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NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

JULY 25, 1994.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany the nomination of Stephen G. Breyer to be an Associate Justice of the United States Supreme Court]

The Committee on the Judiciary, to which was referred the nomination of Chief Judge Stephen G. Breyer to be an Associate Justice of the U.S. Supreme Court, having considered the same, reports favorably thereon, a quorum being present, by a vote of 18 yeas and 0 nays, with the recommendation that the nomination be approved.

CONTENTS

79–114 CC

INTRODUCTION

The Senate Judiciary Committee unanimously recommends the confirmation of Judge Stephen G. Breyer to be an Associate Justice of the U.S. Supreme Court.

Judge Breyer possesses exceedingly high and exceptionally varied credentials. He was a full professor at one of our nation's most prestigious law schools. He has served in all three branches of the Federal Government. A circuit judge for 14 years, he has served 4 years as chief judge. His academic writings on economic regulation and administrative law have marked him a leader in those fields.

This report canvasses the record of significant issues explored with the nominee during the hearings. Although individual Senators may not agree with the conclusions drawn in every section of this report, each of the issues was relevant to some members of this committee in reaching the recommendation that the Senate consent to this nomination.

Based on its review of his entire professional career, the committee enthusiastically recommends the confirmation by the Senate of the nomination of Judge Stephen G. Breyer.

PART 1: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Chief Judge Stephen G. Breyer to be an Associate Justice of the United States Supreme Court on May 17, 1994. The hearings on Judge Breyer's nomination were held on July 12, 13, 14, and 15. The nominee was questioned for approximately 20 hours over the course of 3 days. The nominee was also questioned in a closed session, pursuant to rule 26 of the Standing Rules of the Senate, on July 14, 1994.

The nominee was introduced by Senators Kennedy and Kerry of Massachusetts, his present home, and Senators Boxer and Feinstein of California, his childhood home.

The committee heard testimony from a total of 21 witnesses, including Robert P. Watkins, chair, Standing Committee on the Federal Judiciary, American Bar Association; Michael Greco, First Circuit representative, American Bar Association; Gerhard Casper, president, Stanford University; Kathleen Sullivan, professor, Stanford University Law School; Paige Comstock Cunningham, Americans United for Life; Michael P. Farris, Home School Legal Defense Association; Jose Trias Monge, former justice of the Supreme Court of Puerto Rico; Margaret Marshall, vice president and general counsel, Harvard University; Helen Corrothers, National Institute for Justice, former U.S. Sentencing Commissioner; Ralph Nader; Dr. Sidney Wolfe, director, Public Citizen's Health Research Group; Lloyd Constantine, Constantine & Associates; Ralph Estes, professor, The Kogod College of Business Administration, American University; Robert Pitofsky, Arnold & Porter; Cass Sunstein, professor, University of Chicago Law School; Martha Matthews, National Center for Youth Law, former clerk to Judge Breyer; Barbara Paul Robinson, president, The Association of the Bar of the City of New York; Paulette Brown, president, National Bar Association, on behalf of the Coalition of Bar Associations of Color; Brian Sun, president, Asian Pacific American Bar Association; Richard Monet, Native American Bar Association; and Wilfredo Caraballo, president, Hispanic National Bar Association.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, including his 14-year record as a circuit judge on the U.S. Court of Appeals for the First Circuit, 4 years of which he served as chief judge, his 2-year record as chief counsel to this committee, his 13-year record as professor at Harvard Law School, his tenure as assistant special prosecutor for the Watergate Special Prosecution Force, his 2-year record as special assistant to the Assistant Attorney General for Antitrust, and his voluminous academic writings and speeches.

On July 19, 1994, a quorum being present, the committee voted, 18 to 0, to report the nomination with a favorable recommendation.

AYES	NAYS
Mr. Biden	None
Mr. Kennedy	
Mr. Metzenbaum	
Mr. DeConcini	
Mr. Leahy	
Mr. Heflin	
Mr. Simon	
Mr. Kohl	
Mrs. Feinstein	
Ms. Moseley-Braun	
Mr. Hatch	
Mr. Thurmond	
Mr. Simpson	
Mr. Grassley	
Mr. Specter	
Mr. Brown	
Mr. Cohen	
Mr. Pressler	

II. THE NOMINEE

Judge Breyer was born on August 15, 1938, in San Francisco, CA. He received his undergraduate degree from Stanford University in 1959. Judge Breyer attended Magdalen College, Oxford University, as a Marshall Scholar from 1959 to 1961. He received an LL.B. (magna cum laude) from Harvard Law School in 1964.

From 1964 to 1965, the nominee served as law clerk to U.S. Supreme Court Justice Arthur J. Goldberg.

From 1965 to 1967, the nominee worked at the Department of Justice as a Special Assistant to the Assistant Attorney General for Antitrust.

From 1967 to 1970, the nominee was an assistant professor of law at Harvard Law School. From 1970 to 1980, the nominee was a full professor at Harvard Law School.

In 1973, the nominee worked at the Department of Justice as an Assistant Special Prosecutor for the Watergate Special Prosecution Force.

From 1974 to 1975, the nominee was Special Counsel to the Administrative Practices subcommittee of this committee.

In 1975, the nominee was a visiting lecturer on antitrust law at the College of Law in Sydney, Australia.

From 1979 to 1980, the nominee was chief counsel to this committee under then-Chairman Edward M. Kennedy.

In 1980, President Carter nominated Judge Breyer to the U.S. Court of Appeals for the First Circuit. He has served that court from 1980 to the present. In 1990, Judge Breyer became chief judge of the U.S. Court of Appeals for the First Circuit.

From 1980 to the present, during his tenure as a circuit judge, the nominee has been a lecturer at Harvard Law School.

From 1985 to 1989, the nominee was a Commissioner of the U.S. Sentencing Commission, in Washington, DC.

In January of 1993, the nominee was a visiting professor at the University of Rome, Rome, Italy.

President Clinton nominated Judge Breyer to the Supreme Court on May 17, 1994.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. The Standing Committee unanimously gave Judge Breyer its highest rating of "Well Qualified"

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary, chaired by Robert P. Watkins, unanimously found Judge Breyer to be "Well Qualified," its highest rating. (Letter from Robert P. Watkins to Chairman Biden at 2 (July 11, 1994) (on file with the Senate Committee on the Judiciary)). Based on its investigation, the Standing Committee determined that Judge Breyer "earned and enjoys an excellent general reputation for his integrity and character." (Id. at 3). Out of the many hundreds of persons questioned regarding Judge Breyer's integrity, not one had any question or doubt in this regard. The Standing Committee also found that Chief Judge Breyer's judicial temperament meets the highest standards and that his professional competence meets the highest standards required for a seat on the Supreme Court. An ex-

ample of the praise for Judge Breyer's writing and scholarship was given by a chairman of a reading group who said:

> He is a lawyer's lawyer and a judge's judge. He is careful, scholarly, dispassionate, and objective. Furthermore, he recognizes that there are limits to his own abilities, as a jurist, to resolve every dispute engendered by the contentious press of modern life.

(Id. at 6.)

The Standing Committee concluded of Judge Breyer that his "academic training, his broad experience in the Federal Government, his service on the faculty of a distinguished law school, his scholarly writings, and his distinguished service for 14 years, 4 as chief judge on the court of appeals, establish his professional competence. His integrity is above reproach, and he possesses and exhibits the highest level of judicial temperament." *Transcript of Proceedings, Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary,* 103d Cong., 2d sess., July 15, 1994, at 6 [hereinafter cited as "Transcript"].

B. The Standing Committee conducted an extensive investigation

The Standing Committee conducted an extensive investigation of Judge Breyer, including interviews with 300 judges at all levels of the Federal and State courts. The Standing Committee also interviewed several hundred other people, including practicing lawyers, former law clerks, lawyers who have appeared before Judge Breyer, law school deans, and law professors at schools throughout the United States. (Letter from Robert P. Watkins to Chairman Biden at 2 (July 11, 1994) (on file with the Senate Committee on the Judiciary).)

Chief Judge Breyer's opinions were reviewed by: (1) a Reading Group of lawyers, chaired by Rex E. Lee, former Solicitor General of the United States and presently president of Brigham Young University, who have practiced and argued cases in the Supreme Court; and (2) a Reading Group of 26 professors at Vanderbilt University School of Law, chaired by Prof. Nicholas S. Zeppos of Vanderbilt. The members of both Reading Groups reported their independent analyses of Judge Breyer's opinions and writings to the Standing Committee. One group characterized his opinions as reflecting "a wide breadth of knowledge about the law," and described him as possessing "enormous intellectual ability with an outstanding ability to write clearly and persuasively;" the other group was equally favorable. (Id. at 6.)

IV. COMMITTEE RECOMMENDATION

A motion to report with favorable recommendation the nomination of Chief Judge Stephen G. Breyer to be an Associate Justice of the U.S. Supreme Court passed by a vote of 18 to 0.

PART 2: JUDGE BREYER'S JUDICIAL PHILOSOPHY AND CONSTITUTIONAL METHODOLOGY

I. JUDGE BREYER ESPOUSES A PRAGMATIC APPROACH TO JUDICIAL DECISIONMAKING

Judge Breyer's written record and testimony before the committee demonstrate that the overarching characteristic of his approach to judging has been pragmatism.

In simplest terms, the legal pragmatist rejects grand theories, in favor of the idea that answers to legal problems are situated in a context; that they are partial, not absolute; and changing, not timeless. Legal pragmatists believe that pragmatism answers questions more coherently than any single theory of interpretation. The pragmatist believes that, while originalist and nonoriginalist theories may come up with answers in individual cases, no one theory provides adequate guidance for the task of judicial review.

Judge Breyer's pragmatism is well illustrated by his concurring opinion in *Jamestown School Committee* v. *Schmidt,* 699 F.2d 1 (1st Cir.), *cert. denied,* 464 U.S. 851 (1983). In his majority opinion, Chief Judge Coffin found that a Rhode Island statute providing bus transportation to nonpublic school children was consistent with the establishment clause, in all but one minor respect. Although part of the money paid for the transportation of children to Catholic schools, the majority opinion applied traditional establishment clause analysis and upheld the busing statute as a neutral program by the State to help parents get their children, regardless of their religion, safely to and from school.

In his concurring opinion, Judge Breyer stated that the establishment clause called for "a more practical approach," and he engaged in a pragmatic assessment to show that the parochial school children and their parents attained no more benefit—measured in dollar terms—from the busing than the public school children. Id. at 15. Although he too applied the traditional constitutional analysis, Judge Breyer opined that "the question of constitutionality * * * is primarily a question of practical effect, measured in terms of costs incurred by the state and actual benefit conferred on the parochial school student." Id. at 17.

A second case illustrating Judge Breyer's pragmatism is *Alexander* v. *Trustees of Boston University,* 766 F.2d 630 (1985), Judge Breyer dissented from a panel decision in a Solomon Amendment suit requiring students applying for financial aid to certify that they were in compliance with draft-registration requirements. Three theology students challenged this requirement on the basis of religious beliefs that they should in no way help the military—even though by virtue of age or gender they were not required to register for the draft. Judge Breyer noted that the students had in fact already provided the necessary information—their age and gender—in other parts of the form, so that the dispute over the draft eligibility checkoff was moot. Thus, reasoned Judge Breyer, the aid should have been awarded even if they had not filled out the form required by the Solomon Amendment. He would "overlook so trifling a deviation from the bureaucratic norm, at least where the applicants have a genuine religious or ideological scruple that prohibits their supplying the information on one form but not on

another * * * [T]o deny this, in a nation as diverse as ours, housing so many strongly held but differing points of view, is to exacerbate conflict where it could be muted." Id. at 648.

