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file*

December 17, 1996

MEMORANDUM

TO: Hillary Rodham Clinton
FROM: Nicole Rabner
RE: Recent Supreme Court Ruling

As you may know, the Supreme Court ruled yesterday that a state cannot refuse to hear a parent's appeal of a court decision terminating parental rights because of an inability to pay court fees. The court has long required that fees be waived for indigents in criminal appeals, but until yesterday had resisted extending the ruling to civil cases.

Justice Ruth Bader Ginsburg wrote for the majority in this 6 to 3 ruling. In the opinion, Ginsburg wrote, "No ties are more precious than those that binding parent and child, and ... few decrees are so grave in their consequences as a court order permanently severing the parent-child bond."

The Department of Justice and the Counsel's Office advise that the ruling does not affect the directive that the President issued Saturday, as it deals only with a parent's right to appeal. However, I fear that the high profile announcement (see attached clips) may send a signal to courts be cautious (and thereby slow) in terminating parental rights, even in cases where children may have been languishing for years in foster care. Perhaps now more than ever, we need the clarification of the "reasonable efforts" requirement that the President asked for in his directive.

Today, I will touch base with the foundation and advocacy communities that deal with court reform and judge training issues to see how they view the impact of the ruling.

Justices Give Indigent Parents Greater Access to Civil Appeals

By Joan Biskupic
Washington Post Staff Writer

The Supreme Court ruled yesterday that a state may not refuse to hear a mother's appeal of a court decision terminating her parental rights just because she cannot pay court fees.

Writing for the majority, Justice Ruth Bader Ginsburg said states could not "bolt the door to equal justice" because of poverty.

The court has long required that fees be waived for indigents in criminal appeals, but until yesterday had resisted extending the rule to civil cases. Although yesterday's 6 to 3 ruling applies to a narrow category of cases, it is nonetheless significant that this generally conservative court decided to give poor civil litigants greater access to the courts.

"Choices about marriage, family life and the upbringing of children are among associational rights the court has ranked as of basic importance in our society," Ginsburg wrote, adding that "few consequences of judicial action are so grave as the severance of natural family ties."

In reinstating Melissa Brooks's case yesterday, the court noted that the basic principle of equal opportunity for appeals in criminal cases has gone beyond situations involving prison to cover petty offenses.

The decision knocks out a Mississippi rule that a parent appealing a termination decree must pay to have a transcript of the original proceeding prepared, in this case at a cost of more than \$2,000. Brooks, who lost her rights to a young son and daughter, challenged the fees as violating basic notions of fairness and equal protection under the law.

Ginsburg took pains to distinguish parental rights cases from other civil disputes, highlighting the significant interest at stake: "In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is irretrievably destructive of the most fundamental family relationship. And the risk of error . . . is considerable."

Still, dissenting justices warned that the door is now open for states to be forced to pay appeals costs in a raft of domestic cases. In a dissenting opinion, Justice Clarence Thomas raised the possibility of states having to pay for an indigent party in a paternity lawsuit, a divorce dispute, a zoning case that impacts families or a foreclosure action that seeks to remove people from their lifelong home.

"I do not think . . . that the new-found constitutional right to free transcripts in civil appeals can be restricted to this case," wrote Thomas, who was joined by Chief Justice William H. Rehnquist and Justice Antonin Scalia. "The inevitable consequence will be greater demands on the states to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here."

Ginsburg compared loss of parental rights to a criminal sentence, saying the mother is trying "to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the state's devastatingly adverse action."

Ginsburg said the appeal right in parental termination cases should not greatly burden the states because there should be relatively few appeals. She noted that about 30 states already pay fees for poor people to appeal in parental-rights disputes.

Robert B. McDuff, who represented Brooks before the court, said of the ruling, "It really sends a message to Mississippi and other states that might not be as solicitous to the poor. The message is that the Constitution demands justice for those who are poor."

Rickey T. Moore, Mississippi special assistant attorney general, said he fears a slew of appeals from parental rights cases as well as potential appeals from all the state's domestic relations disputes, including divorce and paternity matters. "As the dissent points out, this has the potential to open up everything," he said.

Brooks, whose name has been publicized and who has granted interviews in connection with the case, is identified only as M.L.B. in the court ruling. The case began in 1992 when Brooks and her husband were divorced and he won custody of their son, then 7, and daughter, then 5. About three months later the husband remarried, and a year later he and his new wife sought to end Brooks's parental rights.

Her ex-husband contended that Brooks had not kept up visits with the children and child-support payments. After three days of trial, a chancery judge severed Brooks's rights and said the new wife could adopt the children.

The judge's order relied heavily on statutory language, declaring that there had been a "substantial erosion of the relationship between the natural mother . . . and the minor children," although it is unclear from the record why.

Brooks, now a waitress in Memphis, appealed. She paid a \$100 filing fee, but could not pay the costs of preparing and transmitting the record, close to \$2,400. State courts denied her appeal.

Ginsburg was joined in her opinion in *M.L.B. v. S.L.J.* by Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter and Stephen G. Breyer. Justice Anthony M. Kennedy concurred in the judgment.

FOR MORE INFORMATION

To read a Post analysis of how the court decides which cases to hear, click on the above symbol on the front page of The Post's site on the World Wide Web at <http://www.washingtonpost.com>

Date: 12/16/96 Time: 16:08

SJustices: Parents must be allowed to appeal termination of rights

WASHINGTON (AP) Underscoring the importance of parents' rights to their children, the Supreme Court said Monday states must let parents appeal orders terminating such rights even when they cannot afford court fees.

"We place decrees forever terminating parental rights in the category of cases in which the state may not bolt the door to equal justice," Justice Ruth Bader Ginsburg wrote. The court ruled, 6-3, that a Mississippi woman must be allowed to appeal an order ending her rights to her two children.

"No ties are more precious than those binding parent and child, and ... few decrees are so grave in their consequences as a court order permanently severing the parent-child bond," Ginsburg said from the bench.

She said in her opinion that the Mississippi woman was "decreed, forevermore, a stranger to her children."

Once a state allows appeals in such cases, the right to appeal cannot be denied to the poor, she said.

In other cases, the court:

Allowed a Bible club at a Long Island, N.Y., public high school to require its officers to be Christians. The Roslyn Union Free School District sought to bar the club from discriminating against students based on their religious beliefs.

Let a one-time murder defendant pursue a lawsuit accusing author Joseph Wambaugh of helping police conceal evidence in a true-life murder case.

Asked the Clinton administration for its views on whether same-sex sexual harassment violates federal law. The court later will decide whether to hear an appeal by an oil rig worker who says he was sexually harassed by his male supervisor.

The ruling in the parental rights case reversed a Mississippi Supreme Court decision that barred Melissa Lumpkin Brooks from appealing a 1994 order that ended her rights to her son and daughter.

About 30 states already allow a waiver of court transcript fees for indigent people who seek to appeal orders terminating their parental rights. It is unclear how many of the approximately 20 remaining states have laws or policies similar to Mississippi's.

Brooks' lawyer, Robert B. McDuff, said, "The Supreme Court is sending the message that in cases of this magnitude states cannot leave their courthouse doors open to the rich while they are closed to the poor."

He said Brooks, who now lives in Memphis, Tenn., has seen her children only once since 1994, in a chance encounter at a county fair.

Brooks had the children with her husband, Sammy Lee James, before they were divorced in 1992. The children stayed with their father after the divorce, and he was remarried about three months later.

In 1993, James and his new wife asked a court in Benton County, Miss., to terminate Brooks' parental rights and allow the new wife to adopt the children. A judge granted the order in late 1994.

Brooks sought to appeal but could not afford the \$2,352 cost of preparing transcripts and court records for the appeal. Under Mississippi law, such costs must be paid before an appeal can proceed.

Termination of parental rights is irrevocable and thus is different from court actions involving divorce or child custody, Ginsburg said.

She noted that fee requirements ordinarily are upheld so long as they are rational. But she said there have been exceptions: Access to courts in criminal cases and the right to participate in the political process as a voter or a candidate.

Termination of parental rights belongs in the same category of exceptions, Ginsburg wrote.

Her opinion was joined by Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter and Stephen G. Breyer. Justice Anthony M. Kennedy wrote a separate opinion agreeing with the result.

Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented. Writing for the three, Thomas predicted the ruling will end up being extended to other types of civil cases.

"The inevitable consequence will be greater demands on the states to provide free assistance to would-be appellants in all manner of civil cases," Thomas said.

In a section of his opinion joined only by Scalia, Thomas said he likely would vote to overturn the court's 1956 ruling that let people appeal criminal convictions even if they could not afford a transcript.

APNP-12-16-96 1611EST

June 13, 1994

TO:	SUSAN BROPHY	JOEL KLEIN
	DORIS MATSUI	VICKI RADD
	ARTHUR JONES	SUSAN DAVIES
	MELANNE VERVEER	MICHAEL BERMAN
	CAROLYN OSOLINIK	CHERYL MILLS
	DONALD VERRILLI	SUSAN LISS
	JIM HAMILTON	

FROM: CLIFF SLOAN

Attached is the current version of the "Sales Book". It's just about ready to go. Let me or Susan know if you have any additional comments or suggestions.

