had so adjusted their lights for Senator Simpson's head, they want to be consistent? [Laughter.]

Senator SIMPSON. Why don't you tell them the story about what——

Senator LEAHY. No, no, I'm not going to do that.

Senator SIMPSON. Then I will. Let me tell you. Mr. Chairman, you will recall that during——

The CHAIRMAN. You go right ahead. I never talk about hair or lack thereof. [Laughter.]

Senator SIMPSON. During a hearing in this committee, a courier came to the door——

Senator LEAHY. You don't have to tell this, Alan.

Senator SIMPSON. I think I will. You have told it enough times. It is very short. It is like war stories, you have to get them out of the way.

This courier came and said to the person at the door, "I have a message here for somebody." He said, "Who is it?" He said, "I don't know. He's tall, bald, homely, and wears glasses." And this guy looked in and said, "There's two of them." [Laughter.]

The CHAIRMAN. We are recessed for 5 minutes.

[Recess.]

The CHAIRMAN. The committee will come to order.

Welcome back, Judge. We will do another hour and a half. We will do Senators Leahy, Heflin, and Grassley, and we will reconvene tomorrow at 10 o'clock, at which time, if all goes as planned, I believe the next person will be Senator Specter, I think. I am not sure. The name plates are not up, but I think that is correct.

Senator Leahy, the floor is yours.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

Judge, I was thinking, as I was listening to you, I have had the opportunity in the years I have been in the Senate, now with your nomination, which I fully expect will go through the Senate, I will have had an opportunity to vote on all nine members of the Supreme Court. I also will have been in the hearings on eight of them. That is counting Chief Justice Rehnquist in his capacity as Chief Justice.

I have an opening statement that I was going to include in the record as though read, Mr. Chairman.

The CHAIRMAN. Without objection, it will be included.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR LEAHY

When you visit the Supreme court, and walk into the courtroom chamber, you cannot help but be struck by a special authority that exists there. I remember being affected this way when I was first there as a law student, and I remember feeling the same way when I was there just a few weeks ago.

The courtroom itself is more cramped than you might expect. It essentially consists of a broad wooden bench, behind which sit the nine justices in their high-backed chairs. Before the bench is a lectern and tables for counsel arguing cases, as well as tables for clerks and other court personnel. The rest of the chamber is devoted to rows of chairs for public seating.

Yet the importance of this room is enormous—one cannot enter that room without having a feeling about what happens in it. This is where our most precious rights

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

and freedoms are protected through the decisions of the justices of the Supreme Court—the right to free speech, the right to practice one's faith, the right to a jury of one's peers and to due process, the right to vote. Nowhere on the face of the globe or in the history of mankind has a nation guaranteed such liberties.

It is no wonder that this place evokes such powerful feelings, and it is no wonder that the American people place so much importance on the naming of a person to take a seat behind the bench in this courtroom.

You have been nominated to be one of the nine persons who will question and debate and judge in this room as one of the final arbiters of the meaning and application of the Constitution of the United States and the basic freedoms of us all. You follow in the path of names like John Marshall, Oliver Wendell Homes, Jr., Louis D. Brandeis, Hugo L. Black and Thurgood Marshall. Very large shoes to fill, to be sure. But we must hold such expectations of you. As a justice of the Supreme Court, if you shirk from protecting these freedoms, we have nowhere else to turn. I call upon you, if confirmed, to be a beacon of freedom and common sense.

Like other members of the Committee, I have reviewed your record extensively over these past weeks. I have been struck by its breadth and distinction. You are one of our nation's most distinguished circuit judges. You are an accomplished legal scholar. You are without question a person with the legal acumen necessary to sit on the Supreme Court.

But you are more than that, and your nomination means more than that. An essential, but sometimes overlooked, attribute of any judge is that he or she be fair. Justice requires that all litigants, regardless of their cause, can present their case and have it decided on the basis of the facts and the law, not on any predisposition of a particular judge hearing the case. My sense from reviewing your record is that you are fair—you take each case individually and decide it on its merits under the law. You do not prejudge the outcome on the basis of an existing notion or narrow political goal.

If you are confirmed, I will have participated in confirmations for each of the nine justices serving on the High Court. During the last 20 years we have had different sorts of presidents and different sorts of nominations to the Supreme Court. Some presidents have used Supreme Court nominees as a wedge to divide the American people—to promote an "us" versus "them" politics. Often these types of nominations have resulted in divisive battles, political pontificating, and intensely personal attacks during the confirmation process.

