The CHAIRMAN [continuing]. Because we make those judgments every day. The American people have no doubt that more people die from coal dust than from nuclear reactors, but they fear the prospect of a nuclear reactor more than they do the empirical data that would suggest that more people die from coal dust, from having coal-fired burners.

They also know that more lives would be saved if we took that 25 percent we spend in the intensive care units in the last few months of the elderly's lives, that more children would be saved. But part of our culture is that we have concluded as a culture that we are going to, rightly or wrongly, we are going to spend the money, costing more lives, on the elderly. We made that judgment.

I think it is incredibly presumptuous and elitist for political scientists to conclude that the American people's cultural values in fact are not ones that lend themselves to a cost-benefit analysis and to presume that they would change their cultural values if in fact they were aware of the cost-benefit analysis.

I have no doubt that more people know that more people die of cigarettes than they do of other substances, but they have concluded they would rather have the money spent on research in other areas. We make those decisions every day, and I am delighted that as a judge, you are not going to be able to take your policy prescriptions into the Court.

I yield to Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Breyer, I would like to ask you a few questions about your decision in the *Ottati* case. As I understand the *Ottati* case, you upheld a ruling that allowed a company responsible for polluting 43 acres in Kingston, NH, to clean up that site about one-tenth as much as EPA determined was necessary to protect Kingston's residents from 439 cases of cancer over their lifetimes.

I do not want to question you about the merits of your decision in that case. What concerns me, however, Judge, is that you decided a case that reduces polluters' and their insurance companies' liability for cleaning up hazardous waste at a time when your investment at Lloyd's of London included environmental liability insurance policies.

In retrospect, Judge, do you feel that possibly you should have recused yourself from hearing that case?

Judge BREYER. Senator, I looked at this very carefully. There was no party that I had invested in in the case. It had been fully disclosed. The issue to me, and I think the issue under the canons, is whether there would flow from that investment a substantial effect on my investment from that decision in that case. That is not a speculative effect, it is not a remote effect, it is not a contingent effect. It is a real, substantial effect. And having looked at that case before and looked at it again, it seems to me that it was correct under the canons that I could sit in that case. I do think that, though I understand in fact the various problems you have raised.

Senator METZENBAUM. Well, I know that there are some who think that it was proper under the canons; there are some who disagree. Justice Scalia—whom I did not think I would ever be quoting in connection with the law—but he says that 455(a) covers all forms of partiality and requires them all to be evaluated on an

objective basis so that what matters is not the reality of partiality, but its appearance.

He goes on to say: "Quite simply and quite universally, recusal was required whenever impartiality might reasonably be questioned." He is not addressing himself to this matter as such, but that is a quote from him.

Now, in your response to Judge Heflin, you acknowledged that, as Professor Hazard said, it was possibly imprudent for you as a Federal judge to invest in Lloyd's. Isn't the corollary of that reasoning that it was possibly imprudent for you to decide the *Ottati* case since your Lloyd's syndicates included environmental pollution liability?

Judge BREYER. What he said was imprudent, Senator, he believes that it is ethical, that no ethical canon was violated, and he is concerned—and I have since read this—whether or not it is prudent for a judge to have an investment in an insurance company. And having listened to your concerns, which I realize were in very good faith and were very, very important to address thoroughly, I have come to the conclusion that it would be best not to have such an investment, and that is a matter of prudence; it is not a matter of ethics. But having listened to that, that is how I feel about it.

Senator METZENBAUM. Having said that it would probably be prudent not to have such an investment, isn't the corollary of that equally true, and that is that were similar matters to come before you in the future, matters that might have some impact upon your Lloyd's investment, would it not be prudent in those cases to recuse yourself from hearing those cases?

Judge BREYER. I think that I must have a very, very careful system to achieve the very objective you are announcing and enunciating and I have listened to. What I think that system is is that it must be absolutely disclosed fully, in whatever court I am in, just what that investment is, and indeed, the parties have to be directed, their attention directed to it, and the parties have to be able to—anonymously, so I do not know which party—either orally or in writing, point out how there might be a real impact on that investment from a holding in the case. And then I think that must be communicated to me in a way that I do not know which party raised the issue, and I must evaluate that with great care and then, having done so, if I come to the conclusion that there would be a direct, a real impact on my investment, then I recuse myself.

Senator METZENBAUM. I think you said a direct, real impact. What we are talking about in the *Ottati* case is not a question of whether or not your investment in Lloyd's was being affected by your judgment in the *Ottati* case, but whether or not your judgment in the *Ottati* case might set precedents, might set certain standards in the law——

Judge BREYER. That is right.

Senator METZENBAUM [continuing]. That could affect your investment.

Judge BREYER. Yes.

Senator METZENBAUM. There is no question Lloyd's was not on the *Ottati* liability. Now, as a matter of fact, environmental law experts tell me that as a practical matter, the *Ottati* case does make it more difficult for EPA to pressure polluters into speedy hazard-

ous waste removal under stringent cleanup standards; second, it reduces EPA's ability to clean up more hazardous waste sites because EPA must use its own limited resources to clean up these sites, rather than making the polluters clean them up immediately; and it allows the district courts to weaken EPA's cleanup requirements to one-tenth—one-tenth—of EPA's standard when the agency seeks a preliminary injunction.

Is that not the practical effect of your decision in *Ottati*?

Judge BREYER. The question, from my point of view, is was there a real, direct impact on the investment. And I think the question of whether there is a real, direct impact on the investment by those who have looked at it—the answer is no. And I think that what I would like to do in the future is to look to see, after having been advised by the parties or anyone who wants to, is there a real impact on the investment from the holding in the case.

Senator METZENBAUM. Well, it should be pointed out that *Ottati* did have a direct and predictable effect on pollution insurance, particularly like Merritt 418, which was your investment, because all polluters and their insurers stand to benefit from that ruling, by less hazardous waste cleanup and weaker cleanup standards. So I think that the *Ottati* case is relevant to your investment, but indirectly, not directly, and to what extent, neither you nor I know.

Would you agree with that?

Judge BREYER. If I thought there were a substantial, that is, a direct, effect, I would have taken myself out, and that would be the correct thing to do. If, judgmentally, I think that the effect is remote or speculative or contingent, then I think the thing to do is to sit. And in making my judgment on that case, I concluded that any effect on my investment was remote or speculative or contingent, not substantial, not direct.

I think that was a correct judgment. What I am trying to do is, in the future, make certain that I am fully informed so I can make similar judgments with complete information, with the parties fully understanding the problems, the likelihoods.

The CHAIRMAN. Would the Senator yield on *Ottati*? I am confused. Since I asked about the case, Judge, I thought the facts in *Ottati* were that the EPA chose a procedural route that allowed the district court judge to make a judgment that the judge otherwise would not have been able to make had the EPA proceeded and attempted to enforce its own judgment. Is that correct?

Judge BREYER. That is correct.

The CHAIRMAN. What I am confused about is how does that affect any insurance case, on anybody. I am confused about that.

Judge BREYER. I could not find a way. I think it does not. I think it does not. And I suppose there are people who have thought of some way, but I think any way people might think of would be speculative. I personally cannot think of a real way.

The CHAIRMAN. If you had ruled—if the EPA had gone directly to the district court judge under a different procedure, and the district court judge substituted his or her judgment as to what was sufficient under the statute for EPA, then I can understand how it could be argued that you have changed the rules of the game and put district court judges, who could be more or less stringent than EPA, in the driver's seat. But that was not the case, was it?

I thank the Senator for allowing me to yield, because I am confused about this.

Senator METZENBAUM. Well, I would just say that I do not think I want to debate the substance of the *Ottati* case with my friend, the chairman, and I will ask him to give me additional time by reason of the interruption.

But the fact is under the conclusion you reached, it was necessary for the EPA to go back to get a final order, which could take an additional 2, 3, 4, 5 years, which would be very costly to EPA, and in the interim, fewer waste sites would be cleaned up, and there would be less cleanup as a result of *Ottati.* As a matter of fact, in the *Ottati* case, you say additional cleanup will cost an added several million dollars, and then you say:

International Mineral and Chemical has already spent about $2.6 million, all for very little purpose, since 1 part per million is not significantly safer than 5 or 10.

That is your language.

Just prior to that statement, you note:

Evidence suggests that a one part per million standard would reduce the risk of 439 human cancers from lifetime exposure to about one in a million.