One question that has been raised is whether his Planned Parenthood dissent should be included in the discussion of the privacy cases. Any thoughts?

[PRESIDENTIAL SEAL]

STEPHEN BREYER

**NOMINATION FOR ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT**

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STEPHEN BREYER

Stephen Breyer is President Clinton's nominee to be the 108th Justice of the United States Supreme Court. Appointed to the federal bench by President Carter in 1980, he currently serves as Chief Judge of the U.S. Court of Appeals for the First Circuit.

Judge Breyer is widely recognized as one of the nation's leading judges. In announcing his nomination to the Supreme Court, President Clinton hailed "[h]is sheer excellence, his broad understanding of the law, his deep respect for the role of the courts in our life and in protecting our individual rights, and his gift as a consensus builder."

Judge Breyer's life has been devoted to public service and public issues. He has served in all three branches of government, and has been a teacher and student of public law issues. His career reflects a deep-seated commitment to fairness and a record of tackling complex issues and attempting to resolve them with principle, reason, and pragmatism so that government and law may work better for all people.

As a jurist, Judge Breyer has written leading opinions on civil rights, criminal law, constitutional liberties, economic regulation, and environmental protection. He has emphasized that courts and law must be accessible to all citizens, and has written in an easily understandable style, without jargon or unnecessary complexity.

Prior to his judicial appointment, Judge Breyer served as Special Counsel and later Chief Counsel to the Senate Judiciary Committee. In that work, he pioneered landmark airline deregulation legislation, which was supported by a broad coalition that included consumer groups and businesses. Judge Breyer also supervised Committee efforts on a wide range of issues -- among them, fair housing legislation, criminal code revision, and the first-ever policy requiring judicial nominees to resign from discriminatory clubs.

Judge Breyer has extensive additional experience in the public sector. He served as a law clerk to Supreme Court Justice Arthur Goldberg in 1964-65; as a top aide in the Justice Department's Antitrust Division in 1965-67 (where he developed the Department's successful position that an agreement not to show homes in white neighborhoods to African-American buyers could be challenged as an antitrust violation); and as an Assistant Special Prosecutor in the Watergate Special Prosecutor's Office in 1973-74. In 1985-89, he served as a charter member of the U.S. Sentencing Commission and sought to fulfill Congress' goal of fair, honest and evenhanded criminal punishment for all law-breakers, including white collar criminals.

Judge Breyer's career also reveals a profound commitment to teaching and education. He joined the Harvard Law School faculty in 1967, became a full professor in 1970, and has continued to teach since joining the bench. He has written broadly on public issues, focusing on complex legal subjects that have a powerful impact on the day-to-day lives of countless citizens. In 1987, he received the American Bar Association Annual Award for Scholarship in Administrative Law.

Stephen Breyer was born and raised in San Francisco, California, and was educated in the city's public schools. He earned his A.B. in 1959 from Stanford University; attended Oxford University on a Marshall Scholarship; and graduated from Harvard Law School in 1964, where he worked on the Harvard Law Review. He served in the Army Reserves for eight years, becoming a corporal before his honorable discharge in 1965.

Judge Breyer is married to Joanna Hare Breyer, a clinical psychologist at the Dana Farber Cancer Institute. They have three grown children -- Chloe, a Harvard graduate who founded and edits a magazine for youth volunteers; Nell, who recently graduated from Yale University; and Michael, a student at Stanford University.

STEPHEN BREYER

MAJOR CASES -- U.S. COURT OF APPEALS

In his fourteen years on the Court of Appeals for the First Circuit, Stephen Breyer has written hundreds of opinions. A small sampling of these judicial decisions follows.

I. Access to Courts

Judge Breyer has shown an abiding commitment to ensuring that the federal courts are open to all Americans.

- **Ensuring that Citizens Can Vindicate Constitutional Claims.** Judge Breyer has rejected unjustified technical arguments that would shut the courthouse door to citizens seeking a remedy for violation of their constitutional rights. In Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984), he denied the government's claim that technical barriers barred an important First Amendment claim.
- **Challenges To Government's Failure To Follow the Law.** Judge Breyer has held that individual residents of a community may challenge unlawful government actions that would profoundly affect their community. In a 1983 decision, he determined that community residents could proceed with a challenge to HUD's award of funds to develop a commercial complex. Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983). Similarly, in Project Basic v. O'Rourke, 907 F.2d 1242 (1st Cir. 1990), Judge Breyer allowed a challenge that sought to require the construction of replacement public housing units within a reasonable period of time.
- **Access for Those of Limited Means.** Judge Breyer has repeatedly given a broad interpretation to statutory attorneys fee provisions that enable those of limited means to obtain quality legal representation. In Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986), he reversed a trial court decision that had improperly limited attorneys fees for a prevailing civil rights plaintiff. In Guglietti v. Secretary of HHS, 900 F.2d 397 (1st Cir. 1990) (dissenting opinion), he emphasized the right of social security disability claimants to attorneys fees when they prevail.
- ★ **Protection Against Arbitrary Government Action.** Judge Breyer has consistently protected the rights of Medicare and Medicaid recipients against formalistic regulations and excessive bureaucracy. In Mayburg v. Secretary of Health and Human Services, 740 F.2d 100 (1st Cir. 1984), he determined that residents of nursing homes do not need to leave the nursing homes to continue to receive benefits. In Ciampa v. Secretary of Health and Human Services, 687 F.2d 518 (1st Cir. 1982), he held that Social Security recipients do not lose Medicaid

FACT SHEET: JUDGE STEPHEN BREYER

Judicial Record

- * Chief Judge, U.S. Court of Appeals, First Circuit since 1990. Appointed to the bench by President Jimmy Carter in 1980.
- * Received American Bar Association Annual Award for Scholarship in Administrative Law (1987).
- * Rated by American Lawyer magazine as a "First-Rate Centrist" candidate for the U.S. Supreme Court (1991).
- * Wrote key opinions in civil rights, criminal law, economic regulation, constitutional liberties, and environmental protection. (An analysis is attached).
- * Charter member of U.S. Sentencing Commission.

Lawyer and Law Professor

- * Law clerk for Supreme Court Justice Arthur Goldberg. Has written that a Goldberg clerk "learned a highly practical view of the Constitution. [Goldberg] saw the Constitution as protecting basic liberties in a practical way, a way that permitted achieving the ideal without unduly interfering with the workings of government."
- * Special Assistant to the Assistant Attorney General, Antitrust. Developed and argued successful Justice Department position that agreement not to show homes in white neighborhoods to African-American buyers could be challenged as an antitrust violation.
- * Professor of Law, Harvard Law School. Wrote about law and government in many areas, including administrative law and antitrust.
- * Assistant Special Prosecutor, Watergate Special Prosecutor's Office. Helped organize ITT investigation.
- * Chief Counsel, Senate Judiciary Committee. Worked on economic regulation, civil rights, civil liberties.

Personal History

- * Born, 1938; San Francisco, California. Married Joanna Hare Breyer in 1967. Three children: Chloe, Nell, and Michael.
- * Graduated from Stanford University; attended Oxford University on a Marshall Scholarship; graduated from Harvard Law School.
- * Served in Army Reserves for eight years.

benefits because of cost-of-living increases in other benefits.

II. Freedom of Speech and Religion, and Privacy Rights

Judge Breyer is a strong defender of First Amendment freedoms of speech and religion, and of the right to privacy.

- **Free Speech.** Judge Breyer resoundingly affirmed the rights of freedom of speech and freedom of conscience in Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984). In that case, Judge Breyer struck down a loyalty investigation requirement on the ground that the requirement impermissibly targeted "political advocacy."
- **Religious Freedoms.** In Aman v. Handler, 653 F.2d 41 (1st Cir. 1981), Judge Breyer ruled that the First Amendment prohibited a state university from discriminating against a student religious group on the ground that the university disapproved of the group's practices.
- **Right to Travel.** In a 1983 case, Judge Breyer held that a Treasury Department regulation prohibiting travel to Cuba went beyond the Department's statutory authority, noting that the regulation interfered with the constitutionally protected right to travel. Wald v. Regan, 708 F.2d 794 (1st Cir. 1983). The Supreme Court later reversed the decision by a 5-4 vote.
- **Privacy Rights.** In Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990), Judge Breyer joined a First Circuit opinion holding that the Reagan Administration's "gag rule" -- which prohibited abortion counseling or referral at facilities receiving federal funds -- violated a woman's constitutional right to "freedom of reproductive choice." The court also determined that the "gag rule" violated the First Amendment. The Court of Appeals' decision was eventually overturned by the Supreme Court in Rust v. Sullivan, a 5-4 decision.

III. Civil Rights

Judge Breyer has shown a vigorous commitment to protecting the civil rights of all Americans and to enforcing civil rights laws with care and sensitivity.

- **Fair Housing.** In NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987), Judge Breyer found that HUD has a statutory duty to further nondiscrimination in housing, and that courts have the authority to review HUD's compliance with this obligation.
- **Careful Attention to Facts and Law of Particular Cases.** Judge Breyer forcefully applies this nation's antidiscrimination laws, as in Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984), where Judge Breyer rebuked an employer for paying women less

than men "just because they were women." At the same time, he has carefully reviewed the evidence in each case to determine whether discrimination has been proved, and has ruled against plaintiffs claiming discrimination where the record did not support the claim. Lamphere v. Brown University, 875 F.2d 916 (1st Cir. 1989).

