Brian Sun is the president of the National Asian-Pacific American Bar Association.

Richard Monet is president of the Native American Bar Association.

And Wilfredo Caraballo is president of the Hispanic National Bar Association.

We welcome all of you here. I want to mention that, as the youngest member of a large family, I was often the last one to be heard at a large table. I think we want to thank you all very much for your patience here. We have had a series of interruptions which were unavoidable in the course of today's hearings. Generally, we do not have the type of interruptions that we have had today, with the floor activity. So you have been very patient. We are very grateful. This is very important. I know I speak for all of my colleagues when I say that we will be looking forward to examining in very careful detail your commentary.

So I want to personally express my great appreciation for your patience and for your willingness to be a part of this whole process.

We will start off with Ms. Robinson.

PANEL CONSISTING OF BARBARA PAUL ROBINSON, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NEW YORK, NY; PAULETTE BROWN, NATIONAL BAR ASSOCIATION, ON BEHALF OF THE COALITION OF THE BAR ASSOCIATIONS OF COLOR, WASHINGTON, DC; BRIAN SUN, PRESIDENT, NATIONAL ASIAN-PACIFIC AMERICAN BAR ASSOCIATION; RICHARD MONET, PRESIDENT, NATIVE AMERICAN BAR ASSOCIATION; AND WILFREDO CARABALLO, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION

STATEMENT OF BARBARA PAUL ROBINSON

Ms. ROBINSON. Thank you, Senator. I was going to thank you for your patience in hearing us at this late hour and to tell you again thank you for the opportunity to testify before this distinguished Senate Committee on the Judiciary in the context of the nomination of Judge Breyer to the Supreme Court.

As you said, my name is Barbara Paul Robinson, and I am here as president of The Association of the Bar of the City of New York. We are one of the oldest bar associations in the country, and we are about to celebrate our 125th anniversary.

We now include over 20,000 members, and we were established to promote reform and approve the administration of justice, particularly in the courts. We try very hard to work in the public interest.

Our executive committee, through a subcommittee chaired by Stephen Rosenfeld, who is here with me today, has reviewed Judge Breyer's nomination, as it has reviewed earlier candidates for appointment to the Supreme Court. After an extensive review, the association has concluded that Judge Breyer is indeed qualified to be a Justice of the U.S. Supreme Court, because he possesses to a substantial degree all of the following qualifications that are set forth in our guidelines when we consider nominees to the U.S. Supreme Court.

They are: exceptional legal ability; extensive experience and knowledge in law; outstanding intellectual and analytical talents; maturity of judgment; unquestionable integrity and independence; a temperament reflecting a willingness to search for a fair resolution of each case before the Court; a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; an appreciation of the historic role of the Supreme Court as the final arbiter of the meaning of the U.S. Constitution, including especially sensitivity to the respective powers and reciprocal responsibilities of the Congress and executive.

Because these guidelines limit approval to those of high distinction, the guidelines do not provide for gradations in ratings. Qualified and unqualified are the only ratings we employ.

In reaching this conclusion, our subcommittee read extensive materials, including all of Judge Breyer's more than 500 opinions which he has written as a judge of the U.S. Court of Appeals for the First Circuit, many of his articles, lectures and books, and numerous news articles and commentaries appearing with respect to the nomination. In particular, the subcommittee focused on cases in the areas of antitrust, which you have addressed extensively today, but also civil rights and civil liberties, criminal law and sentencing guidelines, and administrative law, particularly in the economic and environmental regulatory field.

The subcommittee also conducted numerous telephone interviews with former colleagues and law clerks of Judge Breyer, and attorneys who had appeared before him. They received and considered comments from our membership—which, as I said, is over 20,000—and because of the graciousness of Judge Breyer, several members of the subcommittee interviewed him in person.

The executive committee also took account of the recent reports in the press which questioned whether Judge Breyer should have focused and recused himself in cases involving Superfund environmental liability under Federal law because of his investments in Lloyd's of London syndicates and his possible personal liability for underwriting losses. They considered carefully the Superfund cases in which Judge Breyer has participated since 1987, none of which involved insurance coverage issues, as well as the available evidence concerning Judge Breyer's awareness of the extent and nature of possible Superfund exposure by the syndicates in which he was a member, and his ability to evaluate the potential impact, if any, of his decisions in Superfund cases on his own financial interests.

Based on the applicable statutory standard for disqualification of Federal judges—28 U.S.C. section 455—and the evidence available prior to these hearings and during them, the executive committee found no reason to depart from its conclusions as to Judge Breyer's judgment, integrity, and independence by virtue of the fact that he did not recuse himself in the Superfund cases.

I might add in closing that because these questions of recusal and judges' investments do pose challenging issues and do arise not only in these hearings, but in other cases, our Association, following on some of the comments raised by Senator Simon, intends to study this area, and we hope to perform a public service by making some helpful recommendations for the future.

Thank you very much. I would be delighted to answer any questions.

The CHAIRMAN. Thank you very much.

Ms. Brown.

[The prepared statement of Ms. Robinson follows:]

PREPARED STATEMENT OF BARBARA PAUL ROBINSON

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FINDS JUDGE STEPHEN G. BREYER QUALIFIED TO BE A JUSTICE OF THE SUPREME COURT

The Association of the Bar of the City of New York has concluded that Judge Stephen G. Breyer is qualified to be a Justice of the United States Supreme Court, because he possesses, to a substantial degree, all of the following qualifications enumerated in the Guidelines established by the Executive Committee for considering nominees to the United States Supreme Court:

- exceptional legal ability;
- extensive experience and knowledge in law;
- outstanding intellectual and analytical talents;
- maturity of judgment;
- unquestionable integrity and independence;
- a temperament reflecting a willingness to search for a fair resolution of each case before the Court;
- a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals;
- an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

Because the Executive Committee Guidelines limit approval to those of high distinction, the Guidelines do not provide for gradations of ratings; qualified and unqualified are the only ratings employed.

In reaching this conclusion, a subcommittee of the Executive Committee read extensive materials, including all of Judge Breyer's more than 500 written opinions as a judge of the United States Court of Appeals for the First Circuit, many of his articles, lectures and books, and numerous news articles and commentaries appearing with respect to the nomination. The subcommittee also conducted a number of telephone interviews of former colleagues and law clerks of Judge Breyer and attorneys who had appeared before him, received and considered comments from the membership of the Association, and interviewed Judge Breyer in person.

The Executive Committee also took account of recent reports in the press which questioned whether Judge Breyer should have recused himself in cases involving "Superfund" environmental liability under federal law, as a consequence of his investments in Lloyd's of London syndicates and his possible personal liability for underwriting losses. The Executive Committee considered carefully the "Superfund" cases in which Judge Breyer has participated since 1987, none of which involved insurance coverage issues, as well as the available evidence concerning Judge Breyer's awareness of the extent and nature of possible "Superfund" exposure by the syndicates of which he was a member, and his ability to evaluate the potential impact, if any, of his decisions in "Superfund" cases on his own financial interests.

Based on the applicable statutory standard for disqualification of federal judges (28 U.S.C. §455) and the evidence currently available prior to the Senate confirmation process, the Executive Committee found no reason to depart from its conclusions as to Judge Breyer's judgment, integrity and independence by virtue of the fact that he did not recuse himself in the "Superfund" cases.

The Association acted on the nomination under a policy that directs the Executive Committee to evaluate all candidates for appointment to the Supreme Court.

STATEMENT OF PAULETTE BROWN

Ms. BROWN. Thank you, Senator Kennedy.

We, too, appreciate the opportunity, as Ms. Robinson expressed, for your patience in staying here this late on a Friday.

Before I start, I would also like to make note of the fact and extend my appreciation on behalf of the National Bar Association for the remarks which were made earlier this morning which are re-

freshing, in that you keep an open mind as to the various evaluations that are brought before the committee. We appreciate very much those comments.

I am, as was indicated before, the president of the National Bar Association, which is the oldest and largest bar association of color, founded in 1925. Also present, as you indicated, are Wilfredo Caraballo, president of the Hispanic Bar Association; Brian Sun, president of the Asian-Pacific Bar Association; and Richard Monet, who is a representative of the Native American Bar. Johnny Bear Cub Stiffarm is actually the president, but she could not be here today.

We are representing the entire membership of the Coalition of Bar Associations of Color. By way of background, the Coalition became a formal organization as of May 22, 1994. The preceding year, the boards of governors of each organization held a summit to discuss and resolve issues of common concern. This year, when we convened, a decision was made to formalize our association. We have learned over the years that the issues that we face are not necessarily unique to our individual organizations. We believe it to be crucial to our well-being and to our constituents that on certain issues, we must speak as one voice.

The coalition is a unified voice for more than 50,000 attorneys of color. We are unified and bonded together by our common experiences of discrimination and denial of access. For these reasons, we feel compelled to speak to the nomination of Judge Breyer to the Supreme Court.

Our primary purpose before the committee is neither to oppose nor extol, but rather to once again apprise Judge Breyer and the members of the Senate Judiciary Committee of the growing need for the Supreme Court to once again assume the mantle of leadership as to ensuring the protection, inclusion, empowerment, and uplifting people of color throughout our Nation.

Although we are not here to oppose the confirmation of Judge Breyer as the 108th Justice of the U.S. Supreme Court, in truth, the coalition would have preferred that President Clinton nominate a jurist of color with some meaningful degree of exposure and sensitivity to the issues of concern and importance to all Americans, particularly those who are least likely to have their interests and rights protected.

We are not certain that the background of Judge Breyer comports with these important qualities which the President has himself recognized as a priority in the makeup of the Court. Of the 107 Justices to serve on our Nation's highest court to date, there have only been two persons of color—Justice Thurgood Marshall and, now, Justice Clarence Thomas. There have been two woman—Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg. There have been zero Hispanic Americans, zero Native Americans, and no Asian-Pacific Americans. The two African-American Justices represent less than a paltry 2 percent of all Supreme Court Justices throughout the years. If we count the two woman now serving as "minorities," the combined total of four minority Justices would represent an anemic 4 percent of the total number of those who have served on the Nation's highest Court.

If you further consider that, of those named, the sensitivity toward those who are most likely to be underrepresented, the percentages decrease even further. Hispanics, for example, and Asian-Pacific Americans now constitute the fastest-growing segment of our Nation's population. The inability of Presidents over the past 25 years to nominate judges of color to serve on the Supreme Court tends to imply, whether intentionally or not, that there are no well-qualified intellectuals of color deserving of a seat on this Court.

This implication is untrue and must be dispelled as soon as possible. Further, while a Hispanic, Asian-Pacific, or African-American jurist would have been an appropriate choice, we cannot ignore the fact that Native Americans have lived in this country longer than any other group of people, and likewise, they have, if we dare say, been trampled upon more than other groups of people. One among their ranks should also have been considered.

It appears that people of color are only entitled to have one representative on the Court at any given time. Moreover, at this time, there is no one who clearly represents our interests.

For the Supreme Court to remain viable, relevant, respected and accepted, at least a few of its members must be more than intellectuals isolated from the realities, experiences, and perspectives of significant segments of American society.

Despite our preference, the Coalition of Bar Association of Color for the moment has moved forward to deal with the hand that we have been dealt. There have been a number of accolades and so forth that have been made with regard to Judge Breyer, but we believe that they are mere statements about the potential of a Justice Breyer.

We are hopeful that Justice Breyer's commitment to fairness will extend to encompass issues such as affirmative action, discriminatory application of the death penalty, and other related civil rights matters.

We also hope that if there is a propensity for Justice Breyer to be probusiness, that his attitude in supporting travel sovereignty and the Native Americans in their effort to support economic development in Indian country will be considered.

We are also hopeful that a Justice Breyer will be forceful and influential in cases involving the Civil Rights Act which still, regrettably, provides an exemption to the Asian-American workers in the *Wards Cove* case.

Though our rights are under attack from more than one source, people of color across the Nation have not yet all become pessimistically cynical. In hopes of preventing such an occurrence, the Coalition of Bar Associations of Color will be closely watching to see whether Judge Breyer manifests his fullest potential for fairness once he assumes his role as Justice Breyer, and if so, what impact it has upon the entire Court.

For people of color, the time for potential has passed. As has been said, words are wonderful, but deeds are divine. The coalition looks forward to Justice Breyer's deeds of fairness, and hopefully, those of the entire Court.

Thank you very much.

[The prepared statement of Ms. Brown follows:]

PREPARED STATEMENT OF THE COALITION OF BAR ASSOCIATIONS OF COLOR ("CBAC")

Good morning Chairman Biden, members of the Committee, I am Paulette Brown, president of the National Bar Association (NBA). Also present are Wilfredo Caraballo, president of the Hispanic National Bar Association (HNBA), Brian Sun, president of the National Asian-Pacific American Bar Association (NAPABA), and Richard Monet, a representative of the Native American Bar Association (NABA), Jonnie Bearcub Stiffarm, president of the Native American Bar Association, could not be present today.

This morning we are here representing not only the National Bar Association, but the entire membership of the coalition of Bar Associations of Color; the National Bar Association, Hispanic National Bar Association, the National Asian-Pacific Bar Association, and the Native American Bar Association.

By way of background, the coalition became a formal organization as of May 22, 1994. The preceding year, the Boards of Governors of each organization held a summit to discuss and resolve issues of common concern. This year when we convened, a decision was made to formalize our association. We have learned over the years that the issues that we face are not necessarily unique to our individual organizations. We believe it to be crucial to our well being and to our constituents that on certain issues, we speak as one voice.

CBAC is a unified voice for more than 50,000 attorneys of color. We are unified and bonded together by our common experiences of discrimination and denial of access. For these reasons, we feel compelled to speak to the nomination of Judge Breyer to the Supreme Court.

Our primary purpose before the Committee this morning is neither to oppose nor extol, but rather to once again apprise Judge Breyer and the members of the Senate Judiciary Committee of the growing need for the Supreme Court to once again assume the mantle of leadership as to ensuring the protection, inclusion, empowerment and uplifting of people of color throughout our Nation.

Although we are not here this morning to oppose the confirmation of Judge Breyer as the 108th Justice of the United States Supreme Court, in truth, the Coalition of Bar Associations of Color would have preferred that President Clinton nominate a jurist of color with some meaningful degree of exposure and sensitivity to the issues of concern and importance to all Americans, particularly those who are least likely of having their interests and rights protected. We are not certain that the background of Judge Breyer comports with these important qualities which the President has himself recognized as a priority in the makeup of the Court.

Of the 107 Justices to serve on our Nation's highest court to date, there have been only two (2) persons of color: Justice Thurgood Marshall and now Justice Clarence Thomas; two (2) women: Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg; zero (0) Hispanic Americans; zero (0) Native Americans; and no Asian-Pacific Americans. The two African-American Justices represent less than a paltry 2 percent of all Supreme Court Justices throughout the years. If we count the two (2) women now serving as "minorities," the combined total of four (4) "minority" Justices would represent an anemic 4 percent of the total number of those who have served on the Nation's highest court. If you further consider that of those named, the sensitivity toward those who are most likely to be underrepresented, the percentages decrease even further.

Hispanics, for example, and Asian-Pacific Americans now constitute the fastest growing segments of our Nation's population. The inability of Presidents over the last 25 years to nominate judges of color to serve on the Supreme Court tends to imply, whether intentionally or not, that there are no well-qualified intellectuals of color deserving of a seat on this court. This implication is untrue and must be dispelled as soon as possible. Further, while a Hispanic, Asian-Pacific, or African-American jurist would have been an appropriate choice, we cannot ignore the fact that Native Americans have lived in this country longer than any other group of people and, likewise, they have, if we dare to say, been trampled upon more than other groups of people. One among their ranks should also have been considered, It appears that people of color are only entitled to have one representative on the court at any given time. Moreover, at this time there is no one who clearly represents our interests.

For the Supreme Court to remain viable, relevant, respected and accepted, at least a few of its members must be more than intellectuals isolated from the realities, experiences and perspectives of significant segments of American society. We wonder whether Judge Breyer, because of his gender and ethnicity is able to fully understand this reality.

Despite our preference, the coalition of Bar Associations of Color, for the moment, has moved forward to deal with the hand that we have been dealt.

The Department of Justice has averred that Judge Breyer's "career reflects a deep-seated commitment to fairness * * * so that all government and law may work better for all people * * * (and) that courts and law * * * be accessible to all citizens."[1]

Vernon Jordan has written: "Judge Breyer's decisions reflect his strong commitment to protecting the rights of all Americans and ensuring the vindication of our civil rights. He will be a champion of fairness and justice on the bench."[2]

Robert Pitofsky, a former dean of Georgetown University asserts: "He understands that Government regulation is often necessary to ensure not just efficiency but fairness * * *"[3]

All of these laudatory assertions begin heaped upon Judge Breyer, however, constitute no more than mere statements about the potential of a Justice Breyer.

As we all know, however, potential simply means that the thing has not yet manifested itself, and more realistically, justices do change.

Yet, the Coalition of Bar Associations of Color, remains hopeful that Justice Breyer's commitment to fairness will extend to encompass issues such as affirmative action: Discriminatory application of the death penalty; reflect a sensitivity on immigration issues; adequate due process protection for death penalty appeals; environmental justice; minority and women business set-aside programs; insurance, mortgage and commercial redlining; selective prosecution of doctors of color on Medicaid fraud charges and as amazing as it may seem, the Voting Rights Act, which is being steadily undermined by the regressive trend of voting rights decisions emanating from the court during the past several years.

We have read with interest the assertions that Judge Breyer is "pro-business". Hopefully, if such a propensity exists, Justice Breyer will extend this "pro-business" attitude to supporting tribal sovereignty and Native Americans in their effort to support economic development in Indian country. We are also hopeful that a Justice Breyer will be forceful and influential on cases involving the Civil Rights Act, which still regrettably provides an exemption to the Asian-American workers in the *Ward's Cove* case.

Though our rights are under attack from more than one source, people or color across the nation have not yet all become pessimistically cynical.

In hopes of preventing such an occurrence, the Coalition of Bar Associations of People of Color will be closely watching to see whether Judge Breyer manifests his fullest potential for fairness once he assumes his role as Justice Breyer and if so, what impact it has on the entire Court.

For people of color, the time for potential has passed. As it has been said, words are wonderful. But deeds are divine.

The Coalition of National Bar Associations of Color looks forward to Justice Breyer's deeds of fairness and, hopefully, those of the entire Court during the 1995 term and beyond.

Thank you.

CBAC.
National Bar Association.
National Hispanic Bar Association.
Native American Bar Association.
National Asian-Pacific American Bar Association.

Senator KENNEDY. Thank you, Mr. Brown.
Mr. Sun.

STATEMENT OF BRIAN SUN

Mr. SUN. Thank you, Senator Kennedy, for allowing me to speak on behalf of my organization here today on Judge Breyer's nomination. NAPABA, as my organization is known, was formed basically for the same reasons that the NBA, the HNBA and NABA were formed, as a response to a historical pattern, a long historical pattern of discrimination, denial of access to political and social insti-

[1] Judge Stephen Breyer, nominee for the U.S. Supreme Court, at 1 (1994) (alteration in original) (emphasis added) (Publication of the U.S. Department of Justice).
[2] Id.
[3] Id. (Alteration in original).

tutions, as a reaction to hate crimes that were racially motivated and, in general, a response to prejudice and injustice.

The historical events that affect Asian-Pacific Americans are well-known even in our current history books. I don't think I need to go into detail in terms of recalling the anti-Chinese immigrant exclusion laws of the 1920's, the Supreme Court's decision in the *Koramatsu* case which all of us in law school read about in constitutional law that justified the relocation camps, and the hate crime murders that have directly led to the formation of my bar organization in the 1980's of Asian-Pacific Americans.

