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July 11, 1994

BY HAND and BY TELECOPIER

Hon. Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

Re: Honorable Stephen G. Breyer

Dear Mr. Chairman:

This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Chief Judge Breyer is based on an investigation of his professional qualifications, that is, his integrity, judicial temperament and professional competence. Consistent with long standing policy, the Committee did not undertake any examination or consideration of Chief Judge Breyer's political ideology or his views on any issues that might come before the Supreme Court.

To merit the Committee's evaluation of Qualified or Well Qualified the Supreme Court nominee must be at the top of the legal profession, have outstanding legal ability and wide experience and meet the highest standards of integrity, professional competence and judicial temperament. The evaluation of Well Qualified is reserved for those found to merit the Committee's strongest affirmative endorsement.

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I am pleased to report that the Committee finds Chief Judge Breyer to be Well Qualified for appointment as an Associate Justice of the Supreme Court of the United States. This determination was unanimous.

In conducting the investigation members of the Committee personally interviewed more than 300 federal judges, including present and retired members of the Supreme Court of the United States, members of the Federal Courts of Appeals, members of the Federal District Courts, Federal Magistrate Judges, Federal Bankruptcy Judges, and members of State Courts. The investigation included all colleagues of Chief Judge Breyer on the United States Court of Appeals for the First Circuit, all Federal District Court Judges from the District of Massachusetts, and all the justices on the Supreme Judicial Court of Massachusetts. Numerous federal and state court judges from the other states in the First Circuit were also interviewed.

Members of the Committee personally questioned several hundred other individuals, including practicing lawyers throughout the United States, former law clerks and lawyers who have appeared before Chief Judge Breyer. Committee members also interviewed law school deans, faculty members of law schools and constitutional scholars throughout the United States, including professors at Harvard Law School, where Chief Judge Breyer has served on the faculty since 1967.

The Committee also had available the report prepared in 1980 by the Committee in connection with the investigation of Chief Judge Breyer for appointment to the United States Court of Appeals for the First Circuit. He was at that time found by a majority of the Committee to be Qualified and by a substantial minority Well Qualified for appointment to that Court.

It has been the practice of the Committee to ask groups of distinguished legal scholars and Supreme Court practitioners to review independently all of the opinions written by nominees for the Supreme Court. This practice was followed again here and Chief Judge Breyer's opinions were reviewed by: (1) a Reading Group of distinguished lawyers chaired by Rex E. Lee, formerly Solicitor General of the United States and presently President of Brigham Young University, consisting of a diverse group of 10 lawyers, all of whom have practices and argued cases in the Supreme Court; and (2) a Reading Group chaired by Professor Nicholas S. Zeppos of Vanderbilt University School of Law, consisting of 26 members of that law school's faculty. Members of the two Reading Groups who participated are listed on Exhibit A to this letter.

The two Reading Groups reported to the Committee their independent analyses of Chief Judge Breyer's opinions and other writings. These reports were evaluated by the members of our Committee, who also read opinions of Chief Judge Breyer and his published writings on a variety of legal subjects.

Evaluation

Integrity

Chief Judge Breyer has earned and enjoys an excellent general reputation for his integrity and character. No one interviewed by the Committee had any question or doubt in this regard. His colleagues in the First Circuit, where he has served for fourteen years, the last four as Chief Judge, commented on his character and integrity in terms such as these: "He is absolutely first rate, a remarkable combination of one who has character and is intelligent, yet is a personable and likeable human being"; "He is eminently well qualified, of the highest character"; "He combines acute intelligence and a deep sense of humanity. He is a down to earth human being who is very smart. This is simply a superb appointment."

Temperament

Chief Judge Breyer's judicial temperament also meets the highest standards set by the Committee for appointment to the Supreme Court.

His colleagues on the First Circuit and on the Harvard Law School faculty who have worked with him for up to twenty-five years, Federal District Court judges, former law clerks, his secretary of almost fourteen years, and counsel who have argued cases before him, uniformly give Chief Judge Breyer the highest praise for his demeanor, temperament, and manner of treating people. The Court of Appeals Judges in the First Circuit universally credit Chief Judge Breyer for the strong collegiality that exists in the Circuit, for his remarkable ability to build consensus, for his sensitivity and good grace, and for his outstanding leadership skills.

Representative comments from his colleagues on the First Circuit Court of Appeals include these: "He does not browbeat, and he is a genius at forging consensus and compromise"; "He has a wonderful temperament"; "He is universally well liked and respected by all of us on the Court"; "He can soften rigid positions with gentle humor"; "He is a master at getting consensus on court

decisions"; "He has very good judgment, is stimulating to be around, and is not arrogant."

District Court Judges in the First Circuit also praised Chief Judge Breyer's judicial temperament: "He is a great leader"; "He is humane, not impressed with his own intelligence, which is extremely powerful"; "He has great sensitivity toward lower court judges ... he doesn't hold anyone up to ridicule, as other appellate judges do sometimes"; "As Chief Judge of the First Circuit he has been superb, a true leader"; "He is very well liked by all the members of the First Circuit community. The Court's strong collegiality is directly attributable to Steve Breyer's wonderful personal skills"; "He is a brilliant judge"; "He conducts himself beautifully on the bench -- bright and a perfect gentleman."

To the same effect are the comments of his colleagues on the Harvard Law School faculty, his former law clerks and the lawyers who have argued cases before him. Chief Judge Breyer clearly possesses and exhibits the highest level of judicial temperament.

Professional Competence

Chief Judge Breyer's educational background amply prepared him for service on the Supreme Court of the United States. He attended public schools in San Francisco, graduated from Stanford University in 1959 with highest honors in philosophy, attended Oxford University as a Marshall Scholar, receiving First Class Honors, and graduated from Harvard Law School in 1964, Magna Cum Laude. He served as Articles Editor of the Harvard Law Review. After law school he served as Law Clerk to Supreme Court Justice Arthur J. Goldberg.

