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Stephen Gillers
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Via Fax and
Express Mail

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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