

**OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S.
SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you very much, Mr. Chairman. It should be noted that there is not a whole lot I can do in your absence.

The CHAIRMAN. Well, I will not say anything.

Senator SPECTER. Or in your presence, for that matter. [Laughter.]

Senator SPECTER [presiding]. But it is a powerful feeling, Judge Breyer, to be the entire Senate Judiciary Committee. For those who may wonder why I am the only one present, it is because a vote was scheduled at 10 o'clock, and I was there at the start of the vote to vote early and be able to proceed, because there are a great many Senators who are waiting to question.

Judge Breyer, in my opinion, the Senate has no more important responsibility than the confirmation of a Supreme Court nominee under its advise and consent constitutional duty. The Court, with its 5-to-4 decisions, has made a practical reality of great power for that fifth vote, touching the lives of virtually all Americans in many important cases and sometimes people around the world. And the nominees, unlike the Presidents who serve for 4 or 8 years, once they are confirmed sit for decades and have a very profound impact on the life of Americans.

The concern which many of us feel turns on the expanding role of the Court in taking on decisions of public policy which really move across the line, I think, very frequently into legislative rules—really a superlegislature. And that is why I think it is very important to find out as much about a nominee as we can, and the experience which I have seen in the 14 years I have been in the Senate—and this is the ninth confirmation hearing since 1981—the experience has been the nominees answer about as many questions as they feel they have to to win confirmation. That is a practical fact of life on the so-called tension between Senators and nominees.

I am sorry my colleagues are not here to hear just a little bit of criticism. We do that to one another occasionally, publicly and privately. I think it is unfortunate that Senators commit themselves in advance, because I think that makes confirmation a virtual certainty, and it has been expressed by many of my colleagues, even in the course of these hearings and more frequently in the media, and I think that is unfortunate, because I think that Senators, like Justices and judges, ought to reserve judgment until they hear all the witnesses. And there will be some witnesses—there always are—who will testify in opposition to the nomination.

I do not want to take too much time on a preliminary statement. I want to get right down to the issues, and I want to start with the issue of the relative responsibilities of a judge versus the legislators. And I want to start with the case of *Rust v. Sullivan*, which I personally consider to be a matter of judicial legislation.

When the provisions on Planned Parenthood were passed in 1970, there was a regulation issue which gave the counselors latitude to counsel women on the abortion option. And that was changed by regulation 17 years later, although Congress had really, by implication, given its imprimatur of approval to that interpretation. And in a 5-to-4 decision written by Chief Justice

Rehnquist, one of his reasons was a "shift in attitude against the elimination of unborn children by abortion."

I am at a loss to understand what bearing a shift in attitude has on the subject, but here we have legislation, a regulation, stands for 17 years; Congress could have changed it if Congress disagreed with it. And then along comes the Court and says the new regulation stands; there cannot be any more counseling of women on the abortion option, in part because of a shift in attitude.

My question to you, Judge Breyer: Isn't that really a legislative determination by the Supreme Court?

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

Judge BREYER. Senator, as you probably know—I do not know if you know or not, but my circuit had a case that was very, very similar to that case.

Senator SPECTER. Same case. Similar case. I know.

Judge BREYER. And our circuit decided—and I joined the opinion—that came out the other way.

Senator SPECTER. But your circuit also said that the absence of congressional action did not determine the case. You had about the same view. You did not write the opinion.

Judge BREYER. No, I did not.

Senator SPECTER. As you say, you joined in the opinion. But the first circuit said that it really was not determinative, that Congress had let this regulation stand for 17 years.

Judge BREYER. And we did not go into that in any depth. We did not go into that in depth and—

Senator SPECTER. Well, you mentioned it. It is there.

Judge BREYER. That is true. But what you are asking me to do and why it is difficult is, of course, a judge from a lower court that decides a case one way is always tempted to think, my goodness, how right I was. And then the higher court that reverses the lower court, one is tempted to think that the judges on that court were wrong.

Now, in fact, we wrote the case, I joined it, and the Supreme Court had a different view. On the particular issue you are talking about, which is a complicated issue, I would have to say that the way in which the case was argued in our court did not flag that issue in the way that you have put it. And so I am hesitant to talk about that only for the reason that it is not something I have thought through in that context.

I know the issue in a general context, but I really have not thought it through in the context of that specific case.

Senator SPECTER. Well, Judge Breyer, there are a couple of cases which I may come to in a later round where you rendered a judgment outside of the scope of the arguments. And I compliment you on your background and your capabilities. It does not really have to be presented head on for you to grasp the import of it.

The question I have to you is really one of probing your consideration of this in a future issue. Isn't there not only enormous weight but a virtual conclusion that, if a matter is a longstanding interpretation, Congress has an opportunity to change it, Congress does not change it—and there are many cases, and I hope to come to some