section 455(a) requires recusal when an "objective, disinterested, observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt that justice would be done" in the particular case. Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 715 (7th Cir. 1986). I do not believe that conclusion can be reached on the facts of the cases in which Judge Breyer sat. Certainly, it was not an abuse of discretion to reject application of §455(a) as so defined.

A stronger objection to §455(a) exists. As I mentioned in my letter to Mr. Cutler, while not congruent, §455(a) and §455(b) do overlap. As a matter of statutory interpretation, it is improper to resort to §455(a) when Congress has specifically legislated criteria for recusal in the particular circumstances described in §455(b) and these criteria are absent. As the Court wrote in Liteky v. United States, 114 S.Ct. 1147, 1156 n.2 (1994), "it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires."

Here, §455(b)(4), as construed in caselaw, requires that the outcome of the proceeding before the judge have both a direct and substantial effect on the judge's interests. Liteky tells us that we should not use §455(a) to "nullify" these requirements. Specifically, here, we should not use §455(a) to require recusal where the effect is "remote" or "speculative" or "contingent." In any event, the same test is employed to reject recusal under §455 (a). In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988) (remote, contingent, or speculative interest does not reasonably bring judge's impartiality into question.)

Let me conclude by addressing two other of Professor Freedman's points. First, he suggests that Judge Breyer might have had a "financial interest" in the "subject

matter" of the cases before him because the legal issue he decided could arise in a case involving his Lloyd's syndicate. Professor Freedman does not even adopt this view himself. He says merely that "some have read" the phrase "subject matter in controversy" to include the remedy, like the lien at issue in Reardon. He also writes that "(o)ne could similarly say" that EPA enforcement powers in Ottati & Goss were the "subject matter" of that controversy.

"One" could, of course, "say" many things, just as "some" may have "read" the statute a variety of ways. But the fact is that no authority supports the view that a judge can have a "financial interest" in a question of law. As Professor Thode explained, the "subject matter" language "becomes significant in in rem proceedings." Thode at 65. Another example is Lilieberg, where the university on whose board the judge sat had a financial interest riding on the holder of the certificate of need, which was the subject matter before the judge. This is not a case like Tumey v. State of Ohio, 273 U.S. 510 (1927), cited by Professor Freedman, where the adjudicator had a financial interest in the very fine he imposed on the defendant because he would receive part of it.

Professor Freedman suggests (p. 5) that Judge Breyer violated his duty to keep himself informed of his financial interests. Section 455(c). My letter was premised on two assumptions about what Judge Breyer knew or could have known and what he did not know and could not have known. I charged him with knowledge of what he could have known but he can't be faulted with not knowing what he could not have known.

Thank you for this opportunity.

Sincerely,

Stephen Gillers

cc:Honorable Lloyd Cutler

SG:m

Judge BREYER. Yes, Senator. I have taken into account your concern, and I understand the concern, and I think it is extremely important that people have confidence in the integrity and that there is absolutely no conflict in such circumstances. What I intend to do, as I said, is that whatever investment I have in this area in whatever court I am in will be posted clearly, all information given, with the clerk of court. The parties in every case will be directed to that so they will find it and know what it says. They will be told that, anonymously—anonymously—they may write out or tell orally to the clerk any way in which they see that the holding in this case could really affect that investment.

Then the clerk would or an appropriate person would communicate that to me anonymously. I would consider very carefully, in light of what you and others have said, whether in any case there would be really an impact on the investment from the holding of that case. And should I conclude there would be, I would recuse myself.

Senator METZENBAUM. I believe that that is a major step in the right direction. I think it is the right step, and I think that the concerns that many of us have about your continued exposure in the Merritt syndicate 418 may warrant or may necessitate your recusing yourself in future cases.

I believe that it is our obligation to and I think we have sensitized you to this issue. Nobody has said, at least I have not said—some have said but I have not said—that you have conducted yourself in an unethical manner. I do not think that you have. But I think that if the *Ottati* case were before you again, using the present standard that you are talking about, I somehow have the feeling that you might not have gone forward in hearing that case.

It is a fait accompli, and you are not going to hear the case over again, and so it does not necessitate our going into a lengthy discussion. But I think your new approach to matters, until you get out of the Lloyd's investment, will be helpful, and at least this Senator thinks it will make you that much better a Supreme Court jurist than I hope you will be notwithstanding.

Judge BREYER. Thank you, Senator.

Senator METZENBAUM. I guess my time has expired.

The CHAIRMAN. You can have more time, because I interrupted you, if you want to take a few more minutes.

Senator METZENBAUM. Several more. All right. I think I will. Thank you, Mr. Chairman.

On this whole question of the Merritt 418 and its relationship to your exposure and cases you have heard, the latest annual report emphasizes not only the uncertain upper limit of losses, but also the breadth of the exposure. With respect to asbestos, it says:

> The falling off in the number of new claims long predicted has yet to occur. Major uncertainties lie in the estimate of the number of future claimants.

You have already recused yourself in connection with asbestos cases.

With respect to pollution, it says:

> A number of claims have been made against our insureds and, therefore, against us. The amount of theoretical aggregate liability is clearly huge and, indeed, unquantifiable.

Even the syndicate's auditor, the accounting firm of Ernst and Young, will not give a firm opinion as to the size. I think that the point that I would make with you, Judge, is that you were aware that you had certain exposure. You had concerns. You actually sent several letters to other investors in Merritt 418, dated from February 1992 through February of this year.

Those letters indicate your knowledge of Merritt's asbestos risk in 1987 and 1988 and describe why you decided by 1988 to recuse yourself from asbestos cases because of Merritt's asbestos risk.

You say in one letter:

> I was surprised Merritt syndicate was involved more than average, for this seems contrary to what I had wanted. As a result, I have had to disqualify myself on all asbestos cases, and ultimately, for that reason, in 1988 I decided to leave Lloyd's.

And then it goes on, other letters that you wrote.

I think we can agree that the Merritt 418 was obviously a bad investment. The Merritt 418 had all sorts of exposure, asbestos, pollution, other kinds of exposures. And the question of your recusing yourself in future cases until you can discharge yourself of the liability, potential liability that you have arising out of it I think is a valid concern. I think you have addressed yourself to that concern. I am pretty well satisfied that when and if matters come up before you, you will be aware of some of the questions that have been discussed with you here, and I wish you well.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Does that mean the matter is closed, Senator?

Senator METZENBAUM. Pardon?

The CHAIRMAN. Does that mean the matter is closed?

Senator METZENBAUM. For the moment. [Laughter.]

I think so, but who knows what the next hour will bring?

The CHAIRMAN. I surely do not.

I know the next 10 minutes will bring a break. You have been sitting there a long time, Judge. Why don't we break until 10 minutes after. That is about 8 or 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Our next questioner is the distinguished Senator from Wyoming, Senator Simpson. Senator, the floor is yours.

Senator SIMPSON. Mr. Chairman, I thank you very much.

Judge Breyer and associates, fellow lawyers and family and so on. Anyway, in my first round of questions, I mentioned that bills had been introduced in both Houses of Congress by members of both parties to eliminate birthright citizenship. I kind of fired this out the other day, knowing you would mull it, as you do. The issue of eliminating birthright citizenship in the case of a child born in the United States to persons who are here illegally.

There are calls for repeal of what we would term birthright citizenship for children of aliens who are in an illegal status, and part of the impetus behind this interest in changing the law regarding birthright citizenship is that these children, often born impoverished to impoverished parents, are immediately eligible for public assistance, and then that assistance, of course, is provided to the parents who care for their citizen child even though the parents themselves would not qualify for public assistance because they are illegal, undocumented persons.

Having been in this issue for some 15 years, I have never seen more of a rush toward doing something. Things are being said by people on both sides of the aisle that, if I had said them 10 years ago, I would have been prey to the designation of bigotry or racism or some other. But this is an issue filled with that when we talk about immigration and refugees and legal and illegal and permanent resident aliens and so on.

But illegal immigration in the United States, in combination with the development of the modern welfare state in this country, has increased the fears and resentments of many citizens in the most heavily impacted States.

And as I mentioned to you, the citizenship clause of the 14th amendment provides that any person born in the United States and subject to the jurisdiction thereof is a citizen of the United States.

While the citizenship clause was intended originally to benefit black Americans, it is obvious that this "jurisdiction requirement," as it has been called, was intended to narrow the scope of the birthright citizenship principle.

Clearly, the American-born children of foreign diplomats who receive extraterritorial immunity from our laws are not subject—not subject to the jurisdiction thereof. Further, the debate over the Civil Rights Act of 1866 makes clear that citizenship of Native-Americans was also an issue.

I mention the 1866 act because the citizenship clause in that statute was apparently the basis for a similar provision in the 14th amendment.

So at the time the framers of the citizenship clause wrote that provision, the United States maintained a policy of open borders. It was a time when immigration was thoroughly encouraged. We wanted to populate the vast open spaces of a young nation, and I suppose there were no illegal aliens in 1868. Immigration at that time was essentially unregulated. Today the vast majority of Americans would consider an open-border policy to be nonsensical, if not unthinkable. And so, rather, now all policy discussions today revolve around control of our borders and a sovereign nation's duty to control its borders.

One scholar examined this issue of birthright citizenship in some depth. His name was Peter Schuck, of Yale. He has written:

> It is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens. Parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, they can hardly be said to have consented to that of their children who happen to be born while their parents are here in clear violation of American law.

In my view and research and study, the meaning of the clause "subject to the jurisdiction thereof" is very unclear and ambiguous. And my question to you: As a general matter, may the Congress by statute define an ambiguous constitutional provision?

Judge BREYER. The short answer, Senator, is it would depend upon the provision and it would depend upon the statute. You have raised the question about whether those words "subject to the jurisdiction thereof" are meant to exclude only a few people, such as

diplomats' children and some others, or whether Congress can control that definition by statute.

I understand the question, and I am absolutely certain if legislation of that sort is enacted, court challenge will follow immediately. And, therefore, we would consider that—I would have to if I was on the Court—in the context of litigation, get the briefs, get the arguments, and think hard about it.

Senator SIMPSON. Actually, mine is the general question, although it was obviously long and somewhat tedious, about the single issue of the birthright. But on the general question of whether the Congress may statutorily define or clarify any ambiguous constitutional provision, do you have a view on that, completely aside from the citizenship clause jurisdiction issue requirement?

Judge BREYER. The reason that I say I think it depends is because I know there are legal arguments about the extent to which section 2, I guess, or section 5 of the 14th amendment does or does not allow Congress to do or say certain things in statutes.

So, not having gone into it thoroughly, I suspect it depends upon the particular statute and the particular provision. Always there will be a question with any statute and any provision: If there is an area of ambiguity, does that particular statute nonetheless fall outside of it? So those are the kinds of questions that would arise.

Senator SIMPSON. And will arise?

Judge BREYER. Yes, they will.

Senator SIMPSON. That is why you do not intend to go any further.

Judge BREYER. That is right.

Senator SIMPSON. Is that correct?

Judge BREYER. That is exactly right.

Senator SIMPSON. Thus sparing you further pain.

Let me ask you, I want to follow up on home schooling. Surprisingly enough, I have received a tremendous amount of mail. I do not know what group is generating this, but I want to be certain—and I know others have asked about it, and should, and my colleague, Senator Warner, who is not on the panel, our panel, asked me about it. And he, too, is receiving a great deal of material. But we discussed the *New Life Baptist Academy* case Tuesday, and you assured me you had nothing against or no bias against home schooling.

If I might just ask a final question on that, at least from me, as a Justice you will be, of course, interpreting the Constitution. And so I am interested, and I know many, as I say, in my State and other States are interested, in hearing your interpretation of the Constitution as it pertains to the right of parents to teach their children at home and the right of religious organizations to operate private schools.

In your mind, what does the Constitution have to say about that?

Judge BREYER. In general, though not in detail, I think it fair to start from the proposition, it is true, religion is extremely important to all of us. Even if we have different religions, we share the fact that it is important. And from a constitutional point of view, it is there protected in the first amendment because the Founders recognized the importance of religion and the importance of allowing people freely to exercise their religion. They had learned

through experience. That experience came from the religious wars of the 17th century. They put that in the Constitution to be absolutely certain that that free exercise was protected.

In my own view, if someone or a State or someone tried to prevent people from teaching their religion to their children or practicing a home school that was based on that kind of thing, very serious constitutional questions would arise. They would have to be decided in the context of the case. But on their face, it would be a very serious problem.

Senator SIMPSON. But the Constitution, without——

Judge BREYER. It is designed to protect the right of the parents to pass along to their children their religion and to protect that from State interference.

Senator SIMPSON. And to then also have home schools if that——

Judge BREYER. I think those home schools based on that principle follow from that, and that is why I say somebody who tried to prevent that legally would suddenly face very, very serious constitutional challenges.

Senator SIMPSON. Well, I think that is important, and I have been listening to what Senator Brown has asked, and others. It seems rather absurd that you can get on your hind legs now and do about any kind of oral expression known except you cannot pray in schools. I do not know how it got to that point, but I think that certainly there has been a great removal of religion from our society. And I am not talking about forcing it on people, but commencement exercises. I understand all those things, but it seems to me that it is a part of the heritage of our country, one of the only countries on the face of the Earth founded in a belief in God, that is the United States.

They came here to freely exercise their religion. That is who came here. And to see it all twisted in these ways through judicial interpretation through the years is puzzling, a curious thing to me. We have almost removed religion, certainly the establishment of religion. I think I understand that. But to remove these things in a—well, enough. But that is a puzzler to me when we are the country that was founded—the only one I know of founded on a belief in God, and when all of its Founding Fathers were deeply committed in almost elitist ways to worship. Interesting.

You do not have any comment on that, do you? You are waiting for more?

Judge BREYER. No, I understand this is an area—how the first amendment is applied in this area is a matter of great contention legally. But I do not think it is contentious, and I think the vast majority of people, I think there is a kind of consensus that that first amendment—it is not my opinion. I think there is a consensus opinion that that first amendment protects the right of people to pass their religion on to their children, and the home school situation on its face seems to fall within that. Therefore, I think there is a consensus. Not my personal opinion but a consensus that some protection is offered there.

Senator SIMPSON. Well, I thank you.

In response to the question on judicial activism in the committee questionnaire, you said, among other things:

One must recognize that legislators and executive entities have sometimes failed to address problems until constitutional violation resulted. It would be vastly preferable for all branches of Government and for the public if the political branches were able to resolve such issues and render their determination through judicial adjudication unnecessary.

Then you also noted that:

If the legislature or the executive either acts or fails to act in a manner that results in a violation of individual rights, the Court's role must include the difficult and sensitive task of defining an appropriate judicial remedy.

Could you share, if you would, what are some of those issues which have not been resolved by the executive or legislative branches which, in your view, the judicial branch has had to resolve through judicial adjudication? Are there any such issues or problems before us today for which the judicial branch might be called upon to define an appropriate judicial remedy due to present and historical inaction by the executive and legislative branches?

Judge BREYER. It is certainly true, Senator, that Congress gets advice from all kinds of people, everybody in the country, including judges, including policymakers, including dozens of others, and it is up to Congress to decide, the legislature, what to do. So, therefore, I would stick to a historical example. The one that most obviously comes to mind is: Wouldn't it have been a wonderful thing, in my mind, if sometime around the year 1870, 1880, 1885, 1890, any time before 1954, that Congress had decided to enact laws that made that promise of fairness in the 14th amendment a real thing? How wonderful that would have been. And yet there was not that law.

I think in 1954 the Court said that promise will be made a reality, and it has been a very difficult thing, but an ultimately critical thing, that that become real. I can hardly think of all our country's problems—and there are so many, whether you start with violence, or hunger, or children, or reading, or anything. Right there at the top of that list is the need to make that promise a reality. And that is hard.

So I think the courts began that in 1954, and I know Congress has stepped in, and I just wish, wouldn't it have been wonderful if that had been done earlier.

Senator SIMPSON. Well, I remember Justice Brennan, in visits with him, and Justice Burger, I was fortunate to come to know both of them personally. Wonderful men. And they would both say, in rather remarkably guarded ways: When will you people begin to do something about illegal immigration? This is when the commission started back in the early 1980's because the court cases were coming in. The Texas case; you had to educate the children of an illegal, undocumented person because you couldn't visit the sins of the parent upon the child, and that child was entitled to an education, and is. So that was a gentle goading from the other side of the triangle of our constitutional government, like: Don't you think you ought to get busy with something? And I remember we did get busy, and we did a bill, and eventually dealt with that in a way which we will have to revisit.

But one final question, and then I will yield back the balance of my time. A continuing aspect of the game in these Supreme Court nominations is the committee's efforts to learn or try to learn a

nominee's position on one legal issue or another, countered by the nominee's efforts to avoid disclosing where he or she stands on specific issues. This is our ritual.

We say we need to know in order to assure ourselves and the Senate that the nominee is within "the mainstream" of legal thought. That was a phrase that we heard during these latter years, "the mainstream." The nominees argue that it would be inappropriate, if not wholly improper, to indicate where a prospective Justice stands on a particular issue which may come before the Court on which the nominee hopes to sit. But if the nominee has written or spoken on an issue, it is often rather difficult for him or her to duck that issue at the confirmation hearings.

The exceedingly bright and able Judge Bork had written and spoken extensively. He had done 106 opinions. None of them had been overruled. And six of his dissents became majority opinions of the U.S. Supreme Court. But before my eyes, the nomination process turned him into a lot different guy than that.

That was a painful thing, and I would not want to revisit any of it. And there have been others just as painful.

But as a result, with him we had a lengthy and wide-ranging, free-range discussion of his views on many constitutional issues during his hearings, and that is reported historically that that might have hurt him badly.

Justice Scalia handled it quite differently. He declined to respond to most questions on current constitutional questions, a man of similar brightness and ability as Judge Bork or as you. He felt it inappropriate, and said it clearly, to discuss legal issues that are, to use your words, I think the other morning, "up in the air," issues that are still "up in the air."

Now, however, my question: Justice Scalia was recently reported, at least reported—I never really believe everything the fourth estate says because I think they blur journalism with divinity. There will be a report on that now that I have done something ugly and quite evil with them, but line them up in the other alley because we will do it again.

Now, Justice Scalia recently is reported to have suggested that caning might pass constitutional muster. I do not know that. In the last year, Justice Blackmun announced to the country his position on the death penalty. Now, other sitting judges, Justices, have made statements disclosing their position on various controversial issues, and without necessarily commenting on the behavior of any particular Justice or nominee or yourself, do you see any valid reason why a Supreme Court nominee should be less forthcoming than a sitting Justice about his or her views? I am not going to ask you about a view, but should they be less forthcoming about his or her views on constitutional jurisprudence during confirmation hearings than he or she might be after becoming a sitting Justice, other than wanting very much to obtain the job? Would not the public perception of bias be just as applicable to a sitting Justice as to a nominee?

Judge BREYER. You are asking me if I can think quickly of a distinction, and obviously I cannot. But, nonetheless, I think what is important, which is what I have tried to do, is to expose to you how I might go about thinking and dealing with a problem.

What the basic view is, how I see things basically, the reason, as I see it, for hesitating to go into—there are three, really—to go into something that is going to be a specific case, the best reason, which is usually the true reason, is that I have not thought about it in that kind of depth, and I should not go say something that I have not thought about that is likely to come up in the context of a particular case. That is always true.

A second reason is, even if you think you have thought about it, how often it really is true that I think I know something, I think I have thought it through, and then a real case comes along—maybe it is like a vote. I do not know if it is or not, but suddenly it is real. Suddenly you really know that people's lives turn on it. And that produces a tremendous degree of concentration that might previously have been lacking.

You read the briefs, and you understand the full facts, and that is not true in a context before it becomes real. And of course, the third reason is that you want to impress upon people that you will be fair and openminded in a particular case, and decide on the basis of briefs and arguments and thought at the time.

Senator SIMPSON. Well, I think it is important for Supreme Court Justices and Justices in the State Supreme Courts to interact with the public, to let them know that there is not just mystery coming down from on high. Do you feel that way?

Judge BREYER. Yes; there are many, many ways of interacting. In my career, I have written quite a lot, and I have gone to bar meetings, and I have gone around and talked to people. It is not secret. It is not—there should be this interaction, and trying to work out how you do the interaction, what is going to far, what you can say, what precisely the boundaries are in terms of policy issues relating to courts, and all the different things I might have taught about or whatever—that is difficult. There are no easy answers to those things, but the need to get out and communicate, I have always felt strongly; I have tried to build a career that reflects that. I do not guarantee I have always drawn the line correct, but that is——

Senator SIMPSON. Will you hope to be able to continue to do that?

Judge BREYER. Yes, I do.

Senator SIMPSON. And you will do that.

Judge BREYER. Every instinct I have cuts in that direction.

Senator SIMPSON. I think it would be very important.

Judge BREYER. I will be careful. I would be careful if I am confirmed.

Senator SIMPSON. Oh, yes, you will. They will be watching. They will not be watching for the good things you are saying; it will be as you dibble around the edges. But I remember Justice Burger. He would speak about advertising of lawyers, go to forums, lay it on the line. I remember his great phrase he had, with regard to court-appointed attorneys and people who were not prepared in court, that we had 747 litigation and Piper Cub lawyers. That was controversial.

I think it is very important for judges to speak out, let them know that they are not just there to please those who are engaged in Elysian mysteries. And I said when we started that, knowing you as I do, you will not give them legal mumbo-jumbo. You will

give them justice and understanding, in English, of what it is you have done. Is that your hope?

Judge BREYER. I certainly hope so.

Senator SIMPSON. It is mine, too, and I know you will, from my knowledge of you.

I thank you, Mr. Chairman, and I have further questions; I am just going to submit those in writing, if I may.

Thank you for your courtesies and your manner in conducting the hearing.

The CHAIRMAN. Thank you. He likes judges that are controversial, but that is easy for a man who never has known controversy to say that. If you had a little controversy, political controversy, you might not encourage him so much to do that.

Senator SIMPSON. It takes one to know one, my friend. You have been there.

[Prepared questions of Senator Simpson and Judge Breyer's responses follow:]

QUESTIONS FOR JUDGE BREYER

SUBMITTED BY SENATOR ALAN K. SIMPSON

JULY 14, 1994

1. I am asking this question at the request of Senator Warner.

A number of Senator Warner's constituents have called and written asking what are your views of "home schooling" and "private religious schools." This week you addressed some testimony to these issues. Senator Warner has asked me to give you the attached op-ed piece from the July 13 *Virginia Pilot* written by Michael Farris, who is the president and founder of the Virginia-based Home School Legal Defense Association, for you review.

Specifically, in the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, the District Court had ruled that it was a violation of the First Amendment for the public school district to evaluate teachers and curriculum in the New Life Baptist Church Academy, a "private religious school."

You reversed the lower court's decision on September 7, 1989. This raises concerns with not only those whose children are home schooled or in private religious schools, but also for others who are committed to a strict interpretation of the First Amendment.

Judge Breyer, what assurances can Senator Warner give his constituents about your views on "private religious schools" and the protection afforded these institutions in the First Amendment?

And, religion aside, what protection does the Constitution offer to those parents who wish to teach their children at home?

2. What do you think of the efficacy of state medical malpractice and product liability tort laws in the following areas:

(a) compensating people who have been injured or killed by corporate or professional negligence;

(b) deterring the marketing of unsafe products and the practice of substandard medical care; and

(c) alerting state and federal health and safety agencies to information that enables them to perform their generalized duties?

3. What are your views on the preemption of state tort laws through a federal statute [1] that does not confer federal question jurisdiction over tort lawsuits?

In other words, do you think it is wise for Congress to pass a federal law to govern product liability or medical malpractice lawsuits that are brought in state courts under state common and statutory law?

[1] S. 687, which was recently defeated on the Senate Floor, would have preempted state product liability laws with a statute that would be interpreted by 30 different state court systems.

JUDGE BREYER'S RESPONSES

JULY 18, 1994.

Senator ALAN K. SIMPSON,
261 Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR SIMPSON: Thank you for your additional questions dated July 14, 1994. I am pleased to offer the following responses to your inquiry.

1. *Home Schooling.* Many years ago, in the cases of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court made clear that the "liberty" guarantee of the due process clause of the Fourteenth Amendment ensures parents' right to "direct the upbringing and education of children under their control." 268 U.S. at 534–35. The Court reaffirmed the existence of that right in *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). That basic guarantee of liberty protects parents who are not motivated by religious considerations as well as those who are. Thus it is well-established law that the Constitution offers protection independent of the Free Exercise Clause to parents in deciding how to educate their children.

At the same time, it is also well-established law that the state has a "compelling" interest in making certain that its children receive an adequate secular education. *See, e.g., Wisconsin* v. *Voder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); *Meyer* v. *Nebraska*, 262 U.S. at 402 ("The power of the State of compel attendance at some school and to make reasonable regulations for all schools * * * is not questioned.")

In the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), the First Circuit was required to engage in a delicate balance of those competing interests of parents and the state, and to ensure that both interests were respected. The state laws at issue in *New Life Baptist* provided that a local school commission must "approve" the quality of secular education (i.e., in nonreligious subjects) provided at private schools—religious and nonreligious alike—in order for students of those schools to comply with the state's compulsory school attendance laws. A unanimous panel, in a decision which I authored, upheld the proposed approval process after ensuring that the state's regulation of private secular education was "reasonable" and no more burdensome upon constitutional protections afforded to private religious schools than necessary to serve the state's interest.

Several of my other opinions have recognized the importance of accommodating religious beliefs and of guaranteeing parents' right to send their children to private schools. *See, e.g., Members of Jamestown School Committee* v. *Schmidt*, 699 F.2d 1, 13 (1st Cir.) (Breyer, J., concurring) (states have latitude to provide services such as bus transportation to children attending private religious schools so long as those services are provided equally to public school students), *cert. denied*, 464 U.S. 851 (1983); *see also Aman* v. *Handler*, 653 F.2d 41 (1st Cir. 1981) (public university officials may not deny official recognition to religious student organizations simply because they disagree with the organizations' views); *Alexander* v. *Trustees of Boston University*, 766 F.2d 630, 646 (1st Cir. 1985) (Breyer, J., dissenting) (states must tolerate deviations from regulations and statutes where doing so would further the accommodation of sincere religious beliefs); *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 383 (1st Cir. 1986) (en bano) (faculty hiring by church-operated universities should be exempt from the National Labor Relations Act).

I might add that the test our court applied in *New Life Baptist* might be viewed as more protective of the free exercise of religion than the test later adopted by the Supreme Court in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and far closer to the test that Congress recently enacted into law in the Religious Freedom Restoration Act.

2. *State Medical Malpractice and Product Liability Tort Laws.* The efficacy and wisdom of state medical malpractice and product liability tort laws is a highly controversial issue currently the subject of extensive legislative debate at both the state and federal levels. It would be inappropriate for me to comment on essentially legislative judgments. As a judge, I would enforce any constitutional federal legislation enacted in the area.

3. *Preemption of State Tort Laws.* The wisdom of enactment of a federal law to govern state product liability or medical malpractice lawsuits is likewise a legislative determination that is currently the subject of extensive debate. As a judge, I would enforce any federal legislation enacted in the areas that is in accord with the Constitution.

Thank you for your inquiry. My best wishes.
Sincerely,

STEPHEN G. BREYER.

The CHAIRMAN. Senator Leahy.

Senator LEAHY [presiding]. Thank you, Mr. Chairman.

As we know, a vote has just started in the last few minutes, and so I will not have the time to do a number of the questions I had wanted.

Judge Breyer, you are the first nominee in the nearly 20 years I have been here that I have not been able to be here for every word of your testimony, and I apologize for that. Unfortunately, something that I had absolutely no control over, the foreign operations bill, was on the floor, and as we have in the last number of years, we have done both our authorizing and appropriating in the same bill. I am the manager of that bill, so I have been stuck there.

I had a lot of followup questions from your earlier responses. I was impressed with your answers, but I was also impressed earlier that on a number of my questions, very artfully, you did not go into a full answer. I understand some of your reasons, but I would like to follow up on a couple of those questions.

One answer in your discussion with Senator Simpson made me think of this question. You have talked of the ninth amendment. You have talked of unenumerated rights. You and I had a discussion of Justice Goldberg's decisions. But as I recall from my notes, after you noted that the ninth amendment protected unenumerated rights, as well as noting that a right to privacy is well-settled, you said that what these enumerated rights "are and how you find them is a big question." I would agree with that. You said you looked for a reference to liberty in the 14th amendment, and as I have read the transcript of your testimony in the evening, you have talked about the dignity of the person during the last couple days. Is that your way of articulating an unenumerated constitutional guarantee?

Judge BREYER. The ninth amendment, to Justice Goldberg, and I think to many others, makes clear that fact that certain rights are listed does not mean there are not others. Then the 14th amendment takes the word "liberty," and the question that you ask is, well, if there are others, how do we know what they are.

Senator LEAHY. How do you find them—where do you find them?

Judge BREYER. And what you have suggested is of course, you start with the text, and then you look back to history, and you look back to what the Framers thought. But so often, you cannot—what the Framers thought is that the Constitution should adapt, preserving certain basic values. So, what are those values? And we are back to where we started with a historic approach. We are back to where we started.

I think the word "dignity" is important. At the most basic level, the Preamble to the Constitution lists what the Framers were up to—establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

Liberties are then listed, some, and underlying things like free speech and free religion, as I described or discussed when I talked about my own family, listening, is an idea, in my mind, of dignity.

Freedom from search, unreasonable search, unreasonable seizures, rights to fair trial, rights to speak and discuss, rights to express oneself creatively, rights to practice one's own religion without interference—all of those things have something to do with an individual, a man, a woman, a family, being able to lead a certain kind of life, to have a story to their life that is a story of a dignified life. That means many decisions must be up to them, and not to be told to them by the State. That, too, is why the Constitution, in my opinion, originally started out as a Government—and remains—of limited power.

Now, you reserve the area of autonomy. You look back into history. You try to determine what are the basic values that underlay those things that are enumerated, and that gives you a key to other basic values. You look to what Frankfurter and Harlan and Goldberg and others talked about as the traditions of our people, always trying to understand what people historically have viewed as traditional, and the values being there, you look to history in the past, to history in the present, and to the meaning, to what life is like today, to try to work out how—maybe an idea a little bit into the future, too—to get an idea of what are those things that are fundamental to a life of dignity.

I know those are very general statements, but in working that out with precedents and working that out in the context of the Constitution, you look and see what judges have tried to do, and you try to behave in that particular way.

Senator LEAHY. But you had said—in the discussion with Senator Simpson a few minutes ago, you talked about—if I am quoting you correctly—in the late 1800's, it would have been nice if the Congress, the President, the political powers, had taken the steps that the Supreme Court eventually did in 1954.

Judge BREYER. Yes.

Senator LEAHY. And I agree with you. The fact is, of course, the Congress did not, and in fact, the Congress probably would have been divided enough even in 1954 that they would not have taken those steps. The remarkable thing is that the Supreme Court did it, and did it in a unanimous opinion—probably one of the greatest gifts to our constitutional history and to the integrity of the Supreme Court that they were able to do that unanimously.

But doesn't that mean that there are possibilities that the Court steps in, basically making a political as well as a legal decision? Or, another way of putting it—when we speak of these unenumerated rights, do you accept that there may be a time in the future that what the Court may see as unenumerated rights are, because of a changing society, something different than we might see today?

Judge BREYER. I do not think the values are different. I think how they might apply might be.

Senator LEAHY. But obviously, the Court—you go from *Dred Scott* to *Brown*—I realize they are differing things—*Plessy* v. *Ferguson,* whatever—if you look at some of these decisions, you find the Court certainly changes. We still have the same Constitution, but the Court changes in how it sees rights.

Judge BREYER. That, of course, is true. But what I think in my own mind in respect to that particular opinion, *Brown,* surely, every time I think about it—and you go back to the pre-*Brown*

world—you can ask yourself how could people have looked at that promise, which is a promise of fairness, and think of the dignity that underlies so many of the first 10 amendments, and say we have it? They did not have it. It seems so obvious that that was not there that I think of *Brown* as an instance of applying law that was there, that was clear—a promise of fairness to circumstances where the fairness did not exist.

And perhaps it is hindsight, but I would like to think that if I had been there before, it would have been foresight. And I understand that judges, like any human beings, can make mistakes and get things wrong, but you would like to think that if you are getting things right, you are referring back to the basic idea of values that reflect human dignity, that underlie the Constitution because they are necessary to assure the promise of the Preamble.

Senator LEAHY. Judge Breyer, in many ways, it is with probably as deep a regret as I think I have had on just about anything in years, that now, with the clock down to where we have 5 or 6 minutes left in this vote, I am going to have to leave. I am also extraordinarily disappointed that 20 years of precedent has broken with you in that I have not been able to sit here for everything you have had to say, because I would like to carry on this discussion a great deal.

You will be confirmed—we all know that—but I hope that you and I might have the opportunity to continue this discussion, if not in an on-the-record basis, in an off-the-record basis. And I hope—and I will put my closing statement in the record—but I hope that you will resist any pressure to become cloistered from the world. I have spoken of judges being outside the judicial monastery. I have a feeling that your wife and your children will, should you become too cloistered, bring you back to reality rather quickly.

Judge BREYER. That is true.

Senator LEAHY. And I suspect your friends will. But you need that. Every judge needs that. They need to go out—if somebody says, "Wait a minute, that is baloney. Let me tell you why"—because just as we in the Senate do, where people do not want to talk back to us, we need to go out and do it. I hope that you will do that.

I will leave one question for the record, and this is the one I really am sorry that I am not going to be able to have a discussion with you. I would hope that you and I might perhaps some evening, some day, have this discussion. It is a question I ask all nominees to the Supreme Court, and that is: Since you left law school, or in the space of your experience, what are some of the most significant cases the Supreme Court has decided? Judge, I would ask you if you might take a moment after to submit an answer for the record. I am just curious, what are those things that stand out the most in your mind as those cases that have had probably the greatest impact from this unique and wonderful Court on which you are about to serve; what are the ones that have had the most impact?

And with that, seeing that we are voting right now, we will recess, subject to the call of the Chair.

Thank you.

Judge BREYER. Thank you.

[Response of Judge Breyer and the prepared statement of Senator Leahy follow:]

JUDGE BREYER'S RESPONSE TO SENATOR LEAHY'S QUESTION

LEADING CASES

In response to Senator Leahy's request that I identify Supreme Court cases of particular importance decided since I graduated from law school, I am providing the following list of decisions, the importance and wisdom of which are, in my judgment, widely accepted.

1. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). This case redeemed the promise of our democratic form of government by ensuring an equal vote for every citizen.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While the exact contours of the right against self-incrimination remain a subject of debate, *Miranda* established the basic proposition that the Fifth Amendment would prevent the most serious abuses of official power.

3. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). By reinvigorating the clear and present danger test in a case involving the Ku Klux Klan, this decision affirmed the fundamental principle that the First Amendment must protect even the speech we hate.

4. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Craig* v. *Boren*, 429 U.S. 190 (1976). These cases established the critical principle that the Fourteenth Amendment's guarantees extend to gender discrimination.

5. *Mistretta* v. *United States*, 488 U.S. 714 (1989). This decision is important not so much for its specific subject matter (the Sentencing Commission) but more generally because it reintroduced needed flexibility into the constitutional separation-of-powers analysis, ensuring that Congress and the President can meet new challenges to effective governance posed by complex modern problems.

PREPARED STATEMENT OF SENATOR LEAHY

Mr. Chairman, I conclude my round of questioning with these observations: I want to commend my colleagues for their thoughtful participation in these most important proceedings and to commend Judge Breyer for the way he has conducted himself and his willingness to reveal something of himself and his thinking.

Quite frankly, I would have liked him to be even more forthcoming and specific in his responses, but I acknowledge that the appropriate line is difficult to draw and recognize that my frustration may reflect my own perspective as a Senator asking questions.

I have sensed through the course of these proceedings a disappointment among some that there has not been more controversy surrounding this nomination, that we have not had to endure a donnybrook or witness a wealth of political maneuvering. I suggest, to the contrary, that we should take pride in what is transpiring here: This is an occasion when all three branches of our Federal Government can be seen working together smoothly and efficiently.

I hope that the members of the public who have had an opportunity to join us over the last few days either in person or to witness these proceedings on television have taken something positive from them. I again commend President Clinton for having chosen a nominee who can bring people of diverse political views together and who has engendered such praise as an excellent choice.

Finally, if I might, I say to you, Judge Breyer, that after you are confirmed I hope that you will successfully resist the pressures to become cloistered away from the world. I think that your involvement with your family, demonstrated throughout these hearings, provides some protection for you. I doubt that your active wife and children are going to allow you to lose touch.

In your opening statement and your answers over these last three days you have indicated your intention always to remember the effects that your decisions will have on real people—people who may not be powerful or well-connected. You have demonstrated that you have not only mastered the complexities of the law but are the fulfillment of your parents' influences toward public service and to awareness of the impact your work will have on the lives of others.

So I urge you even while sitting on the High Court to be of the world. I do not suggest that you tailor your opinions to the winds of public opinion. Rather, I urge you to remember that you have learned about government and people. I call upon you to fulfill the promise you made to the American people as these proceedings began—to remember that the decisions you help to make will have an enormous effect upon the lives of many, many Americans and to do your utmost to see that

those decisions reflect both the letter and the spirit of law that is meant to help them.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Grassley.

Senator GRASSLEY. Thank you.

We went through legislative history, and I want to go back to legislative history, but not in the general way I did the first time. I will be a little more specific this time. I am somewhat concerned about some of the answers you gave me about statutory construction yesterday—or, I guess it was 2 days ago, now. In light of that, I want to ask you about your 1992 decision in *Paleo.*

Paleo, for the benefit of those who do not know, had been convicted of four violent crimes, and under Federal law, a person with three or more violent crime convictions who possesses a firearm—and that is a very important ingredient—faces a 15-year mandatory minimum sentence. Paleo, as you recall, argued that the mandatory minimum sentencing provisions did not apply to him because he claimed that three of his convictions were constitutionally invalid. You ruled that the statute required that the criminal be allowed to challenge his prior convictions in Federal court.

Last May 23, this year, the Supreme Court ruled in *Custis* that the same statute did not permit the defendant to challenge his conviction prior to sentencing. So I want to kind of compare your opinion with the Supreme Court's.

For instance, the Supreme Court interpreted the key terms in the statute—three words—"three previous convictions"—according to the statute's very plain language. In other words, as I would read it, someone who has three previous convictions has in fact three previous convictions.

Now, in contrast, I think your opinion did not follow the plain language, and you did not identify any compelling legislative history to justify your departing from the plain language. I think that you interpreted the statute according to what interest you believed the Government had in the operation of the statute, and you wrote that:

> The Federal Government has no recognizable interest in imprisoning a defendant on the basis of convictions that are constitutionally invalid.

I suppose that your approach would be an example—and even beyond you, I suppose—of a judge who would use a style of statutory construction that would give me some concern. I am concerned that such a judge might in fact be what I do not like, a kind of activist-type judge who wants to put his own ideological imprint on something, because often, activists narrowly define the Government's interest at stake to rule against the Government.

It seems to me that the Government's interest is having its statutes enforced according to their plain terms and in getting dangerous criminals locked up for long, long periods of time.

I want to know why you interpreted the statute according to what I see as being maybe your own views, instead of the Government's interest, since you did not quote any legislative history. You applied your view of the Government's interest, instead of what I see as very, very plain language of the statute.

Judge BREYER. A difficult case. I think that if in fact I could have read the statute, "three prior convictions," to mean what you say—three prior convictions—the case would have been much easier.

The problem in the case arose from the fact that you could not read it that way because the Supreme Court had said at least some of those things that say convictions are not convictions.

They had said, for example, that one of those previous convictions was a conviction that was obtained without the person having a lawyer; then, it is not a conviction, even though it says "conviction."

So the dilemma—and this is why it was so very difficult—is it assumed by everybody, everybody agrees, that you cannot just read "conviction" to mean conviction. Certain ones do not count. Those without a lawyer, for example, do not count. And now the question is are there some other ones that do not count. And the simplest thing seemed to me to be to say those that are unconstitutional do not count, because if you do not do it that way, you would have to say there are some unconstitutional convictions which are convictions, and there are other unconstitutional convictions—those without a lawyer—which are not convictions. And I did not understand how to draw that distinction.

On the other side of it was if you take the approach I just said, won't it become very, very difficult for judges to work at sentencing hearings? Won't people challenge it all the time? And what you have in so many of these cases which was present there is you have some very strong policy reasons, which policy reasons are a key to try to understand how Congress would have wanted a statute interpreted where the language cannot be read literally, and where there is no legislative history. And where there is not, I am trying to put myself in the shoes of a person in Congress who has an objective, who is faced with the same kind of interpretive difficulties that I would be faced with.

The Supreme Court went along with the opposite approach, I guess, which is that it is better to say there are different kinds of unconstitutional convictions, and some of them count, and some of them do not count. That is a reasonable view, too, and I did decide it the other way, and they are authoritative.

But I do not think one view or the other is more or less a departure from the statute. I think in both instances, what you are trying to do is interpret a statute in conditions where it cannot be read just literally because of the circumstance I mentioned.

Senator GRASSLEY. Well, could I ask you if, given what you know about the Supreme Court's opinion in that *Custis* case, would you have decided the *Paleo* case differently, either in terms of results or reasoning?

Judge BREYER. It would have had to come out the other way, in my opinion. I know there are some distinctions. We actually—the decision in *Paleo* was a very close, very difficult decision that we debated quite a lot, and I do not like to give a legal opinion, and so you are getting an off-the-cuff response to the Supreme Court, putting myself back, and most of the lawyers, I think, and the judges in our circuit would say that the recent Supreme Court opinion suggests it should have come out the other way. I do not make that statement definitely, but——

Senator GRASSLEY. Let me contrast your opinion with the Supreme Court's decision—and then ask you to react to that.

The Supreme Court did not find that the statute contemplates that defendants could challenge their prior sentences. They pointed out that another provision of the same statute says that a Federal court cannot count a conviction "which has been set aside." To me, this surely means that the defendant's convictions that have not been set aside will be counted as the three strikes for an enhanced sentence. And the Court analyzed other statutes that provided specific procedures for challenging the validity of prior convictions used to enhance sentences. So Congress has drafted clearly in this area, both when we want to allow challenged convictions and when we do not.

The Court also cited a 1980 Supreme Court case, interpreting a prior version of the same statute to disallow challenges to convictions. So then, that would lead me to ask why you did not consider the other portions of the statute—or other statutes where Congress expressly permitted defendants to challenge their convictions, or even this 1980 Supreme Court case.

Judge BREYER. I think that is all there, Senator, and I think that what I am trying to do and I think most of us in the judiciary would try to do is to try to work out what the intention of the Congress is. The question that was a stumbling block for me and is in the Supreme Court opinion that you read is, well, prior precedent of the Supreme Court—which, by the way, they are free to modify or interpret. We are not free to modify or interpret. Prior precedent of the Supreme Court said that the defendant could challenge some prior convictions; for example, convictions that were obtained without a lawyer.

That being so, what is the rule as to when a prior conviction could be challenged and when it could not? Are there different categories of constitutional violation? Are some more important than others? I cannot answer that question as a lower court judge.

Looking at precedent when I looked at it, I found that there, and whether I was right or wrong, I thought that was a major stumbling block to the interpretation that the later court came up with. That was my thinking at the time, and that is what I tried to express in that opinion.

Senator GRASSLEY. *Paleo* is about ineffective assistance from a lawyer as opposed to the denial of a lawyer.

Judge BREYER. Yes, exactly. Exactly.

Senator GRASSLEY. And that is what *Custis* is about.

Judge BREYER. Exactly; and the Court, the Supreme Court has the power to say, look, there are differences in a conviction being unconstitutional because the person did not have a lawyer and a conviction being unconstitutional because he did have a lawyer and the lawyer acted ineffectively. The Supreme Court has the power to say those are two different things.

As I interpreted it at the time, I did not see how to say that they were two different things, that they were different kinds of constitutional violation. I recognize the argument. You had to do it one way or the other. You had to say there are different kinds, or you had to create the procedural problem. And I thought more closely—

to the intent of Congress was the way I decided it, and the Supreme Court said later, no, it was the other way.

Senator GRASSLEY. I guess I will move on. I would just like to leave a message with you. That would be in regard to the fact that we are now working on a crime bill where we hope to make very clear, three strikes and you are out, three prior convictions and you are out. And maybe what you are saying is we have not done it plain enough in the past. I think we have. I think the Supreme Court has differentiated enough, and I guess maybe I would just, based upon the *Paleo* case, ask you to take a view at whether or not we were clear enough in this instance.

There was a recent column by William Raspberry in the Washington Post. After surveying various studies, Mr. Raspberry has come to a conclusion that the most effective antipoverty activities are provided by religious institutions. He finds that church-based drug rehabilitation and antiviolence programs are more effective than others.

However, he is concerned that the establishment clause, that the Supreme Court has found blocks almost all public funding for parochial schools, might also be interpreted to bar aid to these very successful church-based antipoverty programs.

I hope I do not have to say that I respect separation of church and state, but I also believe that what the establishment clause demands is neutrality toward religion. And I think a little bit along the lines of Senator Brown. I think that when the Government goes too far in avoiding religious issues, sometimes you can have government promoting secularism. I do not try to convince you that that can be a form of religion, but it seems to me the absence of religion is something we have to be concerned about in a society that has a moral basis for our existence.

I think that you may also agree with what I just said about neutrality toward religion based on a 1989 decision of yours involving busing of parochial school students. The Government need not be hostile to religion to comply with the first amendment. It need not aid all antipoverty organizations except church-based ones.

Can't Congress, consistent with the establishment clause, pursue the secular objective of trying to eliminate drug use and violent behavior and poverty by neutrally aiding a whole range of entities that have programs in these areas, including religious organizations?

Judge BREYER. There are areas, vast areas, as I really said yesterday and the day before and would say the same tomorrow and every other day, that there are vast areas where it is obvious that churches receive assistance from the Government. The area of social services, the area of fire departments is the obvious example I use, but there are many others. And there are tax exemptions—tax exemptions aimed at religious institutions. And there are various busing, as in the opinion that you read. And the difficult question, when you say neutrality, of course, immediately that is fine. In the context of any individual program, what happens when there is a challenge in court is someone says, yes, we understand that; yes, you are absolutely right. But this particular one goes too far.

Then what you have in a court case is the issue about whether this is or is not going too far. And what I can say is I consider those open-mindedly. You understand from my opinions in this area that I have a practical bent of mind to see if it really is going too far, not some theory, and that I will try to decide those cases in that light.

Senator GRASSLEY. In deciding establishment clause cases, do you see yourself being more inclined to fine tuning as opposed to making sweeping changes?

Judge BREYER. It sounds to me most of these cases that have come along have been involved in line-drawing, and is it really going too far up here, or is it not quite far enough? Is this too far or isn't it? That is my impression of most of what comes up in recent years in this area.

I cannot promise there will not be major cases that come up. Obviously, there may be.

Senator GRASSLEY. I have a question about our jury system. A number of recent criminal trials have garnered huge amounts of publicity, as you know. They also share something else in common. It seems like whether it is the Menendez brothers or whether it is John and Lorena Bobbitt or the police attackers of Rodney King or the attackers of the truck driver, Reginald Denny, the defendant was either acquitted outright or acquitted of all really serious charges.

Now, remarkably, this occurred in this last instance, in the case of Denny, despite the fact that that was captured on TV videotape.

Do you now believe that the jury system functions as well as in criminal trials as it has in the past? And do you have any suggestions about how to improve the function of criminal juries?

Judge BREYER. It is interesting. Of course, I am not a trial judge, but I talk to trial judges. And what is interesting to me when I talk to trial judges is the enormous faith that they have in the jury system. And again and again they will say, particularly in criminal trials—it is very interesting because at lunch we discuss this every so often. And in the district court in Massachusetts, the judges that I usually have lunch with, you know, quite often, they say it works. It works, again and again. And I do not promise you—and no one would—that it always works, that it works perfectly. But you do discover a tremendous sincere belief on the part of judges over and over in the value of the that system, that it does basically work pretty well. The jurors are admirable in contributing that time and effort.

So I know that people, thoughtful people like you and me, I hope, and many, many others, are concerned with the way in which the right to fair trials interacts with the free press right. But the basic idea of the jury and the way it is working, my sense is among people who deal with it, they think it works.

Senator GRASSLEY. Even though it is working somewhat differently in recent years than maybe it has historically, I do not think there is anything basically wrong with it. It was meant to have the opinion of the community involved in the determining of justice.

But I think there is something disturbing about the last 30 years. It seems like society has been less willing to hold people re-

sponsible for their actions in general. This is particularly true concerning crimes. What were once poor excuses are now frequently accepted as justification for finding the perpetrator to be a victim. Additionally, it seems like respect for all of our societal institutions, whether it be Mom and Dad in the home or our schools and the teachers in those schools or our churches and synagogues and the pastors and the priests and the rabbis connected with them, as well as even law enforcement, the respect that they used to have, it seems to me, has eroded greatly in the years. And the criminal justice process, the laws and the judges' instructions are not immune from these trends. I think maybe we are seeing some of this reflected there, especially since the jury was designed to reflect community sentiment. It might be reflected there like it is in other places.

What suggestion would you have for those of us in the legislative branch who believe that we have got to stop blaming society when an individual commits a crime, and make people realize that they have to be responsible for their actions? And how do you suggest we restore respect for institutions, including our criminal justice system that sometimes loses respect when it looks obvious to the public at large somebody is guilty and they get off?

Judge BREYER. Of course, I agree that the trust problem is amazing. It is an amazingly big problem for institutions.

In the particular area that you are talking about, what I have said publicly—I hope it is not overly optimistic; many would think it is—is that not all the solutions are legislative; that if, in fact, you get members of the bar who are interested in criminal defense work as well as those interested in prosecutions, and members of the press, and they get a sense of what each other's problems and responsibilities and so forth are, very often some of the things that you are concerned about that interfere with fair trials or whatever can be ironed out outside of the legal system, outside of laws and legislation, from people simply understanding the institutional problems of the other.

That is the kind of thing I have talked about. I think it is still possible.

Senator GRASSLEY. When you say you have talked about it, do you mean publicly or privately?

Judge BREYER. Publicly.

Senator GRASSLEY. Yes, and do you do it with the intent of trying to wake people up to the problem?

Judge BREYER. Yes.

Senator GRASSLEY. And when you see these problems, do you see yourself as a leader who ought to help direct public opinion to maybe look inwardly and trying to solve them and not always solve them through a government action?

Judge BREYER. I hope so. We so see ourselves in our own institutions. I so much see myself as a judge, and we become so narrow, in a sense, not understanding not just the other person's point of view but the institution in which they are working. I think that is true of press and judges and everyone else. And conversation in an effort to see the different perspective, that is what I have said publicly.

I have tried to encourage that, and I would try to encourage it still.

Senator GRASSLEY. You served in a number of different positions with the ABA, and you have done some of this since becoming a Federal judge. You have served on a governing body of the Administrative Law Section. I believe you have been a vice chair of the section's Judicial Review Committee.

As I am sure you are aware, there is much controversy these days about the role of the ABA. The ABA has deeply involved itself in a number of controversial social and political issues. Through its governing bodies, the ABA has taken positions relating to legislative matters such as abortion, civil rights, affirmative action, parental leave, the death penalty, gun control.

Just this past week, the president of the ABA stated his support for the Racial Justice Act, which, of course, right now has our crime conference bogged down.

The ABA has filed amicus briefs with Federal appellate courts, including the Supreme Court, addressing employment discrimination, good-faith exception to the exclusionary rule, capital punishment for minors, and the constitutionality of the independent counsel and legislative veto, and I suppose there are a lot of other things.

In light of the ABA's activity in policy areas, questions have come up concerning the propriety of judicial participation in the organization. In fact, in 1991, an ABA commission of judges, including four of your fellow Federal appellate colleagues, recommended limitations on judicial activity within the ABA.

Specifically, the commission suggested that judges be permitted to join various ABA committees and sections only if all policy statements and all briefs disclaimed that they reflect the views of its judicial members or that judges participated in the adoption of the views.

The commission also recommended that judges not participate in formulating or adopting ABA policies concerning matters on which the judge in his own name could not comment upon.

Finally, the commission recommended that no judge occupy any ABA position that would lead the public to associate that judge with ABA policy even if the judge played no role relating to the specific policy.

These recommendations were developed in light of the Code of Judicial Conduct. The code prohibits judges from taking stands on controversial legal issues, from making statements that might impair court proceedings, and from engaging in activities that might require recusal because they call into question the judge's impartiality.

In light of this report of the ABA's own commission, are you concerned about judicial participation in the ABA? And what role do you intend to play in that organization if you are confirmed to the Court?

Judge BREYER. The approach of that report—I am not saying that I agree with everything in that report, but the approach of that report is an approach that I would call disclosure, and what I would think would be clear to the public anyway. The Administrative Law Section of the American Bar Association has taken the

positions that are controversial that you describe, and I think it should be apparent through ABA policy that they are not speaking for judges when they talk about something controversial that judges have no business talking about.

And in the Administrative Law Section, should something have come up that I thought was something I should not express my view upon as a judge, I would just say so, if it was not apparent to everybody from the situation that that was the case.

I would not like to see membership in that association by judges discouraged. I do think it is so terribly important for judges to be associated with members of the bar and to be able to have forums where they can discuss problems of judging, the institution of judging, problems of the bar, problems of the litigants that lead to the bar, having clients. All these matters are terribly important, in my opinion, to discuss outside the pure ivory tower of the judiciary.

And I see the American Bar Association as offering forums where those kinds of discussions are encouraged and appropriate, and I favor that.

Senator GRASSLEY. Could you think of maybe one example of where you have not associated yourself with or spoken a point of view in the association since you have been a judge?

Judge BREYER. There are things that come up. I think that——

Senator GRASSLEY. You think there has been some time, when you have not associated with the ABA's point of view?

Judge BREYER. Yes, on the ABA, there would be in the council in the Administrative Law Section, things would come up and I would just say this, of course, doesn't include me. I can't pinpoint it, but I do have a distinct recollection there have been such instances.

Senator GRASSLEY. Since crime has become a very serious concern of so many communities around the country, and particularly the increasingly violent and even the random nature of it, and the fact that even a lot of young people are committing more crime and even more serious crime, citizens of some of these communities have tried to keep young people from joining gangs and/or committing crimes, and one method they have used has been to impose curfews on youth.

The Washington Post had a front-page story this week that reminded me of this, and they said almost 1,000 jurisdictions across the country have done this. The curfew reflects a belief that, after a certain hour, it is important that kids be at home, not hanging around the streets without supervision and, in the process, being exposed to very dangerous situations.

Some communities interested in enacting such curfews have been discouraged from doing so, because of concerns regarding the first amendment. Indeed, some judges who usually live in the communities, totally isolated from the crime-ridden world, as they do, have found some curfews unconstitutional. That is not meant to be derogatory, but I presume most judges don't live in crime-ridden areas.

It seems to me that the case law is quite clear that children do not have the same constitutional rights as adults, and it also seems to me that the interest of keeping children from being in situations where they can be recruited to commit crimes, where they actually

commit crimes, and where they are victimized by crime is a very compelling argument for curfew. If local communities want to do it, we should let them do it.

I know you cannot express your views on specific language of any specific curfew, because you might be dealing with that. But what are your general views about whether the first amendment prevents communities from imposing curfews on juveniles?

Judge BREYER. I know your general statement that a child is different and in need of greater protection is correct, it is an important interest. There are circumstances in which curfews, I am sure, are normal in various circumstances in which they have been upheld.

The constitutional argument which you say is being made means that I have to be cautious, because I would absolutely want to approach that with an open mind, and so it is hard for me to go further into that. The interests that you identify, I am absolutely certain are there. In other words, I can't easily discuss this, as you say, which is totally true, that it is likely to be the subject of a case.

Senator GRASSLEY. Mr. Chairman, I do not have another question, but I would like to take 2 minutes to do a Metzenbaum and just ask him to consider something.

The CHAIRMAN. I think everyone is entitled to be a Metzenbaum at least one time in their life. I am a Metzenbaum today. That is why I am wearing this tie. [Laughter.]

While you are preparing your question, I should point out that a number of press have asked me about this tie. This tie is a consequence of some of my colleagues in the Senate, particularly the Senator from the State of Washington, Patty Murray, walking up to me and looking at me and saying, "Joe, I must tell you, you are very dull," and then saying, why couldn't I be more like Howard Metzenbaum.

Now, I have been here a long time and this is the first time anyone has said that to me, and so I went out and got a Metzenbaum tie. So you can ask a Metzenbaum question.

Senator GRASSLEY. Well, I am not sure your tie is protected by the first amendment. [Laughter.]

The CHAIRMAN. They are cartoon characters, for the record.

Senator GRASSLEY. Yesterday, we discussed the Supreme Court's decision on illegitimacy, and I appreciate what you said, that you would keep an open mind, if someone asked the Court to overrule those decisions, in light of the changes in our factual underpinnings that have occurred over the last three decades.

Throughout its history, the Supreme Court has overruled constitutional decisions. Since the 1960's, the Court has overruled, I think, more than 160 constitutional decisions. This has occurred, in the words of Justice Brandeis, who, of course, was 40 years before that, because, "Not only the decisions of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Moreover," he continues, "the judgment of the Court in the earlier decisions may have been influenced by prevailing views as to the economic or social policy, which have since been abandoned."

Now, it is one thing for the Supreme Court to overturn decisions which were always contrary to the original meaning of the Constitution and which were based on faulty social theory, as I think these illegitimacy cases were. In hindsight, the Court's theory of social engineering that its decisions would not increase illegitimacy have turned out to be wrong statistically, as well as practically. We see it every day.

It is quite another thing to say that the meaning of the Constitution changes as society changes. That view suggests that Justices conduct an ongoing constitutional convention in which the law is made up as the judges go along. Overruling decisions that were never true to the Constitution in the first place is, as you understand, a judicial obligation. But the Constitution is not up for grabs with every case. Changed circumstances permit judges to justify and to change the application of the constitutional provisions. Changed circumstances do not change the core meaning of the provision. The latter belief makes it too easy for judges to enshrine their own personal prejudices into constitutional law.

So that is what I submit happens and did happen in some of these illegitimacy cases, and we have had terribly disastrous results for our country, and there is bipartisan unanimity on it. And if the President speaks in the State of the Union Message saying that we have got to do something about the illegitimacy problem, you know it is bad.

So I hope that if you are confirmed to the Supreme Court, that you would keep this distinction in mind between what is the basic Constitution as what is the application of those principles to the things of the day.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

Now we are going to move to Senator Heflin. Again, let me make it clear that it is 5 o'clock, but we are finishing tonight. So I would ask staff to let their principals know that if they have questions, please be ready to ask. I see two other of my colleagues are here prepared to go, but I want all the staff to know that we will finish with the witness tonight.

Senator Heflin.

Senator HEFLIN. Judge, in an article entitled "The Regulation of Genetic Engineering," you argue that the Government should refrain from the regulation of genetic engineering. In your article, you reference the existence of strong natural forces that tend to contain and reverse undesirable practices in connection with genetic engineering.

Would you say that these strong and natural forces govern the field of bioethics generally?

Judge BREYER. That, Senator, was a brief article years and years ago. I think it was written at a time—I don't know much about genetic engineering now, and I can say I knew less then—it was as time when people didn't know a lot about it. And I think the thrust of that was get to the scientists and find out what is really happening before you enact specific legislation. I think that was the thrust of the article.

I think since that time there have been programs in the legislatures, in statutes. I think that the executive branch has acted in

a variety of ways to try to assure adequate protection in that area, like others.

Senator HEFLIN. Well, are you skeptical of the efficacy of governmental intervention in bioethical issues?

Judge BREYER. No; it would depend on what it was. The ethical issues are very, very important, very important. If I am remembering correctly, one way in which some of those issues—I think Professor Freund wrote an article suggesting you try to get members of the community—doctors, ministers, and others—into groups that can jointly work out the way of dealing with some of these implications and problems. That kind of approach, too, not necessarily the only approach, but that can be a possible approach.

Senator HEFLIN. I think it becomes pretty clear that you try to pattern your thoughts in some organized fashion, and the word "technocrat" has been frequently used in descriptions about you. I know that technical approach has sometimes been criticized. I think Cardozo once warned of judges who become pharmacists, on the idea that they were unduly fond of neat formulas in which they separated the cases and they separated their thinking. Do you have any feeling that you are unduly a technocrat?

Judge BREYER. I hope not. I hope what I am doing is using the technical part to try to uncover the human purpose that we are trying to help. Airline, et cetera, that was technical, you can say, but they are real human beings who couldn't afford to fly, and those real human beings have benefited, if it is a lower electricity rate, it is a lower air fare. All these technical things have to do with real people and may affect their lives a lot.

I plead guilty to a dry style of writing. That is to say when I wrote this book on regulation, the object of which, of course, was to produce a style of regulation that would be effective and that would help people. The Los Angeles Times, in reviewing that, said—I don't know how the Los Angeles Times was reviewing a technical book, but they did, and they said, well, Alice, when she emerged from the pool of tears in "Alice in Wonderland," turned to the door mouse, who was reading Hume's "History of England." "Why are you reading that," said Alice. "We are all wet," said the door mouse, "and this is the driest thing I know." That was before, said the Times, Judge Breyer wrote this book. [Laughter.]

Now, I plead guilty to that, but the purpose is a human purpose.

Senator HEFLIN. You know, there are problems that we are facing, and one of the problems we are facing in the judiciary is the issue of backlogs and the creation of new judgeships. We have a number of judges that we are trying to approve or go through the confirmation process at trial and appellate level.

In some circuits, there are proposals, on the ninth circuit particularly, to increase the number of judges substantially. I think the ninth circuit has 29 judges, and the idea is to increase the size to 38. Do you think that we need to try to relook at the organization of circuits? I will ask you this, with an idea of having more of an effective administrative approach toward it for decisionmaking. Have we gotten so big in the judiciary, with so many judges, that we need to relook at some alternatives that might be available?

Judge BREYER. This is an area that you have thought about a great deal, I think, from reading what the commissions have been

that you have been on and your own experience. There are a limited number of alternatives, and eventually, I guess—you know the door-closing approach doesn't work very well. The reorganizing having more and more appellate judges has its problems. I sometimes describe that as judges can cause confusion, as well as enlightenment, and there are limitations on size and numbers at the appellate level, certainly.

The commissions have recommended, at least for future study, the possibility of additional tiers in the Federal system. Without advocating an approach, I think that eventually Congress and others like you yourself who are interested in these problems will begin to look at restructuring. That may happen. It may happen in 10 years, it may happen in 30, it may wait and see what happens to the growth.

The ultimate problem is delivering justice to people who have problems. That is the basic bottom line. If it keeps growing and growing, somehow, without depriving the public of justice, you have to work out the effective way of doing it, and that could involve restructuring at some point.

Senator HEFLIN. At the trial level, you know, we passed legislation in the Biden Civil Justice Reform Act authorizing various alternate dispute resolution techniques. There are those, including myself, who have some question about the constitutionality of the mandatory aspects of ADR that might remove the right of trial by jury. Do you have thoughts pertaining to alternate dispute resolution and whether its various forms can be effective? Do you have any advice to leave us before you assume the black robe, and probably will not give us too much advice then from a legislative viewpoint?

Judge BREYER. I don't have better than you have, the ADR, et cetera. There are human beings in the world. Those human beings have problems. They get into disputes. Really, I think what they are interested in, those people, are two things, to get the problem resolved and to get it resolved fairly.

Now, ADR, mediation, all those things have an enormous role to play, because they can sometimes get people's problems resolved faster, and then we have to watch, because there is a price that could be paid in terms of fairness that you nor I nor anyone wants to see paid. So I end up usually thinking, yes, it is a good idea to look at all those things. They can produce wonderful results inexpensively. But watch, be careful that that system doesn't turn into an unfair system.

Those are the two general things in my mind that I think about with that.

Senator HEFLIN. You reviewed a book in the New York Times entitled "Private Choices in Public Health." In that book, the authors, Philipson and Posner, who are with the Chicago School of Economic Concepts—and you have been accused of following that—used economic theory to answer the public policy question of how much the Government should spend on AIDS research. In reviewing the book, you suggested that in matters relating to health and safety policy, the Government should not use economic principles alone in determining appropriate allocation of resources.

In that book, you indicated that Government allocates considerable resources to people who, by their own choosing, put themselves in danger, such as those who live on fault lines in earthquakes, and we come back and help. I think you used the illustration where we rescue mountain climbers, even though they know the perils of where they are going into.

What principles do you think, not just economic principles, that one ought to follow in trying to follow the thing in a rational and systematic fashion? What thoughts do you have on that? In that book review, some questions are raised that are interesting, and, of course, the issue of AIDS is something that is in the minds of a lot of people today.

Judge BREYER. The thrust of the review, it was a restrained style. As I said, maybe my style is dry. I hope my thinking isn't dry. My thinking was that, no, economics doesn't. So a person had gotten into a bad fix and it was his or her own fault, to which the response is so what, so what? If somebody comes to your doorstep and they are in trouble, you help them. You help them, even if maybe it is their fault. So what?

In that kind of decision, I am not saying if you want to evaluate a program or you want to know how well something is working or you want to compare some alternatives, maybe economics has some role there. But to the basic question of how do you help, that is not an economic question. That is a moral question, and it is that kind of thing that I think people should appeal to in that area, and that is the kind of thing that they do appeal to, and you have to decide those things as matters of legislative policy.

Senator HEFLIN. You have been asked about legislative history, and this gives me some concern about the overall way that judges interpret statutes, et cetera. I suppose that maybe my own thinking is that I may be halfway between Justice Scalia's concept and yours.

We had, for example, the Vietnam war that occurred. Some people argue that that was unconstitutional, because Members of Congress did not intend to authorize the President at the time to expand the war in the manner that he did. If, however, you read the resolution, it was so broad that almost any exercise of Presidential authority in Indochina would be in conformity with the language of the resolution.

Now, you could go back and find legislative history, pretty much, that would have been that it was not intended to be as broad and as comprehensive. Now, you have a situation where that occurs, and then it may have been the authors' intent to give broad language there. So it is a problem as to how far you go relative to the language and how far you go in regards to legislative intent.

I don't know, again, maybe a technocrat can decide some of these issues, just like we have, of course, rules of statutory construction, and it may well be that you have to have some type of rules that need to be looked at.

For example, report language, which is basically the report of the chairman of the committee, but it may not be on the floor when the discussion goes on, has been really the intent to go that far, or else the Members of Congress did not read it and did not understand it.

Another instance is where you have colloquys that are put into the record and not read, but they are supposed to give legislative intent. And sometimes, we use them as a way of reaching compromises, and it seems to me that it causes problems for judges.

Report language—Justice Scalia makes a point that they never voted on, and he says that you give attention to the report language, and nobody ever votes on it, so you do not know whether or not it really was the intent of the overall Congress, or was it the intent of two or three individuals.

It just seems to me that you are going to have more and more, and you are going into a situation where you have got someone who has strong opposite feelings, perhaps, from yours—but maybe we will rely on your consensus-building ability to come up with some rules relative to it. I think there is a need for some rules relative to how legislative history ought to affect the decisions that are made relative to the interpretation of the intent of Congress.

Do you have any comments on how far you think we might go? Do you see problems with just outright saying, well, Congress says—and here it is in the Congressional Record?

Judge BREYER. It depends. I think no process works perfectly, but I would like to think that in writing reports, there used to be—and I think there is—it is a method. The different staffs of the Senators who are involved in that are supposed to, and when it is working well, they understand their Senators' positions on matters of policy, and they keep everyone informed.

It used to be before any report came out, there were no secrets; everything is circulated to everybody, and they are supposed to read it and understand whether that correctly reflects the view, the policy view, of the Senator who did the voting.

And I do not know if it always works perfectly, but it is supposed to be circulated, open, understood, and reflect the policy.

Looking to reports—yes, sometimes. Sometimes floor statements can help, and sometimes, for reasons that you say, they do not. I find it more of an art, and it is hard.

Senator HEFLIN. We are faced more and more in Congress with the issue of federalizing crimes that have historically been in the purview of the State legislatures for the crimes, and it may well be that they feel that the issue is such; but there are dangers, of course, of overburdening particularly, and judges are particularly alarmed with the idea that they are transferring more and more in the criminal field relative to it, and that that issue also has to be looked at with the Speedy Trial Act, and that civil litigation may suffer as a result of it because of the shortage of manpower, the procedures that we follow, and increasing particularly in regard to federalizing, putting more and more burdens on the Federal courts.

Do you have any thoughts as to what we ought to do relative to this?

Judge BREYER. My thinking is that people have a terrible problem with crime—it could hardly be worse; very, very bad—and they would like help with it. And in respect to jurisdiction, that is one aspect of the problem. That is not a determinative aspect.

So my suggestion, if you are asking for a suggestion, is that when Congress or a legislature of any State is working on criminal

jurisdiction, on criminalizing behavior, that they think out what is going to happen in practice when this law is enforced—who will enforce it; how; which courts will be affected—and then, with that in mind, make a judgment about how to create a system, including the way it gets into court, that will most effectively stop crime.

In other words, I am asking, I think, to think, whether it is the Justice Department, or here, or in other places, that they think through ways of allocating crime-fighting resources as well as courts, so that overall, you are more effective in the aim of fighting crime.

Senator HEFLIN. We have a number of problems dealing with the issue of armed conflicts, and the Constitution relative to Congress' power to declare war. And we have adopted the War Powers Act, but there is a lot of feeling that we have gone to the extent where executive decisions are made under the constitutional authority of Commander in Chief, and that Congress, the representatives of the people, have not really authorized the use of force in conflicts. However, that is debatable when appropriation bills are approved.

You, of course, have been here at various times. Do you have any particular thoughts concerning the authority and what ought to be done relative to this; or do you have feelings that the War Powers Act is a proper approach to this issue?

Judge BREYER. I do not have special thoughts that I would think would be particularly enlightening in that area.

Senator HEFLIN. Now let me ask you about the Judicial Conference. I am hearing more and more complaints that in the rulemaking power that the courts have—they send over their rules to us, and we have a 6-month period in which to act to negate or to change during that period of time. I hear more and more that there is too much judge participation and not enough lawyer participation in the rulemaking process. And there are feelings that when you get into judicial reform, that if you leave it to judges alone, things will not change. I think C.K. Chesterton wrote a line one time saying the horrible thing about all judges, legal officials, barristers, and sheriffs was not that they were corrupt, or not that they were incompetent, but that they had become used to it, and therefore were not really looking to make much change that needed to be made. And we are living in times where change is occurring in so many different fields that we may well be looking in the future toward some changes.

But what has been your experience relative to—you mentioned a while ago the American Bar Association and the relationship between judges and lawyers getting together to have a forum where they can discuss issues. It seems to me that probably the Judicial Conference and the advisory committees have moved away from lawyer and public participants more than they should, and that that input is needed.

Judge BREYER. The input is important; the input is good. The Conference itself works mostly through committees. The biggest change that has been going on is the change resulting from the law that you described earlier, Senator Biden's Civil Reform Act, and that requires committees that are made up of lawyers and all kinds of people who are not judges to have input into that process.

My impression has been that that input has been important and has worked pretty well.

Senator HEFLIN. I think that concludes my questions.

The CHAIRMAN. Thank you.

Judge on that score, there was a great deal of resistance at the outset because of the very reason of including those folks, but I must say I have been very pleased that most of the circuits have, in an unsolicited way, come back and said, you know, this has turned out to be a good thing for us.

I think Judge Heflin has a point about the Conference itself.

But I yield now—and again, just a little mechanical scheduling here—I will yield to Senator Specter now, and what we will do then is we will have a break, but——

Senator SIMON. Mr. Chairman, I am going to have about 5 minutes, or 10 minutes at the most, of questions.

The CHAIRMAN. Well, maybe, if it is OK, we can just finish with Senator Simon, and then we will break. And then what we will do is reconnoiter 10 minutes after that and find out how many other Senators have questions. I do not think there are many more questions, Judge, and you are holding up well—your physical constitution is impressive—and then we will make a judgment as to how late we will go. But we are going to finish with you tonight.

So again, I say to the staff, please tell your principals to head on back if they have questions.

I yield to the Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Breyer, I not only compliment you on your stamina, but your family on their stamina. Of all the participants, the Senators have moved in and out—we have had votes and floor matters—and not only have you been at the podium all the time, but your wife, your three children, your brother, your sister-in-law. So it is a very impressive family support.

Judge BREYER. Thank you. I thank them, too.

Senator SPECTER. When I finished my first round, I was asking you questions about *U.S.* v. *Ottati and Goss,* which involved the question of potential conflict of interest. And I said at the time that I did not think there was an actual conflict of interest or anything which undermined the question of your integrity.

The question which I could not come to because of time limitation was on the issue of Lloyd's potential liability on Superfund cases; whether the principles that you set down in the *Ottati* case might have affected many other factual situations where Lloyd's could have had potential liability. And it has been called to my attention that Justice O'Connor recused herself in two cases in which NCR was a party in a tax challenge, and then participated in a case involving Colgate-Palmolive Co. on an almost identical issue which might have indirectly affected NCR's liability.

The question which comes to my mind is whether there are not ramifications which bear on public confidence, which should lead us to take another look at the language of the disqualification statute, which calls for disqualification, recusal, in a number of situations. One is "any other interest that could be substantially affected by the outcome of the proceedings." So that if a judge is to decide Superfund liability, even though it does not involve Lloyd's, the

judge does not have an interest in any corporation, is not a party, but those principles could affect a company in which the judge does have an interest, that a broader look ought to be undertaken. And you and I had a moment in our closed session to talk about such potential liability, and you used the word "proximate cause," which is a complex legal doctrine that befuddles many people as to how far it goes on proximate cause. Lawyers will remember the *Palsgraf* case, a traditional law school case, which illustrated how hard it is to find out what is a proximate cause.

And in the light of this issue, which is very much on your mind and our minds, if you have a view that there might be a modification of the recusal statute which would be broader—because when people watch these proceedings, and disappointed litigants are sometimes very, very disappointed—if we ought not go the extra mile.

Now, I realize we do not want to dissuade lawyers from undertaking judgeships when they have investments, but my experience has been that lawyers are very interested in being Federal judges, very interested in being circuit judges, and even more interested in being Supreme Court Justices.

So might it not be worthwhile to broaden that recusal disqualification statute so that there is absolutely no doubt anywhere? I am not sure quite how we do it, but what do you think?

Judge BREYER. I think the general word, better than "proximate"—I do not know if that was exactly it—what I am thinking of with that is if the interest is—if there is only a speculative effect on your investment, or a remote effect, or contingent, then, under the present standard, you do not disqualify yourself. If it is a substantial effect, you do—direct, substantial—all right, those are the words.

And of course, as you point out, in that case, I did not think that there could be more than an indirect or speculative or remote effect on the insurance industry at all, let alone Lloyd's or my own pocketbook.

Do you want to change that standard—that is really your question. And I will sympathize with both things that you said. It is absolutely crucial that the integrity of the system be clear, that people have confidence in it, that they absolutely know that a pocketbook is not guiding a case. That could not be more important to me, not only personally—and it is personal—but to the system as a whole.

Now, if you are going to try to worry about—and it is worth worrying about—but you will find judges do have investments. It is perfectly clear that if any investment is directly involved in that case, a party, you are out, even if it is worth one penny; but where there is not that direct participation, the reason that the standard have evolved as they have, I think, is because it is so possible there will be remote or indirect connections in so many cases. Could a judge sit in an FDIC case if he owns real estate somewhere, knowing that possibly the holding could in some remote way affect the value of some real estate?

What is the possible remote connection—do you see why I think I agree with you that it is very difficult?

Senator SPECTER. Oh, I understand. I understand your views.

Judge BREYER. I am not saying that it is not worth thinking about. I think it probably——

Senator SPECTER. We will struggle with it. It is a legislative matter. I have absolutely no doubt that you were not in that case with any view to any money in your pocket.

Judge BREYER. That is true. That is correct.

Senator SPECTER. You would not be a Federal judge if you were concerned about money, really.

Judge BREYER. That is correct.

Senator SPECTER. You might not even be a Senator if you were really concerned about money. But the appearance, what litigants think is something very different. And the principles from that case are very far-reaching on Superfund liability and could involve lots of money. We allocated $8.5 billion for Superfund. So that is something that we will struggle with, but I think that the experience here today suggests that we would be wise to do that. It is a legislative issue for the Congress.

Shifting to another subject, Judge Breyer, there continues to be intensive debate in this country on the establishment clause and the appropriate separation of church and state. And I was pleased to hear you forcefully affirm Jefferson's view of the wall of separation between church and state. That is not a universal view. Rev. Marion Pat Robertson was quoted in the Washington Times on November 26, 1993, as saying the radical left keeps "talking about separation of church and state. It is a lie of the left."

The issue of the appropriate line comes up in a number of contexts. Now, there is absolutely no doubt that there is a valued place in politics for people with deep moral and religious convictions, just as there is a valued place in everyday life for people with moral convictions. And there is no doubt that we need more morality in our everyday life and not less of it. So there is no issue about excluding people from active participation in politics where people have deep religious and moral convictions. But the question emerges as to a mixture of church and state, where you have political activities which are intimately connected with churches, and there is the overlay of establishment—that is, help by the Government—fairly directly in the tax-exempt status which churches enjoy.

And I would like to call your attention to two specific contexts and then ask you a question. There are circumstances where political rallies are held in churches, and a flier announces "(Blank) for Congress. The (Blank) for Congress campaign is having our largest rally in the (Blank) church on (Blank) day." And at the Texas Republican Convention, there is a photograph of a placard for a specific candidate, on which it says a vote for that candidate is a vote for God.

The two questions which I would like to have your views on are, first, what is your sense of what is happening to basic American values involved in the mixture of this church and politics, and this mixture of church and state; and how would you approach the underlying constitutional issue—I am not asking you how you would decide a case, but how you would approach the underlying constitutional issue—on the implication of governmental financial sup-

port—establishment, really—for churches through their tax-exempt status?

Judge BREYER. On the one hand, I know I had a case in which I wrote that the school system, when they have a place open for public meetings, has to let churches meet there, too, religious groups, too. Certainly, there is support for religion in the Constitution.

When you come to the establishment clause, it is well established that that clause does not prohibit tax exemption. To the contrary, there is tax exemption.

Senator SPECTER. But the tax exemption is very narrowly tailored and cannot cross the line where there is any support for a political candidate—any support.

Judge BREYER. And when you get into areas beyond that, when you get into areas of definition when the support is greater, what I have said before—and it is hard to go beyond this—is there are difficult problems of line-drawing. The principle is fairly clear in the establishment area at the extremes. Some is absolutely permitted—the fire department, the tax exemptions of certain kinds, busing of certain kinds. Some is quite clearly prohibited. And then what you find are a difficult set of cases in this middle area, and what is going too far.

It is hard for me to be more specific than that, because those are the cases that do come up, that are difficult, that I would have to think about in light of the particular context. That is in the legal area. Outside the legal area, I am not expert.

Senator SPECTER. Well, you have not given me too much on how you would approach the legal issues, really, Judge Breyer; and you have not given me anything on your sense of values aside from the legal issues. We probe to get your thinking.

Judge BREYER. Yes.

Senator SPECTER. The one area which is not an impermissible mixture of Senator and nominee is values. So how about it?

Judge BREYER. Yes, I think that is a fair question. And as I saw what you described as the wall, what I saw as underlying that, which I think is more important today than ever, is that we are a nation—in terms of values—we are a nation of many, many different people, many different groups, many different religions, and each person's religion—mine and yours, and that of every other person—is extremely important to him, to her, to his family. And the history of the first amendment teaches us that that importance, legally, grows out of a world in which those religious differences on matters of such importance led to wars, death—and you still see that in some places.

And for that reason, the thing that must be preserved is the freedom to practice, the freedom to pass that along to your children. That is why schools are so important, and——

Senator SPECTER. Judge Breyer, those are—did you want to finish?

Judge BREYER. No, no.

Senator SPECTER. Those are generalizations which I have heard you say before, especially on the children, and I certainly agree with you. And in our society, we are urging people to come into Government and into politics with deep moral views and deep reli-

gious convictions. But do you share my concern about having political rallies in churches? It looks to me as if it is flatly against the prohibition against political activity, support of a candidate when a candidate is there, or where you have the mixture of "a vote for my candidate is a vote for God."

Does that give you a problem of our basic value on separation of church and state?

Judge BREYER. That is such a politically divisive and such a political matter, and so important to so many people in so many different directions, that I think I have to restrict myself in that very divisive, potentially, very uncertain area. I have to draw back to the law. And when I go back to the law and try to go further in how I would approach the thing from a legal point of view, remember the thing that I have tried to identify as underlying this is each person thinks, "My religion is terribly important," and each person is right. Each person thinks, "I want to pass this on to my children," and each person is right. But each person may think, or many may think, "It is fine if the Government favors me and my religion," but then, I would ask that person to think: But suppose it is not your religion that the Government is favoring? And that question, which asks for neutrality on the part of the people who practice religion—me and you and everybody else—that is the kind of question that the establishment clause is asking people to ask themselves.

Senator SPECTER. One final question on the subject before moving on. How would you approach the constitutional issue—I am not asking you for a decision, but an approach—of the constitutional issue that a religious group meeting in a church organizes itself as a political party, perhaps takes over an existing party, and then receives taxpayer funds through Federal law which authorizes the Treasury to defray the cost of a nominating convention for President?

Judge BREYER. Oh, I see. You are thinking of the Government program——

Senator SPECTER. Well, this is a specific Government program, there is specific authorization for paying for Presidential campaigns. And we do want people with deep religious and moral convictions involved in politics——

Judge BREYER. Yes, we do. Yes, we do.

Senator SPECTER [continuing]. But—but—how do you approach the line?

Judge BREYER. And can I go beyond the general thing that I have tried to say about asking ourselves: "It is fine if it is my religion. How do I feel if it is somebody else's religion?" and is this going to be impermissible favoritism, going too far, or is it the kind of thing that we find all the time——

Senator SPECTER. And these are people who do not believe, do not accept, the definition of church and state separation.

Judge BREYER. The trouble is I keep coming back to thinking that is one of those difficult line-drawing questions that could be right in front of us if I am on the Court. That is my problem.

Senator SPECTER. Senator Heflin broached the question of the conflict between the President's authority as Commander in Chief and the congressional authority to declare war, and this is a sub-

ject which we have talked about with many nominees, and I know that these confirmation hearings have some resemblance to professional football—we look at all your films, we read all your opinions and all of your books; you look at the videotapes of our questioning of a number of nominees. And I appreciated the meeting which you and I had, and I told you that I was going to ask you the question which I have asked before about the Korean conflict—was it a war?

Judge BREYER. Yes.

Senator SPECTER. Well, we are making some progress.

Judge BREYER. Well, I do not know if that is too helpful, but yes. Ask any of the people who were involved or their families, "Was that a war?" and they will say it certainly was.

Senator SPECTER. Well, I was involved, stateside, however, but I thought it was a war; maybe that is why I keep coming back to the Korean war.

We struggle in the Congress for a way to resolve it. Back in 1983, when Senator Baker was the majority leader, I drafted an extensive complaint, seeking original jurisdiction in the Supreme Court, trying to get the agreement of the White House and the Congress to make a submission under the War Powers Act. I do not know that it would have worked, because there are ways that the Court does not have to take those issues—nonjusticiable, not a case in controversy, et cetera.

Last year, we passed in an appropriation bill a prohibition of the Department of Defense for using moneys in the military action in Somalia beyond March 31, 1994. Now, we do not like to do that in Congress, and earlier today, Senator Leahy and I were on the floor—missing part of these proceedings—discussing the situation in Haiti. There are some of us who are concerned that we may be involved in a war in Haiti when the Congress is out of session, and we passed a sense-of-the-Senate resolution that we did not want to see an invasion of Haiti; but a sense-of-the-Senate resolution does not bind the President. Then, a resolution was offered that no funds should be used for an invasion of Haiti, and that was defeated. And Senator Leahy and I came to sort of an agreement that we really ought to face it head-on. No American war can succeed—and we learned that in Vietnam—without public support, and the way you start on that is to get congressional authorization. And I hope that if the President wants to maintain the military option, that he will come to the Congress and ask for a resolution of authority, as President Bush did in Iraq, and let it be a congressional declaration. If the President has to act in an emergency, so be it; he can use his powers as Commander in Chief.

And the question that I have for you, Judge Breyer: Is it realistic to look for the third supreme branch? We know the courts are supreme to both the Congress and the President, because the Court told us so in *Marbury* v. *Madison.* When the Constitution was formed, the Congress was No. 1; the President was No. 2, in the second article; and the courts did not come up until article III, but all that was changed. It was renumbered in *Marbury* v. *Madison.*

And the question is: Is it realistic to try to get some help from the Court on breaking this conflict, which comes up very frequently, between the President and the Congress, or do we have to come back to the political give and take, and the withholding of

funds, and the declarations on the Senate floor and the President from his news conferences?

Judge BREYER. It does—I looked up, I tried to find—after our conversation, which was very interesting, I tried to see if there had been any precedent where this kind of question was resolved in the Supreme Court, and I think there has not been, though I think that some of the Justices dissented and said that the Court should get involved in that during the Vietnam period.

I would say it does not surprise me, that absence of precedent, because there is nothing more important than questions of war and peace, and fighting and not fighting, and defending and not defending. And the kind of question you are talking about is of such extraordinary importance to the public, and it is not surprising to me that the courts, which are an unelected—unelected—third branch of government, have said that these matters of such great importance in a political context should be worked out between the first and second branches of government, both of which involve elections and are responsible directly to the people. That does not surprise me, that.

Senator SPECTER. But these are constitutional issues.

Judge BREYER. Yes.

Senator SPECTER. These are two basic, fundamental constitutional provisions——

Judge BREYER. Yes, yes.

Senator SPECTER [continuing]. Which could really use some adjudication. We try all these right-angle automobile collisions in the Federal courts; why not have the Federal courts get involved in deciding this one? You cannot find a bigger one.

Judge BREYER. I know, despite—I mean, I can understand what has happened in light of what I just said, and it does seem to reflect something about the nature of these terribly important decisions in a democracy.

I thought—in addition, I know cases—we were talking to Senator Pressler about the old, old case of the Indian tribes and so forth, and sometimes, people can work out ways of getting these into courts in certain contexts.

Senator SPECTER. Judge Breyer, moving to another subject—unless you want to say something further——

Judge BREYER. No.

Senator SPECTER [continuing]. I talked to you in our informal section about Court-stripping, and it seems to me this is a fundamental issue. We talked about *Marbury* v. *Madison,* and I think it is fair to say that you concluded the supremacy of the Court was beyond challenge today——

Judge BREYER. Yes, yes, I think so.

Senator SPECTER [continuing]. That *Brown* v. *Board* was beyond challenge today.

Judge BREYER. Correct, that is correct.

Senator SPECTER. Is it your view that the Court cannot be divested of jurisdiction to decide fundamental constitutional questions?

Judge BREYER. I think the framework in that—basically, it is an affirmative answer—the framework, the way that I see it legally working out, there are two different circumstances. One, you start

with article III, where it says the judicial power of the United States shall be vested in one Supreme Court and other courts that you in Congress create. And then it says the judicial power shall extend to all cases of certain kinds, which it then enunciates.

So that to me suggests—and this would be one kind of issue—but if you take cases out of the courts and put them in a different court, there will still be cases that you will not have the power to take out of the Supreme Court because of the way that is written.

The other kind of issue that comes up is where the courts are deciding a case, but what Congress in principle might do is say let us not make this a case. It used to be called a tort case. Now we are going to give it to an administrative agency, and we will say it is not a case anymore; it is an agency matter.

Now, could Congress do that to any old thing and thereby remove all those things from the Court? Justice Brandeis said the question there is under what circumstances the process that is required by the Constitution before you can invade life, liberty, or property is due process; when is that due process judicial process? And obviously, he is thinking there would be a core of important cases where the process that the Constitution requires before one takes away liberty, and property in certain circumstances, that that is judicial process, and that is the area that the Constitution would protect.

Senator SPECTER. I had questioned Chief Justice Rehnquist on this issue, and he declined to answer, and finally did answer, that the Congress could not take away the jurisdiction of the Supreme Court on first amendment issues. I then asked him about the fourth amendment, and he declined to answer; declined on the fifth, declined on the sixth. I then asked him why he would answer on the first amendment but not on the fourth, fifth, and sixth. He declined to answer that question, too.

He went considerably farther, however, than Justice Scalia did, who would not answer a question on *Marbury* v. *Madison;* and Chief Justice Rehnquist went considerably further than Justice Souter, who would not answer my question on whether the Korean war was a war. And most of them went farther than Justice Ginsburg did as a generalization.

I was very surprised—and it has been my conclusion that nominees answer about as many questions as they think they have to. I think you may be an exception, Judge Breyer. We may have the "Breyer rule" coming out of these proceedings, that more questions are being answered than a nominee would have to answer. I will withhold judgment until the proceeding is over in its entirety, but I think we may have the "Breyer rule" coming out of this proceeding, which would be very good.

I was very surprised in 1982 when the Senate passed an amendment taking away the jurisdiction of the courts on busing as a remedy, which is a constitutional issue. And I do not see how the Congress can take away the jurisdiction of the Supreme Court on constitutional issues. Whether we like the remedy or do not, most people long since have disliked busing. And let me ask you the question: Does the Congress have the authority to take away the jurisdiction of the Supreme Court on a constitutional issue—equal pro-

tection, the 14th amendment—to deprive the Court of the option of remedy on busing?

Judge BREYER. I do not think there is a categorical answer in terms of constitutional versus nonconstitutional. The place to begin in my mind is there is a famous opinion called *Crowell* v. *Benson*. And really, in that opinion, Justice Brandeis wrote a concurrence, I think, in which he tried to explain this view that sometimes the process that is due is judicial process. And then, when is that process judicial process; when does the right require judicial process? And it is going to be something involving core liberty and terribly important rights of fairness and so forth. And exactly which ones and how would depend—if Congress ever passed such a statute, and then it came up to the Court, you would get into looking at the shadings and exactly how they did it. But that core principle I think is well explained by Justice Brandeis in that case.

Senator SPECTER. Would you agree with Chief Justice Rehnquist that the Congress cannot take away the jurisdiction of the Supreme Court on first amendment issues?

Judge BREYER. Oh, you see, it is going to be the question—you know there are issues and issues. The core principle there, the core freedom of speech, it is pretty hard for me to see how that would be possible, because if you want the kind of layman's reaction, which is all I can do at this moment, it is to think my goodness, what an important right, and isn't it judicial process—but indeed, that kind of right, it maybe cannot be taken away with any process.

Senator SPECTER. I take that to be a "no."

Judge BREYER. Yes, I think—what is the—I cannot remember at the moment whether the question was phrased affirmatively or negatively. [Laughter.]

Senator SPECTER. The final question, Mr. Chairman.

Can the Congress take away the jurisdiction of the Supreme Court on amendments IV, V, and VI?

Judge BREYER. Again, it is the same core idea there. The core idea, fundamental—some of those rights, they cannot take the right away at all. And so, since you cannot take it away at all, you cannot take it away with any process. And then, if you could limit it at all, it is the kind of important thing that on its face would seem to call for judicial process. The details would depend on a particular statute and what was really at stake.

Senator SPECTER. I interpret that to be an answer under the Breyer doctrine. Thank you.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. I think—I know, I should say—that Senator Helms has many times introduced statutes to take away the jurisdiction of the Court. I do not think—I know the Congress never successfully passed such an amendment. It could be it passed the Senate; I do not know——

Senator SPECTER. We did pass it, Joe. We did pass it in 1982.

The CHAIRMAN. I——

Senator KENNEDY. Was it the law?

Senator SPECTER. No; it did not go through conference. It did not become the law. But I was really surprised——

The CHAIRMAN. But the Senate passed it.

Senator SPECTER [continuing]. My recollection was it was a 58-to-38 vote, and I could not believe my eyes and ears. I had not been around here long. I still cannot believe my eyes and ears with some frequency. But we in the Senate did pass an amendment which took away the jurisdiction of the Supreme Court to use busing as a remedy in a constitutional case under the equal protection clause.

The CHAIRMAN. Again, Senator Simon says he only has part of a round. I might say I think we are nearing the end. There is going to be a vote relatively soon. Senator Simon will be able to ask his questions, and we will take a break when the vote occurs.

I would like those listening—as I understand it, Senator Brown has some questions, less than a full round, and to the best of my knowledge, after that, there is no one who wishes to take a full round with the possible exception of Senator Pressler, and no one wants to even take a part of a round that I am aware of, so we could very well, with the grace of God and the good will of the neighbors, be out of here by 7 o'clock—but then again, I have always been an optimist.

Senator Simon.

Senator SIMON. Thank you.

First, a comment on what Senator Cohen and Senator Heflin said in terms of legislative history. I think we dilute the strength of legislative history, both for Justices and for the lower courts, when we permit—and I have done it, along with all of us here—when we permit speeches and other things to be entered in the record as if given. The reality is the record ought to be the real record, and I hope one of these days we change our rule so that that is the case.

