Thanks, Kathleen.

Ms. SULLIVAN. Thank you, Senator Biden.

The CHAIRMAN. How did Gerhard escape and you get caught?

Senator FEINSTEIN. Mr. Chairman, if I may, I would just like to welcome Professor Sullivan and Dr. Casper, as well. They hail from my alma mater in my State, and I am a big fan of yours. I have heard you many times. I never had occasion to see you in person, and it was most interesting for me to listen to your comments.

If I may, I would just like to make one comment in response, because, surprisingly enough, I agree with much of what Senator Specter just said about the law and the streets very often, not understanding each other, and dropped in between in a huge chasm is protection of the public, and somewhere between the two we have got to find the balance.

But I just want to say I am delighted to welcome you here, and it was a great treat for me to listen to you.

Ms. SULLIVAN. Thank you very much, Senator Feinstein.

Thank you, Mr. Chairman, for the privilege of appearing before you today and working with the committee.

The CHAIRMAN. Thank you.

I want the record to note, Senator Feinstein, that President Casper pointed out on the record that he appreciated you wearing Stanford colors today.

Our next distinguished panel is a panel composed of three individuals representing groups wishing to testify in opposition. First, we have Paige Comstock Cunningham. Ms. Cunningham is president of Americans United for Life in Chicago. Also on this panel is Michael Farris. Mr. Farris is president and founder of the Home School Legal Defense Association and is here on its behalf today. The Home School Legal Defense Association, together with the National Center for Home Education, is a nationwide group in support of home schooling.

I said three. It is panel three, with two people. I apologize. I welcome you both. We welcome you both. Ms. Cunningham, would you begin, please?

PANEL CONSISTING OF PAIGE COMSTOCK CUNNINGHAM, PRESIDENT, AMERICANS UNITED FOR LIFE, CHICAGO, IL; AND MICHAEL P. FARRIS, PRESIDENT, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, PURCELLVILLE, VA

STATEMENT OF PAIGE COMSTOCK CUNNINGHAM

Ms. CUNNINGHAM. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify before you again today, as I was here just a year ago in another confirmation hearing.

My name is Paige Cunningham. I am an attorney and also president of Americans United for Life, which is the oldest national legal organization in this country representing the pro-life movement. We are the only national legal organization devoted exclusively to writing, passing and defending laws, laws of a particular nature, those that shield mothers and their innocent children from abortion. But AUL also works to change the law, to protect the

sick, the elderly and the disabled from euthanasia and assisted suicide.

We are here today perhaps to introduce a somewhat discordant note in these harmonious and cordial proceedings for one reason, and that reason is because we are haunted by the image, the image of millions of women and children who have been injured or destroyed by abortion.

We have fought for them in the courts for 21 years, and it may be another 20 years before we succeed, just as it was for abolition, for women's suffrage, and for the civil rights movements. But one thing is clear: We will never give up.

Judge Breyer may have ample professional and legal credentials to sit on the Supreme Court, but we are concerned about one flaw that is fatal, and that flaw is the process by which he was selected and its impact on the courts, on the law, and on the real people of this Nation.

President Clinton has made it clear that he would appoint to the Supreme Court only a supporter of *Roe* v. *Wade*. A nominee for the Supreme Court must now pass a test, a pro-abortion test. No other administration has pushed its political agenda as feverishly as the current one. Judge Breyer's nomination to the Supreme Court clearly implies that he has passed this political test. It should be obvious that an abortion litmus test is an insult to the integrity of the highest court in this land. But what is far more disturbing is the abortion doctrine itself that Judge Breyer will be expected to support.

In 1973, the Supreme Court ruled in *Roe* v. *Wade* that a mother may end the life of a child in her womb for any reason and at any time. The Court's decision in *Roe* openly defied a social, moral and legal tradition condemning abortion that dates back at least 800 years. *Roe* has been condemned as unprincipled, both by members of the Court and by constitutional scholars, including those who favor a pro-abortion public policy.

Unlike *Brown* v. *Board of Education,* the once controversial school desegregation case which is now universally accepted, *Roe* v. *Wade* has never been settled in our society. In fact, by overriding the democratic process, the Court created the very division it now claims to have healed. That division illustrates what Judge Breyer warned of earlier this week, that judges can become isolated in the court room from the real people in the streets. What he said is true, that the decisions he has made, the decisions that he will help to make on the Supreme Court will have an effect upon the lives of many, many Americans.

Well, AUL is confronted daily with many, many American women which the abortion law of this land has touched. They are career women, teenagers, students, mothers, rich and poor. And as we work with and represent them, AUL is increasingly convinced that women would be better off without this abortion policy.

Roe has done nothing to advance women's legal, social or economic rights. The real progress in these areas has come, as you well know, through Congress and State legislatures. They have passed dozens of laws mandating equal pay for equal work and banning sex discrimination in public and private employment, in the sale and rental of housing, in education and many other areas.

Not one of these laws depends upon *Roe* or upon a right to abortion.

When the law places a mother's rights above those of her very own child, what happens? She is the one who is left with the sole responsibility for any child she chooses to bear. We see it most clearly in the workplace. You can't imagine how many women are told in very subtle ways, because you will not find it in an employee handbook, that if you want to make partner here, don't start a family, if you want to stay on the police force, don't get pregnant.

If abortion were not so readily available and promoted, there would be healthy pressure on employers to accommodate women who have children and want or need to continue working. Instead, employers and men get off the hook, because they can say that if a woman has the right to choose abortion, she chooses not to exercise this right, then she is on her own.

The costs to women's bodies and lives cannot even begin to be measured here today. Many women are abandoned by the baby's father as soon as the crisis pregnancy and the abortion are over. More than 70 percent of relationships fall about after the abortion. Thousands of women now bear the scars of a perforated uterus or the loss of fertility, and many still continue to die from abortions. We can't even give you these figures, because the abortion industry is the most unregulated industry in this country. Accurate data is simply not available.

Judge Breyer has said that the law must work for people. But our 21-year-old abortion law has worked against women. The tragedy of abortion is a gaping national wound, a wound whose ugliness is covered up by polite tolerance and rhetoric about a woman's right to choose and keeping government out of private decisions.

But the devastation of *Roe* is not limited to those millions of children who will never be born or to the mothers and families who will never cuddle their babies and hear them laugh or pick them up when they cry, because *Roe* has seeped into other areas of our law with an abortion distortion lens that clouds our laws and Constitution. We should pay attention to the warning signs.

Just 2 weeks ago, the Supreme Court jeopardized the first amendment for so-called abortion rights. It upheld certain restrictions on peaceful nonviolent protests at abortion clinics. I wonder if these protests would have been protected, if anything other than abortion or opposition to abortion had been the issue.

And in May of this year, a Federal district court in the State of Washington made an unprecedented decision to strike down a 140-year-old law that prevented assisted suicide. And how did she do so? She based her opinion on *Roe's* stepchild, *Planned Parenthood* v. *Casey*.