You then stated that

Allowing 10 times more contamination would lead to 10 times as many cases of cancer.

How could you conclude that by allowing 10 times more pollution, that causes 10 times more cancers, you are making the environment significantly safer? I have trouble following that, and I have to say that with respect to the chairman's inquiry on the question of when the decision is made, following your order, there was to be something like a 2-, 3-, 5-year delay, at substantially additional cost to the EPA, and I do not think any of the EPA lawyers or the EPA questions the fact that your decision was a major setback to their efforts.

Judge BREYER. I did not see it that way, Senator. I thought that the case involved fact-related matters growing out of a particular waste dump, and I think those fact-related matters were viewed under the standard of whether the district court was clearly erroneous.

It is very difficult for an appellant to get an appeals court with a 40,000-page record on a fact-related matter to achieve a reversal under a clearly erroneous standard. EPA did, indeed, achieve such a reversal on one of the matters before us. We decided in favor of the EPA on one of those fact-related points, and we decided on the other fact-related points that the district court's decision was not clearly erroneous.

That is basically, in my mind, what was at issue in that case in the area you are talking about.

Senator METZENBAUM. That case, I think, had been dragged out for about 10 years up until the time it got to you.

Judge BREYER. Yes.

Senator METZENBAUM. I think you added maybe another 5 years to the matter of getting the matter resolved. And I think that does help the defendants in those cases, the polluters, and it certainly does not help the EPA. But let me proceed.

I do not know if you realize that the polluters' own experts admitted that their cleanup fell far short of their own proposed lenient standards. As a matter of fact, the records before you show that up to 280 times more contamination was involved than EPA considered safe or 28 times more contamination than even the polluter acknowledged would be dangerous.

My question is: In view of that additional exposure and risk, why did you disregard the data on the need for more thorough hazardous waste cleanup?

Judge BREYER. On the issue of volatile organic compounds, one of the fact-related issues, after reading through many thousands of pages, we all came to the conclusion that the district court was wrong, and we supported EPA and sent it back for more thorough cleanup on that point. On the other fact-related points, we decided there was enough evidence to support the district court.

Quite honestly, when I finished, I thought maybe EPA has won on this aspect of the case, because it is very difficult to achieve a reversal on that fact-related type of issue. It won some, the important one of VOC. It lost others. I thought the whole matter is fact-related, fact-specific. I went through it conscientiously, reading thousands of pages of records. And on the basis of those thousands of pages, I came and my colleagues came to the fact-related conclusions that we wrote in the opinion.

Senator METZENBAUM. Well, in a recent book, you express actually pretty much disdain for EPA's approach to cleaning up the environment. In *Ottati,* when you say,

> The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million. How much extra safety did the $9.3 million buy?

That is your language.

> Without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt, but there were no dirt-eating children playing in the area, for it was a swamp.

Judge Breyer, I think in that situation you were not actually correct. The record before the district court indicates that the land in dispute in *Ottati* was not a swamp, but the land in dispute was zoned residential. And the record shows the land is partially surrounded by a residential neighborhood where children play, and, therefore, the children did have an exposure. It was not just a swamp.

But let me go on to——

Senator KENNEDY. Are you going to let him answer? Do you want to answer?

Judge BREYER. From my appearance of reading the records, Senator, the area was the way I described it, and there was—but the point that I want to make is what I have written in the book and the decision in the case are two totally separate things. I have gone in my mind, thinking that case is decided as a judge. It is decided, recognizing as I wrote that when the EPA decides something in an administrative context rather than coming into a case in court, all presumptions are for the EPA. It did appear in a book written on a policy basis, having nothing to do with my role as a judge, pointing out a variety of things that I have tried to point out, for other

people—environmentalists and many others—to read and to accept or to reject as they wish.

My object, purely as a person who is interested in public policy, was to write matters down so that other people could consider them, question them, criticize them, say they are absolutely wrong. That is fine with me. I like that. I think that is important to get that kind of criticism as a policymaker, and, indeed, to get it as a judge as well.

But I want to be very, very clear that that book does not have to do with my role as a judge.

Senator METZENBAUM. I hope the Chair will continue to allow me additional time for questions that are not mine.

Judge, the *Ottati* case becomes very relevant because you were a major investor in Lloyd's. I have recently come to know an investment in Lloyd's is unusual. A Lloyd's investor puts up only a very small deposit, and the investor's real investment is his or her personal guarantee.

If the syndicate loses money, the investor's personal assets pay the losses. It makes investing in Lloyd's very, very risky. A Lloyd's investor can be wiped out, lose everything right down to his home, his car, his total assets. A Lloyd's investment is totally different than a purchase of stock, whether in a mutual fund or an insurance company or any other kind of business investment.

So your decisions having to do with *Ottati* and seven other environmental cases is particularly relevant to our hearing, because you have had and continue to have a very substantial exposure to Lloyd's.

Now, do you have any disagreement with the description that I gave of Lloyd's investors?

Judge BREYER. I do, rather. That is to say, I do not know if you are speaking theoretically or practically.

When I went into Lloyd's, I viewed it as a very conservative investment in which, in fact, you are exposed to insurance companies that sell and insure and buy anything in the world. And all these things over time, whether there are earthquakes in Japan or whether there are tidal waves or whether there is maritime losses or these kind of loses—there can be losses in everything, anything. You never know what your own syndicate may be winning, may be losing, whatever it is. It is done in a conservative way so that whether a particular case there is a loss or does not balances out somewhere else, and you do not know.

Now, as a practical matter and as a theoretical matter, as a practical matter I believed and I still believe that my risks and benefits would consist of several thousand dollars in income each year, and sometimes several thousand dollars—by that I mean under $10,000 or $12,000 certainly, possibly having to write a check. There was a deposit at Lloyd's that possibly was meant for the worst case that went up to about $150,000.

Theoretically—theoretically—if worse had come to worse, and it was stressed to me at the time that over 300 years in conservative syndicates, worse did not come to worse. But if worse came to worse, luckily because I am in a very fortunate economic situation, about 20 percent to 25 percent of our family assets would have been lost. That is the worse, theoretically, coming to worse.

Senator METZENBAUM. And that would have been about how much money?

Judge BREYER. It would have been an awful lot of money. It depended on the year. It depended on the year.

Senator METZENBAUM. We are talking about something in excess of——

Judge BREYER. We are talking about several hundred thousand dollars.

Senator METZENBAUM. Or maybe $1 million.

Judge BREYER. I do not think it could have gone that high, but it is possible.

Senator METZENBAUM. But neither you nor I nor any of us know what the loss will be in connection with this one particular syndicate you went into, which was 418, which had exposures in asbestos where you have already recused yourself in those cases, and also had pollution exposures. And it seems to be arguable as to exactly how much the risk could be, but everyone seems to agree that Merritt 418 was probably one of the worst of the Lloyd's of London exposures or syndicates.

Judge BREYER. Senator, what I do if I have a lot of money at stake or if I have a little money at stake, if there is a big investment or if there is a small investment, it is the same question. The question is: Look at those cases, see if there is anyone from the investment that is a party in that case. If so, you are out of it. If not, look again. Look again at that case to see if the decision in that case could substantially affect your pocketbook. If so, you are out of it. If not, fine.

I apply that test with alarm bells to whatever investment I have, big or small. And in that case, no alarm bell went off, and the reason that no alarm bell went off is I thought judgmentally that there was no substantial effect on a small investment, on a big investment, on a medium-sized investment, on any investment. And I think that that conclusion has been verified by others.

Senator METZENBAUM. In retrospect. You are saying it has been verified by others. You mean that the White House asked some ethics professors for their opinion, and one said it was imprudent, others said that it was entirely proper, and some other professors apparently have said it was totally inappropriate.

Judge BREYER. What I must do as a judge is I must make up my own mind on a case-by-case basis whether there is a substantial impact or whether there is not.

Senator KENNEDY [presiding]. Would the Senator yield on that point? I think we ought to put into the record, at this point in the record, exactly what those letters contained. And I dare say they are not as described by the Senator from Ohio. I think in fairness to this nominee we ought to put into the record what those legal scholars and ethicists that have been called on by this committee under Republicans and Democrats alike and who are some of the most distinguished, thoughtful, and profound individuals that write on this subject matter. We will just put that in the record. I think that is what is important, rather than characterizations about some——

Senator HATCH. And all but one found in your favor and said there was nothing unethical.

