Senator SIMON. Mr. Chairman, if I could just say I am going to the same press conference on health care.

The CHAIRMAN. One thing Mr. Nader understands is press conferences, and I am sure he will understand your need to be there.

Senator METZENBAUM. Also, he understands health care.

The CHAIRMAN. He understands health care, as well. As a matter of fact, I am surprised he is not going to the press conference with you.

Senator COHEN. Mr. Chairman, I am told there is going to be a vote at 1:45 p.m.

The CHAIRMAN. I am glad to be informed of all these things. Why don't we just begin and we will see where the schedule takes us.

Mr. Nader, welcome.

PANEL CONSISTING OF RALPH NADER, WASHINGTON, DC; SIDNEY M. WOLFE, CITIZEN'S GROUP, WASHINGTON, DC; LLOYD CONSTANTINE, CONSTANTINE & ASSOCIATES, NEW YORK, NY; AND RALPH ZESTES, KOGOD COLLEGE OF BUSINESS ADMINISTRATION, AMERICAN UNIVERSITY, WASHINGTON, DC

STATEMENT OF RALPH NADER

Mr. NADER. Thank you, Mr. Chairman and members of the committee.

I would like to submit my 20-page testimony and note that there are five important attachments: First, one by Professor Carstensen, of the University of Wisconsin Law School, dealing with the case of price squeeze that was so widely discussed earlier in these hearings, a case by Judge Breyer; second, a thorough critique by a friend of Judge Breyer, but he is a critic, Professor Tom McGarity, of the University of Texas Law School, on Judge Breyer's health and environmental safety positions; third, a critique of Judge Breyer's chapter on the National Highway Traffic Safety Administration, by Clarence Ditlow and Joan Claybrook, which illustrates that some of Judge Breyer's research is quite shoddy; fourth, a list of very stimulating questions by Prof. Richard Parker, of Harvard Law School, on the first amendment and its interpretation to provide affirmative opportunities for ordinary citizens to participate in their democracies, the exercise of free speech; and, fifth, an 11-page letter by Prof. Monroe Freedman, the legal ethicist, where he concludes that Judge Breyer violated the disqualifications statute. I hope they will be included in the record.

The CHAIRMAN. The entire statement, along with the attachments. Would you clarify for the record, Mr. Nader, are all five of the people on behalf whose statements you are submitting comments, are all five of those opposed to Mr. Breyer?

Mr. NADER. Professor Freedman is. The others have not expressed their opposition.

The CHAIRMAN. Thank you. They will all be placed in the record.

Mr. NADER. Thank you.

One point on process, I think the White House process of sifting through nominations, which was managed by Lloyd Cutler, is extremely tainted and unfair and raises an issue within the Judiciary Committee's jurisdiction. A man who is still special counsel to a

corporate law firm is also special counsel to President Clinton under a statute that allows a 130-day tenure.

It was never intended for the position of counsel to the President, which was intended for specialized people like scientists and geologists, to spend some time advising the Federal Government. I think that this should never be allowed again. It has never occurred in American history, that a special counsel to the President is still a special counsel to his corporate law firm down the street and will have I think a relatively baleful effect on the integrity of the process.

Second, the law has many purposes, three of which are to discipline the excesses of power, to reflect reality in the facts on the ground, and to facilitate the exercise of ordinary citizens' political and civic energies. That is to facilitate democracy. I think on all three grounds, Judge Breyer is seriously deficient, whether we look at his decisions, his books, his articles, and other activities.

The conservation of existing power alignments has been a priority for Judge Breyer. He has not been interested in curbing, dissolving, displacing or holding such corporate power accountable. We have gone through a number of years where the Wall Street Journal itself has reported time and time again the elements of what constitutes a corporate crime wave. Whether it is procurement fraud, whether it is the S&L debacle, whether it is health care industry fraud, on and on, the context for elaborating on Judge Breyer's specialty in the regulatory area is the corporate crime wave and the exceptional growth of corporate power over many other areas of our life.

His record on antitrust is extraordinarily one-sided. No judge on the Federal Circuit Court of Appeals has a higher percentage of ruling against plaintiffs who are using the antitrust laws to hold corporate defendants accountable. The Wall Street Journal, the business community, corporate commentators and their counterparts in the Senate have serious reasons why they are for Judge Breyer, and those reasons relate to their belief that he will accommodate, support, and defend the existing pattern of concentrated business power in our country against their challengers.

Second, in the area of regulations, I think his scholarship is minutely shoddy, because his factual predicates are so faulty. He belittles hazards and risks and exaggerates costs. He also exaggerates what the Government has actually spent or required to be spent to reduce risks.

I think in many ways, Mr. Chairman, the statement where he says at all times regulation will reduce some people's income. It illustrates the fantasy world that he is operating in. Prevention of death and injury does not reduce anybody's income except funeral directors' income. I think in many ways his analysis, and I detail it in my testimony, is simplistic, superficial, and ridden with fantasy.

If he is sincere, he is unrealistic. And if he is not sincere, he has developed an elaborate technique for paralysis analysis, a kind of multiple overlapping constantly intermodal consideration that the business community doesn't operate under, that the Government doesn't operate under, and no human being should operate under.

He also filters out from his analysis of how Congress and the regulatory agencies work, all the corporate impact in this city. It is as if they are neuter factors and anonymous factors. The issue of greed, avarice, obstructionism, delay, campaign funds, all the realities that we know that corporations engage in to get their way in this city, whether from regulatory agencies or Members of Congress, are left out of his analysis. How can that be pragmatic? How can that be realistic? How can that be scholarly?

But my principal criticism of Judge Breyer, Mr. Chairman, is that he is uniquely disinterested in fostering or recognizing the elaboration of democratic public participation. In his proposal for regulatory reform, he discounts the efficacious role of Congress, the courts, the liability laws, good appointments to regulatory agencies, and expanding the breadth and depth of democratic public considerations and participation. This is being antidemocratic in a rather affirmative manner.

It is inconceivable that a judge with any knowledge of American history can so denigrate the great successes in our Government and our society from giving people more rights to know, more rights to participate, more rights to communicate their preferences through the processes of government.

In conclusion,.Mr. Chairman, a nominee such as Judge Breyer, who is insensitive to the laws' needs to discipline the excesses and concentrations of corporate power, a nominee who rests his proposals on erroneous reality, factual error and fantasy, and, above all, a nominee who rejects the efficacy of ever-improving democratic participation by the people in making these agencies of Government work better is neither pragmatic, neither realistic, nor moderate. He is extremist. He is ridden with fantasy, and he is insensitive on the ground to the health and safety needs of the American people, and his nomination should be rejected on those grounds alone.

Thank you, Mr. Chairman.

[Mr. Nader's submissions for the record follow:]

Statement of Ralph Nader
on the nomination of
Stephen G. Breyer by President Clinton
to be Associate Justice of the
Supreme Court of the United States
before the Senate Judiciary Committee,
U.S. Senate, Washington, D.C., July 15, 1994

Mr. Chairman and members of the Senate Judiciary Committee, thank you for this brief opportunity to testify on the nomination of Judge Stephen G. Breyer for the position of Associate Justice of the Supreme Court of the United States. With such bipartisan support for his confirmation, it is important for critics of Judge Breyer to have their say, if not for expectation of persuasion, then at least for whatever constitutional symbolism such dissent may provide.

Two preliminary process points need to be made. First, as reported in the New York Times and by other sources, Lloyd N. Cutler was in charge of the White House group sifting possible nominees to recommend to the President. Mr. Cutler is still special counsel to the corporate law firm of Wilmer, Cutler and Pickering and has not resigned that position. At the same time, he is also special counsel to the President. This dual status is unprecedented and deplorably blurs the sharp boundary between public and private service. (Mr. Cutler can still take his draw, by the end of the year, from his law firm.) President Clinton is relying on 18 U.S.C. sec.203 to allow Mr. Cutler to serve up to 130 days in a 365-day period without complying with a number of conflict-of-interest and disclosure statutes. No one ever intended this status of special government employee (SGE) to apply to the position of White House counsel. Most SGEs are scientists or other specialists who are paid by the government to work as advisors or to take on small discrete projects.

The issue is not just what the law does or does not permit in the area of ethics, since the President has imposed much stricter limits on his staff, prior to the arrival of Mr. Cutler, than the law requires. Instead, the issue is whether it is proper for a member of a major Washington law firm to also serve as counsel to the President, pass on judicial nominations, engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests), even if he does not work on matters directly impacting those clients. His role in the selection of Judge Breyer was, according to many sources, critical: at every key

juncture, Mr. Cutler gently tilted the process toward Judge Breyer, a long-time professional, philosophical and personal colleague, with whom he was co-counsel on a merger case, and co-associate on other professional missions. Judge Breyer was the choice of Lloyd Cutler, special counsel both to the President and to his corporate law firm. The Clinton White House process was both tainted and unfair!

Second, I support Senator Arlen Specter's view that nominees are less likely to answer questions when the confirmation process is seen as a sure matter. Also, some Senators are less inclined to take the time to ask those questions. Citizens and citizen groups, critical of nominees, are less likely to bother requesting to testify. "Why spend the time?" "Why alienate Senators from both parties?" "What's the point in following a lovefest?" "Who is going to listen?" are some of the comments I received from law professors, citizen groups and civic leaders.

Of course, responsibility for their lack of assertiveness is on their shoulders, but it does seem that some deliberation is in order by members of this Committee to take Senator Specter's concerns and suggestions under advisement and also to project to the public that more time for more listening will be taken, no matter what the prospects are for the nominee. There is simply no other widely covered forum for the American people to listen, learn and contemplate the great constitutional questions that affect their daily private and public lives and those of their children than a confirmation hearing on a nomination to the highest court in the land. The hearing itself is a national asset.

My focus today is on the necessity for balance in the way our laws handle the challenges of corporate power in America. For our political economy, no issue is more consequential than the distribution and impact of corporate power. For Judge Breyer, whose specialty is government regulation of business and antitrust policy, corporate power provides a significant context for evaluating his record, writings and activities.

Historically, our country periodically has tried to redress the imbalance between organized economic power and people rights and remedies. From the agrarian populist revolt by the farmers in the late 19th and early 20th century, to the rise of the federal and state regulatory agencies, to the surging trade unionism, to the opening of the courts for broader non-property values to have

their day, to the strengthening of civil rights and civil liberties, consumer, women's and environmental laws and institutions, corporate power was partially disciplined by the rule of law. There were years when the antitrust laws were modestly enforced and when other fair trade rules were invocable. There were years when the great common law expanded the accountability of corporations whose products and pollutants harmed innocent people and damaged their property.

Starting in the late Seventies, many of these trends in restraining, if not stopping, corporate crime, fraud, abuse and predations slowed and, in many areas, were reversed. The corporate counterattacks, fueled by the decline of organized labor, the Reagan-Bush period of sharply reduced law and order for corporations, the enhanced ability to achieve corporate ends by threatening to move abroad, and the supremacy of business money in campaigns sent the forces of law and order, of democracy and decentralization, into retreat. In their place came the corporate crime wave, often dutifully reported in the Wall Street Journal news pages and documented by Congress, in the financial and banking markets, the health care megafrauds, the defense procurement debacles and the giant merger, acquisition and LBO surge that created no new wealth or jobs but generated huge profits for the few and huge debts for the companies. Widening disparities in wealth and income between executives and workers reflected the rampant avarice at the top and stagnant incomes (adjusted for inflation) down the ladder for tens of millions of Americans during the past 20 years or more.

The Supreme Court mirrored this rightward drift toward those who have power vis-a-vis those who do not. The present court is still moving rightward with a distinct corporatist inclination.

Justices Warren, Douglas, Brennan, Marshall and now Blackmun are gone. Their judicial views, their quality of "heart" that President Clinton seemed to desire in his nominees, have not been replaced.

Now comes Stephen G. Breyer, judge, writer, lecturer and professor, who would like to be described as evenhanded, impartial, objective, a consensus builder, a person who likes to engage in "critiques of pure reason," to borrow Kant's phrase. Upon his nomination, Judge Breyer stated that he wanted the law to work "for ordinary people." But that "sensibility" is not what practitioners in the business arena use to predict how their

cases would likely emerge from Judge Breyer's pen. Nor do his writings project a "for ordinary people" sensibility.

Let one evaluate Judge Breyer most charitably, as he does for corporations, by deleting motivation, intent and fault from the equation. Let one start with him as a no-fault judge and look at his record and how others perceive him.

First the latter. There are serious reasons why the business community, Wall Street Journal, ex-judge Bork, Lloyd Cutler, Senators Dole, Thurmond and Hatch, and a host of conservative commentators enthusiastically support the nominee. These reasons relate, not to Judge Breyer's conventional views on civil rights and civil liberties. They relate to his views regarding corporate behavior, power and wealth. Judge Breyer is viewed as a consistent judicial reassurance for the corporate status quo and the bigger the corporations the better. He is viewed as defending, sustaining and rationalizing the entrenched and radiating impacts of corporate power vis-a-vis consumers, small investors, workers, health and safety regulatory agencies and other liability exposures. He is not new to them; they are not being exposed to his record lately. He has been congenial to their beliefs over a long period of time. This is not to say that they expect 100 percent from him; just that they expect very few fundamental surprises and lots of unsurprising networking on their priority issues with other Justices.

These corporate supporters may be wrong; certainly the Democrats who are his friends and who have modest concerns regarding corporate conduct believe the corporatists are reading him wrong. I think those Democrats are mistaken for the following reasons:

1. Judge Breyer and corporate economic power. His sensibilities favor the powerful party to a judicial conflict involving antitrust and other business litigation cases. Although his opinions share much of the Chicago school view that the antitrust laws should be interpreted by monetized minds on the basis of short-term economic efficiency standards, bizarrely defined, he does zig and zag more than those Partisans. Nonetheless, his record of deciding for the corporate defendant exceeds that of any other judge, Republican or Democrat, in all the U.S. federal circuit courts of appeal.

Depending on the scholarly assessment, he has ruled in favor

of the corporate defendant 16 out of 16 times, 17 out of 19 times or 19 out of 19 times if remands are seen for their pro-defendant effect. Not even Judge Richard Posner has this record of extremism. Yet Judge Breyer is called a moderate by his friends.

It is apparent from his opinions that Judge Breyer neither believes nor understands that the legislative history of the Sherman and Clayton Antitrust laws reflects a deep concern in Congress over the political, as well as economic, effects of business concentration, monopolization and other anti-competitive practices. Remember, those were the years when the term "political economy" was wisely used to describe the dynamics of economic behavior. Shorn of its legislative history -- a favorite interest of Judge Breyer -- antitrust becomes susceptible to both the mind games and word games of empirically starved theoretical gymnastics. Business people whose victories in the lower federal courts were overturned by the Judge are astonished at how remote he seems from what actually goes on between the big and little fish in the marketplace. Senator Metzenbaum has commented on this remoteness by this school of antitrust ideology. (I have attached to my testimony a short comment by University of Wisconsin Law Professor Peter C. Carstensen on the "price-squeeze case," which he believes has "greater significance for public policy in the regulated industry area, especially telecommunications.")

Such excessive abstraction tends to drain the dispute from commercial or strategic intent by the accused defendant, takes a short-term position on the effects of predatory pricing, price discrimination, exclusive dealing, resale price maintenance, price squeezes and tying arrangements. These practices are viewed as good for consumers, however destructive they may be to smaller competitors or businesses on the losing end of vertical restraints. During my discussion with Judge Breyer last summer, he responded to my criticism of his decisions by saying, "Well you are for small business and I am for the consumer." That indeed is his regular response. I replied that freedom of economic opportunity for small business is essential for the kind of competition that benefits consumers, especially in the long run. Washington, D.C. grocery shoppers would understand the consequences, given the concentration of supermarkets in the hands of Giant Foods and Safeway that has resulted in food prices being about the highest of any urban area in the country.

There have been other judges who have seen antitrust law differently; they looked at market conduct, market structure and

concentration ratios. In criminal and civil antitrust cases, intent was not irrelevant.

Donald Turner, Judge Breyer's antitrust mentor and employer at the Antitrust Division of the Justice Department, co-authored a widely heralded book in 1959 with economist Karl Kaysen, titled Antitrust Policy. It contained a legislative proposal for oligopoly-dissolution legislation. Market power was "conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales." Industries with sales volume below a minimum were not affected and there were several defenses listed to rebut the presumption.

In April 1966, as Antitrust Chief, Turner created a team that established eight specific standards to test whether an actionable shared monopoly existed and produced a list of potential cases. That was the highwater mark before the Johnson Administration, with few exceptions, heeded the demands of big business to cease and desist. A massive attack on antitrust law enforcement began in the Seventies with millions of dollars of corporate-funded studies attacking its very foundations. The Chicago School doctrines were taught at judges' seminars, funded by business. Contrary views were excluded.

When I asked Judge Breyer whether he agreed with the Turner-Kaysen guidelines, he smiled and said, "That's a good question," and he implied that Donald Turner himself, who subsequently worked as a corporate defense attorney, may no longer agree with them. The point of all this is that the great questions of antitrust are no longer debated and studied. This basic charter of the free enterprise system has fallen into limbo beneath a counterattack on all fronts by global corporations and their apologists who claim, with grotesque caricature, that the antitrust laws interfere with U.S. global competitiveness. Now, judges like Stephen G. Breyer are picking over its leftover bones. Apart from overt price-fixing between competitors, antitrust law has few interests for the anti-antitrusters. For many of them, the prevailing view of market structure is satisfied if there are only two companies left in a national market, as Reagan's antitrust chief, William Baxter, asserted in 1981.

Antitrust and its relevance to keeping our economy deconcentrated and competitive has great meaning for diminishing

corporate complacency, for jobs, for communities and the political diversity that comes from economic diversity and independent small business. It also has great relevance for developing and marketing new technologies unsuppressed by "product-fixing" and the fashionable joint ventures (as between the auto companies) that are now routinely cleared and even subsidized by the federal (taxpayer) government.

Judge Breyer, in his decisions and writings, displays little recognition of such antitrust values. His writings show no interest in an aggregative analysis of the wealth of material concerning concentration and anticompetitive practices in today's economy of giantism and private trade restraints. This is too bad, because presently the Supreme Court has little of the familiarity with this subject that the nominee is said to possess.

The practical consequence of Judge Breyer rounding out the Court on the subject of antitrust law for, perhaps, many years is that without new legislation, antitrust law enforcement will sink into a deeper moribund state, regardless of a very occasional dutiful Antitrust Chief at the helm at Justice or the Federal Trade Commission. This is especially true in the area of large mergers and joint ventures. Consider the rash of vertical and horizonal gigantic mergers and acquisitions in the health-care industry during the past year. Many of them would not even have been tried in an atmosphere of modest antitrust law enforcement as occurred in the Sixties and Seventies. If Senators are not worried about such corporate concentration, Judge Breyer is their man.

2. Judge Breyer's writings and the matter of law and order for corporations. Judge Breyer has a unique zig-zag style, which can be called confused unless one stays with the constant theme that, at the end of the day, the result just happens to please corporatists who do not welcome health and safety regulation. He appears to seriously question many health and safety laws that he will be expected to interpret impartially as a Justice of the Supreme Court.

Taken as a whole, his recent book, Breaking the Vicious Circle, is a prescription for decisional paralysis, just as are his stunningly selective sources in voluminous footnotes. Risks are belittled, especially in the toxic area, while costs are viewed in a tunnel vision of exaggeration and separation from

what has actually happened. Alternatives such as materials substitution (in aerosols, for example) or substance prohibition (for example, lead in paint and gasoline) are ignored or slighted. His reliance on many right-wing "think tanks" leads him into regions of cost-benefit hysteria that would be comedic were they not so tragically inimical to the victims of wrongful injuries.

Corporate cost estimates are taken as verities, people benefits of a direct and indirect nature are minimized to absurd levels. He pits tradeoffs of limited resources between funds for child vaccination on the one hand, and toxics reduction on the other, as if that is the relevant choice. His inter-modal tradeoffs, if they quest for economizing, are curiously restrictive, leaving out the massive portions of the federal budgets devoted to corporate welfare programs and waste, fraud and abuses in defense contracting (which produced its own reckless pollution) and misspent health expenditures in the tens of billions yearly. I have attached a paper titled "Could Justice Breyer Be Hazardous to Your Health?" by University of Texas School of Law Professor Thomas O. McGarity, a friend of Judge Breyer's and a critic of his views on health and environmental regulation.

Judge Breyer uses hypothetical slam-dunks, that have not happened in the real world of government regulation of business, to invite credibility for his arguments. Senators, how many times has the federal government, much less industry, spent $20 million, $30 million, $100 million or $600 million to save an American life? Perhaps in the space program for astronauts. The government has declined to spend, or require to be spent, a few dollars to save a motorist's life or an infant or child's life. Whenever there are large expenditures, allegedly to save innocent peoples' lives and restore large properties, a la Superfund, the driving forces are contracts, whether seen as public works or porkbarrel, for companies, consultants and other firms.

By contrast, Congress in a close House vote in 1979 refused to spend $15 million a year for a consumer protection office that would make the regulatory agencies work better by advocacy and judicial review. Imagine how the indentured regulatory agencies might have been made more vigilant in the Eighties, while the S&L financial looting was growing, or the Food and Drug Administration was languishing, by a consumer protection office

series of informed challenges. Lots of taxpayers' money could have been saved there.

Judge Breyer was skeptical about this consumer office, as he is about the Congress, the courts, the liability laws and even the agencies themselves of ever really improving the safety regulatory process. One of his premises is that these agencies err on the side of safety. Really? Instead, especially since Reagan-Bush, these agencies have been sleeping on the side of the regulatees. Can he have made any inquiry of what these agencies do not do or how they do not act under their statutory mission? Can he recognize the large numbers of deaths, injuries and other morbidity year after year when the airbag rule and the lead standard were tied in knots and blocked by their opponents? In a verbal style that is typical of his mode of writing, Judge Breyer knows when he is near the edge and then tries to disarm the gaping reader. After suggesting that fuel efficiency standards cost lives, that organic farming may produce more "natural pesticides" than using artificial pesticides, that atomic energy risks are marginal, that billions are spent on what he believes are virtually zero-risk toxic situations, that very few cancer deaths (less than 2 percent to 10 percent of all cancer deaths and 7 percent to 33 percent of deaths associated with smoking) "see[m] likely to be reduced by regulation," he writes on page 28:

> "In considering my examples, you must remember several important caveats. These examples are selective; they focus on extremes. They leave out the far more numerous examples of balanced, sensible, and cost-effective regulations" (emphasis added).

How strange! We hear virtually nothing about these "far more numerous examples" in his book or other writings. Indeed, in a book chapter on the National Highway Traffic Safety Administration (NHTSA) published in 1982, he goes out of his way to ignore the successes of that body during the short period when it was headed by people who believed in the agency's life-saving mission and were not undermined by White House operatives. Mr. Breyer, by the way, gives little weight to the beneficial effect of appointing good people to these agencies and backing them up at higher levels within the Administration. Attached is a critique questioning Judge Breyer's scholarship on NHTSA in his 1982 book titled Regulation and Its Reform, by Clarence Ditlow, director of the Center for Auto Safety, and Joan Claybrook, President of Public Citizen and former NHTSA Administrator.

Repeatedly, Judge Breyer cites the likes of Viscusi, Huber, the Cato Institute, the Manhattan Institute, Peltzman, Graham, Lave and other charter members of the "pitiless abstraction" crowd whom the Fortune 500 love to cite. For example, Sam Peltzman once wrote an incomplete article declaring that safer designed cars kill more people because drivers, feeling more secure, take more chances. I say incomplete because he did not reach his logical conclusion, which would have been to recommend that sharp spear-like hubs in steering wheels emanating toward drivers be installed to induce greater care by those steering the vehicles.

Curiously, Judge Breyer does not cite the Union of Concerned Scientists, many technical government and Congressional reports, the Natural Resources Defense Council, the Environmental Defense Fund, the Center for Science in the Public Interest, the World Resources Institute, World Watch, or a host of scholarly researchers and specialists who might undermine his abstract thoughts and empirically deprived observations. Is this the sign of a moderate, an impartial analyst? Imagine suggesting, as he did in 1982, that expenditures for vehicle head restraints be replaced with automatic flashing lights when vehicles are travelling over 60 mph, a pinball-machine idea that does little to prevent head injuries in the far more frequent rear-end collisions below 60 mph.

More interesting is his reluctance to put his mind to work on designing an improvement in the nation's regulatory process (broadly defined) on any risk that he does think serious -- for instance, casualties from smoking the products of the tobacco industry. The reader begins to eagerly anticipate how Judge Breyer, the publicized creative problem-solver and consensus-builder, would have society's laws deal with a scourge that takes over 400,000 American lives a year. As a one-time San Francisco lawyer for a tobacco company, his brother, Charles Breyer, could provide him with whatever informational and stimulatory effects have flowed from product liability cases against the tobacco industry. Alas, such an intellectual repast was denied the reader, leaving a feeling that the Judge's mind may work most vigorously to destroy regulatory paradigms for corporate accountability rather than build them.

To illustrate how Judge Breyer's line of thought, or shall they be called musings, can reach levels of intellectual dilettantism, on page 23 of the Vicious Circle book, he writes,

with minimum restraint, that "At all times regulation imposes costs that mean less real income available to individuals for alternative expenditure. That deprivation of real income itself has adverse health effects, in the form of poorer diet, more heart attacks, more suicides" (emphasis added). What he is referring to are "academic studies" that argue that when companies assume regulatory costs, they take it out of worker wages or in worker layoffs (not from shareholders or waste or redesigning products). These workers, it is asserted, mistreat themselves by smoking more, drinking more or not eating well. At all times, Judge Breyer says, regulation imposes costs that reduce real income. That is such a sweeping extremist statement, belied by the illustration of contaminated foods, defective vehicles and unsafe toys being taken off the market that saved the companies' reputations from being harmed further. Or prohibiting vinyl chloride in some products and requiring sharply reduced levels in workplaces actually stimulated substantial productivities and no jobs were lost and fewer cancers resulted. Companies admitted their industry's original cost-estimate for compliance was grossly exaggerated.

Dow Chemical has spoken about economies stimulated by regulation (eg. curbs on mercury dumping). Blocking the use of thalidomide in the United States by the FDA certainly saved infants from disfigurement and that probably saved some companies from near-bankruptcy. There are more fundamental rejections of such an absolutist statement which can be made at a later time. Suffice it to say that airbags now employ workers who produce them, and reduce costs of auto insurance, health care, wage losses and other would-be consequences of non-airbag crash-injuries. Funeral directors, however, do suffer a loss of income, to give Judge Breyer some due.

Later on that page, he cites studies that suggest "many concrete possibilities for obtaining increased health, safety and environmental benefits through reallocation of regulatory resources." These include "advertising the cancer-causing potential of sunbathing, indoor smoke and pollution, and radon and subsidizing the creation of healthier indoor climates; encouraging changes in diet to avoid natural carcinogens. ... [etc.]" The great majority of items on this list involve post-corporate regulatory actions and taxpayer subsidies rather than, where applicable, using the regulatory tools for prevention before the hazards proceed from the companies to workplace, to market, to environment or to household. Surprisingly, Judge

Breyer combines an intriguing disinterest in prevention-oriented regulatory policies that change corporate behavior, with a studied avoidance of using cost-benefit tests for his above-mentioned "alternatives."

