had a direct impact on my pocketbook, that is, that syndicate?—I believe the answer is no, though that is judgmental. And what that means is you have to look at the particular case. And I did look at that case, and I have thought about it, and I have looked at it really again and again in the last few days, believe me. And I still think that there is no direct, proximate money in my pocket through 418 because of what was or might have been held in that case.

That is my belief. That is judgmental. I think many, many others who have looked at it agree with me. And I recognize that reasonable people could differ on the point.

Senator SPECTER. Thank you very much.

The CHAIRMAN. Thank you very much, Senator Specter.

Senator Heflin.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Judge Breyer, we are delighted to see you back with the Judiciary Committee. It was a pleasure to serve with you when you were the staff director and the chief counsel. From that association, which involved many thorny issues, we developed certain evaluations relative to your personality, your intellect, and your integrity. And I think they were the highest.

We had many nonharmonious issues that were raised during that time, and you were a great consensus builder. However, you failed in regards to a consensus builder when it came to the codification of the Criminal Code. I think that is such a thorny issue which was tried twice to try to do it. You and Ken Feinberg and others worked on that to get a consensus of that. But from our association, we developed a friendship. We developed the highest regard for your integrity, the highest regard for your abilities, and for your ability to inform everyone.

We were pleased when we learned that you and a great other lawyer who was representing the other side, Emory Sneeden, would meet for breakfast every morning, and you all would do these things.

But sometimes, you know, as we think about these friendships and things, we do not want to let that prevent us from asking some hard questions. And I think we have that function here.

To follow up on Senator Specter about Lloyd's, you have mentioned your mechanical approach, your technical approach to trying to determine whether or not there could be an interest of Lloyd's of London in any case that you had. When did you start that procedure by which you had three check mechanisms that you would follow relative to that when you went on the bench?

Judge BREYER. That is when I started, Senator.

Senator HEFLIN. When you started. All right.

Judge BREYER. Yes; I cannot tell you every year, but, I mean, I would say very close to when I started, probably when I started.

Senator HEFLIN. Now, when you practiced law, I supposed you tried cases in which there were insurance companies involved but not named. That happens frequently. And the jury is qualified either by the attorneys or the judge relative to whether or not there might be a member of the jury venire who has an interest in or

is a shareholder in a certain insurance company, and that appears in the record.

Did you in part of your mechanism endeavor to try to look at transcripts to determine whether or not Lloyd's of London might have some interest in any case?

Judge BREYER. I would look through the briefs. That is, if I came—I read the briefs in every case, and if, in fact, it appeared from the brief, if, in fact, it appeared in the record, or if, in fact, I learned it from a brief, then I take myself out of the case. And that was basically—and that would be true of any investment. You know, it was not special with Lloyd's. It is that if you learn as a judge that a firm in which you have an investment has a direct interest in the case, you take yourself out. It is simple. Everyone understands that. Everyone understands that, and the only risk in such a thing is that something slips through the net. And you try to cast the net what I would call reasonably wide.

Senator HEFLIN. Well, now, under the Federal Rules of Appellate Procedure, in many instances you do not have the full transcript. You have designated portions of it, what you could do. But I think it is wise to sort of look back relative to the transcript and the jury venire questioning to determine whether or not there could be. That is something you might consider adding. I think your mechanisms that you have listed are good, but that is a method by which generally it will show up, because lawyers are very diligent and want juries asked the question: Do you have stock? That is the only way some lawyers get into the jury's mind that there is insurance in a case relative to that.

Now, I have read various letters that have been presented to us, and one is from Geoffrey Hazard, who was the Sterling Professor of Law at Yale and then I believe is now at the University of Pennsylvania, and who I have a great regard for and is probably one of the leading authorities on judicial ethics and legal ethics. He was the chief draftsman of the Code of Judicial Ethics when it was drafted in 1972, and I happened to be on the court at the time and worked with him. My State was one of the first to adopt the American Bar Association models of judicial ethics.