NAPABA comes here today, Senator, with the other members of the CBAC coalition to speak out on Judge Breyer's nomination, which I believe you yesterday indicated, I think, at the end of yesterday's testimony is one of the most important things this body, the Senate, and, in particular, this committee, can perform among its many important legislative functions, to review, assess, evaluate, and approve nominees to the Supreme Court.

I also join with Senator Biden in his comments yesterday that these hearings give us an opportunity, perhaps our only opportunity, as he said, to get a glimpse at what potential and what background and history a nominee brings to the Supreme Court.

In the written testimony that CBAC has submitted to you, Senator, we represent over 50,000 attorneys of color in this country, and I don't know all the statistics, but I believe we can agree that there are probably in excess of 60 million Americans of color who are affected by the judicial process, and for these reasons we feel that we have to speak out forcefully and vocally on the issues surrounding Judge Breyer's nomination.

The two issues I wish to speak about briefly here this afternoon, Senator, are issues that cannot be overlooked, and to some extent I believe have not been addressed that closely in these hearings, and that is the issue of diversity on the U.S. Supreme Court, the balance that Senator Specter talked about this morning, and, second, the need for a jurist on the Supreme Court who can stand in the tradition of Thurgood Marshall and William Brennan and Harry Blackmun on issues defending the individual liberties and the civil rights of all people in this country and, most importantly, the people of color who have experienced historical discrimination.

With respect to these two issues, NAPABA does not take the view that Judge Breyer is not a qualified jurist. He, in fact, does come to this hearing and these set of hearings with a strong background. His record on civil rights is one that we have found encouraging. However, on the issue of diversity, it is obvious that that issue is significant to the members of CBAC and to NAPABA, in particular, because it sends a message to persons of color that once again we have been denied an opportunity to have a voice through a person of color on the Supreme Court.

Diversity is something that can be broken up in this context into both the symbolic significance of diversity as well as the substantive significance—symbolic because persons of color in this country have long felt, even to this day, that they have been denied equal access to the courts. In fact, even the American Bar Association recently, through commissions that have studied the equal access to courts for minorities and women and the disadvantaged,

has concluded that diversity amongst the Federal and State benches and the U.S. Supreme Court is necessary to help dispel the symbolic perception that persons of color have about the lack of equal access to justice that they have in the courts.

Just to end on that particular issue, Senator, it cannot escape us all the recent media attention that has been given in the last decade or so to whether or not minorities or persons of color could get a fair trial in this country. Unfortunately, it has been the focus of perhaps some cases in the media that bring this out.

But in any event, I think it is pretty clear that persons of color wonder whether the system can be fair to African Americans or other persons of color who are accused of crimes that get the kind of publicity of the *Rodney King*, the *O.J. Simpson* case, and to some extent the *Vincent Chin* case in Michigan.

With respect to the substantive issues that are raised by Judge Breyer's nomination—that is to say whether or not he possesses the qualities and the background that would lead him to be committed toward protecting the civil rights of all American citizens—let me say that we are looking for jurists, again, in the tradition of Justice Marshall and Justice Brennan.

Already, from a historical development standpoint, we have had some judges in the Federal district and circuit courts who have been appointed who are persons of color whose contribution has been not just symbolic from the diversity standpoint, but from the fact that they have made meaningful contributions to the development of the law, such as Judge Higginbotham out of the Third Circuit, Judge Tang out of the Ninth Circuit, and many, many others.

I think that we need to just keep in mind when we focus on these issues of diversity that the President has made a commitment that he wants a Supreme Court that is representative of the diversity of America, and we are hopeful, and believe, that Judge Breyer, at least as to this second issue relating to the protection of civil rights, will stand committed, in the tradition of Justice Marshall and Justice Brennan, to stand up and—the words I often like to say are stand up to the plate and boldly deal with the issues that come up in the civil rights context. We are encouraged by the fact that Vernon Jordan, Duval Patrick, and others have supported this nomination.

In conclusion, Senator, NAPABA believes this issue is important and Supreme Court nominations are important because of our historical setbacks we have suffered in the Supreme Court, and you more than any Senator, I believe, on this committee are aware of our experiences in the *Ward's Cove* case, which led, in part, to the Civil Rights Act of 1991 that you were also a big part of, and also to the problem of the special exemption that was created in that case that deprived the Asian workers in Ward's Cove of the rights and benefits of the Civil Rights Act. We appreciate you and many Senators of this committee cosponsoring legislation that would set aside that special interest exemption that we found to be shameless and totally inappropriate. We applaud that, but the fact that the *Ward's Cove* case had to cause us to go to the Congress and seek civil rights legislation, we believe, highlights the need for strong Supreme Court Justices who can address these issues.

Finally, I would like to say something personally, Senator, and that is this. I look forward to a day when my organization and the members of the CBAC coalition don't have to come before this tribunal or this committee and say to this committee, we need more diversity on the Supreme Court. I look forward to a day when there will be an Asian-Pacific American on the Supreme Court.

I look forward to the fact and hope that my sons don't have to come back here 10, 20, 30 years from now and sit here and make the same statements that I have had to make here today. I do look forward to that day, and until then I think we have to focus again on Judge Breyer's nomination in terms of the impact it has on the persons of color around the country.

I want to thank you and the chairman, and particularly the staff, for allowing us to be heard this afternoon.

Senator KENNEDY. Thank you very much.

Mr. Monet.

STATEMENT OF RICHARD MONET

Mr. MONET. Good afternoon, Senator. On behalf of the Native American Bar Association, I also thank you for the opportunity to present our views on this matter today.

The Native American Bar generally agrees with the sentiments shared by this coalition. Like other racial minorities in our society, Native American people daily confront the effects of racial prejudice and discrimination. However, the Native American Bar has certain concerns that are somewhat distinct from those affecting the other groups in this coalition, and I would like to share just one of those with you today.

As you know, Native Americans not only constitute a distinct race in American society, but as members of tribes they also constitute distinct political entities recognized as such by the United States. Some of our most pressing issues and concerns arise in that capacity. Unfortunately, we know very little of Judge Breyer's sentiments on these matters.

As you also know, the relationship between tribes and the United States flows from solemn treaties made early in the Nation's history. Remarking upon one of those Indian treaties, Justice Hugo Black once wrote, "Great Nations, like great men, should keep their word."

In an early interpretation of another one of those treaties, Justice McKenna penned a sentence of perhaps singular clarity and importance to tribes and the development of Federal law dealing with tribes. He wrote, "Treaties are to be construed as a grant of rights from the Indians, not to them, and a reservation of those not granted."

We ask the committee and the nominee to note how Justice McKenna's wording and logic reflect the words and logic of the 10th amendment to the U.S. Constitution that what is not granted to the Union is reserved to the States or to the people. In other words, like the States and their people, the tribes and their people are the source of their respective tribes' sovereignty; that whatever sovereignty may have transferred in those treaties came from the tribes, so that the tribes were the grantors and thus the reservers of sovereignty. In other words, treaties with tribes, like the 10th

amendment, invoke this Nation's highest principles and logic of Federal republican democracy.

Nevertheless, in recent years the Supreme Court has begun a significant departure from those principles, at least when they are applied to tribes. For example, about 6 years ago in the *Cabazon* decision, the dissenting opinion argued that the tribes did not possess certain regulatory jurisdiction unless it was first granted to them by the Congress or the States, an argument in direct contravention to the logic of the McKenna quote. Fortunately for the tribes, the majority in *Cabazon* was compelled to respond to the dissent by saying, and I quote, "That is simply not the law."

Unfortunately, due to changes on the Court, the *Cabazon* dissent has since garnered a majority on the Court, and the logic of our treaties is being subverted in a way that simply cannot be reconciled with this Nation's first principles. As a result, the tribes and their people have suffered.

In conclusion, I would like to say make note that every term the Supreme Court deals with numerous cases affecting all the tribes, and it is a little-known fact that at times the Supreme Court hears more Indian law cases than any other kind of case. We believe, because of that reason, that it is imperative that nominees to the Supreme Court express their views on these matters and bear an understanding of how this field of law comports with our constitutional jurisprudence, in the hopes that the future jurisprudence of nominees, such as Judge Breyer, on matters affecting tribes will comport with those principles that America stands for.

Thank you very much.

[The prepared statement of Mr. Monet follows:]

PREPARED STATEMENT OF THE NATIVE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee, on behalf of the Native American Bar Association, I thank you for the opportunity to present our views on the nomination of Judge Stephen Breyer for Associate Justice of the Supreme Court.

Mr. Chairman, the Native American Bar Association agrees with the statement offered by the Coalition. Like other racial minorities in our society, Indian people daily confront the effects of racial prejudice and discrimination. Nowhere has the cycle been more difficult to break than in the staid field of the law. However, the Native American Bar Association has certain concerns that are somewhat distinct of those affecting other groups in the coalition.

As you all know, Indian people not only constitute a distinct race in American society, but as members of Tribes many Indian people also constitute distinct political entities recognized as such by the United States. Some of our most pressing issues and concerns arise in that capacity.

The relationship between Tribes and the United States flows from solemn treaties made early in this Nation's history. Remarking upon one of those Indian treaties Justice Black wrote: "Great Nations, like great men, keep their word." In an early interpretation of another one of those treaties Justice McKenna penned a sentence of perhaps singular importance to Tribes and the development of federal law dealing with Tribes. He wrote, "Treaties are to be construed as a grant of rights from the Indians, not to them—and a reservation of those not granted."

We ask the committee and the nominee to note how Justice McKenna's wording and logic reflect the words and logic of the Tenth Amendment to the U.S. Constitution: that what is not granted to the Union in the Constitution is reserved to the States or to the people. In other words like the States and their people, Tribes and their people are the source of the respective Tribes' sovereignty, that whatever sovereignty may have transferred in those treaties came from the Tribes, so that the Tribes were the grantors and thus the reservers of sovereignty. Treaties with Tribes, like the Tenth Amendment, invoke this Nation's highest principles and logic of federal republican democracy.

In recent years the Supreme Court has begun a significant departure from those principles, at least when they are applied to Tribes. For example, about six years ago, in the *Cabazon* decision, the dissenting opinion argued that the Tribes did not possess certain regulatory jurisdiction unless it was first granted to them by Congress or the States, an argument in direct contravention to the logic of the McKenna quote. Fortunately for the Tribes, the majority in *Cabazon* was compelled to respond to the dissent by saying, and I quote, "That is simply not the law."

Unfortunately, due to changes on the Court, the *Cabazon* dissent has since garnered a majority on the Court, and the logic of our treaties has been subverted in a way that cannot be reconciled with this Nation's principles of federal republican democracy. As a result, the Tribes and their people have suffered. We are reminded of what American philosopher Felix Cohen once wrote: "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

In conclusion, Mr. Chairman, every term the Supreme Court deals with numerous cases affecting all Tribes, at times hearing more Indian law cases than any other kind. We believe it is imperative that nominees express their views on these matters and bear an understanding of how this field of the law comports with our constitutional jurisprudence. The Native American Bar Association requests the Committee to solicit the nominee's views and to insist upon answers that comport with the principles for which America stands.

Thank you for the opportunity to share our views.

Senator KENNEDY. Thank you very much.

Wilfredo Caraballo.

STATEMENT OF WILFREDO CARABALLO

Mr. CARABALLO. Thank you very much. Good afternoon. The Hispanic National Bar Association appreciates the longstanding relationship that our organization has had with many of the members of this committee and with a lot of its staff. We hope to continue that relationship into the future.

In particular, I would like to publicly thank two members of this committee who have gone out of their way in the past to make statements publicly concerning the need for an Hispanic on the Supreme Court, and those are Senators Biden and Senator Hatch. On behalf of our organization, we would like to thank both of them.

I know that there might not be many Senators here, and I notice, however, that there are staff. I hope that when the testimony is looked at, one fact comes out. We have come together as four organizations in an unprecedented way. We want the members of this committee, and we would like the administration and this Nation to understand and listen to the words that we have used.

We have not called ourselves minority bars. We don't consider ourselves minorities. We are people of color representing over 60 million people in this country, and in the very near future we are going to be the majority in this country and we ask that as you listen to our pleas, you understand that part of that plea is for the generations to come. We are asking that we be treated today the way we hope you will want our children and our grandchildren to treat your children and your grandchildren.

When Justice Blackmun announced his resignation, the Hispanic National Bar Association received many calls from Hispanics around the country. It was universally believed by the members of our organization and others that the 108th Justice to the Supreme Court of the United States was going to be an Hispanic. We believed the promise that the face of justice was finally going to include ours.

We believed this not because there exists some numerical imperative for sitting on the Supreme Court, but because there exists a moral imperative that all who are among the judged have the right to expect that they may be represented in the faces of those who judge. The members of the Hispanic National Bar Association believed that I would be sitting here today testifying about the qualifications of an Hispanic nominee, a prospect which was personally awe-inspiring.

We relate this to you so that you may sense the difficulty our organization has had in coming to grips with this latest disappointment. Nevertheless, as lawyers, we believe that we cannot abdicate our responsibility to consider and evaluate the credentials of the person who was ultimately nominated. As lawyers from the Hispanic community, we must represent our community before you. As Americans, we owe the Nation the benefits of our thoughts.

In fairness to a nominee who is not responsible for our disappointment and who has worked hard to earn the nomination in his own right, we come before this committee prepared to testify on the nomination of Judge Stephen Breyer.

Having worked with him, many on this committee know better than most about the intellect and compassion that Judge Breyer takes to the Supreme Court. His achievements thus far are truly remarkable. Our organization has looked hard at his ample record. We have discovered in his work a judge who is forthright and who accomplishes something in his opinions which very few judges even try. He is readable. People can actually understand what he writes.

As you know, Judge Breyer is the chief judge of the circuit which encompasses the Federal courts of Puerto Rico. As such, many of our members from Puerto Rico have appeared before him. Our members in Puerto Rico speak very highly of Judge Breyer, as do many of our members in Massachusetts. Many of them have indicated their belief that he is someone who understands the need to make justice a reality for all Americans.

The presidents of the Puerto Rico region of the Hispanic National Bar Association and the Puerto Rico Federal Bar Association are effusive in communicating their colleagues' opinion regarding Judge Breyer's intellect and his appreciation of the fact that the justice system was created to be just. Our evaluation of Judge Breyer's credentials, coupled with firsthand knowledge on the part of many of our members, convinces us that Judge Breyer will make an excellent addition to the Supreme Court. We hope that the words of our members in Puerto Rico will be echoed by our members throughout the country in the years to come.

We further hope that our high regard for our duty is not misunderstood. As we praise the obvious credentials of Judge Breyer, we remind the Nation of the need to have the face of justice reflect all of the people in this country. We should never ration justice or judicial positions. This would demean the importance of selecting the best and the brightest, but it is important to remember that the best and the brightest come from all races and ethnic groups. It is time for the Nation to see an Hispanic as among the best and the brightest on the U.S. Supreme Court.

Thank you.

[The prepared statement of Mr. Caraballo follows:]

PREPARED STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION

Good morning. The Hispanic National Bar Association is appreciative of the long-standing relationship that our organization has had with many of the members of this committee and its staff. In particular, we would like to thank the chair, Senator Biden, and Senator Hatch, for their public statements in support of a Hispanic for the Supreme Court.

When Justice Blackmun announced his resignation, I received many calls for Hispanics around the country. It was universally believed by the members of our organization that the 108th Justice of the United States Supreme Court was surely going to be a Hispanic. We believed the promise that the face of justice would include ours. Not because there exists some numerical imperative for sitting on the Supreme Court, but because there exists a moral imperative that all who are judged have the right to be judges themselves.

I was personally awed by the possibility that I would be the president of the Hispanic National Bar Association when the first Hispanic was named to the Supreme Court.

I truly believed that I would be sitting here speaking about the qualifications of a Hispanic nominee.

I relate this to you so that you may sense the difficulty our organization has had in coming to grips with this latest disappointment.

Nevertheless, as lawyers we believe that we cannot abdicate our responsibility to consider and evaluate the credentials of the person who is actually nominated.

We have set our subjective feelings aside so that we may fairly consider the credentials of Judge Stephen G. Breyer.

As the lawyers from the Hispanic community we must represent our community before you; as Americans we owe the Nation the benefit of our thoughts. In fairness to a nominee who is not responsible for our disappointment, and who has worked hard to earn this nomination in his own right, we come before this committee fully prepared to support the nomination of Judge Stephen G. Breyer.

Many on this committee know better than most about the intellect and the compassion that Judge Breyer takes to the Supreme Court. His achievements thus far are truly remarkable.

Our organization has looked at his ample record. We have discovered, in his work, a judge who is forthright and who accomplishes something in his opinions which very few judges even try: his is readable. He is understood.

As you know, Judge Breyer is the Chief Judge of the circuit which encompasses the Federal Courts of Puerto Rico. As such, many of our members form Puerto Rico have appeared before him. Our member there speak very highly of Judge Breyer as do some of our members from Massachusetts. Many have indicated their belief that he is someone who understands the need to make justice a reality for all Americans. The presidents of the Puerto Rico Region of the Hispanic National Bar Association and the Puerto Rico Federal Bar are effusive in communicating their colleagues' opinion regarding Judge Breyer's intellect and his capacity to understand the nature of our legal system and the reasons for which it was set up as it is. they have observed that he has been very deferential to the decisions of the Puerto Rico courts.

It is this first hand knowledge on the part of many of our members coupled with his record, that makes us believe that Judge Breyer will make an excellent addition to the Supreme Court.

It is our hope that the words of our members in Puerto Rico will be echoed by our members throughout the country in the years to come.

It is our further hope that our high regard for our duty is not misunderstood. As we praise the obvious credentials of Judge Breyer, we remind the Nation of the need to have the face of justice be reflective of all of the people of this country.

We should never ration justice or judicial positions; thus demeaning the importance of selecting the best and the brightest to serve, but, it is important to remember that the best and the brightest come from all races and ethnic groups. It is time for the Nation to see a Hispanic as among the best and the brightest.

Senator KENNEDY. Well, thank you very much, all of you, for being here and for your testimony. Let me just ask very, very briefly a couple of questions—basically, really, one.

Richard Monet, how many Native American graduates do you have from law schools this year?

Mr. MONET. I teach at the University of Wisconsin Law School, and every year I would say anywhere from 60 to 70 students start

law school in the past maybe 10 years. I would say every year maybe 30 or so make it out.

Senator KENNEDY. As I remember, I was chairman, and my brother, Bob, was, of the Indian education committee, and then when I was chairman of the Administrative Practices Subcommittee we got into a lot of issues affecting Indian water rights and other issues, and the basic conflict which exists in the Department of the Interior between the various bureaus—the water rights of Indians versus the other kinds of rights that exist over there, and who is really going to be pursuing them. Does the U.S. attorney protect the Indian water rights or the commercial rights? So there is an enormous amount of very important questions on mineral rights and water rights that I know you are very familiar with.

I believe during the period of the 1960's and early 1970's, the number was down to 10 or 12 a year, so it is important to understand that issue, and we are always interested if you have suggestions or ideas. I am chairman of the committee with jurisdiction on education here, and although a lot of the Indian education is over in Interior, a lot of the higher education is in our committee and we would always welcome ideas that you might have on what we could do.

Mr. MONET. Thank you very much.

Senator KENNEDY. Mr. Sun, I want to let you know that one of the first pieces of legislation that I was able to get passed into law was the elimination of the Asian-Pacific triangle that was part of the Immigration Act, going back to the McCarran-Walter Immigration Act that we changed in 1965. At that time, I think it was limited to about 125 Asian immigrants coming into the United States, and that obviously has dramatically changed and shifted. When you were talking about that issue, it brought back the important legacy of discrimination against Asians, and you have outlined that.

