Senator HATCH. I just want to know if Howard finally got it.
Senator METZENBAUM. What did you say?
The CHAIRMAN. He wanted to know if you finally got it, he said. Senator Simpson.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you very much, Mr. Chairman.

I am glad I was not involved in that line of inquiry there about the milk of human kindness. My friend Howard Metzenbaum and I do not always agree, but I mean sincerely I shall miss his presence. He and I have sharpened our rapiers on each other for 15 years, and it has been an experience that started I think with suspicion, and certainly ends with mutual respect. I enjoy him. As I say, we do not agree, indeed. But if he is speaking on antitrust, you want to listen.

Well, it is a pleasure to see you here. I listened intently this morning and thought I had known a great deal of your background. But when they got to the part about architecture, I want to find more about that.

It is time to talk of many things, of shoes and ships and ceiling wax. I want to find out more about that, and I shall.

It is good to see your family here, and I remember meeting them when I was a freshman on this committee. Michael, while you are out there hiking through the country, I will be astride a horse out in Wyoming. You will be walking, and I will be riding. I hope you will enjoy the Wind Rivers. It is a marvelous area, if that is where you are going. I hunch you are.

Seldom I think in these times, certainly in this century, certainly not at any time in my 15 years on this committee, have members had an opportunity to consider a nomination to the Supreme Court of a person who many of us personally know so well.

And I would note that while the consent role of the Congress has always been strictly observed, in this case of your nomination, I believe the advice provision of article II for the first time in my experience has been a significant factor, because many of us on this side of the aisle and on the other side, as well, have offered the advice that your nomination would be quite well received by the Judiciary Committee.

Nearly half of the members of this committee knew you when you served as the chief counsel of this committee. We all are personally familiar with your intellect, your ability, your professional bearing, and your sense of fairness. A term that I noted was used several times in your statement, fairness or fair. And you were very courteous and helpful to me, as a freshman Senator, never judging or measuring things with a political yardstick, interestingly enough, always grounded in fairness. That is a word I think that typifies what I know about you from my personal observation post.

And you have had a fine, remarkable education. I loved your statement about the things you learned about people which you didn't learn from books, or something to that effect, and I think that is certainly true in my life. Yet, the books took me to where

I could go into a profession that I loved, into law. And your work in academia and your work on the bench has been exemplary.

The Supreme Court is unique in both the size of its workload and in the closed and I think necessarily private environment in which it works, which is going to be a tough one for you, but you will handle that. You mentioned that, too, in your statement. I forget the term, but not to cloister yourself away. That was not the term, but I cannot see you anywhere near that, with your persona.

But to simply be able to cope with the volume of work requires a superior intellect, but, just as important, the absolute necessity to work collegially with your fellow Justices. As chief counsel of this committee you dealt with some of the most controversial issues that came before the Congress, and that was the ideal crucible to develop and display those qualities.

They say there is no proving ground like it, here in the Judiciary Committee—and I do always admire our chairman, Joe Biden. He is very fair, and he faces controversy with more patience than I do. When I get a belly full of something, it shows all over my face, and then I am in deep trouble. And our ranking member, Senator Hatch, is patient and always willing to listen. But I shan't forget when Senator Kennedy came before us in an imploring fashion, after we had dispatched the former President in 1980, and said: "How about Steve Breyer?" And we said: "no". And then Senator Thurmond, who was ranking member, interceded, the committee met and duly judged that you should pass into the ranks of the robed.

And you did, and you have had a remarkable record. And this committee is a tough audience, and there are tough inquiries. Senator Metzenbaum, others of us, Orrin, myself, Ted, and Pat Leahy, all of us do ask tough questions for which we get some tough commentary at times, and that goes with the territory.

But it is interesting that very few Senators really stand in line to serve on this committee, but when they do, they become quite riveted to what we do here and what we must do in our role, especially in this role.

I have always served, as a legislator, on the Judiciary Committee—chaired one when I was in the State legislature.

So we have seen you handle controversial issues with competence. We have watched you deal with members of both parties with fairness—that word again—and good humor, rare good humor, and patience, extreme patience. So, then, one might wonder why we are making this investment of time and energy, significant, indeed, on a nomination which seems to have general approval, why the staff has spent thousands of hours collectively poring over everything Stephen Breyer has spoken and written on the law.

I think there are several factors at play here. The first is that we want a thorough and unhurried examination of the nominee. That is always justified in the case of a lifetime appointment to a Court co-equal with and independent of the Presidency and the Congress. But there is an even more important factor, I think, which justifies the size of the investigative staffs we now see on this committee and the intensity of our scrutiny of Supreme Court nominations. We learned in the 1950's and 1960's that this co-equal branch of Government, the Supreme Court, could, would, and did

take upon itself the job of making profound changes in American society and politics when Congress was slow to act or had determined not to act. And this judicial activism on the part of the Supreme Court led to this clearly reduced pace and increased thoroughness of evaluating nominees to the Court.

