Thank you for your inquiry. My best wishes.
Sincerely,

STEPHEN G. BREYER.

The CHAIRMAN. Senator Leahy.

Senator LEAHY [presiding]. Thank you, Mr. Chairman.

As we know, a vote has just started in the last few minutes, and so I will not have the time to do a number of the questions I had wanted.

Judge Breyer, you are the first nominee in the nearly 20 years I have been here that I have not been able to be here for every word of your testimony, and I apologize for that. Unfortunately, something that I had absolutely no control over, the foreign operations bill, was on the floor, and as we have in the last number of years, we have done both our authorizing and appropriating in the same bill. I am the manager of that bill, so I have been stuck there.

I had a lot of followup questions from your earlier responses. I was impressed with your answers, but I was also impressed earlier that on a number of my questions, very artfully, you did not go into a full answer. I understand some of your reasons, but I would like to follow up on a couple of those questions.

One answer in your discussion with Senator Simpson made me think of this question. You have talked of the ninth amendment. You have talked of unenumerated rights. You and I had a discussion of Justice Goldberg's decisions. But as I recall from my notes, after you noted that the ninth amendment protected unenumerated rights, as well as noting that a right to privacy is well-settled, you said that what these enumerated rights "are and how you find them is a big question." I would agree with that. You said you looked for a reference to liberty in the 14th amendment, and as I have read the transcript of your testimony in the evening, you have talked about the dignity of the person during the last couple days. Is that your way of articulating an unenumerated constitutional guarantee?

Judge BREYER. The ninth amendment, to Justice Goldberg, and I think to many others, makes clear that fact that certain rights are listed does not mean there are not others. Then the 14th amendment takes the word "liberty," and the question that you ask is, well, if there are others, how do we know what they are.

Senator LEAHY. How do you find them—where do you find them?

Judge BREYER. And what you have suggested is of course, you start with the text, and then you look back to history, and you look back to what the Framers thought. But so often, you cannot—what the Framers thought is that the Constitution should adapt, preserving certain basic values. So, what are those values? And we are back to where we started with a historic approach. We are back to where we started.

I think the word "dignity" is important. At the most basic level, the Preamble to the Constitution lists what the Framers were up to—establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

Liberties are then listed, some, and underlying things like free speech and free religion, as I described or discussed when I talked about my own family, listening, is an idea, in my mind, of dignity.

Freedom from search, unreasonable search, unreasonable seizures, rights to fair trial, rights to speak and discuss, rights to express oneself creatively, rights to practice one's own religion without interference—all of those things have something to do with an individual, a man, a woman, a family, being able to lead a certain kind of life, to have a story to their life that is a story of a dignified life. That means many decisions must be up to them, and not to be told to them by the State. That, too, is why the Constitution, in my opinion, originally started out as a Government—and remains—of limited power.

Now, you reserve the area of autonomy. You look back into history. You try to determine what are the basic values that underlay those things that are enumerated, and that gives you a key to other basic values. You look to what Frankfurter and Harlan and Goldberg and others talked about as the traditions of our people, always trying to understand what people historically have viewed as traditional, and the values being there, you look to history in the past, to history in the present, and to the meaning, to what life is like today, to try to work out how—maybe an idea a little bit into the future, too—to get an idea of what are those things that are fundamental to a life of dignity.

I know those are very general statements, but in working that out with precedents and working that out in the context of the Constitution, you look and see what judges have tried to do, and you try to behave in that particular way.

Senator LEAHY. But you had said—in the discussion with Senator Simpson a few minutes ago, you talked about—if I am quoting you correctly—in the late 1800's, it would have been nice if the Congress, the President, the political powers, had taken the steps that the Supreme Court eventually did in 1954.

Judge BREYER. Yes.

Senator LEAHY. And I agree with you. The fact is, of course, the Congress did not, and in fact, the Congress probably would have been divided enough even in 1954 that they would not have taken those steps. The remarkable thing is that the Supreme Court did it, and did it in a unanimous opinion—probably one of the greatest gifts to our constitutional history and to the integrity of the Supreme Court that they were able to do that unanimously.

But doesn't that mean that there are possibilities that the Court steps in, basically making a political as well as a legal decision? Or, another way of putting it—when we speak of these unenumerated rights, do you accept that there may be a time in the future that what the Court may see as unenumerated rights are, because of a changing society, something different than we might see today?

