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

of them later—that that ought to be it? That the Court ought not to say there is a shift in opinion on the abortion issue and turn the law around? Isn't that judicial legislation?

Judge BREYER. It is—I mean, you have raised a complicated and rather difficult general issue, and I am tempted to say yes, in general, but then I have a reservation. The question that you raise in the most general terms is: Suppose Congress delegates to an agency, any agency in the Federal Government, suppose it delegates to the agency the power to have a regulation or the power to interpret the statute? And what I think about that is, Congress having done that and the agency having interpreted the statute through a regulation, the Court will later pay a lot of attention to what the agency says.

And there are really two different reasons. One reason, which you are focusing on, is because the Court knows that the agency, having been involved in the legislative process, probably through testimony and maybe exchange of staff or being more expert about it, is likely to know, perhaps better than the Court, what Congress had in mind. And that kind of reason, the longer that regulation is in effect, the more exactly what you are saying is true.

There can be—and this is my reservation—a different kind of case where Congress quite clearly delegates to the agency the power both to interpret and to change its mind. Now, if you found in the statute that that was the situation, of course, the agency could change its mind because Congress would have said that it could.

So I am quite tempted to agree with a lot of what you say, but I am worried because I have not thought it through in the context of that particular case.

Senator SPECTER. Well, would you do this? Because I want to move on to another line. Think about it, and we will come back to it.

Judge BREYER. Yes.

Senator SPECTER. Because I would be interested in your reflected views.

There were a couple of questions asked yesterday on the death penalty, but I want to pursue that subject in some detail, because this is an area where the Court is moving, perhaps, to eliminate the death penalty in America. At the outset, I would disclose my own position being in favor of the death penalty, having experience as a district attorney, and I think it is a deterrent. And I am working to try to preserve it both in the State and in the Federal system. And this is an area where I think we see a marked erosion of legislative authority by what the Supreme Court has done.

I want to get your views, not as to how you are going to decide some future case, but to see your thinking on this subject, both as it illustrates your approach as a prospective Supreme Court Justice and also as it would give us some insights into your views on the death penalty.

This really illustrates the standards which the Supreme Court has said and articulated which moves really not close to but I think beyond the legislative line.

Justice Marshall, in his dissent in *Furman,* outlines some of the standards for evolving Supreme Court conclusions, and he says

this, articulating the law as he see it. And it is just not a dissenting opinion. There is a lot of background in the Court decisions for what Justice Marshall has said, and I refer to him with the greatest respect.

In *Furman,* he says:

> The cruel and unusual language must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

And then in another point in his opinion, he says:

> Time works changes and brings into existence new conditions and purposes. In the application of the Constitution, our contemplation cannot be only of what has been, but of what may be.

Now, you can see from this kind of language that there is a demarcation away from the text and the precedents and an evolving consideration of public policy which goes really very, very close to what a legislature does, if not really into the legislative area.

Justice Brennan, also in *Furman,* comes to the conclusion that the death penalty is not a deterrent. And he also comes to the conclusion that the death penalty, "Its rejection by contemporary society is virtually total." That is his conclusion in coming to the judgment that the death penalty is barred in all cases—all cases—by the eighth amendment prohibition against cruel and unusual punishment.

Justice Marshall goes back and says that, "Cruel and capital punishment is morally unacceptable to the people of the U.S."

Now, the comments by Justice Marshall and Justice Brennan that, as Justice Brennan puts it, "Its rejection by contemporary society is virtually total," and Justice Marshal, "The death penalty is morally unacceptable to the people of the U.S.," flies in the face of not only public opinion polls but that fact that 37 States reenacted the death penalty after it was struck down in *Furman* and that more than 70 Senators consistently vote for the death penalty in the U.S. Senate and about the same on the House.

Then Justice Marshall, dissenting in *Gregg* v. *Georgia,* says, referring to an observation from his in *Furman,* that, "The American people are largely unaware of the information critical to a judgment on the morality of the death penalty," and concluded that if they were better informed, they would consider it shocking, unjust, and unacceptable.