Second, I think your exchange with Senator Metzenbaum was extremely significant. Your hope, obviously, is that you will be able to sever the ties with Lloyd's of London soon. It may be—I hope this will not be the case—it may be that it will last for years. That means that your response to Senator Metzenbaum could be with you for many years.

I would request that you get a transcript and read it over, and if you feel comfortable with it, fine. If you do not feel comfortable with it, I think you ought to send a letter to Senator Biden, with copies to the other members of the committee, so that we know where we are on that, if that is agreeable.

Judge BREYER. Yes, yes.

Senator SIMON. And for the record, since they cannot——

Judge BREYER. Yes, that is agreeable, Senator. Thank you.

Senator SIMON. Thank you.

There was a case that came to the Court from California, where a California utility was supporting a certain stand, and a citizens' group went to the utility commission and said, "We believe we ought to have the right to have the other side presented, and we would like to include that in the mailing of the utility."

The utility commission ordered that to take place. The utility appealed to the Court, and in a divided opinion, the Court said you do not—as part of freedom of speech for the utility, for the corporation—they do not have to send around a speech that they do not agree with.

The question is: What rights in terms of the first amendment—and I am not asking you to comment on that specific case—but what rights under the first amendment does a corporation have; and if it is a regulated corporation, does that differ from another corporation?

Judge BREYER. My understanding in the area of commercial speech is that there is protection, but that it is different. And my understanding is that it is not meant to impede legitimate regulation. Quite clearly, the Federal Trade Commission can prevent people in the commercial area from making statements that are false. Quite clearly, various agencies can impose labeling requirements, even down to exactly what words should be said, though that is, of course, a form of regulating speech.

I suspect that the case that you are discussing was a case that arose on particular facts and particular circumstances looking to see how necessary that particular regulation was in the particular case compared with the right of the corporation. I am sure if that kind of issue arose again, it would be important for me, if I were on the Court, and any other judge to examine the facts and circumstances in light of the knowledge that commercial speech is different. There is protection, but there is also regulatory need which feeds into the balance.

Senator SIMON. Two suggestions, finally. One is there has been a lot of discussion about capital punishment. I would simply ask you to read Justice Powell's reflections at some point. Justice Powell started off pretty much where you are starting off and decided that his original opinion was wrong.

Then, finally, another request of you. You said it was important that you connect with reality, and I really think this is important. I would like to read from a 1913 speech of Teddy Roosevelt. He says,

> Our judges have been, on the whole, both able and upright public servants. But their whole training and the aloofness of their position on the bench prevent their having, as a rule, any real knowledge of or understanding sympathy with the lives and needs of the ordinary hard-working toiler.

I think there is wisdom in what Teddy Roosevelt had to say, and I do not question for a moment your desire to continue to connect with reality. But if I can use an example from my background as a journalist, every once in a while when I am autographing a book I have written or something like that, someone will say to me, "Someday I am going to write a book." When they say to me, "Someday I am going to write a book," I know it will probably never happen. If they say, "within the next year or two years," then it may happen.

I would make this suggestion to you. Sometime between now and the time you get sworn in, sit down with your wife and your family, and spell out specifically for yourself—nothing you give to Paul Simon or Joe Biden or anyone else. Spell out specifically for yourself how you really will keep in touch with reality, the reality that a great many Americans face, that, frankly, you are just not going to see. As a Supreme Court Justice, I will encounter you occasionally at a reception or, you know, at some event or another. But the people who are there are not going to be unemployed; they are not going to be living in a housing project; they are not going to be suf-

fering. And I want a Supreme Court Justice to empathize with those people who are struggling in our society.

So if you would agree to do that, I would appreciate it.

Judge BREYER. I will.

Senator SIMON. And I have no further questions or comments, Mr. Chairman.

The CHAIRMAN. I thank you very much, Senator.

With Senator Brown here, I know that it is a little bit longer. Senator Brown says he does not have a full round. I think, because there is going to be a vote shortly, if you can persist a while longer, I would like to yield to Senator Brown now, and maybe we can finish up here.

Judge BREYER. Yes.

The CHAIRMAN. Senator Brown.

Senator BROWN. Thank you.

Judge Breyer, my commendation. You have survived our trial by inquiry quite well.

Judge BREYER. Thank you, Senator.

Senator BROWN. I do not know if it is comparable to trial by combat that the common law must have thought about, but you have not only survived, you have prospered. I think Members from both sides of the aisle have been most impressed not just with the quality of your answers but with the thought process that goes into it.

Judge BREYER. Thank you.

Senator BROWN. I listened intently to the queries that were addressed to you about your book. I know you have written in a number of publications, but specifically "Breaking the Vicious Circle" I assume was a series of lectures?

Judge BREYER. Yes, that is right, Senator.

Senator BROWN. Put out in a book form.

Judge BREYER. Yes.

Senator BROWN. I read through that with what I hoped was a searching eye to find out your position on issues, and I did not find admonitions as to what our policy should be. What I found was an urging that we understand the risk we are trying to address and that we set priorities of what is most important to us since we have limited resources.

Is that a fair summary of what you tried to do?

Judge BREYER. I think it is. That is what I was trying to do in various ways, to make as clear as I can some of the problems of maybe spending too much here and not enough there. And if people think about that and then the public and people who read it or anyone else in the world who is interested in this area decides that is what we would like to do, that is the end of the matter. All it does is it calls this to people's attention. They are to think about it. And if we can think of a way that people would prefer, other people, not me—I am the one calling it to their attention. If they then think that is how they would like to proceed, fine. That is up to other people, groups who know more about it than I do, calling it to the attention of Congress, who then may decide to do something different or may not.

Senator BROWN. Well, I noticed you analyzed the cost of a 95-percent cleanup and analyzed the cost of the additional 5-percent cleanup and compared it with the potential good that each did. But

I did not find that you advocated not doing the last 5-percent clean-up.

Judge BREYER. No, I did not. I said look at the problem. Look at the problem, here are some suggestions as to how one might talk to Congress. If you think it is a problem, I do not guarantee this is the solution. I do not guarantee there is a solution. But I do see this as a problem that is worth talking about.

Senator BROWN. I want to draw your attention for a moment to the fourth amendment, and I suspect you have these all memorized, but let me just read the language.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and it goes on. Unreasonable searches and seizures is the operable phrase.

We had a proposal before Congress relating to requiring public housing to be open to search, and presumably seizure if illegal items are found therein. You have looked at fourth amendment cases and ruled on one specifically where you dissented from others on the panel.

Does what is reasonable vary depending on the proprietary interest in the residence? Specifically, is what is a reasonable search of someone's home that they own different from what is a reasonable search of a hotel room that you rent? Are either of those different from a public housing unit that you rent? Does the standard of what is a reasonable search and seizure vary with your ownership interest?

Judge BREYER. I think what happens under that is, of course, there has to be a privacy interest of the person who is complaining in any of the three. And then I think under this idea of unreasonableness or reasonableness, the Supreme Court has cases that, in general terms, describe circumstances in which something is or is not reasonable. And my thought would be that those general descriptions do not vary, but what might vary are the circumstances that bring something within or without.

That is how I think it probably works.

Senator BROWN. You focus on the circumstances, not necessarily the particular proprietary interest.

Judge BREYER. That could be part of the circumstance. I would not say never.

Senator BROWN. I wanted to draw your attention also to a controversy that now rages over term limitations. The question is kind of interesting. It relates——

The CHAIRMAN. The answer to this question could be very important. [Laughter.]

I just want you to know that. Look up here and determine how many people have been here two or more terms and how many have not. Let your conscience be your guide. [Laughter.]

I want the record to show people are laughing. That is meant to be a joke. It is late in the day. But go ahead.

Senator BROWN. Let the record show that those over two terms did not laugh as much as those under. [Laughter.]

It is a fascinating question because it is based upon provisions of the Constitution giving Congress the power to regulate itself in

contrast to the provisions allowing States to set qualifications for elections.

Have you articulated publicly or privately a position on term limitations?

Judge BREYER. I do not think so.

Senator BROWN. Have you come to a judgment in your own mind as to whether it is a good policy or not?

Judge BREYER. I would say, Senator, that I have been preparing pretty hard for these hearings over the last few weeks. I have not read the papers every day. I have not noticed every case that the Supreme Court has decided to decide next term. But I did notice one.

Senator BROWN. Well, I do not ask you how you would rule on that case. [Laughter.]

What your preferences might be is significantly different than how you would rule on a legal question. I do note that with your home being in California originally, you may have an opinion on the term limits referendum that was on the California ballot a few years ago. I thought I would inquire if you have an opinion on the wisdom of term limits.

Judge BREYER. As you can see, on this one, when other people laughed, I have laughed. I have made no indication with my head one way or the other. I do not think that I have particularly smiled out of place. And I think that that is where I would like to leave it, if that is all right.

Senator BROWN. I have noticed that you would make an excellent poker player, or that at least I should not play with you.

For what it is worth, this issue is not overwhelmingly popular in this body. However, we are often faced with difficult policy decisions. Occasionally, someone will say, you must have decided never to run for reelection to vote for that particular measure. Yet, the difficult choice is often the right choice. Perhaps term limits could help us make the right choice.

My own conviction is that there are a lot of things that we ought to be doing that we do not do. Reducing the deficit is a good example. The term limits case is one that could well go either way; there are excellent arguments on either side. I envy your opportunity to review that case and I hope your deliberations will include a consideration of how terribly important it is to this country that we have people who serve in Congress who are willing to do things that could never get them reelected.

The last item I want to turn to is religious freedom. My understanding from what reading I have done in history is that the establishment clause, while it had a number of origins, really came about because some colonies like Virginia had an established religion. The practice was to tax people and use some of that tax money to support the Church of England, the Episcopal Church. Some of the poor Scotchmen that came to this country later than the English Anglicans were forced to pay taxes to support the Church of England. That was why Thomas Jefferson was so focused on this issue. It is why he was so proud of his efforts to establish religious freedom. It is important to understand that the framers viewed the establishment of a religion as an established

religion that people of all faiths were forced by their tax money to support.

The words "establishment of religion" have taken on a much broader meaning. I would be interested to know if you have a different view of the origin of the establishment clause.

Judge BREYER. I do not have a better view. I do not have a better view.

Senator BROWN. It would be a tragic mistake to allow the Government to force people to support one religion or another. It would be tragic to put people in embarrassing circumstances where, if they had a different religious belief, they were humiliated. The concern over public prayers reflects some of that.

But I am appalled that we would prohibit under the establishment clause a public prayer which someone can either listen to or ignore. The way Americans have dealt with speech or public discourse in all other areas has been to ignore it or to listen to it, not to stifle it. The idea of stopping people from making public utterances in the name of the Constitution concerns me.

If you have any comments you would like to make I would be interested in them. But I do think there is a different side to the restriction of public prayer that has not really been brought into balance at this point, and that is the freedom of speech and the freedom of expression.

Judge, thank you for what I consider to be an edifying experience. You are going to make a marvelous Supreme Court Justice, and while I suspect all of us have areas we disagree with you on, everyone that I have spoken with respects your intellect and your honesty and believes that we will have someone with great integrity on the bench.

Judge BREYER. Thank you very much, Senator. I appreciate it. Thank you.

The CHAIRMAN. Judge, the Senator from Colorado and I will have a chance to debate this, but like most things that you deal with as a judge, there are factual questions that sometimes we think we know the answer to and many times we do not. It has been my experience, being here 22 years, having observed at least 25 Senators who have announced their retirement at least a year in advance, I have not noticed a single one that I can recall where they have changed their voting record.

Senator BROWN. But many that should have. [Laughter.]

The CHAIRMAN. Maybe should have. But I think it would be an interesting study for us to do to see whether or not this presumption that people do not vote courageously because they are running again, in fact, stands up to scrutiny. It would seem to me the corollary would be true. If they have decided not to run, then they would change the way in which they voted after they have decided they were not going to run again.

I am prepared to make a gentleman's bet that we would find that that is as much an exception as the woman or man who chooses to, while running again, make a courageous vote, knowing it may cost them their election. But, at any rate, that is just a little aside, because I know you have nothing else to think about, and I am sure it is of no relevance.

I think we can conclude now, but let me just, from my perspective at least, put one cap on this whole issue of the Lloyd's of London and the issue of whether or not there was any ethical breach.

I would like to ask unanimous consent that the statute in question be entered in the record at this point, the statute referred to by Senator Specter, 28 U.S.C. 455.

[The statute follows:]

UNITED STATES CODE—TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

The CHAIRMAN. Let me say, at least this one Senator's view of how this plays out. It seems to me there are two distinct questions. The first question is: Up until this point in your judicial career, have you engaged in any activity at any time that is in any way in conflict with the judicial canons of ethics and/or the statute that I referenced that would lead any reasonable person or reasonable persons to conclude that there was an ethical breach?

For five out of the six scholars in this area we have spoken to, some better known and respected than others, clearly from their perspective, the answer is no, you have not violated any ethical norm, written or spoken.

Second, based on all the testimony here, and the cases I have read that you have acted on, I think it is beyond any question that you have acted ethically.

The second issue is a tougher and less clear issue, and that is, what do you do as a Supreme Court Justice from this moment on or as a circuit court judge from this moment on in matters relating to insurance cases which, somewhere through the ether, could even affect a potential holding? And I think this is a case of first instance in that, to the best of my knowledge, because of your investments and your wife's investments and your wife's country of origin, England, you are for a whole range of reasons the first person before us invested as a Name in Lloyd's of London.

You said in the late 1980's you wanted out but because of the mechanisms that control Lloyd's of London and how that operation works you were not able to do that. What do you do from this point on? It seems to me that that comes down to a question of the extent of your potential liability as an investor, as a so-called Name in Lloyd's of London. And we have had from various sources, respected sources, estimates that range from as low as $37,000 to as much as unlimited liability. And the probable area is something closer to the potential maximum—that is in the $100,000 range. But the truth is we are never going to be able to nail that down with absolute certainty. The liability goes back to the 1980's. You would think after 8, 9, 10 years you would begin to get a picture of what that liability might be. If it was going to be as horrific as some have suggested, we might be able to get a picture.

I do not think anyone can say but the good Lord with absolute certainty what that potential liability is. And I want to emphasize to you what Senator Simon said. I for one am enthusiastic about your nomination because I believe your judicial philosophy and your character is beyond reproach, and your judicial philosophy is

consistent with what—and this is what each individual Senator has a right to consider—consistent with what I look to as to where I would like to see this Nation move and how it should go. Therefore, I do not want you recusing yourself from every important case that comes forward.

So I would look very closely at what you said today. And I am not clairvoyant. I am not even as well schooled as you are in knowing what might or might not be the appropriate future course of action. But it is something that is a case of first instance, to the best of my knowledge and my staff's, and one that the Judicial Conference and the Congress, unrelated to you, are going to have to look at.

So, because I know I will be asked, I want to state on the record that I have looked at this as closely as I can, as dispassionately as I am capable of doing, and have concluded the following: Have you thus far in any way acted in an improper way? The answer is clearly no. What is the font of wisdom as to how to act in the future? I do not know. But I am prepared to bet on your integrity, that you will find the appropriate way without cutting yourself off from participation in the important matters of the next two decades that will come before the Court.

I have one specific question for the record that has not been asked, and unless my colleagues have questions, I would be prepared to dismiss you. They may have comments, but I would be prepared to dismiss you as a witness. That is, during the late 1980's or early 1990's, when you had concluded you wanted to get out of the investment—that is, you wanted to divest from your Lloyd's holding—you were told you thought that could be done by the early 1990's, and then along came 1990 and it turned out they said, no, because of potential liability, whatever the amount, that will take longer. And now you are being told it would be around 1995 or 1996.

Somewhere in that period, late 1980's, early 1990's, as I understand it, you asked, well, can't I get out? Isn't there a way I can get out of this? Can I get someone else to insure me by taking over my potential liability, in effect?

And that has been raised in the public press. I do not think anyone has asked you that question. I think it is important for the record that, A, you explain whether or not you did investigate that avenue of exit, and, B, if you did, what conclusions you reached and why.

But, again, I want to make it clear this does not relate, in my view, to whether or not anything that has transpired indicates in any way that you have operated in any way as a judge other than with the highest ethical standards. But would you answer that question for me or discuss that broad issue of did you try to get out, is there a way you could have gotten out? If you did, why didn't you and so on? Then, hopefully, that will be the end of this issue before this committee.

Judge BREYER. At that time I thought——

The CHAIRMAN. "That time" meaning?

Judge BREYER. Meaning roughly in, I guess, 1990 approximately, 1991, roughly in there. From all I knew my maximum liability if I stayed was around, I guess, something like 25,000 pounds, and

I had a lot of insurance with companies outside Lloyd's that would protect me from a further loss.

When I made the inquiry, I was told it is not practical, and then when I—I mean, my impression was it was not practical to get out immediately. And I was enforced or reinforced in that view by the response, which was: If you want to leave immediately, you will have to pay a figure which is almost 10 times, 8 to 10 times that amount. My impression was if I waited for maybe a year or two—and now it is into 1995—Lloyd's would arrange through the reinsurance company that I would be released and the amount would relate roughly to what I am likely to be liable for. So I took that, as a practical matter, as a negative indication.

The CHAIRMAN. I said that was the last question. It is the last question from me on this issue, but, again, for the record, on a matter that has been in the press, I think it is important for you to state on the record an issue about which I know of no concern by any member of this committee, but I think it is important the public know and know the distinction. That is the so-called Social Security tax issue.

You have indicated to the committee that you did not pay Social Security taxes in the first instance for a cleaning person who worked with you beginning in the early 1980's, if I am not mistaken; that you did not pay any tax before 1993, although all such taxes that were due have been paid and paid in full.

For the record, would you please explain how you handled this matter and why you initially concluded that you did not have to pay Social Security taxes for this person?

Judge BREYER. At the beginning, at the very beginning, I think January or February 1993, I read in the paper that a man who was being considered for a Justice Department post owed Social Security taxes on a part-time home worker who was over the age of 65—indeed, who was in her seventies. At that point, I suddenly thought, well, we have a person who is close to 80, and she is part-time, and why don't we owe taxes on her?

My wife and I and the person discussed this, and we all had thought, incorrectly—incorrectly—that if a person is receiving Social Security, as she always had been, you do not have to pay Social Security. At that point, since we realized there was a problem, Joanna went to the IRS. We straightened out the problem. We initially paid immediate——

The CHAIRMAN. This person is an American citizen?

Judge BREYER. Yes; yes, an American citizen with a passport. American passport.

The CHAIRMAN. And she was an American citizen at the moment she worked for you?

Judge BREYER. Yes.

The CHAIRMAN. An important point to make.

Judge BREYER. Yes; and what we did was then go to the Internal Revenue Service, Joanna did. We immediately paid the tax for 1992. We had to send away for lots of forms, because it goes quarter by quarter, to get all the taxes and forms and everything back until she really first came on that basis. I think it was some time just after 1980, approximately. And we then got all the forms. It took a period of weeks, and we sent the money in for each quarter.

Then, after June of last year, during the summer, there were a number of open questions. It was difficult or uncertain what we—Joanne went back to the IRS. They were very helpful, worked through this, decided that it was a borderline case, gave us forms to fill out, gave us forms for her to fill out; and on the basis of long questionnaires and so forth, ultimately determined that we did not owe taxes because she was not an employee.

The CHAIRMAN. The IRS made that determination?

Judge BREYER. Yes, that is right. That is right.

The CHAIRMAN. You were not petitioning for them to reach that conclusion?

Judge BREYER. No; you fill out a form. They have a system that they will work it out for you, for anyone. Anyone who wants to come in and fill out that form and go through this process, they will make a determination for you.

The CHAIRMAN. And the issue is if one is an independent contractor——

Judge BREYER. You do not owe it.

The CHAIRMAN. You are not required to pay Social Security taxes.

Judge BREYER. That is right.

The CHAIRMAN. If one is not an independent contractor, you are required to pay Social Security taxes; correct?

Judge BREYER. That is right. And they determined that she was an independent contractor, and we did not owe the Social Security up through the end of 1988. But, thereafter, 1989, 1990, 1991, we did owe it and the result of that—and we had paid in 1992 and we paid in 1993.

The CHAIRMAN. Did they tell you why you did not owe up until 1980, why her status changed from independent contractor to an employee?

Judge BREYER. My belief is that there are a bunch of factors on which they make that determination, and the thing that had changed, though I was not aware of this, is that at that time, though she came in the same way she always had to us, she had stopped working for other people. I think she was, you know, in her late seventies. That, I think, was then the determinative factor.

The CHAIRMAN. That is my understanding, that because she no longer worked, beginning in 1989 or whatever, for anyone but you, she lost her independent contractor status. You gained the responsibility of being responsible for paying Social Security even though she was on Social Security the entire time.

Judge BREYER. Yes; that is the situation as far as I knew it, and that is my understanding of what happened.

The CHAIRMAN. Now, were there any penalties you had to pay for those 4 years or whatever?

Judge BREYER. Initially the IRS assesses a penalty automatically. What happened thereafter, since they determined it was a borderline case and they understood that we were in good faith, is the IRS refunded to us all the payments we had made up until—through the end of 1988, and also all amounts that they had automatically assessed a penalty. So they canceled that and we received the money back.

The CHAIRMAN. So the totality of what you paid was roughly 4 years of the period that they, the IRS, concluded she was not an independent contractor.

Judge BREYER. That is correct.

The CHAIRMAN. So you had an American citizen who was receiving Social Security from almost the beginning of her first time she walked into your house, who worked for you part-time along with other people as well. At the end of the 1980's, she stopped her part-time status with others and only continued part-time with you. Your responsibility from the point of view of the IRS legally was triggered at that moment. And they believed you acted in good faith; therefore, there was not a penalty assessed other than the back payment of the Social Security taxes for the point beyond which they concluded this American citizen on Social Security was working only for you and was no longer an independent contractor.

Judge BREYER. That is my understanding.

The CHAIRMAN. That is the understanding of the investigative staff, minority and majority as well, but it is an important point, I think, to make sure we have on the record.

I have no further questions. To the best of my knowledge, no one else has any further questions. I would yield—I am sorry. Do you have a question?

Senator MOSELEY-BRAUN. Just joking, Mr. Chairman. I am sure soon-to-be Justice Breyer would be delighted at my not having any questions. If I have any, I will submit them to him later in writing.

The CHAIRMAN. I would ask the ranking member or your chief sponsor, if you will, if they have any closing comment to make. Otherwise, although it will not be as pleasurable being able to look out tomorrow and see your lovely family, when they finish, you are finished, and your family is finished, in terms of being required to be here before the committee.

Senator HATCH. And I do not want any enthusiastic demonstrations here in this room.

Judge Breyer, we have thoroughly examined to the extent of our ability to do so these problems. You certainly, in the case of Lloyd's, have made an investment that has been unfortunate—like a lot of people. But from what I can see, if every judge would conduct himself or herself with the concerns about conflicts of interest or other difficulties as you have conducted yourself as a judge, and as you have indicated you will conduct yourself hereafter as a member of the Supreme Court, I think we would all be very, very happy in this country; and I believe most judges do, most if not all.

So you have more than satisfied, I think, all of us that you are sensitive to the recusal problems and that you will recuse yourself in cases where you have the slightest concern that there might be any legitimate concern on the part of others that you should not sit on the case.

I do not know what more we could ask of a judicial nominee or a sitting judge than that. And you also have expressed the opinion that recusal is an important issue both ways. It is important for you to recuse yourself if the recusal is necessary; but it is also important for you not to recuse yourself and avoid a tough case when it is not unnecessary, and you understand the distinction. And I think you have articulated it well, and I hope that you have put

to rest some of the criticisms that some have offered, some of which I felt are way beyond where any judge should have to meet.

But the important thing is that I am certainly satisfied that you are not only a very honorable person and a very ethical person, but one who will maintain those high standards of honor and ethics as you serve on the Supreme Court.

I think your testimony has been effective in that regard, but knowing you as well as all of us do, and having watched your career, we have the very highest expectations of your success as a Supreme Court Justice and your handling of these particular issues. And I think the public can have confidence as well, not only from your remarks here, but from your demeanor and the way you have handled yourself in the past.

So I just want to make that very, very clear, that I think there is little or no room for speculation here, and I hope the American people understand that. And I personally appreciated your testimony on so many issues. I have not agreed with you on everything, but my goodness, nobody is going to agree with every other person on everything.

So what is important here is that you have demonstrated a tremendous legal acumen; I think a tolerance that sometimes is difficult under the circumstances; good judicial temperament. You certainly have the capacity and the ability not only to be the chief judge of the First Circuit Court of Appeals, but to be an Associate Justice of the U.S. Supreme Court, and I want to congratulate you for a really good set of hearings.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

Senator Kennedy will close.

Senator KENNEDY. Just very briefly, Mr. Chairman, I want to express our appreciation to Senator Biden and Senator Hatch for the way that the hearings have been conducted and for all of the courtesies that were extended. I know I can speak for Judge Breyer, but I think for all of us.

I think all of us realize that there are a lot of important votes that are cast by Members of the U.S. Senate, but very few are as important as the one that is cast in this instance in terms of service on the Supreme Court. It is really one of the most important responsibilities of the President and certainly of Members of the Senate and us here on the Judiciary Committee as instruments of the Senate in attempting to present to the Senate the qualifications of the nominee.

And I want to say again, as someone who has known Judge Breyer for a long period of time, that hopefully, the members of this body, through the media, have gained a recognition of something that all of us who have known him and have worked with him have about this very unique and special individual. This experience, I think, of these hearings, as Senator Brown and others have mentioned, will remain with us. Judge Breyer has been insightful and illuminating in terms of his responses to these questions. All of us who know of his service in the first circuit and have known of his service on the Watergate Commission and in the Justice Department, and his service to this committee, have known what everyone on those courts, and his friends and colleagues have

known, as a man of the most extraordinary integrity and personal judgment and ethical behavior.

We have been appreciative of the opportunity to hear the responses and also to question you about some of the items that have been raised. I must say we really appreciate your presence here, and we are looking forward to having the conclusion of these hearings in the way that has been outlined by the chairman, but I want to express this Senator's appreciation for the way that you have responded to these questions, and the frankness, the candor, and the honesty. Many of them have been difficult and trying, but this is a process, and I want to say that all of us who have been proud to have supported you at the earliest part of these hearings are prouder now. I think President Clinton deserves great credit for this nomination, and I am confident that Judge Breyer will truly be one of the outstanding Justices not only on this Court, but on any Supreme Court.

I thank the chairman.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

A little housekeeping here. We will adjourn within moments. Tomorrow, we will come back into session at 10 o'clock. We are anxious to hear the public witnesses. Some will come to criticize; most will come to praise. But we are prepared and anxious to listen to both the praise and the criticism.

There are two types of testimony we will receive tomorrow. There will be public testimony, where the witness actually comes and testifies, and there will be written testimony, which is the tradition of this committee.

We have invited all of the individuals who have commented publicly, that we know of, on the issue of Lloyd's of London to submit written testimony, so everyone will have that—it will be available for the press and for the record and for all Senators—as well as the spoken testimony, we will have tomorrow.

I hope—it is my expectation—that we will be able to close the hearing tomorrow, but if any witness has anything of consequence they wish to discuss, we will conduct it exactly as we have here. If there is a need to go beyond that, there is no problem. I do not anticipate that.

I want to thank you, Judge. It has been a pleasure having you before us, and I do thank you. Some of the folks at the White House maybe did not even communicate it to you—they probably did not need to—they thought I was at the beginning, before this process began, somewhat stern by indicating that as much as I liked you, that if you did not respond to the questions, I would not vote for you. I am delighted I did not have to be put in that spot, because I think it is important—I think it is important for the American people to be able to have a glimpse into your thinking——

Judge BREYER. I agree.

The CHAIRMAN [continuing]. How you think about these issues, even though it does impact upon how you might possibly vote. I do not think it in any way jeopardizes your independence or the independence of the Court. From the moment we confirm you, assuming that is what happens, you will not have to speak to anyone

again if you do not want. You are there for life. This is our one chance, and the American people are entitled, entitled, to know. No one who is nominated for the Court is entitled to be on the Court any more than anyone who announces for public office is entitled to hold public office. But it is a privilege, a privilege which I think you deserve, although I will, as you would say in your studied manner, I will truly keep an open mind tomorrow to those who will criticize and listen to their point of view. But there is nothing that I have heard thus far that would lead me to conclude anything other than what Senators Hatch and Kennedy have said, and Senator Brown, and everyone who has spoken, that I think you will make a fine Justice, and I appreciate your family and the courtesy that they have shown to us by being so patient.

I hoped, as I indicated to one of your daughters at the beginning, that this would be a painless operation. She probably thought I was talking about physically painless as well; I did not mean that. I meant emotionally painless.

And Judge, I want to thank you and publicly thank the President for sending two nominees in a row over which we did not have to worry about hiring Capitol Police to keep the interest groups from being at one another's throats in the back of the room. You have no idea how much I, as chairman of this committee, personally appreciate the fact that we do not have one of those hearings. It is the only part of my job I hate. You have made me like my job again. I thank you very much, and I publicly thank the President.

Having said that, we will now adjourn until we begin to hear the public witnesses at 10 a.m. tomorrow morning.

Judge BREYER. Thank you.

[Whereupon, at 6:54 p.m., the committee was adjourned, to reconvene at 10 a.m. on Friday, July 15, 1994.]

NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, JULY 15, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SH–216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Heflin, Simon, Feinstein, Hatch, Grassley, Specter, Brown, and Cohen.

The CHAIRMAN. The hearing will come to order.

Today we begin our panels of public witnesses, whose input into the Supreme Court and all of our judicial nominating process this committee takes very seriously. We have afforded over the decades and requested—"afforded" may be the wrong word—the American Bar Association to testify before this committee and give this committee its judgment as to qualifications of judicial nominees. It is something we take seriously, and it is something that the ABA takes seriously. And I know they take it seriously because Irene Emsellem represents them, and she used to be on this committee. So I know it has to be serious if she is still willing to represent them.

All kidding aside, I do welcome our first panel. It has been the tradition of this committee long before my chairing the committee that the first public witness before the committee would be the American Bar Association. And our first panel today, testifying on behalf of the American Bar Association, includes Mr. Robert Watkins, who chairs the Bar Association's Standing Committee on the Federal Judiciary. A former U.S. attorney, Mr. Watkins is a partner in the firm of Williams and Connolly here in Washington, DC.

Accompanying Mr. Watkins is Mr. Michael Greco, who is a partner at Hill and Barlow in Boston, MA. Former president of the Massachusetts Bar Association, Mr. Greco is the first circuit representative to the ABA's Standing Committee on the Federal Judiciary.

Gentlemen, we welcome you and thank you for your effort and work. I might point out for the record that, although this committee and individual members of the committee have occasionally had disagreements with the ABA and their recommendations, it undertakes a great deal of work for which there is no compensation. We appreciate your public service in that regard, and we are going to

ask you, as well as all the public witnesses, to attempt to limit your comments to 5 minutes, if you would.

Mr. Watkins, welcome.

PANEL CONSISTING OF ROBERT P. WATKINS, CHAIR, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, DC; AND MICHAEL S. GRECO, FIRST CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, DC

Mr. WATKINS. Thank you, Mr. Chairman.

Members of the committee, my name is Robert Watkins. As you heard, I practice law in the District of Columbia, and I am chairman of the American Bar Association's Standing Committee on the Federal Judiciary. With me today is Michael S. Greco of Boston, MA, the committee's first circuit representative and the principal investigator in this investigation.

We appear here today to present views of the American Bar Association on the nomination of Stephen G. Breyer, Chief Judge of the U.S. Court of Appeals for the First Circuit, to be an Associate Justice of the Supreme Court of the United States.

At the request of the administration, our committee investigated Judge Breyer's professional qualifications. Our investigation assessed Judge Breyer's integrity, his judicial temperament, and professional competence. Our work involved discussion with more than 500 persons, including Supreme Court Justices, Federal and State court judges from all over the country, and practicing lawyers throughout the United States. The committee members also interviewed law school professors, including constitutional law and Supreme Court scholars.

In addition, Judge Breyer's opinions were read by two reading groups. One group consisted of Supreme Court practitioners. It was chaired by Rex E. Lee, former Solicitor General of the United States and currently the president of Brigham Young University. The other group was made up of law professors on the faculty at Vanderbilt University School of Law. This group was chaired by Prof. Nicholas S. Zeppos of the Vanderbilt Law School. Their reports were evaluated by members of our committee who also read Judge Breyer's opinions and his published writings on various legal subjects. Finally, Judge Breyer was interviewed by two members of our committee.

The committee began its investigation of Chief Judge Breyer on May 17, 1994, and completed its work on June 30, 1994. Based on our evaluation, we reported to the White House and to this committee that the standing committee is unanimously of the opinion that Judge Breyer is well qualified, the highest rating for a nominee to the Supreme Court of the United States.

That rating is reserved for those who are at the top of the legal profession, have outstanding legal ability and wide experience, and meet the highest standards of integrity, professional competence, and judicial temperament. The well-qualified rating merits our committee's strongest affirmative endorsement.

I have filed with the Judiciary Committee a letter describing the results of our investigation and shall not repeat those results in de-

tail here. I request that the letter be included in the record of these proceedings.

To summarize our findings, the committee is satisfied that Judge Breyer's academic training, his broad experience in the Federal Government, his service on the faculty of a distinguished law school, his scholarly writings, and his distinguished service for 14 years, 4 as chief judge, on the court of appeals establish his professional competence. His integrity is above reproach, and he possesses and exhibits the highest level of judicial temperament.

We are pleased to have the opportunity to appear here today to present the committee's findings, and we will respond to questions about our investigation and evaluation of Chief Judge Breyer.

The CHAIRMAN. Thank you very much.

Mr. Watkins, I really only have one question, and it is a question often raised to me as the chairman of this committee by my Republican and Democratic colleagues. That is the elements you look at in considering your evaluation, while evaluating and considering your recommendation.

With regard to lower court judges, district court judges, and circuit court judges—obviously both very important, but particularly district court judges—we often find ourselves in the circumstance in this committee, particularly when we are attempting to find—not we, but when the President, this President or former Presidents recommend minorities, or recommend people who have had distinguished legal careers but have had legal careers that either have been confined to academia or confined to commercial practices where they did not do any trial work. You often withhold—not you personally, the ABA often withholds recommendations, and occasionally withholds the most positive recommendation and occasionally recommends "unqualified" based upon the fact that the particular nominee did not have trial experience or has not practiced the law in the sense that they have been in a law firm and handling the cases of individual clients and conflicts and controversies.

That has created some difficulty, depending on the President and the nominee, difficulty with Republican Senators or Democratic Senators as to whether or not the ABA is doing the job as it should be done from their perspective.

My question is this: Judge Breyer, who has incredible credentials, to the best of my knowledge, if he were coming here for the district court judgeship in the State of Massachusetts, someone would say, well, he has no trial experience. He has not practiced law. He has been a brilliant professor, a significant legal scholar, handled the job that your former associate, Cynthia Hogan, who runs my staff on this committee and who will not go back to your firm, if I have anything to do with it. You cannot have her back at Williams & Connolly.

All kidding aside, he has done that job, but he has not, to the best of my knowledge, gone out there and practiced law like both of you do. Explain to the committee, will you, if that is a consideration in the Supreme Court, and if it is a consideration for district courts, and why in one and not the other?

Mr. WATKINS. Senator, you are correct in your portraying the approach that the ABA takes to evaluating judges, nominees to the various courts. And I think that we cannot use gross terms, and

we have to separate those in the district court from those from the court of appeals and those from the Supreme Court.

In the courts of appeals and in the Supreme Court, it is vitally important for us to have people who have the academic, analytical ability to take complex controversies and resolve them through analysis and writing.

Oftentimes, people that have those characteristics do not come from the trial bar. They come from the ranks of academia. And if you will recall, since I have been chairman of the committee, I believe that there have been at least three law school deans or professors who have been approved, not for the district court but for the courts of appeal.

The CHAIRMAN. Correct.

Mr. WATKINS. The district courts provide a somewhat different situation. Our committee believes that some of the most important issues of our time are first presented in the U.S. district courts of the United States. And we also believe that lawyers who are going to be district court judges ought to have been involved in the trial process, not necessarily in the Federal courts but in some courts where they understand the trial process, not only understand it from a reading-books point of view, but actually have been involved in the trial process, have tried cases, have taken depositions, have argued motions. And on those candidates, our committee uses as one of the criteria—not the only criteria—one of the criteria the ability and the experience of having tried cases.

Now, let me turn to Judge Breyer. Judge Breyer, I believe it is true that he has not tried any cases. However, he has been a distinguished professor at the Harvard Law School. He has been a Chief Judge for the Court of Appeals for the First Circuit for 4 years, and 10 years before that, he was a judge on the court of appeals.

He in that capacity has taken those difficult controversies that come from the district court and analyzed them, resolved them, written about them, and some of those controversies are similar and, indeed, may be identical to the kinds of issues that he will be called on to resolve in the Supreme Court of the United States.

So I think a short answer to you would be that the district courts pose a slightly different problem than the courts of appeals and the U.S. Supreme Court. And since Judge Breyer is a nominee for the U.S. Supreme Court, our emphasis on trial experience is somewhat less than it would be if he were being considered for the U.S. district court in Boston.

The CHAIRMAN. Well, I appreciate the answer. My question was not meant as a criticism. It was meant to lay in the record what I just told you so you understand this committee, because occasionally—I do not think there has been much conflict between the Chair and the committee, but occasionally there has been conflict between the committee and the ABA. And I just would want the record to show that there is that distinction, and the rationale for the distinction is as you have stated it.

As you well know, under the law, under precedent, we are not bound in any way to accept your recommendations. I can say up to this point my support for Judge Breyer is enthusiastic—I have not heard all the witnesses today, so I will withhold final judgment

until I hear everyone. And I think he is a fine man who will potentially make a great Justice. I for one think we should have people like you on the bench. I mean "you" in the editorial sense. I do not know you well enough to know whether you should be on the bench, but I think there should be people like you gentlemen. This is the first Court that I am aware of in over 200 years that has no practitioners of any consequence on it, and that is a serious problem, in my view. That is a serious problem.

I want Justice Powells on that bench. I want Hugo Blacks on that bench. I want Earl Warrens on that bench. If I want that, the only way to get that is have Orrin Hatch appoint me President. But, I do not get to choose that.

Senator HATCH. I am thinking about it. [Laughter.]

The CHAIRMAN. But, seriously, I think it is a very important point because we are going to have some conflicts as we go on, we, this committee and the bar. We are probably going to reject the recommendation of the bar with regard to an unqualified recommendation for a district court judge in Maryland because the person had not had trial experience. We happen to think, looking at all the other factors you consider, my guess is we will say that person should be confirmed.

So I do not want people to misunderstand that the differences relate to any fundamental character questions. They relate to what you weigh as the most important factors and having the best guess that we will have a good judge, and to what we relate to it. In this case, I do not think there is much of a disagreement at all, and I am not suggesting Judge Breyer has to have trial experience, because I, quite frankly, think his experience in working in public matters, working in the political fora, gives him the same kinds of exposure one would get in court.

This is not a case against academics. I do not mean that at all. But I would like to see a Court made up of people who have actually, to use the trite phrase, been in the trenches, had to stand before clients and say, well, I do not know whether we are going to win this one, we have a settlement offer, I cannot guarantee you, we could get more, or not get more, I cannot guarantee you would be found guilty or innocent, but here is my best judgment.

They are hard decisions for lawyers to make, hard decisions, and I would like to have a few people on the Supreme Court who have had to make those kinds of hard decisions in addition to the very difficult decisions academics and scholars make as well.

So that is the reason I have raised the question, because we have not had much of a chance to talk about the entirety of the process, and I will refrain from doing that any more now. But I wanted the record to reflect the basis upon which you legitimately look to trial experience for the district court, and ironically, weigh that more. In the minds of the average person, they would say, well, gee, why would a person for the lowest court have to have that experience. Well, there is a good reason why, and you have stated it.

Mr. Greco, you look like you want to say something.

Mr. GRECO. Senator, just for the record, in the case of Chief Judge Breyer, I found during my interviews of the outstanding members of the trial bar in the first circuit that Judge Breyer enjoys tremendous respect on the part of the trial bar.

The CHAIRMAN. Absolutely.

Mr. GRECO. And I think this is so because, in addition to what you were saying, which is true—it is important to have a balanced court, especially at the Supreme Court level—what is equally or more important is to have an individual who has the respect of the trial bar and who is respected, among other things, for his fairness and open-mindedness and his concern for resolving disputes involving ordinary people. And Judge Breyer has that respect, and I just wanted to point that out for the record.

The CHAIRMAN. He clearly does, and Judge Breyer has one of those unique abilities to seem to be able to master the subject matter before him that impacts upon the people who are before him. He not only has the sympathy of the trial bar; I have no doubt that he understands the trial practice as well as anyone could who has not had a trial practice.

So I do not have any doubt about that ability. I just thought it was important that it be in the record, because people, my colleagues—this is basically a "get out of jail free" card for me a little bit, Mr. Watkins—because my colleagues constantly say to me, Joe, why do you listen to the ABA when they review this guy that the President sent up or this woman the President sent up in my district, who has practiced law for 21 years and is a fine person and give him or her a partially unqualified, you know, a mixed rating. And I say, well, why did they get the rating? They say, well, look at it. The rating says because they have not had a trial practice. So this discussion here is in part to explain that process as well.

I thank you for your answer. And, again, I do not have any doubt about Judge Breyer's ability to handle anything that comes before the Supreme Court, but I now yield to a trial lawyer, at least a former trial lawyer, Senator Hatch.

Senator HATCH. Mr. Watkins and Mr. Greco, I just want to personally thank you for the efforts that you have put forth here. You have done a very good job. It has been thorough. It has been professional. It is the type of a job we would like to see all ABA investigations conduct. So I want to compliment both of you, and I agree with your conclusions.

Mr. WATKINS. Thank you, Senator.

Mr. GRECO. Thank you.

The CHAIRMAN. Thank you, Senator.

Senator Metzenbaum.

Senator METZENBAUM. Well, Mr. Chairman, I appreciate the fact that you got into this matter of the Bar Association saying that a lower court judge up for approval has to have trial experience. As a matter of fact, you go much further than that. You go to the point of saying that a district court judge has to have practiced within the last 10 years in the trial court. And I must say that that is—you are making a face, Mr. Watkins, but I can tell you that in connection with a nomination that I have made, that is exactly what has been stated; that is, he has not been in the district court or in a trial court in the last 10 years.

I do not have any quarrel about Judge Breyer's nomination and confirmation as far as his not having been in the lower court trying cases. I have more difficulty with the Bar Association somehow concluding that you do not need that experience if you are on the

appellate bench or you are on the Supreme Court, but you do need it if you are a district court judge. I think, frankly, that is a distinction without a difference, and I think that in one matter that I am familiar with, that is the only basis on which the Bar Association is coming forward and saying that a district court nominee is not qualified because he has not practiced, tried cases within the last 10 years. Everybody else says everything is wonderful about him.

I just say that I do not think that you are wrong in indicating that Judge Breyer is an appropriate person to be confirmed as a Supreme Court Justice. But I think you are terribly wrong, I think you are totally inconsistent in saying that a lower court judge needs that experience but an appellate court judge or a Supreme Court Justice does not. And, basically, I think the original point is I think you are totally wrong that in order to be a judge you have to have practiced in the trial courts in the last 10 years.

I would think that Senator Biden or Senator Hatch might very well make good Federal court judges. I think I would even be willing to vote for both of them. They have not been in the trial court——

The CHAIRMAN. Do not get carried away, now. [Laughter.]

Senator SIMON. It might be a close vote on the committee.

Senator METZENBAUM. Well, since I have included you both, you can see how far I am prepared to go. [Laughter.]

Senator HATCH. You can see how radical Howard really is.

Senator METZENBAUM. Yes; but I have great difficulty in the position that you have established as a rule of thumb that a nominee for the district court has to have practiced in—been at trial in the courts during the previous 10 years.

Mr. WATKINS. Well, Senator, I know the matter to which you refer is a very difficult matter for the committee. We looked at it long and hard, and we had several people evaluate that particular person. And the committee came out the way it did, not without great anguish and thought before the results were put together.

Senator HATCH. Would Senator Metzenbaum yield for just a second?

Senator METZENBAUM. Surely.

Senator HATCH. I reviewed that whole file, and I think there is room for question here. I do think I would just caution the Bar Association that you should look at the total record. And it is certainly a factor to be considered. But the person that Senator Metzenbaum has recommended appears to have widespread support in his community. The person that Senator Biden mentioned, as far as I am concerned, has played the game the way it should be played, is a very good person, and frankly, deserves the opportunity to serve. So I hope the bar will reconsider its position in this.

I agree it is a factor. Anybody who is concerned about getting good judges certainly will have to consider that as a factor. But I would consider the totality of the person's experience, and in the case of Senator Metzenbaum's and this other, I personally believe that they are both very qualified to serve as judges.

The CHAIRMAN. Put another way, Mr. Watkins, do not be insulted when we disregard your recommendation on those, because we will disregard your recommendation on Mr. Williams of Mary-

land, we will disregard your recommendation on the Senator Ohio's recommendation, unless there is some other reason that see. I do not want to discourage you from factoring that in a more than I want to discourage you from factoring in the differen factors you do in the Supreme Court.

I just want the record to indicate that we truly appreciate the effort; we appreciate your recommendations——

Senator HATCH. We sure do.

The CHAIRMAN [continuing]. And hopefully, you appreciate the fact we are not going to pay attention to some of them.

Mr. WATKINS. Well, Senator Biden, there are a couple of things. We recognize that the committee only provides a recommendation. We are not of the view that we have the right to block any particular candidate. However, we think that over a period of time, we have developed the kind of expertise that will give us an ability to give guidance to this committee and the President that will be helpful in both venues by the President and by this committee about making a decision on someone who is going to be a district court judge or a court of appeals judge or a Supreme Court Justice.

The CHAIRMAN. As long as I am chairman of this committee—which could only last another couple months, possibly—I look at no other recommendation more closely; I value no other recommendation more highly; and I think in my 22 years of working with you, you have found that out. And so I do not mean this as an overall criticism. It is just something you should be aware of, because as we broaden the nature of the courts, as this President has become—and others have as well—committed to having the courts reflect society more, we are necessarily going to go through changes. I remember when President Carter was President. He was the first President to my knowledge who made a concerted effort to find women to go on the bench. The problem was when you and I graduated law school, we had about 2 percent women in our class—do not hold me to that number, but it was very small. In my class, there were 2 women out of 85 that I graduated with. My son graduated from the same law school, and out of a couple hundred graduating, I believe there were more women than men.

But there used to be a rule, a rule of thumb, that you in fact would not consider someone for the bench without 10 years' experience in the legal community. There were not as many women having had 10 years' experience in 1976 and 1977—as there are now. Now every bar association in the Nation, thank God, has a bevy of qualified women that is equally almost as large, a pool that is close to as large as men, and we have no trouble—none. The ABA has no trouble finding women "qualified."

But we did go through that period where we had the ABA coming, necessarily, based on their rule, saying, well, this person only has 6 years' experience. And it is generally a good rule. It is generally a good rule.

My criticism to the extent there is a criticism is that sometimes the rule is cast in a way that it is hard and fast, and it overcomes in and of itself all the other factors, as opposed to it being stated, "otherwise qualified, but we believe that the lack of trial experience is enough not to recommend." That is usually not how it is stated.

So we are going through that period now with black Americans, Hispanic Americans, and interestingly enough, we are having some difficulty getting young, successful lawyers to look to the bench now, and we are finding that some of the people who have had experience of 20, 25 years at the bar, but who have not had trial practices, are willing to go on the bench.

So it is an interesting dilemma. It reflects the times. You get caught up in that crosscurrent—you, the ABA. I think you have done an admirable job on this and all the other ones that we have had, but I knew that this issue would be raised. I think it is appropriate it be raised. And what I would like to consider doing—and I will yield now to my friend from Maine—and I know you are willing to do this—I think I would like to, not in a formal hearing, although it may take that form—I have spoken to the president of the ABA about this—to invite my colleagues on the committee and any other of my colleagues, and invite you and other members of the ABA who are involved in this just to come to my office and sit down and have a long lunch and discuss some of these things; tell us your thinking about where you see all of this going—not to discuss any particular candidate—because there is a little bit, as you could detect, there is sort of a rising level of confusion—I will put it that way—on the part of Members of the Congress as to motivation. I do not question the motivation at all. I think it is a useful thing for us to discuss because it is a slightly different time and a different cadre of people to whom we are looking to go to the bench.

I yield to the Senator from Maine.

Senator COHEN. Thank you, Mr. Chairman.

I think the discussion has been very helpful. I would like to go back and just say that I think it is important that they do give due consideration to trial experience when we are talking about——

The CHAIRMAN. Absolutely.

Senator COHEN [continuing]. U.S. district court judges. I think trial lawyers are an entirely different breed from corporate lawyers or real estate lawyers or estate lawyers. A trial lawyer——

The CHAIRMAN. I agree.

Senator COHEN [continuing]. Is someone who has, obviously, a strong sense of ego, has a——

The CHAIRMAN. Well, I do not subscribe to that.

Senator COHEN [continuing]. A good memory——

The CHAIRMAN. I subscribe to that.

Senator COHEN [continuing]. Capable of attacking the jugular, but basically is an intuitive type of individual—and highly intelligent. The intuitive part of it is critically important in terms of how one conducts a trial. And I think the trial judge, a U.S. district court judge or an estate court, for that matter, has to have those same characteristics. He or she is called upon to make snap decisions based upon experience, ruling on evidence.

All of those issues, I think, pertain to what type of individual that person is. So I think that they do give importance and should give importance to trial experience when you are looking at the trial court level. But as Senator Biden has said, we ought not to adopt a rule of thumb in each case instead of a rule of reason. There may be reasonable factors involved which would cause the

bar to take into consideration that it does not have to be a 10-year period; it could be an 8 or 7 or 6, depending upon the qualifications of that individual, his or her demonstrable abilities while practicing law, while going before the court as a litigator.

So I think that Senator Biden makes a good recommendation to see if there is not some flexibility that cannot be adopted so that we do not find ourselves in the position of simply thumbing our nose at the ABA, saying, thanks, ladies and gentlemen, but we disagree fundamentally with what you have recommended and just dismiss it.

It is a good rule for the most part; and given some flexibility, I think it would be a really highly workable rule, and I would recommend that you sit down with committee members and see if we cannot find a way to take into account some additional flexibility when we do get candidates who seem extremely well-qualified and yet have not had the requisite number of years before the trial bar.

Mr. WATKINS. May I respond, Senator?

The CHAIRMAN. Please.

Mr. WATKINS. Our committee has semiannual meetings, and we try to review what has happened in the past and what is happening—what will be happening—in the future. And issues are raised and discussed at the committee level to try and respond to concerns that people involved in the process have.

We are constantly looking at our criteria and making sure they are followed in a fair but flexible way. We have these issues that have been raised during my tenure as chairman, and you can be assured that we will try, and we will be raising the question of flexibility in the application of the standards that we apply, particularly to district court judges.

Senator COHEN. I would take just a little bit of issue with my colleague from Ohio, who indicated that it is a distinction without a difference between whether or not you have experience at the district court level and whether or not you have it at the appellate court level. I think there is a major distinction to be made. I think anyone who sits at the appellate court level has a good deal more time to be reflective; does not have to make those kinds of snap decisions in the heat of battle, so to speak; who brings to bear an entirely different type of intelligence that might be much more analytical as opposed to intuitive at that case——

The CHAIRMAN. And has two law clerks sitting with him.

Senator COHEN [continuing]. And has two law clerks sitting with him—and has time to reflect upon whether or not the evidence and the facts that were turned by the district court were consistent with the rulings made at the time as the law applied to them.

So I think you have two entirely different types of qualifications for district court and appellate court, and the ABA is correct in approaching it on that basis. But to the extent that you can have more flexibility, I think that is something that would be worthwhile exploring.

The CHAIRMAN. Let me make it clear, Mr. Watkins, we are not attempting to write your rules. The biggest thing I want to do—and we have talked about this—is that there is a little uprising in the making in the Senate, and I think if you just are able to explain the rationale, it would be a very helpful thing.

Now, we have 5 minutes left in the vote. I am going to yield to the Senator from Illinois to start.

Senator SIMON. I am just going to take 1 minute and make a request of Mr. Watkins and Mr. Greco. Yesterday, in response to Senator Metzenbaum, because of his Lloyd's of London investment, Judge Breyer indicated where he would recuse himself, sitting on the Court. I would like to get the copy of that transcript to you yet this afternoon. I would like you to discuss it with some of your colleagues, and I would like to call you on Monday afternoon, if I could, to get your evaluation.

I think Judge Breyer is going to be a great U.S. Supreme Court Justice. I am concerned that he may recuse himself more than is good for the Court. And I would like to have you take a look at that, and we will get that to you this afternoon. I will call you on Monday afternoon.

Mr. WATKINS. Thank you, Senator. We would be happy to look at that and see if it would make any difference with regard to Judge Breyer. I cannot think that it—I do not think that it would——

Senator SIMON. Oh, I do not think it makes a difference in terms of our vote. I think we should clarify this, if it needs clarification, before he takes the oath.

Mr. WATKINS. Fine.

The CHAIRMAN. Put another way, Mr. Watkins, one of the dilemmas that we have had here is that we do not want you—or, at least, I do not think the Senator from Illinois is suggesting—we do not want you, the ABA, to tell us whether or not that would change your view about Judge Breyer. Obviously, it will not and should not.

What I think we are all groping for here—and I am not sure this is the forum in which to do it—is I think the ABA in its subcommittees that deal with the canons of ethics, I think the Judicial Conference in its appropriate method of dealing with the canons of ethics, and I think we who write legislation who can amend the existing law, should all look together at what is in a sense a case of first instance, but we are going to have more things like this—to look and see whether or not there should be additional circumstances under which a judge should recuse himself.

But your opinion—I think what the Senator of Illinois is saying is he respects your personal, individual opinions; we are not looking for a corporate decision from the ABA at this moment.

Let me suggest to you—and apologize to you for doing this—but we are going to have to go vote. Senator Grassley has questions. He is on his way back. I would now authorize Senator Grassley or whomever arrives back at the podium before I do to take the committee out of recess and begin their questioning, whoever shows up first, so we do not slow this process up.

But let me say again, I truly appreciate the incredible amount of work that you all do and the good faith with which you do it. In the 22 years I have been here, I have disagreed on occasion, but I have never questioned the motivation, nor have I questioned the scholarship or the intensity of the effort put in by the ABA.

But these are changing times, and I think it is time to sort of run the flag back up the pole, make it clear why you do what you

do, and give the rationale so we can make a judgment here as to whether or not we wish to continue to afford you, in effect, you the ABA, the first seat in the process.

Now, I see some of my colleagues are here. I would yield to Senator Specter and keep the hearing going. I am going to go vote, and I will be back.

Thank you.

Mr. WATKINS. Thank you, Senator.

The CHAIRMAN. I thank you for your presence here today, and I look forward to meeting with you soon.

Mr. WATKINS. Thank you for allowing us to appear.

Mr. GRECO. Thank you, Senator.

Senator SPECTER [presiding]. Thank you very much, Mr. Chairman.

I regret that other commitments prevented my hearing your opening testimony, but I would join in what Senator Biden said in thanking you for your work in the judicial evaluation process.

There has been some interest on our committee and by other Senators in broadening the array of possible nominees which I understand is not precisely within the purview of the American Bar Association, but I would be interested in what you think about it. I have expressed concern, which is shared by others, that so many of the Supreme Court Justices—eight of the nine—were appellate judges elsewhere, seven of those eight from Federal courts of appeals, and one, Justice O'Connor, from the intermediate appellate court in Arizona.

Judge Breyer's credentials are excellent, and I think he made a very good impression on the committee as a whole and on others during his testimony here.

But I have been concerned that the same names seem to resurface—the great line from "Casablanca," "Round up the usual suspects." Last year, we had a small group under consideration that included Bruce Babbitt and Steve Breyer, and this year, we had a small group under consideration that again included Steve Breyer and Bruce Babbitt.

And a thought which has been on my mind is to have the Judiciary Committee solicit from the chief justices of the State supreme courts, the chief judges of the courts of appeals, the Federal district courts, the presidents of the bar associations, and presidents of the minority bar associations, recommendations to try to broaden the field, to look for more people who have extraordinary credentials and perhaps have a broader background in everyday life.

We had—not to go to a controversial note—Alexander Williams, who was turned down by the American Bar Association. One of my staffers, Charity Wilson, made a comment that so many of the nominees we see are silk-stocking, and Alexander Williams was with wool socks that had a hole in them, and perhaps had some diversity which would be helpful. And I expressed my view that it was unfortunate that Mr. Babbitt was not nominated in the sense that he is a former Governor, Secretary of the Interior, former Presidential candidate. Governor Cuomo would have been an excellent prospect.

And while I understand that you do not pick nominees—nor do I—what is your thinking about the desirability of having a broader

pool to bring to the attention of the President, to give him some suggestions? We do have an advice function, constitutionally, which we do not exercise very much. We do too much consenting, perhaps, and not enough advising. We dissent very infrequently, probably do not do enough of that.

What do you think, Mr. Watkins?

Mr. WATKINS. I would like to comment first about the question of silk-stocking versus wool stockings. In preparation for that other hearing to which you referred, we looked at the kinds or the types of practices of some of our nominees, of the nominees that we evaluated, and I think it is not accurate to say that we only give qualified or better ratings to those from silk-stocking firms. Many of the nominees that we have evaluated are not from silk-stocking firms. I believe that in the last year since I have been chairman, at least 27 of the candidates that we have found qualified have been minorities, and not all of them have been from silk-stocking firms. So I wanted to try and straighten that—make that point.

Second, I think with regard to giving the President a wider view, a larger list of nominees, I think that is a very good idea. I think that our committee cannot be involved in that. Our committee is insulated in that we only evaluate; we do not participate in the selection process, and I do not think that this committee should participate in the selection process, because it will make it difficult for us to fairly and objectively evaluate somebody.

So I believe that our committee, whatever function it has, should be limited to the evaluation. Now, if there are other sources from which the President can obtain a wider group of candidates for him to select, I think that is a terrific idea, but I do not think that our committee should be involved in that.

Senator SPECTER. Well, Mr. Watkins, I am not saying your committee should be, but I do not know that because you pass on qualifications, that disqualifies you from making recommendations. The Senate might be in the same position where you say the Senate has to vote, or this committee has to vote and make the preliminary determination, but of course, we have an explicit affirmative constitutional duty to advise as well as to consent. But there are plenty of sources for suggestions even if they do not come from the committee itself.

I know that there have been minorities evaluated by your committee and recommended, and Senator Heinz and I established a judicial nominating panel, and we have had very extensive outreach for minorities, for African-Americans and for women. And you are not responsible for those who are sent to you, but I believe that, notwithstanding the efforts of many people, including President Clinton and Presidents Bush and Reagan, to broaden the base, that there is still a very, very heavy proportion of silk-stocking representation in the Federal judiciary. I think we have a long way to go on that, and when I saw the memo with Charity Wilson and the reference to the wool stockings, and the wool stocking with a hole in it, it struck a chord with me.

And Judge Breyer went to some length to point out his associations as a ditch-digger, which I thought was a little thin, and his contacts with the people, which candidly, I thought was a little thin, too. I think Judge Breyer has a phenomenal background, com-

ing from middle America, with a great education; he clerked for a Supreme Court Justice and worked for this committee and was a Harvard law professor and a first circuit judge. Those are extraordinary qualifications, but I do not think it really comes down to the level of being with the people.

And the nomination of Justice Thomas I think posed that kind of a quality, and I might say we are still looking for those qualities to come forward from Justice Thomas that we do look for—and I think there is time yet on a career which has decades to span, only 3 years into the career—but those are qualities which we look for, and we are going to be pressing hard from the committee to try to give that diversity.

I think back to the famous story of Senator Borah, who was chairman of the Judiciary Committee in 1930 and was asked by President Hoover to look at a list of 10 people. Senator Borah looked at it and said, "I like number 10." It turned out to be Cardozo, and I think that was quite a selection.

Let me yield to my colleague, Senator Brown.

Senator BROWN. I have no questions.

Senator SPECTER. Let me yield to my colleague, Senator Grassley.

Senator GRASSLEY. Mr. Watkins, we had a chance to speak a few weeks ago, during the confirmation hearing of Alexander Williams.

I want to follow up on some things that we discussed at that time. You testified that the ABA interviews various lawyers in the community about the nominee, but you do not disclose the names of the people that are interviewed. Of course, that means that the nominee does not know who might be making allegations against them. And, of course, you do not tell the judiciary the identity of people who have participated in your investigation.

Is that a fair characterization of how the ABA investigates?

Mr. WATKINS. That is not quite fair, Senator.

Senator GRASSLEY. OK; I will listen to your——

Mr. WATKINS. If there are negative matters that arise during the course of our investigation, we raise those matters with the candidate in a general way so that he has an opportunity to respond to them.

There are times when raising a particular matter will identify to the candidate the person who made the comment. In those cases, we go back to the interviewee and say to him, well, we have to raise this issue with the candidate, and if we raise it, your identity will be revealed. Will you allow us to reveal your identity to the candidate? Sometimes the interviewees say yes; sometimes they say no.

If they say no, then we do not use that interviewee's information.

Senator GRASSLEY. But as a general rule, then, the idea is that you will keep the names of the people you have interviewed confidential?

Mr. WATKINS. We keep the names confidential. We have found that we get information that sometimes the FBI does not get, and we can follow up on it. Many times we are able to verify the information that is given to us confidentially from other sources that are public, and if we can do that, then it makes it easy for us to reveal that information to the candidate.

Senator GRASSLEY. And, obviously, those names are not available to us on the Judiciary Committee.

Now, the reason that I ask this is to compare it to the way the FBI does an investigation of a nominee. The nominee is advised of any adverse information, is given a chance to respond, and then we get that entire file for our review, and we look it over, and it is our responsibility to draw our conclusions.

In addition, this committee has, of course, an investigative staff, and as I understand it, an individual must be willing to put his or her allegation on the record before this committee will act upon it. And a specific reference to that would be that that was part of Senator Biden's difficulty with Prof. Anita Hill's allegation in the first instance. I just use that as an example, not to bring that up again, but the point is that we want to know who is making allegations.

It seems to me that as far as this committee is concerned, I guess maybe as far as Justice and the White House are concerned, the ABA is given a very special consideration to do those investigations, keep the names a secret, and then at least as a practical matter—and I know that as we were discussing last time, you took exception to my use of the word "veto." I accept that you do not see your role that way, but as a practical matter, at least during the Reagan-Bush years, the ABA was given a virtual veto over judicial nominees.

If the lawyer will not speak on the record about a nominee, why would the ABA even pay attention to such secret charges? And I heard what you said, that you may get some information you would not otherwise get. But is that such an overriding consideration that you keep everybody's name secret, keep it from the committee, and let us draw our conclusions?

Mr. WATKINS. Let me see if I can respond to that, Senator. We have found that lawyers talking to lawyers is a process whereby they speak the same language and they will share things with one another. That is the first thing.

It seems to us that it is not unfair to keep the names secret, if there is any negative information that comes up, that we share that with the candidate. We do. That is our process. If any negative information arises and we can share it with the candidate, we do. And if the negative information comes from a source that the candidate will be able to identify, we go back to that source of information and say we have to reveal this to the candidate so he can respond.

If that source says, I do not want you to reveal my name or I do not want you to indicate this negative information if it would reveal my identity, then we do not use that information. That information is discarded. We do not use it. We do not put it in our report that is circulated to the committee.

So I think that the candidate is, in effect, given an opportunity to rebut any negative information that this committee gets and considers.

Now, if the candidate is not given that opportunity, I agree with you, that would be unfair. But that is not the way our committee works. If there is any negative information, it is shared with the committee; and if the negative information cannot be shared with

the committee—with the candidate, our committee does not consider it.

Senator GRASSLEY. Well, if the information is not correlated to a particular source that the candidate can identify, then he cannot rebut it because the name is not known. So does he really have a chance to clarify?

Mr. WATKINS. Well, let me give you an example. There are times when there is a quality that comes through that we hear from two or three sources; for instance, discovery disputes. Those are things that go on between lawyers about whether documents should be revealed or whether documents should be produced. Over a period of time, if an individual is known or has been known in the legal community as someone who hides hot documents or you have to go to court all the time to get hot documents or documents that should be produced, if that comes from two or three sources, we can say to the candidate, Candidate, this issue has arisen in our contacts about you. What do you have to say about that? And the candidate can respond, and we will consider what the candidate says; therefore, the candidate knows that that is an issue to be dealt with. But we do not reveal the names.

Senator GRASSLEY. Let me just say something in conclusion. You may want to react. If you want to, I will listen to you. If you do not want to, it is okay as well. I kind of take off from what I think is a sincere belief on your part and your committee's part and probably a historical view that you have. I think over my tenure on this committee—I did not start out this way, but after some experiences I think have not been good, I question the special role that the ABA serves and whether or not it serves any purpose whatsoever. I think the words you used that expressed your view is that you feel you have developed some expertise, and out of that expertise, through this very important process of selecting people for a lifetime tenure on our courts, you can add something to the process.

I would just use some examples, and maybe I went over this with you before, but I want to go over it again. I took the Carter administration as an example. There were four nominees rated not qualified; three were confirmed and one, I believe, served with distinction because I know how he served—Judge O'Brien in my State. He is now going to go to senior status, and we are now going through the process of picking a person to succeed him. But that would have been 15 or 16 years he served, I believe.

Now, during later years, we have impeached two Carter era judges, and another one resigned after conviction, and none of these were the same individuals that the ABA committee had rated not qualified. So an ABA evaluation apparently does not bear any relationship to the likelihood that a judge will have a successful tenure. And so that is why I continue—I mean, those are just some examples. There are lots of reasons beyond those examples that I am going to continue to question the role of the ABA.

Mr. WATKINS. May I respond?

Senator GRASSLEY. You can. I said I would listen to you. I owe you that courtesy.

Mr. WATKINS. I believe that those judges that resigned or were impeached, there were questions of integrity that caused their resignation or impeachment.

Senator GRASSLEY. That is probably very true, but they still were rated qualified.

Mr. WATKINS. Right; and I would suggest, although I was not on the committee when those persons were evaluated, I suggest that at the time those people were nominated, there was no indication of their having problems with integrity. That is one of the areas that I think our committee is almost inflexible about. If there are integrity problems with a candidate and they are established, I would believe that our committee would not bend very much.

One can argue about the question of whether a candidate has sufficient trial experience or has the appropriate judicial temperament. On issues of integrity, however, our committee, I would like to characterize it as firm in that, if there is any question of integrity and it is investigated and our committee is of the opinion that there is some problem here, I can assure you, Senator, that that candidate will not be confirmed.

Now, for those three people that you have referred to, I think this issue of integrity came after they came on the bench, and it was their activities while they were on the bench that caused them to be impeached or resign.

Senator GRASSLEY. Well, as important as a nominee's reputation in his or her legal community might be—and it is very important, I believe—I hope that in the not too distant future that we will be able to obtain that information by our own Department of Justice and our own committee investigative staff.

Mr. Chairman, I yield the floor.

Senator METZENBAUM [presiding]. Thank you, Senator Grassley.

Senator Cohen.

Senator COHEN. I have already had questions.

Mr. WATKINS. Mr. Greco, I believe, has something to add to what I said, Senator.

Senator METZENBAUM. I just want to add something along the line of what Senator Grassley is questioning. You talked about the fact that if there is a question of integrity, you can be certain that the person will not be approved.

Mr. WATKINS. I think if we find that there is a question of integrity, that we can have a basis for questioning a person's integrity, I would be very surprised if our committee would approve or find anybody qualified.

Senator METZENBAUM. What concerns me, Mr. Watkins, is you are dealing with human beings, and there are reasons at times to question the integrity of some who are the inquirers themselves, who are on the committee. And that integrity, we have no way of assuring ourselves about that, but I personally have concerns about the integrity of some who have been the inquirers in some of the cases that have come before this committee. So I think that your committee ought to give some little thought to that question of not only judging others but those who are judging being judged themselves.

With that, I think, Mr. Greco, if you have a statement?

Mr. GRECO. Thank you, Senator. On your point and on the point that was raised earlier by Senator Grassley, I want to point out that the American Bar Association is really the messenger. It is not this committee that makes the final judgments as to whether some-

one in a legal community should or should not be given a lifetime appointment.

I would hate to see the messenger shot for delivering the message from that individual's legal community.

Senator METZENBAUM. Unless the messenger is tainted in his inquiry, then perhaps he deserves to be shot.

Mr. GRECO. Well, that is an assumption that is a very serious assumption that you are suggesting, Senator. And until that assumption is demonstrated, I think my point is that if you assume that this committee, which has been in existence for many, many years and since the early 1950's has been looked to by both the White House and the Senate for its evaluation, what we do as a committee is to try to ensure that someone who is appointed for life, someone who cannot be removed from judicial office except by a cumbersome impeachment process, that that person is qualified, at least qualified if not well qualified, to be a Federal judge.

And what concerns me is that criticism of the work of the committee, the ABA Standing Committee on the Federal Judiciary, is really slightly off the mark because if—going back to Senator Cohen's question, if the committee finds that the nominee of the President is totally lacking in trial experience and the appointment is for the trial court, for the Federal district court, we are doing no one a favor. We are not doing the public a favor, we are not doing trial lawyers a favor, we are not doing the nominee a favor by putting that person in the cauldron of having to act as a trial judge. In fact, we are doing just the opposite. Instead of ensuring justice, perhaps we are creating a situation where injustice will result.

The committee standards, the ABA committee standards, are very broad. We do not have a rigid 10-year rule that if someone has not been a trial lawyer for 10 years that person will not be considered. We do not have a rigid rule that says that if a person has not tried so many cases he or she will not be considered. On the contrary, our standards are broad enough that where that situation exists, not enough years at the bar, not enough trials, we look at other compensating factors, other similar kinds of activities of a trial nature, other service in the profession.

So that while we welcome the opportunity to meet with Senator Biden and others to talk about the standards of the committee, we believe that the standards are broad enough. And I am getting a sense from what Senator Biden said earlier that the messenger—when we deliver a message to your committee that the individual, the nominee's community, legal community, is of the view that the person is lacking in one way or another, that it is the messenger being shot rather than the message being heard that we try to communicate from that nominee's legal community.

The CHAIRMAN. We are not going to shoot anybody. We just want to keep this dialog going. I thank you both very, very much for being here. Again, thank you for the extraordinary amount of effort you have put into this in taking the time out of your practices.

Mr. GRECO. Thank you, Senator.

Mr. WATKINS. Thank you for having us.

The CHAIRMAN. I look forward to seeing you very soon, Mr. Watkins.

Mr. WATKINS. You are very kind, Senator.

The CHAIRMAN. No, I am serious. I do want to talk to you about this.

[The letter of Mr. Watkins follows:]

AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
Washington, DC, July 11, 1994.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary, Dirksen Senate Office Bldg., Washington, DC.

DEAR MR. CHAIRMAN: This letter I submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Chief Judge Breyer is based on an investigation of his professional qualifications, that is, his integrity, judicial temperament and professional competence. Consistent with long standing policy, the Committee did not undertake any examination or consideration of Chief Judge Breyer's political ideology or his views on any issues that might come before the Supreme Court.

To merit the Committee's evaluation of *Qualified* or *Well Qualified* the Supreme Court nominee must be at the top of the legal profession, have outstanding legal ability and wide experience and meet the highest standards of integrity, professional competence and judicial temperament. The evaluation of *Well Qualified* is reserved for those found to merit the Committee's strongest affirmative endorsement.

I am pleased to report that the Committee finds Chief Judge Breyer to be *Well Qualified* for appointment as an Associate Justice of the Supreme Court of the United States. This determination was unanimous.

In conducting the investigation, members of the Committee personally interviewed more than 300 federal judges, including present and retired members of the Supreme Court of the United States, members of the Federal Courts of Appeals, members of the Federal District Courts, Federal Magistrate Judges, Federal Bankruptcy Judges, and members of State Courts. The investigation included all colleagues of Chief Judge Breyer on the United States Court of Appeals for the First Circuit, all Federal District Court Judges from the District of Massachusetts, and all the justices on the Supreme Judicial Court of Massachusetts. Numerous federal and state court judges from the other states in the First Circuit were also interviewed.

Members of the Committee personally questioned several hundred other individuals, including practicing lawyers throughout the United States, former law clerks and lawyers who have appeared before Chief Judge Breyer. Committee members also interviewed law school deans, faculty members of law schools and constitutional scholars throughout the United States, including professors at Harvard Law School, where Chief Judge Breyer has served on the faculty since 1967.

The Committee also had available the report prepared in 1980 by the Committee in connection with the investigation of Chief Judge Breyer for appointment to the United States Court of Appeals for the First Circuit. He was at that time found by a majority of the Committee to be *Qualified* and by a substantial minority *Well Qualified* for appointment to that Court.

It has been the practice of the Committee to ask groups of distinguished legal scholars and Supreme Court practitioners to review independently all of the opinions written by nominees for the Supreme Court. This practice was followed again here and Chief Judge Breyer's opinions were reviewed by: (1) a Reading Group of distinguished lawyers chaired by Rex E. Lee, formerly Solicitor General of the United States and presently President of Brigham Young University, consisting of a diverse group of 10 lawyers, all of whom have practices and argued cases in the Supreme Court; and (2) a reading Group chaired by Professor Nicholas S. Zeppos of Vanderbilt University School of Law, consisting of 26 members of that law school's faculty. Members of the two Reading Groups who participated are listed on Exhibit A to this letter.

The two Reading Groups reported to the Committee their independent analyses of Chief Judge Breyer's opinions and other writings. These reports were evaluated by the members of our Committee, who also read opinions of Chief Judge Breyer and his published writings on a variety of legal subjects.

EVALUATION

INTEGRITY

Chief Judge Breyer has earned and enjoys an excellent general reputation for his integrity and character. No one interviewed by the Committee had any question or doubt in this regard. His colleagues in the First Circuit, where he has served for fourteen years, the last four as Chief Judge, commented on his character and integrity in terms such as these: "He is absolutely first rate, a remarkable combination of one who has character and is intelligent, yet is a personable and likable human being"; "He is eminently well qualified, of the highest character"; "He combines acute intelligence and a deep sense of humanity. He is a down to earth human being who is very smart. This is simply a superb appointment."

TEMPERAMENT

Chief Judge Breyer's judicial temperament also meets the highest standards set by the Committee for appointment to the Supreme Court.

His colleagues on the First Circuit and on the Harvard Law School faculty who have worked with him for up to twenty-five years, Federal District Court judges, former law clerks, his secretary of almost fourteen years, and counsel who have argued cases before him, uniformly give Chief Judge Breyer the highest praise for his demeanor, temperament, and manner of treating people. The Court of Appeals Judges in the First Circuit universally credit Chief Judge Breyer for the strong collegiality that exists in the Circuit, for his remarkable ability to build consensus, for his sensitivity and good grace, and for his outstanding leadership skills.

Representative comments from his colleagues on the First Circuit Court of Appeals include these: "He does not browbeat, and he is a genius at forging consensus and compromise"; "He has a wonderful temperament"; "He is universally well liked and respected by all of us on the Court"; "He can soften rigid positions with gentle humor"; "He is a master at getting consensus on court decisions"; "He has very good judgment, is stimulating to be around, and is not arrogant."

District Court Judges in the First Circuit also praised Chief Judge Breyer's judicial temperament: "He is a great leader"; "He is humane, not impressed with his own intelligence, which is extremely powerful"; "He has great sensitivity toward lower court judges * * * he doesn't hold anyone up to ridicule, as other appellate judges do sometimes"; "As Chief Judge of the First Circuit he has been superb, a true leader"; "He is very well liked by all the members of the First Circuit community. The Court's strong collegiality is directly attributable to Steve Breyer's wonderful personal skills"; "He is a brilliant judge"; "He conducts himself beautifully on the bench—bright and a perfect gentleman."

To the same effect are the comments of his colleagues on the Harvard Law School faculty, his former law clerks and the lawyers who have argued cases before him. Chief Judge Breyer clearly possesses and exhibits the highest level of judicial temperament.

PROFESSIONAL COMPETENCE

Chief Judge Breyer's educational background amply prepared him for service on the Supreme Court of the United States. He attended public schools in San Francisco, graduated from Stanford University in 1959 with highest honors in philosophy, attended Oxford University as a Marshall Scholar, receiving First Class Honors, and graduated from Harvard Law School in 1964, *Magna Cum Laude*. He served as Articles Editor of the *Harvard Law Review*. After law school he served as Law Clerk to Supreme Court Justice Arthur J. Goldberg.

Following his Clerkship on the Supreme Court, Chief Judge Breyer began a career with the Federal Government and then an academic career at Harvard Law School, where he has been a member of the faculty since 1967.

His service with the Federal Government included the positions of Special Assistant to the Assistant Attorney General (Antitrust); Assistant Special Prosecutor, Watergate Special Prosecution Force, U.S. Department of Justice; Special Counsel, Administrative Practices Sub-Committee, U.S. Senate Committee on the Judiciary; and Chief Counsel, U.S. Senate Judiciary Committee. He was appointed to the First Circuit Court of Appeals in 1980, and became Chief Judge in 1990. During the years 1985–89 he was a Member of the United States Sentencing Commission, and played a major role in the drafting of the Sentencing Guidelines. His twenty-seven year affiliation with Harvard Law School has included the positions of Assistant Professor, Professor, and, since becoming a Judge on the First Circuit Court of Appeals, Lecturer.

He has developed and maintained broad interests. Throughout his career he has participated actively in legal organizations and has lectured extensively about legal education. He is an active Member of the American Law Institute, and has also been a Member of a Carnegie Commission group studying the relation of science and the courts (Task Force on Science and Technology in Judicial and Regulatory Decision Making). He has participated actively in the work of the American Bar Association (ABA), in particular as a Member of the Council of the ABA Administrative Law Section and the select ABA Committee on Ethics in Government.

During his fourteen years as a Judge on the First Circuit Court of Appeals he has written approximately 600 opinions and numerous books, monographs, and articles which are most impressive, and which establish quite clearly that he is a scholar of the first rank. In addition to his extensive writings, he has delivered numerous Honorary Lectures during the past eleven years, including the prestigious Holmes Lectures at Harvard University which were published in book form by Harvard University Press in 1993 in a volume entitled *Breaking the Vicious Circle: Toward Effective Risk Regulation.*

The legal opinions that he has written during his fourteen years on the First Circuit Court of Appeals cover wide-ranging subjects. He has taken special interest in Administrative Law (which he has taught at Harvard Law School), in government regulatory matters, msot notably airline deregulation, and the Sentencing Guidelines. Chief Judge Breyer was praised repeatedly during the Committee's investigation for his excellent writing skills. His colleagues on the First Circuit call him "brilliant" and "a genius" in crafting legal opinions. Federal District Court Judges, even those he has reversed in appellate opinions, praise highly Chief Judge Breyer's writing and analytical skills. Numerous Federal District Court Judges remarked that Chief Judge Breyer writes so clearly (without footnotes) that a District Court Judge knows precisely what is expected of him or her in an appellate opinion written by Chief Judge Breyer. Chief Judge Breyer's writings reflect a higher level of scholarship required of a Justice of the Supreme Court of the United States

The comprehensive reports submitted to the Committee by the two Reading Groups of scholars and Supreme Court practitioners confirm the Committee's own conclusions concerning the scholarship and writing ability of Chief Judge Breyer. The Chairman of one of the two reading groups summarized his colleagues' assessment of Chief Judge Breyer's opinions and other writings as follows:

> Judge Breyer is a person of enormmous intellectual ability with an outstanding ability to write clearly and persuasively. His opinions reflect a wide breadth of knowledge about the law and an overriding commitment to deeply principled and objective decision making. His work is evidence of a judge keenly aware of the power and corresponding responsibility that go with his office.

The Chairman of the other Reading Group summarized his colleagues' assessment of chief Judge Breyer's writings as follows:

> Judge Breyer's scholarly ability was praised by virtually every Committee member. He was found to "display the intellectual habits associated with the most respected thinking of our times: a preference for the complex over the simple and the particular over the general, a willingness to suspend judgment, and a robust tolerance of conceptual ambiguity." His opinions, furthermore, repeatedly demonstrate "a realistic assessment" of "evolging case law," and "are generally well-researched and complete without being pedantic." "Whenever there is a significant debate about * * * applicable legal principles, Judge Breyer exhibits a determined effort to analyze and apply the governing doctrine * * * his work product is not only scholarly, it is also "free from recrimination or insinuation, even when he seems plainly skeptical. Judge Breyer's opinions are "careful * * *, tolerant and polite."

The same Reading Group Chairman perhaps best summarized the reasons why both Reading Groups have praised the excellence of Chief Judge Breyer writing and scholarship in the following words:

> He is a lawyer's lawyer and a judge's judge. He is careful, scholarly, dispassionate, and objective. Furthermore, he recognizes that there are limits to his own abilities, as a jurist, to resolve every dispute engendered by the contentious press of modern life.

Our Committee is fully satisfied that Chief Judge Breyer meets the highest standard of professional competence required for a seat on the Supreme Court. His academic training, his broad experience in the Federal Government, his service on the

faculty of a distinguished law school, his scholarly writings and his distinguished service for fourteen years (four as Chief Judge) on the Court of Appeals dealing with many of the same kinds of matters that will come before the Supreme Court, fully established his professional competence.

CONCLUSION

Based on the information available to it, the Committee is of the unanimous opinion that Chief Judge Breyer is *Well Qualified* for appointment to the Supreme Court of the United States. This is the Committee's highest rating for a Supreme Court nominee.

The Committee will review its report at the conclusion of the public hearings and notify you if any circumstances have developed that would require a modification of these views.

On behalf of our Committee, I wish to thank you and the Members of the Judiciary Committee for the invitation to participate in the Confirmation Hearings on the nomination of the Honorable Stephen G. Breyer to the Supreme Court of the United States.

Respectfully submitted,

ROBERT P. WATKINS, *Chair.*

The CHAIRMAN. Now, our next distinguished panel is comprised of two well-known members of the legal academic community, both from Stanford University, Judge Breyer's alma mater. Gerhard Casper is a distinguished scholar and administrator. He is president of Stanford University, which I am sure he finds as politically trying as any one of us up here. He will not acknowledge that, I suspect, or maybe he does not believe that. But it would seem to me the next hardest job—maybe the harder job is being the president of a major, nationally known, and internationally recognized university. He is a former dean of the University of Chicago School of Law, and I want to ask him how he hired all those law and economics guys and women out there—that is a joke, an attempt at a joke—and provost at that university. He became president of Stanford in 1992.

And if I do not run the risk of ruining your reputation, we also have an old acquaintance and friend, Kathleen Sullivan, who has moved from coast to coast here, who was kind enough to try to educate me, which was a very difficult job—as a Senator, not educate me in her classroom. Professor Sullivan was then a professor of law at Harvard Law School and is now a professor of law at Stanford. And she is an expert on constitutional and criminal law, someone I have personally called on a number of times when I have needed legal advice for the committee, and I welcome her here as well.

So I would invite you, Mr. President—we do not often get to use that phrase here in the hearing—to begin your testimony, if you would.

PANEL CONSISTING OF GERHARD CASPER, PRESIDENT, STANFORD UNIVERSITY, PALO ALTO, CA; AND KATHLEEN M. SULLIVAN, PROFESSOR, STANFORD UNIVERSITY LAW SCHOOL, PALO ALTO, CA

STATEMENT OF GERHARD CASPER

Mr. CASPER. Thank you very much, Mr. Chairman, for your very generous opening remarks. I am glad there is one person in the country who recognizes how challenging and interesting the life of a university president is.

The CHAIRMAN. Well, there will soon be another one. There will soon be President David Boren, former Senator who will be president of the University of Oklahoma, and he is going to find out and tell us all what it is like.

Mr. CASPER. I was bemused by his expectation that life might be easier at the university than in the U.S. Senate. [Laughter.]

It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. In my still relatively new position as president of Stanford University, I can, as the chairman pointed out, happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

One of the great American judges of this century, Henry Friendly, who served on the U.S. Court of Appeals for the Second Circuit, in a paper about Justice Cardozo, once referred to what is required in a judge. Among the requirements is, of course, that a judge needs to be a lawyer of "the highest grade." But a judge also needs to be somebody who seeks wisdom and is "blessed with saving common sense and practical experience as well as sound and comprehensive learning."

Judge Breyer is a lawyer of the highest grade. He has sought opportunities to do the work of a lawyer in all three branches of the Federal Government. Indeed, I know few men or women who could match his varied legal experience in this respect.

In the executive branch, he served in the Antitrust Division of the Justice Department. He also was a prosecutor in the Watergate Special Prosecutor's Office. In Congress, he was chief counsel to this important committee. In the judiciary, he started out at the Supreme Court, to which I hope you will return him, and, since 1980, has been one of the most distinguished Federal appellate judges.

He has even worked what you might call among the branches through his service as a charter member of the U.S. Sentencing Commission, one of those hybrid interbranch agencies that seem to partake of all branches at one and the same time. As a student of the separation of powers, I wish I had had a similar in-depth exposure to the workings of American Government.

In the last few months, I have seen the press frequently refer to Judge Breyer as pragmatic. This is not a bad attribute, provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life, he has been interested in the right results. In that sense, I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends, and what effects they will have.

In his recent book, "Breaking the Vicious Circle," he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in

any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

Judge Breyer's public service reflects "a saving common sense and practical experience." These qualities can also be found in his writings. His approach to the issue of societal risk management is marked by "a saving common sense." In this instance, the attribute "saving" may be taken quite literally, since Breyer favors foregoing those regulatory gains and risk management that are too small in relation to the resources they consume. What is saved can be applied to other national needs and social priorities.

I referred to Judge Breyer's "Socratic notion of virtue," which includes that judges should judge well. The first prerequisite of judging well is to judge clearly. Reading Breyer opinions is a genuine pleasure—perhaps, as he has suggested, even "for a high school student," though I confess to doubts on that count. His opinions are so written that you understand every step of the way: what the parties argue, what evidence they rely upon, what the judge understands to be the state of the law, what the uncertainties are, how he intends to resolve them and why, how the judge views the facts, and, finally, the conclusions all of this leads him to. One can readily agree or disagree with Judge Breyer because he is clear about where he stands.

In the era of administrative government, we should consider ourselves fortunate that the nominee is one of the country's leading experts on administrative law who has a mature understanding of the Constitution and the requirements that follow from a commitment to the rule of law. Perhaps the most important question concerning trust that the country faces for the foreseeable future is who will control administrative government and how. In order to cope with that challenge, the Supreme Court needs much wise understanding of how the institutions of government work. It is my belief that Judge Breyer will bring that understanding to the Court, in addition to his commitment to the Constitution and the rule of law.

Thank you very much, Mr. Chairman and other members of the committee.

[The prepared statement of Mr. Casper follows:]

BIOGRAPHICAL SKETCH OF GERHARD CASPER

Born in 1937, Gerhard Casper grew up in Hamburg, the port city on the Elbe River. At sixteen he made his first trip to the United States, as one of 32 students from around the world who came to the United Nations for the *New York Herald Tribune* Forum for High Schools, a program intended to promote international understanding.

Mr. Casper studied law at the Universities of Freiburg and Hamburg, where in 1961 he earned his first law degree. He came to Yale Law School in 1961, obtaining his Master of Laws degree a year later. He then returned to Freiburg, where he received his Doctorate in 1964, writing his dissertation on the realist movement in American law.

In the fall of 1964, Mr. Casper emigrated to the United States spending two years as Assistant Professor of Political Science at the University of California at Berkeley. In 1966 he joined the faculty of the University of Chicago Law School, and between 1979 and 1987 served as Dean of the Law School. He has written and taught primarily in the fields of constitutional law, constitutional history, comparative law, and jurisprudence. From 1977 to 1991 he was an editor of *The Supreme Court Review*. He was named the William B. Graham Professor of Law in 1980, and a Distinguished Service Professor in 1987. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.

In 1989 Mr. Casper became Provost of the University of Chicago, a post he held until he accepted the presidency of Stanford University in 1992. He also holds an appointment as Professor of Law at Stanford.

Mr. Casper is married to Regina Casper, M.D. Dr. Casper was a Professor of Psychiatry at the University of Chicago before taking an appointment as Professor of Psychiatry and Behavioral Science in the School of Medicine at Stanford. She is an authority in the area of depression and eating disorders.

The Caspers have one daughter, Hanna, who is a graduate of Yale University and the University of Virginia Law School.

PREPARED STATEMENT OF GERHARD CASPER

Mr. Chairman and Members of the Committee: It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. He and I started teaching law at about the same time in the sixties. In my still relatively new position as president of Stanford University, I can happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

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In the last few months I have seen the press frequently refer to Judge Breyer as "pragmatic." This is not a bad attribute provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life he has been interested in the *right* results. In that sense I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends and what effects they will have. In his recent book, *Breaking the Vicious Circle,* he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

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Senator METZENBAUM [presiding]. Professor Sullivan.

STATEMENT OF KATHLEEN M. SULLIVAN

Ms. SULLIVAN. Thank you very much to the chairman for his generous introduction, to the chairman and the members of the committee for the privilege of allowing me to testify here. It is a great honor and a great pleasure and easy task to testify in enthusiastic support for Judge Breyer's nomination to the Supreme Court. I had the privilege and pleasure of serving as his colleague in nearly a decade that we were both on the Harvard Law School faculty, and I know his opinions and his academic writings well.

I would like to focus briefly here today on three features of Judge Breyer's excellent virtues for the Court. The first is his pragmatic philosophy. Second is the excellence of his legal craft. And the third is his judicious temperament.

Now, the committee has heard a great deal from Judge Breyer himself in the last few days about his pragmatism. He has said to you here, as he has said in his writings, that the law is a profoundly human institution. It is designed to allow the many different individuals who make up America from so many different backgrounds and circumstances to live together productively, harmoniously, and in freedom. It is a human institution serving basic human or societal needs.

And he has said that it must be a practical effort, and many might think, well, this is all very good to be practical. It sounds sound. But is it a judicial philosophy? And my key point before the committee today is that I would like to emphasize that pragmatism is a coherent judicial philosophy. And, indeed, it is the philosophy of the 20th century Court.

Judge Breyer, in his pragmatism, is the spiritual heir of the great Justices of the Court in this century. Most especially, we can start with Justice Oliver Wendell Holmes from Senator Kennedy's home State, the Commonwealth of Massachusetts. This came up in the colloquy with Senator Cohen and others on the committee the other day. Judge Breyer is the spiritual heir of Justice Oliver Wendell Holmes in the following sense: He sees, as Holmes did, that law is not an intellectual exercise in abstract theory. Rather, the law, including constitutional law, is a practical enterprise rooted in the complexity of actual social life.

As Justice Holmes put the point in perhaps his most famous aphorism, "The life of the law has not been logic: it has been experience." That is why pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any single grand unified theory, any simple, overarching approach.

Judge Breyer, as a pragmatist in the tradition of Holmes, instead takes a flexible, undogmatic view of the tools that are relevant to

interpreting the Constitution and the laws passed by the political bodies. Whether interpreting a statute or a constitutional provision, he would look to text and structure and history and tradition and precedent and the way we live today and the way we might live in the future as his guides to meaning. He would not rigidly limit himself to any of these tools alone.

Pragmatism likewise stresses the need for flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances. As Judge Breyer stressed in his testimony, the Constitution must be read in light of its purposes, just as statutes must be read in light of theirs.

Now, such reasoning is really in the mainstream of the greatest thought of 20th century Justices on the Court, from Holmes at the beginning of the century, to Harlan in an era closer to our own time. Justice Harlan captured pragmatism's look at the flexibility needed in law in his famous saying that due process cannot be reduced to any formula and its content cannot be determined by reference to any code.

Now, you might say that is very well and good, but does pragmatism have any problems? And one might ask three questions about pragmatism, and I think the answer in Judge Breyer's case is very satisfactory as to all three.

One might ask, first of all, does pragmatism mean that the judge is just going to do what he thinks is best according to his own light, what he thinks is practical or good? And there the answer is most clear from Judge Breyer's record: Absolutely not.

As Judge Breyer's mentor, the late Justice Arthur Goldberg for whom he clerked once wrote

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and conscience of our people" * * * [and to] "experience with the requirements of a free society."

Tradition, our people, our conscience, our experience, outside himself.

Judge Breyer, as he himself assured the committee on Tuesday, has said that the job of a judge is not to legislate from the bench, but to look outside himself to those guides to meaning in order to follow the law laid down.

Pragmatism is a philosophy of judicial humility, not judicial arrogance. It holds that, as Holmes said, general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

And one might ask, second, well, all right, I accept that pragmatism is respectful law, and a pragmatic judge will look outside himself and be guided by our history, our tradition, our precedent. But does this mean that he will decide things in an ad hoc fashion, that he will issue decisions that will only last for a time? And there, again, the answer is, in Judge Breyer's case, most clearly "no".