Judge Breyer also provided a glimpse of his own likely judicial philosophy in his tribute to former First Circuit Chief Judge Frank Coffin. Judge Breyer noted Coffin's

> understanding of * * * human problems * * *. His opinions make sense in human terms. He sees the need to balance and to compromise the various desirable objectives that human beings in society need to achieve. The talent—imaginatively to understand the scope of the human problem, to develop rules, standards, and examples that will create a practical and human environment surrounding and sustaining social activity, and to do this within the context of strict standards of craftsmanship—is * * * a unique achievement.

A Tribute to Judge Frank M. Coffin, 43 Maine Law Review 2, 5 (1991).

Similarly, in his tribute to former Solicitor General Paul Bator, Judge Breyer recognized Bator as part of a "great legal tradition" of construing the Constitution—in Bator's words—in a "manner that is fundamentally pragmatic, undogmatic, and adaptive." Breyer explained that this tradition "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." Tribute to Paul M. Bator, 102 Harv. L. Rev. 1741, 1743–44 (1989).

During the confirmation hearings, Senator Hatch expressly noted Judge Breyer's pragmatism and his concern with solving human problems. Senator Hatch quoted Judge Breyer's statement 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.

(Transcript, July 12, at 67–68.) In exploring the implications of Judge Breyer's pragmatic vision, Senator Hatch asked:

> [W]hat constraints, formal or informal, legal or prudential, really bind a Supreme Court Justice in his or her own decisionmakings?

(Id. at 68.) Judge Breyer responded:

> I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that that particular judge is not speaking as an individual. In an ideal world, the personality of the judge, the face of the judge, would not be significant because when the judge speaks with a black robe on, in no matter what court, the judge is speaking for the law. And in an ideal world, the law is the same irrespective of the personality of the judge.

> * * * But it is consistent with believing that the law that the judge interprets and enunciates with his black robe on is in fact a body of rules and institutions and so forth that is supposed to work properly for people.
>
> * * * I would imagine that on the Supreme Court, what I would be bound by is the words, the history, the precedents, the traditions, all of those things which in fact go up to make this great body of institutions, including legal advice and how businesses and labor unions interpret it and so forth, that we call law.
>
> [A] judge should be dispassionate and try to remember that what he is trying to do is interpret the law that applies to everyone, not enunciate a subjective belief or preference.

(Id. at 68–70.)

Senator Hatch followed with a related question:

> Would you agree, then, that a judge's authority derives entirely from the fact that he or she is applying the law, not simply imposing his or her policy preferences?

(Id. at 70.) Judge Breyer responded,

> Of course, that is true. And why it is difficult, in an important court like the Supreme Court, is of course people disagree, often, about how, in vast, uncertain, open areas of law, where there are such good arguments on both sides of such important policy issues, of course people disagree about what the proper outcome of those issues is. But in trying to find the correct solution, the helpful solution consistent with the underlying human purpose, the judge follows canons, practices, rules, cases, procedures, all those things that help define the role of the judge, which is the same for judge A as it is for judge B.

(Id.)

In short, Judge Breyer believes that the law is a tool for solving problems for people. His pragmatism permits a wide search of legitimate sources—text, history, tradition, precedent, and the specific facts of the case before him—in answering complex legal questions in a human way.

II. JUDGE BREYER DEMONSTRATES RESPECT FOR PRECEDENT AND STARE DECISIS

The committee believes that Judge Breyer understands the value of precedent and that he properly respects the principle of *stare decisis*. At the same time, he has emphasized the importance of arriving at the proper result in interpreting the Constitution, when the Supreme Court is occasionally called on to break from the past. Repeatedly in his testimony, Judge Breyer stated that he regarded various key precedents of the Court as "settled law," indicating his respect for their value as precedent.

Senator Hatch directly asked Judge Breyer for his "view of the theory of stare decisis." (Transcript, July 13, at 232.)

Judge Breyer answered in this way:

> My view is that stare decisis is very important to the law. Obviously, you can't have a legal system that doesn't operate with a lot of weight given to stare decisis, because people build their lives, they build their lives on what they believe to be the law. And insofar as you begin to start overturning things, you upset the lives of men, women, children, people all over the country. So be careful, because people can adjust, and even when something is wrong, they can adjust to it. And once they have adjusted, be careful of fooling with their expectation.
>
> When I become a little bit more specific, it seems to me that there are identifiable factors that are pretty well established. If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law, that is, how badly reasoned was it?
>
> You ask yourself how the law has changed since, all the adjacent laws, all the adjacent rules and regulations, does it no longer fit. You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice, has it proved impossible or very difficult to administer, has it really confused matters. Finally, you look to the degree of reliance that people have had in their ordinary lives on that previous precedent.

(Id. at 232–33.)

Senator Hatch followed up by asking whether *stare decisis* operates differently with respect to constitutional and statutory rights. Judge Breyer responded, "In principle, I think the questions are the same, questions that one would ask." (Id. at 234.) He said,

> The real difference between the two areas is that Congress can correct a constitutional court, if it is a statutory question, but it can't make a correction, if it is a constitutional matter.

(Id. at 233.)

In the same vein, Senator Grassley asked Judge Breyer about the line of cases in the 1960's and 1970's where the Court "issued a series of opinions striking down statutes that treated differently children born to married parents as opposed to children born out of wedlock." (Transcript, July 12, at 182–83.) Senator Grassley noted that the Court found no rational basis for the belief in various States that illegitimacy would increase if the statutes were invalidated. Expressing his view that these decisions were later revealed to be "just plain wrong," (id. at 184), Senator Grassley noted that legislatures are now seeking various ways to combat the problem of illegitimacy. The Senator asked Judge Breyer about his views of precedent in this context: if a case came before the Supreme Court that asked to overturn a prior precedent regarding illegitimate children, "[w]ould the societal changes that have devel-

oped over the last 30 years be relevant to your decision?" (Id. at 185.) Judge Breyer replied:

> They are relevant. * * * I think that in applying the Constitution in general, one looks, of course, to the conditions of society. I think the Constitution is a set of incredibly important, incredible valuable principles, statements in simple language that have enabled the country to exist for 200 years, and I hope and we believe many hundreds of years more.
>
> That Constitution could not have done that if, in fact, it was not able to have words that drew their meaning in part from the conditions of the society that they govern. And, of course, the conditions and changed conditions are relevant to deciding what is and what is not rational in terms of the Constitution, as in the terms of a statute or in any other rule of law.

(Id. at 186.)

Similarly, in response to a question from Senator Specter regarding the constitutionality of various applications of the death penalty, Judge Breyer first noted that the conclusion that the death penalty did not in all cases violate the eighth amendment was "settled law." (Transcript, July 13, at 14.) Judge Breyer then elaborated on his views of precedent and on the role of history and tradition in reaching a decision in a case:

> I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent. That is normal.
>
> The history is important as well, both because it reflects an intent of the Framers and because it shows how, over the course of 200 years, that intent has been interpreted by others.
>
> The present and the past traditions of our people are important because they can show how past language reflecting past values, which values are permanent, apply in present circumstances. And some idea of what an opinion either way will mean for the lives of the people whose lives must reflect those values, both in the past, in the present, and in the future, is important.

(Id. at 15.)

III. JUDGE BREYER POSSESSES THE REQUISITE JUDICIAL TEMPERAMENT AND JUDICIAL ETHICS

Several Senators questioned Judge Breyer concerning his judicial temperament as well as his personal style of judicial decisionmaking and ethics.

Throughout the testimony, including testimony from several of the outside witnesses, it was made abundantly clear that Stephen Breyer brings a commitment to collegiality and an appreciation for the importance of a Supreme Court that speaks with one voice where possible. Senator Heflin questioned Judge Breyer about his widespread reputation as a consensus builder, as one who brings collegiality to his court:

> [W]hat do you think are the advantages of collegiality and consensus, and what role do you think you can play to help bring this about?

(Transcript, July 13, at 35.) Judge Breyer offered this response:

> Consensus is important for a number of reasons. One is the effort to obtain consensus tends to downplay the individual ego of the individual judge, and that makes it more likely that there will not be subjectivity, and there will not be personal views, and everyone will put his mind or her mind to the more important task of determining the law.
>
> Consensus is important because law is not theoretical; law is a set of opinions and rules that lawyers have to understand; judges have to understand them; lower court judges have to understand them. And eventually, the labor union, the business, small business, everyone else in the country has to understand how they are supposed to act or not act according to law. And consensus helps produce the simplicity that will enable the law to be effective.
>
> Now, how do you achieve that consensus? That is hard. It is not a question of bargaining * * *. It is a question of trying to listen to other people. * * * And then, when the different judges understand that their own ego is less at stake, you do not stick on every little minor thing; try, and try to get a view in the opinion that is straight, that is clear, that pays attention to the different arguments and that treats them fairly, then I think consensus comes along.

(Id. at 35–37.)

During the hearings, the committee carefully examined whether Judge Breyer violated judicial ethical standards by not recusing himself from certain environmental cases that were alleged to have some possible impact on his Lloyd's of London investment in a syndicate named "Merrett 418."

Press accounts questioned whether Judge Breyer should have recused himself from environmental cases before the First Circuit, and, focusing in particular on *United States* v. *Ottati & Goss, infra,* on whether his decisions created precedent that had a direct effect on his investment in a Lloyd's of London syndicate that underwrote a broad range of risks including environmental and asbestos liabilities. In particular, Senator Metzenbaum expressed concerns about whether Judge Breyer exercised bad judgment when he participated in pollution cases, particularly in the *Ottati* case; why Judge Breyer recused himself from participating in asbestos cases but not environmental pollution cases; and what standard of recusal Judge Breyer would use if elevated to the Supreme Court.

The Investment in Lloyd's. Judge Breyer was an investor, called a "Name," in Lloyd's from 1978 to 1988 and was in different individual syndicates over those years. He resigned from participation in Lloyd's in 1988; and because it normally takes 3 years for the books on a Lloyd's syndicate to close, since 1990 his relationship with Lloyd's has ended, with the exception of one syndicate, Merrett 418 (1985), which has remained open because of outstanding liabilities including asbestos and environmental pollution.

When Judge Breyer joined Lloyd's as a Name, he signed an underwriting agreement that vested all control, management, and discretion for choosing the types of risks that a syndicate underwrote and administration with the underwriting agent. As a Name, Judge Breyer knew that Merrett 418 was a "Marine" syndicate with incidental Non-Marine coverage; Judge Breyer said he did not have specific knowledge about what companies or types of risks Merrett 418 insured.

The Evidence at the Hearing. In his opening statement, Judge Breyer explained that in light of the questions raised about his ethical standards, he "reviewed those [environmental] cases again and the judicial recusal statute, and [he] personally [was] confident that [his] sitting on those cases did not present any conflict of interest." Recognizing the importance of avoiding conflicts of interest or even the appearance of such conflicts, Judge Breyer announced his intention to "ask the people who handle [his] investments to divest any holdings in insurance companies as soon as possible." He also explained that he had been advised that he would be able to end his association with Lloyd's Merrett 418 syndicate, which had not closed because of unresolved environmental pollution and asbestos liabilities, by 1995.

The committee received written opinions from several legal and judicial ethics experts and practitioners including University of Pennsylvania Law School Geoffrey Hazard, Jr., New York University Law School Professor Stephen Gillers, and John Frank of Lewis & Roca. Each of them has concluded that Judge Breyer's actions fully complied with current applicable recusal standards. Professor Hazard concluded "in light of the facts no conflict of interest or appearance of conflict materialized." He also noted that "it was possibly imprudent for a person who is a judge to have such an investment, because of the potential for possible conflict of interest and because of the appearance of impropriety." (Letter from Geoffrey C. Hazard, Jr., to Lloyd N. Cutler (July 11, 1994) (on file with the Senate Committee on the Judiciary).) In addition, Thomas Brunner and Susan Sawtelle of Wiley, Rein & Fielding, experienced lawyers in the field of environmental insurance litigation, have expressed the opinion that no case in which Judge Breyer participated had any substantial or predictable effect on his interest as an investor in Lloyd's or on the financial position of insurers generally. These opinions were entered in the hearing record.

