

I was pleased to coauthor the law which created the Sentencing Commission, along with Senators Kennedy, Biden, Hatch, and others. Judge Breyer is the type of individual who we envision would serve on the Commission to make our goal of effective sentencing reform a successful reality. In this regard, Judge Wilkins and others have told me of the invaluable contributions Judge Breyer made in assisting with drafting the initial guidelines and in helping to explain them to others, particularly to Federal judges who must interpret and apply them.

Sentences now imposed under the guidelines are fairer, more uniform, and certain. They are also tougher in the areas of violent crime, major white-collar crime, and major drug offenses—areas where past sentencing practices often were too lenient.

Mr. Chairman, Judge Breyer has come a long way from the summer in 1958 he spent as a ditch digger for the Pacific Gas & Electric Co. I recall his capable work on the Senate Judiciary Committee and as a Federal judge on the U.S. Court of Appeals for the First Circuit. While I may not agree with Judge Breyer on every issue, I have found him to be a man of keen intellect, and he appears to possess the necessary qualifications to serve as an Associate Justice of the U.S. Supreme Court.

Mr. Chairman, this concludes my opening remarks, and I will use the remainder of my time during this round for questioning Judge Breyer.

The CHAIRMAN. Senator, if you will yield for a moment, I would like the record to show, to emphasize what you stated at the outset. I will put it another way: One out of every four Justices who ever served on the Supreme Court in the history of the United States, you oversaw the hearing. One out of four. That is astounding.

What are you going to do the next 25 years?

Senator THURMOND. I expect to have a part in a good many more in the future. [Laughter.]

The CHAIRMAN. Good. All right. I thank you for yielding. One out of four. That is incredible. Twenty-six percent of all the Justices, you have voted on.

Senator THURMOND. Judge Breyer, I have some questions. If there are any that you feel it would be improper to answer, well, you say so. Otherwise, I will propound the questions.

The role of the judicial branch of Government is to interpret the law. Unfortunately, there are times when some judges go beyond that authority and legislate from the bench rather than interpreting the law before the Court.

Where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking?

Additionally, if confirmed, what approach could you use in resolving whether or not a decision was the type that should be made by a judge or an elected legislative body?

Judge BREYER. Thank you. I think that is a good question. I think that is an important question, and the short answer to the question is: Of course, a judge should not legislate from the bench. The difficult part of the question is how you know. How do you know when there are broad, open areas of law? And I think you

ask yourself two things. Particularly if it's a statute, you ask yourself who did Congress give the power to, to fill in the blanks?

One strong possibility is they gave it to someone else like the executive branch or they kept it for themselves.

Another question you ask is: Can I, in fact, justify this interpretation of the statute through its language and through its history? And if the answer to that question is no, then there is a danger signal that you are legislating, which you should not do.

Senator THURMOND. Judge Breyer, in *McCleskey v. Kemp*, the U.S. Supreme Court held that a capital defendant who contested his death sentence on the basis of racial discrimination is required to prove that the decisionmakers in his own case acted with discriminatory purposes. The Court rejected the use of statistics from unrelated cases to establish racial discrimination in the imposition of the death penalty.

Recently, the House of Representatives adopted a provision in its crime bill which would overturn the *McCleskey* decision and allow a capital defendant to challenge and avoid his death sentence based on statistics from unrelated cases.

Do you believe that statistics on race from unrelated cases should be used and, further, are reliable indicators to determine the appropriateness of the death penalty?

Judge BREYER. I would say, Senator, that there are statistics and statistics. Obviously, statistics must be reliable. Obviously, it is easy to use statistics that are not reliable to prove almost anything. I do not think there is an absolute rule that bars the use of statistics, where they are reliable, in proving a legal point.

In respect to the particular law that you are discussing, which is now legislation pending before Congress, I think that, of course, is Congress' decision, and as Congress decides it, so should the courts enforce it.

Senator THURMOND. Judge Breyer, if confirmed, you will succeed Justice Blackmun, who recently stated his belief that capital punishment is inherently flawed under the Constitution. While I disagree with his pronouncement, I want to know if you find his position reasonable in light of Supreme Court decisions in this area and your own personal reflections on whether capital punishment is constitutional under appropriate circumstances?