Epidemiologists and safety engineers alike have long known that prevention at the earliest point of onset is the most effective, least costly choice of strategies. Prevention by regulation is far preferable to regulation after the hazards are at large. Which recalls the adage that "an ounce of prevention is worth a pound of cure." The trouble for Judge Breyer's construct here is that prevention often starts at the door of the company where his proposals usually stop. This is unfortunate, because training his mind on the way the corporate charter, the constitutional issues of corporate personhood, and the internal corporate structure and its external constituencies can contribute to superior performances in the management of industrial violence and risk might have advanced the very objectives he claims to seek much more efficiently and humanely.

3. Judge Breyer and the issue of democratic public participation. It is his lack of confidence in "greater public participation" leading to real improvements in the problems of health and safety regulation that gives this observer the greatest pause about not just Judge Breyer's philosophy but his understanding of the historical efficacy of broader and deeper democracy. It is a premise of democracy that those who are affected by government should participate, if they choose, in its proceedings without mischievous and costly obstructions. More and more aggrieved parents -- some starting safety institutions -- have alerted or persuaded regulatory agencies to act. Citizens have exposed, sensitized these agencies and sometimes pressed Congress to create these safety and health regulatory programs as a systematic approach to living in a safer and more healthful America.

Procedural proposals for wider public participation have included broader standing rights before these agencies, modest intervenor expense funding for impecunious groups (tried successfully in the late Seventies at the Federal Trade Commission), more fulsome information and notice rights about agency actions, allowance of citizen suits to mandate actions -- to name a few ways that can facilitate the involved energies of citizens.

Judge Breyer's position is that while the general notion of public participation may be well and good, it won't adequately address the challenge of better government. Instead of opening the lighted highways of democracy for the people to shape and improve their governments' health and safety agencies, Judge Breyer believes in his proposal for a new prestigious, executive corps of authoritative, skilled civil servants be established from on high to rationalize the agencies' work internally and between each other. As described and analogized to an OMB office and the French Conseil d'Etat, this proposed unit seems autocratic, secretive and outside the lighted highways.

Given the experience of the Office of Management and Budget in becoming a supra-agency with some of these same coordinating missions, the process did become more secretive, more remote from public dockets and commentary and more like another paralytic layer of bureaucracy. Reagan's OMB also became corrupt with rampant ex parte contacts. The process did become much more adept at stopping just about all agency safety standards actions, under Reagan and Bush, than starting any lifesaving endeavor or approving one already underway. "Cost-benefit" conclusions under Reagan's OMB, using the usual rigged formulas, very rarely supported issuance of a health or safety standard. It even found the automobile passive-restraint standard to be not cost-beneficial, until the Administration was overruled by a unanimous Supreme Court.

Why this lack of confidence by Judge Breyer in perfecting the democratic process? How will his top-down "mandarin" philosophy deal with the public access issues that will come before the Court in so many modes -- from old-fashioned ways to such new ideas as the one rejected by a vote of 5 to 3 (Rehnquist dissenting) involving a California rule requiring invitational inserts, at no cost to the utility, to be placed in the utility's billing envelopes inviting residential ratepayers to join and fund their own statewide consumer group? Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986).

How will he handle the access issues posed by the new telecommunications technologies with his very modest regard for the efficacy of strengthening our democratic engagement rights and facilities? I would like to place in the published hearing record, Mr. Chairman, a series of questions that Harvard Law Professor Richard Parker, a colleague of Judge Breyer's, believes could focus attention on the extent to which the nominee

interprets the First Amendment "as more than a right of ordinary people to read or hear speech" and whether "it demands that they be empowered to participate effectively in speech themselves."

Most analysts, from all spectra, believe that the regulatory process needs serious improvements. Our work over the past 25 years has devoted considerable energies to such improvements, advocating the end of cartel regulation in transport modes and proposing ways that make health and safety agencies mindful of their mission with the best approaches to achieve their statutory objectives. When Judge Breyer argues strongly against "the hopeful position that more direct 'democratic' public involvement will automatically lead to better results," he deprives himself of thinking about many creative ways to always improve the effectiveness of such public involvement in a working practical democracy.

He also thoroughly ignores the crushingly obstructive roles that corporate regulatees and their allies play to delay, dilute, fissure or shut down regulatory lifesaving efforts far beyond their legitimate right to plead and petition. These corporate roles are not restricted to artful uses of the Administrative Procedure Act and other regulatory maneuvers. Corporations go to the sources -- prevent the activities by Congressional lobbying, fund political campaigns and when the elections are over, make sure that the sympathetic appointments are made to anesthetize the agency. Reagan's NHTSA head, a coal lawyer by the name of Raymond Peck, made little secret that his mission was to dismantle the agency without closing it. His boss, Transportation Secretary Drew Lewis, told an auto dealer convention in early 1981 that he didn't want to issue any safety standards during his tenure. He missed his goal by one, but that was countered by rescinding other standards. Other agencies, such as EPA, FDA and FAA, had similar leaders.

Judge Breyer simply does not factor these relentless, daily pressures by regulatees, their trade associations and corporate lawyers on the regulatory process. There seems in his mind to be no continuing, serious link between these corporate interest groups and some of the deficiencies that he attaches to these agencies. (He does not even have entries for "corporation," "business" or "company" in the indices to his two books on government regulation of business!) Yet everybody in the real world of Washington, D.C. must agree that corporations are major players, major factors in the maelstrom of power and decision

around and in these agencies. Nonetheless, we have one of these agencies' main analysts -- the nominee -- who relegates them to a neuter, anonymous status. This neglect simply is not good scholarship and accounts for the excessive abstraction and remoteness of his treatments.

Consider, by comparison, the empirical awareness of the Supreme Court of the United States in a case involving the airbag safety system under Standard 208. The unanimous opinion in 1983 by Justice White displayed an attentiveness to the industrial power reality, which obstructed and delayed a regulatory agency's mission, that Judge Breyer would do well to ponder. The Court wrote:

> The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost -- the inflatable restraint was proven sufficiently effective. Now the automobile industry has decided to employ a seatbelt system which will not meet the safety objectives of Standard 208. This hardly constitutes cause to revoke the standard itself. Indeed, the Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be "technology-forcing" in the sense of inducing the development of superior safety design. See Chrysler Corp. v. Dept. of Transp. 472 F. 2d, at 672-673. If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, a fortiori it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design." Motor Vehicle Manufacturers Association of the United States, Inc. et. al. v. State Farm Mutual Automobile Insurance Co. et. al., 463 U.S. 29, 49 (1983).

In conclusion, I wish that Judge Breyer were more pragmatic when it came to thinking about democratic public participation. I wish that he were more empirical when thinking about the many elements of corporate power, structure and behavior. I wish that he were more realistic when he discusses risks, costs, alternatives and technical sources for his writings and judgments. I wish he would think deeply about corporate status

and the Constitution as developed between 1886 (Santa Clara v. Southern Pacific Railroad Co. 118 U.S. 394) and 1986 (Pacific Gas and Electric Company v. Public Utility Commission of California 475 U.S. 1) to see what limits there should be to the personhood of the corporate entity.

It is disappointing that President Clinton chose not to nominate a person to the Supreme Court who combined learning, experience, wisdom and compassion with a proven record over time of putting people first under the law. Unfortunately, the people are left only with the hope that, should he be confirmed instead of rejected, a transformation, nourished a little by these hearings, will occur to make Justice Breyer different from Judge Breyer.

Hope, as it is written, springs eternal.

Thank you.

Judge Breyer and the Price Squeeze Problem
(Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)

Peter C. Carstensen
Arthur-Bascom Professor of Law
University of Wisconsin Law School

Judge Breyer's decision in *Town of Concord, Mass. v. Boston Edison*, complete with two academic appendices, is a classic example of using abstract economic theory to deny or override factual realities. While I can not say that the ultimate holding in the case was necessarily wrong, it is very clear that the approach adopted is antithetical to a reasoned, fact based inquiry into what are in real world terms very difficult and complex legal-economic questions. This is even more troubling because the decision has the effect of empowering large and dominant utilities to engage in anticompetitive, strategic regulatory behavior. In an era of large scale deregulation, especially in the telecommunications area, Judge Breyer has repeated the error that he made as a staff advisor to Senator Kennedy in preparing the airline deregulation legislation: he has assumed despite generations of real world experience to the contrary that business's will not seek and exploit strategic opportunities to gain unjustified competitive advantage. Only strict but thoughtful antitrust review can police such market conduct and ensure that the nominally competitive market is competitive in practice so that consumers gain the theoretically predicted advantages.

The facts of the *Concord* case appear to be that Concord and another locality had municipally owned, local power systems. These systems purchased the bulk of their power from Boston Edison at a wholesale rate. Boston Edison also provided retail power service in a number of adjacent communities. Boston Edison convinced the Federal Energy Regulatory Commission (FERC) that its costs of producing power had increased and so its wholesale rates (the prices charged to the independent distribution systems like Concord that retailed power) should go up. However, Boston Edison did not ask the Massachusetts Department of Public Utilities for an increase in its own retail rates for the service it provided in 39 adjacent towns. In consequence, Concord found that while it had to raise its retail rates, retail customers in the adjacent communities faced no comparable price increase. Such a "price squeeze" would directly affect Concord's ability to compete for new customers that used substantial amounts of electricity. In

addition (this is perhaps the greater competitive evil), the lesson for communities using Boston Edison's service is that retail prices would go up in any community that sought to take control over its own local electric service.

Although Concord satisfied a jury and trial judge that the price squeeze existed and that its purpose was to harm the competitive capacity of the towns being squeezed, Judge Breyer writing for a three judge panel rejected the verdict and ordered the case dismissed. The decision rests on two conclusions: first, that the antitrust laws should not generally be used to condemn price squeezes engaged in by monopolists if both levels of price are subject to direct regulation. Second, the Court concluded that Boston Edison lacked monopoly power in the business of supplying electricity and so the predicate monopoly power necessary for any finding of illegality was missing. This second conclusion makes the entire discussion of the merits of the conduct unnecessary for the result in the case. One can not help but wonder why Judge Breyer undertook such a lengthy (8+ pages compared to only 3 for the legally controlling issue) analysis of the price squeeze issue which advances several controversial positions when a second issue was controlling in any event [1]

Judge Breyer starts his analysis of price squeezes by arguing that the competitive risks of such conduct have been exaggerated and the potential efficiency gains largely ignored in contexts outside those presented by regulated industries His proof consists of citations to the Areeda and Turner treatise on antitrust law, a dissenting opinion by Judge Easterbrook, one of the most persistent users of economic theory to deny the reality of business experience, and a quotation from a Supreme Court decision that had nothing to do with price squeezes. This is hardly an overpowering array of support for the proposition that price squeezes are not generally a serious threat to competition. This conclusion is then linked with the more plausible contention that determining the facts about a purported price squeeze is a difficult judicial task. The combination of arguments in turn justifies a negative attitude toward price squeezes as potential

[1] The monopoly power analysis is questionable on its own merits and was applied in the case in a way that ignored the potential of an attempt to monopolize claim that might have been a more relevant way to evaluate the jury's ultimate decision. In order not to unduly lengthen this discussion, I will focus only on the price squeeze issue which represents the most troublesome aspect of the case as a precedent restricting antitrust review of strategic conduct in regulated industries

antitrust violations. While repeatedly asserting that the opinion does not "question that conclusion. . . " (p. 25), the implication is that Judge Breyer is very skeptical that any price squeeze occurs except for legitimate business reasons. Indeed, Judge Breyer might be on stronger ground with respect to unregulated markets where entry and exit can occur without lengthy administrative processes.

The second stage of the argument against price squeezes is the more remarkable. Without any examination or recognition of the lengthy, well worked out theories of how regulatory processes can be and are used strategically to harm consumer and other public interests, Judge Breyer starts from the naive assumption that regulation is done in the public interest. Hence he asserts that "regulation significantly diminishes the likelihood of major antitrust harm." (at 25) He then advances a simple proposition: when both levels of price are subject to direct regulation there should be little or no risk of anticompetitive exploitation of price.

Indeed, if a SINGLE, well-motivated regulator controlled both levels, such a presumption might seem plausible on its face. But in this, and as far as I have seen all comparable cases, the key and central regulatory fact is that DIFFERENT REGULATORS CONTROL PRICES AT THE TWO DIFFERENT LEVELS. Thus, FERC only controlled Boston Edison's wholesale price while the Massachusetts regulator alone controlled its retail prices. This regulatory division creates an obvious opportunity to manipulate the retail-wholesale difference in strategic ways. The integrated company can shift costs to wholesale customers (who also compete for new retail business) while not igniting a fire storm of local opposition because no application is made to the state authorities to increase retail prices (who else is going to force up retail prices to reflect the new, higher nominal wholesale price?). Unlike some predatory practices, this squeeze results in shifting costs to the competitor which enhances the profits of the dominant firm while penalizing the other firm. According to antitrust history, John D. Rockefeller got the railroads to pay rebates to Standard Oil based on the volume of oil shipped by its competitors (thus both lowering Standard's costs and raising those of its rivals); yet Judge Breyer is both unaware of the analogy and insensitive to the manifest competitive risks that dual regulation presents in this case.

Indeed, not one word in the opinion addresses the tension that necessarily exists when two regulators share authority over the final price to consumers and are not required to

coordinate their actions. Such a situation, where the mandated prices must be charged as a matter of legal requirement, creates a particularly attractive opportunity for strategic behavior that can shift costs, deter existing competition, and retard the incentives for new entry of locally owned retail distribution systems. Yet Judge Breyer, a man who made his reputation as a scholar by writing about the problems of effective regulation, does not even acknowledge the issue. Instead, he uses general concerns about how antitrust review might disrupt public interested, regulatory efficiency to validate further his preference for ignoring the competitive risks involved. A similar inability to see the risks inherent in airline deregulation (a project in which Judge Breyer played an important role as a staffer for Senator Kennedy) caused that legislation to become law without the necessary protections against anticompetitive mergers and conduct.

The spirit of the *Concord* decision is close to that of Justice Scalia in *Business Electronics Corp. v. Sharp Electronics Corp,* 485 U.S. 717 (1988). In that decision, Scalia claimed that economic theory established that vertical restraints not directly controlling prices could have no anticompetitive effect despite thousands of real world examples to the contrary. The better approach is that eloquently articulated by Justice Blackmun, whom Judge Breyer is to replace, in the recent decision of *Eastman Kodak v. Image Technical Services, Inc.* __U.S._, 112 S.Ct 2072 (1992). Justice Blackmun used economic theories to assist in evaluating the particular facts of the case. Theories were rejected if they could not explain the facts rather than the other way around.

The *Concord* decision is particularly troubling because it refuses an antitrust review in a context of regulatory conflict and uncertainty. It invokes sweeping theories having little empirical support and no particular relevance to the specific factual context. As the states and the federal government move toward more competitive public utilities, we need the spirit of Blackmun with his concern for understanding the competitive realities and not another Scalia type theorist who, having imagined a pro-competitive explanation, ignores the record and the context to refuse a focused antitrust evaluation of the merits of the conduct at issue.

COULD JUSTICE BREYER BE HAZARDOUS TO OUR HEALTH?

Thomas O. McGarity
William Stamps Farish Professor of Law
University of Texas School of Law

Now that prominent representatives of both ends of the political spectrum have enthusiastically endorsed President Clinton's nomination of Judge Stephen Breyer to the Supreme Court, most knowledgeable observers predict a speedy confirmation process at the end of which the Senate will consent without providing very much advice. Before jumping on the Breyer bandwagon, however, the Senate should pay some attention to what Judge Breyer has been saying about a rather arcane topic that is nevertheless of great concern to the general public -- federal regulation of activities that pose risks to human health and the environment. An examination of Judge Breyer's views on health and environmental regulation reveals that he is not likely to disappoint conservative critics of the Environmental Protection Agency, (EPA) the Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA). Before the confirmation process has run its hasty course, the Senate Judiciary Committee should pause to ask whether Justice Breyer could be hazardous to the public health.

Judge Breyer's Background.

Judge Breyer has extensive experience in public policymaking. After graduating from Harvard Law School and serving a clerkship with Justice Arthur Goldberg, he worked briefly for the Justice Department's Antitrust Division. In 1967, Breyer joined the faculty of the Harvard Law School to teach courses on

Administrative Law and Antitrust Law. He returned to Washington, D.C. several times during the next thirteen years to work for the Watergate Special Prosecutor and on two separate occasions for the Senate Judiciary Committee. During his early teaching years, Professor Breyer gained a national reputation as an expert on federal regulation of natural gas. In the midst of the energy crisis, Judge Breyer and Paul MacAvoy, a well-regarded Harvard economist, co-authored a short book questioning the existing framework for regulating natural gas and urging rapid deregulation.[1] Although the book was a little ahead of its time, Congress later passed the Natural Gas Policy Act of 1978,[2] which to a large extent adopted the policy prescriptions of Breyer, MacAvoy and other critics of natural gas regulation.

Judge Breyer next broadened his intellectual horizons to encompass *all* federal regulation of private activity. In the late 1970s, he became a consultant to the American Bar Association's newly created Commission on Law and the Economy to help in drafting a report on federal regulation and its impact on the American economy. The Commission's Report, entitled *Federal Regulation: Roads to Reform*, proved very influential in the congressional debates over "regulatory reform" in the late 1970s and early 1980s.[3] The Report adopted an impressively sophisticated taxonomy of regulation that Professor Breyer later elaborated upon in an article in the

---

[1] Stephen Breyer and Paul MacAvoy, *Energy Regulation by the Federal Power Commission* (1973).

[2] 15 U.S.C. §§ 3301-3432.

[3] American Bar Association Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (1978).

Harvard Law Review[1] and in a subsequent book of about the same length entitled *Regulation and its Reform.*[2]

Soon after penning the regulatory reform article, Professor Breyer left Harvard to become Chief Counsel to the Senate Judiciary Committee, which was at that time considering legislation designed to bring about important changes in economic regulation. During his brief stint with the Committee, Breyer was instrumental in drafting legislation deregulating the airlines. Impressed with his staff work, Senator Kennedy persuaded President Carter to nominate Breyer to a vacant position on the First Circuit Court of Appeals in Boston. The nomination languished until after the 1980 election, after which the Senate (for which the Republican Party was soon to be the majority party) confirmed only one of the many Carter nominations to the bench. The single appointment was that of Judge Breyer. Senate Republicans were apparently sufficiently comfortable with Judge Breyer's views that they elected not to stall the nomination for the few weeks that would have been necessary to allow newly elected President Reagan to withdraw it.

Once on the bench, Judge Breyer did not abandon his interest in federal regulation. Although the First Circuit does not have many opportunities to review actions of federal regulatory agencies, Judge Breyer has continued to teach and write scholarly articles and books on Administrative and Environmental Law. His most recent book, entitled *Breaking the Vicious Circle: Toward Effective Risk Regulation,*[3]

---

[1] Stephen Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 549 (1979) [hereinafter cited as Analyzing Regulatory Failure].

[2] Stephen Breyer, *Regulation and Its Reform* (1981).

[3] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) [hereinafter cited as Vicious Circle].

contains Judge Breyer's current thinking on federal regulation of toxic chemicals in the workplace and the environment. A close look at this book and some of Judge Breyer's earlier writing on the role that courts should play in reviewing the actions of federal regulatory agencies should help answer the question whether Justice Breyer could be hazardous to the public health.

Judge Breyer's *Laissez Faire* Presumption.

One clear theme that emerges from Judge Breyer's writings is his strong preference for the free market and his corresponding skepticism about the efficacy of governmental intervention into private market arrangements. For example, the framework for analysis of federal regulation that Professor Breyer developed in the late 1970s "assume[d] that the unregulated marketplace is the norm and that those who advocate governmental intervention must justify it by showing that it is needed to achieve an important public objective that an unregulated marketplace cannot provide."[1] In this important respect, Judge Breyer's views parallel those of prominent judicial appointees of President Reagan, including Justice Antonin Scalia, Judge Alex Kozinski of the Ninth Circuit, Judges Frank Easterbrook and Richard Posner of the Seventh Circuit, Judges Stephen Williams and Douglas Ginsberg of the D.C. Circuit, and former Judge Robert Bork. Indeed, this presumption against government intervention into private economic arrangements is nothing new; it is merely a

---

[1] Analyzing Regulatory Failure, supra, at 552.

somewhat subdued reinvocation of the principles of *laissez faire*, *caveat emptor*, *volenti non fit injuria*, and other related doctrines that formed the foundation for the legislative and judicial regime of the late nineteenth century that was thoroughly discredited during the Progressive and New Deal eras.

It is certainly possible that Judge Breyer is less hesitant than some of his more conservative brethren to allow the presumption to be rebutted. He does, for example, recognize certain traditional explanations for why "market failure" can justify governmental intervention. Thus, the presence of "externalities" or "spillovers" can justify environmental regulation, and occupational safety regulation may be necessary to correct for inadequate information.[1] Still, it is clear that he is no fan of health and environmental regulation. The pathbreaking aspect of his early work on regulatory reform was its recognition that just as market failures sometimes justify regulation, "regulatory failures" sometimes justify regulatory reform. According to Breyer, regulatory failures most often result from "mismatches" between the justifications for regulation and the regulatory tools that the government adopts.[2] He suggests that policymakers look for alternative regulatory tools that better match the nature of the market failure that gave rise to the need for regulation. In the case of health and environmental regulation, Breyer strongly urges agencies to pay more attention to private bargaining and incentives, such as effluent fees and marketable permits, rather than continuing to focus on traditional standard setting,[3] even though such market-

---

[1] Analyzing Regulatory Failure, supra, at 555-56.

[2] Analyzing Regulatory Failure, supra, at 551.

[3] Analyzing Regulatory Failure, supra, at 586, 595-97.

oriented techniques have rarely been tested in the real world.[1]

In *Breaking the Vicious Circle*, Judge Breyer, much more clearly than in his previous work, demonstrates a willingness to allow health and safety proponents to rebut the *laissez faire* presumption. Yet although he concedes that health and environmental regulation is necessary to reduce the risks posed by toxic chemicals in the environment, he nearly always minimizes the magnitude of those risks. In his usual deliberative fashion, Judge Breyer addresses the ongoing debate in the scientific community over how to assess the magnitude of health risks posed by exposure to environmental contaminants. Some scientists believe that a relatively large percentage of human cancers are caused by exposure to man-made toxic chemicals; others believe that the percentage is so small as to warrant little societal attention. Some scientists believe that high-dose animal testing is the most practical way to screen chemicals for carcinogenicity; others believe that animal tests are not sufficiently reliable to serve as the basis for regulatory action. Unfortunately, in describing health and environmental risks, Judge Breyer relies almost exclusively upon the scientists on one side of the debate, relegating the scientists on the other side to a judicious "but see" citation at the end of a footnote. In short, Judge Breyer takes sides in the debate, and he sides with those that believe that the risks posed by environmental contaminants are not very large.

This leads Judge Breyer to conclude that environmental activists and the media have steered a naive Congress into creating a precautionary regulatory atmosphere in

---

[1] See Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 Stan. L. Rev. 1267, 1275-84 (1985); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

which federal agencies force well-meaning companies to waste scarce resources trying to reduce or eliminate the "last ten percent" of the risks posed by environmental contaminants. Relying upon his own experience in reviewing the record in the *Ottati & Goss* case,[1] Judge Breyer questions whether it would be worth spending $9.3 million to protect children who might at some time in the future eat some of the contaminated dirt that would otherwise be left in place at a notorious New Hampshire superfund site.[2] In a similar vein, Judge Breyer critiques EPA's attempts to regulate asbestos and OSHA's and EPA's attempts to regulate benzene.[3] In each instance, Judge Breyer accepts the opinions of the experts that trivialize the risks that the government was attempting to address and rejects experts that take them seriously. Judge Breyer therefore concludes in each case that the government was attempting to force private companies to pay too much to reduce minimal health risks.

If one believes the experts that Judge Breyer cites, many of whom either work for or are supported financially by the regulated industries, it is easy to agree with his analysis. A company should not be required to spend tens of millions of dollars to save a small fraction of a single statistical life. The experts that Judge Breyer relies upon, however, are inclined to gloss over the enormous uncertainties that becloud any attempt to quantify the risks posed by chemicals in the environment. If one is less inclined than Judge Breyer to trust these experts to assess risks accurately, one might insist that companies be required to undertake their best efforts to reduce emissions or

---

[1] United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).

[2] Vicious Circle, supra, at 11-12.

[3] Vicious Circle, supra, at 12-15.

to clean up old messes, even when the resulting benefits are not precisely quantifiable.

Much depends upon how much risk lies in the last ten percent that, according to Judge Breyer, should not generally be of great concern to society. Unfortunately, attempts to answer that question are confounded by huge uncertainties. Because testing toxic chemicals in human beings in controlled experiments is ethically questionable, scientists attempt to identify subpopulations (often workers) who have received larger exposures that the general population. These after-the-fact epidemiology studies can identify substances, like asbestos and vinyl chloride, that have powerful toxic effects. Less striking, but still significant, effects get lost in the statistical noise. As the apparently never ending debate over the health effects of smoking makes clear, even the studies that show a positive correlation between exposure and disease are fiercely debated among well-credentialed scientists. Risk predictions based upon such studies are at best highly debatable, and not appropriately cited as gospel.

In the absence of good epidemiological studies, government agencies have for decades relied upon tests in rodent species to predict potential health effects in humans. For economic reasons, the tests are carried out at doses much higher than typical human exposures in the environment. Sadly, the scientists who examine under a microscope the tissues from the animals cannot always agree about what they see. Some pathologists see cancer where others see only dead tissue. Animal testing also gives rise to uncertainties over the relevance of animal studies to humans and over the proper mechanism for extrapolating the high exposure results to the low exposures that humans typically experience. Risk predictions can vary over several orders of magnitude, depending upon which mathematical model one chooses.[1]

---

[1] For extended discussions of the uncertainties that regulators encounter in conducting health risk assessments, see National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983); James Leape, Quantitative Risk

Swimming in this sea of uncertainties, the regulatory decisionmaker must rely upon presumptions to fill in the factual gaps. Guided by their respective statutes, federal agencies have in the past tended to "err on the side of safety" in resolving the science/policy disputes that produce the uncertainties. It is precisely on this point that Judge Breyer parts company with this mainstream public policy toward regulating health and environmental risks. Although he clearly understands the regulator's dilemma, Judge Breyer flatly rejects a policy of erring on the side of safety in dealing with the uncertainties that arise our of these science/policy disputes, because it leads society to spend too many dollars chasing after what he believes to be trivial risks.[1]

This is the essence of a contentious policy debate over health and environmental regulation in the United States. For the most part, the American public and its elected representatives have adopted a policy of erring on the side of safety. They recognize that sometimes this policy will lead to actions being taken with respect to chemicals that do not pose very high risks, but the presumption will also help avoid disasters like thalidomide, Bhopal and Chernobyl. Persuaded by the experts on one side of the debate that tend to trivialize most health and environmental risks, Judge Breyer does not believe that the uncertainties are so large or the consequences of error so terrible that society should replace the presumption in favor of free markets with one that errs on the side of safety.