Beyond Justice Marshall and Justice Brennan, Justice Blackmun made an opinion, rendered an opinion, saying that, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." And he said in a dissent on a cert case, in *Callins* v. *Collins,* that he would no longer uphold the death penalty. And Justice Powell has recently been quoted as saying that he would be against the death penalty were he still sitting there.

Now, my question to you is: Given what you have already testified that there ought not to be a subjective determination by a Justice, what standing does—take the elements of its being morally unacceptable to the American people. How proper is that as a basis which Justice Marshall and Justice Brennan articulate in the face of the reenactment of the death penalty and in the face of the congressional votes 70-percent-plus strong in reenacting it?

Judge BREYER. I want to reveal to you my thinking without actually predicting or expressing a view on a particular case that might come up. And that, as you have said very well, is a question of drawing the line. And you will correct me, I hope, if you feel I am not drawing it properly. I want to reveal to you as much as I can without making that—without crossing the line to decide a particular case. For reasons of fairness later on and making people understand, I will——

Senator SPECTER. I respect that, Judge Breyer. I know you cannot comment on how you will decide a pending case. But what this question looks to is: Is it appropriate given the text of the Bill of Rights, which refers to the death penalty, and the longstanding use to rule out the death penalty in all cases on the judgments of individual Justices that it is not a deterrent and that the American people have rejected it? Which I think is factually not so.

Judge BREYER. First, I think it is fair that I certainly agree—and I think the vast majority of people would agree—that judges should not legislate. That is your job. It is not the job of a judge.

Second, looking at the death penalty, I have said—and I think this is the case—that it is settled law that applying the death penalty in some circumstances does not violate the cruel and unusual punishment clause.

Third——

Senator SPECTER. May I just interrupt you for one quick point?

Judge BREYER. Yes.

Senator SPECTER. Do I understand you to say that in some circumstances you think the death penalty can be constitutionally imposed?

Judge BREYER. Yes, I think that is settled law.

Senator SPECTER. So that you would reject the Marshall and Brennan view that it is, on its face, violative of the eighth amendment?

Judge BREYER. What I have said: in my opinion that is settled law.

Senator SPECTER. Thank you.

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

The question, the deep question that you raise, the deep question that you raise is the question, you would say or as I hear you saying, Fine, everyone is against judges legislating. How do you, Judge, know whether what you are doing is improperly legislating, improperly putting in your own subjective views, or quite properly trying to interpret the law in an area where the question is broad, open, and important?

That is difficult. And in my own mind, I cannot say the text is what answers the question, because in these difficult questions often it does not, though it certainly is a starting place.

I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent. That is normal.

The history is important as well, both because it reflects an intent of the framers and because it shows how, over the course of 200 years, that intent has been interpreted by others.

The present and the past traditions of our people are important because they can show how past language reflecting past values, which values are permanent, apply in present circumstances. And some idea of what an opinion either way will mean for the lives of the people whose lives must reflect those values, both in the past, in the present, and in the future, is important. And that is what judges like Harlan, the second Harlan, Frankfurter, who were not viewed as legislators, would put within the phrase like "concept of ordered liberty" or "those values that the traditions of our people review as fundamental."

Now, you——

Senator SPECTER. Well, there is always—I want to ask you one related question and then move to another subject, because there is not a great deal of time. That is a line which is hard to draw.

Judge BREYER. Yes, it is.

Senator SPECTER. One of the current major concerns in Congress and the conference committee on the crime bill is the issue of whether there will be the application of a quota system on the death penalty, where my own view expressed on the floor of the Senate is that the essence of American jurisprudence is individual justice. What is the nature of the offense, and what is the nature of the offender?

Judge BREYER. Yes.

Senator SPECTER. As opposed to having the death penalty invalidated on a statistical analysis as to how many other like people of a given group have been subjected to the death penalty.

Now, the Supreme Court decided this matter, as you know, 5 to 4 in the *McCleskey* v. *Kemp,* and now it is back in Congress. And the Senate rejected in substantial numbers, and the House passed it narrowly, and it is now on the front burner of legislation. And it seems to me that this is a matter which is properly the determination of public policy, belongs in the Congress, and we ought to decide it.

