Senator SIMON. There is one question that has not been clarified completely in connection with Lloyd's of London. You have talked about the dates, and in 1988 you started to close those ties, and in the 1970's purchased your interest. What is not part of the record, and I think should be clarified by you for the record, is that you were not on the court when you purchased your initial interest. Is that correct?

Judge BREYER. That is correct, and when I became a judge in 1980, I disclosed it to the committee. That is correct.

Senator SIMON. But the purchase was not at that point.

It is interesting that next to the first amendment, the amendment that has come up for questioning and referred to more often than any other is the ninth amendment. One former appellate court judge has called it an ink blot on the Constitution. You referred to the history yesterday. James Madison originally had 12 amendments he wanted on the Bill of Rights, but in sending them around, he sent them, among other people, to Alexander Hamilton, and Alexander Hamilton said if you spell these rights out, people say these are the only rights people have. And so the ninth amendment was added, which I think is an extremely important amendment.

We had a nominee before us a few years ago who said 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. And he said that when they say "retained by the people," that the Framers probably meant retained by the States. That is a very different meaning. And as you look at the following amendment, the 10th amendment, it differentiates between States and the people.

What is your construction? When the Constitution says "retained by the people," what does it mean?

Judge BREYER. Retained by the people, that is what I think it means.

Senator SIMON. Right. Then when it talks about unenumerated rights, how do you, as a Supreme Court Justice, how do you determine what those unenumerated rights are?

Judge BREYER. A very good question. It 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 14th 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 tradition 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, and in various other ways.

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.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

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 and virtually every Justice. That is not meant to unleash subjective opinion. Those are meant to be objective, though general ways of trying to find the content of that word.

Senator SIMON. But the subjective enters into this, and there is what Learned Hand called the spirit of liberty that has to pervade things.

Judge BREYER. That is true.

Senator SIMON. I do not mean to be putting words in your mouth, but yesterday you talked about borderline cases, and that is what you will be deciding to a great extent, will be borderline cases. When we get to borderline cases in this area of liberty, it seems to me if we are to err, it should be on the side of freedom. You are nodding your head, but that cannot get into the record here.

Judge BREYER. You do not want to err, but you have to understand—I do have to understand, 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. That is the challenge.

Senator SIMON. You have answered in response to several members on questions of religious liberty. It has been about 5 years since you have had to make a decision in this arena.

Judge BREYER. That is true.

Senator SIMON. You have relied on the *Lemon* criteria, the *Lemon* case, which the majority of the Court has relied on for some time, and I believe are basically sound criteria. But there are two members of the Court who differ with that conclusion. Obviously, you cannot indicate how you might rule on anything, but since you have used the *Lemon* criteria, you are familiar with it.

Do you find the *Lemon* criteria basically sound criteria in line with the spirit of the first amendment?

Judge BREYER. What I have always thought is that perhaps the disagreement is a disagreement more about communication than it is about substance.

The *Lemon* criteria say look to see if the Government has as its purpose aiding religion. Look to see if the effect of the statute will have a substantial aid to religion. Look to see if the courts or the government becomes too entangled with religion.

Those seem to me to be three helps, three things people might want to look to, and that, I would suspect, is widely, widely shared.

I suspect the argument comes in when the people want to say, well, those are the only possible things. Are they always determinative? Should it be communicated in the form of an absolute test? Should it be communicated in the form of, well, these things help you identify? That is where I think the area of disagreement likely lies.

Senator SIMON. But the basic no excessive entanglement, that there is a secular purpose, and it does not have the primary effect of advancing or inhibiting religion, those criteria are not offensive to you, if I can put it that way?

Judge BREYER. No, no; they seem important criteria, and it seems to me that what will happen—I am guessing here, but I suspect their exact shape, how absolute they are, how helpful the test is, that perhaps is an area of disagreement; but that those are important factors. I suspect—I am suspecting now, because I am not certain—that there is widespread agreement that those are helpful ways of identifying constitutional problems. And there may be other ways, and those ways may not always apply. But that is what I think is the area of disagreement. That they are helpful, I suspect there is a lot of agreement about it. I am not positive.

Senator SIMON. Jeff Rosen wrote in an article in the New Republic, commenting on Justice Blackmun's departure more than on your ascendancy, but obviously including that, said that for the first time since the 1920's the Court will not have someone who is consistently speaking out for the least fortunate in our society. And I quote him, "Ever since Brandeis, at least one Justice has felt instinctive sympathy for people on the fringe of the political process."

