those decisions reflect both the letter and the spirit of law that is meant to help them.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Grassley.

Senator GRASSLEY. Thank you.

We went through legislative history, and I want to go back to legislative history, but not in the general way I did the first time. I will be a little more specific this time. I am somewhat concerned about some of the answers you gave me about statutory construction yesterday—or, I guess it was 2 days ago, now. In light of that, I want to ask you about your 1992 decision in *Paleo.*

Paleo, for the benefit of those who do not know, had been convicted of four violent crimes, and under Federal law, a person with three or more violent crime convictions who possesses a firearm—and that is a very important ingredient—faces a 15-year mandatory minimum sentence. Paleo, as you recall, argued that the mandatory minimum sentencing provisions did not apply to him because he claimed that three of his convictions were constitutionally invalid. You ruled that the statute required that the criminal be allowed to challenge his prior convictions in Federal court.

Last May 23, this year, the Supreme Court ruled in *Custis* that the same statute did not permit the defendant to challenge his conviction prior to sentencing. So I want to kind of compare your opinion with the Supreme Court's.

For instance, the Supreme Court interpreted the key terms in the statute—three words—"three previous convictions"—according to the statute's very plain language. In other words, as I would read it, someone who has three previous convictions has in fact three previous convictions.

Now, in contrast, I think your opinion did not follow the plain language, and you did not identify any compelling legislative history to justify your departing from the plain language. I think that you interpreted the statute according to what interest you believed the Government had in the operation of the statute, and you wrote that:

> The Federal Government has no recognizable interest in imprisoning a defendant on the basis of convictions that are constitutionally invalid.

I suppose that your approach would be an example—and even beyond you, I suppose—of a judge who would use a style of statutory construction that would give me some concern. I am concerned that such a judge might in fact be what I do not like, a kind of activist-type judge who wants to put his own ideological imprint on something, because often, activists narrowly define the Government's interest at stake to rule against the Government.

It seems to me that the Government's interest is having its statutes enforced according to their plain terms and in getting dangerous criminals locked up for long, long periods of time.

I want to know why you interpreted the statute according to what I see as being maybe your own views, instead of the Government's interest, since you did not quote any legislative history. You applied your view of the Government's interest, instead of what I see as very, very plain language of the statute.

Judge BREYER. A difficult case. I think that if in fact I could have read the statute, "three prior convictions," to mean what you say—three prior convictions—the case would have been much easier.

The problem in the case arose from the fact that you could not read it that way because the Supreme Court had said at least some of those things that say convictions are not convictions.

They had said, for example, that one of those previous convictions was a conviction that was obtained without the person having a lawyer; then, it is not a conviction, even though it says "conviction."

So the dilemma—and this is why it was so very difficult—is it assumed by everybody, everybody agrees, that you cannot just read "conviction" to mean conviction. Certain ones do not count. Those without a lawyer, for example, do not count. And now the question is are there some other ones that do not count. And the simplest thing seemed to me to be to say those that are unconstitutional do not count, because if you do not do it that way, you would have to say there are some unconstitutional convictions which are convictions, and there are other unconstitutional convictions—those without a lawyer—which are not convictions. And I did not understand how to draw that distinction.

On the other side of it was if you take the approach I just said, won't it become very, very difficult for judges to work at sentencing hearings? Won't people challenge it all the time? And what you have in so many of these cases which was present there is you have some very strong policy reasons, which policy reasons are a key to try to understand how Congress would have wanted a statute interpreted where the language cannot be read literally, and where there is no legislative history. And where there is not, I am trying to put myself in the shoes of a person in Congress who has an objective, who is faced with the same kind of interpretive difficulties that I would be faced with.

The Supreme Court went along with the opposite approach, I guess, which is that it is better to say there are different kinds of unconstitutional convictions, and some of them count, and some of them do not count. That is a reasonable view, too, and I did decide it the other way, and they are authoritative.