Judge BREYER. I do not think the values are different. I think how they might apply might be.

Senator LEAHY. But obviously, the Court—you go from *Dred Scott* to *Brown*—I realize they are differing things—*Plessy* v. *Ferguson,* whatever—if you look at some of these decisions, you find the Court certainly changes. We still have the same Constitution, but the Court changes in how it sees rights.

Judge BREYER. That, of course, is true. But what I think in my own mind in respect to that particular opinion, *Brown,* surely, every time I think about it—and you go back to the pre-*Brown*

world—you can ask yourself how could people have looked at that promise, which is a promise of fairness, and think of the dignity that underlies so many of the first 10 amendments, and say we have it? They did not have it. It seems so obvious that that was not there that I think of *Brown* as an instance of applying law that was there, that was clear—a promise of fairness to circumstances where the fairness did not exist.

And perhaps it is hindsight, but I would like to think that if I had been there before, it would have been foresight. And I understand that judges, like any human beings, can make mistakes and get things wrong, but you would like to think that if you are getting things right, you are referring back to the basic idea of values that reflect human dignity, that underlie the Constitution because they are necessary to assure the promise of the Preamble.

Senator LEAHY. Judge Breyer, in many ways, it is with probably as deep a regret as I think I have had on just about anything in years, that now, with the clock down to where we have 5 or 6 minutes left in this vote, I am going to have to leave. I am also extraordinarily disappointed that 20 years of precedent has broken with you in that I have not been able to sit here for everything you have had to say, because I would like to carry on this discussion a great deal.

You will be confirmed—we all know that—but I hope that you and I might have the opportunity to continue this discussion, if not in an on-the-record basis, in an off-the-record basis. And I hope—and I will put my closing statement in the record—but I hope that you will resist any pressure to become cloistered from the world. I have spoken of judges being outside the judicial monastery. I have a feeling that your wife and your children will, should you become too cloistered, bring you back to reality rather quickly.

Judge BREYER. That is true.

Senator LEAHY. And I suspect your friends will. But you need that. Every judge needs that. They need to go out—if somebody says, "Wait a minute, that is baloney. Let me tell you why"—because just as we in the Senate do, where people do not want to talk back to us, we need to go out and do it. I hope that you will do that.

I will leave one question for the record, and this is the one I really am sorry that I am not going to be able to have a discussion with you. I would hope that you and I might perhaps some evening, some day, have this discussion. It is a question I ask all nominees to the Supreme Court, and that is: Since you left law school, or in the space of your experience, what are some of the most significant cases the Supreme Court has decided? Judge, I would ask you if you might take a moment after to submit an answer for the record. I am just curious, what are those things that stand out the most in your mind as those cases that have had probably the greatest impact from this unique and wonderful Court on which you are about to serve; what are the ones that have had the most impact?

And with that, seeing that we are voting right now, we will recess, subject to the call of the Chair.

Thank you.

Judge BREYER. Thank you.

[Response of Judge Breyer and the prepared statement of Senator Leahy follow:]

JUDGE BREYER'S RESPONSE TO SENATOR LEAHY'S QUESTION

LEADING CASES

In response to Senator Leahy's request that I identify Supreme Court cases of particular importance decided since I graduated from law school, I am providing the following list of decisions, the importance and wisdom of which are, in my judgment, widely accepted.

1. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). This case redeemed the promise of our democratic form of government by ensuring an equal vote for every citizen.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While the exact contours of the right against self-incrimination remain a subject of debate, *Miranda* established the basic proposition that the Fifth Amendment would prevent the most serious abuses of official power.

3. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). By reinvigorating the clear and present danger test in a case involving the Ku Klux Klan, this decision affirmed the fundamental principle that the First Amendment must protect even the speech we hate.

4. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Craig* v. *Boren*, 429 U.S. 190 (1976). These cases established the critical principle that the Fourteenth Amendment's guarantees extend to gender discrimination.

5. *Mistretta* v. *United States*, 488 U.S. 714 (1989). This decision is important not so much for its specific subject matter (the Sentencing Commission) but more generally because it reintroduced needed flexibility into the constitutional separation-of-powers analysis, ensuring that Congress and the President can meet new challenges to effective governance posed by complex modern problems.