Judge Breyer also believes that Congress, the regulatory agencies and the

---

Assessment in Regulation of Environmental Carcinogens, 4 Harvard Envt'l L. Rev. 86, 100-103 (1980); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

[1] Vicious Circle, supra, at 42-50.

public cannot be trusted to address risk regulation in a sensible way. Relying on highly suspect comparisons of environmental risks with other safety risks that human beings routinely encounter, Breyer concludes that the risk perceptions of ordinary folks depart dramatically from the real risks as determined by the experts.[1] If the experts are right (and Judge Breyer rather uncritically assumes that they are), the public must be wrong in clamoring for more protection from environmental contamination. Nor does Judge Breyer trust Congress to regulate risks intelligently. He is especially critical of absolutist statutory provisions like the Delaney Clause, which prohibits the deliberate addition of animal carcinogens to food. He believes that "Congress is not institutionally well suited to write detailed regulatory instructions that will work effectively."[2] In fact, Judge Breyer does not really trust the regulatory agencies to get it right, because they cannot be trusted to "resist Congressional or public efforts to set agendas and to manage particular results."[3]

Like many industry and academic critics of health and environmental regulation, Judge Breyer argues that the money expended complying with "unreasonable" health and environmental regulations could more effectively be spent addressing different health and environmental risks. For example, he suggests that much of the money expended on cleaning up abandoned hazardous waste dumps in the United States would be better spent saving the trees in Madagascar. In addition to relying upon dubious quantitative risk comparisons, such "wishful thinking" arguments

---

[1] Vicious Circle, supra, at 35-39.

[2] Vicious Circle, supra, at 42.

[3] Vicious Circle, supra, at 50.

presume the existence of institutional vehicles for directing private resources from one private use to entirely unrelated public uses. Judge Breyer's example presumes a vehicle for collecting monies from hazardous waste generators, a vehicle for directing those resources to Madagascar, and a vehicle for ensuring that they are spent on saving trees, presumably by compensating the owners of those trees. Imagine the reception in Congress of a Bill the intent of which was to shift wealth from manufactures and municipalities in United States to large land holders in Madagascar. Since the government is powerless to save the trees in Madagascar, the argument that the money spent cleaning up hazardous waste dumps could be better spent in Madagascar is in reality an argument for doing nothing at all.

Judge Breyer even accepts the highly dubious "richer is safer" argument against stringent regulation of activities that pose health and safety risks. This theory, which has few adherents in the academic community, posits that health and environmental regulation can harm human health through the adverse impact that it has on the economy. Breyer approvingly cites one estimate that "every $7.25 million spent on a cleanup regulation will, under certain assumptions, induce one additional fatality"[1] for the proposition that regulations that cost more than that amount per statistical life saved are counterproductive. The "certain assumptions" alluded to are for the most part entirely lacking in empirical support. They include the assumption that the money that employers save from not having to comply with strict OSHA standards will be passed on to workers, rather than shareholders, and the assumption that workers will spend that extra money on better diets, rather than cigarettes, and on less stressful leisure, rather than on jet-skiing or bungie-jumping. It is hard not to

---

[1] Vicious Circle, supra, at 23.

conclude that this argument is merely a conscience-salving makeweight to justify an antiregulatory posture arrived at on other grounds.

In sum, Judge Breyer has after much study formed fairly strong opinions about the need for and efficacy of federal health and environmental regulation. In his mind, the burden of justifying such regulation is on the would-be beneficiaries of such regulation, and they should be prepared to demonstrate not only that regulation will reduce health and environmental risks, but also that the money expended in doing so could not better be spent reducing some other risks. It seems reasonably clear that if Judge Breyer had been a member of Congress, he would not have supported many of the current health and environmental statutes. But Judge Breyer is not running for Congress; he has been nominated to fill a vacancy on the Supreme Court. The Supreme Court cannot enact or repeal legislation, but it can profoundly affect how regulatory agencies implement congressional enactments. Therefore, to answer the question whether Justice Breyer would be hazardous to the public health, we must examine his views on the proper role of the reviewing courts in implementing health and environmental legislation.

The Role of Federal Courts in Health and Environmental Regulation.

To understand how a Supreme Court Justice could possibly have an adverse effect on human health or the environment, one must begin with an understanding of the role that federal courts play in federal regulation. Under prevailing doctrines of Administrative Law, arising out of the federal Administrative Procedure Act (APA) and various substantive statutes, the federal courts play a profound role in health and safety regulation. Congress has in many cases assigned the federal courts the role of

stimulating action by lazy or recalcitrant federal agencies. The APA provides that a reviewing court may compel agency action that is "unlawfully withheld or unreasonably delayed," and specific deadlines in many environmental laws provide Congress' guidance on how long particular tasks should take.[1] The net result has been a long line of "bureaucracy forcing" cases in which the beneficiaries of delayed regulatory programs secure court orders forcing health and environmental agencies to issue orders or promulgate rules by dates certain.[2] For example, during the 1980s, nearly every health standard issued by the Occupational Safety and Health Administration (OSHA) came only after a court had ordered OSHA to take up the topic and decide whether or not to promulgate a regulation prior to a judicially determined deadline.[3]

The federal courts are also empowered to review agency orders and rules after they have been promulgated and issued. Courts engaged in judicial review of agency action can perform three basic functions. First, a court can review the agency's interpretation of a statute or the constitution. In some cases petitioners allege that the agency's action is unconstitutional or outside of the agency's delegated powers and ask the court to restrain such unlawful exercises of bureaucratic power. More frequently, petitioners accept the agency's power to address a particular topic, but

---

[1] 5 U.S.C. § 706(1).

[2] See generally Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Administrative Law Review 171 (1987); Neil R. Eisner, Agency Delay in Informal Rulemaking, 3 Ad. L. J. 7 (1989); John D. Graham, The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act, 1985 Duke Law Journal 100.

[3] See Thomas O. McGarity and Sidney A. Shapiro, Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration (1993).

challenge the agency's interpretation of the statutory language that empowers the agency.

Second, a court can set aside agency action that is "without observance of procedure required by law."[1] Petitioners often challenge agency action on the ground that the agency did not afford them an appropriate opportunity to present their side of the issues. Or the petitioners may claim that the agency failed make a required threshold finding or to prepare a necessary analytical document such as an environmental impact statement or a regulatory flexibility analysis. These challenges do not go to the existence of agency power or to the correctness of the agency's conclusions. Rather, the challengers are insisting that the agencies "go by the book" in taking actions that affect their interests.

Third, petitioners may challenge the substance of the agency's resolution of an issue or issues at the end of the relevant procedures. The Administrative Procedure Act and many agency statutes require an agency's explanation for its action to come up certain minimum measures of rational decisionmaking. For the most part, agency action taken after formal proceedings, such as licensing hearings, must be supported by "substantial evidence" in the record made before the agency.[2] Informal agency action, such as standard setting, must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3]

Given the extraordinary potential for a court playing one or more of these three

---

[1] 5 U.S.C. § 706(2)(D).

[2] 5 U.S.C. § 706(2)(E).

[3] 5 U.S.C. § 706(2)(A).

roles to disrupt an agency's policymaking initiatives, it should come as no surprise that agencies are very aware of the possibility judicial review and adjust their conduct accordingly. Applied with the deft touch envisioned in the Administrative Procedure Act, judicial review can be a bulwark against the arbitrary exercise of bureaucratic power. But judicial power can also be abused. Overly aggressive judicial intrusion into the administrative process can greatly hinder the implementation of laws designed to protect human health and the environment from dangerous private conduct. If regulatory agencies like EPA and OSHA are not allowed to perform their assigned tasks in an expeditious fashion, unprotected workers will be killed and maimed, and irreparable environmental damage will needlessly result. It therefore behooves us to examine where Judge Breyer, an acknowledged expert in administrative law, stands on these somewhat arcane questions concerning the scope of judicial review of administrative action.

Judge Breyer on Statutory Interpretation.

Since 1984, courts reviewing agency interpretations of their own statutes have been guided by the so-called *Chevron* doctrine. The Supreme Court announced that doctrine in a case involving an environmental group's challenge to EPA's policy of allowing major sources of pollution in areas that did not meet air quality standards to add new equipment or modify existing equipment without EPA review so long as they came up with offsetting reductions in emissions within the same plant. As a prelude to examining the statutory basis for this "bubble" policy, the Supreme Court spoke to the role of courts in interpreting agency statutes:

> When a court reviews an agency's construction of the statute which it

> administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

This prescription for a very limited judicial role in statutory interpretation of agency statutes has received a great deal of academic criticism, and it is not always clear that the lower courts follow it religiously. Reviewing courts, including the Supreme Court itself, are sometimes inclined to find the statute clear on its face when they disagree with the agency's interpretation and to stretch to find ambiguity when they agree with the agency.

The existing sample of Judge Breyer's opinions involving judicial review of statutory interpretation is too small to support any firm conclusions about his

inclination to defer to agencies' interpretations of their own statutes. But his writing on the subject indicates that he believes that the *Chevron* test is too simplistic to provide guidance to the lower courts, given the wide variety of situations in which agencies are called upon to interpret their own statutes.[1] Judge Breyer doubts that judges, who develop their own expertise in interpreting statutes, can adopt the deferential frame of mind that the *Chevron* test demands:

> [S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, and that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute . . . and that the "better" view is "correct," and the alternative view is "erroneous."[2]

Given Judge Breyer's skeptical view of the deferential *Chevron* test, we should expect *Justice* Breyer to reach his own conclusions about the "better" view of the environmental statutes. Since Judge Breyer is not sympathetic to the existing statutory regime for health and environmental regulation, Justice Breyer may be inclined to interpret health and environmental statutes narrowly to preclude health and environmental agencies from taking aggressive action at the outer edges of their

---

[1] Judge Breyer has also written on the related question of the role that legislative history should play in judicial interpretation of statutes. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1991). In this article, Judge Breyer convincingly rejects Justice Scalia's radical suggestion that legislative history should play no role in statutory interpretation.

[2] Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986) [hereinafter cited as Judicial Review].

statutory authority. Justice Breyer's presumption in favor of allowing markets to function without government intrusion may not easily be overcome by an agency's interpretation of its statute to allow governmental intervention.

Judge Breyer on Agency Procedures.

Although Judge Breyer has had very little to say in the academic literature about judicial review of an agency's procedural choices, he has authored four opinions in cases involving challenges to agency failures to prepare environmental impact statements (EISs). The court in two of the cases ruled in favor of the agencies;[1] in one case the court required the agency to prepare an EIS;[2] and in another case the court required the agency to prepare a supplemental EIS.[3] In none of the cases was the agency clearly out of bounds in failing to prepare an EIS. Yet in all four cases, Judge Breyer examined very carefully the agency's reasons for foregoing the EIS and measured the agency's explanation against the materials assembled in the substantial administrative records. Given that the Supreme Court has not once in NEPA's twenty-

---

[1] City of Waltham v. U.S. Postal Service, 11 F.3d 235 (1st Cir. 1993) (EIS not required for construction of a Postal Service regional distribution facility); Citizens for Responsible Area Growth v. Adams, 680 F.2d 835 (1st Cir. 1982) (EIS not required for private construction of hanger for corporate jets).

[2] Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (EIS required for proposed cargo port and causeway on Sears Island).

[3] Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983) (supplemental EIS required for federal auction of drilling rights off Georges Banks, given government's drastically reduced estimate of amounts of oil yields likely to result).

five year history ruled against an agency, Judge Breyer's apparent willingness to do so half the time may indicate an activism with respect to this particular procedural issue that is currently lacking on the Court.[1]

Judge Breyer on Substantive Judicial Review of Agency Action.

Judge Breyer has had a great deal to say in the academic literature about the role that reviewing courts should play when they engage in substantive judicial review of agency action under the "substantial evidence" and "arbitrary and capricious" tests. Under existing judicial precedent "substantial evidence" means "more than a mere scintilla." It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] An informal agency action is "arbitrary and capricious" if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

---

[1] Judge Breyer's opinion in *Watt* demonstrates an inclination to require agencies to engage in meticulous cost-benefit analysis. Although there is strong judicial precedent for requiring agencies to engage in a "finely tuned" cost-benefit balancing in NEPA cases, Calvert Cliffs' Coordinating Comm. v. v. AEC, 449 F.2d 1109 (D.C.Cir. 1971), cost-benefit analysis is not as clearly required in statutes empowering EPA and OSHA to take actions to protect health and the environment, and it is in fact forbidden by statute in some contexts. See American Textile Mfrgs. Inst. v. Donovan, 452 U.S. 490 (1981) (occupational health standards); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (1980) (national primary ambient air quality standards).

[2] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

expertise.[1]

Both of these tests appear at first glance to be quite deferential, but they both leave substantial room for courts to substitute their policy judgments for those of the agencies. We have seen that Judge Breyer has strong opinions about the policies that should govern health and environmental regulation. The paramount question in the area of substantive judicial review is whether he will substitute his policy preferences for those of the health and environmental agencies.

Judge Breyer's writings suggest that he believes that the courts should take a deferential approach toward substantive judicial review. He is particularly sensitive to the question of the institutional competence of federal courts to second-guess agency attempts to resolve highly complex and uncertain science/policy disputes:

> . . . The court may not appreciate the agency's need to make decisions under conditions of uncertainty. Compromises made to secure agreement among the parties may strike a court as "irrational" because the agency cannot "logically" explain them.
>
> [C]ourts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand. . . .

---

[1] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983).

> . . . The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo.[1]

Yet most of the examples that he cites of judicial overreaching involve cases in which the agency action was deregulatory in nature and therefore consistent with his laissez faire policy presumption.[2]

The critical question, on which Judge Breyer's existing judicial opinions shed very little light, is whether *Justice* Breyer will retain this sympathetic posture when the agency action runs counter to his strongly held preference for free markets. The reviewing courts have tremendous discretion under the "substantial evidence" and "arbitrary and capricious" tests to find gaps in the agency's analysis, to question the agency's assumptions, and to second guess how the agency resolves science/policy questions. The temptation for the judge to substitute his or her weltanschauung

---

[1] Judicial Review, supra, at 388-91.

[2] For example, Judge Breyer is critical of the Supreme Court's opinion in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983), a case in which the Court remanded a deregulatory initiative by the National Highway Traffic Safety Administration withdrawing a previous rule requiring auto makers to incorporate passive restraints in automobiles manufactured after 1984. See Judicial Review, supra, at 395. At the same time, Judge Breyer cites the Fifth Circuit opinion in Aqua Slide'N'Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978) as an example of a court's ability under even a relaxed judicial supervisory attitude "to catch the occasional agency policy decision that is in fact highly irrational." Judicial Review, supra, at 395. The Fifth Circuit in *Aqua Slide'N'Dive* overturned a regulation of the Consumer Product Safety Commission aimed at making swimming pool slides safer for the public. From a perspective other than Judge Breyer's presumption in favor of free markets, the agency action was not at all irrational. The Fifth Circuit opinion is in many respects a paradigm of overly strict judicial review.

for that of the appointed regulatory officials can be overwhelming. But it must be resisted if agencies are to be allowed to implement congressionally enacted regulatory programs to protect public health and the environment. For, as Judge Breyer clearly recognizes, a judicial remand of an important regulation can have a tremendous impact on the ongoing viability of a regulatory program.[1]

Conclusion.

Will Justice Breyer possess the fair-mindedness to consider the opinions of experts on both sides of science/policy debates? Will Justice Breyer have the humility to shelve his personal policy preferences and allow regulatory agencies to pursue the "last ten percent" of the health and environmental risks that Congress has empowered them to regulate? Will Justice Breyer exercise the good judgment to defer to congressional policy determinations when they differ dramatically from his own considered conclusions, even when he knows that he has thought longer and harder about the underlying issues than any individual congressperson?

The members of the Senate Judiciary Committee should press Judge Breyer hard for honest answers to all of these questions. Judge Breyer's policy prescriptions are a matter of

---

[1] Judicial Review, supra, at 383.

public record. However, the record is still incomplete on how Justice Breyer will resolve the tension between his views on the proper role for regulation in society and his views on the proper role for the courts in reviewing regulatory agency actions. Only after Judge Breyer has publicly addressed this tension can we know whether Justice Breyer will be hazardous to our health.

CRITICISM RUN AMOK

Comments by
Clarence Ditlow, Executive Director,
Center for Auto Safety
and
Joan Claybrook, President,
Public Citizen

Introduction

In chapter 5 of his 1982 book, "Regulation and Its Reform," Judge Stephen Breyer tries to use the National Highway Safety Administration (NHTSA) as an example of regulatory failure in standard setting. As the following shows, NHTSA's standard setting has saved hundreds of thousands of lives and untold billions of dollars for consumers despite strenuous opposition from industry.

Until passage of the National Traffic and Motor Vehicle Safety Act and its companion Highway Safety Act in 1966, Americans did not have Federal regulatory agencies to protect them from death and injury on the nation's highways. In that year, 53,000 people were killed and 1.9 million injured. If the 1966 fatality rate of 5.70 deaths per 100 million vehicle miles traveled had continued,[1] over 165,000 people would have been killed in traffic accidents in 1993. Instead, the death rate was 1.8 and 39,800 were killed. The cost to society of motor vehicle accidents is well over $100 billion.

Failure of the Auto Industry in a Free Market

The first point that Judge Breyer misses is that left to its own in a free market, the auto industry delivered increasing deaths, property damage, air pollution and wasted resources. For the first 75 years of its existence, the motor vehicle industry was unregulated and could have produced safe, efficient and clean cars but chose not to do so. In fact, the auto companies conspired to suppress the development of pollution control technology that would have made cars cleaner and more fuel efficient, knowingly held back such simple, lifesaving technologies as laminated windshields and opposed the funding of mass transit that would have made the nation less reliant on the motor vehicle.

NHTSA Standard Setting

Head Restraints: Judge Breyer singles out NHTSA's Head Restraint Standard (FMVSS 202) as an example of an ineffective regulation. Under Executive Order 12291 issued by President Reagan in February 1981 requiring Federal regulatory agencies to evaluate major rules, NHTSA evaluated the head restraint standard and found that FMVSS 202 prevented 64,000 injuries in rear impacts annually saving $2,150 per injury based on average insurance company compensation for whiplash injuries. Thus the annual saving in injury costs was over $135 million for this standard.

NHTSA found that the number of injuries prevented would have been 85,000 if all car companies had used integral head restraints instead of using adjustable head restraints in two-

---

[1]While fatalities climbed steadily from 1900 to 1966, the fatality rate decreased through 1961 to 5.16 when it began to climb again as the auto companies increased horse power and performance. The enormous increase vehicles and miles traveled overwhelmed any decrease in the death rate and produced an annual death toll of 40-50,000 that society found unacceptable.

thirds of their new cars. The choice of adjustable over integral head restraints flies in the face of cost-benefit analysis because the purchase price increase for integral restraints is only $6.65 versus $24.33 for adjustable restraints. Given a performance standard which Judge Breyer favors, the auto makers picked the more costly and less effective technology to meet the standard. If Congress had given NHTSA the authority to mandate a design standard requiring integral restraints, the benefits would have outweighed the costs by 3.4 to 1.

Passive Restraints: In his criticism of NHTSA's issuance of the passive restraint standard, Judge Breyer engaged in sloppy research or deliberate revisionist history. Judge Breyer assumes the ignition interlock (that required seat belts to be fastened before a car could be started) substitute for airbags in 1974 was an idea of NHTSA. In fact, it was an idea of Ford and its lawyer Lloyd Cutler to head off airbags.

The protracted delay in installing airbags in cars was not due to some fatal flaw in standard setting but was rather due to scorched earth opposition of the auto companies who saw airbags giving auto safety regulation a good name. In overturning the Reagan Administration's revocation of the passive restraint rule in 1983, the U.S. Supreme Court called it right in a 9-0 unanimous decision saying, "The auto industry waged the regulatory equivalent of war against the airbag, and lost."

What better justification can there be of auto safety regulation than that it delivered the lifesaving airbag, a technology too good to destroy and developed only because NHTSA used its technology-forcing power to require the auto industry to develop them. Separate studies done by the Insurance Institute for Highway Safety and NHTSA both show airbags reduce occupant deaths by 28 to 29 percent. When all cars and vans are equipped, 9,000 to 12,000 lives a year will be saved and a quarter-million injuries a year will be prevented by this important public health regulation.

Fuel Economy (CAFE) Standards: Judge Breyer makes a passing criticism of NHTSA setting of corporate average fuel economy (CAFE) standards. His criticism is so short because the program is so good. CAFE standards are simply the most successful energy conservation program adopted by the United States. Today, we save nearly 3 million barrels per day of petroleum due to improvements in fuel economy since Congress enacted the Energy Petroleum Conservation Act of 1975 which required NHTSA to adopt CAFE standards. The success of this program has helped reduced gasoline prices and has reduced our dependence on uncertain supplies of oil from the Persian Gulf.

Passenger car fuel economy has more than doubled since then while the vehicle fatality rate has been cut in half in the same time. But for the fact that the Reagan/Bush Administration rolled back CAFE standards for passenger cars and failed to increase CAFE standards for light trucks and vans, we would now be saving over 5 million barrels per day of petroleum. CAFE worked until the Reagan Administration stopped it at the behest of the auto industry.

Bumper Standards: Judge Breyer reluctantly concedes the 5-mph bumper standard worked but attributed it to luck rather than sound analysis. Talk about sour grapes. According to Judge Breyer, this regulation worked because NHTSA guessed right that the industry would use soft face bumpers rather than steel. This was not a matter of guessing but hard work and effective analysis. Anyone who was knowledgeable about the industry realized that soft face bumpers were the bumpers of the future. Ironically, the one regulatory success cited by Judge Breyer was later repealed by the Reagan Administration when it rolled back the 5-mph bumper standard to 2.5-mph in 1982 -- a devolution upheld by Judge Robert Bork.

Tire Ratings: A constant theme of Judge Breyer is that regulatory agencies take too long to issue standards, as was the case with NHTSA when it took nearly 10 years longer than Congress wanted in issuing uniform tire quality grading standards (UTQGS). What Judge Breyer overlooks is that the delay is not due to inefficiencies on part of the agency but frivolous opposition by the regulated industry, including protracted court battles.

The tire industry waged regulatory war against UTQGS just like the auto industry waged regulatory war against the airbag. There were court challenges, Congressional hearings and White House interference just as there was with airbags. Only a citizen suit brought by Public Citizen forced the agency to take action. But this cannot be cited as an example of poor standard setting. If anything, it is heroic overcoming of objections raised by a regulated industry. The proof of the success of UTQGS is that since it has been adopted as a result of citizen litigation, tire treadwear has increased dramatically as the rating system has forced tire companies to compete to produce longer lasting tires.

Large Truck Antilock Brakes: Judge Breyer asserts that NHTSA's technology-forcing regulation for truck brakes "worked very badly ..." because some systems did not work and "the systems changed too rapidly for mechanics to adjust." He says "the agency and industry were wrongly optimistic about how much could be quickly accomplished" and suggests the agency's lack of information makes it difficult to know whether compliance was impossible or the industry did not try hard enough (pp. 106-7).

Technology forcing standards are indeed complex and difficult. But in this case the reasons for the problems with the first brakes produced to meet the standard are well known. First, the standard was not rushed. It was first proposed five years before the effective date, with various amendments along the way to accommodate industry critiques. Second, the major truck brake manufacturing companies were convinced that Gerald Ford, who became president in 1974, a year before the standard took effect, would revoke the standard at their request. As a result, they resisted investing in preparations for manufacture. When the standard was not revoked, they rushed into production at the last moment and made lousy systems.

Other companies, specifically Delco and Wagner Electric, began producing competing systems in 1977 which had none of the problems in the first systems manufactured. The standard was not a failure. Many of the first products were inadequate and some did not even comply because of industry negligence. The agency ordered a number of recalls. But in a weird decision three years after the standard took effect in a trucking industry lawsuit, the 9th Circuit said the agency erred in setting the standard but based its decision on experience with systems manufactured after the standard took effect -- information not known to the agency when it issued the standard.

The concept of electronic rather than mechanical brakes to stop 80,000 pound trucks in shorter distances and keep them in the lane of traffic without jackknifing has been proven successful beyond any doubt. Mechanical brakes are notoriously inadequate for these behemoths. In 1991, Congress, irritated that the agency has not reissued the standard after 13 mostly Reagan/Bush years, mandated a rulemaking on antilock brakes with specific deadlines. With this clear guidance, the agency has acted to reissue the standard.

Naive Criticism

Some of Judge Breyer's criticism of NHTSA is simply naive. He claims that "NHTSA...did not simply consider how it might best save lives" (p. 101). To the contrary, reduction of death and injury are the criteria mandated by the statute and have been used by NHTSA from the very beginning in selecting what standards to issue.

The agency has also made major changes in its rulemaking actions over the years as its information and sophistication advanced but has always been guided by its lifesaving criteria. The first static standards were based on (but not identical to) existing standards. Next came crash test dynamic standards, and then dynamic standards measuring injury levels of dummies instrumented to simulate humans. All of this has been accomplished despite harsh budget cuts at crucial times and a lack of political support in the White House over many years.

In place of head restraints, Judge Breyer suggests "even a very rough cost-benefit analysis" might have led NHTSA to work "on mandating special devices to stop illegal speeding, such as flashing lights on the outside of a car that would indicate a speed of above 60 mph" (p. 101). What Judge Breyer failed to realize is that most whiplash injuries occur in rear impacts in urban areas with speeds of impact under 40 mph. Regardless of the political feasibility of making every car that goes over 60 mph look like a pinball machine, it would do nothing to reduce whiplash injuries because most of the offending cars are going no faster than 40 mph.

In addition, the flashing light concept is highly speculative, can be very dangerous on the highway, and was summarily rejected for further exploration in agency appropriations hearings in 1977.

Judge Breyer also suggests NHTSA should have tried to improve brake maintenance instead of mandating new brake technology (antilock brakes -- he calls them interlock). But the agency has no statutory authority to require improved brake maintenance, and did in fact urge the trucking industry to improve training for its brake mechanics.

Judge Breyer also criticizes NHTSA for relying on voluntary SAE standards for its first set of mandatory standards adopted in 1968. According to Judge Breyer, making the SAE standards mandatory was a mistake because previously auto companies could "reject the standards if they are absurd, inappropriate, or simply wrong." p. 102. What Judge Breyer fails to realize is that the SAE standard-setting process was controlled by an oligopoly of GM, Ford and Chrysler. SAE never set a standard the Big Three didn't want. When Congress passed the 1966 Motor Vehicle Safety Act, it specifically criticized the SAE standards as being inadequate and failing to stem the rising tide of traffic fatalities. NHTSA used only a few elements of SAE standards very selectively in its initial safety standards.

Judge Breyer discusses performance and design standards but does not apparently understand what a performance standard is. For example, he says, "...it may be as easy for the agency to write its standard directly in terms of performance goals, such as cleaner air or fewer injuries. On the other hand, performance standards are often difficult to enforce, because they lead to complex arguments about the appropriate testing procedure for differently designed machines" (p. 105).

