a lot of people, when your statute is unclear in this respect, that might argue their way into protection.

Now, any of those people, if they are really hurt, should be able to bring a lawsuit, because those are people that you mean to protect, or at least arguably you mean to protect them, from the very kind of injury that you are worried about in that statute. I think most people would agree with that.

Then there are areas of what I would call gray areas in the law about whether the Court is pushing a little bit more this way or a little bit more that way in respect to how we go about making a little more concrete what I have just said generally. On those matters, I think I should like to reserve judgment, because I think that those are matters that are very much at issue in Supreme Court cases.

Senator HATCH. I thank you. I notice that my time has just about expired, but I appreciate your answers. I have really enjoyed listening to you.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Breyer, the Preamble to the Constitution makes it clear the purpose of our system of law is to enhance the lives of every American; in the Framers' words, "to secure the blessings of liberty to ourselves and our posterity." And at the White House ceremony, when you were nominated, you said quite eloquently that your goal as a Justice was to help make the Constitution and laws work for real people. So I would like to discuss with you several areas where your work made an impact on real people, on the rights of working women, on the safety of medications, on the quality of our environment, and also on the security of Americans from the threat of crime in our homes and on the streets in our communities.

Let's begin with the area of gender discrimination on the job, and one of your decisions, in particular, is a classic case involving two working women in the town of Peabody, MA, which illustrates what the law can mean in real human terms to the people involved. The case I am referring to is *Stathos* v. *Bowden.*

The plaintiffs, Stella Stathos and Gloria Bailey, worked in clerical jobs at the Peabody Municipal Lighting Commission. Both women devoted their entire working lives to the city agency, starting when they finished high school and continuing until they reached the retirement age. Ms. Stathos worked there 36 years before she retired in 1985; Mrs. Bailey worked there 41 years until she retired just last year.

In 1977, the Lighting Commission reorganized the plant where the women worked and drew up an organization chart which made it clear for the first time that men holding the positions equivalent to those held by Ms. Stathos and Mrs. Bailey were being paid about $12,000 more than the two women were receiving, and the women repeatedly asked for a pay increase to eliminate the disparity, and their requests were denied. They filed suit under two Federal antidiscrimination laws, and I am sure it took a lot of courage to sue their employer. It really was fighting city hall then. But in the end, they prevailed, and they won a jury verdict in their favor,

requiring the employer to raise their pay and pay them damages. And when the city appealed, you wrote an opinion upholding the trial court on several points of law and affirmed the award.

One line in your opinion seems to me to be particularly revealing on how you viewed the case. The defendants had argued that they were entitled to upset the verdict because the jury had not been asked to consider whether the defendants had acted in good faith. And in rejecting the claim, you wrote, and I quote, "We do not see how anyone could think that paying women less just because they were women would not constitute unlawful discrimination."

Can you tell us how this case is a reflection of your attitude toward equality, equal opportunity for women, and about your approach in interpreting the laws against sex discrimination?

Judge BREYER. Some things seem fairly obvious to me, Senator, and I think that was one of them. I suppose I was restrained in that. I guess it is fairly obvious, isn't it, that you are not going to pay a woman less for doing the same job as a man? What is very easy to me is I think of Chloe and I think of Nell, and they are going to be in the workplace. And, my goodness, I should come back and somebody should have to tell somebody that a woman is going to make less money for doing the same thing or is going to have some other onerous condition that a man would not have?

I mean, you try to explain that to Chloe or to Nell or to any other woman in the workplace. There is no explanation. And I would think in 1994 that that is rather clear to people. I would think it is rather difficult to make a defense saying, oh, dear, I did not know that. What else is there to say?

You see, I start with certain things that I assume is fairly obvious.

Senator KENNEDY. Well, I think there are many of us that would certainly agree with both your analysis and conclusion, but I think we also understand the reality in terms of the American workforce that too often that is not the case, and it is a real issue that is out there. Your response to that injustice I think was very well received.

I took the opportunity to call last night, I called Stella Stathos and Gloria Bailey, who still live up there in Peabody, and they said interesting things. They told us that after they won the case, the Lighting Commission accepted the outcome and showed them no animosity, which I thought was somewhat hopeful. And they also told me how proud they are that their case may open up the doors for other women in the same situation.