Monroe Freedman, a professor at Hofstra Law School and a legal ethics expert, in contrast, has expressed his written opinion that Judge Breyer should have recused himself from environmental pollution cases because, in Professor Freedman's view, he could have benefited indirectly if legal precedent from these cases weakened cleanup standards and thus, Lloyd's was spared further liability. This opinion was entered into the hearing record. Professor Gillers has written a response to Professor Freedman's letter, which will also be entered into the record.

Recusal Standards. It is the view of the committee that Judge Breyer complied with all applicable laws and ethical standards with respect to his Lloyd's investment.

In order to screen possible conflicts, Judge Breyer each year provided the First Circuit clerk and his own staff with a list of his in-

vestments and a request that he not sit on cases involving these companies. This list included "Lloyd's" and "asbestos cases." Judge Breyer himself reviewed cases to determine conflicts of interest. He also stated that he had invested in Lloyd's on his annual judicial financial disclosure report. That report is available to the public, including litigants who are free to seek recusal in any case where they feel a judge may have a conflict.

Current ethics rules, 28 U.S.C. 455 and canon 3 of the Code of Conduct for United States Judges, require that a judge recuse himself or herself when the judge's impartiality may be questioned; when he or she has a financial interest in the subject matter or party before the court; or when he or she has any other interest that would be substantially affected by the outcome of the case.

As for the requirement that judges avoid the appearance of impropriety whenever possible [28 U.S.C. 455(a)], the Supreme Court in *Liljeberg* v. *Health Services Acquisition Services Corp.,* 108 S. Ct. 2194 (1988), held that recusal is required when facts might reasonably cause an objective observer to question a judge's impartiality. 108 S. Ct. at 2205. To establish a knowing financial interest in the subject matter in controversy (when the judge's interest is not in one of the parties), the effect must be direct rather than indirect or speculative. *McCann* v. *Communications Design Corp.,* 775 F. Supp. 1535 (D. Conn. 1991). Interests that are remote, speculative, or slight do not call for recusal. *See DOE* v. *Brimmer,* 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982). *See also Andersen* v. *Roszkowski,* 681 F. Supp. 1284, 1290 (N.D. Ill. 1988) ("[a] judge's financial interest in a 'correspondent bank' to a defendant bank is simply too indirect and insignificant a financial interest to require disqualification."), *aff'd without op.,* 894 F.2d 1338 (7th Cir. 1990); *In re Placid Oil Co.,* 802 F.2d 783, 786–87, *reh'g en banc denied,* 805 F.2d 1030 (5th Cir. 1986) (the effect that a case may have on an industry as a whole is generally considered indirect and speculative and not the basis for recusal).

Because Lloyd's Names do not have specific knowledge of the companies or risks insured by a syndicate and do not exercise any control over the selection of specific risks, Professor Hazard and others are of the view that the investment is like a mutual fund or other common investment fund. As Professor Hazard stated, "Just as ownership in a mutual fund is not ownership in the securities held by the fund, so, in my opinion, is investment as a Name not an assumption of direct involvement in the risks covered by the particular Lloyd's syndicate." (Letter from Geoffrey C. Hazard, Jr., to Lloyd N. Cutler (July 11, 1994) (on file with the Senate Committee on the Judiciary).) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" requiring recusal unless the judge participates in the management of the fund. 28 U.S.C. 455(d)(4)(i). A judge is under no obligation to keep informed about those underlying investments. Instead, the judge's recusal obligation with respect to such a fund arises only if the fund itself is a party or could be substantially affected by the case. Courts have held that "[a] motion for recusal should not be granted lightly; a judge is under as much obligation not to recuse himself when facts do not show prejudice as he is to recuse himself if they

do." *Williams* v. *Balcor Pension Investors,* 1990 U.S. Dist. LEXIS 15927, at 14 (N.D. Ill. Nov. 27, 1990).

Professor Freedman, however, rejects the argument that Judge Breyer's membership in Lloyd's is analogous to being an investor in a mutual fund. He states that although mutual funds are typically diverse, Lloyd's is solely involved in the insurance business, and Professor Freedman asserts that Judge Breyer should have known that one or more of his insurance liabilities related to environmental pollution. Professor Freedman also states that although a mutual fund investor cannot lose more than the principal invested, a Lloyd's Name investor may risking losing more than he invested. (Letter from Monroe Freedman to Chairman Biden (July 13, 1994) (on file with the Senate Committee on the Judiciary).)

Judge Breyer did not participate in any case in which Lloyd's was a party or had a named interest. Judge Breyer has participated in eight cases that involved the Superfund statute. One of these cases was *United States* v. *Ottati & Goss,* 900 F.2d 429 (1st Cir. 1990). Senator Metzenbaum shared Professor Freedman's concern that Judge Breyer's decision in this case on an unsettled area of the law had the potential to set precedent that could have affected Lloyd's liability sometime in the future. It is the view of the committee that none of the Superfund statute cases on which Judge Breyer sat posed a direct and clearly predictable effect on the insurance industry, or on Lloyd's itself.

Conclusion. In summary, the question before the committee is whether Judge Breyer violated current ethics rules. Many Senators directly questioned Judge Breyer about his investment and the environmental cases in which he participated. Based on Judge Breyer's thoughtful and forthright testimony about his investment in Lloyd's, the applicable case law on the recusal standards, and a review of the environmental cases that Judge Breyer decided, the committee concludes that Judge Breyer has acted ethically and fully complied with the current applicable ethical standards. In addition, given Judge Breyer's decision to divest himself of all insurance holdings, the committee believes that Judge Breyer will continue to act in an ethical manner as a member of the Supreme Court.

IV. CONCLUSIONS

The written record and the totality of his testimony demonstrate that Judge Breyer understands the role and function of the judicial branch within our constitutional system, a system that entrusts legislating to the elected branches, not the judiciary. His pragmatic judicial philosophy is not ideological, nor is it comprised of the personal views of Stephen Breyer. Instead, Judge Breyer's legal pragmatism seeks answers to legal disputes from a range of legitimate sources, including the text of the Constitution or statute, history and tradition, relevant precedent, and the current conditions of society.

He also considers the people whose lives are affected by his decisions. As he said to Senator Moseley-Braun:

> [I]f you are dealing with whether a man or a woman is getting a Social Security disability check, you do not just

> think to yourself: That check is as important to that man or woman as a whole business is to its owner. You think it is more important, because that man or woman has nothing else.

(Transcript, July 13, at 167.)

The committee believes that Judge Breyer will use his extensive judicial experience, his keen intellect, his commitment to making law work for people, and his pragmatic approach to solving problems to serve most ably on the Supreme Court. His voice will be, we believe, one of reasoned and deliberate interpretation of the Constitution and the laws.

The confirmation hearings on Judge Breyer's nomination also served to bring to light an important phenomenon on the Court: That an increasingly important role for the Supreme Court is in construing statutes and regulations, the work of the elected branches. As the Court's docket becomes increasingly filled with cases requiring statutory interpretation and judicial review of regulation, it is particularly timely to consider for the position of Associate Justice a nominee with the extensive expertise and experience in these critically important areas that Judge Breyer has demonstrated.

PART 3: JUDGE BREYER'S VIEWS ON UNENUMERATED RIGHTS AND PRIVACY

Judge Breyer has had relatively little to say in his speeches and writings, even in his many judicial opinions on the First Circuit, in the areas of unenumerated rights and privacy. Nonetheless, in his testimony before the committee, Judge Breyer unequivocally recognized the importance of unenumerated rights and he affirmed personal privacy as among our most cherished freedoms.

I. JUDGE BREYER SUPPORTS THE CONCEPT OF UNENUMERATED RIGHTS

Judge Breyer testified at several points in the hearing that he regarded the existence of unenumerated rights as settled, that their source may be derived from the "liberty" protected in the fourteenth amendment, and that the ninth amendment serves to reinforce the existence of those rights.

Senator Simon asked Judge Breyer what are the unenumerated rights referenced in the language of the ninth amendment, which mentions "rights retained by the people." (Transcript, July 13, at 64.) Judge Breyer responded:

> [The Ninth Amendment] says that there are others. It says don't construe the Constitution in such a way to deny the existence of others. The word that protects the others is the word "liberty" in the Fourteenth Amendment.
>
> What is the content of that word "liberty"? The general description given by Justices like Frankfurter or Harlan and others, those rights that through [sic] traditions of our people view as fundamental. That is a phrase used. Concepts of ordered liberty, that is another. Over time, the precedents have achieved a virtual consensus that almost all the rights listed in the first eight amendments are part

> of that word "liberty." And almost every Justice has said that there are others, sometimes described as rights of privacy * * *.
>
> Where does it come from? In deciding how to interpret that word "liberty," I think a person starts with the text, for, after all, there are many phrases in the text of the Constitution, as in the Fourth Amendment, that suggest that privacy is important.
>
> One goes back to history and the values that the Framers enunciated. One looks to history and tradition, and one looks to the precedents that have emerged over time. One looks, as well, to what life is like at the present, as well as in the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future.
>
> Text, history, tradition, precedent, the conditions of life in the past, the present, and a little bit of projection into the future, that is what I think the Court has done. * * * That is not meant to unleash subjective opinion. Those are meant to be objective, through general ways of ways of trying to find the content of that word.

(Id. at 64–65.)

Judge Breyer returned to the principle of liberty in acknowledging a constitutional right to privacy that "is well established in the law." (Transcript, July 12, at 177.) Consider this answer to a question from Senator Moseley-Braun:

> [I]t is not surprising to me that there is widespread recognition that that word "liberty" does encompass something on the order of privacy. People have described those basic rights not mentioned in words like "concept of ordered liberty," that which the traditions of our people realize or recognize as fundamental, and in looking to try to decide what is the content of that, I think judges have started with text, and after all, in amendments to the Constitution, there are words that suggest that in different contexts, privacy was important. They go back to the history; they look at what the Framers intended; they look at traditions over time; they look at how those traditions have worked out as history has changed, and they are careful, they are careful, because eventually, 20 or 30 years from now, other people will look back at the interpretations that this generation writes if they are judges, and they will say: Were they right to say that that ought permanently to have been the law?

(Transcript, July 13, at 177.)

Judge Breyer explained that in his view, the language of the ninth amendment should not be read to suggest that unenumerated rights, including the right of privacy, are granted by the government to the people—rather, they are retained by the people against a government of limited powers. Judge Breyer explained his thinking in an answer to Senator Leahy:

> [The Ninth Amendment] says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> Now, what does that mean? * * * Go back to the Framers. They thought that they had delegated limited powers to the central Government. Therefore, that is all you needed. You see, the central Government could not trample people's free speech or religion because they did not have the power to do it.
>
> But others said do not trust that. You better have a Bill of Rights, and in that Bill of Rights you better say specifically that the central Government cannot do that, cannot trample people's free speech or religion.
>
> The first group then said, wait a minute, you better be careful. Once you write that Bill of Rights, people are going to get up and argue that everything that you did not put in there, they could run out and do. No, no. Here is what we will do, they all decided. We will put in the Ninth Amendment, and the Ninth Amendment will make very clear to everybody that just because we have not said—just because we have that Bill of Rights and we have said certain things—speech, religion, press—do not take our statement there as meaning nothing else is important. Do not take our statement there as meaning nothing else exists.

(Transcript, July 12, at 177–78; *see also* id., July 13, at 227–29 (colloquy with Senator Hatch).)

Judge Breyer did embellish his views on personal freedoms, in response to questioning from Senator Simon concerning new questions that arise at the borders of presently recognized freedoms. (Transcript, July 13, at 66.)

> You do not want to err * * * and I think everyone understands that the Constitution was written to protect basic freedoms, which are basic values, which are related to the dignity of the human being. That dignity of the human being is not something that changes over time. The conditions that create the dignity may change. The needs of the country for whatever conditions that will permit the dignity may change, but the dignity is what stays the same. And how to interpret the Constitution, that is the challenge.