It became important in the eyes of many members of this committee to attempt to learn intimately the attitudes and values of persons nominated to serve on the Court. But sometimes we, all of us, become overly zealous on the singularly posed question: How would you vote on this or that critical issue of the day?

And in my mind, a nominee who is fully qualified by education and experience and temperament should, nevertheless, be rejected if a nominee believes it is the Court's duty to act when the Congress fails to do so or to allow his or her personal views and prejudices to influence his or her decisions. And yet, conversely, I am much less concerned about a nominee's ideological bent if he or she is otherwise well qualified by education, experience, and temperament; and clearly a person who would assiduously follow the Constitution, the precedents, and the laws of the country, despite his or her strongly held personal views to the contrary.

So this great and sometimes ponderous effort to determine the social and political views of nominees reflects all of our own concerns about judicial activism, whichever side of that we happen to be on.

Some claim that this has led to the appointment of what have been called "stealth nominees," a description which assuredly would not fit you, for you have left a paper trail a mile wide and a yard deep: 91 speeches, 50 articles and book chapters, and 80 opinions. Of course, I have nearly completed my own personal exhaustive review of these various tomes and treatises. Summer reading, I call that.

And I suspect that we have sometimes overdone it in the thoroughness of our efforts to learn the ideological beliefs of nominees. And we should probably spend more time inquiring into the nominee's judicial philosophy and the analytical approach that he or she might use in deciding issues and cases.

We will, of course, also inquire in some detail about current constitutional controversies. I have some questions myself in that area in this round, and I know that you will attempt to be candid but circumspect, and respectfully and necessarily guarded in your responses. I am positive of one thing with you, as surely as anything, the lodestar, that you will not give our citizens mumbo-jumbo, legal mumbo-jumbo. You will give them justice. That I know. And that is the pleasing part of the whole process for me with my personal knowledge of you.

Now, let me ask you, I know that Senator Hatch and Senator Thurmond have talked about the *New Life Baptist Church* v. *East Longmeadow,* and I will not go into the details of that case. But until recently, the U.S. Supreme Court, not the Congress or the executive branch, has decided the standard to be used to determine whether the Government's actions have impermissibly burdened a person's ability to exercise his or her religious beliefs.

Over time, the Supreme Court developed these several standards for various types of free exercise claims. For most cases, the Court

determines whether the State's interest is compelling and whether a less restrictive means to accomplish that interest is available. In *Sherbert* v. *Werner* and *Yoder*—cases brought by prisoners against prison administrators—the Court standard was whether the restrictions on a prisoner's free exercise of religion are reasonably related to legitimate penological objectives.

But then came the Supreme Court in the *Employment Division* v. *Smith*. Two employees were convicted of smoking peyote, and they were fired from their jobs. They claimed that their peyote smoking was pursuant to their religion. The Court held that no balancing test between the State's interest and the individual's interest was necessary when a criminal law applied to all activities, religious or secular, and was not intended to target religious activities.

So last year, we enacted the Religious Freedom Restoration Act, as previously mentioned by Senator Hatch and Senator Thurmond, which overturned the Court's 1990 case standard. And, of course, that went rolling through here in high fashion. I was very disturbed by it, especially with regard to what it will do in prisons as we see people selecting what religion they may concoct in order to drive the prison administrators goofy. But that is my view—I think that will cause us great pain.

The Religious Freedom Restoration Act mandated that all free exercise claims be considered under one standard; the compelling State interest and the least restrictive means.

My question: To what extent is it constitutionally permissible for Congress to provide the courts with a substantive standard for a free exercise of religion claim? Or to what extent is it constitutionally permissible for Congress to overrule the Supreme Court's own substantive standards for review of free exercise of religion claims?

Judge BREYER. The reason that I smiled, Senator, was because you have articulated the question exactly that I would imagine is likely to be before the Supreme Court. And if I am confirmed and you decide to confirm me, then I would be a member of that Court. Therefore, I have to exercise caution on that particular question. That is going to be right there. It is going to be right there.

Senator SIMPSON. It will be right there, and it will come through this law.

Judge BREYER. Yes, it will.

Senator SIMPSON. And another one that will be right there and you need not talk about is the issue of the restriction of freedom of expression, freedom of speech with regard to demonstrations around abortion clinics. The law has a lot of ramifications that go far, far beyond freedom of speech. I happen to be pro-choice, and I supported the provision. But I can see right now the use of that law in ways which those who promoted it will blanch and shrivel when that begins to take shape. I can see some of those beginning to form, and I was part of it. But that is the interesting part of sitting on a Judiciary Committee as you work your craft.