President Clinton has taken a different course. He has sought a nominee who can bring people of diverse views together and who has been near universally praised as an excellent candidate. President Clinton has chosen someone who people of all stripes—conservatives, liberals, whatever—know will provide them a fair hearing and a fair reading of the law. The President should be commended for selecting a person who can help forge our way into a new century and a new age through consensus based in commonly-shared constitutional values.

Finally, I was struck by some of your comments in the days that your nomination was first announced. You said that the law has to make practical sense to ordinary people—it has to accord with real life. I could not agree with you more. I commend you for writing opinions in a style and manner that is accessible generally rather than restricted to lawyers or legal scholars. I also commend you for the commitment you made in your opening statement in these hearings to do your utmost to see that our decisions reflect both the letter and the spirit of law that is meant to help people and to remember the effect your decision will have upon the lives of Americans.

As a justice, you are charged with making decisions that, quite literally in some cases, are of life and death significance. The Court is not a place for academic musings. I hope you will be the kind of justice who focuses on the effect your decisions have on real people—people who may not be powerful or well-connected. I want you to be the kind of justice who could take the case of Barbara Johns—a young girl who had to attend a segregated school where classes were held in tarpaper shacks—and turn it into the unanimous opinion that was Brown v. Board of Education. I want you to be the kind of justice who would take up Clarence Gideon's habeas petition, scrawled by hand on plain paper, and affirm the right of every citizen to due process of the law. It is a weighty responsibility.

I have appreciated hearing your views in these proceedings. Your family is justifiably proud of you and you of them. I hope this has not been a matter of torment for any of you but an occasion in which you can enjoy participating in a constitutional exercise involving all three branches of our federal government in a most important function.

Senator LEAHY. I would like to just mention a couple of things I say at the end of that statement. When your nomination was first

announced, you said during that period that the law has to make practical sense to ordinary people, it has to accord with real life. I could not agree with you more, and I commend you, incidentally, for writing opinions that are in a style and a manner that is accessible generally, rather than just restricted to lawyers or legal scholars.

I commend you for the commitment you made also in your opening statement today to do your utmost to see that your decisions reflect both the letter and the spirit of the law that is meant to help people, also to remember the effect your decisions are going to have on the lives of Americans.

As a Justice, you are going to be charged with making decisions that quite literally, in some cases, are of life and death significance. And the court in that regard goes way beyond being a place for some kind of academic music. So I hope you will be the kind of Justice who focuses on the effect that your decisions would have on real people, people who are not very powerful or well-connected.

I want you to be the kind of Justice who could take the case of Barbara Jones, a young girl who had to attend segregated schools where classes were held in tar-paper shacks, a young girl who had her case go all the way to the Supreme Court, where it became the unanimous opinion of *Brown* v. *Board of Education,* the kind of Justice who would take up the handwritten, poorly drafted petition of Clarence Gideon, which indeed was so well-written that Gideon's trumpet was heard and affirmed the right of every citizen due process of the law. And that is a weighty responsibility.

So I am glad to have heard your views in these proceedings. Your family has had to sit through all of this. They perhaps heard you express these views before on more than one occasion.

It is interesting, because of television and the media covering this, that the American people probably have a better view of who you are than they would have otherwise. In that regard, I might ask, when they do see a judge or a Justice at these kinds of hearings, sometimes it is the only time they ever really get to see them. They read a little bit about the Supreme Court and arguments. We hear that some judges are very good in their questioning, and some tend to pontificate, some go to the point, some appear to do legal games with the lawyers, and so on. But nobody really knows, unless you are actually sitting there.

What do you think about having television in the Supreme Court for arguments? Would you be in favor of that?

Judge BREYER. I would say this, Senator: The issue came up in the Judicial Conference of the United States, of which I was a member. They have representatives of all the circuits and also the district courts. And I voted in favor of that. We voted to have television, the question was the court of appeals and the district courts, and we would run an experimental program. It has been going on now in the district courts and also in the courts of appeals. I volunteered our first circuit, with the concurrence of the other judges, for the program, but we were not accepted as the experimental circuit.

So I have expressed a view that that is appropriate in that way in the Judicial Conference. Now, I should add that before making any decision in the Supreme Court of the United States, if that

issue arose. Obviously, I would listen to other members of the court and try to understand their points of view and what they were thinking, too.

