APPENDIX

Alliance for Justice

A National Association of Organizations Working for Equal Justice

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Women's Legal Defense Fund

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.

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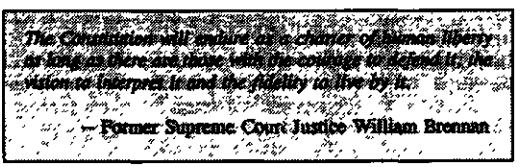
INTRODUCTION



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.