- **Remedying Discrimination.** In Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), Judge Breyer emphasized the compelling interest in curing past racial discrimination, and carefully reviewed and upheld a plan designed to achieve that goal. Similarly, in 1985, Judge Breyer upheld a narrowly tailored consent decree designed to increase the number of promotions awarded to black police officers. Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dept., 780 F.2d 5 (1st Cir. 1985).

IV. Criminal Law

Judge Breyer has enforced the criminal law fairly and vigorously, with appropriate respect for law enforcement interests and individual rights.

- **Limits on Bail for Serious Offenders.** Judge Breyer upheld the constitutionality of a federal statute creating a presumption that persons charged with serious drug offenses should be denied bail because they pose a serious risk of flight. United States v. Jessup, 757 F.2d 378 (1st Cir. 1985).
- **Respect for Law Enforcement.** Judge Breyer's record reflects deep respect for the legitimate needs of law enforcement. He has emphasized that the Fourth Amendment question of "'probable cause' . . . should be answered in terms of common sense, not technicalities," and not with a proliferation of procedural "subrules, some of which may unnecessarily threaten law enforcement interests . . . and all of which threaten unnecessary rigidity and complexity." United States v. Guarino, 729 F.2d 864 (1st Cir. 1984) (dissenting opinion). In United States v. Berryman, 717 F.2d 651 (1st Cir. 1983), Judge Breyer dissented when a panel overturned a drug conviction even though the defendant had voluntarily submitted to questioning by DEA agents who suspected him of carrying drugs. The full Court of Appeals agreed with Judge Breyer. United States v. Berryman, 717 F.2d 650.
- **Respect for Individual Rights.** While recognizing the need to respect law enforcement interests, Judge Breyer carefully reviews the accused's claim in each case and, if warranted, orders appropriate relief for a meritorious claim. In United States v. Daniels, 821 F.2d 76 (1st Cir. 1987), he found that the government's failure to disclose important information to the court required setting aside a conviction.

- **Sentencing.** Judge Breyer has been a leader on the bench in interpreting and applying the Sentencing Guidelines to achieve fair and evenhanded sentencing. He has frequently upheld sentences imposed under the Guidelines and emphasized that "the primary objective" of the guideline system is "uniformity of sentencing treatment." United States v. Beasley, 12 F.3d 280 (1st Cir. 1993). At the same time, recognizing the important role of federal trial judges at sentencing, Judge Breyer has explained that the Guidelines authorize federal trial judges to adjust a sentence when appropriate and when warranted by the facts and the law. United States v. Rivera, 994 F.2d 942 (1st Cir. 1993); United States v. Doe, 18 F.3d 41 (1st Cir. 1994).

V. Antitrust Law and Economic Regulation

Judge Breyer is widely recognized as one of the nation's leading authorities on antitrust and economic regulation. His decisions emphasize the statutory goals of rigorous competition and lower prices for consumers.

- **Protecting Consumers from High Health Care Costs.** Judge Breyer has repeatedly held that federal law should not thwart reasonable efforts to control health care costs. In a decision hailed as "a victory for all older Americans," Senior Citizen News (May 1987), Judge Breyer rejected a constitutional challenge to a Massachusetts law forbidding "balance billing" -- the practice of charging patients more than the Medicare-approved charge for medical service. Massachusetts Medical Society v. Dukakis, 815 F.2d 790 (1st Cir. 1987). Similarly, in Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984), Judge Breyer held that the federal antitrust laws were no bar to efforts by insurance companies to limit what doctors could charge their patients. And in Federal Trade Commission v. Monahan, 832 F.2d 688 (1st Cir. 1987), Judge Breyer upheld broad enforcement authority for the Federal Trade Commission to investigate potential cartel pricing of prescription drugs.
- **Price Discrimination.** In Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994), an important case under the Robinson-Patman Act and the Sherman Act, Judge Breyer reversed a district court decision and allowed the plaintiff car dealer to challenge price discrimination and resale price-fixing in the sale of automobiles.
- **Leading Opinion on Predatory Pricing.** Judge Breyer's opinion in Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983), is widely regarded as a leading opinion explaining predatory pricing under the antitrust laws. Recognizing that the ultimate goal of the antitrust laws is fair competition and lower prices for consumers, Judge Breyer ruled that the antitrust laws should not be applied in ways that unduly

discourage companies from lowering their prices, and should bar only clearly predatory efforts to drive out a competitor by pricing below cost.

VI. Environmental Law

Judge Breyer has shown a consistent commitment to vigorous enforcement of federal laws protecting the environment, and has worked to ensure that federal officials obey their legal responsibilities to consider environmental impact when administering federal programs.

- **Compliance with Environmental Statutes.** Judge Breyer has demanded compliance with environmental statutes from all levels of government. In a 1983 decision, he upheld an order barring a federal agency's plan to allow oil drilling in a fishing area off the Atlantic coast. Commonwealth v. Watt, 716 F.2d 946 (1st Cir. 1983). In two related cases brought by the Sierra Club, he required careful analysis of possible effects on the environment before the State of Maine could build a new cargo port and causeway. Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989); Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985). At the same time, where the facts and law do not warrant judicial intervention, Judge Breyer has rejected environmental claims. Valley Citizens v. Aldridge, 886 F.2d 458 (1st Cir. 1989).
- **Power of Courts to Correct Serious Violations of Environmental Laws.** In a 1991 case involving outflow to Boston Harbor, Judge Breyer reaffirmed the power of courts to craft broad remedies for violations of the Clean Water Act. He upheld a district court order that halted the hook-up of new sewer lines that would have emptied into the Boston Harbor discharge system. United States v. Metropolitan District Comm'n, 930 F.2d 132 (1st Cir. 1991).

VII. Labor Law

Judge Breyer's record demonstrates careful interpretation of federal law to ensure that legal protections for workers' rights are fairly enforced.

- In Associated Builders v. Massachusetts Water Resources Authority, 935 F.2d 345 (1st Cir. 1991), Judge Breyer dissented from a decision of the First Circuit which had concluded that federal law prohibited Massachusetts from requiring that contractors working on large state construction projects belong to unions. Judge Breyer argued that such a requirement was permissible. The Supreme Court eventually agreed with Judge Breyer, reversing the First Circuit in a 9-0 opinion.
- In Bath Iron Works v. Director, OWCP, 942 F.2d 811 (1st Cir. 1991), Judge Breyer interpreted the Longshore and Harbor

Workers' Compensation Act to permit deaf workers to receive the requested level of disability benefits. The Supreme Court unanimously affirmed Judge Breyer's interpretation.

VIII. Personal Injury

- **Ensuring Full Compensation for Victims.** Judge Breyer has issued a landmark decision that protects the rights of families to obtain compensatory damages from pharmaceutical companies when family members are injured as a result of vaccinations. In Schafer v. American Cyanamid Co., 20 F.3d 1 (1st Cir. 1994), Judge Breyer rejected the argument that permitting all victims to be compensated would raise drug prices, and his opinion ensures that families will be able to obtain full compensation for their injuries.

COMMENTS ON THE SUPREME COURT NOMINATION OF STEPHEN BREYER

"I am happy to say that Judge Stephen Breyer is one of the brightest lawyers that I have ever encountered. . . [A]s the Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee . . . , I had a good deal to do with Steve Breyer, who then was the chief counsel of the Senate Judiciary Committee. He always impressed me in the way that he approached law making and the inevitable compromises that occur in conference committees. I am certain Judge Breyer will continue to utilize his fine skills in his new position as an Associate Justice of the Supreme Court."

--Father Robert F. Drinan, Professor,
Georgetown University Law Center

"The President's selection of Chief Judge Stephen Breyer for elevation to the Nation's highest court is an event much to be applauded. Judge Breyer is universally admired among his judicial colleagues throughout the country as a judge of high abilities and unshakable integrity. With his intellect, wisdom, and energy, he will prove to be, I am confident, one of the great Justices of this Century."

--Kenneth W. Starr,
former Solicitor General;
former Judge, U.S. Court of Appeals
for the D.C. Circuit

"In matters of economic regulation, Judge Breyer is the model of what sensible liberal thought should be. . . . He understands that government regulation is often necessary to ensure not just efficiency but fairness, and then goes still another step and asks whether the type of regulation chosen is the right fit for the problem that it set out to address. In this process, he touches all the bases, respects all values."

--Robert Pitofsky,
former Dean, Georgetown University
Law Center;
former Commissioner, Federal Trade
Commission

"He's a name that if you're going to list the top 10 to 15 lawyers in the country, he would be on anyone's list."

--Susan Low Bloch, Professor,
Georgetown University Law Center

"Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity

to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore. . . . My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time."

--Douglas I. Foy,
Conservation Law Foundation

"Judge Stephen Breyer brings to the court a superb intellect. But more important, he brings practical wisdom. . . . He is a master of economic theory who also knows that there is more to life than the bottom line. He sees judges not as high priests but as public servants. He writes his opinions clearly, without jargon or footnotes, so that they can be widely understood. He has demonstrated skill at bringing about consensus both on the Hill and on his court. He has a fair and judicious temperament."