As Judge Breyer himself has emphasized in his testimony, a pragmatist judge looks not only backward to our traditions but forward to how the law can be an authoritative and predictable guide.

Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

Third, though, one might say, well, with all this respect for law and history and tradition and precedent and the will of the community, will a pragmatist judge like Judge Breyer sacrifice constitutional rights? Absolutely not. Again, the answer is clear. Absolutely not. Judge Breyer's record is quite clear that when rights are clearly embodied in the Constitution or in statute, he has not hesitated boldly and squarely to uphold them, whether rights of free speech, free conscience, rights to equal protection of the law.

In sum, Judge Breyer's thoughtful commitment to pragmatism places him squarely in the mainstream of this century's most important judicial philosophy and allies him with the Court's most powerful and influential Justices from Harlan to Holmes.

I will be brief on the second two points. I would like to say in addition——

The CHAIRMAN. Kathleen, it is only our friendship that is allowing you to go beyond your 5 minutes, but go ahead.

Ms. SULLIVAN. Two sentences, Mr. Chairman. First, should not confuse—there has been talk of lack of passion. Is this man so pragmatic he has no passion? We should not confuse passion with commitment to justice and fairness, and I think Justice Breyer's opinions, like Judge Breyer's opinions, will be marked by a kind of superior craftsmanship and legal excellence that enables him to bring about justice and fairness in a way that might be more enduring than the efforts of mere passion alone.

And, last, he is, as you have seen and as others have testified—and I wholly concur—a man of great evenhandedness and openmindedness. He has the qualities of spirit as well as mind to be one of the great Justices on the Supreme Court in this century.

Thank you very much.

[The prepared statement of Ms. Sullivan follows:]

BIOGRAPHICAL SKETCH OF KATHLEEN M. SULLIVAN

Kathleen M. Sullivan is Professor of Law at Stanford Law School. She was previously Professor of Law at Harvard Law School, where she taught from 1984 to 1993. Her specialty is constitutional law. She has published articles on a wide range of constitutional issues, including affirmative action, abortion, unconstitutional conditions, freedom of religion and freedom of speech. She wrote the 1992 *Forward* to the Supreme Court issue of the *Harvard Law Review.*

Professor Sullivan has served as co-counsel in a number of Supreme Court cases, including *Turner Broadcasting* v. *FCC, Freytag* v. *Commissioner, Rust* v. *Sullivan, Bowers* v. *Hardwick, Puerto Rico* v. *Branstad, Fisher* v. *City of Berkley,* and *Hawaii Housing Authority* v. *Midkiff.* She has commented on various constitutional issues on *The New York Times* op-ed page and the MacNeil/Lehrer News Hours.

Professor Sullivan holds degrees from Cornell University (B.A. 1976), Oxford University (B.A. 1978), and Harvard Law School (J.D. 1981). At Oxford, she was a Marshall Scholar. In 1981–82, she served as law clerk to Judge James L. Oakes of the United States Court of Appeals for the Secord Circuit.

PREPARED STATEMENT OF KATHLEEN M. SULLIVAN

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before this distinguished Committee. It is both a great honor and a great pleasure to testify in enthusiastic support of the nomination of Judge Stephen G. Breyer to serve as a Justice on the United States Supreme Court. I have known Judge Breyer for over a decade, as we were colleagues on the Harvard Law School faculty before I moved west to Stanford Law School. I have closely followed his opinions

and his academic writings over the years. I believe that he will be an exemplary Supreme Court Justice, and will bring great credit to the Court.

Three features of Judge Breyer's approach to law and judging lead me to that conclusion. First is his thoroughly pragmatic philosophy, which is in keeping with the best of the Supreme Court's traditions over the last century. Second is the excellence of his legal craftsmanship. Third is his judicious temperament. Allow me to address each feature in turn.

1. Pragmatic philosophy. Throughout his opinions and other writings, Judge Breyer has expressed a view of law as a practical enterprise, to be applied in a practical way for practical ends. Just the other day, in his opening statement to the Committee, he summarized this view as follows: "I believe that law must work for people. That vast array of Constitution, statutes, rules, regulations, practices, procedures—that huge, vast web—has a single basic purpose. That purpose is to help the many different individuals who make up America from so many different backgrounds and circumstances, with so many different needs and hopes * * * live together productively, harmoniously, and in freedom." The New York Times, July 13, 1994 (national edition), at A8.

That statement echoes Judge Breyer's previous statements in other contexts. For example, in a 1991 lecture he delivered at USC on statutory interpretation, he said, "I assume that law itself is a human institution, serving basic human or societal needs. It is therefore properly subject to praise, or to criticism, in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies." On the Uses of Legislative History in Interpreting Statutes, 65 So. Cal. L. Rev. 845, 847 (1992).

Likewise, in a 1989 tribute to his late Harvard colleague Paul Bator, Judge Breyer praised the legal tradition that "sees law, including constitutional law, as an untidy body of understandings among groups and institutions, inherited from the past, open to change mostly at the edges. It is a tradition that communicates its important vision, not through the explication of any single theory, but through detailed study of cases, institutions, history, and the human needs that underlie them." 102 Harv. L. Rev. 1737, 1744 (1989).

In expressing these views, Judge Breyer has situated himself squarely within the great and distinctively American tradition that has dominated the Supreme Court throughout this century: namely, legal pragmatism. The pragmatic tradition links the opinions of the great Justice Oliver Wendell Holmes at the beginning of the century with those of Justice John Marshall Harlan and his admirers in our own era. And this tradition continues overwhelmingly to predominate among the Justices who sit on the Supreme Court today.

Pragmatism sees law not as an intellectual exercise in abstract theory, but rather as a practical enterprise rooted in the complexity of actual social life. As Justice Holmes put this point in his most famous aphorism, "The life of the law has not been logic: it has been experience." O.W. Holmes, The Common Law 5 (1881). *See generally* Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989).

Pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any one grand unified theory or single, simple, overarching approach. Thus, Judge Breyer, as a pragmatic judge, takes a flexible, undogmatic view of the tools relevant to legal interpretation. Whether interpreting a statute or a constitutional provision, he would look to text *and* structure *and* history *and* tradition as his guides to meaning, rather than rigidly limiting himself to any one of these tools alone.

Pragmatism likewise stresses the need for legal flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances. As Judge Breyer stressed to the Committee in his testimony on Tuesday, citing the pragmatist Justice Holmes himself, the Constitution cannot be read to enact any particular economic theory that would hamstring government "if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety. * * *" New York Times, *supra*. Such reasoning is in the mainstream of the Court's pragmatic tradition, once captured by Justice Harlan in his famous saying that "due process has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Does pragmatism mean that a judge seeks to impose his own preferences on the law? Absolutely not. As Judge Breyer's mentor, the late pragmatist Justice Arthur Goldberg, once wrote, "In determining which rights are fundamental, judges are not

left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and conscience of our people' * * * [and to] 'experience with the requirements of a free society.'" *Griswold* v. *Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). And as Judge Breyer himself assured the Committee in his testimony on Tuesday, a Justice's job is certainly *not* to "legislate from the bench," but rather to follow the law—although determining just what an open-ended law really means may demand all the resources of his judicial craft. Pragmatism is a philosophy of judicial humility, not judicial arrogance: it holds that general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

Does pragmatism mean that a judge resolves legal disputes in an ad hoc way? Again, the answer is clearly no. As Judge Breyer himself has emphasized, a pragmatist judge looks not only backward to our traditions, but also forward to how his ruling will achieve present peace and future stability by resolving disputes in an authoritative manner that enables people to predict what the next case will hold. Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

On the other hand, does pragmatism sacrifice constitutional rights to the social welfare of the community? Once again, in Judge Breyer's hands it most assuredly does not. As he has stressed, our most basic laws are designed to protect not only harmony but also freedom. And when rights are clearly embodied in the text of the Constitution or a statute, Judge Breyer has not hesitated strongly to uphold them, whatever the will of the community might be.

For example, as he told the Committee on Tuesday, the Constitution "foresees over the course of history that a person's right to speak freely and to practice his religion is something that is of value [and thus] is not going to change." New York Times, *supra.* Accordingly, he has ruled for his Court that the First Amendment plainly bars government from targeting either one's political or one's religious views. *See, e.g., Ozonoff* v. *Berzak,* 744 F.2d 224 (1st Cir. 1984); *Aman* v. *Handler,* 653 F.2d 41 (1st Cir. 1981). Likewise, he held for his Court in *Stathos* v. *Bowden,* 728 F. 2d 15 (1st Cir. 1984), that no matter what conventional attitudes about sex roles might be, an employer violates the most basic notions of equality if he pays women less than men "just because they were women."

In sum, Judge Breyer's thoughtful commitment to a pragmatic judicial philosophy places him squarely in the mainstream of the century's most important and enduring jurisprudential tradition, and allies him with the Court's most powerful and influential Justices. And this legal pragmatism is thoroughly consistent both with the rule of law and the role of individual rights.

2. Legal craftsmanship. Judge Breyer's judicial opinions during his tenure on the Court of Appeals for the First Circuit are marked by clear thought, careful analysis, close reasoning, and precision of language. Eschewing footnotes and legal jargon, Judge Breyer has a gift for boiling down highly complicated matters to their basic core, and expressing legal opinions with compelling simplicity. In keeping with his view of law as a practical enterprise, he cares deeply that his decisions can be readily understood. He writes his opinions to be watertight, so that even people of differing views might find they can agree upon them.

The absence of fiery rhetoric or sweeping slogans from Judge Breyer's opinions should not be confused with a lack of commitment to justice and fairness. To the contrary, his calm reasoning and superior craftsmanship often achieve more effective victories for justice and fairness than might have been won by a display of passion alone.

For example, through his judicious methods, Judge Breyer has often been able to dissolve technical obstacles and give force to holdings that increase access to courts or protect the rights of minorities—holdings that might not have been as persuasive if set forth with less precision or care, *See, e.g., Munoz-Mendoza* v. *Pierce,* 711 F. 2d 421 (1st Cir 1984) (holding, contrary to the district court, that minority residents of an integrated Boston neighborhood had standing to argue that a federal building project would cause the racial segregation of their neighborhood); *Mayburg* v. *Secretary of Health and Human Services,* 740 F.2d 100 (1st Cir 1984) (holding, contrary to an HHS interpretation, that an 88-year-old woman who lived in a nursing home was eligible to keep receiving benefits without having to move from the home); *Stuart* v. *Roche,* 951 F.2d 446 (1st Cir 1991) (upholding a decree designed to cure past racial discrimination in the Boston Police Department, finding it narrowly tailored under the Supreme Court's decision in *City of Richmond* v. *Croson Co.*).

Finally, his opinions also exhibit considerable restraint. He declines to reach out to embrace principles that are broader than necessary to decide the case before him. *See, e.g., Alexander* v. *Trustees of Boston University,* 766 F.2d 630, 650 (1st Cir 1985) (Breyer, J., dissenting) ("I would not allow the parties, through their choice

of arguments, to force this court unnecessarily to decide a broader constitutional question than the facts require."). And if a record is inadequate, he does not hesitate to send a case back for further facts.

Taken together, these features of Judge Breyer's skilled judicial craftsmanship enable him to serve as a potential catalyst for consensus on the Court, even among Justices of differing views.

3. Judicious temperament. On this point, I can be brief: Judge Breyer is not only an intellectually distinguished judge, but a fair and judicious one. He is open-minded and even-handed. He genuinely listens to others. He is willing to revise his views when one persuades him that he was wrong. He is highly focused, and is undaunted by factiousness or conflict. Thus, he has in abundance the qualities of spirit, as well as the qualities of mind, to serve with the greatest distinction as an Associate Justice on the United States Supreme Court.

The CHAIRMAN. Thank you very much, Professor.

I read with some interest the treatise of Professor Farber of the University of Minnesota on pragmatism and the criticisms of the new pragmatism—as nonlawyers have a clear sense, we lawyers sometimes try to give phrases that have generic meanings very specific meanings that sometimes are difficult to understand. There are some very cogent criticisms of pragmatism.

I have one question for you, Professor. You make it clear that you think that Judge Breyer is a legal pragmatist in the tradition of Holmes and Harlan. Apart from the work of these two Justices, what makes you conclude that the Court's dominant tradition in this century has been legal pragmatism?

Ms. SULLIVAN. It is not just Justice Holmes, but also Justice Cardozo, to a great extent Justice Brandeis, who launched us in the modern constitutional tradition who were pragmatists, who were influenced by that distinctively American philosophy that says that the value of something is to be measured by its practical effect. It is a distinctively American tradition rooted in the writings of Dewey and Perse and James. But to connect it up with our own time, I believe it is also the dominant judicial philosophy on our Supreme Court today. It is a philosophy that enables——

The CHAIRMAN. That was my next question. I would like to know why you conclude that.

Ms. SULLIVAN. Because I think if we look at the decisions of the Court, the great decisions of the Court in the last few terms, we see the Justices who come from very different places in life and very different views of the world, very different political sides of the aisle, can come together around basic propositions such as that people should be unfettered in their right of access to basic constitutional rights, such as the view that there is a balance to be held between the interests of people in exercising their religion and the interests of keeping the public order free from the establishment of religion.

In issues like privacy and speech and religion, the most contested issues in our time, where it is so easy to be divided, where it is so easy to be passionate, we have seen that pragmatism is what enables Justices, as distinctive across a spectrum from Chief Justice Rehnquist to Justice Ginsburg to agree, to agree on what is the best outcome in a particular case.

The CHAIRMAN. You think that is the spectrum? I kind of think it goes Rehnquist, Ginsburg, to some other place. But——

Ms. SULLIVAN. There are some on the Court, of course, Mr. Chairman, who do not share this philosophy. There are some who

do not share this philosophy, but I think we have seen it in recent terms to be dominant, and that is no surprise. That is no surprise because the people on the Court today are bearers of the tradition that traces back to Holmes.

The CHAIRMAN. I happen to agree with you. That was one of the reasons—and I know I expose you here, I consulted you on the nominations of Justices Souter and Kennedy and others. I will end with this, but I was just asked by a press person 10 minutes ago on the way back from the vote where did I think Judge Breyer fit of the six or seven nominees I have presided over, the eight or nine that I have either been in the minority or majority, ranking member or Chair. And something struck me, and I would like you to comment on it. Notwithstanding that there have been some aberrations, there is a similarity in approach, although reaching different conclusions sometimes, from the Republican appointees of Kennedy and Souter, for example, and the Clinton appointees of Ginsburg and Breyer.

I have no way to prove this, but it seems to me there is a generational element that fits here in the following sense—and I have facetiously said they are somewhere between "Ozzie and Harriet" and Roseanne Barr in terms of their life experiences, in what they value and do not value, what they view as accepted and given values of this society. I do not think we are going to see any fundamental difference among them on issues of race, on issues of basic civil rights and civil liberties.

Oh, there will be disagreements. You know, that old expression: Hard cases make bad law, and lots of those hard cases get to the Supreme Court, on the rights of defendants and determining how far the right to privacy goes and does not go. But it seems as though they reflect these values that are shared in common that reflect this pragmatic approach you have referred to in their approach to constitutional methodology.

Talk to me about that a little bit, about where you see these last four nominees in fitting within your definition of pragmatism and the tradition of Holmes and Harlan and others.

Ms. SULLIVAN. I agree, Mr. Chairman, with your description. I think that there is a lot of similarity of method and approach among these recent nominees, and I think that is no surprise, and I think it is generational, as you suggest.

Justice Blackmun, whom Justice Breyer will replace, and Justice Kennedy and Justice Souter at Harvard and Judge Breyer at Harvard, like Justice O'Connor and Chief Justice Rehnquist at Stanford, received an education in this pragmatic tradition. The pragmatic tradition was distilled in the 1950's and 1960's into what is sometimes called the legal process school, dominated by Professors Henry Hart and former dean of Harvard Law School Albert Sachs, the late Albert Sachs.

What they said is very much like what Judge Breyer has said to you today. We have got to look at all the sources of information we can, institutions, history, text, structure, tradition, precedent, in order to inform our judgments. And we have got to be humble; we have got to be modest; we have got to decide the case before us. We have got to mistrust grand theories and sweeping propositions. We mistrust the philosopher in his certainty that he has the right

angle on all questions. We are more modest folks. We want to look at the case before us and decide things case by case.

So I think their training, both at Harvard and at Stanford, and at the other schools from where the Justices comes, was very similar.

The CHAIRMAN. So that if anyone is dissatisfied with the Court, they can blame in on Harvard and Stanford.

Ms. SULLIVAN. That is right.

Mr. CASPER. Senator Biden, may I add something?

The CHAIRMAN. Please. I am finished.

Mr. CASPER. You pointed to the basic consensus among the Justices and the candidates you have seen on redefining American values. And I think in the heat of debate over the last decade or so, we sometimes forget how strong that consensus actually is. The consensus is very strong in the country.

It so happened that I was just reading last night a paper on evaluating public attitudes toward those values, and it is very gratifying to see that the public across all ethnic groups continues to be very much dedicated to these values. And so is the group of lawyers that have been educated at our law schools, to a very large extent. The gap is not as great as it sometimes seems to be made out in the press.

The CHAIRMAN. I would like to attach to the record—I do not think we have to spend the money to put it in the record—"Legal Pragmatism and the Constitution," by Daniel A. Farber,* of the University of Minnesota Law School, which goes into great detail, but essentially raises in great detail the criticisms of legal pragmatism by others and the defenses. But I, quite frankly, gain some solace from what I think has been a diminution of the ideological warfare, if you will, that has gone on in the recent past on occasion, with the exception of the Justices that I have named, although I am absolutely convinced beyond any reasonable doubt that under the advise and consent clause Senators have a right to ask whatever they wish to ask and a right to resist an appointment whenever they so deem appropriate.

What is a right is not always wise to exercise. I have views that have been informed by people like you, Kathleen, and others that are somewhat different sometimes from some of the Justices that are on the Court, and I am sure they will differ with Justice Breyer. But this acceptance that seems to run through the four Justices I have mentioned of the basic touchstones in the American value system on the important issues is, I think, an important point to make, and you have made it well. I thank you both.

I yield the floor now to my friend from Utah.

Senator HATCH. Well, I want to welcome both of you here again. Ms. Sullivan, I welcome you to the committee again, and, President Casper, we are glad to have you here and we appreciate your testimony. And I agree that this is an excellent nominee. Do I agree with him on everything? None of us does, and that is not the issue. The issue is, I think, more than put to rest by his testimony and helped by yours.

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*See Farber, "Legal Pragmatism and the Constitution," 72 Minn. L. Rev. 1331 (1988). An earlier version of part I of this article was presented as the inaugural lecture for the Fletcher Chair on Nov. 6, 1987.

Thank you.

Ms. SULLIVAN. Thank you.

Mr. CASPER. Thank you, Senator.

Senator KENNEDY. Mr. Chairman, I want to join in welcoming the panel, and a special welcome to Professor Sullivan. I think all of us who have been on this committee have benefited from her enormous insight on these constitutional issues and questions. You have had an incredibly distinguished career up at Harvard Law School, and I know all the members of this committee have valued very much your insights, and the breadth of her sensitivity on so many of these fundamental issues of constitutional rights and liberties. We are delighted to have you here.

Ms. SULLIVAN. Thank you, Senator.

Senator KENNEDY. The clock has gone on. I wanted to just——

The CHAIRMAN. Excuse me, Senator. They tell me we have 6 minutes before the vote.

Senator KENNEDY. OK; just in one area, Professor Sullivan, one area of constitutional law that is a specialty of yours is the right of privacy, and the right of a woman to terminate a pregnancy is encompassed within that right. I would just like to ask you about Judge Breyer's record in that area.

In *Commonwealth of Massachusetts* v. *HHS,* Judge Breyer joined the first circuit in holding that the so-called gag rule barring counseling with respect to abortion by federally funded family planning programs violated what the Court called the right of reproductive choice as well as the first amendment.

Just based on this first circuit opinion and Judge Breyer's overall record, are you confident that Justice Breyer sitting on the Supreme Court will do honor to Justice Blackmun's legacy in upholding the fundamental right to choose recognized in *Roe* v. *Wade*?

Ms. SULLIVAN. Senator Kennedy, as Judge Breyer said before the committee, he regards *Roe* v. *Wade* as settled law, as reaffirmed in *Casey* two terms ago. But the case that you mention, *Commonwealth of Massachusetts* v. *Secretary of HHS,* reinforces that view because that was a case in which the first circuit, sitting en banc, Judge Breyer voting with the court for this view, held that the so-called gag rule that said those clinics that take Federal money can counsel for pregnancy but they cannot counsel in favor of abortion, what the first circuit did is they struck that down, and they said that violates not only the first amendment rights of doctors to speak and women to listen to truthful medical advice, but it also violates their right of privacy by, in effect, burdening that right with skewed information, a bum steer.

Now, in a very close, it is a very difficult and controversial area because it involves Federal funding, and the Supreme Court came to the opposite conclusion in *Rust* v. *Sullivan.* But I think in that very thoughtful and very well developed opinion for the first circuit, Judge Breyer joined in a view that the right of privacy is fundamental and that it must be protected against burdens.

Senator KENNEDY. Thank you very much. Our time I think is up, Mr. Chairman. I again want to thank the panel.

The CHAIRMAN. I know you both have come a long way to testify, and I say this with great sincerity. Please do not read from the failure of everyone to be here and ask you a lot of questions anything

other than respect for your testimony and lack of disagreement with what you have come here to suggest. So I thank you both very, very much, and, Mr. President, I mean this sincerely, I wish you well. You are at the helm of one of the great universities in the world, and it is a hell of an honor, I am sure, but an incredible obligation and difficult task. I wish you well. It is a great school.

Mr. CASPER. Thank you very much, Mr. Chairman. I regret that Senator Feinstein is not here any longer. I saw that she is even dressed in Stanford's colors.

The CHAIRMAN. Yes, she is.

Mr. CASPER. I assume that was in honor of my appearance here today. Please express my appreciation to her.

The CHAIRMAN. I will. Let me ask staff, are there any Senators who wish this panel to stay? I do not believe there was a request from them.

I thank you both very, very much.

Ms. SULLIVAN. Thank you, Mr. Chairman.

The CHAIRMAN. Let me announce, before I go to vote, our next panel is composed of three very distinguished people who wish to testify in opposition to Judge Breyer. And as soon as I return, we will empanel that panel and get on with the testimony.

We will adjourn for a vote.

[Recess.]

Senator SPECTER. Professor, I want to speak with you about the Court's responsibility to interpret the Constitution, and I have been concerned about the Court's, in effect, reversal of decisions like *Griggs,* which established the important doctrines of disparate impact and business necessity, and to the Civil Rights Act, a very important civil rights concept, which interpreted the 1964 Civil Rights Act in the 1971 unanimous opinion written by Chief Justice Burger, and then was reversed in *Ward's Cove,* and then the Congress took up the laborious, highly partisan task of amending the Civil Rights Act, which we did by 1991, and the impact of *Rust* v. *Sullivan* where the regulation that stood for some 18 years that counselors using Federal family planning grants could advise on the abortion option, until that was reversed by the new regulation, which was upheld by a 5-to-4 decision with Chief Justice Rehnquist saying that the attitude of the public having changed on abortion accommodated or justified a change, and the issue of capital punishment where Justice Marshall, along with Justice Brennan, came to the conclusion that capital punishment violated the eighth amendment prohibition against cruel and unusual punishment.

This is a quotation from Justice Marshall's concurring opinion in *Furman,* which I discussed with Judge Breyer, where Justice Marshall said, cited with approval the quotation, "Time works changes and brings into existence new conditions and purposes. In the application of the Constitution, our contemplation cannot be only of what has been but of what may be."

Now, I am very concerned about a standard of that sort which appears to me to really give the Supreme Court a policymaking function, really a legislative function. And you search the history of our country, and the most prominent example you come to of a public need for that would be *Brown* v. *Board of Education,* where you had, intolerable in this country, segregation which had gone on

uncorrected by the Congress or by the State legislatures or by the executive branch. And finally the Court acted. And the Court acted in what was unquestionably the interest of justice in America, equal justice, and the Court acted because nobody else had acted. The Congress, the State legislatures, the executive branch, the Governors, nobody else acted.

That necessity has been applauded, and I join in that applause, the moral conscience of the country. But what we really had were these Platonic Solons deciding what was good for the country in a change of constitutional doctrine.

My question for you, Professor, is: With this standard, that in the application of the Constitution, our contemplation, the Court's contemplation cannot be only of what has been but what may be, where is any line, bright or dim, separating the Court's role from the legislative function?

Ms. SULLIVAN. Well, it is an excellent question, Senator. It is the deep question of constitutional law that you ask. But let me stress that we must be clear in distinguishing pragmatism on the one hand from personal opinion or popular opinion on the other.

Pragmatism is not an effort to enact you own preferences into law, and it is not an effort to be a bellwether of popular opinion. Pragmatism does not follow the polls.

What a pragmatic judge tries to do instead is to look outside himself and to sources more lasting and deeper and enduring than the passions of the moment. And what the Court did in *Brown* is a fine example. It was certainly not a response to popular opinion, which, of course, was, if anything, the other way in 1954. *Brown* was an effort to look at the meaning of the guarantee of equal protection in a time that had changed. There were very few public schools, virtually no public schools at the time the 14th amendment was enacted. Those that existed were segregated in some parts of the country, and yet what the Court said is we are not going to look to that narrow history at the time of the framing of the 14th amendment. We are going to look to this guarantee in terms of its purpose, in terms of its human purpose in guaranteeing the equality of the races before the law.

The law cannot just mean the courtroom, said the Court. The law cannot just mean certain civic institutions. It has to mean the schools as well.

Now, where did they look? They looked to the text of the clause. They looked to the history of the clause, not its narrow history but the history of its broader purposes. They looked to the change in social circumstance over time, the rising importance of public schools as a fountain of people's dignity and civic education. And they said, reading this clause in terms of its present meaning but according to its original purposes, there must no longer be segregation of the schools.

It is the same sort of thing that the Court did when it upheld the New Deal, in the cases, the great cases of 1936 and 1937 that said that to read the doctrine of laissez faire into the Constitution was in error. It was an error in terms of the circumstances of our time: soup kitchens, 25 percent unemployment, the need for Government to regulate if the very human purposes of a free economic were to be realized.

So I think it is a very important distinction to make, but it is critical, between pragmatism, which is a look outside the judge's self to history, tradition, the conscience of a free people, precedent, social facts outside himself—we must distinguish that effort, which is an effort to look to objective sources of meaning from any attempt to enact one's subjective preferences into law. And I think Judge Breyer was clear to the committee in numerous colloquies that when strong personal preferences are held that conflict with all that information, all that data from outside about what the law means, one is not to enact one's person preferences into law; one is to, if the personal feeling is too strong, remove oneself from the case.

Senator SPECTER. Well, Professor Sullivan, that sounds good and makes sense to a substantial extent, but it is the judge who looks outside, starting from looking inside. And none of us can divorce ourselves from our own views, and it has to be significantly if not largely a personal decision as to what those outside forces are.

Now, wasn't it a matter in the first instance, really, for the legislature of Alabama, Georgia, or the Congress of the United States, or the President? President Truman had an executive order for nondiscrimination in the armed services. Wasn't it first a matter of public policy that should have been decided by the legislatures, by the Congress, or by the President?

Ms. SULLIVAN. There are times when the political bodies do not and sometimes times when the political bodies cannot act given the——

Senator SPECTER. What do you mean cannot act?

Ms. SULLIVAN. When their political——

Senator SPECTER. It is against their political interest to act?

Ms. SULLIVAN. Well, in the case of civil rights legislative efforts in the 1950's, that might well be the case. But I think that it would be a mistake, though, to say that what the Court did in *Brown* was to legislate what Congress could not. I do not think that would be a description of what the Court did. The Court interpreted the equal protection clause. The Court interpreted the document, the Constitution, the binding text.

Senator SPECTER. Do you think the Congress should have legislated long before *Brown* v. *Board of Education* in 1954?

Ms. SULLIVAN. There might be an argument that that is so. There might be an argument that is so.

I think our history and the case of racial segregation is a tragic and embarrassing one and one that should have been rectified sooner. But when political bodies cannot act, sometimes courts must.

Senator SPECTER. Well, I think that you articulate it accurately. I agree with what you say when political bodies do not act. I do not believe that political bodies cannot act. I believe that political bodies do not act because it is against their personal interest, significantly of the legislators, and it reflects their constituents' point of view. But they do not act. And I think the Supreme Court had to act in *Brown,* and that is the seminal case for the Court to act. And it can be articulated in very fine concepts deeply rooted in the tradition of the people, as the Court recognized in *Palco.* You have in the criminal field the decision in *Miranda* v. *Arizona,* where the

Court decided that the Constitution required five specific warnings and five specific waivers. And that was a field where the legislative bodies could have acted for decades, and on June 13, 1966, the Supreme Court of the United States came down and said the Constitution requires that every police officer give five warnings. You have the right to remain silent; you have a right to counsel; if you do not have counsel, it will be provided for you; if you start to talk, you can stop talking. And then a week later the Supreme Court came down with the decision saying that that decision took effect on June 13 for any trial that started after that date.

I was a district attorney at that time and had cases where criminals had confessed, corroborating evidence, found the gun, found the loot, in May 1966. You could not start the trial before June 13. Who knew? And the Supreme Court of the United States came down with that decision.

Now, what is there in our traditions that warrants that kind of an abrupt change which is retroactive in its application? How do you accord, under our theory of constitutional government, that much power in the Court, except what the judges themselves make a personal determination? And they can say they look outward, but it is hard to find any external objective determinants which warrant that kind of a conclusion or which give them that kind of power.

Ms. SULLIVAN. Well, Senator Specter, I think the important holding of *Miranda* was not the specific words of the five warnings that everyone who watches prime-time television is so familiar with today. The important holding in the *Miranda* decision was that coercion of a person to bear witness against himself can come as well from psychological methods as from the end of a rubber hose.

What the Court was saying is that our fundamental, deep-seated, 18th century view that no one shall be compelled, coerced, made against his will to speak against himself to confess, that was the core of *Miranda*. What *Miranda* was saying is that there is a lot more coercion in a station house than happens simply through physical beatings. Coercion can come in other forms.

That is the kind of decision the Court has to make in many areas. The Court has made the decision that sometimes school children are coerced into school prayer when they are made to say it along with their fellows, or a State can be coerced into following the will of Congress through being told things in a Federal law. Sometimes the Court has to expand its modern notion of what is a very ancient fundamental concept that certain things should not be coerced out of people or out of States.

I think that is the core. We should not focus so much on the specific warnings or on the specific timing. It is always hard when a new rule comes into effect, and I understand very much what you are saying about being caught in that transition period. But the core of *Miranda* was doing exactly what I think pragmatic judges do, which is you look outside—you take our tradition. You take the fifth amendment guarantee against compelled self-incrimination, and you interpret it in light of modern times, in light of late 20th century understandings that sometimes police methods other than brute force can violate our rights. And I think that the Court in that case did look to other sources, to studies by the States, to

changes in State law, to studies by the ALI and other bodies, to try to come up with the method. And we can all—reasonable men and women can disagree about the precise warnings, but about the concept of compelled self-incrimination, that is what the Court was really just trying to bring anew into a modern age.

Senator SPECTER. Well, I thank you for your comments. The chairman has returned, and we have a great many witnesses, so I am not going to prolong any further Q and A. We had a little lull in the action. I thought it would be worthwhile to discuss these issues with you.

I would say in conclusion that the principles of coercion had long been articulated by the Court, and we had the *Escobedo* case 2 years before which had two warnings. And we had *Turner* v. *Pennsylvania* on coerced confessions. We have a large body of law, and I would have to disagree with you that it was not too important what the specific warnings were, because a lot of murderers, where there was conclusive evidence, far beyond the confession, corroboration, that went to the residence of the defendant, found the gun, found the proceeds from the taxi robbery. So that when the Court comes down with these specific warnings and the policemen in May 1966 could not conceivably, obviously, have anticipated what the warnings would have to be, and you have the Court coming down with that decision, and not only the decision but it is not prospective from that day forward, it is retroactive. And you take a look at what the Court has done, and we have a wonderful system of government beyond any question with our Constitution. And the advantages far outweigh the disadvantages. But I think we have to stop and take a look at what the Court does when they articulate the meaning of the Constitution relying on a standard of external factors, pragmatism, something which is not their personal view that comes from the outside, it is hard to find that outside.

I think we do not have enough focus in hearings of this sort or in the Court itself on the respective role of the legislative branch versus the judicial branch. And you can applaud the Court loudly for *Brown* v. *Board of Education,* but you look at a lot of their other decisions, and you wonder where they think they get the authority to do that.

Ms. SULLIVAN. Yes.

Senator SPECTER. This is a subject I think we have to pursue when the only chance we have is when they come here in this brief nominating process or when there is a break in the action and we can talk to a professor of law.

Thank you.

The CHAIRMAN. Thank you, Professor. I only regret because of your transfer from Harvard to Stanford, that it takes you longer to get here. But I am not sure—and I am not being facetious when I say this—that you could continue the tutorial for Senator Specter. I have found, Senator, that what I have attempted to do, maybe because I have needed it more than you, is to assemble professors of the caliber of Professor Sullivan who have been kind enough over the last 10 years to literally come to my office and spend hours, sometimes days pursuing a particular constitutional point with me, to educate me, unrelated to the hearings. I would highly recommend it, and I would highly recommend Professor Sullivan.

Thanks, Kathleen.

Ms. SULLIVAN. Thank you, Senator Biden.

The CHAIRMAN. How did Gerhard escape and you get caught?

Senator FEINSTEIN. Mr. Chairman, if I may, I would just like to welcome Professor Sullivan and Dr. Casper, as well. They hail from my alma mater in my State, and I am a big fan of yours. I have heard you many times. I never had occasion to see you in person, and it was most interesting for me to listen to your comments.

If I may, I would just like to make one comment in response, because, surprisingly enough, I agree with much of what Senator Specter just said about the law and the streets very often, not understanding each other, and dropped in between in a huge chasm is protection of the public, and somewhere between the two we have got to find the balance.

But I just want to say I am delighted to welcome you here, and it was a great treat for me to listen to you.

Ms. SULLIVAN. Thank you very much, Senator Feinstein.

Thank you, Mr. Chairman, for the privilege of appearing before you today and working with the committee.

The CHAIRMAN. Thank you.

I want the record to note, Senator Feinstein, that President Casper pointed out on the record that he appreciated you wearing Stanford colors today.

Our next distinguished panel is a panel composed of three individuals representing groups wishing to testify in opposition. First, we have Paige Comstock Cunningham. Ms. Cunningham is president of Americans United for Life in Chicago. Also on this panel is Michael Farris. Mr. Farris is president and founder of the Home School Legal Defense Association and is here on its behalf today. The Home School Legal Defense Association, together with the National Center for Home Education, is a nationwide group in support of home schooling.

I said three. It is panel three, with two people. I apologize. I welcome you both. We welcome you both. Ms. Cunningham, would you begin, please?

PANEL CONSISTING OF PAIGE COMSTOCK CUNNINGHAM, PRESIDENT, AMERICANS UNITED FOR LIFE, CHICAGO, IL; AND MICHAEL P. FARRIS, PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, PURCELLVILLE, VA

STATEMENT OF PAIGE COMSTOCK CUNNINGHAM

Ms. CUNNINGHAM. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify before you again today, as I was here just a year ago in another confirmation hearing.

My name is Paige Cunningham. I am an attorney and also president of Americans United for Life, which is the oldest national legal organization in this country representing the pro-life movement. We are the only national legal organization devoted exclusively to writing, passing and defending laws, laws of a particular nature, those that shield mothers and their innocent children from abortion. But AUL also works to change the law, to protect the

sick, the elderly and the disabled from euthanasia and assisted suicide.

We are here today perhaps to introduce a somewhat discordant note in these harmonious and cordial proceedings for one reason, and that reason is because we are haunted by the image, the image of millions of women and children who have been injured or destroyed by abortion.

We have fought for them in the courts for 21 years, and it may be another 20 years before we succeed, just as it was for abolition, for women's suffrage, and for the civil rights movements. But one thing is clear: We will never give up.

Judge Breyer may have ample professional and legal credentials to sit on the Supreme Court, but we are concerned about one flaw that is fatal, and that flaw is the process by which he was selected and its impact on the courts, on the law, and on the real people of this Nation.

President Clinton has made it clear that he would appoint to the Supreme Court only a supporter of *Roe* v. *Wade*. A nominee for the Supreme Court must now pass a test, a pro-abortion test. No other administration has pushed its political agenda as feverishly as the current one. Judge Breyer's nomination to the Supreme Court clearly implies that he has passed this political test. It should be obvious that an abortion litmus test is an insult to the integrity of the highest court in this land. But what is far more disturbing is the abortion doctrine itself that Judge Breyer will be expected to support.

In 1973, the Supreme Court ruled in *Roe* v. *Wade* that a mother may end the life of a child in her womb for any reason and at any time. The Court's decision in *Roe* openly defied a social, moral and legal tradition condemning abortion that dates back at least 800 years. *Roe* has been condemned as unprincipled, both by members of the Court and by constitutional scholars, including those who favor a pro-abortion public policy.

Unlike *Brown* v. *Board of Education,* the once controversial school desegregation case which is now universally accepted, *Roe* v. *Wade* has never been settled in our society. In fact, by overriding the democratic process, the Court created the very division it now claims to have healed. That division illustrates what Judge Breyer warned of earlier this week, that judges can become isolated in the court room from the real people in the streets. What he said is true, that the decisions he has made, the decisions that he will help to make on the Supreme Court will have an effect upon the lives of many, many Americans.

Well, AUL is confronted daily with many, many American women which the abortion law of this land has touched. They are career women, teenagers, students, mothers, rich and poor. And as we work with and represent them, AUL is increasingly convinced that women would be better off without this abortion policy.

Roe has done nothing to advance women's legal, social or economic rights. The real progress in these areas has come, as you well know, through Congress and State legislatures. They have passed dozens of laws mandating equal pay for equal work and banning sex discrimination in public and private employment, in the sale and rental of housing, in education and many other areas.

Not one of these laws depends upon *Roe* or upon a right to abortion.

When the law places a mother's rights above those of her very own child, what happens? She is the one who is left with the sole responsibility for any child she chooses to bear. We see it most clearly in the workplace. You can't imagine how many women are told in very subtle ways, because you will not find it in an employee handbook, that if you want to make partner here, don't start a family, if you want to stay on the police force, don't get pregnant.

If abortion were not so readily available and promoted, there would be healthy pressure on employers to accommodate women who have children and want or need to continue working. Instead, employers and men get off the hook, because they can say that if a woman has the right to choose abortion, she chooses not to exercise this right, then she is on her own.

The costs to women's bodies and lives cannot even begin to be measured here today. Many women are abandoned by the baby's father as soon as the crisis pregnancy and the abortion are over. More than 70 percent of relationships fall about after the abortion. Thousands of women now bear the scars of a perforated uterus or the loss of fertility, and many still continue to die from abortions. We can't even give you these figures, because the abortion industry is the most unregulated industry in this country. Accurate data is simply not available.

Judge Breyer has said that the law must work for people. But our 21-year-old abortion law has worked against women. The tragedy of abortion is a gaping national wound, a wound whose ugliness is covered up by polite tolerance and rhetoric about a woman's right to choose and keeping government out of private decisions.

But the devastation of *Roe* is not limited to those millions of children who will never be born or to the mothers and families who will never cuddle their babies and hear them laugh or pick them up when they cry, because *Roe* has seeped into other areas of our law with an abortion distortion lens that clouds our laws and Constitution. We should pay attention to the warning signs.

Just 2 weeks ago, the Supreme Court jeopardized the first amendment for so-called abortion rights. It upheld certain restrictions on peaceful nonviolent protests at abortion clinics. I wonder if these protests would have been protected, if anything other than abortion or opposition to abortion had been the issue.

And in May of this year, a Federal district court in the State of Washington made an unprecedented decision to strike down a 140-year-old law that prevented assisted suicide. And how did she do so? She based her opinion on *Roe's* stepchild, *Planned Parenthood* v. *Casey*.

Unless this committee was presented with convincing evidence to the contrary, we must assume that Judge Breyer has passed President Clinton's abortion litmus test. But the Senate is not obliged to rubber stamp this nomination. It is time to stop and seriously question the support for an abortion law that is ripping away at our constitutional freedoms, the right to life and liberty and the pursuit of happiness, and now the freedom of speech.

Judge Breyer said before you that he thinks it is absolutely intolerable that one real child is killed every hour through violence.

Now, you may not have seen the assault on them, you could not have heard their cries. But in the short time I have spoken to you, over 15 children have felt the violent pain of abortion.

Because we believe this onslaught must end, we must respectfully and regretfully oppose this nomination.

Thank you.

[The prepared statement of Ms. Cunningham follows:]

PREPARED STATEMENT OF PAIGE COMSTOCK CUNNINGHAM

Mr. Chairman, Members of the Judiciary Committee, thank you for this opportunity to testify concerning the nomination of Judge Stephen Breyer to the United States Supreme Court.

My name is Paige Cunningham. I am an attorney and the president of Americans United for Life, the legal arm of the pro-life movement. Americans United for Life (AUL) is the only national legal organization dedicated exclusively to writing, passing and defending laws—laws that shield innocent children and their mothers from abortion. AUL also works to change law and public policy to protect the sick, the elderly, and the disabled from euthanasia and assisted suicide.

We are here today because we are haunted by the image of millions of women and their children who have been injured and destroyed by abortion. We have fought on their behalf in the courts for twenty-one years, and it may be another twenty years—just as it was for the abolition, women's suffrage, and the civil rights movements—before we succeed. But one thing is clear. We will not give up the fight for women and their little ones in the judicial arena.

Although Judge Breyer clearly has the credentials to sit on the Supreme Court, we are concerned about one flaw which we believe to be fatal. That flaw is the process by which he was selected and its impact on the courts, the law, and American society.

President Clinton made it clear that he would appoint to the Supreme Court only a supporter of *Roe* v. *Wade*[1]. A nominee for the Supreme Court must now pass a test—an abortion litmus test, a test which other presidents were wrongfully accused of applying. His position as a nominee implies that Judge Breyer has passed this test. Members of this Committee and other Senators warned several years ago that we should not require a judicial nominee to commit himself to a particular position on an issue that may come before him as a judge. As Abraham Lincoln said, "[W]e cannot ask a nominee how he would vote, and if he told us, we would despise him."

It should be obvious that an abortion litmus test is an insult to the integrity of the Highest Court in the land. But what is far more disturbing is the abortion doctrine that Judge Breyer will be expected to support. In 1973, the Supreme Court ruled in *Roe* v. *Wade* that a mother may end the life of the child in her womb for any reason, throughout all nine months of her pregnancy. And it did so with no constitutional basis. The Court's decision in *Roe* openly defied a social and legal tradition condemning abortion that dates back at least to the beginnings of the common law in England, almost eight hundred years ago.

Roe has been condemned as unprincipled both by Members of the Court and by constitutional scholars, including those who favor abortion as a matter of legislative policy. Unlike *Brown* v. *Board of Education*,[2] the once-controversial school desegregation case which is now universally accepted, *Roe* v. *Wade* has never been settled in our society. In fact, by overriding the democratic process, the Court created the very division it now claims to have healed.

Women would be better off without this abortion policy. *Roe* has done nothing to advance women's legal, social or economic rights. The real progress has come through Congress and state legislatures. They have passed dozens of laws mandating equal pay for equal work and banning sex discrimination in public and private employment, sale and rental of housing, education and other areas. Not one of these laws depends on *Roe* or on a right to abortion.

Even more troubling is the Court's current belief that abortion is necessary for women's equality. This is profoundly anti-woman. The Court seemed to suggest two years ago in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*[3] that we women can be made "equal" to men only if we are given the right to destroy our own children through abortion. But it is offensive and sexist to imply that we must

[1] 410 U.S. 113 (1973).
[2] 347 U.S. 483 (1954).
[3] 112 S. Ct. 2791 (1992).

deny what makes us unique as women (our ability to conceive and bear children) in order to be treated "equally" by men. True equality between the sexes will be reached on the day when we can affirm what makes us unique as women and still be treated fairly by the law and society.

As our feminist pioneers agreed, abortion goes against core values of womanhood: equality, care, nurturing, compassion, inclusion, and non-violence.

Roe was supposed to answer the causing concerns of a woman in a troubled pregnancy. But what has been the legacy of *Roe*? Has a generation of abortion on demand solved any of the problems for which it was offered? Has abortion reduced the rates of child abuse? Or absentee fathers? Or teen pregnancy? Or spousal abuse? Or has the violence of abortion, both to our unborn children and to ourselves, desensitized us to violence?

Has the availability of abortion reduced the numbers of women in poverty? Or has it actually aggravated the feminization of poverty? Has abortion enhanced respect for women? Or has it encouraged casual sexual relationships and male irresponsibility?

After more than twenty years of abortion on demand, abortion has flunked the test as the miracle cure for the social problems abortion advocates promised it would solve. The destruction and tragedy caused by more than thirty million abortions—nearly 30,000 every week, or half the population city of Chicago every year—performed at all stages of pregnancy, is a gaping national wound, a wound whose ugliness is covered up by polite tolerance and rhetoric about "a woman's right to choose" and "keeping government out of private choices."

The devastation of *Roe* is not limited to those millions of children who will never be born, or to the mothers and families who will never cuddle their babies and hear them laugh or comfort them when they cry. *Roe* has seeped into other areas of law, with an "abortion distortion" lens that clouds our laws and Constitution. We should pay attention to the warning signs.

Just two weeks ago, the Supreme Court sacrificed the First Amendment to so-called abortion rights. It upheld restrictions on peaceful, nonviolent, and otherwise lawful protests at abortion clinics that in all likelihood would have been struck down if anything other than abortion had been the subject of the protests.[4] What have we come to as a nation and society when abortion centers must be protected by speech-free "muzzle zones," when the truth about abortion must be relegated to the outfield of the public square?

And in May of this year, a Federal district court in the State of Washington made an unprecedented decision to strike down a 140-year-old law to protect assisted suicide.[5] The judge squarely based her opinion on *Roe's* step-child, *Planned Parenthood* v. *Casey*.

Unless this Committee is presented with convincing evidence to the contrary, we must assume that Judge Breyer has passed President Clinton's "abortion-litmus test." But the Senate is not obliged to rubber-stamp this nomination. In light of the unprincipled nature of the decision in *Roe* and the enormous damage to millions of men, women, and children, we must oppose a nominee who supports the abortion regime that the Supreme Court has imposed on the American people, against their wishes and profound beliefs. As a result, we must oppose the nomination of Stephen Breyer to become Associate Justice of the United States Supreme Court.

Thank you.

Senator METZENBAUM [presiding]. Thank you very much, Ms. Cunningham.

Mr. Farris, we are happy to hear from you, sir.

STATEMENT OF MICHAEL P. FARRIS

Mr. FARRIS. Thank you, Mr. Chairman and members of the committee.

My name is Michael Farris, and I am the president of the Home School Legal Defense Association and our affiliated group, the National Center for Home Education. We have over 40,000 members in all 50 States and every U.S. territory. We network with approximately 150 State and regional home school organizations, which in turn network with 3,000 to 4,000 local home school support groups.

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[4] *Madsen* v. *Women's Health Center, Inc.*, 62 U.S.L.W. 4686 (U.S. June 30, 1994).

[5] *Compassion in Dying* v. *State of Washington*, No. C94–119 (W.D. Wash. May 20, 1994).

There are approximately 400,000 families home schooling approximately 1 million children in this country. It is the fastest growing educational movement in our Nation.

By way of personal background, I am a constitutional litigator with an emphasis in free exercise litigation. I last testified before this committee as the cochairman of the drafting committee for the coalition supporting the Religious Freedom Restoration Act.

Home School Legal Defense Association opposes the nomination of Stephen Breyer to the Supreme Court of the United States, because his views on the subject of the free exercise of religion, especially within the context of education, are so far beyond the pale of acceptability, that we believe his presence on the Supreme Court would represent a clear and present danger to our freedoms.

Senator METZENBAUM. Mr. Farris, I don't want to interrupt you, but I would just like you to clarify. I am not quite clear what the home school concept is. Do you believe that all children should be educated in the home and not in the public school system? Is that the thrust of your organization?

Mr. FARRIS. No, Senator, it is not. The thrust is that we want to defend the right of parents who choose to do that to legally do so without unreasonable fetters. We want home schooling to be a legal alternative in this country. When we started the organization, only three States allowed home schooling as a matter of statutory right. Now it is legal in all 50 States, although there are undue restrictions placed by various school districts and various laws. It is a matter of legal freedom, not a matter of saying everyone should choose this method.

Senator METZENBAUM. And the parents can opt for that alternative to teach their children at home, and not send them to public school or private school?

Mr. FARRIS. We would oppose any coercion of any parent to choose any form of education, whether it is public, private or home. We simply think that this choice should be made available.

Senator METZENBAUM. Thank you for that clarification. Thank you.

Mr. FARRIS. You are welcome.

We base our opposition of Judge Breyer on his exhaustive—there is no question about Judge Breyer's scholarship. He is a very scholarly judge and writes very clear and articulate opinions, but that does not make them right.

His decision in *New Life Baptist Academy* v. *East Longmeadow School District,* decided in 1989, is the focus of our opposition. I wrote an amicus brief in that case submitted to Judge Breyer and his fellow panel members in that case. He did reverse an excellent opinion by the Federal district court. And later, when the private school was unable to continue the case with private counsel, our organization undertook their case at that point and I became lead counsel and personally wrote the cert petition to the U.S. Supreme Court, which was denied during the same period of time within a few weeks of their issuance of the decision of *Employment Division* v. *Smith,* which was overturned, in effect, by the Senate's passage of the Religious Freedom Restoration Act.

We believe and are greatly concerned with the fact that Judge Breyer's legal philosophy is in full accord with the majority opinion

in *Smith,* and we believe totally out of sync with the philosophy of this committee and Congress as a whole, which was endorsed by passing the Religious Freedom Restoration Act.

We bring to this committee's attention four brief specific problems of Judge Breyer's opinion in *New Life.* First, he endorses the notion that private schools can be regulated by subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local school officials. Many school districts in Massachusetts have adopted written policies which specify objective criteria which they will evaluate for an approval. But some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private school and make a wholly discretionary decision.

The Federal district court in this case held that the system of subjective discretion violated the free exercise and establishment clause rights of this private religious school. A system of unwritten, subjective, prior restraints I believe is simply unacceptable to a nation with a historical commitment to the freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The school had offered to voluntarily submit to achievement tests, and Breyer rejected this offer as untrustworthy.

I see that my time is up. The written testimony has been submitted and I ask you to read it. But if I could just summarize in this way:

Judge Breyer's views are in lock-step opinion and sympathy with the majority opinion in *Smith.* He gives very low opinion and value to the free exercise of religion. Although he claims to be enforcing the compelling State interest test, if you read his opinion closely, he really says all the State has to do is enact reasonable laws. Mere reasonableness is not enough to override the free exercise of religion. There must be a compelling governmental interest for the particular regulation at stake, and that particular regulation cannot have any less restrictive alternatives.

Judge Breyer substituted his own judgment for the judgment of that religious school as to what was acceptable to their religions views and what would burden their religion. And the substitution of a judge for his determination of someone else's religion is such a departure from an appropriate judicial methodology of evaluating religious freedom, we view it very dangerous. He gratuitously said that home schooling can be constitutionally banned entirely by a State. We think that was not a necessary decision and very dangerous to have someone on the Supreme Court who thinks that that form of education can be constitutionally banned outright.

[The prepared statement and a letter of Mr. Farris follow:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Mr. Chairman and members of the Judiciary Committee:

My name is Michael Farris. I am the president of the Home School Legal Defense Association (HSLDA) and our affiliated group, the National Center for Home Education. HSLDA has over 40,000 member families. We have members in all fifty states and every U.S. territory.

Through the National Center for Home Education we network with approximately 150 state and regional organizations, which in turn network with three to four thousand local home school support groups.

There are approximately 400,000 families home schooling approximately 1 million children in this country.

By way of personal background, I am a constitutional lawyer with an emphasis in free exercise litigation. I last testified before this Committee as the co-chairman of the drafting committee for the coalition supporting the Religious Freedom Restoration Act.

Home School Legal Defense Association opposes the nomination of Stephen Breyer to the Supreme Court of the United States because his views on the subject of the free exercise of religion—especially within the context of education—are so far beyond the pale of acceptability that his presence on the Supreme Court would represent a clear and present danger to our freedoms.

We base our assessment of Judge Breyer on his exhaustive, articulate, and, in our view, dangerous opinion in *New Life Baptist Academy* v. *East Longmeadow School District*, 885 F.2d 940 (1st Cir. 1989).

On behalf of the private school, I wrote an *amicus* brief which was submitted to Judge Breyer and his fellow panel members in that case. After Judge Breyer reversed an excellent opinion by the federal district court, the private school was unable to afford to have private counsel petition the Supreme Court for a Writ of Certiorari. Our organization undertook their case at that point, and I became lead counsel and personally wrote the *cert* petition to the Supreme Court.

The Supreme Court denied the petition during the same period of time it was deciding the discredited opinion in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). This Commission helped effectively overturn *Smith* by the passage of the Religious Freedom Restoration Act. We believe and are greatly concerned that Judge Breyer's legal philosophy is in full accord with the majority opinion in *Smith* and totally out of sync with the philosophy this Committee and Congress as a whole endorsed by passing the Religious Freedom Restoration Act.

We bring to this Committee's attention four specific problems with Judge Breyer's opinion in *New Life:*

First, Judge Breyer endorses the notion that private schools can be regulated by the subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local public school officials. Many school districts have adopted written policies which specify objective criteria by which they will evaluate a request for approval. Some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private (often religious) schools to make a wholly discretionary decision.

The federal district court held that this system of subjective discretion violated the free exercise rights of this private religious school. A system of unwritten, subjective, prior restraints is simply unacceptable to a nation with an historical commitment to freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The private school officials voluntarily offered to submit achievement test results to the public officials. Breyer viewed this offer as untrustworthy. He found it to insufficiently regulate the conduct of those who ran the school.

We have a hard time understanding why people can be trusted to choose their leaders by voting for school board members and United States Senators, yet are deemed unfit and untrustworthy to make unregulated choices regarding the education of their own children. Breyer's mistrust of parents and church officials while endorsing the use of government power over their First Amendment choices is an anathema to those who believe in the competence of Americans and those who love freedom.

It is impossible to reconcile Judge Breyer's distrust of the parents and church leaders in *New Life* and the following strong endorsement of the rights of parents by former Chief Justice Burger written in a majority opinion for the Court:

"That some parents 'may at times be acting against the interests of their children' * * * creates a basis for caution, but it is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest * * * The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."

Parham v. *J.R.*, 442 U.S. 584, 602–603 (1979).

Moreover, Judge Breyer views regarding the right of government officials to rule by their "mere discretion" directly violate longstanding precedents of the United

States Supreme Court. In *Hague* v. *CIO*, 307 U.S. 496 (1939), the Supreme Court ruled that it is unconstitutional to subject the exercise of a First Amendment freedom to the discretionary opinions of government officials. Judge Breyer's views represent a slap in the face to this line of Supreme Court precedent. Judge Breyer embraces government power too readily and spurns legitimate, longstanding protections of constitutional freedoms too easily.

Second, Judge Breyer's *New Life* opinion cites with approval three decisions which he says, "uphold [an] effective total ban on home schooling." Consider an analogy from *Employment Division* v. *Smith*. Justice Scalia's opinion in *Smith* was subjected to much criticism because it cited with approval *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940). *Gobitis*, of course, is the case where the Supreme Court said it was constitutional to expel Jehovah's Witnesses from the public schools for refusing to salute the flag. By citing *Gobitis*, Justice Scalia clearly indicated that his willingness to restrict religious freedom carried a long way indeed.

Judge Breyer's citation of these anti-home school cases raises a similar concern. We believe his opinion clearly indicates he would vote to uphold a state law which bans home education. Four hundred thousand families in this country deserve a better choice for the Supreme Court. It is simply unacceptable to American home schoolers to have a person on the Court of last resort for their freedoms who believes they have no constitutionally protected right to educate their children.

Judge Breyer is no moderate; but possesses the most extreme views concerning the rights of those who lovingly teach their children at home.

Third, Judge Breyer believes that *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), does not state a general principle of parental religious liberty. His *New Life* opinion clearly indicates that he sides with the school of thought that *Yoder* grants religious freedom only to Amish parents. This view raises two concerns.

The lesser concern is this: Should someone be elevated to the Supreme Court who so clearly misunderstands the very nature of a Supreme Court decision? The Supreme Court simply does not hear cases which do not involve general principles of law. If the *Yoder* decision was to be limited to its facts, it would have never been accepted for review by the high Court.

The greater concern arises from Breyer's aberrant views on religious freedom. Either religious freedom is protected for every faith in America or it is protected for none. The reason the Religious Freedom Restoration Act passed was that virtually every faith group endorsed it as stating a broad principle that every group is entitled to religious freedom in America.

We believe that a person is disqualified to serve on the Supreme Court if he has ever endorsed the notion that a particular constitutional protection applies to one faith group, but not to others. Breyer refused to apply *Yoder* to a Baptist church in Massachusetts. We believe that the Supreme Court should be reserved for those who believe that all parents of all faiths have the rights enunciated in *Yoder*.

Fourth, Judge Breyer endorses the duplicitous notion religious school offer "religious education" when one is talking about government funding, but, when the issue is government regulation, he then believes these same schools offer "secular education." We believe that schools which are too religious to receive direct funding under the Establishment Clause are too religious to be regulated by the government under the Free Exercise Clause. The Constitution should not be interpreted as a judicial Catch-22.

While these are our specific concerns relating to religious freedom and private education, we believe there are broader concerns which should trouble all Americans.

Judge Breyer has endorsed the idea that one fundamental freedom can be subjected to a prior restraint-styled approval process which depends solely on the discretion of local government officials. If the free exercise of religion can be subjected to such a system of discretionary prior restraints, there is no reason to believe that freedom of speech, freedom of press, and freedom of assembly would fare any better. Either Judge Breyer has a narrow view of all First Amendment freedoms or he has a special antipathy for religious freedom. Neither alternative is acceptable for a member of the United States Supreme Court.

This Committee was very recently involved in helping to reinstitute a broad basis of religious freedom for all Americans of all faiths. The Supreme Court's decision in *Smith* represented a dramatic departure from established precedent and, more importantly, from our longstanding national commitment to religious liberty. No scholar could read Judge Breyer's opinion in *New Life* and have any doubt that he would have been part of the majority in the *Smith* case.

This Committee is on record endorsing a broad view of religious freedom by its passage of the Religious Freedom Restoration Act. It would be totally inconsistent to turn immediately around and place a nominee on the same Court who personifies

the philosophy of big government and little freedom that this Committee has just rejected.

We need Justices who trust Americans much and government little. We need Justices who readily embrace freedom and rarely embrace government power. Judge Breyer embraces government power too readily and freedom—especially religious freedom—far too rarely.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION,
Paeonian Springs, VA, July 22, 1994.

Hon. JOSEPH BIDEN,
221 S.R.O.B, Washington, DC.

DEAR SENATOR BIDEN: Thank you for the opportunity to provide you with more information regarding my concerns about Judge Breyer. You will recall that I questioned Judge Breyer's failure to follow the fact stipulation approved by the lower court that all the instruction in this school was religious in nature. All subjects are taught from a Christian perspective.

You asked me for more information on how math and other subjects can be taught from a religious perspective and for information on the history of constitutional litigation relative to textbooks. I am happy to supply you with the additional information you requested.

1. Federal cases repeatedly state that academic textbooks can be too religious for Establishment Clause purposes.

The Establishment Clause has consistently been interpreted to prohibit the use of tax money for textbooks or instruction in religious schools, even where the texts or instruction were in secular subjects like math. See, e.g., *Flast* v. *Cohen,* 392 U.S. 83 (1968) (taxpayers had standing to sue to stop the teaching of reading and arithmetic in religious schools); *Rhode Island Fed. of Teachers* v. *Norberg,* 479 F.Supp. 1364 (R.I. 1079) (tax deductions for secular textbooks by parochial school families violates the Establishment Clause because the government would have to inspect the books to eliminate those with religious content and supervise the schools to make sure that the books were not used in the course of religious instruction), *Public Funds for Public Schools* v. *Marburger,* 358 F.Supp. 29 (N.J. 1973) (reimbursing parents for cost of "secular, nonideological textbooks" violates the Establishment Clause because the government would have to inspect the books to verify that there was no religious content and monitor instruction to ensure that they were not used for religious purposes).

2. Christian teaching of secular subjects (including math) can be quite religious. Consider this Christian Teacher's Manual:

"The Christian approach to teaching arithmetic begins with knowing and teaching the students that the universe has structure and order because it was created by a rational, orderly God. In arithmetic the students study one aspect of the order of the real world and indirectly begin to know more about the God Who has given them the world they live in. In the arithmetic processes the students are not creating truth but learning truth; they are, in a sense, thinking God's thoughts after Him. The students will find exactness, preciseness, and completeness in the subject matter of mathematics, just as would be expected in God's world."

A Beka Mathematics 5 Teacher's Guide, Introduction [attached as Appendix A]. Or consider this, from the Spring, 1968 issue of the The Christian Teacher:

"A Christian school that is content only with the teaching of manipulatory skills of arithmetic, algebra, and geometry blinds the student's perception to all but a fraction of the glory of God reflected in the unique mirror of mathematics."

Even the methods of teaching reflect a distinctively Christian emphasis, as shown in this Teacher's Guide:

"We are unabashed advocates of traditional arithmetic, partly because the students learn something that can be built upon, but also because it accords with out Christian viewpoints on education. Only from a Christian perspective can the basic rationale, the intrinsic reasonableness of traditional elementary arithmetic be seen and appreciated. Traditional arithmetic will not succeed unless it is taught with the conviction that something more than arbitrary processes derived from arbitrary principles is at issue. The elementary student does not need to "understand" 2+2=4 in order to learn it and use it; he will learn the abstract principles later. But the elementary student does need to see his multiplication tables as part of the truth and order that Good has built into reality. From the Christina perspective, 2+2=4 takes on cosmic significance, as does every fact of mathematics, however particular! Traditional elementary arithmetic is Christian elementary arithmetic."

A Beka Mathematics 5 Teacher's Guide, Introduction, *supra.*

3. Government officials have repeatedly attempted to interfere with religiously-motivated parental choices in academics.

In South San Francisco, lawyers threatened to sue a Christian home-schooling family which operated under the supervision of a local public school. The family had chosen religious texts for their public school "Independent Study Program." Because the family was not a member of HSLDA, we do not know whether they were able to continue using their religious books.

Government officials have also objected to the religiously-motivated teaching methodology outlined above. In Bourne, Massachusetts, for example, Assistant Superintendent Gail Roe examined the A Beka mathematics textbook chosen by a home schooling family. Dr. Roe objected to the traditional teaching methods used in the textbook, saying, "This operates at the very lowest level of learning!" (It is worth noting that the textbooks she criticized are among the most popular texts used in Christian home and private schools, and that these home and private schools routinely outscore public schools on standardized tests.)

Under the same Massachusetts law at issue in *New Life,* this home-schooling family could be prosecuted for criminal truancy unless they received approval in advance from the local school. Dr. Roe used the power of her position to threaten this family with prosecution unless they changed their educational choices. With the help of HSLDA, the family was able to continue to use the religious math textbooks which they had chosen.

On a grander scale, Congress is currently weighing legislation which would mandate the new secular approaches. The House version of the *Improving America's Schools Act,* says at H.R. 6 § 1001(c)(5):

"The disproven theory that children must first learn basic skills before engaging in more complex tasks continues to dominate strategies for classroom instruction, resulting in emphasis on repetitive drill and practice at the expense of content-rich instruction, accelerated curricula, and effective teaching to high standards."

This language, as originally written, would have put the federal government on record as being against the traditional methodology chosen by religious educators who believe in moral and mathematical absolutes. Only a massive outcry by private, religious, and home educators, kept this provision of H.R. 6 from being mandated for all schoolchildren in America.

Conclusion.—As you can see, the thrust of my comments were quite accurate although I did not have all the relevant information at my fingertips when you asked me the question. I appreciate the opportunity to supplement this information, and ask that it be placed in the record to demonstrate that I answered your public request.

Thank you so much for the courtesy to allow me to testify before your committee.

Very truly yours,

MICHAEL P. FARRIS, ESQ./CG,

Enclosures: Introduction to *A Beka Teachers' Manual for Mathematics 5.*

[APPENDIX A]

TO THE TEACHER: THE CHRISTIAN APPROACH TO TEACHING ARITHMETIC

The Christian approach to teaching arithmetic begins with knowing and teaching the students that the universe has structure and order because it was created by a rational, orderly God. In arithmetic the students study one aspect of the order of the real world and indirectly begin to now more about the God Who has given them the world they live in. In the arithmetic processes the students are not creating truth but learning truth; they are, in a sense, thinking God's thoughts after Him. The students will find exactness, preciseness, and completeness in the subject matter of mathematics, just as would be expected in God's world.

As the content of the arithmetic curriculum and the textbook has reason and order to it, so must the arithmetic class itself be taught according to an organized, reasonable plan. A daily class should include oral drill, the teaching of new material, practice of new material, and review of basic facts, All four areas need to be completed in 60 minutes or less time each day. The teacher must have classroom habits and procedures that will produce an orderly classroom conducive to good learning.

Elementary arithmetic, quite naturally, begins with the most elementary, basic mathematical processes of arithmetic. Students learn best when they proceed from the particular to the general, from the concrete to the abstract. Elementary arithmetic properly emphasizes the facts of addition, subtraction, multiplication, and division that accord with the child's stage of mental development and have immediate

practical application. A solid foundation is laid for high school arithmetic which appropriately (but still gradually) introduces the student to a higher level of abstraction. The student will learn more efficiently and be better at algebra and all higher mathematics if he masters arithmetic first.

We are unabashed advocates of traditional arithmetic, partly because the students learn something that can be built upon, but also because it accords with our Christian viewpoints on education. Only from a Christian perspective can the basic rationale, the intrinsic reasonableness of traditional elementary arithmetic be seen and appreciated. Traditional arithmetic will not succeed unless it is taught with the conviction that something more than arbitrary processes derived from arbitrary principles is at issue. The elementary student does need need to "understand" 2+2=4 in order to learn it and use it; he will learn the abstract principles later. But the elementary student does need to see his multiplication tables as part of the truth and order that God has built into reality. From the Christian perspective, 2+2=4 takes on cosmic significance, as does every fact of mathematics, however particular! Traditional elementary arithmetic is Christian elementary arithmetic.

The way we view a subject matter and the method we think we ought to use to teach it are always related. Traditional arithmetic goes with traditional teaching methods, and we believe that these teaching methods also accord with our Christian perspective. Elementary students are taught the arithmetic facts through oral and written drill, just as the Bible says, "For precept must be upon precept, upon precept; line upon line, line upon line; here a little, and there a little" (Isaiah 28:10). The elementary students learn the facts by hearing them over and over again. They need facts in order to think and build up their minds for more abstract mathematics in high school. The students will need generous amount of oral and written drill conducted by the teacher to have accuracy and speed in arithmetic.

A teacher who is faithful in teaching and drilling the facts if arithmetic in a reasonable, consistent way will be teaching much more than the particulars of arithmetic—such a teacher will be instilling within the students some of the most basic attitudes that are necessary for knowing and obeying God. C. T. Studd, missionary to Africa, understood this principle well and used it in his work with a people who had just risen from the depths of cannibalism. Norman Grubb described Studd's reasoning in his biography of the missionary (C. T. Studd, Fort Washington, Pennsylvania, Christian Literature Crusade, 1972, 1974):

"Every pole had to be exactly the right length, placed at the right angle, etc.; and he had a purpose in it, for the natives must be taught that good Christianity and lazy or bad workmanship are an utter contradiction. He believed that one of the best ways to teach a native that righteousness is the foundation of God's Throne was my making him see the absolute straightness and accuracy is the only law of success in material things."

Traditional arithmetic is Christian arithmetic, and it must be taught by traditional methods. A rightly taught arithmetic lesson is one more way that a Christian teacher can instill within students the principles of God's Word.

Arithmetic 5 is a traditional Christian arithmetic book. You can use this book with confidence in your Christian classroom, knowing that it accords with the orderliness and realities of God's world. Day-by-day curriculum to help you teach this book in the traditional way is available and necessary for the most effective instruction. A student speed drill and test booklet and flashcards and other teaching aids are also available from *A Beka Book* Publications.

Upon completion of the work in *Arithmetic 5,* students should have mastered the following terms, facts, and concepts:

1. Review of all addition, subtraction, multiplication, and division facts with their terminology
2. Place value of numbers through billions
3. Review of borrowing and carrying
4. Multiplication problems with up to four digits in the multiplier
5. Division problems with up to three digits in the divisor
6. Checking addition, multiplication, and division problems by casting out 9's
7. Review of story problems
8. Review of number averaging
9. Review of roman numerals
10. Rounding off whole numbers, decimals, and money
11. English and metric measures
12. Converting measures within the same system and solving measurement equations
13. Fraction terminology and solving problems containing fractions—adding and subtracting fractions and mixed numbers with a common denominator or having to find a common denominator—recognizing proper and improper fractions—changing

mixed numbers to improper fractions and changing improper fractions to mixed or whole numbers—subtracting fractions involving borrowing—writing a remainder as a fraction—multiplying fractions using cancellation—writing a fraction as a decimal—working division problems involving fractions

14. Factoring
15. Finding the least common multiple
16. Divisibility rules
17. Writing decimals as fractions—adding, subtracting, multiplying, and dividing decimals—comparing decimals—renaming decimals—recognizing terminating and repeating decimals—learning common fraction and decimal equivalents
18. Reading a thermometer
19. Converting from a Celsius scale to a Fahrenheit scale and from a Fahrenheit scale to a Celsius scale
20. Solving equations
21. Reading and drawing pictographs, bar graphs, and line graphs
22. Reading scale drawings
23. Recognizing and drawing geometric shapes and figures
24. Finding the perimeter of a rectangle and a square using the formulas
25. Finding the area of a rectangle and a square using the formulas

The CHAIRMAN [presiding]. Mr. Farris, do you make any distinction, for purposes of my understanding here, between home schooling and religious schooling?

Mr. FARRIS. Under Massachusetts law and the law of this country generally, home schooling is a form of private education. Religious education is a form of private education. Particularly, under Massachusetts law, there is no such thing as a home school per se. Home schools are just small private schools where parents teach their own kids at home.

What we mean by it in our organization is that we will defend families who want to choose to teach their children at home. We believe they have a right to do that constitutionally, and——

The CHAIRMAN. But your umbrella is broader than that, though, isn't it?

Mr. FARRIS. Our criticism of Judge Breyer's opinion——

The CHAIRMAN. I'm sorry, I am trying to understand the association.

Mr. FARRIS. The association exclusively defends families that choose to teach their children at home.

The CHAIRMAN. But it does not encompass parochial education, for example, or schools like I recently visited that are run by orthodox Jewish communities, you know, religious schools stated as a Catholic grade school, a Jewish grade school or whatever?

Mr. FARRIS. Our organization does not litigate on behalf of private institutional religious schools. As a lawyer, I have done so many times.

The CHAIRMAN. I just want to make sure I understood, because the case you are referring to—and correct me if I am wrong—was not about home schooling in terms of the organization that you represent. That doesn't mean you shouldn't comment on it. I just want to make sure I understand. I don't want people walking away misunderstanding what that case was about beyond the principle. Factually, that was a religious school, correct?

Mr. FARRIS. It was an institution——

The CHAIRMAN. As opposed to a mother and father deciding that they wished to educate their child at home.

Mr. FARRIS. That is correct.

The CHAIRMAN. You do not represent institutions like the one that was the focus of the court case in the Breyer case, correct?

Mr. FARRIS. Normally, we did not, but we did in that particular case represent that school at the Supreme Court level——

The CHAIRMAN. I see.

Mr. FARRIS [continuing]. Because the law in Massachusetts is identical, one and the same law for home schools and private schools. The devaluation of the right of private schools in Massachusetts was by its very nature the devaluation of the right of home schools to exist in Massachusetts, and so we undertook free of charge the representation of that school at the Supreme Court level.

The CHAIRMAN. Thank you very much.

Senator Hatch.

Senator HATCH. Let me just say this: I have appreciated the testimony of both of you, and I decry, as you do, Ms. Comstock Cunningham, the use of a litmus test, a single litmus test to determine whether a person should sit on the Supreme Court. I don't want it under Republican administration, and I don't think it is particularly fitting under this administration.

With regard to the school case that you mentioned, Mr. Farris, I have a lot of respect for you personally, as you know, both of you. Judge Breyer tried to apply the compelling interest test, but I understand your view that he didn't apply the least restrictive alternative test, even though the case was decided before the Religious Freedom Restoration Act was enacted into law. I have been very upset with the *Christian Schools* case, where a person who pays tithing, but goes into bankruptcy, justifies the court ordering the church to repay the tithing. I think it is a wrong case and that it ought to be decided otherwise, and I hope that it will be vociferously fought on appeal.

But as I listened to Judge Breyer, he seemed to have an open mind toward some of the concepts that you are talking about and did justify his decision in that case on the basis of standards. But be that as it may, your points are well taken. I am glad to have your testimony here today.

Mr. FARRIS. Thank you, Senator Hatch.

If I could briefly respond, perhaps this would have been a case, had Judge Breyer had some litigation experience, it might have helped. The fundamental error that he made was to disregard a stipulation entered by the parties, which was approved by the Federal district trial court. The stipulation was that all the education offered by this private religious school was religious in nature. They may teach math, they may teach history, they may teach literature, but they do so from the religious perspective of the school.

For the judge to ignore that trial stipulation and to substitute his view that this is simply secular education, we can regulate secular education however we want, was to ignore the importance of the trial stipulation and a factual finding by the trial court.

Senator HATCH. That is a good point, but I also think he came down on the side that there are certain educational standards that a State can set even for religious schools. I agree with you, that is a sticky point that has to be debated and argued.

Mr. FARRIS. Well, there is a wide variety of opinion about the permissive nature of that, but there is very little opinion that suggests that the standards imposed on private religious schools can be subjective in nature. And that is what Judge Breyer endorsed, is a wholly subjective standard.

Senator HATCH. I have a tendency to be on your side on that issue, but the fact is that I think we are all learning in this area. My point is that the Republican administration was accused of a litmus test on abortion, when in fact that was not the case. I happen to know, because I know who interviewed the judgeship nominees, and I know exactly the questions that were asked, and that wasn't one of them.

It is certainly quite clear today from the decisions of the Court that that wasn't one of the tests. But here we have an administration requiring these litmus tests, and I think your points are well taken. On the other hand, I don't think we should be imposing our own litmus test, albeit however strong we feel about it, because I don't think that a single issue should stop a person from serving on the Supreme Court, no matter how important they may be, if that person is otherwise qualified.

There may be some issues such as the person won't swear to uphold the Constitution. I think that is a single litmus test issue that would disqualify anybody from serving on the Supreme Court. You may feel deeply enough about your issues that they fit in that category, but we up here have to decide these matters on the basis of the overall record and what we know about the person.

I just want to tell you that I appreciate your testimony and are glad to have both of you here.

The CHAIRMAN. Running the risk of opening up a large area, I am probably the only one here that is the product of 13 years of religious education. How the devil do you teach math from a religious perspective?

Maybe that explains my difficulty with math. [Laughter.]

Senator HATCH. I do not think he should answer it. He just gave a good explanation.

The CHAIRMAN. No—seriously, how could you say such an apparently preposterous thing?

Mr. FARRIS. I was not trying to single out math, Senator Biden.

The CHAIRMAN. No; I am singling it out. You said the academic subjects are taught from a religious perspective. How does one teach mathematics—how does one teach calculus from a religious perspective?

Mr. FARRIS. You cannot teach the science of math from a religious perspective. But what is often done in math books—which would disqualify them, for example, from Federal funding—is that the examples used and the illustrations used within the math book are particularly religious examples, where they will give stories of the disciples and say three disciples were here——

The CHAIRMAN. Not so; I went through at least 8 years of education with those books. I think you are factually incorrect. If that is true, then you have gained an ally in me. But I think that is not true. I know of no such place where you can say in a book that there are 12 disciples, one of them turned on Jesus, and what percentage of the disciples turned on Jesus. I know no place that says,

hey, by the way, that is not—the school loses Federal funding for that.

Mr. FARRIS. Senator Biden, as a matter of litigation, there is no such case.

The CHAIRMAN. You got it.

Mr. FARRIS. But as a matter of practical interpretation of the way the laws are implemented, I am confident in my opinion that any Federal regulator looking at such a book would raise hackles. And I could tell you that attorneys—I think of one in south San Francisco, CA—threatened to sue a family for using such a textbook——

The CHAIRMAN. No; I am not talking about a family. I am talking about the case—the circumstances. I would ask you to supply for the record anything to sustain your point as it relates to teaching sciences from a religious perspective and the use of an example that has a religious grounding to compute and/or to multiply or divide. I mean, I remember the fishes and the loaves, and how did we get there, and that being used in my math book. I do not have any further questions.

Senator Grassley.

Senator GRASSLEY. Before I ask you three or four questions, would you clarify something for me. I think I understand home schooling, because I have some nephews and a niece that are home-schooled, and I am quite well-acquainted with it in Iowa. There are a lot of people in my State who do it. But we always talk of home schooling in concepts of first amendment rights, and that there is a religious reason for having home schooling. And I am not saying that there is anybody who does it for reasons other than for religious purposes. But can't the concept of home schooling involve people who want to teach their kids at home, regardless of any religious reason?

Mr. FARRIS. Yes, Senator, many do; a goodly percentage. Perhaps 20, 30 percent of the people who are home schooling are not doing so for any religious reason whatsoever.

Senator GRASSLEY. From that standpoint, I remember that every time that Judge Breyer responded to questions about home schooling, he always started out with a first amendment basis for his response.

You can leave the first amendment out of it entirely, can't you, and have a constitutional justification for home schooling?

Mr. FARRIS. Yes, you can. The 14th amendment due process clause, protecting the liberty interest of parents to direct the upbringing of their children, that has been recognized by the Supreme Court since the mid-1920's in the *Pierce* case, recognizes a wholly nonreligious basis for a constitutional right to home-school your children, which I believe that all parents possess.

Senator GRASSLEY. When you are in court on this subject, do you use a 1st amendment argument, or are you using the 14th amendment argument?

Mr. FARRIS. Depending on the facts of the particular family, we use——

Senator GRASSLEY. You could use both.

Mr. FARRIS [continuing]. We have used both, often; sometimes, we use simply the parents' rights, depending on the factual situation.

Senator GRASSLEY. But I believe, as I recall, that it was always approached by Judge Breyer from a first amendment perspective, and——

Mr. FARRIS. That is my reading of his testimony as well.

Senator GRASSLEY. Senator Simpson asked Judge Breyer about home schooling. Judge Breyer indicated that he had no bias against home schools, and the judge also testified that he thought the Constitution protected the rights of parents to inculcate religious values in their children. Additionally, Judge Breyer stated that religious schooling was constitutionally protected.

Do these statements provide you with some level of comfort about Judge Breyer?

Mr. FARRIS. A very minimal level of comfort, Senator. I am not so much concerned about his personal opinion and his lack of bias toward home schools. I am more concerned about this view of our constitutional rights. His opinion in the *New Life* case was thorough, it was articulate, it was exhaustive. In that case, he stated that States have the power, in his words, citing with approval the *Duro* case from North Carolina, that they have the right to totally effectively ban home schooling.

I dispute that proposition, and someone who cites such a case with approval embraces its view. He also cites with approval a sixth circuit rendering of *Wisconsin* v. *Yoder* that says that that decision does not state a general proposition, but only applies to the Amish. I do not believe that, first, any Supreme Court decision fails to state a general proposition. If you fundamentally misunderstand the nature of a Supreme Court decision to say that it does not state a general proposition, we are not dealing with the same theory of the Supreme Court.

Second, I do not think that *Wisconsin* v. *Yoder* is factually limited to the Amish. If religious freedom is not for every faith in this country, we have denied it for all faiths. And I reject the proposition that the Amish and only the Amish have the rights announced in that case before the Supreme Court. And this Baptist school in Massachusetts should have had the same rights that the Amish did in *Wisconsin* v. *Yoder*, but they were denied such a right. I think that that form of religious discrimination, elevating one faith for protection that no other faith can achieve, is simply unacceptable, and I would suggest that that is one of the litmus tests for a Supreme Court nominee that says that only one faith can have religious freedom in this country, or one aspect of religious freedom in this country. I think that that is a very, very serious issue.

Senator GRASSLEY. Totally unrelated to the subject that you come here to bring up, I assume that you have observed Judge Breyer in his general approach to the law, and I guess I want to tell you a feeling I have, that I believe that he has been fairly disciplined and restrained in his 15 years as a Federal appellate judge. I would not put him in the category of a judicial activist, as I view some people who have been on the Supreme Court during the sixties and seventies.

Would you generally agree with that statement?

Mr. FARRIS. Yes, Senator, I would. I would say he is a moderate in those terms.

Senator GRASSLEY. Judge Breyer told me in an answer to a question that there were, in his words, "vast areas" where Government could accommodate religion and even provide assistance on a neutral basis. And I do not think that approach means forced secularism that you and I might fear.

What was your reaction to these comments?

Mr. FARRIS. I tend to look at things in terms of actual cases, and Judge Breyer properly refrained from commenting on specific cases that might come before the Court. I think that Judge Breyer would probably accept something like *Witters* v. *Washington Department of Services for the Blind,* which I argued before the Supreme Court where the Supreme Court unanimously said you cannot discriminate against a person for establishment clause purposes on the basis that they want to receive a religious education; that as long as everybody is getting vocational rehabilitation for the blind, you cannot single out ministers and say they are disqualified for establishment clause reasons. I would view him as probably accepting that unanimous ruling of the Supreme Court.

Senator GRASSLEY. Judge Breyer also indicated that he believed that institutions such as families, churches, synagogues, have been restrained in recent decades, and he is open-minded about a number of prior Court decisions that you and I might think have weakened the family and the force of morality in our society. To me, this was somewhat a refreshing attitude. Do you have the same reaction that I have about his statements?

Mr. FARRIS. I find those hopeful on the establishment clause side of things. The free exercise is where I am much more troubled.

Senator GRASSLEY. I have no further questions, Mr. Chairman.

Senator METZENBAUM [presiding]. Thank you very much, Senator Grassley, and I compliment you for your astute line of questioning. I thought it was particularly relevant.

Ms. Cunningham and Mr. Farris, thanks, both of you, for your participation in this hearing, and you can be certain the committee will take into consideration your comments.

Thank you very much.

Mr. FARRIS. Thank you.

Ms. CUNNINGHAM. Thank you, Senator.

Senator METZENBAUM. Our next panel includes Jose Trias Monge, former Justice of the Supreme Court of Puerto Rico; Margaret Marshall, vice president and general counsel, Harvard University; Helen Corrothers, National Institute for Justice, and former U.S. Sentencing Commissioner, Washington.

I think you are all aware of our 5-minute rule; I guess somebody is keeping time on it. Judge Trias Monge, we will be happy to hear from you, sir.

I might say that I think I have about 8 minutes to get to the floor for a roll call, and I do not see anybody else sitting around here, so that if I interrupt your testimony so that I may leave and cast my vote, please understand it is not a reflection upon my interest in what you are saying, but it is just that I want to get my vote in.

Judge.

PANEL CONSISTING OF JOSE TRIAS MONGE, FORMER JUSTICE OF THE SUPREME COURT OF PUERTO RICO, SAN JUAN, PR; MARGARET H. MARSHALL, VICE PRESIDENT AND GENERAL COUNSEL, HARVARD UNIVERSITY, CAMBRIDGE, MA; AND HELEN G. CORROTHERS, VISITING FELLOW, NATIONAL INSTITUTE FOR JUSTICE, AND FORMER COMMISSIONER, U.S. SENTENCING COMMISSION, WASHINGTON, DC

STATEMENT OF JOSE TRIAS MONGE

Mr. TRIAS MONGE. Thank you, Senator.

My name is Jose Trias Monge. I served as chief justice of Puerto Rico from 1974 to 1985. As part of my duties and pleasure, I have been a close student for many years of the Supreme Court of the United States, and given its special relationship to Puerto Rico, of the U.S. Court of Appeals for the First Circuit. Their decisions on insular affairs since the start of the century have been discussed at length in several of my books. In a 1991 book, I singled out for special praise several of Judge Breyer's opinions on the subject.

Puerto Rico is a mixed law jurisdiction. Large areas of its legal system are governed by the civil tradition and others by common law. During the early part of this century, the boundary——

Senator METZENBAUM. Judge, I think it would serve your purposes better if I interrupted you before you got into the main thrust of your remarks. I am informed I have 5 minutes to get to the floor.

This committee stands in recess until some other member of the committee returns, so that we may proceed forward. Please forgive us.

[Recess.]

The CHAIRMAN. The hearing will come to order.

I must apologize to our witnesses. We are debating one of the most controversial issues of that every year comes up, and that is the foreign aid appropriations bill, which lends itself—it is very important, but occasionally lends itself to some demagoguery on occasion and occasionally lends itself to very difficult votes on occasion. But there is a whole series of votes, and this is going to continue.

I failed to announce to the press and everyone here that we are, as is obvious by now, going right through the lunch hour, and our fourth panel, which has been brought up but not introduced at this point, includes several of Judge Breyer's colleagues who know him in his various capacities as Chief Judge for the First Circuit, a professor at Harvard Law School, and his work on the Sentencing Commission in the late 1980's.

In addition, we are fortunate to have on this panel a former colleague of the Chief Judge in the First Circuit, Judge Trias, and Judge, it is a pleasure to have you here. I appreciate you making the effort.

Justice Trias is a former chief justice of the Supreme Court of Puerto Rico, which is located in Judge Breyer's circuit, and currently serves as counsel to Trias—that is all I have here, but that is not the whole name of the firm—what is the name of the firm?

Mr. TRIAS MONGE. Trias & Melendez.

The CHAIRMAN. Trias & Melendez, in San Jose, PR. And I would like to thank you for being here, Mr. Justice.

With us also is Margaret Marshall, vice president and general counsel of Harvard University, where Judge Breyer is employed as a professor—I guess now, an adjunct professor; is that correct——

Ms. MARSHALL. That is correct, Mr. Chairman.

The CHAIRMAN [continuing]. Professor of law, in addition to his duties as Chief Judge of the first circuit.

Prior to her appointment at Harvard, Ms. Marshall was a partner in the Boston law firm of Choate, Hall & Stewart.

And Helen Corrothers has extensive experience in the field of criminal justice. She is past president of the American Correction Association; served with Judge Breyer on the U.S. Sentencing Commission. Appointed to the Commission in 1985 by President Reagan, Ms. Corrothers served on that body until 1991.

I welcome you all.

Judge if you would begin, and then we will work our way across. I thank you very much.

Mr. TRIAS MONGE. Mr. Chairman, I had started briefly while you were out. As part of my duties and pleasure, I have been a close student for many years of the Supreme Court of the United States, and given its special relationship to Puerto Rico, of the U.S. Court of Appeals for the First Circuit. Their decisions on insular affairs since the start of the century have been discussed at length in several of my books. In a 1991 book, I singled out for special praise several of Judge Breyer's opinions on the subject.

Puerto Rico is a mixed law jurisdiction. Large areas of its legal system are governed by the civil tradition and others by the common law. During the early part of this century, the boundary between the civil and the common law became increasingly blurred. The lower Federal courts used to decide civil law questions on the basis of common law doctrines and reverse local rulings with great frequency. The situation promoted the Supreme Court of the United States to point out repeatedly the deference due to the decisions of local courts on matters of local law, particularly in the light of the different conformation of such law.

In the words of Oliver Wendell Holmes:

> This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. This is especially true in dealing with the decisions of a court inheriting and brought up in a different system from that which prevails here. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish-American law according to common law conceptions, except so far as that law has to bend to the expressed will of the United States.

In spite of this and other statements by the Supreme Court of the United States, the lower Federal courts have sometimes handled civil law questions in diversity cases without proper attention to civil law sources. In the tradition of Holmes and other distinguished members of the Supreme Court through the years, Judge Breyer has displayed great sensitivity to the civil law roots of several areas of Puerto Rican law and the intricacies of the constitutional relationship between the United States and Puerto Rico.

Judge Breyer has contributed in other, less-known ways to Puerto Rican society. Many years ago, I received a phone call from him. He wanted to know whether I could recommend a candidate for one

of his clerkships. I gave him the name of one of our clerks who was then doing postgraduate work at Yale Law School. That man was the first Puerto Rican to clerk for a member of the Court of Appeals for the First Circuit. He has been for some years now the dean of the University of Puerto Rico Law School. Another of Judge Breyer's clerks was until recently attorney general of Puerto Rico.

These considerations, to an extent parochial in nature, do not provide, however, the basic reasons for my endorsing Judge Breyer's nomination to the Supreme Court. The Supreme Court, after all, seldom deals with Puerto Rican issues. My admiration for Judge Breyer is rather based on two other considerations: the quality of his judicial thinking——

The CHAIRMAN. Judge, I hate to do this to you. I just got a phone call, and the Speaker of the House of Representatives and the chief of staff of the White House are on the telephone and asked whether I would join them briefly on a conference call to discuss a matter that is of some urgency, which is the crime bill. With your permission, I would like to recess for about 3 minutes to see if I can arrange to do that another time.

With that, I will recess just for a few minutes. I am going to be right back here on the telephone, and I will come right back in.

[Recess.]

Senator HATCH [presiding]. Judge Monge, why don't you continue?

Mr. TRIAS MONGE. Senator, I was about to finish. I had been talking about some of Judge Breyer's positions with reference to the distinction between the attention due to civil law questions and diversity cases. But I was saying also that those were not the reasons for my admiration for Judge Breyer, and that that is, rather, based on two further considerations—the quality of his judicial thinking, and his worth as a human being. Judge Breyer, to my believe, is blessed with a wide-ranging, inquisitive intellect, solid learning, and a passion for fairness. As a human being, I have found him to possess a great capacity for friendship, a warm, caring manner, and deep respect for the opinions of others.

I believe that, should you decide to confirm him, Judge Breyer certainly would be not only a good Justice of the United States Supreme Court, but that he has the makings of a truly great Justice.

Thank you.

[The prepared statement of Mr. Trias Monge follows:]

BIOGRAPHICAL SKETCH OF JOSE TRIAS MONGE

Born at San Juan, Puerto Rico, May 5, 1920. B.A., University of Puerto Rico, 1940; M.A., Harvard University, 1943; LL.B., Harvard University, 1944; J.S.D., Yale University, 1947; LL.D. (Hon.), Inter-American University, 1986. Married since 1943 to Jane Grimes (B.A. Radcliffe College, 1943, b. June 3, 1921).

Attorney General, 1953–1957; member, Constitutional Convention of Puerto Rico, 1951–1952; United States Representative before the Caribbean Commission, 1954–1960; United States Representation to the Inter-American Juridical Commission, Organization of American States (OAS), 1966–1967; trustee, Superior Educational Council, 1962–1972; Vice-President, Casals Festival, Inc., 1957–1969 and 1973–1974; private practice, 1945–49; 1950–53; 1957–1974; Chief Justice, Supreme Court of Puerto Rico, 1974–1985; Distinguished Professor, University of Puerto Rico, 1985–; at present of counsel, Trías & Meléndez.

Honors: Elected life member, Royal Academy of the Spanish Language, Puerto Rico Chapter, 1979; elected member, Société de Legislation Comparée, France, 1981; guest lecturer at the Seminar on American Studies, Salzburg, Austria, 1981; elected

Associate Member of the International Academy of Comparative Law, France, 1982; President, P.R. Academy of Jurisprudence and Legislation, 1986–.

Author: *El Sistema Judicial de Puerto Rico,* Río Piedras, Ed. Universitaria, 1978, *La Crisis del Derecho en Puerto Rico,* San Juan, Edit. JTS, 1979; *Historia Constitutional de Puerto Rico,* 4 vols., Río Piedras, Ed. Universitaria, 1980–1983; *Sociedad, Derecho y Justicia,* Ed. Universitaria, Río Piedras, 1986; *El Choque de Dos Culturas Jurídicas en Puerto Rico,* Equity Publishing Co., a U.S. Division of Butterworths, 1991; a fifth volume to the *Historia Constitucional* is being published this Fall.

PREPARED STATEMENT OF JOSE TRIAS MONGE

My name is José Trías Monge. I served as Chief Justice of Puerto Rico from 1974 to 1985.