But I do not think one view or the other is more or less a departure from the statute. I think in both instances, what you are trying to do is interpret a statute in conditions where it cannot be read just literally because of the circumstance I mentioned.

Senator GRASSLEY. Well, could I ask you if, given what you know about the Supreme Court's opinion in that *Custis* case, would you have decided the *Paleo* case differently, either in terms of results or reasoning?

Judge BREYER. It would have had to come out the other way, in my opinion. I know there are some distinctions. We actually—the decision in *Paleo* was a very close, very difficult decision that we debated quite a lot, and I do not like to give a legal opinion, and so you are getting an off-the-cuff response to the Supreme Court, putting myself back, and most of the lawyers, I think, and the judges in our circuit would say that the recent Supreme Court opinion suggests it should have come out the other way. I do not make that statement definitely, but——

Senator GRASSLEY. Let me contrast your opinion with the Supreme Court's decision—and then ask you to react to that.

The Supreme Court did not find that the statute contemplates that defendants could challenge their prior sentences. They pointed out that another provision of the same statute says that a Federal court cannot count a conviction "which has been set aside." To me, this surely means that the defendant's convictions that have not been set aside will be counted as the three strikes for an enhanced sentence. And the Court analyzed other statutes that provided specific procedures for challenging the validity of prior convictions used to enhance sentences. So Congress has drafted clearly in this area, both when we want to allow challenged convictions and when we do not.

The Court also cited a 1980 Supreme Court case, interpreting a prior version of the same statute to disallow challenges to convictions. So then, that would lead me to ask why you did not consider the other portions of the statute—or other statutes where Congress expressly permitted defendants to challenge their convictions, or even this 1980 Supreme Court case.

Judge BREYER. I think that is all there, Senator, and I think that what I am trying to do and I think most of us in the judiciary would try to do is to try to work out what the intention of the Congress is. The question that was a stumbling block for me and is in the Supreme Court opinion that you read is, well, prior precedent of the Supreme Court—which, by the way, they are free to modify or interpret. We are not free to modify or interpret. Prior precedent of the Supreme Court said that the defendant could challenge some prior convictions; for example, convictions that were obtained without a lawyer.

That being so, what is the rule as to when a prior conviction could be challenged and when it could not? Are there different categories of constitutional violation? Are some more important than others? I cannot answer that question as a lower court judge.

Looking at precedent when I looked at it, I found that there, and whether I was right or wrong, I thought that was a major stumbling block to the interpretation that the later court came up with. That was my thinking at the time, and that is what I tried to express in that opinion.

Senator GRASSLEY. *Paleo* is about ineffective assistance from a lawyer as opposed to the denial of a lawyer.

Judge BREYER. Yes, exactly. Exactly.

Senator GRASSLEY. And that is what *Custis* is about.

Judge BREYER. Exactly; and the Court, the Supreme Court has the power to say, look, there are differences in a conviction being unconstitutional because the person did not have a lawyer and a conviction being unconstitutional because he did have a lawyer and the lawyer acted ineffectively. The Supreme Court has the power to say those are two different things.

As I interpreted it at the time, I did not see how to say that they were two different things, that they were different kinds of constitutional violation. I recognize the argument. You had to do it one way or the other. You had to say there are different kinds, or you had to create the procedural problem. And I thought more closely—

to the intent of Congress was the way I decided it, and the Supreme Court said later, no, it was the other way.

Senator GRASSLEY. I guess I will move on. I would just like to leave a message with you. That would be in regard to the fact that we are now working on a crime bill where we hope to make very clear, three strikes and you are out, three prior convictions and you are out. And maybe what you are saying is we have not done it plain enough in the past. I think we have. I think the Supreme Court has differentiated enough, and I guess maybe I would just, based upon the *Paleo* case, ask you to take a view at whether or not we were clear enough in this instance.

