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

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

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

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

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

Judge BREYER. Thank you very much.

The CHAIRMAN. Thank you, Senator.

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

Judge BREYER. That is very complimentary.

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

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

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

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

Senator COHEN. In other words, if there is no numerical figure that is either set in law or policy, then it really is not a quota, but an affirmative action program?

Judge BREYER. Then you are on the edge. I mean as I understand it—and I am not saying how you would measure a person's real effort—internally, internally, when a person makes an affirmative action effort, it means what it says. It means you really look, you really understand the situation. You understand that a lot of people haven't had the opportunities that other people have had. You think to yourself, why aren't there the persons of this race or whatever, why.

Remember why. Remember the history. And then taking all that into account, remembering the history, remembering the discrimination that may exist, remembering that some people have a lot less opportunity than others, then you go out and look and say I'm going to find these people who may not have thought of coming, and you really try very, very hard, and that is subjective. It might fail, but if it does fail, you better be able to tell yourself that you really looked very, very hard.

A lot of that is subjective, but that is the subjective difference that I think of in my own mind.

Senator COHEN. If you have a situation such as the congressionally established policy of affirmative action programs in the absence of a change in that policy, is there any merit to a contention on the part of an individual that he or she is equally qualified to be admitted to a medical school, a law school, a position, and is denied that opportunity based upon his or her race? Is there a constitutionally protected argument here that that is a denial of equal protection of the law?

Judge BREYER. What has happened I think, Senator, in the affirmative action cases legally in the Supreme Court is that the Supreme Court basically has recognized two things. The first thing that it has recognized is that there are injustices that need remedying, and those injustices stem from that long history, and the long history before the 14th amendment and the long history after the 14th amendment, where the injustice was perpetuated.

So they begin with the first point, which is we have to see a need rooted in that history of past discrimination. And the second point is, once the first point is there, once we see that need, then the program has to be carefully tailored. Why carefully tailored? Because it is quite clear that an affirmative action program seeking to remedy past injustice can in fact adversely affect other people who themselves did not discriminate. Of course, those people are upset and, therefore, you can absolutely understand that.

Now, looking into the way in which those two problems are to be balanced, it seems to me that the Supreme Court has looked at a number of individual factors and they have distinguished, for example, in terms of that other third person, between taking away from that person what he or she already have, like a job, or not giving to that person something he or she did not ever have, like a promotion. And while there is a problem in both cases, the second is a little bit less harmful than the first. And they have looked at how long the program will last, and they have looked at how tai-

lored it is to the problem, and they have looked at is it going to expire, is it coming along well.

It seems to me there are a number of factors they have looked at, as they have tried both to remedy and to balance, in order not to work too much harm to others.

Senator COHEN. The question I have is, if Congress were to change the policy itself, so that there is no longer an affirmative action policy, and yet either companies or institutions were to pursue such a policy on their own or its own, is there a constitutional argument to be made on the part of an individual who maintains that he or she has been discriminated against based upon either sex, gender, race, or some other factor?

Judge BREYER. If you go beyond——

Senator COHEN. In the absence of a congressional policy is what I am asking.

Judge BREYER. If you go beyond those cases you know where the Supreme Court has spelled out what is permissible in terms of these two sets of factors, and you were to pass a law doing something like a quota, is that what you are thinking of?

Senator COHEN. I am saying that you simply do not have an affirmative action program mandated by Congress.

Judge BREYER. You don't have one.

Senator COHEN. Assuming it is taken off the books.

Judge BREYER. Assuming it is taken off the books, then there are still cases like *Weber,* for example, where the Supreme Court will permit employers to adopt these programs to remedy past discrimination. There are cases like *Bakke,* where the Supreme Court has said, you know, that universities can do it. So there are circumstances, and indeed courts can as part of a remedy.

Senator COHEN. Is there ever a statute of limitations in terms of past injustices, or is that something the court makes a determination on as to whether the past injustices have been either rectified, if that can be the case, or that this no longer should be a policy to be pursued privately or by public institutions? Who determines when the past injustice has been remedied?

Judge BREYER. Well, if it is a court case, I suppose that there are now standards, which I am not totally familiar with, frankly, which the Supreme Court has tried to promulgate in a number of cases, saying, well, it is time and the problem is over in the school area, for example. I haven't looked at those, but if it arises in the court case, in the court circumstance, I suppose the court, when faced with a challenge, would look to see if this is still really necessary or not. Suppose it has been complied with. Suppose it has been met. I suppose that is a judgment that a court would make, but it has to be careful.

