NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 12, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:09 a.m., in room 216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order.

Judge and Mrs. Breyer, welcome. We are delighted to have you here. The first issue, when we get to questions, will be resolving what State you are really from. But you are, indeed, privileged this morning to have four of our distinguished colleagues anxious to be associated with your nomination, and one in particular maybe is considerably responsible for your nomination.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

In each of the confirmation hearings that I have had the privilege to chair, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which our Nation defines and redefines itself over time, and the means by which Government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us and most of the legal community thought had already been well settled. In the late 1980's, for example, the Nation watched to see whether the Supreme Court would limit the set of personal rights that the Court had previously deemed off limits to the Government and Government intrusion, especially the right of the individual to make certain highly intimate decisions free from Court interference, or, as Justice Brandeis had put it, the "right to be let alone."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named—the so-called unenumerated rights—in the Constitution. My blatantly stated fear at that time was, if you will, a constitutional fear.

More recently, we have seen new challenges mounted by the most powerful economic interests in America by those who want to reduce the ability of Government to protect the rights and interests of the majority of Americans.

Thus, in the hearings on Justice Clarence Thomas—and most people forget that there really were two hearings. We had had a hearing, and it had ended, on the substance before we had the second, much more celebrated hearing. But in the hearing on Justice Thomas's nomination, I was concerned at the same time the Court would limit individual freedoms, it would tell Government that it must pay a factory owner before it can keep him from dumping chemical waste in a river running through his property and then onto some adjacent farmland downstream.

At the time, many people asked why I was concerned about this arcane thing referred to as the takings clause, the takings clause of the fifth amendment. As a matter of fact, many of the press writing today wrote interesting articles about how boring the discussion was and why were we taking any interest in it, except for the Wall Street Journal, which worried me that they got it right.

That is supposed to be a joke. You are supposed to laugh a little bit.

There may be fewer questions now as to why I raised the issue of the takings clause then, since in recent cases the Supreme Court has used the takings clause to make it harder for Government to regulate polluters or developers or other economic interests and activities in the name of public welfare. In raising the level of protection afforded the rights of owners of businesses and beach-front vacation properties, the Court used language equating these property rights with personal rights, such as the first amendment guarantee of freedom of speech.

So our recent confirmation hearings have focused primarily on how the Court's direct interpretation of the Constitution shapes our life. But the focus has now changed again in academia and among legal scholars, and we are soon going to see a whole new set of questions arise in the Supreme Court that I think have far-reaching consequences based on how they will be resolved for the public at large.

The focus has now changed, and it must be remembered, it seems to me, that the Court has, in fact, two major responsibilities. The first responsibility is to interpret the Constitution, and the second is to interpret statutes passed by the Congress and signed by the President.

While the first job is more familiar to most Americans, it is not in any way more significant. Indeed, what has become quite clear over the last decade is that it is increasingly through statutory interpretation that the Court is shaping the nature and scope of basic rights of all Americans.

For example, one of the rights secured by the Constitution is the 14th amendment guarantee of equal protection of the laws. The Constitution empowers the Congress to enforce that guarantee of

equality through legislation. And, today, women, Americans with disabilities, older Americans, and others enjoy equal opportunity to work and to conduct their daily lives that are protected not by the Constitution but by statute.

In recent years, the Court has tended toward a grudging interpretation of statutes passed by the Congress, signed by the President, and supported by the American people to ensure this greater equality.

Through various interpretive rules or, as we lawyers say, canons of interpretation, the Court has raised the bar on Government by adopting unduly restrictive, in my view, rules for interpreting statutes or changing those statutory rules of interpretation midstream and frustrating Congress' intent to ensure equality to women, the disabled, and others. A classic case which I will discuss with you later, Judge, is the *Patterson* case where the Court ruled that legislation passed after the Civil War guaranteed that an employer could not deny a person employment because they were black, but concluded that if they were fired because they were black, the legislation did not cover them for other reasons.

