[Response of Judge Breyer and the prepared statement of Senator Leahy follow:]

JUDGE BREYER'S RESPONSE TO SENATOR LEAHY'S QUESTION

LEADING CASES

In response to Senator Leahy's request that I identify Supreme Court cases of particular importance decided since I graduated from law school, I am providing the following list of decisions, the importance and wisdom of which are, in my judgment, widely accepted.

1. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). This case redeemed the promise of our democratic form of government by ensuring an equal vote for every citizen.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While the exact contours of the right against self-incrimination remain a subject of debate, *Miranda* established the basic proposition that the Fifth Amendment would prevent the most serious abuses of official power.

3. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). By reinvigorating the clear and present danger test in a case involving the Ku Klux Klan, this decision affirmed the fundamental principle that the First Amendment must protect even the speech we hate.

4. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Craig* v. *Boren*, 429 U.S. 190 (1976). These cases established the critical principle that the Fourteenth Amendment's guarantees extend to gender discrimination.

5. *Mistretta* v. *United States*, 488 U.S. 714 (1989). This decision is important not so much for its specific subject matter (the Sentencing Commission) but more generally because it reintroduced needed flexibility into the constitutional separation-of-powers analysis, ensuring that Congress and the President can meet new challenges to effective governance posed by complex modern problems.

PREPARED STATEMENT OF SENATOR LEAHY

Mr. Chairman, I conclude my round of questioning with these observations: I want to commend my colleagues for their thoughtful participation in these most important proceedings and to commend Judge Breyer for the way he has conducted himself and his willingness to reveal something of himself and his thinking.

Quite frankly, I would have liked him to be even more forthcoming and specific in his responses, but I acknowledge that the appropriate line is difficult to draw and recognize that my frustration may reflect my own perspective as a Senator asking questions.

I have sensed through the course of these proceedings a disappointment among some that there has not been more controversy surrounding this nomination, that we have not had to endure a donnybrook or witness a wealth of political maneuvering. I suggest, to the contrary, that we should take pride in what is transpiring here: This is an occasion when all three branches of our Federal Government can be seen working together smoothly and efficiently.

I hope that the members of the public who have had an opportunity to join us over the last few days either in person or to witness these proceedings on television have taken something positive from them. I again commend President Clinton for having chosen a nominee who can bring people of diverse political views together and who has engendered such praise as an excellent choice.

Finally, if I might, I say to you, Judge Breyer, that after you are confirmed I hope that you will successfully resist the pressures to become cloistered away from the world. I think that your involvement with your family, demonstrated throughout these hearings, provides some protection for you. I doubt that your active wife and children are going to allow you to lose touch.

In your opening statement and your answers over these last three days you have indicated your intention always to remember the effects that your decisions will have on real people—people who may not be powerful or well-connected. You have demonstrated that you have not only mastered the complexities of the law but are the fulfillment of your parents' influences toward public service and to awareness of the impact your work will have on the lives of others.

So I urge you even while sitting on the High Court to be of the world. I do not suggest that you tailor your opinions to the winds of public opinion. Rather, I urge you to remember that you have learned about government and people. I call upon you to fulfill the promise you made to the American people as these proceedings began—to remember that the decisions you help to make will have an enormous effect upon the lives of many, many Americans and to do your utmost to see that

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.