(Id.)

With regard to the more specific area of procreative choice, Judge Breyer stated that *"Roe* v. *Wade* is the law * * * reaffirmed * * * in *Casey* v. *Planned Parenthood* * * * that is settled law." (Transcript, July 13, at 178–79; *see also* July 12, at 110–11.)

In a colloquy with Senator Leahy, Judge Breyer captured the essence of his view of personal freedoms and their place under the Constitution:

> 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 * * * Freedom from * * * 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.

(Transcript, July 14, at 85–87.)

PART 4: JUDGE BREYER'S VIEWS ON EQUAL PROTECTION AND CIVIL RIGHTS

I. JUDGE BREYER BELIEVES IN THE ESSENTIAL COMMANDS OF THE EQUAL PROTECTION CLAUSE

During the hearings, Senator Kennedy cited one of Judge Breyer's decisions for the First Circuit, *Stathos* v. *Bowden,* 728 F.2d 15 (1st Cir. 1984), a statutory civil rights claim by two clerical workers, as a reflection of the nominee's attitude toward equality, particularly equal opportunity for women. In response to a question about the case from Senator Kennedy, Judge Breyer stated his belief in simple terms:

> I guess it is fairly obvious, isn't it, that you are not going to pay a woman less for doing the same job as a man?

(Transcript, July 12, at 88.)

In a colloquy with Senator DeConcini, Judge Breyer also spoke more broadly about the "promise of basic fairness" in the fourteenth amendment, a promise that he regretted had not been carried out for many years after the fourteenth amendment was added to the Constitution. (Transcript, July 12, at 205.) In response to a question from Senator Kohl asking which three Supreme Court decisions in this century were most important, Judge Breyer listed *Brown* first, because to him it was "shocking to write a promise like [the fourteenth amendment] into the Constitution" and not en-

force it. *Brown* was "a decision of courage * * * to do what the law says." (Transcript, July 13, at 114.) Judge Breyer made it clear throughout the hearings that he believes that the Court and the entire nation share a commitment to make the Constitution's promise of fairness real for everyone.

In response to a question from Senator Simon, Judge Breyer suggested it is up to courts—and the Supreme Court in particular—to try to temper the fears and passions of the moment that may sometimes cause the government to act irrationally toward a group of people, as it did with the Japanese internment camps during World War II. Breyer said that he favored Justice Murphy's dissent in the 1944 *Korematsu* decision, which recognized that a terrible wrong had been done, in the name of an emergency that either never was present or, at the very least, had passed by the time the case reached the Supreme Court. *See Korematsu* v. *United States,* 323 U.S. 214 (1944).

II. JUDGE BREYER UNDERSTANDS THE PROPER ROLE FOR AFFIRMATIVE ACTION PROGRAMS IN OUR SOCIETY

Growing out of the equality problem is one of the most contentious areas of contemporary constitutional law—affirmative action. During his tenure on the First Circuit and in his testimony before the committee, Judge Breyer demonstrated his keen awareness of the difficult lines that must be drawn by policymakers and judges so that those who have suffered discrimination in the past might be repaid for that harm, without unduly harming those who did not participate in the original discrimination. In a series of questions, Senator Cohen asked Judge Breyer to elucidate the difference between legally permissible affirmative action and forbidden quotas:

> Judge BREYER. I think affirmative action means you make an enormous effort, you make a really serious effort. A quota is an absolute number that you have to meet. Affirmative action means you take this seriously and you really look. * * *
>
> Senator COHEN. In other words, if there is no numerical figure that is either set in law or policy, then it really is not a quota, but an affirmative action program?
>
> Judge BREYER. Then you are on the edge. * * * [Affirmative action] means you really look * * *. You understand that a lot of people haven't had the opportunities that other people have had. You think to yourself, why aren't there the persons of this race or whatever, why.
>
> Remember why. Remember the history. And then taking all that into account, remembering the history, remembering the discrimination that may exist, remembering that some people have a lot less opportunity than others, then you go out and look and say I'm going to find these people who may not have thought of coming, and you really try very, very hard, and that is subjective. It might fail, but if it does fail, you better be able to tell yourself that you really looked very, very hard.
>
> Senator COHEN. If you have a situation in which, in the absence of a change—right now, currently we have a con-

gressionally established policy of affirmative action programs—in the absence of a change in that policy, is there any merit to a contention on the part of an individual that he or she is equally qualified to be admitted to a medical school, a law school, a position, and is denied that opportunity based upon his or her race, is there a constitutionally protected argument here that that is a denial of equal protection of the law?

Judge BREYER. What has happened I think, Senator, in the affirmative action cases legally in the Supreme Court is that the Supreme Court basically has recognized two things. The first thing that it has recognized is that there are injustices that need remedying, and those injustices stem from that long history, and the long history before the Fourteenth Amendment and the long history after the Fourteenth Amendment, where the injustice was perpetuated. So they begin with the first point, which is we have to see a need rooted in that history of past discrimination. And the second point is, once the first point is there, once we see that need, then the program has to be carefully tailored. Why carefully tailored? Because it is quite clear that an affirmative action program seeking to remedy past injustice can in fact adversely affect other people who themselves did not discriminate. Of course, those people are upset and, therefore, you can absolutely understand that.

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

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

(Transcript, July 14, at 19–22.)

In response to Senator Hatch, Judge Breyer explained his understanding of the "strict scrutiny" standard that must support affirmative action by local governments after *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989):

They said strict scrutiny. * * * [T]he Court in a variety of ways has said affirmative action is appropriate, but you had better be certain you are remedying a real past wrong. That is necessary, in light of the real wrongs that were committed. Then when you look at that program, if you are righting a real past wrong, remember that affirmative action programs also have the ability to adversely affect

people who themselves did nothing wrong, so please be certain that it is tailored carefully.

(Transcript, July 13, at 225–26.)

III. JUDGE BREYER HAS DEMONSTRATED A COMMITMENT TO ENFORCING THE CIVIL RIGHTS STATUTES

As is more fully explained elsewhere in this report, Judge Breyer believes judges should be helpful in implementing congressional intent in interpreting statutes. This is nowhere more fully revealed than in Judge Breyer's views regarding the enforcement of the civil rights statutes.

As noted above, in *Stathos* v. *Bowden,* 728 F.2d 15 (1st Cir. 1984), Judge Breyer voted to uphold a sex discrimination claim against a municipal lighting company that paid women substantially less than men in similar positions. Further, in *Massachusetts Association of Afro-American Police, Inc.* v. *Boston Police Department,* 780 F.2d 5 (1st Cir.), *cert. denied,* 478 U.S. 1020 (1985), Judge Breyer rejected an effort by white police officers to reopen a 1979 consent decree authorizing an affirmative action program.

In response to a question from Senator Moseley-Braun regarding the obligation of the Court to eliminate racial discrimination "whether or not the specific words of * * * the statute suggest that result," (Transcript, July 13, at 175), Judge Breyer stated that "[s]uch is very often likely to be the purpose of the civil rights statute, and one normally interprets language in light of its purpose." (Id.). In this answer, Judge Breyer thus simultaneously emphasized his commitment to civil rights and his understanding that a judge should search for legislative purpose in interpreting statutes.

Finally, Judge Breyer also noted in response to questions from Senator Kennedy "the importance of persons with disabilities being treated both fairly and properly," (Transcript, July 14, at 14), while he explained that the Fair Housing Act had the "very important purpose * * * [of] social justice." (Id. at 16.)

IV. CONCLUSIONS

In sum, the committee is satisfied that Judge Breyer has an expansive view of the equal protection clause, and that he will vigorously enforce the civil rights statutes.

PART 5: JUDGE BREYER'S VIEWS OF ECONOMIC RIGHTS AND REGULATION

I. CONSTITUTIONAL ECONOMIC RIGHTS: THE TAKINGS CLAUSE

The takings clause of the fifth amendment has taken on greater significance in the past few years. The Supreme Court has issued several important rulings in this area, rulings that may make it more difficult for the government to regulate property use in the interest of health, safety and public welfare.

In its 1992 decision in *Lucas* v. *South Carolina Coastal Council,* 112 S.Ct. 2886 (1992), the Court held that government action that deprives land of all economic value must meet the following test: if the government does not want to pay the landowner for her property, it must show that the harm that it is trying to avoid is one

akin to a common-law nuisance. Last Term, the Court held in *Dolan* v. *Tigard,* 62 U.S.L.W. 4576 (1994), that if the government wants to condition a government benefit (like a building permit) on a landowner's relinquishment of certain property rights, the government must prove that its condition is "roughly proportional" to the harm the government wants to avoid. Importantly, that decision also shifted the burden of proof to the government.

Judge Breyer has not written about the takings clause, either in his academic work or in his judicial opinions. In several exchanges during the hearings, however, Judge Breyer did provide a general idea about his approach to the takings clause. First, he correctly recognizes that property rights are accorded some degree of protection by the takings clause of the fifth amendment. The fact that "the Constitution does not enact into law Herbert Spencer's Social Statics," Judge Breyer said, borrowing Justice Holmes's famous phrase in a response to Chairman Biden, "does not mean that people's clothes and toothbrushes are somehow at stake and could be swept away randomly." (Transcript, July 12, at 53.)

At the same time, he believes that the government must have the ability to regulate property to some extent; it would be "going too far," he said, to "impos[e] significant practical obstacles" to reasonable government regulation. (Transcript, July 12, at 59.)

Further, he recognizes that the question of when regulation itself "goes too far" is highly case- and context-specific. Factors such as the importance of the regulation, its interference with expectations, and its character (such as, is it akin to a physical occupation?), all play a role in deciding whether regulation has gone too far. (Transcript, July 12, at 48–49.) In discussing *Dolan* v. *Tigard,* for example, he explained:

> So where I end up in my mind is that this is an area that is not determined forever, that there are likely to be quite a few cases coming up, that this problem of how you work out when it goes too far is something that undoubtedly will come up again in the future, and there is a degree of flexibility and flux in these opinions that I think haven't made a definite decision forever.

(Transcript, July 12, at 51.) Further emphasizing the fact-specific nature of takings clauses cases, he suggested that *Dolan* might be a "little special" because "it did at least arguably involve a physical occupation of a piece of property" —although he recognized that the Court did not "make all that much out of" this fact. (Transcript, July 12, at 51.)

Finally, Judge Breyer addressed the question whether property rights should be given the same level of protection as "personal" rights. In an exchange with Senator Brown, he noted that one cannot neatly distinguish "property" rights from "personal" rights because property affects our everyday lives. (Transcript, July 13, at 52–53.) Yet he also observed that different values—such as free speech and property—"lend themselves to different kinds of potential regulation or State interference, depending on what they are." (Transcript, July 13, at 52.) In response to a question from Senator Brown, he explained:

> [I]t seems to me that what you are thinking about is the protection accorded property as compared, say, to the protection accorded free speech. And I think what people learned over the course of time was that when the Supreme Court in the early part of this century began to say these are exactly the same thing [in *Lochner* and other cases], they ran into a wall. And the wall they ran into was it will not work. And the reason that it will not work is that when you start down that track, you see that what you are reading into the word "property" is a specific kind of economic theory, the very kind of theory that Holmes said the Constitution did not enact. And therefore the Constitution being a practical document has of necessity given the Government greater authority to regulate in the area of property [than] in the area of free speech. That I think is the simplest way to look at it. That is how I look at it.

(Transcript, July 13, at 55–56.)

In a related vein, in response to questioning by Chairman Biden, Judge Breyer acknowledged that "a person's right to speak freely and to practice his religion is something that is of value," and "is not going to change." (Transcript, July 12, at 54.) He contrasted the immutable nature of these personal freedoms with economic rights:

> [O]ne particular economic theory or some other economic theory is a function of the circumstances of the moment. And 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, the Constitution is not a bar to that, because its basic object is to permit people to lead lives of dignity.