As part of my duties and pleasure I have been a close student for many years of the Supreme Court of the United States and, given its special relationship to Puerto Rico, of the United States Court of Appeals for the First Circuit. Their decisions on insular affairs since the start of the century have been discussed at length in several of my books. In a 1991 book I singled out for special praise several of Judge Breyer's opinions on the subject.[1]

Puerto Rico is a mixed law jurisdiction. Large areas of its legal system are governed by the civil tradition and others by the common law. During the early part of this century, the boundary between the civil and the common law became increasingly blurred. The lower federal courts used to decide civil law questions on the basis of common law doctrines and reverse local rulings with great frequency. The situation prompted the Supreme Court of the United States to point out repeatedly the deference due to the decisions of local courts on matters of local law, particularly in the light of the different conformation of such law. In the words of Oliver Wendell Holmes: "This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. * * * This is especially true in dealing with the decisions of a court inheriting and brought up in a different system from that which prevails here. Our appellate jurisdiction is not given for the purpose of remodeling the Spanish-American law according to common-law conceptions except so far as that law has to bend to the expressed will of the United States."[2]

In spite of this and other statements by the Supreme Court of the United States, the lower federal courts have sometimes handled civil law questions in diversity cases without proper attention to civil law sources. In the tradition of Holmes and other distinguished members of the Supreme Court through the years, Judge Breyer has displayed great sensitivity to the civil law roots of several areas of Puerto Rican law and the intrincacies of the constitutional relationship between the United States and Puerto Rico.[3]

Judge Breyer has contributed in other, less known ways to Puerto Rican society. Many years ago I received a phone call from him. He wanted to know whether I could recommend a candidate for one of his clerkships. I gave him the name of one of our clerks who then was doing postgraduate work at Yale Law School. That man was the first Puerto Rican to clerk for a member of the Court of Appeals for the First Circuit. He has been for some years now the Dean of the University of Puerto Rico Law School. Another of Judge Breyer's clerks was until recently Attorney General of Puerto Rico.

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[1] *El Choque de Dos Culturas Jurídicas en Puerto Rico,* Equity Publishing Company, San Juan, 1991, p. 391 et seq.

[2] *Díaz* v. *González,* 261 US 102, 105–106 (1923). See also Holmes' opinion in *Calaf* v. *Calaf,* 232 US 371 (1914).

[3] Among other decisions, see: *Republic Sec. Corp.* v. *P.R.A.S.A.,* 674 F2d 952, 958 (1st Cir. 1982); *Reyes-Cardona* v. *J.C. Penney Co., Inc.,* 694 F2d 894 (1st Cir. 1982); *Federal Insurance Co.* v. *Banco de Ponce,* 751 F2d 38 (1st Cir. 1984); *Córdova & Simonpietri Ins. Agency, Inc.* v. *Chase Manhattan Bank,* 649 F2d 36 (1st Cir. 1981).

Mister Chairman and members of this Committee, I believe that, should you confirm him, Judge Breyer will not only be a good Justice of the United States Supreme Court; he has the makings of a truly great Justice.

Senator HATCH. Thank you very much.

Ms. Marshall.

STATEMENT OF MARGARET H. MARSHALL

Ms. MARSHALL. Senator Hatch, it is a particular pleasure for me to appear before this committee today to testify on behalf of Judge Stephen Breyer.

I knew Judge Breyer first as a member of the bar, and I appeared before him in the first circuit court of appeals. I may be one of the few witnesses here today who has actually had the pleasure, I might say, of appearing before Judge Breyer, and I came to know him as well in my capacity as president of the Boston Bar Association, and I know him more recently as a friend.

I have a peculiar and deep respect for an independent judiciary and the role that it plays in our society. My respect stems from my perspective as an immigrant from South Africa, where in the past, the judiciary in that country too often rubber-stamped apartheid-suppressive laws and failed to protect its citizens.

By contrast, in this country, we have the protection of independent judges, women and men of integrity and courage, and Judge Breyer is an outstanding example of those qualities.

First, as a lawyer appearing in the first circuit, it is always a pleasure to draw Judge Breyer as a member of the panel. Any appellate advocate wants to believe that oral argument before a court can make a difference, and that is so with Judge Breyer; one feels as if he has focused on the issues and that he sees the case not as an abstraction but as a reality for the parties involved. In his questioning, he can be serious and attentive, but also witty. And to appear before Judge Breyer is to appear before a "hot bench," as we say. The questions are many and demanding, and one is relieved when the argument draws to a close, but also disappointed that his questions do not continue.

Senator HATCH. He and Justice Ginsburg are going to enjoy each other, I think.

Ms. MARSHALL. I think there is going to be an interesting issue on that question when he is there.

Senator HATCH. That is correct.

Ms. MARSHALL. With so many women now admitted to the bar, permit me to add one historical observation. A decade or more ago, there were not many of us who appeared in court, and I always had a sense when a judge was really listening, even though a woman was speaking. And long before I knew Judge Breyer personally, I recognized him as someone who did listen to women and who did not permit bias to influence his decisions, and who could be persuaded to change his mind by skillful advocacy.

As an officer and later president of the Boston Bar Association, I had many occasions in which to observe Judge Breyer in a different role. First, he is an admirer of lawyers, and not all judges evince the same view. He welcomes our participation in the judicial process; he wants them to be well-informed. Judge Breyer is generous with his time, always willing to meet with bar representatives

or to appear as a speaker on legal education panels. He listens and responds. Indeed, he does not wait to be approached by the bar, but often reaches out to make sure that lawyers understand changes in the rules or other matters of importance.

It was Judge Breyer who first suggested—and perhaps the chairman might be interested in this—that he discuss with lawyers the changes contemplated by the Judicial Improvement Act of 1990 and to alert advocates to the significant changes that were contemplated by the civil justice expense and delay reduction plans.

I know there has been testimony about the site of the new Federal courthouse in Boston, but I should say that before the site was selected, Judge Breyer approached members of the bar to ascertain our views, and as you know, he arranged for lawyers and citizens to meet with the architects and others to discuss their concerns.

In fact, Judge Breyer is always ready to talk with any group of lawyers or to appear at any event if it is helpful to lawyers or judges; and he is as thoughtful and helpful with new members of the bar as he is with established bar leaders and litigators.

I recall a talk that he gave some years ago at the American Bar Association, at its ceremony at the Franklin Flaschner Judicial Award, given each year to an outstanding jurist of a court of limited jurisdiction. Not so many attend that particular ABA ceremony each year—certainly not the many hundreds who flock to the meetings of the big ABA sections—but, as is typical of him, Judge Breyer took the assignment seriously, and he chose on that occasion to reflect on the relationship between appellate judges and those whose decisions are reviewed on appeal.

It was as thoughtful aim to meet illuminating talk reflecting real sensitivity and insight on the role of appellate judicial making delivered to judges who had a real interest in the subject. In fact, Judge Breyer has worked hard and effectively to bridge the gap that often exists between judges and lawyers, and every bar president will be fortunate to have as a chief in her circuit a judge of Judge Breyer's qualities.

As I said, I have also known Judge Breyer personally for a number of years, and let me make a few comments about him as a friend. His qualities include enthusiasm, willingness to listen, interest in a wide range of subjects, humor, and gentleness.

I think of another great first circuit judge, Calvert Magruder, the first Supreme Court law clerk of Justice Brandeis, later a close friend to Justice Frankfurter and himself a distinguished member of the Harvard Law School faculty. Judge Magruder was known for his intelligence, his fairness, his integrity and his realism, and Judge Breyer is a man I believe in the Magruder tradition, as a Justice of the Supreme Court, he would give distinguished service to this Nation, even as we in Massachusetts would regret his departure from the first circuit.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Marshall follows:]

PREPARED STATEMENT OF MARGARET H. MARSHALL

CURRICULUM VITAE

Margaret H. Marshall is Vice President and General Counsel of Harvard University. Prior to her appointment in November, 1992 she was a senior partner in the

Boston law firm of Choate, Hall & Stewart, where her practice concentrated on civil litigation.

Ms. Marshall was born in Newcastle, Natal, in the Republic of South Africa. In 1966 she received her B.A. from Witwatersrand University, in Johannesburg, South Africa. An opponent of apartheid, she served as President of the National Union of South African Students from 1966 to 1968. She came to the United States in 1968 and became a United States citizen in 1978. In 1969 she received a master's degree from the Harvard Graduate School of Education, where she also pursued doctoral studies from 1969 through 1973. She receiver her J.D. degree from Yale Law School in 1976.

In 1991 Ms. Marshall was elected president of the Boston Bar Association. She also serves as Massachusetts state chair of the American Bar Foundation and as a delegate to the American Bar Association.

Ms. Marshall is a member of the American Law Institute, the Advisory Committee on Rules of the United States Court of Appeals for the First Circuit, and served on the Civil Justice Advisory Group of the U.S. District Court for the District of Massachusetts.

She has served on a number of boards including the National Lawyers Committee for Civil Rights Under Law, the Supreme Judicial Court Historical Society, and the Civil Liberties Union of Massachusetts.

Ms. Marshall has also served on the boards of a number of charities. She has maintained her interest in South Africa and is a trustee of The Africa Fund and is a board member of Southern Africa Legal Services and Legal Education Project, Inc. and of Africa News. She is a trustee of Regis College, Weston.

Mr. Chairman, Members of the Senate Committee on the Judiciary:

It is a particular pleasure for me to appear before you today to testify on behalf of Judge Stephen Breyer. I knew him first as a member of the bar, and I appeared before in the First Circuit Court of Appeals. I came to know him as well in my capacity as President of the Boston Bar Association and related bar activities. And I know him more recently as a friend.

I have a peculiar and deep respect for an independent judiciary and the role that it plays in our society. My respect stems from my perspective as an immigrant from South Africa, where in the past the judiciary too often rubber stamped apartheid's oppressive laws and failed to protect its citizens. In this country we have the protection of independent judges, women and men of integrity and courage. Judge Breyer is an outstanding example of those qualities.

First, as a lawyer appearing in the Federal Circuit it is always a pleasure to draw Judge Breyer as a member of the panel. Any appellate advocate wants to believe that oral argument before a court *can* make a difference, and that is so with Judge Breyer. One feels as if he has focused on the issues, and that he sees a case not as an abstraction but as a reality for the parties involved. In his questioning he can be serious and attentive, but also witty. To appear before Judge Breyer is to appear before a "hot" bench; the questions are many, and demanding. One is both relieved when argument draws to a close, but also disappointed that his questions do not continue.

With so many women now admitted to the bar, permit me to add one historical observation. A decade and more ago there were not many of us who appeared in court. I could always sense when a judge was really listening, even though a woman was speaking. Long before I knew Judge Breyer personally, I recognized him as someone who did listen to women, who did not permit bias to influence his decisions, and who could be persuaded to change his mind by skillful advocacy.

As an officer and later President of the Boston Bar Association, I had many occasions on which to observe Judge Breyer in a different role. First he is an admirer of lawyers. (Not all judges evince the same view). He welcomes their participation in the judicial process. He wants them to be well informed. Judge Breyer is generous with his time, always willing to meet with Bar representatives or to appear as a speaker on legal education panels. He listens and responds; indeed, he does not wait to be approached by the Bar but often reaches out to make sure that lawyers understand changes in the rules or other matters of importance. It was Judge Breyer who first suggested that he discuss with lawyers the changes contemplated by the Judicial Improvements Act of 1990, and to alert advocates to the significant changes that were contemplated by the civil justice expense and delay reduction plans. Before the site of the new Federal court house in Boston was selected, Judge Breyer approached members of the Bar to ascertain their views. He arranged for lawyers and citizens to meet the architect to discuss their concerns.

Judge Breyer is always ready to talk with any group of lawyers or to appear at any event if it is helpful to lawyers or judges. He is as thoughtful and helpful with new members of the bar as he is with established Bar leaders and litigators. I recall a talk that he gave some years ago at the American Bar Association at the ceremony of the "Franklin Flaschner Judicial Award" given each year to an outstanding jurist of a court of limited jurisdiction. Not so many attend that particular ABA ceremony each year—certainly not the many hundreds who flock to the meetings of the big ABA sections. As is typical of him, Judge Breyer took the assignment seriously, and chose on that occasion to reflect on the relationship between appellate judges and those whose decisions are reviewed on appeal. It was a thoughtful and—to me—illuminating talk, reflecting real sensitivity and insight on the role of appellate judicial making, delivered to judges who had a real interest in the subject. Judge Breyer has worked hard and effectively to bridge the gap between judges and lawyers. Every bar president would be fortunate to have as the Chief in her Circuit a judge of Judge Breyer's qualities.

I have known Judge Breyer personally for a number of years, and let me make a few comments about him as a friend. His qualities include enthusiasm, willingness to listen, interest in a wide range of subjects, humor, gentleness. In a crowded room he will notice who is excluded, and move to include them. I have been taken aback at the suggestion that Judge Breyer lacks passion: one senses always his enthusiasm, and his intensity. It is true that one sometimes has to run to keep up with him, but the attempt to keep up is a pleasure.

I think of another great First Circuit Judge, Calvert Magruder, the first Supreme Court law clerk of Justice Brandeis, later close to Justice Frankfurter, and himself a distinguished member of the Harvard Law School faculty. Judge Magruder was known for his "intelligence, fairness, integrity and realism."[1] Judge Breyer is a man in the Magruder tradition. As a Justice of the Supreme Court he would give distinguished service to this Nation, even as we in Massachusetts would regret his departure from the First Circuit.

The CHAIRMAN. Thank you, Ms. Marshall.

Ms. Corrothers.

STATEMENT OF HELEN G. CORROTHERS

Ms. CORROTHERS. Yes, Mr. Chairman and members of the committee. It is so good to see you again. I still remember and appreciate the support that you and this committee rendered for our efforts on the Commission.

The CHAIRMAN. We appreciate the work you did. It was heavy lifting.

Ms. CORROTHERS. That is right. Thank you.

I appreciate the opportunity to appear before the committee today to support the nomination and recommend confirmation of the chief judge of the U.S. Court of Appeals, first circuit, Stephen Breyer, for the post of Associate Justice, U.S. Supreme Court.

I would like to offer what may be for you a different kind of testimony. You have no doubt been inundated with opinions attesting to Judge Breyer's important educational and professional credentials, with statements about his wit, keen intelligence and knowledge. And I agree with all of these assessments.

But I invite you to share my perspectives concerning Steve Breyer as an associate and fellow human being in a professional setting. Steve and I were colleagues at the U.S. Sentencing Commission, and I am going to address the qualities and traits that I observed during that period.

It is important to consider the fact that, at the beginning of our work effort, it was necessary for us during a short period of time to find office space, hire staff, develop an organizational structure,

[1] Dargo, George "A History of the United States Court of Appeals for the First Circuit: Volume 1, 1891–1960," p. 216.

begin and complete the initial set of guidelines, an unprecedented task, and at the same time deal with numerous issues concerning each area of concern addressed by the guidelines.

During this early period and at different points later, long hours and hard work proved to be routine. It was a time when seven people, all eager to make a personal contribution to the product, were faced with the knowledge that there was not an automatic consensus on important issues.

Hectic periods of this sort often brings out the worst traits in people. So it is meaningful for you to know that it is from this in the trenches perspective that I saw Steve Breyer's true character. Also, it will be necessary for me to examine Judge Breyer's qualities against the background of my own personal values.

The first trait I would like to mention is Steve Breyer's ability to relate to persons from diverse backgrounds. Judge Breyer is from a world of privilege, from the I believe western and northeastern part of the country. Conversely, I am from a background of poverty, from the southern part of the country. As a woman born of African descent in the rural segregated South. It would not be surprising if we failed to relate to each other.

However, I found that I could relate to him and his ideas. I also noted that, as Steve Breyer listened to my opinions on various matters of the years, that he had the extraordinary ability to not just listen, but to hear and to comprehend the information. He understood that each Commissioner brought a different strength and perspective to the Commission, and that we each had something of import to share.

Moreover, he could articulate or accurately communicate our views in subsequent discussions or in his famous amazingly clear, I guess you could call them summations or review of all matters covered before decisions were made.

I would like to mention why I value this attribute. We are a diverse nation. We have different professions. There are differences that are physical, such as race, gender and age. Additional differences are less visible, but also important, such as cultural heritage, personal background, functional expertise, and certain strengths and skills which are both inherited and learned.

The Nation is best served, if the Justices on the court of last resort are able to understand, then communicate and articulate that understanding, as the law is construed and applied to particular situations.

The second trait I observed was one of accountability. I believe that Steve Breyer holds the same commitment as I do about the importance of accountability in a criminal justice system that strives for effectiveness. Now, such a system must be strong on accountability and replete with fairness.

Of course, as you know, the Commission's overall goal had to do with providing a structure and framework for sentencing decisions, so that similar offenders who commit similar offenses are sentenced in a similar fashion or to enhance fairness.

I came to believe that Steve Breyer cared about this precious entity. He shared significant sensitivity to my deep-seated concerns about fairness. A person from my background might view justice as a hoped-for miracle, and fairness as a scarce and valuable commod-

ity. I think Steve Breyer on the highest court can contribute to the dispensation of that precious commodity called justice.

I would like to mention briefly industriousness. It is relevant to this appointment to note that Steve Breyer is one of the hardest working people that I know. His thoroughness and preparation for our meetings on the Commission was key to his ability to serve as a stimulus for compromise. Not only was it necessary for him to research and think through his own perspective or position on subject issues, but it was necessary for him to examine the issues from a variety of perspectives.

His penchant for hard work and thorough preparation, along with his God-given wisdom, enabled him to synthesize the various seemingly dissimilar ideas sufficiently to be the leader in effecting compromise on numerous occasions.

I would be remiss, if I failed to note his temperament, his pleasant disposition and respectful treatment of staff and other individuals with whom he had contact on a routine basis.

Finally, Judge Stephen Breyer is a man who can relate to all Americans, and he is fair, a man of great integrity and sound judgment. He is a decent human being. I am confident that should you confirm him, he will through his service on the Court bring great honor on this committee, President Clinton and to our Nation.

[The prepared statement of Ms. Corrothers follows:]

PREPARED STATEMENT OF HELEN G. CORROTHERS

CURRICULUM VITAE

Aug 1993 recipient of her profession's highest award, the E.R. Cass Correctional Service Award from the American Correctional Assn.

A native of Pine Bluff, Arkansas, Helen G. Corrothers recently completed a term of office as the President of the American Correctional Association, the largest correctional association in the world. In 1985, she was appointed by President Ronald Reagan to the post of Commissioner, United States Sentencing Commission. She served in this capacity from October 1985–November 1, 1991. The Commission's purpose is to meet the Congressionally imposed mandate, which includes the establishment of sentencing policies and practices for the federal criminal justice system that meet the established purposes of sentencing and ensure certainty and fairness while avoiding unwarranted sentencing disparities among like defendants. Corrothers received her first appointment from President Reagan in 1983 to the United States Parole Commission. In addition to her national policy development and formulation responsibilities, she assumed command in January, 1984, for the fourteen-state Western Region with headquarters in Burlingame, California. This position included responsibility for administration, release decisions, the training of several hundred probation officers and quasi-judicial duties to include the issuance of summons, warrants, and subpoenas that were implemented by the United States Marshals Service.

Prior to her federal posts, she was Superintendent/Warden of the Women's Correctional Facility for the State of Arkansas. Violent offenders consistently constituted the bulk of the prison population throughout her tenure. She developed a successful program of administration and rehabilitation and ensured the facility's recognition through receipt of national accreditation. Additionally, she is a veteran. She advanced through the ranks in the United States Army from Private to Captain and served with distinction in the Far East, Europe, and the United States. She was Distinguished Military Graduate from Officer Leadership School and has received the Good Conduct Medal, the National Defense Service Medal, and the Army Commendation Medal.

She has served on numerous local, state, and federal policy-making boards, has extensive experience in the Criminal Justice field and has received numerous awards for her contribution to the field of corrections. She is currently an officer and member of the Executive Committee of the American Correctional Association; an officer and member of the National Board of Directors for the Volunteers of America, Inc.; and member of the National Board of Directors for The National As-

sembly of National Voluntary Health and Social Welfare Organizations, Inc. She is included in the "International Directory of Distinguished Leadership" and is featured by the Marquis Publication Board in their editions of "Who's Who of American Women" and "Who's Who in the World."

Mr. Chairman, members of the committee, my name is Helen G. Corrothers. I am from Pine Bluff, Arkansas. A retired member of the United States Sentencing Commission and currently a Visiting Fellow, conducting a research project, at the National Institute of Justice. I appreciate the opportunity to appear before the committee today to support the nomination and recommend confirmation of the Chief Judge, United States Courts of Appeals, First Circuit, Stephen Breyer for the post of Associate Justice, United States Supreme Court.

I would like to offer, what may be for you, a different kind of testimony. You have no doubt been inundated with opinions attesting to Judge Breyer's important educational and professional credentials, with statements about his wit, keen intelligence and knowledge and I agree with all of these assessments. But, I invite you to share my perspectives concerning Steve Breyer as an associate and fellow human being in a professional setting.

Steve and I were colleagues at the U.S. Sentencing Commission and I am going to address the qualities and traits that I observed during that period. It is important to consider the fact that at the beginning of our work effort, it was necessary for us (during a short period of time) to find office space, hire staff, develop an organizational structure, begin and complete the initial set of guidelines (an unprecedented task), and at the same time deal with numerous issues concerning each area of concern addressed by the guidelines. During this early period and at different points later, long hours and hard work proved to be routine. It was a time when seven people, all eager to make a personal contribution to the product were faced with the knowledge that there was not an automatic consensus on important issues. Hectic periods of this sort often bring out the worst traits in people. It is meaningful for you to know that it is from this "in the trenches" perspective that I saw Steve Breyer's true character. Also, it will be necessary for me to examine Judge Breyer's qualities against the background of my own personal values.

The first trait to be mentioned is Steve Breyer's ability to relate to persons from diverse backgrounds.

Judge Breyer is from a world of privilege, from the western and northeastern part of the country. Conversely, I am from a background of poverty, from the southern part of the country. As a woman, born of African descent, in the rural segregated south, it would not be surprising if we failed to relate to each other. However, I found that I could relate to him and his ideas. I also noted that as Steve Breyer listened to my opinions on various matters over the years, that he had the extraordinary ability to not just listen, but to hear and to comprehend the information. He understood, that each commissioner brought a different strength and perspective to the commission and that we each, had something of import to share. Moreover, He could later articulate or accurately communicate our views in subsequent discussions or in his famous (amazingly clear) "summations" or review of all matters covered before decisions were made.

Why do I value this attribute?

We are a diverse nation, we have different professions, there are differences that are physical, such as race, gender and age. Additional differences are less visible, but also important, such as cultural heritage, personal background, functional expertise, and certain strengths and skills which are inherited and learned. The nation is best served if the justices on the court of last resort are able to understand then communicate and articulate that understanding, as the law is construed and applied to particular situations.

The second relevant trait—Accountability. Because of the death of my father when I was 2 years old, my mother proved to be the sole source for a personal value system, that I still treasure today. The work ethic and accountability are high on the list. I believe Steve Breyer holds the same commitment to the importance of accountability in a criminal justice system that strives for effectiveness. Such a system must be strong on accountability and replete with fairness.

Fairness. The Commission's overall goal and our mandate from Congress was to provide a structure and framework for sentencing decisions so that similar offenders who commit similar offenses are sentenced in a similar fashion, or to enhance fairness. Steve Breyer displayed significant sensitivity to our goal and my deep seated concerns for fairness. I came to believe that he, too, cared about this precious entity. Persons coming from my background might view justice as a "hoped for miracle" and fairness as "a scarce and valuable" commodity. I think Steve Breyer, on the

highest court, can contribute to the dispensation of that precious commodity called "justice."

Industriousness. It is relevant to this appointment to note that Steve Breyer is one of the hardest working people I know. His thoroughness in preparation for our meetings on the commission was key to his ability to serve as the stimulus for compromise. Not only was it necessary for him to research and think through his own perspective or position on the subject issues but it was necessary for him to examine the issues from a variety of perspectives. His penchant for hard work and thorough preparation, along with his God given wisdom, enabled him to synthesize the various, seemingly dissimilar ideas, sufficiently to be the leader in effecting compromise on numerous occasions.

I would be remiss if I failed to note his temperament. His pleasant disposition and respectful treatment of staff and other individuals with whom he had contact on a routine basis.

Finally, Judge Stephen Breyer is a man who can relate to all Americans and he is fair. A man of great integrity and sound judgment. He is a decent human being. I am confident that, should you confirm him, he will through his service on the court, bring great honor on this committee, President Clinton and to our nation.

Mr. Chairman, I thank you for this time.

The CHAIRMAN. Thank you very much.

I thank all three of you. Your testimony from three different perspectives of your relationships with Judge Breyer are helpful, meaningful and are very much appreciated by the committee. I know you have all come a long way to be able to make these statements. We appreciate your accommodating the hectic and difficult schedule of the Senate. I thank you all very much for being here.

Mr. CORROTHERS. Thank you, Mr. Chairman.

The CHAIRMAN. Now, our next panel is comprised of a total of four witnesses, I believe all four in opposition to the nomination of Judge Breyer. On this panel is Ralph Nader, founder of the Center for Responsive Law. Dr. Sidney Wolfe is also here. He is director of Public Citizen's Health Research Group.

Also on the panel is Lloyd Constantine, a lawyer in the field of antitrust and a partner in the firm of Constantine & Associates. In addition, Mr. Constantine teaches antitrust law at Fordham University School of Law and is a former assistant attorney general for antitrust enforcement for the State of New York. And Mr. Ralph Estes also joins this panel. Mr. Estes is a professor of business administration at the American University here in Washington. Professor Estes has written in the area of corporate regulation and is currently a fellow at the Center for the Advancement of Public Policy.

I welcome you all. I guess we caught Mr. Nader off-guard with the last panel, and I apologize for that. Unless you all would prefer to proceed in another way, I would suggest we proceed in the order in which you were recognized, Mr. Nader, Dr. Wolfe, Mr. Constantine, and Mr. Estes.

Senator METZENBAUM. Mr. Chairman, before this panel begins, I committed to be elsewhere at 2 o'clock, at a press conference on health care. I am particularly interested in what this panel has to say. I hope to come back before the panel concludes its deliberations, but I do not want to be interpreted that my leaving is from a lack of interest or support. I am very interested in what they have to say, and I just wanted to make that statement before I excused myself in about 5 minutes.

The CHAIRMAN. Thank you, Senator.

Senator SIMON. Mr. Chairman, if I could just say I am going to the same press conference on health care.

The CHAIRMAN. One thing Mr. Nader understands is press conferences, and I am sure he will understand your need to be there.

Senator METZENBAUM. Also, he understands health care.

The CHAIRMAN. He understands health care, as well. As a matter of fact, I am surprised he is not going to the press conference with you.

Senator COHEN. Mr. Chairman, I am told there is going to be a vote at 1:45 p.m.

The CHAIRMAN. I am glad to be informed of all these things. Why don't we just begin and we will see where the schedule takes us.

Mr. Nader, welcome.

PANEL CONSISTING OF RALPH NADER, WASHINGTON, DC; SIDNEY M. WOLFE, CITIZEN'S GROUP, WASHINGTON, DC; LLOYD CONSTANTINE, CONSTANTINE & ASSOCIATES, NEW YORK, NY; AND RALPH ZESTES, KOGOD COLLEGE OF BUSINESS ADMINISTRATION, AMERICAN UNIVERSITY, WASHINGTON, DC

STATEMENT OF RALPH NADER

Mr. NADER. Thank you, Mr. Chairman and members of the committee.

I would like to submit my 20-page testimony and note that there are five important attachments: First, one by Professor Carstensen, of the University of Wisconsin Law School, dealing with the case of price squeeze that was so widely discussed earlier in these hearings, a case by Judge Breyer; second, a thorough critique by a friend of Judge Breyer, but he is a critic, Professor Tom McGarity, of the University of Texas Law School, on Judge Breyer's health and environmental safety positions; third, a critique of Judge Breyer's chapter on the National Highway Traffic Safety Administration, by Clarence Ditlow and Joan Claybrook, which illustrates that some of Judge Breyer's research is quite shoddy; fourth, a list of very stimulating questions by Prof. Richard Parker, of Harvard Law School, on the first amendment and its interpretation to provide affirmative opportunities for ordinary citizens to participate in their democracies, the exercise of free speech; and, fifth, an 11-page letter by Prof. Monroe Freedman, the legal ethicist, where he concludes that Judge Breyer violated the disqualifications statute. I hope they will be included in the record.

The CHAIRMAN. The entire statement, along with the attachments. Would you clarify for the record, Mr. Nader, are all five of the people on behalf whose statements you are submitting comments, are all five of those opposed to Mr. Breyer?

Mr. NADER. Professor Freedman is. The others have not expressed their opposition.

The CHAIRMAN. Thank you. They will all be placed in the record.

Mr. NADER. Thank you.

One point on process, I think the White House process of sifting through nominations, which was managed by Lloyd Cutler, is extremely tainted and unfair and raises an issue within the Judiciary Committee's jurisdiction. A man who is still special counsel to a

corporate law firm is also special counsel to President Clinton under a statute that allows a 130-day tenure.

It was never intended for the position of counsel to the President, which was intended for specialized people like scientists and geologists, to spend some time advising the Federal Government. I think that this should never be allowed again. It has never occurred in American history, that a special counsel to the President is still a special counsel to his corporate law firm down the street and will have I think a relatively baleful effect on the integrity of the process.

Second, the law has many purposes, three of which are to discipline the excesses of power, to reflect reality in the facts on the ground, and to facilitate the exercise of ordinary citizens' political and civic energies. That is to facilitate democracy. I think on all three grounds, Judge Breyer is seriously deficient, whether we look at his decisions, his books, his articles, and other activities.

The conservation of existing power alignments has been a priority for Judge Breyer. He has not been interested in curbing, dissolving, displacing or holding such corporate power accountable. We have gone through a number of years where the Wall Street Journal itself has reported time and time again the elements of what constitutes a corporate crime wave. Whether it is procurement fraud, whether it is the S&L debacle, whether it is health care industry fraud, on and on, the context for elaborating on Judge Breyer's specialty in the regulatory area is the corporate crime wave and the exceptional growth of corporate power over many other areas of our life.

His record on antitrust is extraordinarily one-sided. No judge on the Federal Circuit Court of Appeals has a higher percentage of ruling against plaintiffs who are using the antitrust laws to hold corporate defendants accountable. The Wall Street Journal, the business community, corporate commentators and their counterparts in the Senate have serious reasons why they are for Judge Breyer, and those reasons relate to their belief that he will accommodate, support, and defend the existing pattern of concentrated business power in our country against their challengers.

Second, in the area of regulations, I think his scholarship is minutely shoddy, because his factual predicates are so faulty. He belittles hazards and risks and exaggerates costs. He also exaggerates what the Government has actually spent or required to be spent to reduce risks.

I think in many ways, Mr. Chairman, the statement where he says at all times regulation will reduce some people's income. It illustrates the fantasy world that he is operating in. Prevention of death and injury does not reduce anybody's income except funeral directors' income. I think in many ways his analysis, and I detail it in my testimony, is simplistic, superficial, and ridden with fantasy.

If he is sincere, he is unrealistic. And if he is not sincere, he has developed an elaborate technique for paralysis analysis, a kind of multiple overlapping constantly intermodal consideration that the business community doesn't operate under, that the Government doesn't operate under, and no human being should operate under.

He also filters out from his analysis of how Congress and the regulatory agencies work, all the corporate impact in this city. It is as if they are neuter factors and anonymous factors. The issue of greed, avarice, obstructionism, delay, campaign funds, all the realities that we know that corporations engage in to get their way in this city, whether from regulatory agencies or Members of Congress, are left out of his analysis. How can that be pragmatic? How can that be realistic? How can that be scholarly?

But my principal criticism of Judge Breyer, Mr. Chairman, is that he is uniquely disinterested in fostering or recognizing the elaboration of democratic public participation. In his proposal for regulatory reform, he discounts the efficacious role of Congress, the courts, the liability laws, good appointments to regulatory agencies, and expanding the breadth and depth of democratic public considerations and participation. This is being antidemocratic in a rather affirmative manner.

It is inconceivable that a judge with any knowledge of American history can so denigrate the great successes in our Government and our society from giving people more rights to know, more rights to participate, more rights to communicate their preferences through the processes of government.

In conclusion,.Mr. Chairman, a nominee such as Judge Breyer, who is insensitive to the laws' needs to discipline the excesses and concentrations of corporate power, a nominee who rests his proposals on erroneous reality, factual error and fantasy, and, above all, a nominee who rejects the efficacy of ever-improving democratic participation by the people in making these agencies of Government work better is neither pragmatic, neither realistic, nor moderate. He is extremist. He is ridden with fantasy, and he is insensitive on the ground to the health and safety needs of the American people, and his nomination should be rejected on those grounds alone.

Thank you, Mr. Chairman.

[Mr. Nader's submissions for the record follow:]

Statement of Ralph Nader
on the nomination of
Stephen G. Breyer by President Clinton
to be Associate Justice of the
Supreme Court of the United States
before the Senate Judiciary Committee,
U.S. Senate, Washington, D.C., July 15, 1994

Mr. Chairman and members of the Senate Judiciary Committee, thank you for this brief opportunity to testify on the nomination of Judge Stephen G. Breyer for the position of Associate Justice of the Supreme Court of the United States. With such bipartisan support for his confirmation, it is important for critics of Judge Breyer to have their say, if not for expectation of persuasion, then at least for whatever constitutional symbolism such dissent may provide.

Two preliminary process points need to be made. First, as reported in the New York Times and by other sources, Lloyd N. Cutler was in charge of the White House group sifting possible nominees to recommend to the President. Mr. Cutler is still special counsel to the corporate law firm of Wilmer, Cutler and Pickering and has not resigned that position. At the same time, he is also special counsel to the President. This dual status is unprecedented and deplorably blurs the sharp boundary between public and private service. (Mr. Cutler can still take his draw, by the end of the year, from his law firm.) President Clinton is relying on 18 U.S.C. sec.203 to allow Mr. Cutler to serve up to 130 days in a 365-day period without complying with a number of conflict-of-interest and disclosure statutes. No one ever intended this status of special government employee (SGE) to apply to the position of White House counsel. Most SGEs are scientists or other specialists who are paid by the government to work as advisors or to take on small discrete projects.

The issue is not just what the law does or does not permit in the area of ethics, since the President has imposed much stricter limits on his staff, prior to the arrival of Mr. Cutler, than the law requires. Instead, the issue is whether it is proper for a member of a major Washington law firm to also serve as counsel to the President, pass on judicial nominations, engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests), even if he does not work on matters directly impacting those clients. His role in the selection of Judge Breyer was, according to many sources, critical: at every key

juncture, Mr. Cutler gently tilted the process toward Judge Breyer, a long-time professional, philosophical and personal colleague, with whom he was co-counsel on a merger case, and co-associate on other professional missions. Judge Breyer was the choice of Lloyd Cutler, special counsel both to the President and to his corporate law firm. The Clinton White House process was both tainted and unfair!

Second, I support Senator Arlen Specter's view that nominees are less likely to answer questions when the confirmation process is seen as a sure matter. Also, some Senators are less inclined to take the time to ask those questions. Citizens and citizen groups, critical of nominees, are less likely to bother requesting to testify. "Why spend the time?" "Why alienate Senators from both parties?" "What's the point in following a lovefest?" "Who is going to listen?" are some of the comments I received from law professors, citizen groups and civic leaders.

Of course, responsibility for their lack of assertiveness is on their shoulders, but it does seem that some deliberation is in order by members of this Committee to take Senator Specter's concerns and suggestions under advisement and also to project to the public that more time for more listening will be taken, no matter what the prospects are for the nominee. There is simply no other widely covered forum for the American people to listen, learn and contemplate the great constitutional questions that affect their daily private and public lives and those of their children than a confirmation hearing on a nomination to the highest court in the land. The hearing itself is a national asset.

My focus today is on the necessity for balance in the way our laws handle the challenges of corporate power in America. For our political economy, no issue is more consequential than the distribution and impact of corporate power. For Judge Breyer, whose specialty is government regulation of business and antitrust policy, corporate power provides a significant context for evaluating his record, writings and activities.

Historically, our country periodically has tried to redress the imbalance between organized economic power and people rights and remedies. From the agrarian populist revolt by the farmers in the late 19th and early 20th century, to the rise of the federal and state regulatory agencies, to the surging trade unionism, to the opening of the courts for broader non-property values to have

their day, to the strengthening of civil rights and civil liberties, consumer, women's and environmental laws and institutions, corporate power was partially disciplined by the rule of law. There were years when the antitrust laws were modestly enforced and when other fair trade rules were invocable. There were years when the great common law expanded the accountability of corporations whose products and pollutants harmed innocent people and damaged their property.

Starting in the late Seventies, many of these trends in restraining, if not stopping, corporate crime, fraud, abuse and predations slowed and, in many areas, were reversed. The corporate counterattacks, fueled by the decline of organized labor, the Reagan-Bush period of sharply reduced law and order for corporations, the enhanced ability to achieve corporate ends by threatening to move abroad, and the supremacy of business money in campaigns sent the forces of law and order, of democracy and decentralization, into retreat. In their place came the corporate crime wave, often dutifully reported in the Wall Street Journal news pages and documented by Congress, in the financial and banking markets, the health care megafrauds, the defense procurement debacles and the giant merger, acquisition and LBO surge that created no new wealth or jobs but generated huge profits for the few and huge debts for the companies. Widening disparities in wealth and income between executives and workers reflected the rampant avarice at the top and stagnant incomes (adjusted for inflation) down the ladder for tens of millions of Americans during the past 20 years or more.

The Supreme Court mirrored this rightward drift toward those who have power vis-a-vis those who do not. The present court is still moving rightward with a distinct corporatist inclination.

Justices Warren, Douglas, Brennan, Marshall and now Blackmun are gone. Their judicial views, their quality of "heart" that President Clinton seemed to desire in his nominees, have not been replaced.

Now comes Stephen G. Breyer, judge, writer, lecturer and professor, who would like to be described as evenhanded, impartial, objective, a consensus builder, a person who likes to engage in "critiques of pure reason," to borrow Kant's phrase. Upon his nomination, Judge Breyer stated that he wanted the law to work "for ordinary people." But that "sensibility" is not what practitioners in the business arena use to predict how their

cases would likely emerge from Judge Breyer's pen. Nor do his writings project a "for ordinary people" sensibility.

Let one evaluate Judge Breyer most charitably, as he does for corporations, by deleting motivation, intent and fault from the equation. Let one start with him as a no-fault judge and look at his record and how others perceive him.

First the latter. There are serious reasons why the business community, Wall Street Journal, ex-judge Bork, Lloyd Cutler, Senators Dole, Thurmond and Hatch, and a host of conservative commentators enthusiastically support the nominee. These reasons relate, not to Judge Breyer's conventional views on civil rights and civil liberties. They relate to his views regarding corporate behavior, power and wealth. Judge Breyer is viewed as a consistent judicial reassurance for the corporate status quo and the bigger the corporations the better. He is viewed as defending, sustaining and rationalizing the entrenched and radiating impacts of corporate power vis-a-vis consumers, small investors, workers, health and safety regulatory agencies and other liability exposures. He is not new to them; they are not being exposed to his record lately. He has been congenial to their beliefs over a long period of time. This is not to say that they expect 100 percent from him; just that they expect very few fundamental surprises and lots of unsurprising networking on their priority issues with other Justices.

These corporate supporters may be wrong; certainly the Democrats who are his friends and who have modest concerns regarding corporate conduct believe the corporatists are reading him wrong. I think those Democrats are mistaken for the following reasons:

1. Judge Breyer and corporate economic power. His sensibilities favor the powerful party to a judicial conflict involving antitrust and other business litigation cases. Although his opinions share much of the Chicago school view that the antitrust laws should be interpreted by monetized minds on the basis of short-term economic efficiency standards, bizarrely defined, he does zig and zag more than those Partisans. Nonetheless, his record of deciding for the corporate defendant exceeds that of any other judge, Republican or Democrat, in all the U.S. federal circuit courts of appeal.

Depending on the scholarly assessment, he has ruled in favor

of the corporate defendant 16 out of 16 times, 17 out of 19 times or 19 out of 19 times if remands are seen for their pro-defendant effect. Not even Judge Richard Posner has this record of extremism. Yet Judge Breyer is called a moderate by his friends.

It is apparent from his opinions that Judge Breyer neither believes nor understands that the legislative history of the Sherman and Clayton Antitrust laws reflects a deep concern in Congress over the political, as well as economic, effects of business concentration, monopolization and other anti-competitive practices. Remember, those were the years when the term "political economy" was wisely used to describe the dynamics of economic behavior. Shorn of its legislative history -- a favorite interest of Judge Breyer -- antitrust becomes susceptible to both the mind games and word games of empirically starved theoretical gymnastics. Business people whose victories in the lower federal courts were overturned by the Judge are astonished at how remote he seems from what actually goes on between the big and little fish in the marketplace. Senator Metzenbaum has commented on this remoteness by this school of antitrust ideology. (I have attached to my testimony a short comment by University of Wisconsin Law Professor Peter C. Carstensen on the "price-squeeze case," which he believes has "greater significance for public policy in the regulated industry area, especially telecommunications.")

Such excessive abstraction tends to drain the dispute from commercial or strategic intent by the accused defendant, takes a short-term position on the effects of predatory pricing, price discrimination, exclusive dealing, resale price maintenance, price squeezes and tying arrangements. These practices are viewed as good for consumers, however destructive they may be to smaller competitors or businesses on the losing end of vertical restraints. During my discussion with Judge Breyer last summer, he responded to my criticism of his decisions by saying, "Well you are for small business and I am for the consumer." That indeed is his regular response. I replied that freedom of economic opportunity for small business is essential for the kind of competition that benefits consumers, especially in the long run. Washington, D.C. grocery shoppers would understand the consequences, given the concentration of supermarkets in the hands of Giant Foods and Safeway that has resulted in food prices being about the highest of any urban area in the country.

There have been other judges who have seen antitrust law differently; they looked at market conduct, market structure and

concentration ratios. In criminal and civil antitrust cases, intent was not irrelevant.

Donald Turner, Judge Breyer's antitrust mentor and employer at the Antitrust Division of the Justice Department, co-authored a widely heralded book in 1959 with economist Karl Kaysen, titled Antitrust Policy. It contained a legislative proposal for oligopoly-dissolution legislation. Market power was "conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales." Industries with sales volume below a minimum were not affected and there were several defenses listed to rebut the presumption.

In April 1966, as Antitrust Chief, Turner created a team that established eight specific standards to test whether an actionable shared monopoly existed and produced a list of potential cases. That was the highwater mark before the Johnson Administration, with few exceptions, heeded the demands of big business to cease and desist. A massive attack on antitrust law enforcement began in the Seventies with millions of dollars of corporate-funded studies attacking its very foundations. The Chicago School doctrines were taught at judges' seminars, funded by business. Contrary views were excluded.

When I asked Judge Breyer whether he agreed with the Turner-Kaysen guidelines, he smiled and said, "That's a good question," and he implied that Donald Turner himself, who subsequently worked as a corporate defense attorney, may no longer agree with them. The point of all this is that the great questions of antitrust are no longer debated and studied. This basic charter of the free enterprise system has fallen into limbo beneath a counterattack on all fronts by global corporations and their apologists who claim, with grotesque caricature, that the antitrust laws interfere with U.S. global competitiveness. Now, judges like Stephen G. Breyer are picking over its leftover bones. Apart from overt price-fixing between competitors, antitrust law has few interests for the anti-antitrusters. For many of them, the prevailing view of market structure is satisfied if there are only two companies left in a national market, as Reagan's antitrust chief, William Baxter, asserted in 1981.

Antitrust and its relevance to keeping our economy deconcentrated and competitive has great meaning for diminishing

corporate complacency, for jobs, for communities and the political diversity that comes from economic diversity and independent small business. It also has great relevance for developing and marketing new technologies unsuppressed by "product-fixing" and the fashionable joint ventures (as between the auto companies) that are now routinely cleared and even subsidized by the federal (taxpayer) government.

Judge Breyer, in his decisions and writings, displays little recognition of such antitrust values. His writings show no interest in an aggregative analysis of the wealth of material concerning concentration and anticompetitive practices in today's economy of giantism and private trade restraints. This is too bad, because presently the Supreme Court has little of the familiarity with this subject that the nominee is said to possess.

The practical consequence of Judge Breyer rounding out the Court on the subject of antitrust law for, perhaps, many years is that without new legislation, antitrust law enforcement will sink into a deeper moribund state, regardless of a very occasional dutiful Antitrust Chief at the helm at Justice or the Federal Trade Commission. This is especially true in the area of large mergers and joint ventures. Consider the rash of vertical and horizonal gigantic mergers and acquisitions in the health-care industry during the past year. Many of them would not even have been tried in an atmosphere of modest antitrust law enforcement as occurred in the Sixties and Seventies. If Senators are not worried about such corporate concentration, Judge Breyer is their man.

2. Judge Breyer's writings and the matter of law and order for corporations. Judge Breyer has a unique zig-zag style, which can be called confused unless one stays with the constant theme that, at the end of the day, the result just happens to please corporatists who do not welcome health and safety regulation. He appears to seriously question many health and safety laws that he will be expected to interpret impartially as a Justice of the Supreme Court.

Taken as a whole, his recent book, Breaking the Vicious Circle, is a prescription for decisional paralysis, just as are his stunningly selective sources in voluminous footnotes. Risks are belittled, especially in the toxic area, while costs are viewed in a tunnel vision of exaggeration and separation from

what has actually happened. Alternatives such as materials substitution (in aerosols, for example) or substance prohibition (for example, lead in paint and gasoline) are ignored or slighted. His reliance on many right-wing "think tanks" leads him into regions of cost-benefit hysteria that would be comedic were they not so tragically inimical to the victims of wrongful injuries.

Corporate cost estimates are taken as verities, people benefits of a direct and indirect nature are minimized to absurd levels. He pits tradeoffs of limited resources between funds for child vaccination on the one hand, and toxics reduction on the other, as if that is the relevant choice. His inter-modal tradeoffs, if they quest for economizing, are curiously restrictive, leaving out the massive portions of the federal budgets devoted to corporate welfare programs and waste, fraud and abuses in defense contracting (which produced its own reckless pollution) and misspent health expenditures in the tens of billions yearly. I have attached a paper titled "Could Justice Breyer Be Hazardous to Your Health?" by University of Texas School of Law Professor Thomas O. McGarity, a friend of Judge Breyer's and a critic of his views on health and environmental regulation.

Judge Breyer uses hypothetical slam-dunks, that have not happened in the real world of government regulation of business, to invite credibility for his arguments. Senators, how many times has the federal government, much less industry, spent $20 million, $30 million, $100 million or $600 million to save an American life? Perhaps in the space program for astronauts. The government has declined to spend, or require to be spent, a few dollars to save a motorist's life or an infant or child's life. Whenever there are large expenditures, allegedly to save innocent peoples' lives and restore large properties, a la Superfund, the driving forces are contracts, whether seen as public works or porkbarrel, for companies, consultants and other firms.

By contrast, Congress in a close House vote in 1979 refused to spend $15 million a year for a consumer protection office that would make the regulatory agencies work better by advocacy and judicial review. Imagine how the indentured regulatory agencies might have been made more vigilant in the Eighties, while the S&L financial looting was growing, or the Food and Drug Administration was languishing, by a consumer protection office

series of informed challenges. Lots of taxpayers' money could have been saved there.

Judge Breyer was skeptical about this consumer office, as he is about the Congress, the courts, the liability laws and even the agencies themselves of ever really improving the safety regulatory process. One of his premises is that these agencies err on the side of safety. Really? Instead, especially since Reagan-Bush, these agencies have been sleeping on the side of the regulatees. Can he have made any inquiry of what these agencies do not do or how they do not act under their statutory mission? Can he recognize the large numbers of deaths, injuries and other morbidity year after year when the airbag rule and the lead standard were tied in knots and blocked by their opponents? In a verbal style that is typical of his mode of writing, Judge Breyer knows when he is near the edge and then tries to disarm the gaping reader. After suggesting that fuel efficiency standards cost lives, that organic farming may produce more "natural pesticides" than using artificial pesticides, that atomic energy risks are marginal, that billions are spent on what he believes are virtually zero-risk toxic situations, that very few cancer deaths (less than 2 percent to 10 percent of all cancer deaths and 7 percent to 33 percent of deaths associated with smoking) "see[m] likely to be reduced by regulation," he writes on page 28:

> "In considering my examples, you must remember several important caveats. These examples are selective; they focus on extremes. They leave out the far more numerous examples of balanced, sensible, and cost-effective regulations" (emphasis added).

How strange! We hear virtually nothing about these "far more numerous examples" in his book or other writings. Indeed, in a book chapter on the National Highway Traffic Safety Administration (NHTSA) published in 1982, he goes out of his way to ignore the successes of that body during the short period when it was headed by people who believed in the agency's life-saving mission and were not undermined by White House operatives. Mr. Breyer, by the way, gives little weight to the beneficial effect of appointing good people to these agencies and backing them up at higher levels within the Administration. Attached is a critique questioning Judge Breyer's scholarship on NHTSA in his 1982 book titled Regulation and Its Reform, by Clarence Ditlow, director of the Center for Auto Safety, and Joan Claybrook, President of Public Citizen and former NHTSA Administrator.

Repeatedly, Judge Breyer cites the likes of Viscusi, Huber, the Cato Institute, the Manhattan Institute, Peltzman, Graham, Lave and other charter members of the "pitiless abstraction" crowd whom the Fortune 500 love to cite. For example, Sam Peltzman once wrote an incomplete article declaring that safer designed cars kill more people because drivers, feeling more secure, take more chances. I say incomplete because he did not reach his logical conclusion, which would have been to recommend that sharp spear-like hubs in steering wheels emanating toward drivers be installed to induce greater care by those steering the vehicles.

Curiously, Judge Breyer does not cite the Union of Concerned Scientists, many technical government and Congressional reports, the Natural Resources Defense Council, the Environmental Defense Fund, the Center for Science in the Public Interest, the World Resources Institute, World Watch, or a host of scholarly researchers and specialists who might undermine his abstract thoughts and empirically deprived observations. Is this the sign of a moderate, an impartial analyst? Imagine suggesting, as he did in 1982, that expenditures for vehicle head restraints be replaced with automatic flashing lights when vehicles are travelling over 60 mph, a pinball-machine idea that does little to prevent head injuries in the far more frequent rear-end collisions below 60 mph.

More interesting is his reluctance to put his mind to work on designing an improvement in the nation's regulatory process (broadly defined) on any risk that he does think serious -- for instance, casualties from smoking the products of the tobacco industry. The reader begins to eagerly anticipate how Judge Breyer, the publicized creative problem-solver and consensus-builder, would have society's laws deal with a scourge that takes over 400,000 American lives a year. As a one-time San Francisco lawyer for a tobacco company, his brother, Charles Breyer, could provide him with whatever informational and stimulatory effects have flowed from product liability cases against the tobacco industry. Alas, such an intellectual repast was denied the reader, leaving a feeling that the Judge's mind may work most vigorously to destroy regulatory paradigms for corporate accountability rather than build them.

To illustrate how Judge Breyer's line of thought, or shall they be called musings, can reach levels of intellectual dilettantism, on page 23 of the Vicious Circle book, he writes,

with minimum restraint, that "At all times regulation imposes costs that mean less real income available to individuals for alternative expenditure. That deprivation of real income itself has adverse health effects, in the form of poorer diet, more heart attacks, more suicides" (emphasis added). What he is referring to are "academic studies" that argue that when companies assume regulatory costs, they take it out of worker wages or in worker layoffs (not from shareholders or waste or redesigning products). These workers, it is asserted, mistreat themselves by smoking more, drinking more or not eating well. At all times, Judge Breyer says, regulation imposes costs that reduce real income. That is such a sweeping extremist statement, belied by the illustration of contaminated foods, defective vehicles and unsafe toys being taken off the market that saved the companies' reputations from being harmed further. Or prohibiting vinyl chloride in some products and requiring sharply reduced levels in workplaces actually stimulated substantial productivities and no jobs were lost and fewer cancers resulted. Companies admitted their industry's original cost-estimate for compliance was grossly exaggerated.

Dow Chemical has spoken about economies stimulated by regulation (eg. curbs on mercury dumping). Blocking the use of thalidomide in the United States by the FDA certainly saved infants from disfigurement and that probably saved some companies from near-bankruptcy. There are more fundamental rejections of such an absolutist statement which can be made at a later time. Suffice it to say that airbags now employ workers who produce them, and reduce costs of auto insurance, health care, wage losses and other would-be consequences of non-airbag crash-injuries. Funeral directors, however, do suffer a loss of income, to give Judge Breyer some due.

Later on that page, he cites studies that suggest "many concrete possibilities for obtaining increased health, safety and environmental benefits through reallocation of regulatory resources." These include "advertising the cancer-causing potential of sunbathing, indoor smoke and pollution, and radon and subsidizing the creation of healthier indoor climates; encouraging changes in diet to avoid natural carcinogens. ... [etc.]" The great majority of items on this list involve post-corporate regulatory actions and taxpayer subsidies rather than, where applicable, using the regulatory tools for prevention before the hazards proceed from the companies to workplace, to market, to environment or to household. Surprisingly, Judge

Breyer combines an intriguing disinterest in prevention-oriented regulatory policies that change corporate behavior, with a studied avoidance of using cost-benefit tests for his above-mentioned "alternatives."

Epidemiologists and safety engineers alike have long known that prevention at the earliest point of onset is the most effective, least costly choice of strategies. Prevention by regulation is far preferable to regulation after the hazards are at large. Which recalls the adage that "an ounce of prevention is worth a pound of cure." The trouble for Judge Breyer's construct here is that prevention often starts at the door of the company where his proposals usually stop. This is unfortunate, because training his mind on the way the corporate charter, the constitutional issues of corporate personhood, and the internal corporate structure and its external constituencies can contribute to superior performances in the management of industrial violence and risk might have advanced the very objectives he claims to seek much more efficiently and humanely.

3. Judge Breyer and the issue of democratic public participation. It is his lack of confidence in "greater public participation" leading to real improvements in the problems of health and safety regulation that gives this observer the greatest pause about not just Judge Breyer's philosophy but his understanding of the historical efficacy of broader and deeper democracy. It is a premise of democracy that those who are affected by government should participate, if they choose, in its proceedings without mischievous and costly obstructions. More and more aggrieved parents -- some starting safety institutions -- have alerted or persuaded regulatory agencies to act. Citizens have exposed, sensitized these agencies and sometimes pressed Congress to create these safety and health regulatory programs as a systematic approach to living in a safer and more healthful America.

Procedural proposals for wider public participation have included broader standing rights before these agencies, modest intervenor expense funding for impecunious groups (tried successfully in the late Seventies at the Federal Trade Commission), more fulsome information and notice rights about agency actions, allowance of citizen suits to mandate actions -- to name a few ways that can facilitate the involved energies of citizens.

Judge Breyer's position is that while the general notion of public participation may be well and good, it won't adequately address the challenge of better government. Instead of opening the lighted highways of democracy for the people to shape and improve their governments' health and safety agencies, Judge Breyer believes in his proposal for a new prestigious, executive corps of authoritative, skilled civil servants be established from on high to rationalize the agencies' work internally and between each other. As described and analogized to an OMB office and the French Conseil d'Etat, this proposed unit seems autocratic, secretive and outside the lighted highways.

Given the experience of the Office of Management and Budget in becoming a supra-agency with some of these same coordinating missions, the process did become more secretive, more remote from public dockets and commentary and more like another paralytic layer of bureaucracy. Reagan's OMB also became corrupt with rampant ex parte contacts. The process did become much more adept at stopping just about all agency safety standards actions, under Reagan and Bush, than starting any lifesaving endeavor or approving one already underway. "Cost-benefit" conclusions under Reagan's OMB, using the usual rigged formulas, very rarely supported issuance of a health or safety standard. It even found the automobile passive-restraint standard to be not cost-beneficial, until the Administration was overruled by a unanimous Supreme Court.

Why this lack of confidence by Judge Breyer in perfecting the democratic process? How will his top-down "mandarin" philosophy deal with the public access issues that will come before the Court in so many modes -- from old-fashioned ways to such new ideas as the one rejected by a vote of 5 to 3 (Rehnquist dissenting) involving a California rule requiring invitational inserts, at no cost to the utility, to be placed in the utility's billing envelopes inviting residential ratepayers to join and fund their own statewide consumer group? Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986).

How will he handle the access issues posed by the new telecommunications technologies with his very modest regard for the efficacy of strengthening our democratic engagement rights and facilities? I would like to place in the published hearing record, Mr. Chairman, a series of questions that Harvard Law Professor Richard Parker, a colleague of Judge Breyer's, believes could focus attention on the extent to which the nominee

interprets the First Amendment "as more than a right of ordinary people to read or hear speech" and whether "it demands that they be empowered to participate effectively in speech themselves."

Most analysts, from all spectra, believe that the regulatory process needs serious improvements. Our work over the past 25 years has devoted considerable energies to such improvements, advocating the end of cartel regulation in transport modes and proposing ways that make health and safety agencies mindful of their mission with the best approaches to achieve their statutory objectives. When Judge Breyer argues strongly against "the hopeful position that more direct 'democratic' public involvement will automatically lead to better results," he deprives himself of thinking about many creative ways to always improve the effectiveness of such public involvement in a working practical democracy.

He also thoroughly ignores the crushingly obstructive roles that corporate regulatees and their allies play to delay, dilute, fissure or shut down regulatory lifesaving efforts far beyond their legitimate right to plead and petition. These corporate roles are not restricted to artful uses of the Administrative Procedure Act and other regulatory maneuvers. Corporations go to the sources -- prevent the activities by Congressional lobbying, fund political campaigns and when the elections are over, make sure that the sympathetic appointments are made to anesthetize the agency. Reagan's NHTSA head, a coal lawyer by the name of Raymond Peck, made little secret that his mission was to dismantle the agency without closing it. His boss, Transportation Secretary Drew Lewis, told an auto dealer convention in early 1981 that he didn't want to issue any safety standards during his tenure. He missed his goal by one, but that was countered by rescinding other standards. Other agencies, such as EPA, FDA and FAA, had similar leaders.

Judge Breyer simply does not factor these relentless, daily pressures by regulatees, their trade associations and corporate lawyers on the regulatory process. There seems in his mind to be no continuing, serious link between these corporate interest groups and some of the deficiencies that he attaches to these agencies. (He does not even have entries for "corporation," "business" or "company" in the indices to his two books on government regulation of business!) Yet everybody in the real world of Washington, D.C. must agree that corporations are major players, major factors in the maelstrom of power and decision

around and in these agencies. Nonetheless, we have one of these agencies' main analysts -- the nominee -- who relegates them to a neuter, anonymous status. This neglect simply is not good scholarship and accounts for the excessive abstraction and remoteness of his treatments.

Consider, by comparison, the empirical awareness of the Supreme Court of the United States in a case involving the airbag safety system under Standard 208. The unanimous opinion in 1983 by Justice White displayed an attentiveness to the industrial power reality, which obstructed and delayed a regulatory agency's mission, that Judge Breyer would do well to ponder. The Court wrote:

> The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost -- the inflatable restraint was proven sufficiently effective. Now the automobile industry has decided to employ a seatbelt system which will not meet the safety objectives of Standard 208. This hardly constitutes cause to revoke the standard itself. Indeed, the Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be "technology-forcing" in the sense of inducing the development of superior safety design. See Chrysler Corp. v. Dept. of Transp. 472 F. 2d, at 672-673. If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, a fortiori it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design." Motor Vehicle Manufacturers Association of the United States, Inc. et. al. v. State Farm Mutual Automobile Insurance Co. et. al., 463 U.S. 29, 49 (1983).

In conclusion, I wish that Judge Breyer were more pragmatic when it came to thinking about democratic public participation. I wish that he were more empirical when thinking about the many elements of corporate power, structure and behavior. I wish that he were more realistic when he discusses risks, costs, alternatives and technical sources for his writings and judgments. I wish he would think deeply about corporate status

and the Constitution as developed between 1886 (Santa Clara v. Southern Pacific Railroad Co. 118 U.S. 394) and 1986 (Pacific Gas and Electric Company v. Public Utility Commission of California 475 U.S. 1) to see what limits there should be to the personhood of the corporate entity.

It is disappointing that President Clinton chose not to nominate a person to the Supreme Court who combined learning, experience, wisdom and compassion with a proven record over time of putting people first under the law. Unfortunately, the people are left only with the hope that, should he be confirmed instead of rejected, a transformation, nourished a little by these hearings, will occur to make Justice Breyer different from Judge Breyer.

Hope, as it is written, springs eternal.

Thank you.

Judge Breyer and the Price Squeeze Problem
(Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)

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Judge Breyer's decision in *Town of Concord, Mass. v. Boston Edison*, complete with two academic appendices, is a classic example of using abstract economic theory to deny or override factual realities. While I can not say that the ultimate holding in the case was necessarily wrong, it is very clear that the approach adopted is antithetical to a reasoned, fact based inquiry into what are in real world terms very difficult and complex legal-economic questions. This is even more troubling because the decision has the effect of empowering large and dominant utilities to engage in anticompetitive, strategic regulatory behavior. In an era of large scale deregulation, especially in the telecommunications area, Judge Breyer has repeated the error that he made as a staff advisor to Senator Kennedy in preparing the airline deregulation legislation: he has assumed despite generations of real world experience to the contrary that business's will not seek and exploit strategic opportunities to gain unjustified competitive advantage. Only strict but thoughtful antitrust review can police such market conduct and ensure that the nominally competitive market is competitive in practice so that consumers gain the theoretically predicted advantages.

The facts of the *Concord* case appear to be that Concord and another locality had municipally owned, local power systems. These systems purchased the bulk of their power from Boston Edison at a wholesale rate. Boston Edison also provided retail power service in a number of adjacent communities. Boston Edison convinced the Federal Energy Regulatory Commission (FERC) that its costs of producing power had increased and so its wholesale rates (the prices charged to the independent distribution systems like Concord that retailed power) should go up. However, Boston Edison did not ask the Massachusetts Department of Public Utilities for an increase in its own retail rates for the service it provided in 39 adjacent towns. In consequence, Concord found that while it had to raise its retail rates, retail customers in the adjacent communities faced no comparable price increase. Such a "price squeeze" would directly affect Concord's ability to compete for new customers that used substantial amounts of electricity. In

addition (this is perhaps the greater competitive evil), the lesson for communities using Boston Edison's service is that retail prices would go up in any community that sought to take control over its own local electric service.

Although Concord satisfied a jury and trial judge that the price squeeze existed and that its purpose was to harm the competitive capacity of the towns being squeezed, Judge Breyer writing for a three judge panel rejected the verdict and ordered the case dismissed. The decision rests on two conclusions: first, that the antitrust laws should not generally be used to condemn price squeezes engaged in by monopolists if both levels of price are subject to direct regulation. Second, the Court concluded that Boston Edison lacked monopoly power in the business of supplying electricity and so the predicate monopoly power necessary for any finding of illegality was missing. This second conclusion makes the entire discussion of the merits of the conduct unnecessary for the result in the case. One can not help but wonder why Judge Breyer undertook such a lengthy (8+ pages compared to only 3 for the legally controlling issue) analysis of the price squeeze issue which advances several controversial positions when a second issue was controlling in any event [1]

Judge Breyer starts his analysis of price squeezes by arguing that the competitive risks of such conduct have been exaggerated and the potential efficiency gains largely ignored in contexts outside those presented by regulated industries His proof consists of citations to the Areeda and Turner treatise on antitrust law, a dissenting opinion by Judge Easterbrook, one of the most persistent users of economic theory to deny the reality of business experience, and a quotation from a Supreme Court decision that had nothing to do with price squeezes. This is hardly an overpowering array of support for the proposition that price squeezes are not generally a serious threat to competition. This conclusion is then linked with the more plausible contention that determining the facts about a purported price squeeze is a difficult judicial task. The combination of arguments in turn justifies a negative attitude toward price squeezes as potential

[1] The monopoly power analysis is questionable on its own merits and was applied in the case in a way that ignored the potential of an attempt to monopolize claim that might have been a more relevant way to evaluate the jury's ultimate decision. In order not to unduly lengthen this discussion, I will focus only on the price squeeze issue which represents the most troublesome aspect of the case as a precedent restricting antitrust review of strategic conduct in regulated industries

antitrust violations. While repeatedly asserting that the opinion does not "question that conclusion. . . " (p. 25), the implication is that Judge Breyer is very skeptical that any price squeeze occurs except for legitimate business reasons. Indeed, Judge Breyer might be on stronger ground with respect to unregulated markets where entry and exit can occur without lengthy administrative processes.

The second stage of the argument against price squeezes is the more remarkable. Without any examination or recognition of the lengthy, well worked out theories of how regulatory processes can be and are used strategically to harm consumer and other public interests, Judge Breyer starts from the naive assumption that regulation is done in the public interest. Hence he asserts that "regulation significantly diminishes the likelihood of major antitrust harm." (at 25) He then advances a simple proposition: when both levels of price are subject to direct regulation there should be little or no risk of anticompetitive exploitation of price.

Indeed, if a SINGLE, well-motivated regulator controlled both levels, such a presumption might seem plausible on its face. But in this, and as far as I have seen all comparable cases, the key and central regulatory fact is that DIFFERENT REGULATORS CONTROL PRICES AT THE TWO DIFFERENT LEVELS. Thus, FERC only controlled Boston Edison's wholesale price while the Massachusetts regulator alone controlled its retail prices. This regulatory division creates an obvious opportunity to manipulate the retail-wholesale difference in strategic ways. The integrated company can shift costs to wholesale customers (who also compete for new retail business) while not igniting a fire storm of local opposition because no application is made to the state authorities to increase retail prices (who else is going to force up retail prices to reflect the new, higher nominal wholesale price?). Unlike some predatory practices, this squeeze results in shifting costs to the competitor which enhances the profits of the dominant firm while penalizing the other firm. According to antitrust history, John D. Rockefeller got the railroads to pay rebates to Standard Oil based on the volume of oil shipped by its competitors (thus both lowering Standard's costs and raising those of its rivals); yet Judge Breyer is both unaware of the analogy and insensitive to the manifest competitive risks that dual regulation presents in this case.

Indeed, not one word in the opinion addresses the tension that necessarily exists when two regulators share authority over the final price to consumers and are not required to

coordinate their actions. Such a situation, where the mandated prices must be charged as a matter of legal requirement, creates a particularly attractive opportunity for strategic behavior that can shift costs, deter existing competition, and retard the incentives for new entry of locally owned retail distribution systems. Yet Judge Breyer, a man who made his reputation as a scholar by writing about the problems of effective regulation, does not even acknowledge the issue. Instead, he uses general concerns about how antitrust review might disrupt public interested, regulatory efficiency to validate further his preference for ignoring the competitive risks involved. A similar inability to see the risks inherent in airline deregulation (a project in which Judge Breyer played an important role as a staffer for Senator Kennedy) caused that legislation to become law without the necessary protections against anticompetitive mergers and conduct.

The spirit of the *Concord* decision is close to that of Justice Scalia in *Business Electronics Corp. v. Sharp Electronics Corp,* 485 U.S. 717 (1988). In that decision, Scalia claimed that economic theory established that vertical restraints not directly controlling prices could have no anticompetitive effect despite thousands of real world examples to the contrary. The better approach is that eloquently articulated by Justice Blackmun, whom Judge Breyer is to replace, in the recent decision of *Eastman Kodak v. Image Technical Services, Inc.* __U.S._, 112 S.Ct 2072 (1992). Justice Blackmun used economic theories to assist in evaluating the particular facts of the case. Theories were rejected if they could not explain the facts rather than the other way around.

The *Concord* decision is particularly troubling because it refuses an antitrust review in a context of regulatory conflict and uncertainty. It invokes sweeping theories having little empirical support and no particular relevance to the specific factual context. As the states and the federal government move toward more competitive public utilities, we need the spirit of Blackmun with his concern for understanding the competitive realities and not another Scalia type theorist who, having imagined a pro-competitive explanation, ignores the record and the context to refuse a focused antitrust evaluation of the merits of the conduct at issue.

COULD JUSTICE BREYER BE HAZARDOUS TO OUR HEALTH?

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Now that prominent representatives of both ends of the political spectrum have enthusiastically endorsed President Clinton's nomination of Judge Stephen Breyer to the Supreme Court, most knowledgeable observers predict a speedy confirmation process at the end of which the Senate will consent without providing very much advice. Before jumping on the Breyer bandwagon, however, the Senate should pay some attention to what Judge Breyer has been saying about a rather arcane topic that is nevertheless of great concern to the general public -- federal regulation of activities that pose risks to human health and the environment. An examination of Judge Breyer's views on health and environmental regulation reveals that he is not likely to disappoint conservative critics of the Environmental Protection Agency, (EPA) the Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA). Before the confirmation process has run its hasty course, the Senate Judiciary Committee should pause to ask whether Justice Breyer could be hazardous to the public health.

Judge Breyer's Background.

Judge Breyer has extensive experience in public policymaking. After graduating from Harvard Law School and serving a clerkship with Justice Arthur Goldberg, he worked briefly for the Justice Department's Antitrust Division. In 1967, Breyer joined the faculty of the Harvard Law School to teach courses on

Administrative Law and Antitrust Law. He returned to Washington, D.C. several times during the next thirteen years to work for the Watergate Special Prosecutor and on two separate occasions for the Senate Judiciary Committee. During his early teaching years, Professor Breyer gained a national reputation as an expert on federal regulation of natural gas. In the midst of the energy crisis, Judge Breyer and Paul MacAvoy, a well-regarded Harvard economist, co-authored a short book questioning the existing framework for regulating natural gas and urging rapid deregulation.[1] Although the book was a little ahead of its time, Congress later passed the Natural Gas Policy Act of 1978,[2] which to a large extent adopted the policy prescriptions of Breyer, MacAvoy and other critics of natural gas regulation.

Judge Breyer next broadened his intellectual horizons to encompass *all* federal regulation of private activity. In the late 1970s, he became a consultant to the American Bar Association's newly created Commission on Law and the Economy to help in drafting a report on federal regulation and its impact on the American economy. The Commission's Report, entitled *Federal Regulation: Roads to Reform*, proved very influential in the congressional debates over "regulatory reform" in the late 1970s and early 1980s.[3] The Report adopted an impressively sophisticated taxonomy of regulation that Professor Breyer later elaborated upon in an article in the

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[1] Stephen Breyer and Paul MacAvoy, *Energy Regulation by the Federal Power Commission* (1973).

[2] 15 U.S.C. §§ 3301-3432.

[3] American Bar Association Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (1978).

Harvard Law Review[1] and in a subsequent book of about the same length entitled *Regulation and its Reform.*[2]

Soon after penning the regulatory reform article, Professor Breyer left Harvard to become Chief Counsel to the Senate Judiciary Committee, which was at that time considering legislation designed to bring about important changes in economic regulation. During his brief stint with the Committee, Breyer was instrumental in drafting legislation deregulating the airlines. Impressed with his staff work, Senator Kennedy persuaded President Carter to nominate Breyer to a vacant position on the First Circuit Court of Appeals in Boston. The nomination languished until after the 1980 election, after which the Senate (for which the Republican Party was soon to be the majority party) confirmed only one of the many Carter nominations to the bench. The single appointment was that of Judge Breyer. Senate Republicans were apparently sufficiently comfortable with Judge Breyer's views that they elected not to stall the nomination for the few weeks that would have been necessary to allow newly elected President Reagan to withdraw it.

Once on the bench, Judge Breyer did not abandon his interest in federal regulation. Although the First Circuit does not have many opportunities to review actions of federal regulatory agencies, Judge Breyer has continued to teach and write scholarly articles and books on Administrative and Environmental Law. His most recent book, entitled *Breaking the Vicious Circle: Toward Effective Risk Regulation,*[3]

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[1] Stephen Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 549 (1979) [hereinafter cited as Analyzing Regulatory Failure].

[2] Stephen Breyer, *Regulation and Its Reform* (1981).

[3] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) [hereinafter cited as Vicious Circle].

contains Judge Breyer's current thinking on federal regulation of toxic chemicals in the workplace and the environment. A close look at this book and some of Judge Breyer's earlier writing on the role that courts should play in reviewing the actions of federal regulatory agencies should help answer the question whether Justice Breyer could be hazardous to the public health.

Judge Breyer's *Laissez Faire* Presumption.

One clear theme that emerges from Judge Breyer's writings is his strong preference for the free market and his corresponding skepticism about the efficacy of governmental intervention into private market arrangements. For example, the framework for analysis of federal regulation that Professor Breyer developed in the late 1970s "assume[d] that the unregulated marketplace is the norm and that those who advocate governmental intervention must justify it by showing that it is needed to achieve an important public objective that an unregulated marketplace cannot provide."[1] In this important respect, Judge Breyer's views parallel those of prominent judicial appointees of President Reagan, including Justice Antonin Scalia, Judge Alex Kozinski of the Ninth Circuit, Judges Frank Easterbrook and Richard Posner of the Seventh Circuit, Judges Stephen Williams and Douglas Ginsberg of the D.C. Circuit, and former Judge Robert Bork. Indeed, this presumption against government intervention into private economic arrangements is nothing new; it is merely a

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[1] Analyzing Regulatory Failure, supra, at 552.

somewhat subdued reinvocation of the principles of *laissez faire*, *caveat emptor*, *volenti non fit injuria*, and other related doctrines that formed the foundation for the legislative and judicial regime of the late nineteenth century that was thoroughly discredited during the Progressive and New Deal eras.

It is certainly possible that Judge Breyer is less hesitant than some of his more conservative brethren to allow the presumption to be rebutted. He does, for example, recognize certain traditional explanations for why "market failure" can justify governmental intervention. Thus, the presence of "externalities" or "spillovers" can justify environmental regulation, and occupational safety regulation may be necessary to correct for inadequate information.[1] Still, it is clear that he is no fan of health and environmental regulation. The pathbreaking aspect of his early work on regulatory reform was its recognition that just as market failures sometimes justify regulation, "regulatory failures" sometimes justify regulatory reform. According to Breyer, regulatory failures most often result from "mismatches" between the justifications for regulation and the regulatory tools that the government adopts.[2] He suggests that policymakers look for alternative regulatory tools that better match the nature of the market failure that gave rise to the need for regulation. In the case of health and environmental regulation, Breyer strongly urges agencies to pay more attention to private bargaining and incentives, such as effluent fees and marketable permits, rather than continuing to focus on traditional standard setting,[3] even though such market-

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[1] Analyzing Regulatory Failure, supra, at 555-56.

[2] Analyzing Regulatory Failure, supra, at 551.

[3] Analyzing Regulatory Failure, supra, at 586, 595-97.

oriented techniques have rarely been tested in the real world.[1]

In *Breaking the Vicious Circle*, Judge Breyer, much more clearly than in his previous work, demonstrates a willingness to allow health and safety proponents to rebut the *laissez faire* presumption. Yet although he concedes that health and environmental regulation is necessary to reduce the risks posed by toxic chemicals in the environment, he nearly always minimizes the magnitude of those risks. In his usual deliberative fashion, Judge Breyer addresses the ongoing debate in the scientific community over how to assess the magnitude of health risks posed by exposure to environmental contaminants. Some scientists believe that a relatively large percentage of human cancers are caused by exposure to man-made toxic chemicals; others believe that the percentage is so small as to warrant little societal attention. Some scientists believe that high-dose animal testing is the most practical way to screen chemicals for carcinogenicity; others believe that animal tests are not sufficiently reliable to serve as the basis for regulatory action. Unfortunately, in describing health and environmental risks, Judge Breyer relies almost exclusively upon the scientists on one side of the debate, relegating the scientists on the other side to a judicious "but see" citation at the end of a footnote. In short, Judge Breyer takes sides in the debate, and he sides with those that believe that the risks posed by environmental contaminants are not very large.

This leads Judge Breyer to conclude that environmental activists and the media have steered a naive Congress into creating a precautionary regulatory atmosphere in

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[1] See Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 Stan. L. Rev. 1267, 1275-84 (1985); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

which federal agencies force well-meaning companies to waste scarce resources trying to reduce or eliminate the "last ten percent" of the risks posed by environmental contaminants. Relying upon his own experience in reviewing the record in the *Ottati & Goss* case,[1] Judge Breyer questions whether it would be worth spending $9.3 million to protect children who might at some time in the future eat some of the contaminated dirt that would otherwise be left in place at a notorious New Hampshire superfund site.[2] In a similar vein, Judge Breyer critiques EPA's attempts to regulate asbestos and OSHA's and EPA's attempts to regulate benzene.[3] In each instance, Judge Breyer accepts the opinions of the experts that trivialize the risks that the government was attempting to address and rejects experts that take them seriously. Judge Breyer therefore concludes in each case that the government was attempting to force private companies to pay too much to reduce minimal health risks.

If one believes the experts that Judge Breyer cites, many of whom either work for or are supported financially by the regulated industries, it is easy to agree with his analysis. A company should not be required to spend tens of millions of dollars to save a small fraction of a single statistical life. The experts that Judge Breyer relies upon, however, are inclined to gloss over the enormous uncertainties that becloud any attempt to quantify the risks posed by chemicals in the environment. If one is less inclined than Judge Breyer to trust these experts to assess risks accurately, one might insist that companies be required to undertake their best efforts to reduce emissions or

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[1] United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).

[2] Vicious Circle, supra, at 11-12.

[3] Vicious Circle, supra, at 12-15.

to clean up old messes, even when the resulting benefits are not precisely quantifiable.

Much depends upon how much risk lies in the last ten percent that, according to Judge Breyer, should not generally be of great concern to society. Unfortunately, attempts to answer that question are confounded by huge uncertainties. Because testing toxic chemicals in human beings in controlled experiments is ethically questionable, scientists attempt to identify subpopulations (often workers) who have received larger exposures that the general population. These after-the-fact epidemiology studies can identify substances, like asbestos and vinyl chloride, that have powerful toxic effects. Less striking, but still significant, effects get lost in the statistical noise. As the apparently never ending debate over the health effects of smoking makes clear, even the studies that show a positive correlation between exposure and disease are fiercely debated among well-credentialed scientists. Risk predictions based upon such studies are at best highly debatable, and not appropriately cited as gospel.

In the absence of good epidemiological studies, government agencies have for decades relied upon tests in rodent species to predict potential health effects in humans. For economic reasons, the tests are carried out at doses much higher than typical human exposures in the environment. Sadly, the scientists who examine under a microscope the tissues from the animals cannot always agree about what they see. Some pathologists see cancer where others see only dead tissue. Animal testing also gives rise to uncertainties over the relevance of animal studies to humans and over the proper mechanism for extrapolating the high exposure results to the low exposures that humans typically experience. Risk predictions can vary over several orders of magnitude, depending upon which mathematical model one chooses.[1]

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[1] For extended discussions of the uncertainties that regulators encounter in conducting health risk assessments, see National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983); James Leape, Quantitative Risk

Swimming in this sea of uncertainties, the regulatory decisionmaker must rely upon presumptions to fill in the factual gaps. Guided by their respective statutes, federal agencies have in the past tended to "err on the side of safety" in resolving the science/policy disputes that produce the uncertainties. It is precisely on this point that Judge Breyer parts company with this mainstream public policy toward regulating health and environmental risks. Although he clearly understands the regulator's dilemma, Judge Breyer flatly rejects a policy of erring on the side of safety in dealing with the uncertainties that arise our of these science/policy disputes, because it leads society to spend too many dollars chasing after what he believes to be trivial risks.[1]

This is the essence of a contentious policy debate over health and environmental regulation in the United States. For the most part, the American public and its elected representatives have adopted a policy of erring on the side of safety. They recognize that sometimes this policy will lead to actions being taken with respect to chemicals that do not pose very high risks, but the presumption will also help avoid disasters like thalidomide, Bhopal and Chernobyl. Persuaded by the experts on one side of the debate that tend to trivialize most health and environmental risks, Judge Breyer does not believe that the uncertainties are so large or the consequences of error so terrible that society should replace the presumption in favor of free markets with one that errs on the side of safety.

Judge Breyer also believes that Congress, the regulatory agencies and the

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Assessment in Regulation of Environmental Carcinogens, 4 Harvard Envt'l L. Rev. 86, 100-103 (1980); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

[1] Vicious Circle, supra, at 42-50.

public cannot be trusted to address risk regulation in a sensible way. Relying on highly suspect comparisons of environmental risks with other safety risks that human beings routinely encounter, Breyer concludes that the risk perceptions of ordinary folks depart dramatically from the real risks as determined by the experts.[1] If the experts are right (and Judge Breyer rather uncritically assumes that they are), the public must be wrong in clamoring for more protection from environmental contamination. Nor does Judge Breyer trust Congress to regulate risks intelligently. He is especially critical of absolutist statutory provisions like the Delaney Clause, which prohibits the deliberate addition of animal carcinogens to food. He believes that "Congress is not institutionally well suited to write detailed regulatory instructions that will work effectively."[2] In fact, Judge Breyer does not really trust the regulatory agencies to get it right, because they cannot be trusted to "resist Congressional or public efforts to set agendas and to manage particular results."[3]

Like many industry and academic critics of health and environmental regulation, Judge Breyer argues that the money expended complying with "unreasonable" health and environmental regulations could more effectively be spent addressing different health and environmental risks. For example, he suggests that much of the money expended on cleaning up abandoned hazardous waste dumps in the United States would be better spent saving the trees in Madagascar. In addition to relying upon dubious quantitative risk comparisons, such "wishful thinking" arguments

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[1] Vicious Circle, supra, at 35-39.

[2] Vicious Circle, supra, at 42.

[3] Vicious Circle, supra, at 50.

presume the existence of institutional vehicles for directing private resources from one private use to entirely unrelated public uses. Judge Breyer's example presumes a vehicle for collecting monies from hazardous waste generators, a vehicle for directing those resources to Madagascar, and a vehicle for ensuring that they are spent on saving trees, presumably by compensating the owners of those trees. Imagine the reception in Congress of a Bill the intent of which was to shift wealth from manufactures and municipalities in United States to large land holders in Madagascar. Since the government is powerless to save the trees in Madagascar, the argument that the money spent cleaning up hazardous waste dumps could be better spent in Madagascar is in reality an argument for doing nothing at all.

Judge Breyer even accepts the highly dubious "richer is safer" argument against stringent regulation of activities that pose health and safety risks. This theory, which has few adherents in the academic community, posits that health and environmental regulation can harm human health through the adverse impact that it has on the economy. Breyer approvingly cites one estimate that "every $7.25 million spent on a cleanup regulation will, under certain assumptions, induce one additional fatality"[1] for the proposition that regulations that cost more than that amount per statistical life saved are counterproductive. The "certain assumptions" alluded to are for the most part entirely lacking in empirical support. They include the assumption that the money that employers save from not having to comply with strict OSHA standards will be passed on to workers, rather than shareholders, and the assumption that workers will spend that extra money on better diets, rather than cigarettes, and on less stressful leisure, rather than on jet-skiing or bungie-jumping. It is hard not to

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[1] Vicious Circle, supra, at 23.

conclude that this argument is merely a conscience-salving makeweight to justify an antiregulatory posture arrived at on other grounds.

In sum, Judge Breyer has after much study formed fairly strong opinions about the need for and efficacy of federal health and environmental regulation. In his mind, the burden of justifying such regulation is on the would-be beneficiaries of such regulation, and they should be prepared to demonstrate not only that regulation will reduce health and environmental risks, but also that the money expended in doing so could not better be spent reducing some other risks. It seems reasonably clear that if Judge Breyer had been a member of Congress, he would not have supported many of the current health and environmental statutes. But Judge Breyer is not running for Congress; he has been nominated to fill a vacancy on the Supreme Court. The Supreme Court cannot enact or repeal legislation, but it can profoundly affect how regulatory agencies implement congressional enactments. Therefore, to answer the question whether Justice Breyer would be hazardous to the public health, we must examine his views on the proper role of the reviewing courts in implementing health and environmental legislation.

The Role of Federal Courts in Health and Environmental Regulation.

To understand how a Supreme Court Justice could possibly have an adverse effect on human health or the environment, one must begin with an understanding of the role that federal courts play in federal regulation. Under prevailing doctrines of Administrative Law, arising out of the federal Administrative Procedure Act (APA) and various substantive statutes, the federal courts play a profound role in health and safety regulation. Congress has in many cases assigned the federal courts the role of

stimulating action by lazy or recalcitrant federal agencies. The APA provides that a reviewing court may compel agency action that is "unlawfully withheld or unreasonably delayed," and specific deadlines in many environmental laws provide Congress' guidance on how long particular tasks should take.[1] The net result has been a long line of "bureaucracy forcing" cases in which the beneficiaries of delayed regulatory programs secure court orders forcing health and environmental agencies to issue orders or promulgate rules by dates certain.[2] For example, during the 1980s, nearly every health standard issued by the Occupational Safety and Health Administration (OSHA) came only after a court had ordered OSHA to take up the topic and decide whether or not to promulgate a regulation prior to a judicially determined deadline.[3]

The federal courts are also empowered to review agency orders and rules after they have been promulgated and issued. Courts engaged in judicial review of agency action can perform three basic functions. First, a court can review the agency's interpretation of a statute or the constitution. In some cases petitioners allege that the agency's action is unconstitutional or outside of the agency's delegated powers and ask the court to restrain such unlawful exercises of bureaucratic power. More frequently, petitioners accept the agency's power to address a particular topic, but

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[1] 5 U.S.C. § 706(1).

[2] See generally Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Administrative Law Review 171 (1987); Neil R. Eisner, Agency Delay in Informal Rulemaking, 3 Ad. L. J. 7 (1989); John D. Graham, The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act, 1985 Duke Law Journal 100.

[3] See Thomas O. McGarity and Sidney A. Shapiro, Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration (1993).

challenge the agency's interpretation of the statutory language that empowers the agency.

Second, a court can set aside agency action that is "without observance of procedure required by law."[1] Petitioners often challenge agency action on the ground that the agency did not afford them an appropriate opportunity to present their side of the issues. Or the petitioners may claim that the agency failed make a required threshold finding or to prepare a necessary analytical document such as an environmental impact statement or a regulatory flexibility analysis. These challenges do not go to the existence of agency power or to the correctness of the agency's conclusions. Rather, the challengers are insisting that the agencies "go by the book" in taking actions that affect their interests.

Third, petitioners may challenge the substance of the agency's resolution of an issue or issues at the end of the relevant procedures. The Administrative Procedure Act and many agency statutes require an agency's explanation for its action to come up certain minimum measures of rational decisionmaking. For the most part, agency action taken after formal proceedings, such as licensing hearings, must be supported by "substantial evidence" in the record made before the agency.[2] Informal agency action, such as standard setting, must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3]

Given the extraordinary potential for a court playing one or more of these three

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[1] 5 U.S.C. § 706(2)(D).

[2] 5 U.S.C. § 706(2)(E).

[3] 5 U.S.C. § 706(2)(A).

roles to disrupt an agency's policymaking initiatives, it should come as no surprise that agencies are very aware of the possibility judicial review and adjust their conduct accordingly. Applied with the deft touch envisioned in the Administrative Procedure Act, judicial review can be a bulwark against the arbitrary exercise of bureaucratic power. But judicial power can also be abused. Overly aggressive judicial intrusion into the administrative process can greatly hinder the implementation of laws designed to protect human health and the environment from dangerous private conduct. If regulatory agencies like EPA and OSHA are not allowed to perform their assigned tasks in an expeditious fashion, unprotected workers will be killed and maimed, and irreparable environmental damage will needlessly result. It therefore behooves us to examine where Judge Breyer, an acknowledged expert in administrative law, stands on these somewhat arcane questions concerning the scope of judicial review of administrative action.

Judge Breyer on Statutory Interpretation.

Since 1984, courts reviewing agency interpretations of their own statutes have been guided by the so-called *Chevron* doctrine. The Supreme Court announced that doctrine in a case involving an environmental group's challenge to EPA's policy of allowing major sources of pollution in areas that did not meet air quality standards to add new equipment or modify existing equipment without EPA review so long as they came up with offsetting reductions in emissions within the same plant. As a prelude to examining the statutory basis for this "bubble" policy, the Supreme Court spoke to the role of courts in interpreting agency statutes:

> When a court reviews an agency's construction of the statute which it

> administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

This prescription for a very limited judicial role in statutory interpretation of agency statutes has received a great deal of academic criticism, and it is not always clear that the lower courts follow it religiously. Reviewing courts, including the Supreme Court itself, are sometimes inclined to find the statute clear on its face when they disagree with the agency's interpretation and to stretch to find ambiguity when they agree with the agency.

The existing sample of Judge Breyer's opinions involving judicial review of statutory interpretation is too small to support any firm conclusions about his

inclination to defer to agencies' interpretations of their own statutes. But his writing on the subject indicates that he believes that the *Chevron* test is too simplistic to provide guidance to the lower courts, given the wide variety of situations in which agencies are called upon to interpret their own statutes.[1] Judge Breyer doubts that judges, who develop their own expertise in interpreting statutes, can adopt the deferential frame of mind that the *Chevron* test demands:

> [S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, and that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute . . . and that the "better" view is "correct," and the alternative view is "erroneous."[2]

Given Judge Breyer's skeptical view of the deferential *Chevron* test, we should expect *Justice* Breyer to reach his own conclusions about the "better" view of the environmental statutes. Since Judge Breyer is not sympathetic to the existing statutory regime for health and environmental regulation, Justice Breyer may be inclined to interpret health and environmental statutes narrowly to preclude health and environmental agencies from taking aggressive action at the outer edges of their

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[1] Judge Breyer has also written on the related question of the role that legislative history should play in judicial interpretation of statutes. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1991). In this article, Judge Breyer convincingly rejects Justice Scalia's radical suggestion that legislative history should play no role in statutory interpretation.

[2] Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986) [hereinafter cited as Judicial Review].

statutory authority. Justice Breyer's presumption in favor of allowing markets to function without government intrusion may not easily be overcome by an agency's interpretation of its statute to allow governmental intervention.

Judge Breyer on Agency Procedures.

Although Judge Breyer has had very little to say in the academic literature about judicial review of an agency's procedural choices, he has authored four opinions in cases involving challenges to agency failures to prepare environmental impact statements (EISs). The court in two of the cases ruled in favor of the agencies;[1] in one case the court required the agency to prepare an EIS;[2] and in another case the court required the agency to prepare a supplemental EIS.[3] In none of the cases was the agency clearly out of bounds in failing to prepare an EIS. Yet in all four cases, Judge Breyer examined very carefully the agency's reasons for foregoing the EIS and measured the agency's explanation against the materials assembled in the substantial administrative records. Given that the Supreme Court has not once in NEPA's twenty-

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[1] City of Waltham v. U.S. Postal Service, 11 F.3d 235 (1st Cir. 1993) (EIS not required for construction of a Postal Service regional distribution facility); Citizens for Responsible Area Growth v. Adams, 680 F.2d 835 (1st Cir. 1982) (EIS not required for private construction of hanger for corporate jets).

[2] Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (EIS required for proposed cargo port and causeway on Sears Island).

[3] Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983) (supplemental EIS required for federal auction of drilling rights off Georges Banks, given government's drastically reduced estimate of amounts of oil yields likely to result).

five year history ruled against an agency, Judge Breyer's apparent willingness to do so half the time may indicate an activism with respect to this particular procedural issue that is currently lacking on the Court.[1]

Judge Breyer on Substantive Judicial Review of Agency Action.

Judge Breyer has had a great deal to say in the academic literature about the role that reviewing courts should play when they engage in substantive judicial review of agency action under the "substantial evidence" and "arbitrary and capricious" tests. Under existing judicial precedent "substantial evidence" means "more than a mere scintilla." It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] An informal agency action is "arbitrary and capricious" if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

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[1] Judge Breyer's opinion in *Watt* demonstrates an inclination to require agencies to engage in meticulous cost-benefit analysis. Although there is strong judicial precedent for requiring agencies to engage in a "finely tuned" cost-benefit balancing in NEPA cases, Calvert Cliffs' Coordinating Comm. v. v. AEC, 449 F.2d 1109 (D.C.Cir. 1971), cost-benefit analysis is not as clearly required in statutes empowering EPA and OSHA to take actions to protect health and the environment, and it is in fact forbidden by statute in some contexts. See American Textile Mfrgs. Inst. v. Donovan, 452 U.S. 490 (1981) (occupational health standards); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (1980) (national primary ambient air quality standards).

[2] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

expertise.[1]

Both of these tests appear at first glance to be quite deferential, but they both leave substantial room for courts to substitute their policy judgments for those of the agencies. We have seen that Judge Breyer has strong opinions about the policies that should govern health and environmental regulation. The paramount question in the area of substantive judicial review is whether he will substitute his policy preferences for those of the health and environmental agencies.

Judge Breyer's writings suggest that he believes that the courts should take a deferential approach toward substantive judicial review. He is particularly sensitive to the question of the institutional competence of federal courts to second-guess agency attempts to resolve highly complex and uncertain science/policy disputes:

> . . . The court may not appreciate the agency's need to make decisions under conditions of uncertainty. Compromises made to secure agreement among the parties may strike a court as "irrational" because the agency cannot "logically" explain them.
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> [C]ourts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand. . . .

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[1] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983).