I want you to know, on *Ward's Cove,* I am right with you. We have been talking with Patty Murray, and Norm Mineta, I know, from the House has been working on it, and we want you to know that this is something that is very much on our minds and we are going to do what we can to try and see a reversal of that current injustice. So I want to just reiterate that. We haven't been able to do what we should on that case, but it isn't because we are still not interested and committed and concerned about it, and we want you to work with us, and I know you will, and with other members of this committee and of the Senate on the issue.

Mr. SUN. I appreciate that very much, Senator. NAPABA appreciates you and Senator Murray cosponsoring the legislation seeking to set aside that exemption, and Representative McDermott from the House side as well.

Senator KENNEDY. Yes. In the Supreme Court holding, my position was retroactivity, and then I thought once we got the retroactivity there could be no denial in terms of justice of including *Ward's Cove.* As you are aware, the courts did not come out in that particular way when they interpreted it, although I think, if you look historically at the Civil Rights Act, it is probably pretty mixed in terms of applying the Civil Rights Act retroactively or prospectively. But nonetheless, we have been working with some of those

in the community who have been most concerned, and we will continue to do so. I want to give you those assurances.

Mr. SUN. Thank you.

Mr. KENNEDY. Let me just ask you this, just finally, and each of you might comment. Senator Kerry and I had the opportunity of making suggestions to the President in filling Federal District Court vacancies, and we were able to get important diversity on that court, and we have continued to do so over the period of the last several months. But let me ask you what you would welcome, either procedurally or nonprocedurally, as far as ways that we could get more qualified and well-qualified to the attention of decisionmakers.

We saw over a long period of time that most of the individuals, both on gender and color, were not until fairly recently in major law firms, and that many of them had come up from legal services programs, working out in the counties as public defenders or prosecutors, and then in small firms.

So there is a whole range built into the process and the system where those who evaluate individuals who might be considered for courts—Federal, circuit, as well as Supreme Court—have these inherent biases. It is still out there. And it exists in gender as well. I know, being married to a professional lawyer; she talks about the fact that if a woman partner goes to a Little League game, the other partners will feel that she is not serious about the law; yet if the father goes, they say, "Isn't he a wonderful father."

So there is a whole series—I think many of you could talk about this—the nuances that are out there, all across the framework of the process. It is out there, and we have to be sensitive to these issues.

But can you tell us a little bit of what you would like to see follow the next time we have a vacancy; what would you suggest to this President, or to the Attorney General, or to the selection committee, or whatever way they are going to proceed—what kinds of things do you really wish they would do if you had that opportunity now?

Let us start with Paulette. Ms. Brown.

Ms. BROWN. Thank you, Senator.

It sounds to me like it is a two-part question, and if I could, I would like to answer it as I see it, in two parts. One is that you talked about the selection process, and then it seemed that you talked about the confirmation process.

In the first instance, the judges from the district court generally, in my understanding, come upon recommendation from their Senators. In that regard, I think that it is necessary for the respective State Senators—I know that we have affiliates in almost every State in the United States, and most of them keep at the ready names of qualified individuals who can serve on the district court level.

Also, in our national office, we are a little better situated than some of my other colleagues, just because we are older. And we do have a staff, which means that we have a bank which can provide names of individuals and their qualifications and backgrounds. We also have a judicial selection committee within our organization to assist in this process.

With regard to the next phase, once someone is recommended, you may recall that during the Carter administration, the National Bar Association had the opportunity, just as the American Bar Association, to evaluate candidates for the Bench on every level, not just the district court level. We have not been given that privilege since then.

We believe that it is necessary for this committee to have a different perspective other than the perspective of the American Bar Association. It is not to suggest that the American Bar Association does not do a credible job, but I do think that they are limited in their scope and what they think are the most important issues.

One example which was given today—and although we were not asked, we took it upon ourselves to conduct our own investigation and evaluation of a recent nominee, and it was extremely thorough. We had interviewed as many individuals on the qualifications of, in this case, Mr. Williams, as did the American Bar Association. We had his writings evaluated by respected scholars, and I would dare say that the evaluation that we conducted was as extensive and as thorough as anyone could ever hope to expect.

So I think that in this process, if the Senate, if they are going to consider the evaluation that the American Bar Association performs, that they should also consider that of the National Bar Association or of the coalition.

Senator KENNEDY. Mr. Sun.

Mr. SUN. Yes, Senator. I sort of interpret your question in terms of breaking it up into the various levels—district court, circuit, and Supreme Court.

With respect to the district courts, in working with the Senators, groups such as ours and others work with the Senators on two aspects. One is in fact, the search committees that a particular Senator might form to look for qualified candidates. We look to make sure, or try to ensure, that those committees have a diversity of representation. That is a starting point that I think has a meaningful impact in the end on who gets recommended to the Senator by the search committee, because I think, although different Senators have different ways of going about doing it, essentially, they look to recommendations made by qualified people they trust. And it is incumbent on community groups and bar organizations such as ours, it seems to me, to feed the qualified names, and in fact, even affirmatively go out and solicit people who we think are qualified to try to get them interested. Sometimes, some of the most qualified people are people who are financially well-off and may not want to go back to public service, since we have to sometimes cajole them. So we do that.

With respect to the circuit level, it is done a little bit more here in Washington, we find. So we feel that we need to increase our communications, and I think, echoing what Paulette said, we need to communicate more with the members of this committee because the political reality as we all see it is when an important position comes open, be it in the circuit or the Supreme Court, this committee is consulted by the executive branch, for the obvious reasons that we all know. For that reason, we feel, again, that the lines of communication have to be improved, and we need to feed you the names because, as Senator Biden indicated here this morning,

there is a difference now in 1994 from 1977 when President Carter was President. The so-called pool of qualified persons of color and women is much greater in terms of those who are qualified for circuit positions and, indeed, for the Supreme Court, and we now have the opportunity to provide those names and to urge the members of this committee when they communicate with the executive branch, to add your voice to the names that are submitted by our various bar organizations.

So I see us working in that vein as a means of improving the process.

Senator KENNEDY. Thank you.

Mr. Monet.

Mr. MONET. Senator, when the process turns political, as you know, Native Americans, because of their population, stand very little chance of having a lot of leeway at any level in the game. But if the objective is, as one of the panelists said, to have the judged have a decision and a voice in who will be doing the judging, again I would turn to our Native Americans' tribal side of these issues. Quite simply, if this committee—I think it would be in its jurisdiction—if this committee could force States and the Federal courts to pay full faith and credit to tribal courts and to the decisions issued by tribes and their judges, most of the American Indians would be involved at that local level in their tribal governments and dealing with their tribal courts, and I feel like they would then feel they have participated in the process somewhat.

If I might also, just on another point, you know, 20 years ago, you could count on one hand all of the American Indian attorneys in the country. Today, there are perhaps about 500. Many of the courts are staffed by attorneys, and attorneys work in the tribes' courts. If that otherwise unconventional and nontraditional criterion were counted by this committee and by the President and by other people as real qualifications for judging in the Federal courts, I think we would see more qualified people.

Senator KENNEDY. Thank you.

Mr. Caraballo.

Mr. CARABALLO. Senator, the Hispanic National Bar Association has a pretty sophisticated process. We are actually getting to the point where we are starting to feel comfortable with the district court and court of appeals nominations, because we have developed relationships with the Senators in those States where our people are in large numbers. And that is really what it comes down to is developing relationships with the individual Senators so that the nominations can come out from them to the President. And we feel that we are starting to make some progress in most areas.

There are some areas where we have great relationships with the Senator; in other areas we do not, and we are trying to develop them. Our frustration is really more along the lines of the Supreme Court because, truthfully, we do not know what else we can do. We have actually done what we thought was the right thing to do, which is we convened a nationwide committee of Hispanics from across the country representing every Hispanic constituency we could think of. We came up with a list. We gave that list to this committee, which actually received it very well. We gave it to the administration, which we believe received it very well.

So we have done what we think is our part, which is to bring before you, bring before the administration, individuals whom we think are qualified.

We do not know what that next step is that we need to do to get somebody on, but we are trying.

Senator KENNEDY. OK.

Ms. ROBINSON. Senator, may I just add that I do think that our association is eager to encourage judicial service of qualified people, particularly minorities and women, and feel we have an educational outreach function to actually have programs at our association in New York to invite people who might be intimidated by the process, to encourage them, to educate them, as to the possibilities both on the Federal level, but it is also important on the State and local levels.

So I think all the organized bars can do more to help not only their members, but those people who are not members, to try.

Senator KENNEDY. I am going to ask the Attorney General to meet with all of you and try to work out some processes and procedures so at least we can get it to that level, and you can hear some of the suggestions and think a little bit about it. I think the comments have been very constructive, but I think it is important that the Attorney General, in a way that just does not go out at the time when you have these vacancies, but has a built-in, continuing and working kind of relationship and understanding. I think that is the only way that any of these suggestions will work. I will follow up with her and with you and see if there are some additional ways that we can establish better kinds of both input and communication. I think it is very important, and I am convinced that the President feels very strongly about it. I have talked with him about it, and I know he does, and I know that Attorney General Reno does as well. It is very legitimate. I have spoken with them about this question. And President Carter had a very good record on it. We went through the period of the 1980's, and I think you are familiar with the statistics, and I am not interested at this time in going all the way back through that. But I think if we look at the record on this—and as you pointed out, the pool now is so much greater than it was a number of years ago—there is a very, very important responsibility that all of the faces at Justice, not only at the Department, but every aspect of the judicial system be responsive to the kinds of excellence that exist out there in our diversity. We all need to think about that more carefully.

I thank all of you very much for being here. I appreciate your patience with us. We will follow up with you and find out what additional suggestions you might have.

We will include in the record at this point a statement submitted by Nicholas Katzenbach.

[The prepared statement of Mr. Katzenbach follows:]

PREPARED STATEMENT OF NICHOLAS DEB. KATZENBACH

Mr. Chairman and Members of the Committee: My name is Nicholas Katzenbach and I presently practice law in New Jersey. From 1961 to 1966 I served in the Department of Justice in various capacities including Attorney General. It was in this capacity that I first had the privilege of knowing Judge Stephen Breyer. I am delighted to testify in support of his nomination as a Justice of the Supreme Court.

Judge Breyer had been an outstanding student at Harvard Law School with a particular interest in competition law and its economics. In 1965 I had persuaded one of his professors at Harvard, Donald Turner, to head the Antitrust Division. Don, in turn, was able to persuade a young Steve Breyer to join the Division at the conclusion of his clerkship with Justice Goldberg. It was then, as you know, that he brought even the Antitrust Division into the struggle for civil rights with his imaginative use of competition law to compel the showing of homes in white neighborhoods to African-American buyers. That position, which he both developed and successfully defended, is illustrative, I believe, of his ability as even a young lawyer to use scholarship in the service of human values—a capacity that has served him well throughout his career.

The Committee is aware of Judge Breyer's very distinguished record as a lawyer, law professor, Counsel to this Committee, and judge. There is no question as to his intellectual and experiential qualifications to be a Justice. What I would like to do very briefly is to relate that experience and his personal qualities to the job of a Justice.

I think in recent years there has been a change in the way both Presidents and the Senate have looked at judicial appointments, and particularly those to the Supreme Court. The focus has been, in my opinion, too much on efforts to predict how a putative Justice will vote on the immediate political issues and too little on how he will perform over many years as a Member of our unique and important third branch of government. Assuming a nominee has the requisite intelligence and integrity what else should the President and the Senate look for?

First, I think it is useful to weigh the candidate's experience against the job. The Court in our political system is a political entity with a political role—note a partisan one but undeniably a political one, albeit a limited one. It is obviously useful if the nominee can bring from personal experience an understanding of government and the proper roles of the branches of the federal government as well as that of the States to the Court. Few candidates can bring, as Judge Breyer does, valuable experience in all three branches and the mature understanding of roles which he has demonstrated in all his governmental capacities.

Second, Justices must be particularly sensitive to the long view of law and relatively immune, as the President and the Congress cannot be, to the passions of the moment. It is, after all, very often the Constitution which they are expounding. I may be prejudiced but I think one value of teaching is that it encourages—almost compels—a broad understanding of trends in our changing society relevant to the long view the Court must take when interpreting the Constitution.

Finally—and most important of all although too rarely discussed—is judicial temperament. The Supreme Court is composed of nine Members with varying backgrounds and experience. It is a collegial institution which operates best when it makes its decisions in a spirit of mutual respect. It is not a question of counting votes for particular positions. It is most effective when each Member is prepared to listen to and be persuaded by the views of colleagues. In this manner both the views of a majority and dissenters are developed and shaped. Much more than the particular result is at stake.

Judge Breyer is often described in terms of his pragmatism and practicality. I think he is a man of principle with deeply held values—but one who is not so sure he is right than he has no need to listen to the differing views of others. He is an able advocate. But, in my opinion more importantly, he is a good listener, respectful of the views of others and always prepared to reconsider his own. Perhaps that is pragmatic and practical. I think it shows the temperament of a wise and intelligent judge.

If confirmed, Judge Breyer will undoubtedly prove to be an excellent Justice. I believe that he has the intelligence, experience and temperament to be one of the great ones.

CURRICULUM VITAE

Born: January 17, 1922.

Military Service: USAF: 1942–1945; Air Medal with 3 clusters.

Education: Princeton, BA *cum laude,* 1945; Yale Law School, LL.B. *cum laude,* 1947; Editor in Chief, *Yale Law Journal,* 1947; Rhodes Scholar, Balliol College, Oxford, 1947–1949.

Legal experience:

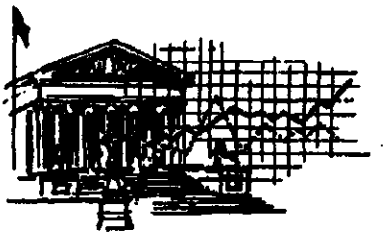
Associate, Katzenbach, Gildea & Rudner, Trenton, NJ, 1949–1950.

Office of General Counsel, Department of the Air Force, 1950–1952.

Associate Professor, Yale Law School, 1952–1956.
Professor, University of Chicago Law School, 1956–1960.
Subjects: Contracts, Conflict of Laws, Secured; Commercial Transactions, International; Business Transactions, Inter'l Law.
Ford Foundation Fellow, 1960–1961.
United States Department of Justice: Assistant Attorney General, 1961–1962; Deputy Attorney General, 1962–1964; Acting Attorney General, 1964–1965; U.S. Attorney General, 1965–1966; Under Secretary of State, 1966–1969.
V.P. (later Senior V.P.) & General Counsel, IBM Corporation, 1969–1986.
Herman Phleger Distinguished Professor of Law, Stanford Law School, 1986.
Partner, Riker, Danzig, Scherer, Hyland & Perretti, 1986–Present.
Member: New Jersey Bar (1950), Connecticut Bar (1956), New York Bar (1972). Admitted to Practice before the United States Supreme Court; Second Circuit Court of Appeals; Third Circuit Court of Appeals; Eighth Circuit Court of Appeals; Ninth Circuit Court of Appeals.
Author: Kaplan and Katzenbach, *Legal Foundations of International Law* (1961); Numerous Law Review Articles.
Organizations: Council, American Law Institute; Board of Director—IBM Corporation, Washington Post Corporation, Southeast Banking Corporation, NAACP Legal Defense Fund; American Bar Association; Association of the Bar Association; American Judicature Society; American Society of International Law.

Senator KENNEDY. We will also insert in the record a statement from Charles Mueller of the Antitrust Law and Economics Review.

[The prepared statement of Mr. Mueller follows:]



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WHY BREYER SHOULD NOT BE CONFIRMED TO THE U.S. SUPREME COURT

Statement of

Charles E. Mueller

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Antitrust Law & Economics Review
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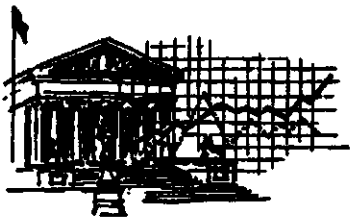
Before the

Judiciary Committee
U.S. Senate
Washington, DC 20510

July 15, 1994



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July 13, 1994

Antitrust Cases of
Judge Stephen G. Breyer, 1st Circuit

I. Decisions 1981-6/8/93

1. *Cordova & Simonpietri Insurance Agency, Inc. et al. v. Chase Manhattan Bank N.A. et al.*, 649 F.2d 36 (1st Cir. 1981). AFFIRMING DISMISSAL of plaintiff's Sherman Act conspiracy complaint. Breyer. (Local insurance agency vs. a large bank, Chase Manhattan.)

2. *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981). AFFIRMING DIRECTED VERDICT for defendant. Price discrimination. Breyer. (Stationery wholesaler vs. a manufacturer of photo albums, scrap books, etc.)

3. *Auburn News Co. et al. v. Providence Journal Co. et al.*, 659 F.2d 273 (1st Cir. 1981). REVERSING INJUNCTION against defendant. Conspiracy, refusal to deal. Bownes. (Newspaper home-delivery distributors vs. newspaper.)

4. *Claire M. White et al. v. The Hearst Corp. et al.*, 669 F.2d 14 (1st Cir. 1982). AFFIRMING SUMMARY JUDGMENT for defendant. Resale price fixing, refusal to deal. Murray. (9 news dealers vs. newspaper publisher, Hearst.)

5. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1983). FINDING NO VIOLATION by defendant. Predatory pricing. Breyer. (New entrant vs. manufacturer with 94% of U.S. market for nuclear-plant shock absorbers.)

6. *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030 (1st Cir. 1984). AFFIRMING DIRECTED VERDICT for defendant. Tying arrangement. Bownes. (Dealer vs. manufacturer of photocopiers.)

7. *Kenworth of Boston, Inc. v. Paccar Financial Corp. et al.*, 735 F.2d 622 (1st Cir. 1984). REVERSING INJUNCTION against defendants. Tying, refusal to deal. Breyer. (Truck dealer vs. manufacturer with 18% of U.S. heavy-truck market.)

8. *Home Placement Service, Inc. et al. v. Providence Journal Co. et al.*, 739 F.2d 671 (1st Cir. 1984). DENYING PLAINTIFF new trial on damages ($1 trebled to $3) and denying most of its attorney's fees. Monopolisation, refusal to deal. Bownes. (Advertiser of rental real estate vs. newspaper.)

9. *James P. Kartell, M.D. et al. v. Blue Shield of Massachusetts et al.*, 749 F.2d 922 (1st Cir. 1984). REVERSING JUDGMENT for plaintiffs. Sherman Act conspiracy, monopolisation. Breyer. (Local doctors vs. large health insurer, Blue Shield.)

10. *Computer Identics v. Southern Pacific Co. et al.*, 756 F.2d 200 (1st Cir. 1985). Sherman Act conspiracy. AFFIRMING VERDICT for defendants. Torruella. (Seller of computer control systems with railroad, Southern Pacific.)

11. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1987). FINDING NO VIOLATION of Sherman Act. Exclusive dealing. Breyer. (Airline charter service with two planes vs. Massachusetts Port Authority.)

12. *Texaco Puerto Rico, Inc. v. Jose Medina et al.*, 884 F.2d 242 (1st Cir. 1987). AFFIRMING SUMMARY JUDGMENT for defendant. Monopolisation, refusal to deal. Timbers. (Puerto Rican service station dealer vs. large refiner, Texaco.)