Senator LEAHY. I understand, but I applaud you for the feeling you have, because I think that the court, like every part of the government, should be as accessible as possible, and that is one way of making it accessible. Nobody asked that these cameras be in in camera discussion or in chamber discussions where you might be determining how you are going to vote, but certainly in the arguments.

Judge, I grew up in a family where the idea of the first amendment was greatly respected, both parts of it. My parents had a printing business and a weekly newspaper and also held their religion very deeply. So let me go first to that part of the first amendment dealing with speech.

Do you think there is a core political speech that is entitled to greater constitutional protection than other forms of speech?

Judge BREYER. 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. What do I mean by that? Actually, it is Michael, my son, who really gave me a good compliment once that sat me thinking about this. I don't always get compliments from him.

What he said was, well, we did used to argue a lot at the dinner table, I mean discuss, and he said, "You know," he said, "I always felt you were listening to me." That, of course, doesn't always mean we agree. But, you see, there is something in that idea of listening that promotes the dignity of the person who is listened to.

I have noticed in court sometimes, if there are two people arguing, I will listen and then I try to repeat the argument in my own words to the other side. As you go back and forth, it promotes a good feeling, because people feel they have been listened to, even if you disagreed with them. You took in what they were saying.

Now, that kind of conversation that has to do with dignity and the way that the democracy functions, the expressive vale of speech, the political value of free speech, all of those things are a cluster of things. Then, as you move out sort of from that center in different ways, you can discover that some of those things are mixed with more conduct or some of those things are mixed with activity that could cause a lot of harm. That was Holmes' point, you can't yell fire in a crowded theater.

You could find it in some areas that the expressive value and the political value is totally gone and there is nothing. Think of child pornography. But I mean at that core there are several things.

Senator LEAHY. But do you protect nonpolitical speech like, say, a scientific debate?

Judge BREYER. Of course.

Senator LEAHY. And art and literature?

Judge BREYER. Of course.

Senator LEAHY. Let me go into another area, then, as we follow this a little bit. I have been both a prosecutor and a defense attor-

ney. You are brought up to believe you try your cases in the court room.

But it seems to me—and we have had of recent days even more of an example of this, where you have witnesses in a high-profile criminal case that are going to be out selling their story to tabloids or television or whatever else before they even go in to testify. They are obviously telling their story not under oath, but they have sold it for a great deal of money, and then they are expected to come in under oath, and certainly it is going to be awkward for them to contradict what they have just sold it for, and sometimes, as we have discovered, those buying it want to make sure that it is as spectacular as possible. A suggestion has been made that sometimes stories are changed to accommodate that.

I wonder if this kind of checkbook journalism undercuts the pursuit of justice or witnesses' credibility, or what it does to the tension between the first amendment rights and the rights of the public and the defendant to a fair trial. What would you think of the constitutionality of a statute that would prohibit persons identified as witnesses at a preliminary hearing or a trial from selling their stories prior to the time they testify? Could you write such a statute?

Judge BREYER. I am not going to be or am I in Congress. I understand the difficulty that your question is getting at. I have two reactions. Obviously, I cannot discuss the legality of that particular thing, because that could come up. But underlying your question, it seems to me that there are two important points.

The first is what you hone in specifically is likely to be a problem over the next 20 years, 30 years, maybe indefinitely, where you have two important sets of rights that all Americans value. All Americans value free speech. All Americans value the important right to a trial that is fair, so that an innocent person is not convicted. Sometimes those rights can clash, and then you are in a difficult area of how you are going to reconcile. Now, that is fairly well known, I suppose.

The other point that I would like to emphasize—and this is a little self-serving, as a judge—is also, as you recognize, not every clash of this sort need be resolved in a court. That is, I have always thought that the press, too, is sensitive to the problems of fair trial. I have always thought that lawyers, too, are sensitive to the problems of free press. And sometimes that kind of communication—this is things I have said in speeches, I am not saying anything new that I have not said before—sometimes that communication among groups outside of courts, before creating a legal issue out of everything, can help.

Those are the only two general comments which may be fairly obvious.

Senator LEAHY. Let me pursue that in a different way. I am not going to ask you to write a statute for us on this, assuming that one is needed, and then pass on its constitutionality. I also understand what you are saying is the bar and the press could spend some time and talk with each other, but I must suggest that there has not been evidence of overwhelming restraint on either side. As we end up with more and more television networks and more and more newspapers trying for the next headline, I think the kind of

restraint we may talk about may be discussed at prestigious panels of either press associations or bar associations, and the discussion will be forgotten the first time there is competition for a story.

