My impression has been that that input has been important and has worked pretty well.

Senator HEFLIN. I think that concludes my questions.

The CHAIRMAN. Thank you.

Judge on that score, there was a great deal of resistance at the outset because of the very reason of including those folks, but I must say I have been very pleased that most of the circuits have, in an unsolicited way, come back and said, you know, this has turned out to be a good thing for us.

I think Judge Heflin has a point about the Conference itself.

But I yield now—and again, just a little mechanical scheduling here—I will yield to Senator Specter now, and what we will do then is we will have a break, but——

Senator SIMON. Mr. Chairman, I am going to have about 5 minutes, or 10 minutes at the most, of questions.

The CHAIRMAN. Well, maybe, if it is OK, we can just finish with Senator Simon, and then we will break. And then what we will do is reconnoiter 10 minutes after that and find out how many other Senators have questions. I do not think there are many more questions, Judge, and you are holding up well—your physical constitution is impressive—and then we will make a judgment as to how late we will go. But we are going to finish with you tonight.

So again, I say to the staff, please tell your principals to head on back if they have questions.

I yield to the Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Breyer, I not only compliment you on your stamina, but your family on their stamina. Of all the participants, the Senators have moved in and out—we have had votes and floor matters—and not only have you been at the podium all the time, but your wife, your three children, your brother, your sister-in-law. So it is a very impressive family support.

Judge BREYER. Thank you. I thank them, too.

Senator SPECTER. When I finished my first round, I was asking you questions about *U.S.* v. *Ottati and Goss,* which involved the question of potential conflict of interest. And I said at the time that I did not think there was an actual conflict of interest or anything which undermined the question of your integrity.

The question which I could not come to because of time limitation was on the issue of Lloyd's potential liability on Superfund cases; whether the principles that you set down in the *Ottati* case might have affected many other factual situations where Lloyd's could have had potential liability. And it has been called to my attention that Justice O'Connor recused herself in two cases in which NCR was a party in a tax challenge, and then participated in a case involving Colgate-Palmolive Co. on an almost identical issue which might have indirectly affected NCR's liability.

The question which comes to my mind is whether there are not ramifications which bear on public confidence, which should lead us to take another look at the language of the disqualification statute, which calls for disqualification, recusal, in a number of situations. One is "any other interest that could be substantially affected by the outcome of the proceedings." So that if a judge is to decide Superfund liability, even though it does not involve Lloyd's, the

judge does not have an interest in any corporation, is not a party, but those principles could affect a company in which the judge does have an interest, that a broader look ought to be undertaken. And you and I had a moment in our closed session to talk about such potential liability, and you used the word "proximate cause," which is a complex legal doctrine that befuddles many people as to how far it goes on proximate cause. Lawyers will remember the *Palsgraf* case, a traditional law school case, which illustrated how hard it is to find out what is a proximate cause.

And in the light of this issue, which is very much on your mind and our minds, if you have a view that there might be a modification of the recusal statute which would be broader—because when people watch these proceedings, and disappointed litigants are sometimes very, very disappointed—if we ought not go the extra mile.

Now, I realize we do not want to dissuade lawyers from undertaking judgeships when they have investments, but my experience has been that lawyers are very interested in being Federal judges, very interested in being circuit judges, and even more interested in being Supreme Court Justices.

So might it not be worthwhile to broaden that recusal disqualification statute so that there is absolutely no doubt anywhere? I am not sure quite how we do it, but what do you think?

Judge BREYER. I think the general word, better than "proximate"—I do not know if that was exactly it—what I am thinking of with that is if the interest is—if there is only a speculative effect on your investment, or a remote effect, or contingent, then, under the present standard, you do not disqualify yourself. If it is a substantial effect, you do—direct, substantial—all right, those are the words.

And of course, as you point out, in that case, I did not think that there could be more than an indirect or speculative or remote effect on the insurance industry at all, let alone Lloyd's or my own pocketbook.