Unless this committee was presented with convincing evidence to the contrary, we must assume that Judge Breyer has passed President Clinton's abortion litmus test. But the Senate is not obliged to rubber stamp this nomination. It is time to stop and seriously question the support for an abortion law that is ripping away at our constitutional freedoms, the right to life and liberty and the pursuit of happiness, and now the freedom of speech.

Judge Breyer said before you that he thinks it is absolutely intolerable that one real child is killed every hour through violence.

Now, you may not have seen the assault on them, you could not have heard their cries. But in the short time I have spoken to you, over 15 children have felt the violent pain of abortion.

Because we believe this onslaught must end, we must respectfully and regretfully oppose this nomination.

Thank you.

[The prepared statement of Ms. Cunningham follows:]

PREPARED STATEMENT OF PAIGE COMSTOCK CUNNINGHAM

Mr. Chairman, Members of the Judiciary Committee, thank you for this opportunity to testify concerning the nomination of Judge Stephen Breyer to the United States Supreme Court.

My name is Paige Cunningham. I am an attorney and the president of Americans United for Life, the legal arm of the pro-life movement. Americans United for Life (AUL) is the only national legal organization dedicated exclusively to writing, passing and defending laws—laws that shield innocent children and their mothers from abortion. AUL also works to change law and public policy to protect the sick, the elderly, and the disabled from euthanasia and assisted suicide.

We are here today because we are haunted by the image of millions of women and their children who have been injured and destroyed by abortion. We have fought on their behalf in the courts for twenty-one years, and it may be another twenty years—just as it was for the abolition, women's suffrage, and the civil rights movements—before we succeed. But one thing is clear. We will not give up the fight for women and their little ones in the judicial arena.

Although Judge Breyer clearly has the credentials to sit on the Supreme Court, we are concerned about one flaw which we believe to be fatal. That flaw is the process by which he was selected and its impact on the courts, the law, and American society.

President Clinton made it clear that he would appoint to the Supreme Court only a supporter of *Roe* v. *Wade*[1]. A nominee for the Supreme Court must now pass a test—an abortion litmus test, a test which other presidents were wrongfully accused of applying. His position as a nominee implies that Judge Breyer has passed this test. Members of this Committee and other Senators warned several years ago that we should not require a judicial nominee to commit himself to a particular position on an issue that may come before him as a judge. As Abraham Lincoln said, "[W]e cannot ask a nominee how he would vote, and if he told us, we would despise him."

It should be obvious that an abortion litmus test is an insult to the integrity of the Highest Court in the land. But what is far more disturbing is the abortion doctrine that Judge Breyer will be expected to support. In 1973, the Supreme Court ruled in *Roe* v. *Wade* that a mother may end the life of the child in her womb for any reason, throughout all nine months of her pregnancy. And it did so with no constitutional basis. The Court's decision in *Roe* openly defied a social and legal tradition condemning abortion that dates back at least to the beginnings of the common law in England, almost eight hundred years ago.

Roe has been condemned as unprincipled both by Members of the Court and by constitutional scholars, including those who favor abortion as a matter of legislative policy. Unlike *Brown* v. *Board of Education*,[2] the once-controversial school desegregation case which is now universally accepted, *Roe* v. *Wade* has never been settled in our society. In fact, by overriding the democratic process, the Court created the very division it now claims to have healed.

Women would be better off without this abortion policy. *Roe* has done nothing to advance women's legal, social or economic rights. The real progress has come through Congress and state legislatures. They have passed dozens of laws mandating equal pay for equal work and banning sex discrimination in public and private employment, sale and rental of housing, education and other areas. Not one of these laws depends on *Roe* or on a right to abortion.

Even more troubling is the Court's current belief that abortion is necessary for women's equality. This is profoundly anti-woman. The Court seemed to suggest two years ago in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*[3] that we women can be made "equal" to men only if we are given the right to destroy our own children through abortion. But it is offensive and sexist to imply that we must

[1] 410 U.S. 113 (1973).
[2] 347 U.S. 483 (1954).
[3] 112 S. Ct. 2791 (1992).

deny what makes us unique as women (our ability to conceive and bear children) in order to be treated "equally" by men. True equality between the sexes will be reached on the day when we can affirm what makes us unique as women and still be treated fairly by the law and society.

As our feminist pioneers agreed, abortion goes against core values of womanhood: equality, care, nurturing, compassion, inclusion, and non-violence.

Roe was supposed to answer the causing concerns of a woman in a troubled pregnancy. But what has been the legacy of *Roe*? Has a generation of abortion on demand solved any of the problems for which it was offered? Has abortion reduced the rates of child abuse? Or absentee fathers? Or teen pregnancy? Or spousal abuse? Or has the violence of abortion, both to our unborn children and to ourselves, desensitized us to violence?

Has the availability of abortion reduced the numbers of women in poverty? Or has it actually aggravated the feminization of poverty? Has abortion enhanced respect for women? Or has it encouraged casual sexual relationships and male irresponsibility?

After more than twenty years of abortion on demand, abortion has flunked the test as the miracle cure for the social problems abortion advocates promised it would solve. The destruction and tragedy caused by more than thirty million abortions—nearly 30,000 every week, or half the population city of Chicago every year—performed at all stages of pregnancy, is a gaping national wound, a wound whose ugliness is covered up by polite tolerance and rhetoric about "a woman's right to choose" and "keeping government out of private choices."

The devastation of *Roe* is not limited to those millions of children who will never be born, or to the mothers and families who will never cuddle their babies and hear them laugh or comfort them when they cry. *Roe* has seeped into other areas of law, with an "abortion distortion" lens that clouds our laws and Constitution. We should pay attention to the warning signs.

Just two weeks ago, the Supreme Court sacrificed the First Amendment to so-called abortion rights. It upheld restrictions on peaceful, nonviolent, and otherwise lawful protests at abortion clinics that in all likelihood would have been struck down if anything other than abortion had been the subject of the protests.[4] What have we come to as a nation and society when abortion centers must be protected by speech-free "muzzle zones," when the truth about abortion must be relegated to the outfield of the public square?

And in May of this year, a Federal district court in the State of Washington made an unprecedented decision to strike down a 140-year-old law to protect assisted suicide.[5] The judge squarely based her opinion on *Roe's* step-child, *Planned Parenthood* v. *Casey*.

Unless this Committee is presented with convincing evidence to the contrary, we must assume that Judge Breyer has passed President Clinton's "abortion-litmus test." But the Senate is not obliged to rubber-stamp this nomination. In light of the unprincipled nature of the decision in *Roe* and the enormous damage to millions of men, women, and children, we must oppose a nominee who supports the abortion regime that the Supreme Court has imposed on the American people, against their wishes and profound beliefs. As a result, we must oppose the nomination of Stephen Breyer to become Associate Justice of the United States Supreme Court.