Senator COHEN. Is that policymaking?

Judge BREYER. It isn't, if it is following the legal standard. But one has to be careful.

Senator COHEN. I know you have talked quite a bit about legislative history. I just want to go back over it for a few moments. In your article on the uses of legislative history in interpreting statutes, you say that critics maintain that it is constitutionally improper to look beyond the statute's language or that searching for congressional intent is a semimystical exercise like hunting the

snark. Of course, Justice Scalia has been perhaps the biggest critic of legislative intent, and you have debated him on this subject and you are familiar with what his written statements are on the matter.

But he has called legislative history an omnipresent make-weight for decisions arrived at on other grounds, and referred to its use as "the Conan Doyle approach to statutory construction." In his view, the Court's task is not to enter the minds of the Members of Congress who need have nothing in mind in order for their votes to be lawful and effective. I might point out he often thinks that we have nothing in mind, without the qualifier about being lawful and effective, but, rather, to give fair and reasonable meaning to the text of the United States Code.

You point out that the problem is not with the use of legislative history, but its abuse—care must be taken. The question I have is that the Supreme Court recently, I believe, has ruled in cases where legislative history has been discounted. I must say that I have questions in my own mind as to what extent any court should take into account what we say and how we say it.

For example, the managers of a bill bring a measure to the floor. We debate it openly and toward the conclusion of that debate, after everyone has long since departed, the managers will insert colloquies which are not read to the other members, but are simply inserted in the record so that many members have virtually no idea what the colloquy is until long after the measure has been passed.

I took this into account, because on a certain piece of legislation I stood on the floor with some colleagues and I read the colloquies into the record, so at least to put everyone on notice that this is the interpretation that we were giving to this legislation.

But in the absence of an open declaration or reading of it, I would dare say that most members have little idea of the colloquies that are inserted in the record as a matter of course. So I think there is some merit to the question of challenging what Congress intended, when something is not as clear as it ought to be on the face of it, in the statutory language.

I would like to ask you your opinion. Would it make a difference—perhaps on a constitutional basis—but would it make a difference from your interpretive analysis as to whether or not this had been widely discussed in an open forum, or simply inserted in the record where members are not aware of it? Does it make a difference, or is it sufficient if I simply put a colloquy in the record?

Judge BREYER. The answer in my mind is, of course, it is different, but that is a difference that courts should take into account, and it doesn't make it useless.

Suppose, for example, you, after the Senators are all thinking about a bankruptcy law, it is easiest with a law that isn't too controversial, and you all get together and all the Senators who are working on this bill work out a set of words that is going to distinguish which kind of cases can be brought by consent before the bankruptcy judge and which cases there is a right to bring before the bankruptcy judge even without consent. That is awfully technical, and the words that describe that are pretty technical, too, and they can refer to another case in the Supreme Court which is filled with technicality.

Well, might or you might read that statute and read those technical words that everybody really agrees to as a matter of policy, because you have thought about it as a matter of policy. Yet, one might still scratch his head and be puzzled. And if you have decided to help by putting a statement in the record, even though it came after the debate was over, that is something a court might look to and lawyers might look to for enlightenment, because it might be apparent that there is no policy disagreement among you or your colleagues about what you are trying to do. But it is important to explain what you are trying to do.

That is why I say it depends. If there is a huge disagreement, beware of that later admitted statement. If it is simply a kind of explanation, it can help guide.

Senator COHEN. The only point I would make is that many times members are unaware of these declarations of intent, and for the court to rely upon those declarations of intent which are not shared by a majority of the members and, in fact, are unknown until after the bill is passed, I think would be a misreading of the legislative intent.

In that connection, you wrote an article in 1992 in Southern California Law Review on legislative history and interpreting statutes, and you point out if the history is vague or seriously conflicting, don't use it. That was your advice. I mention this, because about 9 years earlier you decided a case, *Wald* v. *Regan,* if you are familiar with that.

Judge BREYER. Yes.

Senator COHEN. You struck down a Treasury Department regulation—I will not go into the details of it—but, in any event, you relied upon legislative history in striking down that particular regulation, because it didn't comply with the International Emergency Economics Powers Act. The Supreme Court reversed you in a 5-to-4 decision. They looked to the legislative history and came to a completely different conclusion.