There was a recent column by William Raspberry in the Washington Post. After surveying various studies, Mr. Raspberry has come to a conclusion that the most effective antipoverty activities are provided by religious institutions. He finds that church-based drug rehabilitation and antiviolence programs are more effective than others.

However, he is concerned that the establishment clause, that the Supreme Court has found blocks almost all public funding for parochial schools, might also be interpreted to bar aid to these very successful church-based antipoverty programs.

I hope I do not have to say that I respect separation of church and state, but I also believe that what the establishment clause demands is neutrality toward religion. And I think a little bit along the lines of Senator Brown. I think that when the Government goes too far in avoiding religious issues, sometimes you can have government promoting secularism. I do not try to convince you that that can be a form of religion, but it seems to me the absence of religion is something we have to be concerned about in a society that has a moral basis for our existence.

I think that you may also agree with what I just said about neutrality toward religion based on a 1989 decision of yours involving busing of parochial school students. The Government need not be hostile to religion to comply with the first amendment. It need not aid all antipoverty organizations except church-based ones.

Can't Congress, consistent with the establishment clause, pursue the secular objective of trying to eliminate drug use and violent behavior and poverty by neutrally aiding a whole range of entities that have programs in these areas, including religious organizations?

Judge BREYER. There are areas, vast areas, as I really said yesterday and the day before and would say the same tomorrow and every other day, that there are vast areas where it is obvious that churches receive assistance from the Government. The area of social services, the area of fire departments is the obvious example I use, but there are many others. And there are tax exemptions—tax exemptions aimed at religious institutions. And there are various busing, as in the opinion that you read. And the difficult question, when you say neutrality, of course, immediately that is fine. In the context of any individual program, what happens when there is a challenge in court is someone says, yes, we understand that; yes, you are absolutely right. But this particular one goes too far.

Then what you have in a court case is the issue about whether this is or is not going too far. And what I can say is I consider those open-mindedly. You understand from my opinions in this area that I have a practical bent of mind to see if it really is going too far, not some theory, and that I will try to decide those cases in that light.

Senator GRASSLEY. In deciding establishment clause cases, do you see yourself being more inclined to fine tuning as opposed to making sweeping changes?

Judge BREYER. It sounds to me most of these cases that have come along have been involved in line-drawing, and is it really going too far up here, or is it not quite far enough? Is this too far or isn't it? That is my impression of most of what comes up in recent years in this area.

I cannot promise there will not be major cases that come up. Obviously, there may be.

Senator GRASSLEY. I have a question about our jury system. A number of recent criminal trials have garnered huge amounts of publicity, as you know. They also share something else in common. It seems like whether it is the Menendez brothers or whether it is John and Lorena Bobbitt or the police attackers of Rodney King or the attackers of the truck driver, Reginald Denny, the defendant was either acquitted outright or acquitted of all really serious charges.

Now, remarkably, this occurred in this last instance, in the case of Denny, despite the fact that that was captured on TV videotape.

Do you now believe that the jury system functions as well as in criminal trials as it has in the past? And do you have any suggestions about how to improve the function of criminal juries?

Judge BREYER. It is interesting. Of course, I am not a trial judge, but I talk to trial judges. And what is interesting to me when I talk to trial judges is the enormous faith that they have in the jury system. And again and again they will say, particularly in criminal trials—it is very interesting because at lunch we discuss this every so often. And in the district court in Massachusetts, the judges that I usually have lunch with, you know, quite often, they say it works. It works, again and again. And I do not promise you—and no one would—that it always works, that it works perfectly. But you do discover a tremendous sincere belief on the part of judges over and over in the value of the that system, that it does basically work pretty well. The jurors are admirable in contributing that time and effort.

So I know that people, thoughtful people like you and me, I hope, and many, many others, are concerned with the way in which the right to fair trials interacts with the free press right. But the basic idea of the jury and the way it is working, my sense is among people who deal with it, they think it works.