A performance standard does not measure the amount of injuries reduced. It contains a test procedure, as for example with Standard 208 for passive restraints that an instrumented dummy cannot suffer significant injuries in a crash test at 30 mph.

Judge Breyer emphasizes many times that "The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard" (p. 109).

While he makes interesting and accurate statements about deficiencies in information such as self-interested industry information and industry withholding information to undercut agency action, he suggests no remedies (such as the use of subpoenas or other mandatory devices that NHTSA used for fuel economy rulemaking).

Also, he doesn't indicate any appreciation for the role of agency technical and scientific research which includes real world and proving ground testing, surveys, opinion polls, marketing research, collection of statistical and in-depth data on crashes, injuries and deaths, and on industry production plants, materials and testing, statistical analysis, production of model and experimental vehicles and systems, to mention a few areas. For example, NHTSA spends almost a third of its budget (over $40 million a year) on very sophisticated research in-house and with outside consultants and universities for motor vehicle and highway safety standards.

Judge Breyer appears uninformed about agency research for rulemaking. He describes the agency effort as follows:

"It will obtain the information, in part, through research by agency staff, as they consult research literature and talk to employees of other agencies. Before the agency formulates an initial proposal, the staff may consult widely outside the agency as well. Staff members will telephone, write letters to and arrange meetings with independent experts, industry experts--in fact anyone they consider knowledgeable. Once the Notice of Proposed Rulemaking is promulgated, however, staff members may feel less free to consult widely. ... Obtaining accurate, relevant information constitutes the central problem for the agency engaged in standard setting. It has difficulty finding knowledgeable, trustworthy sources ..." (pp. 102-3).

"Developing information within the agency avoids the taint of industry self-interest, but the agency may lack the requisite technical ability. NHTSA was unable to develop fuel conservation standards, for example" (emphasis added) (p. 111). He indicates NHTSA lacked firm-specific information. He's wrong about the standards and about firm-specific information. NHTSA research evaluated every transmission and engine plant for every U.S. company, what was produced in terms of size and output, how many sold each year etc. In other words, NHTSA knew not just about each company, but about each make/model in preparation for issuance and as well as for evaluation of standards.

Conclusion

Overall, NHTSA regulation of the auto industry has been a dramatic success with over 200,000 lives saved to date, over 2 million injuries prevented, billions of dollars of accident loss avoided, and over 100 million gallons of gasoline saved every day. To the extent there are inefficiencies in NHTSA's actions, it is because of loopholes in the law exploited or created by the auto industry.

Judge Breyer never mentions that most of the problems with truck brakes, passives, tire information and bumpers flowed from the lack of leadership in the Nixon/Ford years when the president disliked or at best was ambivalent about regulation while the industries (tire, truck, auto, bumper) were all tigers against these standards. Who can forget the Henry Ford/Iacocca meeting with President Nixon memorialized on the Watergate tapes where the captains of industry asked the President to revoke the air bag rule and he did?

Of the six NHTSA safety standards he uses to show the failures of the current regulatory/adversary system, four (passive restraints, tire information, bumper damageability, and fuel economy) were completed during the Carter Administration with no difficulty under the administrative procedures he claims are problems. And all of them were difficult, technology-forcing standards vehemently opposed by the relevant industries.

He also never mentions the budget and top staff cuts the agency has suffered, particularly in the Reagan years, which to this day have hamstrung NHTSA in development of much needed technical information. It is amazing the agency got as much done as it did.

NHTSA regulation could be even more successful than it is if there were (1) citizen suits or rights of action to enforce mandates under the Safety Act, (2) broader standing to challenge agency inaction, (3) criminal penalties for violation of the Safety Act, (4) NHTSA authority to issue design as well as performance standards, (5) restored NHTSA funding cut by Congress under pressure from industry lobbyists, and (6) restoration of the antitrust injunction against joint industry lobbying and research on safety, emissions and fuel economy.

The main thesis of Chapter 5 "Standard Setting," focusing primarily on NHTSA, is that regulation under the procedural protections of the Administrative Procedure Act has many pitfalls and with its reliance on an adversary process, it generally does not work well. The better alternative, says Judge Breyer, is negotiation among various interested parties--the industry, academics, consumers and the agency.

For example, he says, "The procedural requirements of 'notice and comment'

rulemaking encourage the agency to use a back-and-forth adversary trial-and-error approach to obtain information and develop standards" (emphasis added) (p. 116).

Difficulties with compliance are a reason "to seek negotiated standards that all parties feel are reasonable, so that firms will not resist compliance" (p. 114).

"Fairness in terms of an ability to hear and to meet arguments can be combined with effectiveness only if all interested parties can meet informally and make various suggestions until agreement is reached or all considerations are out in the open. But this discussion cannot take place through back-and-forth, notice/comment/revise procedures" (p. 117).

"This back-and-forth process may prevent the agency from revising the standard optimally in light of the last set of comments for fear of provoking new hearings. The agency may determine the standard's content initially through informal meetings and negotiation with those affected, later 'ratifying' the decision with a more formal procedure. The courts may hold this process unlawful, however, as an effort to circumvent the law's procedural requirements" (p. 117, fn. 44).

"One sees, for example, obvious major advantages for the agency in achieving mutually satisfactory ('negotiated') solutions, given the agency's comparative inability to secure necessary information--particularly as to costs and competitive impacts, the desirability of securing voluntary compliance procedures and industry cooperation in developing enforcement procedures, and the time and effort saved if judicial challenge can be avoided" (p. 118).

"One sees the time needed to develop standards as stemming in part from the difficulties of obtaining appropriate information and the need to force a multifaceted or 'polycentric' problem into an adversary mode" (p. 119).

Judge Breyer concedes that, "None of these problems warrants abandoning the standard-setting process, nor do these difficulties pose insurmountable obstacles. They are simply tendencies -- likely to be present -- that administrators must take into account when planning strategies for developing workable sets of standards" (p. 119).

But his entire chapter denigrates and undercuts the effectiveness of rulemaking for setting standards. Moreover, his points are often off base or lack thorough understanding of the work of NHTSA.

PROPOSED QUESTIONS FOR JUDGE BREYER

(1) QUESTION: "When your nomination was announced, you stated that your aspiration was to make the law work for 'ordinary people'. By that, did you mean, simply, that the law should serve the interests of the majority of the people? Or do you mean, also, that it should enhance their opportunity and capacity to participate actively in our democratic political life?"

Comment: For two reasons, all of the proposed questions get at matters of general attitude, not specific cases. First, nominees have learned to avoid specific questions. And, second, matters of attitude matter, and questions about attitude may actually stick with the nominee after confirmation. This first question -- again like the others -- is written so as to make it very likely that the nominee will hear himself making the desired answer. In this instance, the answer sets up the most fundamental problem of law in the late twentieth century: Do we want -- and can we have -- government for the people without government of and by the people?

(2) QUESTION: "The constitutional provision whose interpretation has most to do with the participation of ordinary people in our democracy is the Free Speech clause. Do you agree with Justice Brennan's reading of that clause that speech should be 'free, robust and wide open'? And, if so, what does that mean, in particular, for the opportunity and capacity for ordinary people to speak effectively?"

Comment: Justice Brennan offered this famous formula -- of great symbolic importance to constitutional lawyers -- in United States v. Robel, 389 U.S. 258 (1967). It represents one magnetic pole of free speech argument. Yet no lawyer will reject it.

(3) QUESTION: "Do you, then, agree that free speech protection should not be limited to the most politely 'reasonable' 'exposition of ideas' -- that it should extend to modes of expression most characteristic of ordinary people?"

Comment: The question invites the nominee to forswear the other magnetic pole of free speech argument. For decades, conservatives have used this formula to bias constitutional protection against ordinary people.

(4) QUESTION: "Do you agree, also, that the First Amendment demands more than a right of ordinary people to read or hear speech -- that it demands that they be empowered to participate, effectively, in speech themselves?"

Comment: In recent years, many conservatives have tried to collapse the right to produce speech into a

right to consume the speech of others. This, obviously, favors the powerful and well-to-do at the expense of ordinary people who do not own a broadcast license or other medium for promulgating their views?

(5) QUESTION: "Do you, then, agree with Justices White and Powell that the Amendment is concerned, importantly, with the distribution of effective opportunities to speak? That the very well-to-do or corporations should not be protected in 'drowning out' the speech of ordinary people? Or do you take the view that this concern is 'foreign' to the First Amendment?"

Comment: This gets to the crux. The pernicious idea that distributional concerns are "foreign" to the Amendment was famously stated in Buckley v. Valeo, 424 U.S. 1 (1976). Justice White's counter-view was stated not only in his Buckley opinion, but most notably in his majority opinion in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). Justice Powell's recognition of a "drown-out" concern came in First National Bank v. Bellotti, 435 U.S. 765 (1978).

(6) QUESTION: "Very often, the opportunity of ordinary people to speak effectively depends on access to forums for speech controlled and used by the well-to-do corporations. In recent years, some have interpreted the First Amendment to deny them this opportunity. Some have said that 'property' rights override free speech rights or that access would impermissably 'coerce' the rich to join in the speech of ordinary people, or that access must be denied to ordinary people because, otherwise, the rich supposedly would stop speaking themselves. What do you think of this idea that the rights of the well-to-do to speak 'trump' the rights of the majority of people?"

Comment: Now, we're in territory worrying to any nominee. But it poses one of the most vital problems of free speech law -- a problem which the Burger and Rehnquist Courts have often resolved in favor of the rich and corporations. Examples are Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). The great Warren Court opinion (by Justice Marshall) taking the other view was Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (now overruled). In 1980, the Court at least allowed States, if they so choose, to compel access to some such forums in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Richard Parker
Harvard Law School
Cambridge, Massachusetts
July, 1994

The CHAIRMAN. Thank you very much.
Dr. Wolfe.

STATEMENT OF DR. SIDNEY M. WOLFE

Dr. WOLFE. According to Judge Breyer, because the existing system fails to rationally cope with risk assessment management, a new entity, a priesthood of people outside of the regulatory agencies, the courts and the Congress, should be created, according to what he states in his book "Closing the Vicious Circle."

As a frequent critic of and litigant against FDA and OSHA, I am not here to say that these agencies are perfect, but I believe that through existing mechanisms, including the checks and balances of the other parts of the Government and citizen participation, that these agencies could be made to function better.

If there is one reason why they do not currently function better, it is not because of the absence of a Judge Breyer "risk superbody," but because of relentless interference with their function by corporations which withhold information, submit false information and otherwise obstruct the activities of these agencies.

I am just going to go through several examples, all of which are taken from his book "Closing the Vicious Circle." They are just representative examples of a much larger number of instances in which Judge Breyer has done I believe sloppy and often in many cases biased research.

The first has to do with the Delaney clause. Yesterday, when he testified here, he talked about we can't count molecules, what number of molecules, and the implication was that there is government regulatory activity being taken on the basis of a few molecules.

One of the ways of criticizing Federal health and safety regulations is to paint a statute as ridiculous. In his book, Judge Breyer paints the 30-year-old amendment to the Food, Drug and Cosmetic Act, the Delaney clause as ridiculous. The Delaney clause prohibits the addition of any food or color additive which, in well-done studies in animals or humans, has been shown to cause cancer.

On page 41 of the book, he states that:

> Occasionally, a statutory provision goes further itself, setting a standard that, if applied literally, seems unreasonably and pointlessly strict. The Delaney Clause seems to instruct the agency not to permit addition or packaging of or by any substance that contains even a single molecule of an offending chemical, however large the cost or small the risk.

In making this faulty assertion, Judge Breyer has either missed or ignored FDA's constituents policy, which was set over 10 years ago, which makes it clear that his fears of unreasonably and pointlessly strict interpretation of the Delaney clause are unfounded. This policy was upheld in the face of a Federal court challenge, and it arose over FDA's decision to approve a drug and cosmetic dye, Green 5, even though the dye contained trace amounts of a chemical impurity, p-toluidine, which itself was a carcinogen.

The FDA found that, although the contaminant carcinogen, when it was fed itself in large quantities, caused cancer, that it was there in such a small amount in the dye, that when the dye was fed to animals, they did not get cancer. It concluded this was not a food additive or a color additive, and in this case it showed that the

Delaney clause is a good law, that it has some reason and it is not "unreasonably and pointlessly strict."

Other errors in the book include his gross understatement of the number of workers who are injured or in this case killed every year from occupational cancer. He says that all people killed by cancer from pollution and industrial products amount to only 10,000 to 50,000 deaths a year. But in the footnotes, not in the text of the book, buried in the footnotes he has estimates ranging from 75,000 to 150,000 cancer deaths a year, and for occupational cancer alone one estimate is as high as 75,000.

But worse is the omission of the importance of preventing occupational cancer. He says that:

> Only a relatively small portion of these chemical induced cancers are preventable. In fact, almost all of the 10,000 to 100,000 occupational cancer deaths (the range in the book) are preventable.

To his credit, when I pointed this out to him, in the second edition of the book he changed it.

Most of the evidence for chemical induced cancer is among workers. Therefore, most chemical induced cancer from inexcusably delayed regulation of various substances, including benzene, cadmium, and chromium, is and has been preventable and regulatable. He also denigrates the ability to regulate cigarettes and tobacco, claiming that only 30 percent of those cancer deaths could be prevented. I think there is lots of evidence that that is not the case.

Another error in the book is that he seems to go with the OMB conclusion, as he calls it, that there is an overestimation of risk of a thousand or a million times, particularly in the area of environmental hazards. The conclusion that he cites is actually from an OMB economist, and this conclusion was attacked by a large group of prestigious risk-assessment experts, including the former Director of the National Cancer Institute.

In the letter they wrote to the White House, refuting this notion that there is a systematic 1,000 to 1,000,000 overstatement of risk, they said:

> The broader allegation that risk assessment is generically "conservative" is demonstrably suspect. * * * The OMB document (and the references cited therein) fails to provide any evidence that risk assessment is, in fact, systematically "conservative."

Finally, an example that you have discussed a number of times during this hearing, the toxic dump site in Kingston, NH, known because of its name in the litigation as *Ottati and Goss*. In the book, there are a number of statements that Judge Breyer makes referring to this case, including the idea that the site was mostly cleaned up, that it was a swamp and, therefore, children would not play there, and that the parties had agreed that half of the volatile organic toxic chemicals would evaporate by the year 2000.

In the actual opinions that he wrote on this case, and in other documents we have obtained, these statements are demonstrably false. The statement that the site was mostly cleaned up is refuted in his own opinion in the first circuit, in which he said:

> We remand this aspect of the case to the district court so that it can devise a further volatile organic chemical cleanup which, in light of its findings about danger to the public health, will adequately satisfy the public interest.

He also said in the opinion that:

The studies and related testimony indicate that such overstandard concentrations, too high concentrations of these toxic chemicals, are widespread and in significant amounts within the total test area.

Elsewhere in the opinions in his court and in the district court and in briefs filed in the case is other evidence that these statements about this case, which he uses repeatedly in the book to cite the example of ridiculous government regulation, are wrong. In the Government's brief, the site, this toxic dump site was referred to by one of the defendants' own counsel as "severely contaminated."

Other evidence concerning it has to do with levels of ground water contamination which, according to a State official I spoke to yesterday, are thousands of—are more than a thousand times higher than the allowable amount of contamination in ground water. And right now, despite the fact that Judge Breyer characterized this site as mostly clean several years ago, there is a massive cleanup effort beginning to try and do something about the ground water so that it does not migrate to adjacent sites where people are likely to live. He also characterizes it as a swamp, which it is not. It is actually zoned for rural residential use.

Finally, he claims again in the book that half of the volatile organic chemicals will evaporate by the year 2000, and the planned cleanup of the site belies that. In fact, that statement was made by the counsel for the defendant. The parties did not agree on that.

In conclusion, for me and for many others concerned about occupational and environmental health and food safety, it is extremely disappointing that President Clinton was unable or unwilling to nominate someone with a more enlightened attitude toward the solution of these serious problems. Although stating that economic considerations are not as decisive in health, safety, and environmental regulation, Judge Breyer's views as expressed in this book amount to an unfair and unwarranted bashing of the very Federal agencies who are trying to prevent toxic chemical-induced deaths and illnesses. I can only hope that, good listener that he is, Judge Breyer will listen to these concerns and, to use his terms, become more influenced by the humanity of John Donne than by the corporate hand of Adam Smith, as he appears to be at this time.

Thank you.

[The prepared statement of Dr. Wolfe follows:]

PREPARED STATEMENT OF SIDNEY M. WOLFE, M.D.

In statements made at these hearing on Tuesday, July 12, Judge Breyer said that he distinguished between classic economic regulation (airlines and trucks) and health, safety and environmental regulation. He said: "When you start talking about health, safety and the environment, the role [of economics] is much more limited, because there no one would think that economics is going to tell you how much you want to spend helping the life of another person. If in fact people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong? * * * That's a decision for Congress to make reflecting the values of people." Whereas there is no reason to question Judge Breyer's attitudes about the victims of natural disasters, his recent book, *Closing the Vicious Circle* deals exclusively with industry-caused disasters. Throughout the book are examples wherein he minimizes the risks of exposure to various chemicals and questions and deprecates health and safety laws or the efforts which the federal health and safety agencies make to protect the lives he professes to cherish.

According to Judge Breyer, because the existing system fails to rationally cope with risk assessment and its management, a new entity, a priesthood of people outside of the regulatory agencies, the courts and the Congress, should be created. As a frequent critic of, and litigant against the FDA and OSHA, I am not here to say

these agencies are perfect. I believe, however, that through existing mechanisms, including the checks and balances of the other parts of the government and citizen participation, that these health and safety regulatory agencies can be made to function better. If there is one reason why they do not currently function better, it is not because of the absence of a Judge Breyer "risk superbody," but because of relentless interference with their function by corporations which withhold information, submit false information and otherwise obstruct the activities of these agencies.

The examples of flawed and/or biased research by Judge Breyer which I will discuss are drawn from his recent book, *Closing the Vicious Circle,* originally published in 1993, with the slightly revised edition published several months ago. These are but a few representative examples of a much larger number which Judge Breyer discusses in the book.

THE DELANEY CLAUSE

One of the ways of criticizing federal health and safety regulation is to paint a statute as ridiculous. Judge Breyer, in *Closing the Vicious Circle* does just that with the Delaney Clause. This 30-plus year-old amendment to the Food Drug and Cosmetic Act prohibits the addition of any food (or color) additive which, in well-done studies in animals or humans, has been shown to cause cancer. On page 41 of the book, Breyer states that "Occasionally a statutory provision goes further, itself setting a standard that, if applied literally, seems unreasonably and pointlessly strict. * * * The Delaney Clause, applicable to food [and color] additives * * * seem[s] to instruct the agenc[y] not to permit addition * * * or packaging of or by any substance that contains even a single molecule of an offending chemical, however large the cost or small the risk."

In making this faulty assertion, Breyer has either missed or ignored FDA's constituents policy, which makes it clear that his fears of an "unreasonably and pointlessly strict" interpretation of the Delaney Clause is unfounded. This policy—in effect for more than a decade—has been upheld in the face of a federal court challenge. In 1982, the FDA approved a drug and cosmetic dye. Green 5, even though the dye contained trace quantities of a chemical impurity, p-toluidine, itself a carcinogen. Although p-toluidine alone, fed in large quantities, was a carcinogen, large quantities of Green 5, even though containing trace amounts of p-toluidine, *did not* cause cancer in animals. In its 1982 regulation approving of the dye, the FDA argued that p-toluidine itself was not a color additive and that, therefore, the Delaney Clause was inapplicable. This regulation was upheld in *Scott* v. *Food and Drug Administration* 728 F.2d 322 (6th Cir. 1984).

In this case, involving a direct color additive, it is clear that the FDA has the authority and flexil ility to apply the Delaney Clause, in the case of food or color additives, in a way which protects the public health but which, Judge Breyer notwithstanding, is not "unreasonably and pointlessly strict."

UNDERSTANDING OCCUPATIONAL AND ENVIRONMENTAL CANCER DEATHS

On page 6 of the book, Breyer states that the "range of expert estimates" for those cases of cancer which are caused by pollution and industrial products is from 10,000 to 50,000 deaths a year out of the 500,000 cancer deaths each year. In the endnotes, at the back of the book, however, is one expert estimate which has occupational toxic chemicals causing from 10 to 20 percent of all cancers and environmental toxic exposures causing from 5 to 10 percent of all cancers for a sum of 15 percent to 30 percent of all cancers or 75,000 to 150,000 cancer deaths a year. Another expert mentioned in the back of the book—former government occupational health physician Dr. Phillip Landrigan, now Chief of Occupational Medicine at Mount Sinai School of Medicine—estimated that occupational cancer along may account for as many as 75,000 cancers deaths a year. This is also cited in the references but ignored in the text of the book.

Equally striking is the omission, in the first edition of the book, of the importance of preventable occupational cancer. On page 6, it says that "only a relatively small portion of these [chemically-caused cancers] are preventable." In fact, almost all of the 10,000 to 100,000 occupational cancer deaths (the range of the expert estimates cited by Breyer in the book) are preventable and, to his credit, when this serious error was pointed out, the second edition was changed. Most of the evidence for chemical-induced cancer is among workers. Therefore, most chemical-induced cancer—from inexcusably delayed regulation of such substances as benzene, cadmium, chromium, ethylene oxide and many other chemicals—is and has been preventable and "regulatable."

ACCUSATIONS ABOUT OVERSTATING RISKS

On page 47 of the book, and in many other places, Breyer argues that, especially in the area of EPA and OSHA regulation, the magnitude of risk is greatly overstated. On page 47, Breyer says, "OMB argues that the agencies apply these assumptions too conservatively; it concludes that, taken together, they 'often' overstated risks by factors of 1,000 or even a million or more. * * * At the same time, even such assumptions sometimes can overlook special, much greater than average exposures—exposures via multiple pathways, or exposures that pose special risks to those who also smoke or are also exposed to other chemicals."

To illustrate his statement that OMB "concludes" that regulators who use conservative assumptions to estimate risk may overstate risks by 1,000 to one million times, Breyer cites OSHA's basis for setting standards for cancer-causing chemicals (page 46 of *Closing the Vicious Circle*): OSHA assumes factory worker exposure 8 hours a day, 5 days a week, 50 weeks a year for 45 years, that agency's example of this "conservatism".

In fact, OMB's conclusion about overstated risks is from a 1990 OMB report, "Current Regulatory Issues in Risk Assessment and Risk Management", written by OMB economist Richard Belzer. The report was attached by a prestigious group of experts in risk assessment including former National Cancer Institute Director, Dr. Arthur Upton, former *New England Journal of Medicine* epidemiology consultant and current Chair of the Department of Epidemiology, McGill University, Dr. John Bailar, Dr. Clark Health, Vice President for Epidemiology and Statistics, American Cancer Society and Dr. Adam Finkel, of the Center for Risk Management, Resources for the Future.

In a January 30, 1991 letter from these scientists to Dr. D.A. Bromley in the White House Office of Science and Technology Policy, they stated that "The broader allegation that risk assessment is generically 'conservative' is demonstrably suspect—The OMB document (and the references cites therein) fails to provide any evidence that risk assessment is in fact systematically 'conservative'."

In summary, on this point of a 1,000 to one million times overstatement of risk, the evidence to support such a claim is non-existent, in 1991 as well as the present.

TOXIC SUPERFUND DUMP SITE: KINGSTON, NEW HAMPSHIRE

In the first Superfund site case under that law, a toxic dump site, known as *Ottati and Goss* was the subject of litigation by EPA in a Federal District Court and in the First Circuit Court of Appeals in Boston, the court where Judge Breyer is the Chief Judge. The purpose of this example is not to challenge the First Circuit's upholding of the District Court's ruling that there was a need for abatement/remediation of the contaminated groundwater. Instead, the dispute is with the misleading way Judge Breyer characterizes this case in the book. On page 11 and 12, he says: "The site was mostly cleaned up." Referring to the concerns of children eating contaminated dirt on the site, he said "But there were no dirt-eating children playing in the area, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely. The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000."

What follows is drawn from the District Decision, the First Circuit's decision, and the government's (EPA's) brief (GB) and reply brief (RB) in the First Circuit Court of Appeals.

A. "The site was mostly cleaned up."

The site was *not* mostly cleaned up, and Judge Breyer knows this. Judge Breyer states, "We have examined those portions of the record that the parties have cited in their briefs." 900 F.2d 429, 432 (1st Cir. 1990). (a) IMC's (the remaining defendant's) own expert admitted that the average concentration of PCBs left on the site after cleanup was 87 ppm, "The contractor * * * seems to have accepted a characterization of an 'average' level of 87 [ppm] as reasonable." 900 F.2d 440, (b) A post cleanup study of 62 randomly selected test sites amounting to less than 1 percent of the site's total area, "uncovered 4 drums in that small area alone." Government Brief p. 40, (c) the PCB concentrations in the soil at the site are well above 50 ppm, and at least as high as 143 ppm. Three of five "samples exceeded 50 ppm (56, 134, and 143 ppm, respectively)," 900 F.2d 441, (d) "[t]he government's eight laboratory samples for VOCs at the IMC site post cleanup showed VOCs as high as 870 ppm," GB p. 46, (e) "[w]ithout VOC soil cleanup, the source of groundwater contamination will persist for decades," GB p. 47, and (f) IMC's own witness's statement that he "would be amazed if there were not some PCBs on the surface." Reply Brief, note 6. IMC also admitted using soil with PCBs up to 50 ppm as backfill, 694 Fed Supp 977, 982 (D.N.H. 1988).

B. "The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of highly diluted PCBs and 'volatile organic compounds' (benzene and gasoline components) by incinerating the dirt."

Not a "last little bit" (VOCs 870 ppm, average 87 according to IMC; 3/5 samples were greater than 50 PCBs, 900 F.2d 441).

The PCB left was not a small amount and was not highly diluted.

The VOCs left consisted of more than benezene and gasoline: acetone, arsenic, chloroform, creosol, toluene, trichloroethylene (which was found to be 3,000 times higher than the acceptable concentration in some of the wells), to name a few (comprehensive list at 630 Fed Supp 1361, 1383–90 (D.N.H. 1985)).

C. "But there were no dirt-eating children playing in the area there, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely."

A description of the site is found at 630 Fed Supp 1366. "The site is zoned rural residential according to the Kingston Zoning Ordinance," meaning "you can build a single family or a two story dwelling." Fed Supp 1000. "But the undisputed fact is that the site is zoned residential, which means that it may be developed for virtually any purpose." RB at 6.

There is no building there, but not because it is a swamp. "* * * IMBC's real estate witness stated that the site could have developed residentially but for the contaminate remaining on site, and explained that his conclusion concerning current development of the site was based on a view of the property during which he saw 'horrible looking water' and on the statement by IMC's counsel, after IMC's cleanup attempt, that the site was 'severely contaminated.'" RB at 7.

D. "The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000."

An IMC expert testified to this theory, 900 F.2d 440, but the Government disputed it in detail, "Allowing mere diffusion of VOCs in the soil rather than remediation would result in effectively condemning the site for use the foreseeable future, a 'remedy' plainly not permissible under Section 121 of CERCLA." See 42 U.S.C. 9621(b)(1) (strong preference for remedial action which "permanently and significantly reduces the volume, toxicity or mobility of the hazardous substance)." RB p. 7.