Judge BREYER. They did.

Senator COHEN. What is interesting about it is that the dissent pointed out that the majority was confused about the legislative history. So, I was wondering if the legislative history has been thrown out by both the majority and yourself under those circumstances?

Judge BREYER. I don't think so, actually. I understand that legislative history can point in different directions and I understand it can be complicated and confused, but I think it is worth trying. I think it is like you do your best, you do your best. You look at it, you try to draw information from it, you try to help understand the human purpose. People can still disagree about it and it isn't always done properly, but I think it is worth trying.

Senator COHEN. I would like to turn quickly to the subject of hate crimes. We have had in 1992 more than 7,000 hate crimes reported in this country, most of which were motivated by racial bias. In 1992, the Supreme Court struck down a Minneapolis law which imposed punishment for the display of inflammatory symbols. I think it was *RAV* v. *City of St. Paul.* Are you familiar with that case?

Judge BREYER. Yes.

Senator COHEN. The defendant had burned a cross inside the fenced yard of a black family, and the Court held that because the State had not criminalized all fighting words, the law isolated certain words based on their content or viewpoint and, therefore, violated the first amendment. I am not exactly clear how the Court came to that conclusion by burning a cross inside of a black family's fenced-in yard amounts to protected expression.

Nonetheless, in 1993, the Court then had another case, *Wisconsin* v. *Mitchell,* in which it upheld the constitutionality of a Wisconsin statute that enhanced the maximum penalty for crimes that were committed by those who intentionally selected the victim because of that victim's race, religion, color, disability, sexual orientation, national origin, or ancestry.

I was wondering, from your perspective, because of your work on the Sentencing Commission, do you see any difficulties in the lack of any universally accepted definition of a hate crime or problems in trying to determine an offender's motivation?

Judge BREYER. What I have said on this publicly really are two things. One is in response to your question directly. Of course, it is difficult in instances, but there are instances where it isn't difficult. And like many matters of law in tough areas, you can say, all right, I understand that there are difficult borderline calls, but that doesn't mean stay away from the main thing which isn't so difficult. So there will be some that are difficult and some that are not. The not is not. In other words, there are many cases where it isn't too hard to figure out.

The other thing which you point out is, of course, from a first amendment point of view, it is easier, if you are enhancing the penalty of conduct, it is already illegal, than if you do get right into an area where there isn't such conduct and only expression. That thought doesn't decide cases, but, nonetheless, the actual decisions I am sure will come up again and again. I know that *RAV* is a very controversial case.

Senator COHEN. Yesterday, you talked about the Boston courthouse. Let me come back to it for a moment. I see that Senator Kennedy is not here, but I am sure that he is aware of the controversy and has touched upon it himself. You have mentioned that, in looking through your architecture books and perhaps through your own empirical research, you came across one town, I can't recall what it was now, that had the century or two-century old structure which really became the town meeting place. I assume from that that you were implying that you wanted this new courthouse to also have that kind of attraction to the community.

Judge BREYER. Yes.

Senator COHEN. It struck me that Boston doesn't really need that kind of an attraction to be a meeting place. If you look at the tremendous development that has taken place in the city of Boston, there are many, many places that one can go in that city, a beautiful city, to attend a variety of functions. For me, somehow, the courthouse has always remained very much a singular symbol in our society.

I would say, for example, if you were talking about designing a courthouse for the Supreme Court, you would not look to see whether or not you could make it compatible or attractive to a vari-

ety of either enterprises or other types of activities that could take place there. It is the place for the dispensing of justice.

So I was curious about the impact of the past upon your thinking for the future as far as that courthouse was concerned. And I raise it in conjunction with matters that were brought up before the Governmental Affairs Committee, in which I and other members also serve. What we found is that there seems to be a disparity, or at least the GAO has found that the Federal judiciary has overestimated its space needs over a 10-year period by more than 3 million square-feet, which means that the Government may be building 1.1 billion of unneeded court space. That is what the GAO has determined.

They have also determined that there seems to be a great disparity between the construction costs of Federal courthouses versus those of State courthouses, almost double the amount. So it raised questions in our minds in terms of whether we were building edifices that were either unneeded, that the goal could have been achieved in a much less expensive way, still comporting with the needs of having a structure that would stand the test of time and stand for future generations, as well, and that these costs were very excessive, compared to State courts.