Judge BREYER. Senator, if a judge has strong personal views on a matter as important as the death penalty, views that he believes might affect his decision in such a case, he should, perhaps, if they are very strong—and this happens sometimes. In lower courts I have seen it happen where you feel you have a personal view that does not necessarily reflect the law, and you might take yourself out of the case. I have no such personal view in respect to the death penalty. So I would sit on such a case.

In respect to the constitutionality of the death penalty, it seems to me that the Supreme Court has considered that matter for quite a long time, in a large number of cases. And, indeed, if you look at those cases, you will see that the fact that there are some circumstances in which the death penalty is consistent with the cruel and unusual punishment clause of the Constitution is, in my opinion, settled law. At this point it is settled.

Senator THURMOND. Judge Breyer, it is likely that Justice Blackmun is most widely known to the public as the author of *Roe v. Wade*. What was your impression of his majority opinion in that landmark decision? In particular, give us your thoughts on where he draws the line at different points during pregnancy as it relates to the State's interest in the regulation of abortion-related services?

For instance, do you agree that the first trimester of pregnancy is distinctive and that the State should not be able to prohibit abortion during that period?

Judge BREYER. You are asking questions, Senator, that I know are matters of enormous controversy. The case of *Roe v. Wade* has been the law—

Senator THURMOND. Speak a little bit louder.

Judge BREYER. Yes; the case of *Roe v. Wade* has been the law for 21 years or more, and it was recently affirmed by the Supreme Court of the United States in the case of *Casey*. That is the law. The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.

Senator THURMOND. Judge Breyer, article I of the Constitution gives specific legislative powers to the Congress. One particular power granted to the Congress is the power to tax. Members of Congress are elected by the people and are accountable through the ballot box for their support or opposition on tax matters.

Do you believe that Federal judges who serve for life and are unaccountable to the American electorate should have the power to order tax increases or new taxes as a part of a judicial remedy?

Judge BREYER. Again, Senator, I think there it is not possible to be categorical. I think much depends upon the circumstance. I know that the Supreme Court has held that there are circumstances in which such tax orders are permissible, and, therefore, I start with the assumption that that is the holding of the Court. And since the Court has held that, there could be such circumstances. Exactly what they are, I cannot tell you at this moment.

Senator THURMOND. Then Congress, of course, would have to change it if we think it is improper.

Judge BREYER. Yes, that is correct. That is correct.

Senator THURMOND. And that is what I hope we can do.

Judge Breyer, as an original judge-member of the U.S. Sentencing Commission, you were closely involved in drafting the sentencing guidelines. Congressionally enacted mandatory minimum sentences are now applied through the sentencing guidelines.

In November 1992, while chief judge of the first circuit, you prepared a memorandum for Phil Heymann, who recently served as President Clinton's Deputy Attorney General. In that memo, you outlined major criticisms of the guidelines which you believed were valid.

The criticisms in your memorandum are as follows: First, mandatory minimum sentences in statutes distort the guidelines. Second, the guidelines insufficiently encourage departures. Third, the guidelines are too complicated. Fourth, the guidelines are not re-

sponding sufficiently to empirical research. Fifth, the guidelines pay inadequate attention to intermediate punishments.

Judge Breyer, what prompted you to prepare that memorandum, and do you consider it an accurate reflection of your current views on the guidelines?

Judge BREYER. Senator, basically that memorandum was a summary of a speech that I gave to a group of judges in Williamsburg, VA, and the memorandum was attached to the whole speech, but I thought a summary might be appropriate.

I think the actual wording of it was a little more tactful, possibly, than it was listing criticisms and was saying to some extent they are justified, to some extent they are not justified.

I think those are a list of the criticisms that have been made of the guidelines. I think to some extent they are justified. I think there is room for improvement. They are not fatal to the guideline effort, and I think Judge Wilkins would agree, frankly. I think Judge Wilkins has always been on the side, as of I—we have always seen eye to eye on this, and basically we think that we would like it, as former Sentencing Commissioners, if Congress really would delegate to the Commission the authority to create the sentence. Then if the Commission does not do a good job, then Congress would change it.

