faculty of a distinguished law school, his scholarly writings and his distinguished service for fourteen years (four as Chief Judge) on the Court of Appeals dealing with many of the same kinds of matters that will come before the Supreme Court, fully established his professional competence.

CONCLUSION

Based on the information available to it, the Committee is of the unanimous opinion that Chief Judge Breyer is *Well Qualified* for appointment to the Supreme Court of the United States. This is the Committee's highest rating for a Supreme Court nominee.

The Committee will review its report at the conclusion of the public hearings and notify you if any circumstances have developed that would require a modification of these views.

On behalf of our Committee, I wish to thank you and the Members of the Judiciary Committee for the invitation to participate in the Confirmation Hearings on the nomination of the Honorable Stephen G. Breyer to the Supreme Court of the United States.

Respectfully submitted,

ROBERT P. WATKINS, *Chair.*

The CHAIRMAN. Now, our next distinguished panel is comprised of two well-known members of the legal academic community, both from Stanford University, Judge Breyer's alma mater. Gerhard Casper is a distinguished scholar and administrator. He is president of Stanford University, which I am sure he finds as politically trying as any one of us up here. He will not acknowledge that, I suspect, or maybe he does not believe that. But it would seem to me the next hardest job—maybe the harder job is being the president of a major, nationally known, and internationally recognized university. He is a former dean of the University of Chicago School of Law, and I want to ask him how he hired all those law and economics guys and women out there—that is a joke, an attempt at a joke—and provost at that university. He became president of Stanford in 1992.

And if I do not run the risk of ruining your reputation, we also have an old acquaintance and friend, Kathleen Sullivan, who has moved from coast to coast here, who was kind enough to try to educate me, which was a very difficult job—as a Senator, not educate me in her classroom. Professor Sullivan was then a professor of law at Harvard Law School and is now a professor of law at Stanford. And she is an expert on constitutional and criminal law, someone I have personally called on a number of times when I have needed legal advice for the committee, and I welcome her here as well.

So I would invite you, Mr. President—we do not often get to use that phrase here in the hearing—to begin your testimony, if you would.

PANEL CONSISTING OF GERHARD CASPER, PRESIDENT, STANFORD UNIVERSITY, PALO ALTO, CA; AND KATHLEEN M. SULLIVAN, PROFESSOR, STANFORD UNIVERSITY LAW SCHOOL, PALO ALTO, CA

STATEMENT OF GERHARD CASPER

Mr. CASPER. Thank you very much, Mr. Chairman, for your very generous opening remarks. I am glad there is one person in the country who recognizes how challenging and interesting the life of a university president is.

The CHAIRMAN. Well, there will soon be another one. There will soon be President David Boren, former Senator who will be president of the University of Oklahoma, and he is going to find out and tell us all what it is like.

Mr. CASPER. I was bemused by his expectation that life might be easier at the university than in the U.S. Senate. [Laughter.]

It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. In my still relatively new position as president of Stanford University, I can, as the chairman pointed out, happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

One of the great American judges of this century, Henry Friendly, who served on the U.S. Court of Appeals for the Second Circuit, in a paper about Justice Cardozo, once referred to what is required in a judge. Among the requirements is, of course, that a judge needs to be a lawyer of "the highest grade." But a judge also needs to be somebody who seeks wisdom and is "blessed with saving common sense and practical experience as well as sound and comprehensive learning."

Judge Breyer is a lawyer of the highest grade. He has sought opportunities to do the work of a lawyer in all three branches of the Federal Government. Indeed, I know few men or women who could match his varied legal experience in this respect.

In the executive branch, he served in the Antitrust Division of the Justice Department. He also was a prosecutor in the Watergate Special Prosecutor's Office. In Congress, he was chief counsel to this important committee. In the judiciary, he started out at the Supreme Court, to which I hope you will return him, and, since 1980, has been one of the most distinguished Federal appellate judges.

He has even worked what you might call among the branches through his service as a charter member of the U.S. Sentencing Commission, one of those hybrid interbranch agencies that seem to partake of all branches at one and the same time. As a student of the separation of powers, I wish I had had a similar in-depth exposure to the workings of American Government.

In the last few months, I have seen the press frequently refer to Judge Breyer as pragmatic. This is not a bad attribute, provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life, he has been interested in the right results. In that sense, I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends, and what effects they will have.

In his recent book, "Breaking the Vicious Circle," he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in

any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

Judge Breyer's public service reflects "a saving common sense and practical experience." These qualities can also be found in his writings. His approach to the issue of societal risk management is marked by "a saving common sense." In this instance, the attribute "saving" may be taken quite literally, since Breyer favors foregoing those regulatory gains and risk management that are too small in relation to the resources they consume. What is saved can be applied to other national needs and social priorities.

I referred to Judge Breyer's "Socratic notion of virtue," which includes that judges should judge well. The first prerequisite of judging well is to judge clearly. Reading Breyer opinions is a genuine pleasure—perhaps, as he has suggested, even "for a high school student," though I confess to doubts on that count. His opinions are so written that you understand every step of the way: what the parties argue, what evidence they rely upon, what the judge understands to be the state of the law, what the uncertainties are, how he intends to resolve them and why, how the judge views the facts, and, finally, the conclusions all of this leads him to. One can readily agree or disagree with Judge Breyer because he is clear about where he stands.

In the era of administrative government, we should consider ourselves fortunate that the nominee is one of the country's leading experts on administrative law who has a mature understanding of the Constitution and the requirements that follow from a commitment to the rule of law. Perhaps the most important question concerning trust that the country faces for the foreseeable future is who will control administrative government and how. In order to cope with that challenge, the Supreme Court needs much wise understanding of how the institutions of government work. It is my belief that Judge Breyer will bring that understanding to the Court, in addition to his commitment to the Constitution and the rule of law.

Thank you very much, Mr. Chairman and other members of the committee.