I suppose you can make a case that Federal courts are more important and need to be more lasting than State courts, but I suggest that State justices and judges might take great issue with that. By the way, I might point out that the GSA, the Administrative Office of the U.S. Courts, and the Congress all share responsibility in this. You have to come before us, we have to give the authorizations and appropriate the dollars, so it is not just picking out the judiciary and trying to point fingers and blame.

But it does raise questions as to why Federal courthouses cost much more than State or local facilities. Are you aware of any activities surrounding the selection site for the Boston courthouse that could be considered in any way either improper, extravagant, or unnecessary?

Judge BREYER. No, I think we followed all the rules.

Senator COHEN. As you know, a lot has been made of the fact that you have got 63 private bathrooms, 37 separate law libraries, 33 private kitchens, spiral staircases, and so forth. In your judgment, those were necessary or would you consider them to be extravagant?

Judge BREYER. The bathrooms, it is a general rule that a judge does have a bathroom in his chambers, and there are a lot of people working there and——

Senator COHEN. How many judges in that building?

Judge BREYER. I think there is room for somewhere close to 30, and there is the U.S. attorney, and there are a number of others. Whatever the normal rules were, we followed them.

In respect to the law libraries, I feel that it is very important that each judge has a library, and that library should be close. A law book is to a judge what a scalpel is to a surgeon, and you don't want the judge very far from the book, because maybe the judge won't look into the book, and nobody wants that. So it is normal that books are near judges, and I think that is proper.

The kitchens consist of a small area where a judge, at his own expense, not government expense, can go and buy a small refrigerator and bring in a little microwave, which he would purchase, in order to have lunch, say, with his clerks or the other people in the chambers.

Senator COHEN. What was the total cost you recall of this facility, $220 million?

Judge BREYER. I think Senator DeConcini gave the cost yesterday. I think it is 750,000 square-feet. It is a big building, and I think the cost, with land purchase and everything, was around $218 million or somewhere around there.

Senator COHEN. I might point out that we are familiar with the cost of expensive buildings. You are in one right now. As a matter of fact, when it was first built, it was I believe the most expensive building in the city of Washington at that time, the Hart Building.

As a matter of fact, most Senators were reluctant to move into this building, and by congressional fiat, the Senate leadership ordered the younger members to vacate the premises that they were then occupying and move in here, because the senior members were unwilling to take the public reaction to the costs of this Taj Mahal.

The CHAIRMAN. I want the record to show that my office is not in this building. [Laughter.]

Senator COHEN. You were then a senior member at the time.

Just a couple of more questions, Judge. I want to go back to the book that you wrote that Senator Biden had on his desk yesterday, called "Breaking the Vicious Cycle." In the books, you talked about the vicious cycle of public demand and said that the excessive regulatory response is the product of several factors that work in tandem. At the root is an ill-informed public, with skewed perceptions of the risk, fed by unsystematic media reports, a distrust of experts, and low levels of mathematical understanding. I believe I have summarized your basic analysis of this vicious cycle that you have talked about.

You point out that Congress is susceptible to public concerns; it contributes to the distortions of priorities. The public fears are picked up and translated into policy by a Congress that does not have the institutional resources to resist draconian legislation establishing rigid objectives with little room for adjusting priorities within limited budgets or balancing costs against benefits.

Then you go from Congress to the regulators, who compound the problem, as bureaucrats respond with overly conservative assumptions in order to forestall charges of inattention or neglect, and the regulators also aim their rules narrowly to deal with one problem while worsening another. For example, proposed rules concerning disposal of sewage sludge designed to save one statistical life every 5 years would encourage waste incineration likely to cause two statistical cancer deaths annually.

What you recommend, as I recall, in this particular book is to create a small, centralized administrative unit within the executive branch, with a mandate to rationalize risk policies across agencies. Critics have pointed to that and suggested that it is unrealistic in the United States of America to establish a sort of platonic administrative group of wise men, circle of wise men, who would in fact

be an elite, top-down policy coordination group, that would be unthinkable in a society that prizes open debate, diversity of opinion, and easy access to Government.

In other words, they suggest, this is a proposal that might work well in Singapore, but not a Seattle, or indeed, a Washington, DC.