Do you want to change that standard—that is really your question. And I will sympathize with both things that you said. It is absolutely crucial that the integrity of the system be clear, that people have confidence in it, that they absolutely know that a pocketbook is not guiding a case. That could not be more important to me, not only personally—and it is personal—but to the system as a whole.

Now, if you are going to try to worry about—and it is worth worrying about—but you will find judges do have investments. It is perfectly clear that if any investment is directly involved in that case, a party, you are out, even if it is worth one penny; but where there is not that direct participation, the reason that the standard have evolved as they have, I think, is because it is so possible there will be remote or indirect connections in so many cases. Could a judge sit in an FDIC case if he owns real estate somewhere, knowing that possibly the holding could in some remote way affect the value of some real estate?

What is the possible remote connection—do you see why I think I agree with you that it is very difficult?

Senator SPECTER. Oh, I understand. I understand your views.

Judge BREYER. I am not saying that it is not worth thinking about. I think it probably——

Senator SPECTER. We will struggle with it. It is a legislative matter. I have absolutely no doubt that you were not in that case with any view to any money in your pocket.

Judge BREYER. That is true. That is correct.

Senator SPECTER. You would not be a Federal judge if you were concerned about money, really.

Judge BREYER. That is correct.

Senator SPECTER. You might not even be a Senator if you were really concerned about money. But the appearance, what litigants think is something very different. And the principles from that case are very far-reaching on Superfund liability and could involve lots of money. We allocated $8.5 billion for Superfund. So that is something that we will struggle with, but I think that the experience here today suggests that we would be wise to do that. It is a legislative issue for the Congress.

Shifting to another subject, Judge Breyer, there continues to be intensive debate in this country on the establishment clause and the appropriate separation of church and state. And I was pleased to hear you forcefully affirm Jefferson's view of the wall of separation between church and state. That is not a universal view. Rev. Marion Pat Robertson was quoted in the Washington Times on November 26, 1993, as saying the radical left keeps "talking about separation of church and state. It is a lie of the left."

The issue of the appropriate line comes up in a number of contexts. Now, there is absolutely no doubt that there is a valued place in politics for people with deep moral and religious convictions, just as there is a valued place in everyday life for people with moral convictions. And there is no doubt that we need more morality in our everyday life and not less of it. So there is no issue about excluding people from active participation in politics where people have deep religious and moral convictions. But the question emerges as to a mixture of church and state, where you have political activities which are intimately connected with churches, and there is the overlay of establishment—that is, help by the Government—fairly directly in the tax-exempt status which churches enjoy.

And I would like to call your attention to two specific contexts and then ask you a question. There are circumstances where political rallies are held in churches, and a flier announces "(Blank) for Congress. The (Blank) for Congress campaign is having our largest rally in the (Blank) church on (Blank) day." And at the Texas Republican Convention, there is a photograph of a placard for a specific candidate, on which it says a vote for that candidate is a vote for God.

The two questions which I would like to have your views on are, first, what is your sense of what is happening to basic American values involved in the mixture of this church and politics, and this mixture of church and state; and how would you approach the underlying constitutional issue—I am not asking you how you would decide a case, but how you would approach the underlying constitutional issue—on the implication of governmental financial sup-

port—establishment, really—for churches through their tax-exempt status?

Judge BREYER. On the one hand, I know I had a case in which I wrote that the school system, when they have a place open for public meetings, has to let churches meet there, too, religious groups, too. Certainly, there is support for religion in the Constitution.

When you come to the establishment clause, it is well established that that clause does not prohibit tax exemption. To the contrary, there is tax exemption.

Senator SPECTER. But the tax exemption is very narrowly tailored and cannot cross the line where there is any support for a political candidate—any support.

Judge BREYER. And when you get into areas beyond that, when you get into areas of definition when the support is greater, what I have said before—and it is hard to go beyond this—is there are difficult problems of line-drawing. The principle is fairly clear in the establishment area at the extremes. Some is absolutely permitted—the fire department, the tax exemptions of certain kinds, busing of certain kinds. Some is quite clearly prohibited. And then what you find are a difficult set of cases in this middle area, and what is going too far.