I have read his letter, and I think his letter goes to the point and is excellent, and I want to just point out that he says that, "I am advised that Judge Breyer as judge participated in a number of cases" involving CERCLA, which is Superfund.

> None of these cases involved Lloyd's as a party or by name in any respect. None appear to have involved issues that would have material or predictable impact on general legal obligations under the Superfund legislation.

And then he says:

> In my opinion, Judge Breyer's participation in the foregoing cases did not entail a violation of judicial ethics. None of the cases involved Lloyd's as a party or as having an interest disclosed in the litigation. None could have had a material effect on Judge Breyer's financial interests. None had a connection direct enough with Judge Breyer as to create a basis on which his impartiality might reasonably be questioned * * *

Then he goes on and says that, "There is a close analogy between the kind of investment as a Name"—and, of course, "Name" is meaning that it is under Lloyd's. That is the way a person participates.

There is a close analogy between the kind of investment as a Name and an investment in a mutual fund. A mutual fund is an investment that holds the securities of operating business enterprises. Ownership in a mutual fund is specifically excluded as a basis for imputed bias under [the code] and the Code of Judicial Ethics. This exclusion was provided deliberately, in order to permit judges to have investments that could avoid the inflation risk inherent in owning Government bonds and other fixed income securities but without entailing direct ownership in business enterprises.

Now, Chief Justice Roger Traynor of the Supreme Court of California, who worked on the Code of Judicial Ethics, went on to say that the idea of a common fund or a similarity to a mutual fund is because of the impossibility of keeping track of the portfolio of such a fund. But if a mutual fund had only insurance companies, that might raise a flag of caution.

Now, when you consider Lloyd's, Lloyd's is known nationwide as insuring anything. They say, all right, if you want—insurance companies will not insure this, but you can get it under Lloyd's of London. So the idea of having an investment in Lloyd's of London raises some sort of an issue pertaining to this as to whether or not, after going on the bench, you ought to divest yourself of any interest in Lloyd's.

Now, what is your feeling relative to that? Did that enter your mind, the fact that Lloyd's of London is such a widely known and the fact that you—of course, you filed disclosures all during the time that you were there, so it was publicly known. But there is that issue of whether or not that raises a red flag.

Judge BREYER. As I understood it, it was like a mutual fund. I would go over and visit my mother-in-law and family over there, Joanna's family, in the summer. And what it consisted of, my investment, is you would go and spend an hour's lunch with this person who was the agent, who would tell you we have various—we are proceeding for the next year, and anything in the world can be insured. And when you read about losses, remember, losses in some areas have gains in another. You will never know. You will never know how the insurance all works out. You will never know what is insured. You will never know whether there is a gain or a loss. What can be a gain for one company can be a loss for another. If there are a lot of losses, that can be good because then more people want to buy insurance. So in a sense, it was a good investment like a mutual fund because it is all over the place and there is no way to predict whether any case would help you or hurt you if you tried.

On the other hand, that word "insurance," as I have learned in the last few weeks, that word "insurance" does ring bells. And basically what I decided—it takes a long time to get out of Lloyd's. You have to resign, and then it takes 3 years. So when I first became a judge, I put it down. I knew it would take 3 years, and I did not immediately resign. By 1988, I had reached a conclusion such as you suggest, and I resigned. That is partly why I did. That is partly what I wrote.

I think the thing to do now is—given the issue that has come up, I am not interested in having an investment in an insurance company. It does not affect—I mean, that is why I said yesterday I would like to simply get rid of it.

Senator HEFLIN. Well, now, there are other experts in the field of judicial ethics and legal ethics. Professor Stephen A. Gillers at New York University Law School comes out and says:

I see no evidence that the decisions in Judge Breyer's case would have had a direct or substantial effect on his interest as a syndicate that has insured against risk of liability for environmental pollution.

He supports you.

John Frank, who worked on these issues when they were being formulated and worked as a consultant, and others, have written letters, and I think they ought to be introduced into the record, all of these—I believe they were addressed to Mr. Lloyd Cutler—pertaining to these matters; I think they ought to be in the record.