Senator GRASSLEY. Even though it is working somewhat differently in recent years than maybe it has historically, I do not think there is anything basically wrong with it. It was meant to have the opinion of the community involved in the determining of justice.

But I think there is something disturbing about the last 30 years. It seems like society has been less willing to hold people re-

sponsible for their actions in general. This is particularly true concerning crimes. What were once poor excuses are now frequently accepted as justification for finding the perpetrator to be a victim. Additionally, it seems like respect for all of our societal institutions, whether it be Mom and Dad in the home or our schools and the teachers in those schools or our churches and synagogues and the pastors and the priests and the rabbis connected with them, as well as even law enforcement, the respect that they used to have, it seems to me, has eroded greatly in the years. And the criminal justice process, the laws and the judges' instructions are not immune from these trends. I think maybe we are seeing some of this reflected there, especially since the jury was designed to reflect community sentiment. It might be reflected there like it is in other places.

What suggestion would you have for those of us in the legislative branch who believe that we have got to stop blaming society when an individual commits a crime, and make people realize that they have to be responsible for their actions? And how do you suggest we restore respect for institutions, including our criminal justice system that sometimes loses respect when it looks obvious to the public at large somebody is guilty and they get off?

Judge BREYER. Of course, I agree that the trust problem is amazing. It is an amazingly big problem for institutions.

In the particular area that you are talking about, what I have said publicly—I hope it is not overly optimistic; many would think it is—is that not all the solutions are legislative; that if, in fact, you get members of the bar who are interested in criminal defense work as well as those interested in prosecutions, and members of the press, and they get a sense of what each other's problems and responsibilities and so forth are, very often some of the things that you are concerned about that interfere with fair trials or whatever can be ironed out outside of the legal system, outside of laws and legislation, from people simply understanding the institutional problems of the other.

That is the kind of thing I have talked about. I think it is still possible.

Senator GRASSLEY. When you say you have talked about it, do you mean publicly or privately?

Judge BREYER. Publicly.

Senator GRASSLEY. Yes, and do you do it with the intent of trying to wake people up to the problem?

Judge BREYER. Yes.

Senator GRASSLEY. And when you see these problems, do you see yourself as a leader who ought to help direct public opinion to maybe look inwardly and trying to solve them and not always solve them through a government action?

Judge BREYER. I hope so. We so see ourselves in our own institutions. I so much see myself as a judge, and we become so narrow, in a sense, not understanding not just the other person's point of view but the institution in which they are working. I think that is true of press and judges and everyone else. And conversation in an effort to see the different perspective, that is what I have said publicly.

I have tried to encourage that, and I would try to encourage it still.

Senator GRASSLEY. You served in a number of different positions with the ABA, and you have done some of this since becoming a Federal judge. You have served on a governing body of the Administrative Law Section. I believe you have been a vice chair of the section's Judicial Review Committee.

As I am sure you are aware, there is much controversy these days about the role of the ABA. The ABA has deeply involved itself in a number of controversial social and political issues. Through its governing bodies, the ABA has taken positions relating to legislative matters such as abortion, civil rights, affirmative action, parental leave, the death penalty, gun control.

Just this past week, the president of the ABA stated his support for the Racial Justice Act, which, of course, right now has our crime conference bogged down.

The ABA has filed amicus briefs with Federal appellate courts, including the Supreme Court, addressing employment discrimination, good-faith exception to the exclusionary rule, capital punishment for minors, and the constitutionality of the independent counsel and legislative veto, and I suppose there are a lot of other things.

In light of the ABA's activity in policy areas, questions have come up concerning the propriety of judicial participation in the organization. In fact, in 1991, an ABA commission of judges, including four of your fellow Federal appellate colleagues, recommended limitations on judicial activity within the ABA.

Specifically, the commission suggested that judges be permitted to join various ABA committees and sections only if all policy statements and all briefs disclaimed that they reflect the views of its judicial members or that judges participated in the adoption of the views.