Thank you.

Senator METZENBAUM [presiding]. Thank you very much, Ms. Cunningham.

Mr. Farris, we are happy to hear from you, sir.

STATEMENT OF MICHAEL P. FARRIS

Mr. FARRIS. Thank you, Mr. Chairman and members of the committee.

My name is Michael Farris, and I am the president of the Home School Legal Defense Association and our affiliated group, the National Center for Home Education. We have over 40,000 members in all 50 States and every U.S. territory. We network with approximately 150 State and regional home school organizations, which in turn network with 3,000 to 4,000 local home school support groups.

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[4] *Madsen* v. *Women's Health Center, Inc.*, 62 U.S.L.W. 4686 (U.S. June 30, 1994).

[5] *Compassion in Dying* v. *State of Washington*, No. C94–119 (W.D. Wash. May 20, 1994).

There are approximately 400,000 families home schooling approximately 1 million children in this country. It is the fastest growing educational movement in our Nation.

By way of personal background, I am a constitutional litigator with an emphasis in free exercise litigation. I last testified before this committee as the cochairman of the drafting committee for the coalition supporting the Religious Freedom Restoration Act.

Home School Legal Defense Association opposes the nomination of Stephen Breyer to the Supreme Court of the United States, because his views on the subject of the free exercise of religion, especially within the context of education, are so far beyond the pale of acceptability, that we believe his presence on the Supreme Court would represent a clear and present danger to our freedoms.

Senator METZENBAUM. Mr. Farris, I don't want to interrupt you, but I would just like you to clarify. I am not quite clear what the home school concept is. Do you believe that all children should be educated in the home and not in the public school system? Is that the thrust of your organization?

Mr. FARRIS. No, Senator, it is not. The thrust is that we want to defend the right of parents who choose to do that to legally do so without unreasonable fetters. We want home schooling to be a legal alternative in this country. When we started the organization, only three States allowed home schooling as a matter of statutory right. Now it is legal in all 50 States, although there are undue restrictions placed by various school districts and various laws. It is a matter of legal freedom, not a matter of saying everyone should choose this method.

Senator METZENBAUM. And the parents can opt for that alternative to teach their children at home, and not send them to public school or private school?

Mr. FARRIS. We would oppose any coercion of any parent to choose any form of education, whether it is public, private or home. We simply think that this choice should be made available.

Senator METZENBAUM. Thank you for that clarification. Thank you.

Mr. FARRIS. You are welcome.

We base our opposition of Judge Breyer on his exhaustive—there is no question about Judge Breyer's scholarship. He is a very scholarly judge and writes very clear and articulate opinions, but that does not make them right.

His decision in *New Life Baptist Academy* v. *East Longmeadow School District,* decided in 1989, is the focus of our opposition. I wrote an amicus brief in that case submitted to Judge Breyer and his fellow panel members in that case. He did reverse an excellent opinion by the Federal district court. And later, when the private school was unable to continue the case with private counsel, our organization undertook their case at that point and I became lead counsel and personally wrote the cert petition to the U.S. Supreme Court, which was denied during the same period of time within a few weeks of their issuance of the decision of *Employment Division* v. *Smith,* which was overturned, in effect, by the Senate's passage of the Religious Freedom Restoration Act.

We believe and are greatly concerned with the fact that Judge Breyer's legal philosophy is in full accord with the majority opinion

in *Smith,* and we believe totally out of sync with the philosophy of this committee and Congress as a whole, which was endorsed by passing the Religious Freedom Restoration Act.

We bring to this committee's attention four brief specific problems of Judge Breyer's opinion in *New Life.* First, he endorses the notion that private schools can be regulated by subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local school officials. Many school districts in Massachusetts have adopted written policies which specify objective criteria which they will evaluate for an approval. But some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private school and make a wholly discretionary decision.

The Federal district court in this case held that the system of subjective discretion violated the free exercise and establishment clause rights of this private religious school. A system of unwritten, subjective, prior restraints I believe is simply unacceptable to a nation with a historical commitment to the freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The school had offered to voluntarily submit to achievement tests, and Breyer rejected this offer as untrustworthy.

I see that my time is up. The written testimony has been submitted and I ask you to read it. But if I could just summarize in this way:

Judge Breyer's views are in lock-step opinion and sympathy with the majority opinion in *Smith.* He gives very low opinion and value to the free exercise of religion. Although he claims to be enforcing the compelling State interest test, if you read his opinion closely, he really says all the State has to do is enact reasonable laws. Mere reasonableness is not enough to override the free exercise of religion. There must be a compelling governmental interest for the particular regulation at stake, and that particular regulation cannot have any less restrictive alternatives.

Judge Breyer substituted his own judgment for the judgment of that religious school as to what was acceptable to their religions views and what would burden their religion. And the substitution of a judge for his determination of someone else's religion is such a departure from an appropriate judicial methodology of evaluating religious freedom, we view it very dangerous. He gratuitously said that home schooling can be constitutionally banned entirely by a State. We think that was not a necessary decision and very dangerous to have someone on the Supreme Court who thinks that that form of education can be constitutionally banned outright.

[The prepared statement and a letter of Mr. Farris follow:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Mr. Chairman and members of the Judiciary Committee:

My name is Michael Farris. I am the president of the Home School Legal Defense Association (HSLDA) and our affiliated group, the National Center for Home Education. HSLDA has over 40,000 member families. We have members in all fifty states and every U.S. territory.

Through the National Center for Home Education we network with approximately 150 state and regional organizations, which in turn network with three to four thousand local home school support groups.

There are approximately 400,000 families home schooling approximately 1 million children in this country.

By way of personal background, I am a constitutional lawyer with an emphasis in free exercise litigation. I last testified before this Committee as the co-chairman of the drafting committee for the coalition supporting the Religious Freedom Restoration Act.

Home School Legal Defense Association opposes the nomination of Stephen Breyer to the Supreme Court of the United States because his views on the subject of the free exercise of religion—especially within the context of education—are so far beyond the pale of acceptability that his presence on the Supreme Court would represent a clear and present danger to our freedoms.

We base our assessment of Judge Breyer on his exhaustive, articulate, and, in our view, dangerous opinion in *New Life Baptist Academy* v. *East Longmeadow School District*, 885 F.2d 940 (1st Cir. 1989).

On behalf of the private school, I wrote an *amicus* brief which was submitted to Judge Breyer and his fellow panel members in that case. After Judge Breyer reversed an excellent opinion by the federal district court, the private school was unable to afford to have private counsel petition the Supreme Court for a Writ of Certiorari. Our organization undertook their case at that point, and I became lead counsel and personally wrote the *cert* petition to the Supreme Court.

