THE WHITE HOUSE

WASHINGTON

September 7, 1989

APPOINTMENT MEMORANDUM

NAME OF CANDIDATE: Richard C. Breeden

POSITION: Member and Chairman, Securities and Exchange Commission

DATE OF INTERVIEW: September 6 and 7, 1989

INTERVIEWER: Amy L. Schwartz ALS

COMMENTS:

Since February 1989, Richard Breeden has served in the Bush Administration as Assistant to the President for Issues Analysis. Before joining the Administration, he was a partner in the law firm of Baker & Botts, where he worked since 1985. Previously, he spent three years as Deputy Counsel to then-Vice President Bush. During 1981-82, Breeden served as Executive Assistant to the Under Secretary of Labor. Before entering the government initially, Breeden practiced law at Willkie Farr & Gallagher (1980-81), Cravath Swaine & Moore (1976-80), and briefly taught law at the University of Miami School of Law.

Breeden received a B.A. from Stanford (1972) and a J.D. from Harvard Law School (1975).

Authority

If nominated and confirmed, Breeden would serve as a member and Chairman of the Securities and Exchange Commission (SEC). Pursuant to 15 U.S.C. 78d(a):

> Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except . . . [that] any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term . . . .

According to Sara Emery of the Executive Clerk's Office, Breeden would replace Charles C. Cox, whose fixed term expired in June 5, 1988 and who has thereafter been a holdover. Cox was nominated

but never confirmed for a succeeding term that would have ended on June 5, 1993. The Clerk's Office therefore had taken the position that Breeden would serve a term expiring June 5, 1993, i.e., that he would serve until the expiration of the term that Cox would have served if confirmed. This is consistent with the long history of appointments to the SEC: Dan Marks of the Executive Clerk's office said that even the very first SEC commissioner -- who [redacted] was to serve an initial one year staggered term -- served only six months of that term, ending June 5, 1935, because he did not take office until the middle of the term.

I discussed with Paul Gonson of the SEC whether 15 U.S.C. 78d(a) should instead be interpreted to require that Breeden be appointed to a five year term commencing on the date of his confirmation or, in the alternative, to a term ending five years after his predecessor left office (i.e. the end of the Congressional session) rather than the end of the "phantom" term that his predecessor would have served if confirmed. (Gonson is Solicitor at the Securities and Exchange Commission and is currently acting as the SEC ethics counsel.) Gonson confirmed the SEC's historical practice of having terms end sequentially one year apart such that one commissioner's term expired each year in June. Although he acknowledged the ambiguity in the statute under the current circumstances and said that he would have some further research done on an informal basis, he said that he and the SEC General Counsel Dan Goelzer were satisfied that it was legal to appoint Breeden to the term ending June 5 1993.

If it were entirely up to me, I would prefer to hold up the nomination until the Office of Legal Counsel could look at this issue. In view of the longstanding historical interpretation of this provision and the oral SEC opinion, however, I do not believe that OLC consideration of the matter is mandatory. Accordingly, I do not believe that this issue precludes Breeden's nomination to the June 5, 1993 term without prior OLC review. It is possible, however, that someone on the Hill will raise this issue and request reconsideration of the matter at some later point.

The statute specifies that not more than three of the Commissioners may be of the same political party, and requires that "in making appointments members of different political parties shall be appointed alternatively as nearly as may be practicable." 15 U.S.C. 78d(a). According to the Executive Clerk's office, Cox is a Republican. The SEC also contains two other Republicans, one Democrat and one independent. The last appointment was a recess appointment of the independent. Against this background, I am satisfied that Breeden's nomination to replace Cox comports with the statutory requirement.

Under the statute, no commissioner shall engage in any other business, vocation, or employment during his service. I have discussed this requirement with Breeden who has assured me that he understands and will comply with it.

The statute also requires that "[n]o commissioner shall . . . participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission . . . ." 15 U.S.C. 78d(a). For the reasons set forth in the next section of this memorandum, SEC attorneys and I have concluded that Breeden satisfies this requirement.