I asked each of them what they thought about you, which is rather an opening, and Mrs. Bailey said, "Did he ever do it the right way." And Mrs. Stathos said, "He really stood up for all of us," and I think that says it all.

You have been one of the leading scholarly commentators on administrative law and regulations, and while obviously these subject matters seem dry and arcane, they can be of enormous importance to every American. Americans have a right to expect that the food they eat and the water they drink and the medications they take and the air they breathe and the place where they work will be safe and free from dangerous substances or machinery. Congress passes the laws that set the broad standards in these and other

areas, but it is up to the administrative agencies like the EPA and the Occupational Safety and Health Administration and the FDA to adopt the regulations that spell out the standards to apply them in particular situations to protect health and safety.

This is an important work of administrative agencies, and a great deal has been written about your views on these subjects. Most of what has been written has been complimentary, but I would like to give you the opportunity to respond to some of the rest.

My question is: How do you respond to the suggestion some have made that you are hostile to the health and safety regulations?

Judge BREYER. I have said in my book that I think regulation is necessary in those areas. I guess if you wanted a simple statement, a simple statement, I wrote a book review not too long ago in which I tried—because it was written about the economics of AIDS. And I wanted to explain in that book what I saw as an important difference, as you have said, actually, an important difference between what you might call classical economic regulation, like airlines or trucks, and the regulation involving health, safety, and the environment.

I said as to the first, trucking, airlines, it is not really surprising that economics may help. It is not the whole story, but it tells a significant amount of the story because our object there is to get low prices for consumers. And maybe economics can help us.

When you start talking about health, safety, and the environment, the role is much more limited because, there, no one would think that economics is going to tell you how you ought to spend helping the life of another person. If, in fact, people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong? And what I ended up there saying is that in this kind of area, it is probably John Donne, the poet, who has more to tell us about what to do than Adam Smith, the economist. That is a decision for Congress to make reflecting the values of people.

So I tried to draw that distinction, and that does not mean all those areas work perfectly either. Everyone can have a lot of criticisms about every area, but, nonetheless, there is a difference in the way economics feeds into the enterprise. And that is what I have tried to spell out in that review.

Senator KENNEDY. Well, in two of the areas—one in the area of FDA and the other in the environment—you have not written many decisions on the FDA, but there is one that in particular you decided, *U.S.* v. *50 Boxes More or Less*. You voted to uphold the FDA's right to seize prescription drugs because the manufacturer had not presented adequate and well-controlled studies to demonstrate its safety and effectiveness and the conditions for which it would be prescribed.

What is significant about your opinion in this case is that you upheld the district court's grant of summary judgment to the FDA, even though the drug in question has successfully been on the market 35 years. But the manufacturer had not met the strict regulatory standards for proving the safety and effectiveness of the drug, and you upheld the drug seizure by the FDA.

It seems to me that that opinion could hardly have been written by someone who is hostile to health and safety regulations. My question is: Would you spell out the reasons for reaching that decision?

Judge BREYER. That decision reflected an administrative agency's rules and regulations that had evolved slowly over time. Those rules and regulations followed from a statute that Congress enacted. They might not have been perfect, but basically it was the administrative agency's job and the courts over time had ratified that job to work out a system that would remove dangerous drugs from the market.

The particular drug in question fell within that system, and I thought there—and I think now, and I think the law reflects that—that it is risky for courts to start monkeying around with a case-by-case deviation from a regulatory system that has been thoughtfully worked out over the years. You cannot say never with anything. But you have to remember that the basic statute designed to protect people has been worked out in Congress, delegated to the agency, and when that works fairly well over the course of time, it is not surprising that the law says follow what the agency says. That is what I think was basically going on there.

Senator KENNEDY. Your opinions in the environmental cases have earned high marks from the environmentalists in New England. One was very important in Massachusetts involving George's Bank, which is one of the most productive fishing areas. You upheld a district court ruling that former Interior Secretary James Watt could not auction off the rights to drill for oil in that fishing area because the Interior Department had not done an adequate environmental impact statement on the effect of drilling on those important fisheries.

Could you tell us about that decision and how generally your rationale basically would reflect your approach on environmental regulation?

Judge BREYER. I think that decision, again, reflects the need for courts to go back to the underlying intent of Congress, and I think it reflects our own court's view of what that intent was in respect to environmental impact statements. Basically, there had been an environmental impact statement that was going to permit—the Interior Department wanted to drill for oil off George's Bank. But between the time they first looked at it and the time it came up to our court, everybody had changed his mind about how much oil was likely to be there. They first thought billions of barrels. They second thought hardly any.