[The prepared statement of Mr. Casper follows:]

BIOGRAPHICAL SKETCH OF GERHARD CASPER

Born in 1937, Gerhard Casper grew up in Hamburg, the port city on the Elbe River. At sixteen he made his first trip to the United States, as one of 32 students from around the world who came to the United Nations for the *New York Herald Tribune* Forum for High Schools, a program intended to promote international understanding.

Mr. Casper studied law at the Universities of Freiburg and Hamburg, where in 1961 he earned his first law degree. He came to Yale Law School in 1961, obtaining his Master of Laws degree a year later. He then returned to Freiburg, where he received his Doctorate in 1964, writing his dissertation on the realist movement in American law.

In the fall of 1964, Mr. Casper emigrated to the United States spending two years as Assistant Professor of Political Science at the University of California at Berkeley. In 1966 he joined the faculty of the University of Chicago Law School, and between 1979 and 1987 served as Dean of the Law School. He has written and taught primarily in the fields of constitutional law, constitutional history, comparative law, and jurisprudence. From 1977 to 1991 he was an editor of *The Supreme Court Review*. He was named the William B. Graham Professor of Law in 1980, and a Distinguished Service Professor in 1987. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.

In 1989 Mr. Casper became Provost of the University of Chicago, a post he held until he accepted the presidency of Stanford University in 1992. He also holds an appointment as Professor of Law at Stanford.

Mr. Casper is married to Regina Casper, M.D. Dr. Casper was a Professor of Psychiatry at the University of Chicago before taking an appointment as Professor of Psychiatry and Behavioral Science in the School of Medicine at Stanford. She is an authority in the area of depression and eating disorders.

The Caspers have one daughter, Hanna, who is a graduate of Yale University and the University of Virginia Law School.

PREPARED STATEMENT OF GERHARD CASPER

Mr. Chairman and Members of the Committee: It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. He and I started teaching law at about the same time in the sixties. In my still relatively new position as president of Stanford University, I can happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

One of the great American judges of this century, Henry Friendly, who served on the United States Court of Appeals for the 2nd Circuit, in a paper about Justice Cardozo, once referred to what is required in a judge. Among the requirements is, of course, that a judge needs to be a lawyer of "the highest grade." But he also needs to be somebody who seeks wisdom and is "blessed with saving common sense and practical experience as well as sound and comprehensive learning."

Judge Breyer is a lawyer "of the highest grade." He has sought opportunities to do the work of a lawyer in all three branches of the federal government. Indeed, I know few men or women who could match his varied legal experience in this respect. In the executive branch he served in the Antitrust Division of the Justice Department. He also was a prosecutor in the Watergate Special Prosecutor's Office. In Congress he was Chief Counsel to this important committee. In the judiciary he started out at the Supreme Court, to which I hope you will "return" him, and, since 1980, has been one of the most distinguished federal appellate judges. He has even worked what you might call "among" the branches through his service as a charter member of the United States Sentencing Commission—one of those hybrid interbranch agencies that seem to partake of all branches at one and the same time. As a student of the separation of powers, I wish I had had a similar in-depth exposure to the workings of American government.

In the last few months I have seen the press frequently refer to Judge Breyer as "pragmatic." This is not a bad attribute provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life he has been interested in the *right* results. In that sense I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends and what effects they will have. In his recent book, *Breaking the Vicious Circle,* he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

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In the era of administrative government we should consider ourselves fortunate that the nominee is one of the country's leading experts on administrative law who has a mature understanding of the Constitution and the requirements that follow from a commitment to the rule of law. Perhaps the most important question concerning trust that the country faces for the foreseeable future is who will control administrative government and how. In order to cope with that challenge, the Supreme Court needs much wise understanding of how the institutions of government work. It is my belief that Judge Breyer will bring that understanding to the Court in addition to his commitment to Constitution and the rule of law.

Senator METZENBAUM [presiding]. Professor Sullivan.

STATEMENT OF KATHLEEN M. SULLIVAN

Ms. SULLIVAN. Thank you very much to the chairman for his generous introduction, to the chairman and the members of the committee for the privilege of allowing me to testify here. It is a great honor and a great pleasure and easy task to testify in enthusiastic support for Judge Breyer's nomination to the Supreme Court. I had the privilege and pleasure of serving as his colleague in nearly a decade that we were both on the Harvard Law School faculty, and I know his opinions and his academic writings well.

I would like to focus briefly here today on three features of Judge Breyer's excellent virtues for the Court. The first is his pragmatic philosophy. Second is the excellence of his legal craft. And the third is his judicious temperament.

Now, the committee has heard a great deal from Judge Breyer himself in the last few days about his pragmatism. He has said to you here, as he has said in his writings, that the law is a profoundly human institution. It is designed to allow the many different individuals who make up America from so many different backgrounds and circumstances to live together productively, harmoniously, and in freedom. It is a human institution serving basic human or societal needs.

And he has said that it must be a practical effort, and many might think, well, this is all very good to be practical. It sounds sound. But is it a judicial philosophy? And my key point before the committee today is that I would like to emphasize that pragmatism is a coherent judicial philosophy. And, indeed, it is the philosophy of the 20th century Court.

Judge Breyer, in his pragmatism, is the spiritual heir of the great Justices of the Court in this century. Most especially, we can start with Justice Oliver Wendell Holmes from Senator Kennedy's home State, the Commonwealth of Massachusetts. This came up in the colloquy with Senator Cohen and others on the committee the other day. Judge Breyer is the spiritual heir of Justice Oliver Wendell Holmes in the following sense: He sees, as Holmes did, that law is not an intellectual exercise in abstract theory. Rather, the law, including constitutional law, is a practical enterprise rooted in the complexity of actual social life.

As Justice Holmes put the point in perhaps his most famous aphorism, "The life of the law has not been logic: it has been experience." That is why pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any single grand unified theory, any simple, overarching approach.

Judge Breyer, as a pragmatist in the tradition of Holmes, instead takes a flexible, undogmatic view of the tools that are relevant to

interpreting the Constitution and the laws passed by the political bodies. Whether interpreting a statute or a constitutional provision, he would look to text and structure and history and tradition and precedent and the way we live today and the way we might live in the future as his guides to meaning. He would not rigidly limit himself to any of these tools alone.