18. *Clamp-All Corp. v. Cast Iron Soil Pipe Institute et al.*, 851 F.2d 478 (1988). FINDING NO VIOLATION by defendant. Monopolization, predatory pricing. Breyer. (Maker of new pipe couplings and fittings vs. pipe manufacturers' association, 90% of U.S. market.)

14. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1988). OVERTURNING JURY VERDICT for plaintiff. Tying. Breyer. (Local car dealer vs. auto manufacturer.)

15. *Monahan's Marine v. Boston Whaler, Inc., et al.*, 866 F.2d 525 (1989). AFFIRMING SUMMARY JUDGMENT for defendant. Tying. Breyer. (Local boat dealer vs. boat manufacturer.)

16. *Town of Concord et al. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990). OVERTURNING JURY VERDICT for plaintiff. "Price squeeze." Breyer. (Two local towns vs. large electric utility.)

II. Breyer Antitrust Cases, Post-6/8/93

17. *Tri-State Rubbish, Inc., et al. v. Waste Management, Inc., et al.*, 998 F.2d 1073 (1st Cir., 7/13/93). AFFIRMING DISMISSAL in part and remanding rest of plaintiff's "thin and doubtful" case. Exclusive dealing, predatory pricing. Boudin. (Trash hauler vs. 12-town waste-disposal monopoly.)

18. *R.W. Intl. Corp. et al. v. Welch Food, Inc. et al.*, 13 F.3rd 478 (1st Cir., 1/20/94). AFFIRMING SUMMARY JUDGMENT for defendants. Distributor termination, predatory pricing. Coffin. (Puerto Rican food distributor vs. large food manufacturer, Welch Food, Inc.)

19. *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft et al.*, 1994-1 CCH ¶70,548. REMANDING PLAINTIFF's "implausible" case. Resale price fixing, price discrimination. Breyer. (Puerto Rican auto dealer v. German auto manufacturer, BMW.)

Charles Mueller
July 13, 1994

* * *

WHY BREYER SHOULD NOT BE CONFIRMED TO THE SUPREME COURT

Charles E. Mueller

President Clinton has been misled, in my opinion, into making a grave mistake in nominating to the Supreme Court Judge Stephen Breyer of the U.S. Court of Appeals in Boston. On the basis of his antitrust record, he is an unjust man. He is also one who is intellectually and politically committed to a set of "economic" theories that are demonstrably false and that will callously reduce the standard of living of the average American family in the decades to come.

In response to a question from Senator Metzenbaum in these hearings on July 12, Breyer replied: "Sometimes plaintiffs did win in antitrust cases I've had and, as you point out, defendants have often won. The plaintiff sometimes is a big business and sometimes isn't. The defendant sometimes is and sometimes isn't."

Once more Breyer seems to have trouble with the facts. No plaintiff, so far as I can determine, has ever won an antitrust case in his court. In the attached table, I've listed the 19 such cases he's participated in since he joined the court (1980) and none was decided for the plaintiff. (Two were remanded--one as a "thin and doubtful" case, the other as an "implausible" one. See Tri-State and Caribe BMW, be-

low.) Do these qualify as plaintiff "wins" in Breyer's lexicon? If not, what cases is he talking about?

The rest of the Breyer answer quoted above was evidently intended to suggest that there was a "mix" of small and large firms on both sides in his 19 antitrust cases. This is patently not true. Historically, antitrust defendants have been, on average, some 30 times the size of antitrust plaintiffs and that tendency is clearly present in his cases as well.

In the table below, I've described (in a parenthetical sentence) the opposing parties in each of Breyer's 19 cases. His plaintiffs are largely local dealers or distributors, with a couple of new-entrant, new-technology producers--all obviously small by virtually any definition (e.g., the SBA's less-than-500 employees)--while his defendants are generally giant institutions (e.g., Chase Manhattan Bank, Blue Shield, Hearst newspapers, Southern Pacific Railroad, Massachusetts Port Authority, Boston Edison) or big manufacturers (e.g., BMW, Subaru, Welch Food, Paccar (heavy trucks), SCM (photocopiers), ITT Grinnell, and Texaco.)

Again, Breyer has misstated the facts. No antitrust plaintiff has ever won in his court. Similarly, the plaintiffs he's consistently ruled against have all been small and the defendants he's methodically favored--with his vote and his intellectual effort--have virtually all been very large.

Breyer is the candidate of big-business and monopoly in America. He has never met a monopoly or a restraint on competition that he didn't like, ruling for the big-business defendant, again, 19 times in 19 antitrust cases during his 14 years on the 1st Circuit Court of Appeals. He is credited with being "even more conservative than Robert Bork" by his conservative admirers, who gleefully note that he is the only Democratic appointee among 157 federal appeals judges who has voted 100% of the time for the big corporations charged with antitrust offenses--the other 6 who have such "100%" records being all Reagan appointees.

Breyer is disdainful of small business, believing that only the corporate giants can be "efficient." His unbroken line of 19 decisions for the same side (historically, each side in antitrust has won about half the time on appeal) shows a determined unwillingness to decide on the merits. No antitrust plaintiff will ever win a case in his court. In a word, he prejudges cases and nullifies laws he doesn't like.

What does this tell us about his judicial qualifications? About his impartiality, sense of justice, and judicial temperament? About his integrity and intellectual capacity? In his antitrust decisions, there is not a trace of fairness or even-handed application of the law. They reflect routine injustice, a consistent ruling in favor of the economic bullies rather than their victims--a result achieved by crabbed, mean-spirited interpretations of laws never intended as protectionism for inefficient corporate giants.

A host of business practices historically condemned as monopolistic and unfair--that destroy efficient small firms and lead to monopoly prices for the public--have in effect been legalized in his court. Price discrimination, predatory (below-cost) pricing, exclusive dealing, tying arrangements, resale price fixing, and the like have all been consistently approved by Breyer. There is one conspicuous principle in his antitrust

decisions: The corporate defendant always wins, no matter how egregious the challenged conduct.

To get this big-business-always-wins result, Breyer has routinely displayed his disrespect for Congress, rewriting the statutes as he went, in effect--to borrow the favorite phrase of Sen. Orrin Hatch (R-Utah)--"legislating from the bench." He has, for all practical purposes, repealed an entire body of law in his four-state (plus Puerto Rico) jurisdiction, including the venerable Sherman Antitrust Act (1890) and Clayton Act (1914).

Breyer's antitrust record displays a similar disdain for the Constitution. Antitrust cases are among those in which, under the 7th Amendment, "the right of trial by jury shall be preserved." Again to achieve his big-business-always-wins result in antitrust cases, Breyer has repeatedly overturned jury verdicts for the plaintiffs or ordered their cases dismissed before they reached the jury.

Intellect and integrity? Breyer rationalizes his siding with the economic bullies by claiming he's doing it all "for the consumer." In an Orwellian twist of the language, he theorizes that bigger must be more "efficient," so monopoly prices must be lower than competitive prices. His so-called "economics" is ideological fiction churned out by laissez-faire ideologues, with no credible empirical or real-world support. A "jury" of say 12 professional economists selected at random from the directory of the American Economic Association would find his economic theories hilarious.

. In one of his cases (Interface v. Massport, 1987), Breyer suggested that those harmed by the monopoly practices at Boston's Logan Airport could just go out and "build competing airports."

. In his most recent case (Caribe BMW v. Bayerische Motoren Werke, 1994), Breyer expressed perplexity as to how the plaintiff auto dealer could be simultaneously injured by a discriminatory price (charging him more for cars than his competitors paid) and a "maximum" resale price-fixing arrangement that prevented him from passing on that extra charge by raising his own resale prices to the public. The mystery is how Breyer could not understand the familiar "price squeeze" the plaintiff was obviously complaining about--an artificial jacking-up of the price he paid his supplier and an artificial holding-down of the price he was permitted to charge his own customers, thus artificially narrowing his own margin below the competitive level.

. In another case (Barry Wright Corp. v. ITT Grinnell, 1983), he wrote: "When prices exceed incremental [marginal or average variable] cost, one cannot argue that they must rise for the firm to stay in business." But in the airline industry, for example, marginal costs are estimated at less than 25% of full operating costs. A company can stay in business by covering only one-quarter of its operating expenses? This is economically silly.

. The next year (in his Kartell v. Blue Shield, 1984), he declared unambiguously that "to succeed, [a predatory-pricing case] requires a showing that the price was below 'incremental cost' (or the equivalent)," citing as his sole authority his own decision of the preceding year (Barry Wright, above). The U.S. Supreme Court, nearly a decade later (Brooke/Liggett v. B&W Tobacco, 1993), is itself still undecided as to the "appropriate measure of cost" in such cases.

. In a price-discrimination case (Allen Pen Co. v. Springfield Photo, 1981), Breyer relied on the fact that the goods on which the victim was overcharged (more than its competitors) accounted for only 2% of that disadvantaged firm's total business. He made no mention of the Supreme Court's holding (FTC v. Morton Salt, 1948) that the price-discrimination law must, of necessity, apply to each and every individual item in a merchant's inventory if it is to have any real meaning, including, in that case, table salt sold in a supermarket (accounting for a fraction of 1% of its overall sales).

. Breyer rejects the traditional notion that one of antitrust's main purposes is the prevention of "unfair" competitive practices, referring to such attacks on small enterprises as mere "torts" which "lie beyond the purview of the antitrust laws" (Kartell v. Blue Shield, 1984) and disparagingly characterizing a Massachusetts statute prohibiting them as a "fair trade" law (Kenworth v. Paccar, 1984). The difficulty with this Breyer "tort" theory is first that torts were illegal at common law and were thus already illegal in 1890 when Congress passed the Sherman Act, doing so precisely because it found the existing tort law inadequate to deal with the trusts of the day, e.g., Standard Oil, American Tobacco, and the like. A second problem is that this Breyer notion is wildly at odds with a mountain of legislative history and Supreme Court rulings since 1890.

. Rejecting "fairness" as even a part of the standard in antitrust, Breyer embraces a single criterion, what he calls "consumer welfare." The problem, though, is that he defines this term to include not just consumers as members of households (the conventional economic definition) but business firms as well. In mainstream economics, the interests of commercial organizations are designated by the term "producer welfare" but Breyer never mentions this. By lumping both consumers and entrepreneurs under the same label, "consumer welfare," he's able to claim that he's serving "consumers" even when families are being looted by anticompetitive practices. If both the individual citizen and the corporate monopoly are "consumers," then the overcharging of the former by the latter merely "transfers" money from the pockets of one "consumer" to another. Under this definition, the behavior of Willie Sutton--the gentleman who robbed banks "because that's where the money is"--caused no loss of "consumer welfare." He simply "transferred" money from one "consumer" pocket to another, with no reduction in the total amount of money held by him and the bank together.

. While the Supreme Court has repeatedly held that the (federal) Sherman Act does not preempt the antitrust field and that the 50 states are accordingly free to enact and enforce substantively stronger antitrust laws if they like, Breyer holds (Cardova & Simonpietri Ins. v. Chase Manhattan, 1981) that the states--while allowed to "occasionally" vary the "details" of their antitrust statutes from the federal model--must keep them "broadly consistent with general federal policy." Since state antitrust law long preceded the federal, this is an especially outrageous suggestion by Breyer.

. Breyer defines "entry barriers" as costs facing new entrants that incumbents were spared. This is a word game that drains the term of all serious meaning. For example, under this definition, there would be no "barriers" confronting those denied fair access to Boston's Logan Airport (Massport, above), since they could presumably build a new one for the same number of (inflation-adjusted) dollars as were spent by the original Logan builders. In mainstream economics, entry barriers

have an entirely different definition, namely, as costs facing new entrants that allow incumbent firms to maintain higher-than-competitive prices (without inducing new entry that would force their prices back down). This traditional definition protects the public from monopoly pricing; Breyer's does not.

In other cases, Breyer ordered summary dismissal because he wasn't persuaded that the defendants had "market power"--the power to charge a price above the competitive level. But in a case where he assumed such market power (Kartell v. Blue Shield, 1984), he ruled that monopolists have a right to "exploit" their market power and, besides, that it's judicially difficult to determine "what is a 'competitive' price." The rules bend to get a fixed result: The corporate defendant always wins. A court he sits on has no rightful claim to the public's trust and confidence.

In overturning the historic competitive-price standard, Breyer sets aside all enforcement of, for example, the country's merger law: In the Justice Department's 1992 Merger Guidelines, unlawful mergers are defined as those that create or enhance the "ability profitably to maintain prices above competitive levels." And of course public agencies whose job is to prevent utilities from gouging the public routinely set prices intended to approximate those that would prevail under competitive conditions. In holding that the competitive price level can't be judicially determined, and that monopolists have a right to "exploit" their monopoly power, Breyer rejects any form of protection for the public from private economic power, whether antitrust (to maintain competitive markets) or public regulation (to restrain incurable monopoly pricing power).

The underlying assumption in all Breyer's antitrust rulings is that big is more efficient than small. It is a thoroughly false--indeed, a perverse--premise. It is almost universally the case that the largest firm in a given industry is among its most inefficient, e.g., GM in autos, IBM in computers, and so on. In the airline industry, for example, the Big 5 carriers have unit (per-passenger-mile) costs that exceed those of mid-size Southwest Airlines--and even the smallest of the new startup lines--by 23% (American) to 48.6% (USAir). Salamon Bros., NY Times, 4/25/93.

Only when the new administration intervened in early 1993 to stop the incessant predatory attacks by the Big 5 were those efficient small airlines permitted to expand across the country and thus trigger an overall decline in prices to the consumer. It is a fairness or level-playing-field standard in antitrust--the one Congress laid down when it passed these laws over 100 years ago--that deconcentrates markets and systematically lowers consumer prices. It is Breyer's unwillingness or inability to grasp this central empirical fact of the real economic world that makes him the national liability that he is.

Sophistry is the hallmark of Breyer's antitrust decisions. One can search in vain through them for even the slightest trace of the "brilliant jurist" portrayed by his supporters. His opinions are rambling, factually-incoherent lectures (purporting to be "economic" theory) so poorly written--as can be verified by a visit to any county law library--that the reader often has to go to the decision of the court below to find out what had actually happened in the cases. Here all that's evident is either intellectual incompetence--captivity to the crude 19th century dogma that "big is efficient"--or equally crude cheerleading for corporate giantism to gain "conservative" political support for an ambitious judicial career.

A judge's stand on antitrust is a revealing window into his broader view of the general economic issues and his overall judicial philosophy. Antitrust has two vital functions in America. First, it lays down the rules of the entrepreneurial game for the nation's 20 million businesses, providing them and their families with a "bill of rights," a shield against unjust treatment by economic predators.

No less importantly, antitrust is the nation's central price-control mechanism. Without it, mergers and economic thuggery quickly transform competitive industries into sclerotic monopolies and prices start to climb. With Breyer on the Supreme Court, its pro-monopoly majority will be so solid that corporate lawyers will dutifully start telling their clients the rules are now off, that the long-sought grail of laissez-faire has at last arrived. With antitrust effectively repealed by unelected judges, consolidation will accelerate even faster and prices in health care, for example, will be rocketing even further out of control as the voters go to the polls in '96. When President Clinton named Breyer to the high court, he almost certainly killed any serious chance of controlling health-care costs during his presidency and, indeed, cut the strongest cable that restrains prices at large.

Stephen Breyer's 19 pro-monopoly votes spell out an ultra-conservative economic agenda that he shares with Robert Bork and Antonin Scalia. It is one that systematically transfers very large amounts of money from consumers and efficient small enterprises to corporate dinosaurs that are too inefficient to compete on the merits and thus have to resort to economic violence against their smaller, more efficient competitors to survive. Even if Congress should rewrite the country's antitrust laws in a plainly-expressed effort to prevent this result, his record makes it plain that he would find a way to evade it. His is a result-oriented antitrust jurisprudence and no private antitrust plaintiff can ever expect to win his vote. His confirmation by the Senate will itself be read by his 1,000 colleagues on the nation's courts as an endorsement of his antitrust views by Congress or of its indifference to that vital body of law and the economic havoc that its neglect inevitably yields. On the Court, his votes and his pro-monopoly advocacy will cost the nation--and the president--dearly indeed.

"Every great mistake has a halfway moment," Pearl Buck once wrote, "a split second when it can be recalled and perhaps remedied." The U.S. Senate now has such a "halfway moment," a final chance to spare the U.S. and its president the appalling costs of his greatest mistake, Stephen Breyer. It is the one he will most regret in the years to come.

Senator KENNEDY. Before concluding, I want to thank all of the staff. They have been wonderful. All of us, Republican and Democrat alike, rely on our dedicated men and women who help us, and their efforts too often are overlooked or taken for granted. So I want to thank all of them for the great work they have done in helping all of our colleagues on both sides of the aisle, as well as working on the shaping of these hearings. They have done a really outstanding job.

We will now terminate these hearings and look forward to the committee's meeting, as stated by the chairman, next week, and I am confident it will be an overwhelmingly favorable vote for Judge Breyer.

I thank all of you for coming. The committee stands adjourned.

[Whereupon, at 5:57 p.m., the committee was adjourned.]

APPENDIX

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 601 ■ Washington, D.C. 20009 ■ 202/332-3224

NAN ARON
Executive Director

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For Immediate Release

ALLIANCE FOR JUSTICE ISSUES REPORT ON BREYER

Washington -- The Alliance for Justice, a national association of public interest legal organizations, including the Bazelon Center for Mental Health Law and the Native American Rights Fund, today issued its report on the nomination of Judge Stephen G. Breyer to become the 108th Justice of the United States Supreme Court.

The Alliance report praises Judge Breyer's distinguished legal career, his dedication, and his intellectual prowess. It also notes that while these qualities tell us much about what kind of Supreme Court justice he will be, they do not tell us everything. The report says that the "public interest community believes the nation needs someone with a vision of how the law can serve ordinary Americans and protect them when government or private interests are overbearing." When these standards are considered, the report continues, Judge Breyer's record to date is mixed, and how he will perform on the Supreme Court is hard to predict.

"Since 1990, the Supreme Court has lost its three most passionate voices for justice: William Brennan, Thurgood Marshall, and now Harry Blackmun," said Nan Aron, Executive Director of the Alliance. "We need a Justice who will carry on their vision and idealism and help resurrect the Court as a promoter of rights and liberties of ordinary Americans," Aron added.

The Alliance report urges Judge Breyer to "attack the job with the humanity and grit that the greatest of his predecessors brought to the job." "The country needs someone who will breathe again into the Court the inspiration of a living Constitution that promises liberty and justice for all. If Judge Breyer uses his considerable talents to fulfill that role, he could become a truly great Supreme Court justice," the report states.

For a copy of the report or additional information, please contact Nan Aron at (202) 332-3224.

Alliance for Justice

A National Association of Organizations Working for Equal Justice

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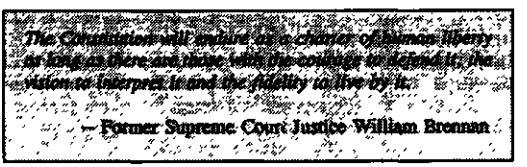
INTRODUCTION



On July 12, 1994, the Senate will begin deliberating the nomination of Judge Stephen G. Breyer to be the 108th Justice of the United States Supreme Court. It is a Court much changed in the last five years. Since 1990, it has lost its three most passionate voices for individual rights and liberties -- William Brennan, Thurgood Marshall, and Harry Blackmun -- and generally moved even further to conservative extremes.

President Clinton has nominated Stephen Breyer to replace Justice Blackmun. Judge Breyer has had a distinguished legal career: Harvard Law School professor, Chief Counsel to the Senate Judiciary Committee, Chief Judge of the United States Court of Appeals for the First Circuit. He is hailed as a brilliant jurist, highly intelligent and dedicated. He is also known to be very personable, and possesses exceptional consensus-building skills.