It is hard for me to be more specific than that, because those are the cases that do come up, that are difficult, that I would have to think about in light of the particular context. That is in the legal area. Outside the legal area, I am not expert.

Senator SPECTER. Well, you have not given me too much on how you would approach the legal issues, really, Judge Breyer; and you have not given me anything on your sense of values aside from the legal issues. We probe to get your thinking.

Judge BREYER. Yes.

Senator SPECTER. The one area which is not an impermissible mixture of Senator and nominee is values. So how about it?

Judge BREYER. Yes, I think that is a fair question. And as I saw what you described as the wall, what I saw as underlying that, which I think is more important today than ever, is that we are a nation—in terms of values—we are a nation of many, many different people, many different groups, many different religions, and each person's religion—mine and yours, and that of every other person—is extremely important to him, to her, to his family. And the history of the first amendment teaches us that that importance, legally, grows out of a world in which those religious differences on matters of such importance led to wars, death—and you still see that in some places.

And for that reason, the thing that must be preserved is the freedom to practice, the freedom to pass that along to your children. That is why schools are so important, and——

Senator SPECTER. Judge Breyer, those are—did you want to finish?

Judge BREYER. No, no.

Senator SPECTER. Those are generalizations which I have heard you say before, especially on the children, and I certainly agree with you. And in our society, we are urging people to come into Government and into politics with deep moral views and deep reli-

gious convictions. But do you share my concern about having political rallies in churches? It looks to me as if it is flatly against the prohibition against political activity, support of a candidate when a candidate is there, or where you have the mixture of "a vote for my candidate is a vote for God."

Does that give you a problem of our basic value on separation of church and state?

Judge BREYER. That is such a politically divisive and such a political matter, and so important to so many people in so many different directions, that I think I have to restrict myself in that very divisive, potentially, very uncertain area. I have to draw back to the law. And when I go back to the law and try to go further in how I would approach the thing from a legal point of view, remember the thing that I have tried to identify as underlying this is each person thinks, "My religion is terribly important," and each person is right. Each person thinks, "I want to pass this on to my children," and each person is right. But each person may think, or many may think, "It is fine if the Government favors me and my religion," but then, I would ask that person to think: But suppose it is not your religion that the Government is favoring? And that question, which asks for neutrality on the part of the people who practice religion—me and you and everybody else—that is the kind of question that the establishment clause is asking people to ask themselves.

Senator SPECTER. One final question on the subject before moving on. How would you approach the constitutional issue—I am not asking you for a decision, but an approach—of the constitutional issue that a religious group meeting in a church organizes itself as a political party, perhaps takes over an existing party, and then receives taxpayer funds through Federal law which authorizes the Treasury to defray the cost of a nominating convention for President?

Judge BREYER. Oh, I see. You are thinking of the Government program——

Senator SPECTER. Well, this is a specific Government program, there is specific authorization for paying for Presidential campaigns. And we do want people with deep religious and moral convictions involved in politics——

Judge BREYER. Yes, we do. Yes, we do.

Senator SPECTER [continuing]. But—but—how do you approach the line?

Judge BREYER. And can I go beyond the general thing that I have tried to say about asking ourselves: "It is fine if it is my religion. How do I feel if it is somebody else's religion?" and is this going to be impermissible favoritism, going too far, or is it the kind of thing that we find all the time——

Senator SPECTER. And these are people who do not believe, do not accept, the definition of church and state separation.

Judge BREYER. The trouble is I keep coming back to thinking that is one of those difficult line-drawing questions that could be right in front of us if I am on the Court. That is my problem.

Senator SPECTER. Senator Heflin broached the question of the conflict between the President's authority as Commander in Chief and the congressional authority to declare war, and this is a sub-

ject which we have talked about with many nominees, and I know that these confirmation hearings have some resemblance to professional football—we look at all your films, we read all your opinions and all of your books; you look at the videotapes of our questioning of a number of nominees. And I appreciated the meeting which you and I had, and I told you that I was going to ask you the question which I have asked before about the Korean conflict—was it a war?