The commission also recommended that judges not participate in formulating or adopting ABA policies concerning matters on which the judge in his own name could not comment upon.

Finally, the commission recommended that no judge occupy any ABA position that would lead the public to associate that judge with ABA policy even if the judge played no role relating to the specific policy.

These recommendations were developed in light of the Code of Judicial Conduct. The code prohibits judges from taking stands on controversial legal issues, from making statements that might impair court proceedings, and from engaging in activities that might require recusal because they call into question the judge's impartiality.

In light of this report of the ABA's own commission, are you concerned about judicial participation in the ABA? And what role do you intend to play in that organization if you are confirmed to the Court?

Judge BREYER. The approach of that report—I am not saying that I agree with everything in that report, but the approach of that report is an approach that I would call disclosure, and what I would think would be clear to the public anyway. The Administrative Law Section of the American Bar Association has taken the

positions that are controversial that you describe, and I think it should be apparent through ABA policy that they are not speaking for judges when they talk about something controversial that judges have no business talking about.

And in the Administrative Law Section, should something have come up that I thought was something I should not express my view upon as a judge, I would just say so, if it was not apparent to everybody from the situation that that was the case.

I would not like to see membership in that association by judges discouraged. I do think it is so terribly important for judges to be associated with members of the bar and to be able to have forums where they can discuss problems of judging, the institution of judging, problems of the bar, problems of the litigants that lead to the bar, having clients. All these matters are terribly important, in my opinion, to discuss outside the pure ivory tower of the judiciary.

And I see the American Bar Association as offering forums where those kinds of discussions are encouraged and appropriate, and I favor that.

Senator GRASSLEY. Could you think of maybe one example of where you have not associated yourself with or spoken a point of view in the association since you have been a judge?

Judge BREYER. There are things that come up. I think that——

Senator GRASSLEY. You think there has been some time, when you have not associated with the ABA's point of view?

Judge BREYER. Yes, on the ABA, there would be in the council in the Administrative Law Section, things would come up and I would just say this, of course, doesn't include me. I can't pinpoint it, but I do have a distinct recollection there have been such instances.

Senator GRASSLEY. Since crime has become a very serious concern of so many communities around the country, and particularly the increasingly violent and even the random nature of it, and the fact that even a lot of young people are committing more crime and even more serious crime, citizens of some of these communities have tried to keep young people from joining gangs and/or committing crimes, and one method they have used has been to impose curfews on youth.

The Washington Post had a front-page story this week that reminded me of this, and they said almost 1,000 jurisdictions across the country have done this. The curfew reflects a belief that, after a certain hour, it is important that kids be at home, not hanging around the streets without supervision and, in the process, being exposed to very dangerous situations.

Some communities interested in enacting such curfews have been discouraged from doing so, because of concerns regarding the first amendment. Indeed, some judges who usually live in the communities, totally isolated from the crime-ridden world, as they do, have found some curfews unconstitutional. That is not meant to be derogatory, but I presume most judges don't live in crime-ridden areas.

It seems to me that the case law is quite clear that children do not have the same constitutional rights as adults, and it also seems to me that the interest of keeping children from being in situations where they can be recruited to commit crimes, where they actually

commit crimes, and where they are victimized by crime is a very compelling argument for curfew. If local communities want to do it, we should let them do it.

I know you cannot express your views on specific language of any specific curfew, because you might be dealing with that. But what are your general views about whether the first amendment prevents communities from imposing curfews on juveniles?

Judge BREYER. I know your general statement that a child is different and in need of greater protection is correct, it is an important interest. There are circumstances in which curfews, I am sure, are normal in various circumstances in which they have been upheld.

The constitutional argument which you say is being made means that I have to be cautious, because I would absolutely want to approach that with an open mind, and so it is hard for me to go further into that. The interests that you identify, I am absolutely certain are there. In other words, I can't easily discuss this, as you say, which is totally true, that it is likely to be the subject of a case.

