prices can be, you interfere with the competitive process, and the result is consumers do not get the benefit of the low price.

He recognized that prices sometimes can be so low that they are predatory and ought to be actionable, but he noted in this case that the prices that *Barry Wright* was complaining about were above full cost. And as a result, that company must have been more efficient than its rival and was passing these benefits along to consumers.

Kartell, all I can say about that case is that doctors were trying to get more money. Blue Cross was trying to keep the prices low, and he found in favor of cost containment.

Let me say in conclusion, the suggestion is that Judge Breyer's opinions are arid, theoretical, impractical. I just do not see it. In every one of these cases, the competitive process is what he is concerned about. Consumer welfare is what he is concerned about. He is skeptical of using the antitrust laws to prevent companies from being aggressively competitive, and I do not see that as arid, theoretical, or impractical.

Thank you.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

BIOGRAPHICAL INFORMATION

Professor of Law, Georgetown University Law Center and of Counsel, Arnold & Porter, Washington, DC.

Formerly held positions as Director, Bureau of Consumer Protection, Federal Trade Commission; Commissioner, Federal Trade Commission; Dean of Georgetown University Law Center; Professor of Law at New York University School of Law and Visiting Professor of Law, Harvard Law School.

Co-Author of *Cases and Materials on Trade Regulation* (with Milton Handler, Harlan M. Blake, Harvey Goldschmid), third edition 1990 and author of numerous books and articles on antitrust including *Revitalizing Antitrust in its Second Century* (1992, co-editor); *Proposals for Revised U.S. Merger Enforcement in a Global Economy,* 81 Geo. L. Rev. 195 (1992); *Definition of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805 (1990); *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051 (1979); *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1 (1978); and *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 1 (1978).

Member of the Council, Administrative Conference (1980–1981); Member of the Board of Governors, D.C. Bar Association (1981–1984); Member of the Council, Antitrust Section of the ABA, (1986–1989).

I appreciate the opportunity to testify in these hearings concerning the confirmation of Stephen Breyer as a Justice of the Supreme Court.

I intend to discuss Judge Breyer's record as a scholar and judge in the field of antitrust. In this testimony, I will focus upon two lines of criticism that have been directed at Judge Breyer's record: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor Big Business over the consumer.

In light of the fact that Judge Breyer has so often reached conclusions in antitrust cases that favor defendants, it is most appropriate for members of the Committee to inquire carefully about this antitrust record. My own view is that his opinions, fully examined, do not evidence any antipathy to antitrust enforcement. Certainly, there is no Big Business bias. His opinions, of course, speak for themselves. Given the facts before him in those cases, there is little reason to contend that he could have reached different conclusions.

Before turning to specifics, let me say that I have read all of Judge Breyer's antitrust opinions and many of his books and articles. I believe his approach to antitrust is thoughtful and enlightened. He would leave the free market alone when it is serv-

ing consumer interests adequately, but parts company with conservatives who believe that the market always, or almost always, does a better job of protecting consumers than government regulators. I expect that Judge Breyer, if confirmed, would be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court supporting effective antitrust enforcement.

A. *The Charge of Consistent Rulings for Defendant.* Of the 15 or 16 antitrust opinions written by Judge Breyer, all but two were decided in favor of antitrust defendants. It does not follow, however, from this numbers game that he is pro-Big Business or anti-antitrust.

Judge Breyer has upheld meritorious antitrust claims by both private and government plaintiffs. In *FTC* v. *Monahan*,[1] he upheld the Federal Trade Commission's broad authority to investigate evidence of price fixing in the pharmaceutical industry. In *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*,[2] he upheld a challenge under the Robinson-Patman Act and the Sherman Act to price fixing in the sale of automobiles. I have not seen any case in which he ruled against the government—federal or state—in an antitrust matter.

Even in cases in which Judge Breyer found for defendants, it does not follow that he is unsympathetic to vigorous antitrust enforcement. In several cases, the plaintiff was a large company and the defendant was the small business, so that decisions in favor of the defendant were hardly pro-Big Business. In many other cases, he was deciding technical questions—whether to deny a preliminary injunction, whether a trial judge should be recused based on conflict of interest, whether Puerto Rico should be treated as a state or a territory—which have no significant bearing on antitrust policy. Finally, as discussed below, his most important decisions, while favoring defendants, consistently reach results that protect the vitality of competitive markets and advance consumer interests.

B. *Criticism of Specific Decisions.*[3] A second charge against Judge Breyer is that several of his decisions evidence hostility toward antitrust enforcement. The cases cited are *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir. 1981), and *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1984).

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

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

A price squeeze cause of action is rarely attempted and is usually without merit, regardless of the market in which the alleged squeeze occurred. Judge Breyer found that such complaints are even more questionable in a market in which both the wholesale and retail prices were set by independent regulators. A history of the proceedings shows why. Boston Electric's wholesale rates had been submitted to and approved by FERC, a Federal regulatory agency, over the opposition of the municipals. That decision in turn had been approved by the courts on review. Thus, the plaintiffs were attempting to end-run the regulatory's decision and prior judicial review by framing their complaint about wholesale prices as an antitrust cause of action.

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

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

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

[2] 19 F.3d 745 (1st Cir. 1944).

[3] This portion of my testimony duplicates discussion in a letter to the Committee, dated July 5, 1994, signed by seven antitrust law professors (myself included) analyzing these decisions.

succeed because it was more efficient than its smaller rivals and was willing to pass efficiencies on to consumers in the form of lower prices.

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

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

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

C. *Conclusion.* Judge Breyer stands well within the mainstream of modern antitrust analysis. He is trained and sophisticated in the use of economics, but does not see economics as the exclusive concern of competition policy. He understands that antitrust incorporates a concern for fairness and justice to large and small business, and has an overriding view that those laws should be enforced in order to serve the welfare of consumers.

There is another dimension to Judge Breyer's opinions that deserve comment. His opinions in antitrust, a complicated subject at best, are as clear, sharp and well organized as any judicial opinions in the federal system. Judge Breyer appreciates that individuals and firms, to obey the law and function effectively must be given fair notice of what the law is. He summed up his concern and indicated his approach in a comment in *Boston Edison,* discussed earlier:

> [A]ntitrust rules are court administered rules. They must be clear enough for lawyers to explain them to their clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstances or qualification.

It is true that Judge Breyer is less likely to support interventionist antitrust theories than some Supreme Court judges in the 1960s. For example, he is unlikely to support inhibitions on aggressive competitive tactics by large companies so that less efficient small business will thrive, especially when the consequence of that kind of intervention is higher prices to consumers. But when it comes to the mainstream of current antitrust enforcement—challenges to cartel behavior, to large mergers that produce substantial anticompetitive effects, to restrictions on the freedom of distributors to select products and set prices as they see fit—I expect that Judge Breyer will be strong supporter of effective antitrust enforcement. Indeed, the very fact that he understands this area so well should make him an especially effective advocate within the Court for sensible enforcement.

Senator KENNEDY. Professor Sunstein.

STATEMENT OF CASS R. SUNSTEIN

Mr. SUNSTEIN. Thank you, Senator. It is an honor to be here.

I, too, support this nominee, and I believe that his work in the area of regulation is superb. For those who are concerned about his work in this area, especially in the area of the environment and health and safety, it is probably important to emphasize that Judge Breyer distinguishes very sharply between his role as a judge and his role as a policy adviser.