But Judge Wilkins and I, I believe, have always thought we would like to see that authority delegated to the Commission.

Senator THURMOND. I believe you also suggested here somewhere, too, that moderate judges be appointed to the Commission. Is that correct?

Judge BREYER. Yes; it seems to me that in order to build the— the Commission was given an awfully difficult job, and one of the difficulties is, of course, you are operating in a world where the judges are used to deciding all these things on their own. And it is not surprising that some are suspicious of a new entity. And to the extent that you could bring sort of moderate judges, not—you know, just judges with experience in sentencing and so forth, and you bring them on to the Commission. I think it helps win acceptability for the Commission within the world of the judiciary.

Senator THURMOND. Would you care to tell us what kind of person you consider a moderate judge?

Judge BREYER. I think a good person, Senator. I am in favor of moderate judges. I would not like to name names.

Senator THURMOND. Judge Breyer, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Judge BREYER. I basically think that the judge has to believe more and it has to be true that there is more. The judge cannot act unless there is more than a simple belief that there is a social problem. Rather, it must be the case that there is a statute or the Constitution itself that creates a law that perhaps another branch of Government would be better off implementing the sub-laws or statutes or regulation. But basically the judge's decision must be tied back to a law, just as the greatest law which has led to the greatest change is the 14th amendment to the Constitution. And judges who implemented that great law, which promised fairness

to all Americans, were not following their own point of view. They were, rather, carrying out the basic promise of fairness that was written into the Constitution. And it is that grounding of law that I think made those decisions lawful, justified, and effective.

Senator THURMOND. Judge Breyer, I was pleased to learn of your concerns with excessive regulation. There has been criticism that, too often, regulatory bodies go beyond the issuance of regulations pursuant to a congressional delegation and actually begin legislating.

What steps, if any, do you believe that Congress and the courts each should take to curtail improper or excessive regulations?

Judge BREYER. The primary audience to which I have addressed what I have written on this subject is the Congress, the regulators, the environmentalists, the health groups, the industry—those who are affected and who have a direct stake in the regulation. And basically there I have said this is what the situation seems to be. If you agree, fine. And then it is up to you to implement that, primarily through rules and regulations and statutes, not judicial decisions. And they either will or will not agree.

Senator THURMOND. Judge Breyer, the free exercise clause of the first amendment guarantees that Congress shall make no law prohibiting the free exercise of religion. In effect, this secures to each American the ability to exercise his or her religion free of encroachment by the Government. Proponents of in-home education often do not use the State schools because of their desire to include religious instruction in their children's curriculum.

Would you discuss your views on an American's right to educate his or her children in the home as it relates to the Government's interest in regulation in-home education?

Judge BREYER. I think, Senator, that that right is an important right that, I think it is widely recognized, stems from the first amendment to the Constitution, which is designed to protect what is so very important to every American and every American's family: the right to practice your own religion, the right to pass on your religious beliefs to your children. That is there, and it is protected in the expression of free religion.

The Government, of course, has some interest to see that education is actually taking place. There is always a Government interest in making certain that there is some kind of education really going on. To balance those two things is difficult and requires fine judgments in particular cases.

When I wrote my case on the subject, the law itself, which since at the constitutional level changed, required that balancing. You in Congress have written a statute that goes back to that balancing approach. I can go no further because I think that that statute is likely to be the subject of litigation.

Senator THURMOND. Judge Breyer, under the 10th amendment to the Constitution, powers not delegated to the Federal Government are reserved to the States and the people. I have been deeply concerned that this amendment has undergone significant erosion as the Federal Government continues its expansion into every facet of people's lives.

Do you believe that the 10th amendment is an effective limitation on the expansion of the Federal Government?

Judge BREYER. I think there are two separate questions there, Senator. The simple answer is yes, but there are two parts to the answer.

To what extent does the Constitution itself and the 10th amendment prevent Congress from acting? And I think there most people would believe there is some kind of a core in respect to State activity, particularly at the governmental level, protecting, say, the State government from others saying whether it should have one house in a legislature or two houses in a legislature.