The question was: Do they have to go prepare a new environmental impact statement if they still want to drill? They did still want to drill. Our court said if you do, you better prepare a new statement. Why? Because there has been such a big change. You might want to hurt the environment if you are going to get billions of barrels, but, really, do you really want to hurt the environment for a little bit?

Now, what had been argued on the other side of that case was: Well, we will do the statement; just let us go forward with our auction in the meantime. But we said no, that is not the purpose of the environmental impact statement. The purpose of that state-

ment is to make this great bureaucracy think about this hard before the gears start in motion.

So do not go let out the bids and everything and then write the statement, because once the agency is committed to the action, it is too late to write statements.

The very purpose of the law, to protect the environment in this area, is to get the statement written before the agency becomes bureaucratically committed to a course of action that could hurt the environment. And that is what was going on in that opinion.

Senator KENNEDY. Well, it is a good example of how sound environmental regulation can protect the public interest.

I would like to introduce into the record a letter, Mr. Chairman, from Douglas Foy, who is the executive director of the Conservation Law Foundation, certainly the leading public interest environmental law group in New England. Mr. Foy writes in part:

> Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore.
>
> Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

To which I can add that the first circuit's loss is the Nation's gain.

The CHAIRMAN. Without objection, it will be placed in the record.

CONSERVATION LAW FOUNDATION,
Boston, MA, June 30, 1994.

TO WHOM IT MAY CONCERN: Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore. The Court's line of decisions on the obligations imposed by NEPA are leading precedents, reflecting a penetrating understanding of the law's requirements and of agencies' cavalier efforts to avoid its application.

Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. Much of the development of environmental law in the next decade will revolve around the application and enforcement of pivotal federal laws (such as the Clean Air Act, National Energy Act, Magnuson Act, and ISTEA), by agencies, in the states and regions. Stephen Breyer is precisely the kind of judge to whom we should entrust review of agency compliance with those laws. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

Sincerely,

DOUGLAS I. FOY,
Executive Director.

Senator KENNEDY. Turning to another area involving the criminal justice system, as you know, Senator Thurmond and I worked for many years with Chairman Biden to pass the Sentencing Reform Act of 1984, the law that abolished the Federal parole and created a sentencing guidelines system in the Federal courts. And with all the talk about truth in sentencing, it is important to remember that we created truth in sentencing at the Federal level 10 years ago.

Before that time, the sentencing system was a matter of law without order; judges in two different courtrooms sentencing two equally culpable defendants might hand down two completely different sentences. One defendant might get 10 years, another might get probation, and there was nothing the prosecutors could do about it. And because of parole, the sentence imposed by the judge had little to do with the time the defendant actually served, and many criminals served only a third of their sentences even in cases involving violent crimes.

This system led people to lose faith in the ability of the legal system to do justice and protect the interests of victims of crime. So we abolished parole in the Federal system and created a commission to write sentencing guidelines so that criminals who commit similar crimes will get similar sentences and actually serve the time they get.

You served as one of the first members of the commission. You helped forge the key agreements that got the job done. These guidelines provide for tough, no-nonsense sentences, increasing the time served by violent criminals and by white-collar corporate criminals who used to get special treatment in the Federal courts.

Could you briefly describe how the guideline system achieves truth in sentencing and why you think that truth in sentencing is an important goal.

Judge BREYER. I think that you decided, Senator, and the other Senators on this committee decided, at that time correctly, that the public was very confused about sentencing. A judge would sentence a robber to 6 years in jail, but the robber would be out after 2. Sometimes, the judge would sentence him to 18 years for a violent robbery, and he would be out after 6. Sometimes, the judge would sentence him to 8, and he would not be out until after 7. No one knew what in fact was happening, and the public's cynicism grew.

Therefore, you and this committee and the Congress decided that under the new Federal sentencing system, the sentence given by the judge would be the sentence that was served—not completely; there is 15 percent good time that could be awarded—but basically, the sentence given would be the sentence served, and that is what has happened.