Senator METZENBAUM. Well, as a matter of fact——

Senator HATCH. Let's get with it.

Senator METZENBAUM. I did not think that I was in a debate with my colleagues on this committee.

Senator KENNEDY. We want an accurate statement of what has been characterized in the record.

Senator METZENBAUM. Well, the fact is I have no problem about putting it in the record. Also put into the record the indication by Professor Hazard that the matter of hearing the case was imprudent. Also put in the fact, I believe, that there is a letter coming from a Professor Freedman, who teaches ethics at Hofstra, in which he comes to the conclusion, as I am informed, that it was inappropriate and was unethical. But I want to make it clear here.

Senator KENNEDY. Well, he did not say it was imprudent.

Senator HATCH. No, he did not say that.

Senator KENNEDY. That is what we are getting at. He did not say it was imprudent. He said because a potential for possible conflict of interest, a possible appearance of impropriety, in light of the facts, no conflict of interest or appearance of conflict materialized. And I do not think it is fair to go on and mischaracterize it.

Senator METZENBAUM. What does he say about the word imprudent?

Senator KENNEDY. I have put it in the record, Senator.

You have asked for my opinion whether Judge Breyer has committed a violation of judicial ethics in investing in Lloyd's name and insurance underwriting while being a Federal judge. In my opinion, there was no violation of judicial ethics. In my view, it was possibly imprudent for a person who is a judge to have such an investment because of the potential for possible conflict of interest and because of possible appearance. However, in light of the facts, no conflict of interest or appearance of conflict materialized.

Senator METZENBAUM. I have no objection putting that in.

Senator KENNEDY. Well, that is different from what was stated.

Senator HATCH. It certainly was.

Senator METZENBAUM. I want to ask the Chair also, there is a letter coming from Professor Freedman, who indicates, as I understand it, that he considers it was unethical. But I want to make it clear: I am not challenging the ethical propriety of your conduct because I believe you conducted yourself in a manner that you considered to be ethical and still do.

I am concerned about what happens tomorrow when cases come before you, and I think we are entitled to your view on that, Judge Breyer.

[The letters referred to follow:]

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Stephen Gillers
Professor of Law

Via Fax and
Express Mail

July 8, 1994

Lloyd Cutler, Esq.
Counsel to the President
White House Counsel's Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Cutler:

You have asked me to answer the following question: Did Judge Stephen Breyer violate section 455 of title 28 of the United States Code ("§455") by sitting on eight cases involving CERCLA when he was a "name" in a Lloyd's of London syndicate that insured against environmental pollution among other risks?

I have been asked to assume (a) that Judge Breyer did not know and could not have known the identities of the syndicate's insureds or the terms of their policies; (b) that Judge Breyer did know or could have known that environmental pollution was one of the risks against which the syndicate insured; and (c) that Judge Breyer was exposed to a possible loss of 25,000 pounds, had insurance against additional loss of up $180,000, and that reasonable estimates are that his actual loss will not exceed the insurance coverage though they could.

In answering your question, I am going to disregard the assumption in (c) and assume instead that at the time Judge Breyer sat on the eight CERCLA cases he had at least 25,000 of financial exposure and possibly more.

I have reviewed the eight CERCLA cases. In my opinion, Judge Breyer did not violate §455.

A judge may not sit in a case in which the judge or certain family members have a "financial interest, however small" in a "party" or in the "subject matter in controversy." §455(b)(4), (d)(4). Judge Breyer had no financial interest in the parties to the CERCLA case nor in their subject matter. An example of the latter would be a judge's stock ownership in a company that, though not a party to a proceeding, was the subject of control between the actual parties.

Where the judge has an interest other than a "financial interest" in a party or in the subject matter in controversy, different rules apply. The judge is not then disqualified "however small" his or her interest. The size of the judge's "other interest" then matters: It must be "substantia[l]." §455(b)(4).

This difference recognizes two truths: the public is less likely to suspect a judge's impartiality when the judge's interest is other than in a party or the subject matter in controversy; and if any "other interest," even insubstantial ones, could disqualify judges, the scope of disqualification would be too broad with no public gain. "[W]hen an interest is not direct, but is remote, contingent, or speculative, it is not

the kind of interest which reasonably brings into question a judge's impartiality." In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)(construing §455(a), discussed below).

Section 455(b)4) and (b)(5)(iii) recognize the different policies when a judge's interest is not in a "party" or in the "subject matter in controversy." These provisions require recusal only when the judge (or certain family members) have "any other interest that could be substantially affected by the outcome of the proceeding." §455(b)(4).

This different standard has two distinguishing elements. First, the effect on the judge's interest must be substantial. Second, the word "could" has been repeatedly construed to require that the effect of "the outcome of the proceeding" on the judge's interest must be not be "indirect" or "speculative." In re Placid Oil Co., 802 F.2d 783, 786-77 (5th Cir. 1986). Construing §455(b)(4) in Placid Oil, the Court wrote: "A remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute...nor does it create a situation in which a judge's impartiality might reasonably be questioned." Id. at 787.

The Court's last reference, to "impartiality," brings us to §455(a), which requires recusal when a judge's "impartiality might reasonably be questioned." While §455(a) and §455(b) overlap, they are not congruent. Liteky v. United States, 114 S.Ct. 1147 (1994). Nevertheless, here, I reach the same conclusion under both provisions.

Placid Oil is an instructive case. It was brought against 23 banks, seeking recision of credit agreements and other relief "based on a number of alleged wrongful acts of the Banks." Id. at 786. Plaintiffs sought recusal of the district judge, who was alleged to have "a large investment in a Texas bank that may be affected by rulings in this case." Plaintiffs argued that "any rulings adverse to the Banks will have a dramatic impact on the entire banking industry and thus on [the judge's] investment as well," thereby giving the judge a "financial interest in the litigation." Id. The Circuit rejected the recusal effort:

> We find no basis here for requiring recusal. We are unwilling to adopt a rule requiring recusal in every case in which a judge owns stock of a company in the same industry as one of the parties to the case.... Id.

This position was followed in Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co., 996 F.2d 282 (11th Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

I see no evidence that the decisions in Judge Breyer's CERCLA cases "could" have a direct and substantial effect on his interest in a syndicate that has insured against the risk of liability for environmental pollution. Without parsing every case here, I found their holdings to be relatively narrow, some quite limited. For most of the cases, it would be impossible to say how the holding could affect Judge Breyer's own interests or those of the syndicate in which he invested. For all of the cases, the Judge's interest is "not direct, but is remote, contingent, or speculative." In re Drexel Burnham Lambert, supra at 1313.

Given the twin requirements of substantiality and the caselaw definition of "could" as used in §455(b), Judge Breyer did not have to recuse himself in the eight CERCLA cases. He did not violate §455.

Sincerely yours,

Stephen Gillers

Geoffrey C. Hazard, Jr.
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July 11, 1994

Hon. Lloyd N. Cutler
Special Counsel to the President
White House
1000 Pennsylvania Avenue
Washington, D.C. 20500

Re: Judge Stephen Breyer

Dear Mr. Cutler:

Your have asked for my opinion whether Judge Stephen Breyer committed a violation of judicial ethics in investing as a "Lloyd's Name" in insurance underwriting while being a federal judge. In my opinion there was no violation of judicial ethics. In my view it was possibly imprudent for a person who is a judge to have such an investment, because of the potential for possible conflict of interest and because of possible appearance of impropriety. However, in light of the facts no conflict of interest or appearance of conflict materialized. I understand that Judge Breyer has divested from the investment so far as now can be done and will completely terminate it when possible.

1. I am Trustee Professor of Law, University of Pennsylvania, and Sterling Professor of Law Emeritus, Yale University. I am also Director of the American Law Institute. I have been admitted to practice law since 1954 and am a member of the bar of Connecticut and California. I am engaged in an active consulting practice, primarily in the fields of legal and judicial ethics, and have given opinions both favorable and unfavorable to lawyers and judges. I was Consultant and draftsman for the American Bar Association Model Code of Judicial Conduct promulgated in 1972, on which the rules of ethics governing federal judges are based. I have also been Reporter and draftsman of the American Bar Association Model Rules of Professional Conduct, promulgated in 1983, and before that consultant to the project for the ABA Model Conduct of Professional Responsibility. I am author of several books and many articles on legal and judicial ethics and write a monthly column on the subject.