--Kathleen Sullivan, Professor,
Stanford Law School

"The designation of Chief Judge Stephen G. Breyer as Associate Justice of the Supreme Court has been received with great enthusiasm by the legal community in Puerto Rico [which is in the jurisdiction of Judge Breyer's court]. . . . Breyer's absorbing personality, his kindness, his diverse interests, his broad humanistic culture, have won him the personal affection and respect of those who have had the privilege of interacting with him in Puerto Rico. The legal community of the Island looks forward to the valuable contributions that Stephen G. Breyer will undoubtedly make to American jurisprudence as a Justice of the Supreme Court of the United States."

--Antonio Garcia-Padilla
Dean and Professor of Law,
University of Puerto Rico School of Law;
Clerk to Judge Breyer, 1981-82

[CIVIL RIGHTS REPRESENTATIVE QUOTE]

"In selecting Stephen G. Breyer for the Supreme Court, President Clinton has chosen a jurist and legal scholar of integrity, intellect and compassion whose skills at compromise and modest personality will likely make him a forceful and influential justice well into the next century."

--San Francisco Chronicle

Judge Breyer is "respected for integrity, good judgment and concern for justice. . . . [He] is popular among his colleagues and a recognized intellectual leader."

--New York Times

"Although his record suggests a man committed to a life of the mind, Judge Breyer's writings show a pragmatism (and clarity of expression) rarely found in legal writings. . . . [H]is best gift may be to make the court more understandable to the American people. What a gift that might be."

--Miami Herald

"[A]s a judge and lawyer, his abilities are unquestioned. In combination with Ginsburg, he represents a formidable addition to the stature of the court."

--Sacramento Bee

"The judge is known as a consensus builder and an intellectual who can clarify complicated legal subjects In court and at the many seminars, speeches and panel discussions in which he has participated, he demonstrates the courtesy, temperament, and fairness that are the hallmarks of a good judge."

--Washington Post

[PRESIDENTIAL SEAL]

STEPHEN G. BREYER

**NOMINATION FOR ASSOCIATE JUSTICE
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DRAFT

STEPHEN G. BREYER

Stephen G. Breyer is Chief Judge of the United States Court of Appeals for the First Circuit. Appointed in 1980 by President Carter, he is widely recognized as one of the nation's leading judges. In 1991, The American Lawyer rated him a "First-Rate Centrist" candidate for the Supreme Court.

Judge Breyer's life has been devoted to public service and public issues. He has served in all three branches of government, and has been a teacher and student of public law issues. His career reflects a deep-seated commitment to tackling complex issues and attempting to resolve them with principle, reason, and pragmatism so that government and the law may work better for all people.

As a jurist, Judge Breyer has written leading opinions on civil rights, criminal law, consitutional liberties, economic regulation, and environmental protection. He has emphasized that courts and law must be accessible to all citizens, and has written in an easily understandable style, without jargon or unnecessary complexity.

Prior to his appointment, Judge Breyer served as Chief Counsel and consultant to the Senate Judiciary Committee. In that post, he pioneered landmark airline deregulation legislation, an effort supported by a broad coalition that included consumer groups and businesses. As Chief Counsel, Breyer supervised Committee efforts on a wide range of issues -- among them, fair housing legislation, criminal code revision, an FBI charter, antitrust legislation making it easier for plaintiffs to file suit, and the first-ever policy requiring judicial nominees to resign from discriminatory clubs.

In 1973-74, Breyer served as Assistant Special Prosecutor in the Watergate Special Prosecutor's Office and organized the ITT investigation. In 1965-67, he worked at the Justice Department as a Special Assistant to the Assistant Attorney General, Antitrust Division, where he developed the Department's successful position that failure to show homes in white neighborhoods to African-American buyers consitutes an antitrust violation. In 1964-65, Judge Breyer clerked for Supreme Court Justice Arthur Goldberg.

For many years, Breyer taught law at Harvard, where he was promoted from Assistant Professor to Professor in 1970. Since joining the bench, Breyer has continued to teach at Harvard; in 1987, he received the American Bar Association Annual Award for Scholarship in Administrative Law.

Stephen G. Breyer was born in San Francisco, California in 1938, where he was raised. He gained his A.B. in 1959 from Stanford University; attended Oxford University on a Marshall Scholarship; and graduated from Harvard Law School in 1964, where he worked on

the Harvard Law Review. He served in the Army Reserves for eight years, becoming a corporal before his honorable discharge in 1965.

Judge Breyer is married to Joanna Hare Breyer, a clinical psychologist at the Dana Farber Cancer Institute. They have three grown children -- Chloe, a Harvard graduate who founded and edits a magazine for youth volunteers; Nell, who recently graduated from Yale University; and Michael, a student at Stanford University.

FACT SHEET: STEPHEN G. BREYER

Judicial Record

- * Chief Judge, U.S. Court of Appeals, First Circuit. Appointed by President Jimmy Carter in 1980.
- * Received American Bar Association Annual Award for Scholarship in Administrative Law (1987).
- * Rated by American Lawyer magazine as a "First-Rate Centrist" candidate for the U.S. Supreme Court (1991).
- * Wrote key opinions in civil rights, criminal law, economic regulation, constitutional liberties, and environmental protection. (An analysis is attached).
- * Charter member of U.S. Sentencing Commission.

Lawyer and Law Professor

- * Law clerk for Supreme Court Justice Arthur Goldberg. Has written that a Goldberg clerk "learned a highly practical view of the Constitution. [Goldberg] saw the Constitution as protecting basic liberties in a practical way, a way that permitted achieving the ideal without unduly interfering with the workings of government."
- * Special Assistant to the Assistant Attorney General, Antitrust. Developed and argued successful Justice Department position that failure to show homes in white neighborhoods to African-American buyers violated antitrust laws.
- * Professor of Law, Harvard Law School. Wrote about law and government in many areas, including administrative law and antitrust.
- * Assistant Special Prosecutor, Watergate Special Prosecutor's Office. Organized ITT investigation.
- * Chief Counsel, Senate Judiciary Committee. Worked on economic regulation, civil rights, civil liberties.

Personal History

- * Born, 1938; San Francisco, California. Married Joanna Hare Breyer in 1967. Three children: Chloe, Nell, and Michael. Religion: Jewish.
- * Graduated from Stanford University; attended Oxford University on a Marshall Scholarship; graduated from Harvard Law School.
- * Served in Army Reserves for eight years.

STEPHEN G. BREYER

MAJOR CASES -- U.S. COURT OF APPEALS

In his fourteen years on the Court of Appeals for the First Circuit, Stephen G. Breyer has written hundreds of opinions. A small sampling of these judicial decisions follows.

I. Access to Courts

Judge Breyer has shown an abiding commitment to ensuring that the federal courts are open to all Americans.

- **Ensuring that Citizens Can Vindicate Constitutional Claims.** Judge Breyer has repeatedly rejected unjustified technical arguments that would shut the courthouse door to citizens seeking a remedy for violation of their constitutional rights. In Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984), he rejected the government's claim that technical barriers barred an important First Amendment claim.
- **Challenges To Government's Failure To Follow the Law.** Judge Breyer has held that individual residents of a community may challenge unlawful government actions that would profoundly affect their community. In a 1983 decision, he determined that community residents could proceed with a challenge to HUD's award of funds to a commercial complex. Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983). Similarly, in Project Basic v. O'Rourke, 907 F.2d 1242 (1st Cir. 1990), Judge Breyer allowed a challenge that sought to require the construction of replacement public housing units within a reasonable period of time.
- **Access for Those of Limited Means.** Judge Breyer has repeatedly given a broad interpretation to statutory attorneys fee provisions that enable those of limited means to obtain quality legal representation. In Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986), he reversed a trial court decision that had improperly limited attorneys fees for a prevailing civil rights plaintiff. In Guglietti v. Secretary of HHS, 900 F.2d 397 (1st Cir. 1990) (dissenting opinion), he emphasized the right of social security disability claimants to attorneys fees when they prevail.
- **Protection Against Arbitrary Government Action.** Judge Breyer has consistently protected the rights of Medicare and Medicaid recipients against formalistic regulations and excessive bureaucracy. In Mayburg v. Secretary of Health and Human Services, 749 F.2d 100 (1st Cir. 1984), he determined that residents of nursing homes do not need to leave the nursing homes to continue to receive benefits. In Ciampa v. Secretary of Health and Human Services, 687 F.2d 518 (1st Cir. 1982), he held that Social Security recipients do not lose Medicaid

benefits because of cost-of-living increases in other benefits.

II. Freedom of Speech and Religion, and Privacy Rights

Judge Breyer is a strong defender of First Amendment freedoms of speech and religion, and of the right to privacy.

