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

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

Senator HEFLIN. I see my time is up.

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

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

The CHAIRMAN. Senator Brown.

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

Senator BROWN. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

the funding was provided according to rules. The amount of the funding is set according to rules, and all that I think was applied right across the board in normal way.

Where we really entered was that what Judge Woodlock wanted to do and what I wanted to do was to use with this what I think a perfectly straightforward appropriation for a courthouse that has a straightforward need; could that money be spent in a way that would be of benefit to more than judges and more than litigants and more than lawyers. We had a very attractive site. We spent a long time trying to choose the right architect. We narrowed it to seven. Certainly, I think those seven, most of them would be on anyone's list of the best architects in the United States. Eventually, we chose an architect, Harry Cobb, and I will tell you what he did to us that is so interesting to me.

He showed us a picture of a courthouse in Virginia, a courthouse that was built I think in the 17th or early 18th century. And what you saw in that courthouse was not expense. It was made of inexpensive material. It had one room, and it had a portico in front. And in that portico, you could see it was the center of the town. Not just lawyers and not just judges, but everyone in that town would gather there, because that building, as so many courthouses in the 18th century and in the 19th century in this country, in the North, the South, the East and the West, they were symbols, and they were used as symbols; they were used in reality as centers of places. Government is part of the community in many ways, and——

Senator BROWN. My question was really more focused on whether you, as chief judge, were the one who made the decision on which architect was hired? Were you the one who made decisions on the plan? What I wanted to pin down was specifically what your responsibilities were in that process.

Judge BREYER. We had a committee, and the committee was GSA, and GSA has the legal authority, and the legal authority was always with GSA. But GSA was extremely cooperative, and GSA worked with us and brought the architects in, and we worked together, and we would meet every, single week, and we worked with community groups, we worked with all the groups in the city that had an interest in this. I would call it in practice a cooperative process; in law, it was a legal process under the control of GSA.

Senator BROWN. So they looked to you for advice, but for example, you were not the one who set the budget for the courthouse?

Judge BREYER. No; that is correct.

Senator BROWN. The newspaper reports indicate a cost of $285 a square foot cost for the building and estimate that it is triple the average courthouse. Are those two assessments correct as far as you know—the $285 a square foot figure, and that it is three times the average of a normal courthouse?

Judge BREYER. The number—I do not know how they calculated it—but the number that I usually think, which is a GSA calculation, was somewhere around $212, $214, somewhere in that range, and that it was right in the middle of the price of Federal courthouses; that is, there were quite a few more expensive, and there were quite a few less expensive. It is right in the middle range.

That is my impression. You could check directly with GSA. They have all the numbers.

Senator BROWN. The Washington Post and another one of the Washington papers indicated that the courthouse included a $450,000 appropriation for a boat dock associated with the courthouse.

Senator GRASSLEY. Does that mean the judges lost their moorings? [Laughter.]

Senator BROWN. Well, I think it is probably in the interest of the Senate not to talk about people who have lost moorings.

I am wondering first of all if the boat dock was in your recommendations and if it is something you approved of?

Judge BREYER. We have no choice. That is to say, it is built on a piece of land that had a boat dock there already, and I think, under the rules and regulations of GSA, that that boat dock must remain suitable for water transport. It was going to be used for public water transport in the city. The hope, I think, of GSA there is that this could be used for public water transport of all different sorts; the Park Service might use it. But the requirement that it be restored and retained was there under normal rules and regulations. We had no choice about that.

Senator BROWN. And $789,000 for original art work?

Judge BREYER. In every public building under the rules and regulations of GSA, I think under the Senate and congressional law, one-half of 1 percent, I believe it is, of the construction budget must be set aside for works of art, and this was done according to that rule, regulation and law, and I think it helps that.

Senator BROWN. $1½ million for a floating marina?

Judge BREYER. That must be the same as the first.

Senator BROWN. In combination with the dock.

Judge BREYER. There is only one dock there. There is only one dock, and that is a restoration of the dock that was there already.

Senator BROWN. Thank you.

Let me draw your attention for a moment to an interesting area of law. With your broad experience, you ought to have some interesting comments for us. We have been fortunate enough to pick up some of the tenets of common law as we develop our own law. One of the more interesting common law concepts that Blackstone recited in his works is the idea that the sovereign can do no wrong, or the king can do no wrong. It has been modified over the years. The British have found areas where they make exceptions to it.

The Framers of the Constitution found something in this concept to model on, and they created areas of congressional immunity. The Constitution, in the speech and debate clause, seems to grant Congress some immunities. We have also exempted ourselves from a variety of statutes, whether it is civil rights, or OSHA, or fair labor standards, and a variety of others.