Senator GRASSLEY. Mr. Chairman, I do not have another question, but I would like to take 2 minutes to do a Metzenbaum and just ask him to consider something.

The CHAIRMAN. I think everyone is entitled to be a Metzenbaum at least one time in their life. I am a Metzenbaum today. That is why I am wearing this tie. [Laughter.]

While you are preparing your question, I should point out that a number of press have asked me about this tie. This tie is a consequence of some of my colleagues in the Senate, particularly the Senator from the State of Washington, Patty Murray, walking up to me and looking at me and saying, "Joe, I must tell you, you are very dull," and then saying, why couldn't I be more like Howard Metzenbaum.

Now, I have been here a long time and this is the first time anyone has said that to me, and so I went out and got a Metzenbaum tie. So you can ask a Metzenbaum question.

Senator GRASSLEY. Well, I am not sure your tie is protected by the first amendment. [Laughter.]

The CHAIRMAN. They are cartoon characters, for the record.

Senator GRASSLEY. Yesterday, we discussed the Supreme Court's decision on illegitimacy, and I appreciate what you said, that you would keep an open mind, if someone asked the Court to overrule those decisions, in light of the changes in our factual underpinnings that have occurred over the last three decades.

Throughout its history, the Supreme Court has overruled constitutional decisions. Since the 1960's, the Court has overruled, I think, more than 160 constitutional decisions. This has occurred, in the words of Justice Brandeis, who, of course, was 40 years before that, because, "Not only the decisions of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Moreover," he continues, "the judgment of the Court in the earlier decisions may have been influenced by prevailing views as to the economic or social policy, which have since been abandoned."

Now, it is one thing for the Supreme Court to overturn decisions which were always contrary to the original meaning of the Constitution and which were based on faulty social theory, as I think these illegitimacy cases were. In hindsight, the Court's theory of social engineering that its decisions would not increase illegitimacy have turned out to be wrong statistically, as well as practically. We see it every day.

It is quite another thing to say that the meaning of the Constitution changes as society changes. That view suggests that Justices conduct an ongoing constitutional convention in which the law is made up as the judges go along. Overruling decisions that were never true to the Constitution in the first place is, as you understand, a judicial obligation. But the Constitution is not up for grabs with every case. Changed circumstances permit judges to justify and to change the application of the constitutional provisions. Changed circumstances do not change the core meaning of the provision. The latter belief makes it too easy for judges to enshrine their own personal prejudices into constitutional law.

So that is what I submit happens and did happen in some of these illegitimacy cases, and we have had terribly disastrous results for our country, and there is bipartisan unanimity on it. And if the President speaks in the State of the Union Message saying that we have got to do something about the illegitimacy problem, you know it is bad.

So I hope that if you are confirmed to the Supreme Court, that you would keep this distinction in mind between what is the basic Constitution as what is the application of those principles to the things of the day.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

Now we are going to move to Senator Heflin. Again, let me make it clear that it is 5 o'clock, but we are finishing tonight. So I would ask staff to let their principals know that if they have questions, please be ready to ask. I see two other of my colleagues are here prepared to go, but I want all the staff to know that we will finish with the witness tonight.

Senator Heflin.

Senator HEFLIN. Judge, in an article entitled "The Regulation of Genetic Engineering," you argue that the Government should refrain from the regulation of genetic engineering. In your article, you reference the existence of strong natural forces that tend to contain and reverse undesirable practices in connection with genetic engineering.

Would you say that these strong and natural forces govern the field of bioethics generally?

Judge BREYER. That, Senator, was a brief article years and years ago. I think it was written at a time—I don't know much about genetic engineering now, and I can say I knew less then—it was as time when people didn't know a lot about it. And I think the thrust of that was get to the scientists and find out what is really happening before you enact specific legislation. I think that was the thrust of the article.

I think since that time there have been programs in the legislatures, in statutes. I think that the executive branch has acted in