Pragmatism likewise stresses the need for flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances. As Judge Breyer stressed in his testimony, the Constitution must be read in light of its purposes, just as statutes must be read in light of theirs.

Now, such reasoning is really in the mainstream of the greatest thought of 20th century Justices on the Court, from Holmes at the beginning of the century, to Harlan in an era closer to our own time. Justice Harlan captured pragmatism's look at the flexibility needed in law in his famous saying that due process cannot be reduced to any formula and its content cannot be determined by reference to any code.

Now, you might say that is very well and good, but does pragmatism have any problems? And one might ask three questions about pragmatism, and I think the answer in Judge Breyer's case is very satisfactory as to all three.

One might ask, first of all, does pragmatism mean that the judge is just going to do what he thinks is best according to his own light, what he thinks is practical or good? And there the answer is most clear from Judge Breyer's record: Absolutely not.

As Judge Breyer's mentor, the late Justice Arthur Goldberg for whom he clerked once wrote

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and conscience of our people" * * * [and to] "experience with the requirements of a free society."

Tradition, our people, our conscience, our experience, outside himself.

Judge Breyer, as he himself assured the committee on Tuesday, has said that the job of a judge is not to legislate from the bench, but to look outside himself to those guides to meaning in order to follow the law laid down.

Pragmatism is a philosophy of judicial humility, not judicial arrogance. It holds that, as Holmes said, general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

And one might ask, second, well, all right, I accept that pragmatism is respectful law, and a pragmatic judge will look outside himself and be guided by our history, our tradition, our precedent. But does this mean that he will decide things in an ad hoc fashion, that he will issue decisions that will only last for a time? And there, again, the answer is, in Judge Breyer's case, most clearly "no".

As Judge Breyer himself has emphasized in his testimony, a pragmatist judge looks not only backward to our traditions but forward to how the law can be an authoritative and predictable guide.

Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

Third, though, one might say, well, with all this respect for law and history and tradition and precedent and the will of the community, will a pragmatist judge like Judge Breyer sacrifice constitutional rights? Absolutely not. Again, the answer is clear. Absolutely not. Judge Breyer's record is quite clear that when rights are clearly embodied in the Constitution or in statute, he has not hesitated boldly and squarely to uphold them, whether rights of free speech, free conscience, rights to equal protection of the law.

In sum, Judge Breyer's thoughtful commitment to pragmatism places him squarely in the mainstream of this century's most important judicial philosophy and allies him with the Court's most powerful and influential Justices from Harlan to Holmes.

I will be brief on the second two points. I would like to say in addition——

The CHAIRMAN. Kathleen, it is only our friendship that is allowing you to go beyond your 5 minutes, but go ahead.

Ms. SULLIVAN. Two sentences, Mr. Chairman. First, should not confuse—there has been talk of lack of passion. Is this man so pragmatic he has no passion? We should not confuse passion with commitment to justice and fairness, and I think Justice Breyer's opinions, like Judge Breyer's opinions, will be marked by a kind of superior craftsmanship and legal excellence that enables him to bring about justice and fairness in a way that might be more enduring than the efforts of mere passion alone.

And, last, he is, as you have seen and as others have testified—and I wholly concur—a man of great evenhandedness and openmindedness. He has the qualities of spirit as well as mind to be one of the great Justices on the Supreme Court in this century.

Thank you very much.

[The prepared statement of Ms. Sullivan follows:]

BIOGRAPHICAL SKETCH OF KATHLEEN M. SULLIVAN

Kathleen M. Sullivan is Professor of Law at Stanford Law School. She was previously Professor of Law at Harvard Law School, where she taught from 1984 to 1993. Her specialty is constitutional law. She has published articles on a wide range of constitutional issues, including affirmative action, abortion, unconstitutional conditions, freedom of religion and freedom of speech. She wrote the 1992 *Forward* to the Supreme Court issue of the *Harvard Law Review.*

Professor Sullivan has served as co-counsel in a number of Supreme Court cases, including *Turner Broadcasting* v. *FCC, Freytag* v. *Commissioner, Rust* v. *Sullivan, Bowers* v. *Hardwick, Puerto Rico* v. *Branstad, Fisher* v. *City of Berkley,* and *Hawaii Housing Authority* v. *Midkiff.* She has commented on various constitutional issues on *The New York Times* op-ed page and the MacNeil/Lehrer News Hours.

Professor Sullivan holds degrees from Cornell University (B.A. 1976), Oxford University (B.A. 1978), and Harvard Law School (J.D. 1981). At Oxford, she was a Marshall Scholar. In 1981–82, she served as law clerk to Judge James L. Oakes of the United States Court of Appeals for the Secord Circuit.

PREPARED STATEMENT OF KATHLEEN M. SULLIVAN

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before this distinguished Committee. It is both a great honor and a great pleasure to testify in enthusiastic support of the nomination of Judge Stephen G. Breyer to serve as a Justice on the United States Supreme Court. I have known Judge Breyer for over a decade, as we were colleagues on the Harvard Law School faculty before I moved west to Stanford Law School. I have closely followed his opinions

and his academic writings over the years. I believe that he will be an exemplary Supreme Court Justice, and will bring great credit to the Court.

Three features of Judge Breyer's approach to law and judging lead me to that conclusion. First is his thoroughly pragmatic philosophy, which is in keeping with the best of the Supreme Court's traditions over the last century. Second is the excellence of his legal craftsmanship. Third is his judicious temperament. Allow me to address each feature in turn.

1. Pragmatic philosophy. Throughout his opinions and other writings, Judge Breyer has expressed a view of law as a practical enterprise, to be applied in a practical way for practical ends. Just the other day, in his opening statement to the Committee, he summarized this view as follows: "I believe that law must work for people. That vast array of Constitution, statutes, rules, regulations, practices, procedures—that huge, vast web—has a single basic purpose. That purpose is to help the many different individuals who make up America from so many different backgrounds and circumstances, with so many different needs and hopes * * * live together productively, harmoniously, and in freedom." The New York Times, July 13, 1994 (national edition), at A8.