If Steve Breyer is approved, which I am confident you will be, will there be someone who will speak for those who are least fortunate in our society?

Judge BREYER. I hope so. I hope so. I am not—normally, when I write an opinion—and it may be different on the Supreme Court, if I am there. Judge Wisdom gave me some good advice. He said:

> If you feel you want to write a purple passage because you feel so strongly, write it, and do not use it. Because people want your result, they are not necessarily interested in your feelings.

It does make me unhappy when I see an individual who is getting a very bad deal. That does make me unhappy. I think it makes everyone in this room unhappy. And as a judge, mostly what you have as an appellate judge to give to that person is your time and your effort. So if you think that is happening in an opinion or in a case, you can read through the record with pretty detailed care. And if it confirms that is what happened, what I will try to do is set out the facts as dispassionately as possible, for the facts will speak for themselves. And that can have an impact, too. That is how I have approached it.

Senator SIMON. In that connection, in the process of writing an opinion, you said earlier today Arthur Goldberg's opinions were Arthur Goldberg's opinions.

Judge BREYER. Yes, that is true.

Senator SIMON. Judges are a little bit like Senators. A staff person can write a speech, and we can go over and deliver a speech on the floor of the Senate, and it may be very little of the Senator. A judge can have a clerk, for all practical purposes, write the opinion.

I am interested in knowing how you go about writing an opinion. Are the opinions that bear your name, are they Steve Breyer's product? If you can comment just on the process because—and you mentioned one other thing that is important, and perhaps because of my background in journalism, every once in a while I read a court decision that is so lacking in clarity, it is baffling to people who read it. I would be interested in the process you go through in writing an opinion.

Judge BREYER. For better or for worse, my opinions are mine. I do sit at the word processor. I do spend most of the day at the word processors. I have learned the life of a Senator is different, and I have learned some of the pressures that you are under. That is not the life of a judge.

Both the job itself—when I write an opinion, I have my law clerks read the briefs before oral argument. I read the briefs before oral argument. We sit down and we discuss the case. I send them off to get any material I think will be relevant, like a statute that I want underlined because I want to be able to read it if it is key to the parties at oral argument.

At the oral argument, you listen to both sides. And, interestingly enough, most judges will tell you that the oral argument matters. The law clerks often think it does not. But it does to the judge, because the attorneys know their case a lot better than I do, and you learn what is important to them.

Afterwards, when the opinion is assigned, I will send my clerks out to do a long memo, and I tell them we both can do research and we both can think. But in a pinch, I will do the thinking, you see. Their job is to get that research done. And they get it done.

And they come back in whatever form they want, a draft, a memo, whatever. I take that. I read the briefs. I do not want them to follow what they think I think. I want them to give me extra input.

Then I take their input, I take the briefs, I take the record. I sit down at the word processor, and I write a draft. That draft is then given back to the clerk, and we go back and forth like an editing process. And, eventually—I would say it is rare that it is less than 3 drafts; on occasion, it has reached maybe 25. But, eventually, we reach an opinion, a draft, which is basically my draft, edited, reedited, reedited back and forth maybe four, five, or six times. That is the process. And I have to be completely comfortable with every word in my opinion before it goes out for circulation to the other judges.

Senator SIMON. And that strikes me as a very good process. Do you intend to follow that process if you are approved by the Senate?

Judge BREYER. I do; yes, I do.

Senator SIMON. We face a problem occasionally, a question on whom does the Constitution and the law protect. One of the worst decisions in the history of U.S. Supreme Court was the *Korematsu* decision which in large part dealt with Japanese-Americans, but also dealt with those who were in this country legally but not American citizens.

We tend to face these problems in times of national passion. When our hostages were held in Iran, President Carter issued a di-

rective that Judge Green said was contrary to the law, that the Constitution protects those who are here as guests of our country legally, as well as American citizens.

The appellate court—and, again, a little bit like the *Korematsu* decision—in a time of passion ruled 2 to 1 against Judge Green. I happened to think it was the wrong decision.

But you have a decision in the case of *U.S.* v. *Maravilla* that touches on this a little. I am interested in your perspective. Does the Constitution, do our laws protect not just citizens of the United States, but those who are not citizens who are here legally?

Judge BREYER. The issue in that case, if I am remembering it correctly, dealt with the word "inhabitant" in a statute. And I think that the reason—am I remembering the right case? Was that the——

Senator SIMON. I do not remember whether that——

Judge BREYER. Yes; I think it was.