The effect on that woman was the same. She was discriminated against because a grudging interpretation of a statute was made, not because of the failure to find a constitutional right in the Constitution.

I will discuss those cases at length with you, Judge, but I now have a second concern and a related one, equally significant in my view; that is, what values the Court will incorporate into its calculus of interpreting statutes.

In recent years, an influential group of scholars and judges, known as the Law and Economics Movement, has proposed that legal problems should be resolved from a purely economic perspective.

Some proponents of this movement are relentless in their application of this reasoning, analyzing every feature of our lives, including marriage and sex, by reference to transactions costs, search costs, and missed opportunities. Some have even said that we can explain rape by talking about the cost to the rapist of finding a sexual partner. This is a serious, serious undertaking on the part of some very, very bright individuals.

Presently, of course, we quite consciously prefer other values, including social and moral norms, when we make policy and resolve legal disputes. We choose to take into account the social values and norms whether or not they make good, purely economic sense. We do that every single day. We make those judgments on health care. It does not make purely economic sense to spend a disproportionate amount of our booty, our money, our taxes, on saving the lives of people over the age of 80. But, as a matter of value, we value—not from an economic standpoint—we, the American people, through their Congress and their President, value the lives of the elderly and conclude even though it does not make economic sense, we have decided to do it. We choose to take into account social values and norms—again, whether or not they make good, purely economic sense.

Throughout your career, Judge, you have advocated the use of economic analysis in prescribing solutions for many legal and policy

problems. As I read what you have written—and I think I have read most of what you have written—your view is very distinguishable from the school of law and economics. But I will want to know how you will use the economic model that you propose in judicial decisionmaking.

Judge Breyer, you have served ably as a judge and chief judge on the First Circuit Court of Appeals for 14 years. As a professor of law at Harvard and, to some of us here, more importantly, as counsel to this committee, you are an established expert in regulation and its reform, in administrative law and processes, and in the intersection of science and law.

I began by describing how the confirmation hearings of the past 8 years have engaged us in the constitutional debates of those times. The reason that occurred, in part, was because the nominees before us were active and influential participants in those debates.

So it is again today, Judge. You have written and spoken at length about the methods of statutory interpretation, and about the role of economic analysis in resolving legal disputes. Thus, many of the very issues that are now boiling today in the cauldrons of debate among legal scholars and judges are those in which you are considered the foremost expert.

So we welcome you here today, Judge, not merely to measure your competence to sit on the Court, but to engage us in a discussion of those important matters.

I would ask unanimous consent that the entirety of my statement be entered in the record at this moment.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF CHAIRMAN BIDEN

Today, the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

The Constitution vests authority in the United States Senate to give "advice and consent" to the appointment of women and men nominated by the President to serve as justices on the Supreme Court. "Advice and consent" has come to serve two purposes: the first is for the Senate to learn more about the qualities of a President's nominee and to determine whether to vote for confirmation; the second—a unique function that has developed more fully over the last decade—is to provide the only opportunity the Senate and the American people will have to discuss the great legal issues of the day with the nominee, to get some indication of how he or she views these issues.

In each of the confirmation hearings I have chaired, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which a nation defines and re-defines itself over time—and the means by which government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us thought had already been well settled. In the late 1980's, for example, the nation watched to see whether the Supreme Court would limit the set of personal rights that the Court has previously deemed off-limits to government intrusion—especially the right of the individual to make certain highly intimate decisions free from government interference—the "right to be let alone"—which Justice Brandeis characterized as "the most comprehensive of rights and the right most valued by civilized man."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named in the Constitution. My fear at that time was, if you will, a "constitutional" fear: I was concerned that the Supreme Court might, in the name of constitutional interpretation, constrict our right to make these highly personal decisions without interference from the government.

More recently, in the early 1990's, we have seen new challenges mounted by the most powerful economic interests in America to reduce the ability of government to