Well, those are things that are of concern, but with regard to the *New Life Baptist Church* v. *East Longmeadow,* I would just ask several specific questions which I believe were not entirely covered in your answers to Senator Hatch and Senator Thurmond. I also

have had some which you have answered and which I will not ask you to repeat.

You were asked to determine whether the town school committee could apply the State's standards to determine the adequacy of the secular education that a religious school provides to its students. The school said that that mandatory process violated the first amendment, free exercise rights, since it believed it to be a sin to submit—and that was the word, "submit"—its educational enterprise to a secular authority for approval.

So in place of the school committee's mandatory approval requirements, the school offered up a less restrictive alternative. They said they would voluntarily give its students standardized tests to determine the adequacy of the secular education, then the school would voluntarily submit the results to the education board for evaluation.

You concluded that while the State's mandatory review requirements do burden the school's free exercise of its religious activities, such a burden was permissible. You have given some remarkable comments about the duty of Government to see that education is given to all children, and I agree. You based your decision on your finding that the school committee has a sufficiently compelling interest in seeing that the children are educated, that there is no less restrictive means available. Not even the school's suggested voluntary standardized-test approach that you felt would both accomplish the State's interest and be less of a burden on the exercise of religion. You questioned whether or not the standardized test would be an adequate measure for the process of teaching, and, of course—and there was a quote:

> Can it be certain that good results reflect good teaching, the teaching of intellectual skills, discipline, complete subject matter, rather than simply teaching the answers to the questions the teachers believe will appear on tests?

But all those kinds of tests are routinely used to measure progress in education, standardized tests. SAT, LSAT, MCAT, GRE, are all indicators of the likelihood of eventual success. I have received considerable mail from my State on the nomination on the most part from constituents writing who are parents who have their children in private, church-operated schools or parents who provide home schooling for their children, and this opinion concerns them. Some feel your decision implies that you believe it is constitutional for States to totally ban home schooling.

One wrote:

> Not only is this position unconstitutional, but it is also nonsensical, as he would give unlimited powers to an already failing public school system to regulate private and home schools, which statistically are turning out well-educated students.

I am interested in your reasoning, if you could explain for me why the school standardized tests would not be an acceptable, less restrictive means to demonstrate adequacy of its secular program, whether your decision "gives unlimited powers to an already failing public school system to regulate," but principally how you feel about home-based education and your response to that, sir?

Judge BREYER. Three general points, Senator, and then a more specific point. The three general points are:

I do not think there is a word in that opinion that suggests, you know, the kind of thing that you mentioned in that latter, that this

powerful State can do what it wants to end the ability of parents to pass on their religion to their children.

The second general point is that everything I have learned about the first amendment—and, interestingly enough, speech has something to do with it, too—is that that really grew out of the religious wars of the 17th century, and that really reflects a great compromise that runs through modern life in a lot of countries, but particularly in the United States. And, that is, people have strongly held religious beliefs, and there are synagogues and there are churches and there are mosques and there are dozens of different religious groups. And, that is, that every one of those groups will have the right to practice their own religion and to pass that religion on to their children. That is right at the heart of it.

The third general point is that the test that I was applying constitutionally in that case was before the recent *Smith* case. The recent *Smith* case said all you do is look to see if there is a secular purpose. I take it if that had been the law at the time, it would not have even been close. And what you have tried to do is go back to restore the type of balancing test that I used in that opinion.

Now, the specific thing in that balancing test really grew out of the particular facts of the case. Some States have laws which say the way that the State should go in and measure whether the home school is doing a good job or the religious school is doing a good job is give people tests. If the State has that, fine and good.

Our State in that case did not have that. And so it became a question of whether the Constitution forced the school board to do it that way rather than do it a different way.

Among the special facts in the case were there were a lot of indications through letters and so forth that the visit to the school by the school board to look and see what was happening could be worked out without infringing that religious group's basic concern that the State was not in charge, that they did not recognize State authority. And that could be worked out because the State was willing to say: Don't recognize our authority. Just let us look at the school like anyone else might off the street, or whatever. Do you mind? And they said, well, we do not mind that much.

The concern in that case, what the school board had, is: How can you really say that tests are less restraining or more restraining? Some parents might believe tests are more of an interference. After all, you are worried about submitting yourself to the authority of the State while I have to bring my child and sit them in a special room and make them take a State test. Some parents might have felt that way. Other parents might have believed that that was a better solution and that the visit was a worse solution.

It is very hard to say, and the school board had to administer some system. So, ultimately, it turned on the fact that we thought that is a reasonable system. And it does not really infringe, in general, the right of the parents any more than would have the opposite system.

Senator SIMPSON. Let me ask you a question. You may not be able to answer it, but it is just right there. Do you have a bias against home schooling or religious schooling?

