would keep an open mind, and I would look into the complexity and understand it as best I could.

Senator THURMOND. I might say we are working with the Justice Department now on some legislation.

Judge Breyer, do you believe that U.S. antitrust laws should apply equally to U.S. and foreign business, or should they seek to favor U.S. companies compared to foreign business?

Judge BREYER. The normal rule is when firms behave similarly, they are treated similarly; and where firms have an adverse impact on this country, they are treated similarly in terms of what they intend to do and what the effect is. I would start from that assumption that the law applies to both alike, but there might be special circumstances.

Senator THURMOND. Judge Breyer, I am aware that in the past, you have lectured on the use of legislative history and touched on it during the hearing. Could you please summarize your current views on the proper use of legislative history in statutory construction?

Judge BREYER. In summary form, I have thought that there are many instances, indeed most, where an open question in a statute is best understood through the use of legislative history. By using that history carefully and not abusing it, I think a court can better understand what the human purposes are that led Congress to enact a particular statute, and once one understands those purposes, technical matters often fall into place; you understand them better, too.

There are instances where courts have used legislative history to reject absurd interpretations of statutes, to find out whether there are technical meanings, to discover whether there was some kind of drafting error, to decide whether there are special meanings of a statute that the parties and Senators wanted to use, to understand better what the purposes were. All those are instances where I think it is very appropriate. I recognize sometimes it can be abused, and it should not be.

Senator THURMOND. Judge, those are all the questions I have. I think you are an able man and a fair man, and I hope you enjoy your career on the Supreme Court.

Judge BREYER. Thank you very much, Senator.

The CHAIRMAN. Senator Kennedy is next to question. He is on the telephone, I am told, right now; if staff would check to see if he is ready to go. [Pause.]

Thank you.

We are just not accustomed to someone not using his whole time.

Senator KENNEDY. Thank you very much, Mr. Chairman, and I appreciate your accommodating some of those on this committee who are also on the Labor and Human Resources Committee, who have been meeting with the leader on some of the health issues.

But I welcome the opportunity just to ask Judge Breyer a few questions on your work of areas of interest to many Americans, including the rights of persons with disabilities, and housing discrimination. These have been areas that this committee has been particularly interested in; the Americans with Disabilities Act is something that the Committee on Labor and Human Resources is very much interested in; and also the questions of crime.

We talked earlier about your role on the Sentencing Commission and the importance that that truth-in-sentencing really means to Americans and also to the integrity of the whole criminal justice system.

There is another area that I wanted to hear your views on, and that is the area of bail and bail reform. You had a chance, as I mentioned earlier, to talk about your role in the Sentencing Reform Act of 1984. At the same time we passed that law, we also passed the Bail Reform Act of 1984 in an effort to improve different aspects of the criminal justice system.

The Bail Act, of which I was the prime sponsor, permits judges to consider whether the defendant is dangerous in deciding whether he or she will be released or kept in custody before the trial and to deny bail to suspects who are likely to pose a danger in the community. It also created a presumption that defendants charged with the most serious, violent crimes, and drug crimes, are at risk of fleeing before the trial.

You have had several opportunities to interpret that law as a judge, including one, the *Jessup* case, in which you upheld the constitutionality of the law's presumption that major drug offenders pose a danger to the community.

So in your experience as a judge, has the Bail Reform Act helped judges, been useful in deciding which defendants need to be detained before the trial?

Judge BREYER. In looking over the act and applying it over the years, Senator, I recognize that the act is an effort to balance two separate things. One is the ordinary right of the person accused of a crime to have bail before he is actually convicted. The other is the problem that there are some defendants who might run away, and they really might; they will never be seen again. And there are others who might be particularly dangerous, and if they are out on bail, they will commit crimes.

So I know that Congress tried to balance those two things in the act that you sponsored. I know it created special circumstances for dangerousness and likelihood to flee, where the person could be kept in jail without bail. We have a set of presumptions. We interpreted them in the first circuit as other circuits did, and in seeing cases come up thereafter, it seems to me that they are working reasonably well—that is, it seems to me the cases where you see the person put in prison or jail before, without bail, before trial, looking through a record, they look like people who really might run away, or they look like people who really are dangerous and would engage in other crimes, drug crimes.