The second basic objective that you had, which I think still is a worthy objective, I could describe like this: Many judges in the first circuit have a lot of experience in sentencing, and they do it well. Judge Toro, the chief judge in Massachusetts, across the hall, for many years would describe to me how he sentenced people, and it seemed very sensible. But then, a different judge in Los Angeles, let us say, an equally good judge, an outstanding judge, would sentence the same kind of person for the same kind of crime, and the results would be dramatically different.

So what you said is that the sentence should not depend on who the judge is. In New York, they would have a wheel and assign judges by lottery. Well, why would you need a wheel, unless people thought that the personality of the judge was playing a role in the sentence? Well, that should not be. And so you set up the Sentencing Commission to try to even that out. That is a hard job.

I think the Sentencing Commission has come up with guidelines that do tend to even that out. The basic philosophy of the statute,

the basic philosophy of the guidelines, is that they will write guidelines that apply to specific types of crimes and specific types of criminals, and judge, when you are sentencing a person for a particular kind of crime, a particular kind of person, you follow the guidelines. That gives you very little leeway—if you have an ordinary case. Judge, if you have an unusual case, you may depart from the guidelines. Use your own judgment there. But you have to give your reason, and it will be reviewable in a court of appeals.

Now, that is the basic theory. Guidelines, I know, are controversial. I know that these guidelines have not worked perfectly. But it does seem to me to be a step in the right direction toward more uniform justice and toward more uniform justice and toward more understandable justice so that people will understand that punishments are uniformly applied, and the punishment announced is the punishment that will be given.

Senator KENNEDY. Do you want to add anything with regard to whether the mandatory minimums have been additive and useful and helpful?

Judge BREYER. Well, what I have said publicly, Senator——

Senator KENNEDY. I was going to keep you out of controversy until that one.

Judge BREYER. This is a legislative matter. This is a legislative matter, and I think that Congress will in its wisdom determine that political matter. I have expressed in my writings sometimes some criticism of that.

Senator KENNEDY. I will include that excellent article as part of the record.

[Article follows:]

THE BREYER NOMINATION

Breyer on Mandatory Minimums

These 'Very Rotten Bananas' Should Be Discarded

Judge Stephen Breyer a founding father of the federal sentencing guidelines has not shied from openly criticizing their oft pummeled stepchild mandatory minimum sentencing statutes Breyer issued a stinging attack on mandatory minimums and the pernicious role he feels they have played in the criminal-justice system at an Aug 7 1993 panel discussion sponsored by the American Bar Association What follows are excerpts from Breyer s remarks

It s very difficult to discuss this issue because the public doesn t know the difference between the statutes and the guidelines and the other things And before you know it, it's turned into an issue of are you for crime or are you against it We re against it, OK We're against it

What I want to do is make four points from a tough anti-crime point of view The first is simply this It's important to keep in mind what statutory mandatory minimums are That s why I want you to read this report of the United States Sentencing Commission, this is not a bunch of liberal minded patsies

This is their report on mandatory statutory minimums And look at what they are What they are are about 60 statutes randomly passed by Congress from time to time when they felt, since 1790, the need to deal with a subject, a special subject

For example, if you cause a vessel to run aground by use of a false light it's a mandatory prison sentence of 10 years All right that was in 1790, that one I hope you aren t going to sell poison in China another mandatory minimum I certainly hope you re not going to engage in piracy

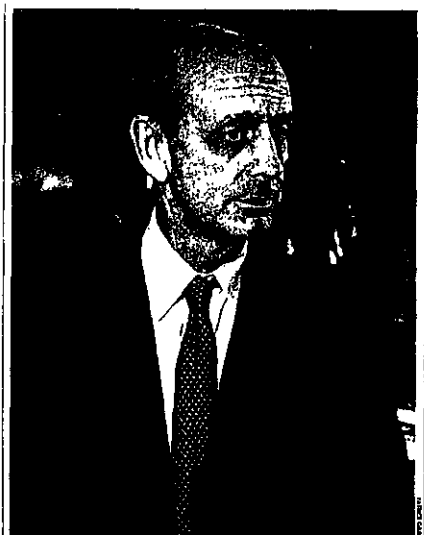
'A Mess in the Statute Books'

I mean, you know, you can look through these and they basically responded to some kind of problem Congress thought was important at the time, and the result is a mess in the statute books for which reason Congress set up the United States Sentencing Commission The United States Sentencing Commission went through every crime on the books And believe me it s an unbelievable nightmare the United States Criminal Code which I don t have to explain to you