2. I am advised that Judge Breyer made an investment as a "Lloyd's Name" some time in 1978. He has since terminated that investment except for one underwriting, Merrett 418, that remains open. He intends to terminate that commitment as soon as legally permitted. I have further

assumed the accuracy of the description of a Lloyd's Name investment set forth in the memorandum of July 3, 1994, by Godfrey Hodgson. My previous understanding of the operation of Lloyd's insurance, although less specific than set forth in the memorandum, corresponds to that description.

3. I have assumed the following additional facts:

(a) As a "Name" Judge Breyer did not have, and could not have had, knowledge of the particular coverages underwritten by the Merrett 418 syndicate. It would have been possible for a Name to discover through inquiry that environmental pollution as a category was one of the risks underwritten by the syndicate.

(b) Judge Breyer had "stop-loss" insurance against his exposure as a Name, up to $188,000 beyond an initial loss of 25,000 pounds. This is in substance reinsurance from a third source against the risk of actual liability.

(c) A reasonable estimate of the potential loss for Judge Breyer is approximately $114,000, well within the insurance coverage described above. However, there is a theoretical possibility that his losses could exceed that estimate.

(d) The Merrett 418 syndicate normally would have closed at the end of 1987. It remains open because of outstanding liabilities to the syndicate that were not later adopted by other syndicates. These outstanding liabilities include environmental pollution and asbestos liability.

4. I am advised that Judge Breyer as judge participated in a number of cases that one way or another involved the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the Superfund statute. None of these cases involved Lloyd's as a party or by name in any respect. None appear to have involved issues that would have material or predicable impact on general legal obligations under the Superfund legislation. Most of the cases are fact-specific and all involve secondary or procedural issues. I have assumed that the description of these cases in the attached list is fair and accurate.

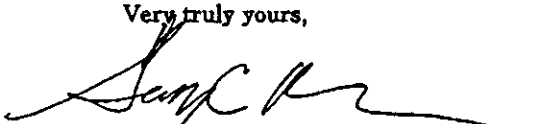
5. In my opinion, Judge Breyer's participation in the foregoing cases did not entail a violation of judicial ethics. None of the cases involved Lloyd's as a party or as having an interest disclosed in the litigation. None could have had a material effect on Judge Breyer's financial interests. None had a connection direct enough with Judge Breyer as to create a basis on which his impartiality might reasonably be questioned, as that term is used in Section 455 and in the Code of Judicial Ethics.

6. There is a close analogy between the kind of investment as a Name and an investment in a mutual fund. A mutual fund is an investment that holds the securities of operating business enterprises. Ownership in a mutual fund is specifically excluded as a basis for imputed bias under Section 455 and the Code of Judicial Ethics. This exclusion was provided deliberately, in order to permit judges to have investments that could avoid the inflation risk inherent in owning Government bonds and other fixed

income securities but without entailing direct ownership in business enterprises. A Names investment is similarly an undertaking in a venture that in turn invests in the risks attending business enterprise. Just as ownership in a mutual fund is not ownership in the securities held by the fund, so, in my opinion, is investment as a Name not an assumption of direct involvement in the risks covered by the particular Lloyd's syndicate.

7. In my opinion it could be regarded as imprudent for a judge to invest as a Lloyd's Name, notwithstanding that no violation of judicial ethics is involved. The business of insurance is complex, sometimes controversial, and widely the subject of public concern and suspicion. The insurance industry is highly regulated and insurance company liability often entails issues of public importance. In my opinion it was therefore appropriate for Judge Breyer to have withdrawn from that kind of investment so far as he could legally do so, simply to avoid any question about the matter. That said, I see nothing in his conduct that involves ethical impropriety.

Very truly yours,



Geoffrey C. Hazard, Jr.

GCH

JUDGE BREYER'S "CERCLA" (SUPERFUND STATUTE) CASES

Judge Breyer has participated in eight cases involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Superfund statute. None involved Lloyds as a party or by name in any other respect. Moreover, none involved the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations, much less on Lloyd's itself.

The cases address a variety of matters. Most are highly fact-specific. Included among them are decisions that enforce an EPA penalty against a chemical company; apply the judicial doctrine of res judicata (which bars relitigation of the same matter); and confirm the federal government's sovereign immunity from state requests for civil penalties on CERCLA claims.

A summary of the cases is attached.

1. Waterville Industries, Inc. v. Finance Authority of Maine, 984 F.2d 540 (1st Cir. 1993). The issue in this case was the "security interest exception" in CERCLA, which exempts from the statute's definition of "owner" a "person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." In an opinion by Judge Boudin, joined by Judge Breyer, the court interpreted the provision and unanimously agreed with the Finance Authority of Maine that it met the requirements of the provision.

Particularly because there is no reason to think that a lender, a borrower, or a property owner is more or less likely to have insurance, the case does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations.

2. State of Maine v. Dept. of Navy, 973 F.2d 1007 (1st Cir. 1992). In this case, the state of Maine sued the United States Navy because one of the Navy's shipyards had not complied with Maine's federally-approved hazardous waste laws. The only CERCLA-related issue was whether the CERCLA statute waives the federal government's traditional sovereign immunity against suits by states for civil penalties. Judge Breyer's opinion held that the CERCLA statute does not waive the federal government's sovereign immunity.

3. Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (en banc). The issue in this case was whether landowners are entitled to notice and an opportunity to be heard before the EPA is allowed to place a lien on their property. In an opinion by Judge Torruella, joined by Judge Breyer, the First Circuit applied a recent Supreme Court precedent, which had found a Connecticut attachment lien statute violated due process. The First Circuit held that CERCLA's lien provision had a similar flaw.

The case thus gives people the right to notice and an opportunity to be heard before a lien is put on their property. It concerns the timing of procedures, and in no way eliminates, lessens, or affects the liability of landowners who are responsible for clean-up costs.

4. All Regions Chemical Labs v. EPA, 932 F.2d 73 (1st Cir. 1991). In this case, Judge Breyer's opinion upheld the EPA's imposition of a $20,000 penalty against a chemical company that failed to

notify the EPA immediately about the release of hazardous substances from its property.

In this highly fact-specific case, the decision upholds the EPA's penalty, over the private company's objection.

5. Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991). Judge Brown's opinion, joined by Judge Breyer, applies the judicial doctrine of res judicata, which prohibits relitigation of the same matter. It does not address CERCLA or Superfund issues.

6. United States v. Kayser-Roth, 910 F.2d 24 (1st Cir. 1990). In an opinion by Judge Bownes, joined by Judge Breyer, the court agreed with EPA that a parent company could be found to be an "operator" liable for clean-up costs even if the site was nominally run by a subsidiary. The court also agreed with the EPA that the trial court properly found that the parent company was an "operator" in this case.

The decision does not present the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. (In many CERCLA cases, there are numerous private parties with conflicting allocation claims, and imposing liability on parent corporations might have different effects on different insurers at different times).

7. United States v. Ottati & Goss, 900 F.2d 429 (1st Cir. 1990). In this decision by Judge Breyer, the court agreed with the district court that, when EPA requests a preliminary injunction under a particular CERCLA provision, the district court has discretion and is not, contrary to EPA's submission, obliged to defer to EPA's request for an injunction unless it is "arbitrary or capricious." The First Circuit emphasized that "to read the statute in this way does not significantly handicap EPA" because the agency may receive full administrative deference at a subsequent stage of the proceedings. The Court of Appeals also reviewed the district court's factual findings, agreed with EPA that the district court should further consider one matter, and found that the district court's other findings were supported by the record. The court also ruled on various miscellaneous issues, including one in which it agreed with EPA that the district court should further consider whether EPA should be entitled to recover certain costs.

None of the holdings in the case presents the kind of issue that would have a direct or predictable impact on the insurance industry's Superfund obligations. The standard for district court consideration of requests for preliminary injunctive relief concerns only district court discretion at a preliminary stage of the proceedings. The factual issues, moreover, are highly case-specific and dependent on the record in the particular case.

8. Dedham Water Co. v. Continental Farms Dairy, 889 F.2d 1146 (1st Cir. 1989). In this opinion by Judge Bownes, the First Circuit agreed with other courts that a plaintiff need show only that a defendant's release of hazardous wastes caused it to incur response costs, not that the wastes actually contaminated the plaintiff's property. Particularly because either side in such a dispute might have insurance, the case does not present the kind of issue that would have a material or predictable impact on the insurance industry's Superfund obligations. (A subsequent opinion in the case specified that a new trial was required. Judge Breyer dissented, arguing that the district court should have discretion to further consider the matter. The issue was unrelated to CERCLA or Superfund. In re Dedham Water Co., 901 F.2d 3 (1st Cir. 1990)).