Let me use a corollary of a case that you have been involved in, *In re Globe Newspapers* in the first circuit in 1990. As I recall, in that one, there was a question of whether the press would be accorded access to the names and addresses of trial jurors. Judge Campbell had noted the clash and constitutionally protected interests, the press' first amendment right to access to a criminal trial, a defendant's right to a fair trial, but also the jurors' interests in having their privacy protected, all major interests.

Judge BREYER. Yes.

Senator LEAHY. What kind of thinking went on? What kind of issues went on in your mind and the others, as you were discussing how to rule on that case? Or what do you see as the important issues in ruling on that case?

Judge BREYER. Eventually, the case I think turned on a rule of court, and it was how to interpret that particular rule, and I think the Globe got the names because of the rule, if I am remembering it correctly. But the considerations there are those that you identified.

You certainly do not want to close the courts off to the press. The courts belong to the public. It is a public forum. It is a public arena. The court is their court, the public's court. It is not the judges' court and it is not the lawyers' court. And that openness creates a confidence in the public that I think is necessary to maintain the institution.

At the same time, as you have just pointed out, remember that a juror, my goodness, what a public service a juror performs. And you see jurors and they are proud of being jurors. They do not get paid anything significant.

Senator LEAHY. You also see jurors in some criminal cases terrified to be jurors, too.

Judge BREYER. Well, it is an amazing thing, if you think about it, that the public will give willingly that time and commitment to this kind of important public matter. And what might they sacrifice? A lot—money, perhaps privacy, perhaps a great deal of time, perhaps a long absence from work. And it can even happen that they are absent for a long time from their families, and they may—it depends on the case—it could even happen they have to be locked up in a hotel room for a very long time, which can be very isolating.

That is an amazing public service, and I think, as well, that has to be recognized. So that is in the mind of the judges who are trying to interpret this rule, and that is why Judge Campbell said that. Eventually, you have to balance those things. Eventually, it is a question of recognizing the juror's right, recognizing the need to run the trial fairly, recognizing the importance of having the proceeding public and maintaining the confidence of the general public. Those are certainly the considerations, and working them out is a matter of judgment, what the rule says, how these different factors play out in the context of a particular case. That is simply to say it is difficult.

Senator LEAHY. It is also saying there are no absolutes either.

Judge BREYER. There are not. There are not.

Senator LEAHY. If the Government is giving out Federal funds for whatever—art, libraries, so on—can they require recipients of Federal funds to express only those views that the Government finds acceptable?

Judge BREYER. If you put it like that, it does not sound likely. I mean it does not sound that they could.

Senator LEAHY. Well, let me give you a couple of examples. Could the Government—and I have asked this of other nominees—to further a policy of protecting the public from sexually explicit material, prohibit a library receiving Federal funds from making books like Alice Walker's "The Color Purple" or J.D. Salinger's "Catcher in the Rye" available?

Judge BREYER. Yes, and, you see, then you get into very—you get into more difficult questions. Of course, one is against censorship, and you can start with very easy cases. Could they say no books? We are paying for statues for Party A, Democrats, but not for Republicans; or Party B, Republicans, not for Democrats. Could you discriminate in that way? And the answer, I think 99.99 percent of all people would say certainly not.

And then you get into more difficult areas, and you have on the one hand the ability of the Government to structure its own programs. After all, if you are going to have statues and that is your program, you do not have to pay for paintings because it is a statue program not a painting program. And then you get into all kinds of middle cases——

Senator LEAHY. Well, that is easy. That is easy when you say it only applies to statues or only applies to paintings.

Judge BREYER. That is right.

Senator LEAHY. But within the statues, shall we say we can only have statues of political figures that are acceptable?

Judge BREYER. Yes; where, of course, I am tending to agree with you——

Senator LEAHY. And if we are going to give books, can we start saying: However, we will give you a list of books that you are not allowed to buy?

Judge BREYER. In principle, in principle, censorship is undesirable. It is undesirable. And when actual cases of censorship come up, typically it is going to be some issue which is a borderline issue. And on this borderline issue, you typically decide it in reading the briefs, reading the arguments, thinking about the particular case and what the particular thing is. And the reason that I answer it in this way is I think that cases will come up like this, and I will have to think about it, and——

Senator LEAHY. Could I suggest that you may want to think—this is just the view of one Vermonter, that the further you move away from the first amendment being an absolute, the more of those cases you are going to have?