The Supreme Court denied the petition during the same period of time it was deciding the discredited opinion in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). This Commission helped effectively overturn *Smith* by the passage of the Religious Freedom Restoration Act. We believe and are greatly concerned that Judge Breyer's legal philosophy is in full accord with the majority opinion in *Smith* and totally out of sync with the philosophy this Committee and Congress as a whole endorsed by passing the Religious Freedom Restoration Act.

We bring to this Committee's attention four specific problems with Judge Breyer's opinion in *New Life:*

First, Judge Breyer endorses the notion that private schools can be regulated by the subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local public school officials. Many school districts have adopted written policies which specify objective criteria by which they will evaluate a request for approval. Some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private (often religious) schools to make a wholly discretionary decision.

The federal district court held that this system of subjective discretion violated the free exercise rights of this private religious school. A system of unwritten, subjective, prior restraints is simply unacceptable to a nation with an historical commitment to freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The private school officials voluntarily offered to submit achievement test results to the public officials. Breyer viewed this offer as untrustworthy. He found it to insufficiently regulate the conduct of those who ran the school.

We have a hard time understanding why people can be trusted to choose their leaders by voting for school board members and United States Senators, yet are deemed unfit and untrustworthy to make unregulated choices regarding the education of their own children. Breyer's mistrust of parents and church officials while endorsing the use of government power over their First Amendment choices is an anathema to those who believe in the competence of Americans and those who love freedom.

It is impossible to reconcile Judge Breyer's distrust of the parents and church leaders in *New Life* and the following strong endorsement of the rights of parents by former Chief Justice Burger written in a majority opinion for the Court:

"That some parents 'may at times be acting against the interests of their children' * * * creates a basis for caution, but it is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest * * * The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."

Parham v. *J.R.*, 442 U.S. 584, 602–603 (1979).

Moreover, Judge Breyer views regarding the right of government officials to rule by their "mere discretion" directly violate longstanding precedents of the United

States Supreme Court. In *Hague* v. *CIO*, 307 U.S. 496 (1939), the Supreme Court ruled that it is unconstitutional to subject the exercise of a First Amendment freedom to the discretionary opinions of government officials. Judge Breyer's views represent a slap in the face to this line of Supreme Court precedent. Judge Breyer embraces government power too readily and spurns legitimate, longstanding protections of constitutional freedoms too easily.

Second, Judge Breyer's *New Life* opinion cites with approval three decisions which he says, "uphold [an] effective total ban on home schooling." Consider an analogy from *Employment Division* v. *Smith*. Justice Scalia's opinion in *Smith* was subjected to much criticism because it cited with approval *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940). *Gobitis*, of course, is the case where the Supreme Court said it was constitutional to expel Jehovah's Witnesses from the public schools for refusing to salute the flag. By citing *Gobitis*, Justice Scalia clearly indicated that his willingness to restrict religious freedom carried a long way indeed.

Judge Breyer's citation of these anti-home school cases raises a similar concern. We believe his opinion clearly indicates he would vote to uphold a state law which bans home education. Four hundred thousand families in this country deserve a better choice for the Supreme Court. It is simply unacceptable to American home schoolers to have a person on the Court of last resort for their freedoms who believes they have no constitutionally protected right to educate their children.

Judge Breyer is no moderate; but possesses the most extreme views concerning the rights of those who lovingly teach their children at home.

Third, Judge Breyer believes that *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), does not state a general principle of parental religious liberty. His *New Life* opinion clearly indicates that he sides with the school of thought that *Yoder* grants religious freedom only to Amish parents. This view raises two concerns.

The lesser concern is this: Should someone be elevated to the Supreme Court who so clearly misunderstands the very nature of a Supreme Court decision? The Supreme Court simply does not hear cases which do not involve general principles of law. If the *Yoder* decision was to be limited to its facts, it would have never been accepted for review by the high Court.

The greater concern arises from Breyer's aberrant views on religious freedom. Either religious freedom is protected for every faith in America or it is protected for none. The reason the Religious Freedom Restoration Act passed was that virtually every faith group endorsed it as stating a broad principle that every group is entitled to religious freedom in America.

We believe that a person is disqualified to serve on the Supreme Court if he has ever endorsed the notion that a particular constitutional protection applies to one faith group, but not to others. Breyer refused to apply *Yoder* to a Baptist church in Massachusetts. We believe that the Supreme Court should be reserved for those who believe that all parents of all faiths have the rights enunciated in *Yoder*.

Fourth, Judge Breyer endorses the duplicitous notion religious school offer "religious education" when one is talking about government funding, but, when the issue is government regulation, he then believes these same schools offer "secular education." We believe that schools which are too religious to receive direct funding under the Establishment Clause are too religious to be regulated by the government under the Free Exercise Clause. The Constitution should not be interpreted as a judicial Catch-22.

While these are our specific concerns relating to religious freedom and private education, we believe there are broader concerns which should trouble all Americans.

Judge Breyer has endorsed the idea that one fundamental freedom can be subjected to a prior restraint-styled approval process which depends solely on the discretion of local government officials. If the free exercise of religion can be subjected to such a system of discretionary prior restraints, there is no reason to believe that freedom of speech, freedom of press, and freedom of assembly would fare any better. Either Judge Breyer has a narrow view of all First Amendment freedoms or he has a special antipathy for religious freedom. Neither alternative is acceptable for a member of the United States Supreme Court.

This Committee was very recently involved in helping to reinstitute a broad basis of religious freedom for all Americans of all faiths. The Supreme Court's decision in *Smith* represented a dramatic departure from established precedent and, more importantly, from our longstanding national commitment to religious liberty. No scholar could read Judge Breyer's opinion in *New Life* and have any doubt that he would have been part of the majority in the *Smith* case.

This Committee is on record endorsing a broad view of religious freedom by its passage of the Religious Freedom Restoration Act. It would be totally inconsistent to turn immediately around and place a nominee on the same Court who personifies

the philosophy of big government and little freedom that this Committee has just rejected.

We need Justices who trust Americans much and government little. We need Justices who readily embrace freedom and rarely embrace government power. Judge Breyer embraces government power too readily and freedom—especially religious freedom—far too rarely.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION,
Paeonian Springs, VA, July 22, 1994.

Hon. JOSEPH BIDEN,
221 S.R.O.B, Washington, DC.

DEAR SENATOR BIDEN: Thank you for the opportunity to provide you with more information regarding my concerns about Judge Breyer. You will recall that I questioned Judge Breyer's failure to follow the fact stipulation approved by the lower court that all the instruction in this school was religious in nature. All subjects are taught from a Christian perspective.

You asked me for more information on how math and other subjects can be taught from a religious perspective and for information on the history of constitutional litigation relative to textbooks. I am happy to supply you with the additional information you requested.