July 13, 1994

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
DC 20510

Dear Senator Biden,

As one who has worked in the field of lawyers' and judges' ethics for almost three decades, I write to oppose the confirmation of Chief Judge Stephen Breyer as a member of the Supreme Court. My opposition is based upon Judge Breyer's violation of the Federal Disqualification Statute, 28 U.S.C. §455.

We have heard much in recent years about a "litmus test" for judges. The reference has been to the nominees' positions on substantive issues, and the test has fluctuated with the politics of the moment. If there is one test that should be constant, however, it is that the record of a nominee for judicial office should not be tainted by a serious violation of judicial ethics. Judge Breyer fails that test.

The Disqualification Statute (§455)

The Federal Disqualification Statute (§455) was enacted by Congress to ensure respect for the integrity of the federal judiciary. Discussing the statute in the Liljeberg case, the Supreme Court said that "We must continuously bear in mind that to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"·

The problem, the Supreme Court explained, is that

· Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. 2194, 2205 (1988), quoting In re Murchison, 75 S.Ct. 623, 625 (1955).

"people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."[2] Section 455(a) was therefore adopted to "promote confidence in the judiciary" and to eliminate those "suspicions and doubts."

Accordingly, §455(a) expressly requires that every federal judge "shall" disqualify himself from any case in which his impartiality "might" reasonably be "questioned."[3] This statutory language is intentionally broad, requiring the judge to avoid the "appearance of impropriety whenever possible."[4]

Writing for the Supreme Court just this year, Justice Scalia said that §455(a) covers all forms of partiality, and "require[s] them all to be evaluated on an objective basis, so that what matters is not the reality of [partiality] but its appearance."[5] And Justice Scalia added: "Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.'"[6]

This objective standard -- which is to be applied "universally" and "whenever possible," -- means that the judge cannot remain in a case on the ground that he, personally, is a person of integrity who would not be affected by a personal financial concern. Rather, the question is whether the "average judge" would be offered a "possible temptation" not to "hold the balance nice,

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[2] Id.

[3] 28 U.S.C. 455(a).

[4] Liljeberg at 2205, citing legislative history.

[5] Liteky v. U.S., 114 S.Ct. 1147, 1153-1154 (1994) (emphasis in the original).

[6] Id. The Supreme Court was unanimous on these points.

clear and true."[7]

That last quotation goes back to cases decided even before §455 was enacted -- cases like Tumey, Murchison, and Lavoie.[8] Those cases hold that constitutional due process requires the judge to disqualify himself unless his interest is "so remote, trifling, and insignificant" as to be "incapable of affecting" an individual's judgment.[9]

Judge Breyer's Violation of the Statute

I have quoted at some length from controlling Supreme Court cases like Liteky, Liljeberg, Tumey, Murchison, and Lavoie, because, so far, they have been virtually ignored in these hearings. Neither Professor Stephen Gillers nor Professor Geoffrey Hazard has discussed these cases in their letters to the Committee in which they conclude that Judge Breyer did not violate the Statute.[10]

Judge Breyer was a member, or Name, in the Lloyd's Merrett syndicate 418 in 1985, insuring asbestos and pollution losses.[11] His exposure to liability continues to this day. As of 1993, the total losses on that account were $245.6 million. Other Names have had their fortunes wiped out in total Lloyd's liabilities

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[7] Liljeberg, at 2205, n. 12, quoting previous cases.

[8] Tumey v. State of Ohio, 47 S.Ct. 437 (1927); In re Murchison, 75 S.Ct. 623 (1955); Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986).

[9] The quote goes back to Justice Cooley's treatise, Constitutional Limitations.

[10] Professor Gillers cites Liteky only for the point (which is immaterial to his conclusion) that "[w]hile §455(a) and §455(b) overlap, they are not congruent."

[11] The information was first revealed publicly in an article in Newsday on June 24, 1994.

approaching $12 billion. For years, therefore, the Names have been understandably jittery.

The New York Times has described Judge Breyer's membership in Lloyd's as "A Tricky Investment."[12] Although Judge Breyer has assured this Committee that he will get out of his membership as soon as possible, this is a questionable pledge. He himself has testified that he has been trying to extricate himself for years. And according to Richard Rosenblatt, who heads a group of hundreds of American Names who are "afraid of being wiped out," it would cost Judge Breyer more that $1 million to insure himself against his personal share of his syndicate's losses.[13] Even then, he would remain liable if his insurer could not pay.[14]

Judge Breyer and the White House have assured this Committee and the public that Judge Breyer's reasonably anticipated liability is negligible. And the ethics experts who have "cleared" Judge Breyer have based their opinions on just such misleading assumptions. As Professor Hazard says, he was told to assume that Judge Breyer's possible losses are well within "stop-loss" insurance coverage that the Judge already has. For similar reasons, Professor Gillers has commented that his own opinion is "rather narrow."[15]

But consider Mr. Rosenblatt's estimate that insurance coverage of Judge Breyer's liability would cost more than $1 million. That reflects the calculation of hard-headed actuaries, not overly optimistic politicians eager to minimize the true dimensions of the Judge's difficulties.

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[12] N.Y.Times A:1, A16, July 13, 1994.

[13] Id.

[14] Id.

[15] Gillers to Freedman, Lexis Counsel Connect E-mail, July 10, 1994.

Having said that, let me emphasize that my opinion is not dependent upon the precise size of Judge Breyer's liability.[16] As Professor Hazard said in his opinion, the business of insurance is complex, sometimes controversial, and "widely the subject of public concern and suspicion." Unfortunately, Professor Hazard did not recognize that his own description of Judge Breyer's position as an insurer echoes the Supreme Court's description of the purpose of §455 -- to avoid public "suspicion and doubts." Predictably, and properly, "public concern and suspicion" have been focused on the integrity of the judiciary because of Judge Breyer's failure to disqualify himself when the Statute required him to do so.

As the White House has admitted, Judge Breyer "knew" or "could have known" that environmental pollution was one of the risks he was insuring as a Name. (In fact, he was notified of this by his syndicate.) But, they contend, he did not know precisely which of his cases involved those risks. In effect, they argue that Judge Breyer could not know for sure whether a particular pollution defendant standing before him was carrying the Judge's blank check in his pocket.

But under §455(c) of the Disqualification Statute, the Judge had an absolute responsibility to "inform himself about his personal ... financial interests."[17] (Professors Gillers and Hazard ignore this requirement in their opinion letters.) Thus, the bizarre defense of Judge Breyer is that he violated his statutory duty to know the details of his personal financial interest, and therefore he didn't violate his statutory duty to disqualify himself.

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[16] See the original article in Newsday, June 24, 1994.

[17] This is in contrast to the second clause of the same subsection, which requires only that he make a "reasonable effort" to inform himself about the financial interests of members of his household.

In fact, Judge Breyer did violate the statute in failing to disqualify himself. Take, for example, United States v. Ottati & Goss, Inc.[18] Two years after Liljeberg explained the broad scope of §455(a), Judge Breyer failed to disqualify himself from Ottati & Goss -- even though the case involved the Environmental Protection Agency's powers to impose liability on polluters like those the Judge knew he was insuring.

In Ottati & Goss, the issue was whether the EPA could impose remedies against polluters, subject to judicial revision only on a finding that the EPA had arbitrarily and capriciously abused its powers. Lower court decisions were split on the issue. A decision by the First Circuit would be an important precedent.

Judge Breyer expressly recognized this in his opinion in Ottati & Goss, saying that the case raised a question with "implications for other cases as well as this one." And he said again: "The EPA's ... argument [has] implications beyond the confines of this case."

That was enough to require that Judge Breyer disqualify himself. In effect, he was in the position of deciding his own case, or, at least, of setting a precedent that could affect his own liability.

How the Judge ultimately decided the case has no effect on his duty to disqualify himself. His decision in Ottati & Goss compounds the appearance of impropriety that the Statue forbids, because the Judge wrote an opinion weakening the power of the EPA to impose liability on polluters. And his opinion, predictably, has been influential, causing the EPA to change its own regulations.

