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

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[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.