That statement echoes Judge Breyer's previous statements in other contexts. For example, in a 1991 lecture he delivered at USC on statutory interpretation, he said, "I assume that law itself is a human institution, serving basic human or societal needs. It is therefore properly subject to praise, or to criticism, in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies." On the Uses of Legislative History in Interpreting Statutes, 65 So. Cal. L. Rev. 845, 847 (1992).

Likewise, in a 1989 tribute to his late Harvard colleague Paul Bator, Judge Breyer praised the legal tradition that "sees law, including constitutional law, as an untidy body of understandings among groups and institutions, inherited from the past, open to change mostly at the edges. It is a tradition that communicates its important vision, not through the explication of any single theory, but through detailed study of cases, institutions, history, and the human needs that underlie them." 102 Harv. L. Rev. 1737, 1744 (1989).

In expressing these views, Judge Breyer has situated himself squarely within the great and distinctively American tradition that has dominated the Supreme Court throughout this century: namely, legal pragmatism. The pragmatic tradition links the opinions of the great Justice Oliver Wendell Holmes at the beginning of the century with those of Justice John Marshall Harlan and his admirers in our own era. And this tradition continues overwhelmingly to predominate among the Justices who sit on the Supreme Court today.

Pragmatism sees law not as an intellectual exercise in abstract theory, but rather as a practical enterprise rooted in the complexity of actual social life. As Justice Holmes put this point in his most famous aphorism, "The life of the law has not been logic: it has been experience." O.W. Holmes, The Common Law 5 (1881). *See generally* Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989).

Pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any one grand unified theory or single, simple, overarching approach. Thus, Judge Breyer, as a pragmatic judge, takes a flexible, undogmatic view of the tools relevant to legal interpretation. Whether interpreting a statute or a constitutional provision, he would look to text *and* structure *and* history *and* tradition as his guides to meaning, rather than rigidly limiting himself to any one of these tools alone.

Pragmatism likewise stresses the need for legal flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances. As Judge Breyer stressed to the Committee in his testimony on Tuesday, citing the pragmatist Justice Holmes himself, the Constitution cannot be read to enact any particular economic theory that would hamstring government "if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety. * * *" New York Times, *supra*. Such reasoning is in the mainstream of the Court's pragmatic tradition, once captured by Justice Harlan in his famous saying that "due process has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Does pragmatism mean that a judge seeks to impose his own preferences on the law? Absolutely not. As Judge Breyer's mentor, the late pragmatist Justice Arthur Goldberg, once wrote, "In determining which rights are fundamental, judges are not

left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and conscience of our people' * * * [and to] 'experience with the requirements of a free society.'" *Griswold* v. *Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). And as Judge Breyer himself assured the Committee in his testimony on Tuesday, a Justice's job is certainly *not* to "legislate from the bench," but rather to follow the law—although determining just what an open-ended law really means may demand all the resources of his judicial craft. Pragmatism is a philosophy of judicial humility, not judicial arrogance: it holds that general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

Does pragmatism mean that a judge resolves legal disputes in an ad hoc way? Again, the answer is clearly no. As Judge Breyer himself has emphasized, a pragmatist judge looks not only backward to our traditions, but also forward to how his ruling will achieve present peace and future stability by resolving disputes in an authoritative manner that enables people to predict what the next case will hold. Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

On the other hand, does pragmatism sacrifice constitutional rights to the social welfare of the community? Once again, in Judge Breyer's hands it most assuredly does not. As he has stressed, our most basic laws are designed to protect not only harmony but also freedom. And when rights are clearly embodied in the text of the Constitution or a statute, Judge Breyer has not hesitated strongly to uphold them, whatever the will of the community might be.

For example, as he told the Committee on Tuesday, the Constitution "foresees over the course of history that a person's right to speak freely and to practice his religion is something that is of value [and thus] is not going to change." New York Times, *supra.* Accordingly, he has ruled for his Court that the First Amendment plainly bars government from targeting either one's political or one's religious views. *See, e.g., Ozonoff* v. *Berzak,* 744 F.2d 224 (1st Cir. 1984); *Aman* v. *Handler,* 653 F.2d 41 (1st Cir. 1981). Likewise, he held for his Court in *Stathos* v. *Bowden,* 728 F. 2d 15 (1st Cir. 1984), that no matter what conventional attitudes about sex roles might be, an employer violates the most basic notions of equality if he pays women less than men "just because they were women."

In sum, Judge Breyer's thoughtful commitment to a pragmatic judicial philosophy places him squarely in the mainstream of the century's most important and enduring jurisprudential tradition, and allies him with the Court's most powerful and influential Justices. And this legal pragmatism is thoroughly consistent both with the rule of law and the role of individual rights.

2. Legal craftsmanship. Judge Breyer's judicial opinions during his tenure on the Court of Appeals for the First Circuit are marked by clear thought, careful analysis, close reasoning, and precision of language. Eschewing footnotes and legal jargon, Judge Breyer has a gift for boiling down highly complicated matters to their basic core, and expressing legal opinions with compelling simplicity. In keeping with his view of law as a practical enterprise, he cares deeply that his decisions can be readily understood. He writes his opinions to be watertight, so that even people of differing views might find they can agree upon them.

The absence of fiery rhetoric or sweeping slogans from Judge Breyer's opinions should not be confused with a lack of commitment to justice and fairness. To the contrary, his calm reasoning and superior craftsmanship often achieve more effective victories for justice and fairness than might have been won by a display of passion alone.

