

Senator THURMOND. Very briefly, yes.

The CHAIRMAN. Then, by that time, if you aren't back, we will just recess for a moment or move to someone else.

Senator METZENBAUM. Mr. Chairman, are we still following the half-hour rule?

The CHAIRMAN. We are still following the half-hour rule.

Senator METZENBAUM. And if any of us wish to go beyond that, there would be a third round?

The CHAIRMAN. Yes; we will not cut off anyone as long as there is any reasonable—and I am sure it would be in your case, Senator—reason to continue the questioning. So I have no intention of cutting anyone off.

Senator SIMON. You shouldn't laugh when you say that. I am sure that we will be reasonable here.

The CHAIRMAN. That is true. I shouldn't. It would be reasonable, and I know that there is much to worry about when, in an op ed piece in the Wall Street Journal, the most glowing report about any Senator I have read in years is one about Senator Metzenbaum. The Wall Street Journal actually put his picture in the paper, an etching, and it was all favorable. So I know the world is changing. I don't know what is going to come next.

At any rate, with that, we will go into closed session.

[The committee retired to closed session, to reconvene in open session at 1 p.m. this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

While we are waiting for the nominee, and he has just been told to come in, I want to share with the press and others covering this what our schedule is.

In a moment, we will officially come out of our closed session, which is now a routine part of the process. I expect we will finish with Judge Breyer today—welcome, Judge—I do not anticipate having any public witnesses today. It will be my intention to start tomorrow, in the morning, and finish, I anticipate, based on the number of witnesses, and close the hearing sometime, hopefully at a reasonable hour, tomorrow.

Second, in the next order of questioning, Senator Kennedy was to question, but Senator Kennedy is involved in a matter on the floor, although he is on his way. What I will do to keep this moving along and accommodate everyone's schedules is in a moment yield to the distinguished Senator from South Carolina who has some additional second-round questions.

The Senator from South Carolina, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Breyer, we are back with you again.

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

Judge BREYER. Yes, Senator.

Senator THURMOND. Judge, in the recent *Weiss v. United States* decision, the Supreme Court stated:

In determining what process is due, courts must give particular deference to the determination of Congress made under its authority to regulate the land and naval forces.

What is your view of the appropriate role of the judiciary in reviewing the terms and conditions of military service?

Judge BREYER. In the law, the military has always had a somewhat special role, because courts have recognized the importance of its running its own affairs, and they have recognized the importance that running their own affairs has to the well-being and the defense of the Nation. That is well-established in law; it is widely recognized, and I accept that widely recognized view.

Senator THURMOND. Judge Breyer, as a general matter, if two companies believe it is in the best interest of their business to combine their organizations through a merger, do you think that they should be allowed to do so unless the Government has good reason to prevent them from merging?

Judge BREYER. Senator, the good reason is typically—or not always, but quite often—a question of whether the antitrust law is violated, because the antitrust law prevents some mergers, though it permits others. So I believe any such merger should be scrutinized carefully under the antitrust laws and applicable laws, and if it passes that test, it would be permitted.

Senator THURMOND. Judge Breyer, as you may know, the Supreme Court held in 1922 that professional baseball was not in interstate commerce, and therefore was not covered by the Federal antitrust laws. When the applicability of the antitrust laws to professional baseball was again considered in 1953 and 1972, the Supreme Court held that baseball is in interstate commerce, but refused to apply the antitrust laws, stating that the decision to eliminate the antitrust immunity should be left to the Congress.

Do you believe that it was necessary or appropriate for the Supreme Court to defer to the Congress rather than take judicial action in circumstances of this type?

Judge BREYER. Senator, if I can depart directly, from a nonlegal point of view, I have always thought that baseball was special, ever since my grandfather used to take me to Seals stadium, where we would pay 50 cents for the bleachers or \$2.50 for a box seat. It seems to me that the Supreme Court—

Senator THURMOND. Now you pay about \$20.

Judge BREYER [continuing]. Well, they pay more, yes, that is true—from a legal point of view, from a legal point of view, I know there are those cases that have said in an antitrust context that baseball is special. I know that is now being considered by Congress, and I think that the courts will follow whatever Congress decides in that matter.

Senator THURMOND. Judge Breyer, could you please discuss your views on the proper scope of the extraterritorial application of our antitrust laws—very briefly.

Judge BREYER. Well, I am glad you said “briefly,” Senator, because briefly, I know it is an enormously complex matter. There used to be a case called *Timberlane*. There were conferences that were set up with the Justice Department. They would negotiate a variety of things. I can promise that in any case that raised that issue before a court that I was on, I would examine it carefully, I

would keep an open mind, and I would look into the complexity and understand it as best I could.

Senator THURMOND. I might say we are working with the Justice Department now on some legislation.

Judge Breyer, do you believe that U.S. antitrust laws should apply equally to U.S. and foreign business, or should they seek to favor U.S. companies compared to foreign business?

Judge BREYER. The normal rule is when firms behave similarly, they are treated similarly; and where firms have an adverse impact on this country, they are treated similarly in terms of what they intend to do and what the effect is. I would start from that assumption that the law applies to both alike, but there might be special circumstances.

Senator THURMOND. Judge Breyer, I am aware that in the past, you have lectured on the use of legislative history and touched on it during the hearing. Could you please summarize your current views on the proper use of legislative history in statutory construction?

Judge BREYER. In summary form, I have thought that there are many instances, indeed most, where an open question in a statute is best understood through the use of legislative history. By using that history carefully and not abusing it, I think a court can better understand what the human purposes are that led Congress to enact a particular statute, and once one understands those purposes, technical matters often fall into place; you understand them better, too.

There are instances where courts have used legislative history to reject absurd interpretations of statutes, to find out whether there are technical meanings, to discover whether there was some kind of drafting error, to decide whether there are special meanings of a statute that the parties and Senators wanted to use, to understand better what the purposes were. All those are instances where I think it is very appropriate. I recognize sometimes it can be abused, and it should not be.

Senator THURMOND. Judge, those are all the questions I have. I think you are an able man and a fair man, and I hope you enjoy your career on the Supreme Court.

Judge BREYER. Thank you very much, Senator.

The CHAIRMAN. Senator Kennedy is next to question. He is on the telephone, I am told, right now; if staff would check to see if he is ready to go. [Pause.]

Thank you.

We are just not accustomed to someone not using his whole time.

Senator KENNEDY. Thank you very much, Mr. Chairman, and I appreciate your accommodating some of those on this committee who are also on the Labor and Human Resources Committee, who have been meeting with the leader on some of the health issues.

But I welcome the opportunity just to ask Judge Breyer a few questions on your work of areas of interest to many Americans, including the rights of persons with disabilities, and housing discrimination. These have been areas that this committee has been particularly interested in; the Americans with Disabilities Act is something that the Committee on Labor and Human Resources is very much interested in; and also the questions of crime.