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# JUDICIAL IMPARTIALITY IN THE SUPREME COURT - THE TROUBLING CASE OF JUSTICE STEPHEN BREYER

Monroe H. Freedman\*

## I. INTRODUCTION

There is increasing concern about the disregard of judicial impartiality by members of the United States Supreme Court. A recent case stimulating this concern is *Cheney v. U.S. District Court for the District of Columbia*,<sup>1</sup> in which Justice Antonin Scalia declined to recuse himself in a case involving Vice President Richard Cheney, his old friend and duck-hunting companion.<sup>2</sup> As I have shown elsewhere,<sup>3</sup> Scalia's trip with Cheney violated recusal rules relating to (1) a close friendship between a judge and a litigant, (2) the acceptance of something of value by a judge from a litigant, and (3) the potential for ex parte communications.<sup>4</sup>

Much more important, however, is the troubling history of Justice Stephen Breyer. Breyer's own failures to recuse himself when required to do so is of particular importance because he is chairing the Judicial Conduct and Disability Act Study Committee.

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\* Professor of Law, Hofstra University Law School. Author, MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004). I am grateful to Lisa Spar, Assistant Director for Reference and Instructional Services at the Hofstra Law Library, for her invaluable research assistance.

1. *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913 (2004) (mem.).

2. See Monroe Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004). Scalia himself noted that editorials in twenty of the thirty leading newspapers in the country urged his recusal in the case. *Cheney*, 541 U.S. at 923 (quoting Motion to Recuse at 3-4); no newspaper in the country argued against his recusal. *Id.*

3. See Freedman, *supra* note 2.

4. *Id.* at 230-32.

Former Chief Justice William Rehnquist appointed this committee on May 24, 2004, to “evaluate how the federal judicial system is dealing with judicial misbehavior and disability.”<sup>5</sup> Significantly, a plurality of the cases of judicial misconduct in the Breyer Committee’s study relates to the failure of judges to recuse themselves when required to do so.<sup>6</sup>

## II. THE BREYER COMMITTEE

The “intense criticism” of Justice Scalia’s denial of a recusal motion in the *Cheney* case was a principal reason for Rehnquist’s appointment of the Breyer Committee.<sup>7</sup> Critics included House Judiciary Committee Chairman F. James Sensenbrenner, R.-Wis., who told judicial leaders at a private meeting that they were not adequately dealing with the issue of recusal.<sup>8</sup> In response to these expressions of concern, Chief Justice Rehnquist appointed the Breyer Committee to “look into it” and “see if there are any real problems.”<sup>9</sup>

Unfortunately, Rehnquist himself was hostile to judicial disqualification.<sup>10</sup> For example, he had written to a group of senators that criticism of Scalia’s participation in the *Cheney* case had been “ill considered.”<sup>11</sup> Moreover, Rehnquist had perjured himself before Congress in his confirmation hearings, and he had lied in a Supreme Court memorandum opinion regarding his failure to recuse himself in *Laird v. Tatum*.<sup>12</sup> More recently, in May of 2004, Rehnquist himself was criticized for flying on a corporate jet owned by an Ohio power plant that had dozens of cases in federal court.<sup>13</sup>

5. THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 – A REPORT TO THE CHIEF JUSTICE app. A at 131 [hereinafter JCDA STUDY COMM.].

6. *See id.* at 25.

7. Gina Holland, *Rehnquist Orders Study After Scalia Flap*, SALON 1, May 25, 2004, <http://dir.salon.com/story/news/wire/2004/05/25/ethics/index.html> (last visited Sept. 1, 2006). *See also* Freedman, *supra* note 2.

8. Holland, *supra* note 7, at 1.

9. JCDA STUDY COMM., *supra* note 5, at 131.

10. *See, e.g.*, Rehnquist’s dissent in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870-74 (1988), which the *New York Times* has characterized as “troubling.” Editorial, *Judicial Ethics Under Review*, N.Y. TIMES, May 27, 2004, at A28 [hereinafter *Judicial Ethics*].

11. Holland, *supra* note 7, at 1 (quoting Letter from Justice Rehnquist to Senate Democrats (Jan. 2005)).

12. *Laird v. Tatum*, 404 U.S. 955 (1971) (mem.). Regarding Rehnquist’s perjury and lying, *see* FREEDMAN & SMITH, *supra* note \*, at 231-242.

13. *Judicial Ethics*, *supra* note 10, at A28.

Not surprisingly, therefore, the committee that Rehnquist appointed to evaluate how the federal judicial system is dealing with judicial misbehavior has a “skewed composition” that “raise[d] concerns” about how effectively it would do its job.<sup>14</sup> Four of the six members are judges appointed by Republican presidents.<sup>15</sup> A fifth was Rehnquist’s own chief administrative assistant.<sup>16</sup> The sixth is Breyer, whom the *New York Times* has called “a curious choice,” because his own confirmation had been jeopardized by his failures to recuse himself when sitting in the First Circuit.<sup>17</sup> Moreover, Breyer has brushed aside the widespread criticism of Scalia’s denial of recusal in the *Cheney* case, and he has called it “a very difficult ethical question.”<sup>18</sup>

The Breyer Committee’s report, which was published in September 2006, is discussed in Part V of this article. Ironically, an issue that it omits even to mention is the failures of Supreme Court Justices, like Scalia and Breyer, to recuse themselves when required to do so.