- **Free Speech.** Judge Breyer resoundingly affirmed the rights of freedom of speech and freedom of conscience in Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984). In that case, Judge Breyer struck down a loyalty investigation requirement on the ground that the requirement impermissibly targetted "certain kinds of political advocacy."
- **Religious Freedoms.** In Aman v. Handler, 653 F.2d 41 (1st Cir. 1981), Judge Breyer ruled that the First Amendment prohibited a state university from discriminating against a student religious group on the ground that the university disapproved of the group's practices.
- **Right to Travel.** In a 1983 case, Judge Breyer held that a Treasury Department regulation prohibiting travel to Cuba went beyond the Department's statutory authority, noting that the regulation interfered with the constitutionally protected right to travel. Wald v. Regan, 708 F.2d 794 (1st Cir. 1983). The Supreme Court later reversed the decision by a 5-4 vote.
- **Privacy Rights.** In Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990), Judge Breyer joined a First Circuit opinion holding that the Reagan Administration's "gag rule" -- which prohibited abortion counselling or referral at facilities receiving federal funds -- violated a woman's constitutional right to "freedom of reproductive choice." The court also determined that the "gag rule" violated the First Amendment. The Court of Appeals' decision was eventually overturned by the Supreme Court in Rust v. Sullivan, a 5-4 decision.

III. Civil Rights

Judge Breyer has shown a vigorous commitment to protecting the civil rights of all Americans and to enforcing civil rights laws with care and sensitivity.

- **Fair Housing.** In NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987), Judge Breyer found that the Department of Housing and Urban Development (HUD) has a statutory duty to further nondiscrimination in housing, and that courts have the authority to review HUD's compliance with this obligation.
- **Careful Attention to Facts and Law of Particular Cases.** Judge Breyer forcefully applies this nation's antidiscrimination laws, as in Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984),

where Judge Breyer rebuked an employer for paying women less than men "simply because they were women." At the same time, he has carefully reviewed the evidence in each case to determine whether discrimination has been proved, and has ruled against plaintiffs claiming discrimination where the facts did not support the claim. Lamphere v. Brown University, 875 F.2d 916 (1st Cir. 1989).

- **Remedying Discrimination.** In Stuart v. Roche, 951 F.2d 446 (1st Cir. 1991), Judge Breyer emphasized the compelling interest in curing past racial discrimination, and carefully reviewed and upheld a plan designed to achieve that goal. Similarly, in 1985, Judge Breyer upheld a narrowly tailored consent decree designed to increase the number of promotions awarded to black police officers. Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dept., 780 F.2d 5 (1st Cir. 1985).
- **Policy Against Confirming Judicial Nominees Belonging to Discriminatory Clubs.** As Chief Counsel to the Senate Judiciary Committee, Judge Breyer helped forge a policy which, for the first time, disapproved judicial nominees' membership in clubs with discriminatory membership practices. He worked hard to establish a consensus that was affirmed jointly by Chairman Edward Kennedy and Ranking Republican Strom Thurmond. See Selection and Confirmation of Federal Judges, Hearings before the Comm. on the Judiciary, U.S. Senate, 96th Cong., 1st Sess. 267 et. seq. (Pt. II).

IV. Criminal Law

In his work on the Sentencing Commission, Judge Breyer sought to fulfill Congress' goal of fair, honest and evenhanded criminal punishment for all law-breakers, including white collar criminals. On the bench, he has enforced the criminal law fairly and vigorously, with appropriate respect for law enforcement interests and individual rights.

- **Limits on Bail for Serious Offenders.** Judge Breyer upheld the constitutionality of a federal statute creating a presumption that persons charged with serious drug offenses should be denied bail because they pose a serious risk of flight. United States v. Jessup, 757 F.2d 378 (1st Cir. 1985).
- **Respect for Law Enforcement.** Judge Breyer's record reflects deep respect for the legitimate needs of law enforcement. He has emphasized that the Fourth Amendment question of "probable cause" . . . should be answered in terms of common sense, not technicalities," and not with a proliferation of procedural "subrules, some of which may unnecessarily threaten law enforcement interests . . . and all of which threaten unnecessary rigidity and complexity." United States v. Guarino, 729 F.2d 864 (1st Cir. 1980) (dissenting opinion). In United States v. Berryman, 717 F.2d 650 (1st Cir. 1983),

Judge Breyer dissented when a panel overturned a drug conviction even though the defendant had voluntarily submitted to questioning by DEA agents who suspected him of carrying drugs. The full Court of Appeals agreed with Judge Breyer. [cite]

- **Respect for Individual Rights.** While recognizing the need to respect law enforcement interests, Judge Breyer carefully reviews the accused's claim in each case and, if warranted, orders appropriate relief for a meritorious claim. In United States v. Daniels, 821 F.2d 76 (1st Cir. 1987), he found that the government's failure to disclose important information to the court required setting aside a conviction.
- **Sentencing.** Judge Breyer has been a leader on the bench in interpreting and applying the Sentencing Guidelines to achieve fair and evenhanded sentencing. He has frequently upheld sentences imposed under the Guidelines and emphasized that "the primary objective" of the guideline system is "uniformity of sentencing treatment." United States v. Beasley, 12 F.3d 280 (1st Cir. 1993). At the same time, recognizing the important role of federal trial judges at sentencing, Judge Breyer has explained that the Guidelines authorize federal trial judges to adjust a sentence when appropriate and when warranted by the facts and the law. United States v. Rivera, 994 F.2d 942 (1st Cir. 1993); United States v. Doe, 18 F.3d 41 (1994).

V. Antitrust Law and Economic Regulation

Judge Breyer is widely recognized as one of the nation's leading authorities on antitrust and economic regulation. His decisions emphasize the consumer's interest in lower prices.

- **Protecting Consumers from High Health Care Costs.** Judge Breyer has repeatedly held that federal law should not thwart reasonable efforts to control health care costs. In a decision hailed as "a victory for all older Americans," Senior Citizen News (May 1987), Judge Breyer rejected a constitutional challenge to a Massachusetts law forbidding "balance billing" -- the practice of charging patients more than the Medicare-approved charge for medical service. Massachusetts Medical Society v. Dukakis, 815 F.2d 790 (1st Cir. 1987). Similarly, in Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984), Judge Breyer held that the federal antitrust laws were no bar to efforts by insurance companies to limit what doctors could charge their patients. And in Federal Trade Commission v. Monahan, 832 F.2d 688 (1st Cir. 1987), Judge Breyer upheld broad enforcement authority for the Federal Trade Commission to investigate potential cartel pricing of prescription drugs.
- **Price Discrimination.** In Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994),

an important case under the Robinson-Patman Act and the Sherman Act, Judge Breyer reversed a district court decision and allowed the plaintiff car dealer to challenge price discrimination and resale price-fixing in the sale of automobiles.

- **Leading Opinion on Predatory Pricing.** Judge Breyer's opinion in Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983), is widely regarded as a leading opinion explaining predatory pricing under the antitrust laws. Recognizing that the ultimate goal of the antitrust laws is lower prices for consumers, Judge Breyer ruled that the antitrust laws should not be applied in ways that unduly discourage companies from lowering their prices, and should bar only clearly predatory efforts to drive out a competitor by pricing below cost.

VI. Environmental Law

Judge Breyer has shown a consistent commitment to vigorous enforcement of federal laws protecting the environment, and has worked to ensure that federal officials obey their legal responsibilities to consider environmental impact when administering federal programs.

- **Compliance with Environmental Statutes.** Judge Breyer has demanded compliance with environmental statutes from all levels of government. In a 1983 decision, he upheld an order barring a federal agency's plan to allow oil drilling in a fishing area off the Atlantic coast. Commonwealth v. Watt, 716 F.2d 946 (1st Cir. 1983). In two related cases brought by the Sierra Club, he required careful analysis of possible effects on the environment before the State of Maine could build a new cargo port and causeway. Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989); Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985). At the same time, where the facts and law do not warrant judicial intervention, Judge Breyer has rejected environmental claims. Valley Citizens v. Aldridge, 886 F.2d 458 (1st Cir. 1988).
- **Power of Courts to Correct Serious Violations of Environmental Laws.** In a 1991 case involving outflow to Boston Harbor, Judge Breyer reaffirmed the powers of courts to craft broad remedies for violations of the Clean Water Act. He upheld a district court order that halted the hook-up of new sewer lines that would have emptied into the Boston Harbor discharge system. United States v. Metropolitan District Comm'n, 930 F.2d 132 (1st Cir. 1991).

VII. Labor Law

Judge Breyer's record demonstrates careful interpretation of federal law to ensure that legal protections for workers' rights are fairly enforced.

- In Associated Builders v. Massachusetts Water Resources Authority, 935 F.2d 345 (1st Cir. 1991), Judge Breyer dissented from a decision of the First Circuit which had concluded that federal law prohibited Massachusetts from requiring that contractors working on large state construction projects belong to unions. Judge Breyer argued that such a requirement was permissible. The Supreme Court eventually agreed with Judge Breyer, reversing the First Circuit in a 9-0 opinion.
- In Bath Iron Works v. Director, OWCP, 942 F.2d 811 (1st Cir. 1991), Judge Breyer interpreted the Longshore and Harbor Workers' Compensation Act to permit deaf workers to receive the requested level of disability benefits. The Supreme Court unanimously affirmed Judge Breyer's interpretation.