CONCLUSION

For me, and for many others concerned about occupational and environmental health and food safety, it is extremely disappointing that President Clinton was unable or unwilling to nominate someone with a more enlightened attitude toward the solution of these serious problems. Although stating that economic considerations are not as decisive in health, safety and environmental regulation, Judge Breyer's views, as expressed in this book, amount to an unfair and unwarranted bashing of the very federal agencies who are trying, to prevent toxic chemical-induced deaths and illnesses. I can only hope that, good listener that he is, Judge Breyer will listen to these concerns ad, to use his terms, become more influenced by the humanity of John Donne than by the corporate hand of Adam Smith, as appears to be the case at this time.

The CHAIRMAN. Thank you, Dr. Wolfe.

Mr. Constantine.

STATEMENT OF LLOYD CONSTANTINE

Mr. CONSTANTINE. Thank you, Senator. It is a pleasure to be back here again.

I oppose the nomination of Judge Breyer principally on the basis of his antitrust jurisprudence. One might ask why Judge Breyer's record in this area should be of substantial concern for the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe an understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to under-

standing his overall approach to the role of the judiciary in our society.

Antitrust scholars and practitioners widely recognize Judge Breyer to be among the major jurists revising and reinterpreting the antitrust laws according to one narrow school of economic thought.

In July 1990, I testified before the Commerce Committee concerning the capacity of antitrust law to address the problem of international trade predation. At that time I told Senators Gorton and Bryan that the antitrust laws had little remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the committee at that time. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison* while he reversed a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, MA.

On Tuesday, Judge Breyer said that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a price squeeze, which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price at which it sells electricity at retail. The remedy for this predatory practice is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices.

On Tuesday, Judge Breyer stated that he decided cases "one at a time" and that he did not "like to be professorial." However, in this decision, Judge Breyer expounds on many issues in cases not before the court. Although *Town of Concord* involved a price squeeze in a fully regulated industry, Judge Breyer went to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the soundness of Judge Learned Hand's classic price-squeeze analysis in the *Alcoa* case.

Judge Breyer then went on to unnecessarily expound to so-called single monopoly profit theory which, among neoclassical price theorists, is an article of faith. According to this theory, a monopolist will earn as much profit in a single market as it would if it extended its monopoly into a second market. Several conclusions flow from this theory. One is that in most cases the antitrust laws should not care if a monopolist extends his power from one market into another.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has set for cases which will come before him when he is on the Supreme Court. His opinion strongly predicts that Judge Breyer will vote to overturn the per se rule of illegality in trying cases. He will reject the rule against price squeezes in nonregulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market, are either competitively neutral or procompetitive. Finally, when the Supreme Court inevitably resolves the split in the circuits on whether monopoly leveraging constitutes a violation of section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's brooding concern for the rights and prerogatives of monopolists is a theme in many of his decisions.

For example, in the *Barry Wright* case, Judge Breyer found that a monopolist who made shock absorbers for the nuclear power plant construction industry did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 to 30 percent in response to the entry of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100-percent forfeiture of the contract price upon cancellation.

Taking the alleged exclusion acts one at a time, he ruled that none of them violated the antitrust laws. But this piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's brilliant analysis in *Alcoa.* An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe Machinery,* where, again, a series of separately lawful actions were held to collectively constitute illegal acts of monopolization.

Judge Wyzanski's famous statement still resonates today. He said:

> The dominance of any one enterprise inevitably * * * accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best.

In contrast, Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counterintuitive and contrary to the basic purpose of the antitrust laws.

In *Barry Wright,* the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which most antitrust judges consider lawful. But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers' incremental costs were also not predatory.

Again, in the *Kartell* case, Judge Breyer nullified a district court finding——

The CHAIRMAN. Excuse me, Mr. Constantine. You have gone way over, and I am in a bind. I have 2 minutes to get over there to vote. I am going to have to end your statement here. We will come back with Professor Estes. You can conclude when I come back, but I will be gone. There are going to be two votes back-to-back. I have 2 minutes to make this vote. I will vote and come back, and then we will go to Professor Estes and questions.

[Recess.]

Senator HATCH [presiding]. Mr. Constantine, why don't you conclude?

Mr. CONSTANTINE. OK. Well, thank you, Senator. I was just getting into finishing up.

As I was saying, in the *Kartell* case, Judge Breyer nullified a district court finding that Blue Shield, with a 74-percent share of the health insurance market, did not violate the antitrust laws by adopting a practice which fixed the prices received by virtually all

Massachusetts physicians. Judge Breyer honestly believes that, once again, a monopolist can be counted on to deliver lower prices.

What is totally missing from this decision—indeed, missing from all of Judge Breyer's decisions—is healthy skepticism about the long-term benefits of monopoly power, a skepticism which is the very core of the Sherman Act. Also missing is recognition of just how high and escalating were health care prices in an environment characterized by dominant rather than competing third-party payers.

To illustrate his method in *Kartell,* Judge Breyer compared buying health care to buying a fleet of taxicabs. Judge Breyer is undoubtedly a brilliant man, but much of the real world and the real marketplace is alien to him. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law when he is constrained only by his own sense of what is economically efficient.

In concluding, I would like to just briefly talk about the last antitrust decision by Judge Breyer in March of 1994, *Caribe BMW.* This was the first time in his career that he found for a plaintiff in an antitrust case. The decision is the most disturbing of all Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout was motivated by the widely known fact that he was under consideration for the next position on the Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act because BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to lower Caribe's retail prices by engaging in maximum vertical price fixing. It is true that maximum vertical price-fixing violates the law. However, Judge Breyer stretched as hard for the plaintiff, as he traditionally does for the defendant. It is also true that the rule against maximum vertical price fixing and the Robinson-Patman Act are the two most highly criticized antitrust rules. They are criticized because they usually prevent firms from lowering prices.

Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. So the result in this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMW's at lower prices to some of its customers and simultaneously being prevented from selling BMW's at a higher price to some of its customers. The context, timing, and result in this case exemplifies a degree of opportunism and cynicism which is disturbing.

I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way Judge Breyer approaches these vitally important cases in the future.

Thank you very much, Senator.

[The prepared statement of Mr. Constantine follows:]

PREPARED STATEMENT OF LLOYD CONSTANTINE

Chairman Biden and members of the Committee. Thank you for the opportunity to testify again, in this instance concerning the nomination of Judge Stephen Breyer to be an Associate Judge of the United States Supreme Court.

I am an antitrust litigator who represents plaintiffs and defendants including "Fortune 500" companies, small firms and groups of consumers.[1] I teach Antitrust Law at Fordham University School of Law. I have served as New York State's chief antitrust enforcer,[2] Chairman of the Task Force which coordinates antitrust enforcement for all 50 states,[3] Chairman of the New York State Bar Association's Antitrust Law Committee and as member of the Council of the American Bar Association Section of Antitrust Law.

I have devoted my professional career to antitrust law because I believe that along with civil rights and liberties, antitrust is at the center of our free and progressive society and has been central in making the United States the strongest and finest nation in the world.

I oppose the nomination of Judge Breyer. I do so principally on the basis of his antitrust jurisprudence. Given the fact that the Supreme Court typically renders only two to four antitrust opinions each year, among more than 150 full opinions, one might ask whether Judge Breyer's record in this area should be a substantial, let alone predominant, concern of the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe a sober and dispassionate understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to understanding his overall approach to the role of the judiciary in our society.

Antitrust law still has the capacity to be what the Supreme Court said it was, that is, "the Magna Carta of free enterprise."[4] However, antitrust is *not* that cornerstone of economic freedom today, because recent administrations and the federal judiciary have openly disregarded the explicit purpose and meaning of the antitrust laws, and reinterpreted them in accordance with one extremely narrow view of neoclassical price theory. Antitrust has been trivialized in what the scholar Frederick Rowe has termed "The Faustian pact between law and economics,"[5] a pact which has spread beyond competition law into the interpretation of environmental law and even the law of civil rights and civil liberties.

Antitrust scholars and practitioners widely recognize Judge Breyer to be, along with Judges Bork, Posner and Easterbrook, the mayor jurists revising and reinterpreting the antitrust laws according to one school of economic thought. Please allow me to illustrate. In July 1990 I testified before the Commerce, Science and Transportation Committee concerning the capacity of antitrust law to address the problem of international trade predation. I told Senators Gorton and Bryan that the antitrust laws had little deterence or remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the Committee. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison*,[6] while reversing a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, Massachusetts. In his colloquy with Senator Metzenbaum on Tuesday, Judge Breyer repeatedly stated that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a "price squeeze" which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price of which it sells electricity at retail. The remedy for this predatory and exclusionary practice, first exhaustively analyzed by Judge Learned Hand in the landmark *Alcoa* decision,[7] is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices. This would have the dual benefit of lowering all prices and increasing competition at the retail level.

More disturbing than the narrow result reached in *Town of Concord*, and the disingenuous manner in which Judge Breyer responded to Senator Metzenbaum's questions about his decision, is Judge Breyer's mode of analysis in this lengthy opinion. On Tuesday Judge Breyer stated that he decided cases "one at a time" and that he didn't "like to be professorial." Please Senators, read *Town of Concord* and judge for yourselves. In this decision Judge Breyer expounds on many issues and cases *not* before the court. Although *Town of Concord* involved what Judge Breyer considers the distinct case of a price squeeze in a fully regulated industry, Judge Breyer went

---

[1] Principal of Constantine & Associates, New York, New York.

[2] Assistant Attorney General In Charge of Antitrust, Office of the Attorney General, New York State, 1980–1991.

[3] Chairman Antitrust Task Force National Association of Attorneys General, 1985–1988.

[4] *United States* v. *Topco Associates*, 405 U.S. 596 (1972).

[5] Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics," 72 Geo. L.J. 1511 (1984).

[6] 915 F.2d 17 (1st Cir. 1990).

[7] *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the economic soundness and judicial administrability of Judge Hand's price squeeze analysis in *Alcoa*. Judge Breyer then went on to unnecessarily expound the so-called "single monopoly profit" theory which among neo-classical price theorists is an article of faith. According to this theory a monopolist will earn as much profit in a single market as it would if it extended its monopoly through leverage, or predation into a second market. The conclusions which flow from this theory are several. One is that in most cases the antitrust law should not care if a monopolist to do this in certain circumstances. Third, since the monopolist won't make any greater profit by doing this, evidence that it has done so is really just a mirage, for a rational monopolist would not try to extend its power if it would not be profitable.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has for cases which will come before him on the Supreme Court. His exposition of the single monopoly profit theory strongly predicts that Judge Breyer will vote to overrule established antitrust law in several cases. He will vote to overturn the *per se* rule of illegality in tying cases, involving firms with market power in the typing product. He will probably reject the rule against price squeezes in on-regulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market is either competitively neutral or pro-competitive. Finally, when the Supreme Court inevitably resolves the current split in the circuits on whether monopoly leveraging constitutes a violation of Section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's concern for the rights and prerogatives of lawful monopolists is a constant theme in several of his antitrust decisions.

For example, in *Barry Wright Corp.*, v. *ITT Grinnell Corp.*,[8] Judge Breyer found that a monopolist who made shock absorbers for nuclear power plant construction did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 percent to 30 percent in response to the entry into the market of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100 percent forfeiture of the contract price upon cancellation. Taking the alleged exclusionary acts one at a time, he ruled that none of them violated the antitrust laws. This piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's classic analysis of Alcoa's dominance of the aluminum industry, which resulted from a series of practices which did not separately violate the law, but which used together maintained a monopoly. An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe*,[9] where again a series of separately lawful actions were held to collectively constitute acts of monopolization in violation of Section 2 of the Sherman Act. Judge Wyzanski's famous statement in that case still resonates today: "the dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best." This completely alien to Judge Breyer's antitrust jurisprudence, which he articulates as a concern about lower prices. However, over and over again Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counter intuitive, and more important, contrary to the basic purpose of the antitrust laws.

Before leaving *Barry Wright*, I would point out that in that decision, once again, Judge Breyer reached out to decide cases not yet before his Court. In *Barry Wright*, the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which almost all antitrust scholars, judges and practitioners, I among them, would consider lawful and non-predatory. (Leaving aside the issue of the syncrgistic effect that this pricing had when used in combination with the other exclusionary practices in that case.) But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers incremental costs were also not predatory. Recall what Judge Breyer told you Tuesday about the judge's duty to only decide actual cases and controversies.

---

[8] 724 F.2d 227 (1st Cir. 1983).

[9] *U.S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Again in the *Kartell*[10] case which Judge Breyer advanced as exemplifying his goal of lowering prices, Judge Breyer nullified a district court finding that Blue Shield, with a 74 percent share of the relevant health insurance market, did not violate the antitrust laws by adopting a ban on "balance billing," which effectively fixed the prices received by virtually all Massachusetts physicians accepting Blue Shield patients. I believe that Judge Breyer honestly believes that he did the right thing in that case, and he believes once again a monpolist can be counted on to deliver lower prices. What is totally missing from this decision, and indeed missing from all of Judge Breyer's decisions, is healthy skepticism about the long-term benefits of monopoly power, a skepticism which *is* the very core of the Sherman Act. Also missing is any recognition of just how high and out of control were healthcare prices in an environment characterized by dominant rather than competing third party payers. Also missing from the decision is any concern for the quality of healthcare which may be a paramount concern in this area. Antitrust not only demands low prices but high quality. Indeed, to illustrate his method in *Kartell*, Judge Breyer resorts to an analogy about the buyer of a fleet of taxicabs[11] and observes that if Blue Shield's practices were truly anticompetitive, there would not be a steadily increasing supply of doctors in Massachusetts.[12] If you don't understand the logic of this supply and demand argument, equating the purchase of healthcare with purchase of a fleet of cabs, please refer to Judge Breyer's diagram at Appendix B of his opinion in *Town of Concord*. Judge Breyer is undoubtedly a brilliant, good and honest man, but much of the real world and real marketplace is alien to him. One of the reasons many people voted for President Clinton was his pledge to appoint to the Supreme Court, people with a broader background. Broader than people like Judge Breyer who have gone from law school to clerkship, to law faculty to the Court, with a segue to position with this Committee. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law, when as a Supreme Court Justice he is constrained only by his own sense of what is logical and economically efficient.

The last case I will address is Judge Breyer's March 1994 decision in *Caribe BMW*,[13] when for the first time in his career he found for a plaintiff in an antitrust case. This decision in my opinion is the most disturbing of all of Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout in antitrust ideology and mode of analysis was motivated by the wisely known fact that he was under consideration for the next seat on the High Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act. Caribe said that BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to *lower* Caribe's retail prices by engaging in *maximum* vertical price fixing. It is true that maximum vertical price fixing violates the law. However, Judge Bryer stretched as hard for the plaintiff, as he traditionally does for the defendant, to find a plausible violation of the law here. It is also true that the rule against maximum vertical price fixing is one of the two most highly criticized antitrust rules. It is criticized because it often prevents firms from lowering prices, which Judge Breyer articulates as the antitrust laws' appropriate core concern. Senator Metzenbaum will not that his bill to codify the *per se* rule against vertical price fixing has never included the maximum vertical price fixing offense.

In *Caribe*, Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. Robinson-Patman is the other of the two most highly criticized provisions of antitrust, again because it allegedly raises prices. To sustain the Robinson-Patman claim, Judge Breyer had to break new ground, applying, I believe correctly, the rule of the *Copperweld*[14] case to the Robinson-Patman Act. The result tin this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMWs at a low price to some of its customers because of price discrimination and simultaneously being prevented from selling BMWs at a higher price to some of its customers because of maximum vertical price fixing. The context, timing and result in this case exemplifies a degree of cynicism which is disturbing.

---

[10] *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F. 2d 922 (1st Cir. 1984).
[11] 749 F. 2d at 929.
[12] 749 F. 2d at 927.
[13] *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994).
[14] *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (19845).

Judge Breyer will be confirmed. I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way he approaches these vitally important cases in the future.

Senator HATCH. Mr. Estes.

STATEMENT OF RALPH ESTES

Mr. ESTES. Senator Hatch, Senator DeConcini, Senator Specter, I know there is important business occupying the Senate today, but I do wish that more members of the committee had the opportunity to hear the testimony of this panel, because coming late though it does in the hearings, it is very important testimony for the future of this country. And I do appreciate the opportunity to testify.

My testimony is based entirely on my reading of Judge Breyer's writings. I do not know the gentleman. I do not even know if I have seen him. His writings on the surface present an appearance of objectivity. They conceal much, but as you read them in the aggregate, they reveal much.

Throughout his writings, you can see in Judge Breyer an allegiance to business and corporations that could, through his opinions as a Supreme Court Justice, do great harm to our citizens and to our Nation. He asserts he does not favor complete deregulation, but he does want to free corporations from regulatory constraints, and he believes that in many more cases the market will appropriately constrain corporate behavior, if, indeed, as he seems to doubt, it needs much constraining.

Judge Breyer's ideas on corporate regulation are grounded in an erroneous free-market view of social costs. In this marketplace of Judge Breyer's, there is no distinction between corporations and people. To the judge, the Disney Corp. and the homeowner in Manassas, VA, are equal players in the economic arena, as are a woman who may have needed silicone breast implants and the Dow Corning Co.

In his economic calculus, the following are mathematically equal: On the one hand, a healthy, undamaged, whole child; on the other hand, a brain-damaged child, brain-damaged for life from a hot dose of DPT vaccine who has been awarded $25 million or whose family has been awarded $25 million to pay for round-the-clock care for the rest of that child's life. Those are economically equivalent in Judge Breyer's economic calculus.

Judge Breyer would prefer not to direct corporations to behave responsibly. Instead, he favors tax breaks and marketable, special rights, such as pollution rights, to try to get them to behave responsibly. Put in more down-to-earth terms, what he is talking about is bribing corporations to keep them from doing harm.

In this kind of approach, Judge Breyer, I am afraid, fails to show a real understanding of the historical basis in this country for chartering corporations. A good study of history would show him that corporations were created in the first place as servants of the people and of the society, and that a corporate charter is a grant of special privilege, conveyed by the people through their State, in expectation of benefits to society.

If Judge Breyer knew this history, I think he would support a public policy that demands that corporations behave responsibly in the first place, instead of one that tries to get them to do good—

be good, rather, by giving them tax breaks and special pollution rights that they can then sell.

Much of what Judge Breyer says about regulatory reform, of course, I would support, particularly with respect to regulations adopted at the instigation of industry to limit competition—trucking, bank CD interest rates—and also his arguments for greater corporate disclosure, very much needed. But beneath his scholarly tone, Judge Breyer's writings convey an antagonism to any but the most unavoidable constraints on corporations, a near reverence for business and corporations as adjudicator of social well-being and of social policy. In the aggregate, Judge Breyer's writings present a pattern of prejudice, almost of disdain, against arguments, research, and theories that support the protection of the public through limitations on abusive corporate actions, while he shows a symmetrical sympathy for theories and research that support hands-off deregulation. Judge Breyer's writings do not suggest a mind-set of judicious objectivity.

He manifests in the aggregate in his writings an aversion toward restriction of those corporate actions that do harm to workers and the public. Collectively, his writings reveal a preference for a laissez-faire role for Government that has been rejected in this country since the excesses of the robber barons in the last century. He appears to have little awareness of the aggregate cost of the harm done to society by corporate America, a cost I have estimated elsewhere at over $2.5 trillion a year.

Judge Breyer and corporate America may want the marketplace to adjudicate workplace safety, toxic emissions, dangerous products. But the effects that kind of prescription would have on many, especially on the poor and those less fortunate in our society is simply too brutal to be acceptable. We have learned the lessons of asbestos, of Love Canal, tobacco, the Dalkon Shield, BCCI, GM's side-saddle gas tanks.

Of course, as others, including members of this panel, have noted, one of the strongest measures of Judge Breyer's devotion to big business is his stunning record and 16 and 0 in antitrust cases. Now, just think about it statistically. That kind of record says that either Judge Breyer in his court received an incredible sequence of 16 consecutive, ill-conceived cases without merit, or else his decisions reflect a closed mind and a personal antagonism to antitrust enforcement.

If you had a population of more or less evenly divided cases, the probability of this, against this, is 65,536 to 1. Now statistical improbability alone does not prove a bias. I know that. But the Wall Street Journal is satisfied. They said, "This is one of the few areas where"—and I emphasize—"the nominee appears to have made up his mind." And they add, "He agrees with much of the agenda promoted by Reagan administration officials."

To wrap up, Senator Biden said this morning that Judge Breyer presents incredible credentials. I do not argue with that. But credentials are not all that matter. More important is what Judge Breyer's position on the Supreme Court will mean for the country.

Judge Breyer has shown through his writings and through his record that as a Supreme Court Justice he will be disposed to rule in favor of corporations against the people and to dismiss regula-

tion designed to protect the environment and human health and safety in favor of a hypothetical free-market discipline.

Gentlemen, if a nominee came before this committee with a record of siding with the defendant and rejecting every civil rights claim heard by him in 14 years, what would you do? You would reject that nominee out of hand, not only because of his clearly hostile attitude toward civil rights, but because you would not place someone on the Supreme Court with such a closed mind on an issue of fundamental importance to our society.

In his writings, Judge Breyer has shown a favoritism to corporate interests over those of the people, a lack of empathy for the poor and less fortunate in our society, and an autocratic view of policymaking and an unusual, at best, interpretation of the U.S. Constitution. If Judge Breyer's writings are a guide to the way he will act as a Supreme Court Justice, gentlemen, then the public will ultimately suffer for the sake of corporate profits. More people will become ill. More will be injured. More will suffer personal economic loss. And some number will die.

Articulate, arrogant, elitist, and too often wrong, a wolf in sheep's clothing who will lead the Supreme Court in this area of his special interest down a dangerous path that will be hazardous to our health. The President and the American people would be better served with a different nominee, one less loyal to corporate interests.

Thank you.

[The prepared statement of Mr. Estes follows:]

Center for Advancement of Public Policy

Testimony (Annotated) of Ralph Estes

Hearings on Confirmation
of Judge Stephen G. Breyer
to the U. S. Supreme Court

Senate Judiciary Committee

July 15, 1994

1735 S Street NW Washington, DC 20009 (202) 797-0606

The purpose of my testimony is to provide information that may assist the Committee in evaluating Judge Breyer's writings, opinions, and views on the corporate system and corporate regulation. My testimony is informed by three decades of research on corporations and regulations, and through service as expert witness on economic loss in numerous wrongful death and personal injury cases.

I am a full professor of business administration at The American University, fellow at the Center for Advancement of Public Policy, author of eight books and over fifty scholarly academic articles. My doctorate is from Indiana University and I am a certified public accountant, formerly with Arthur Andersen & Co.

Judge Breyer's writings give the surface appearance of objectivity. In these he is not prone to overt statements about his personal views, and after extensive reading one is left unaware of his views on many matters of public concern.

But in certain areas his views are revealed quite clearly. Just as an individual's positions and preferences become more evident through the totality of their actions than in singular assertions, so too are Judge Breyer's views concerning corporations and regulation cogently disclosed in the consistent bent reflected in the accumulation of his writings. These reveal that:

- Judge Breyer demonstrates a fundamental lack of understanding of the role of the corporate system in American society, and the historical basis of corporate chartering: the granting of special privileges to private entities in expectation of public benefit.[1]

- His ideas on corporate regulation are grounded in an erroneous "market" view of social costs, or "spillovers."[2]

- In his writings Judge Breyer sets out to teach others about the applicability of statistical and mathematical theory in regulatory discourse, but he reflects an insufficient understanding that results in his misuse of the mathematics and statistics he attempts to apply.[3]

- Judge Breyer's conception of public policymaking reflects an autocratic, undemocratic, and elitist view, as well as an unusual, perhaps even a unique, understanding of the U.S. Constitution.[4]

- Judge Breyer's writing demonstrates a lack of empathy for the poor and for lower income workers and families.[5]

Should Corporations be Favored Over People?

Throughout his writings Judge Breyer evinces an allegiance to business and corporations that could, through his opinions as a Supreme Court justice, do great harm to our citizens and our nation. And while asserting that he is not for complete deregulation, he wants to free corporations from regulatory constraints and believes that in many more cases the market will appropriately constrain corporate behavior -- if indeed, as he seems to doubt, it needs constraining.

Judge Breyer would prefer not to direct corporations to behave responsibly; he instead favors tax breaks and marketable rights to induce socially-responsible behavior. "A more feasible method [than postulating rules] would combine fairly simple rules with economic incentives such as tax breaks or marketable rights."[6] With respect to externalities or spillovers such as pollution, noise, dirt, and waste, Judge Breyer believes, "Classical regulation is not able to deal comprehensively with spillover problems. Taxes, marketable rights, and even bargaining are likely to prove useful as substitutes or supplements."[7]

Judge Breyer's approach seeks to bribe corporations to keep them from doing harm. He apparently fails to recognize that a corporate charter, under which most business activity is conducted, is a special grant of privilege conveyed by the people, through the state, in expectation of benefits to society. If Judge Breyer understood more about the origin of the corporate system, he would support a public policy that demands that corporations behave responsibly in the first place, instead of a policy that seeks to induce responsible behavior by giving corporations tax breaks and special rights to be sold.[8]

Much of what Judge Breyer says about regulatory reform I would support. He is on target, for example, when he observes that each action bears a cost, and there may be better actions we could take for the same cost; or that we should take a systemic approach to regulation that considers harm that may be caused elsewhere by a regulation designed to do good. And his skepticism is likely justified with respect to regulations adopted at the instigation of industry to limit competition - trucking, bank CD interest rates - although not with respect to regulations that protect the public.

There is a prevalent, underlying philosophy beneath the scholarly tone in Judge Breyer's writing, however, that conveys an antagonism to any but the most unavoidable constraints on corporations, a near-adulation of business and corporations as adjudicator of social well-being and of social policy. In the aggregate Judge Breyer's writings present a pattern of prejudice, almost of disdain, against arguments, research, and theories that support the protection of the public through limitations on abusive corporate actions; and a symmetrical sympathy for theories and research that support laissez faire deregulation.[9] Judge Breyer's writings suggest the ardor of the religious convert, except in this case it was conversion to the religion of economic theory -- albeit a misinformed theory, as articulated by Judge Breyer.[10] His writings do not suggest a mindset of judicious objectivity.