And the commission wrote a whole bunch of penalties and they have mandatory statutory minimums for every crime Not just one every one of those things is mandatory The only difference is one it s a little bit more sophisticated so they don t quite give the dude who is paid $500 bucks to take in four kilograms of cocaine the same sentence as the big cheese In other words, they distinguish between the big cheese and the small fry And second they say Judge if you have a special case depart So there s out in the joints and that s what I want you to remember

My second point is that there are some things that are true of law since the beginning of history You cannot get a rule that has 100-percent application And that s why law, since the beginning of history has been a fight between rules called law and equity called fairness Treat like cases alike Make an exception for the special cases Different cases differently, equity

And we can ask Congress, we can ask Plato s geniuses we can ask anybody you want—no one will ever get a system of law that you don t have to have exceptions for And when we get into the criminal area where our perceptions of criminal



Judge Stephen Breyer openly criticizes mandatory minimum sentencing, in part because, he says, there always have to be exceptions.

law are supposed to comport with ordinary people's idea of what's moral and decent, you will always need the exception You will always need what we found at the commission

Ish's robbery even with toy guns a terrible thing? Of course, it's a terrible thing But what do you do with a real case when the person got a toy gun, got $400 for a bank robbery, [and] it turns out he had an IQ of about seventy His only friend in the world is his dog The dog needed an operation He went to the vet, he wouldn t do it on credit He needed the money He asked for a bank loan They wouldn't give it to him So he got his toy gun robbed $70 from the bank to give the dog the operation, turned himself in to the FBI when the dog died anyway

OK you give him life? I mean this is weird, you say That s what equity is there for That's what the discretion of the unusual case is there for That's why we don't want the statutory minimum because, because there will always be exceptions, always

Now, what happens when you stop following the guidelines which say mandatory minimum for everything but if it's an unusual case, make an exception? What happens if we say no? We're throwing that out of the window We're going to say never an exception

I'll tell you what happens, three things The first thing that happens is just what you heard, which is pathetic cases come along that nobody would think this should be the sentence, and so you get a considerable degree of unfairness The second thing that happens is examples nobody will tell you about, but they're there the opposite kind of example

Because you cannot tell human beings to do things that they feel are totally unfair, and if you tell judges or lawyers or prosecutors who are human beings to do something they think is terrible, they won't do it They'll figure a way out And, my goodness, I mean there is out in the joints of the criminal law, always out in the joints

Oil number one, the prosecutor decides not to prosecute Oil number two, the jury won't convict Oil number three, sentencing So we stop any oil in the sentencing part, well you'll just push it into the other two parts The jury won t convict, and the prosecutor won t prosecute

That's why I found what's really here of interest to me is in this commission report It says that when they looked through the presentence reports of all the people who should have gotten minimums, they found the increased penalty was not sought or obtained 63 percent of the time No weapon charge in these things with mandatory minimum, although a weapon was [found] 45 percent of the time

So I say to the people who actually are interested in tough law enforcement, what you ll get is sometimes they ll follow it and then you ll get an unfair case, and more often the prosecutors won't follow it, and then you'll discover no penalty or the jury won't convict, and [there will be] no punishment at all And if you think that s theoretical or isn't happening, what you do is read this report of the United States Sentencing Commission, and you will see that's exactly what's happening And, finally, what you'll discover as a result of this mess—because that s what I would describe it as, a mess—you'll discover not only unfairness, not only failure to punish where there ought to be some punishment, but you ll also see everybody sweeping everything under the rug Because you're not going to find prosecutors really saying publicly they don't prosecute or judges saying, well I sort of cut him a little here or there, whatever it is

Rather what grows generally is you have a law that can't really be enforced and when you have that, you have disrespect for law And you have the public feeling something is going wrong, but you're not quite sure what And you have everyone acting a little bit hypocritically

Well, I've just been to a conference in Switzerland where people were talking about what goes on in other countries And for a long time, we've seen a lot of countries that had great legal systems on paper, but, in reality, the reality does not comport with the paper

Now, you can get by with a little bit of that in any system But when you build in your criminal-law system a set of rules that people inevitably, with their ordinary human perceptions of what is just, will feel compelled to distort or ignore, and you get the unfair results

I suppose that's why I feel so strongly about it, and why I think there isn't much to be said on the other side So my last point is, well, what would you tell the congressman to say who has to deal with a public that is worried about law and order?

