Is this what you think is necessary to prevent the establishment of religion?

Judge BREYER. Teaching history of religion, teaching history, history which involves religion, I do not know of any opinion that says you cannot teach history. The question suggests to me what I very much believe, which is the importance of clarity, the importance of the Court making clear and separating what can be done from what cannot be done, and understanding that a Court opinion is going to be read by lawyers, other judges, school administrators, and those who have to live under it.

And what your question to me suggests is a concern that people take an opinion that says don't do *X*, and then they incorrectly interpret it to say we can't do *Y*. I think that that shows need for the kind of clarity that will allow people to do what they are permitted to do.

Senator BROWN. I think you have hit the nail on the head. You have described exactly what has happened. There are many who are concerned that the way the Court has interpreted the establishment clause in this country has led to a government establishment of secularism. That is not my interpretation of what the Constitution means.

The CHAIRMAN. Senator, you have hit the time over the head—we are over a few minutes.

Senator BROWN. Thank you, Mr. Chairman. I will wind up with that. If the judge has any comments on that particular observation, I would appreciate it.

Judge BREYER. Thank you.

The CHAIRMAN. Judge, what we will do, we have gone now for a little over an hour and a half, we will break until 12. Before we do, let me explain what we will do after that. The schedule, after consulting with my colleagues, is that we will then come back and go from 12 until 1, with Senators Simon and Cohen, and then from 1 until 2 we will break for lunch, and we will come back. If Senator Pressler is able to be here, we will start with him. If not, we will then go to Senators Kohl, Feinstein and Moseley-Braun, last, but not least, and then make a judgment of how we will proceed from there.

So we will now recess for 6 or 7 minutes until noon, and we will come back with Senator Simon.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge.

Judge BREYER. Thank you.

The CHAIRMAN. I now yield to Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

I might mention I speak with some prejudice, because back in 1972 I lost a race for Governor in Illinois, and in the spring semester of 1973, I was a guest lecturer at Harvard and met a young law professor and his wife and, as I recall, two of the three members of his family sitting here. I was very impressed then and have been impressed through the years.

I would like to enter into the record the letter from John Frank on the whole question of ethical conduct. John Frank has testified before us on several occasions.

The CHAIRMAN. I think on every occasion we have ever had a nominee.

Senator SIMON. That is just about right. It makes very clear that Judge Breyer's conduct has been within ethical bounds.

The CHAIRMAN. Without objection, it will be placed in the record.

[The letter referred to follows:]

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Our File Number

July 12, 1994

Lloyd N. Cutler, Esq.
Counsel to the President
The White House Counsel's Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Judge Stephen G. Breyer

Dear Mr. Cutler:

In connection with the pending hearings on Judge Stephen G. Breyer for the Supreme Court, I submit the attached statement requested by you on a problem of disqualification of judges.

Yours very truly,

John P. Frank

JPF/lld
Enclosure

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July 12, 1994

JUDGE STEPHEN G. BREYER DISQUALIFICATION MATTER

I. Identification – John P. Frank.

Mr. Frank is a partner at the law firm of Lewis and Roca, Phoenix, Arizona, who has been heavily involved in disqualification matters over the decades. He is the author of the seminal article on that subject in the 1947 Yale Law Journal. He was subpoenaed by the Senate Judiciary Committee to testify as an expert on disqualification in connection with the nomination of Judge Haynsworth to the Supreme Court in 1969. In the aftermath of that episode, the Congress took to rewrite the Disqualification Act, creating the present statute, 28 U.S.C. § 455. Simultaneously, a commission under the chairmanship of Chief Justice Roger Traynor of California for the American Bar Association was rewriting its canon of judicial ethics. Mr. Frank became, informally, Senate representative in negotiations with the ABA Traynor Commission to achieve both a canon and a new statute which would be nearly the same as possible. Senator Bayh and Mr. Frank appeared before the Traynor Commission. Mr. Frank worked out a mutually satisfactory canon/bill with Professor Wayne Thode of Utah, reporter for the Traynor Commission. The canon was then adopted by the Traynor Commission and essentially put into bill form by Senators Bayh and Hollings. Major witnesses for the bill on the Senate side were Senators Bayh and Hollings, and Mr. Frank. On the House side, Judge Traynor and Mr. Frank jointly lobbied the measure through. Mr. Frank is intimately acquainted with the legislative history and well acquainted with subsequent developments.