How do you respond to that?

Judge BREYER. Thank you, Senator. The response is three. The first is you put in half, I think, when you say too far; and the other half is too little. The problem that the book is aimed at is spending a lot of money over here to save a statistical life that may not even exist, at the same time that there are women with breast cancer who would live, but who do not because they cannot afford or find the place for the mammograms; and there are children who do not have the vaccines that will save them from death for a lot of diseases. And I think there are two pages in that book that summarize, one sentence after another, all those things that might be done but that are not done.

So the book is a plea—though it is put in technical terms—it is put in a plea not to cut back by 1 penny this Nation's commitment to health, safety, and the environment. But please, let us think about the possibility of reorganizing that commitment so that there are fewer women and children who are dying of things they really will die of because the money was not there, when there are moneys being spent on the statistical life that might not exist. That is the first point.

The second point is there is a plan there for reorganization. The point about the reorganization is not really to create a new bureaucracy that will take power from the people. Rather, the people have delegated already to the bureaucracy power to do particular things. And there, it seems to me wise, or at least I suggest it, that the people who are already there—in, let us say, parts of the Office of Management and Budget—not be trained solely as cost-cutters, not be trained solely as people who do policy analysis, but perhaps take on a career where they learn what really goes on at EPA for part of their career; where they come over to Congress and work for a while and learn something about that; where they go out into the field and maybe learn what people are really thinking, and then come back and have, with that experience, more ability to transfer resources from one program to another that a pure cost-cutter might lack.

And the third problem, which is a real problem for democracy and is a tremendous problem for you and a tremendous problem for me, is I think I have a guess of what people want in that area, and may guess is that what they want is more life saved. And my guess is that is what you want, too.

So a lot of what I have written about in that book is should statutes try to do that, or should they go into such detail as dioxin-FO20 to the 14th degree in three molecules, et cetera. That is the problem of delegation. That is the question of what level of specificity do you delegate.

I absolutely think that people want more safety, and that is the basic power that should be delegated. I think it becomes very, very, very difficult to expect people to become experts on risk analysis, or how many molecules there ought to be in what kind of sub-

stance. And that is the kind of concern that I am worried about that leads me to think there are ways of organizing the bureaucracy better to save more human life, with the same commitment of resource that we now have.

Senator COHEN. But you say the root of it is an ill-informed public with skewed perceptions of risk——

Judge BREYER. Yes.

Senator COHEN [continuing]. Fed by systematic media reports and a distrust of the experts.

Judge BREYER. Right.

Senator COHEN. How do you propose to break that—and compounded by Congress, which is also contributing to the distortions of priorities—how do you break that cycle by having the small group of experts in the field, or in OMB or some of the other agencies, who will then do what—better inform the public? Better inform Congress?

Judge BREYER. And this, you might say is utopian, I know. But you realize what it is I think the public is informed about. I do not think they are not informed about what they want. I do not think they are not informed about there being a problem. I think they do know what they want, and I think the public does know that there is a problem. And I think they are right.

What is very hard to get public consensus about is the right number of molecules, or the right chemical substance exactly where. That is the problem of information. And what is perhaps a little utopian, I would call the biggest problem that I find from a policy point of view—the problem of building trust in the Government. And my suggestion there has been a little bit like this: Suppose the President of the United States—this is what I have said before—had somewhat broader authority to take money or resources from one program and to move it to another, and that he was under a mandate to meet the following condition—come back and prove to us that in doing so, you have saved more human life. And suppose that began to be done. Then, you might gradually—you might gradually—build public trust in that kind of circulating career path where people come to Congress and EPA and OMB and create this institution, and people in the country begin to understand that more life is being saved, a little at a time. You might gradually build some confidence in that institution, hard though it is to break into a mode of public trust. And if you could do that, you would end up saving more life, and that is the thrust of the book.

Senator COHEN. I think that sort of outcomes analysis is probably unrealistic in view of the life cycle of any President of this country; that by the time one were able to demonstrate that, then he or she would certainly long be out of office. So I am not sure that is going to be a practical solution.

I see my time is up, and I appreciate your answers, Judge.

The CHAIRMAN. Judge, I hope that was spoken as a political scientist——

Judge BREYER. Absolutely.

The CHAIRMAN [continuing]. And not as a judge——

Judge BREYER. Absolutely.