SENATE—*Friday, July 29, 1994*

(Legislative day of Wednesday, July 20, 1994)

The Senate met at 8:45 a.m., on the expiration of the recess, and was called to order by the Honorable BYRON L. DORGAN, a Senator from the State of North Dakota.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

** * * the Lord * * * said unto Abram * * * I will make of thee a great nation, and I will bless thee * * * and thou shalt be a blessing * * * and in thee shall all families of the earth be blessed.*—Genesis 12:1–3.

*Pray for the peace of Jerusalem * * *.*—Psalm 122:6.

God of Abraham, Isaac, and Ishmael, God of our fathers, as we listened to Prime Minister Rabin of Israel and King Hussein of Jordan speak at the joint meeting Tuesday morning, it was like a dream in which we were immersed in nearly 3,000 years of Biblical history. For more than 25 centuries, the Middle East has struggled with conflict. Now, two great leaders, in the presence of Congress, the Nation, and the world, join hands in a commitment to seek peace. Hallelujah!

We were reminded, gracious God, that the three great monotheistic religions in history have vested interests in Jerusalem. Peace in Jerusalem is the precursor to peace in the world. And we pray for that peace. Grant wisdom and courage to the leaders of Israel, Jordan, Syria, and Palestine, and overrule every attempt that is made to frustrate their efforts for peace.

We pray in the name of the Prince of Peace. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, July 29, 1994.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable BYRON L. DORGAN, a Senator from the State of North Dakota, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. DORGAN thereupon assumed the chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for morning business not to extend beyond 9 a.m. with Senators permitted to speak therein for not to exceed 5 minutes each.

ABOUT SENATOR HUGH SCOTT

Mr. WARNER. Mr. President, there is a particular facet of Hugh Scott's life and conduct which is most dear to me as a Virginian representing our Commonwealth in the U.S. Senate.

Throughout his political career in Pennsylvania and his private life after leaving the Senate, Hugh Scott was proud of his Virginia heritage, as a graduate of Randolph-Macon and of the University of Virginia Law School. Coincidentally, he roomed there 1 year with another distinguished colleague, John Stennis, of Mississippi.

In addition to his personal attachment to Virginia and its institutions, Hugh Scott was dedicated to fostering the reality of a viable Republican Party in Virginia. He was a great personal help to our first Republican Governor, Linwood Holton, with whom he always stayed closely allied over the years. Together with Governor Holton, Senator Scott was a key adviser to me as I assumed the positions of Undersecretary and Secretary of the Navy. He always found time to help me as a patient mentor and a trusted resource as I began to explore my own interest in elective office.

No one has ever given me better or more thoughtful counsel. And no advice I have taken has ever been more valuable than that he gave me over these many years.

Hugh Scott was a gentleman in the best and most classic sense of that word. His personal code of honor was beyond reproach and his partisan advocacy was based on fact and principle—not on conjecture or personality. His firmly grounded civility was matched by ferocity in pursuit of his objective. And the appellation affable tiger was his personal favorite.

Hugh Scott possessed tremendous energy from which we, in the Senate, benefited mightily. And that energy characterized his private life as he pursued deep and scholarly interests, particularly in Chinese art.

And running as a thread through all these activities, public and private, were his deep-seated love of Virginia and his devotion to the enduring themes and values he formed as a young person.

During his service as Senator Republican leader, there was on his inner office door a small hand typed "Prayer of a Breton Fisherman: Oh, God, Thy Sea is so great; and my boat is so small."

On the inside of that door was a metal plaque showing the University and an excerpt from a famous poem about the gentlemen who attended it:

THE HONOR MEN
(By James Hay, Jr. '03)

The University of Virginia writes her highest degree on the souls of her sons. The parchment page of scholarship—the colored ribbon of a society—the jeweled emblem of a fraternity—the orange symbol of athletic prowess—all these, years hence, will be at best mementoes of happy hours—like the withered flower a woman presses between the pages of a book for sentiments sake.

But—

If you live a long, long time, and hold honesty of conscience above honesty of purse;
And turn aside without ostentation to aid the weak;
And treasure ideals more than raw ambition;
And pursue no woman to her tears;
And track no man to his undeserved hurt;
And love the beauty of noble music and mist-veiled mountains and blossoming valleys and great monuments—
If you live a long, long time and, keeping faith with all these things hour by hour, still see that the sun gilds your path with real gold and that the moon floats in dream silver;

Then—

Remembering the purple shadows of the lawns, the majesty of the colonnades, and the dream of your youth, you may say in reverence and thankfulness:
"I have won the honor of honors. I have graduated from Virginia."

Mr. President, I cite these two highly personal vignettes because they illustrate the manner in which Hugh Scott lived his life: Each and every day; trust in God, and conduct yourself as a gentleman.

Mr. President, I also request permission to insert further pertinent material in the RECORD at this point. This includes the statements of two valued friends: his longtime chief aide, Martin G. Hamberger, and Richard G. Quick, who served the Senator in many ways.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

LIPSEN & HAMBERGER,
ATTORNEYS AND COUNSELORS AT LAW,
Washington, DC, July 22, 1994.

LETTER TO THE EDITOR.

DEAR EDITOR: The death of former U.S. Senate Republican Leader Hugh Scott of Pennsylvania ought to serve as an occasion to remember his national leadership as a moderate Republican who fought vigorously for the center from his position as Republican National Chairman in 1948 and continuing through his service as Senate Republican Leader from 1969 through 1976. Hugh Scott's spirited defense of the Office of the Presidency during the Watergate Era has tended to identify him with that time in a way he does not deserve.

It is far more productive and relevant today to understand Hugh Scott in terms of his dedication to the highest principles of public service and personal ethics. During the Vietnam Era he stated he was neither Hawk nor Dove, but rather an Owl. And it was wisdom which guided him throughout his career. He was a fighter for Civil Rights beginning in the 1940s; and through the federal legislative struggles of the 1960s, he was always in the forefront of achieving Civil Rights goals. Senator Scott was a leader in making Eisenhower the first modern Republican President.

Hugh Scott was in most ways a "premedia" Senator, but his sharp wit and excellent turn of phrase made good copy and great sound bites. And in times when bringing federal dollars home to Pennsylvania projects was not criticized, he didn't hesitate to make a reality of this 1970 campaign theme: "The Most Powerful Senator We Ever Had!"

The fundamental characteristic of his public service was his dedication to making government not just responsible but also responsive to the needs of the people. And I am certain that Hugh Scott's last words for all of us would be as he often said:

"Face the future with an eye for excellence, a hand for the helpless, a head for the truth, and a heart for the People."

Sincerely,

MARTIN G. HAMBERGER

REMARKS OF RICHARD G. QUICK

Those of us who were privileged to serve U.S. Senator Huge Scott as he represented the Commonwealth of Pennsylvania are indeed fortunate to have had such an experience in our lives. His example of leadership and compassion, demand and understanding, was a great tool in shaping our own perspective and choices about who and what we would become.

For me, a non-political person from a small town in Central Pennsylvania, association with "Scott of Pennsylvania, the most powerful Senator we ever had" opened an entire new vista of recognition and possibilities. I was but one of many who enjoyed this vista because of him. And he inspired us to do our best to perform for him and Pennsylvanians in a way worthy of his and their trust.

There was no doubt about why he was the first Pennsylvania Senator to be popularly elected to three terms—every day was a work day on which to get something more accomplished for the People. And he worked at those tasks with great patience and foresight. He was willing to accept political risks and to act boldly because he believed that the good judgement of the People would result in good government being the best politics. Having the opportunity to help in that work and to enjoy the benefit of his teaching as we progressed was the most profoundly satisfying experience of my life.

IN PRAISE OF SUMMER INTERNS

Mr. MOYNIHAN. Mr. President, I rise in recognition of my summer intern staff.

These fine young men and women volunteered their time and energy this summer, and did a most outstanding job. Mr. President, in recognition of a job well done, I ask that a list of their names be printed in the RECORD:

Matt Cloud, Kelli Crawford, Chirstophe Delville, Paul Dickson, Roseanne Foster, Erin Goldberg.

Erica Goldschmidt, Kapil Gupta, Ethan Hein, Tara L. Jones, Joey Koch, Sam Meirowitz.

Maragent Phee, Baldwin Robertson, Jennifer Ross, Kinda Serafi.

TRIBUTE TO MARGE LAITOS

Mr. PRESSLER. Mr. President, I rise to pay tribute to Marjorie Laitos of Rapid City, SD, who recently passed away. She was affectionately known as Marge to those of us who were her friends.

Marge was a very special lady. She made a lasting impression on anyone who met her. Marge was an educated, well-read woman who effectively articulated her views. I have many fond memories of my visits to her home and our discussions about various issues.

My friendship with Marge predates the beginning of my service in the U.S. Senate. I first met Marge while I was a Member of the House of Representatives. Over the years she provided me with invaluable advice and assistance. When I first was elected to the Senate, Marge helped to establish my Rapid City field office and worked as a member of my Rapid City staff for several years. I am very grateful for her loyal support and friendship.

Marge was conversant in a wide range of subjects. Her interests were diverse—Egyptian history, geology, paleontology, archaeology, the environment, and natural history—to name just a few. She also was proud of her Scottish heritage and even traveled to Scotland to pursue her genealogical research.

Although she was actively interested in many fields, her avocation was Egyptology. Several years ago she fulfilled a lifetime dream of traveling to Egypt to visit the historical and cultural sites there. She had read about and studied them for many years. Following that trip, Marge later wrote a book, "Bon Bons, Baksheesh and Me," which described Egyptian history and culture in the context of her travel experiences.

Being a published author is an achievement in itself. However, Marge's family was her greatest source of pride and enjoyment. She was a caring wife, mother, and grandmother. She not only encouraged and supported her children in their educational endeavors, but also practiced what she preached. As an avid reader, Marge was an inspiring role model for the continued pursuit of knowledge throughout one's life.

Over the past few decades, we have witnessed a trend whereby some in our society have placed a lower priority on good manners, proper grammar, and standards of conduct. Marge was certainly the exception to this trend. She was poised, gracious, and resolute.

Marge always rose to the occasion and did what needed to be done to help her husband, Jan, with his military career, her children with their education, and the good causes in which she believed. She was a gracious host, a fascinating conversationalist, and an articulate champion of her beliefs.

But most of all, Marge was fun to be around. I will always remember her hearty laugh and her witty sense of humor. We can all draw lessons from her zest for learning and her enjoyment of life. Marge was a "Renaissance woman" in the best sense of the term.

She was a friend of mine and a great South Dakotan. She will be greatly missed by all of us who knew her.

OPPOSITION TO THE SIMON AMENDMENT NO. 2423 ON A LONGER SCHOOL YEAR

Mr. FEINGOLD. Mr. President, I want to voice my disagreement with an amendment to S. 1513, the Elementary and Secondary Education Act, which was accepted last night. I recognize that there are enormous time pressures on the managers of these kinds of measures to expedite consideration of various amendments, but we continue to pass these kinds of amendments for new spending without meaningful scrutiny. This amendment in particular caught my attention because I simply don't believe in this time of enormous fiscal constraints, we should be spending scarce Federal dollars for this purpose.

The Simon amendment, which allows the Secretary of the Department of Education to award grants to school districts that want to implement longer school years, is authorized at $100 million. A few hours earlier, I met with educators from my State who expressed their opposition to the Simon amendment, and the concept of a longer school year. This proposal is advanced by those who believe that American schools ought to operate in every facet like schools in Japan and Germany. They are vested in a largely unfounded belief that a longer school year will magically result in higher academic achievement for our students. Standing on its own, a longer school year will not yield better results, without regard for rigorous concentration on core academic subjects, or any consideration for spending more time each day in the classroom. This is, I believe, another "quick fix," a superficial cosmetic concept that will do

little to improve classroom instruction and learning.

Given scarce resources within the context of a Federal education program that is struggling to define its proper role in State and local education systems, the use of Federal resources for the purpose of lengthening the school year is an inappropriate expenditure. If school districts want to have a longer school year, then let them choose the resource—local, State, or Federal. My view is the limited Federal resources ought to be focused on results yielding programs and policies—many of which are already contained in S. 1513, like professional development for teachers, national education goals for math and science, Head Start, title I for economically and educationally disadvantaged students, educational technology, and women's educational equity programs.

THE GATT IMPLEMENTING LEGISLATION

Mrs. KASSEBAUM. Mr. President, the administration is preparing legislation to implement the Uruguay round agreement of the General Agreement on Tariffs and Trade. This week, the Finance Committee is reviewing provisions and offering its advice. Other committees have undertaken to do the same.

I rise today to express my firm belief that the administration should submit a Congress a clean bill. The implementing legislation should contain no provisions except those necessary to implement the Uruguay round agreements.

Congress has agreed to consider the Uruguay round implementing legislation under special fast track rules, which require an up-or-down vote without amendment. We agreed to this procedure in recognition that delicate balances would be struck by our negotiators as they pursued our national interests in this complex, multilateral negotiation.

Fast track is a powerful tool, and its limits must be narrowly drawn. I am concerned about proposals to include extraneous provisions in the implementing legislation. There has been discussion, for example, of including new fast track negotiating authority and of establishing labor or environmental criteria for future negotiations.

Provisions such as these may have merit, but that is not the point. They are extraneous and unnecessary to implement the Uruguay round agreement. They should stand on their own; they do not belong in the implementing legislation.

There is much good in the Uruguay round agreements, which extend the longstanding American commitment to pry open foreign markets. After 7 long years, our negotiators secured agreements that will bind additional countries to the rules of fair trade by which we long have abided. They will for the first time protect the rights of important American industries trading in services or reliant upon intellectual property. And, they will give all of our exporters unprecedented access to the world's fastest growing markets, particularly in Asia and Latin America.

At the same time, many questions about the Uruguay round agreements must be addressed as the implementing legislation is developed and the congressional debate unfolds. For example, how will this agreement affect the delicate balance of our Federal system when State laws conflict with our trading obligations? How will if affect the Federal budget? What are the strengths and weaknesses of the new structures put in place to administer these trade agreements?

These agreements are important, and Congress should meet them head on. We should debate their benefits and shortcomings and address the sincere concerns raised in Washington and throughout the country. And, in the end, Congress must meet its constitutional duty to decide whether these agreements are an appropriate means of regulating our Nation's foreign commerce.

But I strongly believe that the Uruguay round agreements must rise or fall solely on their own merits. It would be unfortunate indeed, if the important issues of the Uruguay round were cluttered—or overshadowed—by unnecessary and extraneous matters.

THE PASSING OF HUGH SCOTT

Mr. SIMPSON. Mr. President, I rise to express a very deep and profound sadness at the passing of our dear friend, Senator Hugh Scott. I first met him at the Republican National Convention in Chicago in 1952, when my father was a delegate from Wyoming, and Hugh Scott, then serving in the U.S. House of Representatives, was one of the emerging statesmen of our country.

Six years later he was elected to the U.S. Senate. He served with my father when dad was here from 1962 to 1966. They enjoyed each other very much although their voting patterns were somewhat dissimilar, considering they were both in the same party. But, respect and admiration was always the hallmark of their friendship.

When I came to the U.S. Senate, Hugh was one of the first to greet me and wish me well and to ask how he could be of assistance. I always appreciated his good counsel and friendship. He was a wonderful man who possessed great civility and had a wide range of scholarly interests.

He struggled on in these last years, but loved to come to various Senate-related functions. Although physically limited he always had a sparkle in his eye and was delighted to participate in "things of the Senate."

He will be deeply missed. He was a gentleman, a scholar, a legislator, and a friend. We shall miss him greatly. We wish his dear daughter, Marian, and his dear grandchildren who he loved so very dearly, our deepest regards and respects.

My wife, Ann, joins in these expressions of sympathy and regard.

SR–71 BLACKBIRD SUMMARY STATEMENT

Mr. BYRD. Mr. President, the Senate Armed Services Committee and the Senate Defense Appropriations Subcommittee included funds to establish a modest, 3-plane contingent of SR–71 Blackbird reconnaissance aircraft. When it was retired in 1989, the SR–71 was the only survivable, penetrating, manned reconnaissance system in the U.S. inventory providing photographic and radar imagery and electronic intercept. It remains to this day the only survivable, penetrating, manned reconnaissance aircraft. The other aircraft systems operated by the United States, the U–2 and the RC–135, do not have the speed and altitude to overfly a potentially hostile opponent. Expensive efforts to develop unmanned aerial vehicles are still in development and will not be fielded for years.

This capability is still needed. We needed it in the Persian Gulf war, when battlefield commanders could not get enough imagery from satellites to answer all of their intelligence questions. The United States had to use lower-quality civilian Landsat and SPOT satellite imagery to produce the special maps that were needed to prosecute the war against Iraq. As capable as our satellite systems are, in a crisis the additional capability provided by the SR–71 could prove invaluable.

I have been assured that for $100 million from within the budget request, three of these aircraft could be brought back into service within a year with their existing photographic and electronic sensors. A vital, new radar imaging system would also be included within that amount. This would include a 30-day deployment with approximately 10 operational missions. We believe that this austere capability could be maintained for approximately $50 million per year, and surged if required to support a conflict. In my opinion, this is a very efficient stop gap measure, complementing existing satellite and aircraft systems, to assure that U.S. troops have the capability they need in a conflict.

Some critics of the SR–71 question whether the United States has the "political will" to use the SR–71 against another country, since a decision was made not to overfly Iraq in 1991. I reject the notion that we have learned nothing from that conflict. Far better for the political authorities to have an instrument in hand to use if necessary

than to deny them the opportunity to use it by assuming that the nation's leadership will never have the political will to overfly a nation if our intelligence needs, and our combat forces at risk, demand it. Reestablishing a limited contingent of SR–71 Blackbird reconnaissance aircraft is a prudent move, and one that I fully support.

Mr. President, I ask unanimous consent that following my statement additional material referred to in the statement be printed in the RECORD.

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

(See exhibit 1.)

SR–71 BLACKBIRD

Mr. BYRD. Mr. President, in the last few years, the world has been beset by troubles. One of these troubles has already required the deployment of U.S. military forces in a war against Iraq. Another troubling situation is still bubbling away on the Korean peninsula, sometimes at a low simmer, sometimes looking like it is coming up to a boil. One of the critical lessons we learned from the Persian Gulf war is that, in a threatening situation or during the conduct of a war, a military commander cannot have too much information, too many maps, or too many "looks over the hill" to see what the enemy is doing. The Department of Defense's "Final Report to Congress on the Conduct of the Persian Gulf War" in 1992 noted that "Imagery was vital to Coalition operations, especially to support targeting development for precision guided munitions and Tomahawk Land Attack Missile attacks, and for BDA [bomb damage assessment]. Operations Desert Shield and Desert Storm placed great demands on national, theater, and tactical imagery reconnaissance systems. The insatiable appetite for imagery and imagery-derived products could not be met." The U.S. Defense Mapping Agency had to use Landsat and SPOT data to create maps for the U.S.-led coalition's use in that war.

Mr. President, our national ability to meet that "insatiable appetite" has not improved in the intervening years. The "Final Report to Congress on the Conduct of the Persian Gulf War" went on to note that "The SR–71 could have been useful during Operation Desert Shield if overflight of Iraq had been permitted. In that case, the system would have provided broad area coverage of a large number of Iraqi units * * * During Operation Desert Storm air operations, the SR–71 would have been of value for BDA [bomb damage assessment] and determining Iraqi force dispositions." It is for this reason that I have again, as I had in a letter to the Secretary of Defense before the war with Iraq, broached the subject of bringing the SR–71 Blackbird reconnaissance aircraft out of forced retirement.

In 1991, my suggestion to then Secretary of Defense Cheney was not adopted. The SR–71 program had been terminated as a full-fledged operational activity involving 12 aircraft in 1990 on the grounds of cost, lack of need due to the end of the cold war, and the promise of follow-on systems then in development. The follow-on to the SR–71 has since then also been canceled. The SR–71 Blackbird remains our sole manned, survivable, penetrating reconnaissance aircraft. The Congress, however, specifically directed that this capability be preserved. In June, 1990, the Secretary of the Air Force directed the Air Force to "place three SR–71A aircraft and six associated reconnaissance sensors and electronic countermeasure suites into long term storage, rather than a "flight ready" status, as a hedge against a protracted conflict some time in the future." This was a far-sighted move. I believed in 1991 that we should have taken advantage of that foresight, and I continue to believe that we should take advantage of this fortuitous circumstance and create a contingency capability for the SR–71 in the face of the potential for conflict that continues to exist on the Korean peninsula. Our military forces deserve access to every tool that we can provide, particularly tools of such demonstrated capability and need.

Unmanned Aerial Vehicles, or UAV's, have been touted as a penetrating and survivable follow-on to the SR–71 and, indeed, in a few years they may be developed to that point. Very high expenditures are under consideration for a family of various UAV's, amounting to $2.2 billion over the next five years. The funds for UAV development have come in part at the expense of upgrades and overhaul to other existing airborne reconnaissance platforms like the U–2 and RC–135, which unlike the SR–71 are not survivable over hostile territory. While potentially useful, the current program of UAV development is extremely ambitious and may not be fully attainable in the current constrained budget environment. The SR–71 is a cost effective stopgap that makes use of existing, but still state of the art, equipment to fill an inarguable gap in battlefield intelligence. I do not view it as a competitor of UAV's—I support funding for an effective tactical UAV program.

The SR–71 as an aerial surveillance system complements other "national technical means," as satellite systems are euphemistically termed. A 1991 report by the Office of Technology Assessment, "Verification Technologies: Cooperative Aerial Surveillance," cites a 1990 report to the Department of Defense that states "the existence and utility of reconnaissance satellites is accepted . . . Satellite orbits are highly predictable. It is taken as a given by each side that the other will refrain from some activities, which would otherwise by observable, during a satellite pass—once or a few times a day, say for a total of 20 minutes. The long advance predictability of reconnaissance coverage makes it possible to hide, by careful advance scheduling, even very large and elaborate activities. Each side might worry, in the extreme case, that preparations for war or treaty breakout could thus be hidden." The scheduling and route flexibility provided by aircraft platforms such as the SR–71 make it very nearly impossible to avoid detection. Properly employed, there should be no advance warning of when or where an SR–71 might fly. Given the repute of the North Koreans in concealing their facilities and installations even in peacetime, this flexibility might be essential should tensions escalate or hostilities erupt on the peninsula.

"National technical means" of intelligence collection will remain essential, but have some limitations, as I have just illustrated. Another weakness of current satellite intelligence systems, but a strength of the SR–71, is the ability to provide synoptic broad area coverage of large swaths of ground, needed for monitoring overall enemy force dispositions and for specialized and updated mapping. Prior to the Persian Gulf War, the United States acquired Landsat and SPOT satellite images from which to build maps, because U.S. intelligence systems were swamped trying to monitor Iraqi military activities. Buying Landsat and SPOT imagery for these needs was a stopgap measure. We might not be so fortunate the next time a crisis arises. Nor may we benefit from six months to prepare for a conflict, as we did during the Persian Gulf conflict. Military reconnaissance missions' requirements for timeliness often exceed the current capabilities of civilian satellite systems. According to a 1993 Office of Technology Assessment report, "The Future of Remote Sensing From Space: Civilian Satellite Systems and Applications," Landsat satellites pass over any given place along the equator once every 16 days, while SPOT passes over once every 26 days. Each system may require weeks to process orders. The report goes on to state that "existing civilian satellite data are not adequate to create maps with the coverage or precision desired for military use."

The same report also notes that because other nations control some of the most capable civilian satellite imaging systems, they could in the future deny the United States access to their systems. Additionally, since all countries generally follow a nondiscriminatory data policy, any purchaser can buy imagery at the same price and on the same delivery schedule. This means that in the future, Iraq or some other belligerent could purchase Landsat, SPOT, and other civilian satellite imagery to prepare their own battle maps for their troops or for their own future

cruise missile systems. During the Persian Gulf conflict, both the SPOT and Landsat organizations cut off Iraq's access to satellite imagery, but such cooperation is not assured in the future as more and more companies and countries attempt to enter the satellite imaging business.

The SR–71, on the other hand, could have provided photographic coverage of Iraq in under three hours of flying time. It could have covered the country at regular intervals—daily or every several days, if necessary—to help update battle maps showing the widely dispersed Iraqi troop positions. Such missions might also have helped to reveal other Iraqi activities involving their nuclear, biological or chemical weapons industries that were uncovered only with great effort after the war. With electronic intercept sensors available for the SR–71, Iraqi air defense equipment could have been pinpointed prior to bombing raids. And with a different camera, the SR–71 could have followed bombing missions in to provide post-bombing damage assessments. An existing radar suite allows the SR–71 to support U.S. forces even in bad weather or at night, helping to keep in unblinking eye on every movement of enemy forces.

In any future conflict, the capabilities of the SR–71 would augment support to U.S. combat forces. A limited contingency capability involving three aircraft can be reconstituted for as little as $100 million, and maintained in standby status for under $50 million per year, according to estimates provided by the Defense Airborne Reconnaissance Office and by the contractor. The contractor is confident enough in these estimates to willingly accept a cap on the amount provided for the reconstitution of this capability. Over $700 million worth of spare parts remain in storage, ranging from spare engines to spare tires. By basing the contingency aircraft with the NASA-operated SR–71 fleet that is used for scientific studies, additional savings are possible from sharing support equipment. In this scenario, twelve months of operations would include one 30-day deployment in which 10 overflights would be conducted. If or when military tensions escalate, the operating tempo could be readily increased to meet the needs of the local commanders.

More creative use of the SR–71 is possible even while the aircraft remain in contingency status. In March 1993, for instance, the United States used Landsat and SPOT data to create maps of the former Yugoslavia in order to support airdrops of food and medical supplies to towns and cities under siege in eastern Bosnia. With the greater resolution and finer detail achievable with SR–71 imagery, greater precision in airdrops would have been possible. Similarly creative use of the system is possible in support of humanitarian efforts now underway in Rwanda and Zaire, without drawing national collection systems away from other areas of interest.

Finally, I would note that an overflight by an SR–71 can be a potent signal to a potential adversary of the seriousness of U.S. intentions. Even moving an SR–71 into a region underscores U.S. intentions to support possible military actions by every means possible. It is a mechanism that the President can use selectively to demonstrate national will as a political instrument. Imagine the message received by an adversary when an unarmed, non-hostile SR–71 aircraft sweeps across their country at high speed—a portent of future waves of bombers that could follow. It is a message that no satellite blinking across the night sky can send.

During the period leading up the Persian Gulf war, a political decision was made not to overfly Iraq, despite the potential intelligence that might be garnered for the United States and the coalition forces. But to conclude from that decision as some have that no American political authorities will ever have the "political will" to overfly another country, even when the vital interests of the United States demand it, denies the idea that any lessons were learned from the Persian Gulf war experience. A New York Times article from July 4, 1994, says that "senior officers questioned whether the United States had the political will to use the aircraft against North Korea, its likeliest target." I reject the assumption that we are incapable of learning from the past. It is not the job of military officers or professional intelligence officials to second guess the political "will" of our elected national leaders. Far better for the political authorities to have an instrument in hand to use if necessary, than to deny them the opportunity to use it by assuming that the nation's leadership will never have the political will to overfly a nation if our intelligence needs, and our combat forces at risk, demand it. Reestablishing a limited contingent of SR–71 Blackbird reconnaissance aircraft is a prudent move, and one that I firmly believe that we should make.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, DC, January 24, 1991.

Hon. RICHARD CHENEY,
Secretary of Defense, Washington, DC.

DEAR MR. SECRETARY: The need for intense and accurate coverage of the Iraq-Kuwait theater of operations through advanced reconnaissance methods is obviously an important ingredient in our successful limitation of casualties and an early end to the conflict with Iraq. I have been concerned that the decision taken last year to terminate the SR–71 "Blackbird" reconnaissance aircraft has denied the nation an asset which leaves us with a gap in intelligence-gathering that could have been avoided, and might well still be repaired.

I understand that the capabilities of the SR–71 aircraft, in terms of invulnerability to enemy fire, all-weather intelligence gathering, flexibility and speed argue for an immediate review of reinstating several aircraft for use in Desert Storm. In addition, I understand that the cost of reassembling the system, amounting to several aircraft could be held to roughly $100 million, and that at least one operational aircraft could be flying missions in a short time. I certainly feel that such cost would be worth the effort to reinstate a limited system for use in Desert Storm, and would enthusiastically support your efforts to return the SR–71 to service.

I request that you reopen the question of putting a small SR–71 group (1–3 aircraft) back into service at this time, and explore how that might be done expeditiously and with minimal risk. In addition, I request that you examine the possibilities of stationing the group in the Middle East theater in order to reduce costs and increase mission flexibility.

Thank you for your willingness to review this matter.

Sincerely,

ROBERT C. BYRD.

HEADQUARTERS, USAF,
31 August 1990.

Subject: SR–71 Storage:

1. Although SR–71 program termination was directed by Congress in Nov 89, subsequent congressional language requested the Secretary of Defense preserve the option of restoring limited SR–71 operations, should the need arise. In Jun 90, the SECDEF directed the Air Force to "Place three SR–71 aircraft and six associated reconnaissance sensors and electronic countermeasure suits into long term storage, rather than a "flight ready" status, as a hedge against a protracted conflict some time in the future. The Air Staff has since reviewed the available options for storage of SR–71 aircraft and associated sensors and defensive systems. To comply with SECDEF guidance, while minimizing initial and recurring costs, AF/CC approved the following game plan.

2. Aircraft and associated systems storage will be accomplished as follows:

a. Provide indoor storage of three aircraft at Palmdale Calif facilities. Provide limited contractor inspection maintenance services to ensure physical integrity of aircraft.

b. Store six of each type complete sensor systems at contractor facility or other suitable location.

c. Continue the Memorandum of Agreement with the 3246 Test Wing, Eglin AFB FL, allowing storage and use of DEF Systems for test purposes, subject to recall for SR–71 use.

3. All remaining SR–71 unique spare parts, oil, hydraulic fluid and support equipment will be retained to support NASA's proposed 500 hour flight test program. In accordance with the transfer loan agreement, these assets will remain subject to recall by the Air Force should a decision be made to reconstitute a limited SR–71 capability. The twenty two remaining spare engines will continue to be stored at Palmdale.

4. Sufficient JF–7 fuel to support the NASA operation will be retained by the Air Force. A minimum of six months lead time would be required to provide JP–7 manufacture, should a limited operational capability be restored.

5. On behalf of the entire Air Staff, we commend all agencies and personnel involved in the worldwide effort to wind down

this program and retire a superb aircraft that has served the nation well for many years. It was a tremendous task, carried out in a very timely and efficient manner by all concerned. The final actions outlined above will preserve these primary physical assets without which reconstitution would be impossible.

[From Conduct of the Persian Gulf war: Final Report to Congress, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (P.L. 102-25), Appendix C. Intelligence, April 1992]

JSTARS

The Joint Surveillance Target Attack Radar System (JSTARS) provided useful information concerning Iraqi forces during the 29 January Iraqi attack on Al-Khafji. Iraqi follow-on forces were tracked by JSTARS and destroyed by Coalition air power—north of the Saudi border. Information such as this was provided to ground and air commanders in near-real-time via the Army's JSTARS Interim Ground Station Modules (IGSMs). IGSMs were deployed with Army Component, Central Command (ARCENT) headquarters, ARCENT Forward Command Post, ARCENT Main Command Post, 1 Marine Expeditionary Force headquarters, VII Corps, XVIII Airborne Corps, and the Air Force Component, Central Command Tactical Air Control Center.

Just before the Offensive Ground Campaign began, JSTARS confirmed that Iraqi forces remained in their defensive positions against which the attack had been planned. During the attack itself, JSTARS detected the positioning of Iraqi operational reserve heavy divisions into blocking positions in response to the VII Corps advance.

Imagery was vital to Coalition operations, especially to support targeting development for precision guided munitions and Tomahawk Land Attack Missile attacks, and for BDA. Operations Desert Shield and Desert Storm placed great demands on national, theater and tactical imagery reconnaissance systems. The insatiable appetite for imagery and imagery-derived products could not be met.

The SR-71, phased out in 1989, was evaluated for possible reactivation to alleviate the imagery shortfall. The SR-71 could have been useful during Operation Desert Shield if overflight of Iraq had been permitted. In that case, the system would have provided broad area coverage of a large number of Iraqi units. however, since overflight of Iraq was not allowed, it would have provided no more coverage than available platforms. During Operation Desert Storm air operations, the SR-71 would have been of value for BDA and determining Iraqi force dispositions. During Operation Desert Storm ground operations, the SR-71 would not have made greater contributions than other platforms, given the speed of the advance. unique aircraft requirements also would have limited potential SR-71 operating locations.

[From the Office of Technology Assessment, July 1991]

VERIFICATION TECHNOLOGIES—COOPERATIVE AERIAL SURVEILLANCE IN INTERNATIONAL AGREEMENTS (EXCERPT)

CUING

As with collateral intelligence gathering, the potential role for aerial surveillance in cuing or targeting is controversial. It is arguable that using overflights to direct other systems may go against the spirit of an accord; but some types of cuing can reinforce the main goals of an agreement. This is the case when overflights uncover ambiguous activities or objects that are beyond the airborne sensors' ability to resolve. If the inspecting country did not have any other way of determining the legitimacy of its discovery, the result might be unfounded recriminations or an unanswered threat, thus raising tensions or danger. However, if the location of the discovery could be passed on to human inspectors or NTM, the ambiguity might be easily resolved.

But cuing can also be used in a way that is obviously antithetical to the spirit of most agreements: the same information that can localize an ambiguity for further observation may also be used to target the items being observed (or others not related to an accord) for military attack or covert operations. Target information can be specific, e.g., coordinates of a fixed site; or it can be general, e.g., the operational behavior of mobile systems or groups of forces. Aerial surveillance could also be used to provide accurate tactical maps for military or other purposes. These are further examples of how transparency may not be a wholly beneficial objective.

AERIAL SURVEILLANCE AND OTHER MEANS OF OBSERVATION

The utility of aerial surveillance to gather information in support of an agreement is not unique. Many of its features are shared with NTM and OSI. The selection of which monitoring systems to use, and in what combinations, will be determined by the negotiating parties based on the ability of each measure to detect the desired signatures, the synergistic effects of different sensors, the degree of cooperation possible between parties, the capabilities and capacity of NTM, the political advantages of open cooperation, the intrusiveness of the measure, and financial costs.

AERIAL SURVEILLANCE AND NTM

There is considerable overlap in the potential roles of aerial surveillance and NTM. Both kinds of systems can take imagery from overhead and over wide areas. However, while aerial surveillance as described here is cooperative, NTM is generally unilateral or alliance-based. Cooperative measures can be (and have been) negotiated to enhance NTM capabilities, but the sensors and platforms themselves can operate independently of any agreement.

Among the potential advantages that aerial surveillance holds over at least some NTM assets are greater flexibility, possible real-time physical access to the sensors, direct cooperation between parties,[31] and relative political and technological insensitivity.

An aerial surveillance regime could be negotiated to be more flexible than some NTM, varying flight profiles by timing, ground track, and altitude. As a recent report to the U.S. Defense Department stated.

"The existence and utility of reconnaissance satellites is accepted by both sides. Satellite orbits are highly predictable. It is taken as a given by each side that the other will refrain from some activities, which would otherwise be observable, during a satellite pass—once or a few times per day, say for a total of 20 minutes. The long advance predictability of reconnaissance coverage makes it possible to hide, by careful advance scheduling, even very large and elaborate activities. Each side might worry, in the extreme case, that preparations for war or treaty breakout could be thus hidden."

With a sufficiently narrow preflight notification period making it impossible to conceal a violation of an agreement before a plane might arrive, aerial surveillance might be able to plug gaps in NTM coverage. Airborne platforms might have the flexibility to adjust their flight profiles to optimize sun and sensor look angles, and to change altitude to maximize a sensor's resolution or field of view. Aircraft might also be permitted to fly under cloud cover or loiter over areas of interest.

In addition, overflights could have the advantage, if negotiated, of real-time interaction between the sensors and the inspectors. An inspector manning a sensing device on a plane could maintain, fine-tune, retarget, or change the focal length of the instrument if something interesting caught his or her attention. The inspector could also-mark and annotate important sightings to facilitate postflight analysis.

And as mentioned above, because observers are in constant contact with host country escorts, a cooperative atmosphere can be nurtured that is wholly missing from NTM. The confidence that arises from this may lay the foundation for more significant accords. And denial of requested flights could signal a less cooperative relationship, heightening vigilance by other means.

Lastly and perhaps most importantly, information collected by an overt airborne sensor—particularly if parties inspect or share sensors—could more easily be released publicly to confirm compliance, build general confidence, or support charges of noncompliance. Direct release of NTM data is contrary to government policy and is done so only in the most extreme cases. Even in these cases, the evidence of violation displayed is likely to be degraded to avoid giving away information about which system uncovered the violation and how advanced the NTM sensors really are.

The primary advantage of NTM assets is that they are largely independent of political events and negotiations. If an important agreement is abrogated or if surveillance flights are refused, aerial surveillance could leave a country blind to critical developments. NTM would remain unaffected, because it does not usually depend on the cooperation of the country under observation. NTM employment is also not constrained by sensor-limiting compromises, formal notifications, or flight plans. A second advantage of NTM assets is that they can monitor more than one agreement at a time.

Of course, the choice for the United States and the Soviet Union probably will not be between aerial observation and NTM. The questions are more likely to be: what can aerial observation add to current NTM and how can they interact effectively? According to the NATO Open Skies proposal, aerial surveillance is supposed to "complement" NTM.

Besides filling gaps in NTM coverage and capabilities, overflights might be used to cue NTM to particularly interesting sites and to clarify ambiguous NTM information. Overflights or their notification might also be designed to trigger activity that would be detectable by NTM. For example, NTM might be able to spot a large mobile TLI during its transit from an area to be overflown to shelter elsewhere. In some areas, aerial surveillance might even be used to free up NTM assets for other targets.

AERIAL SURVEILLANCE AND OSI

Unlike NTM or aerial surveillance, an OSI is an inherently close-up, but local, affair. OSIs, like aerial surveillance, are also cooperative measures, requiring the consent of

the inspected state. On-site inspectors can go places and do things that would be impossible for other monitoring systems. For example only an OSI can take radiation measurement of a warhead from close enough to negate concerns over shielding; only an OSI can examine the interior of a closed-out production facility. Yet on-site inspectors are limited in the territory they can cover during a given inspection. A similarity between aerial surveillance and OSI, not shared with NTM, is that they both take place inside the earth's atmosphere and thus can both take part in air sampling. All forms of monitoring, with the right technology, could take pictures and read identifying tags on TLSs.

It is in the areas where aerial surveliance and OSI are dissimilar that they may work best interactively. At a minimum, OSI can cover the declared inspection sites, while aerial surveliance flights (and NTM) survey the potentially vast territory not subject to inspection. If ambiguous or suspicious activities or objects are detected during these flights, an inspection team might be sent to visit the site, perhaps while the aircraft loiters overhead.[42] A broad aerial search could trigger a more time-consuming, but more precise, inspection. Conversely, overflights might be used to examine several inspectable sites at a time.

AERIAL SURVEILLANCE FOR COUNTRIES WITHOUT ADVANCED NTM

Until fairly recently, countries with little or no NTM have had to rely on the generosity of the superpowers for a detailed view of the world, including information about the compliance of their neighbors with international agreements. The superpowers' monopoly on advanced NTM limited the quality, quantity, and timeliness of NTM information available to third parties. Yet increasingly, countries have other options: participation in consortia to develop independent NTM or the purchase of commercial imagery from other countries. France, Italy, and Spain are investing in the Helios military reconnaissance satellite system to be operational in early 1994. The United States, France, and the Soviet Union sell relatively low-grade satellite imagery. In the future, international organizations might pool national resources to deploy reconnaissance satellites to monitor agreements or increase global transparency.

Cooperative aerial surveillance might also be used to fulfill the informational need of some countries. With the negotiation of mutual overflights, these countries would at last obtain an independent source of compliance observation and confidence building. If the cost of an aerial surveillance regime remained beyond their reach, they might spread the cost among like-minded countries by maintaining a fleet of common aircraft or by promoting aerial surveillance by international organizations. If they are willing to negotiate the use of an advanced airborne sensor suite, they might even eventually narrow the current informational gap between themselves and the superpowers. This capability will still be limited to overflights of participating states, so participants would still lack the NTM owners' ability to monitor the territory of potential adversaries without their consent.

Granting foreign countries the right to overfly U.S. territory has important implications for the U.S. Government. Such overflights will, to a certain extent, level the informational balance between these countries and the United States, ending an American advantage over all countries except the Soviet Union. How important this leveling is must be determined by U.S. policymakers. It may be the necessary price to get other countries to sign on to important treaties that had traditionally been left to the superpowers to verify. It may also be the price of a more open world. (See table 4-2 in chapter 4 for a listing of the asymmetric advantages and disadvantages of countries negotiating Open Skies.)

[From the Office of Technology Assessment, July 1993]

THE FUTURE OF REMOTE SENSING FROM SPACE: CIVILIAN SATELLITE SYSTEMS AND APPLICATIONS

MILITARY USES OF CIVILIAN REMOTELY SENSED DATA

Data from civilian satellites systems such as Landsat, but more notably SPOT and the Russian Almaz,[1] have considerable military utility. They can be used to support:

Military operations—For example, the use of Landsat and SPOT data gave the United States and its U.N. allies a marked advantage over Iraq in the Persian Gulf Conflict. The U.S. Defense Mapping Agency used these data to create a variety of maps for the U.S.-led battle against Iraqi forces. More recently, in March 1993, the United States has used Landsat and SPOT data to create maps of the former Yugoslavia in support of air delivery of food and medical supplies to besieged towns of Eastern Bosnia.

Reconnaissance—The recent use of data from civilian satellites for military reconnaissance demonstrates that post-processing, skilled interpretation, and the use of collateral information can make these data highly informative. For this reason, the civilian satellites' utility in reconnaissance exceeds that which might be expected on the basis of ground resolution.[2] The highly conservative rules of thumb normally used to relate ground resolution to suitability for particular reconnaissance tasks underestimate the utility of moderate resolution multispectral imagery.

However, reconnaissance missions' requirements for timeliness often exceed the current capabilities of civilian satellite systems. Landsat satellites pass over any given place along the equator once every 16 days; SPOT passes over once every 26 days. In addition, both systems may take weeks to process orders and military data users generally require much shorter response times. Because civilian mission generally have less stringent requirements than military ones, civilian satellite systems will continue to fall short in this regard unless they begin to cater expressly to the military market or improve revisit time for other reasons, such as crop monitoring or disaster tracking. As noted in chapter 4, one way to increase timeliness without adding additional satellites is to provide sensors with the capability of pointing to the side. SPOT has the capacity for cross-track imaging, and can reimage targets of interest in 1 to 4 days.

Arms Control—Civilian satellite data have limited, but important utility for supporting arms control agreements. Although some facilities have been imaged by civilian satellites, many other arms-control tasks are beyond the capabilities (particularly resolution) of civilian satellites. Their greatest weakness in most military applications—lack of timely response—is of less concern in the arms control arena, where events are typically paced by diplomatic, not military, maneuvers.

Mapping—Mapping including precise measurement of the geoid[3] itself, is a civilian mission with important military applications. These include simulation, training, and the guidance of automated weapons. Existing civilian satellite data are not adequate to create maps with the coverage or precision desired for military use. The military use of data from civilian land remote sensing satellites would be greatly enhanced by improved resolution, true stereo capabilities, and improved orbital location and attitude of the satellite. Military map makers and planners would also find use for data acquired with a civilian synthetic aperture radar system, which can sense Earth's surface through layers of clouds.

Because other nations control some of the most capable civilian remote-imaging satellites, they could deny the United States access to some imagery for political reasons, or operate their systems in ways inimical to U.S. interests. Investment in improving U.S. technical strength in civilian remote-imaging could allay these fears. However, attempting to stay far ahead of all other countries in every remote sensing technology could be extremely expensive, and would therefore be difficult to sustain in an environment of highly constrained budgets for space activities. From the national security perspective, staying ahead in technologies of most importance to national security interests may be enough.

Because all countries now generally follow a nondiscriminatory data policy,[4] in which data are offered to all purchasers at the same price and delivery schedule, foreign belligerents can buy Landsat data to further their wars against each other. These data, coupled with information from the Global Positioning System (GPS), might even be used to prepare for a war (or terrorism) against the United States or its allies. As technical progress continues to improve spatial and spectral resolution, the military utility of successive generations of civilian remote sensing satellites will also improve. Although such uses of satellite data may pose some risk to the United States or its allies, the economics and political benefits of open availability of data generally outweigh the risks.

The wide availability of satellite imagery of moderate resolution, and inexpensive computer tools to analyze these images, broadens the number and types of institutions and individuals with access to information about secret sites and facilities. Such information contributes to a widening of the terms of the political debate over future military policies in the United States and elsewhere.

Because the military value of remotely sensed data lies in timely delivery, the United States could cut off access to data as soon as the countries' belligerent status is made clear, as in the Persian Gulf Conflict where both SPOT Image, S.A., a French firm, and EOSAT, Inc., cut off data to Iraq. In that case, the French were part of the allied team opposing Iraq. However, the United States and France (or another country that operates a remote sensing system capable of being used for military purposes) might be on opposing sides of a future dispute.

THE BROADENING OF ACCESS TO MILITARY INFORMATION

The commercial availability of militarily useful remotely sensed imagery has sparked the interest of many interested in military affairs. Landsat and SPOT images have appeared in the media, and have been used to

Footnotes at end of article.

Footnotes at end of article.

support news stories about military action or potentially threatening behavior.[5]

Individuals who have used these images to make significant deductions regarding military activity include Johnny Skorve, whose photographic explorations of the Kola Peninsula using SPOT and Landsat images fill two volumes; Bhupendra Jasani, who has used SPOT data of the territory of the former Soviet Union to investigate military questions including INF Treaty compliance and reporters for several news organizations. These efforts have shown that the resolution provided by SPOT and Landsat, while poor compared to the rule-of-thumb requirements often stated for some military tasks, is more than sufficient to provide useful and even intriguing military information.

Civilians have also explored the military use (as distinct from utility) of civilian satellites by studying the records of SPOT image, S.A. The corporation does not identify its customers, but its catalogue does list pictures already taken by latitude, longitude, and date. Peter Zimmerman makes a convincing case, on this basis, that SPOT has been used for military purposes.

These investigations of military matters share at least one trait in common: they do not require especially timely data. As described in appendix C, it is lack of timeliness, not of resolving power, that most limits the military use of civilian satellites.

FOOTNOTES

[1]In October 1992, Almaz, which had been transmitting data from its synthetic aperture radar, fell back into the atmosphere and burned up.

[2]Ground resolution is a useful but simplistic measure of the capability to identify objects from high altitude.

[3]The figure of the solid Earth.

[4]This principle was originated by the United States when it decided to sell Landsat data on this basis. See U.S. Congress, Office of Technology Assessment, Remote Sensing and the Private Sector, OTA-ISC-TM-239 (Washington, DC: U.S. Government Printing Office, April 1984) for a discussion of the relationship of the U.S. nondiscriminatory data policy to the "Open Skies" principle.

[5]See U.S. Congress, Office of Technology Assessment, Commercial Newsgathering from Space, OTA-ISC-TM-40 (Washington, DC: U.S. Government Printing Office, May 1987).

[From the New York Times, July 4, 1994]

SPY PLANE THAT CAME IN FROM COLD JUST WILL NOT GO AWAY IN THE SENATE

(By Tim Weiner)

WASHINGTON, July 1—The sleek black supersonic spy plane called the SR-71 Blackbird is a museum piece, a mighty relic of the cold war gathering dust. So what is $100 million to resurrect the plane doing in the Senate's bill authorizing $263.3 billion in military spending for the coming year?

The bill contains hundreds of millions of dollars for other weapons and programs the Pentagon says it does not want, like money to keep building the $2.2 billion a copy B-2 bomber. The money keeps flowing for many reasons: Keeping a military contractor solvent or defense workers on the job in a powerful politician's home district, for example.

But the renaissance of the Blackbird is a special case, less about pork than about power and prerogative. The will of one man made it happen: Robert C. Byrd, the West Virginia Democrat who heads the Senate Appropriations Committee.

In reviving the Blackbird, Mr. Byrd appears to have adopted some of the Pentagon's stealthier and more secretive techniques.

SURPRISE FOR PENTAGON

Prominent members of the Senate's Armed Services and Intelligence Committees, along with top Pentagon officials, were taken unawares by Mr. Byrd's move, the Senator's aides acknowledge. Vice President Al Gore; the national security adviser, Anthony Lake, and the chairman of the Joint Chiefs of Staff, Gen. John M. Shalikashvili, knew nothing about the plan when they were visited last month by the senior members of the Congressional Intelligence Committees, according to several Congressional staff members.

Neither Mr. Gore nor Mr. Lake nor General Shalikashvili voiced any enthusiasm for Senator Byrd's plan to take the plane out of mothballs and send it flying over North Korea's suspected nuclear sites. The Pentagon believes that its existing satellites and spy planes can do the job.

Senior intelligence officers working for the Joint Chiefs of Staff said that it would take at least a year to refurbish the aircraft and retrain their crews, that the cost would be far greater than $100 million and that no one in the Pentagon wanted the Blackbirds, other intelligence officials said. The senior officers questioned whether the United States had the political will to use the aircraft against North Korea, its likeliest target, they said.

But the combination of Senator Byrd's prestige, the current worries raised by targeting North Korea and the failure of the Pentagon to produce a secret aircraft to replace the Blackbird have won the battle thus far.

FIGHT BEGAN 4 YEARS AGO

The Blackbird is not built in West Virginia nor do Senator Byrd's constituents depend on Lockheed, the plane's manufacturer, for jobs. But the plane was killed by the Defense Department over Senator Byrd's objections and its resurrection, if approved by Congress, would be a small personal triumph for the Senator.

The story begins four years ago, when Mr. Byrd fought the Pentagon's forced retirement of the Blackbird, a unique aircraft that flew faster than 2,500 miles an hour and used sophisticated cameras to snap pictures of foreign targets. That fight was one of several battles begun in the late 1980's over secret spending for classified programs like the Blackbird's flights over North Korea, China and other lands targeted by United States intelligence.

Mr. Byrd, a Senator since 1959, president pro tempore of the Senate since 1989 and a zealous defender of Congressional prerogatives, joined the battle as a matter of principle.

He contended that the Defense Department, aided by the secrecy that shields classified projects, was refusing to spend huge sums appropriated by Congress for certain programs and flouting Congressional instructions to stop spending money on others. The Bush and Reagan Administrations routinely ignored classified Congressional directives on secret spending, he said in 1990.

When the Pentagon canceled the Blackbird in 1990, citing the huge cost of operating and maintaining the fleet, it assured Senator Byrd and a handful of his senior colleagues on the Armed Services and Intelligence Committees that it was working on a very fast, very expensive, very secret reconnaissance plane to be a successor to the Blackbird.

MISSED IN GULF WAR

But that program collapsed after consuming several hundred million dollars, according to Members of Congress and their aides. And despite rumors that another successor is secretly in the works, they said, nothing of the sort is on the horizon at the secret Air Force base in Nevada where classified prototypes of state-of-the-art aircraft are flown.

Though no supersonic secret reconnaissance aircraft remain in the Nation's arsenal, and by many accounts the Blackbird's ability to target specific sites quickly was sorely missed during the 1991 Persian Gulf War, the Central Intelligence Agency and the Pentagon have several other ways of taking pictures of foreign soil from the sky, including a variety of classified intelligence satellites and the well-known U-2 spy plane. A multibillion-dollar investment in a new series of hugely expensive spy satellites is under way.

So Pentagon officials were chagrined last week when they read the following language in the Senate's defense authorization bill: "The committee sees no reason, in principle, why the Department of Defense could not also operate the SR-71 in an austere manner." The committee recommended $100 million to revive three Blackbirds, the bill said. The money was inserted by the subcommittees of the Appropriations Committee Mr. Byrd heads. Senator Sam Nunn, the Georgia Democrat who heads the Armed Services Committee, was also instrumental in moving the idea forward.

The provision now goes to a conference with the House, whose bill does not include the item. Its prospects are uncertain.

IS $100 MILLION ENOUGH?

Even those who support reviving the Blackbird predict it may be a far more expensive proposition than a mere $100 million.

"It's going to be pretty difficult to do that kind of mission with that kind of money," said Tom Alison, a retired SR-71 Blackbird pilot who works as a curator at the National Air and Space Museum, which owns one of the planes. "If they didn't feel they could afford it five years ago, then I don't understand why they think they can afford it now."

But Richard D'Amato the counsel for national security policy at the Senate Appropriations Committee, said the idea was "generated by Senator Byrd because there is a gap in our abilities the unique capability that the Blackbird provides."

"The idea wasn't generated only by Korea but in like situations, in the Middle East." he said.

While acknowledging that senior Pentagon officials and many of Senator Byrd's colleagues were "blindsided" by the move—and that many of them maintain that the plane is "an antique, a museum piece"—he said three of the planes could be ready to serve the nation by next summer for $100 million or less.

And $100 million is, as everybody in Congress knows, a mere drop in the world's biggest single pool of public capital, the Pentagon's budget.

IS CONGRESS IRRESPONSIBLE? YOU BE THE JUDGE OF THAT

Mr. HELMS. Mr. President, the incredibly enormous Federal debt is like the weather—everybody talks about it but nobody does anything about it. Congress talks a good game about bringing Federal deficits and the Federal debt under control, but there are too many Senators and Members of the House of Representatives who unfailingly find all sorts of excuses for voting to defeat proposals for a constitutional amendment to require a balanced Federal budget.

As of Thursday, July 28, at the close of business, the Federal debt stood—down to the penny—at exactly $4,638,859,244,759.68. This debt, mind you, was run up by the Congress of the United States—the big-spending bureaucrats in the executive branch of the U.S. Government cannot spend a dime that has not first been authorized and appropriated by the U.S. Congress. The U.S. Constitution is quite specific about that, as every school boy is supposed to know.

And pay no attention to the declarations by politicians that the Federal debt was run up by one President or another, depending on party affiliation. Sometimes they say Ronald Reagan ran it up; sometimes they say George Bush. I even heard that Jimmy Carter helped run it up. All three suggestions are wrong. They are false because the Congress of the United States is the culprit.

Most people cannot conceive of a billion of anything, let alone a trillion. It may provide a bit of perspective to bear in mind that a billion seconds ago, Mr. President, the Cuban missile crisis was going on. A billion minutes ago, not many years had elapsed since Christ was crucified.

That sort of puts it in perspective, does it not, that Congress has run up a Federal debt of 4,638 of those billions—of dollars. In other words, the Federal debt, as I said earlier, stands today at 4 trillion, 638 billion, 859 million, 244 thousand, 759 dollars, and 68 cents.

QUORUM CALL

The ACTING PRESIDENT pro tempore. The Chair in his capacity as a Senator from North Dakota suggests the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. If the Senator from Utah will suspend, morning business is now closed.

EXECUTIVE SESSION

The ACTING PRESIDENT pro tempore. Under the previous order, the hour of 9 a.m. having arrived, the Senate will now go into executive session to consider the nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

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

The ACTING PRESIDENT pro tempore. The clerk will report the nomination.

The assistant legislative clerk read the nomination of Stephen G. Breyer, of Massachusetts, to be an Associate Justice of the Supreme Court of the United States.

The ACTING PRESIDENT pro tempore. The Chair recognizes the Senator from Utah.

Mr. HATCH. Mr. President, with the permission of the distinguished chairman of the Judiciary Committee, I will proceed first on the Breyer nomination. Part of the reason for that is that I am also the only non-Banking-Committee member on the Whitewater committee, and that investigation starts at 10 this morning. So my dear friend and colleague from Delaware suggested that I go first on the statements on the Breyer nomination to the Supreme Court.