The foregoing outline is my final conclusion on this subject. I am aided not merely by numerous attorneys in my own office, but also by Gary Fontana, a leading California insurance law specialist of the firm of Thelan, Marrin, Johnson & Bridges of San Francisco.

II. Issue.

In his capacity as an investor, Judge Stephen G. Breyer has been a "Name" on various Lloyds syndicates up to a maximum of 15 at any one time over an 11-year period from 1978 through 1988. This means, essentially, that he is one of a number of investors who have put their credit behind the syndicates to guarantee that claims arising under certain insurance policies directly written or

reinsured by the syndicates are paid. If the premiums on the policies and the related investment income outrun the losses, expenses and reinsurance,there is payment to the Names. If there is a shortfall, the Names must make up the difference. For an extensive description of the Lloyds system, see Guide to the London Insurance Market, BNA 1988, and particularly chapter 3 on underwriting syndicates and agencies. As the full text shows, this is a highly regulated enterprise, a matter of consequence in relation to views of Chief Justice Traynor expressed below.

The syndicates commonly reinsure North American companies against a vast number of hazards. Among these probably are certain hazards arising in connection with pollution which may relate to the "superfund," a financing mechanism of the United States for pollution clean-up. A question has been raised as to whether, in any of the various cases in which Judge Breyer has sat involving pollution, he may have been disqualified. The identical question could arise in connection with any number of other cases in which Judge Breyer has sat because the syndicates have infinitely more coverage than pollution. The selectivity of the current interest is probably due to nothing but the colorful nature of pollution or the failure of some inquiring reporter to see the problem whole.

A very significant factor is that the Lloyds syndicates are not merely insurers or re-insurers. They are also investment companies and much of their revenue comes from investments in securities.

III. Answer.

Should Judge Breyer have disqualified in any pollution cases in which he participated because of his Name status?

Answer: No.

IV. Disqualification Standards As Applied To This Situation.

A. Party Disqualification.

Under the statute, if a judge has an interest in a party, no matter how small, he must disqualify. Knowledge is immaterial; a judge is expressly required to have such knowledge so that he can meet this responsibility. Since the statute, judges have had to narrow their portfolios; "I didn't know" is not even relevant.

We may put this strict criteria of disqualification aside because neither Lloyds nor any of the syndicates is a party to any of these cases. This is of vital

importance because this is the one strict liability disqualification criterion in this situation.

B. The Common Fund Exception.

Congress in § 455 did not mean to preclude judges from investing; this was fully recognized both in § 455 and the canons; H.R. Rep. No. 1453, 93d Cong., 1st Sess. at 7 (Oct. 9, 1974). Judges have a range of income expectations and an investment is quite appropriate. Investment is restricted only where it would lead to needless perils of disqualification.

In that spirit, § 455(d)(4)(i) recognizes that judges may invest in funds which are themselves investment funds and while the judge cannot sit in any case which involves the fund, he is exempted from a duty of disqualification in matters involving securities of the fund unless he participates in the management of the fund, Sen. Hrg. 1973 at 97, which Judge Breyer did not do. "Investments in such funds should be available to a judge," *id.* This section was intended to create "a way for judges to hold securities without needing to make fine calculations of the effect of a given suit on their wealth," *New York Develop. Corp. v. Hart*, 796 F.2d 978, 980 (7th Cir. 1986). As Chief Justice Traynor said of this exception, it is "because of the impossibility of keeping track of the portfolio of such a fund," Sen. Hrg. 1973, House of Rep. Subcomm. Jud. Com. on S. 1064, May 24, 1974 (hereafter H.R. Hrg. 1974), p. 16.