> . . . The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo.[1]

Yet most of the examples that he cites of judicial overreaching involve cases in which the agency action was deregulatory in nature and therefore consistent with his laissez faire policy presumption.[2]

The critical question, on which Judge Breyer's existing judicial opinions shed very little light, is whether *Justice* Breyer will retain this sympathetic posture when the agency action runs counter to his strongly held preference for free markets. The reviewing courts have tremendous discretion under the "substantial evidence" and "arbitrary and capricious" tests to find gaps in the agency's analysis, to question the agency's assumptions, and to second guess how the agency resolves science/policy questions. The temptation for the judge to substitute his or her weltanschauung

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[1] Judicial Review, supra, at 388-91.

[2] For example, Judge Breyer is critical of the Supreme Court's opinion in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983), a case in which the Court remanded a deregulatory initiative by the National Highway Traffic Safety Administration withdrawing a previous rule requiring auto makers to incorporate passive restraints in automobiles manufactured after 1984. See Judicial Review, supra, at 395. At the same time, Judge Breyer cites the Fifth Circuit opinion in Aqua Slide'N'Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978) as an example of a court's ability under even a relaxed judicial supervisory attitude "to catch the occasional agency policy decision that is in fact highly irrational." Judicial Review, supra, at 395. The Fifth Circuit in *Aqua Slide'N'Dive* overturned a regulation of the Consumer Product Safety Commission aimed at making swimming pool slides safer for the public. From a perspective other than Judge Breyer's presumption in favor of free markets, the agency action was not at all irrational. The Fifth Circuit opinion is in many respects a paradigm of overly strict judicial review.

for that of the appointed regulatory officials can be overwhelming. But it must be resisted if agencies are to be allowed to implement congressionally enacted regulatory programs to protect public health and the environment. For, as Judge Breyer clearly recognizes, a judicial remand of an important regulation can have a tremendous impact on the ongoing viability of a regulatory program.[1]

Conclusion.

Will Justice Breyer possess the fair-mindedness to consider the opinions of experts on both sides of science/policy debates? Will Justice Breyer have the humility to shelve his personal policy preferences and allow regulatory agencies to pursue the "last ten percent" of the health and environmental risks that Congress has empowered them to regulate? Will Justice Breyer exercise the good judgment to defer to congressional policy determinations when they differ dramatically from his own considered conclusions, even when he knows that he has thought longer and harder about the underlying issues than any individual congressperson?

The members of the Senate Judiciary Committee should press Judge Breyer hard for honest answers to all of these questions. Judge Breyer's policy prescriptions are a matter of

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[1] Judicial Review, supra, at 383.

public record. However, the record is still incomplete on how Justice Breyer will resolve the tension between his views on the proper role for regulation in society and his views on the proper role for the courts in reviewing regulatory agency actions. Only after Judge Breyer has publicly addressed this tension can we know whether Justice Breyer will be hazardous to our health.

CRITICISM RUN AMOK

Comments by
Clarence Ditlow, Executive Director,
Center for Auto Safety
and
Joan Claybrook, President,
Public Citizen

Introduction

In chapter 5 of his 1982 book, "Regulation and Its Reform," Judge Stephen Breyer tries to use the National Highway Safety Administration (NHTSA) as an example of regulatory failure in standard setting. As the following shows, NHTSA's standard setting has saved hundreds of thousands of lives and untold billions of dollars for consumers despite strenuous opposition from industry.

Until passage of the National Traffic and Motor Vehicle Safety Act and its companion Highway Safety Act in 1966, Americans did not have Federal regulatory agencies to protect them from death and injury on the nation's highways. In that year, 53,000 people were killed and 1.9 million injured. If the 1966 fatality rate of 5.70 deaths per 100 million vehicle miles traveled had continued,[1] over 165,000 people would have been killed in traffic accidents in 1993. Instead, the death rate was 1.8 and 39,800 were killed. The cost to society of motor vehicle accidents is well over $100 billion.

Failure of the Auto Industry in a Free Market

The first point that Judge Breyer misses is that left to its own in a free market, the auto industry delivered increasing deaths, property damage, air pollution and wasted resources. For the first 75 years of its existence, the motor vehicle industry was unregulated and could have produced safe, efficient and clean cars but chose not to do so. In fact, the auto companies conspired to suppress the development of pollution control technology that would have made cars cleaner and more fuel efficient, knowingly held back such simple, lifesaving technologies as laminated windshields and opposed the funding of mass transit that would have made the nation less reliant on the motor vehicle.

NHTSA Standard Setting

Head Restraints: Judge Breyer singles out NHTSA's Head Restraint Standard (FMVSS 202) as an example of an ineffective regulation. Under Executive Order 12291 issued by President Reagan in February 1981 requiring Federal regulatory agencies to evaluate major rules, NHTSA evaluated the head restraint standard and found that FMVSS 202 prevented 64,000 injuries in rear impacts annually saving $2,150 per injury based on average insurance company compensation for whiplash injuries. Thus the annual saving in injury costs was over $135 million for this standard.

NHTSA found that the number of injuries prevented would have been 85,000 if all car companies had used integral head restraints instead of using adjustable head restraints in two-

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[1]While fatalities climbed steadily from 1900 to 1966, the fatality rate decreased through 1961 to 5.16 when it began to climb again as the auto companies increased horse power and performance. The enormous increase vehicles and miles traveled overwhelmed any decrease in the death rate and produced an annual death toll of 40-50,000 that society found unacceptable.

thirds of their new cars. The choice of adjustable over integral head restraints flies in the face of cost-benefit analysis because the purchase price increase for integral restraints is only $6.65 versus $24.33 for adjustable restraints. Given a performance standard which Judge Breyer favors, the auto makers picked the more costly and less effective technology to meet the standard. If Congress had given NHTSA the authority to mandate a design standard requiring integral restraints, the benefits would have outweighed the costs by 3.4 to 1.

Passive Restraints: In his criticism of NHTSA's issuance of the passive restraint standard, Judge Breyer engaged in sloppy research or deliberate revisionist history. Judge Breyer assumes the ignition interlock (that required seat belts to be fastened before a car could be started) substitute for airbags in 1974 was an idea of NHTSA. In fact, it was an idea of Ford and its lawyer Lloyd Cutler to head off airbags.

The protracted delay in installing airbags in cars was not due to some fatal flaw in standard setting but was rather due to scorched earth opposition of the auto companies who saw airbags giving auto safety regulation a good name. In overturning the Reagan Administration's revocation of the passive restraint rule in 1983, the U.S. Supreme Court called it right in a 9-0 unanimous decision saying, "The auto industry waged the regulatory equivalent of war against the airbag, and lost."

What better justification can there be of auto safety regulation than that it delivered the lifesaving airbag, a technology too good to destroy and developed only because NHTSA used its technology-forcing power to require the auto industry to develop them. Separate studies done by the Insurance Institute for Highway Safety and NHTSA both show airbags reduce occupant deaths by 28 to 29 percent. When all cars and vans are equipped, 9,000 to 12,000 lives a year will be saved and a quarter-million injuries a year will be prevented by this important public health regulation.

Fuel Economy (CAFE) Standards: Judge Breyer makes a passing criticism of NHTSA setting of corporate average fuel economy (CAFE) standards. His criticism is so short because the program is so good. CAFE standards are simply the most successful energy conservation program adopted by the United States. Today, we save nearly 3 million barrels per day of petroleum due to improvements in fuel economy since Congress enacted the Energy Petroleum Conservation Act of 1975 which required NHTSA to adopt CAFE standards. The success of this program has helped reduced gasoline prices and has reduced our dependence on uncertain supplies of oil from the Persian Gulf.

Passenger car fuel economy has more than doubled since then while the vehicle fatality rate has been cut in half in the same time. But for the fact that the Reagan/Bush Administration rolled back CAFE standards for passenger cars and failed to increase CAFE standards for light trucks and vans, we would now be saving over 5 million barrels per day of petroleum. CAFE worked until the Reagan Administration stopped it at the behest of the auto industry.

Bumper Standards: Judge Breyer reluctantly concedes the 5-mph bumper standard worked but attributed it to luck rather than sound analysis. Talk about sour grapes. According to Judge Breyer, this regulation worked because NHTSA guessed right that the industry would use soft face bumpers rather than steel. This was not a matter of guessing but hard work and effective analysis. Anyone who was knowledgeable about the industry realized that soft face bumpers were the bumpers of the future. Ironically, the one regulatory success cited by Judge Breyer was later repealed by the Reagan Administration when it rolled back the 5-mph bumper standard to 2.5-mph in 1982 -- a devolution upheld by Judge Robert Bork.

Tire Ratings: A constant theme of Judge Breyer is that regulatory agencies take too long to issue standards, as was the case with NHTSA when it took nearly 10 years longer than Congress wanted in issuing uniform tire quality grading standards (UTQGS). What Judge Breyer overlooks is that the delay is not due to inefficiencies on part of the agency but frivolous opposition by the regulated industry, including protracted court battles.

The tire industry waged regulatory war against UTQGS just like the auto industry waged regulatory war against the airbag. There were court challenges, Congressional hearings and White House interference just as there was with airbags. Only a citizen suit brought by Public Citizen forced the agency to take action. But this cannot be cited as an example of poor standard setting. If anything, it is heroic overcoming of objections raised by a regulated industry. The proof of the success of UTQGS is that since it has been adopted as a result of citizen litigation, tire treadwear has increased dramatically as the rating system has forced tire companies to compete to produce longer lasting tires.

Large Truck Antilock Brakes: Judge Breyer asserts that NHTSA's technology-forcing regulation for truck brakes "worked very badly ..." because some systems did not work and "the systems changed too rapidly for mechanics to adjust." He says "the agency and industry were wrongly optimistic about how much could be quickly accomplished" and suggests the agency's lack of information makes it difficult to know whether compliance was impossible or the industry did not try hard enough (pp. 106-7).

Technology forcing standards are indeed complex and difficult. But in this case the reasons for the problems with the first brakes produced to meet the standard are well known. First, the standard was not rushed. It was first proposed five years before the effective date, with various amendments along the way to accommodate industry critiques. Second, the major truck brake manufacturing companies were convinced that Gerald Ford, who became president in 1974, a year before the standard took effect, would revoke the standard at their request. As a result, they resisted investing in preparations for manufacture. When the standard was not revoked, they rushed into production at the last moment and made lousy systems.

Other companies, specifically Delco and Wagner Electric, began producing competing systems in 1977 which had none of the problems in the first systems manufactured. The standard was not a failure. Many of the first products were inadequate and some did not even comply because of industry negligence. The agency ordered a number of recalls. But in a weird decision three years after the standard took effect in a trucking industry lawsuit, the 9th Circuit said the agency erred in setting the standard but based its decision on experience with systems manufactured after the standard took effect -- information not known to the agency when it issued the standard.

The concept of electronic rather than mechanical brakes to stop 80,000 pound trucks in shorter distances and keep them in the lane of traffic without jackknifing has been proven successful beyond any doubt. Mechanical brakes are notoriously inadequate for these behemoths. In 1991, Congress, irritated that the agency has not reissued the standard after 13 mostly Reagan/Bush years, mandated a rulemaking on antilock brakes with specific deadlines. With this clear guidance, the agency has acted to reissue the standard.

Naive Criticism

Some of Judge Breyer's criticism of NHTSA is simply naive. He claims that "NHTSA...did not simply consider how it might best save lives" (p. 101). To the contrary, reduction of death and injury are the criteria mandated by the statute and have been used by NHTSA from the very beginning in selecting what standards to issue.

The agency has also made major changes in its rulemaking actions over the years as its information and sophistication advanced but has always been guided by its lifesaving criteria. The first static standards were based on (but not identical to) existing standards. Next came crash test dynamic standards, and then dynamic standards measuring injury levels of dummies instrumented to simulate humans. All of this has been accomplished despite harsh budget cuts at crucial times and a lack of political support in the White House over many years.

In place of head restraints, Judge Breyer suggests "even a very rough cost-benefit analysis" might have led NHTSA to work "on mandating special devices to stop illegal speeding, such as flashing lights on the outside of a car that would indicate a speed of above 60 mph" (p. 101). What Judge Breyer failed to realize is that most whiplash injuries occur in rear impacts in urban areas with speeds of impact under 40 mph. Regardless of the political feasibility of making every car that goes over 60 mph look like a pinball machine, it would do nothing to reduce whiplash injuries because most of the offending cars are going no faster than 40 mph.

In addition, the flashing light concept is highly speculative, can be very dangerous on the highway, and was summarily rejected for further exploration in agency appropriations hearings in 1977.

Judge Breyer also suggests NHTSA should have tried to improve brake maintenance instead of mandating new brake technology (antilock brakes -- he calls them interlock). But the agency has no statutory authority to require improved brake maintenance, and did in fact urge the trucking industry to improve training for its brake mechanics.

Judge Breyer also criticizes NHTSA for relying on voluntary SAE standards for its first set of mandatory standards adopted in 1968. According to Judge Breyer, making the SAE standards mandatory was a mistake because previously auto companies could "reject the standards if they are absurd, inappropriate, or simply wrong." p. 102. What Judge Breyer fails to realize is that the SAE standard-setting process was controlled by an oligopoly of GM, Ford and Chrysler. SAE never set a standard the Big Three didn't want. When Congress passed the 1966 Motor Vehicle Safety Act, it specifically criticized the SAE standards as being inadequate and failing to stem the rising tide of traffic fatalities. NHTSA used only a few elements of SAE standards very selectively in its initial safety standards.

Judge Breyer discusses performance and design standards but does not apparently understand what a performance standard is. For example, he says, "...it may be as easy for the agency to write its standard directly in terms of performance goals, such as cleaner air or fewer injuries. On the other hand, performance standards are often difficult to enforce, because they lead to complex arguments about the appropriate testing procedure for differently designed machines" (p. 105).

A performance standard does not measure the amount of injuries reduced. It contains a test procedure, as for example with Standard 208 for passive restraints that an instrumented dummy cannot suffer significant injuries in a crash test at 30 mph.

Judge Breyer emphasizes many times that "The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard" (p. 109).

While he makes interesting and accurate statements about deficiencies in information such as self-interested industry information and industry withholding information to undercut agency action, he suggests no remedies (such as the use of subpoenas or other mandatory devices that NHTSA used for fuel economy rulemaking).

Also, he doesn't indicate any appreciation for the role of agency technical and scientific research which includes real world and proving ground testing, surveys, opinion polls, marketing research, collection of statistical and in-depth data on crashes, injuries and deaths, and on industry production plants, materials and testing, statistical analysis, production of model and experimental vehicles and systems, to mention a few areas. For example, NHTSA spends almost a third of its budget (over $40 million a year) on very sophisticated research in-house and with outside consultants and universities for motor vehicle and highway safety standards.

Judge Breyer appears uninformed about agency research for rulemaking. He describes the agency effort as follows:

"It will obtain the information, in part, through research by agency staff, as they consult research literature and talk to employees of other agencies. Before the agency formulates an initial proposal, the staff may consult widely outside the agency as well. Staff members will telephone, write letters to and arrange meetings with independent experts, industry experts--in fact anyone they consider knowledgeable. Once the Notice of Proposed Rulemaking is promulgated, however, staff members may feel less free to consult widely. ... Obtaining accurate, relevant information constitutes the central problem for the agency engaged in standard setting. It has difficulty finding knowledgeable, trustworthy sources ..." (pp. 102-3).

"Developing information within the agency avoids the taint of industry self-interest, but the agency may lack the requisite technical ability. NHTSA was unable to develop fuel conservation standards, for example" (emphasis added) (p. 111). He indicates NHTSA lacked firm-specific information. He's wrong about the standards and about firm-specific information. NHTSA research evaluated every transmission and engine plant for every U.S. company, what was produced in terms of size and output, how many sold each year etc. In other words, NHTSA knew not just about each company, but about each make/model in preparation for issuance and as well as for evaluation of standards.

Conclusion

Overall, NHTSA regulation of the auto industry has been a dramatic success with over 200,000 lives saved to date, over 2 million injuries prevented, billions of dollars of accident loss avoided, and over 100 million gallons of gasoline saved every day. To the extent there are inefficiencies in NHTSA's actions, it is because of loopholes in the law exploited or created by the auto industry.

Judge Breyer never mentions that most of the problems with truck brakes, passives, tire information and bumpers flowed from the lack of leadership in the Nixon/Ford years when the president disliked or at best was ambivalent about regulation while the industries (tire, truck, auto, bumper) were all tigers against these standards. Who can forget the Henry Ford/Iacocca meeting with President Nixon memorialized on the Watergate tapes where the captains of industry asked the President to revoke the air bag rule and he did?

Of the six NHTSA safety standards he uses to show the failures of the current regulatory/adversary system, four (passive restraints, tire information, bumper damageability, and fuel economy) were completed during the Carter Administration with no difficulty under the administrative procedures he claims are problems. And all of them were difficult, technology-forcing standards vehemently opposed by the relevant industries.

He also never mentions the budget and top staff cuts the agency has suffered, particularly in the Reagan years, which to this day have hamstrung NHTSA in development of much needed technical information. It is amazing the agency got as much done as it did.

NHTSA regulation could be even more successful than it is if there were (1) citizen suits or rights of action to enforce mandates under the Safety Act, (2) broader standing to challenge agency inaction, (3) criminal penalties for violation of the Safety Act, (4) NHTSA authority to issue design as well as performance standards, (5) restored NHTSA funding cut by Congress under pressure from industry lobbyists, and (6) restoration of the antitrust injunction against joint industry lobbying and research on safety, emissions and fuel economy.

The main thesis of Chapter 5 "Standard Setting," focusing primarily on NHTSA, is that regulation under the procedural protections of the Administrative Procedure Act has many pitfalls and with its reliance on an adversary process, it generally does not work well. The better alternative, says Judge Breyer, is negotiation among various interested parties--the industry, academics, consumers and the agency.

For example, he says, "The procedural requirements of 'notice and comment'

rulemaking encourage the agency to use a back-and-forth adversary trial-and-error approach to obtain information and develop standards" (emphasis added) (p. 116).

Difficulties with compliance are a reason "to seek negotiated standards that all parties feel are reasonable, so that firms will not resist compliance" (p. 114).

"Fairness in terms of an ability to hear and to meet arguments can be combined with effectiveness only if all interested parties can meet informally and make various suggestions until agreement is reached or all considerations are out in the open. But this discussion cannot take place through back-and-forth, notice/comment/revise procedures" (p. 117).

"This back-and-forth process may prevent the agency from revising the standard optimally in light of the last set of comments for fear of provoking new hearings. The agency may determine the standard's content initially through informal meetings and negotiation with those affected, later 'ratifying' the decision with a more formal procedure. The courts may hold this process unlawful, however, as an effort to circumvent the law's procedural requirements" (p. 117, fn. 44).

"One sees, for example, obvious major advantages for the agency in achieving mutually satisfactory ('negotiated') solutions, given the agency's comparative inability to secure necessary information--particularly as to costs and competitive impacts, the desirability of securing voluntary compliance procedures and industry cooperation in developing enforcement procedures, and the time and effort saved if judicial challenge can be avoided" (p. 118).

"One sees the time needed to develop standards as stemming in part from the difficulties of obtaining appropriate information and the need to force a multifaceted or 'polycentric' problem into an adversary mode" (p. 119).

Judge Breyer concedes that, "None of these problems warrants abandoning the standard-setting process, nor do these difficulties pose insurmountable obstacles. They are simply tendencies -- likely to be present -- that administrators must take into account when planning strategies for developing workable sets of standards" (p. 119).

But his entire chapter denigrates and undercuts the effectiveness of rulemaking for setting standards. Moreover, his points are often off base or lack thorough understanding of the work of NHTSA.

PROPOSED QUESTIONS FOR JUDGE BREYER

(1) QUESTION: "When your nomination was announced, you stated that your aspiration was to make the law work for 'ordinary people'. By that, did you mean, simply, that the law should serve the interests of the majority of the people? Or do you mean, also, that it should enhance their opportunity and capacity to participate actively in our democratic political life?"

Comment: For two reasons, all of the proposed questions get at matters of general attitude, not specific cases. First, nominees have learned to avoid specific questions. And, second, matters of attitude matter, and questions about attitude may actually stick with the nominee after confirmation. This first question -- again like the others -- is written so as to make it very likely that the nominee will hear himself making the desired answer. In this instance, the answer sets up the most fundamental problem of law in the late twentieth century: Do we want -- and can we have -- government for the people without government of and by the people?

(2) QUESTION: "The constitutional provision whose interpretation has most to do with the participation of ordinary people in our democracy is the Free Speech clause. Do you agree with Justice Brennan's reading of that clause that speech should be 'free, robust and wide open'? And, if so, what does that mean, in particular, for the opportunity and capacity for ordinary people to speak effectively?"

Comment: Justice Brennan offered this famous formula -- of great symbolic importance to constitutional lawyers -- in United States v. Robel, 389 U.S. 258 (1967). It represents one magnetic pole of free speech argument. Yet no lawyer will reject it.

(3) QUESTION: "Do you, then, agree that free speech protection should not be limited to the most politely 'reasonable' 'exposition of ideas' -- that it should extend to modes of expression most characteristic of ordinary people?"

Comment: The question invites the nominee to forswear the other magnetic pole of free speech argument. For decades, conservatives have used this formula to bias constitutional protection against ordinary people.

(4) QUESTION: "Do you agree, also, that the First Amendment demands more than a right of ordinary people to read or hear speech -- that it demands that they be empowered to participate, effectively, in speech themselves?"

Comment: In recent years, many conservatives have tried to collapse the right to produce speech into a

right to consume the speech of others. This, obviously, favors the powerful and well-to-do at the expense of ordinary people who do not own a broadcast license or other medium for promulgating their views?

(5) QUESTION: "Do you, then, agree with Justices White and Powell that the Amendment is concerned, importantly, with the distribution of effective opportunities to speak? That the very well-to-do or corporations should not be protected in 'drowning out' the speech of ordinary people? Or do you take the view that this concern is 'foreign' to the First Amendment?"

Comment: This gets to the crux. The pernicious idea that distributional concerns are "foreign" to the Amendment was famously stated in Buckley v. Valeo, 424 U.S. 1 (1976). Justice White's counter-view was stated not only in his Buckley opinion, but most notably in his majority opinion in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). Justice Powell's recognition of a "drown-out" concern came in First National Bank v. Bellotti, 435 U.S. 765 (1978).

(6) QUESTION: "Very often, the opportunity of ordinary people to speak effectively depends on access to forums for speech controlled and used by the well-to-do corporations. In recent years, some have interpreted the First Amendment to deny them this opportunity. Some have said that 'property' rights override free speech rights or that access would impermissably 'coerce' the rich to join in the speech of ordinary people, or that access must be denied to ordinary people because, otherwise, the rich supposedly would stop speaking themselves. What do you think of this idea that the rights of the well-to-do to speak 'trump' the rights of the majority of people?"

Comment: Now, we're in territory worrying to any nominee. But it poses one of the most vital problems of free speech law -- a problem which the Burger and Rehnquist Courts have often resolved in favor of the rich and corporations. Examples are Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). The great Warren Court opinion (by Justice Marshall) taking the other view was Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (now overruled). In 1980, the Court at least allowed States, if they so choose, to compel access to some such forums in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Richard Parker
Harvard Law School
Cambridge, Massachusetts
July, 1994

The CHAIRMAN. Thank you very much.
Dr. Wolfe.

STATEMENT OF DR. SIDNEY M. WOLFE

Dr. WOLFE. According to Judge Breyer, because the existing system fails to rationally cope with risk assessment management, a new entity, a priesthood of people outside of the regulatory agencies, the courts and the Congress, should be created, according to what he states in his book "Closing the Vicious Circle."

As a frequent critic of and litigant against FDA and OSHA, I am not here to say that these agencies are perfect, but I believe that through existing mechanisms, including the checks and balances of the other parts of the Government and citizen participation, that these agencies could be made to function better.

If there is one reason why they do not currently function better, it is not because of the absence of a Judge Breyer "risk superbody," but because of relentless interference with their function by corporations which withhold information, submit false information and otherwise obstruct the activities of these agencies.

I am just going to go through several examples, all of which are taken from his book "Closing the Vicious Circle." They are just representative examples of a much larger number of instances in which Judge Breyer has done I believe sloppy and often in many cases biased research.

The first has to do with the Delaney clause. Yesterday, when he testified here, he talked about we can't count molecules, what number of molecules, and the implication was that there is government regulatory activity being taken on the basis of a few molecules.

One of the ways of criticizing Federal health and safety regulations is to paint a statute as ridiculous. In his book, Judge Breyer paints the 30-year-old amendment to the Food, Drug and Cosmetic Act, the Delaney clause as ridiculous. The Delaney clause prohibits the addition of any food or color additive which, in well-done studies in animals or humans, has been shown to cause cancer.

On page 41 of the book, he states that:

> Occasionally, a statutory provision goes further itself, setting a standard that, if applied literally, seems unreasonably and pointlessly strict. The Delaney Clause seems to instruct the agency not to permit addition or packaging of or by any substance that contains even a single molecule of an offending chemical, however large the cost or small the risk.

In making this faulty assertion, Judge Breyer has either missed or ignored FDA's constituents policy, which was set over 10 years ago, which makes it clear that his fears of unreasonably and pointlessly strict interpretation of the Delaney clause are unfounded. This policy was upheld in the face of a Federal court challenge, and it arose over FDA's decision to approve a drug and cosmetic dye, Green 5, even though the dye contained trace amounts of a chemical impurity, p-toluidine, which itself was a carcinogen.

The FDA found that, although the contaminant carcinogen, when it was fed itself in large quantities, caused cancer, that it was there in such a small amount in the dye, that when the dye was fed to animals, they did not get cancer. It concluded this was not a food additive or a color additive, and in this case it showed that the

Delaney clause is a good law, that it has some reason and it is not "unreasonably and pointlessly strict."

Other errors in the book include his gross understatement of the number of workers who are injured or in this case killed every year from occupational cancer. He says that all people killed by cancer from pollution and industrial products amount to only 10,000 to 50,000 deaths a year. But in the footnotes, not in the text of the book, buried in the footnotes he has estimates ranging from 75,000 to 150,000 cancer deaths a year, and for occupational cancer alone one estimate is as high as 75,000.

But worse is the omission of the importance of preventing occupational cancer. He says that:

> Only a relatively small portion of these chemical induced cancers are preventable. In fact, almost all of the 10,000 to 100,000 occupational cancer deaths (the range in the book) are preventable.

To his credit, when I pointed this out to him, in the second edition of the book he changed it.

Most of the evidence for chemical induced cancer is among workers. Therefore, most chemical induced cancer from inexcusably delayed regulation of various substances, including benzene, cadmium, and chromium, is and has been preventable and regulatable. He also denigrates the ability to regulate cigarettes and tobacco, claiming that only 30 percent of those cancer deaths could be prevented. I think there is lots of evidence that that is not the case.

Another error in the book is that he seems to go with the OMB conclusion, as he calls it, that there is an overestimation of risk of a thousand or a million times, particularly in the area of environmental hazards. The conclusion that he cites is actually from an OMB economist, and this conclusion was attacked by a large group of prestigious risk-assessment experts, including the former Director of the National Cancer Institute.

In the letter they wrote to the White House, refuting this notion that there is a systematic 1,000 to 1,000,000 overstatement of risk, they said:

> The broader allegation that risk assessment is generically "conservative" is demonstrably suspect. * * * The OMB document (and the references cited therein) fails to provide any evidence that risk assessment is, in fact, systematically "conservative."

Finally, an example that you have discussed a number of times during this hearing, the toxic dump site in Kingston, NH, known because of its name in the litigation as *Ottati and Goss*. In the book, there are a number of statements that Judge Breyer makes referring to this case, including the idea that the site was mostly cleaned up, that it was a swamp and, therefore, children would not play there, and that the parties had agreed that half of the volatile organic toxic chemicals would evaporate by the year 2000.

In the actual opinions that he wrote on this case, and in other documents we have obtained, these statements are demonstrably false. The statement that the site was mostly cleaned up is refuted in his own opinion in the first circuit, in which he said:

> We remand this aspect of the case to the district court so that it can devise a further volatile organic chemical cleanup which, in light of its findings about danger to the public health, will adequately satisfy the public interest.

He also said in the opinion that:

The studies and related testimony indicate that such overstandard concentrations, too high concentrations of these toxic chemicals, are widespread and in significant amounts within the total test area.

Elsewhere in the opinions in his court and in the district court and in briefs filed in the case is other evidence that these statements about this case, which he uses repeatedly in the book to cite the example of ridiculous government regulation, are wrong. In the Government's brief, the site, this toxic dump site was referred to by one of the defendants' own counsel as "severely contaminated."

Other evidence concerning it has to do with levels of ground water contamination which, according to a State official I spoke to yesterday, are thousands of—are more than a thousand times higher than the allowable amount of contamination in ground water. And right now, despite the fact that Judge Breyer characterized this site as mostly clean several years ago, there is a massive cleanup effort beginning to try and do something about the ground water so that it does not migrate to adjacent sites where people are likely to live. He also characterizes it as a swamp, which it is not. It is actually zoned for rural residential use.

Finally, he claims again in the book that half of the volatile organic chemicals will evaporate by the year 2000, and the planned cleanup of the site belies that. In fact, that statement was made by the counsel for the defendant. The parties did not agree on that.

In conclusion, for me and for many others concerned about occupational and environmental health and food safety, it is extremely disappointing that President Clinton was unable or unwilling to nominate someone with a more enlightened attitude toward the solution of these serious problems. Although stating that economic considerations are not as decisive in health, safety, and environmental regulation, Judge Breyer's views as expressed in this book amount to an unfair and unwarranted bashing of the very Federal agencies who are trying to prevent toxic chemical-induced deaths and illnesses. I can only hope that, good listener that he is, Judge Breyer will listen to these concerns and, to use his terms, become more influenced by the humanity of John Donne than by the corporate hand of Adam Smith, as he appears to be at this time.

Thank you.

[The prepared statement of Dr. Wolfe follows:]

PREPARED STATEMENT OF SIDNEY M. WOLFE, M.D.

In statements made at these hearing on Tuesday, July 12, Judge Breyer said that he distinguished between classic economic regulation (airlines and trucks) and health, safety and environmental regulation. He said: "When you start talking about health, safety and the environment, the role [of economics] is much more limited, because there no one would think that economics is going to tell you how much you want to spend helping the life of another person. If in fact people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong? * * * That's a decision for Congress to make reflecting the values of people." Whereas there is no reason to question Judge Breyer's attitudes about the victims of natural disasters, his recent book, *Closing the Vicious Circle* deals exclusively with industry-caused disasters. Throughout the book are examples wherein he minimizes the risks of exposure to various chemicals and questions and deprecates health and safety laws or the efforts which the federal health and safety agencies make to protect the lives he professes to cherish.

According to Judge Breyer, because the existing system fails to rationally cope with risk assessment and its management, a new entity, a priesthood of people outside of the regulatory agencies, the courts and the Congress, should be created. As a frequent critic of, and litigant against the FDA and OSHA, I am not here to say

these agencies are perfect. I believe, however, that through existing mechanisms, including the checks and balances of the other parts of the government and citizen participation, that these health and safety regulatory agencies can be made to function better. If there is one reason why they do not currently function better, it is not because of the absence of a Judge Breyer "risk superbody," but because of relentless interference with their function by corporations which withhold information, submit false information and otherwise obstruct the activities of these agencies.

The examples of flawed and/or biased research by Judge Breyer which I will discuss are drawn from his recent book, *Closing the Vicious Circle,* originally published in 1993, with the slightly revised edition published several months ago. These are but a few representative examples of a much larger number which Judge Breyer discusses in the book.

THE DELANEY CLAUSE

One of the ways of criticizing federal health and safety regulation is to paint a statute as ridiculous. Judge Breyer, in *Closing the Vicious Circle* does just that with the Delaney Clause. This 30-plus year-old amendment to the Food Drug and Cosmetic Act prohibits the addition of any food (or color) additive which, in well-done studies in animals or humans, has been shown to cause cancer. On page 41 of the book, Breyer states that "Occasionally a statutory provision goes further, itself setting a standard that, if applied literally, seems unreasonably and pointlessly strict. * * * The Delaney Clause, applicable to food [and color] additives * * * seem[s] to instruct the agenc[y] not to permit addition * * * or packaging of or by any substance that contains even a single molecule of an offending chemical, however large the cost or small the risk."

In making this faulty assertion, Breyer has either missed or ignored FDA's constituents policy, which makes it clear that his fears of an "unreasonably and pointlessly strict" interpretation of the Delaney Clause is unfounded. This policy—in effect for more than a decade—has been upheld in the face of a federal court challenge. In 1982, the FDA approved a drug and cosmetic dye. Green 5, even though the dye contained trace quantities of a chemical impurity, p-toluidine, itself a carcinogen. Although p-toluidine alone, fed in large quantities, was a carcinogen, large quantities of Green 5, even though containing trace amounts of p-toluidine, *did not* cause cancer in animals. In its 1982 regulation approving of the dye, the FDA argued that p-toluidine itself was not a color additive and that, therefore, the Delaney Clause was inapplicable. This regulation was upheld in *Scott* v. *Food and Drug Administration* 728 F.2d 322 (6th Cir. 1984).

In this case, involving a direct color additive, it is clear that the FDA has the authority and flexil ility to apply the Delaney Clause, in the case of food or color additives, in a way which protects the public health but which, Judge Breyer notwithstanding, is not "unreasonably and pointlessly strict."

UNDERSTANDING OCCUPATIONAL AND ENVIRONMENTAL CANCER DEATHS

On page 6 of the book, Breyer states that the "range of expert estimates" for those cases of cancer which are caused by pollution and industrial products is from 10,000 to 50,000 deaths a year out of the 500,000 cancer deaths each year. In the endnotes, at the back of the book, however, is one expert estimate which has occupational toxic chemicals causing from 10 to 20 percent of all cancers and environmental toxic exposures causing from 5 to 10 percent of all cancers for a sum of 15 percent to 30 percent of all cancers or 75,000 to 150,000 cancer deaths a year. Another expert mentioned in the back of the book—former government occupational health physician Dr. Phillip Landrigan, now Chief of Occupational Medicine at Mount Sinai School of Medicine—estimated that occupational cancer along may account for as many as 75,000 cancers deaths a year. This is also cited in the references but ignored in the text of the book.

Equally striking is the omission, in the first edition of the book, of the importance of preventable occupational cancer. On page 6, it says that "only a relatively small portion of these [chemically-caused cancers] are preventable." In fact, almost all of the 10,000 to 100,000 occupational cancer deaths (the range of the expert estimates cited by Breyer in the book) are preventable and, to his credit, when this serious error was pointed out, the second edition was changed. Most of the evidence for chemical-induced cancer is among workers. Therefore, most chemical-induced cancer—from inexcusably delayed regulation of such substances as benzene, cadmium, chromium, ethylene oxide and many other chemicals—is and has been preventable and "regulatable."

ACCUSATIONS ABOUT OVERSTATING RISKS

On page 47 of the book, and in many other places, Breyer argues that, especially in the area of EPA and OSHA regulation, the magnitude of risk is greatly overstated. On page 47, Breyer says, "OMB argues that the agencies apply these assumptions too conservatively; it concludes that, taken together, they 'often' overstated risks by factors of 1,000 or even a million or more. * * * At the same time, even such assumptions sometimes can overlook special, much greater than average exposures—exposures via multiple pathways, or exposures that pose special risks to those who also smoke or are also exposed to other chemicals."

To illustrate his statement that OMB "concludes" that regulators who use conservative assumptions to estimate risk may overstate risks by 1,000 to one million times, Breyer cites OSHA's basis for setting standards for cancer-causing chemicals (page 46 of *Closing the Vicious Circle*): OSHA assumes factory worker exposure 8 hours a day, 5 days a week, 50 weeks a year for 45 years, that agency's example of this "conservatism".

In fact, OMB's conclusion about overstated risks is from a 1990 OMB report, "Current Regulatory Issues in Risk Assessment and Risk Management", written by OMB economist Richard Belzer. The report was attached by a prestigious group of experts in risk assessment including former National Cancer Institute Director, Dr. Arthur Upton, former *New England Journal of Medicine* epidemiology consultant and current Chair of the Department of Epidemiology, McGill University, Dr. John Bailar, Dr. Clark Health, Vice President for Epidemiology and Statistics, American Cancer Society and Dr. Adam Finkel, of the Center for Risk Management, Resources for the Future.

In a January 30, 1991 letter from these scientists to Dr. D.A. Bromley in the White House Office of Science and Technology Policy, they stated that "The broader allegation that risk assessment is generically 'conservative' is demonstrably suspect—The OMB document (and the references cites therein) fails to provide any evidence that risk assessment is in fact systematically 'conservative'."

In summary, on this point of a 1,000 to one million times overstatement of risk, the evidence to support such a claim is non-existent, in 1991 as well as the present.

TOXIC SUPERFUND DUMP SITE: KINGSTON, NEW HAMPSHIRE

In the first Superfund site case under that law, a toxic dump site, known as *Ottati and Goss* was the subject of litigation by EPA in a Federal District Court and in the First Circuit Court of Appeals in Boston, the court where Judge Breyer is the Chief Judge. The purpose of this example is not to challenge the First Circuit's upholding of the District Court's ruling that there was a need for abatement/remediation of the contaminated groundwater. Instead, the dispute is with the misleading way Judge Breyer characterizes this case in the book. On page 11 and 12, he says: "The site was mostly cleaned up." Referring to the concerns of children eating contaminated dirt on the site, he said "But there were no dirt-eating children playing in the area, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely. The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000."

What follows is drawn from the District Decision, the First Circuit's decision, and the government's (EPA's) brief (GB) and reply brief (RB) in the First Circuit Court of Appeals.

A. "The site was mostly cleaned up."

The site was *not* mostly cleaned up, and Judge Breyer knows this. Judge Breyer states, "We have examined those portions of the record that the parties have cited in their briefs." 900 F.2d 429, 432 (1st Cir. 1990). (a) IMC's (the remaining defendant's) own expert admitted that the average concentration of PCBs left on the site after cleanup was 87 ppm, "The contractor * * * seems to have accepted a characterization of an 'average' level of 87 [ppm] as reasonable." 900 F.2d 440, (b) A post cleanup study of 62 randomly selected test sites amounting to less than 1 percent of the site's total area, "uncovered 4 drums in that small area alone." Government Brief p. 40, (c) the PCB concentrations in the soil at the site are well above 50 ppm, and at least as high as 143 ppm. Three of five "samples exceeded 50 ppm (56, 134, and 143 ppm, respectively)," 900 F.2d 441, (d) "[t]he government's eight laboratory samples for VOCs at the IMC site post cleanup showed VOCs as high as 870 ppm," GB p. 46, (e) "[w]ithout VOC soil cleanup, the source of groundwater contamination will persist for decades," GB p. 47, and (f) IMC's own witness's statement that he "would be amazed if there were not some PCBs on the surface." Reply Brief, note 6. IMC also admitted using soil with PCBs up to 50 ppm as backfill, 694 Fed Supp 977, 982 (D.N.H. 1988).

B. "The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of highly diluted PCBs and 'volatile organic compounds' (benzene and gasoline components) by incinerating the dirt."

Not a "last little bit" (VOCs 870 ppm, average 87 according to IMC; 3/5 samples were greater than 50 PCBs, 900 F.2d 441).

The PCB left was not a small amount and was not highly diluted.

The VOCs left consisted of more than benezene and gasoline: acetone, arsenic, chloroform, creosol, toluene, trichloroethylene (which was found to be 3,000 times higher than the acceptable concentration in some of the wells), to name a few (comprehensive list at 630 Fed Supp 1361, 1383–90 (D.N.H. 1985)).

C. "But there were no dirt-eating children playing in the area there, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely."

A description of the site is found at 630 Fed Supp 1366. "The site is zoned rural residential according to the Kingston Zoning Ordinance," meaning "you can build a single family or a two story dwelling." Fed Supp 1000. "But the undisputed fact is that the site is zoned residential, which means that it may be developed for virtually any purpose." RB at 6.

There is no building there, but not because it is a swamp. "* * * IMBC's real estate witness stated that the site could have developed residentially but for the contaminate remaining on site, and explained that his conclusion concerning current development of the site was based on a view of the property during which he saw 'horrible looking water' and on the statement by IMC's counsel, after IMC's cleanup attempt, that the site was 'severely contaminated.'" RB at 7.

D. "The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000."

An IMC expert testified to this theory, 900 F.2d 440, but the Government disputed it in detail, "Allowing mere diffusion of VOCs in the soil rather than remediation would result in effectively condemning the site for use the foreseeable future, a 'remedy' plainly not permissible under Section 121 of CERCLA." See 42 U.S.C. 9621(b)(1) (strong preference for remedial action which "permanently and significantly reduces the volume, toxicity or mobility of the hazardous substance)." RB p. 7.

CONCLUSION

For me, and for many others concerned about occupational and environmental health and food safety, it is extremely disappointing that President Clinton was unable or unwilling to nominate someone with a more enlightened attitude toward the solution of these serious problems. Although stating that economic considerations are not as decisive in health, safety and environmental regulation, Judge Breyer's views, as expressed in this book, amount to an unfair and unwarranted bashing of the very federal agencies who are trying, to prevent toxic chemical-induced deaths and illnesses. I can only hope that, good listener that he is, Judge Breyer will listen to these concerns ad, to use his terms, become more influenced by the humanity of John Donne than by the corporate hand of Adam Smith, as appears to be the case at this time.

The CHAIRMAN. Thank you, Dr. Wolfe.

Mr. Constantine.

STATEMENT OF LLOYD CONSTANTINE

Mr. CONSTANTINE. Thank you, Senator. It is a pleasure to be back here again.

I oppose the nomination of Judge Breyer principally on the basis of his antitrust jurisprudence. One might ask why Judge Breyer's record in this area should be of substantial concern for the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe an understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to under-

standing his overall approach to the role of the judiciary in our society.

Antitrust scholars and practitioners widely recognize Judge Breyer to be among the major jurists revising and reinterpreting the antitrust laws according to one narrow school of economic thought.

In July 1990, I testified before the Commerce Committee concerning the capacity of antitrust law to address the problem of international trade predation. At that time I told Senators Gorton and Bryan that the antitrust laws had little remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the committee at that time. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison* while he reversed a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, MA.

On Tuesday, Judge Breyer said that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a price squeeze, which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price at which it sells electricity at retail. The remedy for this predatory practice is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices.

On Tuesday, Judge Breyer stated that he decided cases "one at a time" and that he did not "like to be professorial." However, in this decision, Judge Breyer expounds on many issues in cases not before the court. Although *Town of Concord* involved a price squeeze in a fully regulated industry, Judge Breyer went to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the soundness of Judge Learned Hand's classic price-squeeze analysis in the *Alcoa* case.

Judge Breyer then went on to unnecessarily expound to so-called single monopoly profit theory which, among neoclassical price theorists, is an article of faith. According to this theory, a monopolist will earn as much profit in a single market as it would if it extended its monopoly into a second market. Several conclusions flow from this theory. One is that in most cases the antitrust laws should not care if a monopolist extends his power from one market into another.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has set for cases which will come before him when he is on the Supreme Court. His opinion strongly predicts that Judge Breyer will vote to overturn the per se rule of illegality in trying cases. He will reject the rule against price squeezes in nonregulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market, are either competitively neutral or procompetitive. Finally, when the Supreme Court inevitably resolves the split in the circuits on whether monopoly leveraging constitutes a violation of section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's brooding concern for the rights and prerogatives of monopolists is a theme in many of his decisions.

For example, in the *Barry Wright* case, Judge Breyer found that a monopolist who made shock absorbers for the nuclear power plant construction industry did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 to 30 percent in response to the entry of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100-percent forfeiture of the contract price upon cancellation.

Taking the alleged exclusion acts one at a time, he ruled that none of them violated the antitrust laws. But this piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's brilliant analysis in *Alcoa.* An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe Machinery,* where, again, a series of separately lawful actions were held to collectively constitute illegal acts of monopolization.

Judge Wyzanski's famous statement still resonates today. He said:

> The dominance of any one enterprise inevitably * * * accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best.

In contrast, Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counterintuitive and contrary to the basic purpose of the antitrust laws.

In *Barry Wright,* the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which most antitrust judges consider lawful. But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers' incremental costs were also not predatory.

Again, in the *Kartell* case, Judge Breyer nullified a district court finding——

The CHAIRMAN. Excuse me, Mr. Constantine. You have gone way over, and I am in a bind. I have 2 minutes to get over there to vote. I am going to have to end your statement here. We will come back with Professor Estes. You can conclude when I come back, but I will be gone. There are going to be two votes back-to-back. I have 2 minutes to make this vote. I will vote and come back, and then we will go to Professor Estes and questions.

[Recess.]

Senator HATCH [presiding]. Mr. Constantine, why don't you conclude?

Mr. CONSTANTINE. OK. Well, thank you, Senator. I was just getting into finishing up.

As I was saying, in the *Kartell* case, Judge Breyer nullified a district court finding that Blue Shield, with a 74-percent share of the health insurance market, did not violate the antitrust laws by adopting a practice which fixed the prices received by virtually all

Massachusetts physicians. Judge Breyer honestly believes that, once again, a monopolist can be counted on to deliver lower prices.

What is totally missing from this decision—indeed, missing from all of Judge Breyer's decisions—is healthy skepticism about the long-term benefits of monopoly power, a skepticism which is the very core of the Sherman Act. Also missing is recognition of just how high and escalating were health care prices in an environment characterized by dominant rather than competing third-party payers.

To illustrate his method in *Kartell,* Judge Breyer compared buying health care to buying a fleet of taxicabs. Judge Breyer is undoubtedly a brilliant man, but much of the real world and the real marketplace is alien to him. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law when he is constrained only by his own sense of what is economically efficient.

In concluding, I would like to just briefly talk about the last antitrust decision by Judge Breyer in March of 1994, *Caribe BMW.* This was the first time in his career that he found for a plaintiff in an antitrust case. The decision is the most disturbing of all Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout was motivated by the widely known fact that he was under consideration for the next position on the Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act because BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to lower Caribe's retail prices by engaging in maximum vertical price fixing. It is true that maximum vertical price-fixing violates the law. However, Judge Breyer stretched as hard for the plaintiff, as he traditionally does for the defendant. It is also true that the rule against maximum vertical price fixing and the Robinson-Patman Act are the two most highly criticized antitrust rules. They are criticized because they usually prevent firms from lowering prices.

Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. So the result in this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMW's at lower prices to some of its customers and simultaneously being prevented from selling BMW's at a higher price to some of its customers. The context, timing, and result in this case exemplifies a degree of opportunism and cynicism which is disturbing.

I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way Judge Breyer approaches these vitally important cases in the future.

Thank you very much, Senator.

[The prepared statement of Mr. Constantine follows:]

PREPARED STATEMENT OF LLOYD CONSTANTINE

Chairman Biden and members of the Committee. Thank you for the opportunity to testify again, in this instance concerning the nomination of Judge Stephen Breyer to be an Associate Judge of the United States Supreme Court.

I am an antitrust litigator who represents plaintiffs and defendants including "Fortune 500" companies, small firms and groups of consumers.[1] I teach Antitrust Law at Fordham University School of Law. I have served as New York State's chief antitrust enforcer,[2] Chairman of the Task Force which coordinates antitrust enforcement for all 50 states,[3] Chairman of the New York State Bar Association's Antitrust Law Committee and as member of the Council of the American Bar Association Section of Antitrust Law.

I have devoted my professional career to antitrust law because I believe that along with civil rights and liberties, antitrust is at the center of our free and progressive society and has been central in making the United States the strongest and finest nation in the world.

I oppose the nomination of Judge Breyer. I do so principally on the basis of his antitrust jurisprudence. Given the fact that the Supreme Court typically renders only two to four antitrust opinions each year, among more than 150 full opinions, one might ask whether Judge Breyer's record in this area should be a substantial, let alone predominant, concern of the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe a sober and dispassionate understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to understanding his overall approach to the role of the judiciary in our society.

Antitrust law still has the capacity to be what the Supreme Court said it was, that is, "the Magna Carta of free enterprise."[4] However, antitrust is *not* that cornerstone of economic freedom today, because recent administrations and the federal judiciary have openly disregarded the explicit purpose and meaning of the antitrust laws, and reinterpreted them in accordance with one extremely narrow view of neoclassical price theory. Antitrust has been trivialized in what the scholar Frederick Rowe has termed "The Faustian pact between law and economics,"[5] a pact which has spread beyond competition law into the interpretation of environmental law and even the law of civil rights and civil liberties.

Antitrust scholars and practitioners widely recognize Judge Breyer to be, along with Judges Bork, Posner and Easterbrook, the mayor jurists revising and reinterpreting the antitrust laws according to one school of economic thought. Please allow me to illustrate. In July 1990 I testified before the Commerce, Science and Transportation Committee concerning the capacity of antitrust law to address the problem of international trade predation. I told Senators Gorton and Bryan that the antitrust laws had little deterence or remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the Committee. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison*,[6] while reversing a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, Massachusetts. In his colloquy with Senator Metzenbaum on Tuesday, Judge Breyer repeatedly stated that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a "price squeeze" which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price of which it sells electricity at retail. The remedy for this predatory and exclusionary practice, first exhaustively analyzed by Judge Learned Hand in the landmark *Alcoa* decision,[7] is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices. This would have the dual benefit of lowering all prices and increasing competition at the retail level.

More disturbing than the narrow result reached in *Town of Concord*, and the disingenuous manner in which Judge Breyer responded to Senator Metzenbaum's questions about his decision, is Judge Breyer's mode of analysis in this lengthy opinion. On Tuesday Judge Breyer stated that he decided cases "one at a time" and that he didn't "like to be professorial." Please Senators, read *Town of Concord* and judge for yourselves. In this decision Judge Breyer expounds on many issues and cases *not* before the court. Although *Town of Concord* involved what Judge Breyer considers the distinct case of a price squeeze in a fully regulated industry, Judge Breyer went

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[2] Assistant Attorney General In Charge of Antitrust, Office of the Attorney General, New York State, 1980–1991.

[3] Chairman Antitrust Task Force National Association of Attorneys General, 1985–1988.

[4] *United States* v. *Topco Associates*, 405 U.S. 596 (1972).

[5] Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics," 72 Geo. L.J. 1511 (1984).

[6] 915 F.2d 17 (1st Cir. 1990).

[7] *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the economic soundness and judicial administrability of Judge Hand's price squeeze analysis in *Alcoa*. Judge Breyer then went on to unnecessarily expound the so-called "single monopoly profit" theory which among neo-classical price theorists is an article of faith. According to this theory a monopolist will earn as much profit in a single market as it would if it extended its monopoly through leverage, or predation into a second market. The conclusions which flow from this theory are several. One is that in most cases the antitrust law should not care if a monopolist to do this in certain circumstances. Third, since the monopolist won't make any greater profit by doing this, evidence that it has done so is really just a mirage, for a rational monopolist would not try to extend its power if it would not be profitable.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has for cases which will come before him on the Supreme Court. His exposition of the single monopoly profit theory strongly predicts that Judge Breyer will vote to overrule established antitrust law in several cases. He will vote to overturn the *per se* rule of illegality in tying cases, involving firms with market power in the typing product. He will probably reject the rule against price squeezes in on-regulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market is either competitively neutral or pro-competitive. Finally, when the Supreme Court inevitably resolves the current split in the circuits on whether monopoly leveraging constitutes a violation of Section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's concern for the rights and prerogatives of lawful monopolists is a constant theme in several of his antitrust decisions.

For example, in *Barry Wright Corp.*, v. *ITT Grinnell Corp.*,[8] Judge Breyer found that a monopolist who made shock absorbers for nuclear power plant construction did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 percent to 30 percent in response to the entry into the market of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100 percent forfeiture of the contract price upon cancellation. Taking the alleged exclusionary acts one at a time, he ruled that none of them violated the antitrust laws. This piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's classic analysis of Alcoa's dominance of the aluminum industry, which resulted from a series of practices which did not separately violate the law, but which used together maintained a monopoly. An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe*,[9] where again a series of separately lawful actions were held to collectively constitute acts of monopolization in violation of Section 2 of the Sherman Act. Judge Wyzanski's famous statement in that case still resonates today: "the dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best." This completely alien to Judge Breyer's antitrust jurisprudence, which he articulates as a concern about lower prices. However, over and over again Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counter intuitive, and more important, contrary to the basic purpose of the antitrust laws.

Before leaving *Barry Wright*, I would point out that in that decision, once again, Judge Breyer reached out to decide cases not yet before his Court. In *Barry Wright*, the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which almost all antitrust scholars, judges and practitioners, I among them, would consider lawful and non-predatory. (Leaving aside the issue of the syncrgistic effect that this pricing had when used in combination with the other exclusionary practices in that case.) But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers incremental costs were also not predatory. Recall what Judge Breyer told you Tuesday about the judge's duty to only decide actual cases and controversies.

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[8] 724 F.2d 227 (1st Cir. 1983).

[9] *U.S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Again in the *Kartell*[10] case which Judge Breyer advanced as exemplifying his goal of lowering prices, Judge Breyer nullified a district court finding that Blue Shield, with a 74 percent share of the relevant health insurance market, did not violate the antitrust laws by adopting a ban on "balance billing," which effectively fixed the prices received by virtually all Massachusetts physicians accepting Blue Shield patients. I believe that Judge Breyer honestly believes that he did the right thing in that case, and he believes once again a monpolist can be counted on to deliver lower prices. What is totally missing from this decision, and indeed missing from all of Judge Breyer's decisions, is healthy skepticism about the long-term benefits of monopoly power, a skepticism which *is* the very core of the Sherman Act. Also missing is any recognition of just how high and out of control were healthcare prices in an environment characterized by dominant rather than competing third party payers. Also missing from the decision is any concern for the quality of healthcare which may be a paramount concern in this area. Antitrust not only demands low prices but high quality. Indeed, to illustrate his method in *Kartell*, Judge Breyer resorts to an analogy about the buyer of a fleet of taxicabs[11] and observes that if Blue Shield's practices were truly anticompetitive, there would not be a steadily increasing supply of doctors in Massachusetts.[12] If you don't understand the logic of this supply and demand argument, equating the purchase of healthcare with purchase of a fleet of cabs, please refer to Judge Breyer's diagram at Appendix B of his opinion in *Town of Concord*. Judge Breyer is undoubtedly a brilliant, good and honest man, but much of the real world and real marketplace is alien to him. One of the reasons many people voted for President Clinton was his pledge to appoint to the Supreme Court, people with a broader background. Broader than people like Judge Breyer who have gone from law school to clerkship, to law faculty to the Court, with a segue to position with this Committee. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law, when as a Supreme Court Justice he is constrained only by his own sense of what is logical and economically efficient.

The last case I will address is Judge Breyer's March 1994 decision in *Caribe BMW*,[13] when for the first time in his career he found for a plaintiff in an antitrust case. This decision in my opinion is the most disturbing of all of Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout in antitrust ideology and mode of analysis was motivated by the wisely known fact that he was under consideration for the next seat on the High Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act. Caribe said that BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to *lower* Caribe's retail prices by engaging in *maximum* vertical price fixing. It is true that maximum vertical price fixing violates the law. However, Judge Bryer stretched as hard for the plaintiff, as he traditionally does for the defendant, to find a plausible violation of the law here. It is also true that the rule against maximum vertical price fixing is one of the two most highly criticized antitrust rules. It is criticized because it often prevents firms from lowering prices, which Judge Breyer articulates as the antitrust laws' appropriate core concern. Senator Metzenbaum will not that his bill to codify the *per se* rule against vertical price fixing has never included the maximum vertical price fixing offense.

In *Caribe*, Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. Robinson-Patman is the other of the two most highly criticized provisions of antitrust, again because it allegedly raises prices. To sustain the Robinson-Patman claim, Judge Breyer had to break new ground, applying, I believe correctly, the rule of the *Copperweld*[14] case to the Robinson-Patman Act. The result tin this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMWs at a low price to some of its customers because of price discrimination and simultaneously being prevented from selling BMWs at a higher price to some of its customers because of maximum vertical price fixing. The context, timing and result in this case exemplifies a degree of cynicism which is disturbing.

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[10] *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F. 2d 922 (1st Cir. 1984).
[11] 749 F. 2d at 929.
[12] 749 F. 2d at 927.
[13] *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994).
[14] *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (19845).

Judge Breyer will be confirmed. I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way he approaches these vitally important cases in the future.

Senator HATCH. Mr. Estes.

STATEMENT OF RALPH ESTES

Mr. ESTES. Senator Hatch, Senator DeConcini, Senator Specter, I know there is important business occupying the Senate today, but I do wish that more members of the committee had the opportunity to hear the testimony of this panel, because coming late though it does in the hearings, it is very important testimony for the future of this country. And I do appreciate the opportunity to testify.

My testimony is based entirely on my reading of Judge Breyer's writings. I do not know the gentleman. I do not even know if I have seen him. His writings on the surface present an appearance of objectivity. They conceal much, but as you read them in the aggregate, they reveal much.

Throughout his writings, you can see in Judge Breyer an allegiance to business and corporations that could, through his opinions as a Supreme Court Justice, do great harm to our citizens and to our Nation. He asserts he does not favor complete deregulation, but he does want to free corporations from regulatory constraints, and he believes that in many more cases the market will appropriately constrain corporate behavior, if, indeed, as he seems to doubt, it needs much constraining.

Judge Breyer's ideas on corporate regulation are grounded in an erroneous free-market view of social costs. In this marketplace of Judge Breyer's, there is no distinction between corporations and people. To the judge, the Disney Corp. and the homeowner in Manassas, VA, are equal players in the economic arena, as are a woman who may have needed silicone breast implants and the Dow Corning Co.

In his economic calculus, the following are mathematically equal: On the one hand, a healthy, undamaged, whole child; on the other hand, a brain-damaged child, brain-damaged for life from a hot dose of DPT vaccine who has been awarded $25 million or whose family has been awarded $25 million to pay for round-the-clock care for the rest of that child's life. Those are economically equivalent in Judge Breyer's economic calculus.

Judge Breyer would prefer not to direct corporations to behave responsibly. Instead, he favors tax breaks and marketable, special rights, such as pollution rights, to try to get them to behave responsibly. Put in more down-to-earth terms, what he is talking about is bribing corporations to keep them from doing harm.

In this kind of approach, Judge Breyer, I am afraid, fails to show a real understanding of the historical basis in this country for chartering corporations. A good study of history would show him that corporations were created in the first place as servants of the people and of the society, and that a corporate charter is a grant of special privilege, conveyed by the people through their State, in expectation of benefits to society.

If Judge Breyer knew this history, I think he would support a public policy that demands that corporations behave responsibly in the first place, instead of one that tries to get them to do good—

be good, rather, by giving them tax breaks and special pollution rights that they can then sell.

Much of what Judge Breyer says about regulatory reform, of course, I would support, particularly with respect to regulations adopted at the instigation of industry to limit competition—trucking, bank CD interest rates—and also his arguments for greater corporate disclosure, very much needed. But beneath his scholarly tone, Judge Breyer's writings convey an antagonism to any but the most unavoidable constraints on corporations, a near reverence for business and corporations as adjudicator of social well-being and of social policy. In the aggregate, Judge Breyer's writings present a pattern of prejudice, almost of disdain, against arguments, research, and theories that support the protection of the public through limitations on abusive corporate actions, while he shows a symmetrical sympathy for theories and research that support hands-off deregulation. Judge Breyer's writings do not suggest a mind-set of judicious objectivity.

He manifests in the aggregate in his writings an aversion toward restriction of those corporate actions that do harm to workers and the public. Collectively, his writings reveal a preference for a laissez-faire role for Government that has been rejected in this country since the excesses of the robber barons in the last century. He appears to have little awareness of the aggregate cost of the harm done to society by corporate America, a cost I have estimated elsewhere at over $2.5 trillion a year.

Judge Breyer and corporate America may want the marketplace to adjudicate workplace safety, toxic emissions, dangerous products. But the effects that kind of prescription would have on many, especially on the poor and those less fortunate in our society is simply too brutal to be acceptable. We have learned the lessons of asbestos, of Love Canal, tobacco, the Dalkon Shield, BCCI, GM's side-saddle gas tanks.

Of course, as others, including members of this panel, have noted, one of the strongest measures of Judge Breyer's devotion to big business is his stunning record and 16 and 0 in antitrust cases. Now, just think about it statistically. That kind of record says that either Judge Breyer in his court received an incredible sequence of 16 consecutive, ill-conceived cases without merit, or else his decisions reflect a closed mind and a personal antagonism to antitrust enforcement.

If you had a population of more or less evenly divided cases, the probability of this, against this, is 65,536 to 1. Now statistical improbability alone does not prove a bias. I know that. But the Wall Street Journal is satisfied. They said, "This is one of the few areas where"—and I emphasize—"the nominee appears to have made up his mind." And they add, "He agrees with much of the agenda promoted by Reagan administration officials."

To wrap up, Senator Biden said this morning that Judge Breyer presents incredible credentials. I do not argue with that. But credentials are not all that matter. More important is what Judge Breyer's position on the Supreme Court will mean for the country.

Judge Breyer has shown through his writings and through his record that as a Supreme Court Justice he will be disposed to rule in favor of corporations against the people and to dismiss regula-

tion designed to protect the environment and human health and safety in favor of a hypothetical free-market discipline.

Gentlemen, if a nominee came before this committee with a record of siding with the defendant and rejecting every civil rights claim heard by him in 14 years, what would you do? You would reject that nominee out of hand, not only because of his clearly hostile attitude toward civil rights, but because you would not place someone on the Supreme Court with such a closed mind on an issue of fundamental importance to our society.

In his writings, Judge Breyer has shown a favoritism to corporate interests over those of the people, a lack of empathy for the poor and less fortunate in our society, and an autocratic view of policymaking and an unusual, at best, interpretation of the U.S. Constitution. If Judge Breyer's writings are a guide to the way he will act as a Supreme Court Justice, gentlemen, then the public will ultimately suffer for the sake of corporate profits. More people will become ill. More will be injured. More will suffer personal economic loss. And some number will die.

Articulate, arrogant, elitist, and too often wrong, a wolf in sheep's clothing who will lead the Supreme Court in this area of his special interest down a dangerous path that will be hazardous to our health. The President and the American people would be better served with a different nominee, one less loyal to corporate interests.

Thank you.

[The prepared statement of Mr. Estes follows:]

Center for Advancement of Public Policy

Testimony (Annotated) of Ralph Estes

Hearings on Confirmation
of Judge Stephen G. Breyer
to the U. S. Supreme Court

Senate Judiciary Committee

July 15, 1994

1735 S Street NW Washington, DC 20009 (202) 797-0606

The purpose of my testimony is to provide information that may assist the Committee in evaluating Judge Breyer's writings, opinions, and views on the corporate system and corporate regulation. My testimony is informed by three decades of research on corporations and regulations, and through service as expert witness on economic loss in numerous wrongful death and personal injury cases.

I am a full professor of business administration at The American University, fellow at the Center for Advancement of Public Policy, author of eight books and over fifty scholarly academic articles. My doctorate is from Indiana University and I am a certified public accountant, formerly with Arthur Andersen & Co.

Judge Breyer's writings give the surface appearance of objectivity. In these he is not prone to overt statements about his personal views, and after extensive reading one is left unaware of his views on many matters of public concern.

But in certain areas his views are revealed quite clearly. Just as an individual's positions and preferences become more evident through the totality of their actions than in singular assertions, so too are Judge Breyer's views concerning corporations and regulation cogently disclosed in the consistent bent reflected in the accumulation of his writings. These reveal that:

- Judge Breyer demonstrates a fundamental lack of understanding of the role of the corporate system in American society, and the historical basis of corporate chartering: the granting of special privileges to private entities in expectation of public benefit.[1]

- His ideas on corporate regulation are grounded in an erroneous "market" view of social costs, or "spillovers."[2]

- In his writings Judge Breyer sets out to teach others about the applicability of statistical and mathematical theory in regulatory discourse, but he reflects an insufficient understanding that results in his misuse of the mathematics and statistics he attempts to apply.[3]

- Judge Breyer's conception of public policymaking reflects an autocratic, undemocratic, and elitist view, as well as an unusual, perhaps even a unique, understanding of the U.S. Constitution.[4]

- Judge Breyer's writing demonstrates a lack of empathy for the poor and for lower income workers and families.[5]

Should Corporations be Favored Over People?

Throughout his writings Judge Breyer evinces an allegiance to business and corporations that could, through his opinions as a Supreme Court justice, do great harm to our citizens and our nation. And while asserting that he is not for complete deregulation, he wants to free corporations from regulatory constraints and believes that in many more cases the market will appropriately constrain corporate behavior -- if indeed, as he seems to doubt, it needs constraining.

Judge Breyer would prefer not to direct corporations to behave responsibly; he instead favors tax breaks and marketable rights to induce socially-responsible behavior. "A more feasible method [than postulating rules] would combine fairly simple rules with economic incentives such as tax breaks or marketable rights."[6] With respect to externalities or spillovers such as pollution, noise, dirt, and waste, Judge Breyer believes, "Classical regulation is not able to deal comprehensively with spillover problems. Taxes, marketable rights, and even bargaining are likely to prove useful as substitutes or supplements."[7]

Judge Breyer's approach seeks to bribe corporations to keep them from doing harm. He apparently fails to recognize that a corporate charter, under which most business activity is conducted, is a special grant of privilege conveyed by the people, through the state, in expectation of benefits to society. If Judge Breyer understood more about the origin of the corporate system, he would support a public policy that demands that corporations behave responsibly in the first place, instead of a policy that seeks to induce responsible behavior by giving corporations tax breaks and special rights to be sold.[8]

Much of what Judge Breyer says about regulatory reform I would support. He is on target, for example, when he observes that each action bears a cost, and there may be better actions we could take for the same cost; or that we should take a systemic approach to regulation that considers harm that may be caused elsewhere by a regulation designed to do good. And his skepticism is likely justified with respect to regulations adopted at the instigation of industry to limit competition - trucking, bank CD interest rates - although not with respect to regulations that protect the public.

There is a prevalent, underlying philosophy beneath the scholarly tone in Judge Breyer's writing, however, that conveys an antagonism to any but the most unavoidable constraints on corporations, a near-adulation of business and corporations as adjudicator of social well-being and of social policy. In the aggregate Judge Breyer's writings present a pattern of prejudice, almost of disdain, against arguments, research, and theories that support the protection of the public through limitations on abusive corporate actions; and a symmetrical sympathy for theories and research that support laissez faire deregulation.[9] Judge Breyer's writings suggest the ardor of the religious convert, except in this case it was conversion to the religion of economic theory -- albeit a misinformed theory, as articulated by Judge Breyer.[10] His writings do not suggest a mindset of judicious objectivity.

Judge Breyer's enthusiasm for economic theory is reflected in his emphasis on economic efficiency rather than equity. He accepts the propriety of "classical" regulation if it reduces "allocative inefficiency."[11] He does not speak of regulation being required to achieve equity and fairness, to save lives or prevent crippling injuries, to protect those whose economic resources are such that "allocative efficiency" is meaningless. At least in his writings prior to this nomination, these were not the terms of Judge Breyer's vocabulary. As one reviewer observed, "If presidents and Congresses ignore Judge Breyer's prescription for regulatory reform, it will result from their disagreement with the proposition that economic efficiency is the sole objective of government regulation . . . "[12]

Several have noted Judge Breyer's record of consistently finding for corporate defendants in antitrust cases. The St. Louis Post-Dispatch, for example, reported that "Breyer voted against antitrust claims more often than the most conservative appointees of President Ronald Reagan."[13] George Mason University law professor William Kovacic is reported to have found that Judge Breyer voted 100% of the time on the side of big business in antitrust cases.[14] Charles Mueller observed in Legal Times that:

> Breyer's antitrust decisions display one especially conspicuous principle: The corporate defendant always wins, no matter how egregious the challenged conduct. He has never met a monopoly or a restraint on competition that he didn't like, ruling for the big-business defendant 16 times in the 16 antitrust decisions he wrote during his 14 years on the U.S. Court of Appeals for the 1st Circuit. . . The result is that Breyer has effectively repealed the federal antitrust laws in his four-state (plus Puerto Rico) jurisdiction."[15]

Now I am not a lawyer, but just considered statistically it would appear from this record that either Judge Breyer's court received an astounding sequence of sixteen consecutive ill-conceived cases without merit, or else his decisions reflect a personal predisposition that is antagonistic to antitrust enforcement.

Of course statistical improbability alone does not prove a bias, but The Wall Street Journal is satisfied: "This is one of the few areas where the nominee appears to have made up his mind. He agrees with much of the agenda promoted by Reagan administration officials who staffed the Justice Department and federal courts with opponents of aggressive antitrust enforcement."[16] [emphasis mine] Business Week draws a similar conclusion: "He is skeptical of government interference in markets and sympathetic to defendants in antitrust cases."[17]

Skeptical of government interference in markets indeed. Judge Breyer has stated that, with respect to air and water pollution, "the essential problem is that the price of a product made by means of a polluting process does not reflect the harm that the resulting pollution causes."[18] He does not say that the essential problem is that peoples' health, their property values, and their quality of life are damaged. His writings suggest that it would be acceptable for a manufacturer of industrial chemicals to poison a neighborhood as long as its prices were made, through taxes, to be high enough to reflect these social costs. He does not reveal a concern for preventing the damage done, against the *will* of the families and communities harmed, in the first place.

Judge Breyer admits that federal regulation has reduced the number of auto deaths, and that the environment is clearly cleaner ("in some parts of the country"), but he thinks that whether these effects are worth the cost "is open to debate." Here, as elsewhere, his concern is with cost to business, not cost to those who suffer the harm.[19]

But, by and large, it is not Judge Breyer's individual statements that especially cause concern. It is the continued repetition of emphasis on cost to the corporation without a balanced attention to harm to the public.[20]

Judge Breyer manifests, taking his writings in the aggregate, an aversion toward restriction of those corporate actions that do harm to workers and the public. Collectively, his writings reveal a preference for a laissez-faire role for government that has been rejected in American society since the rise of the giant corporation and the excesses of the Robber Barons in the last century. He appears to have little awareness of the aggregate cost of the harm done to society by Corporate America, a cost I have estimated elsewhere at over $2.5 trillion each year.

Judge Breyer and Corporate America may want the marketplace to adjudicate workplace safety, toxic emissions, and dangerous products, but the effects such a prescription would have on many, especially the poor and those who are weaker, is simply too brutal to be acceptable to the vast majority of Americans. The Congress and the American people have rejected that approach. We have learned the lessons taught by asbestos, Love Canal, the tobacco companies, the Dalkon Shield, silicone breast implants, BCCI, the Exxon Valdez, Times Beach, the Ford Pinto, GM's sidesaddle gas tanks.

Summary

We have heard repeatedly that Judge Breyer has superb qualifications to sit on the Supreme Court. But we know that qualifications -- IQ, academic degrees, a full curriculum vita -- are not all that matter.

If a nominee came before this Committee with a record of siding with the defendant and rejecting every civil rights claim heard by him in 14 years on the Court of Appeals, this Committee would not, I am sure, vote to confirm -- not only because of his clearly hostile attitude toward civil rights, but because you would not accept such a closed mind on an issue that reaches to the heart and the spirit of our society.

Judge Breyer, as we know, sided with the defendant in every antitrust case that came before him in 14 years on the Court of Appeals. In so doing he manifests an antagonism to Congress's efforts to restrain the ever-expanding power of colossal corporations, and so to hold large corporations accountable to the public responsibility inherent in their publicly granted charters.

As you review the record of these hearings I would urge that you not focus on detailed incidents such as a failure to pay taxes for domestic help, or a possible conflict of interest in rulings on matters that conceivably could have affected his potential financial liability on Lloyd's of London investments. I would urge you to ask instead: What will it mean for the country to have this nominee on the U. S. Supreme Court. Judge Breyer has shown, through his writings and through his record, that as a Supreme Court justice he will be disposed to rule in favor of corporations against the people, to reject appropriate restraint on corporate power, to dismiss regulation designed to protect the environment and human health and safety in favor of a hypothetical "free market" discipline.

If Judge Breyer acts on the Supreme Court in a manner that is consistent with the preponderance of his public writings, the public will ultimately suffer for the sake of corporate profits. More will become ill, more will be injured, more will suffer personal economic loss -- and some number will die.

The President and the American people would be better served with a different nominee -- one less loyal to corporate interests.

Notes

1. In his writings Judge Breyer generally draws no distinction between corporations and people. To the judge the Disney corporation and a homeowner in Manassas are equal players in the economic arena, as are General Motors and a farmer in Oklahoma buying a pickup truck with sidesaddle gas tanks, or a woman who needed silicone breast implants and the Dow Corning Company.

Overall his writings show little understanding of the aggregate power of large corporations:

- Government can invoke the death penalty and take us to war, but Corporate America is responsible for far more deaths than government. From 1973 through 1991, 1,529 people died from the death penalty and military action combined; during that same period 156 times as many workers, a total of

239,300, died on the job at the hands of industry. An additional untold number of people died from industrial pollution, poisonous food and medicine, and dangerous appliances, equipment, and vehicles. (Statistical Abstract of the United States 1985, Table 712; Statistical Abstract of the United States 1989, Tables 326, 547, 680; Statistical Abstract of the United States 1992, Table 665; National Safety Council, August 1993)

- Corporations control 84% of nongovernment payroll, 67% of total payrolls
- Corporate receipts and spending are more than *10 times* as great as the federal government's (Statistical Abstract of the United States 1992, Table 492, "Federal Receipts, by Source: 1980 to 1992.").
- Corporations control our culture, from the media to entertainment to advertising to taste. A typical child sees 22,000 commercials a year, an average of over 400 a week -- some 350,000 commercials by age 18, and virtually all presented in pursuit of private profit. (Robert M. Liebert. "Effects of Television on Children and Adolescents." Developmental and Behavioral Pediatrics, February 1986, pp. 43-48)
- Ranked by their revenues, the larger corporations nest snugly among the larger countries of the world. Several multinational corporations command resources greater than the tax revenues of such developed nations as Switzerland, Denmark, and Austria (Statistical Abstract of the United States 1990, Table 1456, and Fortune, April 24, 1989, p. 354.), not to mention the hundreds of smaller countries. In their ability to affect lives through expenditure of funds, the largest corporations are more powerful than most countries.
- "The fact that . . . government activities are highly visible, in comparison with those of the corporation, has led to the notion that the prime exercise of social control is done by government. On the contrary, so long as investment decisions are made by the corporations, the locus of social control and coordination must be sought among them; government fills the interstices left by these prime decisions." (Harry Braverman, Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century, New York: Monthly Review Press, 1974, pp. 268-9)

As Professor Galbraith has said, "The truly giant corporations . . . are independent republics of their own management."

2. Breyer's "market" view of externalities is wrong, in two ways: he sums interpersonal utilities, equating a 1 cent cost saving by a sugar producer with a 1 cent reduction in price to sugar buyers -- ignoring that pollution sufferers aren't exactly or necessarily the same persons as the sugar buyers. He fails to properly match up the bearers of the costs and the recipients of the benefits. This was the problem with Ford's Motor Company's use of cost-benefit analysis on moving the Pinto's gas tanks -- and numerous other regulatory uses of cost-benefit analysis. [Regulation and Its Reform, p. 23]

In Judge Breyer's economic calculus these are mathematically equal: a child that is brain-damaged for life from a "hot" batch of DPT vaccine, whose parents receive a $25 million award for around-the-clock care, vs. a child that is undamaged, whole.

When applied outside the domain of business, Judge Breyer's "free market" views would sanction arguments against the "regulation" of street muggings and assaults, on the grounds that such assaults are an economically efficient means of achieving resource distribution. He has shown an unwillingness to apply or extend the criminal and regulatory sanctions we impose on individual behavior, to the often much more harmful behavior of corporations.

Judge Breyer lays down what he sees as criteria for regulation of spillovers or social costs. If his criteria are met, he says regulation can then "reduce allocative inefficiency." He does not speak of equity. He does not speak of innocent neighbors, communities, workers wrongfully harmed. He does not conclude that, under his criteria, regulation will save lives and protect communities. It will reduce allocative inefficiency. [Regulation and Its Reform, p. 26]

He continues: before regulation should reverse an apparently sanctified "market-made decision," the social cost should meet certain criteria, one of which is that it be large. A plant that damages a few lives, reduces the value of a few homes, causes only some misery, should not be regulated. The damage must be "large." What would Judge Breyer tell these few affected workers, customers, neighbors? Sorry? Presumably he would accept regulating the behavior of a single murderer. But when the harm is done by business, by corporations, it must be a "large" harm to warrant interference with the "free market." [Regulation and Its Reform, p. 26]

Speaking of spillovers (or external diseconomies, social costs -- uncompensated costs imposed on those outside the company) caused by products, in this case sugar production that "sends black smoke billowing throughout the neighborhood," Judge Breyer says that, with regulation of this smoke, "those who suffer pollution are made richer." This is the sterile, technocratic economist approach to pollution. Judge Breyer does not say, "those who suffer pollution are made whole" or "are restored to their previous undamaged condition." His focus, his thinking, is purely on an economic calculus with no evident (in this instance) thought about equity, about fairness, about who was wrongfully damaging whom in the first place. No, to Judge Breyer pollution regulation makes the sufferer of pollution richer. [Regulation and Its Reform, p. 25]

As Professor Sheila Jasanoff, professor of science policy, chair of the Dept. of Science and Technology Studies at Cornell Univ., and author of books on risk management and on science policy, has noted "Judge Breyer's view of what constitutes an efficient market is hopelessly wrong."

3. Judge Breyer equates certainty with expected value in examples about soldiers and escape routes (a probability-weighted expected value of 400 lives lost -- 1/3 prob. that all will be saved, 2/3 prob. that all will die -- is not the same as certainty that 400 lives will be lost, since in the first instance there is a reasonable chance that all will be saved (and a larger chance that all will die), whereas in the second 400 will die and 200 will live, for sure. Judge Breyer is ignoring utility functions, as he also does in his market-based solutions to pollution. He knows part of the mathematics and arrogantly criticizes the public for not knowing as much ("people do not understand the counterintuitive consequence of certain important statistical propositions.") [Breaking the Vicious Circle, p. 36-37].

He thes speaks of "deviation toward the mean" (he means regression toward the mean, or that the mean of the sampling error approaches zero as more and more samples are drawn). He uses this concept erroneously, confusing the difference between mean test scores of the group and mean scores for an individual. In an example the judge says an individual who scores high on one test will most likely do worse on the next. In fact, an individual who scores high on one test will most likely, ceteris paribus, score high on the next test. But a group that scores well above its norm, or mean, will most likely score lower as a group on the next test. Judge Breyer then observes, "The statistical deviation toward the mean is positively reinforcing the teacher's negative reinforcement, and negatively reinforcing the positive reinforcement." [Breaking the Vicious Circle, p. 37]

4. Judge Breyer proposes an administrative superagency that would rule over regulatory agencies, by taking policy and budget power away from elected representatives and placing it in the hands of insulated bureaucrats] He says it must have "interagency jurisdiction" to "bring about needed transfers of resources." Congress, one assumes, can just go home. He wants his superagency to have a degree of "political insulation" to withstand political pressures "that emanate from the public directly or through Congress or other political sources" (Breaking the Vicious Circle, p. 60).

". . . one important objective is to limit the extent to which public debate about a particular substance determines the regulatory outcome. . ." Context is that he wants

decisions made on basis of expert analysis, not public pressure, but he shows little concern for the danger of excluding public input (Breaking the Vicious Circle, p. 78). (He also says his superagency proposal is a counter to arguments for deregulation; Breaking the Vicious Circle, p. 80.)

In "Judicial Review of Questions of Law and Policy," Administrative Law Review, v. 38 (Fall 1986), pp. 363-398, Judge Breyer cites admiringly France's Conseil d'Etat as a model for this superagency that would review and change regulations and reallocate funds among programs; he admires the facts that the Conseil "is not bound by the strictures of the adversary system," presents its results "without being confined to a formal record," is able to conduct its deliberations in private without counsel present (pp. 396-97). His superagency would directly affect national policy, yet he likes the idea of a "nonpolitical" body shielded from public input and public scrutiny. [In Breaking the Vicious Circle it is clear that the Conseil doesn't have the resource-reallocation power Breyer wants his superagency to have.] Then after pages of admiration for this French approach, he assures us that his article does not endorse any approach discussed (p. 397).

Judge Breyer says this his proposal is likely to engender objections that it sounds undemocratic and elitist, and then (p. 74) summarily dismisses this charge as not an argument but merely a pejorative label

Judge Breyer is proposing a superagency to reallocate budgetary funds among competing programs, that would override or supercede Congress's constitutional responsibility? This would appear to reflect an unusual, even unique, understanding of the Constitution.

5. Judge Breyer's fondness for market solutions reflects a harshness, a lack of sympathy or concern, for those without the means to adequately defend their rights and express their needs in the marketplace (see Note 2 regarding his harsh allegiance to the justice of the marketplace). Nowhere was I able to find any recognition that the marketplace is a fine mechanism for resource allocation only as long as one has the financial resources -- is wealthy enough -- to adequately express one's preferences. It is analogous to a voting booth in which one votes with dollars, and those without the dollars are disenfranchised. They do not have a vote in this kind of balloting on health care, their workplace safety, or the pollution, noise, and odors dumped on them by a chemical plant down the road.

In his review of "Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective" by Tomas J. Philipson and Richard A. Posner (Harvard University Press, 1994), in The New York Times Book Review, Judge Breyer says that ". . . [Society] has built a Social Security system around the concern that rational individuals may not properly save for old age . . ." In writing that individuals may not properly save for old age, instead of recognizing that they may, in fact, not be able to save, Judge Breyer's writing suggests a lack of connection with, or sympathy for, the poor and lower income workers and families -- the ditch diggers, perhaps -- who have nothing to save. ["The nominee, in his own words: A 'mandate of equal justice under law'," New York Times, May 15, 1994, 1, 30:1]

6. Stephen Breyer, "Reforming Regulation," Tulane Law Review, v. 59 (Oct. 1984), pp. 4-23, specifically p. 4.

7. Stephen Breyer, Regulation and Its Reform (Harvard University Press, 1982), p. 195. Later on p. 261 he also attacks standard setting for dealing with spiliovers.

8. For an explication of the public purposes in creating corporations, see Ralph Estes, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things -- And How We Can Change Them*, forthcoming.

9. In this regard one notes his uniform rejection of antitrust complaints.

One also notes his selectivity in presenting evidence related to his arguments. Professor Jasanoff (see note 1) observed that Judge Breyer's Breaking the Vicious Circle is "not in any sense a complete accounting of what is known about risk. He left out a vast body of highly-respected research and analysis. He appeared unaware of 10 years of writing about risk. Perhaps he had formed his judgments already. Judge Breyer displays advocacy behavior while cloaking his views in a veil of neutrality. He may not even be aware of this behavior."

Professor Jasanoff referred particularly to research reported during the 1980s that indicate the average person integrates probabilities and risk factors more completely than Breyer acknowledges. One can, of course, only speculate as to whether Judge Breyer omits any mention of this research because it is counter to the position he has adopted.

10. See Note 1.

11. Regulation and Its Reform, p. 26.

12. Victor H. Kramer, review of Regulation and Its Reform in the George Washington Law Review, March 1983, pp. 484-490, specifically p. 489.

13. May 15, 1994.

14. Tony Mauro, "Not everyone happy with the nomination," USA Today, May 16, 1994, p. 4A, citing 1993 study.

15. Charles E. Mueller, "The Big-Business Bias in Breyer's Decisions," Legal Times, week of May 23, 1994, pp. 33.

16. "Supreme Court Nominee Wins Business's Approval," The Wall Street Journal, May 16, 1994.

17. "Business Has An Amicus in Stephen Breyer," Business Week, May 30, 1994, p. 40.

18. Regulation and Its Reform, p. 261.

19. Regulation and Its Reform, p. 2.

20. As in the following statement: "Agencies whose primary mission is to protect the environment or health . . . often tend to downplay or disregard the economic costs which protective regulations impose on industry and consumers." (Administrative Law and Regulatory Policy, p. 310)

The CHAIRMAN. Thank you very much, Professor.

Before we move on, I have received a formal request from Mr. Lloyd N. Cutler, special counsel to the President, to ask that a letter directed to me be placed in the record, responding to what he characterizes as a personal attack by Mr. Nader on him. I will place it in the record and make it available to the press and the public if they wish it.

[The letter follows:]

THE WHITE HOUSE,
Washington, July 15, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, Washington, DC.

DEAR MR. CHAIRMAN: Because Ralph Nader's testimony against the nomination of Judge Breyer makes a personal attack on me, I respectfully ask permission to file this reply for the record.

Mr. Nader has made it a practice to advance his public policy views by demonizing some person or entity on the other side of the issue. Unfortunately for me, I have long been one of his favorite targets.

Mr. Nader asserts that the President's selection of Judge Breyer was tainted because of my position as a special government employee (SGE) serving as Special Counsel to the President. Specifically, he contends that this status permits me to evade "a number of conflict-of-interest and disclosure statutes."

Before I undertook my current position, ethics officials in the White House and the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement. Consistent with the law and standards of conduct, I have disqualified myself from any matters in which the firm is a party or represents a party, as well as matters that would affect the financial interests of the firm. Moreover, contrary to Mr. Nader's assertion, I have voluntarily taken a number of steps that go beyond the requirements of the law, precisely because of my commitment to openness and integrity in Government.

For example, to ensure that my financial and client information is open to public security, I have filed a public disclosure form which has been published in full in the *Legal Times*, although only a more limited confidential form is required. Additionally, while I have chosen to serve without government compensation, I have also arranged to have my salary from the law firm reduced to reflect the time I am devoting to government service. I have made this arrangement even though the law applicable to volunteers and special government employees would permit me to receive my full salary from my law firm. Moreover, because I am no longer a member of the firm, but rather a salaried Senior Counsel who will be paid only for the time I work at the firm, I can take no "draw" from the law firm at the end of the year, as Mr. Nader conjectures. I have also agreed to be bound, while in public service, by the representational bar of 18 U.S.C. §205 as it applies to regular government employees, even though special government employees have more limited restrictions. And not only will I adhere to the post-employment restrictions of the criminal law, but I also have announced my intention to comply with President Clinton's Five Year Ethics Pledge for Senior Appointees, which is not otherwise applied to special government employees.

Finally, the decision to nominate Judge Breyer was obviously the President's alone. On Supreme Court nominations, the President solicits and receives advice from many people, including his own staff, members of the Senate and private citizens and groups speaking for every kind of public and private interest. My own advice was given in the spirit of public service and without any thought of personal or financial advantage.

Sincerely,

LLOYD N. CUTLER,
Special Counsel to the President.

The CHAIRMAN. I would yield to Senator Hatch.

Senator HATCH. I have no questions for this panel, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Let me ask the panel, because it concerns me, of the testimony I read of Mr. Nader and Mr. Estes. I did not read the other ones,

but I heard some of them here, regarding Stephen Breyer's position on antitrust. Let me just say this: Given that Breyer is only one of a small part of a much larger structure which works to balance the needs of consumers and business, Mr. Nader, how do you justify a statement that his presence on this Court will cause antitrust law enforcement to sink into a deeper moribund state?

Mr. NADER. Well, I concede that if you believe it is already in a moribund state, it might not sink any lower.

Senator DECONCINI. Well, do you believe it is in a moribund state?

Mr. NADER. Yes.

Senator DECONCINI. OK.

Mr. NADER. And the reason why I say it will sink lower is because it adds not only an additional voice to the nonenforcement of the antitrust laws, but an aggressive voice, and one, because of his writings, would be entitled by people on the Court who agree with him generically to considerable deference.

Senator DECONCINI. Let me ask you this, then, and anyone else: In answering questions from Senator Metzenbaum, Judge Breyer indicated that he utilizes a three-part guideline when reviewing complex or technical antitrust cases. In his view, antitrust is, first, all about getting low prices for consumers; second, getting better products for consumers; and, third, getting more efficient methods of production.

Now, my question is, is that not the proper standard for these cases, and is there anything wrong in that standard?

Do you want to start, Mr. Estes?

Mr. CONSTANTINE. May I start, Senator?

Senator DECONCINI. Yes; go ahead.

Mr. CONSTANTINE. That is not what antitrust is all about. Antitrust is all about what the Congress enacted in 1890 and 1914, and in 1950, with the Seller-Kefauver amendments. Antitrust is about industrial concentration; it is about preventing monopolies; it is about maintaining small business; it is about a lot of political and social ideals. On the next panel, you will have——

The CHAIRMAN. For what purpose?

Mr. CONSTANTINE. For the purpose of——

The CHAIRMAN. You just stated objectives, but for what purpose?

Mr. CONSTANTINE. One of the purposes, Senator, is to keep prices low, but the question is whether low prices are derived by large, efficient monopolists, or——

The CHAIRMAN. Well, that is the question, but the purpose is——

Mr. CONSTANTINE. One of the purposes.

The CHAIRMAN [continuing]. One of the purposes. What are some of the other purposes? The question was what are the purposes—not the posturing—what are the purposes?

Mr. CONSTANTINE. The purposes, Senator, were also to spread out power in this country——

The CHAIRMAN. Right; good. That is an answer.

Mr. CONSTANTINE [continuing]. To maintain small businesses——

The CHAIRMAN. For what purpose, though, to maintain small businesses?

Mr. CONSTANTINE. Because those were viewed as being goods in and of themselves; because those were political ideals that were

specifically adopted by the Congresses that passed both laws, Senator.

The CHAIRMAN. I apologize for interrupting. Thank you.

Senator DECONCINI. Thank you, Mr. Chairman.

But having said what you just said, one of them, at least—lower prices for consumers—you agree with?

Mr. CONSTANTINE. Certainly; but Judge Breyer's decisions do not point in that direction.

Senator DECONCINI. Well, I am not debating they are; I am just defining a standard, first of all. Now, getting a better product—is that a proper purpose? Is that a proper standard?

Mr. CONSTANTINE. Absolutely, Senator.

Senator DECONCINI. It is. And getting more efficient methods of production?

Mr. CONSTANTINE. Certainly, Senator.

Senator DECONCINI. Now, given that, the Judge says that is his standard, and you disagree that he has applied that standard.

Mr. CONSTANTINE. Yes, Senator.

Senator DECONCINI. OK; that is what I wanted to get clarified, because it seems to me that his standard, even though it was not as in-depth as you think should be considered, he does have a standard that he has put out there as a marker.

So do the rest of the witnesses agree that this standard is not an objectionable standard—it may not be everything that you want but is a reasonable standard—first of all.

Mr. NADER. Senator, it is crucially incomplete, because——

Senator DECONCINI. OK; but does it have some proper elements from the standpoint of what antitrust is?

Mr. NADER. But is misses the most important predicate, which is to have an economic system that allows economic opportunity on the part of small business, entrepreneurs and other entries, whether it is new technologies or a variety of businesses. Without that market structure and market conduct, the other three purposes that he posits will not likely to occur.

Senator DECONCINI. You mean you cannot get lower prices for consumers or better products, and not have small business?

Mr. NADER. If you do not have economic opportunity and new entries——

Senator DECONCINI. Yes, so——

Mr. NADER [continuing]. Because over time, you will get oligopolist stagnation and monopolies.

Senator DECONCINI. How will you get lower prices, better products for consumers, and not have more businesses? You would have to have more businesses, wouldn't you?

Mr. NADER. No—yes, you would, but you see, he does not point that out.

Senator DECONCINI. No, but that is his standard. Now, the fact that you disagree on whether or not he has followed this standard——

Mr. NADER. Yes; his standard, Senator, are the fruits of a tree, not watering its roots. And you have got to water your roots.

Senator DECONCINI. But the point is he is not without some sense—you may disagree with what that is—of what antitrust is. And I may disagree with some of his decisions, and some of the

ones you read to us, which I have not read, I would not agree with the decision, either. But I do not think he is without at least a standard that he applies. That is all I want to know.

Now, Mr. Nader, in your statement, I believe, and in the media, you have criticized Judge Breyer for being a follower of the Chicago School of Economic Analysis, which emphasizes the importance of the cost-benefit analysis in court decisions. The criticism continues, although Judge Breyer has explicitly rejected that school's approach.

So in your view, what is the proper role of economic analysis in court decisions?

Mr. NADER. In the antitrust area, or regulatory?

Senator DECONCINI. Sure.

Mr. NADER. In the antitrust area?

Senator DECONCINI. Yes.

Mr. NADER. The proper analysis starts with market structure, market conduct, and then the results.

Senator DECONCINI. So there is a role of economic analysis in court decisions.

Mr. NADER. Of course, of course.

Senator DECONCINI. OK.

Mr. NADER. There is also a role for the structure of political concentration of industry, and that is what the Framers in 1890 and the early 1900's made a big point of, that economic concentration of power leads to political abuse, which leads to economic damage to new entries, small business.

Senator DECONCINI. Do you think that there is an economic role in court decisions, antitrust or otherwise?

Mr. NADER. Yes; the question is whose costs do you take into account, whose payments do you take into account.

Senator DECONCINI. Well, that is a question for a judge, right, or a jury?

Mr. NADER. Yes.