PREPARED STATEMENT OF SENATOR LEAHY

Mr. Chairman, I conclude my round of questioning with these observations: I want to commend my colleagues for their thoughtful participation in these most important proceedings and to commend Judge Breyer for the way he has conducted himself and his willingness to reveal something of himself and his thinking.

Quite frankly, I would have liked him to be even more forthcoming and specific in his responses, but I acknowledge that the appropriate line is difficult to draw and recognize that my frustration may reflect my own perspective as a Senator asking questions.

I have sensed through the course of these proceedings a disappointment among some that there has not been more controversy surrounding this nomination, that we have not had to endure a donnybrook or witness a wealth of political maneuvering. I suggest, to the contrary, that we should take pride in what is transpiring here: This is an occasion when all three branches of our Federal Government can be seen working together smoothly and efficiently.

I hope that the members of the public who have had an opportunity to join us over the last few days either in person or to witness these proceedings on television have taken something positive from them. I again commend President Clinton for having chosen a nominee who can bring people of diverse political views together and who has engendered such praise as an excellent choice.

Finally, if I might, I say to you, Judge Breyer, that after you are confirmed I hope that you will successfully resist the pressures to become cloistered away from the world. I think that your involvement with your family, demonstrated throughout these hearings, provides some protection for you. I doubt that your active wife and children are going to allow you to lose touch.

In your opening statement and your answers over these last three days you have indicated your intention always to remember the effects that your decisions will have on real people—people who may not be powerful or well-connected. You have demonstrated that you have not only mastered the complexities of the law but are the fulfillment of your parents' influences toward public service and to awareness of the impact your work will have on the lives of others.

So I urge you even while sitting on the High Court to be of the world. I do not suggest that you tailor your opinions to the winds of public opinion. Rather, I urge you to remember that you have learned about government and people. I call upon you to fulfill the promise you made to the American people as these proceedings began—to remember that the decisions you help to make will have an enormous effect upon the lives of many, many Americans and to do your utmost to see that

those decisions reflect both the letter and the spirit of law that is meant to help them.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Grassley.

Senator GRASSLEY. Thank you.

We went through legislative history, and I want to go back to legislative history, but not in the general way I did the first time. I will be a little more specific this time. I am somewhat concerned about some of the answers you gave me about statutory construction yesterday—or, I guess it was 2 days ago, now. In light of that, I want to ask you about your 1992 decision in *Paleo.*

Paleo, for the benefit of those who do not know, had been convicted of four violent crimes, and under Federal law, a person with three or more violent crime convictions who possesses a firearm—and that is a very important ingredient—faces a 15-year mandatory minimum sentence. Paleo, as you recall, argued that the mandatory minimum sentencing provisions did not apply to him because he claimed that three of his convictions were constitutionally invalid. You ruled that the statute required that the criminal be allowed to challenge his prior convictions in Federal court.

Last May 23, this year, the Supreme Court ruled in *Custis* that the same statute did not permit the defendant to challenge his conviction prior to sentencing. So I want to kind of compare your opinion with the Supreme Court's.

For instance, the Supreme Court interpreted the key terms in the statute—three words—"three previous convictions"—according to the statute's very plain language. In other words, as I would read it, someone who has three previous convictions has in fact three previous convictions.

Now, in contrast, I think your opinion did not follow the plain language, and you did not identify any compelling legislative history to justify your departing from the plain language. I think that you interpreted the statute according to what interest you believed the Government had in the operation of the statute, and you wrote that:

> The Federal Government has no recognizable interest in imprisoning a defendant on the basis of convictions that are constitutionally invalid.

I suppose that your approach would be an example—and even beyond you, I suppose—of a judge who would use a style of statutory construction that would give me some concern. I am concerned that such a judge might in fact be what I do not like, a kind of activist-type judge who wants to put his own ideological imprint on something, because often, activists narrowly define the Government's interest at stake to rule against the Government.

It seems to me that the Government's interest is having its statutes enforced according to their plain terms and in getting dangerous criminals locked up for long, long periods of time.

I want to know why you interpreted the statute according to what I see as being maybe your own views, instead of the Government's interest, since you did not quote any legislative history. You applied your view of the Government's interest, instead of what I see as very, very plain language of the statute.