For example, through his judicious methods, Judge Breyer has often been able to dissolve technical obstacles and give force to holdings that increase access to courts or protect the rights of minorities—holdings that might not have been as persuasive if set forth with less precision or care, *See, e.g., Munoz-Mendoza* v. *Pierce,* 711 F. 2d 421 (1st Cir 1984) (holding, contrary to the district court, that minority residents of an integrated Boston neighborhood had standing to argue that a federal building project would cause the racial segregation of their neighborhood); *Mayburg* v. *Secretary of Health and Human Services,* 740 F.2d 100 (1st Cir 1984) (holding, contrary to an HHS interpretation, that an 88-year-old woman who lived in a nursing home was eligible to keep receiving benefits without having to move from the home); *Stuart* v. *Roche,* 951 F.2d 446 (1st Cir 1991) (upholding a decree designed to cure past racial discrimination in the Boston Police Department, finding it narrowly tailored under the Supreme Court's decision in *City of Richmond* v. *Croson Co.*).

Finally, his opinions also exhibit considerable restraint. He declines to reach out to embrace principles that are broader than necessary to decide the case before him. *See, e.g., Alexander* v. *Trustees of Boston University,* 766 F.2d 630, 650 (1st Cir 1985) (Breyer, J., dissenting) ("I would not allow the parties, through their choice

of arguments, to force this court unnecessarily to decide a broader constitutional question than the facts require."). And if a record is inadequate, he does not hesitate to send a case back for further facts.

Taken together, these features of Judge Breyer's skilled judicial craftsmanship enable him to serve as a potential catalyst for consensus on the Court, even among Justices of differing views.

3. Judicious temperament. On this point, I can be brief: Judge Breyer is not only an intellectually distinguished judge, but a fair and judicious one. He is open-minded and even-handed. He genuinely listens to others. He is willing to revise his views when one persuades him that he was wrong. He is highly focused, and is undaunted by factiousness or conflict. Thus, he has in abundance the qualities of spirit, as well as the qualities of mind, to serve with the greatest distinction as an Associate Justice on the United States Supreme Court.

The CHAIRMAN. Thank you very much, Professor.

I read with some interest the treatise of Professor Farber of the University of Minnesota on pragmatism and the criticisms of the new pragmatism—as nonlawyers have a clear sense, we lawyers sometimes try to give phrases that have generic meanings very specific meanings that sometimes are difficult to understand. There are some very cogent criticisms of pragmatism.

I have one question for you, Professor. You make it clear that you think that Judge Breyer is a legal pragmatist in the tradition of Holmes and Harlan. Apart from the work of these two Justices, what makes you conclude that the Court's dominant tradition in this century has been legal pragmatism?

Ms. SULLIVAN. It is not just Justice Holmes, but also Justice Cardozo, to a great extent Justice Brandeis, who launched us in the modern constitutional tradition who were pragmatists, who were influenced by that distinctively American philosophy that says that the value of something is to be measured by its practical effect. It is a distinctively American tradition rooted in the writings of Dewey and Perse and James. But to connect it up with our own time, I believe it is also the dominant judicial philosophy on our Supreme Court today. It is a philosophy that enables——

The CHAIRMAN. That was my next question. I would like to know why you conclude that.

Ms. SULLIVAN. Because I think if we look at the decisions of the Court, the great decisions of the Court in the last few terms, we see the Justices who come from very different places in life and very different views of the world, very different political sides of the aisle, can come together around basic propositions such as that people should be unfettered in their right of access to basic constitutional rights, such as the view that there is a balance to be held between the interests of people in exercising their religion and the interests of keeping the public order free from the establishment of religion.

In issues like privacy and speech and religion, the most contested issues in our time, where it is so easy to be divided, where it is so easy to be passionate, we have seen that pragmatism is what enables Justices, as distinctive across a spectrum from Chief Justice Rehnquist to Justice Ginsburg to agree, to agree on what is the best outcome in a particular case.

The CHAIRMAN. You think that is the spectrum? I kind of think it goes Rehnquist, Ginsburg, to some other place. But——

Ms. SULLIVAN. There are some on the Court, of course, Mr. Chairman, who do not share this philosophy. There are some who

do not share this philosophy, but I think we have seen it in recent terms to be dominant, and that is no surprise. That is no surprise because the people on the Court today are bearers of the tradition that traces back to Holmes.

The CHAIRMAN. I happen to agree with you. That was one of the reasons—and I know I expose you here, I consulted you on the nominations of Justices Souter and Kennedy and others. I will end with this, but I was just asked by a press person 10 minutes ago on the way back from the vote where did I think Judge Breyer fit of the six or seven nominees I have presided over, the eight or nine that I have either been in the minority or majority, ranking member or Chair. And something struck me, and I would like you to comment on it. Notwithstanding that there have been some aberrations, there is a similarity in approach, although reaching different conclusions sometimes, from the Republican appointees of Kennedy and Souter, for example, and the Clinton appointees of Ginsburg and Breyer.

I have no way to prove this, but it seems to me there is a generational element that fits here in the following sense—and I have facetiously said they are somewhere between "Ozzie and Harriet" and Roseanne Barr in terms of their life experiences, in what they value and do not value, what they view as accepted and given values of this society. I do not think we are going to see any fundamental difference among them on issues of race, on issues of basic civil rights and civil liberties.

Oh, there will be disagreements. You know, that old expression: Hard cases make bad law, and lots of those hard cases get to the Supreme Court, on the rights of defendants and determining how far the right to privacy goes and does not go. But it seems as though they reflect these values that are shared in common that reflect this pragmatic approach you have referred to in their approach to constitutional methodology.

Talk to me about that a little bit, about where you see these last four nominees in fitting within your definition of pragmatism and the tradition of Holmes and Harlan and others.

Ms. SULLIVAN. I agree, Mr. Chairman, with your description. I think that there is a lot of similarity of method and approach among these recent nominees, and I think that is no surprise, and I think it is generational, as you suggest.

Justice Blackmun, whom Justice Breyer will replace, and Justice Kennedy and Justice Souter at Harvard and Judge Breyer at Harvard, like Justice O'Connor and Chief Justice Rehnquist at Stanford, received an education in this pragmatic tradition. The pragmatic tradition was distilled in the 1950's and 1960's into what is sometimes called the legal process school, dominated by Professors Henry Hart and former dean of Harvard Law School Albert Sachs, the late Albert Sachs.