The ACTING PRESIDENT pro tempore. Under the previous order, the debate on the nomination is limited to 6 hours and is equally divided and controlled in the usual fashion.

The Senator from Utah may proceed.

Mr. HATCH. Mr. President, I will vote for the confirmation of Judge Stephen Breyer to be Associate Justice of the Supreme Court. Let me briefly outline the reasons why.

President Clinton and I are unlikely ever to agree on the ideal nominee to be a Supreme Court Justice. Indeed, there have been many prominently mentioned potential nominees whom I would in all likelihood have vigorously opposed. But I do believe that a President is entitled to some deference in the selection of a Supreme Court Justice. If 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. I am satisfied that Judge Breyer meets this test.

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 earned a reputation as a moderate pragmatist. His hearing testimony reinforced this reputation.

A danger of judicial pragmatism is that it may give short shrift to formal or institutional constraints on judicial action. Indeed, some of Judge Breyer's own jurisprudential musings present, in my view, an unduly open-ended approach to judicial decisionmaking—an approach that is open to manipulation and abuse by judges less moderate and less conscientious than Judge Breyer. My confidence that Judge Breyer will not himself succumb to the siren calls of judicial activism rests on his overall judicial record and on my high regard for his intelligence and integrity.

Several features of Judge Breyer's hearing testimony and judicial record warrant highlighting:

First, while I and other Senators were concerned by Judge Breyer's Free Exercise ruling in *New Life Baptist Church Academy* v. *Town of East Longmeadow* (885 F.2d 940 (1st Cir. 1989)), I took comfort from judge Breyer's recognition that "[t]here 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." (Unofficial transcript, July 12, 1994, at 73:12–16.)

It was precisely because I share this view that I was the lead sponsor, along with Senator KENNEDY, of the Religious Freedom Restoration Act, and Judge Breyer stated that he understood the strong protections that Congress intended to give to religious liberty under that act.

Second, on the subject of the establishment clause, Judge Breyer rejects the extreme secularist view that the establishment clause mandates an absolute wall of separation between church and state. Judge Breyer instead recognizes that there are "vast areas" where religious institutions can neutrally receive benefits from the Government. (Unofficial transcript, July 14, 1994, at 102:12.)

He adopts a pragmatic, not an ideological, approach to these issues.

Third, Judge Breyer recognizes that the death penalty is constitutional. He rejects the activist position taken by Justices Brennan and Marshall, and more recently by Justice Blackmun, that the death penalty violates the eighth amendment.

Fourth, although Judge Breyer's jurisprudence regarding so-called unenumerated rights is in key respects open-ended and manipulable, he gives every indication of being cautious and restrained in this area. He testified that he remains open to the historical evidence showing that the ninth amendment is best understood not as a font of affirmative rights but as a reminder that people's rights are residually protected by virtue of limitations on the Federal Government's enumerated powers. (Unofficial transcript, July 13, 1994, at 228:21–229:19.) He further stated that the ninth amendment was not incorporated into the 14th amendment and therefore does not apply against the States. (Id., at 229:20–230:6.)

In addition, he agreed that the reasoning and methodology of Justice Goldberg's concurrence in the Griswold case would not, and I emphasize

"would not," extend constitutional protection to such things as abortion and homosexual conduct. (Id., at 230:7–24).

Fifth, regrettably, President Clinton has announced a litmus test on abortion. I note that there were many persons on the other side of the aisle who falsely accused President Reagan and President Bush of adopting a litmus test on abortion. That this accusation was false is proven by the fact that three Justices appointed by Presidents Reagan and Bush comprised part of the majority in the Planned Parenthood versus Casey decision. In any event, there has been an embarrassing silence about President Clinton's avowed litmus test. I am disappointed that only 2 years after the 5 to 4 ruling by the Supreme Court in Casey, Judge Breyer stated that he views "some kind of" right to abortion as settled. (Unofficial transcript, July 13, 1994, at 178:22).

But his record indicates that he will be far more understanding of society's power to protect the rights of the unborn than the Justice whom he will replace. In fact, in his one case directly involving State regulation of abortion, Judge Breyer voted to uphold a parental consent statute. Alone in dissent, he voted to bar the abortion clinics from offering more evidence in support of their claim that the statute was unconstitutional. His view was that even if the evidence to be offered was taken as true, that would not alter the conclusion that the statute was constitutional. (*Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 469 (1st Cir. 1989) (Breyer, J., dissenting)).

Judge Breyer's academic writings also reflect a sensitivity to the rights of the unborn. For example, in an article on genetic engineering, Judge Breyer emphasized that "one must be particularly sensitive to the risk of injury to the fetus, who cannot look after himself." (Breyer & Zeckhauser, "The Regulation of Genetic Engineering," 1 Man and Medicine 1, 9 (1975).)

Sixth, I find it curious that many of the same people who are so adamant about protecting so-called rights that are not set forth in the Constitution are dismissive of economic rights that are expressly provided in the Constitution—as, for example, in the takings clause. While I do not put Judge Breyer in this category, I am concerned that certain of his comments could be read as demoting the takings clause and other economic rights to second-class status. As Chief Justice Rehnquist stated in a recent opinion for the Court in *Dolan* v. *City of Tigard* (No. 93–518 (U.S. June 24, 1994)), there is "no reason why the takings clause of the fifth amendment, a much a part of the Bill of Rights as the first amendment or fourth amendment, should be relegated to the status of a poor relation." (Slip op., at 17.)

There is no need here to explore other areas, such as Judge Breyer's fine opinions in such areas as antitrust and administrative law and the fourth amendment. Suffice it to say that while I do not agree with all his opinions and views, I am confident that he will be a fair and very able Justice.

Finally, let me note that the committee thoroughly investigated Judge Breyer's background, including charges relating to his Lloyd's investment. While I do not question the good faith of those making these charges, the committee's investigation has satisfied me that these charges are meritless.

For these reasons, I am going to support Judge Breyer's confirmation to the Supreme Court.

I might mention there are other reasons as well. Let me just add, as a postscript, that I have known Judge Breyer now for approximately 15 years. I knew him when he was an aide to Senator KENNEDY on the Judiciary Committee, and I knew him when he was chief counsel of the committee.

I have to say, in those days, as a younger man, as somebody who worked for Senator KENNEDY—who is a very strong Democratic leader in this body—he proved himself to be a person who would help to develop consensus, who would work with both sides, who worked in a primarily bipartisan way, who did things that were intelligently accomplished, and who, of course, served not only Senator KENNEDY well but the committee as a whole well.

I have tremendous respect for that. I followed his career since. I remember when President Carter was defeated and it looked as though the Judiciary Committee was going to deny Judge Breyer, or should I say, then Stephen Breyer, the staffer, the judgeship opportunity on the First Circuit Court of Appeals.

I can remember what happened then. After President Reagan was elected, of course, a number of us were willing to put him on that court because of his sterling reputation because we knew him well and we thought he would make a great judge, which has proven to be true over the last 14 years.

So I feel very strongly about Judge Stephen Breyer. I feel very strongly that he will make a fine Justice on the Supreme Court, and I have a personal high regard for him and his family. I wish him well. I hope that as many of our Senators as possible will vote for this judge to be Justice on the Supreme Court because I think he deserves it.

Finally, I would like to compliment the President because I have worked with a number of Presidents with regard to Supreme Court nominations, all of whom have been good to work with. But President Clinton has been especially considerate of his particular responsibility of appointing Supreme Court Justices. I think part of that probably comes from the fact that President Clinton is a lawyer himself, has taught constitutional law, has been a Governor and, of course, has had to work around constitutional principles for most of his professional life.

So he has a high regard for this position. He has a high regard for the Supreme Court of the United States of America and, in my conversations with him, he had a very high regard for doing what is right in this area. There were pushes and pulls, as there always are in these constitutional battles over who is going to sit on the Court, among other things, and there were pushes and pulls on this President. I found in every instance that his desire was to get the very best person he could who would have a reasonable chance of being accepted by the Senate and confirmed by the Senate and who would bring distinction and ability to the Supreme Court of the United States of America.

I want to compliment the President for that. I compliment him for working very strongly with the majority and Senator BIDEN, and others, Senator KENNEDY in particular. I compliment him for working with the minority as well and to make us part of that equation. I think it has paid off for the President because almost everybody has acclaimed this nominee and, frankly, I hope that he will be confirmed overwhelmingly on the floor today.

I do not want to disparage the feelings of some who have expressed opposition to Judge Breyer in this body or in the media. Some of the issues that have been raised are certainly issues that we have considered in the committee, and we have considered them a lot more significantly and in much greater detail than some in the media have indicated.

We have found that there are no justifications for the criticisms of Judge Breyer in these areas. I suppose we all make mistakes, and I suppose we can all be criticized.

In the case of Lloyd's, it may have been an investment mistake, but keep in mind Judge Breyer's wife is from Great Britain; her family is a prominent family over there. Lloyd's of London was considered to be, at the time, the finest insurance company in the world by many in England and elsewhere, even in this country, and it has fallen on harder times. That, nobody, including myself, could possibly foresee.

So there are many other things that can be said on that issue. I do not intend to get into it. Suffice it to say that this is an honest man. He is a man of immense qualifications. He is a man of immense integrity. He is a person who has a tremendous judicial and legal mind. He is a person who is fair and open. He is a person who, I think, will have an appropriate temperament for the Court, and he is a person in

whom I have a great deal of confidence. I think he should be confirmed.

I do not know of anybody in this body who takes nominations to the Supreme Court any more seriously than I do. Certainly, I think all Senators take these nominations very seriously. But this is very important to our country. This is the third branch of Government. This is a coequal branch of Government, and we have to get the very best people we can to serve in these positions. In this case, with this President and this administration, I find that Judge Stephen Breyer is an excellent choice, and I will support him with everything I have.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. HATCH. Mr. President, counsel to me has indicated that—I do not think I said this—but they felt that I said the investment in Lloyd's of London was a clear-cut mistake. If I did say that, that is not what I meant. It may have been an investment that did not turn out well. But, in all honesty, it was not a mistake.

Lloyd's of London was considered to be one of the finest insurance institutions in the world by almost everybody, including people in this country, but especially people from Great Britain. We cannot impose a standard that people cannot make bad investments. People do. I have been known to make a few myself, although pittances in comparison. The fact is that my wife feels that almost all my investments have been bad.

I did not mean to convey that. If I did, I want to correct the RECORD at this time so that no one will misconstrue what I am saying.

Our investigation of that certainly went into all the details pertaining to it. Frankly, I think Judge Breyer has been candid about the investment and about what has happened, and he has done everything in his power to contain any damage that could possibly come to him and to his particular estate. And according to experts, he has backed up his approach to it by having acquired insurance that should cover any potential exposure that he may have.

But even if it does not, an investment turning sour is not necessarily a disqualifying event with regard to a judgeship nomination.

So I want to make sure that the RECORD is clear because if I did say that, I did not mean to say that.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. HATCH. Mr. President, is the time equally divided?

The ACTING PRESIDENT pro tempore. The Senator would need consent.

Mr. HATCH. I suggest the absence of a quorum but the time be equally divided.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. HATCH. I ask unanimous consent that Lisa Heinzerling and Bill Banks be given the privileges of the floor throughout the Breyer nomination.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

Mr. HATCH. I suggest the absence of a quorum with the time divided equally.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I yield such time as I might use.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, it is a great honor and privilege to support the nomination of Judge Stephen G. Breyer to be an Associate Justice of the Supreme Court.

The Constitution establishes our democracy and protects the basic freedoms of all our citizens. The Framers recognized that an independent judiciary was necessary to enforce the individual liberties guaranteed by the Constitution, and they created the Supreme Court as the ultimate guardian of our rights and liberties. Few responsibilities we have as Senators are more important than our responsibility to advise and consent to the nominations by the President to the Supreme Court.

Judge Breyer is extraordinarily well qualified to serve on the Nation's highest court. Throughout his long and distinguished career, he has demonstrated an outstanding intellect, unquestioned integrity and temperament, and a deep and abiding commitment to the Constitution and the rule of law.

He compiled an outstanding academic record as an undergraduate at Stanford University, as a Marshall Scholar at Oxford, and as a student and member of the Law Review at Harvard Law School. After serving as a law clerk to Supreme Court Justice Arthur Goldberg, he joined the Antitrust Division at the Department of Justice, where he pioneered innovative approaches to enforcing the antitrust laws, not only to protect consumers from unfair practices, but also to prohibit housing discrimination.

He then joined the faculty at Harvard Law School, where he became one of the Nation's leading experts on economic regulation and administrative law, devoting his energy and talent to improving our free enterprise system and our democracy.

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

The following year, he became Special Counsel to the Senate Judiciary Committee's Administrative Practices and Procedures Subcommittee when I was chairman of the subcommittee. I have known Judge Breyer well ever since, and I have no doubt that he will be an outstanding member of the Supreme Court.

His brilliance and skill at working productively with Senators from both political parties were indispensable to our bipartisan effort in the 1970's 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 have the benefits of lower prices in the trucking industry.

Judge Breyer returned to Capitol Hill in 1979 as chief counsel of the Judiciary Committee, when I was chairman. He gained the respect and affection of every member of the committee—Republicans and Democrats—because he was scrupulously fair, and because he consistently and creatively sought to find common ground to achieve the greatest good for the American people.

The bipartisan admiration for Judge Breyer was apparent in 1980, when his appointment to the Court of Appeals for the First Circuit was the only judicial nomination confirmed during the lame duck session of Congress at the end of the Carter administration.

As a member and later as chief judge of the court of appeals, Judge Breyer has distinguished himself as a preeminent jurist. His opinions are brilliantly reasoned and clearly written. They construe the law in a practical fashion to protect the fundamental rights and liberties of all Americans.

As one of the first members of the Sentencing Commission, Judge Breyer is widely credited with developing tough but fair guidelines to assure that criminals who commit similar crimes receive similar sentences. He excelled at the tough and thankless task of forging consensus on these difficult issues.

As a judge, he has also continued his commitment to legal education and legal scholarship. He has continued to teach courses at Harvard Law School, and he has also continued to write and publish important articles and books analyzing questions of law and government.

Judge Breyer is one of the Nation's foremost scholars of the regulatory process, and his expertise in this complex area will be a major asset to the Supreme Court.

His 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 his views, but I believe everyone will agree that his views have contributed immensely to our understanding of these complex issues in our modern society.

In addition, Judge Breyer is 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 practical perspective to the many important questions of statutory interpretation that come before the Supreme Court.

Judge Breyer's 3 days of testimony before the Judiciary Committee earlier this month revealed to the Nation what we in Massachusetts have known for decades. Judge Breyer is a brilliant and fair-minded judge, dedicated to construing our laws to enhance the lives and protect the basic rights of every citizen.

He views the Constitution as a living charter to protect the individual against excessive government intrusion.

He is respectful of the religious traditions of the American people and committed to ensuring that all Americans remain free to follow their conscience, free from governmental interference.

He recognizes the key role of the Federal courts in remedying discrimination in all its forms.

He views the antitrust laws as important statutes designed to promote and enhance economic competition, so that consumers enjoy the highest quality goods and services at the lowest possible prices.

And he believes in the importance of environmental health and safety laws to protect the lives of all Americans. On that point, I would like to introduce into the RECORD a letter from Mr. Douglas Foy, the executive director of the Conservation Law Foundation, the leading public interest environmental law group in New England. Mr. Foy writes:

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, offshore oil and gas drilling, the cleanup 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. * * *

My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

I would like to address myself very briefly to the questions raised and belabored in some quarters regarding Judge Breyer's investment in Lloyd's of London. The Judiciary Committee thoroughly examined the Lloyd's issue.

The committee's investigators reviewed hundreds of pages of documents relating to it, and Judge Breyer was extensively questioned about it during the committee's hearings.

The Judiciary Committee obtained opinions from leading experts on judicial ethics and environmental insurance litigation. The overwhelming majority of those consulted concluded that Judge Breyer violated no ethical rules.

Judge Breyer publicly disclosed his Lloyd's investments each year, so that litigants could decide for themselves whether to seek his recusal in any particular case. He always recused himself from any case where Lloyd's was a party, or where it appeared from the court papers that Lloyd's insured a party in the litigation or otherwise had a direct interest in the outcome. He has never sat in any such case.

After carefully reviewing the evidence, every member of the Judiciary Committee concluded that Judge Breyer had acted in full compliance with the ethics rules, and every Member voted in favor of his nomination.

The Bar Association of the city of New York and the American Bar Association each found that Judge Breyer had unquestionable integrity. Indeed, the ABA gave Judge Breyer its highest rating. Its letter to the Judiciary Committee attests to the high esteem in which Judge Breyer's integrity is viewed by those who have served with him on the Federal courts. I would like to read an excerpt from the ABA letter:

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 likeable human being"; "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."

In closing, I would like to read briefly from a letter by Judge Leon Higginbotham, who recently retired from the Court of Appeals for the Third Circuit after a distinguished career as one of the most respected jurists of his generation.

I write on the basis of my having served for 29 years as a federal judge on either the District Court or the Court of Appeals, before my resignation in March 1993. * * * I served on the Judicial Conference of the United States with Judge Breyer. Upon special designation prior to my retirement, I had the pleasure of sitting with him and some of his colleagues on the United States Court of Appeals for the First Circuit. I have read with care and relied on many of his opinions.

On the basis of these total experiences, I am confident that he is one of the most prominent, insightful and responsible federal judges I have ever met. He will bring to the United States Supreme Court an extraordinary intellect, a high respect for precedent and the rule of law, a sensitivity to patent injustices, and remarkable collegial skills to cause the Supreme Court to function with as much public institutional harmony as is possible. I feel certain that, after five years, he will be regarded as one of the most outstanding justices in the history of the United States Supreme Court.

Joseph Story, Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter—for nearly two centuries, Massachusetts has sent brilliant justices to the Supreme Court who have combined outstanding legal scholarship with a commitment to making the law work to enhance the lives of ordinary Americans.

I have every confidence that Stephen Breyer will join that illustrious list of the finest justices ever to serve on our highest court.

I congratulate President Clinton in this outstanding appointment, and I urge my colleagues to vote to confirm the nomination.

Mr. President, I ask unanimous consent that the letter dated June 30, 1994, from Douglas Foy, executive director of the Conservation Law Foundation be printed on the RECORD, along with the letter from the American Bar Association Standing Committee on Federal Judiciary dated July 11, 1994, a letter dated July 11, 1994, from A. Leon Higginbotham, Jr., and a brief discussion and a series of letters regarding Judge Breyer's investment in Lloyd's be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

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, and 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.

AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY,

July 11, 1994.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary, Washington, DC.

Re: Hon. Stephen G. Breyer

DEAR MR. CHAIRMAN: This letter is 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 likeable 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.

Represenstative 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, most 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 high 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 enormous 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 'evolving 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 doctine . . . 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 estabish 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.

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
New York, NY, July 11, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Senate Judiciary Committee, Dirksen Building, Washington, DC.

DEAR SENATOR BIDEN: On my own volition, I write this letter to note my great professional and personal admiration for Judge Stephen G. Breyer and to express my wish that your Committee promptly affirm his nomination for the position of Associate Justice of the United States Supreme Court.

I am presently a professor at Harvard University and of counsel with Paul, Weiss, Rifkind, Wharton & Garrison. I write on the basis of my having served for 29 years as a federal judge on either the District Court or the Court of Appeals, before my resignation in March 1993. Prior to my appointments to the federal courts, I served as a Commissioner of the Federal Trade Commission, a Commissioner of the Pennsylvania Human Relations Commission, a partner in a small private practice law firm—consisting of solely African American lawyers—and, in the early 1960s, I was President of the Philadelphia Branch of the NAACP.

I served on the Judicial Conference of the United States with Judge Breyer. Upon special designation prior to my retirement, I had the pleasure of sitting with him and some of his other colleagues on the United States Court of Appeals for the First Circuit. I have read with care and relied on many of his opinions.

On the basis of these total experiences, I am confident that he is one of the most prominent, insightful and responsible federal judges I have ever met. He will bring the United States Supreme Court an extraordinary intellect, a high respect for precedent and the rule of law, a sensitivity to patent injustices and remarkable collegial skills to cause the Supreme Court to function with as much public institutional harmony as is possible.

I feel certain that, after five years, he will be regarded as one of the most outstanding justices in the history of the United States Supreme Court. I urge the Committee's prompt confirmation of his nomination.

With warmest regards and highest esteem, I am

Respectfully,

A. LEON HIGGINBOTHAM, Jr.

JUDGE BREYER AND LLOYD'S—BACKGROUND AND FACTS

Numerous misleading statements have been made in recent weeks about Judge Stephen Breyer's investments in Lloyd's, the London insurance company. The Judiciary Committee thoroughly investigated all aspects of this complex issue and concluded that there is no reasonable basis to question Judge Breyer's integrity or his qualifications for the Supreme Court. There is no factual basis for assertions that Judge Breyer is likely to suffer massive losses from the investment, that he will be unable to escape from the investment for many years, or that the investment reflects poor judgment. To the contrary, as the following five points make clear, the facts are entirely inconsistent with any such assertions.

1. Judge Breyer is not trapped in the Lloyd's investment for a long period of time. Judge Breyer withdrew from his Lloyd's investment in 1988, with the single exception of a 1985 syndicate (Merrett 418) which remains "open." All current indications are that Judge Breyer will be able to terminate his last remaining involvement with Lloyd's in the near future. The Merrett Syndicate is expected to close in approximately one year. According to Lloyd's General Counsel, an entity known as "NewCo" is being formed to assume the remaining liabilities of syndicates like Merrett 418 in exchange for their retained reserves. Even if it becomes necessary to ask for additional modest contributions from investors, the establishment of NewCo is expected to terminate—absolutely and finally—all of Judge Breyer's remaining exposure for Merrett 418's liabilities.

2. Judge Breyer is not even likely to face substantial personal financial losses from his investment in Lloyd's. Demonstrating the very prudence that critics suggest he lacks, Judge Breyer took the precaution of purchasing personal stop-loss insurance to cover any losses he might realistically incur because of his Lloyd's investment. The $37,000 deductible has already been paid. The policy

will cover all further losses up to $225,000. According to the underwriter's current projections, Judge Breyer's total liability will be approximately $44,000. Even the "worst case" losses of $168,000 to $187,000 projected by Chatset's Guide, a leading independent authority on syndicate liabilities, are well within Judge Breyer's insurance coverage. In addition to his $225,000 stop-loss insurance, Judge Breyer has approximately $220,000 in profits from his investments in Lloyd's. Thus Merrett 418's losses would need to be more than double even the most pessimistic current projections before Judge Breyer incurs any net additional personal loss whatever.

3. Assertions that Lloyd's investors have unlimited liability are highly misleading. Investor's losses (or profits) are always directly proportional to the size of their contributions to the total pool of money invested in the syndicate. In light of Judge Breyer's relatively modest initial investment in Merrett 418, he would be responsible for only 1/5600 of the total losses. With his stop-loss insurance and his substantial retained earnings, Judge Breyer will not incur any additional personal loss unless his share of the syndicate's liability exceeds $445,000. Thus, for Judge Breyer to suffer even another penny of loss, the total liability of the syndicate must exceed approximately $2.5 billion (5600 $445,000). Losses at that level are far beyond even the largest estimate. In fact, the total loss of all the hundreds of Lloyd's syndicates in Lloyd's worst year in history (1990) amounted to $5.5 billion. For Judge Breyer to lose all of his remaining personal assets, Merrett 418's losses would have to exceed $8 billion—a figure that has no credibility whatever in light of the known facts.

4. At the time Judge Breyer invested in Lloyd's, it was considered a stable and prudent investment. During the late 1970's and 1980's, when Judge Breyer invested in Lloyd's, sophisticated investors considered Lloyd's a sound, prudent, and—based on its historic track record—conservative investment. For most of its 300-year history, Lloyd's has returned substantial profits to its members. Given this established reputation as a sound and prudent investment, it is no surprise that Lloyd's attracted a large number of highly prominent investors in Great Britain, including many senior British judges and more than forty members of Parliament. In addition, over 3000 Americans, many of whom also are in positions of prominence, have invested in Lloyd's.

5. Judge Breyer's investment in Lloyd's will require his recusal from only a small number of cases on the Supreme Court, if any. As Judge Breyer testified before the Judiciary Committee, he will be required to recuse himself from any case which is likely to have a "direct and predictable" effect on his investment, but not from cases having only remote or speculative effects. Even a broad application of this standard is unlikely to require his recusal from all but a very few cases before the Supreme Court.

In light of these facts, Judge Breyer's investment in Lloyd's does not detract from his impeccable qualifications to serve on the Supreme Court. He will serve with outstanding distinction as a member of that Court, and he deserves to be confirmed by the Senate.

JULY 25, 1994.

LLOYD CUTLER, Esq.,
Counsel to the President, The White House, Washington, DC, USA.

JUDGE STEPHEN BREYER'S MEMBERSHIP OF THE CORPORATION OF LLOYDS

DEAR MR. CUTLER: A mutual friend has suggested that it might be helpful if I were to write to you in connection with Judge Breyer's membership of Lloyds, particularly in a relation to its relevance to the suitability of Judge Breyer's nomination as a Justice of the U.S. Supreme Court. This I am pleased to do.

As a former member of the British diplomatic service, an investment banker for fifteen years with two of the UK's most prestigious merchant banks, an executive director of the Bank of England in charge of international affairs for nine years and currently a non-executive director of two insurance companies, I have been acquainted in general terms with the affairs and reputation of Lloyds for most of my working life. Furthermore, my wife was an external name at Lloyds for much the same period of time as Judge Breyer; as her financial advisor I have taken a particular interest in the fortunes of Lloyds over the past two decades, which includes both good times and bad times.

I understand that two assertions have been made in relation to Judge Breyer's Lloyds membership: that it was an error of judgement on his part for have joined Lloyds in the first place, and to have joined the Merrett Syndicate 418 in 1985; and that there must be doubt about the effect on Judge Breyer's financial situation of the potential future losses from Syndicate 418 since its 1985 underwriting year has remained open.

This letter addresses both those points.

Over a great many years Lloyds has been regarded as a sound and prudent investment. Losses have been recorded in the past but generally over its long history Lloyds has returned good profits.

Many members of the British establishment have been and still are members of Lloyds. It is a well-known and accepted fact that membership of Lloyds is not inconsistent with the highest judicial, political or other public office. A number of judges and politicians continue to be members of Lloyds. There was no reason in 1976 for anyone to believe that joining Lloyds as an external name would not prove over the long-term a sound a profitable investment.

Likewise, in relation to joining Merrett Syndicate 418 in 1984 (in order to underwrite business in 1985), due diligence would have shown that the syndicate was regarded as being under experienced and competence management. It could not have been viewed as careless or unwise to join it at that time, whatever misfortunes may have befallen the syndicate subsequently.

Judge Breyer has acknowledged that this Syndicate 418 has recorded heavy losses, which may increase as long as the Syndicate's 1985 underwriting year remains open. Nevertheless, Judge Breyer has stop-loss cover of 125,000 which, in my judgement, should afford him adequate protection from future losses in this syndicate, as they have been projected on a worst case basis by the most widely used and reputable commentator on the affairs of run-off syndicates. Incidentally, the taking of stop-loss cover in itself demonstrates a prudent and responsible approach to the risk-taking that is an inevitable part of membership of Lloyds or indeed of most other kinds of investment.

I trust that the foregoing will be of assistance. Please do not hesitate to let me know if I can be of further help.

Yours sincerely,

A.D. LOEHNIS.

LEBOEUF, LAMB, GREENE & MACRAE,
New York, NY, July 25, 1994.

Re Judge Stephen G. Breyer.

LLOYD CUTLER, Esq.,
White House Counsel, The White House, Washington, DC.

DEAR MR. CUTLER: You have asked whether Judge Breyer's present stop loss coverage of $225,000 and his funds and deposits at Lloyd's of $220,000 would be sufficient to cover any further losses that Merrett's Syndicate 418 for 1985 year of account might incur. I believe that it is highly unlikely that his share of losses on that syndicate for that year of account could exceed this combined total of $445,000. He had a $25,000 share of the syndicate's total syndicate capacity of approximately £140 million, 04 .000178. Thus, for Judge Breyer to suffer any loss in excess of $445,000, the total liability of the syndicate would need to exceed $2.5 billion. Mr. Merrett indicates that total losses to date and reserves for future losses for Judge Breyer's proportionate share of the syndicate would be approximately $44,000. For these losses to increase more than 10 times, or 1,000%, after the syndicate has been in existence for more than nine years, would be an unprecedented event in the history of the Lloyd's market.

Lloyd's is in the process of forming NewCo, a limited liability reinsurance company, which will accept the liabilities of all syndicates at Lloyd's for the 1985 and prior years of account. It is planned that NewCo will be operational no later than the end of 1995. It is not yet known what, if any, additional premium, other than a syndicate's present reserves, will be charged by NewCo. Once NewCo is established, and Syndicate 418 has transferred its liabilities for the 1985 account to it, Judge Breyer's relationship with Lloyd's will be terminated.

If you need anything further, please let me know.

Sincerely yours,

SHEILA H. MARSHALL.

NEW YORK UNIVERSITY SCHOOL OF LAW,
New York, NY, July 8, 1994.

LLOYD CUTLER, Esq.,
Counsel to the President, White House Counsel's Office, Washington, DC.

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 $188,000, 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 not be "indirect" or "speculative." *In re Placid Oil Co.*, 802 F.2d 783, 786–77 (5th Cir. 1986). Construing §455(b)(4) in *Pacid 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,

Philadelphia, PA, July 11, 1994.

Hon. LLOYD N. CUTLER,
Special Counsel to the President.

DEAR MR. CUTLER: Your have asked for my opinion whether Judge Stephen Breyer committed a violation of judicial ethics in investing as a "Lloyd 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, 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 predictable 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, withstanding 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.

WILEY, REIN & FIELDING,
Washington, DC, July 11, 1994.

LLOYD CUTLER, Esquire,
Counsel to the President, White House Counsel's Office, Washington, DC.

DEAR MR. CUTLER: You have asked us to evaluate whether any case decided by Judge Stephen Breyer under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, could have substantially affected the financial interests of insurers. We represent insurers extensively in connection with insurance coverage matters arising under CERCLA. In addition to representing individual insurers, we and our colleagues represent the Insurance Environmental Litigation Association ("IELA"), a trade group of 21 large property/casualty insurers that appears as amicus curiae in numerous environmental coverage cases at the appellate level.[1] Mr. Brunner has over a decade of direct experience in representing the interests of insurers in disputes arising under CERCLA. Ms. Sawtelle, in addition to representing insurers, has an extensive background in CERCLA and environmental matters generally, having served as an EPA official (as Special Assistant to the Director, Office of Solid Waste, from 1985 to 1987) with responsibility in this area, and having represented numerous potentially responsible parties ("PRPs") in private practice since 1981. As a consequence, we are able to provide you with a realistic appraisal of the significance of CERCLA cases for insurers generally and Lloyds of London syndicates specifically, based on a great deal of experience evaluating CERCLA matters for insurers and others.

We have reviewed all eight cases in which Judge Breyer has passed on CERCLA issues.[2] In our opinion, none of these cases had a material or predictable financial impact on insurers generally or on Lloyds syndicates in particular. Any consequences for insurers were highly speculative and dependent on many independent intervening factors. Any conceivable impact on the financial interests of insurers from these cases resulted only from the court assuring that PRPs received proper procedural protections, or that the statute's provisions were applied properly, before parties were held liable for costs that might possibly be determined to be insured by some insurer. None of the cases determined the obligation of any insurer nor of any PRP for which an insurer might be liable. In real world terms, Judge Breyer's financial interest in these cases as a result of his status as a Lloyd's investor was probably more attenuated than his interest as a federal taxpayer in numerous cases involving financial claims against the Federal Government. In both circumstances, the interest is so diluted, so contingent and so indirect as to be of no consequence.

Of the eight CERCLA cases on which Judge Breyer has sat, four did not involve even potentially insurable interests of PRPs. *Maine* v. *Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992), involved a claim for civil penalties sought by Maine against the (uninsured) Federal Government. Similarly, *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991) (*en banc*), involved the constitutionality of CERCLA's procedures for attaching liens to real property and in no way addresses the extent of financial liabilities under CERCLA. *All Regions Chemical Laboratories* v. *EPA*, 932 F.2d 73 (1st Cir. 1991), concerned the imposition of a civil penalty on a chemical company for failure to report a chemical release; such penalties clearly are uninsured. In much the same vein, *Johnson* v. *SCA Disposal Services, Inc.*, 931 F.2d 970 (1st Cir. 1991), applied the doctrine of res judicata, precluding relitigation of matters already determined by a court, to a case that happened to involve CERCLA claims but without any distinctive precedential significance for CERCLA cases.

Only four cases on which Judge Breyer has sat have even considered the rights or obligations of potentially insured PRPs under CERCLA. In each instance, the significance for insurers has been, at most, highly indirect. *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991), addressing the potential liability of a parent company for its subsidiary's waste disposal practices, is likely irrelevant to insurers in most instances but, if not, could be either "good" or "bad" for a particular insurer, depending on the circumstances of the later case. Indeed, the likelihood of a perceptible impact on insurers is both speculative and remote.

Similarly, the potential impact on the insurance industry of the issues in *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), was de minimis. The case principally involved whether a court must, in an injunctive relief context, adopt any cleanup remedy selected by EPA unless it found that selection to be arbitrary or capricious or, alternately, whether it may itself decide what the remedy should be. Judge Breyer, writing for the unanimous panel, upheld the decision of the court below that the court may fashion the remedy. This holding did not make any determination of a PRP's obligations but merely prescribed the procedure and degree of deference due to certain preliminary EPA actions. There was only an attenuated impact on PRPs and an even more attenuated connection to insurers.

Waterville Industries Inc. v. *Finance Authority of Maine*, 984 F.2d 540 (1st Cir. 1993), involved the application of CERCLA's so-called "secured creditor exemption." Judge Breyer joined in the court's unanimous opinion holding that this provision—which exempts from the class of liable "owners or operators" those who, without participating in the management of a contaminated facility, hold indicia of ownership primarily to protect a security interest—applied to a particular sale-and-leaseback arrangement. The court's opinion, which was consistent with a number of other courts' rulings, was highly fact-specific and thus not likely to have a material or predictable impact on the insurance industry. Moreover, this dispute involved private parties only, each of whom is no more likely than the other to have insurance.

Finally, in *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989), Judge Breyer joined in the court's unanimous decision that CERCLA liability arises when the release of hazardous substances from the defendant's facility cause the plaintiff to incur response costs, rather than when the releases cause contamination on the plaintiff's property. This case did not present an issue that would have a material impact on the insurance industry's CERCLA obligations because in a wholly private dispute such as this, either or both sides might have insurance. (In a subsequent opinion in the Dedham case, Judge Breyer dissented from the majority regarding whether a new trial was required; this opinion was unrelated to the provisions of CERCLA. *See In re Dedham Water Co.*, 901 F.2d 3 (1st Cir. 1990).)

In sum, then, our review makes clear that no case in which Judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's of London or on the financial position of insurers generally.

Sincerely,

THOMAS W. BRUNNER,
SUSAN D. SAWTELLE.

FOOTNOTES

[1] The views expressed herein are our own and are not stated on behalf of IELA or any other client of our law firm. We do not represent any syndicate participating in Lloyds of London.

[2] *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989); *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Johnson* v. *SCA Disposal Services, Inc.*, 931 F.2d 970 (1st Cir. 1991); *All Regions Chem. Labs. Inc.* v. *United States EPA*, 932 F.2d 73 (1st Cir. 1991); *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991); *Maine* v. *Department of Navy*, 973 F.2d 1007 (1st Cir. 1992); *Waterville Indus., Inc.* v. *Finance Auth. of Me.*, 984 F.2d 549 (1st Cir. 1993).

LEWIS AND ROCA LAWYERS,
July 12, 1994.

LLOYD N. CUTLER, Esq.
Counsel to the President, The White House Counsel's Office, Washington, DC.

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.

Enclosure.

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

[1] Footnotes at end of article.

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 enterprises, 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. 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 judges," *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 F2d 976, 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 is 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 * * *.

* * * * *

In *Department of Energy* v. *Brimmer*, 673 F.2d 1287 (Temp. Emerg. Ct. of Apps. 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, 56 (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

[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.").

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 UNREASONABLY 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.

JULY 13, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Office Building, Washington, DC.

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.'"[1]

The problem, the Supreme Court explained, is that "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, 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 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.

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

Footnotes at end of article.

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 this personal financial interest, and therefore he didn't violate his statutory duty to disqualify himself.

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 on 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 Statute 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 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? In 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 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(b)(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*.[21] But *Placid Oil* is obsolete, having been decided two years before *Liljeberg* (discussed above). 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 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 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 Stephen Breyer to the Supreme Court of the United States.

Very truly yours,

MONROE H. FREEDMAN,
Howard Lichtenstein Distinguished Professor of Legal Ethics.

FOOTNOTES

[1] *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2205 (1988), quoting *In re Murchison*, 75 S.Ct. 623, 625 (1955).

[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.

[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.

[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.
[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.
[18] 900 F.2d 429 (1990).
[19] 947 F.2d 1509.
[20] *Liteky* at 1153.
[21] 802 F.2d 783 (5th Cir., 1986).
[22] I am relying here upon the reporting and analysis of Bruce Shapiro in The Nation, p. 76, July 18, 1994.
[23] Id.
[24] Id.
[25] Id.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, July 15, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Office Building, Washington, DC.

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 of 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 from 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), "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 trail 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 the 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 should 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 *Liljeberg*, 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.

Mr. KENNEDY. Mr. President, I withhold the remainder of the time. I suggest the absence of a quorum, and ask unanimous consent that the time be equally divided.

The PRESIDING OFFICER (Mr. MATHEWS). Without objection, it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. BIDEN. Mr. President, it has been a number of years now that I have had the privilege and responsibility, as chairman of the committee or ranking member of the Judiciary Committee, to be involved in the confirmation hearings of Supreme Court nominees. One of the things that always impresses me after it is all over is that my staff and I spend so much time—usually months—reading every single solitary document the nominee has ever written. I do not mean that figuratively, I mean that literally—at least every one we are aware of; interviewing individuals, listening to testimony—in the case of Judge Breyer, 22 hours of his testimony—before the committee. I do not talk to my brother that long, and he is my best friend. I am always amazed at what a broad and deep picture we get of an individual when that process is over.

Quite frankly, the only aspect of being chairman of the Judiciary Committee I do not like is the nominating process, because I almost feel like I am being too intrusive, almost learning too much about an individual—not so much about their personal lives, but

about what they think, and how they have acted in their adult life, and how they have conducted themselves professionally.

I must say that in the case of Judge Breyer, after this long and detailed process, where I personally will have spent literally hundreds of hours in detail roaming through his writings, asking him questions, discussing constitutional methodology and theory with him and cases, I came away from the hearing—and I come to the floor—with the same feeling that the entirety of the Judiciary Committee left those hearings and the process with: That this is a man of high integrity, unblemished achievement, and consistent, constant, relentless excellence in whatever he undertook. This guy was everything from, literally, an Eagle Scout to—I think he was, if not the editor in chief—the article editor with the Law Review at Harvard law school.

I am sure he—like everyone in this country—has had his share of personal pain, travail, and trouble, but you would not know it from this man's record. He has succeeded at everything he has undertaken.

So I approach this nomination, as I approached the five other nominations that preceded it during my tenure as chairman of the Judiciary Committee, with two goals in mind. The first goal is to meet the committee's formal obligation given to it by the Senate to scrutinize the nominee's credentials, abilities, and to make recommendations to the full Senate about the nominee's worthiness to sit on the Supreme Court.

That sounds a bit presumptuous, for all of us to talk about the worthiness of someone to sit on the Court. But I will remind all of us that this is one of the three branches of Government, and it is incredibly powerful. A woman or man placed on the Court, as we all know, is there for life, assuming good behavior. It requires an impeachment to get a person off the Court.

Everything the Court does affects our daily lives. This is the only opportunity the public at large has to try to look into the background, philosophy, attitude, judicial temperament, and moral standing of the individual, just like they look into us, as they should, every 6 years, and House Members every 2 years, and the President every 4 years. We stand for election. And people say to us, well, we like you or we do not like you. We like this about you or do not like this about you.

That is what a democracy is about. When you think about it, there is no such undertaking other than this process for a branch of Government that has affected the lives of the people over 200-plus years, equally as the Senate, House or President of the United States has. And so it is, in one sense, in a personal sense, a high responsibility, and not a particularly welcome one on all of our parts, to look into the background of someone. But it is a responsibility. Under the advice and consent clause, it is one that we do, must, and should take seriously.

That was the first goal of the committee to do, look into and examine—the minority staff, majority staff, and the investigators, and I will not even guess how many hours they put in. If I put in a couple hundred, I am confident, without exaggeration, they put in thousands of hours in figuring out—if you take all the staff who worked on this—what this man is about, and what his philosophy is, and what the likelihood is for him to be able to perform his duties well for the Court. It is like an election. We are about to have an election, like we have in a democracy for a President or a Member of Congress. This is the election.

The Founding Fathers decided we are the electors, the ones who decide. The President nominates, like a party nominates a candidate. A man or woman is nominated by the President and comes before the electors, the people that sit in here. Again, it is not a job we relish, but it is a job we have been constitutionally assigned.

So that was my first goal, to do that thoroughly and well, so we can come back to this body and say to all of you who served in the body, that after our intensive and extensive look at this man, this is what we think he is about.

My second goal in each of these hearings and nominations has been a larger one, to consider the work of the Supreme Court as a whole by conducting a public hearing about how the Court affects and determines the values by which our Nation defines and redefines itself over time and the means by which Government can act to express and defend those values.

So, as nominees have appeared before me, I have tried to engage them in a dialog about the most important issues facing the Supreme Court and, consequently, facing the Nation.

I found, over the years, that the urgency of the issues has waxed and waned from one nomination to the next, but none has ever disappeared entirely.

Thus, I have added new concerns even as I have continued to press on others more familiar to everyone. So that it was with Judge Breyer. I pressed him on the same areas I have pressed other of his predecessors and on new areas as well, because there are new areas of concern and there are new areas of activity on the part of the Supreme Court affecting the lives of Americans.

In the late 1980's, the Nation watched to see whether the Supreme Court would limit the right of the individual to make certain highly intimate decisions free from Government interference or, as one former Justice said, 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 in the Constitution, so-called unenumerated rights. As the Chair will recall, Judge Bork, a brilliant jurist and a brilliant professor, argued with some degree of intellectual consistency and with some power of persuasion that there were no constitutionally guaranteed rights—I am oversimplifying it in the interest of time—there were no constitutionally guaranteed rights any individual had unless the Constitution named them, unless they were enumerated, named in the Constitution.

And if that were so, then many of the rights we take for granted and we assume are protected by the Constitution, everything from who we can marry, to whether or not a married couple can choose to have a child or not by using birth control, very intimate personal decisions not named—there is no place in the Constitution that uses the word "marriage" or "husband" or "wife," no place in the Constitution that uses the phrase "birth control," but the Constitution in its interpretation by the Supreme Court in the past has been read to say, yes, these are rights that are protected constitutionally.

And as to Judge Bork, whether he viewed those should not be read that way, his basic philosophy and the principle he espoused was, if it is not named, it does not exist and it should be left to the democratic institutions to determine whether to guard those rights or not.

So it was a big deal. It was a big deal because one of the leading intellectuals in American jurisprudence was before the U.S. Senate seeking to go on the Court espousing this view.

More recently, in the late eighties, we have seen new challenges mounted to the rights of individuals as protected or nonprotected within the Constitution. In the early 1990's, we have seen new challenges mounted by the most power economic interests in America to reduce the ability of Government to protect the rights and interests of the vast majority of the American people. Obviously, that is my characterization.

Thus, in the hearings on Justice Clarence Thomas's nomination, I pressed Judge Thomas on his view about the "takings clause." Everyone now knows what it was. When I kept using the phrase back then, he said, why is Biden asking the thing about the takings clause, the takings clause of the fifth amendment. Every time anyone hears the fifth amendment, they think of someone raising the right hand and saying, "I take the fifth," meaning "I do not want to say anything."

There is another noninconsequential clause within that fifth amendment, and it is called the takings clause, and it defines the circumstances under

which any government entity can, in fact, impact upon your right to use your property.

A case in point: The State of Delaware wants to widen the highway, a 2-lane highway, a crown top road, to a 4-lane highway. Well, under the right of eminent domain they can come along and take some of your farmland or some of your front yard, but they have to make a showing that the reason they are taking your property is for the public good. They are taking this little road, making it a big road, and that is what the public wants and needs. So, they take your property to build a road. When they do that, they have to pay you for the value of the property they have taken.

But over the centuries what has developed in our English jurisprudence system was the notion about how, if you are using your property in a way that is a nuisance to your neighbors—in modern terms, about how you are using your property, if your oil is seeping out of your underground oil tank that heats your home and it is contaminating the pool water of your next door neighbor or contaminates the property of your neighbor—now you are a "nuisance" as they used to refer to it in the English common law. You are a nuisance. You are bothering me by the use of your property.

Can the Government come along and say—in addition to your being able to sue the person who is creating the nuisance—"By the way, people cannot have a tank that leaks or people cannot have factories that spew out of the factories choking dust or carcinogenic substances or bad things?"

What happens when the Government comes along and says in that circumstance, "By the way, factory owner, all factory owners in the State of Delaware are required to make sure what they have coming out of their smokestack is not harmful, because you have something coming out of your smokestack that is harmful?"

So the Government says, "Fix it or we shut down your factory." And that could cost you millions of dollars. We have taken your property. If we shut down your factory, we have not physically taken title to it, but we have taken your property. We have taken value. Or we say, "Put a scrubber on that smokestack, collect all that terrible stuff before it goes into the air." That costs you, say, $1 million. Well, we have taken a million dollars out of your pocket, made you put it on that smokestack. Now, we have taken your property.

Under the Constitution, what does that mean? You have a taking problem.

I will not go into a lot of detail on this. But the Court basically has said over the years, over the centuries, "Look, when we take your property that way, that is really not taking your property. That is legitimate regulation." I am not using legal terms now in terms of art but trying to explain the concept here. And it is a dangerous thing to do to try to condense it this way. It will not do full justice to the theory here. But I am taking your property. The State of Delaware passed this law. The United States of America has passed this law.

Now, the landowner says: "Wait a minute. You took my farmland because you widened the road, and you paid me for that." And they say: "Yes, we took it because it was for the public good, and it was not because you were doing anything bad." But, you say, "That was only worth $200,000, and you paid me for that, but now you took 1 million bucks out of my pocket making me put all these pollution control devices on my chicken houses and on my compost piles, and all these things. That cost me a million bucks. So you paid me $200,000 for the land you took, but you are not going to give me any money for the million bucks you made me spend?"

The Court says: "No, we are not going to do that because there is a legitimate purpose that the Government has for the common good of the people to regulate for your public health and safety of the folks out there."

So, the debate. All of a sudden these folks who used to use the 14th amendment in the so-called Lochner era to give excessive rights to property owners and people who wanted to contract—remember back in the days when they struck down all those New Deal laws saying you cannot have child labor laws, you cannot have laws that protect people in the work environment, and the Supreme Court kept striking those down? The Supreme Court kept using a thing called the 14th amendment to say, "Hey, you know, the 14th amendment says you have a right to your property, a right to due process, and by the way, if you want to contract with that 14-year-old kid or you want to contract with that baker or that baker wants to open up a shop and wants to work 18 hours a day, you cannot pass a law saying bakers cannot work but 12 hours a day because the dust they inhale is bad for their health. You cannot do that. You cannot regulate the public health and safety that way. You are violating their 14th amendment rights.

By the mid-1930's they came along and said that is crazy; that does not make sense. We ought to be able to help people with their health and their safety without it being a constitutional violation.

Well, we thought that was gone. We thought the monster had been buried. Guess what. It is back.

The use of the 14th amendment that way in Lochner, it is back. It is back in the guise of the fifth amendment and the takings clause. Because now there is a new school of thought that basically says, "Let's go back and relook at that fifth amendment and that takings clause thing where it says you can't take somebody's property without paying them. We ought to count all regulations within that category."

So now if I tell you you have to put a scrubber on your smokestack that is going to cost a $1 million, a lot of new legal scholars of the Chicago School of Economics are coming along, saying, "I'll tell you what. The Government can tell me not to spew that stuff out—I do not argue with that—but if it costs me money to keep the air clean, you have got to pay me. Just like you pay me for my farmland, you have got to pay me to keep the air clean."

And that is a big deal. That is a big deal, because that for the taxpayers is billions of dollars.

Can you imagine what happens if we say, OK, in a Clean Water Act, we are going to have the water clean and here is the standard of what constitutes clean?

Let us take my State. We have farmers plowing their fields. And that is the big industry in my State. I know my friend from Iowa is here. He has some farms almost as big as my State. But it is the biggest industry in my State, farmers, bigger than the chemical industry, bigger than anything else in my State.

And so you have a farmer down in Dover, DE, and he has a field or she has a field that she is working that is right next to the Playtex factory. There is a Playtex factory down there; or, right next to the General Foods factory, which is down there. And General Foods, they are not, but let us assume they are spewing stuff out of the processing plant that was leaching on to the fields of the farmer. Right now, the farmer has the county council and the State which says, "By the way, you can't do those kinds of things." So the farmer is protected.

But the way this new school of thought would have it—and, granted, I am oversimplifying this, but the principle is accurate. What a lot folks want to say now is, "Ah ha, farmer, the State can't do that and regulate that factory from spewing onto your field. You have got to do one of two things: You sue them. You prove that you have been hurt by that and you sue them. It is between you and that big factory. Or, the State can go ahead and tell them they can't spew this stuff onto your field but you have got to pay them the cost of keeping them from doing that, which means everybody's taxes, including yours, gets raised. We are going to raise your taxes to pay that factory for not polluting your field."

It is a big deal in terms of dollars. And so that is this whole new debate which, I promise you, you all are going to hear a lot more about.

It is the intellectual and practically most important debate engaged in in

the last 20 years in American jurisprudence. And it is just starting.

And, by the way, I am not suggesting there is anything nefarious about those who are on the other side of this debate. I mean, the intellectuals and the leading scholars, I am not saying they are bad folks. It is just a different way of how do you read that little old thing called the takings clause. It is a multibillion decision. If you read it the way I read it, you come out one way. If you read it the way some folks want to read it, it has multibillion dollar implications for the taxpayers of America.

So the reason I bothered to go into that is to show you that these esoteric things that we sit in the committee spending hundreds of hours preparing for and scores of hours asking witnesses about have overwhelming consequences on how average Americans can live their lives, just by reading the takings clause a different way. All the folks here in Washington today, tourists, can have their lives radically affected—not necessarily all bad.

If you own a big factory, you are in good shape. By the way, if you are a small property owner, you could, in certain circumstances, be in good shape, too. It could help you.

But the bottom line, to use that trite expression, is we are talking about moving billions of dollars.

Zoning regulations. You live in a residential neighborhood. How many people who live in a residential neighborhood want the owner of the next door property to buy up the guy's property next door to him, and now he owns two houses, to say, "I'm going to tear them down and build a 32-story building?"

"You can't do that and live here. This is my neighborhood. We all know you have got zoning laws. You can't build a 32-story building in my neighborhood. They are all four-bedroom houses here. We have kids running around."

What do you do? Up to now, we have said the county which comes along and says, as long as they apply to everybody, nobody in these kinds of circumstances can build 32-story buildings. But there are a lot of people now arguing that is a taking, those zoning regulations are takings.

"You are taking my property. I have a two-story building on it. But if I can build a 32-story building on it, I will make 16 times as much money when I sell it. I can charge people rent to come into this building. I can make a lot of money. And you are telling me I cannot make money. It is my property, is it not? I live here. If I want to put a 32-story building on it, it is none of your business."

Well, under these new standards that are evolving in the minds of many right now, all the county has to do is say, "No. Can't build that kind of building in this section of the county."

Well, these folks say, "Well, OK, you can tell me I can't build a 32-story building, but you have to pay me. Pay me. If I can prove to you I could have built a 32-story building and make my property worth $20 million and with a two-story house on it, it is only worth $510,000, you owe me the difference between $20 million and $510,000. So, taxpayers, pay me."

So, when people say you do not want the Government to take your property without paying you, I do not know of any red-blooded American who would not say, "That's right. Don't want the Government taking my property. They better pay me."

So all my friends on the right say, you know that mantra is used and everybody goes, "You're right."

But if I look at you and say, "By the way, do you want a 32-story building on your property next door to your house? That is OK, you can keep it from being next to your house. But, by way, pay them not to build it," I imagine their attitudes would change substantially.

Again, I have used extreme examples to make the point, but that is the nature of the debate.

And so, my concerns changed from unenumerated rights and privacy with the Bork hearings, which was what was the onslaught at the time.

We got to the Clarence Thomas hearings and it was all about this new theory that was being proffered. Some of the press said—which is true—about me: "BIDEN: Boring." I am boring a lot. "But why is BIDEN asking a lot of these questions about the takings clause?" Then I noticed the same newspapers saying 3 years later, headline: "Major Takings Clause Case."

You know, the Supreme Court has decided cases along the lines I am worried about.

Well, I am here to tell you there is another concern coming our way, and that is the concern about the expansion of so-called "economic rights" at the expense of important rights that we have thought to be sort of sacrosanct. The hearing about balancing the takings clause, the balance between the rights of all people versus the economic rights of few.

My concerns about the expansion of "economic rights" at the expense of other important rights have, unfortunately, proven well-founded, as demonstrated by the recent decision of the Supreme Court in Dolan versus Tigard and other cases.

So in questioning Judge Breyer, I pressed him with renewed urgency on the question of how much protection should be afforded the economic rights of the few.

These are issues—the scope of personal freedoms and the assault on the public welfare in the name of economic rights—that have concerned me before and where I have pressed other nominees.

These concerns are, if you will, "constitutional" concerns—concerns that certain elements would use constitutional interpretation to restrict important personal rights and, at the same time, expand the economic rights of the few powerful folks in America.

This year I have had, also, new concerns, concerns that these same elements may try to restrict our freedom and demean our personal dignity and moral values, not through constitutional interpretation but through the interpretation of statutes passed by Congress and signed by the President.

For example, in recent years Congress has sought to define and enforce the constitutional guarantee of equal protection of the laws through legislation. But in the last decade the Supreme Court has turned toward a grudging interpretation of those statutes we pass.

By "grudging" I mean, when we say we want to protect that liberty, the Court says, "Wait a minute. They want to protect the liberty rights, equal rights of the handicapped?" And instead of looking at it, the Court says, "We understand they want handicapped people to have these basic rights," because that is how we say it here. They, under new rules of interpretation, canons of interpretation they call it—and they are cannons in effect—take out a magnifying glass and say, "Wait a minute. I am not sure they really wanted to protect that right. Because if they really wanted to protect that right they would have said it. If they wanted to protect this right under this circumstance they would have dotted that 'i,' crossed those two 't's, and put in two extra commas. So we are going to interpret the statute to say they really did not mean to protect the equality rights of that group of people."

In the last decade the Supreme Court has tended toward this grudging interpretation of statutes passed by the Congress and signed by the President, and in my view ignoring the intent of Congress, and instead developing restrictive, judge-made rules for reading the statutes. So I asked Judge Breyer about two Supreme Court decisions that seemed to me to illustrate this grudging trend, the Patterson case and the Dellmuth case. In both cases the Court refused to apply the civil rights statutes, passed by us, signed by Presidents—Democrat and Republican—in a commonsense manner that gave full effect to the intent of Congress in ensuring equal treatment for black Americans and for handicapped children. That is what these two cases were about. One about a black American; one about a handicapped child. In the hearings I also had a second related concern.