The way in which the State sets up its own governmental institutions, whether that is protected by the 10th amendment or the republican form of government clause or something else is a matter of debate. But I think it is widely accepted there is some range of constitutional protection.

Beyond that, although the Supreme Court in the *League of Cities* case began to expand the area of constitutional protection to include wages and hours of municipal employees, that sort of thing, it then retracted that view in *Garcia*. And where we stand today is, yes, there is protection, but it seems that most of the degree of protection is up to Congress. After all, Congress talks to the mayors, talks to the Governors, develops programs of cooperation, decides what the role of the State or the city will be, and thus it becomes primarily a congressional decision to tailor programs that appropriately recognize the roles of the States.

Senator THURMOND. Related to this, unfunded Federal mandates are an overwhelming financial burden upon the States. What is your opinion of unfunded Federal mandates upon the States?

Judge BREYER. I smile a little, Senator, because it seems to me that that is an excellent example of your last question. Indeed, I know there are great difficulties, and I know you are more familiar with those difficulties than I by quite a long shot. And you are the person who is very sensitive to the problems of the towns and the States and the cities that may arise from those mandates. And I do believe that those problems are best translated—indeed, I think that is the state of constitutional law at the moment, as I understand it. I am hesitant because I am not an expert on this point. But basically that is transmitted through Congress, and Congress will give appropriate recognition to that kind of concern.

Senator THURMOND. As you may know, Judge Breyer, I am the ranking member of this committee's Antitrust, Monopolies, and Business Rights Subcommittee. As a judge who has written extensively on the antitrust laws, could you please summarize your views very briefly on the purposes and goals of the antitrust laws and their importance to the competitiveness of U.S. business, both here and abroad?

Judge BREYER. Senator, I was quite lucky about, I guess, 1½, 2 years ago now and was at this conference I spoke of earlier with 500 Russian judges, and they are very interested—there I would get into a lot of private conversations. And they are very interested not only in basic constitutional protections but also economic organization. The point that I would frequently make in those conversations is that if you are going to have a free enterprise economy, if you are not going to have the Government running everything, then you must have a strong and effective antitrust law.

If you are not going to regulate airlines, you must have a strong antitrust law for airlines. The reason is that antitrust law is the policeman. Antitrust law aims, through the competitive process, at bringing about low prices for consumers, better products, and more efficient methods of production.

Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others do not. The justification lies in the fact that that kind of economy is better for almost everyone, and it will not be better for almost everyone unless the gains of productivity are spread. And the gains of productivity are spread through competition. That brings about low prices, better products, and more efficient methods of production. And that is what I think antitrust law is about, and that is what I think that policeman of the free enterprise system has to do. It is called protect the consumer.

Senator THURMOND. Judge, I believe my time is about up. I would just ask you this: I believe you attended Oxford and graduated there?

Judge BREYER. Yes, sir, I did.

Senator THURMOND. And you found that compatible with the military?

Judge BREYER. Yes, sir, I did. [Laughter.]

The CHAIRMAN. I think your time is up, Senator. I was about to say you can have as much time as you would like.

Senator Metzbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Judge Breyer, nice to see you this afternoon.

Judge BREYER. Thank you.

Senator METZENBAUM. Let me start off by saying where I am. I expect you to be confirmed, and I expect to vote for your confirmation.

Judge BREYER. Thank you.

Senator METZENBAUM. You are clearly a man of integrity, exceptional legal skill, high intellectual ability. You have been widely praised for your political and academic credentials. You have had some very able spokespersons speak on your behalf today, four very distinguished and well-respected Members of the U.S. Senate.

There is not much question about the fact that you have exceptional legal credentials. I must say, however, that I am concerned about your position and your views on the fair competition laws which affect the day-to-day lives of all Americans. I am talking about the antitrust laws that Senator Thurmond just raised with you, the antitrust laws that are in place in order to keep prices low and products safe for consumers, to make the competitive market work.

Those same laws protect small businesses against abusive corporate giants and prevent price-gouging monopolies and cartels from harming consumers.

You have been outspoken with respect to the consumer protection laws known as antitrust, but your record suggests, unfortu-