What they said is very much like what Judge Breyer has said to you today. We have got to look at all the sources of information we can, institutions, history, text, structure, tradition, precedent, in order to inform our judgments. And we have got to be humble; we have got to be modest; we have got to decide the case before us. We have got to mistrust grand theories and sweeping propositions. We mistrust the philosopher in his certainty that he has the right

angle on all questions. We are more modest folks. We want to look at the case before us and decide things case by case.

So I think their training, both at Harvard and at Stanford, and at the other schools from where the Justices comes, was very similar.

The CHAIRMAN. So that if anyone is dissatisfied with the Court, they can blame in on Harvard and Stanford.

Ms. SULLIVAN. That is right.

Mr. CASPER. Senator Biden, may I add something?

The CHAIRMAN. Please. I am finished.

Mr. CASPER. You pointed to the basic consensus among the Justices and the candidates you have seen on redefining American values. And I think in the heat of debate over the last decade or so, we sometimes forget how strong that consensus actually is. The consensus is very strong in the country.

It so happened that I was just reading last night a paper on evaluating public attitudes toward those values, and it is very gratifying to see that the public across all ethnic groups continues to be very much dedicated to these values. And so is the group of lawyers that have been educated at our law schools, to a very large extent. The gap is not as great as it sometimes seems to be made out in the press.

The CHAIRMAN. I would like to attach to the record—I do not think we have to spend the money to put it in the record—"Legal Pragmatism and the Constitution," by Daniel A. Farber,* of the University of Minnesota Law School, which goes into great detail, but essentially raises in great detail the criticisms of legal pragmatism by others and the defenses. But I, quite frankly, gain some solace from what I think has been a diminution of the ideological warfare, if you will, that has gone on in the recent past on occasion, with the exception of the Justices that I have named, although I am absolutely convinced beyond any reasonable doubt that under the advise and consent clause Senators have a right to ask whatever they wish to ask and a right to resist an appointment whenever they so deem appropriate.

What is a right is not always wise to exercise. I have views that have been informed by people like you, Kathleen, and others that are somewhat different sometimes from some of the Justices that are on the Court, and I am sure they will differ with Justice Breyer. But this acceptance that seems to run through the four Justices I have mentioned of the basic touchstones in the American value system on the important issues is, I think, an important point to make, and you have made it well. I thank you both.

I yield the floor now to my friend from Utah.

Senator HATCH. Well, I want to welcome both of you here again. Ms. Sullivan, I welcome you to the committee again, and, President Casper, we are glad to have you here and we appreciate your testimony. And I agree that this is an excellent nominee. Do I agree with him on everything? None of us does, and that is not the issue. The issue is, I think, more than put to rest by his testimony and helped by yours.

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*See Farber, "Legal Pragmatism and the Constitution," 72 Minn. L. Rev. 1331 (1988). An earlier version of part I of this article was presented as the inaugural lecture for the Fletcher Chair on Nov. 6, 1987.

Thank you.

Ms. SULLIVAN. Thank you.

Mr. CASPER. Thank you, Senator.

Senator KENNEDY. Mr. Chairman, I want to join in welcoming the panel, and a special welcome to Professor Sullivan. I think all of us who have been on this committee have benefited from her enormous insight on these constitutional issues and questions. You have had an incredibly distinguished career up at Harvard Law School, and I know all the members of this committee have valued very much your insights, and the breadth of her sensitivity on so many of these fundamental issues of constitutional rights and liberties. We are delighted to have you here.

Ms. SULLIVAN. Thank you, Senator.

Senator KENNEDY. The clock has gone on. I wanted to just——

The CHAIRMAN. Excuse me, Senator. They tell me we have 6 minutes before the vote.

Senator KENNEDY. OK; just in one area, Professor Sullivan, one area of constitutional law that is a specialty of yours is the right of privacy, and the right of a woman to terminate a pregnancy is encompassed within that right. I would just like to ask you about Judge Breyer's record in that area.

In *Commonwealth of Massachusetts* v. *HHS,* Judge Breyer joined the first circuit in holding that the so-called gag rule barring counseling with respect to abortion by federally funded family planning programs violated what the Court called the right of reproductive choice as well as the first amendment.

Just based on this first circuit opinion and Judge Breyer's overall record, are you confident that Justice Breyer sitting on the Supreme Court will do honor to Justice Blackmun's legacy in upholding the fundamental right to choose recognized in *Roe* v. *Wade*?

Ms. SULLIVAN. Senator Kennedy, as Judge Breyer said before the committee, he regards *Roe* v. *Wade* as settled law, as reaffirmed in *Casey* two terms ago. But the case that you mention, *Commonwealth of Massachusetts* v. *Secretary of HHS,* reinforces that view because that was a case in which the first circuit, sitting en banc, Judge Breyer voting with the court for this view, held that the so-called gag rule that said those clinics that take Federal money can counsel for pregnancy but they cannot counsel in favor of abortion, what the first circuit did is they struck that down, and they said that violates not only the first amendment rights of doctors to speak and women to listen to truthful medical advice, but it also violates their right of privacy by, in effect, burdening that right with skewed information, a bum steer.

Now, in a very close, it is a very difficult and controversial area because it involves Federal funding, and the Supreme Court came to the opposite conclusion in *Rust* v. *Sullivan.* But I think in that very thoughtful and very well developed opinion for the first circuit, Judge Breyer joined in a view that the right of privacy is fundamental and that it must be protected against burdens.

Senator KENNEDY. Thank you very much. Our time I think is up, Mr. Chairman. I again want to thank the panel.

The CHAIRMAN. I know you both have come a long way to testify, and I say this with great sincerity. Please do not read from the failure of everyone to be here and ask you a lot of questions anything

other than respect for your testimony and lack of disagreement with what you have come here to suggest. So I thank you both very, very much, and, Mr. President, I mean this sincerely, I wish you well. You are at the helm of one of the great universities in the world, and it is a hell of an honor, I am sure, but an incredible obligation and difficult task. I wish you well. It is a great school.

Mr. CASPER. Thank you very much, Mr. Chairman. I regret that Senator Feinstein is not here any longer. I saw that she is even dressed in Stanford's colors.