Do you have a settled view on that question? Is *McCleskey* determinative of that issue?

Judge BREYER. I think that matters of policy—and this sounds like a matter of policy for Congress. This came up yesterday, and I think no judge, I do not think at all, would say statistics are never relevant. But you have to be careful with statistics and you have to be careful because they have to really show what they are supposed to show. And it is so easy for them to show, appear to show what they do not show.

Senator SPECTER. But that is a question of reliability of statistics. This is a different issue. This is an issue of whether statistics are relevant on what happens to others in a given group contrasted to a determination of the nature of the offense and the nature of the offender.

I know this was mentioned briefly yesterday, but I just wanted to understand your position that you consider the matter resolved as a constitutional issue by the *McCleskey* v. *Kemp* decision and,

appropriately, in the legislative range where we are now wrestling with it in the crime conference committee.

Judge BREYER. *McCleskey* is precedent for the particular—you know, the kind of statistics that were presented there are not making the case, and that was decided and that is a precedent.

Senator SPECTER. It can always be revisited.

Judge BREYER. Well, yes, but you have to be careful revisiting precedents. Your question is——

Senator SPECTER. Oh, my next question?

Judge BREYER. No, I was not thinking that. I was thinking that there are—what you are concerned about, there are a couple of checks, I think, on this subjective view of the judge.

Senator SPECTER. Judge Breyer, in the few minutes I have remaining, I would like to pick up a question which has received a lot of attention, and that is your ruling on the case of *U.S.* v. *Ottati and Goss*. It raises the issue where you had been so careful, as I understand the facts—and I would like you to confirm them—that you had not handled any cases involving Lloyd's of London and you had not been involved in any cases involving asbestos liability; but that the case of *U.S.* v. *Ottati and Goss* did potentially touch one of the syndicates, Merritt 418, which involved the underwriting of toxic waste cleanup.

I would like your comment on the underlying facts and your observation. And I have no question at all about your integrity, but I think it is a matter that has to be put on the public record. Also, we need to learn from it as to what judges who have investments can do to find out more about what their investments reach to on matters which come before them.

Judge BREYER. Yes; I, of course, disclosed all my investments, including my investment in Lloyd's. And I have three screening systems, now four, to make certain that I never sit on a case in which any firm in which I have an investment, including Lloyd's, including that syndicate, including any part of Lloyd's, is a party in that case.

The clerk checks everything, all the names that he can find on those briefs, against the names on my disclosure form.

My secretary has the same list and sees if anything slips through that sieve.

I have the list, and I have been putting it up in my clerk's office, too, my personal clerks.

In that case, and in no other case that I am aware of, did anything slip through that sieve. So, to my knowledge, Lloyd's did not have any direct interest in *Ottati and Goss*.

A different issue, I think, was raised about *Ottati and Goss,* and the seven or eight pollution cases that I sat on. The different issue is that sometimes, of course, if you have an investment in company *A,* even though company *A* has nothing to do with this case, maybe the holding in the case, even though it is quite a different case, could affect your investment in company *A*. And there the standard is: Is it a real effect, a direct effect. "A substantial effect" is the word of the statute. And the reason that those words are used is that if you are in—if you have many different stocks, virtually any case could have some theoretical connection to something.

So what I do is bells go off in my mind if I am sitting on a case and I begin to think that the holding in that case, even though no investment is a party, but the holding in that case could affect my own pocketbook, no such holding went off—no such bell went off in my mind in respect to *Ottati and Goss,* nor any of the other seven pollution cases that I sat on. That is to say, the label is the same. There is a label called pollution case, and it is true that Lloyd's and these syndicates and any insurance company can be involved in any insurance anywhere, and there always can be similarity of label. But I saw no direct, proximate connection, let alone a substantial connection, between the holding in that case and my own pocketbook. And that, I think, in recent days has been confirmed by lots of people who have read those cases with care, who are experts in the area, and who have looked to see if my initial judgment—and I cannot tell you my initial judgment is always correct. I can tell you it is something that I am very, very sensitive to and that I will remain sensitive to.