The relevant section is as follows:

> (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

1. A large Lloyds syndicate is a "common investment fund." There is a definition in Reg. § 230.132 of "common trust fund," which is a particular type of bank security specifically exempted from the Securities Act of 1933 pursuant to Section 3(a)(2). The only useful portion of that definition is "maintained exclusively for the collective investment and reinvestment of monies contributed thereto by one or more [bank] members. . ." A "common enterprise" is one of the four elements of an "investment contract" as set forth in the *Howey* case:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person

> [1] invests his money, [2] in a common enterprise, and [3] is led to expect profits, [4] solely from the efforts of a promoter or third party . . .

SEC v. W. J. Howey Co., 328 U.S. 293, 298 (1946). The common enterprise requirement is usually satisfied by a number of investors who have a similar stake in the profitability of the venture.

2. While the precise form of common fund involved here was not contemplated in the statute, functionally a Lloyds investment is the same as any other common fund investment. It is an investment in a common fund in which the judge has no practical way of knowing on what he may make a return.

V. The Non-Party Exception Criteria.

Under § 455(d)(4), "financial interest" covers "ownership of a legal or equitable interest, however small" and then moves on to an additional thing, "or a relationship as director, advisor, or other active participant in the affairs of a party." This, too, is under the "however small" criterion, Sen. Hrg. 1973 at 115. This disqualifies the judge if he is a creditor, debtor, or supplier of a party if he will be affected by the result; but this only applies to a party, *id.* 115. A different standard is applied under § 455(d)(4)(iii) to any "proprietary interest" similar to mutual insurance or mutual savings. Here the disqualifying interest must be "substantial"; the "however small" standard is inapplicable. There is more latitude here than in the other relationships and these can be usefully described as the "non-party" involvement of the judge. I have elaborated on this topic in Commentary, 1972 Utah Law Review § 77, which has reflected the views of Professor Thode of the Utah Law School, reporter on the canon, and which is referenced in the legislative history of § 455, Sen. Hrg. 1973 at 113.

This covers the relationship of the judge not in terms of his direct financial interest in a party (as to which his disqualification is absolute and unawareness is not relevant)[1] but rather covers non-party interest. For classic illustration, if the home of a judge is in an irrigation district and if he is passing on the validity of the charter of the irrigation district itself, the answer to that

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[1] *See, In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1313 (9th Cir. 1982) (judge was disqualified when his wife had a minor investment in a party, "After five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70.").

question may affect the value of this home. As owner, he is not at all a party to the case and he has no financial interest in the irrigation company, but he is affected. The distinction in these non-party cases is that here the interest, instead of being measured by the "however small" criteria must be "substantial" and also in converse to the direct financial interest, must be knowing. Statement of Prof. E. Wayne Thode, Hearing, Subcomm. Sen. Jud. Com. on S. 1064, July 14 and May 17, 1973 (hereafter Sen. Hrg. 1973), pp. 95, 97, 103, and the illustration given is shareholder a domestic bank where decision concerning another bank will have "substantial in effect on the value of all banks." For a comprehensive discussion of the "direct and substantial" approach to nonparty interests, *see Sollenberger v. Mt. States Tel. & Tel. Co.*, 706 F. Supp. 780-81 (D.N.M. 1989).

If "a judge owns stock of a company in the same industry as one of the parties to the case," he is not "substantially affected" by the outcome and is not disqualified, as the Fifth Circuit held in *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986), *reh'g den.*, 805 F.2d 1030 (5th Cir. 1986). The judge in *Placid Oil* owned stock in a bank and was not disqualified from hearing a case that could affect the banking industry.

In *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. den.*, 464 U.S. 814 (1983), and *Ogala Sioux Tribe v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983), *cert. den.*, 466 U.S. 907 (1982) both judges' interests in land adjoining the land in litigation was held not to be a disqualifying interest. The parties seeking disqualification in both cases argued that all land within the territory would be directly affected by the outcome of the litigation, which was a title dispute. That argument was rejected in both cases because the disposition of the litigation would not affect the judges' title in any way.