Judge BREYER. Yes.

Senator SPECTER. Well, we are making some progress.

Judge BREYER. Well, I do not know if that is too helpful, but yes. Ask any of the people who were involved or their families, "Was that a war?" and they will say it certainly was.

Senator SPECTER. Well, I was involved, stateside, however, but I thought it was a war; maybe that is why I keep coming back to the Korean war.

We struggle in the Congress for a way to resolve it. Back in 1983, when Senator Baker was the majority leader, I drafted an extensive complaint, seeking original jurisdiction in the Supreme Court, trying to get the agreement of the White House and the Congress to make a submission under the War Powers Act. I do not know that it would have worked, because there are ways that the Court does not have to take those issues—nonjusticiable, not a case in controversy, et cetera.

Last year, we passed in an appropriation bill a prohibition of the Department of Defense for using moneys in the military action in Somalia beyond March 31, 1994. Now, we do not like to do that in Congress, and earlier today, Senator Leahy and I were on the floor—missing part of these proceedings—discussing the situation in Haiti. There are some of us who are concerned that we may be involved in a war in Haiti when the Congress is out of session, and we passed a sense-of-the-Senate resolution that we did not want to see an invasion of Haiti; but a sense-of-the-Senate resolution does not bind the President. Then, a resolution was offered that no funds should be used for an invasion of Haiti, and that was defeated. And Senator Leahy and I came to sort of an agreement that we really ought to face it head-on. No American war can succeed—and we learned that in Vietnam—without public support, and the way you start on that is to get congressional authorization. And I hope that if the President wants to maintain the military option, that he will come to the Congress and ask for a resolution of authority, as President Bush did in Iraq, and let it be a congressional declaration. If the President has to act in an emergency, so be it; he can use his powers as Commander in Chief.

And the question that I have for you, Judge Breyer: Is it realistic to look for the third supreme branch? We know the courts are supreme to both the Congress and the President, because the Court told us so in *Marbury* v. *Madison.* When the Constitution was formed, the Congress was No. 1; the President was No. 2, in the second article; and the courts did not come up until article III, but all that was changed. It was renumbered in *Marbury* v. *Madison.*

And the question is: Is it realistic to try to get some help from the Court on breaking this conflict, which comes up very frequently, between the President and the Congress, or do we have to come back to the political give and take, and the withholding of

funds, and the declarations on the Senate floor and the President from his news conferences?

Judge BREYER. It does—I looked up, I tried to find—after our conversation, which was very interesting, I tried to see if there had been any precedent where this kind of question was resolved in the Supreme Court, and I think there has not been, though I think that some of the Justices dissented and said that the Court should get involved in that during the Vietnam period.

I would say it does not surprise me, that absence of precedent, because there is nothing more important than questions of war and peace, and fighting and not fighting, and defending and not defending. And the kind of question you are talking about is of such extraordinary importance to the public, and it is not surprising to me that the courts, which are an unelected—unelected—third branch of government, have said that these matters of such great importance in a political context should be worked out between the first and second branches of government, both of which involve elections and are responsible directly to the people. That does not surprise me, that.

Senator SPECTER. But these are constitutional issues.

Judge BREYER. Yes.

Senator SPECTER. These are two basic, fundamental constitutional provisions——

Judge BREYER. Yes, yes.

Senator SPECTER [continuing]. Which could really use some adjudication. We try all these right-angle automobile collisions in the Federal courts; why not have the Federal courts get involved in deciding this one? You cannot find a bigger one.

Judge BREYER. I know, despite—I mean, I can understand what has happened in light of what I just said, and it does seem to reflect something about the nature of these terribly important decisions in a democracy.

I thought—in addition, I know cases—we were talking to Senator Pressler about the old, old case of the Indian tribes and so forth, and sometimes, people can work out ways of getting these into courts in certain contexts.

Senator SPECTER. Judge Breyer, moving to another subject—unless you want to say something further——

Judge BREYER. No.