Over the years, I have seen disclosure requirements simply ignored when Members of Congress did not comply.

We have made some progress in the last few years in changing this. The U.S. Supreme Court said in *U.S.* v. *Lee* in 1982 that no man is so high in this country that he is above the law.

I want you to reflect for a moment on what you consider to be the constitutional basis for legislative immunity from the law.

Judge BREYER. The most obvious place is the speech and debate clause. Let me see if I can find it readily. But the speech and debate clause does basically mean that you, during your speeches and debates in the floor of the Senate or in the House of Representatives, have an immunity, and that immunity, for hundreds of years, has been seen in the law not just as a protection of you, but as a protection of your constituents, those who vote for you, to make certain you are completely free to say what you want on the floor of this House. That is protecting them, and I think that you are protected in order to protect them.

Senator BROWN. Do you see exemptions other than relating to speech and debate that would exempt us from criminal prosecution or civil legal action if the underlying action is not related to speech and debate and not related to a specific exemption in law?

Judge BREYER. In the Constitution itself, I cannot—nothing immediately comes to mind. There may be a range that I am missing, that just is not coming into my mind, but that I——

Senator BROWN. I appreciate that sometimes we are hitting you cold with these things, and you need time to reflect.

Judge BREYER. Yes.

Senator BROWN. What basis you find in the Constitution for judicial immunity.

Judge BREYER. There is a judicial immunity. It is well established that there is a judicial immunity from suit. Whether that is a constitutional basis, many of these—what I do not know in answering your question, since that is such a well established thing, and how interesting you ask me a question, something I know, basically, that that is well established, and you are saying does it rest on the Constitution, or does it just rest on this long tradition that was a common law tradition and then picked up in the Federal system—that is a good question, and I do not know the answer to that. I do not know the answer to that.

Senator BROWN. Obviously, our practices are somewhat mixed, because they rest not only on the Constitution and the common law, but specific statutes as well. In *Nixon* v. *Fitzgerald,* the Court considered Presidential immunity. The Court decided that the President has absolute immunity from civil damage liability arising from his official acts, in the absence of explicit congressional action indicating the contrary.

What do you consider the constitutional basis for Presidential immunity.

Judge BREYER. I do not know how article I and article II really interact with what this long tradition has been. There is a famous statement by Learned Hand—and now, having referred to it, I am sure I will get it wrong—but basically, he talks——

Senator BROWN. He is not here to contradict you.

Judge BREYER [continuing]. That is true—but he talks about this tradition of immunity and explains it very well how many officials do have immunity, and the reason—a policeman, for example, in certain areas, or prosecutors in certain areas, or judges—the reason is basically to permit a public official to act so that Government can function without thousands and thousands of lawsuits; then, what is the nature of the immunity, and under what circumstances, and is it qualified, and where is it absolute. Those are

the subjects of dozens of cases, dozens and dozens—indeed, we have had an awful lot in our circuit arising—a lot of them have arisen in Puerto Rico, actually.

Senator BROWN. Do you see an immunity for the President that extends beyond his official acts?

Judge BREYER. That, I do not know.

Senator BROWN. Do you see a basis in the Constitution for the President to order a Federal judge to dismiss a private suit filed against him if that suit is not related to his official acts?

Judge BREYER. Those are the kinds of questions that have never come before me. If they ever came, I would read the briefs, consider the arguments and think about them, and try to get the correct decision.

Senator BROWN. I can appreciate that as a proper approach and one we would hope you would take. My question is, Do you know of a provision of the Constitution that would grant the President the power to order the dismissal of a suit against the President if it did not relate to official acts?

Judge BREYER. There are the cases that I know and the cases that I do not know. The cases that I do know—as you began, I suddenly realized that while I am quite familiar with a lot of law involving immunity, I have never had to face the question, or never thought through, or it has never arisen, what the constitutional, common law, or statutory source is for the fundamental immunity. And then the area I do not know really at all, because it has never come up, is this question involving the President.

Senator BROWN. Thank you.

Let me refer you now to the field of property rights. You have talked with several members of the committee about property rights. One of the intriguing things in this area has been the phenomenon of the classification of some rights as being property rights and some rights being personal rights and, in our discussion of them, separating them into different categories. My own perspective has been that it is very difficult to separate the two; it is an artificial distinction. Someone's ability to own property is a personal right in that someone's person is affected by what happens to their property. Whether you would agree with me that that is an artificial distinction or not, I want to direct your thinking to the different ways we treat specifically enumerated rights and other rights that are unenumerated, or implied by the Constitution.

The fifth amendment is an enumerated right that prohibits private property from being taken for public use without just compensation; or article I, section 10, "No State shall pass any law impairing the obligation of contracts." Those are rights spelled out specifically in the Constitution. They tend to relate to property rights.