1. Federal cases repeatedly state that academic textbooks can be too religious for Establishment Clause purposes.

The Establishment Clause has consistently been interpreted to prohibit the use of tax money for textbooks or instruction in religious schools, even where the texts or instruction were in secular subjects like math. See, e.g., *Flast* v. *Cohen,* 392 U.S. 83 (1968) (taxpayers had standing to sue to stop the teaching of reading and arithmetic in religious schools); *Rhode Island Fed. of Teachers* v. *Norberg,* 479 F.Supp. 1364 (R.I. 1079) (tax deductions for secular textbooks by parochial school families violates the Establishment Clause because the government would have to inspect the books to eliminate those with religious content and supervise the schools to make sure that the books were not used in the course of religious instruction), *Public Funds for Public Schools* v. *Marburger,* 358 F.Supp. 29 (N.J. 1973) (reimbursing parents for cost of "secular, nonideological textbooks" violates the Establishment Clause because the government would have to inspect the books to verify that there was no religious content and monitor instruction to ensure that they were not used for religious purposes).

2. Christian teaching of secular subjects (including math) can be quite religious. Consider this Christian Teacher's Manual:

"The Christian approach to teaching arithmetic begins with knowing and teaching the students that the universe has structure and order because it was created by a rational, orderly God. In arithmetic the students study one aspect of the order of the real world and indirectly begin to know more about the God Who has given them the world they live in. In the arithmetic processes the students are not creating truth but learning truth; they are, in a sense, thinking God's thoughts after Him. The students will find exactness, preciseness, and completeness in the subject matter of mathematics, just as would be expected in God's world."

A Beka Mathematics 5 Teacher's Guide, Introduction [attached as Appendix A]. Or consider this, from the Spring, 1968 issue of the The Christian Teacher:

"A Christian school that is content only with the teaching of manipulatory skills of arithmetic, algebra, and geometry blinds the student's perception to all but a fraction of the glory of God reflected in the unique mirror of mathematics."

Even the methods of teaching reflect a distinctively Christian emphasis, as shown in this Teacher's Guide:

"We are unabashed advocates of traditional arithmetic, partly because the students learn something that can be built upon, but also because it accords with out Christian viewpoints on education. Only from a Christian perspective can the basic rationale, the intrinsic reasonableness of traditional elementary arithmetic be seen and appreciated. Traditional arithmetic will not succeed unless it is taught with the conviction that something more than arbitrary processes derived from arbitrary principles is at issue. The elementary student does not need to "understand" 2+2=4 in order to learn it and use it; he will learn the abstract principles later. But the elementary student does need to see his multiplication tables as part of the truth and order that Good has built into reality. From the Christina perspective, 2+2=4 takes on cosmic significance, as does every fact of mathematics, however particular! Traditional elementary arithmetic is Christian elementary arithmetic."

A Beka Mathematics 5 Teacher's Guide, Introduction, *supra.*

3. Government officials have repeatedly attempted to interfere with religiously-motivated parental choices in academics.

In South San Francisco, lawyers threatened to sue a Christian home-schooling family which operated under the supervision of a local public school. The family had chosen religious texts for their public school "Independent Study Program." Because the family was not a member of HSLDA, we do not know whether they were able to continue using their religious books.

Government officials have also objected to the religiously-motivated teaching methodology outlined above. In Bourne, Massachusetts, for example, Assistant Superintendent Gail Roe examined the A Beka mathematics textbook chosen by a home schooling family. Dr. Roe objected to the traditional teaching methods used in the textbook, saying, "This operates at the very lowest level of learning!" (It is worth noting that the textbooks she criticized are among the most popular texts used in Christian home and private schools, and that these home and private schools routinely outscore public schools on standardized tests.)

Under the same Massachusetts law at issue in *New Life,* this home-schooling family could be prosecuted for criminal truancy unless they received approval in advance from the local school. Dr. Roe used the power of her position to threaten this family with prosecution unless they changed their educational choices. With the help of HSLDA, the family was able to continue to use the religious math textbooks which they had chosen.

On a grander scale, Congress is currently weighing legislation which would mandate the new secular approaches. The House version of the *Improving America's Schools Act,* says at H.R. 6 § 1001(c)(5):

"The disproven theory that children must first learn basic skills before engaging in more complex tasks continues to dominate strategies for classroom instruction, resulting in emphasis on repetitive drill and practice at the expense of content-rich instruction, accelerated curricula, and effective teaching to high standards."

This language, as originally written, would have put the federal government on record as being against the traditional methodology chosen by religious educators who believe in moral and mathematical absolutes. Only a massive outcry by private, religious, and home educators, kept this provision of H.R. 6 from being mandated for all schoolchildren in America.

Conclusion.—As you can see, the thrust of my comments were quite accurate although I did not have all the relevant information at my fingertips when you asked me the question. I appreciate the opportunity to supplement this information, and ask that it be placed in the record to demonstrate that I answered your public request.

Thank you so much for the courtesy to allow me to testify before your committee.

Very truly yours,

MICHAEL P. FARRIS, ESQ./CG,

Enclosures: Introduction to *A Beka Teachers' Manual for Mathematics 5.*

[APPENDIX A]

TO THE TEACHER: THE CHRISTIAN APPROACH TO TEACHING ARITHMETIC

The Christian approach to teaching arithmetic begins with knowing and teaching the students that the universe has structure and order because it was created by a rational, orderly God. In arithmetic the students study one aspect of the order of the real world and indirectly begin to now more about the God Who has given them the world they live in. In the arithmetic processes the students are not creating truth but learning truth; they are, in a sense, thinking God's thoughts after Him. The students will find exactness, preciseness, and completeness in the subject matter of mathematics, just as would be expected in God's world.

As the content of the arithmetic curriculum and the textbook has reason and order to it, so must the arithmetic class itself be taught according to an organized, reasonable plan. A daily class should include oral drill, the teaching of new material, practice of new material, and review of basic facts, All four areas need to be completed in 60 minutes or less time each day. The teacher must have classroom habits and procedures that will produce an orderly classroom conducive to good learning.

Elementary arithmetic, quite naturally, begins with the most elementary, basic mathematical processes of arithmetic. Students learn best when they proceed from the particular to the general, from the concrete to the abstract. Elementary arithmetic properly emphasizes the facts of addition, subtraction, multiplication, and division that accord with the child's stage of mental development and have immediate

practical application. A solid foundation is laid for high school arithmetic which appropriately (but still gradually) introduces the student to a higher level of abstraction. The student will learn more efficiently and be better at algebra and all higher mathematics if he masters arithmetic first.

We are unabashed advocates of traditional arithmetic, partly because the students learn something that can be built upon, but also because it accords with our Christian viewpoints on education. Only from a Christian perspective can the basic rationale, the intrinsic reasonableness of traditional elementary arithmetic be seen and appreciated. Traditional arithmetic will not succeed unless it is taught with the conviction that something more than arbitrary processes derived from arbitrary principles is at issue. The elementary student does need need to "understand" 2+2=4 in order to learn it and use it; he will learn the abstract principles later. But the elementary student does need to see his multiplication tables as part of the truth and order that God has built into reality. From the Christian perspective, 2+2=4 takes on cosmic significance, as does every fact of mathematics, however particular! Traditional elementary arithmetic is Christian elementary arithmetic.