But Professor Hazard does say this:

In my view, it was possibly imprudent for a person who is a judge to have such an investment because of the potential of possible conflict of interest and because of the possible appearance of impropriety.

Now, what do you say to that statement by Professor Hazard?

Judge BREYER. I would say at the time that I entered into this investment in the 1970's, and my keeping it through the mid-1980's, I thought basically it is like being in the Dreyfus Fund, or it is like being in a big stock fund, although it is a fund of insurance risks. And I did not think beyond that. So it seemed the diversity was OK and probably a good thing for a judge, because you have a tiny little bit of risk everywhere, and therefore it is not going to affect you directly in any way, unless they are involved in the case.

Having listened to what you have said, and having become acquainted with Professor Hazard's view, I accept that view, and I think if there are a substantial number of people who believe it is imprudent, that that is an added reason why I should be out of this investment, and I will be out of it as absolutely soon as I possibly can. That is what I will do.

Senator HEFLIN. Let me go to another subject that have briefly been asked about you, and that is sentencing guidelines; and they are controversial. I have to admit that I was not that enthusiastic about them; I thought there were other ways of handling disparity of sentences other than the sentencing guidelines. I think Senator Mac Mathias and I were the only ones who raised questions about this. I think that some of the States have come up with better systems, rather than the system that we adopted at the Federal level.

But there are a lot of them today—here is a statement that Professor Albert Alschuler of the University of Chicago Law School points out: "You scratch the guidelines anywhere, and you get a horror story. Judge Stephen Breyer is as responsible for the mess as anybody else." Now, of course, he is looking at it from his viewpoint that they are all a mess. There are others who feel like the guidelines are working, but the question of the mandatory minimum sentences—in a recent article that you wrote, you made this statement:

All right. Let us not call them mandatory statutory sentences. We can call them bananas, and we will say we have got to get rid of these bananas because they are very rotten bananas, and they tend to infect the criminal justice system. I think, frankly, it is a kind of mess, and from the point of view of people who are interested

in an effective system and also a rule of law that people will be able to enforce, it seems fairly obvious to me that we ought to get rid of them.

Now, I do not think this is going to be necessarily a judicial question. Do you have any advice that you would give Congress pertaining to this issue as Congress proceeds and as it is proceeding today on the crime bill, in which there are more and more mandatory minimum sentences, that are being formulated in the crime bill?

Judge BREYER. Senator, the rather colorful statement that you read was not made in a judicial context. The view that I was expressing and said yesterday that I thought perhaps it would be understandable that I would have this view because after all, Judge Wilkins and I and others on the Commission were sentencing commissioners, and we naturally thought that it was an advisable thing for Congress to give to the Sentencing Commission the power to write guidelines which are fairly tough guidelines, but which have a little oil in the joints for unusual cases, where, if there is an unusual case, the judge can depart, though the Court of Appeals will review that for reasonableness.

Now, being a commissioner—a former commissioner—it is not surprising that I would hope that Congress would continue to delegate authority to that Commission, see how they exercise it, and if you feel they are exercising it badly, then change that authority. But that seemed to me to be consistent with your general hope to remove some of this from the political arena and to try to make it consistent and coherent.

So for that reason, I have expressed the view, sometimes colorfully, sometimes not, that to have a somewhat random or different assortment of mandatory minimum sentences is not consistent with that and would not work well. That was the view that I expressed, and it is not surprising that I have that view. I think it does not work well from the point of view of criminal law enforcement. That was the view that I have publicly expressed; that is true.

It is a legislative question, and however it is decided in Congress, the courts will enforce the determination that Congress makes.

Senator HEFLIN. Well, I am not asking you to judge on this; I am asking your view relative to giving advice to Congress. You are still of the opinion that there ought to be a very few mandatory sentences; I assume that is your position?

Judge BREYER. That was the view of the Sentencing Commission. They prepared a study, and what the studied showed was when they write guidelines, the departure rate is low; it is about 7 percent, 8 percent downward and a couple of percent upward.