These qualities tell us much -- but not all -- about what kind of Supreme Court justice Steven Breyer would be, and which voids on the Court he might fill and which balances he might shift. These qualities do not tell us whether Judge Breyer would provide other attributes that are sorely needed on the Court.

President Clinton said that he was looking for someone who is compassionate and who has a big heart, and few could doubt that the Court's jurisprudence has greatly lacked compassion and heart in recent years. The public interest community believes the nation needs someone with a vision of how the law can serve ordinary Americans and protect them when government or private interests are overbearing. We need a justice with the creative idealism of an Earl Warren or Brennan, Marshall, or Blackmun, who revered the Constitution as the ultimate guarantor of equality and fairness in our society.

When these standards are used, Judge Breyer's record is mixed. His opinions display a strong concern for procedural fairness, insisting that government agencies and officials adhere to regulatory rules and guidelines. Yet, he is also extremely deferential to agency officials and often interprets statutory protections for citizens in such a narrow manner that the original Congressional purpose of helping ordinary Americans gets lost. In Freedom of Information Act cases, for example, his narrow interpretations have denied citizens access to important information about government operations. And his approach in the area of disability law has left citizens without remedies that they had reason to believe Congress meant to be available. His opinions on Section 504 of the Rehabilitation Act are so restrictive that they undercut the law's spirit and broad purpose to eliminate the widespread discrimination experienced by persons with disabilities.

On issues of fundamental constitutional rights, Judge Breyer's record is mixed. His opinions on First Amendment issues appear, on the whole, to protect freedom of speech and association. His record also suggests a commitment to the constitutional right of privacy, including a woman's right to choose, although it is not clear how broadly he would interpret that right.

This report shows a multitude of other areas in which Judge Breyer has adjudicated cases in a moderate, careful, often meticulous but sometimes antiseptic way. They suggest that Judge Breyer comes to the Court with many, but not all, of the qualities we should look for in a Justice.

Judge Breyer's intelligence, congeniality, and accessible style, combined with his consensus-building abilities, suggest that he will assume an influential position on a Court that continues to struggle to find its way on many issues. But surely he must do more on the Court than search for consensus. Consensus does little to advance the cause of justice if the agreed-upon principles are wrong. The Court needs, as much as consensus, Justices with gut instincts to understand the struggles and needs of ordinary Americans and those who continue to suffer from injustice.

As Judge Breyer ascends to one of the most important positions in the country, the Alliance for Justice urges him to help fill the gaping void on the Court and attack the job with the humanity and grit that the greatest of his predecessors brought to the job. The Court and the nation need more than another very intelligent, competent Justice. The country needs someone who will breathe again into the Court the inspiration of a living Constitution that promises liberty and justice for all. If Judge Breyer uses his considerable talents to fulfill that role, he could become a truly great Supreme Court justice.

Biographical Information

With degrees from Stanford (1959), Oxford (1961), and Harvard Law School (1964), Judge Breyer began his legal career as a law clerk to former Supreme Court Justice Arthur Goldberg. Thereafter, he combined a career in public service, working in a variety of administrative and legislative positions, with teaching stints at Harvard Law School, Harvard's Kennedy School of Government, and the College of Law, Sydney, Australia. From 1979 to 1980, Breyer served as chief counsel to the Senate Judiciary Committee. In late 1980, President Carter appointed him to the United States Court of Appeals for the First Circuit, where he is now Chief Judge. He is currently 55 years old.

In addition to the numerous decisions Judge Breyer has authored, he has written extensively on various topics in administrative law, particularly regulation and regulatory reform. His scholarship complements his hands-on experience during the Carter Administration, when he initiated airline deregulation. In 1987, the American Bar Association recognized Judge Breyer's scholarship by naming him the recipient of its Annual Award for Scholarship in Administrative Law.

Judge Breyer also served as a commissioner on the United States Sentencing Commission from 1985 to 1989. In that capacity, he was instrumental in crafting the federal sentencing guidelines, which were intended to alleviate the unfairness and disparity in federal criminal sentencing across the country. His work in reaching a consensus on the guidelines has been highly praised, but the guidelines themselves have received criticism. Jack Weinstein, Senior Judge on the United States District Court for the Southern District of New York, for example, has said that the guidelines "'require, in the main, cruel imposition of excessive sentences.'" Quoted in Hentoff, *Judge Breyer: Lots of Room for Dissent*, The Washington Post, June 4, 1994.

Judicial Record

Equal Rights

Judge Breyer's mixed record in equal rights cases illustrates his pragmatic and narrow judicial approach. He is deferential to agency officials and tends to interpret statutory provisions narrowly. Within such constraints, however, he displays a concern for reaching fair and just results.

Gender Discrimination - In *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), Judge Breyer upheld a finding of sex-based wage discrimination. *Stathos* involved two female public employees who, according to an organizational chart prepared after a company reshuffling, were of equivalent rank and duty to certain male employees earning significantly more. Company officials refused to bring plaintiffs up to the same salary level, and over time their pay continued to remain less than that of their male counterparts. Judge Breyer

agreed with the lower court that defendants' evidence comparing male and female salaries at other plants was irrelevant to the issue in this case, which was whether men and women at the particular plant in question were paid equally. He also rejected defendants' claims that they were entitled to a "good faith" immunity defense and that both the damages and attorney's fees award were excessive.

In *Dragon v. State of Rhode Island, Dep't of Mental Health, Retardation & Hospitals*, 936 F.2d 32 (1st Cir. 1991), however, Judge Breyer affirmed the dismissal of a sex-based wage discrimination claim. Donna Dragon had proved, to a jury's satisfaction, that although she was classified and paid as a clerk typist, she had assumed most of the duties of "Equal Employment Opportunity (EEO) Officer" -- duties that had previously been performed by her male supervisor -- and that her failure to receive pay commensurate with her duties was based on her sex and in violation of the Equal Pay Act. Judge Breyer assumed the same legal standards applied to the Title VII claim at issue on appeal as the Equal Pay Act claim decided by the jury. Nonetheless, he held that no reasonable person could find illegal sex discrimination based on the facts of the case. He did not address in any detail the nature of the jury decision, which was contrary to his own reading of the facts.

Voting Rights - In *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409 (1st Cir. 1986), Judge Breyer affirmed a district court decision that rejected a Voting Rights Act challenge to Boston's districting plan for city council and school committee elections. Plaintiffs had argued that the plan "packed" too many minority voters into two districts (one was 82.1% African-American, 87.88% total minority; the other was 66.37% African-American, 81.43% total minority), fragmented Hispanic voting power, and placed one "racially and ethnically diverse" community in a district dominated by a "nearly all-white" neighborhood. Judge Breyer upheld the district court's conclusion that the plan did not deprive plaintiffs of equal access to the voting process. Among other things, Judge Breyer ruled that the high proportion of minorities in the two challenged districts did not render the plan automatically unlawful.

Affirmative Action - In *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992), Judge Breyer upheld a consent decree, first entered in 1980, that required the Boston Police Department to provide preferential consideration to minority officers in making promotions to sergeant. In 1990, a group of white officers challenged the decree's continuing validity, arguing that the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down the city's minority set-aside contracting program), had rendered the decree's race-based preferences unconstitutional. Writing for the court, Judge Breyer rejected the argument. In so doing, he carefully delineated Croson's precise holding and explained why "the race-conscious relief" embodied in the challenged decree "represent[ed] a narrowly tailored effort, limited in time, to overcome the effects of past discrimination." 951 F.2d at 455.

Similarly, in *Massachusetts Assoc. of Afro-American Police Inc. v. Boston Police Dept.*, 780 F.2d 5 (1st Cir. 1985) *cert. denied*, 478 U.S. 1020 (1986), Judge Breyer denied a group of police officers' motion to intervene in a Title VII action. The officers sought to challenge a consent decree that included affirmative action provisions designed to increase the number of African-American officers promoted to sergeant.

Criminal Violation of Civil Rights - In *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), *cert. denied*, 112 S.Ct. 1960 (1992), two customs officers were charged with several offenses, including violating an individual's civil rights by kidnapping and murdering him. On that charge, a jury found the officers guilty, but Judge Breyer reversed on the ground that the civil rights statute did not apply. Taking a very narrow view of the statute, Breyer concluded that the victim was not an "inhabitant of any State, Territory of District" because he was a foreigner who intended to stay in the United States for only a few hours. Dissenting, Judge Torruella wrote that the term inhabitant did apply to the victim, "because such construction is required as a matter of plain meaning, because it makes common sense and is fair, because what skimpy legislative history there is, supports such a reading, and lastly, because there is precedential support ...." 907 F.2d at 229 (Torruella, J., concurring in part and dissenting in part). Torruella added:

> In my opinion the majority's interpretation of § 242 does violence to a longstanding scheme established to lend support to the rights guaranteed by the Fourteenth Amendment. This scheme requires interpretation of the supportive legislation in a manner coextensive with that Amendment.

907 F.2d at 232 (citation omitted).

Right to Privacy/Reproductive Freedom

Judge Breyer's record on the right to privacy is scant. He has participated in two cases involving restrictions on the right to choose, voting to strike down one and uphold the other. As a circuit court judge, Breyer is bound by Supreme Court precedent; thus neither case provides a clear answer on his views about a constitutional right to reproductive choice.

In *Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *vacated*, 111 S. Ct. 2252 (1991), Judge Breyer joined an *en banc* decision that held unconstitutional the so-called "gag rule," the federal regulation barring health care providers in federally-funded clinics from providing abortion counseling or referrals to clinic patients. The court concluded that the regulations infringed upon women's right to choose by curtailing the information available about pregnancy options and violated the First Amendment. The opinion was later vacated in light of the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 173 (1991).

In another case, Judge Breyer dissented from a panel decision in *Planned Parenthood League of Massachusetts v. Bellotti*, 868 F.2d 459 (1st Cir. 1989), which involved a challenge to a state law that minors seeking abortions obtain parental consent or, alternatively, judicial approval. At issue on appeal was whether the statute, in operation, unconstitutionally restricted the right of minors to obtain abortions. Appellants requested leave to compile a factual record to show that the statute was, in fact, unconstitutional. The majority remanded the issue to the district court, but cautioned that plaintiffs' "burden [on remand] to demonstrate unconstitutionality as applied" would be "considerable". 868 F.2d at 469. Dissenting, Judge Breyer wrote that the burden was one plaintiffs simply could not satisfy. Even if their factual assertions were found to be correct, he said, they would not "lead the Supreme Court to change its *Bellotti II* statement that such a statute is constitutional." 868 F.2d at 470.

Judge Breyer's view on another important right to privacy issue -- gay rights -- is unknown. His only case dealing with the constitutional rights of homosexuals appears to be *Matthews v. Marsh*, 755 F.2d 182 (1st Cir. 1985), which involved whether homosexual conduct or status is grounds for dismissal from the military. The ROTC had discharged a lesbian, following her voluntary admission that she was homosexual, and she claimed a violation of her First Amendment rights. (It is unclear from the opinion whether the constitutional rights asserted involved those of association or expression or both.) The district court ordered her re-enrollment, and the Secretary of the Army appealed. Pending the appeal, the plaintiff reapplied for admission, this time acknowledging that she had "engaged in homosexual acts numerous times, last one being recently." Because of the additional evidence, the appeals court panel felt compelled to remand the case to the lower court for reconsideration. In a footnote, Judge Breyer dissented without elaboration, stating only "that this court should not remand but should decide the merits of the appeal." 755 F.2d at 184.

Church-State Relations and Freedom of Religion

Judge Breyer's fairly limited record makes it difficult to draw any confident conclusions about his views on religious freedom. However, his self-described practical approach to these issues suggest a substantial degree of deference to government decision-makers both in matters of church-state separation and religious freedoms.

In *Members of Jamestown School Comm. v. Schmidt*, 699 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 851 (1983), the court reversed a district court opinion that struck down a Rhode Island statute providing bus transportation to parochial school children. In a long and detailed opinion, the court concluded that while the issue was a close one, the statute was constitutional (with one exception). Concurring, Judge Breyer wrote separately to state his belief that "the Establishment Clause calls for a more 'practical' approach" than the "comparatively 'theoretical' one taken by the majority." He wrote that because the Supreme Court had already held in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), that such laws were not designed to support religious causes but to promote public welfare, the actual question

was whether unfair advantage had been afforded to parochial schools as a "practical" matter -- a question he answered negatively.

Others cases involving religious freedoms in which Judge Breyer upheld government action include *Rupert v. U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992) (*per curiam*) and *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990). *Rupert* involved a statute that prohibited the possession of rare eagle feathers but permitted Native American groups to obtain an exemption for religious purposes. The pastor of a non-Native American group sought a similar exemption on the ground that the group followed Native American religious customs. After the request was denied, the pastor sued the Director of the Fish and Wildlife Service, claiming a violation of the Establishment Clause. In a *per curiam* decision, the court rejected the claim, holding that Native Americans enjoy special status under federal law and that the government interest in preserving Native American religion and protecting the dwindling eagle population justified its action. In *New Life Baptist Church Academy*, Judge Breyer upheld a state statute requiring review and approval of secular education offered by parochial schools, concluding that the state's interest in ensuring children receive an adequate secular education was "compelling."

Decisions in which Judge Breyer upheld the claims of private individuals or organizations include *Universidad Cent. de Bayamon v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985) (*en banc*), in which Judge Breyer argued for an evenly divided court that the National Labor Relations Board lacked jurisdiction over a university controlled by the Dominican Order of the Roman Catholic Church. (Because the court was divided, it could not grant the NLRB's request to enforce a collective bargaining order against the university.) Similarly, in *Aman v. Handler*, 653 F.2d 41 (1st Cir. 1981), Judge Breyer vacated and remanded a district court decision to deny a preliminary injunction to students who wanted to form a religious organization on a state university campus. In doing so, he noted that he was following Supreme Court precedent in *Healy v. James*, 408 U.S. 169 (1972), which held that the First Amendment prohibited the university from denying the group recognition based solely on the group's philosophy.

Freedom of Speech and Association

Judge Breyer has written a number of important free speech and association opinions, many favorable to individuals claiming that their First Amendment rights were violated. Indeed, his record in this area tends to display a good deal of sensitivity to victims of alleged overreaching by government officials. In other cases, however, Judge Breyer has sided with the government, displaying deference to officials.

In *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), Judge Breyer held unconstitutional an Executive Order, as it applied to an agreement with the World Health Organization (WHO), that required applicants for employment with WHO to undergo a loyalty check. He ruled that the Order's terms relating to political advocacy were overly

broad under established First Amendment precedent, and consequently may have a chilling effect on applicants' free speech rights. He wrote: "While we recognize that "overbreadth" must be measured in light of whatever special job-related security requirements that governmental security or foreign policy needs may reasonably dictate, we conclude ... that in this particular case those considerations are not important enough to save the Order." 744 F.2d at 230.

In a number of cases involving the right of government officials to discharge or demote employees for political reasons, Judge Breyer's practical judicial approach is particularly evident. In *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989) (*en banc*), for example, Judge Breyer concurred in part and dissented in part that politically-motivated employer action may violate employees' First Amendment associational rights. He recognized that "the First Amendment protects a government employee's association with others in a political party," but added that "a major reason the Constitution protects associational rights is so that individuals can join together in working to elect a government that will create practical programs of administration to carry out the policies they advocate." 889 F.2d at 1224. Thus, he said, courts analyzing political association claims "must recognize *not only* that the lack of *any* protection can open the door to unwarranted, politically based victimization, but also that too much judicial intervention may unjustifiably interfere with the electorate's ability to see its political aims translated into action." *Id.* (emphasis in original). He also confessed "to doubts" about the standards for review adopted by the majority, questioning, among other things, "the abilities of the federal courts, insulated from the political process, to determine which specific jobs in fact are politically sensitive ...." *Id.* at 1225.

Judge Breyer has upheld the First Amendment claims of discharged or demoted employees in a number of cases. In *Hernandez-Trado v. Artau*, 874 F.2d 866 (1st Cir. 1989), for example, he held that a government employee offered adequate evidence to support a claim that political affiliation was a substantial, and thus unconstitutional, factor in his demotion. *See also Caro v. Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989) (affirming denial of summary judgment to Puerto Rico's Secretary of Education on claim that plaintiffs' dismissals were politically motivated and thus violated First Amendment). Conversely, in *Nunez-Soto v. Alvarado*, 918 F.2d 1029 (1st Cir. 1990), Judge Breyer vacated a district court decision that denied summary judgment to defendants, who claimed qualified immunity on the issue of whether their demotion of plaintiff, allegedly due to her political party affiliation, violated the Constitution. In a 2-1 opinion, he held that the law in 1985 was not clear that a politically-motivated *demotion*, as opposed to an outright discharge, was unconstitutional, and thus defendants were entitled to qualified immunity. He rejected plaintiff's contention that the demotion amounted to a "constructive discharge" in that it had the purpose or effect of forcing her to quit (the law on "constructive discharge" was more clearly settled at the time). Dissenting, Judge Torruella found the record "clear" that the defendants' actions were taken to force plaintiff to quit, and stated that precedent "must have clearly signaled to appellants, even in 1985, that their retaliatory actions against appellee because of her political beliefs violated the Constitution of the United States." 918 F.2d at 1031.

Disability Law

Judge Breyer's decisions in four disability law cases, including three under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, demonstrate two disturbing patterns. First, they adopt a restrictive view of the legal entitlements of individuals with disabilities, even in the face of contrary precedent and analysis. Second, they generally lack awareness of or empathy for the every-day lives of the victims of disability-based discrimination. As a result, the opinions fail to interpret the letter of the law so that disability-based discrimination is remedied, and do little to advance the spirit of § 504, which was enacted "to eliminate the 'glaring neglect' of the handicapped." *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (quotation omitted).

In *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied* 112 S. Ct. 1558 (1992), Judge Breyer narrowly interpreted the Supreme Court's directive that federal agencies and grantees conduct an "individualized inquiry" to determine whether people with disabilities are "otherwise qualified" for employment. Ward concerned a truck driver with epilepsy who was fired, after working for more than five years without incident, when his employer learned of his disability. Ward asserted that the Department of Transportation (DOT) violated § 504 by refusing to waive a regulation that prohibits people with epilepsy from driving commercial vehicles.

In holding that the DOT did not violate § 504, Judge Breyer declined to apply *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987), the leading Supreme Court case on the intersection between the employment rights of people with disabilities and safety concerns. Had Judge Breyer utilized *Arline*'s legal standard, he might have found, as have many other federal courts, that proponents of blanket employment exclusions bear a heavy burden, and that these exclusions rarely survive an individualized inquiry.

Moreover, Judge Breyer ignored the possibility that DOT's policies were based on the types of "prejudices, stereotypes or unfounded fear" § 504 was intended to eradicate. DOT knew that the risk of seizure or accident among drivers with epilepsy was "extraordinarily low," but relied on findings that these risks "may be somewhat higher" for individuals who sleep and eat irregularly or who forget to take their medication. Yet, although DOT apparently did not inquire as to whether Mr. Ward had ever forgotten his medication, or been adversely affected by irregular sleeping and eating habits, Judge Breyer found that "further 'individualized' investigation ... is most unlikely to provide reasons for believing [Mr. Ward] can drive commercial trucks safely."

Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991) (*en banc*), concerned a medical student with learning disabilities who alleged that the "reasonable accommodation" mandate, *see Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); *Arline*, 480 U.S. at 287-88 n.17, required the school to evaluate him through some method other than multiple choice examinations. The *Wynne* majority rejected the view that

academic decisions are beyond the reach of judicial review and held that the school had failed to "demonstrat[e] that its determination that no reasonable way existed to accommodate Wynne ... was a reasoned, professional academic judgment, not a mere *ipse dixit*."

Dissenting, Judge Breyer opined that academic institutions should be given substantial deference in designing appropriate vehicles to evaluate student performance. Supporting the medical school, he found that multiple choice tests were not a "substantial departure from accepted academic norms." Unlike the majority, Judge Breyer would have denied the plaintiff the opportunity to challenge the institution's view that reasonable accommodation was impossible.

Cousins v. Secretary of the U.S. Department of Transportation, 880 F.2d 603 (1st Cir. 1989) (*en banc*) concerned the DOT's refusal to allow people with hearing impairments to drive commercial vehicles. Affirming the district court, Judge Breyer held that alleged victims of discrimination by federal agencies cannot sue the federal government under § 504. Rather, he ruled that they had to first file complaints with federal agencies under the Administrative Procedure Act (APA), even though § 504 usually allows the victims of discrimination to go directly to court. The ruling denied the victims of federal agency discrimination the right to a trial before federal judges.

In reaching these conclusions, Judge Breyer minimized the fact that the Supreme Court had already considered a challenge to federal agency action based on § 504. As Judge Breyer recognized, his analysis contradicted the "broader view" of other appellate courts. Moreover, the Supreme Court subsequently cast doubt on *Cousins*' reasoning when it held that federal courts lack the authority to order exhaustion of remedies through the APA when exhaustion is not mandated by the relevant statute or agency rules. *See Darby v. Cisneros*, 61 U.S.L.W. 4679 (June 22, 1993).

Finally, in *Brewster v. Dukakis*, 687 F.2d 495 (1st Cir. 1982) (not a § 504 case), the district court had ordered that the Commonwealth of Massachusetts develop and pay for a legal assistance program for people with mental disabilities who had been released from state institutions pursuant to a consent decree. Judge Breyer vacated the order, however, holding that the district court lacked the power to force the Commonwealth to pay for the recommended program. In doing so, Breyer read the consent decree narrowly. Although he admitted that "the district court is more familiar with the background of the litigation than [the appellate court]," he rejected the lower court's finding that its actions were authorized by three provisions of the decree. Judge Breyer held that neither the decree's "main purpose" of deinstitutionalization nor the district court's "general equitable" powers authorized the order.

AFDC and SSI Benefits

Judge Breyer's decisions involving income benefit programs display a deference to administrative agencies and a strict interpretation of statutory language.

Aid to Families with Dependent Children (AFDC) - Judge Breyer has written at least four opinions involving the AFDC program. In three cases, he ruled against the plaintiff and upheld AFDC eligibility restrictions and benefits reductions implemented by the state agency. In the fourth, he stated in his concurring opinion that he would have dissented to the majority's decision to strike down a benefits-restricting regulation if not for Congress's timely offering of the Family Support Act of 1988, which settled the issue for the future.

Judge Breyer's concurrence in *Wilcox v. Ives*, 864 F.2d 915 (1st Cir. 1988), evinces his strong deference to agency officials. In 1988, a group of single-parent families receiving AFDC filed an action against the Secretary of Health and Human Services (HHS). The action challenged the validity of an HHS regulation prohibiting the Maine Department of Human Services from making multiple child support pass-through payments in a given month if the payment total exceeded the $50 per month cap (payments belatedly received for prior months were counted in the $50 total).

The district court found that the regulation impermissibly contradicted the language and purpose of the governing AFDC statute. The First Circuit agreed, holding that "[n]o rational purpose is served by denying child support to a needy family because an employer failed to promptly forward funds withheld from a paycheck or because the state itself has not promptly entered the money onto its books." 864 F.2d at 920. Concurring, Judge Breyer stated that he would have dissented, but that case history in other appellate courts supported the panel decision and the timely-passed Family Support Act of 1988 adopted the view that the $50 "pass through" only applies to payments made on time. Otherwise, he wrote

> in a case like this one, where the statutory provision is minor and interstitial, where the agency has a firm understanding of the relationship of that provision to other, more important, provisions of the statute, and where that understanding grows out of both the agency's daily experience in administering its statute and its familiarity with the initial drafting process, the Secretary's argument has considerable 'power to persuade.'

864 F.2d at 927.

In *Drysdale v. Spirito*, 689 F.2d 252 (1st Cir. 1982), Judge Breyer upheld the Massachusetts Department of Welfare's practice of finding non-AFDC recipient caretaker parents ineligible for "earned income disregard" in the calculation of their children's AFDC benefits. Breyer pointed to the statutory history of excluding custodial parents from assistance benefits under the Aid to Dependent Children program (the precursor to Aid *to Families* with Dependent Children). He also argued that the earned income disregard was

"solely ... an incentive for persons receiving AFDC to earn income and so remove themselves and their families from the AFDC rolls, not ... an incentive for people not receiving AFDC to apply for AFDC." 689 F.2d 252. Finally, Judge Breyer looked to the language of the statute and concluded that a "relative claiming aid" referred to a relative claiming aid to meet her own needs, not only those of her children.

In a similar case, *Evans v. Commissioner, Maine Dept. of Human Services*, 933 F.2d 1 (1st Cir. 1991), Judge Breyer reversed the lower court's finding that the "earned income disregard" applied to the income of a new husband in determining the on-going eligibility of a family receiving AFDC benefits. Although the statute itself was unclear, Judge Breyer ruled that finding such income ineligible for the disregard was in keeping with the government purpose of "get[ing] people off the AFDC rolls, not put[ing] them on." 933 F.2d at 6 (quoting S.Rep.No. 744 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Admin. News 744, 90th Cong., 2995-96).

Finally, in *Dickenson v. Petit*, 692 F.2d 177 (1st Cir. 1982), Judge Breyer affirmed the lower court's decision to deny plaintiffs' request for a preliminary injunction. The plaintiffs sought the injunction to restrain the state of Maine from terminating or reducing their AFDC benefits in accord with the Omnibus Budget Reconciliation Act of 1981, which reduced the size and duration of the earned income deduction to AFDC grants. The plaintiffs argued for a literal reading of the "cut-off" provision, which would have allowed them four additional months of the earned income deduction. Affirming, Judge Breyer wrote that a "clever and literal reading" of the statute "may go directly counter to everything Congress intended."

Supplemental Security Income (SSI) - In *Constance v. Secretary of Health and Human Services*, 672 F.2d 990 (1st Cir. 1982), Judge Breyer reversed the lower court's ruling and held that a state may reduce its portion of the SSI payment dollar for dollar by the amount paid under a federal statute to the "essential persons" of SSI recipients. Judge Breyer deferred to the administrative agency's decision and pointed out that Congress had intended that states have the freedom to structure their SSI payments as long as they were above the floor created by the federal SSI program.

Similarly, in *Usher v. Sweiker*, 666 F.2d 652 (1st Cir. 1981), Judge Breyer upheld a regulation reducing SSI benefits by the in-kind benefit derived by recipients renting below fair market value from their children. Plaintiffs argued that the regulation unconstitutionally discriminated against them as compared to SSI recipients who lived in federally subsidized housing but did not have their benefits reduced. Judge Breyer found that the discrepancy in treatment was rationally related to the reasonable government purpose of encouraging SSI recipients to live in government housing.

In cases in which plaintiffs have challenged the denial of benefits, Judge Breyer has held agencies strictly responsible for fulfilling their burden to consider SSI applications. Where the plaintiff established a prima facie case of disability and HHS denied the

application without giving adequate evaluation or explanation, Judge Breyer has ordered the Secretary to reconsider the application. *See, e.g., Munoz v. Secretary of Health and Human Services*, 788 F.2d 822 (1st Cir. 1986). *See also Vazquez v. Secretary of Health and Human Services*, 683 F.2d 1 (1st Cir. 1982). However, he has also upheld HHS' determinations of ineligibility where the plaintiff failed to meet her burden of proving a disability. *See, e.g., Goodermote v. Secretary of Health and Human Services*, 690 F.2d 5 (1st Cir. 1982); *Geoffroy v. Secretary of Health and Human Services*, 663 F.2d 315 (1st Cir. 1981); *Rodriguez v. Secretary of Health and Human Services*, 647 F.2d 218 (1st Cir. 1981).

Access to the Courts

Judge Breyer's access cases demonstrate a willingness to allow plaintiffs their "day in court," counterbalanced by his deference to other branches of government. In cases involving standing to sue, for example, he often has favored plaintiffs, taking a somewhat broad view of the standing doctrine. He also had upheld several attorney's fees awards against claims that they were excessive, again displaying a respect for the importance of such awards to many plaintiffs. However, in cases involving other issues affecting access, such as mootness and ripeness, his approach is narrow, and he often declines to reach the merits. His access cases also show, as do other parts of his record, that he strictly interprets and enforces procedural rules and guidelines.

Attorney's and Expert Witness Fees - In *Aubin v. Fudala*, 782 F.2d 287 (1st Cir. 1986), Judge Breyer vacated an opinion involving an attorney's fees award for civil rights violations. Judge Breyer held that the district court was incorrect when it substantially reduced the award to reflect the "limited 'extent of [the plaintiffs'] success'" on the civil rights claims ($501) as compared with their success on a pendent state law claim ($300,000). 782 F.2d at 290. Judge Breyer ruled that "success" in a civil rights suit must be measured qualitatively as well as quantitatively. He held that a reasonable fee was appropriate if plaintiffs' other claims and the civil rights claims involved factually or legally related theories, even though the damage award for the latter was significantly less. *See also Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982) (plaintiffs who won injunction against cutoff of AFDC benefits during budget impasse entitled to attorney's fees even though budget passed before injunction took effect); *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (Breyer, C.J., concurring in part and dissenting in part) (disagreeing with majority that plaintiff's request for unreasonably high attorney's fees forfeits right to any fee).

In *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989), the majority held that expert witness fee awards in Title VII cases are governed by a Congressional statute limiting such awards to $30 a day; it rejected plaintiffs' contention that expert witness fees fall within Title VII's general "reasonable attorney's fee" provision. Judge Breyer concurred, but wrote separately to note that the $30 cap was limited to "attendance at trial." He suggested that expert fees for non-attendance work may fall within the Title VII provision, but noted that plaintiffs in this case had not sought recovery for any such work.

Standing - In *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983), Judge Breyer found certain Boston residents had standing to challenge a decision by the Department of Housing and Urban Development (HUD) to provide a grant to the City of Boston to help develop a multi-million dollar commercial complex. Plaintiffs argued that HUD did not, as required, make an appropriately thorough study of the possible negative impact of the complex on racial integration in the area. Judge Breyer first rejected plaintiffs' argument that they had standing (would suffer "injury in fact") because they would have to pay increased rents or move from their homes as a result of increased housing demand generated by the complex. He considered too speculative that particular individuals would incur rent increases and that such increases would be the result of the HUD grant. Judge Breyer did, however, find standing for certain of the plaintiffs on the ground that the complex would generally increase housing demand and rents in nearby neighborhoods, thereby displacing low-income (disproportionately minority) tenants and leading to a less integrated community. *See also Caterino v. Barry*, 8 F.3d 878 (1st Cir. 1993) (employees seeking transfer of pension fund assets to new pension plan have standing to sue trustees who refused to transfer assets); *Maine Association of Interdependent Neighborhoods v. Maine Department of Human Services*, 876 F.2d 1051 (1989) (reversing lower court's dismissal for lack of subject matter jurisdiction; despite doubts that plaintiff can convince state court of its standing, it "should have a chance to try"); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (applicant for job with World Health Organization has standing to challenge Executive Order requiring loyalty check for individuals seeking employment with certain international organizations).

Mootness and Ripeness - Judge Breyer has taken a narrow approach to questions involving the timeliness of judicial review, as reflected in cases involving mootness and ripeness. For example, in *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1034 (1st Cir. 1982), he held that judicial review of an EPA construction permit award was premature because the permit had expired and reactivation of it was still pending. Similarly, in *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988), Judge Breyer concurred in an opinion that the State Department violated the First Amendment when it denied a visa to the widow of a former Chilean president on the ground that her activities (primarily making speeches) would be detrimental to the foreign policy interests of the United States. Breyer agreed with the merits of the majority's opinion, but asserted that the action should be considered moot because the plaintiff had received a visa and current law prohibited denials of visas on the basis of constitutionally-protected beliefs and associations.

Statute of Limitations - Judge Breyer appears to take a strict approach in statute of limitations cases. *See, e.g., Rodriguez v. Banco Central Corp.*, 917 F.2d 664 (1st Cir. 1990) (RICO statute of limitations begins to run when plaintiff knows or should know of injury; rejecting Third Circuit view that limitations period starts when plaintiff knows or should know about last predicate act in racketeering activity); *Lopez v. Citibank, N.A.*, 808 F.2d 905 (1st Cir. 1987) (no absolute rule tolling statute of limitations in employment discrimination case for plaintiff with mental disability); *Freund v. Fleetwood Enterprises Inc.*, 956 F.2d 354 (1st Cir. 1992) (amended complaint naming proper defendant could not,

under Fed.R.Civ.P. 15(c), "relate back" to original complaint as neither original nor subsequently-named defendant received notice of suit within statute of limitations period).

Freedom of Information Act

Judge Breyer's general deferential attitude toward government agency action seems to be reflected in his only two opinions involving the Freedom of Information Act. In both instances, he voted to uphold agency claims of exemption.

The more disturbing of these opinions is *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (*en banc*), in which Judge Breyer reversed a panel opinion ordering the FBI to release to McCarthy Era historians information contained in the FBI's files concerning the prosecution of Communist party leaders under the Smith Act. The requested information included records of what informants who later testified at the Smith Act trials had told the FBI in earlier interviews.

The FBI invoked FOIA exemption 7(d), which permits the government to withhold information compiled in connection with a criminal or national security investigation when that information "could reasonably be expected to disclose ... information furnished by a confidential source." A circuit panel first ruled that the informants had waived the protection of the exemption with respect both to the information they actually revealed as trial witnesses and any information that might have fallen within the scope of cross-examination.

Writing for the *en banc* majority, Judge Breyer held that the panel's view of waiver was an impermissible interpretation of the 7(d) exemption. He found that the phrase "furnished by a confidential source" should be read to mean only that the information was originally provided in confidence, not that the information or the identity of the informant must be secret. Thus, he concluded, even if the informants' identities and the substance of their testimony were matters of public knowledge and public record, the information they provided to the FBI that was not revealed at trial could be kept confidential.

The opinion not only flies in the face of a common sense reading of the FOIA, it appears to be inconsistent with the general purpose of the act to favor public disclosure in the absence of a strong government interest in concealment. *See also Aronson v. Internal Revenue Service*, 973 F.2d 962 (1992).

Antitrust

Judge Breyer, who has a keen interest and expertise in antitrust law, generally interprets the antitrust laws narrowly. Professor William Kovacic of George Mason University School of Law, maintains that Judge Breyer's opinions reflect a "conservative perspective." In a 1991 law review article, Kovacic favorably compared Judge Breyer's

antitrust cases with those of Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit. He further wrote:

> "In a number of instances, Judge Breyer's antitrust opinions have adopted conservative perspectives in evaluating the legality of challenged distribution practices and single-firm pricing conduct. In addressing these and other antitrust issues, the Breyer opinions have expressed recurring concern about adopting conduct rules that would diminish incentives to compete and about the administrability of suggested liability standards. In particular, Judge Breyer has played an influential role in discouraging consideration of the defendant's subjective expressions of intent in evaluating claims of unlawful exclusion."

Kovacic, "Reagan's Judicial Appointees and Antitrust in the 1990s," Fordham L. Rev., Vol. 60, pp. 95-96 (1991) (footnotes and citations omitted).

Kovacic noted that "[d]uring the survey period [1977-1990], Judge Breyer cast 17 votes in antitrust matters. Each vote supported the defendant's position ...." Id. at 95 (citing opinions). Judge Breyer's opinions include: *Barry Wright Corp. v. ITT General Corp.*, 724 F.2d 227 (1st Cir. 1983) (approving price cut by manufacturer with 94 percent of U.S market to country's biggest user of product in exchange for commitment to purchase 'nearly all' requirements from maker); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987) (no violation of Sherman Act when airport operator refused free ground services to charter service, requiring charter company to buy ground service from airport operator's exclusive seller of such services at airport); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (no liability in predatory pricing case); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (overturning jury verdict for car dealer that was denied yearly allocation of cars until it agreed to accept unwanted "part kits"); *Monahan's Marine v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989) (rejecting liability in price discrimination case); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (rejecting claim of two towns alleging that electric utilities' "price squeeze" intended to monopolize local distribution).

The Environment

Judge Breyer's opinions in environmental cases are mixed. In somewhat uncharacteristic form on the issue of deference to agencies, he has twice ruled that agencies were wrong in not preparing environmental impact statements (EIS). However, in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), a case involving clean-up of a hazardous waste site, Breyer largely upheld the district court's substantive findings against a claim by the EPA that the court should have ordered more stringent clean-up relief.

Moreover, as discussed in the next section of this report, Judge Breyer has authored a number of exceptionally critical writings on the efficacy of health, safety, and environmental regulations. Those writings call into question how he will rule on statutes and regulations designed to reduce or eliminate risks to public health and welfare.

Judge Breyer has decided four cases involving agency failures to prepare environmental impact statements (EIS), ruling for the agencies twice and private parties twice. In *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), Judge Breyer upheld a preliminary injunction obtained by environmental organizations to stop the Department of Interior from auctioning off oil-drilling rights in the North Atlantic fishing area. The issue was whether the Department had to prepare a supplementary EIS under the National Environmental Protection Act (NEPA), because of a significantly revised estimate of oil reserves in the area. Holding that a supplementary EIS was required, Judge Breyer noted NEPA's purpose of making government officials consider environmental impacts in their decisionmaking. Moreover, he continued, as a practical matter the more the Department is allowed to sell oil-drilling rights and encourage development by private parties, the more the Department and the private parties may become entrenched and committed to their investment even if a negative supplementary statement is released. *See also Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (vacating and remanding district court decision that would have allowed construction of causeway and port facility without submission of EIS).

Judge Breyer upheld an agency decision not to prepare an EIS, however, in *City of Waltham v. United States Postal Service*, 11 F.3d 235 (1st Cir. 1993). Affirming the lower court, Breyer ruled that the factual record indicated that the project would not significantly affect the quality of the environment. *See also 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; project not sufficiently federal in nature to make NEPA applicable).

In a long-running case, *United States v. Ottati & Goss, Inc.* 900 F.2d 429 (1st Cir. 1990), Judge Breyer largely upheld the district court's findings in a suit concerning clean-up of a 34 acre hazardous waste site in Kingston, New Hampshire. The appeal involved the EPA's actions with respect to one of several companies sued for clean-up costs. Although the district court adopted most of the EPA's suggestions for relief, the EPA claimed on appeal that the court should have ordered more stringent relief as to certain contaminants. Judge Breyer affirmed most of the lower court's factual findings, but remanded for further proceedings on one of the three challenged contaminants. In most respects, he held that the factual record adequately supported the court's conclusions.

Judge Breyer later referred to the *Ottati* case in questioning the efficacy of governmental attempts to clean-up the "last ten percent" of the risks posed by environmental contaminants. In his book, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993), at 11-12, Breyer questioned 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 the challenged New Hampshire site. (See below for a further discussion of *Breaking the Vicious Circle*.)