I'd say, first of all, we do have a system of law and order, we do have a kind of mandatory minimum maximum sentence for every crime, but it is one that has oil in the joints and allows departures and makes distinctions between males, small fry and big cheeses That's called the sentencing guidelines

Second, I'd say there isn't much need, because there's no evidence, for yet stricter laws There are departures allowed under the guidelines Only about 7 percent of the judges have departed, maybe 8, maybe 9 Compare that with the 40 to 60 percent of the prosecutors who aren't prosecuting under these mandatory minimums if you're interested in being tough on crime

'Odd Patchwork'

And I d say then go out and don't call these mandatory minimums. Call them the odd patchwork of statutory nonsense, talk about phasing them out while you give power to the commission Have the commission write reports on how it's going so you can supervise whether or not law's getting weak Think about the prison capacity and what is it going to do when everyone applies them across the board 100 percent Talk about rationality and the effectiveness of *having a criminal justice* system that does punish people who deserve to be punished and has enough oil in the joints so that it can work effectively

And, finally, if you re stuck to say anything else, remember Alfred Kahn Do you remember Alfred Kahn? He was President Carter's inflation fighter

He wasn't supposed to use the word recession, remember? You can't use the word *recession*—that was what the president said He said, "OK, I won t use the *word recession* I'll call it a banana "

All right, let's not call them mandatory statutory sentences We'll call them bananas and we'll say we've got to get rid of these bananas because they are very rotten bananas, and they're tending to infect the criminal-justice system And I think, [illegible] point of view of people who are interested in an effective system and also a rule of law that people will be able to enforce fairly it seems fairly obvious to me that we ought to get rid of them □

Senator KENNEDY. My time is almost up, Judge Breyer, but I want to offer a brief comment about your extraordinary career of public service, and that is that throughout your life, you have dedicated yourself to the public interest. You have served as a law clerk to Justice Goldberg; from there, you went to the Justice Department, where you developed creative ways to use the antitrust laws and fight housing discrimination. When you became a professor at Harvard Law School, you did not retreat into an ivory tower; you focused on the tough problems of economic regulation and making government work better. And whenever the call to public service was heard, you answered, helping Archibald Cox to investigate Watergate, helping the Senate address complex regulatory matters, and serving with great distinction as chief counsel of this committee.

And when you became an appeals court judge, your commitment to the administration of justice did not stop there; you took on the different task of adopting tough, fair sentencing guidelines, and you continued to teach law to young people and to analyze the toughest problems of the day.

That kind of work is not glamorous. It does not get you a lot of publicity or honors. But it is the kind of work that helps real people, and it is the kind of work that will make you a first-rate Justice on the Supreme Court, where you will enhance the lives of Americans for years to come.

Judge BREYER. Thank you, Senator.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. It is also the kind of work that allows me as chairman to get some of the first-rate minds like the two professors sitting behind me to come and work for little or nothing because people like you end up on the Supreme Court. So I thank you for that, for saving the taxpayers a lot of money by getting first-rate staffpersons to take cuts in salaries to come and work with us.

Judge, I thank you for this morning, and as I indicated, what we will do now, since we have a very important vote that will take place on the floor of the Senate at 2:30, we will wait and reconvene at 2:45, at which time, the first order of questioning will be Senator Thurmond and then Senator Metzenbaum.

We are recessed until 2:45.

[Whereupon, at 12:56 p.m., the committee was recessed, to reconvene at 2:45 p.m. this same day.]

AFTERNOON SESSION [2:58 P.M.]

The CHAIRMAN. Welcome back, Judge.

Judge BREYER. Thank you, Mr. Chairman.

The CHAIRMAN. We now turn to the senior member of this committee, our one and only chairman, Senator Thurmond.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman.

Judge Breyer, we are glad to have you with us.

Judge BREYER. Thank you.

Senator THURMOND. I am glad to see your fine family here with you.

Judge BREYER. Thank you.

Senator THURMOND. Today, the Judiciary Committee begins hearings to consider the nomination of Judge Stephen Breyer to be an Associate Justice of the Supreme Court of the United States.

If confirmed, Judge Breyer would be the 108th person to serve as a Justice and is the 26th Supreme Court nominee which I have been privileged to review during my service in the Senate.