By the way, to illustrate this, in the Patterson case there was a Civil War statute that had been passed after the Civil War that said when you are going to hire somebody, as an employer you

cannot go out and say, "You know, you have on a gray suit. I do not like gray suit people. And, by the way, I do not like people who can type that fast. And, by the way, I do not like the color of your eyes. So I am not going to hire you." Or, "You are black and because you are black I am not going to hire you."

We said that is wrong. A former Congress, 100 years ago, said that is wrong. You cannot do that.

So they said, "When you contract with somebody you have to contract with black folks the same way as you contract with white folks." It is a pretty good idea. It was revolutionary in 1877, but commonplace today.

To oversimplify the case, along came this case, the Patterson case just a little while ago. And a black person said, "They hired me, but once I got hired, they harassed me, they treated me with no dignity because I was black. They made no bones about that."

And so they said, "Under this statute that was passed, I am entitled to have them stop doing that and make them hire me and make them keep me and make them treat me right."

And the Court came up with one of these. It took out a microscope—a magnifying glass, "Let us see, now. What did they really mean by that?" And they came up with the following interpretation, which I think in a commonsense way is perverse.

It said, "You know, you are right. When you look at that statute you cannot say you will not hire that man because he is black. You have to hire him if he is otherwise qualified, just like you would a white person. But once you hire him, he is on his own. You can fire him because he is black. You can harass him because he is black. All the statute means is you just cannot 'not hire him.'"

And people said, wait a minute, how did you get that?

And the Court said, with their magnifying glass, "The canons of interpretation."

We have the following, but I will not go into it. I will put it in the RECORD. I ask unanimous consent that a more scholarly dissertation on this case be printed in the RECORD, but it is important everybody understand it.

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

(See exhibit 1.)

Mr. BIDEN. They took out their magnifying glass and in a grudging way said, "Wait a minute. This statute only means hire."

Think about that. Think about anybody in this place writing the statute saying, "you cannot * * * not * * * deny someone employment because they are black. But once you hire them you can pull them in the office and say you black SOB, you are fired because you are black."

Does that make any sense? Could anybody possibly have meant that?

But what the Court recently has been saying is, if you mean you cannot fire them, if you mean that you cannot harass them on the job, you should say: "By the way, it is wrong to deny someone employment because they are black. And then once they are hired it is wrong to treat them badly. And if you want to fire them you cannot fire them because they are black, so help me God."

That is the only thing that seems to satisfy this bunch across the street, now. So the point I am trying to make is the last 10 years in these hearings we have been focusing on: Are judges who are about to go on the bench, through the way in which they interpret the Constitution, going to be able to deny people basic human rights? And the Senator from Illinois, myself, and others have been scrutinizing nominees to make sure that is not their view.

But I say to my friend from Illinois, he is on the floor and he is a member of the committee and he knows it, now we have to scrutinize it another way. We beat that back but now they come at it through another door. "We are not interpreting the Constitution here, Senator. We are merely interpreting a statute," they say. "And we want to make sure precisely what you mean, and therefore you say precisely what you mean. Because we know you folks in Congress, you women and men, you just let your staff do this stuff anyway," according to Judge Scalia. "You do not know anything." In that sense he shares a lot in common with the American people, about what they think about us. But the point is, they say, "You men do not know much, you women do not know much, so we are going to look at language and make sure it says precisely."

What are those rulings called? "The clear statement." But one of the leading scholars in the area has another phrase. He calls them, "superstrong clear statements." Translated: You better say everything you mean, even if it is clear from the words you use that you mean exactly the same thing. You better say it.

It is a little bit like saying, as one of my staff members, a professor at Georgetown, said to me—she said when she was explaining this to me, we were going through these cases: "It is like my turning to you, Senator, and saying, 'Can you tell me the time?' And you interpreting that to mean is she asking me, do I know how to tell time? And I would look at her and I would say, 'Well, yes, I could tell you the time.' When obviously the reason she is looking at me and saying, 'Can you tell me the time?' she means I do not have a watch; I do not know what time it is; would you please tell me what time it is, if you know."

But the way the Supreme Court is interpreting these statutes, they are interpreting like, if I said can you tell me the time, some on the Supreme Court are saying, "Yes, we can." That is the difference. So now, through interpretation of statutes, some on the Court are setting up these canons and rules that have the same effect that some before have wanted to obtain through the Constitution, constricting the rights we value so much. That did not work too well, not very much in favor. So now those who are looking at constricting those rights that the Congress, by the Constitution through the 14th amendment, section 5 is being told, "Look, we are guaranteeing these rights and you implement how to guarantee these rights," say: You, the Congress, you come up with a mechanism that says this is how we are going to guarantee them, this is how we are going to give life to this notion of equality.

So in these hearings, we spent a lot of time talking about that.

In recent years, a very influential group of scholars and judges, known as the law and economics movement, has proposed legal problems should be resolved from a purely economic perspective so that the only values that count are economic values and not the sort of moral values and norms that we, as a people, often prefer, like the high value we place on human life even when it does not make good sense in a purely economic sense.

These new rules of interpretation, I say to the Presiding Officer, are used in a way to say what the Congress must have really meant is what makes economic sense. Let me give you an example—and I see colleagues on the floor wishing to speak. I will put the rest of my statement in the RECORD.

The Senator from Iowa, the best nonlawyer I have ever run across—this man is not a lawyer but you will not be able to tell that from the way he discusses the Constitution and the law. I mean that sincerely. He is also, I think, on the Labor Committee——

Mr. GRASSLEY. And Agriculture Committee.

Mr. BIDEN. And the Finance Committee. In the Finance Committee, he deals with subjects that relate to Social Security, entitlement programs and the like. And my friend from Illinois is on the Labor Committee.

I will bet you they can each, in their involvement with issues in their committees, tell you times they have voted for and proposed maintaining programs that on a purely economic basis do not make any sense, if you run just pure, raw economics, an economic model.

Case in point: In health care, as I understand it—and my friend from Illinois knows so much more about the health area than I do, and the health industry—but if I am not mistaken, an incredibly large percentage of all the dollars Americans spend on health care is spent in the last couple months of a person's life. So that means people who

are 70, 75, 80, 85 years old who only lived in many cases 2, 3, 5, 7, 10 months longer because of heroic, and serious, expensive medical procedures and undertakings, they—to put it in the negative sense—eat up a significant portion of all the money that is spent on health care.

So if you want to be a sharp-pencil, eyeshade guy who is going to sit there and tap out just the raw numbers, you can say, now wait a minute—I think it is 26 percent in the last how many months?

Mr. SIMON. Last few weeks.

Mr. BIDEN. In the last few weeks of an individual's life, we spend 26 percent of all the money we have spent in health care. If you are utilitarian, which is not a bad thing, per se, to be, and you say, "How can we help most people most of the time?" we would say, "OK, doesn't it make more sense to take that 26 percent that only keeps people alive a couple more weeks—doesn't it make sense to take that 26 percent—and spend it on kids who are between the age of 1 day old and 6 years old? Because if you get them on the right track then, their health is going to be maintained better their entire life. Or does it not make more sense to take that money and spend it on immunization programs? Will not more people, on balance, live longer if we did that?"

And the answer is yes, it is true.

But what is our Judeo-Christian ethic? We say we will do all we can to keep our parents and our grandparents, who have made this country, alive as long as we can within reason.

The day these hearings started, there was a big front-page article in my statewide newspaper at home. It had nothing to do with Judge Breyer or the law. It had to do with health care and this issue.

It quoted a man who had to spend $67,000, I think it was, out of his pocket above his health insurance to keep his grandmom alive an extra, I think it was, 6 days. I will put in the RECORD the exact article. But I think it was 6 days. So this reporter asked: "Was it worth it for you to spend $67,000, hock your house, your car, get a second mortgage to keep your grandmother alive only another 6 days?" Do you know what the man's response was? "Yes, it was worth it to keep her alive long enough to see her great granddaughter born."

That is a value that does not lend itself to an economic analysis. I do not criticize those who say economically we should disregard that. I do not. But as a society, at least up to now, we have adopted a value system, and we who serve in this body are supposed to reflect that value system. Under our system, the value is it is worth paying a disproportionate amount of money to keep our parents and grandparents alive.

I have been corrected. There is no amount of money listed in the article. They just imply there was a lot of money spent. So I do not know the exact amount.

But what do we do? We have this new school of law and economics. They are a bunch of very bright women and men, and they are sitting in offices that look like ours and they are doing something worthwhile. They are trying to figure out how we deal with these major problems facing us.

They have come up with a theory. The theory says: Look at the economic impact, and if it does not make economic sense, then—I am overstating it in the interest of time—then adopt a rule of interpretation. If the Congress did not specifically say we want to waste this money for this value, assume that they meant that if it does not add up economically, they did not mean it. That is what these interpretive rules are now. That is the direction they are going.

Is it for a judge through interpretation to tell us here that just because it does not make economic sense it does not reflect a basic value?

It is a basic value that the American people within this democracy have a right to say, "Yeah, we're going to waste that money, if that's what you call it; yeah, we're not going to be economically sound, if that's what you call it, because it is important to us."

I spent 59 days in an intensive care unit hooked up to all those machines. I want to tell you something: Had someone walked in and said, "You know, from purely an economic standpoint, Senator, it doesn't make a lot of sense for us to be spending this exorbitant amount of money out of your insurance to keep you hooked up to all these machines. You have been hooked up 57 days. We are going to give you 1 more day," I doubt I would have said, "By the way, you are right. Where do I sign? This does not make economic sense, and my chances are not that good," which they told me they were not. "Let me sign right here."

If they came to you and said, "By the way, your"—child, husband, wife, your son, daughter, mother, father—"the prospects of us making it work for them are 30 percent and the cost is the following, you only have a 30 percent chance of keeping your child alive, do you want to hock your house to try?" I wonder how many of you would say, "Let me sit down with my wife and look at the economic impact of this. Yes, well, let me see, only a 30 percent chance, we have an equity of *X* amount in the house, we can sell it today at the market value of such and such. I think maybe it is not economically sound, so don't try."

That is not how we think. But that is how these folks think. They are not bad folks. They are not uncaring folks. They just see these massive problems we have—and they are—and they say we ought to look at these things from the lens of law and economics.

That is OK as long as they are political scientists, as long as they run for office. I do not think anybody should not be able to go out in Davenport, IA, and Wilmington, DE, and say, "Elect me because I believe in this new theory"—not new—"I believe in this theory that before I spend a dollar of your money, before I vote for anything, I am going to be satisfied it makes pure economic sense, whether it relates to the health of your children, whether it relates to your farm."

It does not make any sense from an economic standpoint to build those levies and dikes, in my view—I support building them, by the way, because I think it makes broader sense. It does not make economic sense to the folks in Delaware—we are going to let you have beach insurance to let you build all those houses on the beach. God sends those nor'easters every year, and every year it takes away all that sand. A couple years later it shifts it back. But in the meantime your house is gone.

But I run for office and say, "I am not going buy into any of that stuff. If it does not make pure economic sense, I am not going to vote for it. Elect me." I respect that. If that is what the people want, fine.

But what I do not respect is a judge who sits up there on a dais, like you do, and when we make those imprudent economic decisions here in this body, saying, "Now, let me look at this. I acknowledge that Congress may have done this. But the way I am going to do this is I am going to make a canon of interpretation. I am going to come up with a new rule of how I look at legislative language. And the rule is I am going to assume that Congresspersons would not possibly have passed a law that was not just purely economically sound. And so I am going to look at that statute. And it does not seem economically sound to me to do it this way, so I am going to assume that they must not have meant that is what they wanted."

What is the effect? The effect is the exact same if they disregard the statute. The effect is the right, the value, the thing that we, the elected officials, say we think is worth protecting at such and such a cost or any cost is wiped away.

So my point is I questioned Judge Breyer a lot about it, because that is the new wave here; that is where the fight is going to be in the next 15 years on the Supreme Court—statutory interpretation. So I wanted to know whether Judge Breyer, who has written some things that were he running for office I would never vote for him—there is not a shot in the world I would vote for Judge Breyer if he were running for the U.S. Congress, Senate, and/

or county councilman, because he wrote this book, and this book says theoretically this is how we should handle these very difficult problems.

Well, I would like him as a political science professor, but I do not want him as a judge if he is going to take that little book—do we have a copy of the book? Bring the book down for me, please.

If I walked into his class at Harvard and he had this little old book, "Breaking the Vicious Cycle," sitting on his desk, I would say this is going to be a fascinating class. I am going to like this class. It is going to be interesting. Or if he ran for public office and he said the values I stand for are in this book, I vote no. If he is a judge and he sits there while he is judging and, figuratively speaking, has that book sitting at his right hand on the bench, I am not voting for him either.

So I questioned him a lot about this little book—a brilliant piece of work by the way. I am not being facetious. It really is. It makes a very strong case for how we should more intelligently deal with these economic dilemma. And I think it is a serious contribution to the public debate. But it is a serious breach in my view, if he takes this book from the public debate to the bench and says, "This is how I am going to rule. I am going to look through this prism, and I am going to interpret what PAUL SIMON and the rest of his colleagues did in the Senate based on whether it comports to the theories I put forth in this book."

So I spent a lot of time asking him about that, and I am convinced he understands the distinction between the theories in this book and what he is appropriately able to do as a judge.

The one big safeguard—and I will yield now—the one big safeguard built in here is Judge Breyer has also written a lot on another item, on statutory interpretation. And he has written a lot—580 cases he has decided as a circuit court judge, many of them relating to this kind of issue as well.

He has taught as a professor—one of the leading professors in America. He has judged—one of the leading judges in America. He has said, "Look, I understand the congressional process. I understand the legislative process." And he does. He worked here. And he says, and he has shown, and he has argued, and he has debated with Judge Scalia and others, that we should let the people's will, their values—whether or not they make economic sense at the moment—prevail; that as a judge he has no right to take what he believes he would do were he sitting here, and superimpose that on what he will do from the bench like the one you are sitting at.

And so after 22 hours of testimony, of him speaking, and after those 500-some cases being read by me and/or a synopsis of them being given to me, I am convinced that there is a firewall between this, what I call economic elitism, and his judging and his view as to how he is obliged to interpret statutes here.

I think he also revealed himself to be an enthusiastic and engaging interpreter of the law and Government, who understands that there are people behind every legal dispute, whether describing the thick coal columns supporting the cities and those who live in them above the surface of a mine, or in discussing a property rights case, or in noting that there is nothing more important to a family than the freedom to be able to pass on religious beliefs from one generation to the next, in discussing the first amendment's establishment clause.

Whatever he discussed and whatever he has written about and whatever his life has been, it has always been formed by the impact on individuals.

That is a very important ingredient for me. And it I think bodes well for all of us. These qualities will serve judge Steve Breyer very well on the Supreme Court. He has proved himself a thoughtful academic, well known to the Harvard community; a practical problem solver, well known to those who have worked with him here in Congress. He is a man who has unparalleled respect from those in his community, those with whom he has worked, and with those—and by the way, this is not cronyism. You have 18 members of the Senate Judiciary Committee, about half of whom have worked with Judge Breyer when he was on the committee, Democrats and Republicans. And one thing everyone—everyone—has spoken to who has worked with him, Democrat or Republican, is his fine temperament, his judicial temperament, his fairness, his equanimity and his brilliance.

Mr. President, it is without any reservation that I recommend, after 22 hours of hearings on the Senate Judiciary Committee, testimony by Judge Breyer and a number of witnesses, some who have testified against, some who were for, that I, without reservation, recommend Judge Breyer to this Senate and strongly encourage my colleagues to vote "yes" when the vote is called on confirming Judge Breyer to be an Associate Justice of the Supreme Court.

I yield the floor.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa [Mr. GRASSLEY], is recognized.

Mr. GRASSLEY. Mr. President, I would ask to defer to the Senator from Illinois without losing my right to the floor for a period up to 3 minutes.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. SIMON. I thank my colleague from Iowa.

Mr. President, I join the chairman of the Judiciary Committee in urging a favorable vote. I might add that being chairman of the Judiciary Committee is not an easy spot in these things, and JOE BIDEN does a superb job of chairing these hearings.

Just several qualities. I speak with a little bit of prejudice because I have known Judge Breyer from back in 1973, a year and a half before I came to Congress. I had the chance to get acquainted with Judge Breyer and his family. In terms of fairness, I do not think there is any question he is going to do a good job. In terms of just intrinsic ability, as Senator BIDEN says, those who have worked with him up on Capitol Hill know that he has that ability.

In terms of compassion, feeling for people, I think that is important so you do not make those kinds of economic judgments. But the chairman of the committee was talking about just on pure economics, and an indication of that is his daughter is an editor of a publication that I confess I never heard of before the hearing, called "Who Cares?"—trying to encourage those of us who are more fortunate to be helpful to those who are less fortunate in our society.

Then finally, just one other point. It may seem like a small point, but I think it is important in the long run. That is, he writes with clarity. It is often discouraging to read a Supreme Court decision and wonder how the Justices reached a certain decision because the clarity is simply lacking. He is a wordsmith who writes with clarity. And I think he will add an important ingredient to the Court in that way.

So I am pleased to support him. I think it is a good appointment, to the credit of President Clinton. I think he will bring credit to the Court.

I thank my colleague from Iowa.

Mr. GRASSLEY. Mr. President, I think and hope that I have applied a consistent set of criteria in evaluating the nominees to the Supreme Court. After making that evaluation, I have made the same determination that I did in the committee to support Judge Breyer.

In this process, I consider whether the nominee exhibits the necessary intellect and integrity required of a Supreme Court Justice, and also whether that individual understands the role of a Judge within our constitutional system.

Judge Steven Breyer has served as an appellate judge for 14 years. He has great knowledge of the law, and obviously, as he demonstrated so well before the committee, a superior intellect.

I also believe that Judge Breyer has the integrity necessary for public confidence in the judiciary, and it is necessary for us to maintain that confidence. Integrity is an integral part of

the credibility of the system. I think the committee properly inquired into matters that go to Judge Breyer's character. Some of those have been highlighted, and will be highlighted yet in this debate, particularly as they relate to some issues that Senator LUGAR will be addressing.

The committee investigated fully the nature of Judge Breyer's investments, and in all respects those investments were legal and ethical, as they related to Judge Breyer's official duties.

I believe that our examination shows that Judge Breyer possesses the integrity required of a member of our highest Court.

In his testimony, Judge Breyer addressed a wide range of legal issues. I was gladdened to find that he views the constitutionality of the death penalty as settled law, because the person he replaces has all of a sudden had a change of heart on that issue.

Of course, on another matter, I am not pleased that he considers the right to abortion to be settled law. Regardless of these two issues, one I agree with him on, one I do not agree with him on, I recognize that a President—in this case, a newly elected President—has with his mandate from the people a right to select the nominee to the Supreme Court. Judge Breyer maybe would not have been nominated by a Republican President. I doubt if he would have been. But I do believe that a President, Republican or Democrat, is entitled to some level of deference, particularly if the person has integrity, judicial temperance, and the ability to read the Constitution and the law as the writers intended it. Then, as far as I am concerned, a President has deference who to select.

Judge Breyer's constitutional opinions are good evidence that he generally practices judicial restraint. But in his testimony before the committee, he expressed a more expansive view of the Constitution than maybe I would like to have had him express. For instance, he testified that the

> Constitution was written to protect basic freedoms, which are basic values, which are related to the dignity of the human being. The dignity of the human being is not something that changes over time.

There are Judges who take this view that the Constitution protects human dignity, strictly in the abstract, you cannot find any fault with that. But there is connected with this premise a reasoning that is very expansive of the Constitution, way beyond what our writers intended, that anything, almost anything, that furthers human dignity is a constitutional right. I certainly do not read the history of our Constitution as being anything so expansive intended on the part of our writers. And I hope that Judge Breyer does not. But his testimony in this regard is cause for concern.

I was more pleased with his response to my question on the issue of illegitimacy. I believe that the Court misinterpreted the Constitution when it held that classification systems that various States had prior to the sixties based on illegitimacy are normally invalid. The inability of the law to discourage illegitimacy in this way, I believe, has played a direct role in the increase of out-of-wedlock births in the last 25 years, and all those negative consequences that go with that.

Judge Breyer told me that changes in the factual basis for the earlier decisions would be relevant to him if earlier precedents were challenged. There are now large amounts of sociological evidence that this trend in the family is creating a lot of social pathologies that have terrible human and economic consequences.

So I am glad to hear what Judge Breyer said: that maybe the Courts could have been wrong in the sixties. I believe this is the first time, at least in my years in the Senate, that a Supreme Court nominee has testified that he would be open to overruling a particular line of constitutional decisions.

Judge Breyer and I agree on another matter, that legislative history—this is something that Senator BIDEN addressed with great thoroughness—that legislative history is important in interpreting statutes. Judge Breyer agrees, but I am surprised that he views canons of construction so hostilely. Such rules allow courts to reach uniform decisions on the meaning of statutes. These rules also make sure that Congress does its job of legislating as clearly as possible, as we ought to.

I do not think we give enough attention to that. But those rules discourage us, I imagine, from passing the buck on very tough social questions, maybe even economic questions, to the Court. Without these rules, the likelihood of judicial disagreement as to the meaning of statutes will increase, and so will circuit splits. I hope Judge Breyer will reconsider his view on this subject.

During my questioning, I was concerned about some of Judge Breyer's record in the circuit court on the issue of child pornography. As a member of the sentencing commission, Judge Breyer was the only dissenting vote against a proposal to increase the base level offense for child pornography. And that made me wonder whether Judge Breyer was sufficiently committed to fighting child pornography. I wondered whether he knew of the harm that comes to children who are the victims of this crime, and I wondered whether he would accept the well-established rule that child pornography is not entitled to any constitutional protection.

I asked Judge Breyer at the confirmation hearing about his vote as a member of that sentencing commission. He told me that his vote against the motion to increase the base-level offense for child pornography did not rest on a view that child pornography was not a serious crime. Instead, he had a pattern throughout that process of the sentencing commission to apply a general sentencing principle to all crimes relating to base level for offenses. And once Judge Breyer explained his vote, my concerns were alleviated.

Additionally, I am satisfied that Judge Breyer accepts the well-established view that child pornography is not protected by the first amendment. And based on his answers at the hearing, those of us who are strongly opposed to child pornography, and the victimization of the child that goes with it, can be comfortable with Judge Breyer.

Judge Breyer was asked by several Members—not myself, but I did follow up with a written question—about his view on home schooling. There was an attitude expressed at the grassroots that he is very hostile to a growing form of education in America called "home schooling," although home schooling has been protected by the Supreme Court under the Constitution since the 1920's. In each of his oral answers, Judge Breyer stressed that the constitutional protection for home schooling was based upon the free exercise clause of the first amendment. In short, his answers based constitutional protection for home schooling on the right of parents to pass religious beliefs on to their children. He tended to answer those questions in the very narrow scope of a relationship of home schooling to religious freedom. Well, of course, this troubled me, as I stated, because thousands of parents educate their children at home for reasons unrelated to religious beliefs.

Judge Breyer's oral answers, I think, might have been read to exclude constitutional protection for home schooling that is not based on religious belief, despite longstanding constitutional precedent to the contrary.

So I submitted a written question to determine his view on whether all forms of home schooling are constitutionally protected. His response in the affirmative, which cited the relevant cases of longstanding and of a constitutional nature, satisfied me. I hope it will satisfy those out there at the grassroots who are concerned about that subject.

I am also generally pleased with Judge Breyer's decision on constitutional criminal law cases. Judge Breyer has applied the law. He has not let criminals off based on a generalized sympathy for defendants. For instance, he does not interpret exceptions to the warrant requirement in a narrow way. Although some of my colleagues criticized Judge Breyer's opinion that permitted a warrantless search of a ceiling alcove adjacent to a motel room, even though the suspects were handcuffed, I thought he applied clearly established

law. Under fourth amendment law, a search may be conducted incident to an arrest without a warrant. The police did that. While the scope of a search is limited to the reach of the suspect, the entire residence may be searched where there is a specified belief that dangerous conditions exist elsewhere in the residence. In this case, the fact that the police had a gun pointed at them that was unaccounted for provides those dangerous conditions, even if a suspect might have been handcuffed.

So this case shows to me that Judge Breyer is within the mainstream in constitutional criminal law.

Judge Breyer's criminal statutory opinions are a little more mixed, Mr. President. His decision in a case involving the meaning of "inhabitant," which I asked him about, is virtually a textbook model of how statutes should be interpreted. Judge Breyer examined the history of the statute; he examined the way the word was used at the time; as compared to language in other statutes; the purpose of the statute; and the fact that no source ever found that someone who planned to be in this country for only a few hours was an "inhabitant."

That whole series related to the interpretation of the word "inhabitant" and how thoroughly Judge Breyer went on to evaluate it through legislative history, not just through wording in the statute. Judge Breyer properly evaluated the legislative history, refusing to credit statements of individual legislators that flatly contradicted the statutory language.

On the other hand, Judge Breyer's decision in the Paleo case is troubling. There, Judge Breyer found that criminals could challenge their prior convictions that made them eligible for enhanced penalties under the Armed Career Criminal Act. This was true, he found, because the Government has no interest in punishing people for unconstitutional prior convictions. Judge Breyer thus engaged in a frequent technique that is used by judicial activists: he wanted to minimize the Government's interest in passing legislation so as to avoid the plain meaning of the statute.

To me, in this particular instance, it is about as plain as plain can be. It is very clear. In essense, we said "three previous convictions" means "three previous convictions." And the Government's interest in getting dangerous criminals off the street without those criminals delaying the imposition of enhanced sentences by challenging prior convictions, I think, is very substantial and was very substantial in this case.

Judge Breyer reached his result in this Paleo case without addressing the fact that other enhancement statutes explicitly permit defendants to challenge their prior convictions. We in Congress know how to draft statutes that permit challenges and those that do not. He also did not address the Supreme Court cases that distinguish between the absolute denial of counsel and the ineffective assistance of counsel. And he did not discuss a Supreme Court precedent on a prior version of the statute.

Judge Breyer's view of the statute was rejected by the Supreme Court in the Custis case in May. I hope that Judge Breyer will come to realize that the Supreme Court's interpretation of the statute was the correct one. His responses to my questions regarding Paleo do not provide me with very much comfort in this area, albeit maybe a limited area of criminal law. I stress the issue because of its importance to what we are going to be dealing with very shortly in the crime bill because of the "three strikes" provision that is within that crime bill.

Mr. President, in view of this nomination being before us and how I have discussed it, and all the considerations that have been brought to date, including my reconsideration of some points that Senator LUGAR addressed and mailed to us and that we have read about in the media on his view on this, because I have a great deal of respect for Senator LUGAR, I wanted to give those issues some further thought.

But I still stay with a positive view of Judge Breyer, and even though I have some concerns that I have addressed here, I view this nomination with hope. I suppose my concerns are not related to the issues that Senator LUGAR has brought up so much as there are some areas in some aspects of the law.

But I think overall this nominee, at least for those of us on this side of the aisle, is much less of a judicial activist than we would expect for a President of the other party to nominate.

For that reason, I want to vote for him in the sense that I do not consider him to be a judicial activist. So I support this nomination even though I do it with some reservation.

After he gets on the Supreme Court, then I want to see more of the judge who wrote the 14 years of well-crafted opinions than the judge who testified about a so-called expansive view of the Constitution.

I yield the floor.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. LUGAR. Mr. President, I wish to speak in opposition to the confirmation of Judge Stephen Breyer, and I would like at the outset of this statement to outline the case that I will make in order that Senators may follow the argument and then I will supplement these initial contentions with data from the press, from books, written on Lloyd's of London and in specific terms and correspondence involving Judge Breyer.

Let me just say at the outset, Mr. President, as my colleagues pointed out in opening this debate, confirmation of a Supreme Court Justice is for a lifetime term. There are no further opportunities for reevaluation after the vote that we have at 3 o'clock this afternoon.

Unlike our terms of 6 years and those of our colleagues in the House of 2 years, or many terms for Governors of 4 years, at that point there can be and are reevaluation of how things worked out not only in terms of our demeanor, but specific issues that come before the country.

Clearly, the Founding Fathers saw a lifetime term as a basic point of the independence of the judiciary. I do not argue with that. I commend that. But I remind Senators that this is forever. This is for the lifetime of this nominee so long as he may wish to serve. Therefore, if there are reservations they need to be spoken now.

The most important activity of a Justice of the Supreme Court is the exercise of good judgment in his deliberation and in his votes on issues before the courts.

I will speak, Mr. President, to the issue of the good judgment of Judge Breyer this morning. That I think is a central point at issue.

Furthermore, Mr. President, there are human predicaments in which past judgments and financial affairs of a candidate should preclude that candidate from seeking to perform a specific form of public service.

My argument, Mr. President, is not that Judge Breyer lacks qualifications for significant public service. Indeed, the record is replete with that service, and many have commended it. But Judge Breyer is not necessarily entitled to this specific role of public service, that is a lifetime career on the Supreme Court, beyond reservation and reevaluation, given the facts of his judgment and of his investments, which I will outline in due course.

Specifically, Judge Breyer is trapped in a troubled Lloyd's of London insurance syndicate from which he is unlikely to escape for a long period of time. It is beyond contention that the judge has been trapped, Mr. President. There is clearly an argument as to how the escape might be made and how either Judge Breyer's losses might be terminated or what are bound to be a long string of necessary recusals from various cases that will come before the Court, plus discovery of all of the ways in which Judge Breyer might have a conflict of interest in these cases.

The judge's affiliation with the specific Lloyd's syndicate, Merrett 418, will mean substantial personal financial losses for him and his family over several years and will force him necessarily to recuse himself from many cases that come before the Supreme Court of the United States involving

insurance, pollution, asbestos suits, other issues, surrounding broad reinsurance of Lloyd's syndicates. He exercised extraordinarily bad judgment in signing documents that placed him under the jurisdiction of English law and exposed him and his estate to unlimited liability.

I will go further into unlimited liability, Mr. President, but it means just what it says—unlimited, down to the last button, an extraordinary misjudgment for someone reportedly as astute, as intelligent, with a worldly view, as many of my colleagues have pointed out this morning, as he has looked at issues of commerce.

He entered agreements with underwriters that he did not know, involving matters clearly beyond his expertise and perhaps beyond the knowledge of what the underwriters were doing and yet pledged to them unlimited liability of his resources.

The growing troubles of Lloyd's of London should have been known to him as a sophisticated lawyer and investor. I make this point, Mr. President, because early in the debate this morning the distinguished Senator from Massachusetts, Senator KENNEDY, has pointed out that Lloyd's of London was a pillar of strength, a remarkable institution, and clearly the many years of its history do bear out that general statement.

But, Mr. President, by the early 1980's Lloyd's was troubled, and I shall point out circumstances occurring in the world, both in the United States and in England, that had already led to anxiety by those in Lloyd's and those who were investing in Lloyd's's about the future.

Acceptable investment alternatives should have been known to Judge Breyer, if they were known to anyone, as specified under Section 455 of the United States Code, title 28. That, Mr. President, is the section that deals with conflicts of interest with recusal, with the very specific ways in which a judge must take a look scrupulously at his personal finances and those of his spouse and his children to make certain there can be no complaint of conflict of interest.

Senators have asserted that Judge Breyer was not challenged by others demanding his recusal. But that is not the point, Mr. President. The obligation is on the judge. He himself must recuse himself. He must make the examination. This is not left to the good fortune of others who may discover a potential conflict of interest and demand conduct of the judge.

Judge Breyer's examination of the insurance documents he signed with Lloyd's of London was negligent. His poor judgment now places him in an unnecessarily embarrassing predicament which erodes public trust.

But, Mr. President, and this is the heart of my case this morning, whatever may have been Judge Breyer's faulty judgment, the problem now shifts to each of us who must vote on this nominee this afternoon. And Senators will have to bear in mind whatever else may be said in support of Judge Breyer, and his qualifications for service are substantial, each Senator who votes this afternoon should know that Judge Breyer has serious financial entanglements with the Lloyd's syndicate that will continue for years.

The Supreme Court sits at the pinnacle of the United States court system, and that system contains thousands of plaintiffs in cases involving litigation over pollution, asbestos, insurance and investment failures. If the financial resources of insurance companies, including Lloyd's of London, are insufficient to meet claims and court judgments in the future, the only recourse will be a monumental court or congressional rescue of a failing international insurance system. I make that point, Mr. President, because that is fairly predictable.

Senators have spoken this morning about the takings clause of the Constitution, about the ideas of property and person, about a number of issues, but issues that are clearly headed in our way in this body or to the Supreme Court are those involving the fact that claims still unknown, in addition to claims now known, add up to more reserves than international insurance companies appear to have.

And specifically in the case of Lloyd's of London, officials there have been rather direct in anticipating what they call a congressional fix.

Now, Senators ought to understand that, as we were thinking in humanitarian terms earlier this morning about individual plaintiffs who might face injury, the depiction they have in mind is that you cut off the liability, that you limit the exposure, that you save the reinsurance operation in the world by denying claims.

The contention would be that judges and juries and courts and perhaps Congress in the Superfund legislation, various EPA statutes, simply went well beyond the bounds of the resources available for all of the things that we were attempting to cure. And so, a rather large amount of law is likely to be involved in this monumental undertaking which rumbles clearly through the court system of the United States. It is not only predictable, it is observable.

Now, in the face of that, Mr. President, to confirm Judge Breyer to the Supreme Court, with this public knowledge that I am discussing this morning and will discuss for a while longer, that we as Senators now have of his financial quandary and of potential Supreme Court cases, that step would be imprudent on our part. My advice, respectfully given to the President of the United States, would be that he should have nominated someone else of equal qualifications as Judge Breyer—and such persons can be found in the United States—but who did not have the financial and very difficult investment baggage carried by the judge.

I appreciate in a very poignant way this is a personal tragedy for Judge Breyer. His ambition to be on the Supreme Court is obvious and his qualifications are substantial. But there is no entitlement to serve in this specific capacity if one bears these specific burdens.

Mr. President, I sent that outline to colleagues so they might examine it, and I hope they all have. But yesterday I issued another statement which begins to fill in a part of the outline.

I said, Mr. President, after a series of U.S. court decisions in 1980—and I cite 1980, Mr. President, because Judge Breyer's insurance underwritings as a Lloyd's name, as a person who shares in the underwriting of Lloyd's syndicates—these decisions of Judge Breyer took place between 1978 and 1988, in which apparently he attempted to terminate the relationship, unsuccessfully as I will point out, but he made that attempt. So between 1978 and 1988, on several occasions, not just in the final, fatal Merrett 418 syndicate, Judge Breyer was involved in signing his name to unlimited liability.

But in 1980, U.S. court decisions found that insurance policies must be strictly construed in favor of the injured and to promote coverage. The Court of Appeals of the District of Columbia held that all periods of insurance coverage were liable from inhalation of the first harmful asbestos fiber to incidents of asbestos-related diseases 30 years later.

That was a very significant decision, because this has led to what are known as the long-tailed liabilities of Lloyd's; long-tailed because the difficulty for the asbestos victim may be of 30 years' duration.

And once the courts had ruled that you cannot simply cut off the victim after the first year and before, really, the totality of the damage is done, but, rather, all periods are involved, that changed the actuarial rules of the game very substantially.

The California Supreme Court in 1980 had decided to shift the burden of proof from plaintiffs, who had been required to show that they had been harmed, to the defendant manufacturer. That is a very sizable shift. And in the case of Sindell versus Abbott Laboratories, plaintiffs were allowed to plead that they had been harmed by the drug DES, which had proved to be carcinogenic, even if they could not prove which manufacturer was responsible. The courts, therefore, were left to sort out who should pay and the period of exposure. The awards were very substantial from that exercise and occupied the courts in a very conspicuous way, Mr. President.

A substantial share of the financial burden of these claims, and the claims from other cases similar to these that came along in those days, fell on Lloyd's of London under its broad reinsurance policies. Lloyd's of London came into play because it is the reinsuring agent.

To take a very specific example, Mr. President, in the event that a company believes that it might have any kind of insurance liability and it insures with a company in the United States for that liability, as every commercial firm in this country must do, the insurance firm that takes that insurance may very well say, "We want to potentially limit our losses. We don't want unlimited liability." And, therefore, they assign or they buy a policy for a premium from Lloyd's of London to cover everything, say, over $10 million or everything over $1 million, depending on the size of the firm. In short, the insurance companies went to Lloyd's, and Lloyd's wrote premiums for the most extraordinary of cases. It had a reputation of doing this for over two centuries.

But if you should ask why should the asbestos cases or problems of DES have impacted upon Lloyd's of London or Judge Breyer, it is because the Lloyd's of London took the liability, and the Lloyd's of London files, like Judge Breyer, took on the liability, thus providing the capital with which the insurance company reached out to take on these cases.

Now, American lawyers were quick off the mark and they were vigorous in pursuit of asbestos victims in particular, with some setting up x ray equipment, vans parked outside of factories, and others using direct mail to mention recent asbestos victim awards in the six- and seven-figure range.

By the early 1980's—and I stress again the time period, Mr. President, because my point is that Judge Breyer, as a judge, as a sophisticated legal observer, as certainly a reader of the newspapers, would have been aware by 1980 that things had shifted markedly; the burdens to the company, not to the victim in terms of being a defendant; long suits, 30 years mentioned for asbestos in particular; long lines of attorneys, vans parked outside asbestos victims' places of employment. And by the early 1980's, U.S. courts have logged more than 25,000 asbestos cases awaiting hearings.

Now, in the midst of all of this legal and insurance change and turmoil, Judge Stephen Breyer repeatedly—repeatedly—signed on as a Lloyd's name from 1978 to 1988, assuming, on each occasion and with documents clearly in front of him, unlimited liability "down to the last short button," as the Lloyd's people point out.

Furthermore, he signed documents acknowledging that British law would pertain in any disputes arising from his obligations, an unusual thing for an American judge, a sitting judge, after his confirmation in the late 1980's to the Federal bench, to do.

In fact, the U.S. Court of Appeals for the Second Circuit ruled in 1991, and I quote from the ruling of that court:

> Plaintiffs went to England to become members of a distinctly British entity, invested in syndicates operating out of London, and entered numerous contracts, all of which stated plainly that Lloyd's affairs and plaintiffs' investments would be administered in England and subject exclusively to British law.

That was a part of their judgment which denied Lloyd's name who now were injured and were suing trying to get relief and that was denied by the U.S. Court of Appeals for the Second Circuit.

I would contend at the very least prudence would demand that a U.S. circuit court judge stop investing in such a troubled and complex enterprise. He should, instead, have followed section 455 of United States Code, title 28, which gives American judges clear guidelines for acceptable investments which do not get into conflict-of-interest allegations. And acceptable investments include mutual funds, for example.

A Lloyd's of London underwriting with unlimited personal liability and a very specific field of endeavor, namely insurance or reinsurance, is not by any stretch of the imagination a mutual fund—or a prudent investment. Section 455 does not come close to this. Judges that have had much less exotic responsibility than Judge Breyer have understood section 455 very clearly.

I contend that Members of this body, if not bound by section 455, ought to have a very clear understanding of what is involved here. I come at this debate this morning as a person who was involved in business and in farming. I am not an attorney. I have never consulted section 455 prior to this debate on Judge Breyer.

But at a very early point—and I suspect that point arrived for many of us—as a candidate in the Republican primary for mayor of Indianapolis, I was advised, thank goodness, by people who had pretty sound judgment, that if I had any, even New York Stock Exchange securities, I ought to dispose of those—even the small number of shares that I had in General Motors because Alison Division was a local firm and I admired and respected and had worked for that firm in the summertime. I disposed of those because at some point someone would say, "In your public judgments you are guided by the investment you have in a firm for gain. You have an equity position in a firm for gain." I disposed of those securities as a matter of common sense.

I would say most judges have done so a long time ago. This is an exotic case, a sitting Federal judge signing Lloyd's of London underwritings for 10 years and finally getting caught in a disaster for him and, I believe, for us in terms of the involvement that continues on in this predicament.

It has been suggested by some that no convincing explanation has been offered of how Judge Breyer's environmental rulings could have benefited him. But I suspect that is hardly the question. It is a much cleaner ethics situation than that. Judge Breyer has to find out in advance his investment situations and his potential difficulties. For us, at least, we must look toward the future, and the international situation hovering over Lloyd's is a very bleak future.

This judge will not be out of Lloyd's for a long time, and as I pointed out earlier, the Supreme Court sits at the pinnacle of those difficulties.

Mr. MURKOWSKI. I wonder if my friend would yield for a question?

Mr. LUGAR. I will yield briefly to the distinguished Senator from Alaska.

Mr. MURKOWSKI. I thank my friend from Indiana. I compliment him for bringing out the significance of that guarantee in the case of Judge Breyer.

It is my understanding that the implications of the guarantee are unlimited, and could carry on beyond his lifetime and into his estate and his heirs, whatever the ultimate liability associated with the claims that are outstanding?

Mr. LUGAR. The Senator is correct.

Mr. MURKOWSKI. If I may follow up, could the judge transfer those assets that he currently has in his estate to his wife or his family to shield them from the possible claim? Or is that prohibited under the arrangement that he has with Lloyd's, covering the current guarantee, which I would assume may be joint and several?

Mr. LUGAR. I would defer answer to that, really needing more legal advice of what the judge's options are. He has been exploring them substantially. But I am not certain what his research may be and I will not speculate on that.

Mr. MURKOWSKI. But, if I may follow up, one might assume that Lloyd's would require a guarantee substantive enough to ensure that there was an actual claim on his assets or his estate, and he would not have the flexibility of simply transferring those assets, if indeed it appeared that those assets might be threatened?

Mr. LUGAR. That is fully possible. Lloyd's has been aggressive in pursuing the amounts that are due under these reinsurance contracts. The courts are filled, really, with these suits.

Mr. MURKOWSKI. And I would assume that one would recognize the significance of giving an unlimited guarantee associated with an investment. While, obviously, the potential return is perhaps significant and very difficult to measure, nevertheless a prudent person would consider the risks and the implications of an unlimited guarantee.

Has there been or does the Senator from Indiana have any knowledge of Judge Breyer's explanation of why he, perhaps, did not think that this was as significant as the risk turns out to be?

Mr. LUGAR. To my knowledge, the judge was not asked during the committee hearings or in any literature that I have seen.

As I will point out as I proceed through my speech, an article by Mr. Jim Glassman of the Washington Post drew my attention, and perhaps that of other Senators, to the nature of this investment and how imprudent it appears.

Mr. MURKOWSKI. I thank my colleague from Indiana for allowing me to interrupt his presentation. I am very concerned about this as well, because I think it shows where the judge perhaps became an insider in this investment, as is often the case where you depend on other sophisticated partners to guide you. Nevertheless, one would expect a nominee to the Supreme Court to have that extra perception to understand the implications of an unlimited guarantee. I look forward to hearing my colleague's continued evaluation of this.

I do want to say this Senator from Alaska is very uneasy about this nominee, not on the basis of his qualifications on the bench or his record on cases, but because of the lapse of judgment associated with entering into an agreement involving unlimited liability. Having been in the banking business a long time I can tell you, once you give your unlimited guarantee you have given it until the obligation is satisfied. And if you are on joint and several, it does not make any difference whether there are four or five others. One might think you would have to share proportionately. They can go after your assets and exhaust them in any manner or form. And of course that may affect the judge having to recuse himself on issues before the Supreme Court.

It is a very troubling issue. I commend the Senator from Indiana for the depth of his analysis. I wish him well.

Mr. LUGAR. I thank the Senator. Mr. President, while on that subject the Senator from Alaska has raised, let me just point out that Judge Breyer's unlimited liability pertains only to precisely his share of the underwriting.

White House counsel has pointed out it is approximately one-five-thousandths of the Merrett 418 syndicate. Even though it is unlimited for that one-five-thousandths, he at least does have that limitation.

Likewise, White House counsel has pointed out that Judge Breyer has stopped loss insurance as deposits on tap there with Lloyd's anticipating losses and that Tetsat, the accounting firm in Great Britain that tries to make estimates of what kind of long-tailed losses are going to occur, estimated that Judge Breyer's losses will be 3½ to 4 times what they have been at the present time, based upon their best guess, which takes him up somewhere around $180,000, in the worst case scenario that the White House sees.

The dilemma is that the White House may not have seen far enough. The common idea cast about, not in hearings but I think informally among Senators, is that Judge Breyer is going to work very hard to get himself out of this predicament in 1995, next year. Indeed, there is a firm or an idea of a firm called NewCo, which is to be a vast reinsurance firm in which those who are in a predicament like Judge Breyer try to fence in the dilemma. It is a Lloyd's idea because they are finding it very difficult to get investors for the future, with the thought that reinsuring and rolling over all of this means a compounding problem for them, literally a snowball out of control.

The dilemma for Judge Breyer specifically, and for the American names who are active along with Judge Breyer, and others, is that it is doubtful that those who have a stake in this will want to invest that much more money in reinsurance to stake out the unknown. In other words, how could these investors have any idea ultimately of the last asbestos suit or the last Superfund suit? As a matter of fact, they do not.

Senators ought to understand that. There has been a rather bland assurance by White House counsel and by others soothing about Judge Breyer's predicament that he really cares about this, and he sure does. He got out in 1988, and I will recite a letter in my testimony shortly from Judge Breyer to his agent in London—trying to figure out what in the world to do—last December long before he came to this nomination.

But he has a horrendous problem because the nature of reinsurance is that you keep trying to reinsure the unknowable. As the flood waters come up over the dike, you have to reinsure again. The problem for Lloyd's is there may not be, in all of Lloyd's, enough reserves to face the claims that are on the horizon for them.

That is what led me to make a comment which really requires a lot more explanation. Lloyd's, and many other people in the insurance business, are looking to this body—us—in addition to the Judge Breyers of this world, and the Court, for a fix. How do you ever stop the flood set in motion by the number of suits that are out there, as well as those still to come?

Mr. MURKOWSKI. Mr. President, one would assume, if I may just follow up on the point of reinsurance, if the judge were successful in attempting to negotiate some type of reinsurance, his personal guarantee, unlimited as it is now, would follow because they certainly would take no less than what they have now, and that is an unlimited guarantee.

So the judge would not be getting out of the extended liabilities associated with this unlimited guarantee.

Mr. LUGAR. When the reinsurance scheme fails, you are back to square one again with Merrett 418. The idea is that somehow this is fixable. The judge has explored, as we know, on public record, various ways of trying to buy out of the situation; one scheme for $250,000. I have correspondence from Mr. Rosenblatt of the American Names, which says it might cost the judge $1 million. But even then, you do not know, until these long-tailed claims have come in, whether the reinsurance thing itself failed.

Mr. MURKOWSKI. Who would want to buy out the judge's position for a million dollars, and be saddled with the unlimited liability associated with the guarantee, which is an ongoing unlimited guarantee? No one would buy that unless there was a tremendous price paid for it.

Mr. LUGAR. Mr. President, that is why I come to the conclusion that the analysis of how Judge Breyer is going to get out of this has almost the same faults as Judge Breyer's analysis of getting into it.

This is one of these horrendous predicaments overtaken, and I cited a few cases of how the law changed. The defendant became the firm, not the plaintiff or the individual person who is suffering. We took a 30-year view of liability, not a very short run. The courts simply found, in fact—and the most conspicuous failure clearly known to Judge Breyer was the bankruptcy of Johns Manville in 1982. That really opened it up for the world. It may have been an insider game before that time. Johns Manville, a very large American corporation, went under and is still under. Lloyd's of London is almost going to go under because of the Johns Manvilles of this world, and everybody else involved in these sorts of businesses.

When we passed Superfund, we set in motion a whole series of predicaments that ricochet out there, and will do so for a long time.

In this body, we are discussing reform of Superfund. Reform gets to some of these issues: How do you cap the losses and the liabilities that are out there? Hard to do, as the papers are replete with stories of how it is hard for us, the 100 of us, to renegotiate that very important point.

Let me say, for most Members—and I would acknowledge these articles specifically—the Lloyd's Superfund business came to our attention in two articles in the Washington Post, one by Mr. Benjamin Weiser in the June 17, 1994, edition in which he entitled it: "Lloyd's of London's Big Losers, Some American 'Names' Face Financial Ruin."

Very specifically, Judge Breyer's predicament came to our attention in an article in the Washington Post of July 20, 1994, written by James K. Glassman, entitled, "For High Court Nominee Breyer, an Injudicious Investment."

Mr. Glassman, in his summation, said:

But something about Breyer worries me more. How smart and judicious can someone really be if he invests in a mess like Merrett 418? Is he dumb or merely oblivious? Or does he just love to gamble with his family's fortune? Also, imagine the prospect of a Supreme Court Justice facing bankruptcy because of Superfund and asbestos claims. Even if he recuses himself from such cases on the High Court, he'll be embarrassing not only to himself but the institution.

Mr. President, in favor of Judge Breyer, I will say, at least on paper, his net worth and that of his wife is apparently in the $6 million to $8 million range, we are advised. White House counsel has said, surely even if the judge's payments to Lloyd's mount upward and upward and go on for years, he is not going to run through $6 million or $8 million. I have no idea, as the distinguished Senator from Alaska, how the Breyers have arranged their affairs as to the liability of family members in this respect.

My question is not the bankruptcy of Judge Breyer, and I pray that will never come to pass; it is the judgment of the judge, his judgment that we ask of somebody on the Supreme Court of the United States, and preferably not a judgment entangled in any way by the monumental looming problems of Superfund and the asbestos claims.

The New York Times, in its lead editorial of June 26, 1994, just this week, starts out with a headline: "A Cloud on the Breyer Nomination."

The New York Times editorial said:

Eager for swift confirmation of the Supreme Court nominee Stephen Breyer, Senators of both parties are rushing to a floor vote without fully investigating significant ethical issues connected to the nominee's investments. This irresponsible failure by the Senate leaves Judge Breyer with a cloud still hanging over his nomination.

Judge Breyer, who is Chief Judge of the U.S. Court of Appeals in Boston, answered the Senate Judiciary Committee's questions for 3 days and won unanimous clearance for a floor vote scheduled for tomorrow. But the committee failed to fully explore the judge's participation in pollution cases, despite his investment in a Lloyd's of London venture that heavily insured asbestos and toxic pollution risks in this country.

At issue is Judge Breyer's compliance with the Federal recusal statute, which requires judges and justices to disqualify themselves when their impartiality "might reasonably be questioned."

Mr. President, members of the Judiciary Committee have cited a number of legal scholars who wrote to the committee, I presume at the invitation of the committee, to discuss the ethics of Judge Breyer.

But not all of those legal authorities reached the same conclusions. I wish to read from the letter written to Chairman BIDEN on July 13, 1994 by Prof. Monroe H. Freedman, Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University.

He says:

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 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. Section 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 Federal disqualification statute (Section 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 "people who have not served on the bench are often too willing to indulge suspicions and doubts concerning the integrity of judges." Section 455(a) was therefore adopted to "promote confidence in the judiciary" and to eliminate those "suspicions and doubts."

Let me just say, Mr. President, the professor continues:

I have quoted at some length from the controlling Supreme Court cases * * * because, so far, they have been virtually ignored in these hearings.

He is speaking of the judiciary hearings and is speaking of the cases Liteky, Liljeberg, Tumey, Murchison, and Lavoie.

Neither Professor Stephen Gillers nor Professor Jeffrey Hazard—

These were also professors who wrote to the Committee—

discussed these cases in their letters to the Committee in which they conclude that Judge Breyer did not violate the Statute.

Judge Breyer was a member, or Name, in the Lloyd's Merrett syndicate 418 in 1985, insuring asbestos and pollution losses. 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 in Lloyd's liability $12 billion. For years, therefore, the Names have been understandably generated.

The New York Times has described Judge Breyer's membership in Lloyd's as "A tricky investment." Although Judge Breyer has assured this committee that he will get out of this membership as soon as possible, this is a questionable pledge. He himself has testified 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 than $1 million to insure himself against his personal share of the syndicate's losses. Even then, he would remain liable if his insurer could not pay.

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 base 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."

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 hardheaded actuaries, not overly optimistic politicians eager to minimize the true dimensions of the judge's difficulties.

Having said that, let me emphasize that my opinion does not depend upon the precise size of Judge Breyer's liability. 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 Section 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.

But under Section 455(c) of the Disqualification Statute, the Judge had an absolute responsibility to inform himself about his personal * * * financial interests * * *. 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.

In fact, Judge Breyer did violate the statute in failing to disqualify himself. Take, for example, United States v. Ottati & Goss, Inc. Two years after Liljeberg explained the broad scope of Section 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 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 Judge Breyer to 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.

And I quote the professor further:

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 Statute 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.

Now, Mr. President, I will not go through the additional analysis of the professor. But let me just say that one other point I suspect needs to be made about the nature of Judge Breyer's investment under Section 455, and I quote Professor Freedman further:

Another contention is that the Judge's membership in Lloyd's is "analogous" to being an investor in a mutual fund, therefore 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 the 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 been found to their dismay in recent years.

In a rather colorful description, Mr. President, of this predicament Lance Gay writes in the Washington Times of today, July 29, 1994, a lead paragraph:

Here is a deal of a lifetime. I dug a large hole in my backyard and invited friends and strangers alike to come and throw all of their savings and deeds and their homes into it. The best investment opportunity you will find, too good to pass up, Lloyd's of London, and just your cup of tea. All you have to do is commit all of your worldly belongings to Lloyd's, and you can become a Lloyd's name and member of one of the most exclusive clubs.

I point out that it has become a lot less exclusive throughout the 1980's. As a matter of fact, the cachet attached to that was irresistible. And the Lloyd's names rose to over 30,000. They are disappearing by the thousands as rapidly as people are able to jump ship fully knowledgeable that they are unable to explicate themselves.

Mr. President, all of this, of course, comes to Judge Breyer's attention at various stages. He wrote on December 13, 1994, last year to the Director of L. W. Stearns, Limited, who served as an agent for Judge Breyer apparently with regard to his more recent Lloyd's under writings.

Judge Breyer is asking first of all if it is possible for the agency to release the letter of credit, that he deposited 5,000 pounds already in Lloyd's hoping that somehow that this can release, as he puts, more money. But the poignant paragraph is on the second page, fourth paragraph. I quote from Judge Breyer's letter to them.

What are the prospects of my leaving Lloyd's? I resigned in 1987. My reasons * * * are related to my job, namely, Federal Judge, and the disqualification that membership requires, to any Lloyd's losses (for there then seemed to be none) yet, apparently—

In Judge Breyer's language—

I am captured for the rest of my life, despite the small likelihood that losses will exceed my stop loss. Is anyone proposing to do anything about this kind of problem? Should it not be possible, for example, to buy a reasonably priced policy promising to pay any excess liability arising say a decade from now over and above my 125,000 pound stop loss coverage, and, having done so, leave Lloyd's? I should very much appreciate any help you can give me with these questions. Since I must respond about the settlement offered before the end of January, I should be particularly grateful for a speedy reply.

The poignant aspect of this are not only Judge Breyer's difficulties here, but it is the fact that he really does have a situation he still does not apparently understand.

Let me, Mr. President, try to bring more understanding of that.

I received a letter from the law firm of Robbins and Keating, Mr. A.R. Robbins, writing this letter, and he writes:

Richard Rosenblatt, the President of the American Names Association—

That is Lloyd's name.

Requested that I send you a copy of the Lloyd's of London General Undertaking required to be signed by Names of Lloyd's during the 1983–1988 period by the justice bars and underwriting members. The attached form was adopted by the Council of Lloyd's, the governing body, for application in 1987 underwriting years, and subsequently all names required to sign the document, as well as the standardized document, or to continue or to commence underwriting at Lloyd's for the 1987 underwriting year, and subsequent * * *.

