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
Howard Lichtenstein Distinguished Professor
of Legal Ethics