

faculty of a distinguished law school, his scholarly writings and his distinguished service for fourteen years (four as Chief Judge) on the Court of Appeals dealing with many of the same kinds of matters that will come before the Supreme Court, fully established his professional competence.

CONCLUSION

Based on the information available to it, the Committee is of the unanimous opinion that Chief Judge Breyer is *Well Qualified* for appointment to the Supreme Court of the United States. This is the Committee's highest rating for a Supreme Court nominee.

The Committee will review its report at the conclusion of the public hearings and notify you if any circumstances have developed that would require a modification of these views.

On behalf of our Committee, I wish to thank you and the Members of the Judiciary Committee for the invitation to participate in the Confirmation Hearings on the nomination of the Honorable Stephen G. Breyer to the Supreme Court of the United States.

Respectfully submitted,

ROBERT P. WATKINS, *Chair.*

The CHAIRMAN. Now, our next distinguished panel is comprised of two well-known members of the legal academic community, both from Stanford University, Judge Breyer's alma mater. Gerhard Casper is a distinguished scholar and administrator. He is president of Stanford University, which I am sure he finds as politically trying as any one of us up here. He will not acknowledge that, I suspect, or maybe he does not believe that. But it would seem to me the next hardest job—maybe the harder job is being the president of a major, nationally known, and internationally recognized university. He is a former dean of the University of Chicago School of Law, and I want to ask him how he hired all those law and economics guys and women out there—that is a joke, an attempt at a joke—and provost at that university. He became president of Stanford in 1992.

And if I do not run the risk of ruining your reputation, we also have an old acquaintance and friend, Kathleen Sullivan, who has moved from coast to coast here, who was kind enough to try to educate me, which was a very difficult job—as a Senator, not educate me in her classroom. Professor Sullivan was then a professor of law at Harvard Law School and is now a professor of law at Stanford. And she is an expert on constitutional and criminal law, someone I have personally called on a number of times when I have needed legal advice for the committee, and I welcome her here as well.

So I would invite you, Mr. President—we do not often get to use that phrase here in the hearing—to begin your testimony, if you would.

PANEL CONSISTING OF GERHARD CASPER, PRESIDENT, STANFORD UNIVERSITY, PALO ALTO, CA; AND KATHLEEN M. SULLIVAN, PROFESSOR, STANFORD UNIVERSITY LAW SCHOOL, PALO ALTO, CA

STATEMENT OF GERHARD CASPER

Mr. CASPER. Thank you very much, Mr. Chairman, for your very generous opening remarks. I am glad there is one person in the country who recognizes how challenging and interesting the life of a university president is.

The CHAIRMAN. Well, there will soon be another one. There will soon be President David Boren, former Senator who will be president of the University of Oklahoma, and he is going to find out and tell us all what it is like.

Mr. CASPER. I was bemused by his expectation that life might be easier at the university than in the U.S. Senate. [Laughter.]

It is a great privilege, indeed, to appear before you in support of President Clinton's nomination of Judge Breyer for the Supreme Court. I have been acquainted with Stephen Breyer's work throughout most of my professional life. In my still relatively new position as president of Stanford University, I can, as the chairman pointed out, happily claim Judge Breyer as an alumnus of the university, but I am, of course, not testifying in my role as president.

One of the great American judges of this century, Henry Friendly, who served on the U.S. Court of Appeals for the Second Circuit, in a paper about Justice Cardozo, once referred to what is required in a judge. Among the requirements is, of course, that a judge needs to be a lawyer of "the highest grade." But a judge also needs to be somebody who seeks wisdom and is "blessed with saving common sense and practical experience as well as sound and comprehensive learning."

Judge Breyer is a lawyer of the highest grade. He has sought opportunities to do the work of a lawyer in all three branches of the Federal Government. Indeed, I know few men or women who could match his varied legal experience in this respect.