VIII. Personal Injury

- **Ensuring Full Compensation for Victims.** Judge Breyer has issued a landmark decision that protects the rights of families to obtain compensatory damages from pharmaceutical companies when family members are injured as a result of vaccinations. Schaefer v. American Cyanamid Co., No. 93-1422 (March 24, 1994). Judge Breyer rejected the argument that permitting all victims to be compensated would raise drug prices, and his opinion ensures that families will be able to obtain full compensation for their injuries.

COMMENTS ON THE SUPREME COURT NOMINATION OF STEPHEN G. BREYER

"I am happy to say that Judge Stephen Breyer is one of the brightest lawyers that I have ever encountered. . . [A]s the Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, . . . I had a good deal to do with Steve Breyer, who then was the chief counsel of the Senate Judiciary Committee. He always impressed me in the way he approached law making and the inevitable compromises that occur in Conference Committees. I am certain Judge Breyer will continue to utilize his fine skills in his new position as an Associate Justice of the Supreme Court."

--Father Robert J. Drinan, Professor,
Georgetown Law School

"I am an unabashed admirer of Judge Breyer's. Even when I disagree with him, I admire the highly professional and articulate way in which he reaches his conclusions."

--Kenneth W. Starr,
former Solicitor General
(Bush Administration);
former Judge, U.S. Court of Appeals
for the D.C. Circuit

"In matters of economic regulation, Judge Breyer is the model of what sensible liberal thought should be. . . . He understands that government regulation is often necessary to ensure not just efficiency but fairness, and then goes still another step and asks whether the type of regulation chosen is the right fit for the problem that it set out to address. In this process, he touches all the bases, respects all values."

--Robert Pitofsky,
Former dean, Georgetown Law School;
former Commissioner,
Federal Trade Commission

"He's a name that if you're going to list the top 10 to 15 lawyers in the country, he would be on anyone's list."

--Susan Bloch, Professor,
Georgetown University
Law Center

"Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod

National Seashore. . . . My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time."

-- Douglas I. Foy,
Conservation Law Foundation

"Judge Stephen Breyer brings to the court a superb intellect. But more important, he brings practical wisdom. . . . He is a master of economic theory who also knows that there is more to life than the bottom line. He sees judges not as high priests but as public servants. He writes his opinions clearly, without jargon or footnotes, so that they can be widely understood. He has demonstrated skill at bringing about consensus both on the Hill and on his court. He has a fair and judicious temperament."

--Kathleen Sullivan, Professor,
Stanford Law School

"The designation of Chief Judge Stephen G. Breyer as Associate Justice of the Supreme Court has been received with great enthusiasm by the legal community in Puerto Rico [which is in the jurisdiction of Judge Breyer's court]. . . . Breyer's absorbing personality, his kindness, his diverse interests, his broad humanistic culture, have won him the personal affection and respect of those who have had the privilege of interacting with him in Puerto Rico. The legal community of the Island looks forward to the valuable contributions that Stephen G. Breyer will undoubtedly make to American jurisprudence as a Justice of the Supreme Court of the United States."

-- Antonio Garcia-Padilla
Dean and Professor of Law,
University of Puerto Rico School of Law;
Clerk to Judge Breyer, 1981-82

"In selecting Stephen G. Breyer for the Supreme Court, President Clinton has chosen a jurist and legal scholar of integrity, intellect and compassion whose skills at compromise and modest personality will likely make him a forceful and influential justice well into the next century."

-- San Francisco Chronicle

Judge Breyer is "respected for integrity, good judgment and concern for justice. . . . [He] is popular among his colleagues and a recognized intellectual leader."

-- New York Times

"Although his record suggests a man committed to a life of the mind, Judge Breyer's writings show a pragmatism (and clarity of expression) rarely found in legal writings. . . . [H]is best gift may be to make the court more understandable to the American people. What a gift that might be."

-- Miami Herald

"[A]s a judge and lawyer, his abilities are unquestioned. In combination with Ginsburg, he represents a formidable addition to the stature of the court."

-- Sacramento Bee

"Breyer seems likely to bring to the high court important strengths. He has a probing and rigorous intellect, with the precious ability to cut to the heart of complex subject matter. He has broad legal experience, including service in all three branches of the federal government. He has a supremely collegial manner, shown in his treatment of colleagues and litigants alike, that is conducive to winning respect and building coalitions."

-- The Plain Dealer

"The judge is known as a consensus builder and an intellectual who can clarify complicated legal subjects In court and at the many seminars, speeches and panel discussions in which he has participated, he demonstrates the courtesy, temperament, and fairness that are the hallmarks of a good judge."

-- Washington Post

Footling Litigant's Bill Is Allowed but Staying Anonymous Often Isn't

CAN LITIGANTS be forced to reveal who is financing a court fight?

The question recently came up when Paula Jones filed a sexual-harassment suit against President Clinton. Some of his supporters contend that Ms. Jones has a secret financial backer, although her lawyers deny it.

But the issue also has surfaced in a variety of quirky civil and criminal cases. As with so many legal questions, the answer is, "it depends."

These days, it is permissible to foot the bill for someone else's lawsuit or, in a criminal case, for the defense. That hasn't always been so. Old legal principles against "barratry, champerty and maintenance" — fancy words for the evil of stirring up litigation without good reason — once prohibited such tactics in civil suits.

But the Supreme Court in 1963 allowed the National Association for the Advancement of Colored People to pay for other people's civil-rights lawsuits, and even to recruit potential plaintiffs. The court said such a tactic was protected by the First Amendment guarantee of freedom of association.

That principle is now well established, but it is less clear whether a sponsor can remain anonymous.

JUDGES DON'T ALLOW lawyers to use the popular catch-all excuse of the "attorney-client privilege" to cover up the source of fee payments. Fee information has nothing to do with confidential discussions between lawyers and clients, one court noted in a case involving an anonymous person who financed the legal defense of some prostitutes in New York. Other courts almost always have ruled the same way.

In criminal cases, meanwhile, courts routinely force conspiracy and mob defendants to reveal how their lawyers are paid. "It helps to prove a conspiracy — 'Why is this guy paying your fees, is he your godfather?'" explains Vivian Berger, general counsel for the American Civil Liberties Union. "The bottom line is that courts are unsympathetic, and they usually make you reveal the relationship."

Nevertheless, some attorneys in civil suits argue that fee arrangements aren't relevant to a particular case. "The issue at trial is not why you brought the suit," said D. Bradley Kizzia, an attorney with Dallas law firm Strasburger & Price, who filed libel suits against two prominent critics of conspiracy theories involving the assassination of President Kennedy.

One of the critics suspects that filmmaker Oliver Stone financed the suits, and hopes to find out for sure as the case progresses. That allegation is denied by Mr. Kizzia and Mr. Stone's lawyer. Mr. Kizzia argues that if the libel occurred, and the case is warranted, it doesn't matter who pays the legal bill. One of the libel suits, filed by people who would like to reopen the investigation into President Kennedy's death, is in a pretrial fact-finding stage. The other was dismissed for reasons unrelated to the financing but is on appeal.

Professors who teach rules of evidence said a sponsor's identity can very easily be ferreted out because "relevance" is a word interpreted loosely by the courts.

"Given the minimal standard of relevance," it's hard to argue that it would be irrelevant," said Robert M. Pitler of Brooklyn Law School. "You just want to show that it in any way will help you in preparing for the trial."

Academics say that who the sponsor is shouldn't affect the judge's decision about whether its identity should be disclosed. For instance, in the case brought by Ms. Jones — whose allegations have been denied by the president — the rumors suggest everything from a religious organization to a political enemy of the president. "Makes no difference," said Daniel J. Capra, who teaches law at Fordham University. "They have no right to be free from



John Segal

disclosure simply because they're a religious group," he added.

A lawyer who suspects a hidden force behind a lawsuit could first raise questions about financing during pretrial fact-finding. The other side might simply show its hand at that point. Or that side could argue that such information isn't relevant, in which case a judge then would make a ruling.

In a 1992 Virginia case, a benefits fund for the United Mine Workers of America was slapped with a class-action lawsuit ostensibly brought by a mine-worker's widow. An attorney for the United Mine Workers, noticing that the widow was represented by a law firm that defends coal operators, put one of her lawyers on the witness stand during a hearing and asked who was paying the law firm's bills.

OPPOSING LAWYERS objected to the question, but the judge said it would help determine whether the widow was a good representative of the class. The lawsuit was indeed financed by a group of coal operators, but the judge allowed the widow to continue representing the class for the time being, attorneys who worked on the case said. Shortly afterward, the litigation was dropped because Congress passed legislation that made the lawsuit moot.

Depending on who the hidden sponsor turns out to be, a judge might or might not allow the information to become evidence at trial. For instance, if the financier is revealed to be a litigant's mother, a judge might conclude that that's not important for a jury to know.

Lawyers who represent sponsored plaintiffs do risk conflict-of-interest problems, law professors say. Conflicts can emerge if the person holding the purse strings wants the lawyer to do something that is bad for the client or if a plaintiff wants to settle a lawsuit but the benefactor wants to keep going.

That is why ethics codes require attorneys to warn the financial backer that their only duty is to the client. Lawyers also are supposed to make sure a client approves of the benefactor and understands the potential complications. In addition, lawyer-client confidences are none of the financier's business.