The way we view a subject matter and the method we think we ought to use to teach it are always related. Traditional arithmetic goes with traditional teaching methods, and we believe that these teaching methods also accord with our Christian perspective. Elementary students are taught the arithmetic facts through oral and written drill, just as the Bible says, "For precept must be upon precept, upon precept; line upon line, line upon line; here a little, and there a little" (Isaiah 28:10). The elementary students learn the facts by hearing them over and over again. They need facts in order to think and build up their minds for more abstract mathematics in high school. The students will need generous amount of oral and written drill conducted by the teacher to have accuracy and speed in arithmetic.

A teacher who is faithful in teaching and drilling the facts if arithmetic in a reasonable, consistent way will be teaching much more than the particulars of arithmetic—such a teacher will be instilling within the students some of the most basic attitudes that are necessary for knowing and obeying God. C. T. Studd, missionary to Africa, understood this principle well and used it in his work with a people who had just risen from the depths of cannibalism. Norman Grubb described Studd's reasoning in his biography of the missionary (C. T. Studd, Fort Washington, Pennsylvania, Christian Literature Crusade, 1972, 1974):

"Every pole had to be exactly the right length, placed at the right angle, etc.; and he had a purpose in it, for the natives must be taught that good Christianity and lazy or bad workmanship are an utter contradiction. He believed that one of the best ways to teach a native that righteousness is the foundation of God's Throne was my making him see the absolute straightness and accuracy is the only law of success in material things."

Traditional arithmetic is Christian arithmetic, and it must be taught by traditional methods. A rightly taught arithmetic lesson is one more way that a Christian teacher can instill within students the principles of God's Word.

Arithmetic 5 is a traditional Christian arithmetic book. You can use this book with confidence in your Christian classroom, knowing that it accords with the orderliness and realities of God's world. Day-by-day curriculum to help you teach this book in the traditional way is available and necessary for the most effective instruction. A student speed drill and test booklet and flashcards and other teaching aids are also available from *A Beka Book* Publications.

Upon completion of the work in *Arithmetic 5,* students should have mastered the following terms, facts, and concepts:

1. Review of all addition, subtraction, multiplication, and division facts with their terminology
2. Place value of numbers through billions
3. Review of borrowing and carrying
4. Multiplication problems with up to four digits in the multiplier
5. Division problems with up to three digits in the divisor
6. Checking addition, multiplication, and division problems by casting out 9's
7. Review of story problems
8. Review of number averaging
9. Review of roman numerals
10. Rounding off whole numbers, decimals, and money
11. English and metric measures
12. Converting measures within the same system and solving measurement equations
13. Fraction terminology and solving problems containing fractions—adding and subtracting fractions and mixed numbers with a common denominator or having to find a common denominator—recognizing proper and improper fractions—changing

mixed numbers to improper fractions and changing improper fractions to mixed or whole numbers—subtracting fractions involving borrowing—writing a remainder as a fraction—multiplying fractions using cancellation—writing a fraction as a decimal—working division problems involving fractions

14. Factoring
15. Finding the least common multiple
16. Divisibility rules
17. Writing decimals as fractions—adding, subtracting, multiplying, and dividing decimals—comparing decimals—renaming decimals—recognizing terminating and repeating decimals—learning common fraction and decimal equivalents
18. Reading a thermometer
19. Converting from a Celsius scale to a Fahrenheit scale and from a Fahrenheit scale to a Celsius scale
20. Solving equations
21. Reading and drawing pictographs, bar graphs, and line graphs
22. Reading scale drawings
23. Recognizing and drawing geometric shapes and figures
24. Finding the perimeter of a rectangle and a square using the formulas
25. Finding the area of a rectangle and a square using the formulas

The CHAIRMAN [presiding]. Mr. Farris, do you make any distinction, for purposes of my understanding here, between home schooling and religious schooling?

Mr. FARRIS. Under Massachusetts law and the law of this country generally, home schooling is a form of private education. Religious education is a form of private education. Particularly, under Massachusetts law, there is no such thing as a home school per se. Home schools are just small private schools where parents teach their own kids at home.

What we mean by it in our organization is that we will defend families who want to choose to teach their children at home. We believe they have a right to do that constitutionally, and——

The CHAIRMAN. But your umbrella is broader than that, though, isn't it?

Mr. FARRIS. Our criticism of Judge Breyer's opinion——

The CHAIRMAN. I'm sorry, I am trying to understand the association.

Mr. FARRIS. The association exclusively defends families that choose to teach their children at home.

The CHAIRMAN. But it does not encompass parochial education, for example, or schools like I recently visited that are run by orthodox Jewish communities, you know, religious schools stated as a Catholic grade school, a Jewish grade school or whatever?

Mr. FARRIS. Our organization does not litigate on behalf of private institutional religious schools. As a lawyer, I have done so many times.

The CHAIRMAN. I just want to make sure I understood, because the case you are referring to—and correct me if I am wrong—was not about home schooling in terms of the organization that you represent. That doesn't mean you shouldn't comment on it. I just want to make sure I understand. I don't want people walking away misunderstanding what that case was about beyond the principle. Factually, that was a religious school, correct?

Mr. FARRIS. It was an institution——

The CHAIRMAN. As opposed to a mother and father deciding that they wished to educate their child at home.

Mr. FARRIS. That is correct.

The CHAIRMAN. You do not represent institutions like the one that was the focus of the court case in the Breyer case, correct?

Mr. FARRIS. Normally, we did not, but we did in that particular case represent that school at the Supreme Court level——

The CHAIRMAN. I see.

Mr. FARRIS [continuing]. Because the law in Massachusetts is identical, one and the same law for home schools and private schools. The devaluation of the right of private schools in Massachusetts was by its very nature the devaluation of the right of home schools to exist in Massachusetts, and so we undertook free of charge the representation of that school at the Supreme Court level.

The CHAIRMAN. Thank you very much.

Senator Hatch.

Senator HATCH. Let me just say this: I have appreciated the testimony of both of you, and I decry, as you do, Ms. Comstock Cunningham, the use of a litmus test, a single litmus test to determine whether a person should sit on the Supreme Court. I don't want it under Republican administration, and I don't think it is particularly fitting under this administration.

With regard to the school case that you mentioned, Mr. Farris, I have a lot of respect for you personally, as you know, both of you. Judge Breyer tried to apply the compelling interest test, but I understand your view that he didn't apply the least restrictive alternative test, even though the case was decided before the Religious Freedom Restoration Act was enacted into law. I have been very upset with the *Christian Schools* case, where a person who pays tithing, but goes into bankruptcy, justifies the court ordering the church to repay the tithing. I think it is a wrong case and that it ought to be decided otherwise, and I hope that it will be vociferously fought on appeal.