And I have not really seen successful appeals, or many of them, from that. So it seems to be working reasonably well on that basis.

Senator KENNEDY. We tried to provide some additional flexibility for the judges also, on the ability of those who might be accused, and where there was at least some understanding and awareness that they would be present, taking into consideration their ability to make bail. There were a number of circumstances where people did not have the wherewithal, even though there was not the presumption that they were dangerous or that they would flee, and they were being held I think in a way which was an injustice, versus those who were going to flee, particularly those involved in

drug crimes, as well as who had a repeated record of convictions for violence against individuals. It was primarily targeted to deal with the individuals who had a very strong and continuing record of violence and who, on the basis of that record, presented a real danger to the community.

In the second area of disability, in the *Wynne* v. *Tufts University* case, you dissented from an en banc opinion holding that a trial was required to resolve a medical student's Rehabilitation Act claim that Tufts University Medical School was required to alter its testing methods to accommodate the student's learning disability. The medical student had failed eight of the first-year courses; two of the eight, for a second time, and one for a third time. The district court granted summary judgment to the medical school because the student was not otherwise qualified under the Rehabilitation Act, since his inability to pass the multiple choice test indicated that he would not be qualified to analyze complex written materials as a physician.

The court majority reversed, stating that there was insufficient evidence that the medical school had considered alternative means of evaluating the medical student's performance. You dissented, because you believed that an affidavit from the dean of the medical school demonstrated that satisfactory performance on the multiple choice exam was the only way to assure that the medical students would be able to analyze complex written material that is necessary for the safe and responsible practice of modern medicine.

If the rights of persons with disabilities to have reasonable accommodations made to enable them to participate in all aspects of our society is to be meaningful, then those who are subject to the law must make a serious inquiry to determine whether procedures that hurt persons with disabilities can be replaced with less burdensome procedures.

My question is, Will you construe the laws forbidding discrimination on the basis of disability in a manner that protects the rights of persons with disabilities to obtain the reasonable accommodation of their disabilities?

Judge BREYER. The first part of my answer is that particular case was, in my mind, an extremely close question as to the amount of evidence. It went back, and summary judgment was granted again; and it came back again. I do not know on those close questions; they are very difficult.

The answer to your second question, the second half of your answer, is yes; I understand in that act, and also in more recently legislation, that Congress has passed important laws that recognize the importance of persons with disabilities being treated both fairly and properly, and of people making an effort to those people who do have disabilities. I understand that purpose, and I will interpret those laws with that in mind.

Senator KENNEDY. Well, I think we have had a good deal of talk about the Boston courthouse, but I know just from visiting with many of the disability groups up there who visited with you, that your sensitivity on the issues of access, availability in all parts of that courthouse was something that was enormously impressive, certainly to all of the people who worked with you on that.

There was one other case, *Doe* v. *Anrig,* that related to the reimbursement of tuition for private school education. As I understand, you ruled that what was then called the Education for All Handicapped Children Act, which required parents be reimbursed for the cost of educating their child in private school while their lawsuit was pending, to force the State to provide him with an appropriate education. Writing for the court in 1984, you upheld their right to obtain the reimbursement, so that the act's broad purpose of assuring that all children with disabilities receive an appropriate education be preserved. I think that was certainly an important decision.

In many respects, housing discrimination is one of the most insidious forms of bigotry, since racial separation fosters the ignorance that perpetuates racism. I know you are familiar with the 1968 Housing Act which we passed, which was not effective, did not have adequate remedies. We came back after the election of 1980, and in that session, we tried to pass a Fair Housing Act, and we failed to get cloture on it by I believe it was three votes; and then, in 1987, we passed a Fair Housing Act which prohibited discrimination not only on the basis of race, but also disability, as well as with children. There was increasing evidence of discrimination against families in those areas.