Legal Writings: Regulatory Reform and Risk Regulation

Judge Breyer's prolific extra-judicial writings reflect a special interest and expertise in regulatory reform and risk regulation, on which he was written several books and articles. As with his judicial opinions, the writings convey a detailed and analytic approach to identifying problems and proposing possible solutions. Breyer's approach is exemplified in a speech he gave while he was Chief Counsel to the Senate Judiciary Committee: "If you want regulatory reform, you take one agency, you look at it in extreme, exhausting detail, and then you produce major change within that one agency." Proceedings of the National Conference on Federal Regulation: Roads to Reform, Sept. 27-28, 1979, reprinted in *Administrative Law Review*, vol. 32, no. 2 (Spring 1980).

While praised for their depth and accessibility, Breyer's writings on regulatory reform and risk assessment have been criticized as decidedly anti-regulatory in nature and based on questionable scientific evidence about health, safety, and environmental dangers. In 1981, Judge Breyer published one of his best known works, *Regulation and Its Reform*. In the book, Breyer takes a skeptical view of the efficacy of government intervention in the marketplace. He recognizes that regulation is sometimes necessary to correct market failures, but tends to minimize those failures and trumpet an unfettered free market as a better cure for societal problems and inequities.

Breyer's most recent -- and arguably controversial -- book is *Breaking the Vicious Circle: Toward Effective Risk Regulation*. Published in 1993, the book discusses at length Breyer's ideas of risk assessment and refitting the nation's federal regulations on health, safety, and the environment. Using the example of regulatory efforts to reduce exposure to cancer-causing substances, Judge Breyer argues that relatively few people die from cancer whose incidence could have been reduced by regulation. Questioning the efficacy of the regulation of pesticides, asbestos, benzene, and other contaminants, Breyer concedes that health and environmental regulations are necessary to reduce risks posed by toxic chemicals but nearly always minimizes the magnitude of those risks.

Breaking the Vicious Circle has drawn particular criticism. Several experts on risk assessment argue that Breyer's conclusions stem from a over-reliance on the work of scientists who discount environmental risks. According to Thomas McGarity, Professor of Law at the University of Texas, Breyer accepts the opinions of experts who triviliaze environmental dangers and rejects those of experts who take them more seriously. McGarity says that this leads Breyer to conclude that environmental activists and the media have steered Congress into creating a regulatory atmosphere in which agencies force well-meaning companies to waste scarce resources trying to eliminate the "last ten percent" of the risks

posed by environmental contaminants. While many experts -- and ordinary citizens -- believe that federal agencies should "err on the side of safety," Judge Breyer believes that such an approach leads society to spend too many dollars chasing after trivial risks.

How influential Judge Breyer's views on regulatory reform and risk assessment will be in Supreme Court decisionmaking is unclear. While his judicial record displays a strong deference to agency officials and narrow statutory interpretation, there are indications that he will be more inclined to challenge agency decisions in these areas. First, he has in the past questioned the ability of judges to faithfully adhere to the principle that they should defer to agencies' "reasonable" interpretations of statutes when they themselves believe such interpretations are wrong:

> [The deference] 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 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."

Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986). Given his expertise with respect to risk regulation, Justice Breyer may have a tendency to substitute his own conclusions for those of health and environmental agencies.

Second, in his four opinions involving agency decisions not to prepare environmental impact statements, he has twice overturned the agency decision. Given that the Supreme Court has not once in NEPA's twenty-five year history ruled against an agency, Judge Breyer's apparent willingness to do so half the time may indicate that he is inclined to show less deference on healthy, safety, and environmental issues than on others.

Conclusion

Stephen Breyer is a thoughtful, careful, and highly intelligent judge, and he will likely be a very competent and influential justice. The Alliance for Justice urges him to use his considerable talents to solemnly protect the Fourteenth Amendment's promise of equal justice under law, preserve legislative commitments to environmental and consumer protection, and ensure that the courthouse doors remain open to all who are wronged by government, not just the rich and powerful.

Center for Science in the Public Interest, Consumers Union,
National Wildlife Federation and Natural Resources Defense Council
do not take positions on judicial nominations.

STATEMENT

OF CHARLES MERRILL MOUNT

to the United States Senate

Committee on the Judiciary

on

The Nomination of Stephen C. Breyer

to the United States Supreme Court

I

Ladies and Gentleman of the Judiciary Committee. Good morning. I am Charles Merrill Mount and I have come here to oppose confirmation to the United States Supreme Court of Stephen G. Breyer.

I do so with profound apologies to President Clinton. It grieves me infinitely to oppose a President whom I consider to be extraordinarily decent and well-meaning as a man. But I act as a matter of conscience and to save this country the presence on the Supreme Court of a man morally and ethically unfit. The President has chosen a candidate whose patented dualism, of portentious principles expounded in public and vicious retaliations in private, show him to lack the essential quality of judicial impartiality. Moreover Judge Breyer has demonstrated an absolute contempt for the Constitution and into this he has led the First Circuit. At Boston no matter of constitutional magnitude receives fair Hearing, nor even respectful Hearing. I shall spell this out for benefit of the Committee by Article, Section, and Amendment.

But first I must tell you who I am and how I came to be concerned with Judge Breyer. To start at the beginning then, some members of this Committee may know me, or at

least find me familiar. Senator's Hatch, Thurmond, and Simpson surely recall that my friend the former Chief Counsel of this Committee, Francis Coleman Rosenberger, had me paint a large portrait of Senator Eastland at the time of his retirement in 1978. Senator De Concini walked through this Hearing Room on the Saturday when Francis Rosenberger, J.C. Argitsinger, and some others had a scaffold erected to hand the portrait on that wall, where I am sorry to see it no longer is present. That day may have been auspicious in other respects too; I recall Senator De Concini remarking that the Bill to double the federal judiciary was to be voted on at 1 O'Clock.

Senator Kennedy may recall me too. With his respect for scholarship and enormous humanity he arranged for me to have an office in the Library of Congress, which caught me up in the soiled conspiracies of that place which destroyed my career and ultimately brings me here today. Senator Kennedy is not to blame. He does not know what transpires inside the Library of Congress; his only impulse was compassion for a well-known historian like myself whose real home is Dublin, in Ireland, which my heart never has left. There I left behind a wife and four children whom Judge Breyer has made certain I shall never see again.

Senator Biden knows me too. One Sunday long ago when his brother was being married in Delaware his vote was needed

on a finance Bill. He rushed back to Washington and in striped trousers and morning coat cast his vote. That duty performed, he stood with me on the steps of the Senate Wing to await an ambulance that with screaming sirens would take him back to National Airport. I was immensely flattered that a man so eminent and beautifully dressed would stop for frivolous conversation with me at a moment of such strain. Senator Biden, you are not just Chairman of this Committee. You are a nice man.

What I, an artist and historian, do before a Committee of the United States Senate may well be asked. My first book of history, published when I was twenty-six, was a biography of the great American artist John Singer Sargent. THE NEW YORK TIMES listed it for biography in its BEST BOOKS OF THE YEAR and later it was chosen by Mrs. Jacqueline Kennedy for the Presidential Library she was forming in the White House as her example of the new variety of American Biography. An influential book critic wrote of my later biography MONET:

> Mount is a biographer virtually unique in the 20th century; the supreme example of the writer as devil's advocate. He takes nothing for granted, certainly not the self-portraiture of his subject. A portrait-painter himself, his overriding aim is truth, no matter how unpalatable it may be.

How then did this "biographer virtually unique in the 20th century become transformed into federal prisoner number 16431-038, and how did the Chief Judge of the First Circuit

keep him that way for six years? Why is it that every Memorandum Decision he wrote was marked NOT FOR PUBLICATION? What horrible secret has Stephen G. Breyer been keeping right up to the threshold of this Hearing Room?

We must examine together how it happened that all the irregularities of a railroading trial, including denial of all indigent subpoenas for witness, denial of documentary evidence, trial for a crime not on the indictment, trial at Boston contrary to the constitutional bar for a crime alleged to have taken place in Washington, were denied again and again by this man whom today is presented before this Committee of the Senate as a paragone of judicial virtue.

The essential matter to be recalled is that like most active historians most of my life I had collected manuscript documents. Now, grown old and ill, recovering from a stroke, to sell some of these on the understanding that my active career was over, I travelled to Boston where Goodspeed's Book Store advertized that it paid cash for autograph letters. Only when I appeared in Boston I was arrested. For a few weeks thereafter I was beseiged by the media. Invitations to appear on television were frequent. The newspapers sent Reporters whom knocked on my door three and four a day. To the more acute Philip Shenon of THE NEW YORK TIMES when he appeared at my door I commented with a laugh: "You're the only one today - I was feeling neglected". Hustling past me into my

very modest accomodation Shenon's first words were: "This case doesn't make sense. Were you set up?"

* * *

For trial at Boston I was brought before United States District Judge Rya Weickert Zobel, a remarkable experience. A holocaust survivor whom has had numerous other names, trial before her was not unlike being tried by Zsa Zsa Gabor. Judge Zobel's utterances made an unstable sense in her mind alone, and because she equated the gossip of Boston on equal basis with judicial proceedings in the court before her, she saw no need for all the impediments of trial which has come to be called "constitutional rights". To be certain of conviction she denied me all indigent subpoenas for witnesses and most documentary evidence was not admitted. My doom was a certainty.

My court appointed attorney, Charles P. McGinty of the

Federal Defender Office, refused to listen to me concerning The Boston Athenaeum. It was named in FBI Reports of conversation with the Book Store, and we noted that Judge Zobel altered any piece of evidence, and even letters, naming it. That I should have suffered for so many years from The Boston Athenaeum, due to its slanders and libels lost two wives and five children, then been arrested across from The Boston Athenaeum on Beacon Street, is improbable at best. That in telephoning the Library of Congress the FBI should have contacted no high official but the petty functionary whom had been spreading the same Boston Athenaeum defamations, stretches credulity.

But in his own way Charles P. McGinty had a certain genius. He instructed me to trace the history of each of the 167 documents on the indictment. As an experienced historian I was able to give him individual reports, which he used to great effect while the government attempted to prove the documents belonged to them. There was electricity in the air of that courtroom when after each government "expert" gave evidence by inference and belief, McGinty rose and cut them to pieces. Often he showed significant portions of the history were suppressed and replaced by pious claim for which no evidence existed.

Then, on the fourteenth day of trial, McGinty rose on a motion to strike. I read from the transcript:

MR. MCGINTY: Your Honor, with respect to the other exhibits, my motion to strike had identified certain exhibits for which there were insufficient proof of ownership by the Library of Congress and insufficient proof of ownership at trial by the National Archives. They are listed, and there is a substantial number of them that are listed on my motion.

THE COURT: This is the motion filed on the 4th?

MR. MCGINTY: The motion to strike exhibits as just characterized.

THE COURT: Okay. Well, some of those have now gone out, 30 to 39 are out.

MR. MCGINTY: Correct.

THE COURT: One -- 93 to 96, 98, 100 to 202 are out. So, 100 to 202 are out. 189 to 207 are out. And as for the others, the motion is denied. And the motion to seal.

Of 167 documents on the indictment, McGinty had forced dismissal of 135, or seventy per cent. Any impartial judge must have recognized that the government's case was just so much nonsense and granted the motion to acquit which followed. But I was not before an impartial judge. Working in tandem McGinty and I had achieved the impossible. We had proved the documents were not government property as claimed, - and I was convicted. The sheer brilliance of this accomplishment requires amplification.

The dynamics of a trial includes elements never mentioned at Law School. Born at Zwickau, Germany, December 18, 1931,

and tragically orphaned, Judge Zobel was a heavily accented divorce lawyer without federal court practice or experience when this Committee added her to the roster of federal judges. Become the Holly-Golightly of the federal judiciary, anyone suffering through her courtroom performance, noting her obsessions and delusions, her ferocious will to dominate and craving for adulation (every tirade was punctuated by sweet smiles to the jury) must wonder if she is entirely sane.

That her ire was concentrated on me quickly became known to the jury. When a blind man staggered into the courtroom and all but fell into my lap, she called out to me in a tone of severe reprimand. When I made objection to the fact the government had gone into my sealed gift to the Library of Congress, and was cross-questioning me from those documents sealed in my lifetime, she declared me in contempt and sent me to Salem Jail. She credited Boston gossip, or an interview with The Boston Athenaeum, so completely that she sat before the court somber like a chapter of the Apocalypse. Yet no one from THE BOSTON ATHENAEUM appeared to give testimony under oath, lest we cross-question that party about David McKibbin's theft of my proof sheets, his own plagiaries and those of Richard Ormond, the libels with actual malice published in London and New York, and their more recent reiteration.

Forgetting that the Bible begins with a cunning snake but ends with Revelations, Judge Zobel gave an involuntary

shudder each time she looked at me, denied me all indigent subpoenas for witnesses whether from Ireland or the United States, and allowed me no documentary evidence. The government meanwhile was allowed to fly into Boston scores of pseudo-experts from every part of the country. In the varnacular peculiar to such matters this process is known as "railroading", and in this Judge Zobel proved herself one of the most blatant and devoted Railroad Engineers in history. The jury little noted nor long remembered that the documents themselves had been proved my own property in clear title. Every government witness, and the list was extensive, gave evidence not to the indicted crime of "transportation", to to THEFT. On the fourteenth day of trial, almost immediately after 135 documents were dismissed leaving the government's case smashed and in tatters, in his summation the prosecutor boldly said to the jury:

> How do we know that he <u>stole</u> these documents from the Library of Congress?

What documents? Everything claimed by the Library of Congress had been dismissed from the trial.

* * *

Here enters Hon. Stephen G. Breyer, whom the President has nominated to the Supreme Court subject to the Confirmation

of this Committee. From this point forward we have opportunity to examine whether this man believes in justice as the primary mission of the federal courts, and whether he would "preserve and protect the Constitution of the United States", or ever has done so.For with "railroading" by Judge Zobel as established fact, it was Judge Breyer, after he became Chief Judge of the First Circuit in April, 1990, whom barred my escape from her injustice.

The Committee knows my background. But Judge Zobel had been told ex parte and extrajudicially, by which I mean outside the court or in chambers, not where my attorney and I could hear or challenge its truth, that (1) I had appropriated David McKibbin's work on Sargent, and (2) that I was a picture forger. The sensational and groundless talk circulated at Boston showed me to be a truly accursed character, and Judge Zobel had acted on this. The proper enquiry of this Committee now is to examine whether Judge Breyer acted in an ethical manner and with scrupulous adherence to his oath of judicial impartiality.

Of my direct appeal the less said the better. The Appeals Court appointed an attorney who made no pretense of seeking to reverse the district court. He refused all contact with me, neither accepting telephone calls nor answering letters. I was appalled at the continuation of a railroading suffered in the lower coirt. The appeal process completed in Boston,

to atone for a crime never committed long years of wrongful imprisonment stretched before me. My court appointed lawyers had finished their tasks. Left to myself, slowly I began a campaign by Habeas Corpus. The numbers of issues were phenomenal: one 2255 motion (for such they are called) succeeded another.

Judge Zobel of course denied each effort out of hand. Her ear to the ground, she knew what Boston gossip said of me. My 2255 motions thereafter reach the First Circuit on appeal, where a panel of which Chief Judge Breyer was the most prominent member examined them for legal probity. By a decision dated June 28, 1991, and marked NOT FOR PUBLICATION, Judge Breyer ripped apart four of my submissions. These were a third 2255 motion, a second motion for recusal of Judge Zobel, a Rule 27 motion to Declare Nullity, and a motion for Evidentiary Hearing.

Judge Breyer's unique judicial approach becomes apparent, for in this decision he first reduces the issues to those less troublesome, then disposes of these by conclusory statements. Issues of law are never adjudicated - just disposed of. At page 3 elimination of issues came first:

> Of the numerous allegations contained in Mount's various court submissions, we decline to address those raised for the first time on appeal, as well as those raised below but not argued here. What remain are challenges to the following: (1) an alleged variance between the charge in the indictment and the government's proof at trial; (2) the court's instruction that proof of guilt was not required as to every charged document; (3) the failure to explain to the jury why 122 of 144 documents priginally charged in count two had been struck from the indictment; (4)

> the admission of fourteen documents not charged in the indictment; and (5) the exclusion of two letters of James McNeill Whistler, memoranda from the Library of Congress, documents from the United States Patent Office, and copies of articles from a 1905 French Journal.

An impressive list, even so. But now Judge Breyer improvises rationalizations so that these need not be addressed either. The Committee will recall that the attorney appointed to do the direct appeal refused all contact with me. Judge Breyer now finds (at 4) "Mount's failure to advance these issues on direct appeal creates other procedural barriers, however ...." And so, after devoting page 5 to discussions of further barriers he perceives to exist, at page 6 he finds that it is not necessary to consider anything at all:

> Those of Mount's claims that conceivably implicate constitutional concerns are plainly without merit. And the failure to raise his other claims on direct appeal clearly precludes their consideration by way of a section 2255 motion. These additional claims, in any event, are also without substantive merit.

By slithering between Scylla and Charibdis, Judge Breyer does nit sully himself entertaining legal issues put before his court. They had been disposed of, neither more nor less. But what about the needs of justice?

For a fourth Habeas Corpus I made issue of a Supreme Court case from 1989, published after my trial before Judge Zobel. By Schmuck v. United States that high court taught "that a defendant cannot be held to answer a charge not

contained in the indictment brought against him". This seemed to address directly one of the principle evils of trial before Judge Zobel. I had been indicted for "Transportation of goods knowing them to have been stolen", and at trial in every instance the government witnesses gave evidence to theft. Judge Zobel wrote on the face of the motion:

> Denied. Since the jury was not instructed as to an unindicted offense, Schmuck v. U.S. is inapposite.

But the issue was not what the jury was charged. The issue was that the government had set out to prove a charge "not contained in the indictment brought against him". The Circuit Court affirmed her denial employing unique method typical of Judge Breyer, whom continued his practice of not soiling himself by discussion of issues. Though I had brought this Habeas Corpus to show that the actions of the district court defied the lesson of the Supreme Court, Judge Breyer makes no mention of the Supreme Court. Under date of April 14, 1992, he nimbly combined this proceeding with another for change of venue, leaving the Supreme Court ruling unconsidered. His second paragraph disposes of the matter:

> Appellee (the government) has moved under Loc. R. 27.1 for summary disposition in No. 91-2200, arguing that the sole issue there raised has previously been considered and rejected by this court in one of petitioner's earlier habeas appeals. We agree. See Mount v. United States, No. 90-1964, slip op. at 6-7 (1st Cir. June 28, 1991). Nothing contained in petitioner's submissions calls our conclusion there into question.

Side-stepping the Supreme Court has resulted in very bad law. For this was a Supreme Court lesson taught since the conviction, and in Davis v. United States, at116, Mr. Justice Stewart showed: "intervening change in the law" eliminates all possible bar to Habeas Corpus. We begin to comprehend that Judge Breyer never would heed any Supreme Court ruling that interfered with his basic mission to cover-up what had happened in the court of Judge Zobel.

In the same opinion of the Supreme Court (Davis) Justice Stewart had shown "that relief in 28 U.S.C. section 2255 cannot be denied as to constitutional claims solely on ground that relief should have been sought by appeal". Had Judge Breyer heeded that ruling he must have reversed his own opinion of June 28, 1991, in which he wrote "Mount's failure to advance these issues on direct appeal creates other procedural barriers ...." That had been untrue. We see emerging a special, eccentric view of law, which in no particular corresponds with the law of the United States. This is Breyer's Law. And it much encouraged the wanton and reckless nature of Judge Zobel's acts.

