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I referred to Judge Breyer's "Socratic notion of virtue," which includes that judges should judge well. The first prerequisite of judging well is to judge clearly. Reading Breyer opinions is a genuine pleasure—perhaps, as he has suggested, even "for a high school student," though I confess to doubts on that count. His opinions are so written that you understand every step of the way: what the parties argue, what evidence they rely upon, what the judge understands to be the state of the law, what the uncertainties are, how he intends to resolve them and why, how the judge views the facts, and, finally, the conclusions all of this leads him to. One can readily agree or disagree with Judge Breyer because he is clear about where he stands.

In the era of administrative government, we should consider ourselves fortunate that the nominee is one of the country's leading experts on administrative law who has a mature understanding of the Constitution and the requirements that follow from a commitment to the rule of law. Perhaps the most important question concerning trust that the country faces for the foreseeable future is who will control administrative government and how. In order to cope with that challenge, the Supreme Court needs much wise understanding of how the institutions of government work. It is my belief that Judge Breyer will bring that understanding to the Court, in addition to his commitment to the Constitution and the rule of law.

Thank you very much, Mr. Chairman and other members of the committee.

[The prepared statement of Mr. Casper follows:]

#### BIOGRAPHICAL SKETCH OF GERHARD CASPER

Born in 1937, Gerhard Casper grew up in Hamburg, the port city on the Elbe River. At sixteen he made his first trip to the United States, as one of 32 students from around the world who came to the United Nations for the *New York Herald Tribune* Forum for High Schools, a program intended to promote international understanding.

Mr. Casper studied law at the Universities of Freiburg and Hamburg, where in 1961 he earned his first law degree. He came to Yale Law School in 1961, obtaining his Master of Laws degree a year later. He then returned to Freiburg, where he received his Doctorate in 1964, writing his dissertation on the realist movement in American law.

In the fall of 1964, Mr. Casper emigrated to the United States spending two years as Assistant Professor of Political Science at the University of California at Berkeley. In 1966 he joined the faculty of the University of Chicago Law School, and between 1979 and 1987 served as Dean of the Law School. He has written and taught primarily in the fields of constitutional law, constitutional history, comparative law, and jurisprudence. From 1977 to 1991 he was an editor of *The Supreme Court Review*. He was named the William B. Graham Professor of Law in 1980, and a Distinguished Service Professor in 1987. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.

In 1989 Mr. Casper became Provost of the University of Chicago, a post he held until he accepted the presidency of Stanford University in 1992. He also holds an appointment as Professor of Law at Stanford.

Mr. Casper is married to Regina Casper, M.D. Dr. Casper was a Professor of Psychiatry at the University of Chicago before taking an appointment as Professor of Psychiatry and Behavioral Science in the School of Medicine at Stanford. She is an authority in the area of depression and eating disorders.

The Caspers have one daughter, Hanna, who is a graduate of Yale University and the University of Virginia Law School.

#### PREPARED STATEMENT OF GERHARD CASPER

Mr. Chairman and Members of the Committee: It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. He and I started teaching law at about the same time in the sixties. In my still relatively new position as president of Stanford University, I can happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

One of the great American judges of this century, Henry Friendly, who served on the United States Court of Appeals for the 2nd Circuit, in a paper about Justice Cardozo, once referred to what is required in a judge. Among the requirements is, of course, that a judge needs to be a lawyer of "the highest grade." But he also needs to be somebody who seeks wisdom and is "blessed with saving common sense and practical experience as well as sound and comprehensive learning."

Judge Breyer is a lawyer "of the highest grade." He has sought opportunities to do the work of a lawyer in all three branches of the federal government. Indeed, I know few men or women who could match his varied legal experience in this respect. In the executive branch he served in the Antitrust Division of the Justice Department. He also was a prosecutor in the Watergate Special Prosecutor's Office. In Congress he was Chief Counsel to this important committee. In the judiciary he started out at the Supreme Court, to which I hope you will "return" him, and, since 1980, has been one of the most distinguished federal appellate judges. He has even worked what you might call "among" the branches through his service as a charter member of the United States Sentencing Commission—one of those hybrid interbranch agencies that seem to partake of all branches at one and the same time. As a student of the separation of powers, I wish I had had a similar in-depth exposure to the workings of American government.

In the last few months I have seen the press frequently refer to Judge Breyer as "pragmatic." This is not a bad attribute provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life he has been interested in the *right* results. In that sense I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends and what effects they will have. In his recent book, *Breaking the Vicious Circle*, he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

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Senator METZENBAUM [presiding]. Professor Sullivan.

#### STATEMENT OF KATHLEEN M. SULLIVAN

Ms. SULLIVAN. Thank you very much to the chairman for his generous introduction, to the chairman and the members of the committee for the privilege of allowing me to testify here. It is a great honor and a great pleasure and easy task to testify in enthusiastic support for Judge Breyer's nomination to the Supreme Court. I had the privilege and pleasure of serving as his colleague in nearly a decade that we were both on the Harvard Law School faculty, and I know his opinions and his academic writings well.

I would like to focus briefly here today on three features of Judge Breyer's excellent virtues for the Court. The first is his pragmatic philosophy. Second is the excellence of his legal craft. And the third is his judicious temperament.

Now, the committee has heard a great deal from Judge Breyer himself in the last few days about his pragmatism. He has said to you here, as he has said in his writings, that the law is a profoundly human institution. It is designed to allow the many different individuals who make up America from so many different backgrounds and circumstances to live together productively, harmoniously, and in freedom. It is a human institution serving basic human or societal needs.

And he has said that it must be a practical effort, and many might think, well, this is all very good to be practical. It sounds sound. But is it a judicial philosophy? And my key point before the committee today is that I would like to emphasize that pragmatism is a coherent judicial philosophy. And, indeed, it is the philosophy of the 20th century Court.

Judge Breyer, in his pragmatism, is the spiritual heir of the great Justices of the Court in this century. Most especially, we can start with Justice Oliver Wendell Holmes from Senator Kennedy's home State, the Commonwealth of Massachusetts. This came up in the colloquy with Senator Cohen and others on the committee the other day. Judge Breyer is the spiritual heir of Justice Oliver Wendell Holmes in the following sense: He sees, as Holmes did, that law is not an intellectual exercise in abstract theory. Rather, the law, including constitutional law, is a practical enterprise rooted in the complexity of actual social life.

As Justice Holmes put the point in perhaps his most famous aphorism, "The life of the law has not been logic: it has been experience." That is why pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any single grand unified theory, any simple, overarching approach.

Judge Breyer, as a pragmatist in the tradition of Holmes, instead takes a flexible, undogmatic view of the tools that are relevant to