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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Depending on the scholarly assessment, he has ruled in favor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hope, as it is written, springs eternal.

Thank you.