

Senator SPECTER [continuing]. My recollection was it was a 58-to-38 vote, and I could not believe my eyes and ears. I had not been around here long. I still cannot believe my eyes and ears with some frequency. But we in the Senate did pass an amendment which took away the jurisdiction of the Supreme Court to use busing as a remedy in a constitutional case under the equal protection clause.

The CHAIRMAN. Again, Senator Simon says he only has part of a round. I might say I think we are nearing the end. There is going to be a vote relatively soon. Senator Simon will be able to ask his questions, and we will take a break when the vote occurs.

I would like those listening—as I understand it, Senator Brown has some questions, less than a full round, and to the best of my knowledge, after that, there is no one who wishes to take a full round with the possible exception of Senator Pressler, and no one wants to even take a part of a round that I am aware of, so we could very well, with the grace of God and the good will of the neighbors, be out of here by 7 o'clock—but then again, I have always been an optimist.

Senator Simon.

Senator SIMON. Thank you.

First, a comment on what Senator Cohen and Senator Heflin said in terms of legislative history. I think we dilute the strength of legislative history, both for Justices and for the lower courts, when we permit—and I have done it, along with all of us here—when we permit speeches and other things to be entered in the record as if given. The reality is the record ought to be the real record, and I hope one of these days we change our rule so that that is the case.

Second, I think your exchange with Senator Metzenbaum was extremely significant. Your hope, obviously, is that you will be able to sever the ties with Lloyd's of London soon. It may be—I hope this will not be the case—it may be that it will last for years. That means that your response to Senator Metzenbaum could be with you for many years.

I would request that you get a transcript and read it over, and if you feel comfortable with it, fine. If you do not feel comfortable with it, I think you ought to send a letter to Senator Biden, with copies to the other members of the committee, so that we know where we are on that, if that is agreeable.

Judge BREYER. Yes, yes.

Senator SIMON. And for the record, since they cannot—

Judge BREYER. Yes, that is agreeable, Senator. Thank you.

Senator SIMON. Thank you.

There was a case that came to the Court from California, where a California utility was supporting a certain stand, and a citizens' group went to the utility commission and said, "We believe we ought to have the right to have the other side presented, and we would like to include that in the mailing of the utility."

The utility commission ordered that to take place. The utility appealed to the Court, and in a divided opinion, the Court said you do not—as part of freedom of speech for the utility, for the corporation—they do not have to send around a speech that they do not agree with.

The question is: What rights in terms of the first amendment—and I am not asking you to comment on that specific case—but what rights under the first amendment does a corporation have; and if it is a regulated corporation, does that differ from another corporation?

Judge BREYER. My understanding in the area of commercial speech is that there is protection, but that it is different. And my understanding is that it is not meant to impede legitimate regulation. Quite clearly, the Federal Trade Commission can prevent people in the commercial area from making statements that are false. Quite clearly, various agencies can impose labeling requirements, even down to exactly what words should be said, though that is, of course, a form of regulating speech.

I suspect that the case that you are discussing was a case that arose on particular facts and particular circumstances looking to see how necessary that particular regulation was in the particular case compared with the right of the corporation. I am sure if that kind of issue arose again, it would be important for me, if I were on the Court, and any other judge to examine the facts and circumstances in light of the knowledge that commercial speech is different. There is protection, but there is also regulatory need which feeds into the balance.

Senator SIMON. Two suggestions, finally. One is there has been a lot of discussion about capital punishment. I would simply ask you to read Justice Powell's reflections at some point. Justice Powell started off pretty much where you are starting off and decided that his original opinion was wrong.

Then, finally, another request of you. You said it was important that you connect with reality, and I really think this is important. I would like to read from a 1913 speech of Teddy Roosevelt. He says,

Our judges have been, on the whole, both able and upright public servants. But their whole training and the aloofness of their position on the bench prevent their having, as a rule, any real knowledge of or understanding sympathy with the lives and needs of the ordinary hard-working toiler.

I think there is wisdom in what Teddy Roosevelt had to say, and I do not question for a moment your desire to continue to connect with reality. But if I can use an example from my background as a journalist, every once in a while when I am autographing a book I have written or something like that, someone will say to me, "Someday I am going to write a book." When they say to me, "Someday I am going to write a book," I know it will probably never happen. If they say, "within the next year or two years," then it may happen.

I would make this suggestion to you. Sometime between now and the time you get sworn in, sit down with your wife and your family, and spell out specifically for yourself—nothing you give to Paul Simon or Joe Biden or anyone else. Spell out specifically for yourself how you really will keep in touch with reality, the reality that a great many Americans face, that, frankly, you are just not going to see. As a Supreme Court Justice, I will encounter you occasionally at a reception or, you know, at some event or another. But the people who are there are not going to be unemployed; they are not going to be living in a housing project; they are not going to be suf-

fering. And I want a Supreme Court Justice to empathize with those people who are struggling in our society.

So if you would agree to do that, I would appreciate it.

Judge BREYER. I will.

Senator SIMON. And I have no further questions or comments, Mr. Chairman.

The CHAIRMAN. I thank you very much, Senator.

With Senator Brown here, I know that it is a little bit longer. Senator Brown says he does not have a full round. I think, because there is going to be a vote shortly, if you can persist a while longer, I would like to yield to Senator Brown now, and maybe we can finish up here.

Judge BREYER. Yes.

The CHAIRMAN. Senator Brown.

Senator BROWN. Thank you.

Judge Breyer, my commendation. You have survived our trial by inquiry quite well.

Judge BREYER. Thank you, Senator.

Senator BROWN. I do not know if it is comparable to trial by combat that the common law must have thought about, but you have not only survived, you have prospered. I think Members from both sides of the aisle have been most impressed not just with the quality of your answers but with the thought process that goes into it.

Judge BREYER. Thank you.

Senator BROWN. I listened intently to the queries that were addressed to you about your book. I know you have written in a number of publications, but specifically "Breaking the Vicious Circle" I assume was a series of lectures?

Judge BREYER. Yes, that is right, Senator.

Senator BROWN. Put out in a book form.

Judge BREYER. Yes.

Senator BROWN. I read through that with what I hoped was a searching eye to find out your position on issues, and I did not find admonitions as to what our policy should be. What I found was an urging that we understand the risk we are trying to address and that we set priorities of what is most important to us since we have limited resources.

Is that a fair summary of what you tried to do?

Judge BREYER. I think it is. That is what I was trying to do in various ways, to make as clear as I can some of the problems of maybe spending too much here and not enough there. And if people think about that and then the public and people who read it or anyone else in the world who is interested in this area decides that is what we would like to do, that is the end of the matter. All it does is it calls this to people's attention. They are to think about it. And if we can think of a way that people would prefer, other people, not me—I am the one calling it to their attention. If they then think that is how they would like to proceed, fine. That is up to other people, groups who know more about it than I do, calling it to the attention of Congress, who then may decide to do something different or may not.

Senator BROWN. Well, I noticed you analyzed the cost of a 95-percent cleanup and analyzed the cost of the additional 5-percent cleanup and compared it with the potential good that each did. But