And so forth.

In the course of this letter, Mr. Robbins points out:

Once committed, the name cannot cancel or withdraw from these commitments until they are paid, adequate reserves are fully reinsured. If reinsurance, however, cannot be provided with specific syndicates in which named participant pays, then it must remain open until the claims run off; until they are paid, which may take many years, and involve very large liabilities, specifically if the syndicate had inherited reinsurance of old policies which were written on a current basis with unlimited liability, and with the agent of the Lloyd's policies—

That is, an agent of policy; broad language.

construed to cover asbestos, and long-tailed claims which date back as early as 1939. It has been reputed that Merrett is meritorious to respond to one of the worst syndicates. These provisions are intended to operate in tandem to deny U.S. names access to U.S. courts giving them recourse only to the courts of England.

As I point out, Mr. President, the remedy for Judge Breyer, therefore, does not lie in the courts of the United States. It lies in England. But still it is a very unusual thing for an American judge to sign with some sophistication, at least in the American system.

Mr. President, let me quote from a letter dated July 13, 1994, by Mr. Rosenblatt of the American Names Association. He says:

I have no personal opinion as to whether or not Judge Breyer should be confirmed by the Senate. The purpose of this letters is to clarify some misunderstandings about Lloyd's. There are few people in this country, or anywhere else who understand Lloyd's and the calamity which has befallen the entrapped innocent American Names. It has been said that there are two kinds of Names: those who are ruined, and those do not know they are ruined. Possibly, Judge Breyer falls into the latter category.

His statement tend to show that he doesn't understand the nature or scope of his predicament. According to the New York Times he stated that he can get out and that he "in February * * * wrote to lawyers in London emphasizing his strong desire to get out Merrett 418, saying he wanted to avoid syndicates involved in American tort liability * * *". He is in for life, and his heirs are in unless something is done by U.S. courts, regulatory bodies, or legislation.

Mr. President, back to the fixes that I have indicated earlier on, widely contemplated by many:

The American Names Association, of which I am Chairman, has almost 700 members, and all are in the same dilemma as Judge Breyer, with the exception that they understand the nature of their dilemma. There is no way to get out of Merrett 418, or any of the other hundreds of open years syndicates. There are, inside Lloyd's, some schemes where, ostensibly, a Name could buy unlimited reinsurance for an extremely high price. The problem with this is that the syndicate which might sell such insurance may be himself in danger of collapse, as is all of Lloyd's. In that case, Judge Breyer would find itself back with all of his unlimited liabilities for the rest of his life, is children's lives, and so on, having also lost the cost of this expensive reinsurance. One does not get out of Lloyd's by dying, as the estate remains liable. Bankruptcy would be the only sure way to get out of Lloyd's.

Judge Breyer has referred to the possibility of getting out in 1995.

Judge Breyer is not the only one. Lloyd Cutler, White House counsel, and other persons are trying to reassure the Senate that 1995 is the time to finally bring an end to this.

This would be in connection with a scheme developed by the brokers and agents who have gained control of Lloyd's, and which is called "NewCo".

I would point out, Mr. President, that Lloyd's no longer is entirely financed by these unlimited liability names, like Judge Breyer. But, in fact, one-sixth of the capital now comes from corporations who have prudently taken limited liability. So you have this odd mixture of corporations with pretty hardheaded managers limiting their liability, along with the amateurs, the names.

This is a theory that the worst hit Names would deposit large sums of money in order to form a "ring fence" around all of the old open syndicates, and then this entity would take care of all of the losses up to that time. It is a fantasy that the worst hit Names would be in a position to voluntarily raise the kind of money which would cover all of the asbestos, pollution, product liability, and all of the possible losses from the past, which could amount to hundreds of billions of dollars. The principal beneficiary of such a structure, would be the future members of Lloyd's,

They would be the beneficiaries,

rather than those making this gigantic sacrifice. The theory is not practical, and has been raised purely to satisfy current needs to

get past Government authorities, and to impress gullible future investors.

Lloyd's was opened up to American investors, purely to shift unquantifiable future losses away from the insider controlling group. Our organization—

In speaking of the American Names,

has accumulated tens of thousands of documents which prove that Lloyd's has become a giant ponzi, which includes misrepresentation and multi-level marketing schemes, all of which violate our state and federal securities laws as well as insurance laws.

I make that point, Mr. President, and I underline Mr. Rosenblatt's rather poignant plea, as one of the Names, to point out that the idea cast about this Senate debate that an investment in Lloyd's was a sound, prudent investment, is disastrously wrong. Members really need to understand the nature of that type of a situation.

Lloyd's enjoys immunity—

Mr. Rosenblatt continues:

from suit by Act of Parliament. Americans did not know, and were not informed by Lloyd's. Our organization is commencing a lawsuit in the U.S. challenging the fraudulent nature of these agreements. This case may well reach the Supreme Court.

The problem with Marine Syndicate 418—

and the one the nominee belongs to,

stems from the fact that it is not really a marine syndicate. It is a "long-tail" syndicate, which means it may be many years before the true nature of the losses will be known. Since there is no way for a Name to get out of these latent liabilities, short of bankruptcy, the situation is termed "unquantifiable loss."

Mr. President, in the course of this statement, I have tried to establish that I doubt the good judgment of Judge Breyer when I survey the wreckage that I have laid before the Senate this morning. But it is not simply a personal tragedy for Judge Breyer, of which he may still not understand the nature of his dilemma; if Judge Breyer is naive, we as Senators have a responsibility for something more. The bland assurance that Judge Breyer invested in a sound institution—Lloyd's of London—and has some bad luck, Senators have pointed out that we have all had investments that did not work out. Who here has guessed right all the time? This was not simply an unsound investment, or two or three; Judge Breyer signed away everything—unlimited liability—in a foreign land, subject to foreign law. And now, as I have quoted from his letter to his agent last year, he wonders what can keep him from being a captive to this situation forever. A very tough predicament for an American judge.

I have cited Professor Freedman's testimony that there is at least contention by some legal counsel that Judge Breyer already violated section 455. In any event, if he were to come onto the Supreme Court, he has a rigorous job of scholarship to do. He must find out what all Merrett 418 does, in short, very broadly, and how many cases are coming through the courts and through appeals now that are touched by that. He has an absolute obligation to do that. I simply ask, is it useful for the Senate to confirm somebody who must recuse himself from a substantial body of law and judgments? Would it be useful for the Members of the Senate to come to the Senate burdened with situations, and on the first day recuse themselves from votes on this floor? That is not very substantial representation for our States, and I contend that Judge Breyer must give some thought to whether he can give really a full measure of devotion to the task he seeks.

Finally, Mr. President, I come back to my plea that even at this late date, the President of the United States surely ought to consider the record that is before us. If Judge Breyer made difficult judgments, they are in the past. We must make a difficult judgment today. Senators cannot claim that they did not know of all of this. For at least the past hour, I have tried to recite it in the most concise way that I can. I cite to Senators the book, "Ultimate Risk," by Adam Raphael. Unfortunately, it was published only recently in London and is not available, I gather, to most Senators. But, clearly, it is a book that goes definitively into the Lloyd's problem and specifically the dilemmas facing Judge Breyer.

I am hopeful that even if Senators read "Ultimate Risk" after the vote, they will be knowledgeable about what we face, because the problem is not just Judge Breyer, it will be the Senate and the catastrophes and Superfund and all of the case law involving asbestos claims and all of the problems of reinsurance that are coming along the trail. They are going to hit us as well as the Court. I hope that when they do, the team on the field is able to enter with clean hands, without allegations of conflict of interest, and certainly with more confidence in the judgment of the American people.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER (Mr. DECONCINI). The Senator from Pennsylvania [Mr. SPECTER] is recognized.

Mr. SPECTER. Mr. President, the Senator from Indiana has given a very detailed statement on his concerns. When the Senator from Indiana speaks in this Chamber, he is listened to very carefully. Although I could not be here for the opening of his presentation because we had a caucus on the health care legislation, I was here for most of his presentation. I am on the Judiciary Committee, and I did hear Judge Breyer's testimony, including the closed session. There are a few comments which I would like to make in response to what the Senator from Indiana has had to say.

I think that, fairly, Judge Breyer has to be evaluated on the totality of his record. He has to be evaluated on his academic record, which is outstanding—Stanford and Harvard Law School. He has to be evaluated on the basis of his work with the Law Review at Harvard, his scholarly writings in law journals, his books, and his work for the Judiciary Committee, where he came into personal contact with many members of the committee—not this Senator, because I was elected in 1980, his last year of service—and then his work on the court of appeals for the first circuit. I have read many of his opinions, and, in my judgment, he is a very, very distinguished legal scholar. So that his activities with Lloyd's of London and the investment which the Senator has detailed, I think, fairly have to be considered in the total context of his record, which is extraordinary in terms of scholarship, ability, and intellectual capacity.

On the issue of prudence, we must consider that Lloyd's of London has had a very profitable 300-year history, but as the Senator from Indiana has outlined in his account, there have been losses. A question arises as to what could be anticipated by someone like Judge Breyer, who made an investment.

The laws on asbestos were unfolding and Johns Manville was a big red flag. But what was a man in Judge Breyer's position to know about the specifics of Lloyd's investments, or what was he to inquire upon?

When you talk about the Superfund law, which the Congress passed in 1986, if someone made an investment in the late 1970's and into the 1980's, it is hard to figure out what the Congress will do next. We ourselves do not know what we will do next. So that when liability is imposed as a result of Superfund, which imposes liability going far beyond the time of an investment, really on the land itself, how can Judge Breyer's prudence be questioned for not anticipating what the Congress of the United States would do at some future date?

Judge Breyer testified to this effect:

When I went into Lloyd's, I viewed it as a very conservative investment in which in fact you were exposed to insurance companies that sell and insure and buy anything in the world.

He went on to say:

As a practical matter and as a theoretical matter, I believed, and I still believe, that my risks and benefits would consist of several thousand dollars of 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 even meant for the worst case that went up to about $150,000.

As the Senator from Indiana has stated, the liability of Judge Breyer is one five-thousandths of what would happen to his Lloyd's syndicate.

There has been a statement on the floor by the Senator from Alaska about

joint and several liability, and unlimited liability, which do not apply in this case. Joint and several liability means that any individual who is liable jointly and severally could be liable for whatever Lloyd's might be involved in. But I think there is agreement that in this case Judge Breyer's liability is not joint and several, but it is pegged at one five-thousandths of what losses this particular investment might incur.

What are the facts? As best we know them in the estimates that have been given by authorities who presented the evidence to the Judiciary Committee, in the worst case scenario Judge Breyer's exposure is $187,000. The underwriter projects the losses for his share at substantially less than that, at $50,000. He has personal loss insurance of $188,000. He has already paid the $37,000 deductible, and insurance will cover the next $225,000 in losses, and Judge Breyer has retained earnings of $220,000 held by Lloyd's.

Now, beyond that, as the Senator from Indiana himself has noted, the assets of Judge Breyer and his wife are very, very substantial, as Senator LUGAR articulated, in the $6 million to $8 million category.

It is important to know that Judge Breyer's wife's assets could not be reached. He could retain both his home and his pension fund, and his future earnings would be beyond reach.

So even projecting the very, very speculative considerations here, there is an outward limit realistically as to what Judge Breyer would have to pay, and it is far, far less than his assets. And he does have insurance to cover those losses.

You can always say that the insurance company which is covering his losses might be insolvent, but that raises another level of speculation. And the question is whether it is reasonable to deny Judge Breyer confirmation by the U.S. Senate based on this one factor alone.

The Senator from Indiana has spoken at some length about the issue of conflict of interest, and that was a subject which the committee inquired into in some detail. The provisions of the relevant statute as to conflict of interest I submit clearly have not been violated, and that is the opinion given by the legal scholars who made an evaluation on the issue of ethics and on the evaluation of the statute.

But rather than rely on the experts, I think the Senate Judiciary Committee and the individual Senators have an independent duty to take a hard look at the law and evaluation as to what the facts are. The relevant provision of section 455 of title 28 of the United States Code, the recusal statute, makes it a conflict if there is any interest that could be substantially affected by the outcome of the proceedings.

I questioned Judge Breyer on decisions handed down by the First Circuit which could affect Superfund liability, where even though Lloyd's was not an insurer in that particular case, the case might establish a principle which could have an effect on Lloyd's liability in some other case.

I think that that is always a risk which is involved when a judge sits on a case, even though none of his investments may be a direct party, that the ruling could affect some other potential party that he might not even know about. And as I said at the hearing, I believe that there ought to be further legislative consideration as to whether the standards of section 455 are adequate, whether it is necessary to have a broader exclusion so that judges or other Federal officials would not make such investments.

But I think on the face of this statute, which is defined as any other interest that could be substantially affected by the outcome of the proceeding, that in the cases on which Judge Breyer sat there is reasonable certainty that this section was not violated, not only by the terms of the experts who testified and submitted letters, but by an examination of the cases on which Judge Breyer sat.

When the Senator from Indiana refers to his own personal experience when he was sworn in as mayor of Indianapolis in 1967 and decided not to have any stocks on the New York Stock Exchange, not even General Motors, I think that is a judgment that an individual may choose to make.

From my own perspective, the forms are so complicated that they are not worth the time and effort. But I think it would be an undue restriction to say that someone who had an investment in General Motors ought to be compelled to give that up if he is to be a Federal judge, or if he is to be a U.S. Senator. And I state that I do not have an investment in General Motors or any similar company or in any company except an investment which was made in a small retirement fund that I had from my former law firm.

It is not easy to encourage people to come into public life with all of the problems which are attendant to being in public life. The microscopes are very high powered, and I think it is fair that they ought to be for a nominee to the Supreme Court of the United States. But to say that there cannot even be an investment in something like General Motors, while it might be the personal preference of the Senator from Indiana, my own view at this moment is that that goes too far.

But I do believe, by way of brief repetition, that the disqualification provisions of the statute ought to be reexamined, that we ought to take a look to see if there is some remote benefit to stock interest that a judge may have even though that interest is not represented by any specific party in the litigation.

The totality of the issue on Lloyd's of London, Mr. President, I think boils down to at least my conclusion that when Judge Breyer made his investment, based on the 300-year history of the case, it was understandable that he would think it was a conservative investment, as he testified, and that he did try to extricate himself in the mid-1980's, to leave the investment, and that he cannot be held accountable for the additional liability which may be imposed or was imposed by the Congress in 1986, long after he made the investment.

If you take a look at the hard facts of the case, there is a very, very remote possibility that his liability would exceed his insurance, and that his overall assets will not be jeopardized even under the worst-case scenario, as outlined by the Senator from Indiana, and that there are assets which are beyond the reach of the Lloyd's of London liability if in fact the sky were to fall in.

The totality of Judge Breyer's record, Mr. President, I think has to be evaluated in deciding whether we choose to confirm Judge Breyer. My conclusion is that he ought to be confirmed. I say that based upon his capability and his record and the way he responded to questions at the Judiciary Committee hearing.

We have had a practice in the past several years that nominees have answered only as many questions as they have to. We saw a situation with Justice Scalia where he would not even say that the bedrock case of Marbury versus Madison was beyond reconsideration by the Court. That is the case which gave the Supreme Court the authority to be the final arbiter of the Constitution.

When Justice Scalia appeared before the Judiciary Committee, his confirmation was virtually assured because of the facts of that particular year. We had just gone through a very tough confirmation hearing with Chief Justice Rehnquist and it was prudent for Justice Scalia not to respond to much, and he responded to virtually nothing.

We had Judge—later Justice—Souter come before the committee. He responded to very few questions. I asked him a question about whether the Korean situation was a war, and he said he did not know. He declined to answer. That, I think, is an important question.

When Judge Breyer was asked the question, he responded in a direct way that the Korean incident was a war. Why is that important? Because the Supreme Court may be in a position of being the final arbiter on conflicts between the Congress and our sole and exclusive authority to declare, and the President's powers as Commander in Chief.

This floor, which is empty at the moment, has been filled in recent days on very lively debate about whether we ought to invade Haiti. There is a sense-of-the-Senate resolution that the President ought not to invade Haiti. I and others have said that if the President wants to retain that option, he ought to come to the Congress and ask for it; that his powers as Commander in Chief are really for an emergency situation only; and that if he wants authority, it ought to be the Congress which grants that authority, just as the Congress passed a resolution authorizing the use of force in Kuwait.

So on a question which really has very, very serious ramifications, Judge Breyer was forthcoming.

When it came to the issue of the death penalty, which is a subject of really great concern—some 37 States in the United States have the death penalty—there are many who believe, myself included, that the death penalty is a very valuable weapon in the arsenal against criminal violators. And I have concluded that based on the experience that I had as district attorney of Philadelphia for some 8 years.

When we asked Justice Ginsburg whether she had any conscientious scruples against the death penalty, in a context where her confirmation was virtually assured, so many Senators having spoken in advance, she in fact said it was none of the Senate's business and she would apply the law. But then we see later opinions coming out where the impact of the death penalty is cut back. So I think that is a fair question to ask.

And Judge Breyer was forthcoming on that issue.

We asked him questions on the critical matter of the separation of church and state. He said that he agreed with Jefferson's statement that there is a wall of separation between church and state. That is a matter of tremendous importance, as is the free exercise clause, in light of the case of Smith versus Oregon, where the Supreme Court of the United States did not impose the highest standard of strict scrutiny on the free exercise of Congress, and Congress had to legislate on the subject. There are some today who say that the constitutional doctrine of separation of church and state is a lie of the left; that there is no such doctrine.

So it is very important in evaluating the qualifications of a nominee and the reliance on precedents to have that kind of a question answered. And Judge Breyer was forthcoming on that question and many, many others, without reviewing the full transcript.

I had expressed some concerns or some reservations about the nomination process generally. It seems to me that the Supreme Court would be better served if there were members of the Court who had a broader background; if someone like Bruce Babbitt, who has experience as a Cabinet officer, a Governor, and a Presidential nominee, who was considered for the Court, would be nominated, or some Members of the Senate had been considered for that position; that there is a certain uniformity in the Court today, with eight of the nine Supreme Court Justices having come from other appellate courts, seven of them from Federal courts of appeals, and one from a State court of appeals. And Judge Breyer is right in that line. So some greater diversity would be useful. But that is certainly not a disqualifier.

So that on the totality of the record, it is my view that Judge Breyer is qualified for confirmation.

He came through the Judiciary Committee with a unanimous 18-to-0 vote. Everybody on the Judiciary Committee felt that he was qualified.

The issue of Lloyd's of London was a subject of very substantial inquiry by the Judiciary Committee. When the Senator from Indiana speaks on a subject, I—and I think uniformly in this Chamber, we—listen to what he has to say very, very carefully.

But on the issue of prudence and whether Judge Breyer is sufficiently prudent to be a Supreme Court Justice, I am confident that the fair way to evaluate the Lloyd's of London's investment is on one state of the record, combined with the balance of his record, which is outstanding. And even on the Lloyd's issue, there was substantial reason for him to believe at the time he made the investment, as he testified, that it was a conservative investment and his liability was limited.

With respect to the future issue of conflict of interest, the number of cases which reach the Supreme Court which might even remotely or speculatively involve that issue, I think, would be very, very minimal.

Judge Breyer has outlined a protocol, if confirmed—and I think he will be confirmed—which he will leave with the clerk's office so that he can recuse himself or disqualify himself if that should become necessary.

On the issue as to whether this is going to wreck him financially, it is very, very, speculative that any losses would exceed what he is insured for. And if they would exceed what he is insured for, there are substantial assets that he has to cover them, and substantial assets beyond which would not be subject to reach for the Lloyd's of London liability, at the very worst.

So on this state of the record, I intend to vote for Judge Breyer for his confirmation, and I urge my colleagues to do the same.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. CRAIG addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, I rise this afternoon to express my intent to vote for the confirmation of Judge Stephen Breyer to the U.S. Supreme Court.

My decision on a Supreme Court nominee's fitness is based on my evaluation of three criteria—character, competence, and philosophy—by which I mean the nominee's judicial philosophy, when I speak of philosophy, Mr. President; in other words, how the nominee views the duty of the Court and the scope of the authority.

It is my strong belief the judiciary should hold to its original purpose, neither to rubberstamp legislative decisions, nor to be overreaching to act as substitute legislators.

Judge Breyer satisfies my criteria and I think satisfies the concerns of a majority of the Senators. However, I do have some concerns that I want to express about issues that arose during the confirmation hearings.

I think it is important they be on the record, for I hope it is important that the judge, when he is confirmed, will take note of some of these concerns.

My concerns relate to private property rights.

One article about the confirmation hearings reported that Judge Breyer said Government clearly can impose some legitimate regulations without compensation, while other rules could go too far. He said there are no fixed legal rules on where to draw the line. "You always come back to a kind of human judgment—what is too far," he said.

The report goes on to say that Judge Breyer stated property rights cannot be elevated to the same plane as fundamental liberties, such as free speech.

This is a judge who talked about respecting the precedent of the Roe versus Wade decision on abortion.

I certainly hope he is equally respectful of the Supreme Court's private property rights case, including the recent Dolan versus Tigard decision.

Chief Justice Rehnquist wrote:

> 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 a poor relation in these comparable circumstances.

In other words, Judge Rehnquist was saying that certainly takings of private property in this instance are every bit as important, while Judge Breyer says they may not be. I hope he would come to believe in the Dolan versus Tigard decision.

The war to reclaim private property rights in America is not just being fought in the Supreme Court. For the people of my State of Idaho and other parts of the American West, this is literally a matter of life and death—whether their traditional livelihoods will be destroyed by the stroke of a regulator's pen.

I am not saying we should give less weight to the fundamental liberties of

free speech and the like. Just give equal, fair consideration to all rights preserved under the Bill of Rights, as our Founders obviously intended them. To attempt to downgrade the taking clause of the fifth amendment is to ignore history. If any of the rights guaranteed in the Bill of Rights were less important, they would not have been enumerated as they were.

There is one other point I would like to raise about the confirmation hearings. We have tremendous problems in the West with arbitrary, painful regulatory decisions of a number of agencies. The Bruneau Hot Springs snail and the northern spotted owl, as it related to the Endangered Species Act, are creating tremendous problems in the West. I do not believe any Member of the U.S. Senate voting for the Endangered Species Act ever believed that these kinds of things would occur. But the law is now being used, and these are very real problems that have resulted. Even Interior Secretary Bruce Babbitt has admitted there are problems associated with the bureaucracy. He announced administrative changes in June that he hoped would make the endangered species listing, for example, less arbitrary.

I applaud Judge Breyer's interest in cost/benefit analysis in regulatory decisions. However he takes his point too far. One article summarized a proposal from Judge Breyer's book on regulations as follows:

He proposes creating an elite corps of regulators to assess risk and apportion resources accordingly.

I do not think we need an elite corps. We need fewer and more clear laws. That becomes part of the judge's responsibility in delineating that. We do not need the kind of arbitrary decisionmaking that has been allowed.

I think, though, the quote from his book clearly reflects a complete lack of understanding for the way regulations affect the real people in the real world. We do not need regulators drawn into a tighter circle, given more authority and power. Certainly the citizens of Idaho would say just the reverse.

Frankly, we need what even Bruce Babbitt says he is pursuing: Better oversight by regulators and by the Congress; more input from States and local authorities and private property owners. You know, this is a Government of the people and by the people, and not of regulators and by regulators. I am afraid maybe Judge Breyer might need to learn a few lessons in that area—if he continues in his service on the Court—to be more even-handed.

My point is the rights guaranteed in our Constitution are the only protection we have against bureaucrats overstepping their authority. We, the Senate, stand in between by making good law. But when it goes beyond that, we do need courts with a clear vision of what the intent of the Constitution is, and I hope the judge would come down in that way. Unless jurists in the high court, like Judge Breyer, are consistent in recognizing private property equally with other rights in the Bill of Rights, none of our constituents can be assured any of their rights will be adequately protected.

So I hope in the judge's confirmation and his service on the Court he will take in a much more serious vein, private property rights as an extension of human rights, the right of the citizens as spoken to so clearly in our Constitution. But with that admonishment and that concern, I do believe the judge meets my three criteria of character, competence, and philosophy as it relates to the Court. And for those reasons I will vote for his confirmation.

Mr. President, I suggest the absence of a quorum and ask that the time be evenly divided.

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

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. WARNER. Mr. President, I rise to join others to speak in support of the nomination of Judge Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

The Senate's advise-and-consent responsibility for Presidential nominees to the judicial branch, most particularly to the Supreme Court, is one of the most important responsibilities given to this body by the U.S. Constitution. I, like others, take this responsibility very seriously.

This constitutional responsibility as applied to the judicial branch, I believe, is unique. It is distinguished from our responsibility with nominees for Cabinet posts, senior military, or ambassadorial posts.

Judicial nominees are in a separate category because they form the third branch of our Government, a branch created by joint effort between the executive branch, the President nominating the members of the judiciary, and the legislative branch, namely, the Senate exercising constitutional authority under the advise-and-consent clause.

Mr. President, I have followed the proceedings of Judge Breyer's nomination and confirmation hearings very carefully. I also reviewed the briefing material available to Senators on Judge Breyer's personal background and his extensive legal career. Using this information, I made an analysis of the various calls and letters and other communications directed to me by my constituents from Virginia. I also reviewed, given the nature of the calls, the testimony of Mr. Michael Farris, a Virginian and the president and founder of Home School Legal Defense Association, who spoke in opposition to this nominee.

This area of home schooling and religious schools was of particular concern to a great many of my constituents as manifested by the testimony of Mr. Farris. These constituents asked me to determine: "What are Judge Breyer's views on home schooling and private religious schools?"

Constituents specifically referred to Judge Breyer's opinion in the case of New Life Baptist Church Academy versus The Town of East Longmeadow in the Federal Circuit Court of the First Circuit in 1989.

Given the seriousness of these questions, I proceeded as follows:

First, I studied the opinion just enumerated in the Longmeadow case. The next step was to prepare for the Judiciary Committee, during that committee's review of Judge Breyer, a series of questions.

At the hearing, the nominee, on my behalf, was asked—that is July 21, 1994—to give the committee his views on home schooling and private religious schools and his interpretation of how the Constitution protects these schools, most specifically under the First Amendment.

With his response in the official record, I then scheduled a meeting with Judge Breyer in my office to further inform myself about the nominee, his overall qualifications and, specifically, to discuss the issues of concern raised by Virginia constituents. I asked Judge Breyer to expand on the questions relating to home schooling and religious schools and to put them in a letter, which he most respectfully forwarded promptly.

Mr. President, I ask unanimous consent that a letter addressed to me by Judge Breyer on the subject of the Longmeadow case be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

JULY 22, 1994.

Hon. JOHN W. WARNER,
Senate Russell Office Building, Washington, DC.

DEAR SENATOR WARNER: Thank you for your questions about the rights of parents to determine how to educate their children, and in particular about the opinion in *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989).

I did listen carefully to the criticisms of the *New Life Baptist Church Academy* opinion, and I recognize that they have been made in good faith. As I understand them, the criticisms are that the opinion endorses government prohibitions of home schooling, and gives government too much leeway to regulate religious education. In my judgment, these criticisms misstate the meaning and effect of the *New Life Baptist Church Academy* case.

The opinion does not endorse the view that government may prohibit home schooling. It is well established that the "liberty" guarantee of the Fourteenth Amendment ensures parents' right to "direct the upbringing and education of children under their control." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925). As I stated during the Judiciary Committee hearings, I regard this principle as settled and I have no bias whatsoever against home schooling. The opinion in *New Life Baptist Church Academy* expresses no disagreement with this principle. The case did not involve home schooling at all; it involved the accreditation of a private religious school.

The case did raise a difficult issue of balancing a religious organization's freedom under the Free Exercise Clause of the First Amendment to educate their children according to their beliefs and the government's need to ensure that all students receive a basic education in subjects such as reading and math. In deciding the issue, the court applied a test substantially more protective of religious liberty than the current Supreme Court test established in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Recognizing the Academy's "sincere, relevant religious belief," our court in *New Life Baptist Church Academy* required the state to show that its interest in regulation was "compelling" and that there was no practical "less restrictive" way of achieving the state's objectives.

The particular question was whether the state could evaluate the secular education provided through occasional classroom visits or, instead, was required to evaluate the secular education through a system of voluntary testing of each child. Our court held that the latter system (a system that, in the court's view, no state had previously used) was not practical, threatened to entangle the court in religious matters, and offered only comparatively minor benefits to religious schools generally. Consequently, the court held that the Constitution permitted the school board's "school visit" evaluation system. While people of good faith can disagree about the merits of the case's outcome, I should hope that most would see it as a close and difficult case, which might have come out either way. I should also hope that the case would be evaluated in the context of my overall record, which is quite protective of religious liberty.

I hope that this has been helpful. My best wishes.

Sincerely,

STEPHEN G. BREYER

Mr. WARNER. Mr. President, a review of this letter with constituents who continue to call seems to meet most of their major concerns.

Accordingly, Mr. President, I find Judge Breyer a highly qualified professional to become a member of the U.S. Supreme Court. His financial problem raised today by one of our most distinguished colleagues, is a problem, indeed. But in my judgment, it is an investment, perhaps unwisely made in hindsight, but that is separable and a single issue from his overall, very extensive and commendable accomplishments throughout his professional career as a lawyer.

Accordingly, I will vote in favor of Judge Breyer when this body turns to the vote later today.

Mr. President, I would like, at this point, to read into the RECORD briefly from the letter sent to me by Judge Breyer on July 22:

DEAR SENATOR WARNER: Thank you for your questions about the rights of parents to determine how to educate their children, and in particular about the opinion in *New Life Baptist Church Academy* v. *The Town of Longmeadow*.

I did listen carefully to the criticisms of the New Life Baptist Church Academy opinion, and I recognize that they have been made in good faith. As I understand them, the criticisms are that the opinion endorses Government prohibitions of home schooling, and gives Government too much leeway to regulate religious education. In my judgment, these criticisms misstate the meaning and effect of the New Life Baptist Church Academy case.

The opinion does not endorse the view that Government may prohibit home schooling. It is well established that "liberty" guarantee of the fourteenth amendment ensures parents' right to "direct the upbringing and education of children under their control."

He cites the Pierce case of the Supreme Court in 1925.

As I stated during the Judiciary Committee hearings, I regard this principle as settled and I have no bias whatsoever against home schooling.

Mr. President, I would like to repeat that:

I regard this principle as settled and I have no bias whatsoever against home schooling.

I read into this letter the word "settled," that is settled by judicial opinion.

The opinion in New Life Baptist Church Academy expresses no disagreement with this principle. The case did not involve home schooling at all; it involved the accreditation of a private religious school.

The case did raise a difficult issue of balancing a religious organization's freedom under the free exercise clause of the first amendment to educate their children according to the beliefs and the Government's need to ensure that all students receive a basic education in subjects such as reading and math. In deciding the issue, the court applied a test substantially more protective of religious liberty than the current Supreme Court test established in *Employment Division* v. *Smith*.

A Supreme Court case of 1990.

Recognizing the academy's "sincere, relevant religious belief," our court in New Life Baptist Church Academy case required the State to show that its interest in regulation was "compelling" and that there was no practical "less restrictive" way of achieving the State's objectives.

The particular question was whether the State could evaluate the secular education provided through occasional classroom visits or, instead, was required to evaluate the secular education through a system of voluntary testing of each child. Our court held from the latter system (a system that, in the court's view, no State had previously used) was not practical, threatened to entangle the court in religious matters, and offered only comparatively minor benefits to religious schools generally. Consequently, the court held that the Constitution permitted the school board's "school visit" evaluation system. While people of good faith can disagree about the merits of the case's outcome, I should hope that most would see it as a close and difficult case, which might have come out either way. I should also hope that the case would be evaluated in the context of my overall record, which is quite protective of religious liberty.

I hope this has been helpful. My best wishes. Sincerely, Stephen G. Breyer.

Mr. President, when I reviewed that letter, together with a number of facts from other persons who continue to call, the letter, in my judgment, relieves the concern that they had. I thank them for calling me.

I yield the floor.

Mr. GRAMM addressed the Chair.

The PRESIDING OFFICER (Mr. WELLSTONE). The Senator from Texas is recognized.

Mr. GRAMM. Mr. President, I want to speak a moment on the Breyer nomination. For 12 years, I stood on the floor and listened to debate as many of my colleagues on the left sought to win in the Senate what they could not win at the ballot box by opposing nominees by President Reagan and President Bush with whom they disagreed philosophically. I want to make it very clear to my colleagues, and obviously to the folks back home in Texas, why I am going to vote for Judge Breyer and why I think it is the only proper vote.

Elections have consequences. When people in America voted for Bill Clinton they knew, or they should have known, that when it came time for him to nominate a justice for the Supreme Court of the United States and for lower courts and for other positions of authority, that he was going to nominate liberals; that he was going to nominate people who reflected his views and the views of the Democratic Party.

I have voted against Presidential nominees during the Clinton administration but only under very limited circumstances. I voted against those that I believed were not qualified and those that I thought were not credible. I have also voted against those who hold views that are outside the mainstream of liberal Democratic thinking. I have opposed those nominees who hold views that Americans who voted for Bill Clinton could have never conceived that by voting for him, they were setting the foundation for the nomination of people who held views that were contrary to the Constitution or contrary to the basic American principle of the rule of law in private property.

I would never have nominated Judge Breyer had I been President. No Republican would have nominated Judge Breyer because his views are fundamentally different than ours. Judge Breyer came very close to at least hinting that he viewed the protections of property in the fifth amendment as not being as strong or as clearly defined as the protection of speech. I do not agree with that. If we are not secure in our right to property, then we are not secure in our right to free speech.

Certainly in terms of an expansive definition of the Constitution, I have

no doubt that Judge Breyer is going to make rulings that represent a different interpretation of the great document that I have and that people who share my values have.

But I also believe that Judge Breyer's views are mainstream liberal views. I believe that anyone who voted for Bill Clinton knew or should have known that the chances that anyone more conservative than Judge Breyer being nominated by Bill Clinton were almost zero.

So my view is, Mr. President, that elections have consequences. Those who are unhappy with this nomination will have an opportunity to say something about it this November, and they will have a bigger opportunity to say something about it 2 years from now. But when we held the election for President, the American people spoke, and Bill Clinton was elected. I am not going to try to win, on the basis of philosophy, victories in the Senate that my party could not win at the ballot box. Elections have consequences. The election that we held in 1992 had consequences, and one of those consequences is Judge Breyer. Within the constraints that Bill Clinton was going to nominate a liberal to the Court, the person he has chosen is as good as any of us had any right to expect him to be. The President came down to a decision between a politician and a jurist. He chose a jurist. I cannot very well lament that this is not someone that I would have chosen.

So I am going to vote for this nominee, not because I agree with him philosophically but because I believe he is qualified. I believe he is credible. I believe his views, though they are different from mine, are within the mainstream of the thinking of his political party. And whether I like it or I do not—and I do not—the American people put Bill Clinton into the White House. This nomination is a result of that, and I am not going to stand in the way of it because I differ philosophically with this nominee.

I yield the floor.

Mr. McCAIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. McCAIN. Mr. President, as we all know, we will soon vote on the nomination of Judge Stephen Breyer. I think we all also are aware that Judge Breyer will be confirmed by the Senate by an overwhelming vote.

I believe he has received a fair hearing from both sides, and, clearly, as my friend from Texas just stated, he would not have been the choice if there had been a different result of the 1992 election. The fact is that the results of the election indicate that the President of the United States not only has the right to select, in his view, the best qualified members of the Supreme Court but also many other positions in Government. And with rare exceptions, I have tried to give the President of the United States the benefit of the doubt.

I have had serious concerns about Judge Breyer's role in the $500 million Boston Courthouse project, a project that I still believe is an exercise in extravagance, arrogance and a callous disregard for the taxpayer. As we all know, Mr. President, being a Justice of the Supreme Court is all about good judgment and discretion, qualities that have been sorely lacking in the development of the Boston Courthouse. Allegations about the extent of Judge Breyer's involvement in this matter have been quite troubling to me.

Mr. President, when Judge Breyer was asked at the hearings by one of the members of the Judiciary Committee, Judge Breyer rolled his eyes, acted as if it was somewhat of a tiresome issue, and then proceeded to basically blame the General Services Administration for any problems that might have arisen concerning the Boston Courthouse. That, frankly, Mr. President, does not really coincide with Judge Breyer's comments that he made to the Washington Post, and I quote from the article that was on the front page of the Washington Post that said:

> The courthouse that Stephen G. Breyer built will stand on a spectacular stretch of Boston Harbor, a 10-story, $200 million block room of courtrooms and offices turned into something more by a vast public atrium. On the outside, there will be parks and a boating dock; on the inside a day-care center, a theater, a community meeting hall, a restaurant and an art gallery.
>
> This, Boston's new Federal courthouse, has been Breyer's responsibility as chief judge of the First U.S. Circuit Court of Appeals, and the unusual shape it will take says much about the philosophy and temperament of the man who may become the next Supreme Court Justice.

I continue the quote from the Washington Post article, Mr. President:

> Breyer personally interviewed the architects applying for the project. He consulted with community and environmental groups. While cycling through the countryside of France three years ago, Breyer stopped, gazing at the buildings he encountered, talking animatedly with the locals about their design. He called his aunt in San Francisco about how to make the building more accessible to children. He visited courthouses around the country, mining for ideas, and pored over the original plans for the Supreme Court in Washington, all the while insisting on a Boston complex that would expand the definition of courthouse from legal to civic, a place open in the evenings and weekends, a place inviting to the community.
>
> "This most beautiful site in Boston," he said at the time the project was unveiled, "does not belong to the lawyers. It does not belong to the Federal Government. It does not belong to the litigants. It belongs to the people."

Mr. President, that really does not coincide with Judge Breyer's comments in response to questions before the Judiciary Committee. And there is something interesting about this also; in Judge Breyer's commitment to beauty and all of the things, "the most beautiful site in Boston," never once did Judge Breyer mention any concern about the cost, which is now around $500 million for a courthouse, to the point where, Mr. President, the courthouse now has to have a $270 million subway built to reach it so it will be accessible to the people.

It has a 6-story atrium, 63 private bathrooms, 37 law libraries, 33 private kitchens, custom-designed private staircases, a half-million dollar boat dock, nearly $800,000 for original artwork, and $1.5 million for a floating marina. All of this and more to be built on the most expensive and least functional site that was considered.

The pricetag to the taxpayers, as I mentioned, is $500 million, $300 million for the courthouse and $200 million to extend the Boston subway system to the new facility.

I think it is well to note, too, Mr. President, that somehow State and local courthouses are not required to have this kind of "belonging to the people at the most beautiful site in Boston." In fact, the cost of the Boston Federal Courthouse is three times the cost of building a new State courthouse that is in the same area. Private bathrooms, libraries, and kitchens are certainly nice perquisites, but State judges seem to be able to do without the expense of these items. Why is the Federal judiciary so needful and deserving of palatial accommodations? The answer is that they are not.

I also noticed, Mr. President, that Judge Breyer is a man of some wealth. I did not see Judge Breyer in his desire to have everything for "the most beautiful site in Boston. It does not belong to the lawyers. It does not belong to the Federal Government," et cetera, willing to spend any of his substantial wealth in order to make this a beautiful project.

As chief judge of the First Circuit Court of Appeals, Judge Breyer was the liaison on the Boston project between the judges and the General Services Administration.

How can such a project possibly be justified at a time when we are asking every sector of our society to tighten the budgetary belt, to do more with less, and to help reign in our monstrous public debt? Not just certain Senators, but the public finds such extravagance at the expense of the taxpayer to be simply outrageous.

I wish I could say that Boston was an exception, but such excesses have been uncovered in a number of projects, from New York to my own State of Arizona.

The good news is that the sunlight of public scrutiny on this issue, and a more enlightened and responsible leadership at the General Services Administration, is improving the situation. The GSA has implemented a program of time-out and review to reassess Federal building projects, including courthouses, to better protect the taxpayer. But, we must continue to be vigilant.

I am greatly disturbed that it took the weight of congressional inquiries and the force of public outrage to wake up the judiciary and the administration to the abuses involved with the courthouse construction program. I'm even more troubled that judges upon whom we depend for their good judgment and unswerving advocacy for the public interest have been party to this pattern of excess and abuse at Boston and elsewhere.

For the record, not all judges have allowed that to happen, such as the Federal judges in Louisiana who sought to cut the costs of their facility. Regrettably such vision and accountability was not the case in Boston. Again, that is why I have been so concerned about Judge Breyer's role, and the reason I submitted a series of questions to the judge to determine the precise level of his involvement.

I want to thank the judge for his cooperation in responding to my questions. I would be less than candid if I did not acknowledge that I still have some lingering concerns. However, Judge Breyer has assured me that all appropriate procedures and ethical standards were observed in the site selection, scoping and development of the project, and that as chief judge of the circuit he acted properly. Despite my nagging concern, I will accept his word.

I might add that the inquiry into the Judge's role at the Boston Courthouse has been extremely helpful in the effort to curb future abuses by highlighting a serious problem regarding the responsibilities of the Judiciary and the executive branch for the development of courthouse projects.

Judicial officials claim that their role is merely advisory and that the General Services Administration is the absolute authority on the site selection, scope, and design of building projects. General Services Administration officials claim that due to the separation of powers they defer significantly to the wishes of the judiciary. Ill-defined and misunderstood division of responsibilities, and the lack of clear accountability is a recipe for waste and inefficiency. The Administrator of the GSA has made significant progress in addressing this situation, and we must continue efforts to define clearly the responsibilities of the two branches, and ensure that there is accountability to Congress and, most importantly, to the taxpayer.

Again, I thank Judge Breyer for his cooperation. I wish him success, and I hope that good judgment and discretion will mark his tenure on the Supreme Court.

I do not believe that he was candid and forthcoming in his answers concerning the courthouse, particularly in light of the comments that he made to the Washington Post. I do not believe that is sufficient reason for me to oppose his nomination. But I think that there will be questions that are going to be asked about this project in the future as the costs continue to escalate, and the expense to the taxpayer remains unjustified.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. BRADLEY). Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, I yield myself such time from Senator BIDEN's time as I may need.

As I have stated throughout the nomination process, Judge Breyer is clearly a man of exceptional legal skill and high intellectual ability. However, I am disturbed about this nomination for a number of reasons.

I am concerned and bothered that Judge Breyer was not sensitive about his holdings in Lloyd's. He did not realize that his holdings could subconsciously affect his thinking when he decided cases dealing with environmental law.

I believe that Judge Breyer has the potential to become a good Justice.

Will he become a good Justice? I am not sure.

However, to do so he will have to develop a big heart and become more sensitive to the economic concerns of ordinary people, small businessowners and the little guy. He will also have to display better judgment about when to recuse himself from cases in which there could be a conflict with his personal investments, or even the appearance of a conflict.

I have made no secret of the fact that I am extremely disappointed that Judge Breyer failed to recuse himself from the Ottati case. At the time he was sitting in judgment on the EPA's superfund clean up policies, Judge Breyer had a large investment in environmental liability insurance through a Lloyd's of London syndicate.

Most of us Americans have very little knowledge about Lloyd's. I must confess that I learned more about Lloyd's during the Judge Breyer confirmation process than I had learned in my entire lifetime. But Judge Breyer knew what Lloyd's was about.

It should have been clear to Judge Breyer that his decision to make it more difficult for EPA to force polluters to clean up hazardous waste sites would be criticized. Because of his Lloyd's investments, Judge Breyer could have spared himself, and the rest of us, a great deal of soul searching and debate if he had used better judgment.

He saw fit to recuse himself from all cases having to do with asbestos because somehow the Lloyd's investment of his might be involved. But he did not see fit to recuse himself from the environmental cases.

There is no doubt in my mind that Judge Breyer's Ottati decision favors polluters over the EPA. It reduces the EPA's ability to move in quickly and force polluters to clean up the Hazardous waste sites they left behind. In my view, reducing EPA's ability to clean up Superfund sites threatens the health of every man, woman, and child who lives or works nearby.

The sixth circuit was extremely critical of the way in which Judge Breyer substituted his own judgment for that of EPA officials. The court stated that it is "not the job [of the reviewing court to] reformulate a scientific clean-up program developed over the course of months or years."

Frankly, I would have agreed with the sixth circuit's criticism of Judge Breyer under any circumstances. However, his Lloyd's investment makes the situation worse. The fact is that Judge Breyer's investment in Lloyd's of London's Merrett 418 syndicate includes extensive environmental pollution coverage that could have been affected by the Ottati Decision.

As I have learned, Lloyd's insurance syndicates are not like conventional investments. To join a syndicate, investors must pledge their entire net worth to cover future losses. So, even though Judge Breyer has pledged to get out of Lloyd's as soon as possible, it may not be possible for him to do so. There is no way that he can step forward and sign a piece of paper or put up so much money and feel that under those circumstances he can get out of his Lloyd's obligation.

Even Judge Breyer has said that his Lloyd's investments may have "captured" him for life. Judge Breyer's prediction has been confirmed by a legal expert on American investors in Lloyd's. He wrote to me that "There is no way to get out of Merrett 418. One does not get out of Lloyd's by dying * * * bankruptcy would be the only sure way to get out of Lloyd's."

In other words, this albatross hanging over his head, this albatross of an investment, is going to be around Judge Breyer's neck for years and possibly for decades. He has suggested to us that he was buying a reinsurance policy to cover over his losses in Lloyd's, or that he could do so. But the fact is that if that new insurance policy goes belly up and does not have the money to meet its obligation, then the

obligation falls back on everybody who was in the Merrett 418 syndicate. According to this same Lloyd's expert, Merrett 418 is a "long-tail syndicate, which means that it may be many, many years before the true nature of the losses will be known."

Claims against Lloyd's Merrett 418 syndicate can expose Judge Breyer to costly liability claims from asbestos lawsuits and environmental pollution cases, including Superfund cleanup, for many years, and an indeterminate number of years into the future. Merrett 418 investors face claims and losses that are currently estimated at between $725 million and $825 million, but the situation could get worse.

The fact is that Judge Breyer should have recused himself from the Ottati case because of his investments in the Lloyd's of London insurance syndicate. It is not enough to say, well, he just did not think of it that way. It is not enough to say: Well, I got out of the asbestos cases, but I did not get out of the pollution cases. Even if it was not a violation of ethical standards, it was simply bad judgment for a man of Judge Breyer's intellect not to have done so. And it would be inexcusable if he did not recuse himself in the future.

On that point of recusing himself in the future, Judge Breyer told the committee that he had some idea about posting at the Supreme Court, if he were confirmed, a list of what his holdings were, and that if any lawyer on either side felt he should recuse himself by reason of possible conflict of interest, he would do so. I thought that over for a number of days, and that is a totally unrealistic approach. It is totally unrealistic to expect some lawyer to go in and ask a Supreme Court Justice to recuse himself. The decision and the determination of whether he should recuse himself belongs in the heart and head of Judge Breyer, and I am not sure at this point that he will recuse himself. I am not sure that he does not think that, just as in the Ottati case, he could hear the case and still, in spite of his holdings in Lloyd's Merrett 418 syndicate, go ahead and adjudicate that case.

I am also concerned about Judge Breyer's views on the fair competition laws which affect the day-to-day lives of all Americans. To date, his record has not been impressive for a judge who is supposed to have a big heart. He almost always votes against the very people the antitrust laws are supposed to protect. A 1991 study in the Fordham Law Review reported that in all 16 of his antitrust decisions, Judge Breyer voted against the alleged victim of antitrust abuse. At that time, Judge Breyer had the worst antitrust record of any Federal judge appointed by President Carter. It was even worse than most of the judges appointed by President Reagan—and that is going a long way.

Let me give you an example. In a controversial decision, Judge Breyer overturned a $39 million verdict for the consumers of a small electric company. A jury had found that these consumers had been overcharged because of the anticompetitive tactics of an electric conglomerate that controlled the market. Instead of relying on the jury's judgment, based on 13 days of expert testimony, Judge Breyer made up his own graph and chart. It was a graph to explain why consumers should not get the $39 million verdict.

But Judge Breyer did not convince me or the consumers who lost the $39 million verdict that a hypothetical graph and chart did justice in this case. Frankly, I am not sure that legendary trustbuster, Teddy Roosevelt, or the father of our antitrust laws, Republican Senator John Sherman, would have approved of Judge Breyer's view of protecting consumers.

I regret to say that Judge Breyer's antitrust record has not improved much since that decision. In response to my antitrust questions during the nomination hearing, Judge Breyer told me that he does not keep track of the number of times he rules in favor of the defendant. That may be so. But the facts speak for themselves. I am concerned that unless Judge Breyer stops seeing antitrust law in terms of abstract economic theories displayed in complicated charts and graphs about widgets, he will continue to favor big business over mom-and-pop operations and everyday consumers. Small businessmen and women and consumers want justice under the antitrust laws, not a graph on supply and demand theory.

My goal during the committee hearings was to sensitize Judge Breyer to the law's impact on ordinary people. I hope I have been successful, because that is how history will measure whether he becomes the big-hearted Supreme Court Justice that President Clinton believes he can be. Usually around here, I pretty much know which way to vote. I pretty much come down on one side or the other, and I say that is it, and I am not going to worry about what the consequences are. But in this instance, I have mixed feelings—not about the consequences, but about what is the right decision. I do not think this was a great appointment for our President. I think that Judge Breyer is far less of a jurist than we should accord a position on the Supreme Court.

I want to say publicly that I take off my hat to Senator LUGAR. He has made a strong case against confirming Judge Breyer. I am sorely tempted to vote with him. I am frank to say that even as I am speaking here, I am having concerns as to which is the right vote, despite the fact that I voted for Judge Breyer's confirmation in the Judiciary Committee. I have mixed feelings as to what is the right vote. One of the things that bothers me much is that I did vote in favor of confirming Justices Scalia, Kennedy, and O'Connor, and how do I reconcile that with a vote against Judge Breyer?

It is with serious reservations and a heavy heart that I will vote to confirm him. But it is not a vote that will make me particularly proud. I hope that Judge Breyer, as he ascends to the Supreme Court, will become more of a jurist, more of a judge, more fair, more sensitive to the concerns of the little people that come before the Court, those who do not always have the high-powered lawyers, those who are not part of the corporate world.

They come before him, and when they come before him, I hope that Judge Breyer will be far more sensitive than he has been in the past.

Frankly, I think that is what this country expects of him. Whether or not he will reach that goal, whether or not he will be the jurist that some of us had hoped for the next Supreme Court jurist, only time will tell. But I will vote for him. It is not my proudest day.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise in support of the nomination of Judge Stephen Breyer to serve as Associate Justice of the Supreme Court of the United States.

The Senate Judiciary Committee recently held 4 days of hearings, including a closed session to comprehensively consider the qualifications of Judge Breyer to sit on the Supreme Court.

It is unlikely that I would be in accord with President Clinton on every nominee that he puts forth to serve on the Federal bench. In fact, I recently opposed one nominee which he nominated to sit on the Eleventh Circuit Court of Appeals. However, I believe in granting the President some deference pursuant to his constitutional authority to fill Supreme Court vacancies.

I had a favorable impression upon learning of Judge Breyer's nomination to the Supreme Court because I have known him for almost 20 years. Judge Breyer came to my attention when he began work on the Senate Judiciary Committee, serving later in a most capable manner as chief counsel of the committee, and in 1980 he was nominated to serve on the U.S. Court of Appeals for the first Circuit. Judge Breyer has served with distinction on the first circuit and has been chief judge of that circuit since 1990. Additionally, Judge Breyer was nominated by President Reagan and served ably on the U.S. Sentencing Commission to address disparities in sentencing under Federal law.

Mr. President, I was encouraged by a number of Judge Bryer's responses to questions during his confirmation hearing. Specifically, when questioning

Judge Breyer on the death penalty, I pointed out that if confirmed, he would succeed Justice Blackmun who recently stated his belief that the death penalty is inherently flawed under the Constitution. I was pleased when Judge Breyer stated that he would take no such bias on capital punishment to the Supreme Court. Judge Breyer did not hesitate in his recognition that the death penalty is settled constitutional law.

On another matter, questions were raised concerning Judge Breyer's ruling in the New Life Baptist Church case which dealt with religious schooling. During his hearing, Judge Breyer made it clear that he has no bias against home or religious schooling. He remarked:

[t]here is nothing more important to a persons 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.

Judge Breyer said that the religious freedom protection under the first amendment of the Constitution protected the right of parents to pass along their religion to their children free from State interference. It was his belief that anyone attempting to prevent home schooling would face "very, very serious constitutional challenges."

Mr. President, it was encouraging to receive Judge Breyer's thoughts on judicial precedent, stare decisis, and judicial activism. Judge Breyer stated at the hearing: "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." His comments on this matter reflect my own views on the separation of powers between the judicial and the legislative branches of government. At one point during my questioning of Judge Breyer, he stated succinctly and appropriately, "a judge should not legislate from the bench." I was pleased to hear those remarks and it is a good indication that Judge Breyer will show appropriate deference to laws passed by the Congress.

Mr. President, Judge Breyer does not appear to have an ideological bent to move the Supreme Court in one direction or the other. Judge Breyer expressed his desire to administer justice according to the law while being mindful that even archaic judicial decisions ultimately impact upon the lives of individuals.

Based on my knowledge of Judge Breyer for almost 20 years, I am satisfied that he is a man of keen intellect, a capable jurist, and qualified to serve as an Associate Justice on the Supreme Court of the United States.

I yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I rise out of concern for Judge Breyer's nomination to be an Associate Justice of the Supreme Court. I have listened with interest as other Members have expressed opinions of the judge and his record, and I would like to share a few thoughts in this regard.

First of all, Mr. President, let me say that I come to this debate with concerns about Judge Breyer in a couple of areas. He has indicated that he is comfortable with Supreme Court rulings which give second-class protection to property rights. Judge Breyer has also indicated that he recognizes as settled law the restrictions that the Court has placed on religious expression. I strongly disagree with Judge Breyer on both of these issues. But I will end up voting for his confirmation, and I would like to explain the reasons why.

As I listened to the judge articulate his judicial philosophy and his approach to issues, I found that he displayed a keen sense of objectivity and willingness to look at facts and make an honest inquiry.

If there were one quality I would like our Supreme Court Justices to have, it is a willingness to listen to the facts and be objective and independent. I came away convinced that Judge Breyer has that quality—he has a willingness to listen and an objectivity that we need so desperately in our judges. In addition, he has not only a very keen mind but a willingness to use it in scientific inquiry.

Some Senators have come to the floor and expressed concern about the ideas expressed in his most recent book "Breaking the Vicious Cycle." The book itself is a compilation of lectures that he has given. As I read that book, I found not an expression of political opinion, but an objective inquiry, using logic, facts and scientific evidence to examine the way government regulates. The book suggests that we can achieve a better fulfillment of our desires and a better use of our limited resources by looking at the facts and examining the best, most efficient way of allocating our resources.

How some Members can find this a disqualification for service on the Supreme Court defies my imagination. We need a Justice who is willing to look at the facts, and who is willing to make a decision based on those facts.

Any fair reading of the book "Breaking the Vicious Cycle" will reveal that he did not advocate a particular political philosophy and, more assuredly, that he did not advocate shortchanging environmental concerns. Instead, the book suggests that we ought to analyze everything and maximize the use of the resources that we have.

I find that willingness to look at facts and that willingness to maximize our resources as laudable, and an excellent contribution for the Court, not a disqualifying factor.

Last, Mr. President, let me comment on the concerns that some Members have raised regarding ethics. Some have looked at the Lloyd's of London investment and thought of it as being simply irreconcilable with proper service on the Court.