Mr. ESTES. No, Senator, it is not. It is fundamental to the issue of economics that Judge Breyer does not understand, if I could just enter into this discussion. It is not just a question for a judge. If someone is going to hold himself out as an expert on economics and then misapply the very economics that he is trying to state——

Senator DECONCINI. Wait a minute. Who is holding himself out as an expert on economics?

Mr. ESTES. As you read through the totality of Judge Breyer's writings in the area of economics, or the near totality, as I have done, there is an unmistakable image being presented by this person as an expert on economics, on economic analysis in the application of judicial decisions.

Senator DECONCINI. Have you ever heard Judge Breyer state—I have never heard him state or be held out as an expert in economics or an expert on biotechnology or an expert on communications or an expert on the death penalty; have you?

Mr. ESTES. Senator, Judge Breyer sees himself, as he reveals in his writings, as an expert on economics, as also an expert on the application of mathematical and statistical analysis and regulatory matters.

Senator DECONCINI. He wrote a book in that area of regulatory law.

Mr. ESTES. More than one.

Senator DECONCINI. More than one. I do not remember him writing a book on economics.

Mr. ESTES. He imbues his book with references to economic theory, and he is wrong in a good many places.

Senator DECONCINI. Well, he may be wrong, but I dispute that he holds himself out as an expert. He is a judge, and he has had economic cases. I have been a prosecutor, and I have prosecuted people, but I am not an expert on the death penalty.

Mr. ESTES. Senator, there is nothing for me to gain in arguing with a prosecutor, but I would suggest that if you would read those books in their entirety, you would come away with a view that Judge Breyer believes himself and would like to have his colleagues believe him to be an expert in economic analysis as applied to regulatory matters.

Senator DECONCINI. Given that that is your interpretation and that you think any reasonable person would come to this conclusion, your position, then, Mr. Estes, is that this expert is wrong.

Mr. ESTES. He is not wrong all the time, but he is wrong in very serious matters.

Senator DECONCINI. And because he is wrong in serious matters, he is unqualified to be a Supreme Court Justice?

Mr. ESTES. Senator, my place is not to cast a vote on whether Judge Breyer sits on the Supreme Court. Of course, that is your place. My role here is to try to offer helpful information to benefit you in making that decision, and among the information that I would offer to you is Judge Breyer's views on the regulation of matters like pollution. Let me just read something from his own words.

He says if you have a sugar plant that is sending black smoke billowing throughout a neighborhood, if we regulate that smoke, those who suffer pollution are made richer.

Judge Breyer does not say that those who suffer pollution are made whole or are restored to their previous undamaged condition. He says they are "made richer." That is a sterile, technocratic approach to pollution that does not understand the issue of economics at stake here.

Senator DECONCINI. Well, Mr. Estes, I am grateful that you are here to give us these suggestions and advice, but you did not answer my question. First of all, if we take your assumption that he is an expert on economics and if he differs on what you think proper economics are, does that disqualify him to be a judge?

Mr. ESTES. Senator, I am not casting a vote; that is for you to do.

Senator DECONCINI. I am not asking you to cast a vote. I am asking you for an opinion. Does that disqualify him to be a judge in your opinion?

Mr. ESTES. It would raise serious questions in my opinion about seating him on the Supreme Court.

Senator DECONCINI. Thank you. I take that as a yes.

What about being on the circuit court? Do you think that would disqualify someone from being on the circuit court?

Mr. ESTES. I would have the same concern.

Senator DECONCINI. You would.

Mr. Nader, let me ask you this. In a September 1993 article, the New York Times indicated that health and safety regulations cost Americans about $120 billion a year. Do you believe that Americans are getting a maximum return on the enormous investment, or is there room for improvement?

Mr. NADER. Well, I do not know the source for that estimate unless it is Murray Wiedenbaum, who——

Senator DECONCINI. Well, let us go to the source. I only know that it was stated in the New York Times, and I do not necessarily take that as factual, either. Do you dispute that that is a correct amount, or do you have a correct amount that you have some authority on? Maybe you get the Wall Street Journal.

Mr. NADER. I think the costs of regulation are negative. I think they save far more money——

Senator DECONCINI. I am not asking about what they save. What do you think they cost?

Mr. NADER. The costs are negative because they save more than they cost.

Senator DECONCINI. Well, let me put it this way——

Mr. NADER. The airbag, for example, saves billions of dollars of health care costs, wage losses——

Senator DECONCINI. Let me just ask it this way, then, Mr. Nader—I guess I did not get my question over to you, and I apologize for that—I am not asking what the offset is. What do you think the out-of-pocket expenses are for the regulations—nc 'iat they save or what can be calculated back in by not havin' ople lose time from work or what-have-you—do you have any estimates?

Mr. NADER. Other than the budgets of the regulatory agencies, I have not seen a careful study because it is very hard to get costs from industry that are objective and verifiable. So there has never been a study that has been able to give the answer to your question.

Senator DECONCINI. So you do not know; you do not know if $120 billion is a reasonable figure or not—not counting the offsets or the benefits that are achieved by regulation?

Mr. NADER. There is no reliable data to substantiate that figure.

Senator DECONCINI. In terms of regulation, is it your position that there is never a situation where the cost outweighs the benefits?

Mr. NADER. Certainly, I think the cost of the Federal courthouse outweighs the benefits and could be put toward more access to justice by people in New England.

Senator DECONCINI. Well, is the courthouse, in your opinion, a regulatory——

Mr. NADER. It is supported by taxpayers, which comes right under Judge Breyer's intermodal analysis. He——

Senator DECONCINI. I understand where you are coming from, but in terms of regulation, is the courthouse regulation—just the courthouse building; is it regulation?

Mr. NADER. It is part of the allocative inefficiencies that Judge Breyer has talked about in other contexts.

Senator DECONCINI. In terms of regulations, is it your position that there is never a situation where the costs outweigh the benefits?

Mr. NADER. Certainly, no—I will give you an example.

Senator DECONCINI. Would you, please?

Mr. NADER. Where you have regulation that ostensibly is to advance health and safety, but turns into a big, corporate, contracting, pork-barrel boondoggle as the Superfund expenditures have, you will get more money spent, with less return.

Senator DECONCINI. More money spent, with less return.

Mr. NADER. Right; but where you get regulation that focuses on prevention rather than remediation or remedy, after the toxics are at-large, you will get a maximal level of efficiency in terms of what is spent and what is derived as a benefit. Taking lead out of gasoline has terrific consequence, especially for children's health. Airbags—terrific. Restricting vinyl chloride—terrific. This is where an ounce of prevention is worth a pound of cure in monetary terms as well as life-saving terms.

Senator DECONCINI. Well, in testimony before the committee, Judge Breyer said many things, and one of them, let me read to you, gentlemen.

I do not count up how many victories are for plaintiffs or defendants and do statistics. What I am interested in, is the case correct as a matter of law, and I consider the case, one at a time, and I consider the merits, the legal merits, of the argument in front of me.

Can you provide me, any of you, with any basis other than your dissatisfaction with his rulings for not believing that Judge Breyer's statement is true and correct?

Mr. NADER. Oh, sure.

Senator DECONCINI. OK.

Mr. NADER. First, I have introduced in the record a very critical comment on his price squeeze case by Professor Carstensen at the University of Wisconsin, just in anticipation of the question that you have asked.

And second, let me give one that is very understandable to most consumers, Senator DeConcini. There was a case involving the Subaru Corp. sued by a Subaru dealer in Massachusetts. The jury rendered a verdict of over $50,000 for the Subaru dealer against the Subaru Corp., plus attorney costs, fees, and costs.

What was the complaint of the Subaru dealer? That the Subaru Corp. was requiring the Subaru dealer to buy unwanted spare parts in return for the Subaru dealer getting its proper allocation of cars.

Judge Breyer did not dispute the facts. He threw out the jury verdict and overruled the trial court, saying that the reason he did that was that Subaru did not amount to more than a minor percentage of the overall automotive market, and therefore, their tying arrangement did not harm consumers.

I ask you, how do you think the Subaru dealer is going to deal with unwanted costs, that is unwanted spare parts, in treatment of the consumers who come into that dealer's shop? He is going to find a way to pass the costs on.

This is an example of how, again and again, small distributors, dealers, small Government entities, up against large corporations,

in the 16 antitrust cases that the Judge decided, lost—again and again, the giants won.

Senator DECONCINI. Well, but Mr. Nader, that is an interpretation you are making that Judge Breyer did not look at these cases based on the law, or consider the cases one at a time, considering only the merits, the legal merits. You disagree with his finding——

Mr. NADER. No, no——

Senator DECONCINI [continuing]. Not that he did not look at these factors.

Mr. NADER [continuing]. No—he agreed with all the facts. He said taking the facts as the lower judge and the jury found them——

Senator DECONCINI. And a judge is not supposed to make a decision based on what he thinks is the law and the facts and the interpretation?

Mr. NADER. I do not think—and this is where Judge Breyer's judicial activism is going to be very apparent on the Supreme Court. He threw out a jury verdict and overruled a court decision even though he did not disagree with a single fact, and he did not disagree with the connection of the fact to the law; where he disagreed was his impression that it would not harm consumers because Subaru was too small a company in the automotive market. That is an extra-judicious assertion of what I think is impermissible judicial activism.

Senator DECONCINI. Well, now, Mr. Nader, you have been a practicing lawyer. Have you ever had a verdict thrown out by the court that worked against your clients interest?

Mr. NADER. No, I have not.

Senator DECONCINI. You never have. Well, I have, and I really did not like it; I really did not like it.

Mr. NADER. But I do not think you are hearing me, Senator.

Senator DECONCINI. Oh, I am hearing you, I am hearing you.

Mr. NADER. Judge Breyer agreed with the facts in the case. He just said that he did not think Subaru was a big enough player so that its tying arrangements harm consumers.

Senator DECONCINI. Well, that is his judgment as a judge. Now, your testimony, Mr. Nader, paints a very dark future for the little guy in the antitrust and regulatory arena. However, your testimony seems to indicate that your discomfort with Judge Breyer's views may stem from your overall concern that antitrust is moving in a direction you do not support.

Nonetheless, Mr. Nader, even if one assumes that your view of Judge Breyer is correct—and I do not necessarily agree—isn't your position overstated when you make statements like the following—and I quote from your statement:

> The great questions of antitrust are no longer debated and studied. This basic chapter of the free enterprise system has fallen into limbo beneath a counterattack on all fronts by global corporations and their apologists who claim, with grotesque caricature, that the antitrust laws interfere with U.S. global policy. Judges like Stephen Breyer are picking over the leftover bones.

Now, I have to question this "sky is falling" attitude, given that Judge Breyer will be only one of nine Justices, all of whom are independent thinkers and possess the intelligence not to be unduly swayed by others. Furthermore, the Congress of the United States

has not, in my judgment, abdicated authority to the courts. We may not do enough for you, Mr. Nader, but we pass antitrust legislation. We still make the laws; we review the laws and I do not think this body is turning away from the American public.

Mr. NADER. Senator——

Senator DECONCINI. Now, that is very self-serving because I happen to serve in this body and on this committee, and I know you disagree with most of the things this committee, or at least this Senator, does. But I take very seriously our charge to deal with antitrust laws, and I do not think that we are picking over the leftover bones.

Mr. NADER. May I reply, Senator?

Senator DECONCINI. Certainly, you can reply.

Mr. NADER. I think, Senator, looking over the last 40, 50 years in antitrust enforcement, looking at the huge mergers and acquisitions that have occurred of gigantic companies merging and acquiring others, how many times has the Justice Department or the Federal Trade Commission filed an antitrust suit against these mergers in the last 15 to 20 years compared to the prior years?

Mergers and acquisitions under antitrust law are almost a dead letter. Look at the last year—hospital chains buying up hospital chains; hospitals buying up doctor practices; drug companies buying up drug distribution companies—just last week, the Eli Lilly Co. bought, for $4 billion or $6 billion, McKesson subsidiary—health insurance companies buying up whole networks of HMO's.

In 1950 and 1960 and even 1970, Senator, the Antitrust Division would have moved against these mergers. They would not even have been announced because the Antitrust Division was clear on its guidelines. Those guidelines are gone. The Turner-Kasin guidelines are gone; the Justice Department guidelines are gone in terms of concentration ratios. Whatever is left of antitrust is extremely micro, dealing with a tying arrangement here, or a territorial restriction there.

Senator DECONCINI. Mr. Nader, last question. Are you the president of the citizen's group that you represent, or are you just representing yourself here?

Mr. NADER. I am representing myself.

Senator DECONCINI. You are representing yourself.

Mr. NADER. I might add, by the way, and price-fixing by highway bid-riggers, which is a favorite of the Antitrust Division in the Republican years.

Senator DECONCINI. What group are you employed with?

Mr. NADER. I am not employed.

Senator DECONCINI. You are not employed; you have no employment?

Mr. NADER. No; I do not take any employment status, period.

Senator DECONCINI. You have no salary and no income?

Mr. NADER. I take no salary from any organization, no expenses, no benefits—period. That is how I can speak freely and as an individual.

Senator DECONCINI. So you have separate resources to live on.

Mr. NADER. Yes.

Senator DECONCINI. And you have not worked for any citizens' groups.

Mr. NADER. I have run citizens' groups; I have started citizens' groups. I am not paid by any of them.

Senator DECONCINI. They do not pay any of your costs or any of the——

Mr. NADER. Zero.

Senator DECONCINI [continuing]. Costs of your getting here or preparing here, or give you an office or——

Mr. NADER. No; I actually paid the cab fare myself.

Senator DECONCINI. You paid the cab fare yourself.

Mr. NADER. That is right.

Senator DECONCINI. And that money comes from your own resources?

Mr. NADER. Yes, it does.

Senator DECONCINI. Thank you.

The Citizen's Group—what is that group?

Dr. WOLFE. I think it is probably a mistake—I guess it may be a generic term for all citizens' groups. But I am with Public Citizen's Health Research Group, and Mr. Nader is independent.

Senator DECONCINI. What is that?

Dr. WOLFE. That is an organization that was started by Mr. Nader, and shortly thereafter by me, about 22 years ago.

Senator DECONCINI. And what is it? Is it a public interest group?

Dr. WOLFE. It is a consumer research and advocacy group, funded largely through membership.

Senator DECONCINI. I see. Nonprofit?

Dr. WOLFE. Not for profit; right.

Senator DECONCINI. Not for profit.

Dr. WOLFE. Right.

Senator DECONCINI. And who are the contributors to that group?

Dr. WOLFE. Mainly small contributors, $20, $30 a year.

Senator DECONCINI. And Mr. Constantine, I do not know your background.

Mr. CONSTANTINE. My background, Senator, is that I was chief antitrust enforcer for New York State; chairman of the task force which coordinated antitrust enforcement for all 50 States for a number of years; I was a partner at McDermott, Will & Emory, which is a national law firm with over 500 lawyers. I left in April this year, and I started my own law firm with six lawyers. So I guess you could call me a small businessman at this point.

Senator DECONCINI. Mr. Estes, I know who you are.

Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. I might say to Senator DeConcini, we have had the opportunity to know Mr. Nader and Sid Wolfe to the greatest degree, and that organization has been invaluable to our health committee, going back to the pharmaceutical companies, the distributions of sampling, and the arrangements that have been made in terms of how the "me-too" drugs have come onto the market and have been used in many instances to subvert the real consumers' interests, and a variety of different public health areas——

Senator DECONCINI. Would the Senator yield for a comment on that?

Senator KENNEDY. Yes.

Senator DECONCINI. I am glad to hear that Mr. Nader has offered something constructive and positive, because what he did during the recent vote on product liability to Senator Rockefeller was disgraceful. The editorials and articles that he had printed in West Virginia; it was a disgrace. I am glad there is something good about him.

Mr. NADER. I welcome your written justification of that slur.

Senator KENNEDY. Well, as I was just saying about Sidney Wolfe and Lloyd Constantine, they came down and testified a number of years ago when we were considering another nominee, Mr. Bork, and I remember his testimony at that time.

I would just say I have great interest in the whole area of antitrust and antitrust law. I think men and women of good faith and understanding of these laws have differing views.

It is interesting. Bob Pitofsky, who will be coming up just afterwards, was a very effective member in pursuing consumers' interest in the period of President Carter's administration and other agencies as well. And his view, as well as other associates, are different in terms of the nominee's commitment to assuring the lowest possible prices and quality products for the American consumers. But I am grateful to you. I apologize to the other members not being here earlier. We have been working on the health issues in the Senate, and I was necessarily absent. But I appreciate your appearance here.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Nader, I note under your category, Judge Breyer and corporate economic power, your statement about his record involving antitrust and other business litigation cases. And you cite at page 6 his ruling in favor of the corporate defendant 16 out of 16 times, 17 out of 19 times, or 19 out of 19 times if remands are seen for their prodefendant effect. It may be that you are referring to antitrust matters as opposed to corporate matters generally.

Mr. NADER. Yes.

Senator SPECTER. It does not say that on the face. But even if you were, I asked Richard Hertling, my chief counsel—I just had a look at your statement coming in here a few moments ago, and he produced for me on fairly short order seven fairly impressive cases where Judge Breyer has found against major corporate interests. One of them is *Biomedical Instrument* v. *Cordis Corporation,* where a dealer brought an action for illegal termination of a dealership agreement, and Judge Breyer reversed the district court which had granted summary judgment for the big corporate defendant. And Judge Breyer wrote the opinion, holding that a genuine issue of material fact existed.

Another very significant opinion of Judge Breyer's involved a case against the giant, American Cyanamid Co., where the issue was on immunity or barring litigation under the National Childhood Vaccine Injury Act, where a Federal statute was passed to try to provide some limitation of liability, and Judge Breyer wrote the opinion, holding that the statute had to be narrowly interpreted to bar a suit by the minor who was immunized, but that others in the family, parents, could bring a lawsuit.

And *Venturelli* v. *Cincinnati, Inc.*, where a worker who had crushed the tip of his index finger in a plank-sheering machine brought suit against a manufacturer for defective machinery, alleging breach of warranty, and the court of appeals, with Judge Breyer writing the opinion, found in favor of the injured party against a major corporation.

The case denominated *DuPont* v. *Cullen,* where Judge Breyer upheld a finding of the bankruptcy court against DuPont, would had asserted a judgment creditor's claim.

New Hampshire Motor Transportation Association v. *Flynn,* where Judge Breyer wrote the opinion against the corporate defendant, holding in favor of the State, and an issue regarding license fees required for hazardous waste, which was an issue of environmental protection.

A fifth case, *NLRB* v. *Community Health Services,* where Judge Breyer held in favor of the Government against a company on an issue of certification.

NLRB v. *Northeastern University,* where Judge Breyer found in favor of the Government against the university involving a union election on issues of abuse of discretion.

My question to you is: In making the assertion as to Judge Breyer's unfairness as to the major corporations, if you took into account his general record above and beyond the 16 or 19 cases you cite—and I repeat that I have just had these cases pulled in the course of the past half hour, while Senator DeConcini was questioning.

Mr. NADER. Well, I was referring to antitrust, and the paragraph prior indicated that. It would have been better to put the antitrust word in that paragraph again. So I was referring to antitrust.

He has not ruled against plaintiffs all the time. We did not say he did. We said he has a pronounced inclination to favor corporate defendants most of the time. If you look at racketeering cases under RICO, if you look at the securities fraud cases, it is hard to be a plaintiff in Judge Breyer's courtroom.

Senator SPECTER. Well, the cases I just cited involve plaintiffs.

Mr. NADER. Yes.

Senator SPECTER. And these are close legal issues where he found against major corporate defendants. Did your analysis go beyond these 19 cases to his full record with any statistical tabulation as to how he did overall?

Mr. NADER. Well, we have his opinions. We have not made a statistical tabulation across the board. He has not been good on disability rights cases, four bad decisions out of four, in our judgment. He had two out of two bad decisions in freedom of information cases.

I am not saying he makes every decision wrong. I am much more concerned about his writings that are so hostile to the efficacious prospect of greater democratic public participation in regulatory processes. That is what really worries me, because that is what is relevant to the Supreme Court, prognostication.

Senator SPECTER. You are talking about now his writings as opposed to his decisions? You are talking about his books and his articles as opposed to his writings in legal opinions on cases?

Mr. NADER. To summarize, he has not decided for the corporate defendant in 100 percent of the cases. But I am saying he is first of all judges on the Federal circuit court in the percentage of times he has decided for corporate defendants in antitrust cases, and in all the other cases, he has decided for the corporate defendant more often than not. He has also decided for Government on more occasions than I would have liked, and disability rights cases and freedom of information cases.

There seems to be an inclination to find a rationale for the more powerful party to a litigation. And when I read his book in conjunction with his decisions, Senator, I saw where he was really coming from. He has an analysis of the regulatory agencies, how to make them better in the health and safety area, and he discounts, I think extremely radically, the possibility that Congress, the courts, the common law of liability, and greater democratic participation can make, the contribution they can make to alerting, rationalizing, and improving the health and safety regulatory policies. And his solution is a supercorps of wise people somewhere near the Office of Management and Budget to oversee and rationalize and coordinate the regulatory agencies.

Senator SPECTER. A corps of supersmart people near OMB? Where would they be housed? [Laughter.]

Mr. NADER. Page 80 of his book is an exceptionally revealing statement, and he is talking about his examination in the book of the problems of risk regulation. He says:

> It offers an equally strong counter-argument to the hopeful position that more direct democratic public involvement will automatically lead to better results, such as the public itself wants.

I do not know what else has led over the history of our country to better results in government than democratic participation that spills over into Congress, that elaborates the common law through the litigation, that improves the information flow of the agencies.

Good heavens, some of these agencies would never have been created to save lives if it was not for concerned physicians and consumers and doctors, whether it is the Food and Drug Administration, the EPA, or the National Highway Traffic Safety Administration.

Senator SPECTER. Well, I do not discount democratic participation, but the review that my staff has made of the cases that I produced on short notice suggests to me that there is some balance as to what he has had to say. But let me move on to one other question, and that is the issue you raise as to Presidential Counsel Lloyd Cutler.

I just saw a few minutes ago, after Senator Biden put it in the record, Mr. Cutler's letter dated July 15, where he takes issue with a number of your statements. On page 1 of your statement you talk about "Mr. Cutler can still take his draw, by the end of the year, from his law firm." And Mr. Cutler disputes that factually, saying, "Moreover, because I am no longer a member of the firm but rather a salaried senior counsel who will be paid only for the time I work at the firm, I take no draw from the law firm at the end of the year." And he earlier says in his letter, "While I have chosen to serve without governmental compensation, I have also arranged to

have my salary from the law firm reduced to reflect the time I am devoting to Government service."

My question to you is: Do you have any factual basis to dispute what Mr. Cutler is saying or any factual basis for your statement in your prepared testimony that Mr. Cutler can take a draw from his firm?

Mr. NADER. Yes; Mr. Cutler, as you know, is the rainmaker for the firm. He is the founding partner. He is no longer technically a partner. His status is special counsel. And he can take income from that firm at the end of the year. He is only supposed to be working in the White House until August, but he can take income. He can; whether he does or not depends on how much political exposure his dual role is given in the coming weeks. But my criticism is not just based on the income that he could draw from that firm—and there was a report that he was going to draw something like $300,000, which is not a full partner's draw in the current year before he went into the White House.

My concern, Senator Specter, is one that I would hope you would share with me. Never in the history of the country has the special counsel to the President of the United States retained a legal status as special counsel in a corporate law firm down the street with dozens of major corporate clients whose business may be affected indirectly or directly by decisions made in the White House where Lloyd Cutler is a major player. He is everywhere in the White House. Lloyd Cutler is at large in the White House, passing on judicial nominations, advising on product liability issues. He is everywhere. And anybody who knows Lloyd Cutler knows that he is everywhere when he is anywhere.

I think that is truly improper. I think that this has never been done before. And if wants to be special counsel to the White House, he should resign his status in the firm of Wilmer, Cutler & Pickering. And I might add that I have heard now from at least 10 sources, from the White House and from the press, who are close to this issue, that Judge Breyer was Lloyd Cutler's choice. He is a long-time professional, personal, and philosophic colleague of Judge Breyer, and at key junctures in the decisional, or shall we say indecisional process by President Clinton, Lloyd Cutler gently put forth the reasons for President Clinton to nominate Judge Breyer.

Now, if he is counsel, fine. But not when he has one big foot down the street in one of the most aggressive and, I think, anti-consumer corporate law firms that I have ever had to deal with over the last 25 years, including fighting him on the airbag standard, which they held up for years on behalf of General Motors and Ford and other clients.

Senator SPECTER. Well, that is——

Senator KENNEDY. I am glad to find that out about him. I thought I had something about recommending——

Senator SPECTER [continuing]. That is quite an additional statement, Mr. Nader. I have a factual basis for saying to you that you are wrong when you say he is everywhere. I tried to reach him on the phone last night and could not find him. So there is some competent testimony for you.

Mr. NADER. I meant that he is everywhere on policy issues.

Senator SPECTER. I mean some firsthand testimony. If I have to take an affidavit and have it admitted into evidence, unlike most of what we hear, not only in this room, but everywhere in the Senate campus.

Mr. NADER. I did not mean physically he is everywhere.

Senator SPECTER. Well, spiritually? I could not find him. [Laughter.]

When you talk about his——

Senator HATCH. A little bit like the Holy Ghost, I guess.

Senator SPECTER [continuing]. When you talk about his being at large, I have not heard that kind of reference since Al Capone was talked about being at large, or perhaps Capone was a lesser threat to the country than Cutler.

But when you say in your statement——

Mr. NADER. He was a lesser threat.

Senator SPECTER. There is no question pending, Mr. Nader. [Laughter.]

Mr. NADER. The airbag issue alone has cost hundreds of thousands of lives.

Senator SPECTER. There is no question pending, Mr. Nader. Let me ask you a question, Mr. Nader.

Mr. NADER. Yes.

Senator SPECTER. When you say here—well, how about that? Just a little decorum.

When you say here, page 2 of your statement, "all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his law firm," and the statement you just made, do you have any evidence on that? And you and I are lawyers, Mr. Nader. Do you have any evidence on that? Evidence?

Mr. NADER. Oh, yes, I have.

Senator SPECTER. Give me one piece of evidence and pause.

Mr. NADER. First of all, he has dealt with Robert Rubin and others on the political aspects of economic policy being discussed in the White House.

Senator SPECTER. I am asking about a benefit to a corporate client, one bit of evidence.

Mr. NADER. Judge Breyer, Judge Breyer.

Senator SPECTER. Judge Breyer is a corporate client?

Mr. NADER. No; I think his ascension to the Supreme Court will benefit corporate preferred policy.

Senator SPECTER. You talk about substantial benefits to some or most of the many corporate clients of his firm. I am asking you if you have any evidence—that means firsthand knowledge—of a benefit to a corporate client of his law firm.

Mr. NADER. Where did I say direct?

Senator SPECTER. On page 2, you say——

Mr. NADER. Directly impacting, even if he does not work on——

Senator SPECTER [continuing]. "Engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests)," and I ask you for the fourth time: Do you have any evidence of any benefit to anybody, any client of the Cutler firm?

Mr. NADER. You did not finish the sentence: "even if he does not work"——

Senator SPECTER. I did not finish a lot of sentences.

Mr. NADER. "Even if he does not work on matters directly impacting those clients." The job of special counsel to the President affects political, economic, and social policies out of the White House. It is his burden of proof to show us that he is not fulfilling the conventional duties of a special counsel to the President. I am saying I know something of what he has been doing. It is up to him to come clean.

Senator SPECTER. Well, all right. Now I understand your position. It is up to him on his burden of proof, and your statement about benefits to clients of his law firm is unsupported by any evidence.

Let me move on to one other line.

Mr. NADER. I would disagree with your characterization of my testimony. Continue, please.

Senator SPECTER. Well, then let's read the full sentence on page 2:

> Instead, the issue is whether it is proper for a member of a major Washington law firm to also serve as counsel to the President, pass on judicial nominations, engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests), even if he does not work on matters directly impacting those clients.

Now, my question to you, having read the full sentence, is: Can you give one example of competent evidence that he has undertaken any governmental conduct as counsel to the President which has had a benefit to any corporate client of his law firm?

Mr. NADER. I said "which can have substantial benefit."

First, I am not privy to all the internal workings of a special counsel to the President, except that I know that he has very special and important responsibilities on what the President thinks, does, and decides.

Second, he is passing on judicial nominations, and people as close to the process as the Alliance for Justice are saying that he has argued against some progressive nominees for the Federal bench. That can have—can have, Senator Specter—a substantial benefit to some of his corporate clients. Can.

The burden of proof is on him. He is the one who has a foot in the corporate client sector of his law firm and a foot in the White House. Never before has a counsel to the President had that dual role and worn both hats.

Senator SPECTER. Mr. Nader, do you have any reason to contradict Mr. Cutler's assertion that "Ethics officials in the White House in the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement"?

Mr. NADER. Are you asking me whether his status is legal? It is legal. Is it ethical? No! Should the law be changed? Because it was never intended by Congress to apply to the Office of the Counsel. It was intended to apply to geologists, scientists, and other technical personnel to help out for a short period of time Federal agencies. Yes, I think the law should be changed, and I think the Judiciary Committee is the proper jurisdiction for that possibility.

Senator SPECTER. Well, those are direct answers to three other questions. Now let me repeat my question. Do you have any factual basis to contradict Mr. Cutler's statement that "Ethics officials in the White House and the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement"?

Mr. NADER. No, I do not contradict him, and I do not give it all that balance because we should have independent, external ethical review, the way he asked for Judge Breyer.

Senator SPECTER. A final question, and on this you and I agree.

Mr. NADER. Thank goodness.

Senator SPECTER. I do not know, Mr. Nader. We both may be in trouble with that occurrence.

You support my view that nominees are less likely to answer questions when the confirmation process is seen as a sure matter. Would you agree with my characterization that Judge Breyer answered more questions than previous nominees, specifically Justice Ginsburg, Justice Souter, Justice Scalia? Start with Justice Scalia.

Mr. NADER. Oh, yes, definitely.

Senator SPECTER. Thank you. Thank you very much.

Mr. NADER. I think he gave more answers to easy questions than the prior three Justices.

Senator SPECTER. Thank you very much.

Senator KENNEDY. I just want to make a very brief comment in taking issue with you, Mr. Nader, about Judge Breyer willing to take on the corporate giants in this country. I was chairman of the Antitrust Committee, searched the country to try and find a good person to succeed in the staff there after Phil Hart left that position in the mid-1970's, and was fortunate enough to get Steve Breyer. And his concept in terms of trying to improve both lowering costs and improving quality came about with the deregulation of the economic conditions in this society and also the protections of health and safety.

He was willing at that time to take on the airlines. He was willing to take on the trucking companies at that time and was skillful enough to help and assist both developing a bipartisan kind of coalition in this. And, quite frankly, I was late in terms of attending this session, but your characterization and the flat kind of comments on that is completely inconsistent with a very, very distinguished record.

I have heard your comments about the various cases. I dare say the list of the antitrust professors and activists who have a very distinguished career, a letter which I will put into the record, have very, very differing kinds of viewpoints.

[The letter follows:]

July 5, 1994.

Senator JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR BIDEN: The signers of this letter are professors of law who have taught antitrust for many years and written often on the subject. We are familiar with Judge Breyer's record as a scholar in the field of economic regulation, including antitrust, and a judge occasionally called upon to write antitrust opinions.

In our view, Judge Breyer is a thoughtful and enlightened advocate of antitrust enforcement. He understands and appreciates the effectiveness of a free market, protected by the antitrust laws, in serving the welfare of consumers. He also understands the need for vigorous enforcement of the antitrust laws to correct market

failures. We except he would be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court supporting effective antitrust enforcement.

We understand that Judge Breyer's record has been criticized by some on two grounds: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor big business over the consumer.

We believe these criticisms miss the mark. While we may not agree with every decision or sentence in his opinions, Judge Breyer's views are well within the mainstream of contemporary thought about antitrust law. The results, more carefully examined, consistently favor consumers and often are to the advantage of small business.

A. *The Charge of Consistent Rulings For Defendants.* Judge Breyer has decided a number of cases in favor of antitrust defendants. To suggest that this shows he is pro-Big Business and anti-antitrust nevertheless represents a misreading of his record.

In the first place, Judge Breyer has upheld meritorious antitrust claims by both private and government plaintiffs. In *Federal Trade Commission* v. *Monahan*,[1] he upheld the Federal Trade Commission's broad authority to investigate evidence of price fixing in the pharmaceutical industry. In *Caribe BMW Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994), he upheld a challenge under the Robinson-Patman Act and the Sherman Act to price-fixing in the sale of automobiles. And Judge Breyer has never decided an antitrust case against the government—either federal or state.

Even in cases where defendants prevail, Judge Breyer's decisions show no antipathy to vigorous antitrust enforcement. In most of these decisions, no substantive question of antitrust law was at issue. In one case, the issue was whether Puerto Rico should be treated as a state or a territory under the Sherman Act.[2] In several others, Judge Breyer merely voted to deny preliminary relief, and remanded for full evidentiary proceedings.[3] One of the cases was about whether a trial judge should have been recused in an antitrust case based on a possible personal conflict of interest.[4] In still other cases, Judge Breyer simply voted to affirm district court findings that there was no evidence supporting a claimed antitrust violation.[5] In the remaining cases, Breyer refused to find for antitrust plaintiffs, because the result would have been an unjustified increase in the prices charged to consumers.[6] In two cases, the plaintiff was a large company and the defendant the "small business," so that decisions in favor of the defendants were hardly pro-"Big Business."

B. *Specific Cases.* A second charge against Judge Breyer is that certain of his decisions evidence hostility toward antitrust enforcement. The cases cited are *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir. 1981), and *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1984).

While Breyer did find for the defendants in all three cases, the important point is that the decisions are consistent with enlightened antitrust interpretation and enforcement. In addition, his decisions helped consumers in each instance.

1. In *Boston Edison*, two municipal utilities that bought power from Boston Edison, a large private utility, claimed that Boston Edison had engaged in a "price squeeze" by selling power to them at a high wholesale price but selling to consumers at a low price in competition with the municipals. The plaintiffs' complaint was that Boston Edison was selling at retail at too low a price for them to make a profit. If they had won out on the point, these small business plaintiffs would thrive because Boston Edison would have to raise its retail price, but consumes would end up paying higher bills.

A price squeeze cause of action is rarely attempted and is usually without merit, regardless of the market in which the alleged squeeze occurred. Judge Breyer found that such complaints are even more questionable in a market in which both the wholesale and retail prices were set by independent regulators. A history of the proceedings shows why. Boston Electric's wholesale rates had been submitted to and

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[1] 832 F.2d 688 (1987).

[2] *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36 (1st Cir., 1981).

[3] *See Coastal Fuels of Puerto Rico* v. *Caribbean Petroleum*, 990 F.2d 25 (1st Cir., 1993); *Rosario* v. *Amana*, 733 F.2d 172 (1st Cir. 1984).

[4] *Home Placement Serv. Inc.* v. *Providence Home Journal*, 739 F.2d 671 (1st Cir., 1984).

[5] *Clamp-All Corp.* v. *Cast Iron Soil Pine Ins.*, 851 F.2d 478 (1st Cir., 1988); *Computer Identics Corp.* v. *Southern Pac. Co.*, 756 F.2d 200 (1st Cir. 1985).

[6] *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir., 1984); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir., 1981); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990).

approved by FERC, a federal regulatory agency, over the opposition of the municipals. That decision in turn had been approved by the courts on review. Thus, the plaintiffs were attempting to end-run the regulator's decision and prior judicial review by framing their complaint about wholesale prices as an antitrust cause of action.

As Judge Breyer noted, it is difficult for courts to decide what constitutes a fair price and a fair profit. When independent regulators establish a "fair price," judges in antitrust cases are understandably reluctant to reverse those decisions—especially where the result would be to raise prices to consumers.

2. *Barry Wright.* In *Barry Wright,* a small producer of an environmental device claimed it had been injured because Pacific, its dominant competitor, sold at "predatory"—*i.e.,* below cost—prices. In fact, the record showed that the defendant's prices were above its full costs. Barry Wright nevertheless sued, asking the court to intervene and prevent low prices to consumers. Breyer recognized that if Pacific's prices were above its full costs, but below the full costs of rivals, it followed that it would succeed because it was more efficient than its smaller rivals and was willing to pass efficiencies on to consumers in the form of lower prices.

Breyer's decision in *Barry Wright* is part of a growing trend of judges in antitrust cases to shy away from supporting antitrust theories that block low prices to consumers. Breyer recognized that where the prices are so extremely low as to evidence an intent to drive rivals out of business antitrust has a role to play. But where a company charges prices above its own full costs, it would be senseless—and anticonsumer—for the court to intervene in order to protect less efficient businesses. A few years after Judge Breyer's opinion, the Supreme Court in effect ratified his decision and similar decisions in other circuits that prices above full costs are not predatory, noting that a claim of predatory pricing can only be sustained when the challenged prices are below some standard of cost. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.,* 113 Sup. Ct. 2578, 2588 (1993).

3. *Kartell.* In the *Kartell* case, a group of physicians challenged Blue Shield because it extracted from participating doctors a promise not to charge patients an amount above the insurance fee paid by Blue Shield. A lower court had found that the effect of the arrangement was to pay doctors at unreasonably low levels and therefore was an agreement in restraint of trade in violation of Section 1 of the Sherman Act.

Judge Breyer found that Blue Shield was not a collection of "buyers," capable of conspiring, but rather an independent single force, and that single buyers have a right under the antitrust laws to bargain for the lowest price available. While the defendant once again won in a Breyer opinion, the real effect was to sustain cost-containment efforts by a major insurer and to prevent doctors from charging higher prices to their patients.

In sum, Judge Breyer's opinions are sharp in analysis and economically sophisticated. He understands the theory of antitrust, appreciates the consumer protection and other values underlying it, and can be expected to support effective antitrust enforcement. He is unlikely, however, to join decisions that, in effect, protect inefficient businesses at the expense of consumers.

Very truly yours,

PHILLIP AREEDA,
Harvard Law School.*
EDDIE CORREIA,
Northeastern Law School.*
ELEANOR FOX,
NYU Law School.*
THOMAS JORDE,
University of California Law School (Boalt Hall).*
THOMAS KAUPER,
Michigan Law School.*
HARVEY GOLDSCHMID,
Columbia Law School.*
HERBERT HOVENKAMP,
Iowa Law School.*
ROBERT PITOFSKY,
Georgetown Law School.*
EDWARD ROCK,
Pennsylvania Law School.*

* Universities listed for identification purposes only.

Senator KENNEDY. I respect your position on it. We can have these areas of difference. But I must say that the blatant and flagrant kind of commentary and characterization I think is basically unfair. I know that you have a differing view on it, but I will say that I am not going to let those general comments, at least in my presence, go by without some kind of response.

Mr. NADER. Well, Senator, I testified before your subcommittee in favor of airline deregulation. I think it was in 1974.

Senator KENNEDY. Right.

Mr. NADER. And even my testimony was mischaracterized by Mr. Breyer in his book "Regulation and Reform." Because you remember that there are always two caveats, and I think you shared them, to any airline or trucking deregulation. One was a consistent enforcement of the antitrust laws——

Senator KENNEDY. Exactly right.

Mr. NADER [continuing]. And the second was enforcement of safety laws. I think he did some good work in that area. But I think in the last 20 years, with the merger——

Senator KENNEDY. Just before we leave that, the safety part was set aside, the FAA, if you remember that, and we ran into a Justice Department that was completely complacent in terms of the—I mean we don't want to go all the way back on through Lorenzo and the others on it, but there was absolutely no kind of activity, and what we saw really was a deterioration in terms of what that whole experience was, where the ones that were left in were able to, in a predatory way, reduce the certain kind of fares in order to disadvantage the newer entries into the system. We don't want to go all the way back into it.

But I must say the areas at that time were joined by Senator Javits, where he outlined a whole series of different areas where we were going to try and free up the areas of economic competition. I just think the only areas that we were able to was in the airlines and then in trucking, and then what happened is that concept was taken and accepted in terms of the financial institutions, and that was the end of it, because there was absolutely no kind of effort.

I am not familiar on the mischaracterization in the book on it, but I do think that the record over that service in terms of the committee, at a time when there was, as you correctly characterize it, not the kind of vigorous antitrust enforcement policy was an important and creative way of trying to energize some of the competitive forces. This is on Judge Breyer's nomination, and not on the issues on deregulation.

Mr. NADER. Senator, I would have looked forward to Judge Breyer, even before he became a judge, to lending his voice to criticizing the automatic merger approvals in the airline industry that he fought to deregulate under the Republican administrations. I think there were 20, out of 20 merger approvals between airlines approved by the Reagan and Bush administrations. It does occur to me to wonder why, in the greatest merger and consolidation wave in American history, Judge Breyer showed, whether in his

writings or in his decisions, extremely little concern over this consolidation of corporate power.

Senator KENNEDY. Well, the answer would probably be he was on the circuit court from 1980 when Reagan got in.

Mr. NADER. So one answer is there aren't many conglomerate merger cases coming to any judges these days. But he wrote and he lectured, and his voice was respected in these areas, and there is hardly a note of worry or caution or criticism on the growing concentration of power in one industry after another due to mergers and acquisitions that are not challenged by the FTC or the Justice Department, and that makes me puzzled.

Senator KENNEDY. Well, this is probably a pretty good time to go into the next panel, which will have—excuse me, I am sorry. I thought that had been done before. Senator Metzenbaum, I apologize. I thought that I had arrived when Senator DeConcini was questioning.

Senator METZENBAUM. No problem at all.

It is pretty obvious what the issue is before the committee today, and that is shall we confirm Lloyd Cutler for some particular position. [Laughter.]

I heard more comments about Lloyd Cutler since I have been back here than I did about Steve Breyer. Now, coming to Steve Breyer, I think we all have to be realists. Steve Breyer is up for confirmation to the Supreme Court of the United States, and unless some major development occurs that nobody anticipates, he is going to be confirmed by the U.S. Senate.

That being the case, we have to put the testimony of the four of you in its proper context. And I appreciate that testimony, because, frankly, it in some respects goes down the same road that I had raised or roads that I had raised, issued I had raised at an earlier point.

You raised the issues not because, on that basis, Steve Breyer is not going to be confirmed for the Supreme Court. You raised the issues, in my opinion, for the same reason I raised the issues, and that is to sensitize Judge Breyer when he sits on that Court. When he sits on that Court, some of the issues that have to concern you and concern me and concern Judge Breyer and concern the American people, is this whole question of the element of how much regulation and do you go all the way to the point that the EPA or some regulatory agency thinks you should go, or do you do something less, because to go all the way may cost *X* number of dollars.

Now, the fact is, if you go all the way, you are going to save 1, 2, 50, or 100 more lives. I don't have any opinions and don't have any knowledge as to how many it will be. So I think that many of your questions and many of my questions truly relate both in the environmental area and the health area and the antitrust area to bringing Judge Breyer up to a sense of awareness, not that he is not a very aware man, not that he is not a very knowledgeable man.

But the whole question is, knowing that he is going to be confirmed, it seems to me that the four of you who appear before this committee in order to raise issues, because there isn't much doubt in my mind that Judge Breyer is listening to what is going on at

this hearing and is sensitive to the issues to which you are attempting to sensitize him.

I thought it was rather interesting that all four of you sort of spent a fair amount of time—I wasn't here, but my staff has told me—on the *Town of Concord* case as a basis for raising concerns about Judge Breyer. He said that his decision in that case, and actually said it, I believe, if my recollection serves me right, in a hearing, that his decision he felt would benefit the consumers.

Well, this Senator has strong feelings to the contrary that the costs to consumers, the city of Concord is going to get a $39 million verdict. Judge Breyer took that verdict away from them. To this moment, I don't think he arrived at the appropriate conclusion, but I am not the judge. We make laws, and judges render court decisions.

Would any of you care to address yourselves to the *Town of Concord* case? I actually did not hear you, since I wasn't present, but I gather that all of you took issue with the whole question of——

Dr. WOLFE. You are talking about this *Ottati and Goss,* the dumping case?

Mr. CONSTANTINE. Senator, I would like to address it. I think more important than the issue as to whether the $39 million verdict was taken away from Senator Kennedy's constituents in Concord and Wellesley is the issue as to whether or not, as Judge Breyer has characterized it, that the remedy in that case that the plaintiff sought was to raise prices. This involved a price squeeze, and the price squeeze involves the relationship between wholesale and retail prices.

What Judge Breyer said here was that I would have had to raise retail prices or that would have been the effect of granting the judgment for the plaintiff. That was not the case. What had to happen was the wholesale prices had to be lowered, and that is what the plaintiff sought in that case. If wholesale prices had been lowered, then retail prices also could have been lowered, and there would have been a more competitive structure at both levels of the market.

More important than that, in that case, Judge Breyer went on to decide at least three other cases that were not before the court at that time. In this area, he is clearly and demonstrably a judicial activist who reaches out to decide issues which are not before him. Those issues will come before him in the next few years.

The issue of tying will come before him. The vertical mergers will come before him. The issue of monopoly leveraging will come before him. The issue of price squeezes in unregulated industry will come before him, and he has pretty clearly stated how he is going to vote in those cases. In every instance, those votes are contrary to the specific meaning of section 2 of the Sherman Act.

That is my attempt to try to explain this and to deal with the now famous graph which you exhibited at the hearing on Tuesday, Senator.

Senator METZENBAUM. I did not hear that.

Mr. CONSTANTINE. The triangular graph which you showed at the hearing on Tuesday, Senator, the widget graph.

Mr. NADER. The other point, if I may just add to that, Senator, is that Professor Carstensen, whose criticism of Judge Breyer's decision that is attached to my testimony, states:

> Although Concord, the plaintiff, the Town of Concord, satisfied a jury and trial judge that the price squeeze existed and its purpose was to harm the competitive capacity of towns being squeezed, Judge Breyer ordered the case dismissed. He did so on two conclusions: First, that the antitrust laws should not be generally used to condemn price squeezes engaged in by monopolists, if both levels of price is subject to direct regulation.

Well, it is Federal and State regulation, and the ability of utilities to manipulate Federal and State regulation is almost infinite, in order to achieve their strategic objective.

The other point is, Professor Carstensen adds:

> Without any examination or recognition of the lengthy, well worked-out theories of how regulatory prices can be and are used strategically to harm consumer and other public interests, Judge Breyer starts from the naive assumption that regulation is done in the public interest.

Hence, he asserts that "regulation significantly diminishes the likelihood of major antitrust harm."

I think there is a lot of record in this country's regulatory history to contradict Judge Breyer on that point. But the entire critique of that case is in my testimony. The reason why Professor Carstensen thought this was an important case, Senator Metzenbaum, is he thought it had applications to the new telecommunications industry and the way that industry is going to be structured. The price squeeze, the wholesale, the retail, there are a lot of parallels that are about to get into play after the legislation is passed in Congress on the telecommunications industry.

Mr. CONSTANTINE. If I might just briefly, Senator, the 1992 Cable Act, which the Congress labored over so long, is to a certain extent a set of industry specific antitrust regulations. A lot of what the Congress did in that major enactment was deal with the issue of vertical mergers and vertical integration, the control of programmers by companies upstream or downstream. So Congress has already spoken on this issue very specifically and in a very important industry in the United States.

What Judge Breyer has told you in a very profound way and very clearly, because he writes very, very well, is that he just doesn't see it, he doesn't see any harm whatsoever and there can never be any harm in taking your power from one level of an industry and leveraging it into a competitive advantage or a monopoly at another level of the industry. He says not to worry about that.

Dr. WOLFE. May I just comment on that. Mr. Nader alluded briefly to the wave of vertical mergers going on, where drug companies, large drug companies buy up drug distribution systems. In the last year, between Merck buying up Medco, one distribution system, SmithKline buying up a second one, and now Lilly buying up McKesson, the transactional costs of those three deals were $12 billion, money drained out of the health care system. Interestingly, Judge Breyer says if we worked a little better on regulation, we would free up money for health care and breast cancer and everything. Well, here is money just going down the drain.

But, worse than that, those three companies now have an estimated 80 percent of the entire prepaid prescription filling systems

market in this country, three companies. There does not yet seem to have been any kind of serious challenge to this kind of vertical integration that Mr. Constantine has just talked about, and we have reason to believe that if such a case ever got up to the Supreme Court, that Judge Breyer would be on the side of the big drug companies and the distribution systems.

The health care system is being destroyed, amongst other things, by mergers and acquisitions. Eight insurance companies now own half of the HMO's in this country. As Mr. Nader mentioned, hospitals are being bought by chains which are buying up other chains, and so forth and so on. So it is in the health area, the biggest in the country, at a trillion dollars, at an unprecedented time of mergers and acquisitions.

Senator METZENBAUM. Dr. Wolfe, you criticized Judge Breyer for his views on risk assessment in health and safety regulations. Why do you consider Judge Breyer's views a matter of concern in the context of a Supreme Court nominee? Will he have anything to do with that? The whole question of Judge Breyer's concern about risk assessment seems to be that if it costs too much to do, then you get to a certain point and it isn't worth spending that extra $10 million or $100 million or whatever the case may be.

Dr. WOLFE. Well, I am concerned, for a couple of reasons. One—and this is the good news, I guess, of this whole discussion—a year ago, when Mr. Nader and I criticized the first version of this book that he put out, he was sensitive enough to ask if he could meet with us, and we met with him, and I pointed out a number of factual errors in the book. He changed some. Unfortunately, he didn't change others.

One of the things we talked about was what is the basis for saying that we are going to be pouring billions or tens of billions down the drain to go this last 10 percent. I said what is the evidence that it is just 10 percent that we have left undone, given that the majority, over 50 percent of occupational cancers are not regulated, and that on the site that he ruled on in southeastern New Hampshire, there is a massive amount of pollution still there.

When he sat on this case in the first circuit coming up from the New Hampshire district court, there was a lot of need to look at the evidence for the various kinds of risk assessment that had been done. I don't know how many more of these cases are going to get that far or get up to the Supreme Court, but I think that in the opinion that he wrote in that case, he certainly acknowledged some awareness of risk assessment. I think that his views on risk assessment, as he stated in his book, are that the Government is overestimating between a thousand and a million times, and those are the kinds of views that would tend to make someone rule against the Government in some cases, as he did in part of that *Ottati and Goss* case.

So I think that, aside from disagreeing with his views on risk assessment, I think that as more of these environmental cases get litigated, he may well have an opportunity to impose those views on the way in which he judges the case. I know he said yesterday, after Senator Biden chastised him for some of the things that he said, he said I can assure you that the views that I take in this

book are going to have nothing to do with what I do as a judge. We are concerned that he may not be right about that.

Senator METZENBAUM. Well, I think your response is helpful in a particular respect, because it is obvious that Judge Breyer, after writing his book and having received some criticism from you and Ralph Nader, saw fit to meet with you to talk about it.

Dr. WOLFE. That is what I said is the good news. I characterized that as good news, because, as I said at the end of my testimony, he is a good listener. As you were saying before, given that it is a given that he is going to get confirmed, what can we do here? Why are we here? We do not think this is an exercise in futility, and we can only hope that he will be sensitive to the concerns that we have raised.

Senator METZENBAUM. I think, in all reality, that is about the main thrust of where we are going in much of this hearing. No question about it that I had some concerns, still have some concerns about his financial exposure and the propriety of when he does or does not recuse himself. I don't have much doubt in my mind that when this man goes on the Supreme Court, he is going to be extremely sensitive to that very issue and has already indicated that he would take certain positive steps in order to make his position of possible exposure by reason of his Lloyd's investment known to the litigants in trial.

I think that the discussions that have been had here today and the previous questions that this Senator and other Senators have asked him concerning the whole question of risk assessment vis-a-vis adequate regulatory procedures, particularly in the area to which you address yourself, the matter of health, is very, very significant, and I can't help but believe that he will live with some of these questions for the balance of his life, at least as a matter of awareness.

The matters that Mr. Constantine raised concerning the antitrust issues and that I have raised, I think we also believe that in that area, Judge Breyer, I don't know if I can say will be a better judge, but I think that Justice Breyer will be a more alert, more concerned, more sensitive, more aware of his own particular situation as he sits on the Supreme Court than he might otherwise have been.

I don't think there was any question from the inception of these hearings that this man is going to be confirmed. I don't think you appeared before this committee thinking that your testimony was going to keep him from being confirmed or that you were going to change any votes.

But I hope that your efforts, the efforts of some of us on this committee, and I think his own efforts to try to become more aware of some of these issues may very possibly bring about a better Justice Breyer than the Judge Breyer that some of us have seen fit to have some reservations about.

I thank you. I have no further questions.

Mr. NADER. You mean you don't think we are going to change Senator Hatch's mind?

Senator METZENBAUM. We can change Senator Hatch.

Senator HATCH. He has a powerful influence on me, I must say.

Senator METZENBAUM. He is changing a lot. I haven't seen it, but in my heart I know he is changing. [Laughter.]

Mr. NADER. In the biography of Senator Hatch, his greatest contribution, in my judgment, to the American people was that he facilitated the nomination of Dr. Kessler to head the Food and Drug Administration.

Senator METZENBAUM. That was one of the great things that he did. He is not sleeping well at night these days by reason of that fact.

Senator HATCH. You know, Ralph, that is the first nice thing you ever said about me. [Laughter.]

Mr. NADER. Well, you may not be sleeping well at night, but a lot of people in the country are.

Senator HATCH. Actually, I sleep well and Dave Kessler and I are good friends, even though he makes a lot of mistakes. But I am glad he has Sidney Wolfe keeping him on the ball. [Laughter.]

Senator KENNEDY. Thank you very much.

There is a vote under way, so we will recess briefly and then come back and listen to our next panel. I will take just a moment now to introduce our next panel. These are two outstanding academics. Robert Pitofsky is the former head of the Federal Trade Commission, dean of Georgetown University Law Center. Mr. Pitofsky has written extensively on antitrust law. Cass Sunstein is the Karl Llewellyn Professor of Law at the University of Chicago Law School. Professor Sunstein clerked for Justice Thurgood Marshall, served in the Department of Justice, is recognized as a leader in the legal-academic realm on administrative and constitutional law.

Also on the panel is Martha Matthews. Ms. Matthews served as a clerk at every level of the Federal court system, including as a clerk to the nominee and to Justice Blackmun, Judge Breyer's predecessor, if confirmed. Matthews is currently staff attorney for the National Center for Youth Law in San Francisco.

So we will commence with that panel. I am delighted that we are having back Professors Pitofsky and Sunstein. They have been familiar figures to this committee over a long period of time. We always benefit from their insights and their help and assistance to all of us on the committee. We apologize to them for the interruption, but we will be back in a few moments and continue on with the hearing.

The committee stands in recess.

[Recess.]

Senator KENNEDY. We will come to order. I think our colleagues will be winding up their votes on the floor, but we will move ahead with the testimony. We are very, very grateful to all of you. I saw you in here at the opening moments earlier today, and I know you have been—I think Professor Pitofsky has followed this hearing, the other hearings as well. We are very grateful to you for all of you joining with us, and we look forward to your comments.

We will start, I guess, with Bob.

PANEL CONSISTING OF ROBERT PITOFSKY, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC; CASS R. SUNSTEIN, PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, CHICAGO, IL; AND MARTHA MATTHEWS, STAFF ATTORNEY, NATIONAL CENTER FOR YOUTH LAW, AND FORMER LAW CLERK TO JUDGE STEPHEN G. BREYER, SAN FRANCISCO, CA

STATEMENT OF ROBERT PITOFSKY

Mr. PITOFSKY. Thank you, Senator Kennedy. It is a privilege to be invited to testify in these important hearings.

I believe that Steve Breyer from all points of view is an outstanding nominee to the Supreme Court. I will concentrate today, however, on that part of his record dealing with economic regulation and particularly his record in antitrust. That record has been subject to very thoughtful questions by Senator Metzenbaum and others on the committee, and subject to some criticism by witnesses who testified a little earlier today.

I recognize two themes in the criticism. One is sort of a numbers game approach that Judge Breyer is supposed to have decided an unusual number of cases in favor of defendants in antitrust cases, and then there has been some criticism of specific decisions.

As far as the numbers game is concerned, first of all, if people are going to use the numbers game approach, they ought to get their numbers right. The claim is—I have heard it repeatedly today—that he decided 16 consecutive cases against the defendant. Actually, the score was 14 to 2, and I cited two cases for the plaintiff in my prepared testimony. Also, the fact is that in all Federal courts, 75 percent or so of cases are decided in favor of defendants in antitrust matters. So if the record had been 12 to 4, it would have been average, and in Judge Breyer's court it turns out to be 14 to 2. That is hardly a devastating disclosure.

But, in any event, I did not want to play the numbers game. I think that approach asks the wrong question. The real issue is not whether the plaintiff or defendant wins; it is whether the competitive process and consumers win. And that can occur if the plaintiffs prevail or the defendants prevail. And as I will try to discuss in a moment, I believe in the cases for which he has been most criticized, the competitive process and consumers won.

Also, we are talking here about 14 cases decided in favor of defendants, but many of them involved trivial issues from the point of view of antitrust policy. One case addressed the question of whether Puerto Rico was a State or a territory. Well, it came up in an antitrust case, but that is hardly an antitrust policy question.

Another case involved the issue of whether a judge should recuse himself because of a conflict of interest.

In two cases, Judge Breyer and his colleagues denied a preliminary injunction, but the parties were then free to litigate the merits of the case in the following proceeding, and in two cases, the plaintiff was the large company and the defendant was the small company. So that when he found in favor of the defendant, he was hardly finding in favor of big business.

Turning to the specific cases, three have been criticized, or maybe four—*Subaru* was mentioned in the earlier hour—*Boston Edison, Barry Wright, Kartell* and *Subaru.* First of all, let me start by saying that several of these cases—*Boston Edison* and *Barry Wright* in particular—have something in common, and that is that the plaintiff is a small company, the defendant is a large company, and the plaintiff comes into court and says: My rival is too aggressive, its prices are too low; its strategy is too aggressive, and asks that the antitrust law remedy the losses that it is suffering in the marketplace.

Let me be specific. Frankly, we have heard more about price squeeze in these hearings than the world has heard about price squeeze in 104 years. I am aware of only two price-squeeze cases in the nonregulated market that have ever been won by a plaintiff in 104 years, and both those cases are 50 years old. So the fact that Judge Breyer found against the plaintiff in a price-squeeze case is common rather than unusual.

In a price-squeeze case, as you heard many times over, the plaintiff comes in and says, I must buy from and compete with my supplier. And, therefore, if my supplier makes the wholesale price too high and its retail price too low, I get squeezed, and I cannot earn a decent living.

As I say, those cases are rare, and ordinarily, what the plaintiff is saying is get the retail price up so I can do better in the marketplace. The plaintiff may win that case, but consumers will pay the bill if the retail price goes up.

In *Boston Edison,* I agree with Senator Metzenbaum that had Judge Breyer and his colleagues found the other way around, $36 million would have gone to these two Massachusetts municipal utilities, and I assume it would have been passed on to consumers. But the rule of law would have been that the company exercising the squeeze must get its prices up in order to protect the profits of the small company, and consumers would have lost as a result of that.

Now, I heard today for the first time the argument that that is not necessarily the case. An alternative would have been that the wholesale price would come down and the retail price would stay the same. That is not plausible in this case. The background in this case was that Boston Electric had gotten authority to raise the wholesale price from a Federal regulatory agency, FERC. The same plaintiffs who came into court in the antitrust case then challenged FERC in a judicial proceeding, and they lost there as well.

Therefore, it seems to me that the plaintiffs had to accept the fact that the wholesale price was fair, and the only thing left for them to do—and I read the case as one in which this is exactly what they did. They said get the retail price up as long as the wholesale price is going up. Consumers would have lost.

Barry Wright is even a clearer case because I would grant that *Boston Edison* can be argued both ways. I think Breyer came out correctly. In *Barry Wright,* a small company selling environmental devices says to them, My large rival is giving 25-percent discounts, and as a result, I cannot survive in the marketplace. But Judge Breyer saw the point that when you start regulating how low

prices can be, you interfere with the competitive process, and the result is consumers do not get the benefit of the low price.

He recognized that prices sometimes can be so low that they are predatory and ought to be actionable, but he noted in this case that the prices that *Barry Wright* was complaining about were above full cost. And as a result, that company must have been more efficient than its rival and was passing these benefits along to consumers.

Kartell, all I can say about that case is that doctors were trying to get more money. Blue Cross was trying to keep the prices low, and he found in favor of cost containment.

Let me say in conclusion, the suggestion is that Judge Breyer's opinions are arid, theoretical, impractical. I just do not see it. In every one of these cases, the competitive process is what he is concerned about. Consumer welfare is what he is concerned about. He is skeptical of using the antitrust laws to prevent companies from being aggressively competitive, and I do not see that as arid, theoretical, or impractical.

Thank you.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

BIOGRAPHICAL INFORMATION

Professor of Law, Georgetown University Law Center and of Counsel, Arnold & Porter, Washington, DC.

Formerly held positions as Director, Bureau of Consumer Protection, Federal Trade Commission; Commissioner, Federal Trade Commission; Dean of Georgetown University Law Center; Professor of Law at New York University School of Law and Visiting Professor of Law, Harvard Law School.

Co-Author of *Cases and Materials on Trade Regulation* (with Milton Handler, Harlan M. Blake, Harvey Goldschmid), third edition 1990 and author of numerous books and articles on antitrust including *Revitalizing Antitrust in its Second Century* (1992, co-editor); *Proposals for Revised U.S. Merger Enforcement in a Global Economy,* 81 Geo. L. Rev. 195 (1992); *Definition of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805 (1990); *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051 (1979); *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1 (1978); and *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 1 (1978).

Member of the Council, Administrative Conference (1980–1981); Member of the Board of Governors, D.C. Bar Association (1981–1984); Member of the Council, Antitrust Section of the ABA, (1986–1989).

I appreciate the opportunity to testify in these hearings concerning the confirmation of Stephen Breyer as a Justice of the Supreme Court.

I intend to discuss Judge Breyer's record as a scholar and judge in the field of antitrust. In this testimony, I will focus upon two lines of criticism that have been directed at Judge Breyer's record: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor Big Business over the consumer.

In light of the fact that Judge Breyer has so often reached conclusions in antitrust cases that favor defendants, it is most appropriate for members of the Committee to inquire carefully about this antitrust record. My own view is that his opinions, fully examined, do not evidence any antipathy to antitrust enforcement. Certainly, there is no Big Business bias. His opinions, of course, speak for themselves. Given the facts before him in those cases, there is little reason to contend that he could have reached different conclusions.

Before turning to specifics, let me say that I have read all of Judge Breyer's antitrust opinions and many of his books and articles. I believe his approach to antitrust is thoughtful and enlightened. He would leave the free market alone when it is serv-

ing consumer interests adequately, but parts company with conservatives who believe that the market always, or almost always, does a better job of protecting consumers than government regulators. I expect that Judge Breyer, if confirmed, would be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court supporting effective antitrust enforcement.

A. *The Charge of Consistent Rulings for Defendant.* Of the 15 or 16 antitrust opinions written by Judge Breyer, all but two were decided in favor of antitrust defendants. It does not follow, however, from this numbers game that he is pro-Big Business or anti-antitrust.

Judge Breyer has upheld meritorious antitrust claims by both private and government plaintiffs. In *FTC* v. *Monahan*,[1] he upheld the Federal Trade Commission's broad authority to investigate evidence of price fixing in the pharmaceutical industry. In *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*,[2] he upheld a challenge under the Robinson-Patman Act and the Sherman Act to price fixing in the sale of automobiles. I have not seen any case in which he ruled against the government—federal or state—in an antitrust matter.

Even in cases in which Judge Breyer found for defendants, it does not follow that he is unsympathetic to vigorous antitrust enforcement. In several cases, the plaintiff was a large company and the defendant was the small business, so that decisions in favor of the defendant were hardly pro-Big Business. In many other cases, he was deciding technical questions—whether to deny a preliminary injunction, whether a trial judge should be recused based on conflict of interest, whether Puerto Rico should be treated as a state or a territory—which have no significant bearing on antitrust policy. Finally, as discussed below, his most important decisions, while favoring defendants, consistently reach results that protect the vitality of competitive markets and advance consumer interests.

B. *Criticism of Specific Decisions.*[3] A second charge against Judge Breyer is that several of his decisions evidence hostility toward antitrust enforcement. The cases cited are *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir. 1981), and *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1984).

While Judge Breyer did find for the defendants in all three cases, the important point is that the decisions are consistent with enlightened antitrust interpretation and enforcement. In addition, his decisions helped consumers in each instance.

1. In *Boston Edison*, two municipal utilities that bought power from Boston Edison, a large private utility, claimed that Boston Edison had engaged in a "price squeeze" by selling power to them at a high wholesale price but selling to consumers at a low price in competition with the municipals. The plaintiffs' complaint was that Boston Edison was selling at retail at too low a price for them to make a profit. If they had won out on the point, these small business plaintiffs would thrive because Boston Edison would have to raise its retail price, but consumers would end up paying higher bills.

A price squeeze cause of action is rarely attempted and is usually without merit, regardless of the market in which the alleged squeeze occurred. Judge Breyer found that such complaints are even more questionable in a market in which both the wholesale and retail prices were set by independent regulators. A history of the proceedings shows why. Boston Electric's wholesale rates had been submitted to and approved by FERC, a Federal regulatory agency, over the opposition of the municipals. That decision in turn had been approved by the courts on review. Thus, the plaintiffs were attempting to end-run the regulatory's decision and prior judicial review by framing their complaint about wholesale prices as an antitrust cause of action.

As Judge Breyer noted, it is difficult for courts to decide what constitutes a fair price and a fair profit. When independent regulators establish a "fair price," judges in antitrust cases are understandably reluctant to reverse those decisions—especially where the result would be to raise prices to consumers.

2. *Barry Wright.* In *Barry Wright*, a small producer of an environmental device claimed it had been injured because Pacific, its dominate competitor, sold at " predatory"—*i.e.*, below cost—prices. In fact, the record showed that the defendant's prices were above its full costs. Barry Wright nevertheless sued, asking the court to intervene and prevent low prices to consumers. Breyer recognized that if Pacific's prices were above its full costs, but below the full costs of rivals, it followed that it would

[1] 832 F.2d 688 (1987).

[2] 19 F.3d 745 (1st Cir. 1944).

[3] This portion of my testimony duplicates discussion in a letter to the Committee, dated July 5, 1994, signed by seven antitrust law professors (myself included) analyzing these decisions.

succeed because it was more efficient than its smaller rivals and was willing to pass efficiencies on to consumers in the form of lower prices.

Breyer's decision in *Barry Wright* is part of a growing trend of judges in antitrust cases to shy away from supporting antitrust theories that block low prices to consumers. Breyer recognized that where the prices are so extremely low as to evidence an intent to drive rivals out of business, antitrust has a role to play. But where a company charges prices above its own full costs, it would be senseless—and anti-consumer—for the court to intervene in order to protect less efficient businesses. A few years after Judge Breyer's opinion, the Supreme Court in effect ratified his decision and similar decisions in other circuits that prices above full costs are not predatory, noting that a claim of predatory pricing can only be sustained when the challenged prices are below some standard of cost. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 Sup. Ct. 2578, 2588 (1993).

3. *Kartell.* In the *Kartell* case, a group of physicians challenged Blue Shield because it extracted from participating doctors a promise not to charge patients an amount above the insurance fee paid by Blue Shield. A lower court had found that the effect of the arrangement was to pay doctors at unreasonably low levels and therefore was an agreement in restraint of trade in violation of Section 1 of the Sherman Act.

Judge Breyer found that Blue Shield was not a collection of "buyers," capable of conspiring, but rather an independent single force, and that single buyers have a right under the antitrust laws to bargain for the lowest price available. While the defendant once again won in a Breyer opinion, the real effect was to sustain cost-containment efforts by a major insurer and to prevent doctors from charging higher prices to their patients.

C. *Conclusion.* Judge Breyer stands well within the mainstream of modern antitrust analysis. He is trained and sophisticated in the use of economics, but does not see economics as the exclusive concern of competition policy. He understands that antitrust incorporates a concern for fairness and justice to large and small business, and has an overriding view that those laws should be enforced in order to serve the welfare of consumers.

There is another dimension to Judge Breyer's opinions that deserve comment. His opinions in antitrust, a complicated subject at best, are as clear, sharp and well organized as any judicial opinions in the federal system. Judge Breyer appreciates that individuals and firms, to obey the law and function effectively must be given fair notice of what the law is. He summed up his concern and indicated his approach in a comment in *Boston Edison,* discussed earlier:

> [A]ntitrust rules are court administered rules. They must be clear enough for lawyers to explain them to their clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstances or qualification.

It is true that Judge Breyer is less likely to support interventionist antitrust theories than some Supreme Court judges in the 1960s. For example, he is unlikely to support inhibitions on aggressive competitive tactics by large companies so that less efficient small business will thrive, especially when the consequence of that kind of intervention is higher prices to consumers. But when it comes to the mainstream of current antitrust enforcement—challenges to cartel behavior, to large mergers that produce substantial anticompetitive effects, to restrictions on the freedom of distributors to select products and set prices as they see fit—I expect that Judge Breyer will be strong supporter of effective antitrust enforcement. Indeed, the very fact that he understands this area so well should make him an especially effective advocate within the Court for sensible enforcement.

Senator KENNEDY. Professor Sunstein.

STATEMENT OF CASS R. SUNSTEIN

Mr. SUNSTEIN. Thank you, Senator. It is an honor to be here.

I, too, support this nominee, and I believe that his work in the area of regulation is superb. For those who are concerned about his work in this area, especially in the area of the environment and health and safety, it is probably important to emphasize that Judge Breyer distinguishes very sharply between his role as a judge and his role as a policy adviser.

In his capacity as a judge, he has carried out the instructions of Congress and the will of administrative agencies. He has been a very vigorous enforcer in the sense of he has been very faithful to Congress' own judgments that the environment needs protection. So when he has written as a policy adviser, that is what he has done. And when he has written as a judge, he has not compromised congressional judgments by his own policy views.

Nonetheless, some concerns have been raised about Judge Breyer's views on regulations, so I would like to say just a few words about his work in that area in which he is very widely respected.

Judge Breyer's general attitude toward regulation is highly pragmatic, and in a specific sense, he is very focused on the real world. He is not highly theoretical. His interest is, What do regulations do for the people who are supposed to benefited by them? And to this end, he has looked very empirically at whether agencies make the world better or worse. He has not bashed regulatory agencies in the least. On the contrary, he has found many instances in which regulatory agencies have done a very good job. He is not opposed to regulation as a general rule. He believes that in many areas regulation is indispensable. Indeed, he sometimes describes deregulation as—and this is a direct quote—"a non-solution."

I think because of his pragmatism in the sense of no big theories but attention to consequences, it is because of his pragmatism that he is so widely respected. Most generally in regulation, he sought deregulation and reliance on antitrust law where he thinks the market will work. His very famous work with Senator Kennedy and, in fact, Ralph Nader on airline deregulation is based on the judgment that market competition will work in the area of airlines because it will lower prices and improve services as compared with Government price fixing. This is a judgment supported by facts and evidence, and while a lot of people raise questions about the current status of airline transportation, there is no question that deregulation has brought about many significant gains.

In the area of health and safety, he is against deregulation. He could not be clearer on that. He believes we need Government standards, taxes or fines, and a very significant Government role. What his special concern has been is to ensure that we have a good sense of priorities, that we devote our limited resources to areas in which a lot of lives are at stake rather than to areas in which a few lives are at stake.

Now, there have been a number of concerns raised about Judge Breyer's most recent book. Senator Biden has raised some concerns, and the last panel raised a number of concerns. Let me just offer a few notations on the latest book in order maybe to put it in a more general perspective.

As I have noted, this is a book which is very sharply opposed to deregulation. This is not a free-market book in the least. He has a paragraph in which he dismisses deregulation. This is a book in which he catalogues successes, areas in which agencies have saved human life at low cost. He is not opposed to the EPA, the Nuclear Regulatory Commission, or anything of the sort.

His basic goal has been to ensure that more is done in the way of savings lives rather than less is done in saving lives. And to that

end, he has suggested that we ought to adopt some mechanism by which Government can transfer resources from small problems to large problems. It is very pragmatic, highly common-sensical.

Some people have suggested that the notion is not democratic. With respect to this question, it is important to note that any power that Judge Breyer suggests agencies should have would be exercised within congressional limits. On that he is crystal clear, that there is no increase in executive power over such power as the agencies now have. This approach involving more protection of life rather than less, a body of experts who would ensure that result would Judge Breyer thinks the public would like, is a policy recommendation offered as an experiment. And Judge Breyer is also very clear that this is an experimental idea and not an idea set in stone.

Let me conclude by suggesting that Judge Breyer's work on the law as opposed to policy makes crystal clear that his basic judgment is that law is for courts, policy is for agencies and Congress. Policy judgments, he has said, in the environmental area, everywhere else, are not judicial business, and he has criticized some courts for being too activist in that regard.

This is an especially distinguished appointment to the Supreme Court, really an extraordinary appointment to the Supreme Court, and the Court itself will be better with Judge Breyer on it.

[The prepared statement of Mr. Sunstein follows:]

Statement of Cass R. Sunstein

Karl N. Llewellyn Professor of Jurisprudence
University of Chicago
Law School and Department of Political Science

Statement of Cass R. Sunstein, Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago.

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you today to discuss Judge Stephen Breyer's work on regulatory policy and administrative law. I will restrict myself to these subjects. I will give particular emphasis to Judge Breyer's books, Regulation and its Reform (1982) and Breaking the Vicious Circle (1993). I will spend some time as well on Judge Breyer's other academic work; but I will deal only briefly with his judicial opinions, which by necessity offer a less detailed and sustained statement of his views.

Let me begin with some general notes, offered by way of summary. For many years, Judge Breyer has been one of the most valuable writers on regulation and administrative law. He is an unfailingly constructive, fair-minded, and sophisticated contributor to public and academic discussion. Avoiding dogmatism and ideology, he is highly pragmatic; for this reason he appeals to people of widely varying views. A special virtue of his work is that he focuses insistently on the real-world consequences of law.

With respect to regulation, his chief goal has been to develop approaches that will actually improve people's lives, by (for example) reducing prices, promoting employment, improving the quality of services, or increasing health and safety. He is not "anti-regulation" or "pro-regulation." Instead he seeks sound regulation, where soundness is evaluated with close reference to what regulation does in the actual world. Thus Judge Breyer was sympathetic to deregulation in some areas of transportation, urging competition among airlines to keep prices down. But he sharply opposes deregulation in the areas of health and safety, claiming that marketplace forces are insufficient.

With respect to administrative law, Judge Breyer has tried to work out a sensible understanding of the relations among courts, agencies, Congress, and the President. His work is characterized by appreciation of the constitutional backdrop, healthy pragmatism, attention to actual effects, appreciation for experimentation, and good common sense. His work shows that he believes that his primary obligation as a judge is to the law. He understands that his own judgments about regulatory policy should not determine his interpretation of the law.

No one in these complex, technical, and often controversial fields is likely to agree with everything that Judge Breyer has written or said. Reasonable people have reasonable disagreements. But there can be no doubt that Judge Breyer has been an exceptionally valuable contributor in current debates. His work on government regulation and administrative law is unusually distinguished. In part because of his expertise and sophistication in these fields, he would be an superb addition to the Supreme Court.

I. Regulation in General

Judge Breyer's first book, Regulation and its Reform (1982), offers a comprehensive overview of the subject. The book is a careful, fair-minded, and balanced discussion of regulation. It seeks particularly to identify the regulatory tools that will best promote our common economic, social, and environmental goals. This is a detailed and sophisticated book, one that defies simple summary. I offer a brief outline here.

Judge Breyer's principal complaint is that we have not always sought regulatory tools that are well-matched to regulatory problems. For example, if the regulatory problem is natural monopoly, the best regulatory tool is cost-of-service ratemaking, which can keep consumer costs at the optimal place. If the problem is excessive competition, the best tool is antitrust law, which can prevent predatory behavior. The question of "match" and "mismatch" is the basic theme of the book. In urging good matches between problem and solution, Judge Breyer seeks regulatory approaches that will actually work, and that will do so without increasing prices, promoting unemployment, harming economic productivity, or endangering other important social goals.

Judge Breyer favors deregulation in certain limited but important circumstances -- especially when the evidence suggests that competition, rather than government mandates or government price-fixing, will benefit consumers and the public at large. His approval of airline deregulation grows out of the view that airlines can be made to compete with one another, and that if so, government should not set prices for airline tickets. (There was evidence, receiving bipartisan support, that government price-fixing resulted in unnecessarily high prices for consumers.) Judge Breyer thinks that "excessive competition" is rarely (though not never) a problem; most of the time, so-called "excessive" competition helps consumers and the economy, by lowering prices and improving services. Thus he favors reliance on the antitrust laws to ensure that airlines are truly competing with one another, rather than use of governmental controls to determine prices and services. In short, Judge Breyer urges policymakers to use the marketplace where the marketplace will work.

But Judge Breyer rejects deregulation when he believes that it will fail. His book shows that he is certainly not a member of the so-called Chicago School, which tends to see government failure as pervasive, and to treat deregulation as invariably the remedy of choice. In this way, Judge Breyer does not follow the views expressed by the most prominent and severe critics of regulation. In this book, he claims that deregulation would be a failure in many areas of social and economic life.

In the context of unhealthy or dangerous food and drugs, for example, Judge Breyer notes that ordinary people usually lack information about risks. A government role is therefore indispensable. It may be best for government merely to provide the relevant information; it may be best for government to ban certain risk-producing substances "where disclosure does not work." Id. at 193. There is a separate problem for many social harms, which involve "spillover costs." Id. at 192. With many products, the price that is charged does not reflect the harm that is actually inflicted, and here laissez-faire would be a mistake. Id. at 192-93. Taxes and fines may be the best solution for this problem, or perhaps government should set minimum standards.

Hence in the area of environmental protection, Judge Breyer suggests that the principal choice is not between regulation and no regulation, but between governmentally-set standards on the one hand and economic incentives (taxes or fines) on the other. Judge Breyer offers a detailed discussion of the risks and benefits associated with these various

strategies. (I might add at this point that Judge Breyer's general if cautious support for economic incentives has now received considerable bipartisan approval. President Clinton's Executive Order on Regulation supports economic incentives, as did Presidents Reagan and Bush, and as does the well-respected environmental group, the Environmental Defense Fund. In the 1990 Clean Air Act, Congress made the same judgment in controlling acid deposition.)

Judge Breyer also urges government to follow some general precepts: to be modest, to aim at the worst cases, and to aim for simplicity. He is concerned that some regulation may cause problems as bad as or worse than the disease, and he seeks approaches that will actually work in the world, rather than prove futile or counterproductive, or amount to symbolic posturing that does little good. All in all, Judge Breyer's analysis of the problem of regulatory "mismatch" is subtle, sophisticated, detailed, and refreshingly nondogmatic.

Regulation and its Reform has proved to be a highly influential and extremely constructive contribution to academic and public debate. Of course the book is not the last word on the subject. Certainly it is possible to question some of its analysis and some of its conclusions. But the book has become something of a classic, and quite deservedly so.

II. Health, Safety, and the Environment

I have said that in the area of safety, health, and the environment, Judge Breyer is sharply opposed to deregulation. In recent years his basic concern has been to ensure that our limited resources will be devoted to areas where they will do the most good. This is a large theme of his first book, and it is the principal goal of his latest book, Breaking the Vicious Circle (1993).

In this book Judge Breyer is not concerned with how much we should be spending on health, safety, and the environment. Instead he is asking how we should allocate our resources for these purposes, assuming that the amount is fixed. In investigating this issue, Judge Breyer identifies a large problem: the apparently large expenditure of resources for relatively small problems, and the failure to devote significant or sufficient resources to relatively large problems. This problem has been found by many observers from many different perspectives, and it is supported by the standard studies from both government and the private sector. See, e.g., W. K. Viscusi, Fatal Tradeoffs (1993), and sources cited; C.R. Sunstein, After the Rights Revolution (1990), Appendix B, and sources cited; Regulatory Program of the United States Government, April 1, 1991-March 31, 1992, and sources cited.

Judge Breyer's book is no attack on government regulation. On the contrary, Judge Breyer insists that regulation is necessary, and that deregulation is a "nonsolution." Id. at 56. He even contends that some popular less restrictive alternatives, like labelling and taxes, may well be inadequate. Id. at 56.

Judge Breyer's basic claim is that we can rearrange our priorities so as to do much more to promote health and safety. His comparison of saved lives with costs is designed to ensure that we have more gains, not that we trade off lives and dollars in some mechanical fashion. See id. at 22-28. Thus he shows that much regulation is highly successful, saving lives and protecting the environment at comparatively low cost. See id. at 24. Thus he urges that we might improve our regulatory outcomes through, for example, better prenatal care; increased vaccinations; better cancer diagnosis; improvements in indoor climates; changes in diet to avoid natural carcinogens; spending more government time and effort on such

serious ecological problems as ozone, forest destruction, and climate change; and much more. Id. at 23, 28. Judge Breyer draws on some recent work by the Environmental Protection Agency to show that attention to priorities can help ensure that we devote our resources to the most serious problems, and thus do a lot of good, rather than more minor problems, and thus do less good.

In short, the basic problem addressed by Breaking the Vicious Circle -- a problem the existence of whose existence there can be no doubt -- is inadequate priority-setting and inadequate allocation of limited regulatory resources. Judge Breyer believes that the American public wants those resources to increase gains to life and health. He does not think that the present inadequate allocations really reflect the public will. Thus he seeks solutions that will do what the public most deeply seeks -- to save many lives and protect health and the environment, without damaging the economy.

To overcome the current misallocations, Judge Breyer offers a straightforward but innovative proposal. This is a new institution, one that would operate within the executive branch and always remain subject to the law as enacted by Congress. The purpose of the institution would be simple: to help ensure better priority-setting. Thus its members would have expertise in science and technology and receive experience in many places, including EPA, Congress, and elsewhere. Id. at 71. The new institution would be authorized to ensure good priority-setting, by allocating resources to serious problems rather than trivial ones, and thus by saving more lives rather than fewer.

This is an intriguing and provocative proposal. It is not unprecedented or radical. On the contrary, it draws on some important precedents in the United States and abroad. Notably, officials in both the Bush and the Clinton administrations have expressed considerable interest in the proposal. The proposal also raises many questions, some of which are addressed by Judge Breyer itself, and some of which require further consideration. I cannot discuss those questions here. But it is important to emphasize that the proposal has already attracted a great deal of bipartisan interest, finding support among liberals and conservatives alike. Much of its analysis is reflected, for example, in the recent report of the Carnegie Commission, Risk and the Environment: Improving Regulatory Decision Making (1993). It is notable that the authors of that report were exceptionally diverse.

I conclude that Breaking the Vicious Circle is an unusually valuable and illuminating book. Like many likely readers, I do not agree with everything that is said in the book. Surely we can quarrel with some of Judge Breyer's particular claims, especially in areas involving such a high degree of scientific uncertainty. Surely we can urge modifications and qualifications to his provocative proposal. Perhaps the proposal should ultimately be rejected (though I think that it is far too soon to make such a judgment). What is important for present purposes is that Judge Breyer has offered a highly promising suggestion for the future. The book is a constructive and informed effort to address a significant problem with modern regulation.

III. Administrative Law

Judge Breyer's work on administrative law has been concerned not with substantive policy, but with the appropriate relations among our various governmental actors -- Congress, courts, the President, and federal agencies. He believes in a limited role for the judges, seeing regulatory policy as, fundamentally, a decision for others, especially Congress and regulatory agencies. See, e.g., Afterword, 92 Yale LJ 1614 (1983). Here too Judge Breyer has done first-rate work. This work is perhaps most relevant

to these confirmation proceedings, since it suggests Judge Breyer's views on the function of the judiciary.

For present purposes, two of Judge Breyer's essays are especially notable. On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992), sharply criticizes the view that legislative history is irrelevant to statutory interpretation. Judge Breyer urges that legislative history has some limited but important functions for judges. His basic claim is that the history helps uncover Congress' instructions, and to that extent legislative history bears on judicial work. He shows that the history may help courts to avoid absurd outcomes that Congress has not intended; that it may help reveal drafting errors; that it may show that Congress wrote with a specialized meaning that courts should respect. Perhaps most important, the history may reveal that Congress has sought to promote an identifiable purpose and that a particular interpretation was Congress' own.

Judge Breyer does not believe that courts should search the legislative history in support of fragmentary quotations establishing the court's preferred policy view. But he thinks that when there is room for interpretive doubt, the history can be a real help. This is a balanced, modest, moderate, and highly intelligent discussion. It shows an appreciation for possible abuses of legislative history, but also responds well to people who think that the history should be abandoned. In Judge Breyer's view, the proper answer to abuse is to stop the abuse, not to drop reliance on the history altogether. Reasonable people may claim that Judge Breyer has not struck the right balance; but the article is a fine one.

Also notable is Judicial Review of Questions of Law and Policy, 38 Ad. L. Rev. 363 (1986). Here Judge Breyer draws attention to Supreme Court cases apparently suggesting (quite oddly) that courts should carefully review policy judgments by agencies, but should defer to agency judgments about the meaning of law. Judge Breyer says that this is an anomalous and unstable set of ideas, since courts are better suited to interpreting law, and poorly suited to assessing policy. Judge Breyer emphasizes that courts are not well-equipped to make policy judgments, since they lack a comprehensive overview of agency objectives and options. Judge Breyer also offers a highly sophisticated discussion of the problem of deciding when courts should defer to agency interpretations of law. He shows that this is a complex or subtle problem, not easily answered by general rule. This is an excellent article too, and it has been quite influential.

My principal task here is to discuss Judge Breyer's scholarship in regulatory policy and administrative law, and I will not discuss his judicial work in detail. But I will note that as a judge, Judge Breyer has been a faithful interpreter of federal regulatory law. To take just one example, he has strongly supported the goals of the National Environmental Policy Act (NEPA). In two especially influential opinions, he emphasizes the need to consider environmental consequences before decisions are actually made, and in this way he has remained faithful to Congress' initial goals in enacting NEPA. See Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1989); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983). The rest of his judicial work on administrative law and regulation reflects first-rate legal skills and respect for governmental institutions and the law.

A reading of Judge Breyer's work shows that he certainly does not impose his policy preferences on the law. He has revealed a strong commitment to a limited role for the judiciary, safeguarding the lawmaking prerogatives of Congress and the policymaking powers of the President and regulatory agencies. This approach is highly consistent with his academic writings.

Conclusion

For a long period, Judge Breyer has been one of the most valuable commentators on administrative law and regulatory policy. He is widely respected and discussed. His work is highly pragmatic, and he is always focussed on real-world consequences. Avoiding dogmatism, abstraction, and high theory, he cannot be characterized as "for" or "against" regulation in general. Instead he is aware that regulation can fail or succeed, and he tries to urge strategies that will actually work, and that will do so while minimally burdening the economy.

His work on administrative law -- probably more relevant for present purposes -- is characterized by a sensible understanding of the strengths and limits of different institutions in the federal government. Hence he urges a limited role for courts, especially in overseeing policy judgments in the regulatory area. But he also insists that courts have an important function in ensuring that agencies have complied with the law as enacted by Congress.

Let me add some final words. Judge Breyer has done his work on regulation not in his judicial capacity, but as an academic and as a policy adviser. There is every reason to think that as a Justice, he would not attempt to "legislate from the bench" by reading statutes in accordance with his own policy preferences. Judge Breyer's work as an academic and as a judge shows that he is fully aware of the sharp limitations of judges in our system of government. In interpreting the law, he has been concerned above all with Congress' instructions, not with his own theories. I think that with his evident skills, unusual expertise, and sense of balance and fair-mindedness, Judge Breyer would be a truly extraordinary addition to the Supreme Court. This is an exciting and distinguished nominee. I very much hope that he will be confirmed.