Similarly, Judge Breyer participated in Reardon v. United States,[19] where the First Circuit again made it more difficult for the EPA to impose liability on

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[18] 900 F.2d 429 (1990).

[19] 947 F.2d 1509.

polluters. In Reardon, the EPA had removed tons of contaminated soil and put a lien on the property to secure payment of its costs. The loss represented by that lien is the same kind of loss that Judge Breyer was liable to reimburse as an insurer. And the decision held that the EPA did not have the power to impose the lien.

Is it not clear that Judge Breyer's impartiality "might" reasonably be "questioned" in Ottati & Goss and in Reardon? Would not his participation cause "suspicions and doubts" about the integrity of judges? Is that not precisely the problem that the Congress intended to resolve with §455(a) of the Disqualification Statute?

One contention put forth by the White House is that Judge Breyer was not asked to disqualify himself by a litigant. That is irrelevant. The Statute does not permit a judge to wait to see whether a litigant has smoked out his interest and makes a motion for disqualification. Rather, the Statute is "self-executing," requiring the judge to take the initiative. As Justice Scalia said for a unanimous Court in Liteky, the Statute "placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit."[20]

Another contention is that the Judge's membership in Lloyd's is "analogous" to being an investor in a mutual fund, and therefore is exempt from the statute under §455(d)(4). There are two important differences between being a name in Lloyd's and being an investor in a mutual fund. One is that mutual funds are typically highly diverse. But Lloyd's is solely involved in insurance, and the Judge knew that one or more of his insurance liabilities related to environmental pollution. Another major difference is that an investor in a mutual fund cannot lose more than the principle invested. In Lloyd's, on the contrary, one's entire fortune is at risk, as hundreds of Names have found to their dismay in

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[20] Liteky at 1153.

recent years.

It has also been argued that §455(a) is not the right section to apply. The contention is that the correct section is §455(b)(4), which (on one reading) requires that the judge's interest "could" be "substantially affected by the outcome of the proceeding." There are three answers to that argument.

First, those who make that contention have been assuming, contrary to fact, that the Judge's potential liability is negligible. (See discussion above).

Second, §455(b) does not require that the Judge's interest be "substantial" if it is an interest in the "subject matter in controversy." In that event, the judge must disqualify himself "however small" his interest might be. §455(d)(4). And some read the phrase "subject matter in controversy" to include the remedy -- such as the lien in Reardon -- if that is what the litigation is about. One could similarly say that the subject matter of the controversy in Ottati & Goss was the enforcement powers of the EPA. Thus, Judge Breyer was required to disqualify himself under §455(b)(4) in both those cases "however small" his financial interest in the outcome might be.

Third, the "substantially affected" provision of §455(b)(4) does not preclude application of the basic provision, §455(a). And §455(a) can require disqualification when the Judge's impartiality "might reasonably be questioned" even when the amount of financial interest is not in fact substantial. In Liljeberg, for example, the Supreme Court relied principally upon §455(a) even while recognizing that §455(b)(4) also applied.

Ignoring the Supreme Court cases in point, Professor Gillers has placed his primary reliance on In re Placid Oil Company.[2] But Placid Oil is obsolete, having been decided two years before Liljeberg (discussed above).

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[2] 802 F.2d 783 (5th Cir., 1986).

With no analysis whatsoever, the appeals court in Placid Oil said in a single conclusory sentence that the judge's interest in that case did not create a situation in which a judge's impartiality might reasonably be questioned. The court also said that the judge's interest at issue was, in fact, "remote, contingent, and speculative" -- unlike Judge Breyer's position in Ottati & Goss and Reardon. Professor Gillers' reliance upon the obsolete and limited holding in Placid Oil, while ignoring Liljeberg and all of the other Supreme Court authorities, renders his opinion highly questionable.

The court in Placid Oil also says that a judge is not automatically disqualified if he has any stock at all in a company that is in the same industry as a litigant. That certainly remains true. But Judge Breyer has much more than a minor interest in a company in the same industry. He is an insurer with a potential liability that he cannot avoid for less than $1,000,000.

In addition, Judge Breyer, with his wife, holds investments of over $250,000 in chemical and pharmaceutical companies. Moody's Investors Service says that these are "among the highest risks" for Superfund liability.[22]

Judge Breyer has also held significant long-term investments in several liability insurance carriers that, according to the Financial Times, have been "haunted by the prospect of big claims for environmental liability," especially Superfund.[23]

In 1994 his biggest single U.S. investment is American International Group. According to Best's Review -- an industry trade magazine and investment adviser -- A.I.G. is "depending on ... judicial trends" on Superfund

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[22] I am relying here upon the reporting and analysis of Bruce Shapiro in The Nation, p. 76, July 18, 1994.

[23] Id.

for its future financial health.[24]

The Judge also owns stock in General Re Corporation. That company's 1994 annual report warns investors that their future earnings could be affected by "new theories of liability and new contract interpretations" by judges on Superfund.[25]

Judge Breyer appears to have been accommodating these concerns. And his investments in such companies -- unlike that in Lloyd's -- are investments that a judge with ethical sensitivity could, and would, have gotten out of and stayed away from.

Conclusion

Chief Judge Stephen Breyer has more than once violated the Federal Disqualification Statute -- a Statute that was designed to ensure the constitutional requirement that "justice must satisfy the appearance of justice." In violating that Statute, he has, predictably, caused the very "suspicions and doubts" about the integrity of judges that the Statute was enacted to avoid.

These violations of his judicial responsibilities raise serious doubts about how Judge Breyer would conduct himself as a Justice of the Supreme Court. And his refusal to recognize anything more serious than "imprudence" reinforces those doubts.

In addition, Judge Breyer's violations, and his insistence that he has done nothing improper, raise the concern that as a member of the Supreme Court, Judge Breyer would vote to weaken the Federal Disqualification Statute, thereby encouraging other federal judges to disregard the intent of Congress in enacting that law.

For these reasons, I oppose confirmation of Judge

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[24] Id.

[25] Id.

Stephen Breyer to the Supreme Court of the United States.

Very truly yours,

Monroe H. Freedman
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of Legal Ethics

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Stephen Gillers
Professor of Law

July 15, 1994

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Biden:

The White House Counsel's Office has given me a copy of Professor Monroe Freedman's letter to you of July 13, 1994, and asked me to reply to it. Since the letter takes issue with my July 8, 1994 letter to the White House Counsel, I appreciate having this opportunity to do so. The issue, of course, is whether Chief Judge Stephen Breyer violated 28 U.S.C. §455 when he sat in certain pollution cases while he was also a "Name" in a Lloyd's syndicate. I will assume general familiarity with the facts and the prior correspondence.

Professor Freedman is in my opinion in error when he charges Judge Breyer with illegal conduct. Professor Freedman has misconstrued the governing rules and ignored governing precedent. I shall explain how presently. First, though, the Committee should be aware of a critical doctrine that has not yet been identified.

Section 455, which derives from the 1972 ABA Code of Judicial Conduct, states the Congressional rules for recusal of a federal judicial officer. The section has two kinds of rules: categorical rules and standards. The categorical rules require no judgment. They either apply or they do not. The standards, by contrast, require judgment.

An example of a categorical rule is §455(b)(5)(i), which would require a judge to step aside if the judge's "spouse, or a person within the third degree of

relationship to either of them...Is a party to the proceeding...." This circumstance either exists or it does not. If it does, recusal is required.

The two provisions of §455 that have been cited in connection with Judge Breyer (until Professor Freedman injected a third, discussed below) contain standards, not categorical rules. The first standard is that part of §455(b)(4) that requires recusal if the judge (as an individual or fiduciary) or certain relatives of the judge have "any other interest that could be substantially affected by the outcome of the proceeding." The second standard is §455(a), which requires recusal if the judge's "impartiality might reasonably be questioned."

As should be clear, these two standards require a judge to interpret imprecise words like "could," "substantially affected," "might" and "reasonably." The meaning of these words (and the standards that contain them) are, of course, clarified as cases construe them, but they have never, and were not intended to, become fixed categories.

When we deal with standards, we deal with a continuum. In some matters, it will be self-evident that a judge's "impartiality might reasonably be questioned" or that a proceeding's "outcome" could "substantially" affect a judge's interests. In other matters, the opposite will be clear. But in many cases, different judges will apply the standards differently.

That doesn't mean that one judge is right and the other judge wrong. It means only that as with all flexible standards there will be room for disagreement. The way that the judicial system accommodates this reality is pertinent to the questions before the Judiciary Committee.