Senator SIMON. It was the case of a courier, someone who was——

Judge BREYER. The courier, that is it.

Senator SIMON. The courier who was in the United States just for a day.

Judge BREYER. That is right. That is right, exactly. The question in the case was—so the answer to your question is yes, because the problem with the case arose out of the fact that most of the civil rights statutes use the word "person." And I think it was conceded that if they had used in Congress, when they enacted that, that word, there would have been protection for the courier who came in in this case.

The problem was that in a particular provision they used the word "inhabitant," and so could you say—and that was the legal issue. Could you say that a person who is only here for 2 or 3 hours, who is coming in as a courier and just leaving, was an inhabitant? And that was what created all the agony and the difficulty in the case.

But I think it was conceded by everyone that if Congress had used the word "person"—and Congress does normally use the word "person"—there would have been protection.

Senator SIMON. And as far as you are concerned—first of all, I would be interested in your reflections on the *Korematsu* case, if I may.

Judge BREYER. Of course, I think when there are pressures of that sort, that is the time for a judge to stand up. I know it is difficult. That is what I always admired about Holmes. Holmes believed lots of deference is due the legislature. Pay a lot of attention to the legislature. Let's have a lot of restraint on the judge's part. But then when the right of free speech was infringed, suddenly Holmes said, That is it, stop. And he stood up, even though it was in dissent. So I think that is important in the case of a judge.

The irony about *Korematsu,* of course, I have always thought—and I have rather always admired Justice Murphy's opinion. I think it was Murphy. Because the majority was obviously worried in the case because it was a time of invasion or people were afraid there would be an invasion from Japan. And so the Court was saying, but could we as a Court really stand up to the public with the

military and people worried about invasion? And that led them to interpret the law a certain way.

And what Murphy said was, wait a minute, I think this is 1944. That is not 1941. Nobody thinks we are going to be invaded now. So what is going on here and now. And if you want to say the law might have been different then, say it. But what is going on right now?

Now, I may not remember that correctly, but I have always thought that that was an important view because it says do what you can. Even if somebody did something wrong before, that is no need to follow it. He was in dissent, unfortunately.

Senator SIMON. Your recollection is correct, and one of the ironies, as you look back on this history, one of the people who said that we should not issue that directive of February 1942 was J. Edgar Hoover.

Judge BREYER. That is right.

Senator SIMON. One of the persons you would least expect to do that.

Judge BREYER. That is true.

Senator SIMON. But your point that a judge should be willing to do what is unpopular, just as Senators should be willing to do what is unpopular, tell me something in the background of Judge Breyer that indicates a willingness to stand up to do what is unpopular.

Judge BREYER. Nothing that I could compare with those really dramatic figures of the past. But many of the things I was engaged in here—well, you listened to the discussion about sentencing guidelines, or listened to some of the discussion about the airline deregulation, or listened to the discussion about the book, and you would not think I was moved by popularity in order to get into that.

But some of instances in the Commission or some of the instances that occurred here are ones where I think people who knew me at the time would say you can push me to a point, but not beyond. Not beyond. And once you get to that point, well, that is what it is. That is what it is.

Senator SIMON. And if we get to the point where the popular passion is on the one side and the Constitution is on the other——

Judge BREYER. It is the Constitution.

Senator SIMON. There is no question in your mind where Steve Breyer——

Judge BREYER. There is no question. That is what judges are there for. That is why they are independent. That is why they are there.

Senator SIMON. Mandatory minimums has been talked about a little bit here. Senator Heflin and Senator Kennedy, and I believe Senator Brown also asked about them. You are correct. This is a legislative responsibility, but it is also true that sometimes we need judges to stand up and tell us to do what maybe we even instinctively know is the right thing to do, but we get caught up in this desire to do what may get us a few votes in the next election rather than what is desirable.

I just read yesterday a statement by Norman Carlson, you may remember, former Director of the Bureau of Prisons under Democratic and Republican administrations.

Judge BREYER. Yes, I do.

Senator SIMON. Highly respected. He says—this is in testimony before the House:

> I believe that most individuals who seriously examine the Federal criminal justice system would conclude that minimum mandatory sentences have produced results which have not served the public interest and are costing the taxpayers a tremendous amount of money.

I happen to concur with that. Chief Justice Rehnquist has spoken out on this.