Judge BREYER. Absolutely not.

Senator SIMPSON. Never have had?

Judge BREYER. I never have had.

Senator SIMPSON. I think that that is the key and, with your explanation, it will be one that will be helpful for the public to understand.

Of course, the Religious Freedom Restoration Act would change a lot of things, as you say, outcomes or reviews on that legislation, and it will be laid at your door, Justice. You will see it there one morning waif-like, writhing, all yours.

Now, the confirmation process—I see that the light is still green——

The CHAIRMAN. You are doing fine, but if you want to stop, it is OK. [Laughter.]

Senator SIMPSON. I thought you guys were going to go all day.

The CHAIRMAN. Go right ahead, Senator.

Senator SIMPSON. I am going to save one for tomorrow. I am going to ask the nominee to hone his processes, because here is one coming—immigration law. That got a little rise.

The CHAIRMAN. An audible groan.

Senator SIMPSON. You see, nobody will touch it. It is too ghastly to play with. But there are a couple of bills which amend the 14th amendment, which says:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens,

and so on.

There are statutory proposals to say that a person born in the United States is not a citizen of the United States, because they are not "subject to the jurisdiction thereof." The children are born to an illegal person and become legal citizens at the moment of birth. Some are saying that, by statute, we could amend this constitutional provision statutorily because they are not being born to a legal citizen of the United States, and therefore are not "subject to the jurisdiction thereof." It is going to be a rather knotty one for us to handle.

I am going to come back to that in my second round and just ask you some thoughts, because it is a very difficult issue. Right now we have a situation where two-thirds of the live births in a certain area of California are to illegal undocumented mothers who are giving birth to a U.S. citizen. That U.S. citizen child, when 21 years old, may petition for the mother, the father, the siblings and through the preference system—an interesting issue, one that again is something we must pursue.

It is not something that I have proposed. It is being proposed by several persons of both parties on this issue, and I will come back to that.

I thank the Chairman for your courtesy.

The CHAIRMAN. Thank you, Senator.

Judge, it may be an appropriate time to take a 5-minute break here, and then we will return. Really, let us make it 5 minutes, and we will return with Senator Leahy.

Senator LEAHY. Mr. Chairman, is there anything to the rumor that the reason they are going to me next is that the TV cameras

had so adjusted their lights for Senator Simpson's head, they want to be consistent? [Laughter.]

Senator SIMPSON. Why don't you tell them the story about what——

Senator LEAHY. No, no, I'm not going to do that.

Senator SIMPSON. Then I will. Let me tell you. Mr. Chairman, you will recall that during——

The CHAIRMAN. You go right ahead. I never talk about hair or lack thereof. [Laughter.]

Senator SIMPSON. During a hearing in this committee, a courier came to the door——

Senator LEAHY. You don't have to tell this, Alan.

Senator SIMPSON. I think I will. You have told it enough times. It is very short. It is like war stories, you have to get them out of the way.

This courier came and said to the person at the door, "I have a message here for somebody." He said, "Who is it?" He said, "I don't know. He's tall, bald, homely, and wears glasses." And this guy looked in and said, "There's two of them." [Laughter.]

The CHAIRMAN. We are recessed for 5 minutes.

[Recess.]

The CHAIRMAN. The committee will come to order.

Welcome back, Judge. We will do another hour and a half. We will do Senators Leahy, Heflin, and Grassley, and we will reconvene tomorrow at 10 o'clock, at which time, if all goes as planned, I believe the next person will be Senator Specter, I think. I am not sure. The name plates are not up, but I think that is correct.

Senator Leahy, the floor is yours.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

Judge, I was thinking, as I was listening to you, I have had the opportunity in the years I have been in the Senate, now with your nomination, which I fully expect will go through the Senate, I will have had an opportunity to vote on all nine members of the Supreme Court. I also will have been in the hearings on eight of them. That is counting Chief Justice Rehnquist in his capacity as Chief Justice.

I have an opening statement that I was going to include in the record as though read, Mr. Chairman.

The CHAIRMAN. Without objection, it will be included.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR LEAHY

When you visit the Supreme court, and walk into the courtroom chamber, you cannot help but be struck by a special authority that exists there. I remember being affected this way when I was first there as a law student, and I remember feeling the same way when I was there just a few weeks ago.

The courtroom itself is more cramped than you might expect. It essentially consists of a broad wooden bench, behind which sit the nine justices in their high-backed chairs. Before the bench is a lectern and tables for counsel arguing cases, as well as tables for clerks and other court personnel. The rest of the chamber is devoted to rows of chairs for public seating.

Yet the importance of this room is enormous—one cannot enter that room without having a feeling about what happens in it. This is where our most precious rights