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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