* * *

Curriculum Vitae

Name: Cass R. Sunstein
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Married to Lisa Ruddick with one child (Ellen)
Born: September 21, 1954, Salem, Massachusetts

Employment

1988-Present -- Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago

1985-1988 -- Professor of Law, Law School and Department of Political Science, University of Chicago

1987, spring -- Visiting Professor of Law, Harvard Law School

1986, fall -- Samuel Rubin Visiting Professor of Law, Columbia Law School

1983-July 1, 1985 -- Assistant Professor, Law School and Department of Political Science, University of Chicago

1981-1983 -- Assistant Professor of Law, University of Chicago Law School

1980-1981 -- Attorney-Advisor, Office of Legal Counsel, U.S. Department of Justice

1979-1980 – Law Clerk to the Honorable Thurgood Marshall, Supreme Court of the United States

1978-1979 – Law Clerk to the Honorable Benjamin Kaplan, Supreme Judicial Court of Massachusetts

Education:

J.D. 1978, Harvard Law School magna cum laude (Executive Editor, Harvard Civil Rights-Civil Liberties Law Review; Winning Team, Ames Moot Court Competition)

A.B. 1975, Harvard College magna cum laude (Board of Editors, Harvard Lampoon; Varsity Squash)

Subjects:

Constitutional Law (Three Courses: Free Speech and Religion; Governmental Structure; Equality and Due Process), Constitutional Theory and Interpretation, Constitutionalism and Democracy, Administrative Law, The Theory of the Regulatory State, Environmental Law, Regulation: What Works and What Doesn't, Social Security and Welfare Law, Civil Procedure, Supreme Court Seminar, Rawls and His Critics, Elements of the Law (introductory jurisprudence), Selected Issues in Contemporary Legal Theory

Public Service, Administrative Responsibilities, Related Matters:

Co-Director, Center on Constitutionalism in Eastern Europe, University of Chicago, 1990 - present

Vice-Chair, Judicial Review Committee, Section on Administrative Law and Regulatory Practice, American Bar Association, 1991-present

Commissioner, American Bar Association Commission on the future of the Federal Trade Commission and of economic regulation, 1988

Associate Editor, Ethics, 1986-1988

Board of Editors, Studies in American Political Development, 1989-present

Board of Editors, Journal of Political Philosophy, 1991-present

Board of Editors, Constitutional Political Economy, 1991-present

Contributing Editor, The American Prospect, 1989-present

Chair, Administrative Law Section, Association of American Law Schools, 1989-1990

Vice-Chair, American Bar Association Section on Governmental Organization and Separation of Powers, 1986-1987

Council, American Bar Association Section on Administrative Law, 1987-1988

Vice-Chair, American Association of Law Schools, Section on Administrative Law, 1987-1989, 1990-present

Member, American Law Institute, 1990-present

Member, American Academy of Arts and Sciences, elected 1992

Have testified on numerous legal subjects, usually involving separation of powers, administrative law, regulatory policy, and constitutional law, before a number of national and local government bodies, including Senate Judiciary Committee, Senate Government Affairs Committee, House Rules Committee, Attorney General's Commission on Pornography, and Illinois House of Representatives

Have advised on law reform and constitution-making efforts in various nations, including Ukraine, Romania, Poland, South Africa, Bulgaria, Lithuania, Albania, Israel, and China

Have worked on briefs pro bono on various subjects in United States Supreme Court, United States Court of Appeals, and United States District Courts

Publications:

Books:

Democracy and the Problem of Free Speech (The Free Press, 1993)

The Partial Constitution (Harvard University Press 1993)

After the Rights Revolution: Reconceiving the Regulatory State (Harvard University Press 1990; paperback 1993)

Constitutional Law (Little, Brown & Co., 1st edition 1986; 2d edition 1991) (co-author)

The Bill of Rights and the Modern State (University of Chicago Press 1992) (co-editor with Geoffey R. Stone and Richard A. Epstein)

Feminism and Political Theory (editor) (University of Chicago Press 1990)

Articles:

Rules and Analogies, The Tanner Lectures in Human Values (forthcoming 1994)

Well-Being and the State, Harvard Law Review (forthcoming 1994)

The Anticaste Principle, Michigan Law Review (forthcoming 1994)

Conflicting Values in Law, Fordham Law Review (forthcoming 1994)

Homosexuality and the Constitution, Indiana Law Journal (forthcoming 1994)

The Politics of Constitutional Amendment in Eastern Europe (with Stephen Holmes), forthcoming in Constitutional Amendment (S. Levinson ed., Princeton University Press)

Economic Incentives, Environmental Law, and Democracy, Ecology Law Quarterly (forthcoming 1994)

Standing Injuries, 1994 Supreme Court Review (forthcoming)

Liberal Constitutionalism and Liberal Justice, Texas Law Review (1994)

Incommensurability and Valuation in Law, Michigan Law Review (1994)

Incommensurability and Modes of Valuation: Some Applications in Law (forthcoming in Incommensurability, R. Chang ed., Harvard University Press 1994)

Gender, Caste, Law, in Human Capabilities (J. Glover & M. Nussbaum eds. forthcoming, Cambridge University Press, 1994 or 1995)

The President and the Administration, 94 Columbia Law Review (1994)

Article III Revisionism, 92 Michigan Law Review (1993)

Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems, Academe (1993), and forthcoming in Academic Freedom (Louis Menand ed. 1994)

Information, Please, Eastern European Constitutional Review (1993)

The Enduring Legacy of Republicanism, in A New Constitionalism (K. Soltan & S. Elkin eds., University of Chicago Press 1993)

On Legal Theory and Legal Practice, NOMOS: Theory and Practice (forthcoming 1994)

Endogenous Preferences, Environmental Law, J. Legal Studies (1993)

Environmental Economics, The American Prospect (1993)

Words, Conduct, Caste, University of Chicago Law Review (1993)

In Defense of Liberal Education, J. Legal Educ. (forthcoming 1993)

On Analogical Reasoning, 106 Harvard Law Review (1993)

Truisms and Constitutional Duties: A Reply, Texas Law Review (1993) (with David A. Strauss)

Presidential Power and the Council on Competitiveness, Am. Univ. J. of Ad. Law (1993)

On Finding Facts, in Questions of Evidence (James Chandler, Arnold Davidson, and Harry Harootunian eds, forthcoming 1994)

What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III, Michigan Law Review (1992)

Federalism in South Africa? Lessons From the American Experience, American University J. of International Law (forthcoming 1993) and in From Apartheid to Democracy (N. Kittrie, ed., forthcoming 1993 or 1994)

Democracy and Shifting Preferences, in The Idea of Democracy (Cambridge University Press, 1993, edited by David Copp, Jean Hampton, and John Roemer)

Half-Truths of the First Amendment, Univ. Chi. Legal Forum (1993)

Independent Agencies and the New Deal Model, in Independent Agencies (Cambridge University Press, forthcoming 1993)

Against Interest-Group Theory: A Comment, Journal of Law & Economics (1993)

Informing America, Fla. State L.J. (1993)

On Marshall's Conception of Equality, 44 Stanford L. Rev. 1267 (1992)

The Negative Constitution: Transition in Latin America, University of Miami Law Review (forthcoming 1993), reprinted in Transition to Democracy in Latin America: The Role of the Judiciary (I. Stotzky ed. 1993)

Public Choice, Endogenous Preferences, International Review of Law and Economics (1992)

The Senate, the Constitution, and the Confirmation Process, 103 Yale L. J. (1992) (with David A. Strauss)

Economics and the Environment: Trading Debt and Technology for Nature, 14 Colum. J. Env. L. (1992) (with Catherine O'Neill), to be republished in 24 Land Use and Environment Law Review (1993) as one of best articles on environmental and land use law in 1992

On Property and Constitutionalism, Cardozo L. Rev. (1992)

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Neutrality in Constitutional Law (with special reference to pornography, abortion, and surrogacy), 92 Columbia L. Rev. (1992)

Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe, Constitutional Political Economy (1991)

Democratizing America Through Law, 20 Suffolk L. Rev. (1991)

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Remaking Regulation, 3 The American Prospect 73 (1990)

Principles, Not Fictions, 57 University of Chicago Law Review (1990)

Norms in Surprising Places: The Case of Statutory Construction, Ethics (1990)

Paradoxes of the Regulatory State, 57 University of Chicago Law Review (1990)

Constitutional Politics and the Conservative Court, in The American Prospect (1990)

Interpreting Statutes in the Regulatory State, 103 Harvard Law Review (1989), recipient of 1990 award of American Bar Association for best annual scholarship in administrative law

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On the Costs and Benefits of Aggressive Judicial Review of Administrative Action, Duke Law Journal (1989)

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Six Theses on Interpretation, Constitutional Commentary (1989)

Beyond the Republican Revival, 98 Yale Law Journal (1988)

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Compelling Government Action: The Problem of Affirmative Rights, in The Cambridge Lectures (1988)

Pornography and Free Speech, in Civil Liberties in Conflict (L. Gostin ed. 1988)

Protectionism, National Markets, and the American Supreme Court, in volume on National Integration and the Future of the European Economic Community (European University Institute, 1988)

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Constitutionalism After the New Deal, 101 Harvard Law Review 421 (1987)

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Routine and Revolution, Northwestern Law Review (1987), reprinted in Critique and Construction (R. Lovin & M. Perry eds., Cambridge University Press, 1990)

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Participation, Public Law, and Venue Reform, 49 University of Chicago Law Review 976 (1982)

Public Programs and Private Rights, 95 Harvard Law Review 1193 (1982) (with Richard Stewart)

Section 1983 and the Private Enforcement of Federal Law, 49 University of Chicago Law Review 394 (1982)

Public Values, Private Interests, and the Equal Protection Clause, 1982 Supreme Court Review 127

Cost-Benefit Analysis and the Separation of Powers, 23 Arizona Law Review 1267 (1981)

Short Essays and Reviews:

Founders, Keepers., The New Republic (1993) (reviewing Samuel Beer, To Make A Nation)

Valuing Life, The New Republic (1993) (reviewing W. Kip Viscusi, Smoking, and W. Kip Viscusi, Fatal Tradeoffs)

Against Positive Rights, 2 Eastern European Constitutional Review (1993)

Where Politics Ends, The New Republic (1992)

Hans, University of Chicago Law Review (1992)

Something Old, Something New, 1 Eastern European Constitutional Review (1992)

Judicial Remedies and the Public Tort Law, 92 Yale Law Journal 450 (1983) (book review of Schuck, Suing Government)

Review of Baer, Equality Under the Constitution, 95 Ethics (1984)

Review of John Keane, Public Life and Late Capitalism, 96 Ethics (1986)

Feminism and Legal Theory, 101 Harv. L. Rev. (1988) (book review of MacKinnon, Feminism Unmodified)

The Spirit of the Laws, The New Republic (1991) (reviewing L. Tribe and M. Dorf, Reading the Constitution)

Rightalk, The New Republic (1991) (reviewing M. Glendon, Rights Talk)

New Deals, The New Republic (1992) (reviewing B. Ackerman, We the People)

Is The Court Independent?, The New York Review of Books (1992) (reviewing W Rehnquist, Grand Inquests, and G. Rosenberg, The Hollow Hope)

Speeches, Honors, Invited Papers, Workshops

Invited lectures and papers within United States (selected): National Science Foundation/Columbia University Conference on administrative law and political economy; Urban League Conference on Civil Rights in the Eighties: A Thirty Year Perspective; The Midwest Constitutional Law Professors Conference at Wayne State University; William & Mary College Symposium on Defamation Law; Samuel Rubin Lecture at Columbia Law School; Distinguished Lecture at Boston University; Distinguished Lecture at the University of Connecticut; Principal

paper at University of Pennsylvania Symposium on First Amendment in honor of 250th anniversary of trial of John Paul Zenger; Marx Lecture at the University of Cincinnati Law School; Duke Law Journal Lecture; Distinguished Lecturer, Bicentennial Celebration, Law Day, University of Texas at Austin; Annual Meeting of Federalist Society; Law Day Lecturer, Georgetown University; Yale University symposium on Law, Language, and Compulsion; Midwest Faculty Seminar; in Washington, DC, at joint US-South Africa Conference on new South African Constitution

Invited lectures and papers outside of United States (selected): Israel, on freedom of speech and the proposed Israeli Constitution; Florence, Italy, at international conference on the future of the European Economic Community, on the lessons of American federalism for federalism in Europe; University of Beijing, Beijing, China, on American administrative law and constitutional law; Munich, Germany, for German Celebration of Bicentennial of American Constitution, on the New Deal and the Constitution; Cambridge, England, at The Cambridge Lectures, on negative and positive rights in the American Constitution; Salzburg, Austria, as instructor at the Salzburg Seminar, on constitutional and administrative law; Toronto, Canada, on government regulation of the economy; Paris, at conference on French and American constitutional experiences; Warsaw, Poland, on constitution-making in Poland; Prague, on constitution-making in Ukraine

Legal or political theory workshops (selected): Boston University, Columbia University, Northwestern University, McGill University, University of Southern California, Princeton University, Harvard University, Stanford University, Yale University, University of Toronto, University of Michigan, Washington University, New York University, University of Pennsylvania, University of California at Los Angeles

Professional meetings: American Association of Law Schools Annual Convention, panels on poverty law (1985), administrative law (1986 and 1989) republicanism (1987), separation of powers (1987), constitutional law (1988), law and interpretation (1989), and jurisprudence (1988); Annual Meeting of Public Policy and Management Society, panel on Deregulation and the Courts; Annual meeting of American Political Science Association, panels on various subjects (1986, 1987, 1989, 1990)

Certificate of Merit Award of American Bar Association for contribution to public understanding of American legal system, 1991, for After the Rights Revolution

Award of American Bar Association for best scholarship in administrative law, 1987, for Interest Groups in American Public Law, 38 Stanford Law Review

Award of American Bar Association for best scholarship in administrative law, 1989, for Interpreting Statutes in the Regulatory State, 102 Harv. L. Rev.

Visiting Scholar, University of Minnesota Law School, Rutgers University, George Washington University

Goldsmith Book Award, Harvard University, 1994, for Democracy and the Problem of Free Speech

Current projects:

1. Book on theory and practice of environmental protection

2. Various projects on constitutionalism and constitution-making, with particular reference to Eastern Europe

3. Book on legal reasoning

The CHAIRMAN. Thank you very much.

I apologize, Professor Pitofsky, for not being here while you were here, and, Cass, it is great to see you.

I assume Ms. Matthews has not spoken yet. Correct?

Ms. MATTHEWS. Yes.

The CHAIRMAN. I want to thank Senator Kennedy for chairing this. I have a slight scheduling problem. The reason I was out is we were trying to work out a matter on the crime bill between the House and the Senate, and I apologize for not being here.

Because I am going to have to leave before 5 o'clock, probably about 4:55, before the last panel speaks, I want to indicate for the press that is here what the schedule will be for the remainder of consideration of the Breyer nomination. We will now question this panel and the next panel—and the next panel is a very important panel as well because they represent the various bar associations that have done an awful lot of work on this, and other nominations, and we have come to rely on their judgment a lot.

We will then close the hearing, and we will have an executive session in which we will vote in committee, assuming no Senator exercises his or her right to hold it over for a week—I have no notion anyone will do that—at the latest by next Thursday, possibly as early as Tuesday. I want to confer with the ranking member who I believe is, along with his colleagues, ready to accommodate a Tuesday executive committee meeting. To translate, that means we get to vote on Judge Breyer in committee on Tuesday, I hope, but the latest, Thursday.

If we vote on Tuesday, it is my expectation, absent any opposition—and I know of none—we would be voting on Judge Breyer on the floor as early as the end of next week, but I expect no later than the beginning of the following week.

I do not know if that is at all helpful to the press, who always get stuck having to cover these details, but that is what my expectation is.

Now, Ms. Matthews, again, I apologize for the interruption, and the floor is yours.

STATEMENT OF MARTHA MATTHEWS

Ms. MATTHEWS. Thank you. It is a privilege to be here, Senator Biden, Senator Kennedy.

First, I have to offer a disclaimer. I know absolutely nothing about antitrust or regulation.

The CHAIRMAN. That qualifies you, with the exception of Senator Kennedy and a few others, to be a member of the Judiciary Committee.

Ms. MATTHEWS. I am not sure if that is a disappointment or a relief. [Laughter.]

I am a civil rights lawyer and poverty lawyer. I am a staff attorney at the National Center for Youth Law, which is a legal services national backup center specializing in legal issues affecting poor children and families. What I actually do is mostly class action litigation on behalf of foster children, and other litigation and administrative advocacy related to benefit levels, children's access to health care, and other vital legal issues affecting poor children. So

I am not qualified to speak on the debate that we have just heard on antitrust and regulation.

The reason that I think that I was asked to testify today is because several years ago I had the rare opportunity to work both with Judge Breyer and with the distinguished Justice that he was nominated to replace. I served as a law clerk for Judge Breyer from 1988 to 1989. I served as a law clerk for Justice Blackmun from 1989 to 1990. And so I had the somewhat unique opportunity to be there on a day-to-day basis at the elbow of each one of these jurists and see what they do every day.

So I would like to direct my remarks not so much to their overall jurisprudence. You have heard law professors who are far more experienced than I to do that, but as to what Judge Breyer was like on a day-to-day basis, what he was like working——

The CHAIRMAN. Did you write the *Ottati* opinion? [Laughter.]

Ms. MATTHEWS. Law clerks do not write opinions.

The CHAIRMAN. I know. Maybe you are the one we should have speaking to all this time.

Ms. MATTHEWS. I am sure that any fatal errors in antitrust opinions are entirely—well, I cannot say they are due to mistakes of law clerks, because he checks everything that we write so carefully.

Actually, the biggest case that I researched for Judge Breyer during the year I was there was a case about futures trading on the London options market, something I knew nothing about before I came and I knew nothing about after I left, either.

The CHAIRMAN. Well, he has made an Anglophile of almost all of us since we have had to learn about Lloyd's of London.

Ms. MATTHEWS. I was saddened to hear of Justice Blackmun's retirement, but I cannot think of anyone better qualified to replace him than Judge Breyer. Like Justice Blackmun, he cannot be easily labeled as a liberal or conservative judge. His views on cases have never been predetermined by any political agenda. Nobody could accurately say about him that he always rules for the plaintiff in a civil rights case or always rules for the Government in a criminal case or any such generalization.

Judge Breyer has shared with Justice Blackmun a profound commitment to judge each case fairly as it comes before him, with rigorous honesty, intellectual clarify, lack of bias, and with a deep respect for the limits of judicial authority.

It is striking to me that Judge Breyer has been nominated to replace Justice Blackmun because there are some profound similarities between them, even though their temperaments are quite different.

Again, like Justice Blackmun, Judge Breyer has never forgotten that each case that comes before a Federal court is of great importance to the parties involved in the case and to other people who are going to be affected by the decision in the case. Each case he has treated with——

The CHAIRMAN. How do you know that? People say that. But did either of the judges ever turn to you and the clerks and say, By the way, Martha, keep in mind when you look at these cases—I mean, when you—how do you know that?

Ms. MATTHEWS. Well, in Judge Breyer's case, by the rigorous attention he has paid to the record. Judge Breyer makes sure that

every—I mean, the records sent to the Federal circuits are voluminous. He is familiar with every page of those records, makes sure that we really understand how the case came about, who the parties are, what happened to them, what is going to happen to them if they win or if they lose.

I do not think that he is the kind of judge that takes a case as an opportunity to explore some academic legal theory or to write a Law Review article, you know, in the guise of a judicial opinion. I think that he profoundly cares what happens to the people in the cases.

That is shown, for example, by the tone of his questioning at oral argument, and like Justice Blackmun, in fact, is famous. The questions that he asks at oral argument show that kind of concern for what is going to happen as a result of this case.

Another thing that I would like to say about oral argument is that one thing that deeply impressed me as I watched arguments before Judge Breyer is the respect and courtesy that he treated the lawyers who argued the cases with. Not everyone who appears before a Federal circuit court of appeals is brilliant. Some of them are eloquent. Some of them stumble over their words. Some of them drop their papers off the podium.

Every single lawyer who comes before him gets a fair chance to plead his cause. His questions to the lawyers show that he is prepared on their cases. He genuinely wants to hear what they have to say and wants to give them a fair chance. And I think that that is one of the most profound ways in which a judge as a public figure can show respect for the law and show respect even for the positions of lawyers with whom he disagrees.

Another thing I would like to comment on is—this may be prosaic, but the hours that Judge Breyer works. He is there every day. He is completely prepared on each case. The cases that are argued before the court, he is fully briefed. He sits on the bench, understanding each case, and I am not talking about interesting—well, to me, interesting cases. I am saying that the same amount of attention to detail goes into a case on, say, the proper interpretation of a Social Security regulation as to a cutting-edge issue of first amendment law that his law clerks find fascinating. And that gave me a deep sense of respect for him, that it did not matter if a case seemed to my mind to be boring. He would believe that it deserved the same amount of respect and the same amount of detail.

But in spite of the kind of standards that he held himself to, I would also like to say that he was a joy to work for. He was always courteous and polite to his clerks. He was fascinating to talk to in conversation. We used to—Judge Breyer has a taste for sweets, and we used to leave cookies out on the table in the room where we worked as clerks so that we could sort of tempt him to come in and sit down and talk to us. We called this "judge bait." We would always leave out judge bait because, no matter what subject that you talked to him on, he had something fascinating to say. And he had a broad range of interests beyond the subjects on which he has written books. It was amazing the number of areas of legal scholarship that he kept up with.

I do not want to take too much time with personal reminiscences, but that has always stood out to me.

The CHAIRMAN. They are worthy reminiscences, and one of the things that is important—it has been clearly established, I think, but you have reinforced it—is his temperament and his concern for the litigants and the way in which he treats those before him. That is an important consideration.

I thank you for your testimony, and, again, I thank Senator Kennedy and apologize to the last panel for not being able to be here, but I appreciate your testimony.

[The prepared statement of Ms. Matthews follows:]

PREPARED STATEMENT OF MARTHA MATTHEWS IN SUPPORT OF THE NOMINATION OF JUDGE STEPHEN BREYER TO THE U.S. SUPREME COURT

Thank you for the opportunity to appear and present testimony before this Committee. My name is Martha Matthews; I currently work as a staff attorney at the National Center for Youth Law, a national support center for legal aid attorneys focusing on issues affecting poor children and families.

I believe that I was asked to testify today because, several years ago, I had the rare good fortune to work both for Judge Breyer and for the distinguished Justice he has been nominated to replace. I served as a law clerk for Judge Breyer from 1988 to 1989, and for Justice Blackmun from 1989 to 1990. As a law clerk, I had the opportunity to work closely with Judge Breyer at the First Circuit Court of Appeals, performing legal research, reviewing the case records, and discussing with Judge Breyer the cases argued before that court.

Although I was saddened to hear of Justice Blackmun's retirement, I cannot think of anyone better suited to take his place than Judge Breyer. Like Justice Blackmun, he cannot be easily labeled as a "liberal" or "conservative" judge, because his views on cases are never predetermined by a set political agenda. Nobody could accurately say about him, he always rules for the plaintiff in a civil rights case, or he always rules for the government in criminal cases, or any similar generalization. Judge Breyer shares with Justice Blackmun a profound commitment to judge each case fairly as it comes before him, with rigorous honesty, intellectual clarity, lack of any bias or preconception, and with a deep respect for the limits of judicial authority.

Like Justice Blackmun, Judge Breyer has never forgotten that each case that comes into federal court is of great importance to the parties involved, and to other people who may be affected by it. Each case is treated with the same high standards of thoroughness and clarity—whether it involves a cutting-edge First Amendment issue, or an arcane Social Security regulation. Each litigant receives a judicial opinion written clearly, thoughtfully, and in language he or she can understand (and without any footnotes!), explaining the basis for the decision rendered. Each lawyer who appears at oral argument before Judge Breyer, whether brilliant or stumbling, is treated with respect and courtesy, and is given a fair chance to plead his cause.

Judge Breyer, like Justice Blackmun, habitually works long hours to ensure that he is fully prepared for every case heard by the Court, and that every detail of every opinion is accurate, every sentence clear and well-crafted every legal theory explored. Yet, during the year I worked for him, Judge Breyer somehow also found time to teach, to lecture, to serve on numerous committees, and to keep abreast of developments in legal scholarship in many areas. His dedication to a life of public service has been an inspiration to me in my own work.

Yet despite the rigorous standards to which he holds himself, Judge Breyer was a joy to work for, courteous to his clerks and staff, gracious and engaging in conversation, with a broad range of interests and talents.

I would like to share with you a memory of Judge Breyer that I will always treasure. On a cold winter night in 1989, after a long day of work, Judge Breyer still found the time and energy to attend a Valentine's day party at my house, to sit on the floor with us and make construction-paper valentines for his children. This memory assures me that the application of Judge Breyer's formidable intellect to the cases that come before the Supreme Court will always be tempered with warmth and compassion, with a keen awareness of how the lofty decisions of judges affect the everyday lives of the people of this nation.

It is a privilege to be here, to express my admiration for Judge Breyer and to applaud his nomination to the Supreme Court. Thank you.

BIOGRAPHICAL SKETCH

Martha Matthews is originally from Tucson, Arizona. She received the National Merit Scholarship and Presidential Scholar awards on graduation from public high school in 1980. She attended Swarthmore College, graduating with high honors in panilosophy in 1984.

Ms. Matthews attended Boalt Hall School of Law at the University of California at Berkeley, while concurrently enrolled in a Ph.D. program in Jurisprudence & Social Policy. Upon graduation from law school in 1987, Ms. Matthews received the Order of the Coif and Student Writing awards. Ms. Matthews was admitted to the California Bar in fall 1987.

During 1987–1990, Ms. Matthews served as a law clerk at all three levels of the federal court system, first for Congress [now Chief Judge] Thelton E. Henderson in the U.S. District Court for the Northern District of California, then for Judge [now Chief Judge] Stephen Breyer in the U.S. Court of Appeals for the First Circuit, and finally for Justice Harry A. Blackmun in the U.S. Supreme Court.

In fall 1990, Ms. Matthews returned to California to work as a staff attorney at Legal Services for Children in San Francisco. She represented inner city children in Abuse/Neglect cases, guardianship and emancipation petitions, and other civil cases.

In 1991, Ms. Matthews went to work as a staff attorney at the National Center for Youth Law, a legal services support center focusing on issues affecting low-income families and children.

Ms. Matthews currently specializes in litigation and administrative advocacy to improve child protective services, foster care, and children's mental health systems. She has served as counsel in two major class action cases on behalf of foster children *Angela R.* v. *Clinton* and *David C.* v. *Leavitt*. In these cases Ms. Matthews helped to negotiate settlements providing for comprehensive reform of the child welfare systems in Arkansas and Utah. Ms. Matthews also directed the California Children's SSI Campaign, an outreach project to help low-income families with disabled children obtain benefits and health care. Ms. Matthews serves as the training coordinator for NCYL, planning and conducting trainings and conferences on children's advocacy.

Ms. Matthews resides in San Francisco, California.

EDUCATION

Legal: Boalt Hall School of Law (J.D. 1987) University of California at Berkeley.
Graduate: Jurisprudence & Social Policy Program (coursework towards Ph.D. 1984–1987), University of California at Berkeley.
Undergraduate: Swarthmore College (B.A., high honors in philosophy 1984).

PROFESSIONAL ASSOCIATIONS

California Bar Association (admitted 1987).

LEGAL EMPLOYMENT

Staff Attorney, National Center for Youth Law, San Francisco (1990–present).
Staff Attorney, Legal Services for Children, San Francisco (1990).
Law Clerk, Justice Harry A. Blackmun, United States Supreme Court (1989–1990).
Law Clerk, Judge Stephen Breyer, United States Court of Appeals, First Circuit (1988–89).
Law Clerk, Judge Thelton E. Henderson, United States District Court, Northern District of California (1987–1988).

SELECTED PUBLICATIONS

"Family Preservation Programs May Benefit Legal Services Clients, "*Youth Law News* May–June 1993.
"Troubling Report on Care of Children with Emotional Problems," *Youth Law News* May–June 1993.
"Youth with Mental or Emotional Problems May Be Eligible for SSI," *Youth Law News* May–June 1992.
"Major Victory for Arkansas Children," *Youth Law News* March–April 1992.
"Supreme Court Denies Children's Right to Sue for 'Reasonable Efforts," *Youth Law News* March–April 1992.
"Supreme Court Rejects Challenge to Child Witness Hearsay," *Youth Law News* Jan.–Feb. 1992.

"Wilderness Programs Offer Promising Alternative for Some Youth; More Regulation Likely," *Youth Law News* Nov.–Dec. 1991.
"Many More Infants Eligible for SSI Under *Zebley* Regulations," *Youth Law News* Sept.–Oct. 1991.
"Supreme Court Upholds Title X 'Gag Rule,' Major Impact on Adolescents Expected," *Youth Law News* May–June 1991.
Comment, "Suicidal Competence and the Patient's Right to Refuse Life-Saving Treatment," *California Law Review* 75:2 (1987).

The CHAIRMAN. I would yield to Senator Kennedy.

Senator KENNEDY [presiding]. Thank you very much.

That was fascinating insight, Ms. Matthews. I do not think over the time I have been on the committee we have probably had the kinds of recollections both in terms of work habits, personal kinds of insights that you have about Judge Breyer. I would certainly, in the time that I have known him, agree with all the characterizations that you have made. I think the seriousness with which he addresses these matters, the work habits, his consideration of people, his real interest in the impact of the decision on real people. I think you have commented on it, and it is certainly something that I have noted. And I think those of us who have watched him as a judge have certainly seen it as well. I think that will be enormously important in the work on the Court, so we thank you for those insights.

Let me ask just very briefly, Professor Sunstein, could you tell us, with Judge Breyer's legal philosophy, what your sense is about the issues in protecting health and safety that will come to him in different forms and shapes that will come to the Supreme Court? If people were to ask you what in his background, his writings, and his decisions that should give us some satisfaction on those issues relating to health and safety, that he has demonstrated a real commitment to assuring the rights of individuals in those two important areas?

Mr. SUNSTEIN. I will give you a specific answer and then a general answer. The specific answer has to do with the National Environmental Policy Act, which is sometimes thought to be the Magna Carta of the environmental movement. It says that every agency before it takes action that might affect the environment has to prepare a careful environmental impact statement.

Now, Judge Breyer in two cases has said that if the Government fails to do that when it has to, the court will issue an injunction to stop the Government from going forward with its act.

Now, he has been somewhat unusual—not by any means out of the mainstream—but somewhat unusual in allowing the injunction to go forward. The idea that he has spoken for is that the Government has to consider the environmental impact before the action is taken, and that means that we cannot wait for the environmental impact statement to be prepared while the action is taken; he has insisted the injunction will stop the Government from acting until it has considered the environmental impact.

Now, that, I think, is a signal of how seriously he takes environmental issues and a signal of how seriously he takes his understanding of congressional purposes. That is the specific answer.

The more general answer is he is first and foremost dedicated to faithful interpretation of the law. So the key question is what have you, what has Congress, instructed the courts to do, and the agen-

cies to do. That is why he is so insistent that legislative history plays a role in statutory interpretation. For him, the principal role of the judge is to make sure that Congress' instructions have been complied with, and these cases involving issuing injunctions, stopping Government from acting until the environmental impact has been considered, those are testimony to that judgment of his.

Senator KENNEDY. I know we did not go into with Judge Breyer on the old issue—some of my other colleagues did—of interpreting statutes and also interpreting some of the discussions and debates. I can think of a case that is so clear, and that is the *Grove City* case, where, rather than looking at the particularity of the words in the statute, if the Court had ever looked at what this institution had been doing for a whole period of time, that is, not permitting taxpayer money to be used in a discriminatory way—that is just boilerplate from the period of the 1960's on. And as you remember, in that case, since there was not discrimination in the financial office, it did not make any difference whether there was discrimination in the hiring or the treatment of, in this case, women at Grove City. They said, well, there is no discrimination in the office where the money is going. And that is really what Congress—because look at these words—rather than looking at what was stated in the floor debates, what was stated in terms of the legislative history and in the perspective of the actions that had been taken by Congress in a period of time where, as a policy matter, they were not going to permit taxpayers' money to be used in a way that would permit discriminatory action.

There were some references, certainly, to the value of looking just, at a time when there was confusion about particular words, at some of the other factors in terms of the history. Of course, we overrode that case for that very reason, and in that case, certainly, it seemed to me that the courts had looked at a broader perspective.

Professor Pitofsky, you mentioned *Kartell* v. *Blue Shield of Massachusetts,* which involved cost control measures in the health care area, which is not irrelevant in terms of the current discussion and debate now in Congress. Can you explain how the *Kartell* case is an example of a Breyer opinion in favor of the defendant that in fact protects consumers?

Mr. PITOFSKY. Yes; it is an excellent example. What happened there was that Blue Cross/Blue Shield essentially imposed on the doctors in Massachusetts a rule that they accept the insurance payment as complete discharge of any moneys that were owed to the doctors. The doctors then got together and sued, claiming that Blue Cross/Blue Shield had set the level too low, and they were not being reasonably compensated for their services. They wanted to charge the patient additional money over and above the insurance money, and they claimed that Blue Cross/Blue Shield was engaged in a boycott.

Technically, Judge Breyer found that Blue Cross/Blue Shield was a single entity; it was not a conspiracy, and therefore they had the right to bargain for the lowest price.

As a practical matter, there is little question that the consequence of the case was that Blue Cross/Blue Shield's efforts at cost containment were sustained. And an antitrust effort to block

that, which would have allowed the doctors to charge the patients more money otherwise, was struck down by Judge Breyer.

That is hardly a big business, anti-antitrust conclusion. On the contrary, it seems to me, looking at it in a common sensical, practical way, that is a proconsumer result.

Senator KENNEDY. Well, it certainly is, and that is a pretty common issue, and different States have had different laws in attempting to deal with that, and we have at the Federal level as well. It is a very key area in terms of a public policy issue, and you have certainly stated accurately what the conclusion was on that holding, and that is that the consumers' pocketbooks and wallets were protected.

We have seen in Massachusetts, Professor Sunstein in the cases on environment, one of them obviously was the *Georgia Banks* case, and that action was, I think, an enormously important environmental action. I think the estimate in terms of what was going to be out there was in the hundreds of thousands or millions of barrels, and then the reassessment down to what would have been a 6- to 7-day consumption of the country, and what would have happened in an area of the country that provides about a quarter to a third of all of the fish product that is actually consumed by the United States—a very, very important area—was certainly very, very significant and profound.

I thank all of you for your presence here today and for your testimony.

I will put in the record the letter that was sent to Senator Biden, which I referenced earlier. I placed it in the record, but I will just quote here:

> In our view, Judge Breyer is a thoughtful and enlightened advocate of antitrust enforcement. He understands and appreciates the effectiveness of a free market protected by the antitrust laws and serving the welfare of consumers. He also understands the need for vigorous enforcement of the antitrust laws to correct market failures. We expect he will be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court, supporting effective antitrust enforcement.

That is certainly my conclusion, also, having worked with him when I was chairman of the antitrust subcommittee here in the Senate, and I think for those who have studied his work.

So I will include the full letter in the record.

We thank you very, very much. We appreciate it.

Mr. PITOFSKY. Thank you.

Mr. SUNSTEIN. Thank you.

Senator KENNEDY. Our final panel—and here, the old saying, "last, but not least," really does apply—the committee welcomes the presidents of bar associations around the country. Barbara Paul Robinson is here today on behalf of the Association of the Bar of the City of New York; Ms. Robinson is the president of the Association and a partner in Debevois & Plimpton. The committee welcomes you, Ms. Robinson.

Also on the panel are representatives of other nationwide bar associations. Paulette Brown is president of the National Bar Association and is here today on behalf of the Coalition of Bar Associations of Color. With her this afternoon are members of the coalition representing their respective memberships.

Brian Sun is the president of the National Asian-Pacific American Bar Association.

Richard Monet is president of the Native American Bar Association.

And Wilfredo Caraballo is president of the Hispanic National Bar Association.

We welcome all of you here. I want to mention that, as the youngest member of a large family, I was often the last one to be heard at a large table. I think we want to thank you all very much for your patience here. We have had a series of interruptions which were unavoidable in the course of today's hearings. Generally, we do not have the type of interruptions that we have had today, with the floor activity. So you have been very patient. We are very grateful. This is very important. I know I speak for all of my colleagues when I say that we will be looking forward to examining in very careful detail your commentary.

So I want to personally express my great appreciation for your patience and for your willingness to be a part of this whole process.

We will start off with Ms. Robinson.

PANEL CONSISTING OF BARBARA PAUL ROBINSON, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NEW YORK, NY; PAULETTE BROWN, NATIONAL BAR ASSOCIATION, ON BEHALF OF THE COALITION OF THE BAR ASSOCIATIONS OF COLOR, WASHINGTON, DC; BRIAN SUN, PRESIDENT, NATIONAL ASIAN-PACIFIC AMERICAN BAR ASSOCIATION; RICHARD MONET, PRESIDENT, NATIVE AMERICAN BAR ASSOCIATION; AND WILFREDO CARABALLO, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION

STATEMENT OF BARBARA PAUL ROBINSON

Ms. ROBINSON. Thank you, Senator. I was going to thank you for your patience in hearing us at this late hour and to tell you again thank you for the opportunity to testify before this distinguished Senate Committee on the Judiciary in the context of the nomination of Judge Breyer to the Supreme Court.

As you said, my name is Barbara Paul Robinson, and I am here as president of The Association of the Bar of the City of New York. We are one of the oldest bar associations in the country, and we are about to celebrate our 125th anniversary.

We now include over 20,000 members, and we were established to promote reform and approve the administration of justice, particularly in the courts. We try very hard to work in the public interest.

Our executive committee, through a subcommittee chaired by Stephen Rosenfeld, who is here with me today, has reviewed Judge Breyer's nomination, as it has reviewed earlier candidates for appointment to the Supreme Court. After an extensive review, the association has concluded that Judge Breyer is indeed qualified to be a Justice of the U.S. Supreme Court, because he possesses to a substantial degree all of the following qualifications that are set forth in our guidelines when we consider nominees to the U.S. Supreme Court.

They are: exceptional legal ability; extensive experience and knowledge in law; outstanding intellectual and analytical talents; maturity of judgment; unquestionable integrity and independence; a temperament reflecting a willingness to search for a fair resolution of each case before the Court; a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; an appreciation of the historic role of the Supreme Court as the final arbiter of the meaning of the U.S. Constitution, including especially sensitivity to the respective powers and reciprocal responsibilities of the Congress and executive.

Because these guidelines limit approval to those of high distinction, the guidelines do not provide for gradations in ratings. Qualified and unqualified are the only ratings we employ.

In reaching this conclusion, our subcommittee read extensive materials, including all of Judge Breyer's more than 500 opinions which he has written as a judge of the U.S. Court of Appeals for the First Circuit, many of his articles, lectures and books, and numerous news articles and commentaries appearing with respect to the nomination. In particular, the subcommittee focused on cases in the areas of antitrust, which you have addressed extensively today, but also civil rights and civil liberties, criminal law and sentencing guidelines, and administrative law, particularly in the economic and environmental regulatory field.

The subcommittee also conducted numerous telephone interviews with former colleagues and law clerks of Judge Breyer, and attorneys who had appeared before him. They received and considered comments from our membership—which, as I said, is over 20,000—and because of the graciousness of Judge Breyer, several members of the subcommittee interviewed him in person.

The executive committee also took account of the recent reports in the press which questioned whether Judge Breyer should have focused and recused himself in cases involving Superfund environmental liability under Federal law because of his investments in Lloyd's of London syndicates and his possible personal liability for underwriting losses. They considered carefully the Superfund cases in which Judge Breyer has participated since 1987, none of which involved insurance coverage issues, as well as the available evidence concerning Judge Breyer's awareness of the extent and nature of possible Superfund exposure by the syndicates in which he was a member, and his ability to evaluate the potential impact, if any, of his decisions in Superfund cases on his own financial interests.

Based on the applicable statutory standard for disqualification of Federal judges—28 U.S.C. section 455—and the evidence available prior to these hearings and during them, the executive committee found no reason to depart from its conclusions as to Judge Breyer's judgment, integrity, and independence by virtue of the fact that he did not recuse himself in the Superfund cases.

I might add in closing that because these questions of recusal and judges' investments do pose challenging issues and do arise not only in these hearings, but in other cases, our Association, following on some of the comments raised by Senator Simon, intends to study this area, and we hope to perform a public service by making some helpful recommendations for the future.

Thank you very much. I would be delighted to answer any questions.

The CHAIRMAN. Thank you very much.

Ms. Brown.

[The prepared statement of Ms. Robinson follows:]

PREPARED STATEMENT OF BARBARA PAUL ROBINSON

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FINDS JUDGE STEPHEN G. BREYER QUALIFIED TO BE A JUSTICE OF THE SUPREME COURT

The Association of the Bar of the City of New York has concluded that Judge Stephen G. Breyer is qualified to be a Justice of the United States Supreme Court, because he possesses, to a substantial degree, all of the following qualifications enumerated in the Guidelines established by the Executive Committee for considering nominees to the United States Supreme Court:

- exceptional legal ability;
- extensive experience and knowledge in law;
- outstanding intellectual and analytical talents;
- maturity of judgment;
- unquestionable integrity and independence;
- a temperament reflecting a willingness to search for a fair resolution of each case before the Court;
- a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals;
- an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

Because the Executive Committee Guidelines limit approval to those of high distinction, the Guidelines do not provide for gradations of ratings; qualified and unqualified are the only ratings employed.

In reaching this conclusion, a subcommittee of the Executive Committee read extensive materials, including all of Judge Breyer's more than 500 written opinions as a judge of the United States Court of Appeals for the First Circuit, many of his articles, lectures and books, and numerous news articles and commentaries appearing with respect to the nomination. The subcommittee also conducted a number of telephone interviews of former colleagues and law clerks of Judge Breyer and attorneys who had appeared before him, received and considered comments from the membership of the Association, and interviewed Judge Breyer in person.

The Executive Committee also took account of recent reports in the press which questioned whether Judge Breyer should have recused himself in cases involving "Superfund" environmental liability under federal law, as a consequence of his investments in Lloyd's of London syndicates and his possible personal liability for underwriting losses. The Executive Committee considered carefully the "Superfund" cases in which Judge Breyer has participated since 1987, none of which involved insurance coverage issues, as well as the available evidence concerning Judge Breyer's awareness of the extent and nature of possible "Superfund" exposure by the syndicates of which he was a member, and his ability to evaluate the potential impact, if any, of his decisions in "Superfund" cases on his own financial interests.

Based on the applicable statutory standard for disqualification of federal judges (28 U.S.C. §455) and the evidence currently available prior to the Senate confirmation process, the Executive Committee found no reason to depart from its conclusions as to Judge Breyer's judgment, integrity and independence by virtue of the fact that he did not recuse himself in the "Superfund" cases.

The Association acted on the nomination under a policy that directs the Executive Committee to evaluate all candidates for appointment to the Supreme Court.

STATEMENT OF PAULETTE BROWN

Ms. BROWN. Thank you, Senator Kennedy.

We, too, appreciate the opportunity, as Ms. Robinson expressed, for your patience in staying here this late on a Friday.

Before I start, I would also like to make note of the fact and extend my appreciation on behalf of the National Bar Association for the remarks which were made earlier this morning which are re-

freshing, in that you keep an open mind as to the various evaluations that are brought before the committee. We appreciate very much those comments.

I am, as was indicated before, the president of the National Bar Association, which is the oldest and largest bar association of color, founded in 1925. Also present, as you indicated, are Wilfredo Caraballo, president of the Hispanic Bar Association; Brian Sun, president of the Asian-Pacific Bar Association; and Richard Monet, who is a representative of the Native American Bar. Johnny Bear Cub Stiffarm is actually the president, but she could not be here today.

We are representing the entire membership of the Coalition of Bar Associations of Color. By way of background, the Coalition became a formal organization as of May 22, 1994. The preceding year, the boards of governors of each organization held a summit to discuss and resolve issues of common concern. This year, when we convened, a decision was made to formalize our association. We have learned over the years that the issues that we face are not necessarily unique to our individual organizations. We believe it to be crucial to our well-being and to our constituents that on certain issues, we must speak as one voice.

The coalition is a unified voice for more than 50,000 attorneys of color. We are unified and bonded together by our common experiences of discrimination and denial of access. For these reasons, we feel compelled to speak to the nomination of Judge Breyer to the Supreme Court.

Our primary purpose before the committee is neither to oppose nor extol, but rather to once again apprise Judge Breyer and the members of the Senate Judiciary Committee of the growing need for the Supreme Court to once again assume the mantle of leadership as to ensuring the protection, inclusion, empowerment, and uplifting people of color throughout our Nation.

Although we are not here to oppose the confirmation of Judge Breyer as the 108th Justice of the U.S. Supreme Court, in truth, the coalition would have preferred that President Clinton nominate a jurist of color with some meaningful degree of exposure and sensitivity to the issues of concern and importance to all Americans, particularly those who are least likely to have their interests and rights protected.

We are not certain that the background of Judge Breyer comports with these important qualities which the President has himself recognized as a priority in the makeup of the Court. Of the 107 Justices to serve on our Nation's highest court to date, there have only been two persons of color—Justice Thurgood Marshall and, now, Justice Clarence Thomas. There have been two woman—Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg. There have been zero Hispanic Americans, zero Native Americans, and no Asian-Pacific Americans. The two African-American Justices represent less than a paltry 2 percent of all Supreme Court Justices throughout the years. If we count the two woman now serving as "minorities," the combined total of four minority Justices would represent an anemic 4 percent of the total number of those who have served on the Nation's highest Court.

If you further consider that, of those named, the sensitivity toward those who are most likely to be underrepresented, the percentages decrease even further. Hispanics, for example, and Asian-Pacific Americans now constitute the fastest-growing segment of our Nation's population. The inability of Presidents over the past 25 years to nominate judges of color to serve on the Supreme Court tends to imply, whether intentionally or not, that there are no well-qualified intellectuals of color deserving of a seat on this Court.

This implication is untrue and must be dispelled as soon as possible. Further, while a Hispanic, Asian-Pacific, or African-American jurist would have been an appropriate choice, we cannot ignore the fact that Native Americans have lived in this country longer than any other group of people, and likewise, they have, if we dare say, been trampled upon more than other groups of people. One among their ranks should also have been considered.

It appears that people of color are only entitled to have one representative on the Court at any given time. Moreover, at this time, there is no one who clearly represents our interests.

For the Supreme Court to remain viable, relevant, respected and accepted, at least a few of its members must be more than intellectuals isolated from the realities, experiences, and perspectives of significant segments of American society.

Despite our preference, the Coalition of Bar Association of Color for the moment has moved forward to deal with the hand that we have been dealt. There have been a number of accolades and so forth that have been made with regard to Judge Breyer, but we believe that they are mere statements about the potential of a Justice Breyer.

We are hopeful that Justice Breyer's commitment to fairness will extend to encompass issues such as affirmative action, discriminatory application of the death penalty, and other related civil rights matters.

We also hope that if there is a propensity for Justice Breyer to be probusiness, that his attitude in supporting travel sovereignty and the Native Americans in their effort to support economic development in Indian country will be considered.

We are also hopeful that a Justice Breyer will be forceful and influential in cases involving the Civil Rights Act which still, regrettably, provides an exemption to the Asian-American workers in the *Wards Cove* case.

Though our rights are under attack from more than one source, people of color across the Nation have not yet all become pessimistically cynical. In hopes of preventing such an occurrence, the Coalition of Bar Associations of Color will be closely watching to see whether Judge Breyer manifests his fullest potential for fairness once he assumes his role as Justice Breyer, and if so, what impact it has upon the entire Court.

For people of color, the time for potential has passed. As has been said, words are wonderful, but deeds are divine. The coalition looks forward to Justice Breyer's deeds of fairness, and hopefully, those of the entire Court.

Thank you very much.

[The prepared statement of Ms. Brown follows:]

PREPARED STATEMENT OF THE COALITION OF BAR ASSOCIATIONS OF COLOR ("CBAC")

Good morning Chairman Biden, members of the Committee, I am Paulette Brown, president of the National Bar Association (NBA). Also present are Wilfredo Caraballo, president of the Hispanic National Bar Association (HNBA), Brian Sun, president of the National Asian-Pacific American Bar Association (NAPABA), and Richard Monet, a representative of the Native American Bar Association (NABA), Jonnie Bearcub Stiffarm, president of the Native American Bar Association, could not be present today.

This morning we are here representing not only the National Bar Association, but the entire membership of the coalition of Bar Associations of Color; the National Bar Association, Hispanic National Bar Association, the National Asian-Pacific Bar Association, and the Native American Bar Association.

By way of background, the coalition became a formal organization as of May 22, 1994. The preceding year, the Boards of Governors of each organization held a summit to discuss and resolve issues of common concern. This year when we convened, a decision was made to formalize our association. We have learned over the years that the issues that we face are not necessarily unique to our individual organizations. We believe it to be crucial to our well being and to our constituents that on certain issues, we speak as one voice.

CBAC is a unified voice for more than 50,000 attorneys of color. We are unified and bonded together by our common experiences of discrimination and denial of access. For these reasons, we feel compelled to speak to the nomination of Judge Breyer to the Supreme Court.

Our primary purpose before the Committee this morning is neither to oppose nor extol, but rather to once again apprise Judge Breyer and the members of the Senate Judiciary Committee of the growing need for the Supreme Court to once again assume the mantle of leadership as to ensuring the protection, inclusion, empowerment and uplifting of people of color throughout our Nation.

Although we are not here this morning to oppose the confirmation of Judge Breyer as the 108th Justice of the United States Supreme Court, in truth, the Coalition of Bar Associations of Color would have preferred that President Clinton nominate a jurist of color with some meaningful degree of exposure and sensitivity to the issues of concern and importance to all Americans, particularly those who are least likely of having their interests and rights protected. We are not certain that the background of Judge Breyer comports with these important qualities which the President has himself recognized as a priority in the makeup of the Court.

Of the 107 Justices to serve on our Nation's highest court to date, there have been only two (2) persons of color: Justice Thurgood Marshall and now Justice Clarence Thomas; two (2) women: Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg; zero (0) Hispanic Americans; zero (0) Native Americans; and no Asian-Pacific Americans. The two African-American Justices represent less than a paltry 2 percent of all Supreme Court Justices throughout the years. If we count the two (2) women now serving as "minorities," the combined total of four (4) "minority" Justices would represent an anemic 4 percent of the total number of those who have served on the Nation's highest court. If you further consider that of those named, the sensitivity toward those who are most likely to be underrepresented, the percentages decrease even further.

Hispanics, for example, and Asian-Pacific Americans now constitute the fastest growing segments of our Nation's population. The inability of Presidents over the last 25 years to nominate judges of color to serve on the Supreme Court tends to imply, whether intentionally or not, that there are no well-qualified intellectuals of color deserving of a seat on this court. This implication is untrue and must be dispelled as soon as possible. Further, while a Hispanic, Asian-Pacific, or African-American jurist would have been an appropriate choice, we cannot ignore the fact that Native Americans have lived in this country longer than any other group of people and, likewise, they have, if we dare to say, been trampled upon more than other groups of people. One among their ranks should also have been considered, It appears that people of color are only entitled to have one representative on the court at any given time. Moreover, at this time there is no one who clearly represents our interests.

For the Supreme Court to remain viable, relevant, respected and accepted, at least a few of its members must be more than intellectuals isolated from the realities, experiences and perspectives of significant segments of American society. We wonder whether Judge Breyer, because of his gender and ethnicity is able to fully understand this reality.

Despite our preference, the coalition of Bar Associations of Color, for the moment, has moved forward to deal with the hand that we have been dealt.

The Department of Justice has averred that Judge Breyer's "career reflects a deep-seated commitment to fairness * * * so that all government and law may work better for all people * * * (and) that courts and law * * * be accessible to all citizens."[1]

Vernon Jordan has written: "Judge Breyer's decisions reflect his strong commitment to protecting the rights of all Americans and ensuring the vindication of our civil rights. He will be a champion of fairness and justice on the bench."[2]

Robert Pitofsky, a former dean of Georgetown University asserts: "He understands that Government regulation is often necessary to ensure not just efficiency but fairness * * *"[3]

All of these laudatory assertions begin heaped upon Judge Breyer, however, constitute no more than mere statements about the potential of a Justice Breyer.

As we all know, however, potential simply means that the thing has not yet manifested itself, and more realistically, justices do change.

Yet, the Coalition of Bar Associations of Color, remains hopeful that Justice Breyer's commitment to fairness will extend to encompass issues such as affirmative action: Discriminatory application of the death penalty; reflect a sensitivity on immigration issues; adequate due process protection for death penalty appeals; environmental justice; minority and women business set-aside programs; insurance, mortgage and commercial redlining; selective prosecution of doctors of color on Medicaid fraud charges and as amazing as it may seem, the Voting Rights Act, which is being steadily undermined by the regressive trend of voting rights decisions emanating from the court during the past several years.

We have read with interest the assertions that Judge Breyer is "pro-business". Hopefully, if such a propensity exists, Justice Breyer will extend this "pro-business" attitude to supporting tribal sovereignty and Native Americans in their effort to support economic development in Indian country. We are also hopeful that a Justice Breyer will be forceful and influential on cases involving the Civil Rights Act, which still regrettably provides an exemption to the Asian-American workers in the *Ward's Cove* case.

Though our rights are under attack from more than one source, people or color across the nation have not yet all become pessimistically cynical.

In hopes of preventing such an occurrence, the Coalition of Bar Associations of People of Color will be closely watching to see whether Judge Breyer manifests his fullest potential for fairness once he assumes his role as Justice Breyer and if so, what impact it has on the entire Court.

For people of color, the time for potential has passed. As it has been said, words are wonderful. But deeds are divine.

The Coalition of National Bar Associations of Color looks forward to Justice Breyer's deeds of fairness and, hopefully, those of the entire Court during the 1995 term and beyond.

Thank you.

CBAC.
National Bar Association.
National Hispanic Bar Association.
Native American Bar Association.
National Asian-Pacific American Bar Association.

Senator KENNEDY. Thank you, Mr. Brown.
Mr. Sun.

STATEMENT OF BRIAN SUN

Mr. SUN. Thank you, Senator Kennedy, for allowing me to speak on behalf of my organization here today on Judge Breyer's nomination. NAPABA, as my organization is known, was formed basically for the same reasons that the NBA, the HNBA and NABA were formed, as a response to a historical pattern, a long historical pattern of discrimination, denial of access to political and social insti-

[1] Judge Stephen Breyer, nominee for the U.S. Supreme Court, at 1 (1994) (alteration in original) (emphasis added) (Publication of the U.S. Department of Justice).
[2] Id.
[3] Id. (Alteration in original).

tutions, as a reaction to hate crimes that were racially motivated and, in general, a response to prejudice and injustice.

The historical events that affect Asian-Pacific Americans are well-known even in our current history books. I don't think I need to go into detail in terms of recalling the anti-Chinese immigrant exclusion laws of the 1920's, the Supreme Court's decision in the *Koramatsu* case which all of us in law school read about in constitutional law that justified the relocation camps, and the hate crime murders that have directly led to the formation of my bar organization in the 1980's of Asian-Pacific Americans.

NAPABA comes here today, Senator, with the other members of the CBAC coalition to speak out on Judge Breyer's nomination, which I believe you yesterday indicated, I think, at the end of yesterday's testimony is one of the most important things this body, the Senate, and, in particular, this committee, can perform among its many important legislative functions, to review, assess, evaluate, and approve nominees to the Supreme Court.

I also join with Senator Biden in his comments yesterday that these hearings give us an opportunity, perhaps our only opportunity, as he said, to get a glimpse at what potential and what background and history a nominee brings to the Supreme Court.

In the written testimony that CBAC has submitted to you, Senator, we represent over 50,000 attorneys of color in this country, and I don't know all the statistics, but I believe we can agree that there are probably in excess of 60 million Americans of color who are affected by the judicial process, and for these reasons we feel that we have to speak out forcefully and vocally on the issues surrounding Judge Breyer's nomination.

The two issues I wish to speak about briefly here this afternoon, Senator, are issues that cannot be overlooked, and to some extent I believe have not been addressed that closely in these hearings, and that is the issue of diversity on the U.S. Supreme Court, the balance that Senator Specter talked about this morning, and, second, the need for a jurist on the Supreme Court who can stand in the tradition of Thurgood Marshall and William Brennan and Harry Blackmun on issues defending the individual liberties and the civil rights of all people in this country and, most importantly, the people of color who have experienced historical discrimination.

With respect to these two issues, NAPABA does not take the view that Judge Breyer is not a qualified jurist. He, in fact, does come to this hearing and these set of hearings with a strong background. His record on civil rights is one that we have found encouraging. However, on the issue of diversity, it is obvious that that issue is significant to the members of CBAC and to NAPABA, in particular, because it sends a message to persons of color that once again we have been denied an opportunity to have a voice through a person of color on the Supreme Court.

Diversity is something that can be broken up in this context into both the symbolic significance of diversity as well as the substantive significance—symbolic because persons of color in this country have long felt, even to this day, that they have been denied equal access to the courts. In fact, even the American Bar Association recently, through commissions that have studied the equal access to courts for minorities and women and the disadvantaged,

has concluded that diversity amongst the Federal and State benches and the U.S. Supreme Court is necessary to help dispel the symbolic perception that persons of color have about the lack of equal access to justice that they have in the courts.

Just to end on that particular issue, Senator, it cannot escape us all the recent media attention that has been given in the last decade or so to whether or not minorities or persons of color could get a fair trial in this country. Unfortunately, it has been the focus of perhaps some cases in the media that bring this out.

But in any event, I think it is pretty clear that persons of color wonder whether the system can be fair to African Americans or other persons of color who are accused of crimes that get the kind of publicity of the *Rodney King*, the *O.J. Simpson* case, and to some extent the *Vincent Chin* case in Michigan.

With respect to the substantive issues that are raised by Judge Breyer's nomination—that is to say whether or not he possesses the qualities and the background that would lead him to be committed toward protecting the civil rights of all American citizens—let me say that we are looking for jurists, again, in the tradition of Justice Marshall and Justice Brennan.

Already, from a historical development standpoint, we have had some judges in the Federal district and circuit courts who have been appointed who are persons of color whose contribution has been not just symbolic from the diversity standpoint, but from the fact that they have made meaningful contributions to the development of the law, such as Judge Higginbotham out of the Third Circuit, Judge Tang out of the Ninth Circuit, and many, many others.

I think that we need to just keep in mind when we focus on these issues of diversity that the President has made a commitment that he wants a Supreme Court that is representative of the diversity of America, and we are hopeful, and believe, that Judge Breyer, at least as to this second issue relating to the protection of civil rights, will stand committed, in the tradition of Justice Marshall and Justice Brennan, to stand up and—the words I often like to say are stand up to the plate and boldly deal with the issues that come up in the civil rights context. We are encouraged by the fact that Vernon Jordan, Duval Patrick, and others have supported this nomination.

In conclusion, Senator, NAPABA believes this issue is important and Supreme Court nominations are important because of our historical setbacks we have suffered in the Supreme Court, and you more than any Senator, I believe, on this committee are aware of our experiences in the *Ward's Cove* case, which led, in part, to the Civil Rights Act of 1991 that you were also a big part of, and also to the problem of the special exemption that was created in that case that deprived the Asian workers in Ward's Cove of the rights and benefits of the Civil Rights Act. We appreciate you and many Senators of this committee cosponsoring legislation that would set aside that special interest exemption that we found to be shameless and totally inappropriate. We applaud that, but the fact that the *Ward's Cove* case had to cause us to go to the Congress and seek civil rights legislation, we believe, highlights the need for strong Supreme Court Justices who can address these issues.

Finally, I would like to say something personally, Senator, and that is this. I look forward to a day when my organization and the members of the CBAC coalition don't have to come before this tribunal or this committee and say to this committee, we need more diversity on the Supreme Court. I look forward to a day when there will be an Asian-Pacific American on the Supreme Court.

I look forward to the fact and hope that my sons don't have to come back here 10, 20, 30 years from now and sit here and make the same statements that I have had to make here today. I do look forward to that day, and until then I think we have to focus again on Judge Breyer's nomination in terms of the impact it has on the persons of color around the country.

I want to thank you and the chairman, and particularly the staff, for allowing us to be heard this afternoon.

Senator KENNEDY. Thank you very much.

Mr. Monet.

STATEMENT OF RICHARD MONET

Mr. MONET. Good afternoon, Senator. On behalf of the Native American Bar Association, I also thank you for the opportunity to present our views on this matter today.

The Native American Bar generally agrees with the sentiments shared by this coalition. Like other racial minorities in our society, Native American people daily confront the effects of racial prejudice and discrimination. However, the Native American Bar has certain concerns that are somewhat distinct from those affecting the other groups in this coalition, and I would like to share just one of those with you today.

As you know, Native Americans not only constitute a distinct race in American society, but as members of tribes they also constitute distinct political entities recognized as such by the United States. Some of our most pressing issues and concerns arise in that capacity. Unfortunately, we know very little of Judge Breyer's sentiments on these matters.

As you also know, the relationship between tribes and the United States flows from solemn treaties made early in the Nation's history. Remarking upon one of those Indian treaties, Justice Hugo Black once wrote, "Great Nations, like great men, should keep their word."

In an early interpretation of another one of those treaties, Justice McKenna penned a sentence of perhaps singular clarity and importance to tribes and the development of Federal law dealing with tribes. He wrote, "Treaties are to be construed as a grant of rights from the Indians, not to them, and a reservation of those not granted."

We ask the committee and the nominee to note how Justice McKenna's wording and logic reflect the words and logic of the 10th amendment to the U.S. Constitution that what is not granted to the Union is reserved to the States or to the people. In other words, like the States and their people, the tribes and their people are the source of their respective tribes' sovereignty; that whatever sovereignty may have transferred in those treaties came from the tribes, so that the tribes were the grantors and thus the reservers of sovereignty. In other words, treaties with tribes, like the 10th

amendment, invoke this Nation's highest principles and logic of Federal republican democracy.

Nevertheless, in recent years the Supreme Court has begun a significant departure from those principles, at least when they are applied to tribes. For example, about 6 years ago in the *Cabazon* decision, the dissenting opinion argued that the tribes did not possess certain regulatory jurisdiction unless it was first granted to them by the Congress or the States, an argument in direct contravention to the logic of the McKenna quote. Fortunately for the tribes, the majority in *Cabazon* was compelled to respond to the dissent by saying, and I quote, "That is simply not the law."

Unfortunately, due to changes on the Court, the *Cabazon* dissent has since garnered a majority on the Court, and the logic of our treaties is being subverted in a way that simply cannot be reconciled with this Nation's first principles. As a result, the tribes and their people have suffered.

In conclusion, I would like to say make note that every term the Supreme Court deals with numerous cases affecting all the tribes, and it is a little-known fact that at times the Supreme Court hears more Indian law cases than any other kind of case. We believe, because of that reason, that it is imperative that nominees to the Supreme Court express their views on these matters and bear an understanding of how this field of law comports with our constitutional jurisprudence, in the hopes that the future jurisprudence of nominees, such as Judge Breyer, on matters affecting tribes will comport with those principles that America stands for.

Thank you very much.

[The prepared statement of Mr. Monet follows:]

PREPARED STATEMENT OF THE NATIVE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee, on behalf of the Native American Bar Association, I thank you for the opportunity to present our views on the nomination of Judge Stephen Breyer for Associate Justice of the Supreme Court.

Mr. Chairman, the Native American Bar Association agrees with the statement offered by the Coalition. Like other racial minorities in our society, Indian people daily confront the effects of racial prejudice and discrimination. Nowhere has the cycle been more difficult to break than in the staid field of the law. However, the Native American Bar Association has certain concerns that are somewhat distinct of those affecting other groups in the coalition.

As you all know, Indian people not only constitute a distinct race in American society, but as members of Tribes many Indian people also constitute distinct political entities recognized as such by the United States. Some of our most pressing issues and concerns arise in that capacity.

The relationship between Tribes and the United States flows from solemn treaties made early in this Nation's history. Remarking upon one of those Indian treaties Justice Black wrote: "Great Nations, like great men, keep their word." In an early interpretation of another one of those treaties Justice McKenna penned a sentence of perhaps singular importance to Tribes and the development of federal law dealing with Tribes. He wrote, "Treaties are to be construed as a grant of rights from the Indians, not to them—and a reservation of those not granted."

We ask the committee and the nominee to note how Justice McKenna's wording and logic reflect the words and logic of the Tenth Amendment to the U.S. Constitution: that what is not granted to the Union in the Constitution is reserved to the States or to the people. In other words like the States and their people, Tribes and their people are the source of the respective Tribes' sovereignty, that whatever sovereignty may have transferred in those treaties came from the Tribes, so that the Tribes were the grantors and thus the reservers of sovereignty. Treaties with Tribes, like the Tenth Amendment, invoke this Nation's highest principles and logic of federal republican democracy.

In recent years the Supreme Court has begun a significant departure from those principles, at least when they are applied to Tribes. For example, about six years ago, in the *Cabazon* decision, the dissenting opinion argued that the Tribes did not possess certain regulatory jurisdiction unless it was first granted to them by Congress or the States, an argument in direct contravention to the logic of the McKenna quote. Fortunately for the Tribes, the majority in *Cabazon* was compelled to respond to the dissent by saying, and I quote, "That is simply not the law."

Unfortunately, due to changes on the Court, the *Cabazon* dissent has since garnered a majority on the Court, and the logic of our treaties has been subverted in a way that cannot be reconciled with this Nation's principles of federal republican democracy. As a result, the Tribes and their people have suffered. We are reminded of what American philosopher Felix Cohen once wrote: "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

In conclusion, Mr. Chairman, every term the Supreme Court deals with numerous cases affecting all Tribes, at times hearing more Indian law cases than any other kind. We believe it is imperative that nominees express their views on these matters and bear an understanding of how this field of the law comports with our constitutional jurisprudence. The Native American Bar Association requests the Committee to solicit the nominee's views and to insist upon answers that comport with the principles for which America stands.

Thank you for the opportunity to share our views.

Senator KENNEDY. Thank you very much.

Wilfredo Caraballo.

STATEMENT OF WILFREDO CARABALLO

Mr. CARABALLO. Thank you very much. Good afternoon. The Hispanic National Bar Association appreciates the longstanding relationship that our organization has had with many of the members of this committee and with a lot of its staff. We hope to continue that relationship into the future.

In particular, I would like to publicly thank two members of this committee who have gone out of their way in the past to make statements publicly concerning the need for an Hispanic on the Supreme Court, and those are Senators Biden and Senator Hatch. On behalf of our organization, we would like to thank both of them.

I know that there might not be many Senators here, and I notice, however, that there are staff. I hope that when the testimony is looked at, one fact comes out. We have come together as four organizations in an unprecedented way. We want the members of this committee, and we would like the administration and this Nation to understand and listen to the words that we have used.

We have not called ourselves minority bars. We don't consider ourselves minorities. We are people of color representing over 60 million people in this country, and in the very near future we are going to be the majority in this country and we ask that as you listen to our pleas, you understand that part of that plea is for the generations to come. We are asking that we be treated today the way we hope you will want our children and our grandchildren to treat your children and your grandchildren.

When Justice Blackmun announced his resignation, the Hispanic National Bar Association received many calls from Hispanics around the country. It was universally believed by the members of our organization and others that the 108th Justice to the Supreme Court of the United States was going to be an Hispanic. We believed the promise that the face of justice was finally going to include ours.

We believed this not because there exists some numerical imperative for sitting on the Supreme Court, but because there exists a moral imperative that all who are among the judged have the right to expect that they may be represented in the faces of those who judge. The members of the Hispanic National Bar Association believed that I would be sitting here today testifying about the qualifications of an Hispanic nominee, a prospect which was personally awe-inspiring.

We relate this to you so that you may sense the difficulty our organization has had in coming to grips with this latest disappointment. Nevertheless, as lawyers, we believe that we cannot abdicate our responsibility to consider and evaluate the credentials of the person who was ultimately nominated. As lawyers from the Hispanic community, we must represent our community before you. As Americans, we owe the Nation the benefits of our thoughts.

In fairness to a nominee who is not responsible for our disappointment and who has worked hard to earn the nomination in his own right, we come before this committee prepared to testify on the nomination of Judge Stephen Breyer.

Having worked with him, many on this committee know better than most about the intellect and compassion that Judge Breyer takes to the Supreme Court. His achievements thus far are truly remarkable. Our organization has looked hard at his ample record. We have discovered in his work a judge who is forthright and who accomplishes something in his opinions which very few judges even try. He is readable. People can actually understand what he writes.

As you know, Judge Breyer is the chief judge of the circuit which encompasses the Federal courts of Puerto Rico. As such, many of our members from Puerto Rico have appeared before him. Our members in Puerto Rico speak very highly of Judge Breyer, as do many of our members in Massachusetts. Many of them have indicated their belief that he is someone who understands the need to make justice a reality for all Americans.

The presidents of the Puerto Rico region of the Hispanic National Bar Association and the Puerto Rico Federal Bar Association are effusive in communicating their colleagues' opinion regarding Judge Breyer's intellect and his appreciation of the fact that the justice system was created to be just. Our evaluation of Judge Breyer's credentials, coupled with firsthand knowledge on the part of many of our members, convinces us that Judge Breyer will make an excellent addition to the Supreme Court. We hope that the words of our members in Puerto Rico will be echoed by our members throughout the country in the years to come.

We further hope that our high regard for our duty is not misunderstood. As we praise the obvious credentials of Judge Breyer, we remind the Nation of the need to have the face of justice reflect all of the people in this country. We should never ration justice or judicial positions. This would demean the importance of selecting the best and the brightest, but it is important to remember that the best and the brightest come from all races and ethnic groups. It is time for the Nation to see an Hispanic as among the best and the brightest on the U.S. Supreme Court.

Thank you.

[The prepared statement of Mr. Caraballo follows:]

PREPARED STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION

Good morning. The Hispanic National Bar Association is appreciative of the long-standing relationship that our organization has had with many of the members of this committee and its staff. In particular, we would like to thank the chair, Senator Biden, and Senator Hatch, for their public statements in support of a Hispanic for the Supreme Court.

When Justice Blackmun announced his resignation, I received many calls for Hispanics around the country. It was universally believed by the members of our organization that the 108th Justice of the United States Supreme Court was surely going to be a Hispanic. We believed the promise that the face of justice would include ours. Not because there exists some numerical imperative for sitting on the Supreme Court, but because there exists a moral imperative that all who are judged have the right to be judges themselves.

I was personally awed by the possibility that I would be the president of the Hispanic National Bar Association when the first Hispanic was named to the Supreme Court.

I truly believed that I would be sitting here speaking about the qualifications of a Hispanic nominee.

I relate this to you so that you may sense the difficulty our organization has had in coming to grips with this latest disappointment.

Nevertheless, as lawyers we believe that we cannot abdicate our responsibility to consider and evaluate the credentials of the person who is actually nominated.

We have set our subjective feelings aside so that we may fairly consider the credentials of Judge Stephen G. Breyer.

As the lawyers from the Hispanic community we must represent our community before you; as Americans we owe the Nation the benefit of our thoughts. In fairness to a nominee who is not responsible for our disappointment, and who has worked hard to earn this nomination in his own right, we come before this committee fully prepared to support the nomination of Judge Stephen G. Breyer.

Many on this committee know better than most about the intellect and the compassion that Judge Breyer takes to the Supreme Court. His achievements thus far are truly remarkable.

Our organization has looked at his ample record. We have discovered, in his work, a judge who is forthright and who accomplishes something in his opinions which very few judges even try: his is readable. He is understood.

As you know, Judge Breyer is the Chief Judge of the circuit which encompasses the Federal Courts of Puerto Rico. As such, many of our members form Puerto Rico have appeared before him. Our member there speak very highly of Judge Breyer as do some of our members from Massachusetts. Many have indicated their belief that he is someone who understands the need to make justice a reality for all Americans. The presidents of the Puerto Rico Region of the Hispanic National Bar Association and the Puerto Rico Federal Bar are effusive in communicating their colleagues' opinion regarding Judge Breyer's intellect and his capacity to understand the nature of our legal system and the reasons for which it was set up as it is. they have observed that he has been very deferential to the decisions of the Puerto Rico courts.

It is this first hand knowledge on the part of many of our members coupled with his record, that makes us believe that Judge Breyer will make an excellent addition to the Supreme Court.

It is our hope that the words of our members in Puerto Rico will be echoed by our members throughout the country in the years to come.

It is our further hope that our high regard for our duty is not misunderstood. As we praise the obvious credentials of Judge Breyer, we remind the Nation of the need to have the face of justice be reflective of all of the people of this country.

We should never ration justice or judicial positions; thus demeaning the importance of selecting the best and the brightest to serve, but, it is important to remember that the best and the brightest come from all races and ethnic groups. It is time for the Nation to see a Hispanic as among the best and the brightest.

Senator KENNEDY. Well, thank you very much, all of you, for being here and for your testimony. Let me just ask very, very briefly a couple of questions—basically, really, one.

Richard Monet, how many Native American graduates do you have from law schools this year?

Mr. MONET. I teach at the University of Wisconsin Law School, and every year I would say anywhere from 60 to 70 students start

law school in the past maybe 10 years. I would say every year maybe 30 or so make it out.

Senator KENNEDY. As I remember, I was chairman, and my brother, Bob, was, of the Indian education committee, and then when I was chairman of the Administrative Practices Subcommittee we got into a lot of issues affecting Indian water rights and other issues, and the basic conflict which exists in the Department of the Interior between the various bureaus—the water rights of Indians versus the other kinds of rights that exist over there, and who is really going to be pursuing them. Does the U.S. attorney protect the Indian water rights or the commercial rights? So there is an enormous amount of very important questions on mineral rights and water rights that I know you are very familiar with.

I believe during the period of the 1960's and early 1970's, the number was down to 10 or 12 a year, so it is important to understand that issue, and we are always interested if you have suggestions or ideas. I am chairman of the committee with jurisdiction on education here, and although a lot of the Indian education is over in Interior, a lot of the higher education is in our committee and we would always welcome ideas that you might have on what we could do.

Mr. MONET. Thank you very much.

Senator KENNEDY. Mr. Sun, I want to let you know that one of the first pieces of legislation that I was able to get passed into law was the elimination of the Asian-Pacific triangle that was part of the Immigration Act, going back to the McCarran-Walter Immigration Act that we changed in 1965. At that time, I think it was limited to about 125 Asian immigrants coming into the United States, and that obviously has dramatically changed and shifted. When you were talking about that issue, it brought back the important legacy of discrimination against Asians, and you have outlined that.

I want you to know, on *Ward's Cove,* I am right with you. We have been talking with Patty Murray, and Norm Mineta, I know, from the House has been working on it, and we want you to know that this is something that is very much on our minds and we are going to do what we can to try and see a reversal of that current injustice. So I want to just reiterate that. We haven't been able to do what we should on that case, but it isn't because we are still not interested and committed and concerned about it, and we want you to work with us, and I know you will, and with other members of this committee and of the Senate on the issue.

Mr. SUN. I appreciate that very much, Senator. NAPABA appreciates you and Senator Murray cosponsoring the legislation seeking to set aside that exemption, and Representative McDermott from the House side as well.

Senator KENNEDY. Yes. In the Supreme Court holding, my position was retroactivity, and then I thought once we got the retroactivity there could be no denial in terms of justice of including *Ward's Cove.* As you are aware, the courts did not come out in that particular way when they interpreted it, although I think, if you look historically at the Civil Rights Act, it is probably pretty mixed in terms of applying the Civil Rights Act retroactively or prospectively. But nonetheless, we have been working with some of those

in the community who have been most concerned, and we will continue to do so. I want to give you those assurances.

Mr. SUN. Thank you.

Mr. KENNEDY. Let me just ask you this, just finally, and each of you might comment. Senator Kerry and I had the opportunity of making suggestions to the President in filling Federal District Court vacancies, and we were able to get important diversity on that court, and we have continued to do so over the period of the last several months. But let me ask you what you would welcome, either procedurally or nonprocedurally, as far as ways that we could get more qualified and well-qualified to the attention of decisionmakers.

We saw over a long period of time that most of the individuals, both on gender and color, were not until fairly recently in major law firms, and that many of them had come up from legal services programs, working out in the counties as public defenders or prosecutors, and then in small firms.

So there is a whole range built into the process and the system where those who evaluate individuals who might be considered for courts—Federal, circuit, as well as Supreme Court—have these inherent biases. It is still out there. And it exists in gender as well. I know, being married to a professional lawyer; she talks about the fact that if a woman partner goes to a Little League game, the other partners will feel that she is not serious about the law; yet if the father goes, they say, "Isn't he a wonderful father."

So there is a whole series—I think many of you could talk about this—the nuances that are out there, all across the framework of the process. It is out there, and we have to be sensitive to these issues.

But can you tell us a little bit of what you would like to see follow the next time we have a vacancy; what would you suggest to this President, or to the Attorney General, or to the selection committee, or whatever way they are going to proceed—what kinds of things do you really wish they would do if you had that opportunity now?

Let us start with Paulette. Ms. Brown.

Ms. BROWN. Thank you, Senator.

It sounds to me like it is a two-part question, and if I could, I would like to answer it as I see it, in two parts. One is that you talked about the selection process, and then it seemed that you talked about the confirmation process.

In the first instance, the judges from the district court generally, in my understanding, come upon recommendation from their Senators. In that regard, I think that it is necessary for the respective State Senators—I know that we have affiliates in almost every State in the United States, and most of them keep at the ready names of qualified individuals who can serve on the district court level.

Also, in our national office, we are a little better situated than some of my other colleagues, just because we are older. And we do have a staff, which means that we have a bank which can provide names of individuals and their qualifications and backgrounds. We also have a judicial selection committee within our organization to assist in this process.

With regard to the next phase, once someone is recommended, you may recall that during the Carter administration, the National Bar Association had the opportunity, just as the American Bar Association, to evaluate candidates for the Bench on every level, not just the district court level. We have not been given that privilege since then.

We believe that it is necessary for this committee to have a different perspective other than the perspective of the American Bar Association. It is not to suggest that the American Bar Association does not do a credible job, but I do think that they are limited in their scope and what they think are the most important issues.

One example which was given today—and although we were not asked, we took it upon ourselves to conduct our own investigation and evaluation of a recent nominee, and it was extremely thorough. We had interviewed as many individuals on the qualifications of, in this case, Mr. Williams, as did the American Bar Association. We had his writings evaluated by respected scholars, and I would dare say that the evaluation that we conducted was as extensive and as thorough as anyone could ever hope to expect.

So I think that in this process, if the Senate, if they are going to consider the evaluation that the American Bar Association performs, that they should also consider that of the National Bar Association or of the coalition.

Senator KENNEDY. Mr. Sun.

Mr. SUN. Yes, Senator. I sort of interpret your question in terms of breaking it up into the various levels—district court, circuit, and Supreme Court.

With respect to the district courts, in working with the Senators, groups such as ours and others work with the Senators on two aspects. One is in fact, the search committees that a particular Senator might form to look for qualified candidates. We look to make sure, or try to ensure, that those committees have a diversity of representation. That is a starting point that I think has a meaningful impact in the end on who gets recommended to the Senator by the search committee, because I think, although different Senators have different ways of going about doing it, essentially, they look to recommendations made by qualified people they trust. And it is incumbent on community groups and bar organizations such as ours, it seems to me, to feed the qualified names, and in fact, even affirmatively go out and solicit people who we think are qualified to try to get them interested. Sometimes, some of the most qualified people are people who are financially well-off and may not want to go back to public service, since we have to sometimes cajole them. So we do that.

With respect to the circuit level, it is done a little bit more here in Washington, we find. So we feel that we need to increase our communications, and I think, echoing what Paulette said, we need to communicate more with the members of this committee because the political reality as we all see it is when an important position comes open, be it in the circuit or the Supreme Court, this committee is consulted by the executive branch, for the obvious reasons that we all know. For that reason, we feel, again, that the lines of communication have to be improved, and we need to feed you the names because, as Senator Biden indicated here this morning,

there is a difference now in 1994 from 1977 when President Carter was President. The so-called pool of qualified persons of color and women is much greater in terms of those who are qualified for circuit positions and, indeed, for the Supreme Court, and we now have the opportunity to provide those names and to urge the members of this committee when they communicate with the executive branch, to add your voice to the names that are submitted by our various bar organizations.

So I see us working in that vein as a means of improving the process.

Senator KENNEDY. Thank you.

Mr. Monet.

Mr. MONET. Senator, when the process turns political, as you know, Native Americans, because of their population, stand very little chance of having a lot of leeway at any level in the game. But if the objective is, as one of the panelists said, to have the judged have a decision and a voice in who will be doing the judging, again I would turn to our Native Americans' tribal side of these issues. Quite simply, if this committee—I think it would be in its jurisdiction—if this committee could force States and the Federal courts to pay full faith and credit to tribal courts and to the decisions issued by tribes and their judges, most of the American Indians would be involved at that local level in their tribal governments and dealing with their tribal courts, and I feel like they would then feel they have participated in the process somewhat.

If I might also, just on another point, you know, 20 years ago, you could count on one hand all of the American Indian attorneys in the country. Today, there are perhaps about 500. Many of the courts are staffed by attorneys, and attorneys work in the tribes' courts. If that otherwise unconventional and nontraditional criterion were counted by this committee and by the President and by other people as real qualifications for judging in the Federal courts, I think we would see more qualified people.

Senator KENNEDY. Thank you.

Mr. Caraballo.

Mr. CARABALLO. Senator, the Hispanic National Bar Association has a pretty sophisticated process. We are actually getting to the point where we are starting to feel comfortable with the district court and court of appeals nominations, because we have developed relationships with the Senators in those States where our people are in large numbers. And that is really what it comes down to is developing relationships with the individual Senators so that the nominations can come out from them to the President. And we feel that we are starting to make some progress in most areas.

There are some areas where we have great relationships with the Senator; in other areas we do not, and we are trying to develop them. Our frustration is really more along the lines of the Supreme Court because, truthfully, we do not know what else we can do. We have actually done what we thought was the right thing to do, which is we convened a nationwide committee of Hispanics from across the country representing every Hispanic constituency we could think of. We came up with a list. We gave that list to this committee, which actually received it very well. We gave it to the administration, which we believe received it very well.

So we have done what we think is our part, which is to bring before you, bring before the administration, individuals whom we think are qualified.

We do not know what that next step is that we need to do to get somebody on, but we are trying.

Senator KENNEDY. OK.

Ms. ROBINSON. Senator, may I just add that I do think that our association is eager to encourage judicial service of qualified people, particularly minorities and women, and feel we have an educational outreach function to actually have programs at our association in New York to invite people who might be intimidated by the process, to encourage them, to educate them, as to the possibilities both on the Federal level, but it is also important on the State and local levels.

So I think all the organized bars can do more to help not only their members, but those people who are not members, to try.

Senator KENNEDY. I am going to ask the Attorney General to meet with all of you and try to work out some processes and procedures so at least we can get it to that level, and you can hear some of the suggestions and think a little bit about it. I think the comments have been very constructive, but I think it is important that the Attorney General, in a way that just does not go out at the time when you have these vacancies, but has a built-in, continuing and working kind of relationship and understanding. I think that is the only way that any of these suggestions will work. I will follow up with her and with you and see if there are some additional ways that we can establish better kinds of both input and communication. I think it is very important, and I am convinced that the President feels very strongly about it. I have talked with him about it, and I know he does, and I know that Attorney General Reno does as well. It is very legitimate. I have spoken with them about this question. And President Carter had a very good record on it. We went through the period of the 1980's, and I think you are familiar with the statistics, and I am not interested at this time in going all the way back through that. But I think if we look at the record on this—and as you pointed out, the pool now is so much greater than it was a number of years ago—there is a very, very important responsibility that all of the faces at Justice, not only at the Department, but every aspect of the judicial system be responsive to the kinds of excellence that exist out there in our diversity. We all need to think about that more carefully.

I thank all of you very much for being here. I appreciate your patience with us. We will follow up with you and find out what additional suggestions you might have.

We will include in the record at this point a statement submitted by Nicholas Katzenbach.

[The prepared statement of Mr. Katzenbach follows:]

PREPARED STATEMENT OF NICHOLAS DEB. KATZENBACH

Mr. Chairman and Members of the Committee: My name is Nicholas Katzenbach and I presently practice law in New Jersey. From 1961 to 1966 I served in the Department of Justice in various capacities including Attorney General. It was in this capacity that I first had the privilege of knowing Judge Stephen Breyer. I am delighted to testify in support of his nomination as a Justice of the Supreme Court.

Judge Breyer had been an outstanding student at Harvard Law School with a particular interest in competition law and its economics. In 1965 I had persuaded one of his professors at Harvard, Donald Turner, to head the Antitrust Division. Don, in turn, was able to persuade a young Steve Breyer to join the Division at the conclusion of his clerkship with Justice Goldberg. It was then, as you know, that he brought even the Antitrust Division into the struggle for civil rights with his imaginative use of competition law to compel the showing of homes in white neighborhoods to African-American buyers. That position, which he both developed and successfully defended, is illustrative, I believe, of his ability as even a young lawyer to use scholarship in the service of human values—a capacity that has served him well throughout his career.

The Committee is aware of Judge Breyer's very distinguished record as a lawyer, law professor, Counsel to this Committee, and judge. There is no question as to his intellectual and experiential qualifications to be a Justice. What I would like to do very briefly is to relate that experience and his personal qualities to the job of a Justice.

I think in recent years there has been a change in the way both Presidents and the Senate have looked at judicial appointments, and particularly those to the Supreme Court. The focus has been, in my opinion, too much on efforts to predict how a putative Justice will vote on the immediate political issues and too little on how he will perform over many years as a Member of our unique and important third branch of government. Assuming a nominee has the requisite intelligence and integrity what else should the President and the Senate look for?

First, I think it is useful to weigh the candidate's experience against the job. The Court in our political system is a political entity with a political role—note a partisan one but undeniably a political one, albeit a limited one. It is obviously useful if the nominee can bring from personal experience an understanding of government and the proper roles of the branches of the federal government as well as that of the States to the Court. Few candidates can bring, as Judge Breyer does, valuable experience in all three branches and the mature understanding of roles which he has demonstrated in all his governmental capacities.

Second, Justices must be particularly sensitive to the long view of law and relatively immune, as the President and the Congress cannot be, to the passions of the moment. It is, after all, very often the Constitution which they are expounding. I may be prejudiced but I think one value of teaching is that it encourages—almost compels—a broad understanding of trends in our changing society relevant to the long view the Court must take when interpreting the Constitution.

Finally—and most important of all although too rarely discussed—is judicial temperament. The Supreme Court is composed of nine Members with varying backgrounds and experience. It is a collegial institution which operates best when it makes its decisions in a spirit of mutual respect. It is not a question of counting votes for particular positions. It is most effective when each Member is prepared to listen to and be persuaded by the views of colleagues. In this manner both the views of a majority and dissenters are developed and shaped. Much more than the particular result is at stake.

Judge Breyer is often described in terms of his pragmatism and practicality. I think he is a man of principle with deeply held values—but one who is not so sure he is right than he has no need to listen to the differing views of others. He is an able advocate. But, in my opinion more importantly, he is a good listener, respectful of the views of others and always prepared to reconsider his own. Perhaps that is pragmatic and practical. I think it shows the temperament of a wise and intelligent judge.

If confirmed, Judge Breyer will undoubtedly prove to be an excellent Justice. I believe that he has the intelligence, experience and temperament to be one of the great ones.

CURRICULUM VITAE

Born: January 17, 1922.

Military Service: USAF: 1942–1945; Air Medal with 3 clusters.

Education: Princeton, BA *cum laude,* 1945; Yale Law School, LL.B. *cum laude,* 1947; Editor in Chief, *Yale Law Journal,* 1947; Rhodes Scholar, Balliol College, Oxford, 1947–1949.

Legal experience:

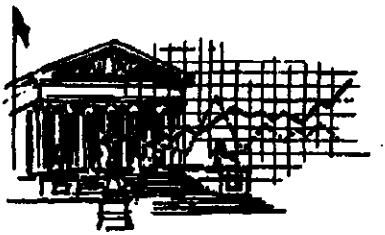
Associate, Katzenbach, Gildea & Rudner, Trenton, NJ, 1949–1950.

Office of General Counsel, Department of the Air Force, 1950–1952.

Associate Professor, Yale Law School, 1952–1956.
Professor, University of Chicago Law School, 1956–1960.
Subjects: Contracts, Conflict of Laws, Secured; Commercial Transactions, International; Business Transactions, Inter'l Law.
Ford Foundation Fellow, 1960–1961.
United States Department of Justice: Assistant Attorney General, 1961–1962; Deputy Attorney General, 1962–1964; Acting Attorney General, 1964–1965; U.S. Attorney General, 1965–1966; Under Secretary of State, 1966–1969.
V.P. (later Senior V.P.) & General Counsel, IBM Corporation, 1969–1986.
Herman Phleger Distinguished Professor of Law, Stanford Law School, 1986.
Partner, Riker, Danzig, Scherer, Hyland & Perretti, 1986–Present.
Member: New Jersey Bar (1950), Connecticut Bar (1956), New York Bar (1972). Admitted to Practice before the United States Supreme Court; Second Circuit Court of Appeals; Third Circuit Court of Appeals; Eighth Circuit Court of Appeals; Ninth Circuit Court of Appeals.
Author: Kaplan and Katzenbach, *Legal Foundations of International Law* (1961); Numerous Law Review Articles.
Organizations: Council, American Law Institute; Board of Director—IBM Corporation, Washington Post Corporation, Southeast Banking Corporation, NAACP Legal Defense Fund; American Bar Association; Association of the Bar Association; American Judicature Society; American Society of International Law.

Senator KENNEDY. We will also insert in the record a statement from Charles Mueller of the Antitrust Law and Economics Review.

[The prepared statement of Mr. Mueller follows:]



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WHY BREYER SHOULD NOT BE CONFIRMED TO THE U.S. SUPREME COURT

Statement of

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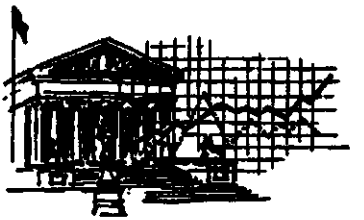
Before the

Judiciary Committee
U.S. Senate
Washington, DC 20510

July 15, 1994



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July 13, 1994

Antitrust Cases of
Judge Stephen G. Breyer, 1st Circuit

I. Decisions 1981-6/8/93

1. *Cordova & Simonpietri Insurance Agency, Inc. et al. v. Chase Manhattan Bank N.A. et al.*, 649 F.2d 36 (1st Cir. 1981). AFFIRMING DISMISSAL of plaintiff's Sherman Act conspiracy complaint. Breyer. (Local insurance agency vs. a large bank, Chase Manhattan.)

2. *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981). AFFIRMING DIRECTED VERDICT for defendant. Price discrimination. Breyer. (Stationery wholesaler vs. a manufacturer of photo albums, scrap books, etc.)

3. *Auburn News Co. et al. v. Providence Journal Co. et al.*, 659 F.2d 273 (1st Cir. 1981). REVERSING INJUNCTION against defendant. Conspiracy, refusal to deal. Bownes. (Newspaper home-delivery distributors vs. newspaper.)

4. *Claire M. White et al. v. The Hearst Corp. et al.*, 669 F.2d 14 (1st Cir. 1982). AFFIRMING SUMMARY JUDGMENT for defendant. Resale price fixing, refusal to deal. Murray. (9 news dealers vs. newspaper publisher, Hearst.)

5. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1983). FINDING NO VIOLATION by defendant. Predatory pricing. Breyer. (New entrant vs. manufacturer with 94% of U.S. market for nuclear-plant shock absorbers.)

6. *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030 (1st Cir. 1984). AFFIRMING DIRECTED VERDICT for defendant. Tying arrangement. Bownes. (Dealer vs. manufacturer of photocopiers.)

7. *Kenworth of Boston, Inc. v. Paccar Financial Corp. et al.*, 735 F.2d 622 (1st Cir. 1984). REVERSING INJUNCTION against defendants. Tying, refusal to deal. Breyer. (Truck dealer vs. manufacturer with 18% of U.S. heavy-truck market.)

8. *Home Placement Service, Inc. et al. v. Providence Journal Co. et al.*, 739 F.2d 671 (1st Cir. 1984). DENYING PLAINTIFF new trial on damages ($1 trebled to $3) and denying most of its attorney's fees. Monopolisation, refusal to deal. Bownes. (Advertiser of rental real estate vs. newspaper.)

9. *James P. Kartell, M.D. et al. v. Blue Shield of Massachusetts et al.*, 749 F.2d 922 (1st Cir. 1984). REVERSING JUDGMENT for plaintiffs. Sherman Act conspiracy, monopolisation. Breyer. (Local doctors vs. large health insurer, Blue Shield.)

10. *Computer Identics v. Southern Pacific Co. et al.*, 756 F.2d 200 (1st Cir. 1985). Sherman Act conspiracy. AFFIRMING VERDICT for defendants. Torruella. (Seller of computer control systems with railroad, Southern Pacific.)

11. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1987). FINDING NO VIOLATION of Sherman Act. Exclusive dealing. Breyer. (Airline charter service with two planes vs. Massachusetts Port Authority.)

12. *Texaco Puerto Rico, Inc. v. Jose Medina et al.*, 884 F.2d 242 (1st Cir. 1987). AFFIRMING SUMMARY JUDGMENT for defendant. Monopolisation, refusal to deal. Timbers. (Puerto Rican service station dealer vs. large refiner, Texaco.)

18. *Clamp-All Corp. v. Cast Iron Soil Pipe Institute et al.*, 851 F.2d 478 (1988). FINDING NO VIOLATION by defendant. Monopolization, predatory pricing. Breyer. (Maker of new pipe couplings and fittings vs. pipe manufacturers' association, 90% of U.S. market.)

14. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1988). OVERTURNING JURY VERDICT for plaintiff. Tying. Breyer. (Local car dealer vs. auto manufacturer.)

15. *Monahan's Marine v. Boston Whaler, Inc., et al.*, 866 F.2d 525 (1989). AFFIRMING SUMMARY JUDGMENT for defendant. Tying. Breyer. (Local boat dealer vs. boat manufacturer.)

16. *Town of Concord et al. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990). OVERTURNING JURY VERDICT for plaintiff. "Price squeeze." Breyer. (Two local towns vs. large electric utility.)

II. Breyer Antitrust Cases, Post-6/8/93

17. *Tri-State Rubbish, Inc., et al. v. Waste Management, Inc., et al.*, 998 F.2d 1073 (1st Cir., 7/13/93). AFFIRMING DISMISSAL in part and remanding rest of plaintiff's "thin and doubtful" case. Exclusive dealing, predatory pricing. Boudin. (Trash hauler vs. 12-town waste-disposal monopoly.)

18. *R.W. Intl. Corp. et al. v. Welch Food, Inc. et al.*, 13 F.3rd 478 (1st Cir., 1/20/94). AFFIRMING SUMMARY JUDGMENT for defendants. Distributor termination, predatory pricing. Coffin. (Puerto Rican food distributor vs. large food manufacturer, Welch Food, Inc.)

19. *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft et al.*, 1994-1 CCH ¶70,548. REMANDING PLAINTIFF's "implausible" case. Resale price fixing, price discrimination. Breyer. (Puerto Rican auto dealer v. German auto manufacturer, BMW.)

Charles Mueller
July 13, 1994

* * *

WHY BREYER SHOULD NOT BE CONFIRMED TO THE SUPREME COURT

Charles E. Mueller

President Clinton has been misled, in my opinion, into making a grave mistake in nominating to the Supreme Court Judge Stephen Breyer of the U.S. Court of Appeals in Boston. On the basis of his antitrust record, he is an unjust man. He is also one who is intellectually and politically committed to a set of "economic" theories that are demonstrably false and that will callously reduce the standard of living of the average American family in the decades to come.

In response to a question from Senator Metzenbaum in these hearings on July 12, Breyer replied: "Sometimes plaintiffs did win in antitrust cases I've had and, as you point out, defendants have often won. The plaintiff sometimes is a big business and sometimes isn't. The defendant sometimes is and sometimes isn't."

Once more Breyer seems to have trouble with the facts. No plaintiff, so far as I can determine, has ever won an antitrust case in his court. In the attached table, I've listed the 19 such cases he's participated in since he joined the court (1980) and none was decided for the plaintiff. (Two were remanded--one as a "thin and doubtful" case, the other as an "implausible" one. See Tri-State and Caribe BMW, be-

low.) Do these qualify as plaintiff "wins" in Breyer's lexicon? If not, what cases is he talking about?

The rest of the Breyer answer quoted above was evidently intended to suggest that there was a "mix" of small and large firms on both sides in his 19 antitrust cases. This is patently not true. Historically, antitrust defendants have been, on average, some 30 times the size of antitrust plaintiffs and that tendency is clearly present in his cases as well.

In the table below, I've described (in a parenthetical sentence) the opposing parties in each of Breyer's 19 cases. His plaintiffs are largely local dealers or distributors, with a couple of new-entrant, new-technology producers--all obviously small by virtually any definition (e.g., the SBA's less-than-500 employees)--while his defendants are generally giant institutions (e.g., Chase Manhattan Bank, Blue Shield, Hearst newspapers, Southern Pacific Railroad, Massachusetts Port Authority, Boston Edison) or big manufacturers (e.g., BMW, Subaru, Welch Food, Paccar (heavy trucks), SCM (photocopiers), ITT Grinnell, and Texaco.)

Again, Breyer has misstated the facts. No antitrust plaintiff has ever won in his court. Similarly, the plaintiffs he's consistently ruled against have all been small and the defendants he's methodically favored--with his vote and his intellectual effort--have virtually all been very large.

Breyer is the candidate of big-business and monopoly in America. He has never met a monopoly or a restraint on competition that he didn't like, ruling for the big-business defendant, again, 19 times in 19 antitrust cases during his 14 years on the 1st Circuit Court of Appeals. He is credited with being "even more conservative than Robert Bork" by his conservative admirers, who gleefully note that he is the only Democratic appointee among 157 federal appeals judges who has voted 100% of the time for the big corporations charged with antitrust offenses--the other 6 who have such "100%" records being all Reagan appointees.