Judge Breyer's enthusiasm for economic theory is reflected in his emphasis on economic efficiency rather than equity. He accepts the propriety of "classical" regulation if it reduces "allocative inefficiency."[11] He does not speak of regulation being required to achieve equity and fairness, to save lives or prevent crippling injuries, to protect those whose economic resources are such that "allocative efficiency" is meaningless. At least in his writings prior to this nomination, these were not the terms of Judge Breyer's vocabulary. As one reviewer observed, "If presidents and Congresses ignore Judge Breyer's prescription for regulatory reform, it will result from their disagreement with the proposition that economic efficiency is the sole objective of government regulation . . . "[12]

Several have noted Judge Breyer's record of consistently finding for corporate defendants in antitrust cases. The St. Louis Post-Dispatch, for example, reported that "Breyer voted against antitrust claims more often than the most conservative appointees of President Ronald Reagan."[13] George Mason University law professor William Kovacic is reported to have found that Judge Breyer voted 100% of the time on the side of big business in antitrust cases.[14] Charles Mueller observed in Legal Times that:

> Breyer's antitrust decisions display one especially conspicuous principle: The corporate defendant always wins, no matter how egregious the challenged conduct. He has never met a monopoly or a restraint on competition that he didn't like, ruling for the big-business defendant 16 times in the 16 antitrust decisions he wrote during his 14 years on the U.S. Court of Appeals for the 1st Circuit. . . The result is that Breyer has effectively repealed the federal antitrust laws in his four-state (plus Puerto Rico) jurisdiction."[15]

Now I am not a lawyer, but just considered statistically it would appear from this record that either Judge Breyer's court received an astounding sequence of sixteen consecutive ill-conceived cases without merit, or else his decisions reflect a personal predisposition that is antagonistic to antitrust enforcement.

Of course statistical improbability alone does not prove a bias, but The Wall Street Journal is satisfied: "This is one of the few areas where the nominee appears to have made up his mind. He agrees with much of the agenda promoted by Reagan administration officials who staffed the Justice Department and federal courts with opponents of aggressive antitrust enforcement."[16] [emphasis mine] Business Week draws a similar conclusion: "He is skeptical of government interference in markets and sympathetic to defendants in antitrust cases."[17]

Skeptical of government interference in markets indeed. Judge Breyer has stated that, with respect to air and water pollution, "the essential problem is that the price of a product made by means of a polluting process does not reflect the harm that the resulting pollution causes."[18] He does not say that the essential problem is that peoples' health, their property values, and their quality of life are damaged. His writings suggest that it would be acceptable for a manufacturer of industrial chemicals to poison a neighborhood as long as its prices were made, through taxes, to be high enough to reflect these social costs. He does not reveal a concern for preventing the damage done, against the *will* of the families and communities harmed, in the first place.

Judge Breyer admits that federal regulation has reduced the number of auto deaths, and that the environment is clearly cleaner ("in some parts of the country"), but he thinks that whether these effects are worth the cost "is open to debate." Here, as elsewhere, his concern is with cost to business, not cost to those who suffer the harm.[19]

But, by and large, it is not Judge Breyer's individual statements that especially cause concern. It is the continued repetition of emphasis on cost to the corporation without a balanced attention to harm to the public.[20]

Judge Breyer manifests, taking his writings in the aggregate, an aversion toward restriction of those corporate actions that do harm to workers and the public. Collectively, his writings reveal a preference for a laissez-faire role for government that has been rejected in American society since the rise of the giant corporation and the excesses of the Robber Barons in the last century. He appears to have little awareness of the aggregate cost of the harm done to society by Corporate America, a cost I have estimated elsewhere at over $2.5 trillion each year.

Judge Breyer and Corporate America may want the marketplace to adjudicate workplace safety, toxic emissions, and dangerous products, but the effects such a prescription would have on many, especially the poor and those who are weaker, is simply too brutal to be acceptable to the vast majority of Americans. The Congress and the American people have rejected that approach. We have learned the lessons taught by asbestos, Love Canal, the tobacco companies, the Dalkon Shield, silicone breast implants, BCCI, the Exxon Valdez, Times Beach, the Ford Pinto, GM's sidesaddle gas tanks.

Summary

We have heard repeatedly that Judge Breyer has superb qualifications to sit on the Supreme Court. But we know that qualifications -- IQ, academic degrees, a full curriculum vita -- are not all that matter.

If a nominee came before this Committee with a record of siding with the defendant and rejecting every civil rights claim heard by him in 14 years on the Court of Appeals, this Committee would not, I am sure, vote to confirm -- not only because of his clearly hostile attitude toward civil rights, but because you would not accept such a closed mind on an issue that reaches to the heart and the spirit of our society.

Judge Breyer, as we know, sided with the defendant in every antitrust case that came before him in 14 years on the Court of Appeals. In so doing he manifests an antagonism to Congress's efforts to restrain the ever-expanding power of colossal corporations, and so to hold large corporations accountable to the public responsibility inherent in their publicly granted charters.

As you review the record of these hearings I would urge that you not focus on detailed incidents such as a failure to pay taxes for domestic help, or a possible conflict of interest in rulings on matters that conceivably could have affected his potential financial liability on Lloyd's of London investments. I would urge you to ask instead: What will it mean for the country to have this nominee on the U. S. Supreme Court. Judge Breyer has shown, through his writings and through his record, that as a Supreme Court justice he will be disposed to rule in favor of corporations against the people, to reject appropriate restraint on corporate power, to dismiss regulation designed to protect the environment and human health and safety in favor of a hypothetical "free market" discipline.

If Judge Breyer acts on the Supreme Court in a manner that is consistent with the preponderance of his public writings, the public will ultimately suffer for the sake of corporate profits. More will become ill, more will be injured, more will suffer personal economic loss -- and some number will die.

The President and the American people would be better served with a different nominee -- one less loyal to corporate interests.

Notes

1. In his writings Judge Breyer generally draws no distinction between corporations and people. To the judge the Disney corporation and a homeowner in Manassas are equal players in the economic arena, as are General Motors and a farmer in Oklahoma buying a pickup truck with sidesaddle gas tanks, or a woman who needed silicone breast implants and the Dow Corning Company.

Overall his writings show little understanding of the aggregate power of large corporations:

- Government can invoke the death penalty and take us to war, but Corporate America is responsible for far more deaths than government. From 1973 through 1991, 1,529 people died from the death penalty and military action combined; during that same period 156 times as many workers, a total of

239,300, died on the job at the hands of industry. An additional untold number of people died from industrial pollution, poisonous food and medicine, and dangerous appliances, equipment, and vehicles. (Statistical Abstract of the United States 1985, Table 712; Statistical Abstract of the United States 1989, Tables 326, 547, 680; Statistical Abstract of the United States 1992, Table 665; National Safety Council, August 1993)

- Corporations control 84% of nongovernment payroll, 67% of total payrolls
- Corporate receipts and spending are more than *10 times* as great as the federal government's (Statistical Abstract of the United States 1992, Table 492, "Federal Receipts, by Source: 1980 to 1992.").
- Corporations control our culture, from the media to entertainment to advertising to taste. A typical child sees 22,000 commercials a year, an average of over 400 a week -- some 350,000 commercials by age 18, and virtually all presented in pursuit of private profit. (Robert M. Liebert. "Effects of Television on Children and Adolescents." Developmental and Behavioral Pediatrics, February 1986, pp. 43-48)
- Ranked by their revenues, the larger corporations nest snugly among the larger countries of the world. Several multinational corporations command resources greater than the tax revenues of such developed nations as Switzerland, Denmark, and Austria (Statistical Abstract of the United States 1990, Table 1456, and Fortune, April 24, 1989, p. 354.), not to mention the hundreds of smaller countries. In their ability to affect lives through expenditure of funds, the largest corporations are more powerful than most countries.
- "The fact that . . . government activities are highly visible, in comparison with those of the corporation, has led to the notion that the prime exercise of social control is done by government. On the contrary, so long as investment decisions are made by the corporations, the locus of social control and coordination must be sought among them; government fills the interstices left by these prime decisions." (Harry Braverman, Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century, New York: Monthly Review Press, 1974, pp. 268-9)

As Professor Galbraith has said, "The truly giant corporations . . . are independent republics of their own management."

2. Breyer's "market" view of externalities is wrong, in two ways: he sums interpersonal utilities, equating a 1 cent cost saving by a sugar producer with a 1 cent reduction in price to sugar buyers -- ignoring that pollution sufferers aren't exactly or necessarily the same persons as the sugar buyers. He fails to properly match up the bearers of the costs and the recipients of the benefits. This was the problem with Ford's Motor Company's use of cost-benefit analysis on moving the Pinto's gas tanks -- and numerous other regulatory uses of cost-benefit analysis. [Regulation and Its Reform, p. 23]

In Judge Breyer's economic calculus these are mathematically equal: a child that is brain-damaged for life from a "hot" batch of DPT vaccine, whose parents receive a $25 million award for around-the-clock care, vs. a child that is undamaged, whole.

When applied outside the domain of business, Judge Breyer's "free market" views would sanction arguments against the "regulation" of street muggings and assaults, on the grounds that such assaults are an economically efficient means of achieving resource distribution. He has shown an unwillingness to apply or extend the criminal and regulatory sanctions we impose on individual behavior, to the often much more harmful behavior of corporations.

Judge Breyer lays down what he sees as criteria for regulation of spillovers or social costs. If his criteria are met, he says regulation can then "reduce allocative inefficiency." He does not speak of equity. He does not speak of innocent neighbors, communities, workers wrongfully harmed. He does not conclude that, under his criteria, regulation will save lives and protect communities. It will reduce allocative inefficiency. [Regulation and Its Reform, p. 26]

He continues: before regulation should reverse an apparently sanctified "market-made decision," the social cost should meet certain criteria, one of which is that it be large. A plant that damages a few lives, reduces the value of a few homes, causes only some misery, should not be regulated. The damage must be "large." What would Judge Breyer tell these few affected workers, customers, neighbors? Sorry? Presumably he would accept regulating the behavior of a single murderer. But when the harm is done by business, by corporations, it must be a "large" harm to warrant interference with the "free market." [Regulation and Its Reform, p. 26]

Speaking of spillovers (or external diseconomies, social costs -- uncompensated costs imposed on those outside the company) caused by products, in this case sugar production that "sends black smoke billowing throughout the neighborhood," Judge Breyer says that, with regulation of this smoke, "those who suffer pollution are made richer." This is the sterile, technocratic economist approach to pollution. Judge Breyer does not say, "those who suffer pollution are made whole" or "are restored to their previous undamaged condition." His focus, his thinking, is purely on an economic calculus with no evident (in this instance) thought about equity, about fairness, about who was wrongfully damaging whom in the first place. No, to Judge Breyer pollution regulation makes the sufferer of pollution richer. [Regulation and Its Reform, p. 25]

As Professor Sheila Jasanoff, professor of science policy, chair of the Dept. of Science and Technology Studies at Cornell Univ., and author of books on risk management and on science policy, has noted "Judge Breyer's view of what constitutes an efficient market is hopelessly wrong."

3. Judge Breyer equates certainty with expected value in examples about soldiers and escape routes (a probability-weighted expected value of 400 lives lost -- 1/3 prob. that all will be saved, 2/3 prob. that all will die -- is not the same as certainty that 400 lives will be lost, since in the first instance there is a reasonable chance that all will be saved (and a larger chance that all will die), whereas in the second 400 will die and 200 will live, for sure. Judge Breyer is ignoring utility functions, as he also does in his market-based solutions to pollution. He knows part of the mathematics and arrogantly criticizes the public for not knowing as much ("people do not understand the counterintuitive consequence of certain important statistical propositions.") [Breaking the Vicious Circle, p. 36-37].

He thes speaks of "deviation toward the mean" (he means regression toward the mean, or that the mean of the sampling error approaches zero as more and more samples are drawn). He uses this concept erroneously, confusing the difference between mean test scores of the group and mean scores for an individual. In an example the judge says an individual who scores high on one test will most likely do worse on the next. In fact, an individual who scores high on one test will most likely, ceteris paribus, score high on the next test. But a group that scores well above its norm, or mean, will most likely score lower as a group on the next test. Judge Breyer then observes, "The statistical deviation toward the mean is positively reinforcing the teacher's negative reinforcement, and negatively reinforcing the positive reinforcement." [Breaking the Vicious Circle, p. 37]

4. Judge Breyer proposes an administrative superagency that would rule over regulatory agencies, by taking policy and budget power away from elected representatives and placing it in the hands of insulated bureaucrats] He says it must have "interagency jurisdiction" to "bring about needed transfers of resources." Congress, one assumes, can just go home. He wants his superagency to have a degree of "political insulation" to withstand political pressures "that emanate from the public directly or through Congress or other political sources" (Breaking the Vicious Circle, p. 60).

". . . one important objective is to limit the extent to which public debate about a particular substance determines the regulatory outcome. . ." Context is that he wants

decisions made on basis of expert analysis, not public pressure, but he shows little concern for the danger of excluding public input (Breaking the Vicious Circle, p. 78). (He also says his superagency proposal is a counter to arguments for deregulation; Breaking the Vicious Circle, p. 80.)

In "Judicial Review of Questions of Law and Policy," Administrative Law Review, v. 38 (Fall 1986), pp. 363-398, Judge Breyer cites admiringly France's Conseil d'Etat as a model for this superagency that would review and change regulations and reallocate funds among programs; he admires the facts that the Conseil "is not bound by the strictures of the adversary system," presents its results "without being confined to a formal record," is able to conduct its deliberations in private without counsel present (pp. 396-97). His superagency would directly affect national policy, yet he likes the idea of a "nonpolitical" body shielded from public input and public scrutiny. [In Breaking the Vicious Circle it is clear that the Conseil doesn't have the resource-reallocation power Breyer wants his superagency to have.] Then after pages of admiration for this French approach, he assures us that his article does not endorse any approach discussed (p. 397).

Judge Breyer says this his proposal is likely to engender objections that it sounds undemocratic and elitist, and then (p. 74) summarily dismisses this charge as not an argument but merely a pejorative label

Judge Breyer is proposing a superagency to reallocate budgetary funds among competing programs, that would override or supercede Congress's constitutional responsibility? This would appear to reflect an unusual, even unique, understanding of the Constitution.

5. Judge Breyer's fondness for market solutions reflects a harshness, a lack of sympathy or concern, for those without the means to adequately defend their rights and express their needs in the marketplace (see Note 2 regarding his harsh allegiance to the justice of the marketplace). Nowhere was I able to find any recognition that the marketplace is a fine mechanism for resource allocation only as long as one has the financial resources -- is wealthy enough -- to adequately express one's preferences. It is analogous to a voting booth in which one votes with dollars, and those without the dollars are disenfranchised. They do not have a vote in this kind of balloting on health care, their workplace safety, or the pollution, noise, and odors dumped on them by a chemical plant down the road.

In his review of "Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective" by Tomas J. Philipson and Richard A. Posner (Harvard University Press, 1994), in The New York Times Book Review, Judge Breyer says that ". . . [Society] has built a Social Security system around the concern that rational individuals may not properly save for old age . . ." In writing that individuals may not properly save for old age, instead of recognizing that they may, in fact, not be able to save, Judge Breyer's writing suggests a lack of connection with, or sympathy for, the poor and lower income workers and families -- the ditch diggers, perhaps -- who have nothing to save. ["The nominee, in his own words: A 'mandate of equal justice under law'," New York Times, May 15, 1994, 1, 30:1]

6. Stephen Breyer, "Reforming Regulation," Tulane Law Review, v. 59 (Oct. 1984), pp. 4-23, specifically p. 4.

7. Stephen Breyer, Regulation and Its Reform (Harvard University Press, 1982), p. 195. Later on p. 261 he also attacks standard setting for dealing with spiliovers.

8. For an explication of the public purposes in creating corporations, see Ralph Estes, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things -- And How We Can Change Them*, forthcoming.

9. In this regard one notes his uniform rejection of antitrust complaints.

One also notes his selectivity in presenting evidence related to his arguments. Professor Jasanoff (see note 1) observed that Judge Breyer's Breaking the Vicious Circle is "not in any sense a complete accounting of what is known about risk. He left out a vast body of highly-respected research and analysis. He appeared unaware of 10 years of writing about risk. Perhaps he had formed his judgments already. Judge Breyer displays advocacy behavior while cloaking his views in a veil of neutrality. He may not even be aware of this behavior."

Professor Jasanoff referred particularly to research reported during the 1980s that indicate the average person integrates probabilities and risk factors more completely than Breyer acknowledges. One can, of course, only speculate as to whether Judge Breyer omits any mention of this research because it is counter to the position he has adopted.

10. See Note 1.

11. Regulation and Its Reform, p. 26.

12. Victor H. Kramer, review of Regulation and Its Reform in the George Washington Law Review, March 1983, pp. 484-490, specifically p. 489.

13. May 15, 1994.

14. Tony Mauro, "Not everyone happy with the nomination," USA Today, May 16, 1994, p. 4A, citing 1993 study.

15. Charles E. Mueller, "The Big-Business Bias in Breyer's Decisions," Legal Times, week of May 23, 1994, pp. 33.

16. "Supreme Court Nominee Wins Business's Approval," The Wall Street Journal, May 16, 1994.

17. "Business Has An Amicus in Stephen Breyer," Business Week, May 30, 1994, p. 40.

18. Regulation and Its Reform, p. 261.

19. Regulation and Its Reform, p. 2.

20. As in the following statement: "Agencies whose primary mission is to protect the environment or health . . . often tend to downplay or disregard the economic costs which protective regulations impose on industry and consumers." (Administrative Law and Regulatory Policy, p. 310)

The CHAIRMAN. Thank you very much, Professor.

Before we move on, I have received a formal request from Mr. Lloyd N. Cutler, special counsel to the President, to ask that a letter directed to me be placed in the record, responding to what he characterizes as a personal attack by Mr. Nader on him. I will place it in the record and make it available to the press and the public if they wish it.

[The letter follows:]

THE WHITE HOUSE,
Washington, July 15, 1994.

Hon. JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, Washington, DC.

DEAR MR. CHAIRMAN: Because Ralph Nader's testimony against the nomination of Judge Breyer makes a personal attack on me, I respectfully ask permission to file this reply for the record.

Mr. Nader has made it a practice to advance his public policy views by demonizing some person or entity on the other side of the issue. Unfortunately for me, I have long been one of his favorite targets.

Mr. Nader asserts that the President's selection of Judge Breyer was tainted because of my position as a special government employee (SGE) serving as Special Counsel to the President. Specifically, he contends that this status permits me to evade "a number of conflict-of-interest and disclosure statutes."

Before I undertook my current position, ethics officials in the White House and the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement. Consistent with the law and standards of conduct, I have disqualified myself from any matters in which the firm is a party or represents a party, as well as matters that would affect the financial interests of the firm. Moreover, contrary to Mr. Nader's assertion, I have voluntarily taken a number of steps that go beyond the requirements of the law, precisely because of my commitment to openness and integrity in Government.

For example, to ensure that my financial and client information is open to public security, I have filed a public disclosure form which has been published in full in the *Legal Times*, although only a more limited confidential form is required. Additionally, while I have chosen to serve without government compensation, I have also arranged to have my salary from the law firm reduced to reflect the time I am devoting to government service. I have made this arrangement even though the law applicable to volunteers and special government employees would permit me to receive my full salary from my law firm. Moreover, because I am no longer a member of the firm, but rather a salaried Senior Counsel who will be paid only for the time I work at the firm, I can take no "draw" from the law firm at the end of the year, as Mr. Nader conjectures. I have also agreed to be bound, while in public service, by the representational bar of 18 U.S.C. §205 as it applies to regular government employees, even though special government employees have more limited restrictions. And not only will I adhere to the post-employment restrictions of the criminal law, but I also have announced my intention to comply with President Clinton's Five Year Ethics Pledge for Senior Appointees, which is not otherwise applied to special government employees.

Finally, the decision to nominate Judge Breyer was obviously the President's alone. On Supreme Court nominations, the President solicits and receives advice from many people, including his own staff, members of the Senate and private citizens and groups speaking for every kind of public and private interest. My own advice was given in the spirit of public service and without any thought of personal or financial advantage.

Sincerely,

LLOYD N. CUTLER,
Special Counsel to the President.

The CHAIRMAN. I would yield to Senator Hatch.

Senator HATCH. I have no questions for this panel, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Let me ask the panel, because it concerns me, of the testimony I read of Mr. Nader and Mr. Estes. I did not read the other ones,

but I heard some of them here, regarding Stephen Breyer's position on antitrust. Let me just say this: Given that Breyer is only one of a small part of a much larger structure which works to balance the needs of consumers and business, Mr. Nader, how do you justify a statement that his presence on this Court will cause antitrust law enforcement to sink into a deeper moribund state?

Mr. NADER. Well, I concede that if you believe it is already in a moribund state, it might not sink any lower.

Senator DECONCINI. Well, do you believe it is in a moribund state?

Mr. NADER. Yes.

Senator DECONCINI. OK.

Mr. NADER. And the reason why I say it will sink lower is because it adds not only an additional voice to the nonenforcement of the antitrust laws, but an aggressive voice, and one, because of his writings, would be entitled by people on the Court who agree with him generically to considerable deference.

Senator DECONCINI. Let me ask you this, then, and anyone else: In answering questions from Senator Metzenbaum, Judge Breyer indicated that he utilizes a three-part guideline when reviewing complex or technical antitrust cases. In his view, antitrust is, first, all about getting low prices for consumers; second, getting better products for consumers; and, third, getting more efficient methods of production.

Now, my question is, is that not the proper standard for these cases, and is there anything wrong in that standard?

Do you want to start, Mr. Estes?

Mr. CONSTANTINE. May I start, Senator?

Senator DECONCINI. Yes; go ahead.

Mr. CONSTANTINE. That is not what antitrust is all about. Antitrust is all about what the Congress enacted in 1890 and 1914, and in 1950, with the Seller-Kefauver amendments. Antitrust is about industrial concentration; it is about preventing monopolies; it is about maintaining small business; it is about a lot of political and social ideals. On the next panel, you will have——

The CHAIRMAN. For what purpose?

Mr. CONSTANTINE. For the purpose of——

The CHAIRMAN. You just stated objectives, but for what purpose?

Mr. CONSTANTINE. One of the purposes, Senator, is to keep prices low, but the question is whether low prices are derived by large, efficient monopolists, or——

The CHAIRMAN. Well, that is the question, but the purpose is——

Mr. CONSTANTINE. One of the purposes.

The CHAIRMAN [continuing]. One of the purposes. What are some of the other purposes? The question was what are the purposes—not the posturing—what are the purposes?

Mr. CONSTANTINE. The purposes, Senator, were also to spread out power in this country——

The CHAIRMAN. Right; good. That is an answer.

Mr. CONSTANTINE [continuing]. To maintain small businesses——

The CHAIRMAN. For what purpose, though, to maintain small businesses?

Mr. CONSTANTINE. Because those were viewed as being goods in and of themselves; because those were political ideals that were

specifically adopted by the Congresses that passed both laws, Senator.

The CHAIRMAN. I apologize for interrupting. Thank you.

Senator DECONCINI. Thank you, Mr. Chairman.

But having said what you just said, one of them, at least—lower prices for consumers—you agree with?

Mr. CONSTANTINE. Certainly; but Judge Breyer's decisions do not point in that direction.

Senator DECONCINI. Well, I am not debating they are; I am just defining a standard, first of all. Now, getting a better product—is that a proper purpose? Is that a proper standard?

Mr. CONSTANTINE. Absolutely, Senator.

Senator DECONCINI. It is. And getting more efficient methods of production?

Mr. CONSTANTINE. Certainly, Senator.

Senator DECONCINI. Now, given that, the Judge says that is his standard, and you disagree that he has applied that standard.

Mr. CONSTANTINE. Yes, Senator.

Senator DECONCINI. OK; that is what I wanted to get clarified, because it seems to me that his standard, even though it was not as in-depth as you think should be considered, he does have a standard that he has put out there as a marker.

So do the rest of the witnesses agree that this standard is not an objectionable standard—it may not be everything that you want but is a reasonable standard—first of all.

Mr. NADER. Senator, it is crucially incomplete, because——

Senator DECONCINI. OK; but does it have some proper elements from the standpoint of what antitrust is?

Mr. NADER. But is misses the most important predicate, which is to have an economic system that allows economic opportunity on the part of small business, entrepreneurs and other entries, whether it is new technologies or a variety of businesses. Without that market structure and market conduct, the other three purposes that he posits will not likely to occur.

Senator DECONCINI. You mean you cannot get lower prices for consumers or better products, and not have small business?

Mr. NADER. If you do not have economic opportunity and new entries——

Senator DECONCINI. Yes, so——

Mr. NADER [continuing]. Because over time, you will get oligopolist stagnation and monopolies.

Senator DECONCINI. How will you get lower prices, better products for consumers, and not have more businesses? You would have to have more businesses, wouldn't you?

Mr. NADER. No—yes, you would, but you see, he does not point that out.

Senator DECONCINI. No, but that is his standard. Now, the fact that you disagree on whether or not he has followed this standard——

Mr. NADER. Yes; his standard, Senator, are the fruits of a tree, not watering its roots. And you have got to water your roots.

Senator DECONCINI. But the point is he is not without some sense—you may disagree with what that is—of what antitrust is. And I may disagree with some of his decisions, and some of the

ones you read to us, which I have not read, I would not agree with the decision, either. But I do not think he is without at least a standard that he applies. That is all I want to know.

Now, Mr. Nader, in your statement, I believe, and in the media, you have criticized Judge Breyer for being a follower of the Chicago School of Economic Analysis, which emphasizes the importance of the cost-benefit analysis in court decisions. The criticism continues, although Judge Breyer has explicitly rejected that school's approach.

So in your view, what is the proper role of economic analysis in court decisions?

Mr. NADER. In the antitrust area, or regulatory?

Senator DECONCINI. Sure.

Mr. NADER. In the antitrust area?

Senator DECONCINI. Yes.

Mr. NADER. The proper analysis starts with market structure, market conduct, and then the results.

Senator DECONCINI. So there is a role of economic analysis in court decisions.

Mr. NADER. Of course, of course.

Senator DECONCINI. OK.

Mr. NADER. There is also a role for the structure of political concentration of industry, and that is what the Framers in 1890 and the early 1900's made a big point of, that economic concentration of power leads to political abuse, which leads to economic damage to new entries, small business.

Senator DECONCINI. Do you think that there is an economic role in court decisions, antitrust or otherwise?

Mr. NADER. Yes; the question is whose costs do you take into account, whose payments do you take into account.

Senator DECONCINI. Well, that is a question for a judge, right, or a jury?

Mr. NADER. Yes.

Mr. ESTES. No, Senator, it is not. It is fundamental to the issue of economics that Judge Breyer does not understand, if I could just enter into this discussion. It is not just a question for a judge. If someone is going to hold himself out as an expert on economics and then misapply the very economics that he is trying to state——

Senator DECONCINI. Wait a minute. Who is holding himself out as an expert on economics?

Mr. ESTES. As you read through the totality of Judge Breyer's writings in the area of economics, or the near totality, as I have done, there is an unmistakable image being presented by this person as an expert on economics, on economic analysis in the application of judicial decisions.

Senator DECONCINI. Have you ever heard Judge Breyer state—I have never heard him state or be held out as an expert in economics or an expert on biotechnology or an expert on communications or an expert on the death penalty; have you?

Mr. ESTES. Senator, Judge Breyer sees himself, as he reveals in his writings, as an expert on economics, as also an expert on the application of mathematical and statistical analysis and regulatory matters.

Senator DECONCINI. He wrote a book in that area of regulatory law.

Mr. ESTES. More than one.

Senator DECONCINI. More than one. I do not remember him writing a book on economics.

Mr. ESTES. He imbues his book with references to economic theory, and he is wrong in a good many places.

Senator DECONCINI. Well, he may be wrong, but I dispute that he holds himself out as an expert. He is a judge, and he has had economic cases. I have been a prosecutor, and I have prosecuted people, but I am not an expert on the death penalty.