Senator HEFLIN. Let me ask you another tough question. Supposedly—this has been brought out by David Garrow's book, "Law and Sexuality," and he suggests that you wrote the first draft of Justice Goldberg's concurrence in *Griswold* v. *Connecticut*. Will you give us information pertaining to your participation in that opinion?

Judge BREYER. If you had worked for Justice Goldberg as I did, you would be fully aware that Justice Goldberg's drafts are Justice Goldberg's drafts. It was Justice Goldberg who absolutely had the thought, that his clerks implemented, and both my coclerk Stephen Goldstein and I did—there were two at that time—and we worked

on that draft. I might have worked on it a little more than he. But it is Justice Goldberg's draft.

Senator HEFLIN. Well, as a clerk, you generally follow the directions of your judge——

Judge BREYER. That is correct.

Senator HEFLIN [continuing]. Or you cease to be a clerk.

Judge BREYER. That is correct, that is correct.

Senator HEFLIN. Much has been said about your ability to be a consensus builder, and the collegiality of the Court. Do you think that the collegial atmosphere of the John Marshall Supreme Court is preferable to the more—or at least it appearing—to the appearing contentious atmosphere of the Court today; and what do you think are the advantages of collegiality and consensus, and what role do you think you can play to help bring this about?

Judge BREYER. That is a very big question. John Marshall's Supreme Court played a major role in building the United States of America. It made real the constitutional promise that there would be one Nation. It did that through the decisions that we all know.

I think the consensus was critical there to the fact that we have a United States with limited government, with great freedom, that allows us to live together. It is a remarkable thing, that Court. No court could live up to that Court—maybe the Brown Court—but really tough to do.

Consensus is important. Consensus is important for a number of reasons. One is the effort to obtain consensus tends to downplay the individual ego of the individual judge, and that makes it more likely that there will not be subjectivity, and there will not be personal views, and everyone will put his mind or her mind to the more important task of determining the law.

Consensus is important because law is not theoretical; law is a set of opinions and rules that lawyers have to understand; judges have to understand them; lower court judges have to understand them. And eventually, the labor union, the business, small business, everyone else in the country has to understand how they are supposed to act or not act according to law. And consensus helps produce the simplicity that will enable the law to be effective.

Now, how do you achieve that consensus? That is hard. It is not a question of bargaining—I will give you that, or I will give you that—believe me, it is not that kind of a question. It is a question of trying to listen to other people. It is a question on our Court of each judge listening to the other. And I bet you found that on yours as well. And you think it is so much more important to another person. You listen to the argument, and even if you say, "In the opinion, it might be argued that, but we reject that," the other judge is much happier. The point of view is taken into account, and that tends to draw people together. And then, when the different judges understand that their own ego is less at stake, you do not stick on every little minor thing; try, and try to get a view in the opinion that is straight, that is clear, that pays attention to the different arguments and that treats them fairly, then I think consensus comes along. It is pretty general, but I think it is important.

Senator HEFLIN. Charles Evans Hughes once wrote that dissents are vital to a living Constitution because they appeal "to the brooding spirit of the law, to the intelligence of a future day, when a

later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." You, however, have commented favorably on the fact that your circuit produces very few dissenting opinions. Don't we make bad decisions worse by discouraging dissenting opinions? Should Justice Harlan have been encouraged not to write his now famous dissent in *Plessy* v. *Ferguson*?

So now I am asking you—a consensus builder, when and in what circumstances do you feel that dissents ought to come from the members of the Court?

Judge BREYER. In my own court, and I am sure in yours, Senator, there is no problem—there was no problem—if people felt strongly, they dissented. The thing that you would like to have the judges feel, and that is why I feel we were quite lucky in the first circuit, is look, this is not a matter of your own ego, this is not a matter of being picky that it does not say exactly what you want on minor things. Use common sense about this. Remember that you are writing for lawyers and judges and others who are going to have to apply this opinion and live under it. Remember all that. Now, if you think that this majority opinion is wrong on a significant point, you file a dissent. That happens. That happens in our court. It is the right thing.