The CHAIRMAN. Yes, she is.

Mr. CASPER. I assume that was in honor of my appearance here today. Please express my appreciation to her.

The CHAIRMAN. I will. Let me ask staff, are there any Senators who wish this panel to stay? I do not believe there was a request from them.

I thank you both very, very much.

Ms. SULLIVAN. Thank you, Mr. Chairman.

The CHAIRMAN. Let me announce, before I go to vote, our next panel is composed of three very distinguished people who wish to testify in opposition to Judge Breyer. And as soon as I return, we will empanel that panel and get on with the testimony.

We will adjourn for a vote.

[Recess.]

Senator SPECTER. Professor, I want to speak with you about the Court's responsibility to interpret the Constitution, and I have been concerned about the Court's, in effect, reversal of decisions like *Griggs,* which established the important doctrines of disparate impact and business necessity, and to the Civil Rights Act, a very important civil rights concept, which interpreted the 1964 Civil Rights Act in the 1971 unanimous opinion written by Chief Justice Burger, and then was reversed in *Ward's Cove,* and then the Congress took up the laborious, highly partisan task of amending the Civil Rights Act, which we did by 1991, and the impact of *Rust* v. *Sullivan* where the regulation that stood for some 18 years that counselors using Federal family planning grants could advise on the abortion option, until that was reversed by the new regulation, which was upheld by a 5-to-4 decision with Chief Justice Rehnquist saying that the attitude of the public having changed on abortion accommodated or justified a change, and the issue of capital punishment where Justice Marshall, along with Justice Brennan, came to the conclusion that capital punishment violated the eighth amendment prohibition against cruel and unusual punishment.

This is a quotation from Justice Marshall's concurring opinion in *Furman,* which I discussed with Judge Breyer, where Justice Marshall said, cited with approval the quotation, "Time works changes and brings into existence new conditions and purposes. In the application of the Constitution, our contemplation cannot be only of what has been but of what may be."

Now, I am very concerned about a standard of that sort which appears to me to really give the Supreme Court a policymaking function, really a legislative function. And you search the history of our country, and the most prominent example you come to of a public need for that would be *Brown* v. *Board of Education,* where you had, intolerable in this country, segregation which had gone on

uncorrected by the Congress or by the State legislatures or by the executive branch. And finally the Court acted. And the Court acted in what was unquestionably the interest of justice in America, equal justice, and the Court acted because nobody else had acted. The Congress, the State legislatures, the executive branch, the Governors, nobody else acted.

That necessity has been applauded, and I join in that applause, the moral conscience of the country. But what we really had were these Platonic Solons deciding what was good for the country in a change of constitutional doctrine.

My question for you, Professor, is: With this standard, that in the application of the Constitution, our contemplation, the Court's contemplation cannot be only of what has been but what may be, where is any line, bright or dim, separating the Court's role from the legislative function?

Ms. SULLIVAN. Well, it is an excellent question, Senator. It is the deep question of constitutional law that you ask. But let me stress that we must be clear in distinguishing pragmatism on the one hand from personal opinion or popular opinion on the other.

Pragmatism is not an effort to enact you own preferences into law, and it is not an effort to be a bellwether of popular opinion. Pragmatism does not follow the polls.

What a pragmatic judge tries to do instead is to look outside himself and to sources more lasting and deeper and enduring than the passions of the moment. And what the Court did in *Brown* is a fine example. It was certainly not a response to popular opinion, which, of course, was, if anything, the other way in 1954. *Brown* was an effort to look at the meaning of the guarantee of equal protection in a time that had changed. There were very few public schools, virtually no public schools at the time the 14th amendment was enacted. Those that existed were segregated in some parts of the country, and yet what the Court said is we are not going to look to that narrow history at the time of the framing of the 14th amendment. We are going to look to this guarantee in terms of its purpose, in terms of its human purpose in guaranteeing the equality of the races before the law.

The law cannot just mean the courtroom, said the Court. The law cannot just mean certain civic institutions. It has to mean the schools as well.

Now, where did they look? They looked to the text of the clause. They looked to the history of the clause, not its narrow history but the history of its broader purposes. They looked to the change in social circumstance over time, the rising importance of public schools as a fountain of people's dignity and civic education. And they said, reading this clause in terms of its present meaning but according to its original purposes, there must no longer be segregation of the schools.

It is the same sort of thing that the Court did when it upheld the New Deal, in the cases, the great cases of 1936 and 1937 that said that to read the doctrine of laissez faire into the Constitution was in error. It was an error in terms of the circumstances of our time: soup kitchens, 25 percent unemployment, the need for Government to regulate if the very human purposes of a free economic were to be realized.

So I think it is a very important distinction to make, but it is critical, between pragmatism, which is a look outside the judge's self to history, tradition, the conscience of a free people, precedent, social facts outside himself—we must distinguish that effort, which is an effort to look to objective sources of meaning from any attempt to enact one's subjective preferences into law. And I think Judge Breyer was clear to the committee in numerous colloquies that when strong personal preferences are held that conflict with all that information, all that data from outside about what the law means, one is not to enact one's person preferences into law; one is to, if the personal feeling is too strong, remove oneself from the case.

Senator SPECTER. Well, Professor Sullivan, that sounds good and makes sense to a substantial extent, but it is the judge who looks outside, starting from looking inside. And none of us can divorce ourselves from our own views, and it has to be significantly if not largely a personal decision as to what those outside forces are.

Now, wasn't it a matter in the first instance, really, for the legislature of Alabama, Georgia, or the Congress of the United States, or the President? President Truman had an executive order for nondiscrimination in the armed services. Wasn't it first a matter of public policy that should have been decided by the legislatures, by the Congress, or by the President?

Ms. SULLIVAN. There are times when the political bodies do not and sometimes times when the political bodies cannot act given the——

Senator SPECTER. What do you mean cannot act?

Ms. SULLIVAN. When their political——

Senator SPECTER. It is against their political interest to act?