A Justice on the Supreme Court occupies a life-tenured position of immense power. As members of the Judiciary Committee, we have a responsibility to our Senate colleagues and to the American people to closely examine Judge Breyer's qualifications. It is our solemn duty to ensure that a nominee to the Supreme Court possesses the necessary qualifications to serve on the most important and prestigious Court in America.

Over the years, I have determined the special criteria which I believe an individual must possess to serve on the Supreme Court, and they are as follows:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second, courage. A nominee must possess the courage to make decisions on difficult issues according to the laws and the Constitution.

Third, compassion. While a nominee must be firm in his or her decisions, mercy should be shown when appropriate.

Fourth, professional competence. The nominee must have mastered the complexity of the law.

Fifth, proper judicial temperament. The nominee must have the self-discipline to prevent the pressures of the moment from disrupting the composure of a well-ordered mind, and be courteous to the lawyers, litigants, and court personnel.

Sixth, an understanding of and appreciation for the majesty of our system of Government—its separation of powers between the branches of our Federal Government; its division of powers between the Federal and State governments; and the reservation to the States and to the people of all powers not delegated to the Federal Government.

Mr. Chairman, I have known Judge Breyer and followed his career for 20 years, since his first days as special counsel on the Administrative Practices Subcommittee. Of course, he later served as chief counsel for the Senate Judiciary Committee and was most cooperative in that role.

Since December 1980, Judge Breyer has served with distinction on the U.S. Court of Appeals for the First Circuit and as chief judge of that circuit since 1990.

In 1985, then-President Reagan appointed Judge Breyer as one of the three judge-members of the U.S. Sentencing Commission, a post he held until the expiration of his term at the end of October 1989. Under the very able, continuing leadership of its chairman, Judge William W. Wilkins, Jr., of South Carolina, the Sentencing Commission accomplished on schedule the formidable task of devising a workable set of guidelines to govern the imposition of sentences for Federal crimes.

I was pleased to coauthor the law which created the Sentencing Commission, along with Senators Kennedy, Biden, Hatch, and others. Judge Breyer is the type of individual who we envision would serve on the Commission to make our goal of effective sentencing reform a successful reality. In this regard, Judge Wilkins and others have told me of the invaluable contributions Judge Breyer made in assisting with drafting the initial guidelines and in helping to explain them to others, particularly to Federal judges who must interpret and apply them.

Sentences now imposed under the guidelines are fairer, more uniform, and certain. They are also tougher in the areas of violent crime, major white-collar crime, and major drug offenses—areas where past sentencing practices often were too lenient.

Mr. Chairman, Judge Breyer has come a long way from the summer in 1958 he spent as a ditch digger for the Pacific Gas & Electric Co. I recall his capable work on the Senate Judiciary Committee and as a Federal judge on the U.S. Court of Appeals for the First Circuit. While I may not agree with Judge Breyer on every issue, I have found him to be a man of keen intellect, and he appears to possess the necessary qualifications to serve as an Associate Justice of the U.S. Supreme Court.

Mr. Chairman, this concludes my opening remarks, and I will use the remainder of my time during this round for questioning Judge Breyer.

The CHAIRMAN. Senator, if you will yield for a moment, I would like the record to show, to emphasize what you stated at the outset. I will put it another way: One out of every four Justices who ever served on the Supreme Court in the history of the United States, you oversaw the hearing. One out of four. That is astounding.

What are you going to do the next 25 years?

Senator THURMOND. I expect to have a part in a good many more in the future. [Laughter.]

The CHAIRMAN. Good. All right. I thank you for yielding. One out of four. That is incredible. Twenty-six percent of all the Justices, you have voted on.

Senator THURMOND. Judge Breyer, I have some questions. If there are any that you feel it would be improper to answer, well, you say so. Otherwise, I will propound the questions.

The role of the judicial branch of Government is to interpret the law. Unfortunately, there are times when some judges go beyond that authority and legislate from the bench rather than interpreting the law before the Court.

Where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking?

Additionally, if confirmed, what approach could you use in resolving whether or not a decision was the type that should be made by a judge or an elected legislative body?

Judge BREYER. Thank you. I think that is a good question. I think that is an important question, and the short answer to the question is: Of course, a judge should not legislate from the bench. The difficult part of the question is how you know. How do you know when there are broad, open areas of law? And I think you