Appellate courts routinely defer to a judge's decision regarding application of a standard by upholding the decision unless it was an "abuse of discretion." Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1460 (1st Cir. 1992); Pope v. Federal Express Corp., 974 F.2d 982, 985 (8th Cir. 1992). This test recognizes that there is significant room for

disagreement in the application of a standard. Reasonable minds may differ and neither will be wrong.

While Professor Freedman holds that Judge Breyer should have recused himself in certain of his pollution cases, I and others who study the law of judicial disqualification have reached an opposite conclusion. That difference of opinion is rather strong evidence that the situations confronting Judge Breyer did not self-evidently require his recusal, but were instead situations in which reasonable minds might differ on the application of the standard. Judge's Breyer's conduct was not, therefore, an abuse of discretion and Judge Breyer did not violate §455 notwithstanding that another judge might have elected differently.

Not only do I believe that Judge Breyer's decision to sit in the pollution cases was reasonable, I believe it was right. In the balance of this letter, I will explain why §455 did not disqualify Judge Breyer and where I think Professor Freedman goes wrong.

I have already quoted from §455(b)(4). A judge must not sit if the judge (including certain relatives) has "any other interest that could be substantially affected by the outcome of the proceeding." The words "any other interest" are to be distinguished from a separate basis for recusal if a judge has a "financial interest in the subject matter of the proceeding or in a party to the proceeding." Such a "financial interest" requires recusal "however small." Section 455(d)(4).

No one has suggested that Judge Breyer had a "financial interest" in a party to proceedings before him. Professor Freedman has rhetorically asked, however, whether Judge Breyer had a "financial interest" in the "subject matter" of proceedings before him. (Freedman letter at p. 8.) This suggestion is wrong, as I shall discuss below.

In order to trigger §455(b)(4)'s reference to "any other interest," several facts must be true (and the judge's failure to recognize their truth must be an abuse of discretion). These facts are that the (i) the judge has an "other interest" that (ii) "could be" (iii) "substantially affected" by (iv) "the outcome of the

proceeding."

Judge Breyer had an investment in Lloyd's. I assumed in my letter to Mr. Cutler that he had unlimited financial exposure on that investment. That satisfies factor (i). However, it does not satisfy factor (iii), even though I am assuming that Judge Breyer's financial exposure is unlimited.

The word "substantially" refers to the effect on the "interest" that the "outcome of the proceeding" "could" have. Professor Thode, the Reporter for the ABA Judicial Conduct Code from which this part of §455(b)(4) was drawn, has written: "Here the issue is not whether a judge has a 'substantial interest,' but whether the interest he has could be substantially affected by a decision in the proceeding before him." E. Thode, Reporter's Notes to Code of Judicial Conduct 66 (1973)(hereafter "Thode").

In measuring the possible effect of the "outcome of the proceeding" on the judge's interest, we must construe the word "could." As stated, "could" is not a precise word. "Could" could mean "could conceivably" or it could require a closer nexus between the outcome of the proceeding and the effect on the judge's interest. The courts have construed "could" to require a closer nexus.

My letter to Mr. Cutler cites two cases that require a "direct" connection between the outcome of a proceeding and the judge's interest. By contrast, a "remote, contingent, and speculative interest" will not suffice. In re Placid Oil Co., 802 F.2d 783, 786-77 (5th Cir. 1986); Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co., 996 F.2d 282 (11th Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

While Professor Freedman suggests (p.9) that Placid Oil is "obsolete," because of the Supreme Court's decision in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), two year later, this is wrong. First, the Eleventh Circuit cited Placid Oil in 1993 for the very point made here. Other courts have cited it, too, after Liljeberg. See, e.g., McCann v. Communications Design Corp., 775 F. Supp. 1535 (D. Conn. 1991).

Second, the facts of Liljeberg are dramatically different form those in Placid Oil. In Liljeberg, a university with which the judge had a fiduciary relationship would (as a result of contractual obligations and real estate values) gain millions of dollars if the judge awarded the rights to a certificate of need for a hospital to the defendant. That gave the judge, as fiduciary, an interest "however small" in the subject of the litigation (the certificate) and also an interest that could be substantially affected by the outcome of the proceeding. The facts of Liljeberg show a "direct" effect on the judge's interest as a fiduciary, and of course the effect was substantial.

Permit me to make this clearer with an example. Assume that the outcome of a case will nearly certainly cause a $100 decline in the value of the judge's stock interest. The effect, then, is "direct," but the judge's financial interest is not "substantially affected" because the amount is too small. Now assume an omniscient observer could tell us that the outcome of a proceeding will have 1/1000th of a chance of causing the judge's stock interest to decline by $100,000. There, the effect is substantial but it is not "direct."

Professor Freedman cites two cases in which he concludes Judge Breyer should not have participated. Did the Judge abuse his discretion by concluding that the decisions in these cases could not have a direct and substantial affect on his financial interest in Lloyd's? That is the question.

One issue in United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990), the issue Professor Freedman cites, was whether a federal judge had to grant the EPA the precise injunction it requested (so long as the request was not arbitrary) or whether instead the judge had broader discretion. Judge Breyer held that the judge had broader discretion.

Professor Freedman writes that Judge Breyer should not have properly decided that case because it "involved the [EPA's] powers to impose liability on polluters like those the Judge knew he was insuring." (Freedman letter at p. 6.) This is just wrong. It is not the standard. Professor Freedman cannot say with any degree of

confidence that the decision in Ottati & Goss would have a direct and substantial effect on the judge's interests. Furthermore, Professor Freedman leaves out an important part of the case. The EPA had two routes for seeking judicial injunctions. It had proceeded under one of them. Judge Breyer expressly acknowledged that if it had proceeded via the other route (seeking enforcement of a nonarbitrary EPA order[1], "the court must enforce it." Id at 434.

Now think about the chain of events one would have to envision to get from the holding in Ottati & Goss to the conclusion that Judge Breyer's interests could be directly and substantially affected. One would have to say that because a trial judge will have discretion whether to grant an EPA injunction when the EPA proceeds along one route rather than another, it could happen that in another case the EPA would elect that first route in an action against an insured of Judge Breyer's Lloyd's syndicate, that the judge in that case will deny EPA the injunction it seeks (relying on the discretion Judge Breyer's opinion affords), that the syndicate would not have to pay to comply with the particular injunction EPA wanted, and that the effect from all this on Judge Breyer's pro rata financial interest in the syndicate would be "substantial." That chain of events is what the caselaw means when it uses the words "remote, contingent, and speculative."

Professor Freedman also cites Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991). Reardon is even a more farfetched example than Ottati & Goss. Judge Breyer sat on an en banc court that held that, absent exigent circumstances, due process required "notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed." Id. at 1522. Professor Freedman wrongly says that the decision "held that the EPA did not have the power to impose the lien." (letter at p.7.) It did, so long as it gave notice of its intention to do so and afforded a hearing thereafter.

Professor Freedman connects Reardon to the situation at hand this way: "The loss represented by that lien is the same kind of loss that Judge Breyer was liable to reimburse as an insurer." (letter at p. 7.) This is

beyond "speculative." What "loss" is Professor Freedman referring to? Think about the extended chain of events one would have to describe to get from the Reardon holding to Judge Breyer's interests. The EPA would have to give notice of an intent to impose a lien on property of an insured of the Judge's Lloyd's syndicate. Then, before the EPA could file its lien, the recipient of the notice would have had to defeat that effort by making a quick disposition of the property, thereby defeating the EPA's security interest. As a result of that disposition, somehow (I'm not clear how) the syndicate would escape its insurance responsibility and the pro rata savings to Judge Breyer in particular would have to be substantial. Reardon simply does not support Professor Freedman's conclusion.

Before I leave §455(b), I want to recognize that a "remote, contingent, and speculative" interest is not the same as no conceivable interest whatsoever. A system of judicial recusal must balance between the risk of real or apparent personal interest, on the one hand, and an unduly broad standard that disqualifies a large number of judges (or severely limits their investments), on the other. A broad standard would lead cautious judges to step aside no matter how improbable an effect on their interests. I believe the courts have struck the right balance. But the line will sometimes be unclear, calling on the judge to exercise discretion.