A Robin Hood Spin Is Put on Clinton's High-Court Choice

By PAUL M. BARRETT

Staff Reporter of THE WALL STREET JOURNAL
WASHINGTON — He has a family net worth in the millions, collects expensive old editions of Dickens and Milton and has been known to slip into a slight British accent now and then. But since his nomination to the Supreme Court, Judge Stephen Breyer has become a man of the people.

President Clinton, for instance, took the federal appeals judge jogging and then introduced him in the Rose Garden as someone who would make a difference in the lives of "the average man and woman."

"Judge Breyer is no intellectual egg-head," said Kenneth Feinberg, a Washington lawyer who is the nominee's most aggressive outside promoter.

"He's a real friend of the consumer," added Judge Breyer's chief Senate backer, Edward Kennedy (D., Mass.), as the pair made a round of courtesy calls on Capitol Hill.

Even the nominee himself got into the spirit, telling reporters after his selection was announced last Friday that his role on the high court would be to "make the average person's ordinary life better."

Raised Eyebrows and 'Hahvahd'

By midweek, the sales campaign was provoking snickers among Senate staffers and raised eyebrows among lawyers who know Judge Breyer. The erudite former Harvard Law School professor is widely respected and is seen as centrist to liberal on most individual-rights issues. He looks like a shoo-in for confirmation.

But in reality, "he's not much of a populist," observed Ronald Wright, a law professor at Wake Forest University and a Breyer fan.

Two things worry the White House: First, Judge Breyer's main areas of expertise are antitrust and administrative law, and his views on those subjects lean to the right. Second, though he can be charming and has a talent for persuasive argument, "some people do get put off by Steve," acknowledged a veteran federal judge who also counts himself a Breyer friend.

"It's the 'Hahvahd' business," this judge explained. Judge Breyer was a serious candidate a few years ago to be president of the elite university.

Indeed, a lack of personal chemistry with President Clinton had been cited by White House aides to explain why Judge Breyer was passed over last year for the Supreme Court spot that went to Justice Ruth Bader Ginsburg. This year, chemistry concerns were set aside, and Judge Breyer got the nod when problems surfaced with the other finalists to replace retiring Justice Harry Blackmun.

Heart as Credential

But President Clinton still insists that having a "big heart" is a key credential for the Supreme Court, so rather than just emphasize Judge Breyer's intellectual strengths, the president and his minions are straining to create a man-of-the-people image.

The Clintonites have another concern: As a candidate, Mr. Clinton attacked George Bush for appointing judges who "favor the interests of big business over the rights of individuals." Now some liberals, led by consumer advocate Ralph Nader and Sen. Howard Metzenbaum (D., Ohio), are griping that Judge Breyer fits that description.

Trying to blunt these attacks, Breyer handlers steered reporters to legal authorities who were thought ready to defend the nominee's economic regulatory views. Robert Pitofsky, a prominent middle-of-the-road antitrust expert, was happy to extoll the sound reasoning in Judge Breyer's opinions. He said the nominee, who is a friend, will make a "terrific" justice. But when pressed, Mr. Pitofsky conceded that Judge Breyer can't plausibly be portrayed as "Robin Hood riding to the rescue of consumers and small business."

Judge Breyer Courtesy Calls

Senate Judiciary Committee

Democrats:

Senator Biden, Chair	(May 17)
Senator Kennedy	(May 17)
Senator Metzenbaum	(scheduled for May 25)
Senator DeConcini	(May 18)
Senator Leahy	(scheduled for May 24)
Senator Heflin	(scheduled for May 19)
Senator Simon	(scheduled for May 24)
Senator Kohl	(scheduled for May 19)
Senator Feinstein	(May 18)
Senator Moseley-Braun	(scheduled for May 19)

Republicans:

Senator Hatch, Ranking	(May 17)
Senator Thurmond	(May 18)
Senator Simpson	(scheduled for May 24)
Senator Grassley	(scheduled for May 24)
Senator Specter	(scheduled for May 24)
Senator Brown	(scheduled for May 19)
Senator Cohen	(May 18)
Senator Pressler	(May 18)

Leadership:

Senator Mitchell	(May 17)
Senator Dole	(May 17)
Speaker Foley	(May 18)

Others:

Senator Kerry	(May 18)
Senator Moynihan	(scheduled for May 25)
Rep. Brooks	pending
Rep. Moakley	pending in Boston

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"Breaking the Vicious Circle is a tour de force that should be read by everyone who is interested in improving our regulatory process. Written by a highly respected federal judge, who obviously recognizes the necessity of regulation but perceives its failures and weaknesses as well, it pinpoints the most serious problems and offers a creative solution that would for the first time bring rationality to bear on the vital issue of priorities in our era of limited resources."

-- Alan Morrison, Director, Public Citizen Litigation Group

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Morrison on
Breyer's latest
book.
—Cliff



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Preliminary Analysis of Record of Judge Stephen G. Breyer

This memorandum comprises a preliminary review of the record of Judge Stephen G. Breyer of the United States Court of Appeals for the First Circuit, who has been mentioned as a possible nominee to the Supreme Court. It is based on a preliminary Lexis review of some of his significant opinions, particularly in the civil rights and civil liberties areas, as well as newspaper and other secondary sources and conversations with lawyers who practice in the First Circuit. It does not include cases in which Judge Breyer joined in another judge's opinion but did not write an opinion himself (e.g. Judge Breyer joined in an opinion striking down the abortion gag rule upheld in Rust v. Sullivan.) It is updated as of May 30, 1993.

In general, Judge Breyer is regarded as a very intelligent, hard-working, experienced, highly competent jurist who is a moderate centrist in terms of judicial philosophy. In addition to discussing his overall background, his record is examined below in six areas: freedom of expression, freedom of religion (including church-state separation), abortion and freedom of choice, discrimination and civil rights, access to courts, and other civil and constitutional liberties issues.

General Background

Judge Breyer is the chief judge of the United States Court of Appeals for the First Circuit, where he has served since his appointment by President Carter since 1980. After receiving his law degree from Harvard in 1964, he clerked for Justice Arthur Goldberg in 1964-65. He was an assistant professor and then full professor of law at Harvard during 1965-80, teaching antitrust, administrative law, and economic regulation. During that period, he also held a number of government posts, including special assistant to assistant U.S. attorney general (1965-67), assistant special counsel in the Watergate investigation (1973), special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee (1974-75), and chief counsel to the Senate Judiciary Committee (1979-80), as well as serving as a professor at Harvard's Kennedy School of Government from 1977-80. Since becoming a federal judge, he has continued to lecture at Harvard Law School, has been Judicial Conference representative to the Administrative Conference of the U.S., and served as a commissioner of the United States Sentencing Commission from 1985-89.



Judge Breyer has been the author or co-author of three books and approximately a dozen articles, focusing primarily on administrative law and regulation, antitrust, economics, energy regulation, and sentencing. He served as staff director for investigation of the Civil Aeronautics Board while working for the Senate Judiciary Committee's Administrative Practices Subcommittee, and is widely credited for playing an important role in airline deregulation, including helping build a "political coalition" to support such efforts (Wall St. J. 11/22/83 at 35).

Judge Breyer's role in helping formulate and defend the federal Sentencing Guidelines has subjected him to significant criticism. According to the New York Times, "many believe he gave liberal legitimacy to what became an unmanageable but Draconian set of standards, then dismissed critics condescendingly" (NYT 5/30/93 at 24). In defending the guidelines, Judge Breyer has suggested that problems stem mostly from Congressional mandatory minimum sentences that sometimes supersede the guidelines.

Opinions differ on Judge Breyer's judicial philosophy. Most consider him a moderate centrist, liberal on first amendment and other civil liberties issues. Some have characterized him as pro-government in criminal cases and have suggested that his lack of trial court and "real world" experience limits his perspective. He has received praise both from liberals like Sen. Edward Kennedy and former ACLU president Norman Dorsen and from conservatives like Sen. Orrin Hatch and former Judge Robert Bork.

Judge Breyer is 55 years old, is married with three children, and lives in Cambridge, Mass. He served as a corporal in the Army in 1957, became a fellow of the American Academy of Arts and Sciences in 1981, and was honored with the ABA Annual Award for Scholarship in Administrative Law in 1987. The Almanac of the Federal Judiciary lists his pro bono activities as serving as a trustee of the University of Massachusetts (1974-80), Dana Farber Cancer Institute Jimmy Fund (1977-present), and Boston Philharmonic Orchestra (1978-81).

Free expression and related first amendment decisions

Our preliminary review indicates that Judge Breyer has a favorable record in free expression and related cases, except for some cases concerning rights of government employees. He has written unanimous opinions for First Circuit panels affirming lower court opinions which struck down as unconstitutional a "loyalty oath" requirement for WHO and a state law regulating charitable solicitation. The loyalty oath opinion, Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984), emphatically rejected the government's standing arguments and demonstrated a clear appreciation for and application of First Amendment doctrines concerning vagueness and overbreadth and concerning "governmental

efforts to condition employment upon the exercise of political speech." Id. at 231. The charitable solicitation opinion, Shannon v. Telco Communications, Inc., 824 F.2d 150 (1st Cir. 1987), was a straight-forward application of a Supreme Court decision to invalidate a Massachusetts law.