A rare case involving insurance in a disqualification controversy is *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1107 (5th Cir. 1981). The judge in *Weingart* owned three life insurance policies, "representing mutual ownership" in a corporation which wholly owned the defendant corporations. Based in part on Advisory Committee Opinion No. 62, that a judge insured by a mutual insurance company is not disqualified to hear cases involving that company unless he was also a stockholder, the court held "the judge's mere ownership of three life insurance policies, representing mutual ownership, in the parent corporation of a party to the suit does not demonstrate that the outcome of the proceeding could have substantially affected the value of the ownership interest." *Id.* at 1107.

In *Department of Energy v. Brimmer*, 673 F.2d 1287 (Temp. Emerg. Ct. of Appe. 1982) the court held a judge hearing a case involving an Entitlement Program, who had stock ownership in other Entitlement Programs, was not disqualified. In reaching this conclusion the court used a two step analysis; 1) did the judge have a financial interest in the subject matter in controversy, and, if not, 2) did the judge have some other interest that could be substantially affected by the outcome of the litigation.

The court held the judge did not have a financial interest in the subject matter of the litigation, with a brief analysis:

> The use of the term "subject matter" suggests that this provision of the statute will be most significant in *in rem* proceedings. *See* E. Wayne Thode, Reporters Notes to A.B.A. Code of Judicial Conduct, 66 (1973). We hold that the judge does not have a direct economic or financial interest in the outcome of the case, and thus could hear it without contravening the constitutional due process.

Here is where Judge Breyer drops completely out of the disqualification circle. In the financial relationship of any of his cases to the totality of his dividend potential, his Name is utterly trivial and, in any case, he not only does not know that a litigant is insured with the syndicates but, realistically, has no practical way of finding out. As the legislative history clearly shows, it is intended in these situations, generally speaking, that for a judge not to be kept currently informed is an affirmative virtue, or else the persons controlling the investments, as in a common fund situation, would have the power to disqualify a judge by making an investment and forcing the knowledge on the judge. This was deliberately considered in the legislative history as a hazard and was guarded against. An opinion, closely analogous, shared by several district judges, is whether Alaskan district judges must disqualify in cases claiming "amounts for the Alaska Permanent Fund, from which dividends can flow to, among others, district judges. Held, no disqualification; the amounts are too remote and speculative, *Exxon Corp. v. Heinze*, 792 F. Supp. 77 (D. Ala. 1992). For perhaps the leading case that a judge should not disqualify for a contingent interest where he is not a party but, speculatively, might get a small dividend some day, *see In re Va. Elec. Power Co.*, 539 F.2d 357 (4th Cir. 1976).

VI. Appearance Of Impropriety.

This leaves the generalized provision of § 455(a) that a judge shall disqualify where "his impartiality might reasonably be questioned." This is commonly caught up in the phrase which has a long history, pre-§ 455 ABA and

U.S. Supreme Court opinions. The amorphous quality of the phase makes it hard to deal with decisively. However, the phrase has gained technical meaning in both the legislative history and the cases; categorically it does not mean that pointing a finger and expressing dismay is enough. Moreover, when, as developed above, certain types of investment are expressly allowed under the statute, it will be difficult to make them "improper."

The 1974 Act eliminated the "duty to sit," permitting the judge to disqualify where his impartiality may reasonably be questioned. Both Justice Traynor and Mr. Frank advised the Senate committee that this disqualification was to be determined by "what the traditions and practice have been," Sen. Hrg. 1973 at 15. These do not authorize disqualification for "remote, contingent, or speculative interest," or "indirect and attenuated interest"; *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, *reh'g den.* 869 F.2d 116, *cert. den.* 490 U.S. 1102 (1988); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077 (D. Colo. 1991).