On occasion, by definition, even a remote interest will become a reality. Today's issue of Newsday reports that a loser in a case before Judge Breyer sued a Lloyd's syndicate for reimbursement of its expenditures under an insurance policy the loser had with Lloyd's. The syndicate may or may not have been Judge Breyer's syndicate. Let's assume it was Judge Breyer's syndicate. That is part of the price of a balanced rule. A rule that prohibited a judge from sitting if a decision could have any conceivable effect on his or her interests would have its own (in my view less appealing) price.

In addition, I have been asked to assume that Judge Breyer did not and could not have known the particular insureds under his Lloyd's syndicate. Section 455(b) quite clearly requires knowledge.

Professor Freedman also relies on §455(a), which requires recusal if a judge's "impartiality might reasonably be questioned." Apparently, Professor Freedman believes it to have been an abuse of discretion for Judge Breyer not to recuse himself under this provision.

Section 455(a) requires recusal when an "objective, disinterested, observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt that justice would be done" in the particular case. Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 715 (7th Cir. 1986). I do not believe that conclusion can be reached on the facts of the cases in which Judge Breyer sat. Certainly, it was not an abuse of discretion to reject application of §455(a) as so defined.

A stronger objection to §455(a) exists. As I mentioned in my letter to Mr. Cutler, while not congruent, §455(a) and §455(b) do overlap. As a matter of statutory interpretation, it is improper to resort to §455(a) when Congress has specifically legislated criteria for recusal in the particular circumstances described in §455(b) and these criteria are absent. As the Court wrote in Liteky v. United States, 114 S.Ct. 1147, 1156 n.2 (1994), "it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires."

Here, §455(b)(4), as construed in caselaw, requires that the outcome of the proceeding before the judge have both a direct and substantial effect on the judge's interests. Liteky tells us that we should not use §455(a) to "nullify" these requirements. Specifically, here, we should not use §455(a) to require recusal where the effect is "remote" or "speculative" or "contingent." In any event, the same test is employed to reject recusal under §455 (a). In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988) (remote, contingent, or speculative interest does not reasonably bring judge's impartiality into question.)

Let me conclude by addressing two other of Professor Freedman's points. First, he suggests that Judge Breyer might have had a "financial interest" in the "subject

matter" of the cases before him because the legal issue he decided could arise in a case involving his Lloyd's syndicate. Professor Freedman does not even adopt this view himself. He says merely that "some have read" the phrase "subject matter in controversy" to include the remedy, like the lien at issue in Reardon. He also writes that "(o)ne could similarly say" that EPA enforcement powers in Ottati & Goss were the "subject matter" of that controversy.

"One" could, of course, "say" many things, just as "some" may have "read" the statute a variety of ways. But the fact is that no authority supports the view that a judge can have a "financial interest" in a question of law. As Professor Thode explained, the "subject matter" language "becomes significant in in rem proceedings." Thode at 65. Another example is Lilieberg, where the university on whose board the judge sat had a financial interest riding on the holder of the certificate of need, which was the subject matter before the judge. This is not a case like Tumey v. State of Ohio, 273 U.S. 510 (1927), cited by Professor Freedman, where the adjudicator had a financial interest in the very fine he imposed on the defendant because he would receive part of it.

Professor Freedman suggests (p. 5) that Judge Breyer violated his duty to keep himself informed of his financial interests. Section 455(c). My letter was premised on two assumptions about what Judge Breyer knew or could have known and what he did not know and could not have known. I charged him with knowledge of what he could have known but he can't be faulted with not knowing what he could not have known.

Thank you for this opportunity.

Sincerely,

Stephen Gillers

cc:Honorable Lloyd Cutler

SG:m

Judge BREYER. Yes, Senator. I have taken into account your concern, and I understand the concern, and I think it is extremely important that people have confidence in the integrity and that there is absolutely no conflict in such circumstances. What I intend to do, as I said, is that whatever investment I have in this area in whatever court I am in will be posted clearly, all information given, with the clerk of court. The parties in every case will be directed to that so they will find it and know what it says. They will be told that, anonymously—anonymously—they may write out or tell orally to the clerk any way in which they see that the holding in this case could really affect that investment.

Then the clerk would or an appropriate person would communicate that to me anonymously. I would consider very carefully, in light of what you and others have said, whether in any case there would be really an impact on the investment from the holding of that case. And should I conclude there would be, I would recuse myself.

Senator METZENBAUM. I believe that that is a major step in the right direction. I think it is the right step, and I think that the concerns that many of us have about your continued exposure in the Merritt syndicate 418 may warrant or may necessitate your recusing yourself in future cases.

I believe that it is our obligation to and I think we have sensitized you to this issue. Nobody has said, at least I have not said—some have said but I have not said—that you have conducted yourself in an unethical manner. I do not think that you have. But I think that if the *Ottati* case were before you again, using the present standard that you are talking about, I somehow have the feeling that you might not have gone forward in hearing that case.

It is a fait accompli, and you are not going to hear the case over again, and so it does not necessitate our going into a lengthy discussion. But I think your new approach to matters, until you get out of the Lloyd's investment, will be helpful, and at least this Senator thinks it will make you that much better a Supreme Court jurist than I hope you will be notwithstanding.

Judge BREYER. Thank you, Senator.

Senator METZENBAUM. I guess my time has expired.

The CHAIRMAN. You can have more time, because I interrupted you, if you want to take a few more minutes.

Senator METZENBAUM. Several more. All right. I think I will. Thank you, Mr. Chairman.

On this whole question of the Merritt 418 and its relationship to your exposure and cases you have heard, the latest annual report emphasizes not only the uncertain upper limit of losses, but also the breadth of the exposure. With respect to asbestos, it says:

> The falling off in the number of new claims long predicted has yet to occur. Major uncertainties lie in the estimate of the number of future claimants.

You have already recused yourself in connection with asbestos cases.

With respect to pollution, it says:

> A number of claims have been made against our insureds and, therefore, against us. The amount of theoretical aggregate liability is clearly huge and, indeed, unquantifiable.

Even the syndicate's auditor, the accounting firm of Ernst and Young, will not give a firm opinion as to the size. I think that the point that I would make with you, Judge, is that you were aware that you had certain exposure. You had concerns. You actually sent several letters to other investors in Merritt 418, dated from February 1992 through February of this year.

Those letters indicate your knowledge of Merritt's asbestos risk in 1987 and 1988 and describe why you decided by 1988 to recuse yourself from asbestos cases because of Merritt's asbestos risk.

You say in one letter:

> I was surprised Merritt syndicate was involved more than average, for this seems contrary to what I had wanted. As a result, I have had to disqualify myself on all asbestos cases, and ultimately, for that reason, in 1988 I decided to leave Lloyd's.

And then it goes on, other letters that you wrote.

I think we can agree that the Merritt 418 was obviously a bad investment. The Merritt 418 had all sorts of exposure, asbestos, pollution, other kinds of exposures. And the question of your recusing yourself in future cases until you can discharge yourself of the liability, potential liability that you have arising out of it I think is a valid concern. I think you have addressed yourself to that concern. I am pretty well satisfied that when and if matters come up before you, you will be aware of some of the questions that have been discussed with you here, and I wish you well.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Does that mean the matter is closed, Senator?

Senator METZENBAUM. Pardon?

The CHAIRMAN. Does that mean the matter is closed?

Senator METZENBAUM. For the moment. [Laughter.]

I think so, but who knows what the next hour will bring?

The CHAIRMAN. I surely do not.

I know the next 10 minutes will bring a break. You have been sitting there a long time, Judge. Why don't we break until 10 minutes after. That is about 8 or 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Our next questioner is the distinguished Senator from Wyoming, Senator Simpson. Senator, the floor is yours.

Senator SIMPSON. Mr. Chairman, I thank you very much.

Judge Breyer and associates, fellow lawyers and family and so on. Anyway, in my first round of questions, I mentioned that bills had been introduced in both Houses of Congress by members of both parties to eliminate birthright citizenship. I kind of fired this out the other day, knowing you would mull it, as you do. The issue of eliminating birthright citizenship in the case of a child born in the United States to persons who are here illegally.

There are calls for repeal of what we would term birthright citizenship for children of aliens who are in an illegal status, and part of the impetus behind this interest in changing the law regarding birthright citizenship is that these children, often born impoverished to impoverished parents, are immediately eligible for public assistance, and then that assistance, of course, is provided to the parents who care for their citizen child even though the parents themselves would not qualify for public assistance because they are illegal, undocumented persons.