The committee did a very thorough job of examining this area. I think most Members would be interested to know that there was not a single, solitary case pointed out where Judge Breyer had ever exhibited a bias, much less had any direct interest. Second, I think Members were impressed with the almost unbelievably meticulous method that the judge followed to ensure not only that he had no interest in any case that came before him, but that there was no indirect, minor connection to any of his interests.

Thus, whether he was associated with a company or an entity or an individual that was affected by the direct rulings of the court or whether it was something that could be indirect, I think we came away with a feeling that he had been meticulous in trying to avoid any conflict.

Moreover, Mr. President, my assessment of Judge Breyer is that he possesses the kind of personal and individual integrity that indicates he will do all he can to be objective and avoid bias or conflict. After all, is that not what we are worried about? Not whether someone has made a good investment or bad investment, not whether he has an investment that is far-reaching in its potential liability, but whether or not Judge Breyer is the kind of person who would allow their personal investments to influence their decision making. The record is quite clear. Judge Breyer has not done that.

We have become so focused on the process, we have forgotten what ethics are all about. Ethics are about proper behavior. I think we would be remiss if we did not note that Judge Breyer has gone to extraordinary lengths to conduct his life in an ethical manner.

Mr. President, I am going to vote for soon-to-be Justice Stephen Breyer. I am going to vote for him not because I agree with him on all the issues, because I do not. I am going to vote for him because I am convinced he is a person of great ethical commitment, he is a person of remarkable and sparkling wit, he is a person of extraordinarily intellectual capability and, most important, I am going to vote for him because I believe he has the commitment to objective analysis that will lead him to objective, fair decisions about our Constitution.

As we search for people to serve on the highest court, that the quality of objectivity and independence is one that we ought to prize and it is one I believe Stephen Breyer possesses.

I yield the floor, Mr. President

Mr. LOTT addressed the Chair.

The PRESIDING OFFICER (Mr. HEFLIN). The Senator from Mississippi.

Mr. LOTT. Mr. President, I yield myself 10 minutes of the time available on this side.

The PRESIDING OFFICER. Senator HATCH's time has expired.

Mr. LOTT. Mr. President, I ask unanimous consent that I be permitted to have 10 minutes from the remainder of time on the other side.

I am asking for unanimous consent that I have 10 minutes to speak on the nomination.

Mr. BIDEN. Mr. President, the distinguished Senator is welcome to have 10 minutes of our time.

The PRESIDING OFFICER. The Senator from Mississippi is recognized.

Mr. LOTT. Thank you very much. I appreciate the distinguished Senator from Delaware yielding me this time.

Mr. President, I feel very strongly that, in the case of nominations, the President of the United States should have the benefit of the doubt. And even though I have been the one who has had to do a lot of investigating in some of the nominations, I think the record will show that I have voted for most of them. And I believe it is correct when I say, in my years in the Senate, I know it is correct, I have never voted against a Supreme Court nominee and I do not think I have voted against any Federal court nominees; maybe just one, I have not checked the record.

But I do believe in giving the President the benefit of the doubt. I tried to do that in this instance. But these are super-important appointments when people are confirmed for life for the Supreme Court, and so I put an even higher emphasis on making my decisions on the Supreme Court nominees than I do on other administration appointments. I have done that in this case. I think the Judiciary Committee did a thorough job. I think there is no doubt that this judge, Stephen G. Breyer, is a good man, with outstanding credentials.

But for a number of reasons, which will I will try to outline briefly, I have come to the conclusion that I cannot support his confirmation to serve on the United States Supreme Court for the rest of his life and I will oppose that nomination.

Judge Breyer has certainly lived a laudable and I would say a charmed life. He graduated from Stanford University in 1959. He went onto a Marshall Scholarship at Oxford, England. After Oxford, he graduated from Harvard Law School in 1964. He spent almost all of his life in academia and Government. He has been a Supreme Court clerk, Senator KENNEDY's chief counsel for the Senate Judiciary Committee, and a U.S. Court of Appeals judge since 1981.

He is married to the former Ms. Joanna Freda Hare, daughter of Lord John Hare, Viscount of Blakenham. Judge Breyer's total net worth is about $6.5 million. He is an investor in the Lloyd's of London or, as they say, I believe, in England he is a "name" in Lloyd's of London.

That particular investment is a major concern to me, as I will point out in a moment.

I list this information because I believe if you look back over Judge Breyer"s record, I feel that he will have great difficulty in relating to the everyday life of Americans who are not millionaires, who do not have his background and who cannot afford to take time off to go bird-watching, one of Judge Breyer's favorite pastimes.

I fear Judge Breyer is a technocrat, who is more comfortable dealing with economic theories than with real people and their problems.

Judge Breyer has big problems. Judge Breyer's commitment to fundamental rights such as the right to property and religious freedom is dubious, as seen from his decisions and his comments at his confirmation hearing. Judge Breyer's commitment to parental consent for a minor's abortion—which the Supreme Court ruled constitutional in Webster—and his views on abortion in general are questionable. Also, Judge Breyer's investments in Lloyd's of London insurance syndicates raises conflicts-of-interest questions and the possibility of huge future losses. Lastly, Judge Breyer's involvement in the $47 million sinkhole called the Boston Federal Courthouse shows he is not a good steward of taxpayer funds.

Though I respect Judge Breyer and what he has achieved in his life, he is not the right man for the job of Associate Justice for the rest of his life. The law is more than balancing tests and economic theories. Law affects people and how they live. Law provides protection for people's rights.

Judge Breyer has shown he has little regard for common people. He seems to feel that the Government has the right to take private property on a whim and heavily interfere with religious expression.

In his comments to the Senate Judiciary Committee July 13, Judge Breyer seemed to disagree with the High Court on the status of property rights. In the recent Dolan case, the Court stated that the takings clause has the same status, weight and force as the first or fourth amendment. Simply, the right to property is as fundamental as the right to freely exercise religion or the right to be safe from illegal search and seizure.

Judge Breyer in his hearings seemed to disagree with this. On page 56 on the July 13 transcript, Judge Breyer states that the Constitution gives the Government more authority to regulate property than to regulate in other areas like free speech. Thus Judge Breyer believes, in contradiction to the Supreme Court, that property rights have a lower status and are less protected than speech rights or religious rights. This is against the view of the Court, and against the plain reading of the Constitution. Under Judge Breyer's formulation, Government should be able to, as it has done in the recent past, take private property. Americans everywhere should have shuddered when they heard Judge Breyer—he has little regard for the safety of private property.

Judge Breyer in his opinion *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), turns Supreme Court precedents concerning religious freedom on their heads. Mr. President, I ask unanimous consent that a memorandum from the Judicial Selection Monitoring Project be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 1.)

Mr. LOTT. The New Life Baptist Church Academy claimed that town regulations for teacher and curricula certification did not apply to religious schools. The Academy did offer to voluntarily submit information about its curriculum, students, teachers and activities. The academy under the Supreme Court acting at the time didn't even have to offer this.

Judge Breyer, writing for the U.S. Court of Appeals, approved of the town's regulations. Judge Breyer decided that the town's regulations were "valid by default," that presumes the Government is acting constitutionally unless the supposed aggrieved party can find some better, more constitutional alternative.

This turns what the Supreme Court had said up until that time on its head. Judge Breyer put the burden of proof not on the Government, where it belongs, but on the person or group whose rights were obviously violated.

The First amendment, Mr. President, was meant to protect citizens from Government infringement of certain inalienable rights. Judge Breyer decided to turn this around. Judge Breyer's view of the first amendment is a recipe from tyranny. Either he misread the Constitution, or he meant to twist the Constitution. Either way, it is disturbing.

On the abortion issue, Judge Breyer in Planned Parenthood League of Massachusetts versus Bellotti, 1989, dissented in a case that struck down a challenge to Massachusetts' parental consent law. Though Judge Breyer did not call for striking down the State law, his dissent, I think, shows that he is not in tune with the parents of this country, who overwhelmingly want to make such a tough decision with their children. In another case, Judge Breyer voted to overturn Bush administration regulations that barred workers in Federally-funded clinics from promoting abortion. Again, I think this shows a disregard for national opinion—most

Americans do not want the Government promoting abortion. Judge Breyer thinks otherwise.

Judge Breyer's investments in Lloyd's of London insurance syndicates raises serious questions about conflicts-of-interests, and Judge Breyer's future financial liabilities.

Mr. President, I ask unanimous consent that an article from the Washington Post, entitled "For High Court Nominee Breyer, an Injudicious Investment" by James K. Glassman be printed in the RECORD.

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

(See exhibit 2.)

Mr. LOTT. The article talks about the fact that these investments have bankrupted many people over the years. The syndicate that Judge Breyer is involved in already has been forced to pay about $245 million in cash for asbestos and environmental pollution. The eventual liability could be in the billions of dollars.

Judge Breyer says that he has enough to cover further losses. The potential losses though, are not known—Judge Breyer could be facing bankruptcy within the next few years. As the article I just mentioned states so well, it would be an embarrassment for a Supreme Court Justice to go bankrupt because of financial liabilities. Judge Breyer says that he will be out of the syndicate "soon." How soon though? Probably not soon enough—maybe it is too late. Richard Rosenblatt, head of an association of American investors in Lloyd's, was quoted in the Washington Post saying that Judge Breyer is "'captured for life,' as is his estate after his death." We can't have an Associate Justice held hostage by future financial losses.

Another point to mention is that Judge Breyer wold probably have to recuse himself from the various Superfund and environmental cases that might come before the High Court. Judge Breyer has, unfortunately, not recused himself in the past from environmental cases, such as United States versus Ottati & Goss Inc., which dealt with penalties against polluters.

Lastly, Judge Breyer, who as Chief Judge of the First Circuit Court of Appeals, took part in the site selection, procurement, and planning of the new Boston Federal Courthouse. The courthouse has yet to be finished, but the General Services Administration has already spent $34 million on buying the site and $13 million for design. The current site for the courthouse was rated the least desirable, yet a panel chaired by Judge Breyer chose the site anyway. The design of the courthouse, which Judge Breyer actively took a part in, includes lavish design elements like a six-story atrium; 63 private bathrooms; 37 different law libraries; 33 private kitchens; $789,000 for original artwork; $450,000 for a boat dock, and $1.5 million for a floating marina.

And all this for one courthouse? Judge Breyer has not adequately explained why tax dollars should go to a dock and 63 private bathrooms for a courthouse. This disdain for accounting for taxpayer dollars, I think, shows that Judge Breyer does not care about the people who earn the tax dollars to pay for that lavish Boston spread.

These questions I have raised are troubling—they're troubling enough to disqualify Judge Breyer from sitting on the High Court. Because of these problems, I will vote against his confirmation.

EXHIBIT 1

JUDICIAL SELECTION MONITORING PROJECT,
Washington DC, June 7, 1994.

NOMINATION MEMORANDUM

To: Interested Parties.

Re Judge Stephen Breyer on the free exercise of religion.

From: Thomas L. Jipping, M.A., J.D.

The opinion in *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), written by Judge Stephen Breyer, President Clinton's choice to replace retiring Supreme Court Justice Harry Blackmun, reflects a disturbingly narrow view of the enumerated fundamental right to freely exercise religion. He created what might be called a "valid by default" standard that is both unprecedented and incorrect. It turns traditional Supreme Court free exercise jurisprudence on its head and gives the government wide latitude in infringing on this fundamental enumerated right. This decision was mentioned in our Nomination Memorandum of June 1, 1994, but deserves separate treatment here.

I. FACTS

Massachusetts law requires school attendance. For students to satisfy this requirement through attendance at a non-public school, a local school committee must approve non-public education "when satisfied that the instruction . . . equals . . . that in the public schools . . . but shall not withhold such approval on account of religious teaching." The Town of Longmeadow's school committee's approval process involves gathering written information about the school's pupils, texts, class schedules, and curricula; reviewing the academic credentials of teachers; and school visits "to observe the quality of the teaching."

Citing the First Amendment's free exercise clause,[1] New Life Baptist Church Academy objected both to the general requirement that a secular authority must approve a religious school and to the particular procedures used by the Longmeadow school committee.[2] The Academy offered to administer standardized pupil tests and voluntarily submit information about activities, curriculum, students, and teachers. The Academy was not legally required to propose an alternative approach; it may have been a sincere attempt to settle the controversy.

II. DECISION

The U.S. District Court "held the School Committee's proposed evaluation methods unconstitutional, as violating both the 'free exercise' and 'establishment' clauses of the First Amendment."[3]

Footnotes at end of article.

The U.S. Court of Appeals, in an opinion written by Judge Breyer, first said that the government does have the power to enforce, "through appropriate means, a state law that requires 'approval' of the Academy's secular education program.'[4] Judge Breyer then reviewed and upheld the school committee's approval procedures. He did so, however, after creating an unprecedented and incorrect legal standard which gives short shrift to the fundamental enumerated right to freely exercise religion. The apparent explanation is that he did what was necessary to achieve his own preferred policy result rather than what the law required.

III. ANALYSIS

The First Amendment is directed at government. It assumes and protects individual liberty and puts the burden on the government affirmatively to justify its burden on enumerated freedoms. The Supreme Court's standard in free exercise cases reflects this set of priorities. The standard prevailing at the time of Judge Breyer's decision[5] was as follows:

"The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[6]

In this case, Judge Breyer ultimately applied a rule which turns this standard on its head. He started by outlining four questions which must be answered:

"Whether the Academy's religious beliefs are sincerely held."[7]

"Whether . . . the relevant regulation burdens the exercise of those beliefs."[8]

"Whether the regulation nonetheless serves a compelling, or overriding, governmental interest."[9]

"Whether the School Committee might nonetheless adequately serve that interest in a 'less restrictive,' *i.e.*, less burdensome, way."[10]

Judge Breyer cited the Supreme Court's landmark decision in *Wisconsin v. Yoder*[11] for the first three questions. They are unobjectionable and obviously reflected in the Supreme Court's *Thomas v. Review Board* standard quoted above.

The fourth question set up a false comparison between two choices—the government's approach and the Academy's alternative approach—which, in turn, created a false standard. This fourth question asks whether the school committee can serve its compelling interest in a "less restrictive" way. What other way could that be? The Supreme Court's *Thomas v. Review Board* standard would say any other way, since it required the government to show its action is the "least restrictive" way. Judge Breyer, however, looked only at one other way—the Academy's alternative—and insisted that this one alternative literally be "constitutionally mandated"[12] or the government's action is constitutionally valid by default.

This comparison between only two alternatives is obvious throughout Judge Breyer's opinion. He wrote of "our effort to determine whether [the school's alternative] is, constitutionally speaking, a 'less restrictive alternative'" than the government's approach.[13] He wrote that "the question remains whether or not [the school's alternative] is a 'less restrictive' way to achieve the state's legitimate, 'compelling' goals."[14] He put the ultimate legal question this way: "does the Free Exercise Clause forbid the School Committee to follow its proposed approval procedures rather than the [school's alternative]?"[15]

This is a false comparison. Judge Breyer's standard did not focus, as the Supreme Court

required, on the government's action to determine whether it was the "least restrictive means." Rather, his standard focused on the Academy's alternative to determine whether it was less restrictive (i.e., more constitutional) than the government's approach. He concluded that the government's approach did not violate the free exercise clause because the school's alternative was no less burdensome on religion.[16]

Put simply, even if the Academy's particular alternative approach—one which it did not need to present at all—were not less restrictive than the government's approach, it does not follow at all that the government's approach is the least restrictive means of achieving its end. Under the Supreme Court's clear precedents, this burden remains on the government whether the Academy has offered a more restrictive alternative or no alternative at all. The government must affirmatively justify its burden on the free exercise of religion.

Here, Judge Breyer created a "valid by default" standard that presumes the government's action is constitutional unless the individual whose right to freely exercise religion has been violated can offer an alternative that is more constitutional. This standard turns the Supreme Court's free exercise jurisprudence on its head and has no precedent or parallel. It is a prescription for wholesale violation of the right to freely exercise religion.

Neither of the Supreme Court decisions Judge Breyer cited as the source of his "less restrictive" fourth question uses those words. *Thomas v. Review Board*, as quoted above, requires that the government prove that its approach is the "least restrictive" means of achieving a compelling end. The other decision cited by Judge Breyer, *Sherbert v. Verner*,[17] makes the same point in different words: "[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[18]

Judge Breyer went to unusual lengths to distinguish this case from what he called "the leading case in which the courts have upheld a 'free exercise' claim against a state effort to control secular education provided by a religious institution,"[19] *Wisconsin v. Yoder*.[20] Judge Breyer cited with approval the statement by the U.S. Court of Appeals for the Sixth Circuit that "'*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule.'"[21]

This is a bizarre way to characterize a landmark Supreme Court decision. Judge Breyer himself cited *Yoder* at least nine times in his opinion and offered it as a foundation for three of the four parts of the legal standard he said applied to free exercise cases generally. It is strange, then, after citing that decision all along, for Judge Breyer suddenly to declare that "this case [is] quite unlike *Yoder*,"[22] As of June 3, 1994, *Yoder* had been cited 806 times in state court cases and 758 times in federal court cases, 43 of them by the court on which Judge Breyer currently sits.

IV. CONCLUSION

Judge Breyer's opinion in *New Life Baptist Church Academy* is judicial activism writ large. He misquoted a clear Supreme Court standard and eventually turned that standard on its head. His standard means that the government does not have to affirmatively justify its infringement on the free exercise of religion as "least restrictive" as the Supreme Court requires. Rather, the individual whose constitutional rights have been infringed must offer a more constitutional alternative. Otherwise, the government's action is constitutional by default, without the government ever having to meet the Supreme Court's standard of proving it is the least restrictive means of achieving a compelling government end. That approach turns the Constitution's priorities exactly backwards and puts Americans' first liberty largely at the mercy of the government.

FOOTNOTES

[1] The First Amendment to the U.S. Constitution states in part: "Congress shall make no law prohibiting the free exercise [of religion]." The Supreme Court has held this provision also applies to the states. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[2] *New Life Baptist Church Academy*, 885 F.2d at 941.

[3] *Id.*

[4] *Id.*

[5] In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the Supreme Court dramatically changed the standard for justifying government infringement on the free exercise of religion from the "least restrictive means" of achieving a "compelling state interest" to a rational means of achieving a "legitimate" state interest. Congress enacted the Religious Freedom Restoration Act, which President signed into law in 1993, to restore the old standard.

[6] *Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

[7] *New Life Baptist Church Academy*, 885 F.2d at 944. The court concluded: "We concede that the Academy has a sincere, relevant religious belief that it ought not participate in any such secular approval process." *Id.*

[8] *Id.* The court concluded: "We agree with the Academy that the very existence of a state approval requirement will burden the exercise of its religion." *Id.*

[9] *Id.* The court concluded that "the state's interest in making certain that its children receive an adequate secular education is 'compelling'." *Id.*

[10] *Id.*

[11] 406 U.S. 205 (1972).

[12] *New Life Baptist Church Academy*, 885 F.2d at 947.

[13] *Id.* at 946.

[14] *Id.*

[15] *Id.* at 944.

[16] *Id.* at 944.

[17] 374 U.S. 398 (1963).

[18] *Id.* at 407.

[19] *New Life Baptist Church Academy*, 885 F.2d at 951.

[20] 406 U.S. 205 (1972).

[21] *New Life Baptist Church Academy*, 885 F.2d at 951, quoting *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1067 (6th Cir. 1987).

[22] *Id.*

EXHIBIT 2

[From the Washington Post, July 20, 1994]

FOR HIGH COURT NOMINEE BREYER, AN INJUDICIOUS INVESTMENT

(By James K. Glassman)

Ten years ago, a lively young Southern heiress confided to me that she had found a sensational investment—Lloyd's of London. "They just send you checks," she explained. "You should get into it too."

She described how Lloyd's works: You join a syndicate that insures ships, planes or businesses. You don't have to put up any money, just present a fairly modest letter of credit from a bank. Than, after commissions and losses are deducted, you get the profits from the premiums. She made $35,000 her first year—an infinite return on an investment of zero!

And besides, a Lloyd's investor—called by the archaic term "Name"—joins a distinguished roster that includes Princesses Michael and Alexandra of Kent, golfer Tony Jacklin and former prime minister Edward Heath. It's just the ticket for Anglophile Americans.

There is, however, a catch. If things go sour, your liability is unlimited. "You go to London," said my friend, "and they bring you into this room and sit you down at a huge table, and this dude sitting across from you says, 'Do you realize you can lose everything you own?'

"They tell you this so many times you get sick of it. And then you sign the papers and go drink Bloody Mary's and have a big lunch."

What she was describing seemed to me, on reflection, to be the Worst Investment in the World—a form of Russian roulette in which some catastrophe you could not possibly foresee can take away your house, car, retirement funds and (as Lloyd's puts it) your "last shirt button."

To make matters worse, Lloyd's investors rarely have any idea what they're insuring; they are completely at the mercy of the underwriter who manages their particular syndicate.

At least four British investors, ruined by Lloyd's investments, have committed suicide in recent years. But the irony is that you can't even get out of Lloyd's by dying.

In "Ultimate Risk," a book about Lloyd's just published in Britain, the author described how Harold Weston, a 51-year-old solicitor, hanged himself in April 1993 after Lloyd's "asked for more and more money" to meet leases.

His wife, writes the author, "while trying to recover from the trauma of her husband's death, has had to meet his continuing Lloyd's losses."

By contrast, nearly every other investment in the world is structured to prevent this sort of personal, unlimited liability. For example, if you put $100,000 into a high-tech stock and it goes bankrupt, the most you can lose is $100,000. But a Lloyd's investor worth $6.5 million can lose all $6.5 million.

That figure is not snatched from the air. It is roughly the net worth of Judge Stephen Breyer and his blue-blood British wife, Joanna. Breyer's nomination to the Supreme Court was cleared by the Senate Judiciary Committee yesterday.

Breyer, a typical Lloyd's investor, earned an average of $50,000 a year from the British insurer from 1988 to 1991, according to his financial disclosure statements. Now, however, he faces losses because one syndicate he joined, called Merrett 418, is in deep, deep trouble.

Thanks to damage claims stemming from asbestos and environmental pollution, investors in Merrett 418 already have been forced to cough up about $245 million in cash. Chatset Ltd., an insurance consulting firm, estimates that final calls will be 3.5 to 4 times as much.

And that's just a guess. Actual liability could run into the billions. For example, Merrett 418's latest report admits, "We have not been able to assess with any accuracy the number of individuals injured [by asbestos], and the falling off in the number of new claims long predicated on logical grounds * * * has yet to occur."

What about Breyer himself? In a letter last December he said he had about $160,000 on deposit at Lloyd's, plus insurance coverage for nearly the same amount. Will that be enough? No one knows.

With so much at stake in his insurance investments, Breyer has been criticized by some scholars of legal ethics for not disqualifying himself from cases like United States v. Ottati & Goss Inc., which involved the government's power to impose liability on polluters.

But something about Breyer worries me more: How smart and judicious can someone really be if he invests in a mess like Merrett 418? Is he dumb, or merely oblivious? Or does

he just love to gamble with his family's fortune?

Also, imagine the prospect of a Supreme Court justice facing bankruptcy because of Superfund and asbestos claims. Even if he recuses himself from such cases on the high court, he'll be embarrassing not only himself but the institution.

Breyer has been trying to extricate himself from Lloyd's since 1988, when he stopped investing in its syndicates. But he can't resign from Merrett 418. It's like the Cosa Nostra. They decide who leaves.

"I will be out of it as absolutely soon as I possibly can," Breyer told the Judiciary Committee last week. But the choice is not his anymore.

In September 1990, Seascope Special Risks Ltd. offered Breyer a deal: If he would pay the firm about $250,000, it would assume all his future liabilities in Merrett 418. But Breyer turned down the bargain, and it's unclear whether he'll ever be offered an escape like this one again.

"Apparently," Breyer said in a letter to his agent in London, "I am 'captured' for the rest of my life."

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. DECONCINI. Mr. President, I support the nomination of Judge Stephen Breyer to be an Associate Justice of the Supreme Court. During his recent confirmation hearings, I had the opportunity to question Judge Breyer on a range of subjects, and I was repeatedly impressed with the forthcoming nature in which he discussed a number of topics. His candor is something which has been notable absent from many of the recent confirmation hearings. While he did not compromise his ability to hear any cases which might come before the Court, he did offer substantial insight into his judicial philosophy and the constitutional principles that guide his decisions.

I believe that Judge Breyer will be a very positive addition to the Supreme Court. His career distinguishes him as a highly-qualified jurist, whose achievements reflect his commitment to excellence. As a lifelong public servant, he has shown himself to be dedicated to the law and the service of others. His work in all three branches of our Government gives Judge Breyer a unique and important perspective on our democracy—it is a perspective that I believe will serve him well on the High Court.

His understanding of the importance of legislative history will help to ensure that congressional intent, and not judicial fiat, is utilized in interpreting statutes. His tenure as a professor will allow him to craft and communicate opinions which can be understood by the people they truly affect, and not just the lawyers. His many years of the first circuit have allowed Judge Breyer to develop and refine his keen understanding of American jurisprudence. These factors, and many others, led President Clinton to nominate Stephen Breyer, and they combine again today to result in what I believe will be his conformation later today.

However, the responsibility awaiting Judge Breyer as a Supreme Court Justice is enormous.

It requires making difficult decisions that affect millions of people throughout this Nation. It requires dedication to upholding and preserving the fundamental rights which are granted to each of us by the Constitution of this country.

Throughout his confirmation hearing, Judge Breyer repeatedly stressed the importance of ensuring that the "promise of basic fairness" in the Constitution is upheld. While a technical grasp of the law is important, it is the dedication of each Justice to the principles of fairness which defines their tenure on the Court. I will vote for Judge Breyer.

Having said that, there have been questions raised. First of all, the courthouse. It is interesting that now that the money has been authorized and appropriated, and this body has voted on the money for that courthouse, that now, all of a sudden, it becomes Judge Breyer's courthouse.

The Judicial Conference has a committee that Judge Breyer sat on, and did chair, which recommended this particular location. It so happens that upon the request of the Appropriations Committee, it was pared back, not as much as perhaps today we think it should have been. But the fact is that Judge Breyer did not vote on how much money should be spent on that courthouse. We in this body did. Those that object now about the courthouse and criticize it, I wonder if they would go back and look and see how they voted. If they voted against that Treasury, postal and general government appropriations bill because of this courthouse, then I accept their criticism. Perhaps that is a disqualifier for Judge Breyer because those who elected to vote against that bill because of the courthouse could see that it cost too much. And if they could see that it cost too much, certainly Judge Breyer could see that it cost too much as well.

I must say, that does not make a lot of sense to me, but at least it would be a rationale for someone to come out here and say, because Judge Breyer was the judge who was sitting on the committee that requested, and ultimately received, money from the Congress of the United States to build a courthouse, that he is the one who spent the money. Of course, that is nonsense.

Now as to Judge Breyer's investments. When are we in this body going to realize that those of us who hold public office, whether it is in the judiciary branch, legislative branch, or the executive branch, are not perfect individuals?

When are we going stop requiring someone who is nominated to be a judge, whether it is in a district court, a circuit court, or the Supreme Court, to have no investments, to have never written anything controversial, to answer everything at their hearings, to disclose all their decisions regarding their investments over their whole life, and account for any of those investments that turn sour or are not so good today?

Judge Breyer made some very positive investments before he was on the court and during the time he was on the court. He recused himself from the cases that were clearly brought to his attention or that he saw might appear to have any improprieties or potential conflicts.

Yes, today we know that the insurance that he had an interest in—and this is an interest of one out of, I believe, over 4,000 individuals, so it is not like he is a major owner and controller of the insurance—happened to insure some high-risk properties and enterprises that later made a claim against the insurance and against this group of underinsurers or guarantors. And for that we are to say, "Well, judge, you cannot serve on the Supreme Court because you made an investment that it appears is going to lose money for you and maybe it will be very costly."

There are two schools of thought as to just how costly that investment might be if the ultimate happened and the maximum contribution had to be forthcoming by the individuals who were part of this syndicate. We do not know. One school says it takes everything, including your estate. Another says, no, there are limits to liabilities.

But the point is, here is a person who in good faith made an investment and had made similar investments, and repeatedly attempted to avoid any appearance of conflict. The New York Times criticizes Judge Breyer's investments. When is the New York Times all of a sudden the arbiter or should determine whether or not your economic interest is a conflict?

There is no proof whatsoever, not a scintilla of evidence, that indicates any conflict by Judge Breyer or that he benefited by the decisions that he made in certain cases. There is no information that he benefited from that.

In fact, it is clear that in the cases he did know about—and they dealt with asbestos—he recused himself. Had he known about the other cases, certainly he would have recused himself. Why would he not? Why would he say, "I am going recuse myself on the asbestos case because this syndicate I have"—which is a small part of his total investment portfolio—"may have some conflict here or some interest in it." Which he did and properly so. But then with other cases, the inference is that he knew that these cases, or should have known that these cases, dealing with the Superfund were also insured by this syndicate. There is no evidence that he knew that. Nobody has actually said he knew. All we have heard is that he should have known.

Nobody would think that a judge has to be without any investments, with no capabilities for economic support that might have come before he was a judge. What we want is judges to have some experience, to understand what the economic world is all about, and then to divest themselves or recuse themselves, as the case may be, when and if there is a case that involves this investment.

Judge Breyer, I think, did what was proper and prudent. He has demonstrated that he is sensitive to this. He has been a public servant. He is not afraid to admit that this was a bad investment. But he did not know, and as I indicated, there was no evidence whatsoever, no one has said that he knew and went ahead and acted on those cases. They only said, "Well, he should have known."

That is not enough, in my judgment, to criticize this fine jurist. To indicate that he is unqualified is to me unfair to the system of what we are about. That is ensuring fairness, in my opinion, to anybody who is promoted or nominated to an office of public trust.

But it is also unfair to Judge Breyer. He has been an exemplary jurist. He was an outstanding academician. He had high marks when he worked at the Justice Department, and many of us knew him here on the Judiciary Committee when he was the chief of staff.

So there is no good reason that I know of, common sense or otherwise, why this body should not overwhelmingly confirm Judge Steve Breyer, to be an Associate Justice of the Supreme Court.

The PRESIDING OFFICER (Mr. PRYOR). The Senator from Alabama is recognized.

Mr. HEFLIN. Mr. President, I rise today in support of the nomination of Judge Stephen G. Breyer to be an Associate Justice on the U.S. Supreme Court. This nomination comes to the floor of the Senate after 4 days of hearings and many hours of exhaustive research into the nominee's background. As a member of the Judiciary Committee, I have been involved in the nomination of seven, including Judge Breyer, of the nine sitting members of the present Court. Judge Breyer received a unanimous vote from the Judiciary Committee recommending his confirmation to the Supreme Court.

Judge Breyer has spent almost his entire professional career devoted to public service. He received his undergraduate degree from Stanford University, and his law degree from the Harvard Law School, after which he served as a law clerk to Justice Arthur Goldberg.

His public service continued over the years in several Federal positions, including the Antitrust Division of the Department of Justice. He served as chief counsel to the Senate Judiciary Committee and he was a charter member of the U.S. Sentencing Commission. Since 1970 he has served and continues to serve on the faculty of the Harvard Law School.

Stephen Breyer became Judge Breyer with his appointment to the First Circuit Court of Appeals in 1980. He has served for the past 14 years on that court and as its' chief judge since 1990. It is from his expansive opinions, numerous writings and personal actions, especially during his years on the bench, that I have been able to discern some insight about his judicial ability and character and his beliefs.

The clear and candid way in which Judge Breyer addressed his answers to questions propounded by members of the Judiciary Committee during 3 days of hearings proves to me what kind of judge he will be on the Court. I believe that he can be best described as a principled moderate.

A principled moderate is the type of individual which can be a consensus builder. Judge Breyer has proven his ability to build a consensus in the decisions rendered by the first circuit, as well as on difficult and controversial issues of a national scale, including airline deregulation and as a member of the U.S. Sentencing Commission. He was one of the architects of airline deregulation while working as chief counsel to the Senate Judiciary Committee. When he served as a member of the Sentencing Commission he helped forge key agreements that formed the sentencing guidelines. It is through consensus which Judge Breyer believes "helps produce the simplicity that will enable the law to be effective." I think that there is room on the Supreme Court for this type of a consensus builder.

Some have claimed that his opinions are dry and lack heartfelt feeling and that he is a technocrat. I believe that he addressed those critics when he stated the reason some may find his opinions dry, is because, "Law is a set of opinions and rules that lawyers have to understand, lower court judges have to understand, and eventually, labor unions, small businesses, and everyone else in the country has to understand how they are suppose to act or not act according to the law." Judge Breyer's view that judicial opinions should be written to be understood by all who may be affected by them is sound reasoning for what some may see as dry, emotionless legal writings.

During the course of the hearings an issue was raised by several of my colleagues, concerning Judge Breyer's views on the establishment clause of the first amendment and the interests of the state in making sure that children are receiving an adequate education in private or home schools.

Judge Breyer was directly asked about his ruling in New Life Baptist Church, a case in which he wrote the majority opinion while on the First Circuit Court of Appeals. In his response to Senators questions he voiced strong support for the rights of parents to educate their own children. He also stated that he firmly believed that the first amendment to the Constitution is designed to protect "what is so important to every American and every American family: the right to practice your own religion, the right to pass on your beliefs to your children." But he does believe there is a delicate balance the State must weigh in making sure that quality education is taking place in schools outside the public school system.

Critics and proponents of Judge Breyer have made an issue out of his pragmatic approach to cases and issues on which he has written. They say that during 3 days of hearings he reaffirmed his image as a pragmatist unlikely to embark on ideological crusades on the high court. If is a correct interpretation of Judge Breyer to refer to him as a pragmatic judge. He has been a judge who prefers, in some areas of the law, a pragmatic balancing test between competing rights rather than fixed legal formula or new interpretations of the law. Although this approach to legal decisions has earned him the sometimes description of "technocrat," I believe that it has enabled Judge Breyer to make determinations on difficult and technical legal questions, as shown in his response to a question regarding antitrust, "we tried to focus on where the ball really is—work our way through a very complicated area to see if antitrust law, technically would come to that result."

As we approach the next century more and more of the calendar of the Supreme Court will include issues in which Judge Breyer should find familiar ground. The environment, science, and administrative law will be among the most important legal issues in the near future.

His extensive legal writings and opinions regarding administrative law, I think, prove that he has the ability to understand and interpret administrative agency rules and regulations.

An issue was raised late in the confirmation process of Judge Breyer concerning his investments in Lloyds of London, and a possible conflict of interest he may had in hearing certain pollution related cases. As a former judge myself, the fact that he did not rescue himself from hearing these cases, which could have an impact, even though a remote one, on his investments concerned me. I directly questioned Judge Breyer on his investments and his knowledge of them. He responded to my questions stating, that he was personally confident that his sitting on those cases did not represent a conflict of interest and that he had incorporated from almost day one in his court a form of checks to assure

himself that he was not hearing cases in which he may have an interest.

Lloyds of London, which has insured everything from oil tankers to Betty Grable's legs, is different from typical investments because the investor never knows exactly what his investments include, sort of like a mutual fund. In Judge Breyer's case he stated in testimony that he stopped hearing asbestos cases when he became aware, through news reports, that Lloyds had exposure in U.S. cases. He further stated, that he was not aware of the exposure in pollution related cases, but had disclosed his investments with Lloyds in his financial disclosure each year while serving on the First Circuit Court of Appeals.

After reviewing the pollution related cases in question, I agree with the conclusion which eminent scholars in the field of judicial ethics have made. They reviewed the cases in question and have held that the "participation of Judge Breyer in the cases did not entail a violation of judicial ethics. . . . None of the cases had a connection direct enough with Judge Breyer as to create a basis on which his impartiality reasonably might be questioned."

Mr. President, at this time I would like to call the attention of the Senate to letters, one from Geoffrey C. Hazard, Jr., of the law school at the University of Pennsylvania, and who is the Sterling professor of law emeritus at Yale University, who 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 is based.

I might say that I worked with Geoffrey Hazard at that time on judicial ethics. It was then a matter of working on the Supreme Court of Alabama, and my State was one of the first to adopt it.

Geoffrey Hazard has also been the 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 American Bar Association Model Code of Professional Responsibility.

He has authored many books on legal and judicial ethics, and is known throughout the legal profession as being the real authority on the issue of judicial ethics and professional conduct among lawyers.

He reviewed all of the facts in the cases herein. He came to the conclusion that his participation in a number of cases involving a CERCLA—which is commonly known as the Superfund statute—and that none of these cases involved Lloyd's as a party or by name in any respect. "None appeared to be involved issues that would have a material or predictable impact on general legal obligation under the Superfund legislation."

Then he also reviews and says:

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 would have had a material effect on Judge Breyer's financial interests. None had a connection direct enough with Judge Breyer to create a basis on which his impartiality might be questioned.

He mentions to the fact that Lloyd's of London's participation by a name, as they are referred to, is similar to an investment in a mutual fund. A mutual fund, of course, is one in which there are many investments made, and it is impossible for a person to keep up and know all of the investments because many of the investments change from day to day in a mutual fund.

He did raise the question that there was a possibility Judge Breyer might have been imprudent in connection with such an investment. But the possibility or cause of a possible appearance I think does is not raise a situation in which a judge of necessity has to recuse himself. He acts in regard to the matters as it would appear you will never know everything that would be involved really, such as with an insurance company. It would mean really that in effect you ought to have a canon of ethics that a judge ought not to invest in any insurance company. Well, many people inherited insurance stock. They invested in insurance stock at an early stage. They have tax problems dealing with that. But just because they have insurance does not mean that you are going to therefore bring about a question. If there is a named insurance company, then they certainly ought to recuse themselves in regard to that.

I ask unanimous consent that the letter of Geoffrey C. Hazard, Jr., dated July 11, 1994, to the Honorable Lloyd Cutler, special counsel to the President, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

LAW SCHOOL,
UNIVERSITY OF PENNSYLVANIA,
Philadelphia, PA, July 11, 1994.

Re Judge Stephen Breyer.

Hon. LLOYD N. CUTLER,
Special Counsel to the President, White House, Washington, DC.

DEAR MR. CUTLER: You 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 Lloyd 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 predictable 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.

Mr. HEFLIN. Mr. President, I would also like to enter into the RECORD a letter from John P. Frank, who is an outstanding lawyer, who has been involved in the matter of the American Bar Association in rewriting its Cannons of Judicial Ethics. Mr. Frank, originally a law clerk to Justice Hugo Black, is an outstanding lawyer in Phoenix, AZ. And he has written in regard to this matter that in his opinion the activities that have been brought out and brought to light in regard to this constitute no violation of the Canons of Judicial Ethics. He clearly says that Judge Breyer properly did not disqualify himself in the pollution cases that came before him.

I ask unanimous consent that this letter from John Frank of the law firm of Lewis & Roca of Phoenix, AZ, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

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 because, 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 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)(1) 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 976,980 (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 (hearafter H.R. Hrg. 1974), p. 16.

The relevant section is as follows:

"(1) 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 a "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. 1978 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 his 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 "nonparty" 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. 1978 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) 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 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. 1978), pp. 95, 97, 108, 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 Sollenbarger 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., 455 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 Apps. 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. 1978 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.

Mr. HEFLIN. Mr. President, I also ask unanimous consent that a letter signed by Thomas W. Brunner and Susan D. Sawtelle of the law firm of Wiley, Rein & Fielding in Washington, DC, in which they have written pertaining to pollution cases be printed in the RECORD. They come to the conclusion that a higher review makes clear that no case in which Judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's of London or the financial position of the insurers generally.

I ask unanimous consent that the material be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

WILEY, REIN & FIELDING,
Washington, DC, July 11, 1994.

LLOYD CUTLER,
Counsel to the President, White House Counsel's Office, Washington, DC.

DEAR MR. CUTLER: You have asked us to evaluate whether any case decided by Judge Stephen Breyer under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, could have substantially affected the financial interests of insurers. We represent insurers extensively in connection with insurance coverage matters arising under CERCLA. In addition to representing individual insurers, we and our colleagues represent the Insurance Environmental Litigation Association ("IELA"), a trade group of 21 large property/casualty insurers that appears as amicus curiae in numerous environmental coverage cases at the appellate level. Mr. Brunner has over a decade of direct experience in representing the interests of insurers in disputes arising under CERCLA. Ms. Sawtelle, in addition to representing insurers, has an extensive background in CERCLA and environmental matters generally, having served as an EPA official (as Special Assistant to the Director, Office of Solid Waste, from 1985 to 1987) with responsibility in this area, and having represented numerous potentially responsible parties ("PRPs") in private practice since 1981. As a consequence, we are able to provide you with a realistic appraisal of the significance of CERCLA cases for insurers generally and Lloyds of London syndicates specifically, based on a great deal of experience evaluating CERCLA matters for insurers and others.

We have reviewed all eight cases in which Judge Breyer has passed on CERCLA issues. In our opinion, none of these cases had a material or predictable financial impact on insurers generally or on Lloyds syndicates in particular. Any consequences for insurers were highly speculative and dependent on many independent intervening factors. Any conceivable impact on the financial interests of insurers from these cases resulted only from the court assuring that PRPs received proper procedural protections, or that the statute's provisions were applied properly, before parties were held liable for costs that might possibly be determined to be insured by some insurer. None of the cases determined the obligation of any insurer nor of any PRP for which an insurer might be liable. In real world terms, Judge Breyer's financial interest in these cases as a result of his status as a Lloyd's investor was probably more attenuated than his interest as a federal taxpayer in numerous cases involving financial claims against the Federal Government. In both circumstances, the interest is so diluted, so contingent and so indirect as to be of no consequence.

Of the eight CERCLA cases on which Judge Breyer has sat, four did not involve even potentially insurable interests of PRPs. *Maine* v. *Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992), involved a claim for civil penalties sought by Maine against the (uninsured) Federal Government. Similarly, *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991) (*en banc*), involved the constitutionality of CERCLA's procedures of this provision—which exempts from the class of liable "owners or operators" those who, without participating in the management of a contaminated facility, hold indicia of ownership primarily to protect a security interest—applied to a particular sale-and-leaseback arrangement. The court's opinion, which was consistent with a number of other courts' rulings, was highly fact-specific and thus not likely to have a material or predictable impact on the insurance industry. Moreover, this dispute involved private parties only, each of whom is no more likely than the other to have insurance.

Finally, in *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989), Judge Breyer joined in the court's unanimous decision that CERCLA liability arises when the release of hazardous substances from the defendant's facility cause the plaintiff to incur response costs, rather than when the releases cause contamination on the plaintiff's property. This case did not present an issue that would have a material impact on the insurance industry's CERCLA obligations because in a wholly private dispute such as this, either or both sides might have insurance. (In a subsequent opinion in the *Dedham* case, Judge Breyer dissented from the majority regarding whether a new trial was required; this opinion was unrelated to the provisions of CERCLA. *See in re Dedham Water Co.*, 901 F.2d 3 (1st Cir. 1990).)

In sum, then, our review makes clear that no case in which judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's of London or on the financial position of insurers generally.

Sincerely,

THOMAS W. BRUNNER.
SUSAN D. SAWTELLE.

Mr. HEFLIN. Mr. President, I commend President Clinton on his excellent selection of Judge Stephen G. Breyer as his nominee. I will support Judge Breyer with my vote for his confirmation to serve as an Associate Justice on the U.S. Supreme Court. I believe that he will be a voice of moderation guided by principles and will work unfailing to preserve the Constitution in a manner which will guarantee that the laws of this land are interpreted in a faithful and fair manner for all citizens.

I yield the floor.

Mr. SIMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Wyoming [Mr. SIMPSON].

Mr. SIMPSON. Mr. President, what is the status of time?

The PRESIDING OFFICER. The Senator from Delaware controls the remaining time.

Mr. SIMPSON. How much time is remaining?

The PRESIDING OFFICER. Forty-three minutes and two seconds.

Mr. BIDEN. Mr. President, I am delighted to yield as much time as the Senator wants.

Mr. SIMPSON. Mr. President, that is the most generous offer I have had yet from the chairman of the Judiciary Committee. Five minutes would be adequate.

Mr. BIDEN. I have no objection.

The PRESIDING OFFICER. The Senator is recognized.

Mr. SIMPSON. I thank my friend from Delaware.

He and I have just finished a vigorous conference on the crime bill, were released from bondage at 2:45 in the morning, and repaired to our chambers, rose again from the dead, and reported it at 7:30 a.m. in the morning. We did not complete our work exactly with bankers hours. Pardon the expression. That is not politically correct either.

Mr. President, I rise in support of the nomination of Stephen Breyer to be an Associate Justice of the Supreme Court.

Justice Breyer's educational accomplishments are very evident to us all. He has had varied experience in the executive branch, 14 years experience on the circuit court of appeals, but he has also served in the legislative branch. Several of us knew him very well, and worked with him as chief counsel of the Senate Judiciary Committee. He was exceedingly able. I had the personal ability to perceive and observe his work when I was a freshman member of the Judiciary Committee. In that position as chief counsel, he clearly demonstrated a very special ability to work with Members of both parties, and in particular to bring people of differing views together to resolve difficult issues. Mr. President, those are the attributes of a skilled Justice. Judge Breyer clearly is so very well qualified for the Supreme Court, and I am very pleased to support the nomination.

Some Senators have expressed certain reservations regarding Judge Bryer's investments in the Lloyd's of London syndicate. I have expressed a view that Judge Breyer should have recused himself from all cases before his court involving environmental issues in which insurance possibly could have been involved. The Judiciary Committee, during the 3 days of testimony by Judge Breyer, questioned him fully, closely, and completely about the Lloyd's of London matter in both the public and in the closed session.

Ethics experts were consulted as well. Based on Judge Breyer's responses and the views of experts, I am well satisfied that Judge Breyer acted ethically and appropriately, and I believe he will act in a similar fashion on the Supreme Court.

One other issue of concern to the committee, and a number of my constituents, is Judge Breyer's position on

home schooling and church-operated private schools. I discussed his views on this important right of parents to decide exactly how their children will be educated on four separate occasions—on two different days at the public hearing, in a private meeting in my office, and an executive session the committee held with the nominee.

Those discussions with Judge Breyer convinced me that he is not in any way a foe of home schooling or private religious schools, but rather that he clearly understands that the Constitution protects the right of parents, not only to pass their religious beliefs on to their children, but also to determine how they will educate them—at home, at a private school, or in the public schools.

I think, too, that the President made a fine selection, a fine nominee, and I believe Stephen Breyer will be a fine successor to Justice Blackmun, a splendid gentleman who has served with great distinction on the Court, and who I have come to admire greatly. He will be a superb addition to the High Court.

I thank the Chair and yield the floor.

Mr. KENNEDY. Mr. President, I yield myself such time as I might use.

Mr. President, I believe we are coming to the conclusion of what I think has been an excellent debate and discussion and presentation by a number of our colleagues that have been on the Judiciary Committee and have paid attention to the considerations of the Judiciary Committee. I am enormously grateful to all of them. I know that Judge Breyer is, as well, for the courtesies and for the way that the hearings were held.

Once again, I pay tribute to the chairman of the Judiciary Committee, Senator BIDEN, and Senator HATCH, as well, and the staffs, for the way the hearings were scheduled, the preparation that was made available to the members of the committee and to the Senate, the way the hearings were conducted, and the range of witnesses that were heard. I think it was a real service to the institution and a service to the country, as well. I think all of us are grateful to them for bringing us to where we are this afternoon.

I know that a few Senators—very few, I believe—have expressed some concern about Judge Breyer's judicial philosophy and about his investment in Lloyd's of London, and certain other issues. The Judiciary Committee hearings analyzed all of these issues thoroughly. Judge Breyer was extremely forthcoming in his responses, and I believe he has passed every test with flying colors.

After hearing his responses, all members of the committee voted for the confirmation. The vote by the full Senate will not be quite as unanimous, but I believe it should be, and I suspect it would be if all 100 Senators had the opportunity to participate in our Judiciary Committee hearings and discuss their concerns with Judge Breyer himself.

I, again, commend President Clinton for a truly outstanding nomination. President Clinton is an outstanding lawyer himself, and he knows excellence when he sees it. Judge Breyer is the epitome of excellence in the law, and he eminently deserves the high position.

It is said that it is our laws of wise restraints that make us free. Judge Breyer has the wisdom, experience, ability and integrity to apply the Constitution and the laws of the United States fairly for the benefit of all Americans. Stephen Breyer will make an outstanding Justice of the United States Supreme Court. Future Senates will be proud of him, and so will the country.

I urge the Senate to confirm him.

Mr. HATCH. Mr. President, just one last sentence about this candidate. We know him. He is a man of integrity and a man of exceptional legal ability. He is a person who understands the role of the courts and our constitutional process. He is a student of constitutional law and, frankly, he is a good choice.

I compliment the President for choosing him. I believe we are ready to go to a vote. We are only waiting for the majority leader to make his concluding remarks.

Mr. BIDEN. Mr. President, I yield myself 60 seconds to speak to one issue—the issue of whether or not we, the committee, the majority and minority, thoroughly looked at the potential conflict-of-interest question raised here.

I ask unanimous consent that I may have printed in the RECORD a chronology of what the committee staff and the committee did relative to that issue.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

LLOYD'S OF LONDON INVESTMENT—THOROUGHNESS OF COMMITTEE QUESTIONING

(By Senator Joseph R. Biden, Jr.)

During the Judiciary Committee's hearing on the nomination of Judge Stephen Breyer on July 12, 13, and 14, members of the committee asked Judge Breyer dozens of questions about his investment in Lloyd's of London. He was asked extensively about the cases that he participated in involving Superfund and environmental pollution issues as well as the procedures that he used to screen out potential conflicts of interest. Of course, that testimony has been made available to all Senators.

Moreover, prior to Judge Breyer's hearing, every member of the committee was provided with hundreds of documents relevant to the Lloyd's investment. Again, all of those documents have been made available to all Members of the Senate.

Judge Breyer's testimony about this investment in Lloyd's and his standards for recusal was thoughtful and forthright. In my view, Judge Breyer was candid with the committee about the details of the investment and his approach to the issue of recusal.

With respect to the recusal issue, in particular, the committee received assessments of Judge Breyer's actions from several well known and respected legal and judicial ethics experts and practitioners, including University of Pennsylvania Law School, Geoffrey Hazard, Jr., New York University Law School Professor Stephen Gillers, and John Frank of Lewis & Roca. Each of them has concluded that Judge Breyer's actions fully complied with current applicable recusal standards. I enclose those letters for the RECORD.

In addition, Thomas Brunner and Susan Sawtelle of Wiley, Rein & Feilding have expressed the opinion that no case in which Judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's or on the financial position of insurers generally.

While one individual, Monroe Freedman, a Hofstra law professor, was critical of Judge Breyer, the others stated clearly that Judge Breyer had done nothing unethical.

After unlimited questioning and careful consideration of all relevant information by each member of the committee, Judge Breyer was unanimously reported favorably to the Senate on July 19, 1994. Committee members were satisfied that Judge Breyer has acted ethically and has fully complied with the current applicable ethical standards.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, July 8, 1994.

LLOYD CUTLER,
Counsel to the President, White House Counsel's Office, Washington, DC.

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 $188,000, 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 "subsantia[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 world "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 are 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.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, July 15, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

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 required 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 versus U.S. Army Corps of Engineers*, 968 F.2d 1438, 1460 (1st Cir. 1992); *Pope versus Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992). This test recognizes that there is significant room for disagreement is the application of 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 situation 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, 783–77 (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 years 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 from 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 *Ottai & 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), "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 *Ottai & 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 *Ottai & 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. *Readon* 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 (for 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 Freeman'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 *Liljeberg*, 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.

LAW SCHOOL,
UNIVERSITY OF PENNSYLVANIA,
Philadelphia, PA, July 11, 1994.

Re Judge Stephen Breyer.

Hon. LLOYD N. CUTLER,
Special Counsel to the President,
White House,
Washington, DC.

DEAR MR. CUTLER: You 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 predictable 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 a 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.

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 obligation.

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 Diary*, 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)).

LEWIS AND ROCA LAWYERS,
July 12, 1994.

LLOYD N. CUTLER, Esq.
Counsel to the President, The White House Counsel's Office, Washington, DC.

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.

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 exert on disqualification in connection with the nomination of Judge Haynesworth 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 syndicate 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 976, 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 is 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. §280.132 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) 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 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, 1978 (hereafter Sen. Hrg. 1978), pp. 95, 97, 108, 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 Sollenbarger* 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.*, 455 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 Apps. 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, 56 (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 besides 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

WILEY, REIN & FIELDING,
Washington, DC, July 11, 1994.

LLOYD CUTLER, Esq.,
Counsel to the President, White House Counsel's Office, Washington, DC.

DEAR MR. CUTLER: You have asked us to evaluate whether any case decided by Judge Stephen Breyer under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, could have substantially affected the financial interests of insurers. We represent insurers extensively in connection with insurance coverage matters arising under CERCLA. In addition to representing individual insurers, we and our colleagues represent the Insurance Environmental Litigation Association ("IELA"), a trade group of 21 large property/casualty insurers that appears as amicus curiae in numerous environmental coverage cases at the appellate level.[1] Mr. Brunner has over a decade of direct experience in representing the interests of insurers in disputes arising under CERCLA. Ms. Sawtelle, in addition to representing insurers, has an extensive background in CERCLA and environmental matters generally, having served as an EPA official (as Special Assistant to the Director, Office of Solid Waste, from 1985 to 1987) with responsibility in this area, and having represented numerous potentially responsible parties ("PRPs") in private practice since 1981. As a consequence, we are able to provide you with a realistic appraisal of the significance of CERCLA cases for insurers generally and Lloyds of London syndicates specifically, based on a great deal of experience evaluating CERCLA matters for insurers and others.

We have reviewed all eight cases in which Judge Breyer has passed on CERCLA issues.[2] In our opinion, none of these cases had a material or predictable financial impact on insurers generally or on Lloyds syndicates in particular. Any consequences for insurers were highly speculative and dependent on many independent intervening factors. Any conceivable impact on the financial interests of insurers from these cases resulted only from the court assuring that PRPs received proper procedural protections, or that the statute's provisions were applied properly before parties were held liable for costs that might possibly be determined to be insured by some insurer. None of the cases determined the obligation of any insurer nor of any PRP for which an insurer might be liable. In real world terms, Judge Breyer's financial interest in these cases as a result of his status as a Lloyd's investor was probably more attenuated than his interest as a federal taxpayer in numerous cases involving financial claims against the Federal Government. In both circumstances, the interest is so diluted, so contingent and so indirect as to be of no consequence.

Of the eight CERCLA cases on which Judge Breyer has sat, four did not involve even potentially insurable interests of PRPs. *Maine* v. *Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992), involved a claim for civil penalties sought by Maine against the (uninsured) Federal Government. Similarly, *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), involved the constitutionality of CERCLA's procedures for attaching liens to real property and in no way addresses the extent of financial liabilities under CERCLA. *All Regions Chemical Laboratories* v. *EPA*, 932 F.23 73 (1st Cir. 1991), concerned the imposition of a civil penalty on a chemical company for failure to report a chemical release; such penalties clearly are uninsured. In much the same vein, *Johnson* v. *SCA Disposal Services, Inc.*, 931 F.2d 970 (1st Cir. 1991), applied the doctrine of res judicata, precluding relitigation of matters already determined by a court, to a case that happened to involve CERCLA claims but without any distinctive precedential significance for CERCLA cases.

Only four cases on which Judge Breyer has sat have even considered the rights or obligations of potentially insured PRPs under CERCLA. In each instance, the significance for insurers has been, at most, highly indirect. *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991), addressing the potential liability of a parent company for its subsidiary's waste disposal practices, is likely irrelevant to insurers in most instances but, if not, could be either "good" or "bad" for a particular insurer, depending on the circumstances of the later case. Indeed, the likelihood of a perceptible impact on insurers is both speculative and remote.