A case in which Judge Breyer appeared to show less sensitivity to public employee First Amendment concerns was Agosto-De-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989). This was one of a number of cases alleging politically-motivated dismissals or other job actions in Puerto Rico. The majority ruled that some politically motivated personnel actions short of dismissal may violate public employees' First Amendment rights, but with a number of restrictions and limitations protested by dissenting judge Torruella. Judge Breyer partially concurred in and partially dissented from the majority opinion, suggesting that even the majority's standard may not give sufficient deference to the government's interests. Both the majority opinion and Judge Breyer's opinion appear to conflict with the subsequent Supreme Court decision in Rutan v. Republican Party, 110 S.Ct. 2729 (1990), where the Court held that First Amendment protections against politically motivated discharges were fully applicable to politically motivated transfer and other job decisions short of discharge.

Other opinions by Judge Breyer in this area include: Caro v. Aponte-Roque, 878 F.2d 1 (1st Cir. 1989) (affirming refusal to grant summary judgment against employees on politically-motivated discharge claim but reversing lower court as to failure to renew "transitory" employment); Rushia v. Town of Ashburnham, 701 F.2d 7 (1st Cir. 1983) (affirming refusal to grant preliminary injunction against local ordinance concerning display or sale of indecent material to minors); Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988) (concurring in opinion that denial of visa to wife of former Chilean president violated First Amendment but suggesting that case was moot).

Freedom of religion and church-state separation decisions

Judge Breyer has written opinions in several religion cases, which exhibit consideration of both religious freedom concerns and countervailing interests. In New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989), Judge Breyer wrote an opinion for a unanimous panel reversing a lower court decision and ruling that a fundamentalist Baptist school could be subjected to state law approval requirements for private schools. Relying on numerous other decisions and on the government's stated concern for evaluating the quality of private schools, Judge Breyer rejected the claim that standardized testing of students was a sufficient alternative to state evaluation, and also rejected the claim that such evaluation would foster excessive government entanglement with religion.

On the other hand, several other opinions by Judge Breyer have found in favor of religion vis-a-vis government interests. In Alexander v. Trustees of Boston University, 766 F.2d 630 (1st Cir. 1985), Judge Breyer dissented from a panel opinion and suggested that students who objected on religious grounds to filing statements of compliance with the Selective Service Act should nevertheless receive student aid because they had substantially complied with the rule. In Universidad Central De Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1985), Judge Breyer wrote an opinion for half of an equally divided court indicating that the NLRB could not exercise jurisdiction over a church-operated college, based on a similar Supreme Court decision concerning church-operated secondary schools. And in Members of Jamestown School Committee v. Schmidt, 699 F.2d 1 (1st Cir. 1983), Judge Breyer concurred in an opinion generally upholding a state statute providing for bus transportation for private school students. His opinion argued more strongly in favor of the law than the majority, maintaining that it was constitutional so long as it was part of a general program applying to all students that did not provide a disproportionate benefit to religious school students and without specifically applying the Lemon test; this raises questions about Judge Breyer's views in this area which our preliminary review does not answer.

Abortion and freedom of choice decisions

Our preliminary review revealed one opinion written by Judge Breyer in this area: Planned Parenthood League v. Bellotti, 868 F.2d 1 (1st Cir. 1989), in which Judge Breyer dissented from an opinion holding that the lower court should consider whether a state two-parent-consent-with-judicial-bypass requirement for abortion in fact has the effect of unconstitutionally burdening the right of a minor to choose to have an abortion. Judge Breyer believed that in light of a previous Supreme Court opinion upholding a similar statute on its face, the law was constitutional even if plaintiffs could show the problems with the statute in operation which they alleged. Judge Breyer did not exhibit specific negative views towards abortion or choice, but was not as receptive as the majority to the possibility that the law in fact burdened that right under applicable Supreme Court precedent.

Judge Breyer's rationale appears to resemble the reasoning employed by Justice O'Connor, who provided an important vote to uphold a two-parent-notice-with-judicial-bypass provision in Hodgson v. Minnesota, 110 S.Ct. 2926, 2950-51 (1990), and who distinguished spousal from parental notice in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992). Judge Breyer's opinion provides little information on whether he would agree with the "undue burden" standard in Casey or how he would apply it, particularly where the issue becomes how a restrictive abortion-related statute functions in operation.

Discrimination and civil rights decisions

Our preliminary review found six opinions by Judge Breyer in this area, all but one written for unanimous three-judge panels, with mixed results. Two decisions by Judge Breyer upheld affirmative action plans. See Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (affirming decision rejecting white police officers' challenge to affirmative action plan in consent decree); Massachusetts Ass'n. of Afro-American Police v. Boston Police Dept., 780 F.2d 5 (1st Cir. 1985) (affirming decision refusing to allow intervention in discrimination suit in order to challenge consent decree containing affirmative action provisions). In NAACP v. Secretary of HUD, 817 F.2d 149 (1st Cir. 1987), Judge Breyer vacated a lower court decision and ruled that HUD could be sued for alleged failure to administer programs in a manner to affirmatively further fair housing policies.

In several other decisions, Judge Breyer has ruled against civil rights plaintiffs and claims. See Latino Political Action Committee v. City of Boston, 784 F.2d 409 (1st Cir. 1986) (affirming decision finding that city council and school board districting plan did not violate Voting Rights Act); Lamphere v. Brown University, 875 F.2d 916 (1st Cir. 1989) (upholding decision rejecting sex discrimination claim); United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990) (holding in split decision that federal criminal civil rights law does not apply to robbery and murder by Customs agents against courier temporarily in the U.S.).

Access to courts and related decisions

Judge Breyer has authored a number of decisions in this area. Statutes providing for attorneys' fees for prevailing parties in civil rights and other cases are important in helping provide access to the courts, and Judge Breyer's opinions on that subject have generally been very favorable. See Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986) (reversing lower court decision which had improperly limited civil rights attorneys fees based on the ratio of the recovery on the civil rights claims to the total recovery); Aubin v. Fudala, 821 F.2d 45 (1st Cir. 1987) (affirming revised and enhanced attorneys fees award based on plaintiff's success on state law claims connected to civil rights claims); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) (vacating lower court decision refusing to recognize plaintiffs as prevailing parties); Guglietti v. Secretary of HHS, 900 F.2d 397 (1st Cir. 1990) (dissenting from ruling that plaintiff in social security case was not a prevailing party for purposes of attorneys fees statute); Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (dissenting from holding that plaintiff could recover no fees whatsoever because of unreasonably high fee demand); Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) (concurring in opinion that expert witness in-court fees could not be recovered under

restrictive Supreme Court decision but suggesting that out-of-court expert fees could be so recovered).

With respect to standing issues, Judge Breyer has generally held that individuals do have standing to challenge action by large administrative agencies which arguably injures them. In addition to cases like NAACP v. HUD and Ozonoff v. Berzak, discussed above, see Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983) (reversing lower court and ruling that minority city residents had standing to challenge HUD grant of funds to help develop commercial complex because it would allegedly cause increased segregation); Project BASIC v. O'Rourke, 907 F.2d 1242 (1st Cir. 1990) (holding that proper basis could exist for order requiring construction of replacement housing units on specified time schedule). Judge Breyer has been less willing to permit access to the courts in other types of cases, particularly where plaintiffs are not seeking APA-type review of action by large administrative agencies. In addition to Allende, supra, and Rushia, supra, see Enrique Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (1st Cir. 1982) (holding that federal constitution precluded application of federal wage laws to Commonwealth highway authority).

Other civil and constitutional liberties decisions

Judge Breyer's record in other cases dealing with constitutional and civil liberties is mixed. In Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983), Judge Breyer upheld a prison's policy of strip searching inmates, despite a vigorous dissent with respect to the routine application of the policy before and after intraprisson transfers, including to the prison hospital and library. More favorable opinions were written by Judge Breyer in Morales-Feliciano v. Parole Board, 887 F.2d 1 (1st Cir. 1989) (upholding contempt order by lower court in case concerning unconstitutional prison conditions); and Hager v. Secretary of Air Force, 938 F.2d 1449 (1st Cir. 1991) (concurring in decision reversing lower court which failed to grant discharge to Air Force captain who demonstrated he was a conscientious objector). See also Aronson v. IRS, 973 F.2d 962 (1st Cir. 1992) (reversing lower court and holding that taxpayer address information was not available pursuant to FOIA); Massachusetts Medical Society v. Dukakis, 815 F.2d 790 (1st Cir. 1987) (upholding state law prohibiting doctors from charging elderly patients higher fees than those approved by Medicare despite claimed "liberty" interest by physicians).

Two decisions by Judge Breyer in this general area have been reversed by the Supreme Court. In Wald v. Regan, 708 F.2d 794 (1st Cir. 1983), Judge Breyer ruled that an administrative regulation banning certain travel to Cuba lacked statutory authority; the Supreme Court ruled to the contrary at 468 U.S. 222 (1984). In Keeton v. Hustler Magazine, 682 F.2d 33 (1st Cir. 1982), Judge Breyer held that the due process clause did not

permit Hustler to be sued for libel in New Hampshire. The Supreme Court reversed based on the fact that Hustler continually sold magazines in the state at 465 U.S. 770 (1984).

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