Senator SPECTER [continuing]. I talked to you in our informal section about Court-stripping, and it seems to me this is a fundamental issue. We talked about *Marbury* v. *Madison,* and I think it is fair to say that you concluded the supremacy of the Court was beyond challenge today——

Judge BREYER. Yes, yes, I think so.

Senator SPECTER [continuing]. That *Brown* v. *Board* was beyond challenge today.

Judge BREYER. Correct, that is correct.

Senator SPECTER. Is it your view that the Court cannot be divested of jurisdiction to decide fundamental constitutional questions?

Judge BREYER. I think the framework in that—basically, it is an affirmative answer—the framework, the way that I see it legally working out, there are two different circumstances. One, you start

with article III, where it says the judicial power of the United States shall be vested in one Supreme Court and other courts that you in Congress create. And then it says the judicial power shall extend to all cases of certain kinds, which it then enunciates.

So that to me suggests—and this would be one kind of issue—but if you take cases out of the courts and put them in a different court, there will still be cases that you will not have the power to take out of the Supreme Court because of the way that is written.

The other kind of issue that comes up is where the courts are deciding a case, but what Congress in principle might do is say let us not make this a case. It used to be called a tort case. Now we are going to give it to an administrative agency, and we will say it is not a case anymore; it is an agency matter.

Now, could Congress do that to any old thing and thereby remove all those things from the Court? Justice Brandeis said the question there is under what circumstances the process that is required by the Constitution before you can invade life, liberty, or property is due process; when is that due process judicial process? And obviously, he is thinking there would be a core of important cases where the process that the Constitution requires before one takes away liberty, and property in certain circumstances, that that is judicial process, and that is the area that the Constitution would protect.

Senator SPECTER. I had questioned Chief Justice Rehnquist on this issue, and he declined to answer, and finally did answer, that the Congress could not take away the jurisdiction of the Supreme Court on first amendment issues. I then asked him about the fourth amendment, and he declined to answer; declined on the fifth, declined on the sixth. I then asked him why he would answer on the first amendment but not on the fourth, fifth, and sixth. He declined to answer that question, too.

He went considerably farther, however, than Justice Scalia did, who would not answer a question on *Marbury* v. *Madison;* and Chief Justice Rehnquist went considerably further than Justice Souter, who would not answer my question on whether the Korean war was a war. And most of them went farther than Justice Ginsburg did as a generalization.

I was very surprised—and it has been my conclusion that nominees answer about as many questions as they think they have to. I think you may be an exception, Judge Breyer. We may have the "Breyer rule" coming out of these proceedings, that more questions are being answered than a nominee would have to answer. I will withhold judgment until the proceeding is over in its entirety, but I think we may have the "Breyer rule" coming out of this proceeding, which would be very good.

I was very surprised in 1982 when the Senate passed an amendment taking away the jurisdiction of the courts on busing as a remedy, which is a constitutional issue. And I do not see how the Congress can take away the jurisdiction of the Supreme Court on constitutional issues. Whether we like the remedy or do not, most people long since have disliked busing. And let me ask you the question: Does the Congress have the authority to take away the jurisdiction of the Supreme Court on a constitutional issue—equal pro-

tection, the 14th amendment—to deprive the Court of the option of remedy on busing?

Judge BREYER. I do not think there is a categorical answer in terms of constitutional versus nonconstitutional. The place to begin in my mind is there is a famous opinion called *Crowell* v. *Benson*. And really, in that opinion, Justice Brandeis wrote a concurrence, I think, in which he tried to explain this view that sometimes the process that is due is judicial process. And then, when is that process judicial process; when does the right require judicial process? And it is going to be something involving core liberty and terribly important rights of fairness and so forth. And exactly which ones and how would depend—if Congress ever passed such a statute, and then it came up to the Court, you would get into looking at the shadings and exactly how they did it. But that core principle I think is well explained by Justice Brandeis in that case.

Senator SPECTER. Would you agree with Chief Justice Rehnquist that the Congress cannot take away the jurisdiction of the Supreme Court on first amendment issues?