Breyer is disdainful of small business, believing that only the corporate giants can be "efficient." His unbroken line of 19 decisions for the same side (historically, each side in antitrust has won about half the time on appeal) shows a determined unwillingness to decide on the merits. No antitrust plaintiff will ever win a case in his court. In a word, he prejudges cases and nullifies laws he doesn't like.

What does this tell us about his judicial qualifications? About his impartiality, sense of justice, and judicial temperament? About his integrity and intellectual capacity? In his antitrust decisions, there is not a trace of fairness or even-handed application of the law. They reflect routine injustice, a consistent ruling in favor of the economic bullies rather than their victims--a result achieved by crabbed, mean-spirited interpretations of laws never intended as protectionism for inefficient corporate giants.

A host of business practices historically condemned as monopolistic and unfair--that destroy efficient small firms and lead to monopoly prices for the public--have in effect been legalized in his court. Price discrimination, predatory (below-cost) pricing, exclusive dealing, tying arrangements, resale price fixing, and the like have all been consistently approved by Breyer. There is one conspicuous principle in his antitrust

decisions: The corporate defendant always wins, no matter how egregious the challenged conduct.

To get this big-business-always-wins result, Breyer has routinely displayed his disrespect for Congress, rewriting the statutes as he went, in effect--to borrow the favorite phrase of Sen. Orrin Hatch (R-Utah)--"legislating from the bench." He has, for all practical purposes, repealed an entire body of law in his four-state (plus Puerto Rico) jurisdiction, including the venerable Sherman Antitrust Act (1890) and Clayton Act (1914).

Breyer's antitrust record displays a similar disdain for the Constitution. Antitrust cases are among those in which, under the 7th Amendment, "the right of trial by jury shall be preserved." Again to achieve his big-business-always-wins result in antitrust cases, Breyer has repeatedly overturned jury verdicts for the plaintiffs or ordered their cases dismissed before they reached the jury.

Intellect and integrity? Breyer rationalizes his siding with the economic bullies by claiming he's doing it all "for the consumer." In an Orwellian twist of the language, he theorizes that bigger must be more "efficient," so monopoly prices must be lower than competitive prices. His so-called "economics" is ideological fiction churned out by laissez-faire ideologues, with no credible empirical or real-world support. A "jury" of say 12 professional economists selected at random from the directory of the American Economic Association would find his economic theories hilarious.

. In one of his cases (Interface v. Massport, 1987), Breyer suggested that those harmed by the monopoly practices at Boston's Logan Airport could just go out and "build competing airports."

. In his most recent case (Caribe BMW v. Bayerische Motoren Werke, 1994), Breyer expressed perplexity as to how the plaintiff auto dealer could be simultaneously injured by a discriminatory price (charging him more for cars than his competitors paid) and a "maximum" resale price-fixing arrangement that prevented him from passing on that extra charge by raising his own resale prices to the public. The mystery is how Breyer could not understand the familiar "price squeeze" the plaintiff was obviously complaining about--an artificial jacking-up of the price he paid his supplier and an artificial holding-down of the price he was permitted to charge his own customers, thus artificially narrowing his own margin below the competitive level.

. In another case (Barry Wright Corp. v. ITT Grinnell, 1983), he wrote: "When prices exceed incremental [marginal or average variable] cost, one cannot argue that they must rise for the firm to stay in business." But in the airline industry, for example, marginal costs are estimated at less than 25% of full operating costs. A company can stay in business by covering only one-quarter of its operating expenses? This is economically silly.

. The next year (in his Kartell v. Blue Shield, 1984), he declared unambiguously that "to succeed, [a predatory-pricing case] requires a showing that the price was below 'incremental cost' (or the equivalent)," citing as his sole authority his own decision of the preceding year (Barry Wright, above). The U.S. Supreme Court, nearly a decade later (Brooke/Liggett v. B&W Tobacco, 1993), is itself still undecided as to the "appropriate measure of cost" in such cases.

. In a price-discrimination case (Allen Pen Co. v. Springfield Photo, 1981), Breyer relied on the fact that the goods on which the victim was overcharged (more than its competitors) accounted for only 2% of that disadvantaged firm's total business. He made no mention of the Supreme Court's holding (FTC v. Morton Salt, 1948) that the price-discrimination law must, of necessity, apply to each and every individual item in a merchant's inventory if it is to have any real meaning, including, in that case, table salt sold in a supermarket (accounting for a fraction of 1% of its overall sales).

. Breyer rejects the traditional notion that one of antitrust's main purposes is the prevention of "unfair" competitive practices, referring to such attacks on small enterprises as mere "torts" which "lie beyond the purview of the antitrust laws" (Kartell v. Blue Shield, 1984) and disparagingly characterizing a Massachusetts statute prohibiting them as a "fair trade" law (Kenworth v. Paccar, 1984). The difficulty with this Breyer "tort" theory is first that torts were illegal at common law and were thus already illegal in 1890 when Congress passed the Sherman Act, doing so precisely because it found the existing tort law inadequate to deal with the trusts of the day, e.g., Standard Oil, American Tobacco, and the like. A second problem is that this Breyer notion is wildly at odds with a mountain of legislative history and Supreme Court rulings since 1890.

. Rejecting "fairness" as even a part of the standard in antitrust, Breyer embraces a single criterion, what he calls "consumer welfare." The problem, though, is that he defines this term to include not just consumers as members of households (the conventional economic definition) but business firms as well. In mainstream economics, the interests of commercial organizations are designated by the term "producer welfare" but Breyer never mentions this. By lumping both consumers and entrepreneurs under the same label, "consumer welfare," he's able to claim that he's serving "consumers" even when families are being looted by anticompetitive practices. If both the individual citizen and the corporate monopoly are "consumers," then the overcharging of the former by the latter merely "transfers" money from the pockets of one "consumer" to another. Under this definition, the behavior of Willie Sutton--the gentleman who robbed banks "because that's where the money is"--caused no loss of "consumer welfare." He simply "transferred" money from one "consumer" pocket to another, with no reduction in the total amount of money held by him and the bank together.

. While the Supreme Court has repeatedly held that the (federal) Sherman Act does not preempt the antitrust field and that the 50 states are accordingly free to enact and enforce substantively stronger antitrust laws if they like, Breyer holds (Cardova & Simonpietri Ins. v. Chase Manhattan, 1981) that the states--while allowed to "occasionally" vary the "details" of their antitrust statutes from the federal model--must keep them "broadly consistent with general federal policy." Since state antitrust law long preceded the federal, this is an especially outrageous suggestion by Breyer.

. Breyer defines "entry barriers" as costs facing new entrants that incumbents were spared. This is a word game that drains the term of all serious meaning. For example, under this definition, there would be no "barriers" confronting those denied fair access to Boston's Logan Airport (Massport, above), since they could presumably build a new one for the same number of (inflation-adjusted) dollars as were spent by the original Logan builders. In mainstream economics, entry barriers

have an entirely different definition, namely, as costs facing new entrants that allow incumbent firms to maintain higher-than-competitive prices (without inducing new entry that would force their prices back down). This traditional definition protects the public from monopoly pricing; Breyer's does not.

In other cases, Breyer ordered summary dismissal because he wasn't persuaded that the defendants had "market power"--the power to charge a price above the competitive level. But in a case where he assumed such market power (Kartell v. Blue Shield, 1984), he ruled that monopolists have a right to "exploit" their market power and, besides, that it's judicially difficult to determine "what is a 'competitive' price." The rules bend to get a fixed result: The corporate defendant always wins. A court he sits on has no rightful claim to the public's trust and confidence.

In overturning the historic competitive-price standard, Breyer sets aside all enforcement of, for example, the country's merger law: In the Justice Department's 1992 Merger Guidelines, unlawful mergers are defined as those that create or enhance the "ability profitably to maintain prices above competitive levels." And of course public agencies whose job is to prevent utilities from gouging the public routinely set prices intended to approximate those that would prevail under competitive conditions. In holding that the competitive price level can't be judicially determined, and that monopolists have a right to "exploit" their monopoly power, Breyer rejects any form of protection for the public from private economic power, whether antitrust (to maintain competitive markets) or public regulation (to restrain incurable monopoly pricing power).

The underlying assumption in all Breyer's antitrust rulings is that big is more efficient than small. It is a thoroughly false--indeed, a perverse--premise. It is almost universally the case that the largest firm in a given industry is among its most inefficient, e.g., GM in autos, IBM in computers, and so on. In the airline industry, for example, the Big 5 carriers have unit (per-passenger-mile) costs that exceed those of mid-size Southwest Airlines--and even the smallest of the new startup lines--by 23% (American) to 48.6% (USAir). Salamon Bros., NY Times, 4/25/93.

Only when the new administration intervened in early 1993 to stop the incessant predatory attacks by the Big 5 were those efficient small airlines permitted to expand across the country and thus trigger an overall decline in prices to the consumer. It is a fairness or level-playing-field standard in antitrust--the one Congress laid down when it passed these laws over 100 years ago--that deconcentrates markets and systematically lowers consumer prices. It is Breyer's unwillingness or inability to grasp this central empirical fact of the real economic world that makes him the national liability that he is.

Sophistry is the hallmark of Breyer's antitrust decisions. One can search in vain through them for even the slightest trace of the "brilliant jurist" portrayed by his supporters. His opinions are rambling, factually-incoherent lectures (purporting to be "economic" theory) so poorly written--as can be verified by a visit to any county law library--that the reader often has to go to the decision of the court below to find out what had actually happened in the cases. Here all that's evident is either intellectual incompetence--captivity to the crude 19th century dogma that "big is efficient"--or equally crude cheerleading for corporate giantism to gain "conservative" political support for an ambitious judicial career.

A judge's stand on antitrust is a revealing window into his broader view of the general economic issues and his overall judicial philosophy. Antitrust has two vital functions in America. First, it lays down the rules of the entrepreneurial game for the nation's 20 million businesses, providing them and their families with a "bill of rights," a shield against unjust treatment by economic predators.

No less importantly, antitrust is the nation's central price-control mechanism. Without it, mergers and economic thuggery quickly transform competitive industries into sclerotic monopolies and prices start to climb. With Breyer on the Supreme Court, its pro-monopoly majority will be so solid that corporate lawyers will dutifully start telling their clients the rules are now off, that the long-sought grail of laissez-faire has at last arrived. With antitrust effectively repealed by unelected judges, consolidation will accelerate even faster and prices in health care, for example, will be rocketing even further out of control as the voters go to the polls in '96. When President Clinton named Breyer to the high court, he almost certainly killed any serious chance of controlling health-care costs during his presidency and, indeed, cut the strongest cable that restrains prices at large.

Stephen Breyer's 19 pro-monopoly votes spell out an ultra-conservative economic agenda that he shares with Robert Bork and Antonin Scalia. It is one that systematically transfers very large amounts of money from consumers and efficient small enterprises to corporate dinosaurs that are too inefficient to compete on the merits and thus have to resort to economic violence against their smaller, more efficient competitors to survive. Even if Congress should rewrite the country's antitrust laws in a plainly-expressed effort to prevent this result, his record makes it plain that he would find a way to evade it. His is a result-oriented antitrust jurisprudence and no private antitrust plaintiff can ever expect to win his vote. His confirmation by the Senate will itself be read by his 1,000 colleagues on the nation's courts as an endorsement of his antitrust views by Congress or of its indifference to that vital body of law and the economic havoc that its neglect inevitably yields. On the Court, his votes and his pro-monopoly advocacy will cost the nation--and the president--dearly indeed.

"Every great mistake has a halfway moment," Pearl Buck once wrote, "a split second when it can be recalled and perhaps remedied." The U.S. Senate now has such a "halfway moment," a final chance to spare the U.S. and its president the appalling costs of his greatest mistake, Stephen Breyer. It is the one he will most regret in the years to come.

Senator KENNEDY. Before concluding, I want to thank all of the staff. They have been wonderful. All of us, Republican and Democrat alike, rely on our dedicated men and women who help us, and their efforts too often are overlooked or taken for granted. So I want to thank all of them for the great work they have done in helping all of our colleagues on both sides of the aisle, as well as working on the shaping of these hearings. They have done a really outstanding job.

We will now terminate these hearings and look forward to the committee's meeting, as stated by the chairman, next week, and I am confident it will be an overwhelmingly favorable vote for Judge Breyer.

I thank all of you for coming. The committee stands adjourned.

[Whereupon, at 5:57 p.m., the committee was adjourned.]

APPENDIX

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 601 ■ Washington, D.C. 20009 ■ 202/332-3224

NAN ARON
Executive Director

JAMES O. WELL
Chair

MEMBERS

Bazelon Center for Mental Health Law

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Center for Law and Social Policy

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National Wildlife Federation

National Women's Law Center

Native American Rights Fund

National Resources Defense Council

New York Lawyers for the Public Interest

Public Advocates, Inc.

Sierra Club Legal Defense Fund

The Wilderness Society

Women's Law Project

Women's Legal Defense Fund

For Immediate Release

ALLIANCE FOR JUSTICE ISSUES REPORT ON BREYER

Washington -- The Alliance for Justice, a national association of public interest legal organizations, including the Bazelon Center for Mental Health Law and the Native American Rights Fund, today issued its report on the nomination of Judge Stephen G. Breyer to become the 108th Justice of the United States Supreme Court.

The Alliance report praises Judge Breyer's distinguished legal career, his dedication, and his intellectual prowess. It also notes that while these qualities tell us much about what kind of Supreme Court justice he will be, they do not tell us everything. The report says that the "public interest community believes the nation needs someone with a vision of how the law can serve ordinary Americans and protect them when government or private interests are overbearing." When these standards are considered, the report continues, Judge Breyer's record to date is mixed, and how he will perform on the Supreme Court is hard to predict.

"Since 1990, the Supreme Court has lost its three most passionate voices for justice: William Brennan, Thurgood Marshall, and now Harry Blackmun," said Nan Aron, Executive Director of the Alliance. "We need a Justice who will carry on their vision and idealism and help resurrect the Court as a promoter of rights and liberties of ordinary Americans," Aron added.

The Alliance report urges Judge Breyer to "attack the job with the humanity and grit that the greatest of his predecessors brought to the job." "The country needs someone who will breathe again into the Court the inspiration of a living Constitution that promises liberty and justice for all. If Judge Breyer uses his considerable talents to fulfill that role, he could become a truly great Supreme Court justice," the report states.

For a copy of the report or additional information, please contact Nan Aron at (202) 332-3224.

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 601 ■ Washington, D.C. 20009 ■ 202/332-3224

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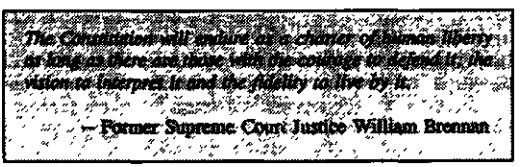
INTRODUCTION



On July 12, 1994, the Senate will begin deliberating the nomination of Judge Stephen G. Breyer to be the 108th Justice of the United States Supreme Court. It is a Court much changed in the last five years. Since 1990, it has lost its three most passionate voices for individual rights and liberties -- William Brennan, Thurgood Marshall, and Harry Blackmun -- and generally moved even further to conservative extremes.

President Clinton has nominated Stephen Breyer to replace Justice Blackmun. Judge Breyer has had a distinguished legal career: Harvard Law School professor, Chief Counsel to the Senate Judiciary Committee, Chief Judge of the United States Court of Appeals for the First Circuit. He is hailed as a brilliant jurist, highly intelligent and dedicated. He is also known to be very personable, and possesses exceptional consensus-building skills.

These qualities tell us much -- but not all -- about what kind of Supreme Court justice Steven Breyer would be, and which voids on the Court he might fill and which balances he might shift. These qualities do not tell us whether Judge Breyer would provide other attributes that are sorely needed on the Court.

President Clinton said that he was looking for someone who is compassionate and who has a big heart, and few could doubt that the Court's jurisprudence has greatly lacked compassion and heart in recent years. The public interest community believes the nation needs someone with a vision of how the law can serve ordinary Americans and protect them when government or private interests are overbearing. We need a justice with the creative idealism of an Earl Warren or Brennan, Marshall, or Blackmun, who revered the Constitution as the ultimate guarantor of equality and fairness in our society.

When these standards are used, Judge Breyer's record is mixed. His opinions display a strong concern for procedural fairness, insisting that government agencies and officials adhere to regulatory rules and guidelines. Yet, he is also extremely deferential to agency officials and often interprets statutory protections for citizens in such a narrow manner that the original Congressional purpose of helping ordinary Americans gets lost. In Freedom of Information Act cases, for example, his narrow interpretations have denied citizens access to important information about government operations. And his approach in the area of disability law has left citizens without remedies that they had reason to believe Congress meant to be available. His opinions on Section 504 of the Rehabilitation Act are so restrictive that they undercut the law's spirit and broad purpose to eliminate the widespread discrimination experienced by persons with disabilities.

On issues of fundamental constitutional rights, Judge Breyer's record is mixed. His opinions on First Amendment issues appear, on the whole, to protect freedom of speech and association. His record also suggests a commitment to the constitutional right of privacy, including a woman's right to choose, although it is not clear how broadly he would interpret that right.

This report shows a multitude of other areas in which Judge Breyer has adjudicated cases in a moderate, careful, often meticulous but sometimes antiseptic way. They suggest that Judge Breyer comes to the Court with many, but not all, of the qualities we should look for in a Justice.

Judge Breyer's intelligence, congeniality, and accessible style, combined with his consensus-building abilities, suggest that he will assume an influential position on a Court that continues to struggle to find its way on many issues. But surely he must do more on the Court than search for consensus. Consensus does little to advance the cause of justice if the agreed-upon principles are wrong. The Court needs, as much as consensus, Justices with gut instincts to understand the struggles and needs of ordinary Americans and those who continue to suffer from injustice.

As Judge Breyer ascends to one of the most important positions in the country, the Alliance for Justice urges him to help fill the gaping void on the Court and attack the job with the humanity and grit that the greatest of his predecessors brought to the job. The Court and the nation need more than another very intelligent, competent Justice. The country needs someone who will breathe again into the Court the inspiration of a living Constitution that promises liberty and justice for all. If Judge Breyer uses his considerable talents to fulfill that role, he could become a truly great Supreme Court justice.

Biographical Information

With degrees from Stanford (1959), Oxford (1961), and Harvard Law School (1964), Judge Breyer began his legal career as a law clerk to former Supreme Court Justice Arthur Goldberg. Thereafter, he combined a career in public service, working in a variety of administrative and legislative positions, with teaching stints at Harvard Law School, Harvard's Kennedy School of Government, and the College of Law, Sydney, Australia. From 1979 to 1980, Breyer served as chief counsel to the Senate Judiciary Committee. In late 1980, President Carter appointed him to the United States Court of Appeals for the First Circuit, where he is now Chief Judge. He is currently 55 years old.

In addition to the numerous decisions Judge Breyer has authored, he has written extensively on various topics in administrative law, particularly regulation and regulatory reform. His scholarship complements his hands-on experience during the Carter Administration, when he initiated airline deregulation. In 1987, the American Bar Association recognized Judge Breyer's scholarship by naming him the recipient of its Annual Award for Scholarship in Administrative Law.

Judge Breyer also served as a commissioner on the United States Sentencing Commission from 1985 to 1989. In that capacity, he was instrumental in crafting the federal sentencing guidelines, which were intended to alleviate the unfairness and disparity in federal criminal sentencing across the country. His work in reaching a consensus on the guidelines has been highly praised, but the guidelines themselves have received criticism. Jack Weinstein, Senior Judge on the United States District Court for the Southern District of New York, for example, has said that the guidelines "'require, in the main, cruel imposition of excessive sentences.'" Quoted in Hentoff, *Judge Breyer: Lots of Room for Dissent*, The Washington Post, June 4, 1994.

Judicial Record

Equal Rights

Judge Breyer's mixed record in equal rights cases illustrates his pragmatic and narrow judicial approach. He is deferential to agency officials and tends to interpret statutory provisions narrowly. Within such constraints, however, he displays a concern for reaching fair and just results.

Gender Discrimination - In *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), Judge Breyer upheld a finding of sex-based wage discrimination. *Stathos* involved two female public employees who, according to an organizational chart prepared after a company reshuffling, were of equivalent rank and duty to certain male employees earning significantly more. Company officials refused to bring plaintiffs up to the same salary level, and over time their pay continued to remain less than that of their male counterparts. Judge Breyer

agreed with the lower court that defendants' evidence comparing male and female salaries at other plants was irrelevant to the issue in this case, which was whether men and women at the particular plant in question were paid equally. He also rejected defendants' claims that they were entitled to a "good faith" immunity defense and that both the damages and attorney's fees award were excessive.

In *Dragon v. State of Rhode Island, Dep't of Mental Health, Retardation & Hospitals*, 936 F.2d 32 (1st Cir. 1991), however, Judge Breyer affirmed the dismissal of a sex-based wage discrimination claim. Donna Dragon had proved, to a jury's satisfaction, that although she was classified and paid as a clerk typist, she had assumed most of the duties of "Equal Employment Opportunity (EEO) Officer" -- duties that had previously been performed by her male supervisor -- and that her failure to receive pay commensurate with her duties was based on her sex and in violation of the Equal Pay Act. Judge Breyer assumed the same legal standards applied to the Title VII claim at issue on appeal as the Equal Pay Act claim decided by the jury. Nonetheless, he held that no reasonable person could find illegal sex discrimination based on the facts of the case. He did not address in any detail the nature of the jury decision, which was contrary to his own reading of the facts.

Voting Rights - In *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409 (1st Cir. 1986), Judge Breyer affirmed a district court decision that rejected a Voting Rights Act challenge to Boston's districting plan for city council and school committee elections. Plaintiffs had argued that the plan "packed" too many minority voters into two districts (one was 82.1% African-American, 87.88% total minority; the other was 66.37% African-American, 81.43% total minority), fragmented Hispanic voting power, and placed one "racially and ethnically diverse" community in a district dominated by a "nearly all-white" neighborhood. Judge Breyer upheld the district court's conclusion that the plan did not deprive plaintiffs of equal access to the voting process. Among other things, Judge Breyer ruled that the high proportion of minorities in the two challenged districts did not render the plan automatically unlawful.

Affirmative Action - In *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992), Judge Breyer upheld a consent decree, first entered in 1980, that required the Boston Police Department to provide preferential consideration to minority officers in making promotions to sergeant. In 1990, a group of white officers challenged the decree's continuing validity, arguing that the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down the city's minority set-aside contracting program), had rendered the decree's race-based preferences unconstitutional. Writing for the court, Judge Breyer rejected the argument. In so doing, he carefully delineated Croson's precise holding and explained why "the race-conscious relief" embodied in the challenged decree "represent[ed] a narrowly tailored effort, limited in time, to overcome the effects of past discrimination." 951 F.2d at 455.

Similarly, in *Massachusetts Assoc. of Afro-American Police Inc. v. Boston Police Dept.*, 780 F.2d 5 (1st Cir. 1985) *cert. denied*, 478 U.S. 1020 (1986), Judge Breyer denied a group of police officers' motion to intervene in a Title VII action. The officers sought to challenge a consent decree that included affirmative action provisions designed to increase the number of African-American officers promoted to sergeant.

Criminal Violation of Civil Rights - In *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), *cert. denied*, 112 S.Ct. 1960 (1992), two customs officers were charged with several offenses, including violating an individual's civil rights by kidnapping and murdering him. On that charge, a jury found the officers guilty, but Judge Breyer reversed on the ground that the civil rights statute did not apply. Taking a very narrow view of the statute, Breyer concluded that the victim was not an "inhabitant of any State, Territory of District" because he was a foreigner who intended to stay in the United States for only a few hours. Dissenting, Judge Torruella wrote that the term inhabitant did apply to the victim, "because such construction is required as a matter of plain meaning, because it makes common sense and is fair, because what skimpy legislative history there is, supports such a reading, and lastly, because there is precedential support ...." 907 F.2d at 229 (Torruella, J., concurring in part and dissenting in part). Torruella added:

> In my opinion the majority's interpretation of § 242 does violence to a longstanding scheme established to lend support to the rights guaranteed by the Fourteenth Amendment. This scheme requires interpretation of the supportive legislation in a manner coextensive with that Amendment.

907 F.2d at 232 (citation omitted).

Right to Privacy/Reproductive Freedom

Judge Breyer's record on the right to privacy is scant. He has participated in two cases involving restrictions on the right to choose, voting to strike down one and uphold the other. As a circuit court judge, Breyer is bound by Supreme Court precedent; thus neither case provides a clear answer on his views about a constitutional right to reproductive choice.

In *Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *vacated*, 111 S. Ct. 2252 (1991), Judge Breyer joined an *en banc* decision that held unconstitutional the so-called "gag rule," the federal regulation barring health care providers in federally-funded clinics from providing abortion counseling or referrals to clinic patients. The court concluded that the regulations infringed upon women's right to choose by curtailing the information available about pregnancy options and violated the First Amendment. The opinion was later vacated in light of the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 173 (1991).

In another case, Judge Breyer dissented from a panel decision in *Planned Parenthood League of Massachusetts v. Bellotti*, 868 F.2d 459 (1st Cir. 1989), which involved a challenge to a state law that minors seeking abortions obtain parental consent or, alternatively, judicial approval. At issue on appeal was whether the statute, in operation, unconstitutionally restricted the right of minors to obtain abortions. Appellants requested leave to compile a factual record to show that the statute was, in fact, unconstitutional. The majority remanded the issue to the district court, but cautioned that plaintiffs' "burden [on remand] to demonstrate unconstitutionality as applied" would be "considerable". 868 F.2d at 469. Dissenting, Judge Breyer wrote that the burden was one plaintiffs simply could not satisfy. Even if their factual assertions were found to be correct, he said, they would not "lead the Supreme Court to change its *Bellotti II* statement that such a statute is constitutional." 868 F.2d at 470.

Judge Breyer's view on another important right to privacy issue -- gay rights -- is unknown. His only case dealing with the constitutional rights of homosexuals appears to be *Matthews v. Marsh*, 755 F.2d 182 (1st Cir. 1985), which involved whether homosexual conduct or status is grounds for dismissal from the military. The ROTC had discharged a lesbian, following her voluntary admission that she was homosexual, and she claimed a violation of her First Amendment rights. (It is unclear from the opinion whether the constitutional rights asserted involved those of association or expression or both.) The district court ordered her re-enrollment, and the Secretary of the Army appealed. Pending the appeal, the plaintiff reapplied for admission, this time acknowledging that she had "engaged in homosexual acts numerous times, last one being recently." Because of the additional evidence, the appeals court panel felt compelled to remand the case to the lower court for reconsideration. In a footnote, Judge Breyer dissented without elaboration, stating only "that this court should not remand but should decide the merits of the appeal." 755 F.2d at 184.

Church-State Relations and Freedom of Religion

Judge Breyer's fairly limited record makes it difficult to draw any confident conclusions about his views on religious freedom. However, his self-described practical approach to these issues suggest a substantial degree of deference to government decision-makers both in matters of church-state separation and religious freedoms.

In *Members of Jamestown School Comm. v. Schmidt*, 699 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 851 (1983), the court reversed a district court opinion that struck down a Rhode Island statute providing bus transportation to parochial school children. In a long and detailed opinion, the court concluded that while the issue was a close one, the statute was constitutional (with one exception). Concurring, Judge Breyer wrote separately to state his belief that "the Establishment Clause calls for a more 'practical' approach" than the "comparatively 'theoretical' one taken by the majority." He wrote that because the Supreme Court had already held in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), that such laws were not designed to support religious causes but to promote public welfare, the actual question

was whether unfair advantage had been afforded to parochial schools as a "practical" matter -- a question he answered negatively.

Others cases involving religious freedoms in which Judge Breyer upheld government action include *Rupert v. U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992) (*per curiam*) and *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990). *Rupert* involved a statute that prohibited the possession of rare eagle feathers but permitted Native American groups to obtain an exemption for religious purposes. The pastor of a non-Native American group sought a similar exemption on the ground that the group followed Native American religious customs. After the request was denied, the pastor sued the Director of the Fish and Wildlife Service, claiming a violation of the Establishment Clause. In a *per curiam* decision, the court rejected the claim, holding that Native Americans enjoy special status under federal law and that the government interest in preserving Native American religion and protecting the dwindling eagle population justified its action. In *New Life Baptist Church Academy*, Judge Breyer upheld a state statute requiring review and approval of secular education offered by parochial schools, concluding that the state's interest in ensuring children receive an adequate secular education was "compelling."

Decisions in which Judge Breyer upheld the claims of private individuals or organizations include *Universidad Cent. de Bayamon v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985) (*en banc*), in which Judge Breyer argued for an evenly divided court that the National Labor Relations Board lacked jurisdiction over a university controlled by the Dominican Order of the Roman Catholic Church. (Because the court was divided, it could not grant the NLRB's request to enforce a collective bargaining order against the university.) Similarly, in *Aman v. Handler*, 653 F.2d 41 (1st Cir. 1981), Judge Breyer vacated and remanded a district court decision to deny a preliminary injunction to students who wanted to form a religious organization on a state university campus. In doing so, he noted that he was following Supreme Court precedent in *Healy v. James*, 408 U.S. 169 (1972), which held that the First Amendment prohibited the university from denying the group recognition based solely on the group's philosophy.

Freedom of Speech and Association

Judge Breyer has written a number of important free speech and association opinions, many favorable to individuals claiming that their First Amendment rights were violated. Indeed, his record in this area tends to display a good deal of sensitivity to victims of alleged overreaching by government officials. In other cases, however, Judge Breyer has sided with the government, displaying deference to officials.

In *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), Judge Breyer held unconstitutional an Executive Order, as it applied to an agreement with the World Health Organization (WHO), that required applicants for employment with WHO to undergo a loyalty check. He ruled that the Order's terms relating to political advocacy were overly

broad under established First Amendment precedent, and consequently may have a chilling effect on applicants' free speech rights. He wrote: "While we recognize that "overbreadth" must be measured in light of whatever special job-related security requirements that governmental security or foreign policy needs may reasonably dictate, we conclude ... that in this particular case those considerations are not important enough to save the Order." 744 F.2d at 230.

In a number of cases involving the right of government officials to discharge or demote employees for political reasons, Judge Breyer's practical judicial approach is particularly evident. In *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989) (*en banc*), for example, Judge Breyer concurred in part and dissented in part that politically-motivated employer action may violate employees' First Amendment associational rights. He recognized that "the First Amendment protects a government employee's association with others in a political party," but added that "a major reason the Constitution protects associational rights is so that individuals can join together in working to elect a government that will create practical programs of administration to carry out the policies they advocate." 889 F.2d at 1224. Thus, he said, courts analyzing political association claims "must recognize *not only* that the lack of *any* protection can open the door to unwarranted, politically based victimization, but also that too much judicial intervention may unjustifiably interfere with the electorate's ability to see its political aims translated into action." *Id.* (emphasis in original). He also confessed "to doubts" about the standards for review adopted by the majority, questioning, among other things, "the abilities of the federal courts, insulated from the political process, to determine which specific jobs in fact are politically sensitive ...." *Id.* at 1225.

Judge Breyer has upheld the First Amendment claims of discharged or demoted employees in a number of cases. In *Hernandez-Trado v. Artau*, 874 F.2d 866 (1st Cir. 1989), for example, he held that a government employee offered adequate evidence to support a claim that political affiliation was a substantial, and thus unconstitutional, factor in his demotion. *See also Caro v. Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989) (affirming denial of summary judgment to Puerto Rico's Secretary of Education on claim that plaintiffs' dismissals were politically motivated and thus violated First Amendment). Conversely, in *Nunez-Soto v. Alvarado*, 918 F.2d 1029 (1st Cir. 1990), Judge Breyer vacated a district court decision that denied summary judgment to defendants, who claimed qualified immunity on the issue of whether their demotion of plaintiff, allegedly due to her political party affiliation, violated the Constitution. In a 2-1 opinion, he held that the law in 1985 was not clear that a politically-motivated *demotion*, as opposed to an outright discharge, was unconstitutional, and thus defendants were entitled to qualified immunity. He rejected plaintiff's contention that the demotion amounted to a "constructive discharge" in that it had the purpose or effect of forcing her to quit (the law on "constructive discharge" was more clearly settled at the time). Dissenting, Judge Torruella found the record "clear" that the defendants' actions were taken to force plaintiff to quit, and stated that precedent "must have clearly signaled to appellants, even in 1985, that their retaliatory actions against appellee because of her political beliefs violated the Constitution of the United States." 918 F.2d at 1031.

Disability Law

Judge Breyer's decisions in four disability law cases, including three under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, demonstrate two disturbing patterns. First, they adopt a restrictive view of the legal entitlements of individuals with disabilities, even in the face of contrary precedent and analysis. Second, they generally lack awareness of or empathy for the every-day lives of the victims of disability-based discrimination. As a result, the opinions fail to interpret the letter of the law so that disability-based discrimination is remedied, and do little to advance the spirit of § 504, which was enacted "to eliminate the 'glaring neglect' of the handicapped." *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (quotation omitted).

In *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied* 112 S. Ct. 1558 (1992), Judge Breyer narrowly interpreted the Supreme Court's directive that federal agencies and grantees conduct an "individualized inquiry" to determine whether people with disabilities are "otherwise qualified" for employment. Ward concerned a truck driver with epilepsy who was fired, after working for more than five years without incident, when his employer learned of his disability. Ward asserted that the Department of Transportation (DOT) violated § 504 by refusing to waive a regulation that prohibits people with epilepsy from driving commercial vehicles.

In holding that the DOT did not violate § 504, Judge Breyer declined to apply *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987), the leading Supreme Court case on the intersection between the employment rights of people with disabilities and safety concerns. Had Judge Breyer utilized *Arline*'s legal standard, he might have found, as have many other federal courts, that proponents of blanket employment exclusions bear a heavy burden, and that these exclusions rarely survive an individualized inquiry.

Moreover, Judge Breyer ignored the possibility that DOT's policies were based on the types of "prejudices, stereotypes or unfounded fear" § 504 was intended to eradicate. DOT knew that the risk of seizure or accident among drivers with epilepsy was "extraordinarily low," but relied on findings that these risks "may be somewhat higher" for individuals who sleep and eat irregularly or who forget to take their medication. Yet, although DOT apparently did not inquire as to whether Mr. Ward had ever forgotten his medication, or been adversely affected by irregular sleeping and eating habits, Judge Breyer found that "further 'individualized' investigation ... is most unlikely to provide reasons for believing [Mr. Ward] can drive commercial trucks safely."

Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991) (*en banc*), concerned a medical student with learning disabilities who alleged that the "reasonable accommodation" mandate, *see Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); *Arline*, 480 U.S. at 287-88 n.17, required the school to evaluate him through some method other than multiple choice examinations. The *Wynne* majority rejected the view that

academic decisions are beyond the reach of judicial review and held that the school had failed to "demonstrat[e] that its determination that no reasonable way existed to accommodate Wynne ... was a reasoned, professional academic judgment, not a mere *ipse dixit*."

Dissenting, Judge Breyer opined that academic institutions should be given substantial deference in designing appropriate vehicles to evaluate student performance. Supporting the medical school, he found that multiple choice tests were not a "substantial departure from accepted academic norms." Unlike the majority, Judge Breyer would have denied the plaintiff the opportunity to challenge the institution's view that reasonable accommodation was impossible.

Cousins v. Secretary of the U.S. Department of Transportation, 880 F.2d 603 (1st Cir. 1989) (*en banc*) concerned the DOT's refusal to allow people with hearing impairments to drive commercial vehicles. Affirming the district court, Judge Breyer held that alleged victims of discrimination by federal agencies cannot sue the federal government under § 504. Rather, he ruled that they had to first file complaints with federal agencies under the Administrative Procedure Act (APA), even though § 504 usually allows the victims of discrimination to go directly to court. The ruling denied the victims of federal agency discrimination the right to a trial before federal judges.

In reaching these conclusions, Judge Breyer minimized the fact that the Supreme Court had already considered a challenge to federal agency action based on § 504. As Judge Breyer recognized, his analysis contradicted the "broader view" of other appellate courts. Moreover, the Supreme Court subsequently cast doubt on *Cousins*' reasoning when it held that federal courts lack the authority to order exhaustion of remedies through the APA when exhaustion is not mandated by the relevant statute or agency rules. *See Darby v. Cisneros*, 61 U.S.L.W. 4679 (June 22, 1993).

Finally, in *Brewster v. Dukakis*, 687 F.2d 495 (1st Cir. 1982) (not a § 504 case), the district court had ordered that the Commonwealth of Massachusetts develop and pay for a legal assistance program for people with mental disabilities who had been released from state institutions pursuant to a consent decree. Judge Breyer vacated the order, however, holding that the district court lacked the power to force the Commonwealth to pay for the recommended program. In doing so, Breyer read the consent decree narrowly. Although he admitted that "the district court is more familiar with the background of the litigation than [the appellate court]," he rejected the lower court's finding that its actions were authorized by three provisions of the decree. Judge Breyer held that neither the decree's "main purpose" of deinstitutionalization nor the district court's "general equitable" powers authorized the order.

AFDC and SSI Benefits

Judge Breyer's decisions involving income benefit programs display a deference to administrative agencies and a strict interpretation of statutory language.

Aid to Families with Dependent Children (AFDC) - Judge Breyer has written at least four opinions involving the AFDC program. In three cases, he ruled against the plaintiff and upheld AFDC eligibility restrictions and benefits reductions implemented by the state agency. In the fourth, he stated in his concurring opinion that he would have dissented to the majority's decision to strike down a benefits-restricting regulation if not for Congress's timely offering of the Family Support Act of 1988, which settled the issue for the future.

Judge Breyer's concurrence in *Wilcox v. Ives*, 864 F.2d 915 (1st Cir. 1988), evinces his strong deference to agency officials. In 1988, a group of single-parent families receiving AFDC filed an action against the Secretary of Health and Human Services (HHS). The action challenged the validity of an HHS regulation prohibiting the Maine Department of Human Services from making multiple child support pass-through payments in a given month if the payment total exceeded the $50 per month cap (payments belatedly received for prior months were counted in the $50 total).

The district court found that the regulation impermissibly contradicted the language and purpose of the governing AFDC statute. The First Circuit agreed, holding that "[n]o rational purpose is served by denying child support to a needy family because an employer failed to promptly forward funds withheld from a paycheck or because the state itself has not promptly entered the money onto its books." 864 F.2d at 920. Concurring, Judge Breyer stated that he would have dissented, but that case history in other appellate courts supported the panel decision and the timely-passed Family Support Act of 1988 adopted the view that the $50 "pass through" only applies to payments made on time. Otherwise, he wrote

> in a case like this one, where the statutory provision is minor and interstitial, where the agency has a firm understanding of the relationship of that provision to other, more important, provisions of the statute, and where that understanding grows out of both the agency's daily experience in administering its statute and its familiarity with the initial drafting process, the Secretary's argument has considerable 'power to persuade.'

864 F.2d at 927.

In *Drysdale v. Spirito*, 689 F.2d 252 (1st Cir. 1982), Judge Breyer upheld the Massachusetts Department of Welfare's practice of finding non-AFDC recipient caretaker parents ineligible for "earned income disregard" in the calculation of their children's AFDC benefits. Breyer pointed to the statutory history of excluding custodial parents from assistance benefits under the Aid to Dependent Children program (the precursor to Aid *to Families* with Dependent Children). He also argued that the earned income disregard was

"solely ... an incentive for persons receiving AFDC to earn income and so remove themselves and their families from the AFDC rolls, not ... an incentive for people not receiving AFDC to apply for AFDC." 689 F.2d 252. Finally, Judge Breyer looked to the language of the statute and concluded that a "relative claiming aid" referred to a relative claiming aid to meet her own needs, not only those of her children.

In a similar case, *Evans v. Commissioner, Maine Dept. of Human Services*, 933 F.2d 1 (1st Cir. 1991), Judge Breyer reversed the lower court's finding that the "earned income disregard" applied to the income of a new husband in determining the on-going eligibility of a family receiving AFDC benefits. Although the statute itself was unclear, Judge Breyer ruled that finding such income ineligible for the disregard was in keeping with the government purpose of "get[ing] people off the AFDC rolls, not put[ing] them on." 933 F.2d at 6 (quoting S.Rep.No. 744 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Admin. News 744, 90th Cong., 2995-96).

Finally, in *Dickenson v. Petit*, 692 F.2d 177 (1st Cir. 1982), Judge Breyer affirmed the lower court's decision to deny plaintiffs' request for a preliminary injunction. The plaintiffs sought the injunction to restrain the state of Maine from terminating or reducing their AFDC benefits in accord with the Omnibus Budget Reconciliation Act of 1981, which reduced the size and duration of the earned income deduction to AFDC grants. The plaintiffs argued for a literal reading of the "cut-off" provision, which would have allowed them four additional months of the earned income deduction. Affirming, Judge Breyer wrote that a "clever and literal reading" of the statute "may go directly counter to everything Congress intended."

Supplemental Security Income (SSI) - In *Constance v. Secretary of Health and Human Services*, 672 F.2d 990 (1st Cir. 1982), Judge Breyer reversed the lower court's ruling and held that a state may reduce its portion of the SSI payment dollar for dollar by the amount paid under a federal statute to the "essential persons" of SSI recipients. Judge Breyer deferred to the administrative agency's decision and pointed out that Congress had intended that states have the freedom to structure their SSI payments as long as they were above the floor created by the federal SSI program.

Similarly, in *Usher v. Sweiker*, 666 F.2d 652 (1st Cir. 1981), Judge Breyer upheld a regulation reducing SSI benefits by the in-kind benefit derived by recipients renting below fair market value from their children. Plaintiffs argued that the regulation unconstitutionally discriminated against them as compared to SSI recipients who lived in federally subsidized housing but did not have their benefits reduced. Judge Breyer found that the discrepancy in treatment was rationally related to the reasonable government purpose of encouraging SSI recipients to live in government housing.

In cases in which plaintiffs have challenged the denial of benefits, Judge Breyer has held agencies strictly responsible for fulfilling their burden to consider SSI applications. Where the plaintiff established a prima facie case of disability and HHS denied the

application without giving adequate evaluation or explanation, Judge Breyer has ordered the Secretary to reconsider the application. *See, e.g., Munoz v. Secretary of Health and Human Services*, 788 F.2d 822 (1st Cir. 1986). *See also Vazquez v. Secretary of Health and Human Services*, 683 F.2d 1 (1st Cir. 1982). However, he has also upheld HHS' determinations of ineligibility where the plaintiff failed to meet her burden of proving a disability. *See, e.g., Goodermote v. Secretary of Health and Human Services*, 690 F.2d 5 (1st Cir. 1982); *Geoffroy v. Secretary of Health and Human Services*, 663 F.2d 315 (1st Cir. 1981); *Rodriguez v. Secretary of Health and Human Services*, 647 F.2d 218 (1st Cir. 1981).

Access to the Courts

Judge Breyer's access cases demonstrate a willingness to allow plaintiffs their "day in court," counterbalanced by his deference to other branches of government. In cases involving standing to sue, for example, he often has favored plaintiffs, taking a somewhat broad view of the standing doctrine. He also had upheld several attorney's fees awards against claims that they were excessive, again displaying a respect for the importance of such awards to many plaintiffs. However, in cases involving other issues affecting access, such as mootness and ripeness, his approach is narrow, and he often declines to reach the merits. His access cases also show, as do other parts of his record, that he strictly interprets and enforces procedural rules and guidelines.

Attorney's and Expert Witness Fees - In *Aubin v. Fudala*, 782 F.2d 287 (1st Cir. 1986), Judge Breyer vacated an opinion involving an attorney's fees award for civil rights violations. Judge Breyer held that the district court was incorrect when it substantially reduced the award to reflect the "limited 'extent of [the plaintiffs'] success'" on the civil rights claims ($501) as compared with their success on a pendent state law claim ($300,000). 782 F.2d at 290. Judge Breyer ruled that "success" in a civil rights suit must be measured qualitatively as well as quantitatively. He held that a reasonable fee was appropriate if plaintiffs' other claims and the civil rights claims involved factually or legally related theories, even though the damage award for the latter was significantly less. *See also Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982) (plaintiffs who won injunction against cutoff of AFDC benefits during budget impasse entitled to attorney's fees even though budget passed before injunction took effect); *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (Breyer, C.J., concurring in part and dissenting in part) (disagreeing with majority that plaintiff's request for unreasonably high attorney's fees forfeits right to any fee).

In *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989), the majority held that expert witness fee awards in Title VII cases are governed by a Congressional statute limiting such awards to $30 a day; it rejected plaintiffs' contention that expert witness fees fall within Title VII's general "reasonable attorney's fee" provision. Judge Breyer concurred, but wrote separately to note that the $30 cap was limited to "attendance at trial." He suggested that expert fees for non-attendance work may fall within the Title VII provision, but noted that plaintiffs in this case had not sought recovery for any such work.

Standing - In *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983), Judge Breyer found certain Boston residents had standing to challenge a decision by the Department of Housing and Urban Development (HUD) to provide a grant to the City of Boston to help develop a multi-million dollar commercial complex. Plaintiffs argued that HUD did not, as required, make an appropriately thorough study of the possible negative impact of the complex on racial integration in the area. Judge Breyer first rejected plaintiffs' argument that they had standing (would suffer "injury in fact") because they would have to pay increased rents or move from their homes as a result of increased housing demand generated by the complex. He considered too speculative that particular individuals would incur rent increases and that such increases would be the result of the HUD grant. Judge Breyer did, however, find standing for certain of the plaintiffs on the ground that the complex would generally increase housing demand and rents in nearby neighborhoods, thereby displacing low-income (disproportionately minority) tenants and leading to a less integrated community. *See also Caterino v. Barry*, 8 F.3d 878 (1st Cir. 1993) (employees seeking transfer of pension fund assets to new pension plan have standing to sue trustees who refused to transfer assets); *Maine Association of Interdependent Neighborhoods v. Maine Department of Human Services*, 876 F.2d 1051 (1989) (reversing lower court's dismissal for lack of subject matter jurisdiction; despite doubts that plaintiff can convince state court of its standing, it "should have a chance to try"); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (applicant for job with World Health Organization has standing to challenge Executive Order requiring loyalty check for individuals seeking employment with certain international organizations).

Mootness and Ripeness - Judge Breyer has taken a narrow approach to questions involving the timeliness of judicial review, as reflected in cases involving mootness and ripeness. For example, in *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1034 (1st Cir. 1982), he held that judicial review of an EPA construction permit award was premature because the permit had expired and reactivation of it was still pending. Similarly, in *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988), Judge Breyer concurred in an opinion that the State Department violated the First Amendment when it denied a visa to the widow of a former Chilean president on the ground that her activities (primarily making speeches) would be detrimental to the foreign policy interests of the United States. Breyer agreed with the merits of the majority's opinion, but asserted that the action should be considered moot because the plaintiff had received a visa and current law prohibited denials of visas on the basis of constitutionally-protected beliefs and associations.

Statute of Limitations - Judge Breyer appears to take a strict approach in statute of limitations cases. *See, e.g., Rodriguez v. Banco Central Corp.*, 917 F.2d 664 (1st Cir. 1990) (RICO statute of limitations begins to run when plaintiff knows or should know of injury; rejecting Third Circuit view that limitations period starts when plaintiff knows or should know about last predicate act in racketeering activity); *Lopez v. Citibank, N.A.*, 808 F.2d 905 (1st Cir. 1987) (no absolute rule tolling statute of limitations in employment discrimination case for plaintiff with mental disability); *Freund v. Fleetwood Enterprises Inc.*, 956 F.2d 354 (1st Cir. 1992) (amended complaint naming proper defendant could not,

under Fed.R.Civ.P. 15(c), "relate back" to original complaint as neither original nor subsequently-named defendant received notice of suit within statute of limitations period).

Freedom of Information Act

Judge Breyer's general deferential attitude toward government agency action seems to be reflected in his only two opinions involving the Freedom of Information Act. In both instances, he voted to uphold agency claims of exemption.

The more disturbing of these opinions is *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (*en banc*), in which Judge Breyer reversed a panel opinion ordering the FBI to release to McCarthy Era historians information contained in the FBI's files concerning the prosecution of Communist party leaders under the Smith Act. The requested information included records of what informants who later testified at the Smith Act trials had told the FBI in earlier interviews.

The FBI invoked FOIA exemption 7(d), which permits the government to withhold information compiled in connection with a criminal or national security investigation when that information "could reasonably be expected to disclose ... information furnished by a confidential source." A circuit panel first ruled that the informants had waived the protection of the exemption with respect both to the information they actually revealed as trial witnesses and any information that might have fallen within the scope of cross-examination.

Writing for the *en banc* majority, Judge Breyer held that the panel's view of waiver was an impermissible interpretation of the 7(d) exemption. He found that the phrase "furnished by a confidential source" should be read to mean only that the information was originally provided in confidence, not that the information or the identity of the informant must be secret. Thus, he concluded, even if the informants' identities and the substance of their testimony were matters of public knowledge and public record, the information they provided to the FBI that was not revealed at trial could be kept confidential.

The opinion not only flies in the face of a common sense reading of the FOIA, it appears to be inconsistent with the general purpose of the act to favor public disclosure in the absence of a strong government interest in concealment. *See also Aronson v. Internal Revenue Service*, 973 F.2d 962 (1992).

Antitrust

Judge Breyer, who has a keen interest and expertise in antitrust law, generally interprets the antitrust laws narrowly. Professor William Kovacic of George Mason University School of Law, maintains that Judge Breyer's opinions reflect a "conservative perspective." In a 1991 law review article, Kovacic favorably compared Judge Breyer's

antitrust cases with those of Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit. He further wrote:

> "In a number of instances, Judge Breyer's antitrust opinions have adopted conservative perspectives in evaluating the legality of challenged distribution practices and single-firm pricing conduct. In addressing these and other antitrust issues, the Breyer opinions have expressed recurring concern about adopting conduct rules that would diminish incentives to compete and about the administrability of suggested liability standards. In particular, Judge Breyer has played an influential role in discouraging consideration of the defendant's subjective expressions of intent in evaluating claims of unlawful exclusion."

Kovacic, "Reagan's Judicial Appointees and Antitrust in the 1990s," Fordham L. Rev., Vol. 60, pp. 95-96 (1991) (footnotes and citations omitted).

Kovacic noted that "[d]uring the survey period [1977-1990], Judge Breyer cast 17 votes in antitrust matters. Each vote supported the defendant's position ...." Id. at 95 (citing opinions). Judge Breyer's opinions include: *Barry Wright Corp. v. ITT General Corp.*, 724 F.2d 227 (1st Cir. 1983) (approving price cut by manufacturer with 94 percent of U.S market to country's biggest user of product in exchange for commitment to purchase 'nearly all' requirements from maker); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987) (no violation of Sherman Act when airport operator refused free ground services to charter service, requiring charter company to buy ground service from airport operator's exclusive seller of such services at airport); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (no liability in predatory pricing case); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (overturning jury verdict for car dealer that was denied yearly allocation of cars until it agreed to accept unwanted "part kits"); *Monahan's Marine v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989) (rejecting liability in price discrimination case); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (rejecting claim of two towns alleging that electric utilities' "price squeeze" intended to monopolize local distribution).

The Environment

Judge Breyer's opinions in environmental cases are mixed. In somewhat uncharacteristic form on the issue of deference to agencies, he has twice ruled that agencies were wrong in not preparing environmental impact statements (EIS). However, in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), a case involving clean-up of a hazardous waste site, Breyer largely upheld the district court's substantive findings against a claim by the EPA that the court should have ordered more stringent clean-up relief.

Moreover, as discussed in the next section of this report, Judge Breyer has authored a number of exceptionally critical writings on the efficacy of health, safety, and environmental regulations. Those writings call into question how he will rule on statutes and regulations designed to reduce or eliminate risks to public health and welfare.

Judge Breyer has decided four cases involving agency failures to prepare environmental impact statements (EIS), ruling for the agencies twice and private parties twice. In *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), Judge Breyer upheld a preliminary injunction obtained by environmental organizations to stop the Department of Interior from auctioning off oil-drilling rights in the North Atlantic fishing area. The issue was whether the Department had to prepare a supplementary EIS under the National Environmental Protection Act (NEPA), because of a significantly revised estimate of oil reserves in the area. Holding that a supplementary EIS was required, Judge Breyer noted NEPA's purpose of making government officials consider environmental impacts in their decisionmaking. Moreover, he continued, as a practical matter the more the Department is allowed to sell oil-drilling rights and encourage development by private parties, the more the Department and the private parties may become entrenched and committed to their investment even if a negative supplementary statement is released. *See also Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (vacating and remanding district court decision that would have allowed construction of causeway and port facility without submission of EIS).

Judge Breyer upheld an agency decision not to prepare an EIS, however, in *City of Waltham v. United States Postal Service*, 11 F.3d 235 (1st Cir. 1993). Affirming the lower court, Breyer ruled that the factual record indicated that the project would not significantly affect the quality of the environment. *See also Citizens for Responsible Area Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982) (EIS not required for private construction of hanger for corporate jets; project not sufficiently federal in nature to make NEPA applicable).

In a long-running case, *United States v. Ottati & Goss, Inc.* 900 F.2d 429 (1st Cir. 1990), Judge Breyer largely upheld the district court's findings in a suit concerning clean-up of a 34 acre hazardous waste site in Kingston, New Hampshire. The appeal involved the EPA's actions with respect to one of several companies sued for clean-up costs. Although the district court adopted most of the EPA's suggestions for relief, the EPA claimed on appeal that the court should have ordered more stringent relief as to certain contaminants. Judge Breyer affirmed most of the lower court's factual findings, but remanded for further proceedings on one of the three challenged contaminants. In most respects, he held that the factual record adequately supported the court's conclusions.

Judge Breyer later referred to the *Ottati* case in questioning the efficacy of governmental attempts to clean-up the "last ten percent" of the risks posed by environmental contaminants. In his book, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993), at 11-12, Breyer questioned whether it would be worth spending $9.3 million to

protect children who might at some time in the future eat some of the contaminated dirt that would otherwise be left in place at the challenged New Hampshire site. (See below for a further discussion of *Breaking the Vicious Circle*.)

Legal Writings: Regulatory Reform and Risk Regulation

Judge Breyer's prolific extra-judicial writings reflect a special interest and expertise in regulatory reform and risk regulation, on which he was written several books and articles. As with his judicial opinions, the writings convey a detailed and analytic approach to identifying problems and proposing possible solutions. Breyer's approach is exemplified in a speech he gave while he was Chief Counsel to the Senate Judiciary Committee: "If you want regulatory reform, you take one agency, you look at it in extreme, exhausting detail, and then you produce major change within that one agency." Proceedings of the National Conference on Federal Regulation: Roads to Reform, Sept. 27-28, 1979, reprinted in *Administrative Law Review*, vol. 32, no. 2 (Spring 1980).

While praised for their depth and accessibility, Breyer's writings on regulatory reform and risk assessment have been criticized as decidedly anti-regulatory in nature and based on questionable scientific evidence about health, safety, and environmental dangers. In 1981, Judge Breyer published one of his best known works, *Regulation and Its Reform*. In the book, Breyer takes a skeptical view of the efficacy of government intervention in the marketplace. He recognizes that regulation is sometimes necessary to correct market failures, but tends to minimize those failures and trumpet an unfettered free market as a better cure for societal problems and inequities.

Breyer's most recent -- and arguably controversial -- book is *Breaking the Vicious Circle: Toward Effective Risk Regulation*. Published in 1993, the book discusses at length Breyer's ideas of risk assessment and refitting the nation's federal regulations on health, safety, and the environment. Using the example of regulatory efforts to reduce exposure to cancer-causing substances, Judge Breyer argues that relatively few people die from cancer whose incidence could have been reduced by regulation. Questioning the efficacy of the regulation of pesticides, asbestos, benzene, and other contaminants, Breyer concedes that health and environmental regulations are necessary to reduce risks posed by toxic chemicals but nearly always minimizes the magnitude of those risks.

Breaking the Vicious Circle has drawn particular criticism. Several experts on risk assessment argue that Breyer's conclusions stem from a over-reliance on the work of scientists who discount environmental risks. According to Thomas McGarity, Professor of Law at the University of Texas, Breyer accepts the opinions of experts who triviliaze environmental dangers and rejects those of experts who take them more seriously. McGarity says that this leads Breyer to conclude that environmental activists and the media have steered Congress into creating a regulatory atmosphere in which agencies force well-meaning companies to waste scarce resources trying to eliminate the "last ten percent" of the risks

posed by environmental contaminants. While many experts -- and ordinary citizens -- believe that federal agencies should "err on the side of safety," Judge Breyer believes that such an approach leads society to spend too many dollars chasing after trivial risks.

How influential Judge Breyer's views on regulatory reform and risk assessment will be in Supreme Court decisionmaking is unclear. While his judicial record displays a strong deference to agency officials and narrow statutory interpretation, there are indications that he will be more inclined to challenge agency decisions in these areas. First, he has in the past questioned the ability of judges to faithfully adhere to the principle that they should defer to agencies' "reasonable" interpretations of statutes when they themselves believe such interpretations are wrong:

> [The deference] formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe that the agency's interpretation is legally wrong, and that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute ... and that the "better" view is "correct," and the alternative view is "erroneous."

Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986). Given his expertise with respect to risk regulation, Justice Breyer may have a tendency to substitute his own conclusions for those of health and environmental agencies.

Second, in his four opinions involving agency decisions not to prepare environmental impact statements, he has twice overturned the agency decision. Given that the Supreme Court has not once in NEPA's twenty-five year history ruled against an agency, Judge Breyer's apparent willingness to do so half the time may indicate that he is inclined to show less deference on healthy, safety, and environmental issues than on others.

Conclusion

Stephen Breyer is a thoughtful, careful, and highly intelligent judge, and he will likely be a very competent and influential justice. The Alliance for Justice urges him to use his considerable talents to solemnly protect the Fourteenth Amendment's promise of equal justice under law, preserve legislative commitments to environmental and consumer protection, and ensure that the courthouse doors remain open to all who are wronged by government, not just the rich and powerful.

Center for Science in the Public Interest, Consumers Union,
National Wildlife Federation and Natural Resources Defense Council
do not take positions on judicial nominations.

STATEMENT

OF CHARLES MERRILL MOUNT

to the United States Senate

Committee on the Judiciary

on

The Nomination of Stephen C. Breyer

to the United States Supreme Court

I

Ladies and Gentleman of the Judiciary Committee. Good morning. I am Charles Merrill Mount and I have come here to oppose confirmation to the United States Supreme Court of Stephen G. Breyer.

I do so with profound apologies to President Clinton. It grieves me infinitely to oppose a President whom I consider to be extraordinarily decent and well-meaning as a man. But I act as a matter of conscience and to save this country the presence on the Supreme Court of a man morally and ethically unfit. The President has chosen a candidate whose patented dualism, of portentious principles expounded in public and vicious retaliations in private, show him to lack the essential quality of judicial impartiality. Moreover Judge Breyer has demonstrated an absolute contempt for the Constitution and into this he has led the First Circuit. At Boston no matter of constitutional magnitude receives fair Hearing, nor even respectful Hearing. I shall spell this out for benefit of the Committee by Article, Section, and Amendment.

But first I must tell you who I am and how I came to be concerned with Judge Breyer. To start at the beginning then, some members of this Committee may know me, or at

least find me familiar. Senator's Hatch, Thurmond, and Simpson surely recall that my friend the former Chief Counsel of this Committee, Francis Coleman Rosenberger, had me paint a large portrait of Senator Eastland at the time of his retirement in 1978. Senator De Concini walked through this Hearing Room on the Saturday when Francis Rosenberger, J.C. Argitsinger, and some others had a scaffold erected to hand the portrait on that wall, where I am sorry to see it no longer is present. That day may have been auspicious in other respects too; I recall Senator De Concini remarking that the Bill to double the federal judiciary was to be voted on at 1 O'Clock.

Senator Kennedy may recall me too. With his respect for scholarship and enormous humanity he arranged for me to have an office in the Library of Congress, which caught me up in the soiled conspiracies of that place which destroyed my career and ultimately brings me here today. Senator Kennedy is not to blame. He does not know what transpires inside the Library of Congress; his only impulse was compassion for a well-known historian like myself whose real home is Dublin, in Ireland, which my heart never has left. There I left behind a wife and four children whom Judge Breyer has made certain I shall never see again.

Senator Biden knows me too. One Sunday long ago when his brother was being married in Delaware his vote was needed

on a finance Bill. He rushed back to Washington and in striped trousers and morning coat cast his vote. That duty performed, he stood with me on the steps of the Senate Wing to await an ambulance that with screaming sirens would take him back to National Airport. I was immensely flattered that a man so eminent and beautifully dressed would stop for frivolous conversation with me at a moment of such strain. Senator Biden, you are not just Chairman of this Committee. You are a nice man.

What I, an artist and historian, do before a Committee of the United States Senate may well be asked. My first book of history, published when I was twenty-six, was a biography of the great American artist John Singer Sargent. THE NEW YORK TIMES listed it for biography in its BEST BOOKS OF THE YEAR and later it was chosen by Mrs. Jacqueline Kennedy for the Presidential Library she was forming in the White House as her example of the new variety of American Biography. An influential book critic wrote of my later biography MONET:

> Mount is a biographer virtually unique in the 20th century; the supreme example of the writer as devil's advocate. He takes nothing for granted, certainly not the self-portraiture of his subject. A portrait-painter himself, his overriding aim is truth, no matter how unpalatable it may be.

How then did this "biographer virtually unique in the 20th century become transformed into federal prisoner number 16431-038, and how did the Chief Judge of the First Circuit

keep him that way for six years? Why is it that every Memorandum Decision he wrote was marked NOT FOR PUBLICATION? What horrible secret has Stephen G. Breyer been keeping right up to the threshold of this Hearing Room?

We must examine together how it happened that all the irregularities of a railroading trial, including denial of all indigent subpoenas for witness, denial of documentary evidence, trial for a crime not on the indictment, trial at Boston contrary to the constitutional bar for a crime alleged to have taken place in Washington, were denied again and again by this man whom today is presented before this Committee of the Senate as a paragone of judicial virtue.

The essential matter to be recalled is that like most active historians most of my life I had collected manuscript documents. Now, grown old and ill, recovering from a stroke, to sell some of these on the understanding that my active career was over, I travelled to Boston where Goodspeed's Book Store advertized that it paid cash for autograph letters. Only when I appeared in Boston I was arrested. For a few weeks thereafter I was beseiged by the media. Invitations to appear on television were frequent. The newspapers sent Reporters whom knocked on my door three and four a day. To the more acute Philip Shenon of THE NEW YORK TIMES when he appeared at my door I commented with a laugh: "You're the only one today - I was feeling neglected". Hustling past me into my

very modest accomodation Shenon's first words were: "This case doesn't make sense. Were you set up?"

* * *

For trial at Boston I was brought before United States District Judge Rya Weickert Zobel, a remarkable experience. A holocaust survivor whom has had numerous other names, trial before her was not unlike being tried by Zsa Zsa Gabor. Judge Zobel's utterances made an unstable sense in her mind alone, and because she equated the gossip of Boston on equal basis with judicial proceedings in the court before her, she saw no need for all the impediments of trial which has come to be called "constitutional rights". To be certain of conviction she denied me all indigent subpoenas for witnesses and most documentary evidence was not admitted. My doom was a certainty.

My court appointed attorney, Charles P. McGinty of the

Federal Defender Office, refused to listen to me concerning The Boston Athenaeum. It was named in FBI Reports of conversation with the Book Store, and we noted that Judge Zobel altered any piece of evidence, and even letters, naming it. That I should have suffered for so many years from The Boston Athenaeum, due to its slanders and libels lost two wives and five children, then been arrested across from The Boston Athenaeum on Beacon Street, is improbable at best. That in telephoning the Library of Congress the FBI should have contacted no high official but the petty functionary whom had been spreading the same Boston Athenaeum defamations, stretches credulity.

But in his own way Charles P. McGinty had a certain genius. He instructed me to trace the history of each of the 167 documents on the indictment. As an experienced historian I was able to give him individual reports, which he used to great effect while the government attempted to prove the documents belonged to them. There was electricity in the air of that courtroom when after each government "expert" gave evidence by inference and belief, McGinty rose and cut them to pieces. Often he showed significant portions of the history were suppressed and replaced by pious claim for which no evidence existed.

Then, on the fourteenth day of trial, McGinty rose on a motion to strike. I read from the transcript:

MR. MCGINTY: Your Honor, with respect to the other exhibits, my motion to strike had identified certain exhibits for which there were insufficient proof of ownership by the Library of Congress and insufficient proof of ownership at trial by the National Archives. They are listed, and there is a substantial number of them that are listed on my motion.

THE COURT: This is the motion filed on the 4th?

MR. MCGINTY: The motion to strike exhibits as just characterized.

THE COURT: Okay. Well, some of those have now gone out, 30 to 39 are out.

MR. MCGINTY: Correct.

THE COURT: One -- 93 to 96, 98, 100 to 202 are out. So, 100 to 202 are out. 189 to 207 are out. And as for the others, the motion is denied. And the motion to seal.

Of 167 documents on the indictment, McGinty had forced dismissal of 135, or seventy per cent. Any impartial judge must have recognized that the government's case was just so much nonsense and granted the motion to acquit which followed. But I was not before an impartial judge. Working in tandem McGinty and I had achieved the impossible. We had proved the documents were not government property as claimed, - and I was convicted. The sheer brilliance of this accomplishment requires amplification.

The dynamics of a trial includes elements never mentioned at Law School. Born at Zwickau, Germany, December 18, 1931,

and tragically orphaned, Judge Zobel was a heavily accented divorce lawyer without federal court practice or experience when this Committee added her to the roster of federal judges. Become the Holly-Golightly of the federal judiciary, anyone suffering through her courtroom performance, noting her obsessions and delusions, her ferocious will to dominate and craving for adulation (every tirade was punctuated by sweet smiles to the jury) must wonder if she is entirely sane.

That her ire was concentrated on me quickly became known to the jury. When a blind man staggered into the courtroom and all but fell into my lap, she called out to me in a tone of severe reprimand. When I made objection to the fact the government had gone into my sealed gift to the Library of Congress, and was cross-questioning me from those documents sealed in my lifetime, she declared me in contempt and sent me to Salem Jail. She credited Boston gossip, or an interview with The Boston Athenaeum, so completely that she sat before the court somber like a chapter of the Apocalypse. Yet no one from THE BOSTON ATHENAEUM appeared to give testimony under oath, lest we cross-question that party about David McKibbin's theft of my proof sheets, his own plagiaries and those of Richard Ormond, the libels with actual malice published in London and New York, and their more recent reiteration.

Forgetting that the Bible begins with a cunning snake but ends with Revelations, Judge Zobel gave an involuntary

shudder each time she looked at me, denied me all indigent subpoenas for witnesses whether from Ireland or the United States, and allowed me no documentary evidence. The government meanwhile was allowed to fly into Boston scores of pseudo-experts from every part of the country. In the varnacular peculiar to such matters this process is known as "railroading", and in this Judge Zobel proved herself one of the most blatant and devoted Railroad Engineers in history. The jury little noted nor long remembered that the documents themselves had been proved my own property in clear title. Every government witness, and the list was extensive, gave evidence not to the indicted crime of "transportation", to to THEFT. On the fourteenth day of trial, almost immediately after 135 documents were dismissed leaving the government's case smashed and in tatters, in his summation the prosecutor boldly said to the jury:

> How do we know that he <u>stole</u> these documents from the Library of Congress?

What documents? Everything claimed by the Library of Congress had been dismissed from the trial.

* * *

Here enters Hon. Stephen G. Breyer, whom the President has nominated to the Supreme Court subject to the Confirmation

of this Committee. From this point forward we have opportunity to examine whether this man believes in justice as the primary mission of the federal courts, and whether he would "preserve and protect the Constitution of the United States", or ever has done so.For with "railroading" by Judge Zobel as established fact, it was Judge Breyer, after he became Chief Judge of the First Circuit in April, 1990, whom barred my escape from her injustice.

The Committee knows my background. But Judge Zobel had been told ex parte and extrajudicially, by which I mean outside the court or in chambers, not where my attorney and I could hear or challenge its truth, that (1) I had appropriated David McKibbin's work on Sargent, and (2) that I was a picture forger. The sensational and groundless talk circulated at Boston showed me to be a truly accursed character, and Judge Zobel had acted on this. The proper enquiry of this Committee now is to examine whether Judge Breyer acted in an ethical manner and with scrupulous adherence to his oath of judicial impartiality.

Of my direct appeal the less said the better. The Appeals Court appointed an attorney who made no pretense of seeking to reverse the district court. He refused all contact with me, neither accepting telephone calls nor answering letters. I was appalled at the continuation of a railroading suffered in the lower coirt. The appeal process completed in Boston,

to atone for a crime never committed long years of wrongful imprisonment stretched before me. My court appointed lawyers had finished their tasks. Left to myself, slowly I began a campaign by Habeas Corpus. The numbers of issues were phenomenal: one 2255 motion (for such they are called) succeeded another.

Judge Zobel of course denied each effort out of hand. Her ear to the ground, she knew what Boston gossip said of me. My 2255 motions thereafter reach the First Circuit on appeal, where a panel of which Chief Judge Breyer was the most prominent member examined them for legal probity. By a decision dated June 28, 1991, and marked NOT FOR PUBLICATION, Judge Breyer ripped apart four of my submissions. These were a third 2255 motion, a second motion for recusal of Judge Zobel, a Rule 27 motion to Declare Nullity, and a motion for Evidentiary Hearing.

Judge Breyer's unique judicial approach becomes apparent, for in this decision he first reduces the issues to those less troublesome, then disposes of these by conclusory statements. Issues of law are never adjudicated - just disposed of. At page 3 elimination of issues came first:

> Of the numerous allegations contained in Mount's various court submissions, we decline to address those raised for the first time on appeal, as well as those raised below but not argued here. What remain are challenges to the following: (1) an alleged variance between the charge in the indictment and the government's proof at trial; (2) the court's instruction that proof of guilt was not required as to every charged document; (3) the failure to explain to the jury why 122 of 144 documents priginally charged in count two had been struck from the indictment; (4)

> the admission of fourteen documents not charged in the indictment; and (5) the exclusion of two letters of James McNeill Whistler, memoranda from the Library of Congress, documents from the United States Patent Office, and copies of articles from a 1905 French Journal.

An impressive list, even so. But now Judge Breyer improvises rationalizations so that these need not be addressed either. The Committee will recall that the attorney appointed to do the direct appeal refused all contact with me. Judge Breyer now finds (at 4) "Mount's failure to advance these issues on direct appeal creates other procedural barriers, however ...." And so, after devoting page 5 to discussions of further barriers he perceives to exist, at page 6 he finds that it is not necessary to consider anything at all:

> Those of Mount's claims that conceivably implicate constitutional concerns are plainly without merit. And the failure to raise his other claims on direct appeal clearly precludes their consideration by way of a section 2255 motion. These additional claims, in any event, are also without substantive merit.

By slithering between Scylla and Charibdis, Judge Breyer does nit sully himself entertaining legal issues put before his court. They had been disposed of, neither more nor less. But what about the needs of justice?

For a fourth Habeas Corpus I made issue of a Supreme Court case from 1989, published after my trial before Judge Zobel. By Schmuck v. United States that high court taught "that a defendant cannot be held to answer a charge not

contained in the indictment brought against him". This seemed to address directly one of the principle evils of trial before Judge Zobel. I had been indicted for "Transportation of goods knowing them to have been stolen", and at trial in every instance the government witnesses gave evidence to theft. Judge Zobel wrote on the face of the motion:

> Denied. Since the jury was not instructed as to an unindicted offense, Schmuck v. U.S. is inapposite.

But the issue was not what the jury was charged. The issue was that the government had set out to prove a charge "not contained in the indictment brought against him". The Circuit Court affirmed her denial employing unique method typical of Judge Breyer, whom continued his practice of not soiling himself by discussion of issues. Though I had brought this Habeas Corpus to show that the actions of the district court defied the lesson of the Supreme Court, Judge Breyer makes no mention of the Supreme Court. Under date of April 14, 1992, he nimbly combined this proceeding with another for change of venue, leaving the Supreme Court ruling unconsidered. His second paragraph disposes of the matter:

> Appellee (the government) has moved under Loc. R. 27.1 for summary disposition in No. 91-2200, arguing that the sole issue there raised has previously been considered and rejected by this court in one of petitioner's earlier habeas appeals. We agree. See Mount v. United States, No. 90-1964, slip op. at 6-7 (1st Cir. June 28, 1991). Nothing contained in petitioner's submissions calls our conclusion there into question.

Side-stepping the Supreme Court has resulted in very bad law. For this was a Supreme Court lesson taught since the conviction, and in Davis v. United States, at116, Mr. Justice Stewart showed: "intervening change in the law" eliminates all possible bar to Habeas Corpus. We begin to comprehend that Judge Breyer never would heed any Supreme Court ruling that interfered with his basic mission to cover-up what had happened in the court of Judge Zobel.

In the same opinion of the Supreme Court (Davis) Justice Stewart had shown "that relief in 28 U.S.C. section 2255 cannot be denied as to constitutional claims solely on ground that relief should have been sought by appeal". Had Judge Breyer heeded that ruling he must have reversed his own opinion of June 28, 1991, in which he wrote "Mount's failure to advance these issues on direct appeal creates other procedural barriers ...." That had been untrue. We see emerging a special, eccentric view of law, which in no particular corresponds with the law of the United States. This is Breyer's Law. And it much encouraged the wanton and reckless nature of Judge Zobel's acts.

Sixth and seventh Habeas Corpus petitions submitted to the district court now received no consideration at all. Judge Zobel wrote DENIED on the lower left corner of each face sheet. Notoriously unaccountable on the bench, she had a protector in Chief Judge Breyer of the Appeals Court. This

was a conspiracy of two to flout the law of the United States. Judge Zobel's proceedings passed without criticism, nomatter how wild. An added grace was that the appeals of her cases are almost never published.

Now imprisoned four years, for all these reasons in the late spring of 1992 I made effort to free myself from the reprehensible jurisdiction of this twosome. Administration of the district court was shocked June 17, 1992, by arrival of my eighth Habeas Corpus, and the next day by Affidavit of Bias pursuant to Halliday v. United States, 380 F.2d 270 (1st Circuit, 1967). Court administration rasped to a halt. No assignment was made. The same frozen malaise seized the Circuit Court where Judge Breyer had erected cordon sanitaire around Judge Zobel. For a year past her cases had been banned from publication. When unaccountably United States v. Grant (September 26, 1991) 956 F.2d 1, slipped through into paperback edition of Federal Reporter, revealing that again Judge Zobel had convicted a defendant of whom it was found "legally impossible for defendant to commit the crime charged" (!), quickly this was withdrawn from hard cover edition.

Aware that Judge Zobel menaced their viability as tribunals, together the district court and the First Circuit instituted a policy to limit the numbers of certiorari petitions I could forward to the Supreme Court. Cooperative effort was made to group submissions into single negative Orders. The 22nd day of April, 1992, Judge Zobel therefore denied six (6)

matters gathered together in her court over a period of four months. None were denials on the merits nor provided opinion of any nature. All merely were subscribed "Denied". Three of these matters were appealable including (a) motion for return of $18,400 sent for filing in the district court January 22, 1992; (b) motion pursuant to section 2255 to vacate and set aside conviction unlawfully obtained by constitutional violations, sent for filing February 10, 1992; and (c) another section 2255 motion sent for filing February 14, 1992.

May 4, 1992, I dispatched three appeal notices, each in separate envelope. Only one such Notice of Appeal was forwarded to the Circuit Court by the district court clerk. The single briefing schedule to reach me seemed an effort to bunch three appeals together and June 4 I sent Motion To Sever for filing with the Circuit Court. By Order dated September 11, 1992, the Circuit Court decreed investigation of the two lost cases:

> ... under Fed R. App. P 10(c) we direct the district court to investigate this matter and, if appropriate, to reconstruct the record nunc pro tunc.

Briefing schedules with respect to the "lost" section 2255 motions filed in February arrived without explanation in October 1992, when I was in my fifth year of imprisonment.

* * *

The test for judicial impropriety established by the Supreme Court in Liljeberg v. Health Services Acquisitions Corp. (1988) was far exceeded, and I was without adequate remedy. That Judge Zobel continued to commit profoundly sociopathic acts violating the fundamental mission of the federal courts to provide justice and protect the innocent, was drowned in more complex pathologies of a cover-up. By Liljeberg the Supreme Court found that judicial propriety is established by a specific test: "if it would appear to a reasonable person that a judge has knowledge of the facts which would give him an interest in the litigation, then an appearance of partiality is created even though no actual partiality exists". The Supreme Court taught further that it is appropriate to consider (1) thr risk of injustice to the parties in the particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process: "a court, in making such a determination, must continuously bear in mind that, in order to perform its function in the best way, justice must satisfy the appearance of justice".

Yet here, knowingly, wantonly and deliberately, the district court and the First Circuit carried on the most

shameful cover-up of a railroading. Proceedings disappeared or were not assigned for adjudication. Denials were without Memorandum or Opinion. Every lesson of the Supreme Court in this century was violated. District court and Circuit Court were devoted to the most appalling dishonesty in support of an aberant judge whom demonstrated absolute contempt for law.

The partiality of Judge Zobel was grotesque and overwhelming. The time was past due to admit the corroded environment in which this unworthy judiciary operated by open bias and prejudice, denial of witnesses and evidence, tampering with evidence false charge to the jury, fatal variance, withholding of court documents, and loss or destruction of multiple submissions. Judge Zobel claimed the powers of a Deity to convict any person brought before her, whether by whim or extrajudicial bias and prejudice.

The interests of justice and constitutional due process cannot allow this to continue. Social costs to the First Circuit from year after year hiding intolerable acts on part of an unstable judiciary, all contrary to the needs of justice, are too great. Judge Breyer exists as co-conspirator with Judge Zobel by allowing her to imprison an eminent scholar whom had been fully vindicated at trial. Inevitably all this must unravel before the public. At stake then, <u>and here today</u>, is the credibility of the entire federal judicial system.

AND THEN THINGS BECAME NASTY. Judge Breyer began to

play a badger game, dismissing submissions with direction to try elsewhere - and elsewhere dismissing again. October 23, 1991, a complaint to the Judicial Council had been acknowledged by the Circuit Executive. Significant aspect of that complaint was willful destruction by Judge Zobel before trial and afterward of letters to the court, two petitions for writs, and a 2255 motion. Her destructive rampage, unprecedented in the history of the federal court system, was considered in parallel with issues from the trial, including fatal variance, gross extrajudicial bias and prejudice, misapplication of the First Circuit's binding precedents, and wanton denial of the Supreme Courts leading cases. Added to grievous constitutional violations was more recent discovery that Judge Zobel also had destroyed the further motion pursuant to 2255 submitted the 29th day of Jabuary, 1991. All was done in evident belief that protection given her by Judge Breyer rendered her acts impervious to discovery.

She was correct. Even when these matters were put before the Judicial Counsel the adjudication entered August 21, 1992, was written by Stephen G. Breyer. Delicately omitting the name of the district judge, he exulted in his own cleverness:

> I dismiss this complaint in part as "directly related to the merits of a decision or procedural ruling." 28 U.S.C. section 372(c)(3)(A)(ii). Insofar as complaint has sought, or seeks, to reverse his conviction, to recuse the district judge, and to prevent the seizure or effect the return of the funds and letters in question, complainants proper

> recourse, following adverse actiob by the district judge, is by way of appeal to the court of appeals.

In a letter to William R. Burchill, Jr., General Counsel of the Judicial Council of the United States, I observed:

> In the end the matter comes down not alone to the ethical disgrace being perpetrated by District Judge Zobel and Circuit Judge Breyer, but question whether justice knowingly can be denied a defendant in the United States' Courts when it becomes a certainty that no crime was committed. Or, alternately, whether such obsessive protection of a district judge whom disgraces her court to obtain conviction of an innocent person is of equal or greater importance than the Federal Courts mission to provide justice.

And still the battle by Habeas Corpus went on. Gloating over his badger game by refering the Judicial Council complaint back to the Court of Appeals, Judge Breyer now wrote dismissive denial for appeal of the ninth Habeas Corpus. It will be recalled that at trial in Boston from a total of 167 documents 135 had been dismissed for "insufficient proof of ownership" by the government. Also, that so large a proportion of the allegedly "stolen" documents having been proved my own property without taint, more than reasonable doubt existed any had been stolen. This comports with the finding of the Supreme Court by Jackson v. Virginia that evidence is insufficient if:

> ...it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the criminal offense ....

Judge Zobel of course would have nothing to do with this. She

wrote on the face page:

> Denied, judgement may be entered dismissing the claim.

Consistent in his own way, Judge Breyer, whom wrote the Opinion of the Court of Appeals, never touched on the issue. I quote his entire twelve lines:

> In this most recent challenge to his 1988 conviction for interstate transportation of stolen property (one of a series of such challenges he has brought pursuant to 28 U.S.C. section 2255), petitioner alleges that the evidence was insufficient to support the jury's finding of guilt. In particular, he contends that the testimony of two government witnesses was unworthy of credence. In our decision on direct appeal, we discussed such testimony at some length and found that the jury was justified in relying thereon. See United States v. Mount, 896 F.2d 612, 616-20 (1st Cir. 1990). The arguments now advanced by petitioner, even if not procedurally barred, provide no basis for revisiting this issue.

But the "arguments now advanced by petitioner" were the lesson of the United States Supreme Court, again discarded in favor of Breyer's Law. And of course this evasion was held in complete secrecy by being marked NOT FOR PUBLICATION. No one must ever know to what depths Judge Breyer sank by continuously disallowing the findings of the Supreme Court. My Habeas Corpus motions numbered 8,9 and 10, dated June 14, 1992, August 3, 1992, and December 2, 1992, were each submitted to the district court with AFFIDAVIT OF BIAS pursuant to Halliday v. United States, a First Circuit case from 1967 reported at 380 F.2d 270. Of this case the Harvard Law Review, Volume 83, at pages 1207-1208, wrote:

> The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion ... There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge ....

This is precisely what I did for these three 2255 motions. Nevertheless Judge Zobel seized and denied them without opinion or reference to the merits. Each denial by Judge Zobel was then affirmed, in the manner of a rubber stamp, by the Circuit Court presided over by Judge Breyer. Nowhere had the merits been considered; no one examined on what basis I languished wrongfully in prison year after year. An appalling situation continued to worsen.

* * *

Then, early in January 1993 this country had a new President. Young, curious, interesting himself in every aspect of government, his first task was to select a Cabinet. Judge Zobel thereupon contracted the notion that as a German woman, born at Zwickau, Germany, December 18, 1931, a Jew and a holocaust survivor, she must be made Attorney General of the United States in the new administration of President William J. Clinton. Her candidacy was considered by this President most anxious to explore every avenue, and eventually she arrived in her little hat for interview at the White House.

By sending the President copy of a mandamus petition recently filed with the First Circuit, naming Judge Zobel as respondent and demonstrating a broad spectrum of improprieties, contribution was made to the defeat of her unseemly ambition.

Worse then arose when in his turn, in that year 1993 Hon. Stephen G. Breyer felt that the new President must nominate him to the United States Supreme Court. June 3, 1993, I wrote a letter to Judge Breyer himself one paragraph of which said:

> Appeal of eleven section 2255 motions have reached the First Circuit, plus a bevy of petitions for mandamus, recusal, and change of venue, and a suit for damages from Judge Zobel's thefts of $18,400 cash and the 135 historical documents dismissed from the indictment at trial. Like my funds, the documents have not been returned to me. In each instance you defied established law to protect a woman whom long ago must have been removed from the bench. Most recently, in No. 92-1576, you even refused to examine the two pages of transcripts enclosed herein, showing dismissal at trial of the 135 historical documents. On petition for rehearing to which the same transcripts were annexed, once more you refused to examine them.

The letter honorably dispatched to Judge Breyer himself, in the same mail copy went to President Clinton.

Original letter to Judge Breyer and copy to the President seem to have been delivered Monday, June 7, 1993. The reaction of Judge Breyer was spectacular. The following day, June 8, 1993, he gathered together three of my cases on appeal before the First Circuit and denied them in a single Order showing no cause. A district judge at Boston, Hon. Joseph L. Tauro, then also weighed in with a dismissal. I sent Judge Breyer's

very unusual triple dismissal to the President. One paragraph of my covering letter said:

> Question arises whether a federal judge so petty, unprincipled, and filled with naked vindictiveness, who retaliates by violation of all civilized standards and standards of jurisprudence, can be fit to sit on the Supreme Court.

President Clinton abandoned the candidacy of Stephen G. Breyer and nominated to the Supreme Court Hon. Ruth Bader Ginsburg.

As we have seen by his Orders, Judge Breyer treats substantial matters of law solely as avenues for expression of a puerile cleverness and a pervasive personal egotism. By uts corresponding contempt for the proper functions of a Court of Appeals, the First Circuit under his guidance leaves vast constitutional infirmities uncorrected. Direct test of this followed again, July 1, 1993, when the First Circuit received from me a petition for writ of mandamus which called attention to gross violation of Article III, Section 2, of the Constitution, as well as the Sixth Amendment.

The indicated portion of the Constitution says:

> The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held <u>in the State</u> where the said Crime shall have been committed ....

How then was I tried at Boston with the government producing squads of witnesses whom gave evidence to "theft" in Washington? For this single violation to hit two governing expressions of the Constitution is remarkable in an extreme.

The enormous gravity of the wrong committed is well demonstrated. The Sixth Amendment says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ....

In sipler words, to have put me on trial at Boston and allowed exhaustive testimony that I had "stolen" documents from the Library of Congress at Washington, was constitutionally barred. And it is typical of proceedings conducted at Boston that it was done anyhow. One wondered how could Judge Breyer evade this direct challenge to unconstitutional law, of the sort he always affirmed by sidestepping the issue. The answer was not long in coming. Within fifteen days from its arrival in Boston, hardly time enough for the Appeals Court to docket and review the petition, it also had determined to dismiss, and to do so not on the merits. The Order of Court entered July 15, 1993, was seven words only:

> The petition for writ of mandamus is denied.

This is barbarous treatment and gross impropriety on part of a Circuit Court with duty to supervise proceedings in its district courts. Here a district judge in Massachusetts had the presumption to try a defendant alleged to have committed a theft in the City of Washington, District of Columbia. Wherever one looked, whether to Article III, Section 2, of the Constitution, the Sixth Amendment, or even Rule 18,

Federal Rules of Criminal Proceedings, no jurisdiction for such a trial existed at Boston.

The district court had exceeded authority, jurisdiction, and powers, and for the First Circuit Judge Breyer merely looked away. Were there any principle orprivilege which would have supported the action of the district court, or rendered it even quasi-legal, this must have been stated. Instead the Circuit Court dismissed not on the merits, leaving gross constitutional infirmity and a state of legal quagmire. An unlawful act was neither justified nor condemned, an innocent scholar left imprisoned without cause.

Examining the situation left by this insolubrious disposition, one sees forthwith that to have imprisoned me without the commission of any crime, but merely on clandestine whisperings of unstable librarians who know nothing of me or my affairs, is a crime against humanity. That I should have been imprisoned by a Boston court that denied me all indigent subpoenas, denied me documentary evidence, and held trial in violation of the absolute bar found in Article III, Section 2, of the Constitution, is too heinous to be properly described. That this man, the Chief Judge of the First Circuit Court of Appeals, should wrongfully have kept me in prison year after year, for six years, never bothering to examine my endless submissions showing so many judicial irregularities, beggars description.

To say that Judge Breyer is like Shakespeare's Iago,

who believed in a cruel God, would not be correct. Judge Breyer belives that he himself has immutable right to inflict cruelty on those before his court. His bias and prejudice can be activated by rumor, frivolous gossip, or the schemes of unstable individuals. He enjoys displaying a superficial cleverness, but lacks the incisive intelligence that would distinguish extrajudicial gossip from evidence. Willingly and obtusely and with singleness of purpose he denies justice, denies all law, all precedents, all statute. The Constitution itself is nothing to him when for whatever private motive he desires to inflict cruelty. He has been called "smug" and "arrogant", and if the media can be trusted, these were President Clinton's original perceptions. So far as they go they are correct. But the reality is that Stephen G. Breyer practices the prerogatives otherwise reserved for God.

He is without human compassion. He taunts and torments with persistent ridicule persons whom he knows to be wrongfully imprisoned, exulting in what he believes to be his own cleverness while they suffer the pain of the Damned. Especially in this age when humanitarian concerns have become an essential element of legal consideration, and the lessons of the Supreme Court show regard for persons in every social range, this man whom is concerned only for himself lacks fundamental qualification. It is a maxim of law, and employed by the Supreme Court in Liljeberg (at 875), that "to perform its high function in the best way 'justice must satisfy the appearance of justice'".

Contrarily Judge Breyer, as we have seen here, deals out injustice couched in a cute cleverness, and hides it under NOT FOR PUBLICATION restriction.

Finally, we hear that he is a builder of "consensus" and this must be examined for whether it is a force for good or evil. In every opinion quoted here, even the most cleverly malign denying basic holdings of the Constitution and the Supreme Court, he has convinced two other judges of the First Circuit at Boston to go along. This is not a form of consensus that would be solubrious on the Supreme Court, for we must recall that "The Devil can quote scripture".

The Breyer nomination, in short, presents a Pandora's Box of courtroom cliches, myths and stereotypes - the ruthlessly ambitious judge who sees a railroading and again and again affirms it. These are issues never addressed in polite company, but I have come here today to expose them. The plain issue before this Committee is whether it can confirm to the Supreme Court a man to whom JUSTICE is an irrelevance; the Constitution something that does not matter.

This man is a threat to the public, to the common good, and to the liberties of every person. What happened to me can happen to any one of you. Were Stephen G. Breyer confirmed to the Supreme Court it would mark the end of liberty in this country. I ask each of you, and I beg and pray, that you decline to confirm Stephen G. Breyer.

THANK YOU.

HC02 Box 7377
Quebradillas, Puerto Rico
00678

July 12, 1994

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510-6275

Dear Chairman Biden:

Thank you for the opportunity to submit this testimony about the nomination of the Honorable Judge Stephen Breyer to be Justice of the Supreme Court of United States of America.

My husband, Joseph Hampel and I would want this testimony circulated to the members of the Judiciary Committee and made part of the official record of Judge Breyer's hearing. We will follow the hearings in the news media.

Again, thank you for allowing us to be part of this civic activity.

Very truly,
Natalya Tamara Hampel
Natalya Tamara Hampel

TO THE COMMITTEE ON THE JUDICIARY
United States Senate
Washington, D. C.

This testimony is to address the record of the Honorable Judge Stephen Breyer as judge and chief judge of the First Circuit Court of Appeals in Boston, Massachusetts. Judge Breyer took an oath, a solemn promise, to defend the Constitution of United States of America, but he failed to support individual and civil, human rights for women and people traditionally denied equal protection and due process of the Fourteenth Amendment.

A brief assessment of Judge Breyer's work finds he was personally informed that people of Puerto Rico were being subjected to experimental nuetron-electronic- magnetic radiation in spying operations by intelligence gathering agencies of United States Government, operations which damage environmental concerns and injure human beings and other living organisms used as test victims. Judge Breyer did not stop this illegal activity which has absolutely no justification, whatsoever, in law, although he and the Appeals Court for the First Circuit were asked many times to issue an injunction.

Judge Breyer was personally informed that American citizens were subjected to unconscionable abuse in actions by Government in the case, HAMPEL vs. AUTORIDAD, which has been in litigation since 1988, constantly beset by lies, deceit, fraud, such as conspriracy in the instant case to dismiss the case before the main defendant had answered and while plaintiffs were complaining about Judge Breyer in Washington, D. C.

Judge Breyer was personally advised through the executive official of the Judicial Coumcil of the Appeals Court about the mental disability and erratic behavior of some of the judges on the Puerto Rican United States District Court. Judge Breyer was sent over a hundred pages of evidence documents relating to the official judicial misconduct of court clerks, Juan Masini Soler and Lydia Pelegrin, misconduct wreaking devastating effects of pain, anguish, injury and torture for Joseph and Natalya Tamara Hampel!

There was no compassion, no understanding, no relief, no protection of the citizenry, not even a humanitarian break in the horror! Judge Breyer did nothing but berate the plaintiffs for their persistence in bringing the complaints to the Courts.

Judge Breyer failed to properly adhere to the Constitution of United States in the administration of his duties in the First Circuit Court of Appeals in Boston, Massachusetts.

JUDGE BREYER IS NOT QUALIFIED TO BE A SUPREME COURT JUSTICE OF UNITED STATES OF AMERICA.

AFFIDAVIT 1180

This testimony has been sworn and subscribed to before me by Natalya Tamara Hampel, a resident of Quebradillas, Puerto Rico, who is known to me, on this the 12 day of July, 1994.

SS.290-30-6409,1 ma

Antonio Cedron Cart... ABOGADO NOTARIO

Natalya Tamara Hampel

Driver's License No. 1980783

Notary Public

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