(Transcript, July 12, at 54.)

In other words, although Judge Breyer stated at one point that he generally does not view rights in "tiers," (Transcript, July 12, at 52), he recognizes that different values underlie different rights, and these different values may warrant different degrees of protection. Indeed, when challenged by Chairman Biden, Judge Breyer seemed to reconsider his earlier statement and agreed that what he called "the basic promise of fairness" embodied in the equal protection clause of the fourteenth amendment does occupy a different—and higher—"tier" of constitutional protection. (Transcript, July 13, at 54.)

II. ECONOMIC ANALYSIS OF THE LAW AND THE ROLE OF THE JUDICIARY

Many of Judge Breyer's academic writings analyze regulatory issues from an economic perspective. His book, *Regulation and Its Reform,* for example, uses economic analysis in explaining why economic regulation sometimes fails to achieve its goals, and his most recent book, *Breaking the Vicious Circle,* urges closer attention to the costs and benefits of health and safety regulation. In response to questioning by Senator Cohen, he described the latter book as "a plea not to cut back by one penny this Nation's commitment to health, safety, and the environment," but to "think about the possi-

bility of reorganizing that commitment" so that more lives are saved. (Transcript, July 14, at 38.)

Whatever Breyer's views on the appropriateness of economic analysis as a matter of public policy, his testimony made clear that, *as a Justice,* he would follow the intent of Congress rather than his own policy preferences. In an exchange with Chairman Biden, he explained that in debating what is the best health, safety, or environmental policy, "[t]hat is a question that you basically answer in Congress." (Transcript, July 12, at 64.) And, in an exchange with Senator Thurmond, he emphasized that the "primary audience" to which he addressed in his books on regulation was

> the Congress, the regulators, the environmentalists, the health groups, the industry—those who are affected and who have a direct stake in the regulation. * * * If you agree, fine. And then it is up to you to implement that, primarily through rules and regulations and statutes, not judicial decisions.

(Transcript, July 12, at 115–16.)

Professor Cass Sunstein characterized Judge Breyer's views in a similar fashion:

> For those who are concerned about his work in [the area of regulation], especially in the area of the environment and health and safety, it is probably important to emphasize that Judge Breyer distinguishes very sharply between his role as a judge and his role as a policy adviser.
>
> In his capacity as a judge, he has carried out the instructions of Congress and the will of administrative agencies. He has been a very vigorous enforcer in the sense of he has been very faithful to Congress's own judgments that the environment needs protection. So when he has written as a policy adviser, that is what he has done. And when he has written as a judge, he has not compromised congressional judgments by his own policy views.

(Transcript, July 15, at 228.)

In response to questioning by Chairman Biden, Judge Breyer testified that he would not, in interpreting statutes, presume that Congress intended a cost-benefit analysis to be applied to government actions implementing the statutes. (Transcript, July 12, at 64–65; Transcript, July 13, at 196–97.) Indeed, he expressed some skepticism that economic analysis could ever provide complete answers to questions involving health and safety:

> There is no economics that tells you the right result in that kind of area. There is no economics that tells you or me or all of us how much we are prepared to spend or should spend on the life of another person. There is nothing that tells us the answer to that in some kind of economics book that I am aware of.
>
> And also, that is so much a decision that people will make through their elected representatives. It is a democratically made decision. Judges are not democratically elected. I mean, it is exactly the kind of reason, in my own view, that it is very important for courts—and I have writ-

> ten this, I have written this—it is so important for courts, which are not good institutions to make those kinds of technical choices because judges are cut off from information that would be relevant, among many other reasons, and they do not have the time, among many other reasons, and they do not have the contact with the people, among many other reasons, and there are just dozens of reasons which I have spelled out why they are not good institutions to make those kinds of decisions.
>
> So that reinforces what I have tended to write, that it is important for courts to go back to try to understand the human purposes that are moving those in Congress who write these statutes when they interpret them.

(Transcript, July 13, at 196–97.)

Judge Breyer expressed similar sentiments in response to questioning by Senator Kennedy. Distinguishing between "economic regulation" (such as regulation of airlines or trucks) and health, safety, and environmental regulation, Judge Breyer said:

> When you start talking about health, safety, and the environment, the role [for economics] is much more limited because, there, no one would think that economics is going to tell you how [much] you ought to spend helping the life of another person. If, in fact, people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong? * * * [I]n this kind of area, it is probably John Donne, the poet, who has more to tell us about what to do than Adam Smith, the economist. That is a decision for Congress to make reflecting the values of people.

(Transcript, July 12, at 91.)

Judge Breyer also testified that where Congress has delegated to an administrative agency the authority to weigh costs and benefits in implementing a statutory mandate, the courts should generally defer to the agency's view of the balance between costs and benefits. (Transcript, July 12, at 63, 64–65.) In response to questions from Chairman Biden, he distinguished sharply between the situation in which courts are given the discretion to balance costs and benefits, and one in which agencies are given such discretion; in the latter case, he explained, the courts' role is much more limited. (Transcript, July 13, at 191–92.) He expressed similar sentiments in an exchange with Senator Metzenbaum. (Transcript, July 14, at 54.)

Judge Breyer used this distinction to explain his decision in *United States* v. *Ottati & Goss,* 900 F.2d 429 (1st Cir. 1990). In that case, he affirmed a decision of the district court rejecting the Environmental Protection Agency's request for further cleanup of the PCB's on a hazardous waste site in New Hampshire. Judge Breyer's opinion suggests that the cleanup would have cost too much in relation to the benefits it would have conferred. In his testimony, Breyer made clear that the court's review of the agency's request would have been far more limited if the agency had issued

a cleanup order itself, rather than asking the court to do so. (Transcript, July 13, at 188–92.)

In sum, whatever his views of economics and public policy, Breyer can—as a Justice on the Supreme Court—be expected to follow the will of Congress and the President as expressed in statutes and regulations.

III. ADMINISTRATIVE LAW AND AGENCY REVIEW

Judge Breyer believes that, in reviewing agency action, courts should seek to implement the will of Congress. Moreover, they should be mindful of their relative lack of expertise in the matters in which agencies are involved.

Thus, for example, Judge Breyer testified that courts should be extremely hesitant to disrupt an agency's view of the appropriate level of regulation. (Transcript, July 12, at 61–63.) He "absolutely" agreed with Chairman Biden's statement that if Congress delegates to an agency the authority to consider costs and benefits in implementing a statute, "the Court should, unless there is a clear disregard of that requirement, yield to the agency." (Transcript, July 12, at 63.)

This is not to say that Judge Breyer would always defer to the agency. In an exchange with Senator Kennedy, for example, he explained that in two decisions he had overturned the decisions of agencies when the agencies had disobeyed a statute's clear command. (Transcript, July 12, at 92–95.) In one of the cases, *Commonwealth of Massachusetts* v. *Watt,* 716 F.2d 946 (1st Cir. 1983), Judge Breyer upheld a preliminary injunction barring the Federal Government from selling offshore drilling rights until a supplemental environmental impact statement had been prepared. In his testimony, Breyer emphasized that the purpose of the relevant statute (the National Environmental Policy Act) was "to get the [impact] statement written before the agency becomes bureaucratically committed to a course of action that could hurt the environment." (Transcript, July 12, at 95.) Judge Breyer feared that if the impact statement were written after the agency had committed to a particular course of action, bureaucratic inertia would prevent the agency from later changing its mind in response to the information contained in the statement.

Thus, although Judge Breyer believes that courts ought not generally second-guess the policy decisions of administrative agencies, he is also committed to ensuring that agencies follow the law. Moreover, his decision in *Commonwealth* v. *Watt* shows a healthy awareness of the dangers of bureaucratic single-mindedness.

He also stressed the importance of a primary goal of modern administrative law—namely, giving citizens notice of what the rules are:

> Congress said if that regulation is not written down, if you do not have that in the Code of Federal Regulation, if there is not a place where a person can go without a lawyer, if necessary, to find out what he is supposed to do, then it is not a rule, and it is not a regulation. I thought [sic] to the Russians that, too, is an enormous protection against arbitrary behavior, against people who are in the

> Government saying, "Well, this is what you have to do, and tomorrow, we will tell you why you have to do it."

(Transcript, July 13, at 168.)

IV. ANTITRUST LAW

Judge Breyer has written widely on the subject of antitrust, both as an academic and as a judge.

In a colloquy with Senator Thurmond, he summarized his views of the purposes of the antitrust laws. Explaining that antitrust is the "policeman" of our competitive system, he described its purposes as "low prices for consumers, better products, and more efficient methods of production. Those three things * * * are the key to antitrust law" (Transcript, July 12, at 120.) In an exchange with Senator Metzenbaum, he stated that he used this "simple three-part key" to try to "unlock these incredibly complex, unbelievably technical legal arguments" in the antitrust area. (Transcript, July 12, at 129–30.) In response to questioning by Senator Kohl, Judge Breyer said that the reason he felt "so strongly" about antitrust was that "unless you have a policeman like that, then those who are better off are just going to be better off and that is the end of it. But you cannot have that." (Transcript, July 13, at 113.)

Judge Breyer's judicial opinions reflect an effort to ensure that the antitrust laws in fact serve the three purposes he identified.

Several times during the hearings, it was remarked that Judge Breyer had most often ruled in favor of the defendants in antitrust cases. In an exchange with Senator Metzenbaum, he explained his voting record in this way:

> I don't count up how many victories are for plaintiffs or defendants and do statistics. Sometimes plaintiffs did win in antitrust cases I have had. And, as you point out, defendants often won. The plaintiff sometimes is a big business, and sometimes is not. The defendant sometimes is, and sometimes is not.
>
> What I am interested in is is the case correct as a matter of law, and I consider the cases one at a time, and I consider the merits, the legal merits of the arguments in front of me.

(Transcript, July 12, at 129.)

In other words, one cannot assess Judge Breyer's views on regulation merely by tallying how many times he has ruled in favor of plaintiffs in antitrust cases; as Prof. Robert Pitofsky testified, one must look instead at whether the three purposes of antitrust law have been achieved, or whether "the competitive process and consumers win." (Transcript, July 15, at 222.)

In *Town of Concord* v. *Boston Edison,* 915 F.2d 17 (1st Cir. 1990), *cert. denied,* 499 U.S. 931 (1991), a case about which Senator Metzenbaum questioned him, for example, Judge Breyer concluded that a plaintiff must lose in order to ensure lower prices for all. In that case, a Massachusetts town complained that an electric utility had caught the town in what is known as a "price squeeze:" it had, the town said, raised the wholesale rates at which it sold electricity to the town, but had not raised the rates at which it sold electricity

to retail customers. This meant, the town said, that the town could not compete with the utility on a retail level.

Judge Breyer overruled the lower court and ruled against the town, emphasizing that the rates at both the retail and wholesale level were regulated by the Federal and State governments. He also stressed that a ruling in favor of the town might mean higher rates for a majority of customers, because the utility might respond to an adverse ruling by simply raising its retail rates. In an exchange with Senator Metzenbaum, Judge Breyer explained the decision in this way:

> [I]f a little company—and he was small—can insist that that rate go up from 10 cents to 12 cents, everyone all over Massachusetts, not just Concord, is going to be paying 12 cents and not 10 cents, and that is higher prices, not lower prices, and the antitrust laws ought not to allow that, if we are following their basic principles.

(Transcript, July 12, at 135.)

In his testimony before the committee, Lloyd Constantine, an antitrust lawyer critical of Judge Breyer, stated that the defendant might have responded by lowering its wholesale rates rather than by raising its retail rates. (Transcript, July 15, at 209–10.) Prof. Robert Pitofsky, on the other hand, testified that the scenario envisioned by Mr. Constantine was "not plausible in this case." (Transcript, July 15, at 224–25.)