But now, on the issue of discrimination on the basis of race, in *NAACP* v. *HUD,* you authored a 1987 opinion for the first circuit, ruling that HUD has a statutory duty to enforce the Fair Housing Act and to ensure that localities participating in Federal housing programs eliminate discrimination. You ruled that persons aggrieved by HUD's failure to do so could sue the Department under the Administrative Procedures Act to force the Department to enforce the law.

My question is would you describe for us how you reached the conclusion that persons aggrieved by HUD's failure to enforce the Fair Housing Act could go to court to obtain relief. This was prior to the time that we took Federal action, so it was an enormously significant and important decision, which I think in an important way really made an important difference in terms of the need for congressional action in this area, which subsequently followed.

Judge BREYER. It is a decision, Senator, that really gave me enormous satisfaction as a person and as a judge. And the reason I felt it important both was is that you only have to look around in this country, and you see terrible social problems of poverty and discrimination, and no housing and no reading, and violence, and so forth. Everyone knows the long list of terrible problems.

Then Congress does address those matters in statutes, and in this case, the statute had a very important purpose which I would describe as social justice.

Then a case arose in the court of appeals, and the district court had thought that a series of very complicated technical doctrines prevented the district court from carrying out that purpose in this instance. So it was a case where I felt knowledge of the technical part of the law helped the court and helped me analyze those technical doctrines fairly, with an idea of what they had in mind, and enabled us, I think, to cut through the technical doctrines, to show to the district court that they were not the obstacle that the district

court had thought and that the technical doctrines permitted the district court to get to the heart of the matter, which was discrimination in housing, and to create appropriate relief.

So I felt that it was an instance where knowing the technical doctrine, using it, understanding it, allowed the possibility of removing it as an obstacle to the social justice that the basic statute passed by Congress aimed at.

Senator KENNEDY. Well, it was a recognition, it seems, in any fair reading of that case, that it really was not the kind of remedy, and you came up with what was a very creative, legitimate remedy for action, which resulted in eliminating the kinds of discriminatory procedures that were being followed at the time. And Congress in the year afterward followed that precedent, and that was enormously important.

That really completes my questions. I would just like to add, Mr. Chairman, that I think that this has been, over the period of the past 2 days, an enormously important hearing on the qualifications of the nominee. I think all of us on this committee, as has been stated before, have benefited from the personal association with the nominee for the most part—there have been new members added, obviously—and many of us I think on this committee, and hopefully the American people, have been finding out what those of us who have observed Judge Breyer as the chief judge of the first circuit—the keen intellect, the broad understanding of constitutional issues, the kind of thoughtful judicial temperament which I think is so important in reaching these decisions and a real awareness and understanding of the importance of applying constitutional principles to real life situations that affect our fellow citizens' everyday lives. I think that will be a distinguishing mark, among others, of this nominee's service on the Supreme Court.

Judge Breyer, I look forward to voting for you, both in this committee and on the floor of the Senate, at an early time.

Judge BREYER. Thank you very much.

The CHAIRMAN. Thank you, Senator.

One thing on which there is no disagreement—and I do not disagree with a single thing the Senator said—as I kidded you in the closed session, thoughtful you are. I indicated, and I will say this publicly, that I thought you were the judicial version of Paul Sarbanes.

Judge BREYER. That is very complimentary.

The CHAIRMAN. The only thing that Paul does, though, is he spends time going like this, rubbing his face, and you just sort of give a studied pause. In both cases, you communicate what is in fact true; both of you are very thoughtful.

I turn to my thoughtful colleague from Maine, the poet laureate of the Senate, Senator Cohen.

Senator COHEN. Judge Breyer, would you explain to us the difference between affirmative action and quotas?

Judge BREYER. No, because I am trying to decide in the—generally speaking, I think affirmative action means you make an enormous effort, you make a really serious effort. A quota is an absolute number that you have to meet. Affirmative action means you take this seriously and you really look. That is the general accepted version I think in a lay person's terms.