Sixth and seventh Habeas Corpus petitions submitted to the district court now received no consideration at all. Judge Zobel wrote DENIED on the lower left corner of each face sheet. Notoriously unaccountable on the bench, she had a protector in Chief Judge Breyer of the Appeals Court. This

was a conspiracy of two to flout the law of the United States. Judge Zobel's proceedings passed without criticism, nomatter how wild. An added grace was that the appeals of her cases are almost never published.

Now imprisoned four years, for all these reasons in the late spring of 1992 I made effort to free myself from the reprehensible jurisdiction of this twosome. Administration of the district court was shocked June 17, 1992, by arrival of my eighth Habeas Corpus, and the next day by Affidavit of Bias pursuant to Halliday v. United States, 380 F.2d 270 (1st Circuit, 1967). Court administration rasped to a halt. No assignment was made. The same frozen malaise seized the Circuit Court where Judge Breyer had erected cordon sanitaire around Judge Zobel. For a year past her cases had been banned from publication. When unaccountably United States v. Grant (September 26, 1991) 956 F.2d 1, slipped through into paperback edition of Federal Reporter, revealing that again Judge Zobel had convicted a defendant of whom it was found "legally impossible for defendant to commit the crime charged" (!), quickly this was withdrawn from hard cover edition.

Aware that Judge Zobel menaced their viability as tribunals, together the district court and the First Circuit instituted a policy to limit the numbers of certiorari petitions I could forward to the Supreme Court. Cooperative effort was made to group submissions into single negative Orders. The 22nd day of April, 1992, Judge Zobel therefore denied six (6)

matters gathered together in her court over a period of four months. None were denials on the merits nor provided opinion of any nature. All merely were subscribed "Denied". Three of these matters were appealable including (a) motion for return of $18,400 sent for filing in the district court January 22, 1992; (b) motion pursuant to section 2255 to vacate and set aside conviction unlawfully obtained by constitutional violations, sent for filing February 10, 1992; and (c) another section 2255 motion sent for filing February 14, 1992.

May 4, 1992, I dispatched three appeal notices, each in separate envelope. Only one such Notice of Appeal was forwarded to the Circuit Court by the district court clerk. The single briefing schedule to reach me seemed an effort to bunch three appeals together and June 4 I sent Motion To Sever for filing with the Circuit Court. By Order dated September 11, 1992, the Circuit Court decreed investigation of the two lost cases:

> ... under Fed R. App. P 10(c) we direct the district court to investigate this matter and, if appropriate, to reconstruct the record nunc pro tunc.

Briefing schedules with respect to the "lost" section 2255 motions filed in February arrived without explanation in October 1992, when I was in my fifth year of imprisonment.

* * *

The test for judicial impropriety established by the Supreme Court in Liljeberg v. Health Services Acquisitions Corp. (1988) was far exceeded, and I was without adequate remedy. That Judge Zobel continued to commit profoundly sociopathic acts violating the fundamental mission of the federal courts to provide justice and protect the innocent, was drowned in more complex pathologies of a cover-up. By Liljeberg the Supreme Court found that judicial propriety is established by a specific test: "if it would appear to a reasonable person that a judge has knowledge of the facts which would give him an interest in the litigation, then an appearance of partiality is created even though no actual partiality exists". The Supreme Court taught further that it is appropriate to consider (1) thr risk of injustice to the parties in the particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process: "a court, in making such a determination, must continuously bear in mind that, in order to perform its function in the best way, justice must satisfy the appearance of justice".

Yet here, knowingly, wantonly and deliberately, the district court and the First Circuit carried on the most

shameful cover-up of a railroading. Proceedings disappeared or were not assigned for adjudication. Denials were without Memorandum or Opinion. Every lesson of the Supreme Court in this century was violated. District court and Circuit Court were devoted to the most appalling dishonesty in support of an aberant judge whom demonstrated absolute contempt for law.

The partiality of Judge Zobel was grotesque and overwhelming. The time was past due to admit the corroded environment in which this unworthy judiciary operated by open bias and prejudice, denial of witnesses and evidence, tampering with evidence false charge to the jury, fatal variance, withholding of court documents, and loss or destruction of multiple submissions. Judge Zobel claimed the powers of a Deity to convict any person brought before her, whether by whim or extrajudicial bias and prejudice.

The interests of justice and constitutional due process cannot allow this to continue. Social costs to the First Circuit from year after year hiding intolerable acts on part of an unstable judiciary, all contrary to the needs of justice, are too great. Judge Breyer exists as co-conspirator with Judge Zobel by allowing her to imprison an eminent scholar whom had been fully vindicated at trial. Inevitably all this must unravel before the public. At stake then, <u>and here today</u>, is the credibility of the entire federal judicial system.

AND THEN THINGS BECAME NASTY. Judge Breyer began to

play a badger game, dismissing submissions with direction to try elsewhere - and elsewhere dismissing again. October 23, 1991, a complaint to the Judicial Council had been acknowledged by the Circuit Executive. Significant aspect of that complaint was willful destruction by Judge Zobel before trial and afterward of letters to the court, two petitions for writs, and a 2255 motion. Her destructive rampage, unprecedented in the history of the federal court system, was considered in parallel with issues from the trial, including fatal variance, gross extrajudicial bias and prejudice, misapplication of the First Circuit's binding precedents, and wanton denial of the Supreme Courts leading cases. Added to grievous constitutional violations was more recent discovery that Judge Zobel also had destroyed the further motion pursuant to 2255 submitted the 29th day of Jabuary, 1991. All was done in evident belief that protection given her by Judge Breyer rendered her acts impervious to discovery.

She was correct. Even when these matters were put before the Judicial Counsel the adjudication entered August 21, 1992, was written by Stephen G. Breyer. Delicately omitting the name of the district judge, he exulted in his own cleverness:

> I dismiss this complaint in part as "directly related to the merits of a decision or procedural ruling." 28 U.S.C. section 372(c)(3)(A)(ii). Insofar as complaint has sought, or seeks, to reverse his conviction, to recuse the district judge, and to prevent the seizure or effect the return of the funds and letters in question, complainants proper

> recourse, following adverse actiob by the district judge, is by way of appeal to the court of appeals.

In a letter to William R. Burchill, Jr., General Counsel of the Judicial Council of the United States, I observed:

> In the end the matter comes down not alone to the ethical disgrace being perpetrated by District Judge Zobel and Circuit Judge Breyer, but question whether justice knowingly can be denied a defendant in the United States' Courts when it becomes a certainty that no crime was committed. Or, alternately, whether such obsessive protection of a district judge whom disgraces her court to obtain conviction of an innocent person is of equal or greater importance than the Federal Courts mission to provide justice.

And still the battle by Habeas Corpus went on. Gloating over his badger game by refering the Judicial Council complaint back to the Court of Appeals, Judge Breyer now wrote dismissive denial for appeal of the ninth Habeas Corpus. It will be recalled that at trial in Boston from a total of 167 documents 135 had been dismissed for "insufficient proof of ownership" by the government. Also, that so large a proportion of the allegedly "stolen" documents having been proved my own property without taint, more than reasonable doubt existed any had been stolen. This comports with the finding of the Supreme Court by Jackson v. Virginia that evidence is insufficient if:

> ...it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the criminal offense ....

Judge Zobel of course would have nothing to do with this. She

wrote on the face page:

> Denied, judgement may be entered dismissing the claim.

Consistent in his own way, Judge Breyer, whom wrote the Opinion of the Court of Appeals, never touched on the issue. I quote his entire twelve lines:

> In this most recent challenge to his 1988 conviction for interstate transportation of stolen property (one of a series of such challenges he has brought pursuant to 28 U.S.C. section 2255), petitioner alleges that the evidence was insufficient to support the jury's finding of guilt. In particular, he contends that the testimony of two government witnesses was unworthy of credence. In our decision on direct appeal, we discussed such testimony at some length and found that the jury was justified in relying thereon. See United States v. Mount, 896 F.2d 612, 616-20 (1st Cir. 1990). The arguments now advanced by petitioner, even if not procedurally barred, provide no basis for revisiting this issue.

But the "arguments now advanced by petitioner" were the lesson of the United States Supreme Court, again discarded in favor of Breyer's Law. And of course this evasion was held in complete secrecy by being marked NOT FOR PUBLICATION. No one must ever know to what depths Judge Breyer sank by continuously disallowing the findings of the Supreme Court. My Habeas Corpus motions numbered 8,9 and 10, dated June 14, 1992, August 3, 1992, and December 2, 1992, were each submitted to the district court with AFFIDAVIT OF BIAS pursuant to Halliday v. United States, a First Circuit case from 1967 reported at 380 F.2d 270. Of this case the Harvard Law Review, Volume 83, at pages 1207-1208, wrote:

> The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion ... There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge ....

This is precisely what I did for these three 2255 motions. Nevertheless Judge Zobel seized and denied them without opinion or reference to the merits. Each denial by Judge Zobel was then affirmed, in the manner of a rubber stamp, by the Circuit Court presided over by Judge Breyer. Nowhere had the merits been considered; no one examined on what basis I languished wrongfully in prison year after year. An appalling situation continued to worsen.

* * *

Then, early in January 1993 this country had a new President. Young, curious, interesting himself in every aspect of government, his first task was to select a Cabinet. Judge Zobel thereupon contracted the notion that as a German woman, born at Zwickau, Germany, December 18, 1931, a Jew and a holocaust survivor, she must be made Attorney General of the United States in the new administration of President William J. Clinton. Her candidacy was considered by this President most anxious to explore every avenue, and eventually she arrived in her little hat for interview at the White House.

By sending the President copy of a mandamus petition recently filed with the First Circuit, naming Judge Zobel as respondent and demonstrating a broad spectrum of improprieties, contribution was made to the defeat of her unseemly ambition.

Worse then arose when in his turn, in that year 1993 Hon. Stephen G. Breyer felt that the new President must nominate him to the United States Supreme Court. June 3, 1993, I wrote a letter to Judge Breyer himself one paragraph of which said:

> Appeal of eleven section 2255 motions have reached the First Circuit, plus a bevy of petitions for mandamus, recusal, and change of venue, and a suit for damages from Judge Zobel's thefts of $18,400 cash and the 135 historical documents dismissed from the indictment at trial. Like my funds, the documents have not been returned to me. In each instance you defied established law to protect a woman whom long ago must have been removed from the bench. Most recently, in No. 92-1576, you even refused to examine the two pages of transcripts enclosed herein, showing dismissal at trial of the 135 historical documents. On petition for rehearing to which the same transcripts were annexed, once more you refused to examine them.

The letter honorably dispatched to Judge Breyer himself, in the same mail copy went to President Clinton.

Original letter to Judge Breyer and copy to the President seem to have been delivered Monday, June 7, 1993. The reaction of Judge Breyer was spectacular. The following day, June 8, 1993, he gathered together three of my cases on appeal before the First Circuit and denied them in a single Order showing no cause. A district judge at Boston, Hon. Joseph L. Tauro, then also weighed in with a dismissal. I sent Judge Breyer's

very unusual triple dismissal to the President. One paragraph of my covering letter said:

> Question arises whether a federal judge so petty, unprincipled, and filled with naked vindictiveness, who retaliates by violation of all civilized standards and standards of jurisprudence, can be fit to sit on the Supreme Court.

President Clinton abandoned the candidacy of Stephen G. Breyer and nominated to the Supreme Court Hon. Ruth Bader Ginsburg.

As we have seen by his Orders, Judge Breyer treats substantial matters of law solely as avenues for expression of a puerile cleverness and a pervasive personal egotism. By uts corresponding contempt for the proper functions of a Court of Appeals, the First Circuit under his guidance leaves vast constitutional infirmities uncorrected. Direct test of this followed again, July 1, 1993, when the First Circuit received from me a petition for writ of mandamus which called attention to gross violation of Article III, Section 2, of the Constitution, as well as the Sixth Amendment.

The indicated portion of the Constitution says:

> The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held <u>in the State</u> where the said Crime shall have been committed ....

How then was I tried at Boston with the government producing squads of witnesses whom gave evidence to "theft" in Washington? For this single violation to hit two governing expressions of the Constitution is remarkable in an extreme.

The enormous gravity of the wrong committed is well demonstrated. The Sixth Amendment says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ....

In sipler words, to have put me on trial at Boston and allowed exhaustive testimony that I had "stolen" documents from the Library of Congress at Washington, was constitutionally barred. And it is typical of proceedings conducted at Boston that it was done anyhow. One wondered how could Judge Breyer evade this direct challenge to unconstitutional law, of the sort he always affirmed by sidestepping the issue. The answer was not long in coming. Within fifteen days from its arrival in Boston, hardly time enough for the Appeals Court to docket and review the petition, it also had determined to dismiss, and to do so not on the merits. The Order of Court entered July 15, 1993, was seven words only:

> The petition for writ of mandamus is denied.

This is barbarous treatment and gross impropriety on part of a Circuit Court with duty to supervise proceedings in its district courts. Here a district judge in Massachusetts had the presumption to try a defendant alleged to have committed a theft in the City of Washington, District of Columbia. Wherever one looked, whether to Article III, Section 2, of the Constitution, the Sixth Amendment, or even Rule 18,

Federal Rules of Criminal Proceedings, no jurisdiction for such a trial existed at Boston.

The district court had exceeded authority, jurisdiction, and powers, and for the First Circuit Judge Breyer merely looked away. Were there any principle orprivilege which would have supported the action of the district court, or rendered it even quasi-legal, this must have been stated. Instead the Circuit Court dismissed not on the merits, leaving gross constitutional infirmity and a state of legal quagmire. An unlawful act was neither justified nor condemned, an innocent scholar left imprisoned without cause.

Examining the situation left by this insolubrious disposition, one sees forthwith that to have imprisoned me without the commission of any crime, but merely on clandestine whisperings of unstable librarians who know nothing of me or my affairs, is a crime against humanity. That I should have been imprisoned by a Boston court that denied me all indigent subpoenas, denied me documentary evidence, and held trial in violation of the absolute bar found in Article III, Section 2, of the Constitution, is too heinous to be properly described. That this man, the Chief Judge of the First Circuit Court of Appeals, should wrongfully have kept me in prison year after year, for six years, never bothering to examine my endless submissions showing so many judicial irregularities, beggars description.

To say that Judge Breyer is like Shakespeare's Iago,

who believed in a cruel God, would not be correct. Judge Breyer belives that he himself has immutable right to inflict cruelty on those before his court. His bias and prejudice can be activated by rumor, frivolous gossip, or the schemes of unstable individuals. He enjoys displaying a superficial cleverness, but lacks the incisive intelligence that would distinguish extrajudicial gossip from evidence. Willingly and obtusely and with singleness of purpose he denies justice, denies all law, all precedents, all statute. The Constitution itself is nothing to him when for whatever private motive he desires to inflict cruelty. He has been called "smug" and "arrogant", and if the media can be trusted, these were President Clinton's original perceptions. So far as they go they are correct. But the reality is that Stephen G. Breyer practices the prerogatives otherwise reserved for God.

He is without human compassion. He taunts and torments with persistent ridicule persons whom he knows to be wrongfully imprisoned, exulting in what he believes to be his own cleverness while they suffer the pain of the Damned. Especially in this age when humanitarian concerns have become an essential element of legal consideration, and the lessons of the Supreme Court show regard for persons in every social range, this man whom is concerned only for himself lacks fundamental qualification. It is a maxim of law, and employed by the Supreme Court in Liljeberg (at 875), that "to perform its high function in the best way 'justice must satisfy the appearance of justice'".

Contrarily Judge Breyer, as we have seen here, deals out injustice couched in a cute cleverness, and hides it under NOT FOR PUBLICATION restriction.

Finally, we hear that he is a builder of "consensus" and this must be examined for whether it is a force for good or evil. In every opinion quoted here, even the most cleverly malign denying basic holdings of the Constitution and the Supreme Court, he has convinced two other judges of the First Circuit at Boston to go along. This is not a form of consensus that would be solubrious on the Supreme Court, for we must recall that "The Devil can quote scripture".

The Breyer nomination, in short, presents a Pandora's Box of courtroom cliches, myths and stereotypes - the ruthlessly ambitious judge who sees a railroading and again and again affirms it. These are issues never addressed in polite company, but I have come here today to expose them. The plain issue before this Committee is whether it can confirm to the Supreme Court a man to whom JUSTICE is an irrelevance; the Constitution something that does not matter.

This man is a threat to the public, to the common good, and to the liberties of every person. What happened to me can happen to any one of you. Were Stephen G. Breyer confirmed to the Supreme Court it would mark the end of liberty in this country. I ask each of you, and I beg and pray, that you decline to confirm Stephen G. Breyer.

THANK YOU.

HC02 Box 7377
Quebradillas, Puerto Rico
00678

July 12, 1994

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510-6275

Dear Chairman Biden:

Thank you for the opportunity to submit this testimony about the nomination of the Honorable Judge Stephen Breyer to be Justice of the Supreme Court of United States of America.

My husband, Joseph Hampel and I would want this testimony circulated to the members of the Judiciary Committee and made part of the official record of Judge Breyer's hearing. We will follow the hearings in the news media.

Again, thank you for allowing us to be part of this civic activity.

Very truly,
Natalya Tamara Hampel
Natalya Tamara Hampel

TO THE COMMITTEE ON THE JUDICIARY
United States Senate
Washington, D. C.

This testimony is to address the record of the Honorable Judge Stephen Breyer as judge and chief judge of the First Circuit Court of Appeals in Boston, Massachusetts. Judge Breyer took an oath, a solemn promise, to defend the Constitution of United States of America, but he failed to support individual and civil, human rights for women and people traditionally denied equal protection and due process of the Fourteenth Amendment.

A brief assessment of Judge Breyer's work finds he was personally informed that people of Puerto Rico were being subjected to experimental nuetron-electronic- magnetic radiation in spying operations by intelligence gathering agencies of United States Government, operations which damage environmental concerns and injure human beings and other living organisms used as test victims. Judge Breyer did not stop this illegal activity which has absolutely no justification, whatsoever, in law, although he and the Appeals Court for the First Circuit were asked many times to issue an injunction.

Judge Breyer was personally informed that American citizens were subjected to unconscionable abuse in actions by Government in the case, HAMPEL vs. AUTORIDAD, which has been in litigation since 1988, constantly beset by lies, deceit, fraud, such as conspriracy in the instant case to dismiss the case before the main defendant had answered and while plaintiffs were complaining about Judge Breyer in Washington, D. C.

Judge Breyer was personally advised through the executive official of the Judicial Coumcil of the Appeals Court about the mental disability and erratic behavior of some of the judges on the Puerto Rican United States District Court. Judge Breyer was sent over a hundred pages of evidence documents relating to the official judicial misconduct of court clerks, Juan Masini Soler and Lydia Pelegrin, misconduct wreaking devastating effects of pain, anguish, injury and torture for Joseph and Natalya Tamara Hampel!

There was no compassion, no understanding, no relief, no protection of the citizenry, not even a humanitarian break in the horror! Judge Breyer did nothing but berate the plaintiffs for their persistence in bringing the complaints to the Courts.

Judge Breyer failed to properly adhere to the Constitution of United States in the administration of his duties in the First Circuit Court of Appeals in Boston, Massachusetts.

JUDGE BREYER IS NOT QUALIFIED TO BE A SUPREME COURT JUSTICE OF UNITED STATES OF AMERICA.

AFFIDAVIT 1180

This testimony has been sworn and subscribed to before me by Natalya Tamara Hampel, a resident of Quebradillas, Puerto Rico, who is known to me, on this the 12 day of July, 1994.

SS.290-30-6409,1 ma

Antonio Cedron Cart... ABOGADO NOTARIO

Natalya Tamara Hampel

Driver's License No. 1980783

Notary Public

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