Similarly, the potential impact on the insurance industry of the issues in *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), was de minimis. The case principally involved whether a court must, in an injunctive relief context, adopt any cleanup remedy selected by EPA unless it found that selection to be arbitrary or capricious or, alternately, whether it may itself decide what the remedy should be. Judge Breyer, writing for the unanimous panel, upheld the decision of the court below that the court may fashion the remedy. This holding did not make any determination of a PRP's obligations but merely prescribed the procedure and degree of deference due to certain preliminary EPA actions. There was only an attenuated impact on PRPs and an even more attenuated connection to insurers.

Waterville Industries Inc. v. *Finance Authority of Maine*, 984 F.2d 540 (1st Cir. 1993), involved the application of CERCLA's so-called "secured creditor exemption." Judge Breyer joined in the court's unanimous opinion holding that this provision—which exempts from the class of liable "owners or operators" those who, without participating in the management of a contaminated facility, hold indicia of ownership primarily to protect a security interest—applied to a particular sale-and-leaseback arrangement. The court's opinion, which was consistent with a number of other courts' rulings, was highly fact-specific and thus not likely to have a material or predictable impact on the insurance industry. Moreover, this dispute involved private parties only, each of whom is no more likely than the other to have insurance.

Finally, in *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989), Judge Breyer joined in the court's unanimous decision that CERCLA liability arises when the release of hazardous substances from the defendant's facility cause the plaintiff to incur response costs, rather than when the releases cause contamination on the plaintiff's property. This case did not present an issue that would have a material impact on the insurance industry's CERCLA obligations because in a wholly private dispute such as this, either or both sides might have insurance. (In a subsequent opinion in the *Dedham* case, Judge Breyer dissented from the majority regarding whether a new trial was required; this opinion was unrelated to the provisions of CERCLA, *See In re Dedham Water Co.* (901 F.2d 3 (1st Cir, 1990.)

In sum, then, our review makes clear that no case in which Judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's of London or on the financial position of insurers generally.

Sincerely,

THOMAS W. BRUNNER,
SUSAN D. SAWTELLE.

FOOTNOTES

[1] The views expressed herein are our own and are not stated on behalf of IELA or any other client of our law firm. We do not represent any syndicate participating in Lloyds of London.

[2] *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989); *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert., denied*, 498 U.S. 1084 (1991); *Johnson* v. *SCA Disposal Services, Inc.*, 931 F.2d 970 (1st Cir. 1991); *All Regions Chem. Labs, Inc.* v. *United States EPA*, 932 F.2d 73 (1st Cir. 1991); *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991); *Maine* v. *Department of Navy*, 973 F.2d 1007 (1st Cir. 1992); *Waterville Indus. Inc.* v. *Finance Auth. of Me.*, 984 F.2d 549 (1st Cir. 1993).

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, NY, July 8, 1994.

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 announced today that it has concluded that Judge Stephen G. Breyer is qualified to be a Justice of the United States Supreme Court. The statement of the Association's Executive Committee is attached.

STATEMENT

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

Footnotes at end of article.

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.

EXHIBIT 1

ADDITION TO FLOOR REMARKS OF SENATOR BIDEN

In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court was faced with the question whether a civil rights statute, Section 1981, passed in the aftermath of 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, by a narrow 5-4 majority, 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.

Justice Brennan, whose powerful dissent was joined by three justices, had this to say about the majority's reasoning:

"What the Court declines to snatch away with one hand, it takes with the other. Though the Court today reaffirms §1981's applicability to private conduct, it simultaneously gives this landmark civil rights statute a needlessly cramped interpretation. The Court has to strain hard to justify this choice to confine §1981 within the narrowest possible scope, selecting the most pinched reading of the phrase 'same right to make a contract,' ignoring powerful historical evidence about the Reconstruction Congress' concerns, and bolstering its parsimonious rendering by reference to a statute enacted nearly a century after §1981, and plainly not intended to affect its reach. When it comes to deciding whether a civil rights statute should be construed to further our Nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal. I dissent from the Court's holding that §1981 does not encompass Patterson's racial harassment claim."—491 U.S. at 189.

Mr. GORTON. I quote Alexander Hamilton:

The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination.

Mr. President, this explanation of the role of the Senate in the confirmation process was eloquently described by Alexander Hamilton in Federalist Paper No. 76. The words of our Founding Fathers are just as relevant today as they were 200 years ago when they empowered the President in article II, section 2 of the U.S. Constitution to nominate "with the Advice and Consent of the Senate, * * * Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States * * *."

Both the Constitution and the Federalist Papers which were written to advocate and explain the provisions of the Constitution clearly express a deference to the President's choice of his administration. The Senate's check is intended to be used only in special circumstances and, as Hamilton wrote, "to be an efficacious source of stability in the administration."

Although some may call it old-fashioned or conservative, I respect this deference to the President that our Framers clearly intended. I have done so even when President Clinton has sent nominations to the Senate with whose philosophies I do not completely agree. On several occasions, however, I have opposed a nominee based on past actions by that nominee which illustrate a clear political agenda that is intolerant of conflicting viewpoints and which reject fundamental principles found in our Constitution. Other nominees whom I opposed were simply incompetent to fulfill the responsibilities of the office to which they were nominated.

The nomination of Judge Stephen Breyer to become an Associate Justice of the Supreme Court of the United States does not in my view, fall into one of the exceptions. Although he would not have been my selection to sit on the Court, he is obviously a highly qualified, well-regarded, and competent jurist who has proven his respect for and obedience to the Constitution. He and I disagree on his past decisions on the separation of church and state. That disagreement, however, matched by other areas in which we agree, does not compel me to reject this nominee whom the President certainly would replace with a less suitable nominee.

While it is impossible to predict the actions taken after a Justice is confirmed to the bench, there is reason for conservatives to be optimistic that Judge Breyer will show more judicial restraint than has his predecessor. As conservative constitutional scholar Bruce Fein recently wrote in his syndicated column:

In stark contrast to Justice Blackmun, Judge Breyer displays no quixotic impulses to employ judicial power in a utopian quest to correct or ameliorate all social ills. It speaks volumes on that score that Judge Breyer concurred with Holmes' admonition to Judge Learned Hand that the overriding judicial imperative is not to do justice, but to play the game according to the rules.

In conclusion, I refer again to the helpful words of Alexander Hamilton in Federalist Paper No. 76. Despite some philosophical differences with Judge Breyer, as I have stated, that in itself is not sufficient reason to oppose his nomination. I shall vote to confirm.

Mr. HATFIELD. Mr. President; I would like to take this opportunity to express why I will vote in favor of the nomination of Judge Stephen Breyer to be the next Associate Justice of the U.S. Supreme Court.

The advice-and-consent role of the Senate is something that we do not take lightly because this is the only opportunity for the people of this Nation to express whether or not they

deem a nominee qualified to set on the highest court in the land. After carefully scrutinizing every aspect of Judge Breyer's personal and professional life, the Judiciary Committee unanimously agreed that he is an ethical and extremely well qualified candidate for this position. Matters involving his financial investments were thoroughly investigated and determined by experts to represent no conflicts of interest. Throughout the hearings on this nomination, Judge Breyer demonstrated the intelligence, integrity, and fairness necessary to excel in this position. The Court will benefit from his intellect, from his unique points of view, and from the strength with which he holds those views.

As with every nomination, I do not agree with all positions that Judge Breyer has taken or will take during his years as a judge. However, he has formed views on the economics of regulatory burdens that I find intriguing in light of the burdens that Western States face from natural resource regulation. In addition, Judge Breyer has demonstrated an even-handed approach to controversial areas involving freedom of religion, property rights, and civil rights.

In some areas of law, including the law involving abortion, I disagree with Judge Breyer's opinions. He has indicated cautious support for current decisions regarding abortion rights, which I view as misguided. In addition, he stated that constitutional questions surrounding the death penalty are settled law, and that he has no personal opinion on the matter. It is disturbing to me that someone who will be deciding the fate of human lives has no personal opinion for or against State-sponsored killing. However, I have never made it a practice to decide the fitness of a judge to serve on the bench based upon one or two opinions that he either does or does not share with me. I am confident that Judge Breyer will keep an open mind on these issues and demonstrate the judicial temperament that he has shown in his career so far.

The diverse background of Judge Breyer speaks very well for his ability to take on this challenge. He is the highly regarded chief judge of the First U.S. Circuit Court of Appeals, and has a reputation as working well with others and searching for common ground on tough issues. He attended Stanford and Oxford Universities, and graduated from Harvard Law School. In addition, Stephen Breyer has accumulated a variety of other legal experiences over the years including service as a law clerk to Supreme Court Justice Goldberg, working in the Justice Department's antitrust division, serving on the U.S. Sentencing Commission, and serving as chief counsel to the U.S. Senate Judiciary Committee. I am pleased to note that, as with Justice Ginsburg before him, this nominee has been committed to teaching and education for many years. Judge Breyer joined the faculty of the Harvard Law School in 1967 and has continued to teach even after becoming a judge.

These varied legal and educational experiences give Judge Breyer a depth of understanding not only of the law, but of how it relates to each of the three branches of government. These experiences combined with his respect for the Constitution and his fair-minded approach to issues should serve the country well as Judge Breyer takes his place on the Supreme Court of the United States.

Mr. PRESSLER. Mr. President, I rise today to speak briefly on the nomination of Chief Judge Stephen Breyer to be Associate Justice of the U.S. Supreme Court. Of my colleagues, I believe I am in the unique position of being the only former law student of Stephen Breyer when he was a professor at Harvard Law School. I am pleased to support my former law school professor for a position on the High Court.

Coincidentally, the class I took from him years ago dealt with Indian law primarily, the same issue I questioned Judge Breyer about during his confirmation hearings. Many of the cases we studied in that law class years ago retain their significance and precedence to this day.

The class discussed the "Cherokee Cases"—perhaps the two most influential decisions in all of Indian law. In *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall, writing for the Court, determined that the Cherokee tribe was a "state," "capable of managing its own affairs and governing itself." Marshall went on to characterize the tribes, in a famous phrase, as "domestic dependent nations."

The following year, the Court held in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), that the laws of Georgia had no force within the boundaries of the Cherokee nation. At the time, this ruling virtually excluded the States from exercising jurisdiction over Indian affairs, and is said by some to have caused President Andrew Jackson to declare, "John Marshall has made his decision; now let him enforce it."

Jurisdictional problems regarding Indian lands are very much with us today. Indian law cases are certain to come before the Court in the near future. I have confidence Judge Breyer will approach these cases with the dedication and respect for the law which he has so ably demonstrated in the past.

Mr. President, though I will vote to confirm Judge Breyer, my vote does not imply that I do so without reservation. Judge Breyer has been a Federal appeals court judge for 14 years and during that time has authored or joined many, many opinions. Certainly, I do not agree with all of his opinions and views.

Take, for example, his 1989 ruling in New Life Baptist Church Academy versus Town of East Longmeadow, regarding the free exercise clause of the Constitution. Judge Breyer held that local school boards could enforce a State law that requires "approval" of a religious school's secular program. In recent weeks, I have heard from constituents concerned that this case indicates the nominee's beliefs that it would be constitutional for a State government to ban home schooling. Judge Breyer's ruling also raises questions about the extent of a local school board's ability to approve or disapprove of a private school's secular program and whether, when making such an approval, a local school board must use clearly articulated, objective standards.

Despite this concern, however, I take comfort from Judge Breyer's remarks concerning this case during the confirmation hearings. He recognized that,

> [t]here 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.

I certainly share this view. Judge Breyer further stated that he understood the strong protections Congress intended to give to religious liberty under the Religious Freedom Restoration Act, passed by the Congress last year. These remarks give me hope that, if confirmed, Judge Breyer will not further erode the right of citizens to school their children at home or at a private school.

Notwithstanding the reservations I have mentioned, I remain confident that Judge Breyer will be a fair and very able Justice of the Supreme Court. I wish him well.

Mr. DODD. Mr. President, I rise to express my strong support for the nomination of Judge Stephen Breyer to the U.S. Supreme Court. He has already distinguished himself as a first-rate jurist, and I am confident that he will be an extraordinary Justice.

This Nation was founded on the rule of law, and the Supreme Court of the United States is our highest embodiment of that principle. Those who we appoint to this court are therefore more than judges. They are guardians of a sacred idea, the idea that our Nation is one where the law will prevail.

Stephen Breyer is uniquely qualified to serve as a guardian of this idea. He has dedicated his life to making the law work for people, to making the courts accessible to American citizens, and to preserving constitutional rights.

Judge Breyer has worked in all three branches of Government and has distinguished himself in each. As an attorney with the Justice Department's antitrust division, he successfully argued that an agreement not to show

property in white neighborhoods to African-American buyers could be challenged as an antitrust violation. As chief counsel to the Senate Judiciary Committee, he helped forge a consensus among business and consumer groups to deregulate the airline industry.

And finally as a judge, Stephen Breyer has brought a commonsense, reasoned approach to the cases he has handled. A survey of his major opinions resembles a tour through the pillars of American jurisprudence: the imperative of free speech, the rights of religious minorities, the injustice of discrimination, a balance between the rights of the accused and the needs of law enforcement.

Stephen Breyer has also gone beyond the confines of his judicial robes and has brought his good judgment and keen intellect to other tasks. He was a charter member of the U.S. Sentencing Commission, which established fair and uniform punishment guidelines for criminals. He has also taught at Harvard Law School since 1967, where he has contributed to our scholarly understanding of the law and has inspired scores of future lawyers.

Given his sterling reputation and considerable accomplishments, it is unsurprising that Judge Breyer has drawn such wide praise from all across the political spectrum. As Kenneth W. Starr, Solictor General under President Bush, has said,

> Judge Breyer is universally admired among his judicial colleagues throughout the country as a judge of high abilities and unshakable integrity. With his intellect, wisdom, and energy, he will prove to be, I am confident, one of the great Justices of this century.

I share Mr. Starr's assessment, and I urge my colleagues to vote for this nomination.

Mr. KEMPTHORNE. Mr. President, it seems that ever since I began my career as a public servant, I have been involved in the selection of judges. In Boise, as a result of my position as mayor, I served on the Fourth District State Court Magistrate Selection Panel.

As a group, we on the selection panel were very serious in our decision-making process. We knew that the men and women we selected would be perhaps the public's only contact with the judicial system. The trust of the citizenry—their belief in the essential fairness of the judiciary, would be given the test in our selection.

My thoughts during that selection process were that we should find and place on the bench the best qualified individual to fit the position. But, as with all things, there was sometimes disagreement as the meaning of the term "best qualified."

By "best qualified" I meant that a judge should exhibit exemplary educational and professional qualifications. They should demonstrate a temperament and attitude of fairness. They should be dedicated to the principles of the law and they should be willing to subject themselves to a life of study and intellectual pursuit. On-the-job training is no place for a judge.

We knew that if a well-qualified individual was lacking in some particular qualification, but was otherwise a deserving person who could satisfy the greater majority of the needs of the bench, that sufficient safeguards existed to backstop our decision. In Idaho, judges stand for public confirmation every 4 years. A competent and watchful review process ensured that judges who failed to perform could and would be replaced.

Now, years later, I find myself in the position of fulfilling the high constitutional duty in the confirmation of Justices of the United States Supreme Court.

In Federalist Paper, No. 76, Alexander Hamilton on April 1, 1788, stated:

> To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

There are few things we will do this year more important than confirm lifetime appointments to the Federal bench. Any Federal judgeship is a position not to be taken lightly. Just as I have never endorsed a "litmus test" for Federal judges, I cannot support a Federal judgeship, any Federal judgeship, based on political patronage. A Federal judgeship is a position that should not be based simply on the slavish adherence to political philosophy. To do so diminishes the bench and diminishes the nominator. To do so betrays our constitutional duty. In Federalist Paper, No. 78, Hamilton stated:

> For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, (it) would have everything to fear from its union with either of the other departments.

The selection of a Federal judgeship cannot be a political game to be played by nominating legislators or a conniving executive but rather a deadly serious business which can determine the future direction of our Nation. The court and its nominees are, however, influenced by the political process. A careful balancing of philosophies, as determined by the election process, determines the direction of the court and the direction of our Nation.

Now, as then, I believe that a Justice of the United States Supreme Court, as with any Federal judgeship, should have the highest educational and professional qualifications. Surely Judge Breyer has those qualifications. Educated at Stanford, Oxford, and Harvard, Judge Breyer has served as the chief counsel of the Senate Judiciary Committee, law clerk for Supreme Court Justice Arthur Goldberg, and professor of law at Harvard School of Law. He currently serves as the chief judge of the First District U.S. Court of Appeals, having been appointed by President Carter.

However, we expect excellent qualifications in a lifetime appointment to any position on the Federal bench. Too many critical issues will be decided. Too many lives will be affected.

A Justice of the U.S. Supreme Court must be a person of integrity and values. The best way to determine if a judge represents our ideal of judicial integrity is through their decisions. Most of the decisions of Judge Breyer represent an incisive legal mind and a scholarly process of thought. Some of his decisions, however, have raised controversy in my State, particularly in his decisions on religious freedom and the free exercise of religion. Some of my constituents are concerned about Judge Breyer's previous rulings on home schooling.

In Idaho, and across the Nation, thousands of concerned families have rejected the public educational system because they do not believe it represents the values they cherish. The values and the reasons for that belief are varied across the country. In some parts of America, alternative schooling is preferred because of cultural or ethnocentric values which parents may rightfully believe are not sufficiently addressed by a public school system. In Idaho, the overwhelming majority of alternative home schooling is done by parents who believe that the exclusively secular education offered by the public school system does not provide the sound religious values they hold above everything else. Home schooling is not easy. It takes a commitment to education and a commitment to those values which the parent feels are not shared by our educational system. These parents have the right to provide an alternative education to their children.

In the confirmation hearing of Judge Breyer, Senator SIMPSON questioned him on his views and on whether Judge Breyer believes it is constitutional for States to mandate testing to determine the adequacy of secular education at religious schools. Judge Breyer answered that the question was dependent on the particular State law and whether the State system was the least intrusive into the rights of the individual. Asked straight out if he had a bias against home schooling or religious schooling he answered, "absolutely not." In the light of his qualifications

and his experience I am willing to take Judge Breyer at his word.

Senator LUGAR has criticized Breyer for his involvement in 1985 with a Lloyds underwriting syndicate known as Merret 418. And I want to thank my good friend and colleague, Senator LUGAR, for bringing this issue to the Senate. The Lloyds syndicate insured a wide range of risks but its main crisis involved asbestos and pollution remediation. It is fair to ask whether this involvement raises a question of conflict of interest over Judge Breyer's participation in environmental pollution cases.

Furthermore, because of the rules of Lloyds investment depending on the results of the losses sustained, Judge Breyer may be unable to leave the syndicate. Currently, Breyer has sustained losses of some $30,000. The worst case scenario differs depending on your source of information. A representative from Lloyds has said that Judge Breyer could lose a maximum of $187,200, with his own insurance covering all of that. Others, also familiar with the Lloyds process, say that Judge Breyer would be harassed by this improvident investment for years to come. They question his judgment and his judicial independence in light of this serious entanglement. They say that he may have to recuse himself from so many decisions that his effectiveness will be compromised for years to come.

But, with all respect to my friend and colleague, Senator LUGAR, I cannot disqualify a person to sit on the Federal bench because of a disputed and speculative impact of a family investment. If Judge Breyer is ineffective because of his entanglements, he should retire from the bench.

On balance, Judge Breyer is a highly qualified and experienced member of the bench who will make the Court marginally more balanced based on the political and judicial philosophy of the Justice he is replacing. Because of his qualifications and his judicial history I will support Judge Breyer to be a Justice of the U.S. Supreme Court.

Mr. DOLE. Mr. President, I would like to say a few words in support of the nomination of Judge Stephen Breyer.

In the late 1970's, I had the opportunity to work closely with Judge Breyer, when I was a member of the Senate Judiciary Committee and Judge Breyer—then just Stephen Breyer—was the committee's chief counsel. Although a member of Senator Kennedy's staff, Stephen Breyer nonetheless made a big impression on those of us sitting on the Republican side of the committee room. Stephen Breyer was someone whose word was good. He was always fair-minded, sharing information and giving us the benefit of his counsel.

After 3 days of confirmation hearings, the American people now know what we knew back then—that Judge Breyer's intellect is considerable, his educational credentials impeccable, his knowledge of the law expansive. Judge Breyer also possesses a skill that should serve him well on the Court—an ability to communicate his knowledge of the law in clear, unambiguous prose, making it accessible to the ordinary American citizen. He is a recognized expert in the area of administrative law, antitrust, and economic regulation. He was a charter member of the U.S. Sentencing Commission. He is a proud father and a loving husband.

Of course, I do not agree with every decision ever rendered by Judge Breyer. For example, in the New Life Church Academy case, it appears that Judge Breyer took too narrow a view of the free exercise clause of the first amendment and, as a result, supported a position that undly burdens private religious schools.

It is also clear that Judge Breyer would not have been nominated if a Republican were sitting in the Oval Office. But, then again, it was President Clinton—not President Bush—who won the election in 1992.

Obviously, Republicans should not give President Clinton a green light on every judicial nomination that comes down the pike, but that does not mean we should flash a red light on every nomination either. Republicans will continue to examine closely the record of every nominee, and if the record raises more questions than answers, then we will speak out, as we did with the nomination of Judge Rosemary Barkett.

The role of a judge is to follow precedent and apply the law neutrally, not rewrite the law by legislating from the bench. What matters is what the law says, not what a judge thinks the law ought to say. Any nominee who does not understand this basic principle of judicial restraint should not be confirmed.

I know it is fashionable in some circles to blame Republicans for something called gridlock. But with the nomination of Justice Ginsburg, and now with the Breyer nomination, Republicans have given the President the benefit of the doubt. In fact, I think it is fair to say we have been more cooperative on these two nominations than Democrats ever were during the Reagan and Bush administrations. Just ask Judge Bork and Justice Thomas.

Finally, Mr. President, before Judge Breyer was officially nominated, there was a lot of talk about how important it was to put someone like former Chief Justice Earl Warren on the Court.

This point of view is disturbing, to say the least, for as violent crime intrudes on every community in America, the last thing we need is another activist Warren Court that expands the rights of criminal defendants and hamstrings law enforcement.

Unfortunately, too many Federal judges have too often viewed law-and-order as just that—a slogan. Arizona Gov. Fife Symington, for example, has tried to rid his State's prison system of pornography, only to be overruled by a district court judge. Federal judges have ruled that State prisoners suffer "cruel and unusual punishment" if they do not have access to televisions and basketball courts. And Federal prison cap orders have led to the early release of violent, vicious criminals.

According to one study, a staggering three-fourths of the State prison systems and one-third of the 500 largest local jails are under some form of Federal court supervision.

So, Mr. President, a judicial nomination is serious business. The decisions of Federal judges can have important, real-life consequences. And when you are talking about filling a vacancy on the highest court in the land, the stakes are even higher.

Mr. President, I am proud to support the nomination of Stephen Breyer. President Clinton has made a fine choice, and I am pleased to join those who wish him well as the newest Associate Justice of the Supreme Court.

Mr. MOYNIHAN. Mr. President, Judge Stephen G. Breyer, the Chief Judge of the U.S. Court of Appeals for the first circuit, is the second superb Supreme Court nominee presented to the Senate by President Clinton, Ruth Bader Ginsburg having been the first. I was an early advocate of Judge Ginsburg's nomination, and I support Judge Breyer's nomination with equal enthusiasm.

My acquaintance with Stephen Breyer began three decades ago when I undertook to edit the collected public papers of Justice Arthur Goldberg. I had been Assistant Secretary of Labor in the Kennedy administration during Arthur Goldberg's tenure as Secretary, and Stephen Breyer was a law clerk to Justice Goldberg on the Supreme Court. Stephen Breyer was of great help to me in the compilation of the Justice's papers, which were published in 1964 under the title "The Defenses of Freedom: The Public Papers of Arthur Goldberg."

More recently, Judge Breyer and I have found we have another common interest—in the subject of risk regulation. I have long advocated a more sensible Government approach to the assessment of risk; this is described in S. 110, the Environmental Risk Assessment Act. He has written a book on the subject entitled "Breaking the Vicious Cycle Toward Effective Risk Regulation." The book, based on the Oliver Wendell Holmes lectures delivered by Judge Breyer at Harvard University, makes the subject easily accessible. In it, he proposes the creation of a Federal agency to help the President determine how best to allocate resources and to help determine the best way to reduce risks. This would be another bureaucracy, but a decentralized agency

whose multidisciplinary employees would serve for 2- to 3-year periods in offices within the executive, judicial, and legislative branches, dealing with risk assessment and management.

In addition to his broad experience as a Federal judge on the first circuit, Stephen Breyer's other professional experience has prepared him well to sit on the Supreme Court. He has served as a professor at Harvard Law School and at Harvard's Kennedy School of Government; as Chief Counsel to the Senate Committee on the Judiciary; as Assistant Special Prosecutor for the Watergate Special Prosecution Force; and as Special Assistant to the Assistant Attorney General here in the U.S. Department of Justice. He is a lawyer who has examined the law from many perspectives.

These experiences, no doubt, have contributed to Judge Breyer's deep respect for and knowledge of the legislative process. Indeed, he is a leading expert—and formidable advocate—on judicial use of legislative history. His approach to this subject was described by Prof. Robert A. Katzmann, who is the Walsh Professor of Government and Professor of Law at Georgetown University, in a recent article which I will place in the RECORD.

Mr. President, Stephen Breyer will be an outstanding Justice of the Supreme Court, and I urge my colleagues to support his nomination when the Senate votes later today. I ask unanimous consent that the article about Judge Breyer by Prof. Robert Katzmann be printed in the RECORD immediately following my remarks.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Roll Call, May 30, 1994]

GUEST OBSERVER

(By Robert A. Katzmann)

JUSTICE BREYER: A RIVAL FOR SCALIA ON THE HILL'S INTENT

If confirmed as the 108th Justice, Stephen Breyer will bring to the Supreme Court an intimate knowledge of, and respect for, the legislative process. As former chief counsel of the Judiciary Committee, he knows how laws are made and he knows the people who make them.

"My experience running the staff of the Senate Judiciary Committee," Breyer once observed, "led me to conclude that elected officials seriously consider public interest argument and act upon them."

As a jurist who is now the chief judge of the First Circuit, he has been a staunch defender of judicial use of appropriate legislative history—for example, committee reports and floor debates—in the interpretation of unclear statutes.

At a time when the venerable practice of looking to legislative history has come under siege, most notably from Justice Antonin Scalia, Breyer's appointment promises to add an effective voice to the debate.

Those who would restrict or even totally abandon the use of legislative history and confine judges merely to the ambiguous words of a statute itself offer a variety of challenges to which Judge Breyer has responded.

Critics argue that legislative history is often conflicting and thus of no use. To that view, Breyer observes that the federal appeals courts are often confronted with unclear statutory provisions, which do not involve major political controversy, and where legislative history is often clear enough to clarify statutory meaning.

Legislative history skeptics make the constitutional argument that the law consists only of the words of a bill passed by both houses of Congress and signed by the president or subject to a veto override—not of floor speeches or committee reports.

Breyer answers that no one claims that legislative history is any strong sense "the law," but rather that it is useful in ascertaining the meaning of the words in the statute.

Opponents of legislative history also assert that the Constitution vests "legislative" power in elected Members of Congress. For Scalia, using legislative history vests illegitimate authority in unelected individuals—Congressional staffers or lobbyist—who write the floor statements, testimony, and reports. Members of Congress, the argument continues, may not even read these materials.

Judge Breyer and Justice Scalia have taken each other on publicly about the workings of the legislative process, disagreeing on the matter at a colloquium of the Governance Institute and the Brookings Institution.

To Breyer, legislators make the significant decisions and take responsibility for the outcome.

Legislators cannot read every word of every report or proposed statute. But in the process of interaction with relevant interest groups, executive branch departments, and other institutions, these words are carefully reviewed by those whom they will likely affect and by the legislator's own employees. The staff act at the direction of their legislators, who, in the end, like the managers of other large institutions, are accountable for the decisions made.

The problem with legislative history, Breyer maintains, is with its abuse, not it use. Legislative history, he argues, aids appellate courts to make the law itself more coherent, workable, and fair in at least five different circumstances:

(1) Avoiding an Absurd Result. Breyer believes that a court should look to legislative history where the literal language of a statute would produce an absurd result. On this point, he and Scalia agree.

(2) Preventing a Court Decision From Relying on a Drafting Mistake. In some situations, the language of statute might seem rather clear and the result is not apparently absurd. But resorting to legislative history could demonstrate that the result is in error because of a drafting mistake, one that a court should correct.

(3) Specialized Meanings. Another relatively noncontroversial use of legislative history that Breyer support is when it gives meaning to a specialized term or phrase in a statute, as understood by the community of experts or other involved in the passage of a statute. Here, too, Justice Scalia would apparently concur with Judge Breyer.

(4) Identifying a "Reasonable Purpose." At times, Breyer argues, legislative history is necessary to understand the purpose a particular statutory word or phrase has within the broader context of a statutory scheme.

For instance, in a First Circuit case, the court had to determine whether the word "persons" in a welfare statute included a child, the child's mother, a stepfather, or all of them. Without examining legislative history, the court might not have appreciated that the same word "persons," found three times in the same sentence, referred in each instance to a different group.

(5) Selecting Among Reasonable Interpretations of a Politically Controversial Statute. A court might also use legislative history when a politically controversial statute, passed amidst conflicting signals, is silent or unclear about a contested issue. Breyer contends that for reasons of "time, the complexity and length of the overall bill, and the difficulty of foreseeing future circumstances," it might have been easier to case language in a floor statement or report than in the statute itself.

As chief judge of the First Circuit, Stephen Breyer has supported initiatives to promote communications between the judiciary and Congress.

To that end, his circuit is participating in a Government Institute project in which judicial opinions identifying perceived noncontroversial problems in statutes are routed to Congress for its information.

This effort, launched in 1992 with the bipartisan support of the House and Senate leadership, is designed to stimulate shared understanding between the branches about the drafting, interpretation, and orderly revision of statutes.

As the product of both the courts and Congress, Justice Breyer will most assuredly be a bridge between each, in ways that promote the more effective workings of government.

Mr. MCCONNELL. Mr. President, I am pleased to support the confirmation of Judge Stephen Breyer for Associate Justice of the United States Supreme Court. Judge Breyer has demonstrated he has the necessary qualifications to become the 108th Justice.

He will come to his new position with experience in all three branches of government and with a distinguished academic background. He has a thorough command of the law, particularly for those areas which increasingly occupy the Court's docket—administrative and regulatory issues.

Judge Breyer appreciates the framework of American democracy—that each of the three branches has separate and distinct functions. And, most importantly he knows it is the responsibility of the Congress to make the laws. In his 14 years as an appellate judge, he has shown appropriate deference to the legislative branch. And he has demonstrated restraint as a judge, avoiding the tendency of so many judges to invent law to achieve a particular result.

During his confirmation hearings, he reviewed a number of issues. He finds the death penalty to be constitutional in certain circumstances—"settled law" was what he said. On the first amendment's protection of religion, he said the separation of church and state was not absolute, and noted that there were "vast areas" in which the government assisted religion. In discussions about the use of statistics in death penalty cases, Judge Breyer noted that the hallmark of our system is "individual justice" based on the facts and circumstances of each case.

And, on those issues he felt he could not discuss in detail, Judge Breyer stated clearly that he would have an open mind; he will study the arguments on both sides of an issue, and he will not prejudge any case. This is in stark contrast to Justices Marshall, Brennan, and lately Blackmun, who announced their position on a key issue—the death penalty—without regard to the particulars of a case.

Mr. President, Judge Breyer possesses a keen intellect, the necessary integrity, as well as an appropriate judicial temperament to serve on the Supreme Court. In addition, his record, including his testimony at his confirmation hearing, demonstrates that he is a practitioner of judicial restraint; he will be disciplined and he will defer to Congress when it comes to setting out new rights or making new law.

I will cast my vote in favor of Judge Breyer's confirmation.

Mr. KOHL. Mr. President, I rise to support the nomination of Judge Stephen Breyer to the U.S. Supreme Court, and to speak briefly—and somewhat critically—about the process that I believe will result in his confirmation.

Judge Breyer came before the Judiciary Committee with a reputation as a brilliant legal scholar and a fair-minded judge.

For the most part, the committee's hearings confirmed these judgments. Judge Breyer impressed us with his ability to simplify complex legal doctrines and cut to the heart of fundamental constitutional questions. His answers revealed that he is a moderate, reasoned man of principle with a commitment to the rule of law; a man who is likely to strengthen the center of the Supreme Court, rather than polarize the Court.

Throughout the hearings, two main criticisms were levied against Judge Breyer. First, many charged that Judge Breyer acted unethically because he ruled in cases that may have indirectly affected his investments.

I do not believe Judge Breyer acted unethically and I do not doubt his integrity. If judges had to recuse themselves in every case that presented a possible conflict of interest, our courts would become paralyzed. But Judge Breyer could have taken more significant measures to dispel any appearance of impropriety. I am pleased, therefore, that he has promised, at the very least, to divest himself of all insurance holdings as soon as possible, although it is not clear exactly when he would do so.

It was also suggested that because Judge Breyer has spent most of his life dealing with books and theories, he lacks Justice Blackmun's empathy for "the poor, the powerless, and the oppressed."

Well, it is true that Judge Breyer did not have an underprivileged upbringing. And it is true that he has spent much of his life as a legal scholar, rather than a hands-on practitioner. But we should not assume that because Judge Breyer has been fortunate, and enjoys the life of the mind, he is unable to care about others.

Judge Breyer seemed to recognize during our confirmation hearings that his actions as a judge have very real consequences for the lives of the people the law governs. And he appears to be aware that beyond the marble columns of the Supreme Court is a world in which the politically powerless are entitled to as much justice as those Americans who hire the best lawyers and lobbyists.

It may be that Judge Breyer still has to demonstrate his professed commitment to making the law work for the average person. But I believe our confidence in him will be justified.

Having said this, there was much we did not learn about Stephen Breyer, and—despite my confidence in him—this concerns me. Judge Breyer's eloquence often gave him the appearance of answering questions when, in fact, he actually sidestepped them with sugar-coated generalities.

For example, he would not give an opinion on whether courts should be required, at the very least, to consider public health and safety before allowing for secrecy in civil litigation. And he refused to discuss many subjects, including voting rights jurisprudence, gender-classifications, and his own decision on abortion counseling—Rust v. Sullivan—with any degree of specificity.

Whenever Judge Breyer felt the need to avoid answering a question, he would cloak himself in his black robe and claim that the issue was within Congress' domain or that the question took him out of his role as a judge. Yet at the same time, he did speak openly and freely on other issues which were just as likely to appear before the Court, or just as easily characterized as issues for Congress rather than the courts.

Why? The answer is by now well known: nominees only answer questions when they want to—or when they feel they need to.

I point all this out not to chastise Judge Breyer, whom I respect. But I cannot ignore a nominee's unwillingness to answer reasonable questions. Indeed, the process demands that we should not.

Mr. President, we all know that because a Supreme Court Justice has life tenure, the confirmation process is crucial—it is the public's only opportunity to learn what is in the heart and mind of a nominee. Of course, we also recognize that there are limits to what a potential Justice of the Supreme Court can say before the Senate.

But these limits do not justify the type of hedging that we have seen from some past nominees—evasion that erodes the Senate's ability to faithfully carry out its advise-and-consent responsibilities.

Judge Breyer was probably more straightforward with the members of this committee than many nominees in recent history. In fact, Senator SPECTER went as far as to coin a new standard for nominees to live up to: the Breyer standard.

In my opinion, however, we still have a way to go before we achieve the candor that the confirmation process demands and deserves. So I would like to impose an even higher standard on future nominees than perhaps would Senator SPECTER.

In the meantime, I commend President Clinton for nominating Judge Breyer—a man of great ability, who has demonstrated an enduring commitment to public service and to the law. I look forward to his tenure on the Court.

Mr. SHELBY. Mr. President, I rise to express my support for the nomination of Judge Stephen Breyer to the U.S. Supreme Court. I am pleased to offer my support because I believe that he is exceptionally well-qualified to serve as a Supreme Court Justice.

Judge Breyer is a native Californian who was born and raised in San Francisco. He was educated in the public school system and received his undergraduate degree from Stanford University. He also attended Oxford University on a Marshal Scholarship. In addition, Judge Breyer had a distinguished academic career at Harvard Law School where he was a member of the Harvard Law Review. Subsequently, he spent 8 years in the Army Reserves.

His entire adult life has been spent as a public servant working in all three branches of the Government. He began his career after law school as a law clerk to Supreme Court Justice Arthur Goldberg where he received firsthand experience in the Federal judicial process. He also served as a Special Assistant to the Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice.

As Chief Counsel to the Senate Judiciary Committee, Judge Breyer worked well with Members of both parties and acquired a reputation for fairness. For the past 14 years, he has served as a judge on the U.S. Court of Appeals for the First Circuit. He is recognized throughout the judicial community as one of this country's leading jurists. He has rendered clear and concise decisions which have protected the individual and civil rights of American citizens. In addition, he has demonstrated exceptional skill in building bridges in the pursuit of justice and this ability will serve the court and the Nation well.

Judge Breyer also has dedicated many years of service to teaching young legal scholars at the Harvard

Law School. He has shared with his students through his instruction, as well as his writings, his expertise in criminal law, antitrust and economic regulation, civil rights, constitutional liberties, and environmental law. In addition, he has emphasized to his students that the judicial system must be accessible to everyone.

As a husband and father of three children, Judge Breyer is a well-rounded individual with broad experiences. He has a keen appreciation for family values and the challenges that families and young people in America face today. He is an honest, responsible, and intelligent jurist who possesses the credentials and wisdom needed for the Supreme Court. It is becoming increasingly difficult to find individuals as talented as Judge Breyer who are willing to dedicate their lives to public service. I am very happy that Judge Breyer is involved in this process, and I want to express again my strong support for his nomination.

Mrs. FEINSTEIN. Mr. President, frankly, while I expected to be impressed with Judge Breyer before the hearings, I must admit that I was not fully prepared for what I saw and heard once they began.

In his answers to question after multipart question fired at him on complex issues, Judge Breyer demonstrated both a deep knowledge of his field—and a comfort with that knowledge—unparalleled in my experience.

I am confident, however, that he will bring to the High Court not just scholastic and intellectual ability, but—more importantly—a rare ability to reveal the simple and elemental truth behind complex legal theories. He will do what he said in the Rose Garden, Mr. President. Make the law work for, and intelligible to, ordinary people.

He also satisfied this Senator that he is a man of great integrity, judgment and good, plain common sense. I believe him to be an outstanding appointment at a critical time in the Nation's history. As the Supreme Court wrestles with the issues that may well define our age: private property versus public need; access to information versus the creation of intellectual property; and crime control versus individual rights.

Judge Breyer will play a major role in shaping the decisions of the Court, perhaps helping articulate a middle ground that will guide us all.

For myself, Mr. President, I will be particularly interested to see how Judge Breyer and the Court balance what I called the rights of the few versus the rights of the many, particularly with respect to criminal justice matters. Perhaps no single issue will better test the Court's ability to strike a delicate balance than deciding what the habeas corpus appeal rights of a convicted killer should be.

As Americans increasingly come to feel that violence is plaguing our Nation, and the need to put laws in place to offer society the protection that it deserves, how will we—as a nation of laws—also protect the rights of the individual.

I, for one, am more than comfortable putting Justice's scales in Judge Breyer's stunningly skilled hands, Mr. President. I urge my colleagues to vote to confirm him this afternoon.

Mr. AKAKA. Mr. President, I rise in support of Judge Stephen G. Breyer, President Clinton's nominee to be Associate Justice of the Supreme Court of the United States.

The Constitution authorizes the Senate to give advice and consent to such nominations made by the President. I assume this responsibility with the utmost solemnity and diligence. I am pleased the Senate Judiciary Committee gave its overwhelming approval to the nomination after thoroughly reviewing Judge Breyer's suitability to serve on the Supreme Court.

I have had the privilege now to vote on four Supreme Court nominations, including three sitting Justices. I applied the same criteria to evaluate Judge Breyer as I did in examining the qualifications of his predecessors, Justices Souter, Thomas, and Ginsburg.

Throughout Judge Breyer's appearances before the Senate Judiciary Committee, I found him to be an engaging and knowledgeable jurist. He possesses a keen sense of humor, a sharp mind and an obvious enjoyment of his family, work, and community. I was most impressed with his belief that a primary precept of the Constitution is the preservation of individual dignity. During Judge Breyer's tenure on the U.S. Court of Appeals for the First Circuit, he has defended constitutional liberties such as free speech, religious freedom, and other privacy issues.

However, it is in the arena of antitrust and economic regulation where Judge Breyer is most widely recognized as one of the Nation's leading authorities. He is also a leader in interpreting Federal statutes and regulations that increasingly occupy the Supreme Court's attention. I believe his approach to statutory interpretation is in part shaped by his respect and understanding for the legislative process.

Judge Breyer enjoys an excellent reputation, particularly among his colleagues on the First Circuit Court. He also received the highest rating from the American Bar Association and was highly praised by those testifying on behalf of his judicial work during the recent confirmation hearings.

Mr. President, as I stated before, I am pleased to vote in favor of this nomination.

Mr. MURKOWSKI. Mr. President, as the Senate conducts its constitutional duty of advising the President on the nomination of Judge Stephen Breyer to the Supreme Court, I am reminded of the solemn significance of the Senate's duty as a separate branch of Government to advise the President, the executive, on the nominations of individuals to serve in posts that are among the highest official posts in the land. Of all nominations this body considers, nominations to the Supreme Court are among the most critical because of the tremendous responsibility we vest in our Supreme Court, and because the tenure of the members of the highest judicial court in the country is limited only by an individual justice's inclination or mortality. This is the first and last say we will ever have on the suitability to Judge Breyer to sit on the Supreme Court.

Judge Breyer has, by most accounts, provided reasoned, intelligent answers to the Senate Judiciary Committee about legal issues and about his many rulings during 14 years as a Judge on the U.S. Court of Appeals for the First Circuit. He received the unanimous approval of the Senate Committee on the Judiciary. That is no small feat and, in all likelihood, will provide enough momentum to secure the consent of the Senate to his nomination to the Supreme Court.

In fact, one of the only serious concerns raised in relation to the Breyer nomination comes, not from the Judiciary Committee, but from the senior Senator from Indiana who provides a measured, thoughtful analysis of Judge Breyer's involvement in a Lloyd's of London insurance underwriting investment. An investment that is, as I understand it, the ultimate roll of the dice, the most important spin of the roulette wheel a person could take with his or her assets. One bets one's entire worth on underwriting insurance claims that other people enter into without consulting you. If they guess wrong the investor could lose everything. According to the Washington Post at least four investors in similar schemes have lost all their wealth and ended their lives in suicide. Now we are told that one of Judge Breyer's underwriting syndicate's faces mounting losses with no end in sight.

As a banker for 25 years, I am extremely troubled by the facts that the Senator from Indiana raises. I often encountered circumstances where I counseled customers, even very wealthy customers, against the advisability of taking on debt or the financial liability of another. Sometimes, very smart people made bad decisions and, literally, had to pay for those mistakes. But, Mr. President, in 25 years of banking, I never saw someone enter into an agreement in which their lability was unlimited. One's judgment is put in serious doubt when he voluntarily enters into an agreement like this.

For these reasons, I cannot support Judge Breyer's nomination to a position on the Supreme Court. His Lloyd's of London investment undermines my confidence in his judgment and forces

me to oppose consenting to his nomination to one of the most critical, most powerful positions in the Nation. I am also concerned about the number of cases that Judge Breyer could not participate in because of the wide ranging nature of his investments which the Senator from Indiana has already discussed.

Mr. SMITH. Mr. President, I rise in opposition to the confirmation of President Clinton's nomination of Judge Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

Mr. President, if Judge Breyer's nomination to the Court is confirmed by the Senate, he will serve for decades after President Clinton leaves office. In making my decision on how I will vote with respect to his confirmation, I had to keep in mind that every time that Judge Breyer votes on the Supreme Court, I will be reminded of my vote in the Senate on his confirmation.

I have carefully reviewed Judge Breyer's background, decisions, and testimony before the Senate Judiciary Committee. As a result, I have concluded that I cannot, in good conscience, vote to confirm a nominee whose judicial record and confirmation hearing testimony indicates that he will move the Supreme Court away from the conservative decisions of Chief Justice Rehnquist and Associate Justices Scalia and Thomas.

In addition to my concerns about Judge Breyer's judicial philosophy, I agree with Senator LUGAR's criticisms about the nominee's controversial Lloyds of London investments. I believe that Lloyds' investments demonstrate highly questionable judgment. Moreover, they may require Judge Breyer to recuse himself from numerous significant cases before the Supreme Court in the years and decades ahead.

Judge Breyer's testimony before the Judiciary Committee places him on the liberal side of the constitutional debate regarding the separation of church and state. I believe that he is likely to vote to uphold the Supreme Court's precedents banning prayer in the public schools and even at public school graduation ceremonies.

Mr. President, the Founders wanted the Constitution to guarantee that the United States would not have an official, national religion like the Church of England. I agree. But Judge Breyer's philosophy takes that worthy concept to an extreme.

As I studied Judge Breyer's judicial record, I was particularly disturbed that he joined a 1990 decision of the First Circuit Court of Appeals holding that the Reagan and Bush administrations' regulation banning the use of Federal funds for abortion counseling is unconstitutional.

Regardless of one's beliefs about whether elective abortions should be legal, the American people do not want to pay for abortions with their tax dollars. Judge Breyer's view that the Constitution requires that the American people pay for abortion counseling in federally funded clinics is extreme and represents an improper reading of the Constitution.

Mr. President, I have reluctantly concluded that President Clinton's nomination of Judge Breyer represents the second building block in his effort to reconstruct the liberal Warren Court. I will vote against his confirmation to the Supreme Court.

Mr. GLENN. Mr. President, one of the most significant responsibilities of a President is the appointment of justices to the Supreme Court. The decisions of Supreme Court justices affect all Americans. They are on the front lines of battles over the most controversial issues of the day. For the American people to have respect for the law, it is imperative that Americans have confidence in the abilities of the justices that serve on the Court.

That is why I take the advise-and-consent clause of the Constitution so seriously. And that is why I am going to vote in support of the nomination of Judge Stephen Breyer to the Supreme Court of the United States.

In these days of rabid partisan bickering, President Clinton wisely nominated an individual who is not an idealogue. Rather, Judge Breyer has a reputation as a thoughtful jurist who carefully examines all sides of an issue. He is a consensus builder who breaks judicial gridlock by searching for middle ground.

Judge Breyer has devoted his life to public service. He has served with distinction in all three branches of government. Judge Breyer was appointed to the U.S. Court of Appeals for the First Circuit in 1980, where he currently serves as chief judge. Prior to his appointment to the Federal bench, Judge Breyer served as special counsel and later as chief counsel to the Senate Judiciary Committee. And in the executive branch, Judge Breyer was a senior official in Antitrust Division of the Justice Department.

This will not be Judge Breyer's first experience at the Supreme Court. Following law school, Judge Breyer served as law clerk to Supreme Court Justice Arthur Goldberg. And Judge Breyer's commitment to legal education did not end after law school. He joined the faculty of Harvard Law School in 1967 and has continued teaching following his appointment to the Federal bench.

Judge Breyer is also well known for his work as a charter member of the U.S. Sentencing Commission and as a special prosecutor in the Watergate investigation.

Academics, labor officials, business people, environmentalists, conservatives and liberals alike have praised Judge Breyer's record and abilities. Harvard Law Professor Charles Ogletree calls Judge Breyer the "consummate reasonable person" who will "bring balance, intellectual rigor, and humility in his role as a Supreme Court justice." AFL–CIO President Lane Kirkland says that Judge Breyer has demonstrated a "keen appreciation of the claims of working men and women for dignity in their work and for economic fairness." And Kenneth Starr, Solicitor General under President Bush, predicts that Judge Breyer will prove to be "one of the great Justices of this Century."

Judge Breyer's opinions demonstrate a real commitment to make courts more accessible to those with limited means. But Judge Breyer is concerned no only with accessibility, but also with ensuring that the American people can understand the cases before the courts. In an age when it seems you need to hire a lawyer to understand your own phone bill, Judge Breyer writes in a clear manner that can be widely understood by the American people.

Judge Breyer's investment in Lloyd's of London has been a subject of some concern. It should be noted that Judge Breyer publicly disclosed his Lloyd's investment each year so that parties could decide whether or not any they felt that any conflict existed. And he recused himself from cases involving Lloyd's. The American Bar Association has investigated Judge Breyer's background and concluded that he has an excellent reputation for integrity and character. I am satisfied with the conclusions of the ABA on this count.

I have also heard from Ohioans regarding Judge Breyer's holding in New Life Baptist Church Academy, a case involving the rights of parents to teach their children at home. During the Judiciary Committee's hearing on Judge Breyer's nomination, Judge Breyer was questioned about this case and his views on home schooling. Judge Breyer assured the committee that he has no bias against home schooling or religious education. Noting that there is nothing more important to a person than religious principles, he said that parents should have the right to pass religion onto their children without undue State interference. I think Judge Breyer has adequately explained his position on this issue.

Mr. President, in conclusion I want to again express my support for Judge Breyer's nomination. I don't agree with Judge Breyer on every issue. But what is important is that Judge Breyer approaches every issue objectively and he rules impartially. He looks at the facts and decides accordingly. Everyone agrees that Judge Breyer has a brilliant legal mind. I believe we should give the American people the benefits of Judge Breyer's legal mind and confirm him for a seat Supreme Court.

Mr. FEINGOLD. Mr. President, I cast my vote in favor of President Clinton's

nominee for the U.S. Supreme Court, Judge Stephen Breyer, because I believe that he has the intellect, judicial temperament and commitment to constitutional principles that are the fundamental requirements for a Supreme Court nominee.

I do want to take a moment, however, to address the issues that were raised by the Senator from Indiana [Mr. LUGAR], regarding the issue of Judge Breyer's investment in Lloyd's, the London insurance company. The Senator from Indiana has made the argument that this investment demonstrated poor judgment on Judge Breyer's part, to expose himself to extensive personal financial liability and that he has a serious financial entanglement with the Lloyd's syndicate that will continue for years and might even force him into bankruptcy at some point.

The Senate Judiciary Committee investigated all aspects of this complex issue and concluded that there was no reasonable basis to question Judge Breyer's integrity or qualifications and there was no factual basis for assertions that Judge Breyer is likely to suffer massive losses from the investment or that the investment reflected a lack of prudence or poor judgment.

According to the materials prepared in response to the allegations regarding this investment, many of the assertions do not appear to be factually correct. First, the record demonstrates that at the time Judge Breyer made these investments, they were universally considered a safe and prudent investment based upon Lloyd's historical earnings record. Throughout its 300-year history, Lloyd's had returned substantial profits to its members and, prior to 1989, had not suffered an overall market loss since 1965, when Hurricane Betsy caused extensive property damage to the Eastern United States.

Second, based upon these materials, the assertion that Judge Breyer is exposed to unlimited liability for catastrophic losses does not appear to be valid. Judge Breyer purchased a personal stop-loss insurance to cover all loss insurance to cover all losses up to $225,000. In addition, I have been advised that he has approximately $220,000 in retained earnings held by Lloyds and that according to the underwriter's current projections, Judge Breyer's total liability will be approximately $44,000. Even the worst case losses of $168,000 to $187,000 projected by one independent authority on the syndicate, would be well within Judge Breyer's insurance coverage. The losses would have to reach double even the most pessimistic current projects before Judge Breyer incurred any net additional personal loss whatever. I have also been advised that investor's losses, or profits, are directly proportional to the size of their contributions and his investment in the syndicate in question would render him responsible for only 1/5600 of the total losses. Thus, before Judge Breyer would suffer any loss, the total liability of the syndicate must exceed $2.5 billion, which is vastly beyond even the largest estimates. The total losses for the hundreds of Lloyds syndicates in 1990—its worst year—was $5.5 billion. Finally, contrary to the assertions that Judge Breyer can "never withdraw," I have been advised that Lloyd's General Counsel has indicated that an entity known as Newco is being formed to assume the remaining liabilities of remaining syndicates such as Judge Breyer's. The establishment of this new entity would terminate all of Judge Breyer's remaining exposure.

Mr. President, based upon the information I have received, I do not believe that this issue should be the basis for opposing Judge Breyer's nomination. I do, however, believe that these kinds of issues should be thoroughly examined, and I think that the Senator from Indiana has done a service in exploring this issue. On balance, however, I believe that satisfactory answers have been provided to the concerns which have been raised.

Mr. ROCKEFELLER. Mr. President, I am proud to have this chance to cast my vote in support of confirming Judge Stephen G. Breyer as an Associate Justice of the U.S. Supreme Court. Judge Breyer is an impressive individual, not only for his obvious intellectual acumen and professional success, but also for his long record of dedication to public service. Judge Breyer has earned a wide array of support, reflected in the views of the labor community, the business community, environmentalists, academics, and the American Bar Association.

The Judiciary Committee performed an examination of his ethical history which revealed some questions, but produced a profile of a legal thinker and professional fully qualified for this tremendously important position.

His history of judicial decision-making reveals a man who weighs heavily the effect of the law on human lives. He does not adhere to any one strict legal ideology but approaches the law with a desire to shape the law to fit human needs. From the earliest age, he was taught that one learns more from people than books, and he has applied this lesson not only to his professional career but also to his family life, where he has been an exemplary husband and father, and in his community involvement.

Mr. President, Judge Breyer is a strong candidate for the Supreme Court because of his wisdom, intelligence, and integrity. He will bring to the Court a commitment to making the law a positive force for achieving justice and improving the lives of human beings. No calling is higher than that of justice, and I am confident that Judge Breyer will rise to that responsibility.

• Mr. WALLOP. Mr. President, I support the nomination of Judge Stephen Breyer to serve as Associate Justice of the U.S. Supreme Court. I believe that the President has the right to appoint the man of his choosing and while Judge Breyer may not be the jurist I personally would pick for this position, I respect that right of the President.

Judge Breyer has shown himself to be a man of keen intellect. He was a distinguished academic and has had the experience of serving in both the Executive and Legislative branches of Government. In addition, he has served with distinction on the U.S. Court of Appeals for the First Circuit. However, in spite of his fine qualities and many achievements, my support is not unqualified. I have serious reservations with regard to statements made by Judge Breyer in recent opinions as well as, his judgment based on evidence which came to light during his confirmation hearings.

First of all, Judge Breyer's investment with Lloyd's of London Syndicates raises several questions about his good judgment. Not only has he exposed himself to far reaching potential liabilities, but he has opened himself up to questions about conflicts of interest on prior cases on which he sat. More importantly, he now must recuse himself on some of the most complex and important issues that this Court will hear dealing with insurance and the environment. This leads me to question his prudence and his judgment.

I would also hope that Judge Breyer develops an increased awareness of and sensitivity to the rights of private property owners. Although he has not written about the takings clause of the fifth amendment, he was questioned about his approach to that issue during Judiciary Committee hearings. I will not go into depth on that at this time, but I would like to align myself with the comments of my colleague from Idaho, Senator CRAIG, who spoke earlier on that issue Mr. President. I strongly endorse the views of Chief Justice Rehnquist who recently stated in the case of Dolan v. City of Tigard, (U.S. June 24, 1994) that there is "no reason why the takings clause of the fifth amendment, as much a part of the Bill of Rights as the first amendment or fourth amendment, should be relegated to the status of a poor relation."