Judge BREYER. Oh, you see, it is going to be the question—you know there are issues and issues. The core principle there, the core freedom of speech, it is pretty hard for me to see how that would be possible, because if you want the kind of layman's reaction, which is all I can do at this moment, it is to think my goodness, what an important right, and isn't it judicial process—but indeed, that kind of right, it maybe cannot be taken away with any process.

Senator SPECTER. I take that to be a "no."

Judge BREYER. Yes, I think—what is the—I cannot remember at the moment whether the question was phrased affirmatively or negatively. [Laughter.]

Senator SPECTER. The final question, Mr. Chairman.

Can the Congress take away the jurisdiction of the Supreme Court on amendments IV, V, and VI?

Judge BREYER. Again, it is the same core idea there. The core idea, fundamental—some of those rights, they cannot take the right away at all. And so, since you cannot take it away at all, you cannot take it away with any process. And then, if you could limit it at all, it is the kind of important thing that on its face would seem to call for judicial process. The details would depend on a particular statute and what was really at stake.

Senator SPECTER. I interpret that to be an answer under the Breyer doctrine. Thank you.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. I think—I know, I should say—that Senator Helms has many times introduced statutes to take away the jurisdiction of the Court. I do not think—I know the Congress never successfully passed such an amendment. It could be it passed the Senate; I do not know——

Senator SPECTER. We did pass it, Joe. We did pass it in 1982.

The CHAIRMAN. I——

Senator KENNEDY. Was it the law?

Senator SPECTER. No; it did not go through conference. It did not become the law. But I was really surprised——

The CHAIRMAN. But the Senate passed it.

Senator SPECTER [continuing]. My recollection was it was a 58-to-38 vote, and I could not believe my eyes and ears. I had not been around here long. I still cannot believe my eyes and ears with some frequency. But we in the Senate did pass an amendment which took away the jurisdiction of the Supreme Court to use busing as a remedy in a constitutional case under the equal protection clause.

The CHAIRMAN. Again, Senator Simon says he only has part of a round. I might say I think we are nearing the end. There is going to be a vote relatively soon. Senator Simon will be able to ask his questions, and we will take a break when the vote occurs.

I would like those listening—as I understand it, Senator Brown has some questions, less than a full round, and to the best of my knowledge, after that, there is no one who wishes to take a full round with the possible exception of Senator Pressler, and no one wants to even take a part of a round that I am aware of, so we could very well, with the grace of God and the good will of the neighbors, be out of here by 7 o'clock—but then again, I have always been an optimist.

Senator Simon.

Senator SIMON. Thank you.

First, a comment on what Senator Cohen and Senator Heflin said in terms of legislative history. I think we dilute the strength of legislative history, both for Justices and for the lower courts, when we permit—and I have done it, along with all of us here—when we permit speeches and other things to be entered in the record as if given. The reality is the record ought to be the real record, and I hope one of these days we change our rule so that that is the case.

Second, I think your exchange with Senator Metzenbaum was extremely significant. Your hope, obviously, is that you will be able to sever the ties with Lloyd's of London soon. It may be—I hope this will not be the case—it may be that it will last for years. That means that your response to Senator Metzenbaum could be with you for many years.

I would request that you get a transcript and read it over, and if you feel comfortable with it, fine. If you do not feel comfortable with it, I think you ought to send a letter to Senator Biden, with copies to the other members of the committee, so that we know where we are on that, if that is agreeable.

Judge BREYER. Yes, yes.

Senator SIMON. And for the record, since they cannot——

Judge BREYER. Yes, that is agreeable, Senator. Thank you.

Senator SIMON. Thank you.

There was a case that came to the Court from California, where a California utility was supporting a certain stand, and a citizens' group went to the utility commission and said, "We believe we ought to have the right to have the other side presented, and we would like to include that in the mailing of the utility."

The utility commission ordered that to take place. The utility appealed to the Court, and in a divided opinion, the Court said you do not—as part of freedom of speech for the utility, for the corporation—they do not have to send around a speech that they do not agree with.