In his own testimony, Judge Breyer acknowledged that not everyone would necessarily agree with his conclusions in this regard, but emphasized that his purpose in Town of Concord was to "focus on where the ball really is, which is the low price for the consumer." (Transcript, July 12, at 133.)

Similar reasoning can be found in Judge Breyer's opinions relating to claims of unfair pricing. In *Kartell* v. *Blue Shield of Massachuseits,* 749 F.2d 922 (1st Cir. 1984), *cert. denied,* 471 U.S. 1029 (1985), for example, he wrote an opinion rejecting a claim that Blue Shield had violated the antitrust laws by forbidding "balance billing," the practice whereby doctors billed patients more than the insurance company paid for the doctors' services. During the hearings, Judge Breyer described that case as follows:

> The plaintiffs were people who wanted to raise the price of health care. They wanted to raise the price of health care and they thought the antitrust laws helped them do it.

(Transcript, July 12, at 137.) Thus, again, Judge Breyer's decision sought to achieve one of the basic purposes of the antitrust laws—low prices.

Although his views on antitrust have been associated with those of conservative thinkers like Judges Richard Posner and Robert Bork, Judge Breyer's views are by no means identical to theirs. In an exchange with Senator Kohl, for example, Judge Breyer reaffirmed his view that the legislative intent behind the antitrust laws should guide courts in their decisionmaking in this area—disagreeing with the views of Posner and Bork on this subject. (Transcript, July 13, at 128–29.) Also in response to questioning by Sen-

ator Kohl, Judge Breyer disagreed with Judge Bork's argument that retail price maintenance should never be unlawful. (Transcript, July 13, at 129–30.)

Judge Breyer recognizes that many of the issues involved in antitrust law are complicated and technical, and therefore he has tried to explain his decisions in straightforward language. In an exchange with Senator Metzenbaum, he explained that he sometimes used charts or graphs with simple examples to illustrate the complex issues involved in antitrust cases—"so that," he said, "a person who is willing to put in time and effort, even without economic training, will see the point intuitively." (Transcript, July 12, at 130.)

V. COPYRIGHT AND INTELLECTUAL PROPERTY

Judge Breyer's earliest academic writings related to copyright law. In his major contribution, *The Uneasy Case for Copyright,* 84 Harv. L. Rev. 281 (1970), he analyzed the justification for copyright protections and the extension of such protection to what were at that time new areas—photocopies and computer programs. He argued in favor of an economic justification for copyright law (namely, that copyright protection is necessary to encourage the production of books and other works), and cautioned against reflexive extension of existing protections to new contexts.

In an exchange with Senator Hatch, Judge Breyer said that although the views he had expressed in his academic writings ran somewhat counter to laws subsequently passed by Congress, he would of course follow the law laid down by Congress. (Transcript, July 12, at 82.)

PART 6: JUDGE BREYER'S VIEWS ON RELIGIOUS FREEDOM

As with past nominees, Judge Breyer's views on the religious freedom guaranteed by the first amendment were the subject of extensive questioning by the members of the committee. Judge Breyer's testimony and his record make it clear that he will respect both aspects of that fundamental guarantee: tolerance of religious practice and separation of church and state.

I. THE FREE EXERCISE CLAUSE

A major controversy at the time of Justice Ginsburg's confirmation hearings last year was the Supreme Court's 1990 decision in *Employment Division* v. *Smith,* 494 U.S. 872 (1990), in which a narrow majority of the Court voted to reduce the level of scrutiny given to generally applicable governmental actions that interfered with religious practices, no matter how greatly.

Congress overruled *Smith* later in 1993 by enacting the Religious Freedom Restoration Act, which once again restored the strict scrutiny standard first applied in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Judge Breyer affirmed his full support for this higher standard in response to a question from Senator Hatch about the Religious Freedom Restoration Act. Judge Breyer stated that the principle of that Act "is absolutely right." (Transcript, July 12, at 76.)

Senator Hatch questioned Judge Breyer closely about his major free exercise clause decision as a judge, *New Life Baptist Church Academy* v. *Town of East Longmeadow,* 885 F.2d 940 (1st Cir. 1989), *cert. denied,* 494 U.S. 1066 (1991). In that case—decided under the strict scrutiny standard that existed before *Smith* and has been restored by Congress—a religious school challenged the right of town authorities to subject the school's curriculum and faculty to limited review to ensure that children were receiving an adequate education in basic subjects. The school proposed a standardized test as an alternative method of judging the quality of its education. Judge Breyer, writing for a unanimous court, concluded that the town had the right to conduct a limited review to uphold the State's well-established and compelling interest in adequate education for all children. Id.

Judge Breyer's thoughtful answer to Senator Hatch's question about the *New Life Baptist Church Academy* case bears quotation at length, because it demonstrates the care with which Judge Breyer analyzed this sometimes inflammatory issue:

> I found [that case] extremely difficult. Why? I will tell you a little bit about it. If you go back into the Constitution * * * it really descends historically from the need to protect religion. There is nothing more important to a person or to that person's family than a religious principle, and there is nothing more important to a family that has those principles than to be able to pass those principles and beliefs on to the next generation.
>
> That is why schools are so important in this area. That is why people feel so strongly about schooling. So one starts with the realization that what was at issue in the First Amendment, I think both for speech and for religion, was a decision made sometime around the 17th century, that it is about time to stop killing each other because of religious beliefs, and what we are going to do is respect the religion of each other, and people are going to be free to practice that religion and to pass it on to their families. They are going to teach their children, and their children can teach their children. That is absolutely basic.
>
> * * * * * * *
>
> The opposite side of the coin is that, of course, the people, as organized in Government, have an interest to see that you or I or any other family do not abuse our children, and they have an interest in seeing that our children * * * do receive some kind of education—that they learn how to read, they learn how to write, they learn mathematics—and for that reason, it is absolutely well-established that although people can teach their children at home if they wish, because of the need to pass on their religion, it is equally well-established that the State has some interest in seeing that education is going on and that the children are being taught.
>
> Now, in that particular case, it was a little unusual because the argument came up—and I read through that

record with pretty great care—and what had gone on, I think, was everyone in the State said they could teach their children at home, that particular religious group. There were some complaints about the quality of the education—they had a special school—and everybody agreed that the school system could go in and look and see what was being done.

Indeed, the religious school itself had said at one point, We do not mind if you come in and look; what we do not want to do is we do not want to acknowledge the school board, because we believe there is no higher authority than God. And the school board, making an effort to accommodate, had said, Do not acknowledge us; we do not want you to acknowledge us. Just let us look and see what is happening, the same way as you might any visitor at all. And then the school had said, Yes, that is OK. But somehow in the legal argument in the lower court, that became a little confused, and before you know it, what had happened was that the lower court had entered a decree which said the way to go about this, State, is to test the children after they leave school; while the State had said, no, no, it is better to go in and see.

Now, there, the question was does the Constitution require after-school testing, or does it require visits, or is it up to the State? And that is a rather narrow point, and what we held in the case, unanimously, was that the Constitution does not require after-school testing; if the State wants to do it that way, they could. But you see, some people might think that was more restrictive; others might think it was less restrictive. In other words, it was a fairly narrow technical matter growing out of the record.

(Transcript, July 12, at 73–75.)

Responding to a question raised by Senator Simpson, Judge Breyer made clear that he has no bias against religious schooling or home schooling. (Transcript, July 12, at 154–55.) Judge Breyer expanded on the constitutional issues implicated in home or religious schooling in response to a later question from Senator Simpson:

I think it fair to start from the proposition, it is true, religion is extremely important to all of us. Even if we have different religions, we share the fact that it is important. And from a constitutional point of view, it is there protected in the First Amendment because the Founders recognized the importance of religion and the importance of allowing people freely to exercise their religion. They had learned through experience. That experience came from the religious wars of the 17th century. They put that in the Constitution to be absolutely certain that that free exercise was protected.

* * * * * * *

It is designed to protect the right of the parents to pass along to their children their religion and to protect that

> from State interference. * * * [S]omebody who tried to prevent [home schools] would suddenly face very, very serious constitutional challenges.

(Transcript, July 14, at 71–72.)

In sum, although some have questioned whether Judge Breyer gave adequate deference to the rights of the religious school in *New Life Baptist Church,* Judge Breyer has explained that his decision in that case turned on the special facts in the record. Overall, Judge Breyer's testimony and record established that he is appropriately sensitive to the problem of measuring government actions that affect or inhibit religious practice in a pluralistic society.

II. THE ESTABLISHMENT CLAUSE

Judge Breyer has made it clear that he is a strong supporter of the principle that the establishment clause erects a "wall of separation between Church and State," in Thomas Jefferson's famous phrase. Judge Breyer said the following in response to a question from Senator Hatch:

> [When] I think of the Establishment Clause, I think of Jefferson, and I think of a wall. And the reason that there was that wall * * * which has become so much more important perhaps even now than it was then, is that we are a country of so many different people, of so many different religions, and it is so terribly important to members of each religion to be able to practice that religion freely, to be able to pass that religion on to their children. And each religion in a country of many, many different religions would not want the State to side with some other religion, so each must be concerned that the State remain neutral.

(Transcript, July 12, at 78.) Judge Breyer recognizes, however, as he went on to say, that this "wall" is not entirely impermeable, and that some State aid to religion is appropriate even taking a strict view:

> Can the State aid religion? The answer is certainly, sometimes. Nobody thinks—nobody thinks—that you are not going to send the fire brigade if the church catches fire. Nobody thinks that the church does not have the advantage of public services. The question becomes when is it too much. * * *

(Transcript, July 12, at 78.)

Judge Breyer also acknowledged, in an exchange with Senator Leahy, the important principle that in matters of religion, "you start with the basic idea that the State is neutral * * * not favoring one religion over another, not favoring religion over nonreligion." (Transcript, July 12, at 174, 175–76.)

As a judge, Judge Breyer has interpreted the establishment clause in one decision, a concurring opinion in *Jamestown School Committee* v. *Schmidt,* 699 F.2d 1 (1st Cir.), *cert. denied,* 464 U.S. 851 (1983). The case raised no controversial issues—it dealt with the propriety of State transportation aid to parochial students, a matter settled by the Supreme Court in *Everson* v. *Board of Edu-*

cation, 330 U.S. 1 (1947)—but it does demonstrate Judge Breyer's familiarity with and willingness to follow current Supreme Court doctrine in this area, particularly the three-part test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

In his testimony, Judge Breyer acknowledged the importance of the three factors considered by the *Lemon* test—whether the statute has a clearly secular purpose, whether it has a primary effect that neither advances nor inhibits religions, and whether it avoids an excessive entanglement with religion. (Transcript, July 13, at 67 (response to Senator Simon).) But as Judge Breyer suggested to Senator Simon and also to Senator Leahy, he has some doubts (as do many critics of *Lemon,* including several Justices) regarding the precise test established by *Lemon* in considering these "important criteria." (Id.; Transcript, July 12, at 172.)

Nevertheless, it is apparent that Judge Breyer is fully committed to the continuing force and importance of the establishment clause, and is willing to accept prevailing principles and standards in this area.

PART 7: JUDGE BREYER'S VIEWS ON FREEDOM OF SPEECH

In his testimony and throughout his career, Judge Breyer has been a staunch supporter of the right to free speech and free expression guaranteed by the first amendment. Indeed, when asked by Senator Kohl to name the three most important Supreme Court decisions of this century, Judge Breyer included among them the famous dissents of Justices Holmes and Brandeis in the early part of this century that laid the groundwork for modern first amendment analysis. (Transcript, July 13, at 115.)