Senator HEFLIN. Before joining the Supreme Court, Justice Ginsburg said that she felt the Supreme Court judges wrote too many memorandums and held too few discussions. Do you agree with her assessment, and in encouraging consensus in the first circuit, did you find it easier to encourage consensus by speaking as opposed to writing to each other?

Judge BREYER. That is interesting. I agree with her about quite a lot, but not on that. It actually helps to put it in memoranda. It is interesting, you know, in our court, Judge Torruella is in San Juan, Puerto Rico; Judge Cyr is in Maine; Judge Bownes and Judge Stahl now are up in New Hampshire; Judge Campbell and I and now Judge Boudin were in Massachusetts; Judge Selya is down in Rhode Island. That is where we are most of the time, and we most of the time communicate through memoranda; and actually, the memoranda help, because you start talking about a complicated case in a discussion, and then people get—"I cannot remember exactly; was it this point, or was it that point, and what did I actually think about it?"—and before you know it, the discussion gets a little confused. But if you get into the habit of do not worry about your English, do not worry about it being perfectly phrased—if you have an idea, put it on a piece of paper, sit there, write it out, send it around. And you get into the habit of reading each other's views and realizing nobody is wedded, but this is what he is thinking at the moment, and we will change that. That actually helps. So I am more on the side of written, actually, than oral; I have learned that.

Senator HEFLIN. Well, does that give you more of a wedding, though, sometimes, rather than discussing it?

Judge BREYER. No; you can discuss it——

Senator HEFLIN. There are a lot of Justices with a prima donna approach, and there are a lot of prima donnas on the bench who

have an idea that they have a pride of authorship and a pride of language that is difficult to make them change.

Judge BREYER. Oh, yes, but you have to get the habit that this is really tentative. You know, another interesting thing is people get into the habit, they have an idea, and the other person incorporates it into the opinion; so you have helped the other person write the opinion. Interesting. That can——

Senator HEFLIN. I see my time is up.

The CHAIRMAN. Is that spoken as a former chief justice or as a Senator?

Senator HEFLIN. Well, maybe more as a former justice; I would say that they are not wedded as much around here because it is generally written by staff. [Laughter.]

The CHAIRMAN. Senator Brown.

OPENING STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BROWN. Thank you, Mr. Chairman.

Judge Breyer, we all admire not only your outstanding record, but your perseverance in surviving this deliberation. We trust that you will be kinder to the people who appear before you at Court than we are to you.

I have been particularly intrigued with the opportunity to read some of your writings—I have not read all of them, but I have read some—and to listen to your responses. You strike me as an individual who is not only a legal scholar but as someone who combines it with a scientific approach to examining facts. I sense in you a willingness to go beyond a doctrinaire political philosophy and look at facts in making up your mind. Is that a fair judgment?

Judge BREYER. Goodness, I hope so. I am a little biased, but I hope so. Thank you.

Senator COHEN. I think the judge indicated he does not like flattery.

Senator BROWN. Well, I think we can take care of that, too. But I find it intriguing and refreshing that someone would have that orientation. That scientific, nonideological approach to judging is much needed in our judicial system.

You spoke earlier today about the courthouse in Boston. Senator DeConcini addressed the expenditures and walked through some of the factors with you. There were several items that were not covered, and I just wanted to clear those up.

First, it would be helpful if you would outline the responsibilities you, as the chief judge of the First U.S. Circuit Court of Appeals, had with regard to that courthouse. What was your responsibility? What did you control and not control?

Judge BREYER. We came in—I say "we," because Judge Woodlock of the district court and I were basically the judges' representatives—and we worked with primarily the people in the General Services Administration. And where we entered in the process, the demand for the courthouse—the need for it had been there for many years before I became chief judge, and eventually, through a normal governmental administrative process, the demand led to a GSA study, which led to show the need for the court, which led to funding, all of which goes according to rules, and I think all of