And my reasons are personal because what I really have, after my own family, is my integrity. And my reasons are institutional, because it is terribly important that the public understand and respect the integrity of the judicial system. And, therefore, the way I proceed is full disclosure, three to four screening systems, and then what I hope is extreme sensitivity to the possibility that a holding in one case could somehow, through some set of interconnections, really affect my pocketbook. And there I will say I made that judgment call. I thought it would not directly affect my pocketbook in any direct, proximate, substantial way.

And I will say that others in the last few days, ethics experts, various kinds of experts looking at this, agree—though I must add that reasonable people could disagree, and there are some who do. And I respect that, and I think it is important to raise such a question. And it is important, though I do not want to be repetitive, it is important for the very reason you raise it. It is very important that people understand the integrity of the judicial system.

Senator SPECTER. Judge Breyer, I accept your conclusion, and I fully appreciate the importance of integrity to you personally and institutionally for the Court. The last question I have on it is the factual matter, and I understand that there was no reason to see the connection. But was there a hidden problem that, in fact, the investments in Merritt 418, which did have liability underwriting in toxic waste cleanup which touched Superfund could factually have been involved in your ruling in *Ottati and Goss,* even though, as I agree with your statement, you had no reason to know it at the time?

Judge BREYER. You mean that they had somehow insured that very toxic waste dump?

Senator SPECTER. Well, or the precedent from your decision in Superfund would have had an impact on the liability of a company in which you had an investment. Factually, did it get there, even though you had no reason to know about it?

Judge BREYER. As to the first part, were they factually involved in that very toxic waste dump, I believe the answer is no. As of this moment, I have no reason to think that answer is any different. As to the second question—that is, could my holding in that case have

had a direct impact on my pocketbook, that is, that syndicate?—I believe the answer is no, though that is judgmental. And what that means is you have to look at the particular case. And I did look at that case, and I have thought about it, and I have looked at it really again and again in the last few days, believe me. And I still think that there is no direct, proximate money in my pocket through 418 because of what was or might have been held in that case.

That is my belief. That is judgmental. I think many, many others who have looked at it agree with me. And I recognize that reasonable people could differ on the point.

Senator SPECTER. Thank you very much.

The CHAIRMAN. Thank you very much, Senator Specter.

Senator Heflin.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Judge Breyer, we are delighted to see you back with the Judiciary Committee. It was a pleasure to serve with you when you were the staff director and the chief counsel. From that association, which involved many thorny issues, we developed certain evaluations relative to your personality, your intellect, and your integrity. And I think they were the highest.

We had many nonharmonious issues that were raised during that time, and you were a great consensus builder. However, you failed in regards to a consensus builder when it came to the codification of the Criminal Code. I think that is such a thorny issue which was tried twice to try to do it. You and Ken Feinberg and others worked on that to get a consensus of that. But from our association, we developed a friendship. We developed the highest regard for your integrity, the highest regard for your abilities, and for your ability to inform everyone.

We were pleased when we learned that you and a great other lawyer who was representing the other side, Emory Sneeden, would meet for breakfast every morning, and you all would do these things.

But sometimes, you know, as we think about these friendships and things, we do not want to let that prevent us from asking some hard questions. And I think we have that function here.

To follow up on Senator Specter about Lloyd's, you have mentioned your mechanical approach, your technical approach to trying to determine whether or not there could be an interest of Lloyd's of London in any case that you had. When did you start that procedure by which you had three check mechanisms that you would follow relative to that when you went on the bench?

Judge BREYER. That is when I started, Senator.

Senator HEFLIN. When you started. All right.

Judge BREYER. Yes; I cannot tell you every year, but, I mean, I would say very close to when I started, probably when I started.

Senator HEFLIN. Now, when you practiced law, I supposed you tried cases in which there were insurance companies involved but not named. That happens frequently. And the jury is qualified either by the attorneys or the judge relative to whether or not there might be a member of the jury venire who has an interest in or