In answer to a question from Senator Leahy about what speech is protected by the first amendment, Judge Breyer's answer was broad and inclusive:

> There is a core of political speech, but it is not the only thing at the core. It seems to me that there are a cluster of things that are at the core of the First Amendment, including expression of a person as he talks, as he creates, and also including what I think of as a dialogue in a civilized society. * * *

(Transcript, July 12, at 163.) Judge Breyer expanded on this thought in response to a question from Senator Kohl:

> That core is very important and virtually inviolable. As you move out from the core, what you discover in different directions is that sometimes we are concerned with something that seems almost like conduct, and the closer it is to conduct, well, the further it is from the core.
>
> We are concerned with instances where a particular kind of speech might have an immediate harmful impact to society that is tangible and real. That is your example—fire in a crowded theater—or, you cannot solicit a person to commit a crime although you do so in words. Then you discover there are areas where in fact we are talking about the impact on younger people. Imagine the control that society exercises in a grammar school or in a high school.

> And then, in another direction yet, you run into instances where the expressive value is totally gone; it is not really communication at all, though it in fact has a negative societal impact. I talked about child pornography.
>
> So as you move out from that core, you look at how far away, you look at whether there are simply rules of procedure—time, manner and circumstance. A town meeting can be run by that. But if you are beyond that, you look to society's needs, and you look as well to the spillover problem, that is to say, have you got a statute that is really narrowly tailored to those needs and will not intrude into the core, or there is a risk that you will chill what is closer to the core.

(Transcript, July 13, at 122–23.)

Judge Breyer made it clear, in responding to Senator Leahy, that he would not hesitate to support a speaker's first amendment rights even if he disagreed with what the speaker said: "[P]eople forget that [the first amendment] is there to protect speech and writing that we do not agree with. * * * And I think that is a fairly absolute principle." (Transcript, July 12, at 172.) Judge Breyer also spoke, to Senator Simon, of his admiration for Justice Holmes, who was willing to affirm the free speech rights of seditionists and socialists—even in dissent—at a time when such speech was extremely unpopular. (Transcript, July 13, at 74.) Further, at a forum on Multiculturalism and Political Correctness in November 1992, Judge Breyer defended the right of a professor to deny the existence of the Holocaust, explaining that he believes that the best way to fight "bad speech" is with more speech—not by silencing the speaker: "[O]ur protection [under the first amendment] is greater against that vicious nut by upholding the principle than by stopping the course." (*Multiculturalism and Political Correctness: Anti-Semitism: Where Does It Fit In?,* at 14 (Anti–Defamation League, Nov. 6, 1992) (on file with the Senate Committee on the Judiciary).)

Judge Breyer has demonstrated his strong support for the first amendment's guarantee of free speech in his work as a judge. In one of his first opinions, he questioned whether a State university had improperly denied official recognition to a student organization because it was affiliated with the Reverend Moon and the Unification Church: "First amendment rights whether of speech or religion are plainly at stake." *Aman* v. *Handler,* 653 F.2d 41, 44 (1st Cir. 1981). In another case, he struck down a "loyalty oath" that the World Health Organization required of its employees, in *Ozonoff* v. *Berzak,* 744 F.2d 224 (1st Cir. 1984).

Judge Breyer does recognize, as he noted in response to questions from Senators Leahy and Kohl, that there are limits to the protections of the first amendment and that one of these is child pornography. (Transcript, July 12, at 164, and July 13, at 123.) In *United States* v. *Doe,* 878 F.2d 1546 (1st Cir. 1989), Judge Breyer upheld the conviction of a child pornographer, rejecting claims that he had been entrapped.

In sum, Judge Breyer is a strong supporter of the fundamental values of free speech and free expression found in the first amendment.

PART 8: JUDGE BREYER'S VIEWS ON STATUTORY INTERPRETATION

As Chairman Biden pointed out in his opening remarks, the Supreme Court has two primary functions—interpreting the Constitution and interpreting statutes—and the second of these has taken on added importance in recent years: "[W]hat has become quite clear over the last decade is that it is increasingly through statutory interpretation that the Court is shaping the nature and scope of basic rights of all Americans." (Transcript, July 12, at 4.) Judge Breyer made it equally clear in his testimony, as he has in his extensive writings on the subject, that in interpreting statutes he believes that courts should seek to follow the intent of Congress as closely as possible, and should not give grudging interpretation to statutes relating to civil rights or other areas.

In determining the intent of Congress, Judge Breyer favors extensive but careful use of legislative history. His views in favor of the use of legislative history are rooted in a deep respect for Congress and the legislative process. He rejects the "textualist" approach of Justice Scalia and others, which views legislative history as irrelevant and would forbid a judge to look beyond the statutory language itself.

Judge Breyer succinctly summarized his strong support for the use of legislative history in response to a question from Senator Thurmond:

> In summary form, I have thought that there are many instances, indeed most, where an open question in a statute is best understood through the use of legislative history. By using that history carefully and not abusing it, I think a court can better understand what the human purposes are that led Congress to enact a particular statute, and once one understands those purposes, technical matters often fall into place; you understand them better, too.
>
> There are instances where courts have used legislative history to reject absurd interpretations of statutes, to find out whether there are technical meanings, to discover whether there was some kind of drafting error, to decide whether there are special meaning of a statute that the parties and Senators wanted to use, to understand better what the purposes were. All those are instances where I think it is very appropriate. I recognize sometimes it can be abused, and it should not be.

(Transcript, July 14, at 8.)

In response to a question from Senator Grassley, Judge Breyer made it clear that although he believes legislative history can be helpful, "[o]f course" there is a limit. (Transcript, July 12, 192.) Senator Grassley followed up by asking whether Judge Breyer agreed it was inappropriate for a judge to use legislative history to achieve a result not mandated by statute. Judge Breyer responded:

> Sure. Ultimately * * * the language of the statute is what governs. You know, history comes in where it is hard to figure out how it applies and what it really means. * * * But it is not the statute that is explaining the history. It is the history that is explaining the statute.

(Transcript, July 13, at 195.) In response to a question from Senator Moseley-Braun asking whether he believed legislative history was an "illusion," Judge Breyer stated that it is not an illusion: indeed, "it is very important to look at." (Transcript, July 12, at 173.)

In response to questioning from Chairman Biden, Judge Breyer expressed skepticism about the sort of "canons" of interpretation put forward by Justice Scalia and others as an alternative to legislative history. As Judge Breyer put it, as such canons proliferate, if they do, it will become much more difficult for drafters, lawyers, and the parties affected by the statute to apply these canons. (Transcript, July 13, at 202–03.)

Judge Breyer's views expressed at the confirmation hearings are fully consistent with his prior views, which he has expressed in testimony before Congress, in an influential law review article, *On the Uses of Legislative History in Interpreting Statutes,* 65 S. Cal. L. Rev. 845 (1992), and in his opinions as a judge on the First Circuit. Judge Breyer even participated in a public debate with Justice Scalia in 1991, in which he publicly challenged Justice Scalia's "textualist" approach to statutory interpretation. (*The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer,* Administrative Law News, Vol. 16 (ABA, Summer 1991).)

In his article, *On the Uses of Legislative History in Interpreting Statutes,* Judge Breyer provided a scholarly and sophisticated defense of judicial use of legislative history. He concluded that while judges should use care in reading legislative history—to ensure that they are reading the will of Congress and not that of a single member or a legislative minority—use of legislative history was nevertheless essential to helping a judge interpret a statute. Judge Breyer pointed to examples from his own court where he had used legislative history to find the intent of Congress.

Judge Breyer's advocacy of the uses of legislative history is based in his deep understanding of the legislative process and his respect for Congress. In explaining why legislative history can be a reliable guide to Congress's intent, he said the following in testimony in 1990 before a House subcommittee:

> It seems to me that major legislation is not spontaneously generated, but arises out of a highly complex, public, time-consuming, detailed process of hearings, debate, and negotiation, typically involving most, or all, of those groups whom the future law will likely affect. The more important, the more politically controversial, the provisions in question, the more likely they are to have been subject to scrutiny by, and to negotiation among, the relevant "interest" groups (including "public interest" groups) or their representatives. Those directly involved, working with staff and legislators, will subject, not only the text of the law, but also committee reports, floor statements, and

> other relevant comments, to scrutiny; they too may become the subject of negotiation. Not every Senator or Representative will read every word of those reports, or hear every floor statement; similarly, not every Senator or Representative will read every word of a law, the text of which may run to hundreds of pages. But, every Senator or Representative will rely upon this process to identify major controversial matters and to help resolve them.

Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, at 46–47 (April 19, 1990.) This sophisticated understanding of the legislative process no doubt reflects Judge Breyer's experience as a staff member of the Judiciary Committee in the 1970's and early 1980's.

In short, all of Judge Breyer's testimony, as well as his consistent views expressed as an academic and judge, indicate that, if confirmed, he will make every effort to construe statutes in accordance with Congress' intent in enacting them. He rejects Justice Scalia's approach of using artificial rules of statutory construction, and will instead bring his sophisticated understanding of the legislative process to bear in determining the will of Congress in the cases that may come before him.

PART 9: JUDGE BREYER'S VIEWS ON CRIMINAL LAW AND PROCEDURE

Judge Breyer's record and testimony in the area of criminal law demonstrates that he is a moderate, balancing the need for effective law enforcement with concern for the constitutional rights of criminal defendants.

In his decisions as circuit judge, Judge Breyer has upheld the need for flexibility on the part of law enforcement. In one case, for example, he affirmed the power of law enforcement officers to stop a suspect in an airport and ask if he would willingly answer questions; indeed, Judge Breyer's reasoning was so persuasive that his original dissenting opinion was adopted by a majority of the judges *en banc* in reversing the original panel's decision, which had refused to give police officers this power. *United States* v. *Berryman,* 717 F.2d 651, *rev'd en banc,* 717 F.2d 650 (1st Cir. 1983), *cert. denied,* 465 U.S. 110 (1984).

At the same time, Judge Breyer fully recognizes the importance of protecting the constitutional rights of defendants. In response to a question from Senator Pressler, Judge Breyer explained in clear terms the importance of the exclusionary rule as a means of ensuring practical compliance with the Constitution. He quoted Justice Cardozo's famous criticism of the exclusionary rule, "Well, why should the criminal go free, because the constable has blundered?" and then responded:

> And the answer to that is, over the course of time and a long period of time, people learned that the protection in the Fourth Amendment, totally innocent people wouldn't be broken into in the middle of the night, that confessions wouldn't be extracted through violence, that the only way to make those meaningful in practice was to have this ex-

clusionary rule. And it has become I think fairly widely accepted.

(Transcript, July 13, at 147–48.)

Judge Breyer has applied these sentiments in practice. In *United States* v. *Doe,* 878 F.2d 1546 (1st Cir. 1989), he wrote an opinion reversing a conviction because the agents had failed to give a *Miranda* warning to suspects before questioning them.

Judge Breyer has also been sensitive to claims of defendants that they had been victims of procedural unfairness—particularly to claims that the defendants had not been apprised that their conduct was criminal. For example, in *United States* v. *Maravilla,* 907 F.2d 216 (1st Cir. 1990), *cert. denied,* 112 S. Ct. 1960 (1991), a case about which Senator Grassley questioned him (Transcript, July 12, at 187–88), Judge Breyer reversed the murder convictions of two Customs officials who had killed and robbed a Dominican money courier during a brief stopover in the United States, because the Dominican courier was not an "inhabitant" of the United States as required by statute.

Judge Breyer's record as Sentencing Commissioner and as judge reveals that on sentencing matters he is appropriately concerned with the twin goals of equity—treating like crimes alike—and fairness—doing justice in the individual case. As one of the original members of the Sentencing Commissioner, Judge Breyer worked to implement the Sentencing Reform Act's goals of "truth in sentencing" and of reducing disparity. In response to a question from Senator DeConcini asking whether he believed these goals had been met, Judge Breyer replied that the first goal had been met, but that with respect to the second that the system had "moved in the right direction, but there are many, many rocks on that road." Nevertheless, Judge Breyer expressed continued support for the work of the Sentencing Commission. (Transcript, July 12, at 216.)