Finally, I followed with interest the questions posed to Judge Breyer with regard to religious schooling and home schooling. His opinion in New Life Baptist Church Academy versus Town of East Longmeadow, that town authorities could conduct a review of the curriculum of a religious school, caused me some initial concern. However, based on his responses to Senator SIMPSON's questions, I am encouraged that

Judge Breyer has no bias against religious schooling or home schooling.●

Mr. LEAHY. Mr. President, when I was in the Supreme Court a few weeks ago, I was reminded of the feel of the chamber. The courtroom itself is more cramped than you might expect. The bench, the chairs, the lectern, and the counsels' tables are all simple in their design. There is seating for the public.

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.

Judge Stephen Breyer has 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. He will follow in the path of John Marshall, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Hugo L. Black, and Thurgood Marshall. These are very large shoes to fill, to be sure.

I have reviewed Judge Breyer's record. It is an exhaustive record of judicial opinions, law review articles and speeches. This record has earned Judge Breyer the reputation of being among the Nation's leading judges and legal scholars. I was struck by its breadth and distinction. He is without question a person with the legal acumen necessary to sit on the Supreme Court.

As I stated at his hearing and again when the Judiciary Committee voted unanimously to send his nomination to the full Senate, 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 Judge Breyer's record is that he is fair—he will take each case individually and decide it on its merits under the law. I believe that he has not and will not prejudge the outcome on the basis of an existing notion or narrow political goal.

I questioned Judge Breyer on a number of longstanding constitutional matters, including freedom of speech, freedom of religion and privacy. Judge Breyer spoke eloquently of the dignity of the person. I was interested to hear him explain that he looks to this concept in determining what rights the Constitution guarantees. Considering matters as they may affect the dignity of the individual is a promising way to make sure constitutional protections remain vigorous in the modern age. I am hopeful that this approach will help the Court decide issues that affect our most fundamental freedoms. I was impressed with his responses, which revealed a sensitivity toward modern-day free speech and censorship questions.

Finally, I wanted to mention the Lloyd's of London question only to say that this debate seems to be headed in the direction of requiring all judges to put their holdings in a blind trust. If that is the case, we should discuss it openly and determine whether to impose that requirement. I see no reason to oppose Judge Breyer. From what I have seen, Judge Breyer did everything required of him. Indeed, he filed exhaustive financial disclosure reports as all Federal judges are required to do, and no questions of conflicts of interest were raised.

If Judge Breyer is 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 deserves credit for nominating Stephen Breyer. With this nomination, like his nomination of Justice Ruth Bader Ginsburg a year ago, 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.

On the day that President Clinton announced his nomination of Judge Breyer, I was struck by Judge Breyer's comments. He said that the law has to make practical sense to ordinary people—it has to accord with real life. I could not agree more. He writes opinions in a style and manner that is accessible generally rather than restricted to lawyers or legal scholars. He stated that he will do his utmost to see that his decisions reflect both the letter and the spirit of law that is meant to help people and will remember the effects his decisions will have upon the lives of Americans.

A justice is 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 told Judge Breyer that I want him to be the kind of justice who focuses on the effect his decisions have on real people—people who may not be powerful or well-connected. I suggest that he strive 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 suggest he 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.

Mr. LAUTENBERG. Mr. President, there is a certain majesty associated with the nomination of an individual to serve on the Supreme Court of the United States. Only 107 men and women have served on that Court. And during their tenure on the bench, they have a significant influence in charting the Constitutional course of the country.

Once on the Court, each Justice sits as an independent arbitrator. Absent an impeachable offense, they are not accountable to the President who nominated them, the Senate that confirmed them, or the country which lives under the decisions made by them.

There is, though, a very brief window of opportunity to look into the mind and heart of a nominee. For a few days—before the Judiciary Committee and the country—they must share with us their thinking on basic issues. It is our only opportunity to get a sense of how they reach their decisions: what values shape their views, what resources inform their rulings, what philosophies will be reflected in their Constitutional pronouncements.

In the past, at times I have been disturbed by those hearings. Some nominees have gone to extraordinary lengths to avoid controversy by avoiding substance. But short of just voting "no," there really wasn't anything the committee could do to compel a nominee to be forthcoming if they declined to answer questions.

Stephen Breyer did not need to be compelled. He was responsive, he answered questions forthrightly, he let the country get a sense of who he is and what he believes.

Judge Breyer's decision to explain his values and views made his hearings informative and satisfying, dignifying the confirmation process for this vital post.

While I might have some disagreements with some of Judge Breyer's positions, on balance I believe they reflect a keen understanding of Constitutional principles and doctrine. Let me take just a few moments to spell out some of the major factors I considered.

First, I wanted to be sure that any nominee would support the right to privacy contained in Roe versus Wade. I have been disturbed by the recent trend to chip away at the protections provided by the historic decision; but I have been alarmed by those who believe that trend will culminate in a reversal of Roe and a rejection of an expansive Constitutional right to privacy which underlies it. Judge Breyer was clear on this issue. He said that Roe was "settled law." He suggested that the right to an abortion is "a basic right." And while I wish he had been more open about his thinking relative to restrictions of the kind upheld in the Court's Casey decision, I believe that once he explained his basic thinking about Roe, he had legitimate grounds to avoid making specific commitments on those issues.

Second, I wanted to get a clear sense of Judge Breyer's thinking about the role of the Court. I am impressed by the deep thought Judge Breyer has already given to this complex issue. He recognized, for example, the need to respect precedent and the heavy burden that those who would upset stare decisis must discharge; at the same time, though, he praised the Brown versus Board of Education of Topeka decision and rightfully concluded that it brought "true meaning" to the Constitution's claims of equality under the law. I believe that Judge Breyer is sensitive to the constant tension between a necessary respect for precedent and a necessary capability for the law to evolve.

In the same context, I took comfort from his positions on "legislative intent" and "judicial activism." Judge Breyer clearly does not subscribe to the flawed theory that the Court must look only at a law as passed rather than using legislative history to clarify ambiguities and uncertainties. Similarly, when asked about judicial activism, Judge Breyer forcefully rejected the notion that a position on the bench is license to impose one's personal views on society; but he also rejected the artificial and misleading notion that a judge's personal philosophy can be checked at the door. I found his comments on these issues to be informative, balanced, and sensitive to the constant need to examine the facts before reaching conclusions. Perhaps the most instructive statement he made in this regard came in response to a question from Senator COHEN about his judicial philosophy. Let me quote Judge Breyer's comments:

> I always think law requires both heart and a head. If you don't have a heart, it becomes a sterile set of rules removed from human problems . . . . If you don't have a head, there's the risk that in trying to decide a particular person's problem in a case that might look fine for that person, you cause trouble for a lot of other people, making their lives yet worse. So it's [always] a question of balance . . . .

Third, I was in agreement with Judge Breyer about the separation of Church and State.

I share the nominee's view about the necessity for, and desirability of, a reasonably constructed wall to separate Church and State. I believe that Judge Breyer articulated the justification for that separation when he argued that assuring the neutrality of the state is the best way to insure that "members of each religion [will] be able to practice that religion freely, to be able to pass their religion on to their children."

Finally, Mr. President, I would like to address the issue of the potential conflict of interest associated with Judge Breyer's investments in Lloyd's of London and his failure to recuse himself from cases which might be relevant to that investment. I share Judge Breyer's conclusion, expressed in the hearing, that the entire issue is a "a matter of prudence, it is not a matter of ethics."

The Judge explained that he had reviewed the specifics of the case—both at the time he accepted it and subsequently—and concluded that the cannons of Judicial ethics allowed him to sit in that case. Still, as he promised the Committee, criticism of his behavior in that case has sensitized him to the concern it raised. Accordingly, even though he is not required to do so, he promised to divest himself from any holdings in insurance companies, including Lloyd's, as soon as possible.

Based on my review of the nominee's record and the record he has made before the Judiciary Committee, I can find no reason to oppose his confirmation and every reason to support it. With the same trepidation and faith I have felt each time I have given or withheld my consent to a Supreme Court nomination, I will cast this vote to confirm Judge Breyer. And I will, in my heart, hope that he will display the wisdom and compassion which our country has come to expect from the Court.

Mr. BYRD. Mr. President, one of the most important and sobering responsibilities that we in the Senate have is our role outlined in Article II, Section 2 of our Constitution. That is, although the President may nominate judges of the Supreme Court, only with the "advice and consent of the Senate" do those nominees assume the position of Mr. or Madam Justice.

I do not take that responsibility lightly. Cases that come before the Supreme Court involve some of the most controversial and contentious issues that face us as a people. The Court's rulings and opinions have a profound impact on all of the citizens of our Nation.

Let us be mindful that a Supreme Court justice should not only possess a keen intellect, but also a reputation for fairness and integrity. Judge Stephen Breyer meets those standards.

Judge Breyer's professional background demonstrates a brilliance and a deep commitment to public service. Having graduated from Stanford University in 1959, Judge Breyer then studied at Oxford University as a Marshall Scholar. After returning to the United States, Judge Breyer attended Harvard Law School. There, Judge Breyer was a member of the Harvard Law Review, and graduated magna cum laude in 1964. Following graduation, Judge Breyer clerked for Supreme Court Justice Arthur Goldberg. During this time, Judge Breyer served in the Army Reserves for 8 years, and received an honorable discharge in 1965.

From 1967 to 1981, Judge Breyer was a professor at Harvard Law School and at the Harvard Kennedy School for Government. At the same time, Judge Breyer held the positions of assistant special prosecutor for the Watergate Special prosecution force, Special Counsel, and later Chief Counsel for the Senate Judiciary Committee. Judge Breyer's tenure with the Judiciary Committee won for him a reputation for fairness, good humor, and bipartisanship. Finally, late in the administration of President Carter, Stephen Breyer was nominated and confirmed to the U.S. Court of Appeals for the First Circuit. Judge Breyer has served the Court with distinction since that time, also serving as a charter member of the U.S. Sentencing Commission, which is charged with examining unwarranted disparity in Federal sentencing, the effects of sentencing policy upon prison resources, and the use of plea bargaining in the Federal criminal justice system.

Mr. President, I do not offer my support of Judge Breyer casually. In the past few weeks, I have heard from a number of West Virginians, predominately those who teach their children at home, who have concerns regarding the Judge's ruling in *New Life Baptist Church Academy* v. *Town of East Longmeadow*. I know that many of my colleagues have similarly heard from constituents about this matter. During Judge Breyer's several days of confirmation hearings before the Senate Judiciary Committee, our colleagues, including Senators HATCH, THURMOND, and SIMPSON, asked Judge Breyer about the *New Life* ruling. In response to questioning by Senator SIMPSON, I found one particular exchange quite helpful. When asked directly about what constitutional questions would arise if the state tried to infringe on the rights of home schoolers, Judge Breyer responded:

It [the Constitution] is designed to protect the right of the parents to pass along to their children their religion and to protect that from State interference * * * I think that 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 * * *. 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.

From his responses, and from my study of the *New Life* case, I believe that Judge Breyer has no bias against home schooling or religious schooling. I also found him quite eloquent on the subject of the First Amendment and religious freedom in particular.

I believe that Judge Breyer will be an able addition to the Supreme Court. His keen mind, gentle humor, and temperament, combined with a deep understanding of the law, should enable him to serve our country well.

Mr. BIDEN. Mr. President, I will say further that Judge Breyer actually testified for 22 hours before our committee. And I think my friend from Utah will confirm—and all saw it on television—a significant amount of that time, he was asked about this potential conflict, the so-called Lloyd's of London issue; and further, that we did seek the written advice and the verbal counsel of four or five of the leading ethicists in the United States of America, recognized by all, one of whom thought it was a close call, three of whom thought it was not even a close call, and one of whom, if I remember correctly, was not sure. There is no need to say more than that.

I see that we only have one—but our most distinguished—speaker left on our side, the majority leader. He is here, and I yield as much time as the majority leader feels is necessary.

Mr. MITCHELL. Mr. President, the Senate will shortly vote on the nomination of Judge Stephen Breyer to be the 108th Justice of the U.S. Supreme Court in our Nation's history. I believe that President Clinton has made an excellent choice, and I urge my colleagues to vote to confirm Judge Breyer.

Judge Breyer's appointment to the Supreme Court is a fitting cap to a lifetime spent in public service. He has served in all three branches of our Government—as chief counsel to the Senate Judiciary Committee, as a top aide in the Justice Department's antitrust division, and, of course, as a chief judge in the U.S. Court of Appeals.

This breadth of experience will serve him well on the Court. He will bring with him a unique perspective of the law and how it is made, how it is enforced, how it is adjudicated.

Judge Breyer's nomination deserves and has received strong bipartisan support, with the Judiciary Committee unanimously voting to recommend his confirmation. Liberals and conservatives alike recognized the merit of Judge Breyer's careful, balanced approach to his job.

During his confirmation hearings and here in debate, concerns were raised regarding the nature of some of Judge Breyer's investments. This issue was thoroughly explored, and the record shows that he responded fully to Senators' concerns.

Whatever one's view of that matter, I do not find it a sufficient basis to reverse my otherwise very favorable impression of Judge Breyer's fitness to serve on the Supreme Court. It certainly should not detract from the reputation he has earned as a fair, considerate, and thoughtful judge.

Since being appointed to the Federal bench in 1980, Judge Breyer has proven himself a skilled jurist. President Clinton, announcing the Breyer nomination, noted "his sheer excellence, his broad understanding of the law, his deep respect for the role of the courts in our life and in protecting our individual rights, and his gift as a consensus builder."

Judge Breyer's opinions are known for their clarity and compelling logic. He recognizes that opinions are supposed to shed light on a point of law, rather than add to their confusion.

A professor and a jurist, Judge Breyer is well versed in the law. He has written many notable opinions in diverse areas, including civil rights, criminal law, constitutional liberties, economic regulation, and environmental protection.

His rulings have served to protect access to Federal courts for all Americans, to ensure the rights to free speech and freedom of religion, to protect the civil rights of all Americans, and to enforce the criminal law fairly by balancing the interests of law enforcement with individual rights.

While many of the Supreme Court's high profile cases involve these sorts of issues, many of the less visible cases involve commercial or administrative issues. Judge Breyer has established himself as one of our Nation's leading authorities on antitrust and economic regulation.

He has decided many cases involving the controlling of health care costs and prescription drug prices, preventing price discrimination, and defining predatory pricing under the antitrust laws.

In each of these cases, he has worked to ensure that antitrust laws are used in the way they are intended—to protect consumers. He has thought and written extensively about these matters, and his expertise is unquestioned.

His knowledge in these difficult areas will be beneficial in the Court's deliberations. His skill as a consensus-builder will further benefit the Court.

In the First Circuit Court of Appeals, where he is currently chief judge, dissents are few. Judge Breyer has an uncommon ability to bring people with divergent viewpoints together, to find common themes, and to help groups reach consensus.

Perhaps most important, no matter what the subject before him, Judge Breyer remembers that his decisions and opinions will affect the lives of real people. During his confirmation hearings, he told the committee that justice requires "both a heart and a head."

He explained that without a heart, the law "becomes a sterile set of rules removed from human problems, and it won't help." And yet without a head, he said, "there's the risk that in trying to decide a particular person's problem * * * you cause trouble for a lot of other people.

Judge Breyer's rulings show that he uses his heart and his head, bringing both compassion and intellect to the Federal bench. He takes into account both the requirements of the letter of the law and the needs of human beings who present their cases.

Stephen Breyer is an outstanding judge, and I believe he will be an outstanding Supreme Court jurist.

I urge my colleagues to support his nomination.

I thank my colleagues and yield the floor.

Mr. HATCH. Mr. President, I ask for the yeas and nays.

Mr. BIDEN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. BIDEN. Mr. President, I will take only 30 seconds.

I have only one regret relative to this nomination, and that is that our last speaker did not choose to take this seat.

The single most qualified person to serve on the Supreme Court of the United States, and I say this without equivocation, is the man who just spoke.

I am sure the opportunity will come again. I hope he is more enlightened next time in the sense of saying yes.

But that in no way is to reflect negatively on Judge Breyer. We say there is no one more qualified than Judge Breyer save one I can think of, and that is GEORGE MITCHELL. But maybe we will have a chance to work on that another time.

I yield back the remainder of the time.

Mr. HATCH. I yield back the remainder of our time.

The PRESIDING OFFICER. All time is yielded back.

VOTE

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Stephen G. Breyer, of Massachusetts, to be an

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Associate Justice of the Supreme Court? On this question, the yeas and nays have been ordered, and the clerk will now call the roll.

Mr. MITCHELL. Mr. President, if I may have the attention of my colleagues, it has been the practice in the Senate that votes on Supreme Court nominations are made from the Senator's desk. I ask that Senators cast their votes from their desks during this vote.

The PRESIDING OFFICER. All Senators will stand back from their desks as their names are called and cast their vote.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. PELL. I announce that the Senator from Florida [Mr. GRAHAM] is necessarily absent.

I further announce that the Senator from Rhode Island [Mr. PELL] is absent on official business.

I further announce that, if present and voting, the Senator from Florida [Mr. GRAHAM] would vote "yea."

Mr. SIMPSON. I announce that the Senator from Minnesota [Mr. DURENBERGER] and the Senator from Wyoming [Mr. WALLOP] are necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming [Mr. WALLOP] would vote "yea."

The result was announced—yeas 87, nays 9, as follows:

[Rollcall Vote No. 242 Ex.]

YEAS—87

Akaka	Faircloth	Mathews
Baucus	Feingold	McCain
Bennett	Feinstein	McConnell
Biden	Ford	Metzenbaum
Bingaman	Glenn	Mikulski
Bond	Gorton	Mitchell
Boren	Gramm	Moseley-Braun
Boxer	Grassley	Moynihan
Bradley	Gregg	Murray
Breaux	Harkin	Nunn
Brown	Hatch	Packwood
Bryan	Hatfield	Pressler
Bumpers	Heflin	Pryor
Byrd	Hollings	Reid
Campbell	Hutchison	Riegle
Chafee	Inouye	Robb
Cochran	Jeffords	Rockefeller
Cohen	Johnston	Roth
Conrad	Kassebaum	Sarbanes
Craig	Kempthorne	Sasser
D'Amato	Kennedy	Shelby
Danforth	Kerrey	Simon
Daschle	Kerry	Simpson
DeConcini	Kohl	Specter
Dodd	Lautenberg	Stevens
Dole	Leahy	Thurmond
Domenici	Levin	Warner
Dorgan	Lieberman	Wellstone
Exon	Mack	Wofford

NAYS—9

Burns	Helms	Murkowski
Coats	Lott	Nickles
Coverdell	Lugar	Smith

NOT VOTING—4

Durenberger	Pell
Graham	Wallop

So the nomination was confirmed.

The PRESIDING OFFICER. Under the order of July 28, the motion to reconsider is tabled.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate now returns to legislative session.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, I thank my colleagues for their cooperation in this matter, the distinguished chairman and ranking member of the Judiciary Committee, the Senator from Massachusetts, who was instrumental in moving this nomination forward, and the Republican leader and our Republican colleagues, who graciously agreed to the procedure for debating and voting on this nomination today.

MORNING BUSINESS

Mr. MITCHELL. Mr. President, I now ask unanimous consent there be a period for morning business with Senators permitted to address the Senate for up to 10 minutes each.

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

FACES OF THE HEALTH CARE CRISIS

Mr. RIEGLE. Mr. President, I rise to continue my effort to put a face on the health care crisis confronting America. I continue to hear from countless citizens in Michigan who have fallen through the cracks of our health care system, and today I want to talk about Allen Johnson of Inkster, MI.

Allen Johnson is a 41-year-old divorced father of three children. By 1988, Allen had worked as a customer service representative for Zantop International Airlines for 15 years, earned $10 an hour, and had Blue Cross Blue Shield health coverage. Under his policy he was only responsible for paying for prescription medication. And although Allen is diabetic, this was affordable because at that time the monthly cost for daily insulin injections was $25.

But in October of that year, he injured his back at work while helping unload a shipment of 90-pound cartons. This injury was so severe that Allen was disabled by it, and has been unable to work ever since. He received workman's compensation for his injuries for a period of time, and now lives on Social Security Disability income of $781 a month.

Allen's back injuries prevent him from performing what were once usual activities, like walking or standing for a long period of time, or maintaining one position while he is sitting.

Unfortunately, in addition to Allen's chronic back disability and diabetes, he now has hypertension. This condition was diagnosed 4 years ago, just about the same time he had to leave his job. And if that were not enough, his diabetes has impaired his vision to the point that Allen was declared legally blind last November.

Allen first lost his medical insurance because of his injury: Since he took a medical leave of absence instead of being fired or quitting, he was not eligible to continue his workplace insurance by paying the premium himself. Allen's medical problems make it impossible for him to find affordable private health insurance. He is now uninsured.

Allen is in the awful position of not having health care coverage when he desperately needs services. For his diabetes he needs needles, insulin, and a special diet. He takes two different prescription medications for his hypertension and pain killers for his back condition. These medications cost over $200 a month, more than one-quarter of his Social Security Disability income. Over the last 2 months Allen has had two separate eye surgeries in an attempt to regain some of his vision. The surgeries failed, and his sight is now worse than before—he can make out shadows, nothing more. He requires regular visits with his physicians to monitor his eyes and diabetes. He has stopped receiving treatment to improve his back condition because he cannot afford the cost of the visits.

If Allen had never worked, his disability would have qualified him for SSI income, food stamps, and Medicaid coverage for his health care. His work history made him eligible for SSDI income. But SSDI, although less than $800 a month, makes him ineligible for all of these other benefits. Allen may use Medicaid coverage for health costs only if he buys into the program, which is how he paid for his eye operations. But to get Medicaid coverage he must "spend down" $406 a month first. This is over half of his monthly income, which would leave him just $375 for all other expenses. Clearly, this is not a real option for him to cover his ongoing medical needs. Because of his disability, in 2 years he will be eligible for Medicare coverage, but until then he must make do on his own.

The rent on Allen's apartment is $430 a month and utilities are usually another $200 to $300. His medical costs are so high that he simply cannot pay all his bills each month. He tries to survive with the help of good friends who will drive him to the doctors and to buy groceries. But the bills are piling up. Allen admits that he has lost track of exactly how many thousands of dollars he owes in medical bills because the amount increases every month.

Allen has delayed doctor visits and is using less medication than prescribed in order to make it last longer. So as he gets deeper and deeper into debt, his physical health suffers as well.

Unfortunately, Allen Johnson's case is not uncommon. Our health system leaves individuals who become disabled without any health care coverage at all. Allen was once a productive, responsible worker and father, but now

he has been reduced to seeking charity to pay for his prescription drugs and he cannot help support his children. We must guarantee access to affordable health care in this country to prevent physical misfortunes from becoming economic tragedies. I will continue to work with my colleagues to create a better health care system for all Americans.

Mr. MITCHELL. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mrs. FEINSTEIN. Mr. President, I as unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. AKAKA). Without objection, it is so ordered.

Mrs. FEINSTEIN. Mr. President, I ask that I be recognized for 5 minutes to speak as in morning business.

The PRESIDING OFFICER. Under the previous order, the Senator may speak for 5 minutes.

Mrs. FEINSTEIN. Mr. President, I rise today to condemn yet another act of violence at an abortion clinic, to urge State and Federal law enforcement agencies to pursue this crime with utmost vigor, and to restate my support for the Freedom of Access to Clinic Entrances Act, which could—and perhaps should—be used against the perpetrator of this newest crime.

Continuing a long history of escalating clinic violence, this morning outside a clinic in Pensacola, FL, a man took a shotgun, killed two people, and wounded a woman. Immediately afterward, a militant antiabortionist named Paul Hill was taken into custody and is likely to be charged with the crimes.

The wounded woman is a worker at the clinic, and press reports have raised the strong possibility that the unidentified murder victims were a doctor or nurse who worked at the clinic.

If one of the victims is a doctor or nurse—as is currently thought because of a bulletproof vest—then this crime is covered under the Freedom of Access to Clinic Entrances Act, which protects both providers and patients from threat or use of force under Federal law. In addition, this act allows the families of the victims and the clinic to pursue damages against the perpetrator and any business or organization with which he may be associated.

At this very moment, I am told, State and Federal law enforcement agencies are determining which charges to press, and I am confident that they will take appropriate action to ensure that the perpetrator is tried under the most rigorous statutes and that the circumstances are investigated fully.

It may be most appropriate for State and local jurisdiction to prevail in this matter, despite the option of Federal enforcement. For example, in the shooting of Dr. David Gunn, which also took place in the same area, the perpetrator was tried under State law and received a life sentence.

However, I know that many men and women who have been extremely concerned about clinic violence will be looking to the Justice Department to apply the Clinic Entrances Act now for the first time. Now that FACE has been enacted, if State and local law enforcement fails—or if there is evidence of a conspiracy that warrants Federal investigation—the Federal Government should and could, I believe, step in to make sure that the crime does not go unpunished.

In addition, this crime shows that clinic violence continues to escalate, and that a strong message must be sent to those who go beyond peaceful protest to vigilante extremism.

I, for one, am confident that the Attorney General will condemn this act in the strongest terms and coordinate closely with local law enforcement to make sure that all necessary steps are taken. If the Attorney General decides to press charges under the Freedom of Access to Clinic Entrances Act, it will show extremist antiabortionists that the Federal Government is not afraid to become involved in this wave of clinic violence.

Mr. President, I ask that Senator BOXER, my colleague from California, be associated with these remarks. She joins me in full.

I thank you, and I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

IMPORTANCE OF C–130H TRANSPORT PLANES TO AIR NATIONAL GUARD

Mr. FORD. Mr. President, last year, a small boy from Sarajevo wanted to make sure the pilot of the silver planes from Kentucky got a note so that he could thank him for his help.

"Mr. Pilot of the Kentucky Air National Guard * * * I love you for help me," he wrote, in the best English he could.

The silver planes he referred to are the C–130H transport aircraft used by the Kentucky Air National Guard not only in Bosnia but in Somalia and soon in Rwanda.

Back in 1990, I had funds included in the 1991 defense authorization bill for the purchase of 12 of these aircraft to modernize the Kentucky National Guard aircraft fleet.

But earlier this year, despite the skill and precision Kentucky's Air National Guard have demonstrated with this aircraft, the Active Air Force proposed taking four of our planes.

After testifying before the Armed Services Committee and taking the National Guard's case directly to the Department of Defense, John Deutch, Deputy Secretary of Defense, put the brakes on this transfer and signed an order maintaining the current status of 12 airplanes at Kentucky's 123d.

Mr. President, I believe that was a wise decision and in the best interests of this country's national security and humanitarian missions.

Tomorrow morning, Kentucky's Air National Guard 123d Airlift Wing will leave for Mombasa, Kenya, to aid in the Rwandan relief effort.

They will bring them unmatched experience in delivering the food, water, and relief supplies the Rwandan refugees need so desperately.

I have no doubt they will make a difference and that the children of Rwanda will come to know the same pilot of the silver planes from Kentucky, who brought relief to a boy in Sarajevo.

As one Kentucky pilot, Ted Perero, said, "It's a shame it had to come to this. This is man-made misery. But if we can do something to save those kids * * *."

Mr. President, at this point I ask unanimous consent that the following article from the Louisville Courier-Journal be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Louisville Courier-Journal, July 29, 1994]

RWANDA-BOUND: KENTUCKY'S AIRLIFT EXPERTS GET A NEW RELIEF MISSION

(By Todd Murphy)

Ted Parero has seen the pictures—Rwandan children, refugees from their homeland without family, sick, hungry, dying.

"They don't deserve any of this," he said yesterday. "They don't."

But Parero and the people he works with knew they might be asked to give more than sympathy.

Yesterday it became official: 50 members of the Kentucky Air National Guard's 123rd Airlift Wing—including Parero, a pilot from Louisville who flew missions in Bosnia last year—will deploy to Africa starting tomorrow to aid in the international Rwandan relief effort.

The contingent from the 123rd, which also has been involved in relief in Somalia and Bosnia the past two years, will be part of a 150-person National Guard airlift, joined by units from Texas, Missouri and Tennessee. They also will be among 4,000 U.S. troops assisting Rwandan refugees.

Three months of fighting between followers of Rwanda's Hutu government and the mainly Tutsi rebels of the Rwandan Patriotic Front have left about 500,000 people dead. The fighting also has forced 2.2 million Rwandans to flee their country including more than a million who have gathered in neighboring Zaire. Relief workers estimate that 20,000 died of starvation or disease in the past week.

The National Guard units will be based in Mombasa, Kenya, and fly to areas in and around Rwanda that need food, water and medical supplies.

The 123rd contingent will heave Standiford Field about 2 a.m. tomorrow, and the trip will take more than 24 hours. The unit is expected to be in Africa at least 30 days. Crews will fly two of the unit's giant, gray C-130s—airplanes that one 123rd member called the "four-wheel-drive pickup truck of airplanes."

"This is the workhorse," Senior Master Sgt. Mike Harp of Louisville said as he showed off one of the unit's C-130s. "Whatever you ask it to do, it'll pretty much do."

The Kentucky unit has a dozen of the newest C-130s, which are exceptionally maneuverable and include computer equipment older airplanes do not have. That may have been a primary reason the unit was asked to participate in the relief mission, said Col. Ed Tonini, spokesman for the Kentucky Air National Guard.

The mission may require landing on crude, dirt airstrips. "We do that job better than any other aircraft in the world." he said.

But Tonini and other 123rd members said they may have been asked to take part in these missions because of their experience, their willingness to volunteer and because the unit does good work.

Tonini said most of the 50 who will be going have participated in at least one of the relief missions in Bosnia or Somalia. A couple of the 123rd members interviewed yesterday had taken part in the relief mission to Somalia early in 1993 and all three Bosnian missions the past two years.

Members said participating can be a sacrifice for them and their families, especially when the missions continue for weeks. But, they said, such missions are what they train for and serve as reminders of how their work can save lives.

It's a great feeling," said Capt. Brad Greschel of Shelbyville, who'd been planning to begin a vacation from his Federal Aviation Administration job today. Instead, he will spend the month in Africa. "It's real world. It's actually helping somebody, instead of flying around the flag poles . . . training for a war that may never come—at least we hope doesn't come."

And, while the relief work can be exhausting—often running to 16 hour days—members can get special gratification when people tell them how they have helped.

"It can get real emotional at times, when . . . somebody walks up to you, shakes your hand and says, "Thanks a lot," Harp said.

After their Bosnian missions last year, a French worker who unloaded food and medical supplies gave a C-130 commander from the 123rd a note written by a boy who lived near the Sarajevo airport. The boy had told him to give the note to the "pilot of the silver planes from Kentucky."

In crude English, the note thanked "Mr. Pilot of the Kentucky Air Nat. Guar." for the help. "I love you for help me." it read.

"That makes it all worthwhile," Parero said.

Of the Rwandan mission, he said: "It's a shame it had to come to this. This is a man-made misery. But if we can do something to save those kids. . . ."

Mr. FORD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator from Kentucky suggests the absence of a quorum. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

HEALTH CARE REFORM BEHIND CLOSED DOORS

Mr. COVERDELL. Mr. President, I wish to address my remarks to the health care debate and several issues regarding that debate that are, in my judgment, exceedingly alarming. And if the American public were aware of the process in which we are engaged at the moment, I think we would find the Nation in revolution.

I spent almost 17 years in the general assembly in the good State of Georgia, and if I had engaged in the activities of the process by which we have been managing the health care bills I would be before an ethics commission. I would be in violation of Georgia law, or worse.

What do I mean? The discovery that the principal legislation passed out of the Senate Finance Committee was nothing more than a concept, I do not think the folks in Peoria, IL, or Enid, OK, or Hahira, GA, could fathom such a process. In Georgia, when you say, Mr. President, I ask for the passage of Senate bill 5, as amended, and it passes, a citizen may immediately pick up what Senate bill 5 is and read it and make some determination about what that is going to mean to that person or their family or their business or their community.

Since this measure was passed, I believe July 2, no one has been able to get a copy of the legislation. You can get a summary. You can get a press release. But there is no legislation. No citizen in this country today can read anything about these proposals.

That is alarming in and of itself, but it is made doubly egregious when we are told that we will act on these thousands of pages of legislation when they suddenly appear in a matter of weeks or days or hours, at best.

Everybody reads the polls and they understand that Congress is not particularly held in the highest regard these days. That is too bad. But this is why. No one can understand that you would pass something that is not language, and then you would revert to going in, unknown people, to unknown places, doing unknown things about health care. While the committee, which did nothing more than pass a concept, was in the full view of the media and C-SPAN, there is no media where the actual legislation is being written.

There is no citizen at the table. There is no one recording what the transactions are. What does that suggest? That suggests that, in the cloak of darkness and secrecy, special deals are being made. That is exactly what is happening. Transactions about, "Well, what will it take to make you be for the bill?" You cannot do that in any State legislature in the United States. And it is reprehensible that it would occur in the most hallowed halls of democracy, that the substance of 15 percent of the American economy is being negotiated in private and in secret, out of the eye of the American public. I cannot imagine that would happen in the halls of the U.S. Congress. But it is. And it is wrong. It is wrong on this debate. It ought to be stopped in the future.

But it is particularly damaging here. We are not talking about ABC construction drivers as opposed to ABC environmental groups. We are talking about legislation that will affect every living soul in this country.

Mr. President, the President and First Lady brought to the Nation a health care reform proposal. They should be complimented that they have made us all much more knowledgeable on the subject. But we have been looking at that matter for 9 months. They have been in every corner of the country, and those that have had differences with it have been in every corner of the country. There has been a raging debate about whether the Government ought to manage medicine or whether we ought to strengthen the current system.

The American people have come to a conclusion. I do not know who the emissary was who came out of the White House that told the President, "Mr. President, due to voter preference and the votes in the Congress, we are going to have to set your bill aside and start over."

The American public came to a conclusion in a vigorous and open debate. I compliment the President for that. Now it is the Congress' turn. Our suggestion is we take something of the same magnitude, just as many thousands of pages, just as many personal and consequential events, and we are going to manage it in 3 days. That is about like taking a group of people and saying, "Look, I want you to rewrite the economy of Great Britain, Sweden, and Denmark and do it by next weekend." You would be laughed out of town. This is bigger. This is more complicated. This is more difficult. And to suggest that all the language would ultimately be changed, that no one has seen it, no family, no grocery store operator, no filling station attendant, no church, no mayor, no municipal official, but we are going to sit up here in the quiet halls and in the bowels of this great building, and we are going to tinker and move all the blocks around. We have even had a Member of this body say, "We are going to pass this thing no matter what the American people think." What in the world have we come to?

The good Senator from West Virginia made an eloquent statement, and he is dead right. Mr. President, the Senator from West Virginia, who is one of the most distinguished, most senior Members of this body, most knowing of the Senate and its process, most knowing of this Senate's responsibilities to this great democracy, said, and I am paraphrasing it: We had better go slow here. We had better be careful. We had better make sure we do not do something wrong. We had better not get in a hurry. We had better fulfill our responsibilities to this great Nation.

He is absolutely, unalterably correct.

Mr. President, the only way to properly deal with this important subject is for all of these bills to surface from their private rooms, and then for the American people—the people; not our staff, not the various members of the committee—the American people need an appropriate period of time to see how that is going to affect them, their families, their businesses, their communities, their Nation.

One of my good friends, the minority leader, Senator DOLE, has suggested we at least need a week. I even take issue with him. A week? A week? We have just spent 9 months trying to unravel the last 1,300 pages. We are dealing with the largest decision we will have made in a quarter century. A week? Three days? The American people need a solid month, in my judgment— that is cutting it short—to unravel all the devils in all the details.

Those of us engaged in this debate should take our ideas to the American people, should take the language and take it to industry, take it to communities, take it to small business and big business. Let us all look at it and see where we come out. This should not be railroaded. This should not happen in speed. The risk of damage to our Nation is enormous.

Mr. President, I have not been here very long. Maybe that is good. I can still remember what folks at home think and feel. And you could not get 1 person in 10 anywhere in this country that would see what we are doing and the way in which we legislate that would not be astounded and embarrassed. I have watched their jaws drop when you tell them that it is not a bill that they passed out; it was a bunch of ideas. And now it is someone else who is writing the bill.

Mr. President, I am going to conclude by saying this is the most important decision in a quarter century. And every American, no matter who they are or what their views are or what their party, needs to have a chance to understand what is being proposed. And then, only then, do we come back and thrash it out in the halls of Congress.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

The majority leader is recognized.

WAIVING REQUIREMENT FOR SINE DIE ADJOURNMENT BY JULY 31

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of House Concurrent Resolution 275, a concurrent resolution waiving the statutory requirements of the Legislative Reorganization Act of 1946 (2 U.S.C. 198), just received from the House; that the concurrent resolution be agreed to and the motion to reconsider be laid upon the table.

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

So the concurrent resolution (H. Con. Res. 275) was agreed to.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

REPORT ON A NATIONAL EMERGENCY UNDER THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT—MESSAGE FROM THE PRESIDENT—PM 137

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs.

To the Congress of the United States:

1. On September 30, 1990, in Executive Order No. 12730, President Bush declared a national emergency under the International Emergency Economic Powers Act ("IEEPA") (50 U.S.C. 1701 *et seq.*) to deal with the threat to the national security and foreign policy of the United States resulting from the lapse of the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401 *et seq.*), and the system of controls maintained under that Act. In that order, the President continued in effect, to the extent permitted by law, the provisions of the Export Administration Act of 1979, as amended, the Export Administration Regulations (15 C.F.R. 768 *et seq.*), and the delegations of authority set forth in Executive Order No. 12002 of July 7, 1977, Executive Order No. 12214 of May 2, 1980, and Executive Order No. 12131 of May 4, 1979, as amended by Executive Order No. 12551 of February 21, 1986.

2. President Bush issued Executive Order No. 12730 pursuant to the authority vested in him as President by the Constitution and laws of the United States, including IEEPA, the National Emergencies Act ("NEA") (50 U.S.C. 1601 *et seq.*), and section 301 of title 3 of the United States Code. At that time, the President also submitted a report to the Congress pursuant to section 204(b) of the IEEPA (50 U.S.C. 1703(b)). On March 27, 1993, the Export Administration Act was extended through June 30, 1994. Subsequently, on September 30, 1993, I issued Executive Order No. 12867, terminating Executive Order No. 12730.

3. Section 401(c) of the NEA additionally requires the submission of a final report on all expenditures incurred during the period of emergency. This report, covering the period from September 30, 1990, to September 30, 1993, is submitted in compliance with this requirement.

4. The expenses incurred by the Federal Government in the 3-year period from September 30, 1990, to September 30, 1993, that are directly attributable to the exercise of authorities conferred by the declaration of a national emergency with respect to export controls were largely centered in the Department of Commerce, Bureau of Export Administration. Expenditures by the Department of Commerce are estimated to have been $117,720,000, most of which represented program operating costs, wage and salary costs for Federal personnel, and overhead expenses.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *July 29, 1994.*

MESSAGES FROM THE HOUSE

At 3:05 p.m., a message from the House of Representatives, delivered by Mr. Hays, one of its reading clerks, announced that the House has agreed to the following concurrent resolution, in which it requests of the Senate:

H. Con. Res. 275. Concurrent Resolution waiving the requirement in section 132 of the Legislative Reorganization Act of 1946 that the Congress adjourn sine die not later than July 31 of each year.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. INOUYE:

S. 2336. A bill to amend the Communications Act of 1934 to extend the authorization of appropriations of the Federal Communications Commission, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. LOTT:

S. 2337. A bill to extend benefits for qualified service to certain merchant mariners who served during World War II, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. BROWN:

S. 2338. A bill to provide that for taxable years beginning before 1980 the Federal income tax deductibility of flight training expenses shall be determined without regard to whether such expenses were reimbursed through certain veterans educational assistance allowances; to the Committee on Finance.

By Mr. HOLLINGS:

S. 2339. A bill to authorize a certificate of documentation for the vessel *Why Knot*; to the Committee on Commerce, Science, and Transportation.

By Mr. DECONCINI:

S. 2340. A bill to recognize and grant a Federal charter to the National Alliance for the Mentally Ill; to the Committee on the Judiciary.

S. 2341. A bill to amend chapter 30 of title 35, United States Code, to afford third parties an opportunity for greater participation in reexamination proceedings before the United States Patent and Trademark Office, and for other purposes; to the Committee on the Judiciary.

By Mr. DORGAN (for himself, Mr. DASCHLE, Mr. SIMON, Mr. CONRAD, Mr. FEINGOLD, Mr. REID, Mr. WELLSTONE, and Mr. LEVIN):

S. 2342. A bill to amend the Internal Revenue Code of 1986 to improve the collection of taxes of United States persons moving production abroad and foreign persons doing business in the United States, and for other purposes; to the Committee on Finance.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. INOUYE:

S. 2336. A bill to amend the Communications Act of 1934 to extend the authorization of appropriations of the Federal Communications Commission, and for other purposes; to the Committee on Commerce, Science, and Transportation.

THE FEDERAL COMMUNICATIONS COMMISSION AUTHORIZATION ACT OF 1994

• Mr. INOUYE. Mr. President, I introduce the Federal Communications Commission [FCC] Authorization Act of 1994. This bill authorizes funding for the FCC in the amount of $163,500,000 for fiscal year 1994 and $198,232,000 for fiscal year 1995. The amount for fiscal year 1994 represents the amount appropriated for fiscal year 1994. The amount for fiscal year 1995 represents a much needed increase in order for the FCC to carry out its new statutory responsibilities and to keep up with the increasing workload under its traditional responsibilities.

The bill I am introducing today also includes a number of provisions that the FCC has asked the Congress to consider. While I do not necessarily endorse every one of these suggestions, I believe that they are all worthy of consideration. I have thus included these recommendations in the bill I introduce today in order to initiate a discussion on the merits of these proposals.

The FCC is an independent regulatory agency that oversees interstate and foreign communications by wire and radio. With advances in new technologies and the opening of markets to competition, the FCC is constantly making key policy decisions that fundamentally affect the marketplace. The importance of the FCC and its actions cannot be underestimated, especially in today's dynamic communications industry. The responsibilities of the FCC have grown dramatically over the past decade while the resources have declined. As our society becomes more and more dependent upon our ability to communicate with each other the decisions of the FCC have an increasingly important effect on the public interest.

Under the Communications Act, the FCC has primary jurisdiction over wire and radio communications. As a result, the FCC has regulatory authority over the interstate services of local and long distance telephone companies, radio and television broadcasters, satellite companies, cellular and other mobile telephone providers, cable television providers, private radio services—such as those used by taxis and ambulances—and local government and public safety services. The FCC also has ancillary—or secondary—authority over equipment manufacturers and information service providers. Because of the tremendous breadth of the FCC's regulatory authority, the decisions taken by the Commission have a direct and important impact on the lives of almost every citizen of this country.

The increased levels of funding for fiscal year 1995 will allow the FCC to hire an additional 250 full-time equivalent [FTE] positions to handle increased workloads resulting from increases in ongoing functions and implementing the PCS auctions and licenses. Since 1980, the FCC's staff has been reduced by over 500 FTE positions while the FCC's legislated responsibilities have grown.

In the policy and rulemaking area, filings requesting or commenting on Commission actions have increased from 80,435 to 125,768, a 56 percent increase in only 5 years. In the enforcement area, telephone company tariffs submitted for review and approval have increased from 1,900 in 1980 to 4,430 in 1993. In 1993 alone, the FCC received over 32,000 complaints from the public and common carriers on various aspects of telephone services. In the licensing area, workloads have increased throughout the agency. The Mass Media Bureau assignment and license transfers have increased from 186 in 1980 to 731 in 1993.

The following is a summary of major provisions in the FCC Authorization bill I am introducing today:

1. Travel Reimbursement Program. The bill deletes section 4(g)(2) of the act regarding the FCC-specific travel reimbursement authority.

2. Communications support from older Americans. This section extends the Older Americans Program through fiscal year 1996.

3. Hawaii monitoring station. This section extends the provision authorizing the relocation of the Hawaii monitoring station through fiscal year 1997.

4. Inspection of ship radio stations. Amends section 4(f)(3), 362(b) and 385 of the act to authorize non-FCC ship inspections and more FCC flexibility on inspection requirements.

5. Clarification of FCC refund authority. This section clarifies FCC authority to make refunds to redress common carrier rule violations.

6. Expedited instructional television fixed service [ITFS] processing. Amends Section 5(c)(1) of the act to allow the FCC to delegate to its processing staff authority to act on routine cases involving ITFS authorizations.

7. Application fees. Amends section 8 of the act to authorize the FCC to retain fees above a certain sum sent to the Treasury, to change or create new section 8 fees, to allocate costs associated with legal and executive services, and to continue to collect application fees at the prior year's rates until the effective date of a new fee schedule.

8. Application fees. Amends section 8(g) of the act to establish a fee schedule for PCS.

9. Regulatory fees. Amends section 9 of the act to authorize the FCC to allocate and recover legal and executive costs it incurs in the discharge of enforcement, policy and rulemaking, user information services and international activities, to continue to collect regulatory fees at prior year's rates until the effective date of a new fee schedule and to provide 45 days notice of fee changes.

10. Tariff rejection authority. Amends section 203 of the act to clarify FCC's authority to reject a common carrier tariff.

11. Refund authority. Amends section 205 of the act to clarify FCC's authority to make refunds to redress common carrier rule violations.

12. Licensing of aviation, maritime, and personal radio services by rule. Amends section 307(e) of the act to authorize the Commission to issue blanket licenses by rule for radio equipment on airplanes, ships, and for personal radio services. The provision removes the requirement that recreational boaters need to apply for a license or pay any administrative licensing costs.

13. Auction technical amendments. Amends section 309(j)(8)(B) to provide

the FCC with more flexibility in the collection and use of auction funds and to authorize the FCC to establish an interest bearing escrow account and to pay interest to unsuccessful bidders.

14. Forfeiture for act or rule violations imperiling safety of life. Amends sections 312(a) and 503(b)(1) to authorize the FCC to issue forfeitures for violation of the Communications Act or FCC rules imperiling safety of life.

15. Statute of limitations for forfeiture proceedings against common carriers. Amends section 503(b)(6) to increase the statute of limitations period from 1 to 5 years to assist in enforcement of the jurisdictional separations and cost allocation rules.

As mentioned earlier, these provisions have been submitted to the Congress by the FCC for consideration. I encourage parties to contact the Commerce Committee with their views of these proposals.

Mr. President, I look forward to continuing to work with the FCC Chairman, Mr. Reed Hundt, and the other Commissioners at the FCC, to develop policies that will respond to the needs of the citizens of the United States and serve the public interest.

I ask unanimous consent that the full text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2336

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Communications Commission Authorization Act of 1994".

SEC. 2. EXTENSION OF AUTHORITY.

Section 6 of the Communications Act of 1934 (47 U.S.C. 156) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 6. There are authorized to be appropriated for the administration of this Act by the Commission $160,300,000 for fiscal year 1994 and $198,232,000 for fiscal year 1995, together with such sums as may be necessary for increases resulting from adjustments in salary, pay, retirement, other employee benefits required by law, and other nondiscretionary costs, for fiscal year 1995. Of the sum appropriated in any fiscal year, a portion, in an amount determined under sections 8(b) and 9(b), shall be derived from fees authorized by sections 8 and 9.".

SEC. 3. TRAVEL REIMBURSEMENT AUTHORITY.

Subsection (g) of section 4 of the Communications Act of 1934 (47 U.S.C. 154) is amended—

(1) by striking paragraph (2), and

(2) by redesignating paragraph (3) as (2).

SEC. 4. COMMUNICATIONS SUPPORT FROM OLDER AMERICANS.

Section 6(a) of the Federal Communications Commission Authorization Act of 1988 (47 U.S.C. 154 note) is amended by striking "1992 and 1993," and inserting "1995 and 1996,".

SEC. 5. HAWAII MONITORING STATION.

Section 9(a) of the Federal Communications Commission Authorization Act of 1988 (Public Law 100-594; 102 Stat. 3024) is amended by striking "1991, 1992, 1993, and 1994" and inserting "1995, 1996, and 1997".

SEC. 6. INSPECTION OF SHIP RADIO STATIONS.

(a) CONTRACTING OUT INSPECTIONS.—Section 4(f)(3) of the Communications Act of 1934 (47 U.S.C. 154(f)(3)) is amended by adding at the end the following: "Notwithstanding the preceding provisions of this paragraph, the Commission may designate an entity to make the inspection referred to in this paragraph.".

(b) ANNUAL INSPECTION REQUIRED.—Section 362(b) of the Communications Act of 1934 (47 U.S.C. 360(b)) is amended—

(1) by striking "as may" in the third sentence and inserting "as the Commission determines to", and

(2) by striking "thereby" and all that follows and inserting the following: "thereby—

"(1) waive the annual inspection required under this section for a period of 90 days for the sole purpose of enabling a vessel to complete its voyage and proceed to a port in the United States where an inspection can be held, or

"(2) waive the annual inspection required under this section for a vessel that is in compliance with the radio provisions of the Safety Convention and that is operating solely in waters beyond the jurisdiction of the United States, but the inspection shall be performed within 30 days after the vessel's return to the United States.".

(c) CONFORMING AMENDMENT.—Section 385 of the Communications Act of 1934 (47 U.S.C. 385) is amended—

(1) by inserting "or an entity designated by the Commission" after "Commission", and

(2) by striking out "as may" and inserting "as the Commission determines to".

SEC. 7. EXPEDITED ITFS PROCESSING.

Section 5(c)(1) of the Communications Act of 1934 (47 U.S.C. 155(c)(1)) is amended by striking "Nothing" and inserting "Except for cases involving the authorization of service in the Instructional Television Fixed Service, or as otherwise provided in this Act, nothing".

SEC. 8. APPLICATION FEES.

(a) MODIFICATION OF FEES.—Subsection (b) of section 8 of the Communications Act of 1934 (47 U.S.C. 158) is amended—

(1) by redesignating paragraph (2) as (6), and

(2) by striking out so much of such subsection as precedes paragraph (6), as redesignated and inserting the following:

"(b)(1) For fiscal year 1995 and each fiscal year thereafter, the Commission shall, by regulation, modify the application fees by proportionate increases or decreases so as to result in estimated total collections for the fiscal year equal to the sum of—

"(A) $40,000,000, plus

"(B) the amount specified in an appropriation Act for the Commission for that fiscal year to be collected and credited to such appropriation, but to exceed necessary expenses of the Commission.

"(2) The Commission may round the modified fees to the nearest $5, in the case of fees under $100, or to the nearest $20, in the case of fees of $100 or more. The Commission shall transmit to the Congress notification of any adjustment made under this paragraph immediately upon the adoption of the adjustment.

"(3) The Commission may collect fees at the prior year's rate until the effective date of modifications, adjustments, or amendments under this subsection.

"(4) The Commission by regulation shall add, delete, or reclassify services, categories, applications, or other filings subject to application fees to reflect additions, deletions, or changes in the nature of its services or authorization of service processes as a consequence of rulemaking proceedings or changes in law.

"(5) The amount of any fee modified or amended as a consequence of action taken under paragraph (4) shall be derived by determining the fulltime equivalent number of employees performing application activities adjusted to take into account other expenses that are reasonably related to the cost of processing the application or other filing, including all executive and legal costs incurred by the Commission in the discharge of these functions, and other factors the Commission determines to be in the public interest. The Commission shall transmit to the Congress notification of—

"(A) any proposed modification of a fee immediately upon adoption of the proposal, and

"(B) any amendment immediately upon adoption of an amended fee.".

(b) REIMBURSEMENT OF APPROPRIATIONS.—Section 8(e) of such Act (47 U.S.C. 8(e)) is amended to read as follows:

"(e) Of the moneys received from fees authorized under this section, $40,000,000 shall be deposited in the general fund of the Treasury to reimburse the United States for amount appropriated for use by the Commission in carrying out its functions under this Act, and the remainder shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the functions of the Commission.".

(c) DERIVATION OF APPROPRIATED FUNDS.—Section 6(d) of such Act (47 U.S.C. 156(d)) is amended—

(1) by striking "section 9(b)" and inserting "sections 8(b) and 9(b)", and

(2) by striking "section 9" and inserting "sections 8 and 9, respectively".

SEC. 9. SCHEDULE OF APPLICATION FEES FOR PERSONAL COMMUNICATIONS SERVICES.

The Schedule of Application Fees set forth in section 8(g) of the Communications Act of 1934 (47 U.S.C. 158(g)) is amended by adding at the end of the part relating to Common Carrier Services the following:

"23. Personal Communications Services	
"a. Initial or new Application	230
"b. Amendment to Pending Application	35
"c. Application for Assignment or Transfer of Control	230
"d. Application for Renewal of License	35
"e. Request for Special Temporary Authority	200
"f. Notification of Completion of Construction	35
"g. Request to Combine Service Areas	50.".

SEC. 10. REGULATORY FEES.

(a) IN GENERAL.—Section 9(a) of the Communications Act of 1934 (47 U.S.C. 159(a)) is amended to read as follows:

"(a) GENERAL AUTHORITY.—The Commission, in accordance with this section, shall assess and collect regulatory fees to recover its costs arising from all executive and legal costs incurred by the Commission in the discharge of these functions.".

(b) NOTICE TO CONGRESS OF ADJUSTMENTS AND AMENDMENTS.—Section 9(b)(4)(B) of such Act (47 U.S.C. 159(b)(4)(B)) is amended by striking "90 days" and inserting "30 days".

(c) AUTHORITY TO COLLECT AT OLD RATE PENDING EFFECTIVE DATE OF NEW RATES.—Section 9(b) of such Act (47 U.S.C. 9(b)) is amended by adding at the end thereof the following:

"(5) RATES PENDING EFFECTIVE DATE OF MODIFICATIONS.—The Commission may continue to collect any fee imposed under this section at the prior year's rate until the effective date of any adjustment or amendment of that fee under this section."

SEC. 11. REPORT OF FEE MODIFICATIONS.

Section 4(k) of the Communications Act of 1934 (47 U.S.C. 154(k)) is amended—

(1) by striking "and" at the end of paragraph (3),

(2) by redesignating paragraph (4) as (5), and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) a detailed explanation of any modification, adjustment, or amendment of any fees the amount of which was increased or decreased under section 8 or 9 in the preceding year, setting forth the reasons for the modification, adjustment, or amendment, together with a statement of anticipated modifications, adjustments, or amendments of fees under those sections in the year in which the report is submitted and an explanation of the reason such action is anticipated; and

SEC. 12. TARIFF REJECTION AUTHORITY.

Section 203(e) of the Communications Act of 1934 (47 U.S.C. 230(d)) is amended by inserting the following after the first sentence: "The Commission may, after inviting comment from interested parties, reject a proposed tariff filing in whole or in part if the filing or any part thereof is patently unlawful. In evaluating whether a proposed tariff filing is patently unlawful, the Commission may consider additional information filed by the carrier or any interested party and shall presume the facts alleged by the carrier to be true."

SEC. 13. REFUND AUTHORITY.

Section 205 of the Communications Act of 1934 (47 U.S.C. 205) is amended by adding at the end thereof the following:

"(c) The Commission may require by order the refund of a portion of any charge by a carrier that results from violation of this Act, or of any rule promulgated under this Act. The refund shall be paid, with interest, to the person by or on whose behalf the charge was paid. The Commission may not require payment of a refund under this subsection unless—

"(1) it issues an order advising the carrier of its potential refund liability and provides the carrier with an opportunity to file written comments as to why the refund should not be required, and

"(2) it issues the order not later than 5 years after the date on which the charge was paid".

SEC. 14. LICENSING OF AVIATION, MARITIME, AND PERSONAL RADIO SERVICES BY RULE.