Mr. ESTES. Senator, there is nothing for me to gain in arguing with a prosecutor, but I would suggest that if you would read those books in their entirety, you would come away with a view that Judge Breyer believes himself and would like to have his colleagues believe him to be an expert in economic analysis as applied to regulatory matters.

Senator DECONCINI. Given that that is your interpretation and that you think any reasonable person would come to this conclusion, your position, then, Mr. Estes, is that this expert is wrong.

Mr. ESTES. He is not wrong all the time, but he is wrong in very serious matters.

Senator DECONCINI. And because he is wrong in serious matters, he is unqualified to be a Supreme Court Justice?

Mr. ESTES. Senator, my place is not to cast a vote on whether Judge Breyer sits on the Supreme Court. Of course, that is your place. My role here is to try to offer helpful information to benefit you in making that decision, and among the information that I would offer to you is Judge Breyer's views on the regulation of matters like pollution. Let me just read something from his own words.

He says if you have a sugar plant that is sending black smoke billowing throughout a neighborhood, if we regulate that smoke, those who suffer pollution are made richer.

Judge Breyer does not say that those who suffer pollution are made whole or are restored to their previous undamaged condition. He says they are "made richer." That is a sterile, technocratic approach to pollution that does not understand the issue of economics at stake here.

Senator DECONCINI. Well, Mr. Estes, I am grateful that you are here to give us these suggestions and advice, but you did not answer my question. First of all, if we take your assumption that he is an expert on economics and if he differs on what you think proper economics are, does that disqualify him to be a judge?

Mr. ESTES. Senator, I am not casting a vote; that is for you to do.

Senator DECONCINI. I am not asking you to cast a vote. I am asking you for an opinion. Does that disqualify him to be a judge in your opinion?

Mr. ESTES. It would raise serious questions in my opinion about seating him on the Supreme Court.

Senator DECONCINI. Thank you. I take that as a yes.

What about being on the circuit court? Do you think that would disqualify someone from being on the circuit court?

Mr. ESTES. I would have the same concern.

Senator DECONCINI. You would.

Mr. Nader, let me ask you this. In a September 1993 article, the New York Times indicated that health and safety regulations cost Americans about $120 billion a year. Do you believe that Americans are getting a maximum return on the enormous investment, or is there room for improvement?

Mr. NADER. Well, I do not know the source for that estimate unless it is Murray Wiedenbaum, who——

Senator DECONCINI. Well, let us go to the source. I only know that it was stated in the New York Times, and I do not necessarily take that as factual, either. Do you dispute that that is a correct amount, or do you have a correct amount that you have some authority on? Maybe you get the Wall Street Journal.

Mr. NADER. I think the costs of regulation are negative. I think they save far more money——

Senator DECONCINI. I am not asking about what they save. What do you think they cost?

Mr. NADER. The costs are negative because they save more than they cost.

Senator DECONCINI. Well, let me put it this way——

Mr. NADER. The airbag, for example, saves billions of dollars of health care costs, wage losses——

Senator DECONCINI. Let me just ask it this way, then, Mr. Nader—I guess I did not get my question over to you, and I apologize for that—I am not asking what the offset is. What do you think the out-of-pocket expenses are for the regulations—nc 'iat they save or what can be calculated back in by not havin' ople lose time from work or what-have-you—do you have any estimates?

Mr. NADER. Other than the budgets of the regulatory agencies, I have not seen a careful study because it is very hard to get costs from industry that are objective and verifiable. So there has never been a study that has been able to give the answer to your question.

Senator DECONCINI. So you do not know; you do not know if $120 billion is a reasonable figure or not—not counting the offsets or the benefits that are achieved by regulation?

Mr. NADER. There is no reliable data to substantiate that figure.

Senator DECONCINI. In terms of regulation, is it your position that there is never a situation where the cost outweighs the benefits?

Mr. NADER. Certainly, I think the cost of the Federal courthouse outweighs the benefits and could be put toward more access to justice by people in New England.

Senator DECONCINI. Well, is the courthouse, in your opinion, a regulatory——

Mr. NADER. It is supported by taxpayers, which comes right under Judge Breyer's intermodal analysis. He——

Senator DECONCINI. I understand where you are coming from, but in terms of regulation, is the courthouse regulation—just the courthouse building; is it regulation?

Mr. NADER. It is part of the allocative inefficiencies that Judge Breyer has talked about in other contexts.

Senator DECONCINI. In terms of regulations, is it your position that there is never a situation where the costs outweigh the benefits?

Mr. NADER. Certainly, no—I will give you an example.

Senator DECONCINI. Would you, please?

Mr. NADER. Where you have regulation that ostensibly is to advance health and safety, but turns into a big, corporate, contracting, pork-barrel boondoggle as the Superfund expenditures have, you will get more money spent, with less return.

Senator DECONCINI. More money spent, with less return.

Mr. NADER. Right; but where you get regulation that focuses on prevention rather than remediation or remedy, after the toxics are at-large, you will get a maximal level of efficiency in terms of what is spent and what is derived as a benefit. Taking lead out of gasoline has terrific consequence, especially for children's health. Airbags—terrific. Restricting vinyl chloride—terrific. This is where an ounce of prevention is worth a pound of cure in monetary terms as well as life-saving terms.

Senator DECONCINI. Well, in testimony before the committee, Judge Breyer said many things, and one of them, let me read to you, gentlemen.

I do not count up how many victories are for plaintiffs or defendants and do statistics. What I am interested in, is the case correct as a matter of law, and I consider the case, one at a time, and I consider the merits, the legal merits, of the argument in front of me.

Can you provide me, any of you, with any basis other than your dissatisfaction with his rulings for not believing that Judge Breyer's statement is true and correct?

Mr. NADER. Oh, sure.

Senator DECONCINI. OK.

Mr. NADER. First, I have introduced in the record a very critical comment on his price squeeze case by Professor Carstensen at the University of Wisconsin, just in anticipation of the question that you have asked.

And second, let me give one that is very understandable to most consumers, Senator DeConcini. There was a case involving the Subaru Corp. sued by a Subaru dealer in Massachusetts. The jury rendered a verdict of over $50,000 for the Subaru dealer against the Subaru Corp., plus attorney costs, fees, and costs.

What was the complaint of the Subaru dealer? That the Subaru Corp. was requiring the Subaru dealer to buy unwanted spare parts in return for the Subaru dealer getting its proper allocation of cars.

Judge Breyer did not dispute the facts. He threw out the jury verdict and overruled the trial court, saying that the reason he did that was that Subaru did not amount to more than a minor percentage of the overall automotive market, and therefore, their tying arrangement did not harm consumers.

I ask you, how do you think the Subaru dealer is going to deal with unwanted costs, that is unwanted spare parts, in treatment of the consumers who come into that dealer's shop? He is going to find a way to pass the costs on.

This is an example of how, again and again, small distributors, dealers, small Government entities, up against large corporations,

in the 16 antitrust cases that the Judge decided, lost—again and again, the giants won.

Senator DECONCINI. Well, but Mr. Nader, that is an interpretation you are making that Judge Breyer did not look at these cases based on the law, or consider the cases one at a time, considering only the merits, the legal merits. You disagree with his finding——

Mr. NADER. No, no——

Senator DECONCINI [continuing]. Not that he did not look at these factors.

Mr. NADER [continuing]. No—he agreed with all the facts. He said taking the facts as the lower judge and the jury found them——

Senator DECONCINI. And a judge is not supposed to make a decision based on what he thinks is the law and the facts and the interpretation?

Mr. NADER. I do not think—and this is where Judge Breyer's judicial activism is going to be very apparent on the Supreme Court. He threw out a jury verdict and overruled a court decision even though he did not disagree with a single fact, and he did not disagree with the connection of the fact to the law; where he disagreed was his impression that it would not harm consumers because Subaru was too small a company in the automotive market. That is an extra-judicious assertion of what I think is impermissible judicial activism.

Senator DECONCINI. Well, now, Mr. Nader, you have been a practicing lawyer. Have you ever had a verdict thrown out by the court that worked against your clients interest?

Mr. NADER. No, I have not.

Senator DECONCINI. You never have. Well, I have, and I really did not like it; I really did not like it.

Mr. NADER. But I do not think you are hearing me, Senator.

Senator DECONCINI. Oh, I am hearing you, I am hearing you.

Mr. NADER. Judge Breyer agreed with the facts in the case. He just said that he did not think Subaru was a big enough player so that its tying arrangements harm consumers.

Senator DECONCINI. Well, that is his judgment as a judge. Now, your testimony, Mr. Nader, paints a very dark future for the little guy in the antitrust and regulatory arena. However, your testimony seems to indicate that your discomfort with Judge Breyer's views may stem from your overall concern that antitrust is moving in a direction you do not support.

Nonetheless, Mr. Nader, even if one assumes that your view of Judge Breyer is correct—and I do not necessarily agree—isn't your position overstated when you make statements like the following—and I quote from your statement:

> The great questions of antitrust are no longer debated and studied. This basic chapter of the free enterprise system has fallen into limbo beneath a counterattack on all fronts by global corporations and their apologists who claim, with grotesque caricature, that the antitrust laws interfere with U.S. global policy. Judges like Stephen Breyer are picking over the leftover bones.

Now, I have to question this "sky is falling" attitude, given that Judge Breyer will be only one of nine Justices, all of whom are independent thinkers and possess the intelligence not to be unduly swayed by others. Furthermore, the Congress of the United States

has not, in my judgment, abdicated authority to the courts. We may not do enough for you, Mr. Nader, but we pass antitrust legislation. We still make the laws; we review the laws and I do not think this body is turning away from the American public.

Mr. NADER. Senator——

Senator DECONCINI. Now, that is very self-serving because I happen to serve in this body and on this committee, and I know you disagree with most of the things this committee, or at least this Senator, does. But I take very seriously our charge to deal with antitrust laws, and I do not think that we are picking over the leftover bones.

Mr. NADER. May I reply, Senator?

Senator DECONCINI. Certainly, you can reply.

Mr. NADER. I think, Senator, looking over the last 40, 50 years in antitrust enforcement, looking at the huge mergers and acquisitions that have occurred of gigantic companies merging and acquiring others, how many times has the Justice Department or the Federal Trade Commission filed an antitrust suit against these mergers in the last 15 to 20 years compared to the prior years?

Mergers and acquisitions under antitrust law are almost a dead letter. Look at the last year—hospital chains buying up hospital chains; hospitals buying up doctor practices; drug companies buying up drug distribution companies—just last week, the Eli Lilly Co. bought, for $4 billion or $6 billion, McKesson subsidiary—health insurance companies buying up whole networks of HMO's.

In 1950 and 1960 and even 1970, Senator, the Antitrust Division would have moved against these mergers. They would not even have been announced because the Antitrust Division was clear on its guidelines. Those guidelines are gone. The Turner-Kasin guidelines are gone; the Justice Department guidelines are gone in terms of concentration ratios. Whatever is left of antitrust is extremely micro, dealing with a tying arrangement here, or a territorial restriction there.

Senator DECONCINI. Mr. Nader, last question. Are you the president of the citizen's group that you represent, or are you just representing yourself here?

Mr. NADER. I am representing myself.

Senator DECONCINI. You are representing yourself.

Mr. NADER. I might add, by the way, and price-fixing by highway bid-riggers, which is a favorite of the Antitrust Division in the Republican years.

Senator DECONCINI. What group are you employed with?

Mr. NADER. I am not employed.

Senator DECONCINI. You are not employed; you have no employment?

Mr. NADER. No; I do not take any employment status, period.

Senator DECONCINI. You have no salary and no income?

Mr. NADER. I take no salary from any organization, no expenses, no benefits—period. That is how I can speak freely and as an individual.

Senator DECONCINI. So you have separate resources to live on.

Mr. NADER. Yes.

Senator DECONCINI. And you have not worked for any citizens' groups.

Mr. NADER. I have run citizens' groups; I have started citizens' groups. I am not paid by any of them.

Senator DECONCINI. They do not pay any of your costs or any of the——

Mr. NADER. Zero.

Senator DECONCINI [continuing]. Costs of your getting here or preparing here, or give you an office or——

Mr. NADER. No; I actually paid the cab fare myself.

Senator DECONCINI. You paid the cab fare yourself.

Mr. NADER. That is right.

Senator DECONCINI. And that money comes from your own resources?

Mr. NADER. Yes, it does.

Senator DECONCINI. Thank you.

The Citizen's Group—what is that group?

Dr. WOLFE. I think it is probably a mistake—I guess it may be a generic term for all citizens' groups. But I am with Public Citizen's Health Research Group, and Mr. Nader is independent.

Senator DECONCINI. What is that?

Dr. WOLFE. That is an organization that was started by Mr. Nader, and shortly thereafter by me, about 22 years ago.

Senator DECONCINI. And what is it? Is it a public interest group?

Dr. WOLFE. It is a consumer research and advocacy group, funded largely through membership.

Senator DECONCINI. I see. Nonprofit?

Dr. WOLFE. Not for profit; right.

Senator DECONCINI. Not for profit.

Dr. WOLFE. Right.

Senator DECONCINI. And who are the contributors to that group?

Dr. WOLFE. Mainly small contributors, $20, $30 a year.

Senator DECONCINI. And Mr. Constantine, I do not know your background.

Mr. CONSTANTINE. My background, Senator, is that I was chief antitrust enforcer for New York State; chairman of the task force which coordinated antitrust enforcement for all 50 States for a number of years; I was a partner at McDermott, Will & Emory, which is a national law firm with over 500 lawyers. I left in April this year, and I started my own law firm with six lawyers. So I guess you could call me a small businessman at this point.

Senator DECONCINI. Mr. Estes, I know who you are.

Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. I might say to Senator DeConcini, we have had the opportunity to know Mr. Nader and Sid Wolfe to the greatest degree, and that organization has been invaluable to our health committee, going back to the pharmaceutical companies, the distributions of sampling, and the arrangements that have been made in terms of how the "me-too" drugs have come onto the market and have been used in many instances to subvert the real consumers' interests, and a variety of different public health areas——

Senator DECONCINI. Would the Senator yield for a comment on that?

Senator KENNEDY. Yes.

Senator DECONCINI. I am glad to hear that Mr. Nader has offered something constructive and positive, because what he did during the recent vote on product liability to Senator Rockefeller was disgraceful. The editorials and articles that he had printed in West Virginia; it was a disgrace. I am glad there is something good about him.

Mr. NADER. I welcome your written justification of that slur.

Senator KENNEDY. Well, as I was just saying about Sidney Wolfe and Lloyd Constantine, they came down and testified a number of years ago when we were considering another nominee, Mr. Bork, and I remember his testimony at that time.

I would just say I have great interest in the whole area of antitrust and antitrust law. I think men and women of good faith and understanding of these laws have differing views.

It is interesting. Bob Pitofsky, who will be coming up just afterwards, was a very effective member in pursuing consumers' interest in the period of President Carter's administration and other agencies as well. And his view, as well as other associates, are different in terms of the nominee's commitment to assuring the lowest possible prices and quality products for the American consumers. But I am grateful to you. I apologize to the other members not being here earlier. We have been working on the health issues in the Senate, and I was necessarily absent. But I appreciate your appearance here.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Nader, I note under your category, Judge Breyer and corporate economic power, your statement about his record involving antitrust and other business litigation cases. And you cite at page 6 his ruling in favor of the corporate defendant 16 out of 16 times, 17 out of 19 times, or 19 out of 19 times if remands are seen for their prodefendant effect. It may be that you are referring to antitrust matters as opposed to corporate matters generally.

Mr. NADER. Yes.

Senator SPECTER. It does not say that on the face. But even if you were, I asked Richard Hertling, my chief counsel—I just had a look at your statement coming in here a few moments ago, and he produced for me on fairly short order seven fairly impressive cases where Judge Breyer has found against major corporate interests. One of them is *Biomedical Instrument* v. *Cordis Corporation,* where a dealer brought an action for illegal termination of a dealership agreement, and Judge Breyer reversed the district court which had granted summary judgment for the big corporate defendant. And Judge Breyer wrote the opinion, holding that a genuine issue of material fact existed.

Another very significant opinion of Judge Breyer's involved a case against the giant, American Cyanamid Co., where the issue was on immunity or barring litigation under the National Childhood Vaccine Injury Act, where a Federal statute was passed to try to provide some limitation of liability, and Judge Breyer wrote the opinion, holding that the statute had to be narrowly interpreted to bar a suit by the minor who was immunized, but that others in the family, parents, could bring a lawsuit.

And *Venturelli* v. *Cincinnati, Inc.*, where a worker who had crushed the tip of his index finger in a plank-sheering machine brought suit against a manufacturer for defective machinery, alleging breach of warranty, and the court of appeals, with Judge Breyer writing the opinion, found in favor of the injured party against a major corporation.

The case denominated *DuPont* v. *Cullen,* where Judge Breyer upheld a finding of the bankruptcy court against DuPont, would had asserted a judgment creditor's claim.

New Hampshire Motor Transportation Association v. *Flynn,* where Judge Breyer wrote the opinion against the corporate defendant, holding in favor of the State, and an issue regarding license fees required for hazardous waste, which was an issue of environmental protection.

A fifth case, *NLRB* v. *Community Health Services,* where Judge Breyer held in favor of the Government against a company on an issue of certification.

NLRB v. *Northeastern University,* where Judge Breyer found in favor of the Government against the university involving a union election on issues of abuse of discretion.

My question to you is: In making the assertion as to Judge Breyer's unfairness as to the major corporations, if you took into account his general record above and beyond the 16 or 19 cases you cite—and I repeat that I have just had these cases pulled in the course of the past half hour, while Senator DeConcini was questioning.

Mr. NADER. Well, I was referring to antitrust, and the paragraph prior indicated that. It would have been better to put the antitrust word in that paragraph again. So I was referring to antitrust.

He has not ruled against plaintiffs all the time. We did not say he did. We said he has a pronounced inclination to favor corporate defendants most of the time. If you look at racketeering cases under RICO, if you look at the securities fraud cases, it is hard to be a plaintiff in Judge Breyer's courtroom.

Senator SPECTER. Well, the cases I just cited involve plaintiffs.

Mr. NADER. Yes.

Senator SPECTER. And these are close legal issues where he found against major corporate defendants. Did your analysis go beyond these 19 cases to his full record with any statistical tabulation as to how he did overall?

Mr. NADER. Well, we have his opinions. We have not made a statistical tabulation across the board. He has not been good on disability rights cases, four bad decisions out of four, in our judgment. He had two out of two bad decisions in freedom of information cases.

I am not saying he makes every decision wrong. I am much more concerned about his writings that are so hostile to the efficacious prospect of greater democratic public participation in regulatory processes. That is what really worries me, because that is what is relevant to the Supreme Court, prognostication.

Senator SPECTER. You are talking about now his writings as opposed to his decisions? You are talking about his books and his articles as opposed to his writings in legal opinions on cases?

Mr. NADER. To summarize, he has not decided for the corporate defendant in 100 percent of the cases. But I am saying he is first of all judges on the Federal circuit court in the percentage of times he has decided for corporate defendants in antitrust cases, and in all the other cases, he has decided for the corporate defendant more often than not. He has also decided for Government on more occasions than I would have liked, and disability rights cases and freedom of information cases.

There seems to be an inclination to find a rationale for the more powerful party to a litigation. And when I read his book in conjunction with his decisions, Senator, I saw where he was really coming from. He has an analysis of the regulatory agencies, how to make them better in the health and safety area, and he discounts, I think extremely radically, the possibility that Congress, the courts, the common law of liability, and greater democratic participation can make, the contribution they can make to alerting, rationalizing, and improving the health and safety regulatory policies. And his solution is a supercorps of wise people somewhere near the Office of Management and Budget to oversee and rationalize and coordinate the regulatory agencies.

Senator SPECTER. A corps of supersmart people near OMB? Where would they be housed? [Laughter.]

Mr. NADER. Page 80 of his book is an exceptionally revealing statement, and he is talking about his examination in the book of the problems of risk regulation. He says:

> It offers an equally strong counter-argument to the hopeful position that more direct democratic public involvement will automatically lead to better results, such as the public itself wants.

I do not know what else has led over the history of our country to better results in government than democratic participation that spills over into Congress, that elaborates the common law through the litigation, that improves the information flow of the agencies.

Good heavens, some of these agencies would never have been created to save lives if it was not for concerned physicians and consumers and doctors, whether it is the Food and Drug Administration, the EPA, or the National Highway Traffic Safety Administration.

Senator SPECTER. Well, I do not discount democratic participation, but the review that my staff has made of the cases that I produced on short notice suggests to me that there is some balance as to what he has had to say. But let me move on to one other question, and that is the issue you raise as to Presidential Counsel Lloyd Cutler.

I just saw a few minutes ago, after Senator Biden put it in the record, Mr. Cutler's letter dated July 15, where he takes issue with a number of your statements. On page 1 of your statement you talk about "Mr. Cutler can still take his draw, by the end of the year, from his law firm." And Mr. Cutler disputes that factually, saying, "Moreover, because I am no longer a member of the firm but rather a salaried senior counsel who will be paid only for the time I work at the firm, I take no draw from the law firm at the end of the year." And he earlier says in his letter, "While I have chosen to serve without governmental compensation, I have also arranged to

have my salary from the law firm reduced to reflect the time I am devoting to Government service."

My question to you is: Do you have any factual basis to dispute what Mr. Cutler is saying or any factual basis for your statement in your prepared testimony that Mr. Cutler can take a draw from his firm?

Mr. NADER. Yes; Mr. Cutler, as you know, is the rainmaker for the firm. He is the founding partner. He is no longer technically a partner. His status is special counsel. And he can take income from that firm at the end of the year. He is only supposed to be working in the White House until August, but he can take income. He can; whether he does or not depends on how much political exposure his dual role is given in the coming weeks. But my criticism is not just based on the income that he could draw from that firm—and there was a report that he was going to draw something like $300,000, which is not a full partner's draw in the current year before he went into the White House.

My concern, Senator Specter, is one that I would hope you would share with me. Never in the history of the country has the special counsel to the President of the United States retained a legal status as special counsel in a corporate law firm down the street with dozens of major corporate clients whose business may be affected indirectly or directly by decisions made in the White House where Lloyd Cutler is a major player. He is everywhere in the White House. Lloyd Cutler is at large in the White House, passing on judicial nominations, advising on product liability issues. He is everywhere. And anybody who knows Lloyd Cutler knows that he is everywhere when he is anywhere.

I think that is truly improper. I think that this has never been done before. And if wants to be special counsel to the White House, he should resign his status in the firm of Wilmer, Cutler & Pickering. And I might add that I have heard now from at least 10 sources, from the White House and from the press, who are close to this issue, that Judge Breyer was Lloyd Cutler's choice. He is a long-time professional, personal, and philosophic colleague of Judge Breyer, and at key junctures in the decisional, or shall we say indecisional process by President Clinton, Lloyd Cutler gently put forth the reasons for President Clinton to nominate Judge Breyer.

Now, if he is counsel, fine. But not when he has one big foot down the street in one of the most aggressive and, I think, anti-consumer corporate law firms that I have ever had to deal with over the last 25 years, including fighting him on the airbag standard, which they held up for years on behalf of General Motors and Ford and other clients.

Senator SPECTER. Well, that is——

Senator KENNEDY. I am glad to find that out about him. I thought I had something about recommending——

Senator SPECTER [continuing]. That is quite an additional statement, Mr. Nader. I have a factual basis for saying to you that you are wrong when you say he is everywhere. I tried to reach him on the phone last night and could not find him. So there is some competent testimony for you.

Mr. NADER. I meant that he is everywhere on policy issues.

Senator SPECTER. I mean some firsthand testimony. If I have to take an affidavit and have it admitted into evidence, unlike most of what we hear, not only in this room, but everywhere in the Senate campus.

Mr. NADER. I did not mean physically he is everywhere.

Senator SPECTER. Well, spiritually? I could not find him. [Laughter.]

When you talk about his——

Senator HATCH. A little bit like the Holy Ghost, I guess.

Senator SPECTER [continuing]. When you talk about his being at large, I have not heard that kind of reference since Al Capone was talked about being at large, or perhaps Capone was a lesser threat to the country than Cutler.

But when you say in your statement——

Mr. NADER. He was a lesser threat.

Senator SPECTER. There is no question pending, Mr. Nader. [Laughter.]

Mr. NADER. The airbag issue alone has cost hundreds of thousands of lives.

Senator SPECTER. There is no question pending, Mr. Nader. Let me ask you a question, Mr. Nader.

Mr. NADER. Yes.

Senator SPECTER. When you say here—well, how about that? Just a little decorum.

When you say here, page 2 of your statement, "all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his law firm," and the statement you just made, do you have any evidence on that? And you and I are lawyers, Mr. Nader. Do you have any evidence on that? Evidence?

Mr. NADER. Oh, yes, I have.

Senator SPECTER. Give me one piece of evidence and pause.

Mr. NADER. First of all, he has dealt with Robert Rubin and others on the political aspects of economic policy being discussed in the White House.

Senator SPECTER. I am asking about a benefit to a corporate client, one bit of evidence.

Mr. NADER. Judge Breyer, Judge Breyer.

Senator SPECTER. Judge Breyer is a corporate client?

Mr. NADER. No; I think his ascension to the Supreme Court will benefit corporate preferred policy.

Senator SPECTER. You talk about substantial benefits to some or most of the many corporate clients of his firm. I am asking you if you have any evidence—that means firsthand knowledge—of a benefit to a corporate client of his law firm.

Mr. NADER. Where did I say direct?

Senator SPECTER. On page 2, you say——

Mr. NADER. Directly impacting, even if he does not work on——

Senator SPECTER [continuing]. "Engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests)," and I ask you for the fourth time: Do you have any evidence of any benefit to anybody, any client of the Cutler firm?

Mr. NADER. You did not finish the sentence: "even if he does not work"——

Senator SPECTER. I did not finish a lot of sentences.

Mr. NADER. "Even if he does not work on matters directly impacting those clients." The job of special counsel to the President affects political, economic, and social policies out of the White House. It is his burden of proof to show us that he is not fulfilling the conventional duties of a special counsel to the President. I am saying I know something of what he has been doing. It is up to him to come clean.

Senator SPECTER. Well, all right. Now I understand your position. It is up to him on his burden of proof, and your statement about benefits to clients of his law firm is unsupported by any evidence.

Let me move on to one other line.

Mr. NADER. I would disagree with your characterization of my testimony. Continue, please.

Senator SPECTER. Well, then let's read the full sentence on page 2:

> Instead, the issue is whether it is proper for a member of a major Washington law firm to also serve as counsel to the President, pass on judicial nominations, engage in all kinds of important decisions which can have substantial benefit to some or most of the many corporate clients of his firm (auto, banking, chemical, drug, mining and other commercial interests), even if he does not work on matters directly impacting those clients.

Now, my question to you, having read the full sentence, is: Can you give one example of competent evidence that he has undertaken any governmental conduct as counsel to the President which has had a benefit to any corporate client of his law firm?

Mr. NADER. I said "which can have substantial benefit."