Ms. SULLIVAN. Well, in the case of civil rights legislative efforts in the 1950's, that might well be the case. But I think that it would be a mistake, though, to say that what the Court did in *Brown* was to legislate what Congress could not. I do not think that would be a description of what the Court did. The Court interpreted the equal protection clause. The Court interpreted the document, the Constitution, the binding text.

Senator SPECTER. Do you think the Congress should have legislated long before *Brown* v. *Board of Education* in 1954?

Ms. SULLIVAN. There might be an argument that that is so. There might be an argument that is so.

I think our history and the case of racial segregation is a tragic and embarrassing one and one that should have been rectified sooner. But when political bodies cannot act, sometimes courts must.

Senator SPECTER. Well, I think that you articulate it accurately. I agree with what you say when political bodies do not act. I do not believe that political bodies cannot act. I believe that political bodies do not act because it is against their personal interest, significantly of the legislators, and it reflects their constituents' point of view. But they do not act. And I think the Supreme Court had to act in *Brown,* and that is the seminal case for the Court to act. And it can be articulated in very fine concepts deeply rooted in the tradition of the people, as the Court recognized in *Palco.* You have in the criminal field the decision in *Miranda* v. *Arizona,* where the

Court decided that the Constitution required five specific warnings and five specific waivers. And that was a field where the legislative bodies could have acted for decades, and on June 13, 1966, the Supreme Court of the United States came down and said the Constitution requires that every police officer give five warnings. You have the right to remain silent; you have a right to counsel; if you do not have counsel, it will be provided for you; if you start to talk, you can stop talking. And then a week later the Supreme Court came down with the decision saying that that decision took effect on June 13 for any trial that started after that date.

I was a district attorney at that time and had cases where criminals had confessed, corroborating evidence, found the gun, found the loot, in May 1966. You could not start the trial before June 13. Who knew? And the Supreme Court of the United States came down with that decision.

Now, what is there in our traditions that warrants that kind of an abrupt change which is retroactive in its application? How do you accord, under our theory of constitutional government, that much power in the Court, except what the judges themselves make a personal determination? And they can say they look outward, but it is hard to find any external objective determinants which warrant that kind of a conclusion or which give them that kind of power.

Ms. SULLIVAN. Well, Senator Specter, I think the important holding of *Miranda* was not the specific words of the five warnings that everyone who watches prime-time television is so familiar with today. The important holding in the *Miranda* decision was that coercion of a person to bear witness against himself can come as well from psychological methods as from the end of a rubber hose.

What the Court was saying is that our fundamental, deep-seated, 18th century view that no one shall be compelled, coerced, made against his will to speak against himself to confess, that was the core of *Miranda*. What *Miranda* was saying is that there is a lot more coercion in a station house than happens simply through physical beatings. Coercion can come in other forms.

That is the kind of decision the Court has to make in many areas. The Court has made the decision that sometimes school children are coerced into school prayer when they are made to say it along with their fellows, or a State can be coerced into following the will of Congress through being told things in a Federal law. Sometimes the Court has to expand its modern notion of what is a very ancient fundamental concept that certain things should not be coerced out of people or out of States.

I think that is the core. We should not focus so much on the specific warnings or on the specific timing. It is always hard when a new rule comes into effect, and I understand very much what you are saying about being caught in that transition period. But the core of *Miranda* was doing exactly what I think pragmatic judges do, which is you look outside—you take our tradition. You take the fifth amendment guarantee against compelled self-incrimination, and you interpret it in light of modern times, in light of late 20th century understandings that sometimes police methods other than brute force can violate our rights. And I think that the Court in that case did look to other sources, to studies by the States, to

changes in State law, to studies by the ALI and other bodies, to try to come up with the method. And we can all—reasonable men and women can disagree about the precise warnings, but about the concept of compelled self-incrimination, that is what the Court was really just trying to bring anew into a modern age.

Senator SPECTER. Well, I thank you for your comments. The chairman has returned, and we have a great many witnesses, so I am not going to prolong any further Q and A. We had a little lull in the action. I thought it would be worthwhile to discuss these issues with you.

I would say in conclusion that the principles of coercion had long been articulated by the Court, and we had the *Escobedo* case 2 years before which had two warnings. And we had *Turner* v. *Pennsylvania* on coerced confessions. We have a large body of law, and I would have to disagree with you that it was not too important what the specific warnings were, because a lot of murderers, where there was conclusive evidence, far beyond the confession, corroboration, that went to the residence of the defendant, found the gun, found the proceeds from the taxi robbery. So that when the Court comes down with these specific warnings and the policemen in May 1966 could not conceivably, obviously, have anticipated what the warnings would have to be, and you have the Court coming down with that decision, and not only the decision but it is not prospective from that day forward, it is retroactive. And you take a look at what the Court has done, and we have a wonderful system of government beyond any question with our Constitution. And the advantages far outweigh the disadvantages. But I think we have to stop and take a look at what the Court does when they articulate the meaning of the Constitution relying on a standard of external factors, pragmatism, something which is not their personal view that comes from the outside, it is hard to find that outside.

I think we do not have enough focus in hearings of this sort or in the Court itself on the respective role of the legislative branch versus the judicial branch. And you can applaud the Court loudly for *Brown* v. *Board of Education,* but you look at a lot of their other decisions, and you wonder where they think they get the authority to do that.

Ms. SULLIVAN. Yes.

Senator SPECTER. This is a subject I think we have to pursue when the only chance we have is when they come here in this brief nominating process or when there is a break in the action and we can talk to a professor of law.

Thank you.

The CHAIRMAN. Thank you, Professor. I only regret because of your transfer from Harvard to Stanford, that it takes you longer to get here. But I am not sure—and I am not being facetious when I say this—that you could continue the tutorial for Senator Specter. I have found, Senator, that what I have attempted to do, maybe because I have needed it more than you, is to assemble professors of the caliber of Professor Sullivan who have been kind enough over the last 10 years to literally come to my office and spend hours, sometimes days pursuing a particular constitutional point with me, to educate me, unrelated to the hearings. I would highly recommend it, and I would highly recommend Professor Sullivan.

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