It is here that the common fund exception has great bearing by analogy. Such an investment involves the same factors which motivated the common fund exception. That is to say, the statutes mean to preserve the right of judges to invest and clearly except from the rigorous disqualification standards investments in common funds where the judge has no effective way of knowing precisely what interests may be within the scope of the investments. Functionally an investment in Lloyds is the same as an investment in any common fund with general holdings. In these circumstances, there cannot be an "appearance of impropriety" in an investment which is just the same, functionally, as those expressly protected.

VII. The Disqualification Claim, If Accepted, Would Produce Unreasonable and Unintended Results.

As noted in the preliminary observations to this memorandum, the concern here is grossly excessive. The syndicates have a broad reach. The returns to the Names could be affected by numerous other matters beside pollution claims. For a comprehensive discussion of the proposition that there is no ground for disqualification because a case may affect general rules of law, *see New York City Develop. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1986) ("Almost every judge will have some remote interest of this sort.")

Almost any case relating to the business community could relate to Lloyds in some remote way, and any number of cases can relate to other reaches of the business community. Even the criminal cases, in at least some instances, can have significant business fallout, as for example, the RICO cases. To say that

Judge Breyer should have recused himself from all pollution cases would logically be to say that judges should not invest in a business generally.

I reiterate that neither the canon nor § 455 meant to preclude investment by judges. The focus on the pollution cases is excessively sharp because, if there were disqualification here, there would necessarily be disqualification as to too many other aspects of investment. This would defeat the purpose of the canons and the statute.

VIII. Conclusion.

Judge Breyer properly did not disqualify in the pollution cases which came before him.

John P. Frank

JPF:cc

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.

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

well know, one of the issues in every plebiscite that has been discussed is whether or not the courts should be Spanish speaking. Federal courts are not; State courts are. It is a big deal, it is a big issue. So the Federal courts do not in the eyes of most Puerto Ricans meet the needs of Puerto Rico in the sense that they do not take into consideration the Spanish culture, which the rest of the Government of Puerto Rico and the rest of the court system does. And it is always used as one of the red herrings in the debate that takes place on statehood.

And it is nice to hear that you have joined the Republican Party, because only the Republican Party has suggested statehood for Puerto Rico. The Democratic Party has not. I happen to think you are probably right. But it is a very convoluted and controversial and emotional debate, and the plebiscite last time was perilously close, depending on how you view it. But the Federal courts are a main source of contention in terms of whether or not they are Spanish speaking. They would be the only Spanish-speaking courts in the Federal system were they allowed to be, and as you know, they are not.

I yield to my friend from Maine.

OPENING STATEMENT OF HON. WILLIAM S. COHEN, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COHEN. On that note, perhaps I should begin by saying, "Como esta usted, Mr. Chairman." [Laughter.]

Yesterday you indicated that you were leery of flattery, so I will dispense with allowing any to flow from this side of the bench, but I might say that I found you to be enormously forthcoming, in stark contrast to some of the nominees who have come before this committee in the past.

On my first day of law school, at the conclusion of the day, my law professor said that any connection between law and justice is purely coincidental. I thought he was engaging in some sort of professorial cleverness at the time, until I went out to practice law, and I found, as I started to lose all my cases, that I had justice on my side, and my opponents had the law on their side.

I raise this in connection with Judge Hand, of whom you are a great fan. I was looking through his book, "The Spirit of Liberty," and he was talking about his relationship with Holmes, whom you are also a great devotee of, in terms of his writings and decisions. And Holmes used to frequently say, "I hate justice." Of course, Hand would go on to say he really did not mean that, but he tried to make the point that on one occasion when they were driving in an automobile past the Supreme Court, when Holmes was going to a weekly conference, Hand tried to pique him a little bit, and he said, "Well, sir, goodbye. Do justice."

Holmes turned around and snapped at him and said, "That is not my job. My job is to play the game according to the rules."

I listened to your opening statement about the need for the Justices, the court system, to strike some sort of a harmonious balance in the lives of such a diverse population, to preserve liberty for as many as possible, all if possible. At no time did you say that you intended to do justice. I take it that your reluctance to do that was the same for Holmes as well, of not seeking to do justice in the