Judge BREYER. Well, that is right. That is right.

Senator LEAHY. Suppose the Government wants to protect the integrity of the Internet or new computer superhighway? Can they prevent computer users from sending each other a copy of "The Shipping News" by Annie Proux? I only mention that because another Vermonter did.

Judge BREYER. You see, what is at the bottom of it, it does seem to me—and people forget that, that it is there to protect speech and writing that we do not agree with. And how often people say, oh, it is not there to protect that. That is too bad, that is—but that is what it is there for. And that principle, I think, is exhibited in lots and lots of different ways. And I think that is a fairly absolute principle.

Senator LEAHY. I have been impressed by the current Court's adherence to free speech issues, and somewhat surprised, I might say. But I would also suggest that the first amendment gives us the guarantees of diversity that makes us such a strong democracy. And it is having to put up now and then with speech, or art, or whatever you or I might find offensive, which guarantees that that diversity stays there, and the same diversity that protects you and me.

Let's speak of the *Lemon* test. Correct me if I am wrong, but from your earlier questions, I would assume that you do not feel we should be out there applying the *Lemon* test, that there may be a better test. Am I correct in that?

Judge BREYER. I do not know if there is a test—I mean, usually in court cases there are so often two different problems. One is the problem of what is this line you try to work out what the correct result is. And then the next question, which is tied into the first, is: How do you communicate the result? How do you communicate it to lots of other judges and lawyers and people who have to live with the rules?

One way of communicating it is creating a lot of sub-rules, but there are other ways to communicate the idea. One of the best ways of all in this area I call a metaphor, the town meeting. As soon as you say an opinion, it is a New England town meeting. There are rules. Everyone knows you can have some rules. Everyone knows the town meeting runs with rules of procedure, but not rules that choke off points of view. That metaphor is an awfully good way of communicating things.

And so when I read a Supreme Court opinion, I wonder if they have an absolute, you know, sort of sounding test. Maybe what is meant is that these are indicia that normally work. You can use a lot of ways of communicating.

Senator LEAHY. Well, for example, would you use the same test if you had education regulations, for example, which might affect parochial schools? Would you apply the same rule to that as you would rules of speech that might cover religious topics? Would you not see the possibility that you may be applying a different test in those cases?

Judge BREYER. The difficult is, of course, you start in this area with the basic idea that the State is neutral. No one wants to see the Government favoring a different religion. And as long as you do not want to see the Government favoring a different religion, that means the Government cannot favor your religion either.

Then no one says that it is absolute. No one believes that the ordinary services—fire department, police, many, many such services—are not available to religious institutions as well. Of course they are.

And then the question is: Where do you draw the line? How much can the Government do without treading—without crossing that barrier and creating the kind of favoritism that the establishment clause was designed to prevent?

That is where I start in the way I think about it.

Senator LEAHY. I listened to your answers to the questions that Senator Hatch asked, which were very valid and good questions. I have always read the first amendment, the establishment clause, as saying that it does set up the way the State must remain neutral between one religion and another and that it guarantees us our right to practice our religion. But I also read it as saying it guarantees our right not to practice a religion, if we want.

Judge BREYER. That is true, yes.

Senator LEAHY. You said that the State should not side with one religion over another.

Judge BREYER. Or a religion——

Senator LEAHY. Would you also agree the State should not side with those who practice religion over those who are nonadherents to any religion?

Judge BREYER. I think that is basic. The Supreme Court has, I think, been very clear about that. Very clear.

Senator LEAHY. We have the Kiryas Joel Village School District that tried different ways to provide special education programs to the handicapped children of a religious community. They tried special education classes in an annex to the religious school. That was stopped in reaction to a 1985 Supreme Court decision. They tried busing. They tried a special school district, finally, and the Supreme Court said this violated the establishment clause.

Do we need a clearer direction from the Court about what governmental accommodation of religion is constitutionally permissible, or is Kiryas Joel as clear as we need?

Judge BREYER. I start and we do start with the basic accepted principle that the Supreme Court makes clear the basic about favoritism, as you point out, not favoring one religion over another, not favoring religion over nonreligion. At the same time, you begin with the idea as well that certainly religious schools and religious churches and synagogues are certainly entitled to basic State protection. And then you are infinitely going to find all these different cases, have they pushed it too far? Have they pushed it too far?

And I wish I had a magic formula that would answer that, and I do not have it. I do not have it.