In the executive branch, he served in the Antitrust Division of the Justice Department. He also was a prosecutor in the Watergate Special Prosecutor's Office. In Congress, he was chief counsel to this important committee. In the judiciary, he started out at the Supreme Court, to which I hope you will return him, and, since 1980, has been one of the most distinguished Federal appellate judges.

He has even worked what you might call among the branches through his service as a charter member of the U.S. Sentencing Commission, one of those hybrid interbranch agencies that seem to partake of all branches at one and the same time. As a student of the separation of powers, I wish I had had a similar in-depth exposure to the workings of American Government.

In the last few months, I have seen the press frequently refer to Judge Breyer as pragmatic. This is not a bad attribute, provided it is not intended to suggest that Judge Breyer prefers any result over no result. The opposite is true. Throughout his life, he has been interested in the right results. In that sense, I have always thought of Stephen Breyer as a man of strong ideals who thinks and worries much about justice, about the ends we pursue, the means we employ towards those ends, and what effects they will have.

In his recent book, "Breaking the Vicious Circle," he expresses the belief that trust in institutions arises from openness, but also from those institutions doing a difficult job well. I quote: "A Socratic notion of virtue—the teachers teaching well, the students learning well, the judges judging well, and the health regulators more effectively bringing about better health—must be central in

any effort to create the politics of trust." Trust in institutions should be one of our highest priorities.

Judge Breyer's public service reflects "a saving common sense and practical experience." These qualities can also be found in his writings. His approach to the issue of societal risk management is marked by "a saving common sense." In this instance, the attribute "saving" may be taken quite literally, since Breyer favors foregoing those regulatory gains and risk management that are too small in relation to the resources they consume. What is saved can be applied to other national needs and social priorities.

I referred to Judge Breyer's "Socratic notion of virtue," which includes that judges should judge well. The first prerequisite of judging well is to judge clearly. Reading Breyer opinions is a genuine pleasure—perhaps, as he has suggested, even "for a high school student," though I confess to doubts on that count. His opinions are so written that you understand every step of the way: what the parties argue, what evidence they rely upon, what the judge understands to be the state of the law, what the uncertainties are, how he intends to resolve them and why, how the judge views the facts, and, finally, the conclusions all of this leads him to. One can readily agree or disagree with Judge Breyer because he is clear about where he stands.

In the era of administrative government, we should consider ourselves fortunate that the nominee is one of the country's leading experts on administrative law who has a mature understanding of the Constitution and the requirements that follow from a commitment to the rule of law. Perhaps the most important question concerning trust that the country faces for the foreseeable future is who will control administrative government and how. In order to cope with that challenge, the Supreme Court needs much wise understanding of how the institutions of government work. It is my belief that Judge Breyer will bring that understanding to the Court, in addition to his commitment to the Constitution and the rule of law.

Thank you very much, Mr. Chairman and other members of the committee.

[The prepared statement of Mr. Casper follows:]

BIOGRAPHICAL SKETCH OF GERHARD CASPER

Born in 1937, Gerhard Casper grew up in Hamburg, the port city on the Elbe River. At sixteen he made his first trip to the United States, as one of 32 students from around the world who came to the United Nations for the *New York Herald Tribune* Forum for High Schools, a program intended to promote international understanding.

Mr. Casper studied law at the Universities of Freiburg and Hamburg, where in 1961 he earned his first law degree. He came to Yale Law School in 1961, obtaining his Master of Laws degree a year later. He then returned to Freiburg, where he received his Doctorate in 1964, writing his dissertation on the realist movement in American law.

In the fall of 1964, Mr. Casper emigrated to the United States spending two years as Assistant Professor of Political Science at the University of California at Berkeley. In 1966 he joined the faculty of the University of Chicago Law School, and between 1979 and 1987 served as Dean of the Law School. He has written and taught primarily in the fields of constitutional law, constitutional history, comparative law, and jurisprudence. From 1977 to 1991 he was an editor of *The Supreme Court Review*. He was named the William B. Graham Professor of Law in 1980, and a Distinguished Service Professor in 1987. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.