But as I listened to Judge Breyer, he seemed to have an open mind toward some of the concepts that you are talking about and did justify his decision in that case on the basis of standards. But be that as it may, your points are well taken. I am glad to have your testimony here today.

Mr. FARRIS. Thank you, Senator Hatch.

If I could briefly respond, perhaps this would have been a case, had Judge Breyer had some litigation experience, it might have helped. The fundamental error that he made was to disregard a stipulation entered by the parties, which was approved by the Federal district trial court. The stipulation was that all the education offered by this private religious school was religious in nature. They may teach math, they may teach history, they may teach literature, but they do so from the religious perspective of the school.

For the judge to ignore that trial stipulation and to substitute his view that this is simply secular education, we can regulate secular education however we want, was to ignore the importance of the trial stipulation and a factual finding by the trial court.

Senator HATCH. That is a good point, but I also think he came down on the side that there are certain educational standards that a State can set even for religious schools. I agree with you, that is a sticky point that has to be debated and argued.

Mr. FARRIS. Well, there is a wide variety of opinion about the permissive nature of that, but there is very little opinion that suggests that the standards imposed on private religious schools can be subjective in nature. And that is what Judge Breyer endorsed, is a wholly subjective standard.

Senator HATCH. I have a tendency to be on your side on that issue, but the fact is that I think we are all learning in this area. My point is that the Republican administration was accused of a litmus test on abortion, when in fact that was not the case. I happen to know, because I know who interviewed the judgeship nominees, and I know exactly the questions that were asked, and that wasn't one of them.

It is certainly quite clear today from the decisions of the Court that that wasn't one of the tests. But here we have an administration requiring these litmus tests, and I think your points are well taken. On the other hand, I don't think we should be imposing our own litmus test, albeit however strong we feel about it, because I don't think that a single issue should stop a person from serving on the Supreme Court, no matter how important they may be, if that person is otherwise qualified.

There may be some issues such as the person won't swear to uphold the Constitution. I think that is a single litmus test issue that would disqualify anybody from serving on the Supreme Court. You may feel deeply enough about your issues that they fit in that category, but we up here have to decide these matters on the basis of the overall record and what we know about the person.

I just want to tell you that I appreciate your testimony and are glad to have both of you here.

The CHAIRMAN. Running the risk of opening up a large area, I am probably the only one here that is the product of 13 years of religious education. How the devil do you teach math from a religious perspective?

Maybe that explains my difficulty with math. [Laughter.]

Senator HATCH. I do not think he should answer it. He just gave a good explanation.

The CHAIRMAN. No—seriously, how could you say such an apparently preposterous thing?

Mr. FARRIS. I was not trying to single out math, Senator Biden.

The CHAIRMAN. No; I am singling it out. You said the academic subjects are taught from a religious perspective. How does one teach mathematics—how does one teach calculus from a religious perspective?

Mr. FARRIS. You cannot teach the science of math from a religious perspective. But what is often done in math books—which would disqualify them, for example, from Federal funding—is that the examples used and the illustrations used within the math book are particularly religious examples, where they will give stories of the disciples and say three disciples were here——

The CHAIRMAN. Not so; I went through at least 8 years of education with those books. I think you are factually incorrect. If that is true, then you have gained an ally in me. But I think that is not true. I know of no such place where you can say in a book that there are 12 disciples, one of them turned on Jesus, and what percentage of the disciples turned on Jesus. I know no place that says,

hey, by the way, that is not—the school loses Federal funding for that.

Mr. FARRIS. Senator Biden, as a matter of litigation, there is no such case.

The CHAIRMAN. You got it.

Mr. FARRIS. But as a matter of practical interpretation of the way the laws are implemented, I am confident in my opinion that any Federal regulator looking at such a book would raise hackles. And I could tell you that attorneys—I think of one in south San Francisco, CA—threatened to sue a family for using such a textbook——

The CHAIRMAN. No; I am not talking about a family. I am talking about the case—the circumstances. I would ask you to supply for the record anything to sustain your point as it relates to teaching sciences from a religious perspective and the use of an example that has a religious grounding to compute and/or to multiply or divide. I mean, I remember the fishes and the loaves, and how did we get there, and that being used in my math book. I do not have any further questions.

Senator Grassley.

Senator GRASSLEY. Before I ask you three or four questions, would you clarify something for me. I think I understand home schooling, because I have some nephews and a niece that are home-schooled, and I am quite well-acquainted with it in Iowa. There are a lot of people in my State who do it. But we always talk of home schooling in concepts of first amendment rights, and that there is a religious reason for having home schooling. And I am not saying that there is anybody who does it for reasons other than for religious purposes. But can't the concept of home schooling involve people who want to teach their kids at home, regardless of any religious reason?

Mr. FARRIS. Yes, Senator, many do; a goodly percentage. Perhaps 20, 30 percent of the people who are home schooling are not doing so for any religious reason whatsoever.

Senator GRASSLEY. From that standpoint, I remember that every time that Judge Breyer responded to questions about home schooling, he always started out with a first amendment basis for his response.

You can leave the first amendment out of it entirely, can't you, and have a constitutional justification for home schooling?

Mr. FARRIS. Yes, you can. The 14th amendment due process clause, protecting the liberty interest of parents to direct the upbringing of their children, that has been recognized by the Supreme Court since the mid-1920's in the *Pierce* case, recognizes a wholly nonreligious basis for a constitutional right to home-school your children, which I believe that all parents possess.

Senator GRASSLEY. When you are in court on this subject, do you use a 1st amendment argument, or are you using the 14th amendment argument?

Mr. FARRIS. Depending on the facts of the particular family, we use——

Senator GRASSLEY. You could use both.

Mr. FARRIS [continuing]. We have used both, often; sometimes, we use simply the parents' rights, depending on the factual situation.

Senator GRASSLEY. But I believe, as I recall, that it was always approached by Judge Breyer from a first amendment perspective, and——

Mr. FARRIS. That is my reading of his testimony as well.

Senator GRASSLEY. Senator Simpson asked Judge Breyer about home schooling. Judge Breyer indicated that he had no bias against home schools, and the judge also testified that he thought the Constitution protected the rights of parents to inculcate religious values in their children. Additionally, Judge Breyer stated that religious schooling was constitutionally protected.

Do these statements provide you with some level of comfort about Judge Breyer?

Mr. FARRIS. A very minimal level of comfort, Senator. I am not so much concerned about his personal opinion and his lack of bias toward home schools. I am more concerned about this view of our constitutional rights. His opinion in the *New Life* case was thorough, it was articulate, it was exhaustive. In that case, he stated that States have the power, in his words, citing with approval the *Duro* case from North Carolina, that they have the right to totally effectively ban home schooling.