Following his Clerkship on the Supreme Court, Chief Judge Breyer began a career with the Federal Government and then an academic career at Harvard Law School, where he has been a member of the faculty since 1967.

His service with the Federal Government included the positions of Special Assistant to the Assistant Attorney General (Antitrust); Assistant Special Prosecutor, Watergate Special Prosecution Force, U.S. Department of Justice; Special Counsel, Administrative Practices Sub-Committee, U.S. Senate Committee on the Judiciary; and Chief Counsel, U.S. Senate Judiciary Committee. He was appointed to the First Circuit Court of Appeals in 1980, and became Chief Judge in 1990. During the years 1985-89 he was a Member of the United States Sentencing Commission, and played a major role in the drafting of the Sentencing Guidelines. His twenty-seven year affiliation with Harvard Law School has included the positions of

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Assistant Professor, Professor, and, since becoming a Judge on the First Circuit Court of Appeals, Lecturer.

He has developed and maintained broad interests. Throughout his career he has participated actively in legal organizations and has lectured extensively about legal education. He is an active Member of the American Law Institute, and has also been a Member of a Carnegie Commission group studying the relation of science and the courts (Task Force on Science and Technology in Judicial and Regulatory Decision Making). He has participated actively in the work of the American Bar Association (ABA), in particular as a Member of the Council of the ABA Administrative Law Section and the select ABA Committee on Ethics in Government.

During his fourteen years as a Judge on the First Circuit Court of Appeals he has written approximately 600 opinions and numerous books, monographs, and articles which are most impressive, and which establish quite clearly that he is a scholar of the first rank. In addition to his extensive writings, he has delivered numerous Honorary Lectures during the past eleven years, including the prestigious Holmes Lectures at Harvard University which were published in book form by Harvard University Press in 1993 in a volume entitled Breaking the Vicious Circle: Toward Effective Risk Regulation.

The legal opinions that he has written during his fourteen years on the First Circuit Court of Appeals cover wide-ranging subjects. He has taken special interest in Administrative Law (which he has taught at Harvard Law School), in government regulatory matters, most notably airline deregulation, and the Sentencing Guidelines. Chief Judge Breyer was praised repeatedly during the Committee's investigation for his excellent writing skills. His colleagues on the First Circuit call him "brilliant" and "a genius" in crafting legal opinions. Federal District Court Judges, even those he has reversed in appellate opinions, praise highly Chief Judge Breyer's writing and analytical skills. Numerous Federal District Court Judges remarked that Chief Judge Breyer writes so clearly (without footnotes) that a District Court Judge knows precisely what is expected on him or her in an appellate opinion written by Chief Judge Breyer. Chief Judge Breyer's writings reflect a high level of scholarship required of a Justice of the Supreme Court of the United States.

The comprehensive reports submitted to the Committee by the two Reading Groups of scholars and Supreme Court practitioners confirm the Committee's own conclusions concerning the scholarship and writing ability of Chief Judge Breyer. The Chairman of one of

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the two reading groups summarized his colleagues' assessment of Chief Judge Breyer's opinions and other writings as follows:

Judge Breyer is a person of enormous intellectual ability with an outstanding ability to write clearly and persuasively. His opinions reflect a wide breadth of knowledge about the law and an overriding commitment to deeply principled and objective decision making. His work is evidence of a judge keenly aware of the power and corresponding responsibility that go with his office.

The Chairman of the other Reading Group summarized his colleagues' assessment of Chief Judge Breyer's writings as follows:

Judge Breyer's scholarly ability was praised by virtually every Committee member. He was found to "display the intellectual habits associated with the most respected thinking of our times: a preference for the complex over the simple and the particular over the general, a willingness to suspend judgment, and a robust tolerance of conceptual ambiguity." His opinions, furthermore, repeatedly demonstrate "a realistic assessment" of "evolving case law," and "are generally well-researched and complete without being pedantic." "Whenever there is a significant debate about ... applicable legal principles, Judge Breyer exhibits a determined effort to analyze and apply the governing doctrine ... his work product is not only scholarly, it is also "free from recrimination or insinuation, even when he seems plainly skeptical. Judge Breyer's opinions are "careful ..., tolerant and polite."

The same Reading Group Chairman perhaps best summarized the reasons why both Reading Groups have praised the excellence of Chief Judge Breyer writing and scholarship in the following words:

He is a lawyer's lawyer and a judge's judge. He is careful, scholarly, dispassionate, and objective. Furthermore, he recognizes that there are limits to his own abilities, as a jurist, to resolve every dispute engendered by the contentious press of modern life.

Our Committee is fully satisfied that Chief Judge Breyer meets the highest standard of professional competence required for a seat on the Supreme Court. His academic training, his broad experience in the Federal Government, his service on the faculty of a distinguished law school, his scholarly writings and his distinguished service for fourteen years (four as Chief Judge) on the Court of

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Appeals dealing with many of the same kinds of matters that will come before the Supreme Court, fully establish his professional competence.

CONCLUSION

Based on the information available to it, the Committee is of the unanimous opinion that Chief Judge Breyer is Well Qualified for appointment to the Supreme Court of the United States. This is the Committee's highest rating for a Supreme Court nominee.

The Committee will review its report at the conclusion of the public hearings and notify you if any circumstances have developed that would require a modification of these views.

On behalf of our Committee, I wish to thank you and the Members of the Judiciary Committee for the invitation to participate in the Confirmation Hearings on the nomination of the Honorable Stephen G. Breyer to the Supreme Court of the United States.

Respectfully submitted,

Robert P. Watkins

Robert P. Watkins
Chair