Senator LEAHY. I have a feeling——

Judge BREYER. I think it will——

Senator LEAHY. I have a feeling you are going to be grappling with it for years to come. There are some who want a very literal, narrow aspect of the establishment clause simply saying that you can do anything you want as long as you do not actually set up a State religion, the Government religion, or simply set it there to prevent Government—well, at the time it was written, from favoring one Christian sect over another.

Would you say that it goes further than simply prohibiting the coercion of a State religion?

Judge BREYER. I think that is well established. Well established.

Senator LEAHY. On the constitutional right to privacy, do you recognize such?

Judge BREYER. I think that is well recognized. I think that is well established in the law.

Senator LEAHY. Where are the unenumerated rights such as the right of privacy? Are those in the 9th amendment, 4th amendment, 14th amendment?

Judge BREYER. That is a very good question, and I have thought about it some. I do not think it is in the ninth amendment, but it is true that Justice Goldberg wrote an opinion about the ninth amendment.

Senator LEAHY. That is why I ask.

Judge BREYER. Yes; and he said in that opinion that what the ninth amendment does is this—it is interesting, I think, if I can take a minute. Do you want me to——

Senator LEAHY. Sure; I would love to—I did not ask the question just as an academic exercise. It is something that is a real issue to me.

Judge BREYER. It 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? Well, what he wrote in that was that it is meant to prevent a certain kind of argument. This is the argument. You go back. Actually, I had read at Senator Hatch's suggestion an article that was quite interesting on this point. 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.

So there was a view in the Supreme Court for a while, really associated with Justice Black, that the only rights that were protected against the States' infringing them were those specifically listed in the first eight amendments and the word "liberty" in the 14th meant only those listed in the first eight, all of them and no others. But, said Justice Goldberg, your argument is doing just what the ninth amendment told you not to do. So do not argue that way. And once you do not argue that way, then you look at that word "liberty" in the 14th amendment, and you say it is designed to protect fundamental rights.

People have described those fundamental rights in many different ways. There are a variety of approaches to figuring out what they are. Almost every Supreme Court Justice since then has accepted the existence of some, and what they are and how you find them is a big question.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. In the meantime, there was the incorporation doctrine.

Judge BREYER. Yes.

The CHAIRMAN. Senator Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I would like to have my opening statement inserted into the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR GRASSLEY

Congratulations on your nomination to the Supreme Court, Judge Breyer. It is readily apparent that your nomination developed from the reputation you have established over many years as a law professor and judge.

Your writings and legal opinions appear to reflect an understanding of the proper place of the Supreme Court, and courts generally, in our society. I find your approach to deciding cases to remind me of Justice Frankfurter. Time and again, when asked to find statutes unconstitutional, you have examined the language and legislative intent, and resolved all legitimate questions in favor of constitutionality. This deference to the legislature is a hallmark of judicial restraint.

In recent decades, too many judges have permitted political considerations of desired policy results to affect their legal conclusions. These decisions are based on the view that the Constitution, rather than guaranteeing specific rights, broadly protects judicially-defined liberty and dignity. More recently, the Court has focused more on legal principles, rather than personal preference. There are those who may hope that their policy goals, unattainable through the political process, can be obtained through your vote on the Supreme Court. Your record as a judge thus far gives little support to such hopes. Nonetheless, as a Supreme Court Justice, you will not be constrained to follow precedent to the same extent as a Federal judge.

The legitimacy of judicial review derives from the power to enforce the Constitution as supreme law. When judges impose their own personal views, they necessarily do not apply the law. The basis for judicial review evaporates in these circumstances, and our limited government of laws becomes a government of people.

I hope to explore with you during your testimony issues relating to the role of judges and important principles of constitutional and statutory decisionmaking. I am not looking for campaign promises, but I do hope to determine your judicial philosophy.

Judge Breyer, your objectivity, adherence to the Constitution, and your awareness of the limited power of judges and the appropriate role of the branches elected to decide policy questions are important. I look forward to addressing these issues with you during these hearings.

Senator GRASSLEY. Judge Breyer, I am glad to hear you say in your previous discussion with Senator Leahy that child pornography is not protected speech. You dealt with child pornography when you served on the Sentencing Commission, and you were making guidelines for violation of the child pornography statutes. There was a January 1987 meeting when one of the Commissioners, Judge MacKinnon, suggested adding an aggravating factor to the crime of transporting, receiving, or trafficking in child pornography. He proposed increasing the sentence when the large sums of money often correlated with organized crime involvement in child pornography were present. And he made a motion to raise