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