Judge Breyer has been outspoken about his criticism of mandatory minimum sentences, calling them "rotten bananas" that should be discarded. In his testimony, he explained in response to questions from Senator DeConcini that, in his view, mandatory minimums were inconsistent with the limited flexibility inherent in the Sentencing Guidelines. (Transcript, July 12, at 218–19.) Judge Breyer made clear, however, in response to questions from Senator DeConcini and also Senator Kennedy, that he viewed mandatory minimums as a matter for Congress, and that as a judge or justice he would follow the sentencing law as mandated by Congress. (Transcript, July 12, at 100, 218–19.)

With respect to capital punishment, Judge Breyer stated on several occasions that he viewed the constitutionality of the death penalty as settled law. Responding to a question from Senator Specter, Judge Breyer explained,

> Yes, I think that is settled law. That settled law is surrounded by what I think of as a cluster of less firmly settled matters, such as how old the person has to be, though there is case law on it; such as the procedures; such as the types of crimes, the exact details. And in those areas of detail, it seems to me that I cannot properly go because it seems to me those are coming up again and again.

(Transcript, July 13, at 14.) Judge Breyer declined, however, to offer his personal views on capital punishment, following the example of Justices Kennedy and Ginsburg before him. Judge Breyer did state in response to a question from Senator Thurmond that he did not have such a strong personal view one way or the other that he would feel obliged to recuse himself from a death penalty case. (Transcript, July 12, at 109–10.)

CONCLUSION

This report summarizes the extensive record before the Judiciary Committee and the Senate as it prepares to exercise its constitutional duty of deciding whether to consent to the President's choice of a Supreme Court nominee. The record amply demonstrates that Stephen G. Breyer merits the support of the committee and the entire Senate.

Judge Breyer is analytic and intelligent, yet at the same time collegial. He is professorial, yet plain-spoken. He is vastly curious about the world around him and about its problems and how to solve them. He brings to the law a sophisticated knowledge of the field of economics, without confusing the roles of judge and policymaker. He understands in a pragmatic way that the Constitution is a living document that must reflect the times in which we live. He honors the concept of individual rights and individual equality. He will be a fine Associate Justice of the United States Supreme Court.

JOSEPH R. BIDEN, JR.
EDWARD M. KENNEDY
HOWARD M. METZENBAUM
DENNIS DECONCINI
PATRICK J. LEAHY
HOWELL HEFLIN
PAUL SIMON
HERBERT KOHL
DIANNE FEINSTEIN
CAROL MOSELEY-BRAUN

ADDITIONAL VIEWS OF SENATORS HATCH AND THURMOND

We will vote for the confirmation of Judge Stephen Breyer to be Associate Justice of the Supreme Court. Let us briefly outline the reasons why.

We are unlikely ever to agree with President Clinton on the ideal nominee to be a Supreme Court Justice. Indeed, there have been many prominently mentioned potential nominees whom we would in all likelihood have vigorously opposed. But we do believe that a President is entitled to some deference in the selection of a Supreme Court Justice. If a nominee is experienced in the law, is intelligent, has good character and temperament, and gives clear and convincing evidence of understanding the proper role of the judiciary in our system of government, we can support that nominee. We are satisfied that Judge Breyer meets this test.

For the past 14 years, Judge Breyer has distinguished himself on the U.S. Court of Appeals for the First Circuit. Known for his careful, scholarly opinions on a range of difficult issues, he has earned a reputation as a moderate pragmatist. His hearing testimony reinforced this reputation.

A danger of judicial pragmatism is that it may give short shrift to formal or institutional constraints on judicial action. Indeed, some of Judge Breyer's own jurisprudential musings present, in our view, an unduly open-ended approach to judicial decisionmaking—an approach that is open to manipulation and abuse by judges less moderate and less conscientious than Judge Breyer. Our confidence that Judge Breyer will not himself succumb to the siren calls of judicial activism rests on his overall judicial record and on our high regard for his intelligence and integrity.

Several features of Judge Breyer's hearing testimony and judicial record warrant highlighting:

1. While we and other Senators were concerned by Judge Breyer's Free Exercise ruling in *New Life Baptist Church Academy* v. *Town of East Longmeadow,* 885 F.2d 940 (1st Cir. 1989), we took comfort from Judge Breyer's recognition that "[t]here is nothing more important to a person or to that person's family than a religious principle, and there is nothing more important to a family that has those principles than to be able to pass those principles and beliefs on to the next generation." (Unofficial transcript, July 12, 1994, at 73:12–16.) It was precisely because we share this view that we supported the Religious Freedom Restoration Act, and Judge Breyer stated that he understood the strong protections that Congress intended to give to religious liberty under that act.

2. On the subject of the Establishment Clause, Judge Breyer rejects the extreme secularist view that the Establishment Clause mandates an absolute wall of separation between church and state. Judge Breyer instead recognizes that there are "vast areas" where religious institutions can neutrally receive benefits from the gov-

ernment. (Unofficial transcript, July 14, 1994, at 102:12.) He adopts a pragmatic, not an ideological, approach to these issues.

3. Judge Breyer recognizes that the death penalty is constitutional. He rejects the activist position taken by Justices Brennan and Marshall, and more recently by Justice Blackmun, that the death penalty violates the Eighth Amendment.

4. Although Judge Breyer's jurisprudence regarding so-called unenumerated rights is in key respects open-ended and manipulable, he gives every indication of being cautious and restrained. He testified that he remains open to the historical evidence showing that the Ninth Amendment is best understood not as a font of affirmative rights but as a reminder that people's rights are residually protected by virtue of limitations on the Federal Government's enumerated powers. (Unofficial transcript, July 13, 1994, at 228:21–229:19.) He further stated that the Ninth Amendment was not incorporated into the Fourteenth Amendment and therefore does not apply against the States. (*Id.*, at 229:20–230:6.) In addition, he agreed that the reasoning and methodology of Justice Goldberg's concurrence in the *Griswold* case would *not* extend constitutional protection to such things as abortion and homosexual conduct. (*Id.*, at 230:7–24.)

5. We decry the fact that President Clinton has announced a litmus test on abortion. We note that those who *falsely* (as the decision in *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2815 (1992), proves) accused President Reagan and President Bush of adopting a litmus test have been embarrassingly silent about President Clinton's avowed policy. We are disappointed that only 2 years after the 5-to-4 ruling by the Supreme Court in *Casey*, Judge Breyer stated that he views "some kind of" right to abortion as settled. (Unofficial transcript, July 13, 1994, at 178:22.) But his record indicates that he will be far more understanding of society's power to protect the rights of the unborn than the Justice whom he will replace. In fact, in his one case directly involving State regulation of abortion, Judge Breyer voted to uphold a parental consent statute. Alone in dissent, he voted to bar the abortion clinics from offering more evidence in support of their claim that the statute was unconstitutional. His view was that even if the evidence to be offered was taken as true, that would not alter the conclusion that the statute was constitutional. *Planned Parenthood League of Massachusetts* v. *Bellotti,* 868 F.2d 459, 469 (1st Cir. 1989) (Breyer, J., dissenting).

Judge Breyer's academic writings also reflect a sensitivity to the rights of the unborn. For example, in an article on genetic engineering, Judge Breyer emphasized that "one must be particularly sensitive to the risk of injury to the fetus, who cannot look after himself." (Breyer & Zeckhauser, "The Regulation of Genetic Engineering," 1 *Man and Medicine* 1, 9 (1975).)

6. We find it curious that many of the same people who are so adamant about protecting so-called rights that are not set forth in the Constitution are dismissive of economic rights that are expressly provided in the Constitution—as, for example, in the Takings Clause. While we do not put Judge Breyer in this category, we are concerned that certain of his comments could be read as demoting the Takings Clause and other economic rights to second-class status. As Chief Justice Rehnquist stated in a recent opinion

for the Court in *Dolan* v. *City of Tigard,* No. 93–518 (U.S. June 24, 1994), there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." (Slip op., at 17.)

* * * * * * *

There is no need here to explore other areas, such as Judge Breyer's fine opinions in such areas as antitrust and administrative law and the Fourth Amendment. Suffice it to say that while we do not agree with all his opinions and views, we are confident that he will be a fair and very able Justice. For these reasons, we will support Judge Breyer's confirmation to the Supreme Court.

ADDITIONAL VIEWS OF SENATOR SIMPSON

I will support the confirmation of Judge Stephen Breyer to be Associate Justice of the Supreme Court.

However, I would like to review an issue that is of serious and sincere concern to many of my constituents regarding Judge Breyer's apparent position on home schooling and church-operated private schools.

Initially, I also had concerns about Judge Breyer's opinion in the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*. In that case, the court had to determine whether a town school committee (the local school board) could require a private school to submit to the State's standard of review in order to determine the adequacy of the secular education a religious school provides to its students.

The school maintained such approval process violated its First Amendment Free Exercise Rights, by requiring it to "submit" its educational enterprise to a secular authority for approval. The school offered—as a "less restrictive" alternative—to voluntarily give its students standardized tests to determine the adequacy of its secular education and then voluntarily submit the results to the school board for evaluation.

Judge Breyer, writing for a unanimous court, concluded that, while the State's mandatory review requirements do burden the school's free exercise of its religious activities, such a burden was permissible since: (1) the school committee has a sufficiently compelling interest in seeing that the children are educated, and (2) there is no "less restrictive means" available that would both accomplish the State's interest and be less of a burden on religious exercise.

I discussed this issue with Judge Breyer in a private meeting in my office; I also raised it again during the closed "executive" session the committee held with Judge Breyer; and I questioned Judge Breyer about it twice during the 3 days he testified at the hearings.

In response to my questions on the *New Life Baptist Church* case and the possible broader implications, Judge Breyer said:

> * * * [P]eople have strongly-held religious beliefs, and there are synagogues and there are churches and there are mosques and there are dozens of different religious groups. And * * * everyone of those groups [has] the right to practice their own religion and to pass that religion on to their children.

When I asked Judge Breyer: "Do you have a bias against home schooling or religious schooling?" He responded: "Absolutely not."

I also submitted the following written question to Judge Breyer on home schooling and religious education:

> What assurances can I give my constituents about your views on "private religious schools" and the protection afforded these institutions in the First Amendment? And, religion aside, what protection does the Constitution offer to those parents who wish to teach their children at home?

In his response Judge Breyer wrote, among other things, "while the power of the State to compel attendance at some school and to make reasonable regulations for all schools is not questioned," the "competing interests of parents * * * [must be] respected."

Continuing, in his written response, Judge Breyer cited the Supreme Court case of *Myer* v. *Nebraska* which he said "made clear that the 'liberty' guarantee of the due process clause of the Fourteenth Amendment ensures parents' right to 'direct the upbringing and education of children under their control.'" He added that, "it is well-established law that the Constitution offers protection independent of the Free Exercise Clause to parents in deciding how to educate their children."

I reviewed other opinions of Judge Breyer, and I found the record clearly demonstrates his support for the Free Exercise Clause of the First Amendment. He concurred in a case which gave latitude to the State to provide services such as bus transportation to children attending private religious schools so long as those services are provided equally to public school students (*Members of Jamestown School Committee* v. *Schmidt,* 699 F. 2d 1, 13 (1st Circuit, *cert. denied,* 464 U.S. 851 (1983).) He also was in the majority in *Aman* v. *Handler,* 653 F. 2d 41 (1st Cir. 1981), where the court held that public university officials may not deny official recognition to religious student organizations simply because they disagree with the organizations' views. In another case, *Alexander* v. *Trustees of Boston University,* 766 F. 2d 630, 646 (1st Cir. 1985), Judge Breyer, in his dissent, held that States must tolerate deviations from regulations and statutes where doing so would further the accommodation of sincere religious beliefs.

Based on his responses to me and to other Senators at both private meetings and public hearings, and based on his written response to my question on home schooling and private religious schools, I am satisfied that Judge Breyer is not a foe of home schooling or church-related private schools. I believe he will properly consider the rights of all families to determine how best to educate their children and find the appropriate "balance" with the interest of the State in assuring the most desirable education of children.

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