Then there is another set of rights that are implied by the Constitution, under the due process clause for example. We apply different tests to these rights. Specifically enumerated property rights in substance get a lower test or lower protection than some of the unenumerated rights which are not even mentioned in the Constitution.

In the *Dolan* case, the current Court had an interesting phrase; I will read it to you:

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances.

What are your thoughts on the sentiments that quote expresses?

Judge BREYER. I do not think I see these things in tiers. I think I see, or at least I start out by seeing—and I might learn more later—but I start out by seeing the individual words of the Constitution that start talking about rights as trying to identify certain basic values or clusters of values, and those values are obviously different, and they lend themselves to different kinds of potential regulation or State interference, depending on what they are.

But you, I thought, said which is there is a sense in which a person's own personality can be mixed with a material thing—think of your old sofa, or mine, or our house; we live in it for a while, and think of how it becomes part of us. And there is something in also being able to earn a living that is terribly important to everyone. And those kinds of things—what the Court said in *Roth*—it is the purpose of the ancient institution of property to protect people in those rights which they rely upon in their ordinary lives. You see, it is driving at something that is important under that term "property"—a different thing than under free speech and so forth, but still something that is important to people. How that interacts with the needs of the rest of society to function will be different, because it is a different kind of thing. That is why the Constitution does not enact some particular theory of the economy. That is why the Constitution recognizes, and Holmes, again, recognized, you know, the need, that it is perfectly necessary for the Government to say to a coal mine operator: Coal mine operator, you must leave columns of coal in the mine so it does not collapse. That is called regulation.

Balancing what is at the heart of the matter in the case of property and the need for society to function through regulation is different in that area than in some other area, but that is because different things are involved, and because, quite clearly, as we said yesterday, no particular theory of the economy is written into the Constitution.

The CHAIRMAN. Senator, would you yield on that point?

Senator BROWN. I would be glad to yield.

The CHAIRMAN. We do not balance in the same way whether or not a black man or woman can move into a neighborhood.

Judge BREYER. No; absolutely not.

The CHAIRMAN. Explain the distinction, please.

Judge BREYER. There is a basic promise of fairness written right into the Constitution in the 14th amendment.

The CHAIRMAN. So there is a tier—the Senator's point is correct, though—there is a tier.

Judge BREYER. Seen that way, there is a tier. Seen that way, there is a tier. Seeing—you start talking about taking away a toothbrush—I am saying there can be something basic, but there is a tier, of course.

The CHAIRMAN. And you do see that tier?

Judge BREYER. Yes; I do.

The CHAIRMAN. OK. Thank you.

I thank you for the interruption.

Senator BROWN. I wanted to go back to an aspect of this, but you have intrigued me with your response. As I understand it, you have talked with leaders of other countries who are in the process of drafting constitutions. You observed that not only was the Constitution important, but the customs and traits and accepted practices were perhaps equally as important.

Do you look to those in helping to determine what the Constitution means when you interpret it?

Judge BREYER. The way in which people live and how they live—yes. The basic values in the Constitution are supposed to apply in this society.

Senator BROWN. Perhaps there is no alternative. Perhaps that has to be part of it. I am wondering how is it that some specifically enumerated rights have received a lower level of protection than a number of unenumerated rights have received. How do you justify it in your own mind if you look at the Constitution?

Judge BREYER. Well, if you are thinking of—I think the answer I gave yesterday is an easier way for me to make the point. What I had said—when you say that, when I see directly what you are thinking about, it seems to me what you are thinking about is the protection accorded property as compared, say, to the protection accorded free speech. And I think what people learned over the course of time was that when the Supreme Court in the early part of this century began to say these are exactly the same thing, they ran into a wall. And the wall that they ran into was it will not work. And the reason that it will not work is that when you start down that track, you see that what you are reading into that word "property" is a specific kind of economic theory, the very kind of theory that Holmes said the Constitution did not enact. And therefore the Constitution being a practical document has of necessity given the Government greater authority to regulate in the area of property than it has given the Government to regulate in the area of free speech. That I think is the simplest way to look at it. That is how I look at it.

Senator BROWN. And that is a line of reasoning that you are not uncomfortable with.

Judge BREYER. No; I think that is well-established. I think it would be—I mean, I do not know that everyone accepts it—but it seems to me a rather traditional—that does not mean there is no protection for property, as you point out. There are specific parts of the Constitution that deal with it.

Senator BROWN. You have talked with several Senators about religious rights. I am intrigued that the effect of our rulings has been not simply to protect people's right of religious freedom, but seems in some cases to have gone to the point of protecting people from religion—that is, restricting an ability to give a prayer at commencement and so on. In effect, we have almost elevated the cause of an agnostic or an atheist to a status above someone who has a religious belief.