You are in a situation today, these 3 days, where you do not want to offend any of us, and I understand that. I hope the time will come when you may think it appropriate, if you feel a situation is one that is deteriorating, where you will feel free at some judicial conference or on some occasion to speak out on this issue. I just pass that along because I think this is an area where we need the judiciary to speak to us.

Senator COHEN. If the Senator would yield, I believe Justice Scalia is doing that on a frequent basis.

Senator SIMON. And I welcome that, even though in the case of Justice Scalia, I differ with just about everything he has to say.

But I do think that you should not be—if you see a need, you should feel free to speak out on it without entering into partisan politics.

You mentioned also in your opening statement—I thought it was an excellent opening statement—that it is important for a judge to be connected to the outside world, to understand the real world. That is not easy for an appellate court justice. It is even more difficult for a Supreme Court Justice.

Have you thought about how, as a member of the Court, you can maintain contact with the real world? I mean the world that suffers.

Judge BREYER. Indirectly, of course, Joanna works with these people all the time at Dana Farber, in the cancer hospital. Directly, people have real problems, real problems.

Justice Blackmun tried to work out ways of doing that. On my part, the will is there, and I have worked out some ways of doing that where I am in my present job. In the new job, if I am confirmed, the will being there, I would look for the possibilities, and I would have to try to work out what I can do and what not. I would try to do my best to get out a little bit of what I call the cloistered chamber. I have been fairly imaginative, I think, at finding ways. So I suspect I will find them.

Senator SIMON. And I really think that is important, and meaning no disrespect to those cancer patients, I think it means more than that. I think it means reaching out to people who are unemployed, who are hurting in our society. And somehow, because of our system of campaign contributions and everything else, we are not responding to them as effectively as we should.

This is not something you are going to have to decide in a court, but since your present jurisdiction includes Puerto Rico—and you are testifying before us—my observation has been that on the legislative side and on the executive side, Puerto Rico gets the short end of the stick, for obvious reasons. There are not two U.S. Senators representing 3.7 million people. And so when we go through

everything from minimum wage to health care legislation, to you name it, it becomes very easy to ignore that side of things. And in terms of appointments to the executive branch, again, Puerto Rico gets the short end of the stick. And this is true in any administration. I am not faulting this administration.

We have a system that we call a commonwealth, but it is a colonial system, and one of these days Puerto Rico either is going to become a State or is going to become an independent nation.

But you have a chance to observe the judicial side, and my impression is that the deficiencies we have on the executive and legislative side, as far as Puerto Rico is concerned, are not there to the same extent on the judicial side. Is that accurate? Or any observations you have in terms of how we are serving 3.7 million Americans in Puerto Rico in the judiciary, I would be interested in hearing them.

Judge BREYER. It has been an enormous privilege for me to have had Puerto Rico in the first circuit. You have no idea what a pleasure, a privilege, it is. Puerto Rico is part of our circuit, and after 14 years, I feel part of Puerto Rico. That is the sort of place it is. I mean, you are part of it. It is wonderful. And I think that the need, the obligation, to pay attention to the people there is an important one. Their judicial system is an independent system. It is a fine system. It is a system that rests on the civil code, as does Louisiana, rather than the common law.

We have a special obligation in the courts to become familiar with that code so that in diversity cases, we can get the law right, as the Supreme Court of Puerto Rico would decide it, and we try to fulfill that obligation.

I think on the judicial side, as well as on the executive side and the legislative side, I feel both emotionally and logically and in every other way that it is very important to pay attention to the people of Puerto Rico. They are part of us; we are part of them.

Senator SIMON. Let me just follow up very briefly. But in terms of our service to them on the judicial side, are we providing the same service to the people of Puerto Rico that we would to the people of Massachusetts or Illinois?

Judge BREYER. The Federal district court there I think is. It is a fine Federal district court. There are seven judges. I think that it is an excellent court, and the facilities are supposed to be in every way—and as far as I know, they are—comparable.

There is also a different—an independent commonwealth system of courts, which we as a Federal court interact with, because we get to know the judges, and we understand their work, and there are cases that go back and forth. But that seems a fine independent system. But our Federal court system in Puerto Rico with its seven judges in the District of Puerto Rico is a fine system. The present chief judge, a woman, Carmen Cerezo, is an excellent chief judge, and there are some vacancies down there now which I think are in the process of being filled.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. It is always a source of debate among Puerto Ricans, who are American citizens, as to whether or not the Federal courts are sensitive enough to their Spanish culture. As you