I dispute that proposition, and someone who cites such a case with approval embraces its view. He also cites with approval a sixth circuit rendering of *Wisconsin* v. *Yoder* that says that that decision does not state a general proposition, but only applies to the Amish. I do not believe that, first, any Supreme Court decision fails to state a general proposition. If you fundamentally misunderstand the nature of a Supreme Court decision to say that it does not state a general proposition, we are not dealing with the same theory of the Supreme Court.

Second, I do not think that *Wisconsin* v. *Yoder* is factually limited to the Amish. If religious freedom is not for every faith in this country, we have denied it for all faiths. And I reject the proposition that the Amish and only the Amish have the rights announced in that case before the Supreme Court. And this Baptist school in Massachusetts should have had the same rights that the Amish did in *Wisconsin* v. *Yoder*, but they were denied such a right. I think that that form of religious discrimination, elevating one faith for protection that no other faith can achieve, is simply unacceptable, and I would suggest that that is one of the litmus tests for a Supreme Court nominee that says that only one faith can have religious freedom in this country, or one aspect of religious freedom in this country. I think that that is a very, very serious issue.

Senator GRASSLEY. Totally unrelated to the subject that you come here to bring up, I assume that you have observed Judge Breyer in his general approach to the law, and I guess I want to tell you a feeling I have, that I believe that he has been fairly disciplined and restrained in his 15 years as a Federal appellate judge. I would not put him in the category of a judicial activist, as I view some people who have been on the Supreme Court during the sixties and seventies.

Would you generally agree with that statement?

Mr. FARRIS. Yes, Senator, I would. I would say he is a moderate in those terms.

Senator GRASSLEY. Judge Breyer told me in an answer to a question that there were, in his words, "vast areas" where Government could accommodate religion and even provide assistance on a neutral basis. And I do not think that approach means forced secularism that you and I might fear.

What was your reaction to these comments?

Mr. FARRIS. I tend to look at things in terms of actual cases, and Judge Breyer properly refrained from commenting on specific cases that might come before the Court. I think that Judge Breyer would probably accept something like *Witters* v. *Washington Department of Services for the Blind,* which I argued before the Supreme Court where the Supreme Court unanimously said you cannot discriminate against a person for establishment clause purposes on the basis that they want to receive a religious education; that as long as everybody is getting vocational rehabilitation for the blind, you cannot single out ministers and say they are disqualified for establishment clause reasons. I would view him as probably accepting that unanimous ruling of the Supreme Court.

Senator GRASSLEY. Judge Breyer also indicated that he believed that institutions such as families, churches, synagogues, have been restrained in recent decades, and he is open-minded about a number of prior Court decisions that you and I might think have weakened the family and the force of morality in our society. To me, this was somewhat a refreshing attitude. Do you have the same reaction that I have about his statements?

Mr. FARRIS. I find those hopeful on the establishment clause side of things. The free exercise is where I am much more troubled.

Senator GRASSLEY. I have no further questions, Mr. Chairman.

Senator METZENBAUM [presiding]. Thank you very much, Senator Grassley, and I compliment you for your astute line of questioning. I thought it was particularly relevant.

Ms. Cunningham and Mr. Farris, thanks, both of you, for your participation in this hearing, and you can be certain the committee will take into consideration your comments.

Thank you very much.

Mr. FARRIS. Thank you.

Ms. CUNNINGHAM. Thank you, Senator.

Senator METZENBAUM. Our next panel includes Jose Trias Monge, former Justice of the Supreme Court of Puerto Rico; Margaret Marshall, vice president and general counsel, Harvard University; Helen Corrothers, National Institute for Justice, and former U.S. Sentencing Commissioner, Washington.

I think you are all aware of our 5-minute rule; I guess somebody is keeping time on it. Judge Trias Monge, we will be happy to hear from you, sir.

I might say that I think I have about 8 minutes to get to the floor for a roll call, and I do not see anybody else sitting around here, so that if I interrupt your testimony so that I may leave and cast my vote, please understand it is not a reflection upon my interest in what you are saying, but it is just that I want to get my vote in.

Judge.

PANEL CONSISTING OF JOSE TRIAS MONGE, FORMER JUSTICE OF THE SUPREME COURT OF PUERTO RICO, SAN JUAN, PR; MARGARET H. MARSHALL, VICE PRESIDENT AND GENERAL COUNSEL, HARVARD UNIVERSITY, CAMBRIDGE, MA; AND HELEN G. CORROTHERS, VISITING FELLOW, NATIONAL INSTITUTE FOR JUSTICE, AND FORMER COMMISSIONER, U.S. SENTENCING COMMISSION, WASHINGTON, DC

STATEMENT OF JOSE TRIAS MONGE

Mr. TRIAS MONGE. Thank you, Senator.

My name is Jose Trias Monge. I served as chief justice of Puerto Rico from 1974 to 1985. As part of my duties and pleasure, I have been a close student for many years of the Supreme Court of the United States, and given its special relationship to Puerto Rico, of the U.S. Court of Appeals for the First Circuit. Their decisions on insular affairs since the start of the century have been discussed at length in several of my books. In a 1991 book, I singled out for special praise several of Judge Breyer's opinions on the subject.

Puerto Rico is a mixed law jurisdiction. Large areas of its legal system are governed by the civil tradition and others by common law. During the early part of this century, the boundary——

Senator METZENBAUM. Judge, I think it would serve your purposes better if I interrupted you before you got into the main thrust of your remarks. I am informed I have 5 minutes to get to the floor.

This committee stands in recess until some other member of the committee returns, so that we may proceed forward. Please forgive us.

[Recess.]

The CHAIRMAN. The hearing will come to order.

I must apologize to our witnesses. We are debating one of the most controversial issues of that every year comes up, and that is the foreign aid appropriations bill, which lends itself—it is very important, but occasionally lends itself to some demagoguery on occasion and occasionally lends itself to very difficult votes on occasion. But there is a whole series of votes, and this is going to continue.

I failed to announce to the press and everyone here that we are, as is obvious by now, going right through the lunch hour, and our fourth panel, which has been brought up but not introduced at this point, includes several of Judge Breyer's colleagues who know him in his various capacities as Chief Judge for the First Circuit, a professor at Harvard Law School, and his work on the Sentencing Commission in the late 1980's.

In addition, we are fortunate to have on this panel a former colleague of the Chief Judge in the First Circuit, Judge Trias, and Judge, it is a pleasure to have you here. I appreciate you making the effort.

Justice Trias is a former chief justice of the Supreme Court of Puerto Rico, which is located in Judge Breyer's circuit, and currently serves as counsel to Trias—that is all I have here, but that is not the whole name of the firm—what is the name of the firm?

Mr. TRIAS MONGE. Trias & Melendez.