How do you view the rights of agnostics or atheists to impact a public ceremony where a prayer is at issue?

Judge BREYER. These cases have to rise under the establishment clause. I will stay away from any specific case. I think it is fairly well established as case law that the establishment clause means

at bottom that the Government of the United States is not to favor one religion over another, nor religion over nonreligion, so that people's area of personal belief is their area. They can practice it themselves, and they should, and it is terribly important, and they certainly can pass it on to their children, and that is terribly important.

But persons who are agnostic, persons who are Jewish, persons who are Catholic, persons who are Presbyterians, all religions, all religions and nonreligion, too, is on an equal footing as far as the Government is concerned. That is the basic principle.

How you apply that, how you apply that is often complicated, because everyone believes, everyone believes, I, and I think I am not alone, that religion itself, a church receives some assistance from the State. No one is going to allow the church to burn down, without sending the fire department. And there is a whole range of assistance that churches can receive, and properly so.

Then when does that cross the line to become too much, to become a kind of government establishment? That is what the cases in the Supreme Court try to address.

Senator BROWN. When the Court rules that you cannot offer a prayer at graduation, doesn't the Court find itself in a position where it is choosing between religious beliefs and an atheistic belief?

Doesn't the Court find itself favoring one over the other, once it makes decisions in that area?

Judge BREYER. Well, certainly people have written and talked about the very kind of problem that you raise. As I see that kind of problem, it is not a problem of aiding a religious institution. Really, it is a problem of a secular institution and the extent to which you can inject religion into that secular institution, at one point, is it de minimis or really why not, and so forth.

I think as the Court has approached that, it has approached it with a recognition that the great religious wars of 300 years ago were fought over not just the religious principle for an individual, but also the right of an individual and his family to pass on his own principles to the next generation, that is over teaching. And so it is not surprising to me that the rules become stricter and stricter, the more the education of children is involved. And that is how I see what has happened in the Court, and I understand that there are difficult line-drawing problems.

Senator BROWN. Let me follow up just briefly on that. One of the fun things that I do during the regular school year is teach a class at Georgetown, to graduate students. It is a fascinating time. They are very, very bright young people. I learn a lot from them.

But one thing I find is their sense of history, their sense of background, frankly, is not up to their abilities in other areas. I suspect that because some want to avoid any potential problems with an establishment of religion question, that society's response has been to simply ban or restrict or prohibit or not teach anything relating to religion. In other words, out of fear of someone accusing them of fostering, or pushing, or assisting a particular religion, we have almost banned the discussion of religion, religious backgrounds, and religious history from our curriculums in school.

Is this what you think is necessary to prevent the establishment of religion?

Judge BREYER. Teaching history of religion, teaching history, history which involves religion, I do not know of any opinion that says you cannot teach history. The question suggests to me what I very much believe, which is the importance of clarity, the importance of the Court making clear and separating what can be done from what cannot be done, and understanding that a Court opinion is going to be read by lawyers, other judges, school administrators, and those who have to live under it.

And what your question to me suggests is a concern that people take an opinion that says don't do *X*, and then they incorrectly interpret it to say we can't do *Y*. I think that that shows need for the kind of clarity that will allow people to do what they are permitted to do.

Senator BROWN. I think you have hit the nail on the head. You have described exactly what has happened. There are many who are concerned that the way the Court has interpreted the establishment clause in this country has led to a government establishment of secularism. That is not my interpretation of what the Constitution means.

The CHAIRMAN. Senator, you have hit the time over the head—we are over a few minutes.

Senator BROWN. Thank you, Mr. Chairman. I will wind up with that. If the judge has any comments on that particular observation, I would appreciate it.

Judge BREYER. Thank you.

The CHAIRMAN. Judge, what we will do, we have gone now for a little over an hour and a half, we will break until 12. Before we do, let me explain what we will do after that. The schedule, after consulting with my colleagues, is that we will then come back and go from 12 until 1, with Senators Simon and Cohen, and then from 1 until 2 we will break for lunch, and we will come back. If Senator Pressler is able to be here, we will start with him. If not, we will then go to Senators Kohl, Feinstein and Moseley-Braun, last, but not least, and then make a judgment of how we will proceed from there.

So we will now recess for 6 or 7 minutes until noon, and we will come back with Senator Simon.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge.

Judge BREYER. Thank you.

The CHAIRMAN. I now yield to Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

I might mention I speak with some prejudice, because back in 1972 I lost a race for Governor in Illinois, and in the spring semester of 1973, I was a guest lecturer at Harvard and met a young law professor and his wife and, as I recall, two of the three members of his family sitting here. I was very impressed then and have been impressed through the years.