Section 307(e) of the Communications Act of 1934 (47 U.S.C. 307(e)) is amended—

(1) by striking "radio control service and the citizens band radio service" in paragraph (1) and inserting: "following radio services: (A) personal radio services, (B) aviation radio service for aircraft stations operated on domestic flights when such aircraft are not otherwise required to carry a radio station, and (C) maritime radio service for ship stations navigated on domestic voyages when such ships are not otherwise required to carry a radio station", and

(2) by striking out "the terms 'radio control service' and 'citizens band radio service' shall" in paragraph (3) and inserting "the terms 'personal radio services', 'aircraft station', and 'ship station' shall".

SEC. 15. AUCTION TECHNICAL AMENDMENTS.

Section 309(j)(8) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)) is amended—

(1) by inserting "are authorized to remain available until expended and" after "Such offsetting collections" in the second sentence of subparagraph (B), and

(2) by adding at the end thereof the following:

"(C) REVENUES ON DEPOSIT.—The Commission is authorized, based on the competitive bidding methodology selected, to provide for the deposit of monies for bids in an interest-bearing account until such time as the Commission accepts a deposit from the high bidder. All interest earned on bid monies received from the winning bidder shall be deposited into the general fund of the Treasury. All interest earned on bid monies deposited from unsuccessful bidders shall be paid to those bidders, less any applicable fees and penalties.".

SEC. 16. FORFEITURE FOR ACT OR RULE VIOLATIONS IMPERILING SAFETY OF LIFE.

(a) ADMINISTRATIVE SANCTIONS.—Section 312(a) of the Communications Act of 1934 (47 U.S.C. 312(a)) is amended—

(1) by striking "or" at the end of paragraph (6),

(2) by striking the period at the end of paragraph (7) and inserting a semicolon and the word "or", and

(3) by adding at the end thereof the following:

"(8) for failure to comply with any requirement of this Act or the Commission's rules that imperils the safety of life.".

(b) FORFEITURES.—Section 503(b)(1) of such Act (47 U.S.C. 503(b)(1)) is amended—

(1) by striking out "or" at the end of subparagraph (C);

(2) by inserting "or" after the semicolon at the end of subparagraph (D), and

(3) by inserting after subparagraph (D) the following:

"(E) failed to comply with any requirement of this Act or the Commission's rules that imperils the safety of life;".

SEC. 17. STATUTE OF LIMITATIONS FOR FORFEITURE PROCEEDINGS AGAINST COMMON CARRIERS.

Section 503(b)(6) of the Communications Act of 1934 (47 U.S.C. 503(b)(6)) is amended—

(1) by striking "or" at the end of subparagraph (A),

(2) by inserting "and is not a common carrier" after "Act" in subparagraph (B),

(3) by redesignating subparagraph (B) and (C), and

(4) by inserting after subparagraph (A) the following:

"(B) such person is a common carrier and the required notice of apparent liability is issued more than 5 years after the date on which the violation occurred; or".●

By Mr. BROWN:

S. 2338. A bill to provide that for taxable years beginning before 1980 the Federal income tax deductibility of flight training expenses shall be determined without regard to whether such expenses were reimbursed through certain veterans educational assistance allowances; to the Committee on Finance.

FLIGHT TRAINING EXPENSES TAX DEDUCTION ACT OF 1994

● Mr. BROWN. Mr. President, I introduce a bill which will restore some fairness to our current tax system. Approximately 200 veteran pilots throughout the country are currently unable to obtain refunds from the Internal Revenue Service [IRS] for taxes they paid which the IRS later ruled were unnecessary. This bill would create a 1-year grace period during which veteran pilots would be able to file for tax refunds.

In 1980, the IRS issued a rule, Revenue Rule 80–173, which retroactively repealed a provision which had been enforced since 1962. The IRS issued this rule against veteran pilots who had previously been allowed to receive educational benefits from the Department of Veteran Affairs and to claim a deduction for tuition expenses. The result of the IRS reversing its own ruling retroactively was that veteran pilots were charged back taxes, interest, and penalties. It seems unfair to me to apply a revenue ruling retroactively to the detriment of taxpayers who took a deduction as instructed.

An 11th Circuit Court decision allowed for some veteran pilots to successfully receive refunds of the tax they had been required to pay. However, 200 pilots throughout this country have not been as fortunate because they do not fall within the geographic jurisdiction of the 11th Circuit Court. There is no provision under the law which would allow the IRS to cancel the tax and refund the overpayment because claims for refund or credit must be filed within 3 years of the due date of the return or 2 years from the date the tax was paid, whichever is later. This legislation would enable the remaining 200 veteran pilots a 1-year opportunity to file for a refund.

These pilots are frustrated by this inequity and it is time to provide them the opportunity to settle this matter with the Federal Government.

Similar legislation—H.R. 641—has been introduced in the House of Representatives by Representative SUNDQUIST. The issue is fairness. I hope my colleagues will agree and cosponsor this important bill.●

By Mr. HOLLINGS:

S. 2339. A bill to authorize a certificate of documentation for the vessel *Why Knot;* to the Committee on Commerce, Science, and Transportation.

WHY KNOT CERTIFICATE OF DOCUMENTATION ACT

● Mr. HOLLINGS. Mr. President, I am introducing a bill today to direct that the vessel *Why Knot*, U.S. official number 688570, be accorded coastwise trading and fisheries privileges and be issued a Coast Guard certificate of documentation under title 46 of the U.S. Code.

The *Why Knot* was constructed in Taiwan in 1985 as a recreational vessel. It is 44 feet in length, 13.5 feet in breadth, has a depth of 7.8 feet, and is self-propelled.

The vessel was purchased on December 21, 1989, by Keith Rogerson of the Isle of Palms, SC, who intended to use it for short harbor tours in Charleston

harbor as well as for overnight excursions. Both of these operations would be limited to six passengers per tour.

When Mr. Rogerson purchased the boat, he was unaware of the specific coastwise trade and fisheries restrictions of the Jones Act. Due to the fact that the vessel was foreign built, it did not meet the requirements for a coastwise license endorsement in the United States. Such documentation is mandatory to enable the owner to use the vessel for its intended purpose.

The owner of the *Why Knot* is thus seeking a waiver of existing law because he wishes to use the vessel in his chartering business. If he is granted this waiver, he intends to comply fully with U.S. documentation and safety requirements. The purpose of the legislation I am introducing is to allow the *Why Knot* to engage in the coastwise trade and fisheries of the United States.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2339

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That, notwithstanding sections 12106, 12107, and 12108 of title 46, United States Code, and section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883), as applicable on the date of enactment of this Act, the Secretary of Transportation may issue a certificate of documentation for the vessel *WHY KNOT*, United States official number 688570.●

By Mr. DECONCINI:

S. 2340. A bill to recognize and grant a Federal charter to the National Alliance for the Mentally Ill; to the Committee on the Judiciary.

NATIONAL ALLIANCE FOR THE MENTALLY ILL FEDERAL CHARTER ACT

● Mr. DECONCINI. Mr. President, today I am introducing legislation to recognize and grant a Federal Charter to the National Alliance for the Mentally Ill [NAMI] as a veterans' service organization [VSO].

NAMI's record since 1980 demonstrates that it has the capacity to provide critical support to mentally ill veterans and their families. This support will enhance inpatient care and post-discharge services, prevent factors that exacerbate mental illness, and enhance those interventions which are required to prevent costly long-term rehospitalization. I am proud to note that NAMI's 19 local affiliates [AMI's] in the State of Arizona have been of invaluable assistance to mentally ill veterans and their families.

To recognize the crucial role while NAMI can play, we need only look at Bay Pines Hospital in Florida where NAMI and the Veterans' Administration Medical Center [VAMC] have combined to develop a model for the Nation. By enacting this legislation, we will be able to provide the means to replicate the successful model throughout the Nation.

NAMI can also play a valuable role in facilitating better coordination between the veterans' inpatient setting and the community mental health system. NAMI believes that total, continuing, and cost-effective health care for veterans with mental illnesses is shaped by various factors including the structure of health insurance, housing, and social services. In addition, voluntary programs dedicated to improving the quality of life for psychiatrically disabled veterans can prevent what often becomes an irrevocable break in health care for some of these veterans. Effective mental health services require a full utilization of community support programs.

Mr. President, NAMI also provides a mechanism for consumer empowerment and support. This will be critical as Congress holds hearings on the integration of the VA into any adopted plan for national health care reform. Despite the valuable role which families can play in enhancing treatment outcomes, doctors and other mental health providers are often resistant to their input. Official chartering as a VSO will provide NAMI families with a more forceful voice—one that is more likely to be listened to—and hence more likely to lead to positive outcomes for veterans with severe mental illness.

Mr. President, NAMI has a strong record in the area of veterans' affairs. On June 15, 1994, I received a letter from Mr. Joseph C. Zengerle, immediate past president of the Disabled American Veterans and a veteran counsel for the distinguished firm of Bingham, Cana & Gould. Mr. Zengerle wrote,

* * * Given our experience with NAMI on this issue [incompetent vets] since 1991, it is clear that the organization is not only zealous to protect the rights of those with mental disabilities but also has no hesitation forcefully to express its interests in fields like veterans affairs * * * and to do so with respect to legislative, executive and judicial actions as well as membership activities and publications * * * that in my view fully support its request for a Congressional charter * * *.

A review of the hearing record shows that psychiatric disorders are extremely expensive for the VA. Expenditures for VA mental health for fiscal year 1993 were $1.3 billion. Moreover, annual VA disability payments for just schizophrenia and manic depressive illness total approxtimately $1.8 billion. The combined totals of fiscal year 1993 VA expenditures for disability payments and services for all chronically mentally ill veterans exceed $3.1 billion.

Mr. President, in these times of increasing national debt and increasingly tight budgets, it would be irresponsible not to spend veterans' health care and rehabilitation moneys effectively and efficiently. Utilizing the nonprofit experience of NAMI can lead to long-term decreases in the overall costs to the VA system and provide critical linkages to the community as well as supportive services to veterans with severe mental illnesses and their families.

Mr. President, I ask unanimous consent that a letter from Mr. Joseph C. Zengerle, dated June 15, 1994, be inserted in the RECORD immediately following my remarks. Mr. President, I further ask unanimous consent that the full text of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2340

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FEDERAL CHARTER.

The National Alliance for the Mentally Ill, a nonprofit corporation organized under the laws of the State of Missouri (hereafter in this Act referred to as the "corporation"), is recognized as such and is granted a Federal charter.

SEC. 2. OBJECTS AND PURPOSES OF CORPORATION.

The objects and purposes of the corporation are those provided in its articles of incorporation, bylaws, and policy platform and shall include the following:

(1) Promoting a system of treatment and rehabilitation for chronically mentally ill veterans in VA hospitals and in the community.

(2) Promoting increased emphasis on biomedical and services research for chronically mentally ill veterans.

(3) Conducting educational programs and activities with the Department of Veterans Affairs to facilitate increased knowledge about mental illness and reducing stigma and misinformation about these disorders.

(4) Developing community support groups within the Department of Veterans Affairs Medical Centers for chronically mentally ill veterans and their families.

(5) Fostering expertise and resource allocation in treatment and supportive services for chronically mentally ill veterans who are homeless or in jeopardy of becoming homeless.

(6) Improving the interface of the Department of Veterans Affairs with other important governmental and private entities serving chronically mentally ill veterans.

SEC. 3. NONDISCRIMINATION.

In establishing the conditions of membership in the corporation and in determining the requirements for serving on the board of directors or as an officer of the corporation, the corporation may not discriminate on the basis of race, color, religion, sex, handicap, age, or national origin.

SEC. 4. RESTRICTIONS.

(a) LOANS.—The corporation may not make any loan to any officer, director, or employee of the corporation.

(b) STOCK.—The corporation shall have no power to issue any shares of stock or to declare or pay any dividends.

(c) CONGRESSIONAL APPROVAL.—The corporation shall not claim congressional approval or the authorization of the Federal Government for any of its activities.

SEC. 5. AUDIT OF FINANCIAL TRANSACTIONS.

The first section of the Act entitled "An Act to provide for audit of accounts of private corporations established under Federal law", approved August 30, 1964 (36 U.S.C. 1101), is amended by adding at the end thereof the following:

"The National Alliance for the Mentally Ill.".

SEC. 6. ANNUAL REPORT.

The corporation shall report annually to the Congress concerning the activities of the corporation during the preceding fiscal year. Such annual report shall be submitted at the same time as the report of the audit required by section 5 of this Act. The report shall not be printed as a public document.

SEC. 7. TAX-EXEMPT STATUS.

The corporation shall maintain its status as an organization exempt from taxation as provided in the Internal Revenue Code of 1986. If the corporation fails to maintain such status, the charter granted by this Act shall expire.

SEC. 8. TERMINATION.

The charter granted by this Act shall expire if the corporation fails to comply with—

(1) any restriction or other provision of this Act,

(2) any provision of its bylaws or articles of incorporation, or

(3) any provision of the laws of the District of Columbia.

BINGHAM, DANA & GOULD,
Washington, DC, June 15, 1994.

Re NAMI Charter.

Senator DENNIS DECONCINI,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR DECONCINI: I received a letter dated June 8, 1994 from Jim Cromwell on behalf of the National Association for the Mentally Ill ("NAMI"), indicating that you were considering legislation that would grant a Congressional charter to NAMI and asking if I would convey to you the nature of NAMI's assistance to veterans rated mentally incompetent to handle their financial affairs ("incompetent vets"). I'm glad to do so.

As you may recall, we represented about 7,000 incompetent vets in a class action against the U.S. Department of Veterans Affairs ("VA") before the U.S. District Court for the Southern District of New York. The class claimed that a provision of the Omnibus Budget Reconciliation Act of 1990 ("OBRA") violated its Equal Protection and Due Process rights. The District Court agreed with plaintiffs and granted a preliminary injunction against enforcement of the statute, which had cut off benefits for certain incompetent vets who had assets above a specified minimum. The VA was not successful in obtaining a stay of the injunction in either the District Court or the U.S. Court of Appeals for the Second Circuit, and disability payments to class members resumed.

The VA appealed the injunction to the Second Circuit on an expedited schedule. At that point, NAMI had already been active in supporting legislation to repeal the challenged OBRA provision. NAMI readily agreed to support the class on appeal as well, through a brief amicus curiae. NAMI filed a brief before the Second Circuit, concentrating on the Due Process deficiencies of the statute, for itself, the National Mental Health Association, the American Psychiatric Association and the Mental Health Law Project.

When the appeals court reversed the District Court ruling and remanded the case for further proceedings, the VA declared the payments the class had received under the injunction to be overpayments. Plaintiffs not only challenged the VA's assertion of recoupment rights in the District Court, but also invoked the Title 38 provision on forgiveness of individual debts for reasons of "equity and good conscience" in a letter to the Secretary of Veterans Affairs, indicating the possibility of filing a claim directly with the VA seeking administrative relief for all members of the class if the VA continued to seek recoupment.

Faced with further District Court proceedings, the threat of a separate administrative claim, a Senate budget resolution condemning the statute and pending legislation with widespread, bipartisan support in the House to repeal the statute, the VA, represented by the Justice Department, agreed to forgo recoupment of the injunction payments to the class in exchange for plaintiffs' agreement to forgo further litigative and administrative proceedings. The end result was that the class received as a result of the injunction, and was able to retain, $55 million in disability payments of which the OBRA provision otherwise would have deprived them.

NAMI's persistent efforts to help incompetent vets was important to legislative actions that demonstrated broad support for class relief and to litigation that showed the mental health community was also strongly behind the class, both of which were essential ingredients in striking a favorable settlement with the VA. Moreover, notwithstanding earlier statements to the contrary, the Bush administration abandoned its plans to seek renewal of the statute, sunsetted by its terms after two years, because of the supportive climate NAMI helped generate. Finally, even after the important achievements of the settlement and the sunset had been realized, NAMI continued to press for legislative relief to secure for incompetent vets the balance of the disability compensation kept from them by the statute and not recovered through the settlement.

Given our experience with NAMI on this issue since 1991, it is clear that the organization is not only zealous to protect the rights of those with mental disabilities but also has no hesitation forcefully to express its interests in fields like veterans affairs, which do not lie in NAMI's traditional backyard, and to do so with respect to legislative, executive, and judicial actions as well as membership activities and publications. NAMI shows the kind of across-the-board involvement, and determination to serve its constituents, that in my view fully support its request for a Congressional charter.

If I can provide any further information, please do not hesitate to contact me.

Sincerely,

Joseph C. Zengerle.●

By Mr. DECONCINI.

S. 2341. A bill to amend chapter 30 of title 35, United States Code, to afford third parties an opportunity for greater participation in reexamination proceedings before the United States Patent and Trademark Office, and for other purposes; to the Committee on the Judiciary.

THE PATENT REEXAMINATION REFORM ACT OF 1994

● Mr. DECONCINI. Mr. President, today I would like to introduce a bill, the Patent Reexamination Reform Act of 1994, with the support of the Clinton administration. This legislation will improve our patent reexamination system by broadening the basis for and scope of reexamination proceedings at the Patent and Trademark Office [PTO], increasing participation in reexamination procedures and appeals, and precluding reexamination in specified circumstances. Making these changes will provide patent owners and third parties alike with a cost-effective alternative to patent litigation in Federal courts to resolve many questions of patent validity.

WHY IS THE CURRENT REEXAMINATION PROCESS INADEQUATE?

In 1981, Congress provided for the reexamination of patents at the PTO. The purpose of reexamination is to provide an alternative to litigation over the validity of a patent. The administrative procedures for reexamination are ex parte in nature and allow the patent owner to file amendments, conduct interviews, and make appeals. This provides patent owners an efficient means to confirm the patentability of issued patents and to reduce the likelihood of validity challenges. Reexamination concludes with a reexamination certificate which may cancel any claims found to be unpatentable and which confirms the patentability of claims found patentable.

However, the ex parte nature of reexamination discourages its use as an alternative to validity challenges in Federal Court. Third parties do not perceive the reexamination process to be fair because of their limited ability to participate in the proceedings. Third parties are limited to filing the initial request and filing a reply if the patent owner files a statement in response to the order for reexamination. If the patent owner amends the claims during the reexamination, which occurs in over two-thirds of all reexamination proceedings, the third party has no opportunity to comment on the significance of those changes.

The restrictions incorporated into the current system have made reexamination a very unattractive option for third parties to challenge patent validity. Complicating this problem is the perception, particularly among juries, that the validity of a patent that successfully emerges from a reexamination is somehow enhanced. This imposes an increased burden upon third parties to prove invalidity in the courts and makes third parties reluctant to request reexamination at the PTO. Therefore, third parties believe that it is not in their best interest to request reexamination and, instead, take the question of validity directly to court.

The limited basis and scope of reexamination is another reason third parties become discouraged. Patent claims are currently reexamined only in light of previously issued patents or printed publications. Only new or amended

claims are examined under the disclosure and claim requirements of the patent law. To ensure that only valid patents are issued, patent claims should also be reexamined for compliance with the disclosure and claim requirements of the patent law. This means that the PTO would be able to reevaluate compliance with every statutory basis of patentability, other than §101 compliance, that is typically reviewed during the original examination. The Patent Reexamination Reform Act of 1994 provides for this type of reexamination.

HOW ELSE WOULD THIS BILL IMPROVE THE REEXAMINATION PROCESS?

Third parties would have the opportunity for meaningful participation in reexamination proceedings under this bill. In place of the current limitations on participation, third parties could submit written comments throughout the reexamination proceedings with minimal added expense or opportunity to harass the patent owner. The PTO also intends to provide, through rule making, the right of third parties to participate in any examiner interview initiated by either the patent owner or the examiner.

The bill also would give appeal rights which parallel the rights of patent owners to third parties. This change provides third parties the opportunity to receive judicial review of reexamination decisions and further encourages the use of reexamination as an alternative to litigation. However, third parties are estopped from litigating validity, in any forum, after the U.S. Court of Appeals determines that a claim is patentable. This maintains a desirable balance between third party participation and an expedited proceeding to reexamine patent validity.

This bill contains numerous provisions which would make reexamination proceedings more desirable to third parties. Many positive steps are taken to alleviate the perception of unfairness in the system. A consensus has developed within the patent community and representative patent organizations that there is, in fact, a problem with the reexamination process and that reform is needed. The patent bar, including the American Intellectual Property Law Association [AIPLA], as well as industry trade associations such as Intellectual Property Owners [IPO], National Association of Manufacturers [NAM], the Business Software Alliance, and the Software Publishers Association all have indicated their support for a reexamination system that provides greater third party participation.

This bill addresses many of the concerns surrounding the issue without upsetting the balance needed to ensure confidence in the patent system. The reforms made by this bill will help build confidence in the patent system in all industries by ensuring that invalid patents can be invalidated more readily, and, conversely, by assuring the public that a patent that survives reexamination will remain valid if subsequently enforced in court. I support the changes made by this legislation and feel confident the bill will provide clear benefits for patent owners and third parties alike, and will improve the operation of the U.S. patent system.

Mr. President, I ask unanimous consent that the entire text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2341

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Patent Reexamination Reform Act of 1994".

SEC. 2. DEFINITIONS.

Section 100 of title 35, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) The term 'third-party requester' means a person requesting reexamination under section 302 of this title who is not the patent owner.".

SEC. 3. REEXAMINATION PROCEDURES.

(a) REQUEST FOR REEXAMINATION.—Section 302 of title 35, United States Code, is amended to read as follows:

"§302. Request for reexamination

"Any person at any time may file a request for reexamination by the Office of a patent on the basis of any prior art cited under the provisions of section 301 of this title or on the basis of the requirements of section 112 of this title except for the best mode requirement. The request must be in writing and must be accompanied by payment of a reexamination fee established by the Commissioner of Patents and Trademarks pursuant to the provisions of section 41 of this title. The request must set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested or the manner in which the patent specification or claims fail to comply with the requirements of section 112 of this title. Unless the requesting person is the owner of the patent, the Commissioner promptly will send a copy of the request to the owner of record of the patent.".

(b) DETERMINATION OF ISSUE BY COMMISSIONER.—Section 303 of title 35, United States Code, is amended to read as follows:

"§303. Determination of issue by Commissioner

"(a) Within three months following the filing of a request for reexamination under the provisions of section 302 of this title, the Commissioner will determine whether a substantial new question of patentability affecting any claim of the patent concerned is raised by the request, with or without consideration of other patents or printed publications. On his own initiative, and at any time, the Commissioner may determine whether a substantial new question of patentability is raised by patents and publications discovered by him or cited under the provisions of section 301 of this title or by the failure of the patent specification or claims to comply with the requirements of section 112 of this title except for the best mode requirement.

"(b) A record of the Commissioner's determination under subsection (a) of this section will be placed in the official file of the patent, and a copy promptly will be given or mailed to the owner of record of the patent and to the third-party requester, if any.

"(c) A determination by the Commissioner pursuant to subsection (a) of this section will be final and nonappealable. Upon a determination that no substantial new question of patentability has been raised, the Commissioner may refund a portion of the reexamination fee required under section 302 of this title.".

(c) REEXAMINATION ORDER BY COMMISSIONER.—Section 304 of title 35, United States Code, is amended to read as follows:

"§304. Reexamination order by Commissioner

"If, in a determination made under the provisions of section 303(a) of this title, the Commissioner finds that a substantial new question of patentability affecting any claim of a patent is raised, the determination will include an order for reexamination of the patent for resolution of the question. The order may be accompanied by the initial Office action on the merits of the reexamination conducted in accordance with section 305 of this title.".

(d) CONDUCT OF REEXAMINATION PROCEEDINGS.—Section 305 of title 35, United States Code, is amended to read as follows:

"§305. Conduct of reexamination proceedings

"(a) Subject to subsection (b) of this section, reexamination will be conducted according to the procedures established for initial examination under the provisions of sections 132 and 133 of this title. In any reexamination proceeding under this chapter, the patent owner will be permitted to propose any amendment to the patent and a new claim or claims thereto in response to a decision adverse to the patentability of a claim of a patent. No proposed amended or new claim enlarging the scope of the claims of the patent will be permitted in a reexamination proceeding under this chapter.

"(b)(1) This subsection shall apply to any reexamination proceeding in which the order for reexamination is based upon a third-party reexamination request.

"(2) Any document (other than the reexamination request) filed in a reexamination proceeding by either the patent owner or the third-party requester shall be served on any other party.

"(3)(A) If the patent owner files a response to any Office action on the merits, the third-party requester may once file written comments within a reasonable period. At a minimum, such comments may be filed within 1 month after the date of service of the patent owner's response.

"(B) Comments filed under this paragraph shall be limited to issues covered by the Office action or the patent owner's response.

"(c) Unless otherwise provided by the Commissioner for good cause, all reexamination proceedings under this section, including any appeal to the Board of Patent Appeals and Interferences, will be conducted with special dispatch within the Office.".

(e) APPEAL.—Section 306 of title 35, United States Code, is amended to read as follows:

"§306. Appeal

"(a) The patent owner involved in a reexamination proceeding under this chapter may—

"(1) appeal under the provisions of section 134 of this title, and may appeal under the provisions of sections 141 through 144 of this title, with respect to any decision adverse to the patentability of any original or proposed amended or new claim of the patent; or

"(2) be a party to any appeal taken by a third-party requester under subsection (b) of this section.

"(b) A third-party requester may—

"(1) appeal under the provisions of section 134 of this title, and may appeal under the provisions of sections 141 through 144 of this title, with respect to any final decision favorable to the patentability of any original or proposed amended or new claim of the patent; or

"(2) be a party to any appeal taken by the patent owner, subject to subsection (c) of this section.

"(c) A third-party requester who files a notice of appeal or who participates as a party to an appeal by the patent owner under the provisions of sections 141 through 144 of this title is estopped from later asserting, in any forum, the invalidity of any claim determined to be patentable on appeal on any ground which the third-party requester raised or could have raised during the reexamination proceedings. A third-party requester is deemed not to have participated as a party to an appeal by the patent owner unless, within twenty days after the patent owner has filed notice of appeal, the third-party requester files notice with the Commissioner electing to participate.".

(f) REEXAMINATION PROHIBITED.—(1) Chapter 30 of title 35, United States Code, is amended by adding the following section at the end thereof:

"§ 308. Reexamination prohibited

"(a) Notwithstanding any provision of this chapter, once an order for reexamination of a patent has been issued under section 304 of this title, neither the patent owner nor the third-party requester, if any, nor privies of either, may file a subsequent request for reexamination of the patent until a reexamination certificate is issued and published under section 307 of this title, unless authorized by the Commissioner.

"(b) Once a final decision has been entered against a party in a civil action arising in whole or in part under section 1338 of title 28 that the party has not sustained its burden of proving the invalidity of any patent claim in suit, then neither that party nor its privies may thereafter request reexamination of any such patent claim on the basis of issues which that party or its privies raised or could have raised in such civil action, and a reexamination requested by that party or its privies on the basis of such issues may not thereafter be maintained by the Office, notwithstanding any provision of this chapter.".

(2) The table of sections for chapter 30 of title 35, United States Code, is amended by adding the following at the end thereof:

"308. Reexamination prohibited.".

SEC. 4. CONFORMING AMENDMENTS.

(a) BOARD OF PATENT APPEALS AND INTERFERENCES.—The first sentence of section 7(b) of title 35, United States Code, is amended to read as follows: "The Board of Patent Appeals and Interferences shall, on written appeal of an applicant, or a patent owner or a third-party requester in a reexamination proceeding, review adverse decisions of examiners upon applications for patents and decisions of examiners in reexamination proceedings, and shall determine priority and patentability of invention in interferences declared under section 135(a) of this title.".

(b) PATENT FEES; PATENT AND TRADEMARK SEARCH SYSTEMS.—Section 41(a)(7) of title 35, United States Code, is amended by inserting "or for an unintentionally delayed response by the patent owner in a re-examination proceeding," after "issuing each patent,".

(c) APPEAL TO THE BOARD OF PATENT APPEALS AND INTERFERENCES.—Section 134 of title 35, United States Code, is amended to read as follows:

"§ 134. Appeal to the Board of Patent Appeals and Interferences

"(a) An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.

"(b) A patent owner in a reexamination proceeding may appeal from the final rejection of any claim by the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.

"(c) A third-party requester may appeal to the Board of Patent Appeals and Interferences from the final decision of the primary examiner favorable to the patentability of any original or proposed amended or new claim of a patent, having once paid the fee for such appeal.".

(d) APPEAL TO COURT OF APPEALS FOR THE FEDERAL CIRCUIT.—Section 141 of title 35, United States Code, is amended by amending the first sentence to read as follows: "An applicant, a patent owner or a third-party requester, dissatisfied with the final decision in an appeal to the Board of Patent Appeals and Interferences under section 134 of this title, may appeal the decision to the United States Court of Appeals for the Federal Circuit.".

(e) PROCEEDINGS ON APPEAL.—Section 143 of title 35, United States Code, is amended by amending the third sentence to read as follows: "In ex parte and reexamination cases, the Commissioner shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all the issues involved in the appeal.".

SEC. 5. EFFECTIVE DATES.

(a) IN GENERAL.—Sections 2 and 4 and subsections (a), (b), (c), (d), and (e) of section 3 of this Act shall take effect six months after the date of enactment of this Act and shall apply to all reexamination requests filed on or after such effective date.

(b) REEXAMINATION PROHIBITION PROVISION.—Section 1 and subsections (f) and (g) of section 3 of this Act shall take effect on the date of enactment of this Act.•

By Mr. DORGAN (for himself, Mr. DASCHLE, Mr. SIMON, Mr. CONRAD, Mr. FEINGOLD, Mr. REID, Mr. WELLSTONE, and Mr. LEVIN):

S. 2342. A bill to amend the Internal Revenue Code of 1986 to improve the collection of taxes of United States persons moving production abroad and foreign persons doing business in the United States, and for other purposes; to the Committee on Finance.

THE FOREIGN TAX COMPLIANCE ACT OF 1994

• Mr. DORGAN. Mr. President, today, I'm joined by Senators DASCHLE, SIMON, CONRAD, FEINGOLD, REID, WELLSTONE, and LEVIN in introducing the Foreign Tax Compliance Act of 1994 to shut down perverse provisions in our tax laws that allow multinational corporations that do business in the United States to pay virtually no taxes here and that subsidize the flight of U.S. producers and jobs out of this country. House Majority Leader RICHARD GEPHARDT, Congressman DAVE OBEY, and 25 other distinguished members of Congress are introducing a companion bill in the House of Representatives.

President Clinton's assessment about the gravity of this problem is absolutely right. These misguided policies are costing this country tens of billions of dollars.

A review of recent IRS return data show that nearly three quarters of the foreign-based corporations that do business here pay no Federal income taxes. U.S.-based companies do not fare much better. I believe that we should not ask our domestic producers on Main Street to compete against tough international competitors that are not paying their fair share of U.S. taxes.

For years, the IRS has been unduly hampered in its tax enforcement of multinational firms and foreign investors. It has been using outdated tax enforcement tools to deal with sophisticated multinations and well-advised foreign investors of today.

As though that weren't bad enough, the tax laws themselves dig the hole deeper for domestic producers. As things stand now, runaway factories get a special tax break called deferral that is not available to those that stay in the United States.

The way this perverse tax bonus works is basically quite simple. If a U.S. company moves an operation abroad, it can defer its taxes on the resulting profits until it sends those profits back to the United States in the form of dividends.

Incredible as it may seem, we actually reward companies that move their jobs and capital out of the United States. This deferral provision operates as an interest-free loan program to help our biggest and brightest companies invest outside of the United States. And that is precisely the way the corporate world uses it.

A tax expert testifying before Congress offered an example that demonstrates the absurdity of our current policy. Consider two U.S. manufacturing companies that are identical in almost every respect. These companies produce virtually identical products and compete head-to-head in the tough U.S. marketplace. However, company A will get an interest-free loan from the Federal Government because it has moved its operations to a tax haven and has not brought any earnings back into this country. Company B, deciding to keep it operations in the United States, does not receive such a government loan. As a result, company A will have a greater, tax-subsidized return than company B, and thus company A will be able to beat the American producer in the U.S. marketplace.

Unfortunately, this interest-free loan program exists today. The Joint Tax Committee estimates the costs of this perverse incentive at $1.6 billion over 5

years. And that's why we introduced legislation to repeal tax deferral in these circumstances.

This legislation is carefully targeted to end tax deferral only where U.S. multinationals produce abroad in foreign tax havens, and ship those tax haven products back in the United States. It's important to note that this bill does nothing to hinder U.S. multinationals that produce abroad from competing with foreign firms in foreign markets.

The point is that we can no longer afford to subsidize the exodus of our biggest and brightest companies to countries peddling the lowest tax rates. It's unfair that American workers are losing thousands of jobs every year because of our own tax laws. Our Main Street businesses deserve a level playing field to compete against well-financed and well-advised multinationals.

Our tax enforcement officials also have been forced to use antiquated, 19th century tax enforcement tools to deal with international taxpayers. As a result, many international firms are able to juggle income to their affiliates in the friendliest jurisdictions—or into the black holes of their international balance sheets where corporate profits are reported to no country at all.

Again, this is not mere polemics. According to the General Accounting Office [GAO], some 73 percent of the foreign-based corporations that do business in the United States are paying no Federal incomes taxes. Zero.

This problem has festered at the IRS for decades, and only the explosion in world trade has forced it into the open. How to distinguish a corporation's U.S. income, from the income that should be reported elsewhere? It sounds simple, but in practice it can be devilishly complex. For example, a global enterprise operates through a multitude of subsidiaries throughout the world. Patents, parts, shared overhead, and a zillion other things flow freely through the company's worldwide web.

By putting prices on these transfers, the company can easily shift its income off its U.S. books and into the black holes in its international balance sheets. For foreign-based firms, whose main records are thousands of miles away, such transfer pricing strategies are especially attractive.

The way the IRS tries to uncover these shell games is straight out of the Keystone Kops. Beleaguered auditors have to comb through a corporation's thousands of internal transactions—one by one—and try a adjust the prices to a hypothetical market level.

The IRS is overwhelmed, and big corporations know it. The result is massive tax avoidance, combined with medieval disputes over correct prices that are clogging the tax court at an increasing rate.

Long ago, the States had to come to grips with corporations operating freely across their borders. They knew they couldn't possibly disentangle the spaghetti pile of a large corporation's internal accounting. So they devised a simple formula to do the job instead. Today, we can apply that basic approach to corporations operating across national borders as well, as some States do already.

Early this summer, the U.S. Supreme Court once again upheld the States' use of a formula method as reasonable and fair. A simple formulaic approach would flush out the billions of dollars that currently disappear in the Treasury's lawyer-intensive comparable pricing approach. Better still, the formula approach would render the medieval accounting games irrelevant; corporations could focus on business instead of fancy tax strategies, and the Government could save money.

This legislation expresses the Sense of the Congress that the Treasury Department should adopt a more streamlined and efficient method of enforcing Federal tax laws involving multinational corporations, especially those based abroad. In particular, we recommend using a simple formula approach where the current "arm's length" transaction rules don't work.

Finally, there's evidence suggesting that international firms and foreign investors are artificially shifting their U.S. source income outside of the taxing jurisdiction of the United States by entering into derivative financial contracts. According to some recent estimates, the total amount of financial derivatives today is fast approaching $16 trillion. This emerging tax loophole may have a devastating impact on Federal revenues. In addition, our tax authorities have known for over a decade that the current enforcement tools used for administering tax treaty benefits were insufficient.

That's why our legislation expresses the Sense of Congress that the Treasury Department use its existing authority to issue long-overdue regulations to ensure that U.S. tax treaty benefits are available only to those persons entitled to such benefits and to prevent the avoidance of U.S. tax by the use of derivative financial instruments. It's my understanding that Treasury Department is currently reexamining its rules in both of these areas. Clearly the current system is in need of fundamental change, and I applaud Treasury Department officials for their willingness to tackle these problems.

In summary, we must get rid of the tax laws and IRS enforcement practices that favor tough international competitors and foreign production to the detriment of our domestic producers. I believe that the Treasury Department must act expeditiously under its existing authority to bring the Nation's multinational tax enforcement tools up to date. In addition, the time has come to end deferral for U.S. corporations that move jobs abroad, but then ship their products back into the United States.

I ask unanimous consent that the full text of the legislation be included in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2342

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Foreign Tax Compliance Act of 1994".

SEC. 2. TAXATION OF INCOME OF CONTROLLED FOREIGN CORPORATIONS ATTRIBUTABLE TO IMPORTED PROPERTY.

(a) GENERAL RULE.—Subsection (a) of section 954 of the Internal Revenue Code of 1986 (defining foreign base company income) is amended by striking "and" at the end of paragraph (4), by striking the period at the end of paragraph (5) and inserting ", and", and by adding at the end the following new paragraph:

"(6) imported property income for the taxable year (determined under subsection (h) and reduced as provided in subsection (b)(5))."

(b) DEFINITION OF IMPORTED PROPERTY INCOME.—Section 954 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(h) IMPORTED PROPERTY INCOME.—

"(1) IN GENERAL.—For purposes of subsection (a)(6), the term 'imported property income' means income (whether in the form of profits, commissions, fees, or otherwise) derived in connection with—

"(A) manufacturing, producing, growing, or extracting imported property,

"(B) the sale, exchange, or other disposition of imported property, or

"(C) the lease, rental, or licensing of imported property.

Such term shall not include any foreign oil and gas extraction income (within the meaning of section 907(c)) or any foreign oil related income (within the meaning of section 907(c)).

"(2) IMPORTED PROPERTY.—For purposes of this subsection—

"(A) IN GENERAL.—Except as otherwise provided in this paragraph, the term 'imported property' means property which is imported into the United States by the controlled foreign corporation or a related person.

"(B) IMPORTED PROPERTY INCLUDES CERTAIN PROPERTY IMPORTED BY UNRELATED PERSONS.—The term 'imported property' includes any property imported into the United States by an unrelated person if, when such property was sold to the unrelated person by the controlled foreign corporation (or a related person), it was reasonable to expect that—

"(i) such property would be imported into the United States, or

"(ii) such property would be used as a component in other property which would be imported into the United States.

"(C) EXCEPTION FOR PROPERTY SUBSEQUENTLY EXPORTED.—The term 'imported property' does not include any property which is imported into the United States and which—

"(i) before substantial use in the United States, is sold, leased, or rented by the controlled foreign corporation or a related person for direct use, consumption, or disposition outside the United States, or

"(ii) is used by the controlled foreign corporation or a related person as a component in other property which is so sold, leased, or rented.

"(3) DEFINITIONS AND SPECIAL RULES.—

"(A) IMPORT.—For purposes of this subsection, the term 'import' means entering, or withdrawal from warehouse, for consumption or use. Such term includes any grant of the right to use an intangible (as defined in section 936(b)(3)(B)) in the United States.

"(B) UNRELATED PERSON.—For purposes of this subsection, the term 'unrelated person' means any person who is not a related person with respect to the controlled foreign corporation.

"(C) COORDINATION WITH FOREIGN BASE COMPANY SALES INCOME.—For purposes of this section, the term 'foreign base company sales income' shall not include any imported property income."

(c) SEPARATE APPLICATION OF LIMITATIONS ON FOREIGN TAX CREDIT FOR IMPORTED PROPERTY INCOME.—

(1) IN GENERAL.—Paragraph (1) of section 904(d) of the Internal Revenue Code of 1986 (relating to separate application of section with respect to certain categories of income) is amended by striking "and" at the end of subparagraph (H), by redesignating subparagraph (I) as subparagraph (J), and by inserting after subparagraph (H) the following new subparagraph:

"(I) imported property income, and".

(2) IMPORTED PROPERTY INCOME DEFINED.—Paragraph (2) of section 904(d) of such Code is amended by redesignating subparagraphs (H) and (I) as subparagraphs (I) and (J), respectively, and by inserting after subparagraph (G) the following new subparagraph:

"(H) IMPORTED PROPERTY INCOME.—The term 'imported property income' means any income received or accrued by any person which is of a kind which would be imported property income (as defined in section 954(h))."

(3) LOOK-THRU RULES TO APPLY.—Clause (i) of section 904(d)(3)(F) of such Code is amended by striking "or (E)" and inserting "(E), or (H)".

(d) TECHNICAL AMENDMENTS.—

(1) Clause (iii) of section 952(c)(1)(B) of the Internal Revenue Code of 1986 (relating to certain prior year deficits may be taken into account) is amended by inserting the following subclause after subclause (II) (and by redesignating the following subclauses accordingly):

"(III) imported property income,".

(2) Paragraph (5) of section 954(b) of such Code (relating to deductions to be taken into account) is amended by striking "and the foreign base company oil related income" and inserting "the foreign base company oil related income, and the imported property income".

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to taxable years of foreign corporations beginning after December 31, 1994, and to taxable years of United States shareholders within which or with which such taxable years of such foreign corporations end.

(2) SUBSECTION (c).—The amendments made by subsection (c) shall apply to taxable years beginning after December 31, 1994.

SEC. 3. IMPROVEMENTS IN THE COLLECTION OF UNITED STATES TAXES OWED BY FOREIGN PERSONS.

(a) FINDINGS.—The Congress finds that—

(1) there is evidence suggesting that foreign-controlled corporations doing business in the United States do not pay their fair share of taxes;

(2) over 70 percent of foreign-controlled corporations doing business in the United States pay no Federal income tax;

(3) the United States Department of the Treasury has limited its ability to protect the revenue base in the case of cross-border transactions, to the detriment of taxpayers engaged solely in domestic transactions;

(4) the United States Department of the Treasury has been using antiquated accounting concepts to deal with sophisticated multinational corporations;

(5) substantial Federal revenues are lost annually due to the inability of the Internal Revenue Service to enforce the "arm's length" transaction rules, along with substantial amounts spent on administration and litigation;

(6) current procedures of the Internal Revenue Service are insufficient for ensuring that a foreigner who is not a resident of a foreign country does not take advantage of the treaty benefits of that country; and

(7) current regulations and other positions adopted by the Internal Revenue Service may permit foreign persons to avoid United States taxes by utilizing derivative financial products which replicate the economic features of United States taxable investments.

(b) SENSE OF THE CONGRESS.—It is the sense of the Congress that deficit reduction should be achieved, in part, by ending loopholes and enforcement breakdowns that now foster the underpayment of taxes on income from cross-border transactions and enable foreign-controlled corporations operating in the United States, and foreign persons investing in the United States, to pay no taxes, including by—

(1) the adoption of a more streamlined and efficient method of enforcing Federal tax laws involving multinational corporations, especially those based abroad, and, in particular, the use of by the Treasury Department of a formulaic approach in cases in which the current "arm's length" transaction rules do not work; and

(2) the promulgation of regulations by the Secretary of the Treasury or the Secretary's delegate no later than December 31, 1994, which—

(A) establish certification, refund, or other procedures which ensure that any treaty benefit relating to withholding of tax under sections 1441 and 1442 of the Internal Revenue Code of 1986 is available only to persons entitled to the benefit, and

(B) prevent the avoidance of withholding of tax under such sections by use of derivative financial instruments, including regulations providing for the sourcing of income of foreign residents from notional principal contracts as income from sources within the United States in appropriate cases.●

ADDITIONAL COSPONSORS

S. 1096

At the request of Mr. SIMPSON, the name of the Senator from Maine [Mr. COHEN] was added as a cosponsor of S. 1096, a bill to amend the Foreign Assistance Act of 1961 to establish and strengthen policies and programs for the early stabilization of world population through the global expansion of reproductive choice, and for other purposes.

S. 1288

At the request of Mr. AKAKA, the name of the Senator from Minnesota [Mr. DURENBERGER] was added as a cosponsor of S. 1288, a bill to provide for the coordination and implementation of a national aquaculture policy for the private sector by the Secretary of Agriculture, to establish an aquaculture commercialization research program, and for other purposes.

S. 1889

At the request of Mr. CHAFEE, the name of the Senator from Washington [Mr. GORTON] was added as a cosponsor of S. 1889, a bill to amend title XIX of the Social Security Act to make certain technical corrections relating to physicians' services.

S. 1976

At the request of Mr. BURNS, his name was added as a cosponsor of S. 1976, a bill to amend the Securities Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the Act.

S. 2215

At the request of Mr. MCCAIN, the name of the Senator from Iowa [Mr. GRASSLEY] was added as a cosponsor of S. 2215, a bill to establish rules governing product liability actions against raw materials and bulk component suppliers to medical device manufacturers, and for other purposes.

SENATE JOINT RESOLUTION 165

At the request of Mr. COCHRAN, the names of the Senator from South Carolina [Mr. HOLLINGS], the Senator from Georgia [Mr. NUNN], the Senator from Ohio [Mr. METZENBAUM], and the Senator from Tennessee [Mr. SASSER] were added as cosponsors of Senate Joint Resolution 165, a joint resolution to designate the month of September 1994 as "National Sewing Month."

SENATE JOINT RESOLUTION 169

At the request of Mr. HEFLIN, his name was added as a cosponsor of Senate Joint Resolution 169, a joint resolution to designate July 27 of each year as "National Korean War Veterans Armistice Day."

SENATE JOINT RESOLUTION 186

At the request of Mr. PACKWOOD, the name of the Senator from Idaho [Mr. CRAIG] was added as a cosponsor of Senate Joint Resolution 186, a joint resolution to designate February 2, 1995, and February 1, 1996, as "National Women and Girls in Sports Day."

SENATE CONCURRENT RESOLUTION 66

At the request of Ms. MIKULSKI, the name of the Senator from Alabama [Mr. SHELBY] was added as a cosponsor of Senate Concurrent Resolution 66, a concurrent resolution to recognize and

encourage the convening of a National Silver Haired Congress.

SENATE CONCURRENT RESOLUTION 73

At the request of Mrs. FEINSTEIN, the name of the Senator from Mississippi [Mr. LOTT] was added as a cosponsor of Senate Concurrent Resolution 73, a concurrent resolution expressing the sense of the Congress with respect to the announcement of the Japanese Food Agency that it does not intend to fulfill its commitment to purchase 75,000 metric tons of United States rice.

NOTICES OF HEARINGS

COMMITTEE ON INDIAN AFFAIRS

Mr. INOUYE. Mr. President, I would like to announce that the Senate Committee on Indian Affairs will be holding a markup on Monday, August 1, 1994, beginning at 2 p.m., in 485 Russell Senate Office Building on S. 2075, to amend Indian Child Protection and Family Violence Prevention Act to reauthorize and improve programs under the Act; S. 2150, the Native Hawaiian Housing Assistance Act of 1994; and, for other purposes to be followed immediately by a hearing on S. 2329, the Mohegan Nation of Connecticut Land Claims Settlement Act.

Those wishing additional information should contact the Committee on Indian Affairs at 224-2251.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

Mr. MITCHELL. Mr. President, the Senate Committee on Banking, Housing, and Urban Affairs is requesting unanimous consent to hold hearings pursuant to Senate Resolution 229, beginning on Friday, July 29, at 10 a.m. in SD-106. The hearings will continue August 1-5, beginning at 9:30 a.m. in room SD-106.

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

COMMITTEE ON FINANCE

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Finance be permitted to meet today, July 29, 1994, at 11 a.m., to continue considering its recommendations for legislation to implement the Uruguay Round of Multilateral Trade Negotiations.

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

COMMITTEE ON LABOR AND HUMAN RESOURCES

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Labor and Human Resources Committee be authorized to meet for a hearing on the Employment Nondiscrimination Act of 1994, during the session of the Senate on July 29, 1994, at 10 a.m.

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

SUBCOMMITTEE ON COMMUNICATIONS

Mr. MITCHELL. Mr. President, I ask unanimous consent that the subcommittee on Communications of the Committee on Commerce, Science, and Transportation be authorized to meet on Friday, July 29, 1994, at 9:30 a.m. on the reauthorization of the Federal Communications Commission.

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

SUBCOMMITTEE ON JUVENILE JUSTICE

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Subcommittee on Juvenile Justice of the Committee on the Judiciary, be authorized to meet during the session of the Senate on Friday, July 29, 1994 at 9 a.m. to hold a hearing on violent video games: The rating system.

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

SUBCOMMITTEE ON REGULATION AND GOVERNMENT INFORMATION AND SUBCOMMITTEE ON JUVENILE JUSTICE

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Governmental Affairs Subcommittee on Regulation and Government Information and the Judiciary Subcommittee on Juvenile Justice be authorized to meet during the session of the Senate on Friday, July 29, 1994 at 9:30 a.m. to hold hearings on the subject: Rating video games.

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

ADDITIONAL STATEMENTS

(At the request of Mr. MITCHELL, the following statement was ordered to be printed in the RECORD:)

EXPLANATION FOR ABSENCE

• Mr. GRAHAM. Mr. President, I will be absent the afternoon of Friday, July 29, 1994, to attend my daughter's wedding. Thus, I will not be present for the vote on the nomination of Mr. Breyer to be an Associate Supreme Court Justice. Had I been present, I would have voted "aye."•

ORDERS FOR MONDAY, AUGUST 1, 1994

Mr. MITCHELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 9 a.m. on Monday, August 1; that following the prayer, the Journal of proceedings be deemed approved to date and the time for the two leaders reserved for their use later in the day; that immediately thereafter, the Senate resume consideration of S. 1513, the Elementary and Secondary Education Authorization bill, with the Hatch amendment No. 2429 as the pending business, to be considered under the conditions and limitations provided for under the provisions of a previous unanimous-consent agreement.

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

SCHEDULE FOR REMAINDER OF LEGISLATIVE PERIOD

Mr. MITCHELL. Mr. President, a number of Senators have asked me to comment on the scheduling for the remainder of this legislative period, including my plans with respect to health care reform legislation.

I have received a large number of inquiries from members of the press on the same subject. Some of those press inquiries were in response to reports or suggestions or rumors of my plans in this regard. Some of them were wholly unfounded and represented, I believe, nothing more than speculation.

Accordingly, in an effort to provide Senators with the most detailed and current information possible, I thought it would be useful to take just a few minutes before completing our business today to describe where we are in the legislative process and what I hope to accomplish over the next few weeks.

As the agreement just obtained indicated, the Senate will return to session at 9 a.m. on Monday and will resume consideration of the elementary and secondary education bill. There will be a vote at or about 10 o'clock Monday morning on the pending Hatch amendment. That will be followed by a debate and vote on an amendment to be offered by Senator FEINSTEIN of California.

I expect there will be other amendments offered and votes held during the day on Monday. I hope that we can complete action on this bill during Monday, and it is my intention to remain in session on that day until we do so.

If that does occur, we will then proceed on the following day, Tuesday, August 2, to consideration of the VA-HUD appropriations bill. Upon completion of that bill, we will, by then, I expect, have received from the House of Representatives the conference report on the crime bill, and it is my intention to proceed to that conference report as soon as possible following disposition of the VA-HUD appropriations bill.

On Tuesday, August 2, I intend to announce my decision with respect to the health care reform legislation, and I hope to have available for all Senators, by the close of business on that day, draft legislative language so that all Senators could have before them the bill language itself, although it will be subject to what I hope will be relatively few minor modifications in the final legislative process.

I emphasize that the legislation to be presented will be largely drawn from the bills which have already been reported to the full Senate by the Senate

Labor Committee and the Senate Finance Committee. Each of those committees held dozens of days of hearings and several days in which the committees considered, marked up, voted on, and completed action on the bills. So most of the provisions of what is presented next week will be very familiar to all Senators, at least those Senators who have followed the process so far, because they will have been included in the debate on the bills reported by the Finance and Labor Committees. While the legislation presented will not be identical and there will be some modifications, I stress that the vast bulk of the provisions will have already been the subject matter of extensive debate, discussion, and voting, and, therefore, should be familiar to all Senators.

Notwithstanding that fact, because there will be some provisions not included in either bill and because this is a matter of such importance, I believe that all Senators should have ample opportunity to read, review and consider this matter, and I repeat what I have said here publicly in the Senate and publicly in other places on many, many occasions. No one will be rushed on this important measure. Every Senator will have the most full opportunity to speak for as long as he or she wants on the subject. Every Senator will have the most full opportunity to offer any amendment he or she wants to offer on this subject.

I believe that it will be appropriate to begin deliberations in the Senate on that bill early the following week, which begins on Monday, August 8. I will not now attempt to set a precise day or time, pending further consultations with my colleagues, both Democratic Senators and Republican Senators and the Republican leader, but I will now also repeat something I have said on many, many occasions previously: that once we do begin on the bill, we will continue in session until we complete action on that bill.

Neither I nor any other person can now predict precisely when that will be, because the Senate rules permit unlimited debate and unlimited amendments. No one can now foresee how long any individual Senator will want to speak or how many amendments Senators individually or in the aggregate will offer. But I want to make it clear that there will be no attempt to prevent anyone from speaking for as long as he or she wants or to offer any amendment he or she wants.

Once we begin on the bill, as I have also said many times before, we will be in session 6 days a week, including Saturdays, with lengthy sessions during each day, to give every Senator the opportunity, as I have just stated, that is, the opportunity for a full debate and amendment.

I have suggested this course of procedure in discussions today with the Republican leader and with other Senators of both parties. I have not made a final decision because I have invited them to consider my suggestions and to consult among themselves and to respond, and I will, as I always do, take carefully into account their responses.

But, in view of the number of requests I have received from Senators about at least the current state of my thinking in this regard, I wanted to make this report. I welcome any suggestions any Senator may have on how best to proceed with respect to these matters. I am completely open to suggestion now, as I always have been, and will, before making any final decision, consider any such suggestion.

In the course of making my decision on the schedule during this period, I will also attempt to accommodate the wishes of as many Senators as possible. But I emphasize in advance that our first and primary responsibility is to the American people to meet our public responsibilities and to conduct ourselves in an appropriate way in attempting to diligently make decisions on these important matters.

I believe that at least the general outline of what I have suggested will enable us to do that in the most fair and appropriate way. But, as I have said earlier, I will not make a final decision in that regard until I have had a chance to consult further with all Senators, and specifically to receive and consider any reactions by Senators to these suggestions.

In conclusion, Mr. President, I will sum up and repeat briefly that we will, on Monday, have a rollcall vote at 10 a.m, and during the day thereafter I expect further rollcall votes. We will attempt to complete action on that education bill on Monday. We will then attempt to complete action on the VA–HUD appropriations bill. And then we will attempt to complete action on the conference report on the crime bill.

On Tuesday I hope to have ready, draft bill language of the health care reform bill for every Senator to review. And I hope to begin action on that measure sometime early the following week.

I thank all of my colleagues for their cooperation on this week. We have made good progress on important measures and I look forward to prompt action next week, as I have previously indicated.

RECESS UNTIL MONDAY, AUGUST 1, 1994, AT 9 A.M.

Mr. MITCHELL. Mr. President, if there is no further business to come before the Senate today, I now ask unanimous consent that the Senate stand in recess as previously ordered.

There being no objection, the Senate, at 4:01 p.m. recessed until Monday, August 1, 1994 at 9 a.m.

NOMINATONS

Executive nominations received by the Senate July 29, 1994:

DEPARTMENT OF VETERANS AFFAIRS

KENNETH W. KIZER, OF CALIFORNIA, TO BE UNDER SECRETARY FOR HEALTH OF THE DEPARTMENT OF VETERANS AFFAIRS FOR A TERM OF 4 YEARS, VICE JAMES WILSON HOLSINGER, JR., RESIGNED.

NAVAJO AND HOPI INDIAN RELOCATION

PETER J. OSETEK, OF ARIZONA, TO BE COMMISSIONER ON NAVAJO AND HOPI RELOCATION, OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION, FOR A TERM OF 2 YEARS, VICE CARL J. KUNASEK, TERM EXPIRED.

CONFIRMATION

Executive nomination confirmed by the Senate July 29, 1994:

SUPREME COURT OF THE UNITED STATES

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