First, I am not privy to all the internal workings of a special counsel to the President, except that I know that he has very special and important responsibilities on what the President thinks, does, and decides.

Second, he is passing on judicial nominations, and people as close to the process as the Alliance for Justice are saying that he has argued against some progressive nominees for the Federal bench. That can have—can have, Senator Specter—a substantial benefit to some of his corporate clients. Can.

The burden of proof is on him. He is the one who has a foot in the corporate client sector of his law firm and a foot in the White House. Never before has a counsel to the President had that dual role and worn both hats.

Senator SPECTER. Mr. Nader, do you have any reason to contradict Mr. Cutler's assertion that "Ethics officials in the White House in the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement"?

Mr. NADER. Are you asking me whether his status is legal? It is legal. Is it ethical? No! Should the law be changed? Because it was never intended by Congress to apply to the Office of the Counsel. It was intended to apply to geologists, scientists, and other technical personnel to help out for a short period of time Federal agencies. Yes, I think the law should be changed, and I think the Judiciary Committee is the proper jurisdiction for that possibility.

Senator SPECTER. Well, those are direct answers to three other questions. Now let me repeat my question. Do you have any factual basis to contradict Mr. Cutler's statement that "Ethics officials in the White House and the Office of Government Ethics thoroughly reviewed and cleared the proposed arrangement"?

Mr. NADER. No, I do not contradict him, and I do not give it all that balance because we should have independent, external ethical review, the way he asked for Judge Breyer.

Senator SPECTER. A final question, and on this you and I agree.

Mr. NADER. Thank goodness.

Senator SPECTER. I do not know, Mr. Nader. We both may be in trouble with that occurrence.

You support my view that nominees are less likely to answer questions when the confirmation process is seen as a sure matter. Would you agree with my characterization that Judge Breyer answered more questions than previous nominees, specifically Justice Ginsburg, Justice Souter, Justice Scalia? Start with Justice Scalia.

Mr. NADER. Oh, yes, definitely.

Senator SPECTER. Thank you. Thank you very much.

Mr. NADER. I think he gave more answers to easy questions than the prior three Justices.

Senator SPECTER. Thank you very much.

Senator KENNEDY. I just want to make a very brief comment in taking issue with you, Mr. Nader, about Judge Breyer willing to take on the corporate giants in this country. I was chairman of the Antitrust Committee, searched the country to try and find a good person to succeed in the staff there after Phil Hart left that position in the mid-1970's, and was fortunate enough to get Steve Breyer. And his concept in terms of trying to improve both lowering costs and improving quality came about with the deregulation of the economic conditions in this society and also the protections of health and safety.

He was willing at that time to take on the airlines. He was willing to take on the trucking companies at that time and was skillful enough to help and assist both developing a bipartisan kind of coalition in this. And, quite frankly, I was late in terms of attending this session, but your characterization and the flat kind of comments on that is completely inconsistent with a very, very distinguished record.

I have heard your comments about the various cases. I dare say the list of the antitrust professors and activists who have a very distinguished career, a letter which I will put into the record, have very, very differing kinds of viewpoints.

[The letter follows:]

July 5, 1994.

Senator JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR BIDEN: The signers of this letter are professors of law who have taught antitrust for many years and written often on the subject. We are familiar with Judge Breyer's record as a scholar in the field of economic regulation, including antitrust, and a judge occasionally called upon to write antitrust opinions.

In our view, Judge Breyer is a thoughtful and enlightened advocate of antitrust enforcement. He understands and appreciates the effectiveness of a free market, protected by the antitrust laws, in serving the welfare of consumers. He also understands the need for vigorous enforcement of the antitrust laws to correct market

failures. We except he would be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court supporting effective antitrust enforcement.

We understand that Judge Breyer's record has been criticized by some on two grounds: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor big business over the consumer.

We believe these criticisms miss the mark. While we may not agree with every decision or sentence in his opinions, Judge Breyer's views are well within the mainstream of contemporary thought about antitrust law. The results, more carefully examined, consistently favor consumers and often are to the advantage of small business.

A. *The Charge of Consistent Rulings For Defendants.* Judge Breyer has decided a number of cases in favor of antitrust defendants. To suggest that this shows he is pro-Big Business and anti-antitrust nevertheless represents a misreading of his record.

In the first place, Judge Breyer has upheld meritorious antitrust claims by both private and government plaintiffs. In *Federal Trade Commission* v. *Monahan*,[1] he upheld the Federal Trade Commission's broad authority to investigate evidence of price fixing in the pharmaceutical industry. In *Caribe BMW Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994), he upheld a challenge under the Robinson-Patman Act and the Sherman Act to price-fixing in the sale of automobiles. And Judge Breyer has never decided an antitrust case against the government—either federal or state.

Even in cases where defendants prevail, Judge Breyer's decisions show no antipathy to vigorous antitrust enforcement. In most of these decisions, no substantive question of antitrust law was at issue. In one case, the issue was whether Puerto Rico should be treated as a state or a territory under the Sherman Act.[2] In several others, Judge Breyer merely voted to deny preliminary relief, and remanded for full evidentiary proceedings.[3] One of the cases was about whether a trial judge should have been recused in an antitrust case based on a possible personal conflict of interest.[4] In still other cases, Judge Breyer simply voted to affirm district court findings that there was no evidence supporting a claimed antitrust violation.[5] In the remaining cases, Breyer refused to find for antitrust plaintiffs, because the result would have been an unjustified increase in the prices charged to consumers.[6] In two cases, the plaintiff was a large company and the defendant the "small business," so that decisions in favor of the defendants were hardly pro-"Big Business."

B. *Specific Cases.* A second charge against Judge Breyer is that certain of his decisions evidence hostility toward antitrust enforcement. The cases cited are *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir. 1981), and *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1984).

While Breyer did find for the defendants in all three cases, the important point is that the decisions are consistent with enlightened antitrust interpretation and enforcement. In addition, his decisions helped consumers in each instance.

1. In *Boston Edison*, two municipal utilities that bought power from Boston Edison, a large private utility, claimed that Boston Edison had engaged in a "price squeeze" by selling power to them at a high wholesale price but selling to consumers at a low price in competition with the municipals. The plaintiffs' complaint was that Boston Edison was selling at retail at too low a price for them to make a profit. If they had won out on the point, these small business plaintiffs would thrive because Boston Edison would have to raise its retail price, but consumes would end up paying higher bills.

A price squeeze cause of action is rarely attempted and is usually without merit, regardless of the market in which the alleged squeeze occurred. Judge Breyer found that such complaints are even more questionable in a market in which both the wholesale and retail prices were set by independent regulators. A history of the proceedings shows why. Boston Electric's wholesale rates had been submitted to and

---

[1] 832 F.2d 688 (1987).

[2] *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36 (1st Cir., 1981).

[3] *See Coastal Fuels of Puerto Rico* v. *Caribbean Petroleum*, 990 F.2d 25 (1st Cir., 1993); *Rosario* v. *Amana*, 733 F.2d 172 (1st Cir. 1984).

[4] *Home Placement Serv. Inc.* v. *Providence Home Journal*, 739 F.2d 671 (1st Cir., 1984).

[5] *Clamp-All Corp.* v. *Cast Iron Soil Pine Ins.*, 851 F.2d 478 (1st Cir., 1988); *Computer Identics Corp.* v. *Southern Pac. Co.*, 756 F.2d 200 (1st Cir. 1985).

[6] *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir., 1984); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir., 1981); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990).

approved by FERC, a federal regulatory agency, over the opposition of the municipals. That decision in turn had been approved by the courts on review. Thus, the plaintiffs were attempting to end-run the regulator's decision and prior judicial review by framing their complaint about wholesale prices as an antitrust cause of action.

As Judge Breyer noted, it is difficult for courts to decide what constitutes a fair price and a fair profit. When independent regulators establish a "fair price," judges in antitrust cases are understandably reluctant to reverse those decisions—especially where the result would be to raise prices to consumers.

2. *Barry Wright.* In *Barry Wright,* a small producer of an environmental device claimed it had been injured because Pacific, its dominant competitor, sold at "predatory"—*i.e.,* below cost—prices. In fact, the record showed that the defendant's prices were above its full costs. Barry Wright nevertheless sued, asking the court to intervene and prevent low prices to consumers. Breyer recognized that if Pacific's prices were above its full costs, but below the full costs of rivals, it followed that it would succeed because it was more efficient than its smaller rivals and was willing to pass efficiencies on to consumers in the form of lower prices.

Breyer's decision in *Barry Wright* is part of a growing trend of judges in antitrust cases to shy away from supporting antitrust theories that block low prices to consumers. Breyer recognized that where the prices are so extremely low as to evidence an intent to drive rivals out of business antitrust has a role to play. But where a company charges prices above its own full costs, it would be senseless—and anticonsumer—for the court to intervene in order to protect less efficient businesses. A few years after Judge Breyer's opinion, the Supreme Court in effect ratified his decision and similar decisions in other circuits that prices above full costs are not predatory, noting that a claim of predatory pricing can only be sustained when the challenged prices are below some standard of cost. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.,* 113 Sup. Ct. 2578, 2588 (1993).

3. *Kartell.* In the *Kartell* case, a group of physicians challenged Blue Shield because it extracted from participating doctors a promise not to charge patients an amount above the insurance fee paid by Blue Shield. A lower court had found that the effect of the arrangement was to pay doctors at unreasonably low levels and therefore was an agreement in restraint of trade in violation of Section 1 of the Sherman Act.

Judge Breyer found that Blue Shield was not a collection of "buyers," capable of conspiring, but rather an independent single force, and that single buyers have a right under the antitrust laws to bargain for the lowest price available. While the defendant once again won in a Breyer opinion, the real effect was to sustain cost-containment efforts by a major insurer and to prevent doctors from charging higher prices to their patients.

In sum, Judge Breyer's opinions are sharp in analysis and economically sophisticated. He understands the theory of antitrust, appreciates the consumer protection and other values underlying it, and can be expected to support effective antitrust enforcement. He is unlikely, however, to join decisions that, in effect, protect inefficient businesses at the expense of consumers.

Very truly yours,

PHILLIP AREEDA,
Harvard Law School.*
EDDIE CORREIA,
Northeastern Law School.*
ELEANOR FOX,
NYU Law School.*
THOMAS JORDE,
University of California Law School (Boalt Hall).*
THOMAS KAUPER,
Michigan Law School.*
HARVEY GOLDSCHMID,
Columbia Law School.*
HERBERT HOVENKAMP,
Iowa Law School.*
ROBERT PITOFSKY,
Georgetown Law School.*
EDWARD ROCK,
Pennsylvania Law School.*

* Universities listed for identification purposes only.

Senator KENNEDY. I respect your position on it. We can have these areas of difference. But I must say that the blatant and flagrant kind of commentary and characterization I think is basically unfair. I know that you have a differing view on it, but I will say that I am not going to let those general comments, at least in my presence, go by without some kind of response.

Mr. NADER. Well, Senator, I testified before your subcommittee in favor of airline deregulation. I think it was in 1974.

Senator KENNEDY. Right.

Mr. NADER. And even my testimony was mischaracterized by Mr. Breyer in his book "Regulation and Reform." Because you remember that there are always two caveats, and I think you shared them, to any airline or trucking deregulation. One was a consistent enforcement of the antitrust laws——

Senator KENNEDY. Exactly right.

Mr. NADER [continuing]. And the second was enforcement of safety laws. I think he did some good work in that area. But I think in the last 20 years, with the merger——

Senator KENNEDY. Just before we leave that, the safety part was set aside, the FAA, if you remember that, and we ran into a Justice Department that was completely complacent in terms of the—I mean we don't want to go all the way back on through Lorenzo and the others on it, but there was absolutely no kind of activity, and what we saw really was a deterioration in terms of what that whole experience was, where the ones that were left in were able to, in a predatory way, reduce the certain kind of fares in order to disadvantage the newer entries into the system. We don't want to go all the way back into it.

But I must say the areas at that time were joined by Senator Javits, where he outlined a whole series of different areas where we were going to try and free up the areas of economic competition. I just think the only areas that we were able to was in the airlines and then in trucking, and then what happened is that concept was taken and accepted in terms of the financial institutions, and that was the end of it, because there was absolutely no kind of effort.

I am not familiar on the mischaracterization in the book on it, but I do think that the record over that service in terms of the committee, at a time when there was, as you correctly characterize it, not the kind of vigorous antitrust enforcement policy was an important and creative way of trying to energize some of the competitive forces. This is on Judge Breyer's nomination, and not on the issues on deregulation.

Mr. NADER. Senator, I would have looked forward to Judge Breyer, even before he became a judge, to lending his voice to criticizing the automatic merger approvals in the airline industry that he fought to deregulate under the Republican administrations. I think there were 20, out of 20 merger approvals between airlines approved by the Reagan and Bush administrations. It does occur to me to wonder why, in the greatest merger and consolidation wave in American history, Judge Breyer showed, whether in his

writings or in his decisions, extremely little concern over this consolidation of corporate power.

Senator KENNEDY. Well, the answer would probably be he was on the circuit court from 1980 when Reagan got in.

Mr. NADER. So one answer is there aren't many conglomerate merger cases coming to any judges these days. But he wrote and he lectured, and his voice was respected in these areas, and there is hardly a note of worry or caution or criticism on the growing concentration of power in one industry after another due to mergers and acquisitions that are not challenged by the FTC or the Justice Department, and that makes me puzzled.

Senator KENNEDY. Well, this is probably a pretty good time to go into the next panel, which will have—excuse me, I am sorry. I thought that had been done before. Senator Metzenbaum, I apologize. I thought that I had arrived when Senator DeConcini was questioning.

Senator METZENBAUM. No problem at all.

It is pretty obvious what the issue is before the committee today, and that is shall we confirm Lloyd Cutler for some particular position. [Laughter.]

I heard more comments about Lloyd Cutler since I have been back here than I did about Steve Breyer. Now, coming to Steve Breyer, I think we all have to be realists. Steve Breyer is up for confirmation to the Supreme Court of the United States, and unless some major development occurs that nobody anticipates, he is going to be confirmed by the U.S. Senate.

That being the case, we have to put the testimony of the four of you in its proper context. And I appreciate that testimony, because, frankly, it in some respects goes down the same road that I had raised or roads that I had raised, issued I had raised at an earlier point.

You raised the issues not because, on that basis, Steve Breyer is not going to be confirmed for the Supreme Court. You raised the issues, in my opinion, for the same reason I raised the issues, and that is to sensitize Judge Breyer when he sits on that Court. When he sits on that Court, some of the issues that have to concern you and concern me and concern Judge Breyer and concern the American people, is this whole question of the element of how much regulation and do you go all the way to the point that the EPA or some regulatory agency thinks you should go, or do you do something less, because to go all the way may cost *X* number of dollars.

Now, the fact is, if you go all the way, you are going to save 1, 2, 50, or 100 more lives. I don't have any opinions and don't have any knowledge as to how many it will be. So I think that many of your questions and many of my questions truly relate both in the environmental area and the health area and the antitrust area to bringing Judge Breyer up to a sense of awareness, not that he is not a very aware man, not that he is not a very knowledgeable man.

But the whole question is, knowing that he is going to be confirmed, it seems to me that the four of you who appear before this committee in order to raise issues, because there isn't much doubt in my mind that Judge Breyer is listening to what is going on at

this hearing and is sensitive to the issues to which you are attempting to sensitize him.

I thought it was rather interesting that all four of you sort of spent a fair amount of time—I wasn't here, but my staff has told me—on the *Town of Concord* case as a basis for raising concerns about Judge Breyer. He said that his decision in that case, and actually said it, I believe, if my recollection serves me right, in a hearing, that his decision he felt would benefit the consumers.

Well, this Senator has strong feelings to the contrary that the costs to consumers, the city of Concord is going to get a $39 million verdict. Judge Breyer took that verdict away from them. To this moment, I don't think he arrived at the appropriate conclusion, but I am not the judge. We make laws, and judges render court decisions.

Would any of you care to address yourselves to the *Town of Concord* case? I actually did not hear you, since I wasn't present, but I gather that all of you took issue with the whole question of——

Dr. WOLFE. You are talking about this *Ottati and Goss,* the dumping case?

Mr. CONSTANTINE. Senator, I would like to address it. I think more important than the issue as to whether the $39 million verdict was taken away from Senator Kennedy's constituents in Concord and Wellesley is the issue as to whether or not, as Judge Breyer has characterized it, that the remedy in that case that the plaintiff sought was to raise prices. This involved a price squeeze, and the price squeeze involves the relationship between wholesale and retail prices.

What Judge Breyer said here was that I would have had to raise retail prices or that would have been the effect of granting the judgment for the plaintiff. That was not the case. What had to happen was the wholesale prices had to be lowered, and that is what the plaintiff sought in that case. If wholesale prices had been lowered, then retail prices also could have been lowered, and there would have been a more competitive structure at both levels of the market.

More important than that, in that case, Judge Breyer went on to decide at least three other cases that were not before the court at that time. In this area, he is clearly and demonstrably a judicial activist who reaches out to decide issues which are not before him. Those issues will come before him in the next few years.

The issue of tying will come before him. The vertical mergers will come before him. The issue of monopoly leveraging will come before him. The issue of price squeezes in unregulated industry will come before him, and he has pretty clearly stated how he is going to vote in those cases. In every instance, those votes are contrary to the specific meaning of section 2 of the Sherman Act.

That is my attempt to try to explain this and to deal with the now famous graph which you exhibited at the hearing on Tuesday, Senator.

Senator METZENBAUM. I did not hear that.

Mr. CONSTANTINE. The triangular graph which you showed at the hearing on Tuesday, Senator, the widget graph.

Mr. NADER. The other point, if I may just add to that, Senator, is that Professor Carstensen, whose criticism of Judge Breyer's decision that is attached to my testimony, states:

> Although Concord, the plaintiff, the Town of Concord, satisfied a jury and trial judge that the price squeeze existed and its purpose was to harm the competitive capacity of towns being squeezed, Judge Breyer ordered the case dismissed. He did so on two conclusions: First, that the antitrust laws should not be generally used to condemn price squeezes engaged in by monopolists, if both levels of price is subject to direct regulation.

Well, it is Federal and State regulation, and the ability of utilities to manipulate Federal and State regulation is almost infinite, in order to achieve their strategic objective.

The other point is, Professor Carstensen adds:

> Without any examination or recognition of the lengthy, well worked-out theories of how regulatory prices can be and are used strategically to harm consumer and other public interests, Judge Breyer starts from the naive assumption that regulation is done in the public interest.

Hence, he asserts that "regulation significantly diminishes the likelihood of major antitrust harm."

I think there is a lot of record in this country's regulatory history to contradict Judge Breyer on that point. But the entire critique of that case is in my testimony. The reason why Professor Carstensen thought this was an important case, Senator Metzenbaum, is he thought it had applications to the new telecommunications industry and the way that industry is going to be structured. The price squeeze, the wholesale, the retail, there are a lot of parallels that are about to get into play after the legislation is passed in Congress on the telecommunications industry.

Mr. CONSTANTINE. If I might just briefly, Senator, the 1992 Cable Act, which the Congress labored over so long, is to a certain extent a set of industry specific antitrust regulations. A lot of what the Congress did in that major enactment was deal with the issue of vertical mergers and vertical integration, the control of programmers by companies upstream or downstream. So Congress has already spoken on this issue very specifically and in a very important industry in the United States.

What Judge Breyer has told you in a very profound way and very clearly, because he writes very, very well, is that he just doesn't see it, he doesn't see any harm whatsoever and there can never be any harm in taking your power from one level of an industry and leveraging it into a competitive advantage or a monopoly at another level of the industry. He says not to worry about that.

Dr. WOLFE. May I just comment on that. Mr. Nader alluded briefly to the wave of vertical mergers going on, where drug companies, large drug companies buy up drug distribution systems. In the last year, between Merck buying up Medco, one distribution system, SmithKline buying up a second one, and now Lilly buying up McKesson, the transactional costs of those three deals were $12 billion, money drained out of the health care system. Interestingly, Judge Breyer says if we worked a little better on regulation, we would free up money for health care and breast cancer and everything. Well, here is money just going down the drain.

But, worse than that, those three companies now have an estimated 80 percent of the entire prepaid prescription filling systems

market in this country, three companies. There does not yet seem to have been any kind of serious challenge to this kind of vertical integration that Mr. Constantine has just talked about, and we have reason to believe that if such a case ever got up to the Supreme Court, that Judge Breyer would be on the side of the big drug companies and the distribution systems.

The health care system is being destroyed, amongst other things, by mergers and acquisitions. Eight insurance companies now own half of the HMO's in this country. As Mr. Nader mentioned, hospitals are being bought by chains which are buying up other chains, and so forth and so on. So it is in the health area, the biggest in the country, at a trillion dollars, at an unprecedented time of mergers and acquisitions.

Senator METZENBAUM. Dr. Wolfe, you criticized Judge Breyer for his views on risk assessment in health and safety regulations. Why do you consider Judge Breyer's views a matter of concern in the context of a Supreme Court nominee? Will he have anything to do with that? The whole question of Judge Breyer's concern about risk assessment seems to be that if it costs too much to do, then you get to a certain point and it isn't worth spending that extra $10 million or $100 million or whatever the case may be.

Dr. WOLFE. Well, I am concerned, for a couple of reasons. One—and this is the good news, I guess, of this whole discussion—a year ago, when Mr. Nader and I criticized the first version of this book that he put out, he was sensitive enough to ask if he could meet with us, and we met with him, and I pointed out a number of factual errors in the book. He changed some. Unfortunately, he didn't change others.

One of the things we talked about was what is the basis for saying that we are going to be pouring billions or tens of billions down the drain to go this last 10 percent. I said what is the evidence that it is just 10 percent that we have left undone, given that the majority, over 50 percent of occupational cancers are not regulated, and that on the site that he ruled on in southeastern New Hampshire, there is a massive amount of pollution still there.

When he sat on this case in the first circuit coming up from the New Hampshire district court, there was a lot of need to look at the evidence for the various kinds of risk assessment that had been done. I don't know how many more of these cases are going to get that far or get up to the Supreme Court, but I think that in the opinion that he wrote in that case, he certainly acknowledged some awareness of risk assessment. I think that his views on risk assessment, as he stated in his book, are that the Government is overestimating between a thousand and a million times, and those are the kinds of views that would tend to make someone rule against the Government in some cases, as he did in part of that *Ottati and Goss* case.

So I think that, aside from disagreeing with his views on risk assessment, I think that as more of these environmental cases get litigated, he may well have an opportunity to impose those views on the way in which he judges the case. I know he said yesterday, after Senator Biden chastised him for some of the things that he said, he said I can assure you that the views that I take in this

book are going to have nothing to do with what I do as a judge. We are concerned that he may not be right about that.

Senator METZENBAUM. Well, I think your response is helpful in a particular respect, because it is obvious that Judge Breyer, after writing his book and having received some criticism from you and Ralph Nader, saw fit to meet with you to talk about it.

Dr. WOLFE. That is what I said is the good news. I characterized that as good news, because, as I said at the end of my testimony, he is a good listener. As you were saying before, given that it is a given that he is going to get confirmed, what can we do here? Why are we here? We do not think this is an exercise in futility, and we can only hope that he will be sensitive to the concerns that we have raised.

Senator METZENBAUM. I think, in all reality, that is about the main thrust of where we are going in much of this hearing. No question about it that I had some concerns, still have some concerns about his financial exposure and the propriety of when he does or does not recuse himself. I don't have much doubt in my mind that when this man goes on the Supreme Court, he is going to be extremely sensitive to that very issue and has already indicated that he would take certain positive steps in order to make his position of possible exposure by reason of his Lloyd's investment known to the litigants in trial.

I think that the discussions that have been had here today and the previous questions that this Senator and other Senators have asked him concerning the whole question of risk assessment vis-a-vis adequate regulatory procedures, particularly in the area to which you address yourself, the matter of health, is very, very significant, and I can't help but believe that he will live with some of these questions for the balance of his life, at least as a matter of awareness.

The matters that Mr. Constantine raised concerning the antitrust issues and that I have raised, I think we also believe that in that area, Judge Breyer, I don't know if I can say will be a better judge, but I think that Justice Breyer will be a more alert, more concerned, more sensitive, more aware of his own particular situation as he sits on the Supreme Court than he might otherwise have been.

I don't think there was any question from the inception of these hearings that this man is going to be confirmed. I don't think you appeared before this committee thinking that your testimony was going to keep him from being confirmed or that you were going to change any votes.

But I hope that your efforts, the efforts of some of us on this committee, and I think his own efforts to try to become more aware of some of these issues may very possibly bring about a better Justice Breyer than the Judge Breyer that some of us have seen fit to have some reservations about.

I thank you. I have no further questions.

Mr. NADER. You mean you don't think we are going to change Senator Hatch's mind?

Senator METZENBAUM. We can change Senator Hatch.

Senator HATCH. He has a powerful influence on me, I must say.

Senator METZENBAUM. He is changing a lot. I haven't seen it, but in my heart I know he is changing. [Laughter.]

Mr. NADER. In the biography of Senator Hatch, his greatest contribution, in my judgment, to the American people was that he facilitated the nomination of Dr. Kessler to head the Food and Drug Administration.

Senator METZENBAUM. That was one of the great things that he did. He is not sleeping well at night these days by reason of that fact.

Senator HATCH. You know, Ralph, that is the first nice thing you ever said about me. [Laughter.]

Mr. NADER. Well, you may not be sleeping well at night, but a lot of people in the country are.

Senator HATCH. Actually, I sleep well and Dave Kessler and I are good friends, even though he makes a lot of mistakes. But I am glad he has Sidney Wolfe keeping him on the ball. [Laughter.]

Senator KENNEDY. Thank you very much.

There is a vote under way, so we will recess briefly and then come back and listen to our next panel. I will take just a moment now to introduce our next panel. These are two outstanding academics. Robert Pitofsky is the former head of the Federal Trade Commission, dean of Georgetown University Law Center. Mr. Pitofsky has written extensively on antitrust law. Cass Sunstein is the Karl Llewellyn Professor of Law at the University of Chicago Law School. Professor Sunstein clerked for Justice Thurgood Marshall, served in the Department of Justice, is recognized as a leader in the legal-academic realm on administrative and constitutional law.

Also on the panel is Martha Matthews. Ms. Matthews served as a clerk at every level of the Federal court system, including as a clerk to the nominee and to Justice Blackmun, Judge Breyer's predecessor, if confirmed. Matthews is currently staff attorney for the National Center for Youth Law in San Francisco.

So we will commence with that panel. I am delighted that we are having back Professors Pitofsky and Sunstein. They have been familiar figures to this committee over a long period of time. We always benefit from their insights and their help and assistance to all of us on the committee. We apologize to them for the interruption, but we will be back in a few moments and continue on with the hearing.

The committee stands in recess.

[Recess.]

Senator KENNEDY. We will come to order. I think our colleagues will be winding up their votes on the floor, but we will move ahead with the testimony. We are very, very grateful to all of you. I saw you in here at the opening moments earlier today, and I know you have been—I think Professor Pitofsky has followed this hearing, the other hearings as well. We are very grateful to you for all of you joining with us, and we look forward to your comments.

We will start, I guess, with Bob.