Financial Disclosure Review

Currently, Breeden's financial interests consist solely of mutual funds, bank accounts, and a contract for the sale of his residence, which is scheduled to close in early October. He has already severed his relationship with Baker & Botts completely, as detailed in his new entrant SF-278 for the White House position which was reviewed and certified by this office. Although a number of his mutual fund interests are held pursuant to the Baker & Botts Savings Plan for Partners and Cash and Deferred Savings Plan, he states in his SF-278 that his interests are entirely vested and absolutely fixed regardless of the profits or continuation of the law firm. As such, he retains no further financial interest in Baker & Botts.

Paul Gonson explained that the statutory provision restricting direct and indirect transactions subject to SEC regulation has long been interpreted not to preclude SEC commissioners from holding or even trading in stocks, within certain limitations, such as not trading in any stock covered by an active SEC filing. He has shared with me two 1957 SEC legal opinions to this effect and a 1975 letter to the Civil Service Commission explaining this interpretation. It is also embodied in a note within the Standards of Conduct regulations for the SEC. See 17 C.F.R. 200.735-3 n.2. SEC regulations at 17 C.F.R. 200.735-5 set forth the applicable restrictions. These materials are in Breeden's financial file.

Breeden's securities holdings consist solely of mutual funds, i.e., shares in investment companies registered under the Investment Company Act. Under 17 C.F.R. 200.735-5, commissioners may retain shares owned at the time of entry on duty and may reinvest capital or income dividends received on such shares. Pursuant to 18 U.S.C. 208, a commissioner who has chosen to retain such interests must recuse himself from matters involving or directly and predictably affecting those interests. In a memorandum dated September 7, 1989 to the General Counsel of the Securities and Exchange Commission, Breeden commits himself to

recusing himself from matters in which "any of the investment companies in which [he] hold[s] shares is involved or may be substantially affected" unless he obtains a written waiver under section 208(b). The memorandum also preserves his option to divest himself of these interests.

This recusal (which was drafted by SEC attorneys) does not quite track the current Department of Justice reading of section 208. In talking to Breeden, however, I have explained that the scope of the recusal required under section 208. He has also told me that it is his intention to sell off all of his mutual funds so that he may participate freely in policy-making affecting mutual funds. On the advice of SEC attorneys, however, he is preserving for himself some flexibility by not entering into a formal ethics agreement committing him to do so.

In his memorandum to the SEC General Counsel, Breeden also commits himself to a recusal until February 2, 1991 (two years after his entry into government) from matters in which Baker & Botts represents a party or with which he had any connection or gained significant knowledge of a matter while at Baker & Botts or involving certain specified Baker & Botts clients. The memorandum also states that he will consider on a case-by-case basis whether circumstances warrant recusal in other matters to avoid a possible appearance of impropriety. The memorandum clarifies, however, that as a general matter he does not intend to recuse himself from general policy considerations, rule-making proceedings, or legislative matters. This recusal, according to Breeden, follows standard SEC practice for commissioners leaving law firms. Although it is not mentioned in the memo, Breeden is also aware that bar rules may limit his future involvement in specific matters in which he was previously involved as an attorney.

Based on the arrangements described above, SEC attorneys and I are satisfied that the measures Breeden has agreed to adopt are sufficient to address statutory and regulatory conflict-of-interest and related appearance considerations.

Other Information

Breeden's SF-278 shows a significant amount of debt, but also reflects his intention to pay off that debt with the proceeds of the sale of his house.

In his SF-86, Breeden states that the New York Yacht Club and Larchmont Yacht Club, in which he holds memberships, may formerly have restricted membership of females to special membership categories. The form states that he does not believe that either club now has a restrictive policy.

Because Breeden apparently was not asked to submit an updated PDS, this memorandum reflects my review of the PDS that he filed on joining the White House.

I posed Breeden the standard interview questions. His answers, which are recorded on the form in the file, raise no serious issues. He indicated that the IRS disputes whether he properly filed an extension in connection with his 1988 taxes; he is contesting that issue and the associated $44 IRS assessment.

Conclusion

No other matters of a controversial or embarrassing nature were revealed during my review and interview. Accordingly, assuming successful completion of all other background checks and assuming that others in Counsel's office are satisfied that Breeden may properly serve a term ending June 5, 1993, I recommend that the nomination be allowed to proceed.

cc: Jane Dannenhauer