### III. BREYER’S FAILURES TO RECUSE HIMSELF IN THE FIRST CIRCUIT

When President Bill Clinton nominated Breyer in 1994 to serve on the Supreme Court, I opposed his confirmation.<sup>19</sup> My objection was based upon a series of failures by Breyer to recuse himself when required to do so while sitting as a judge in the First Circuit. The explanation of my reasoning is in three parts: (A) Disqualification requirements under the Due Process Clause; (B) Disqualification requirements under the federal disqualification statute; and (C) Breyer’s failures to recuse himself in the First Circuit.

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14. *Id.*

15. Holland, *supra* note 7, at 1.

16. *Id.*

17. *Judicial Ethics*, *supra* note 10, at A28. For a discussion of those cases, see *infra* Part III.C.

18. Gina Holland, *Supreme Court Justice Says Tough Decisions Faced in Judges’ Ethics*, ASSOCIATED PRESS, Aug. 9, 2004, <http://www.law.com/jsp/article.jsp?id=1090180304699> (last visited Sept. 1, 2006). See Freedman, *supra* note 2.

19. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong., 325-35 (1994) (letter from Monroe H. Freedman, Lichtenstein Distinguished Professor of Ethics to Hon. Joseph R. Biden, Chairman, Comm. of the Judiciary, U.S. Senate (July 13, 1994)) [hereinafter *Hearing*].

A. *Disqualification Requirements under the Due Process Clause*

The Due Process Clause sets the minimum constitutional requirement of judicial recusal.<sup>20</sup> That is, Congress or state legislatures can make them more stringent, but not less stringent.<sup>21</sup> Even as a minimum standard, due process requires not only impartiality in fact, but also the appearance of impartiality on the part of judges.

*Tumey v. Ohio*<sup>22</sup> was the first judicial disqualification case in the Supreme Court. *Tumey*'s unanimous decision was written by Chief Justice Taft and it held that due process is violated if there is "a possible temptation to the average . . . judge . . . which might lead him not to hold the balance nice, clear, and true . . ." <sup>23</sup> *Tumey* involved a misdemeanor prosecution in which the judge received \$12 as his share of the \$100 penalty assessed against the defendant.<sup>24</sup> In vacating the conviction for violating due process, the Court held that unless the judge's interest is so "remote, trifling, and insignificant," as to be de minimis, the judge must be disqualified.<sup>25</sup> On that standard, the judge's receipt of \$12 was held to be sufficient to require his disqualification.

In determining what constitutes due process in disqualification cases, the *Tumey* Court also held that it would consider the statutory and common law of England prior to the adoption of the Constitution.<sup>26</sup> This includes the fundamental principle, already established in the early seventeenth century, that "no man may be a judge in his own case."<sup>27</sup> The meaning of "his own case" is not limited, literally, to the very same case in which the judge is sitting, but also embraces cases in which the judge is able to adopt a rule of law favorable to himself in a different case.

In *Ward v. Village of Monroeville*,<sup>28</sup> the Supreme Court vacated a traffic conviction on due process grounds. In this case, the mayor, who

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20. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

21. *Id.*

22. *Tumey v. Ohio*, 273 U.S. 510 (1927).

23. *Id.* at 532 (emphasis added).

24. *Id.* at 531-32.

25. *Id.* at 531 (quoting THOMAS MCINTYRE COOLEY, CONSTITUTIONAL LIMITATIONS 594 (7th ed. 1903)).

26. *Id.* at 523.

27. Mark T. Coberly, *Caesar's Wife Revisited – Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1202-03 (1977) (quoting LORD COKE, INSTITUTES \*141a).

28. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

acted as judge, received no share in the petitioner's fine of \$100. However, such fines were a significant part of the village's revenue.<sup>29</sup> Under state law, the defendant could have had a trial de novo before a judge, but the Supreme Court held that due process entitled him to a "neutral and detached judge in the first instance."<sup>30</sup>

Another Supreme Court decision, *In re Murchison*,<sup>31</sup> is of particular importance because neither money nor an allegation of bias was involved. The Supreme Court reversed the conviction on due process grounds because a state judge had held the defendant guilty of contempt for conduct before a prior grand jury proceeding where the same judge had presided.<sup>32</sup> As noted by the dissent in *Murchison*, the judge had no pecuniary interest in the case, nor was there even a contention that the judge had become embroiled in the case or that he had been in any way biased.<sup>33</sup> Nevertheless, the Supreme Court held that "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"<sup>34</sup> Accordingly, even though the judge has no interest or bias in fact, "no man is permitted to try cases where he has an interest in the outcome."<sup>35</sup>

*Aetna Life Insurance Co. v. Lavoie*<sup>36</sup> is another Supreme Court decision involving recusal. In *Lavoie*, the Court found a due process violation when Judge Embry, a judge who had participated in the case in the Alabama Supreme Court, had himself been litigating two other cases against insurance companies (neither of them Aetna) seeking punitive damages for a tortious bad faith refusal to pay a claim.<sup>37</sup> However, previous Alabama law had not clearly established such a tort. In *Lavoie*, the Alabama Supreme Court recognized the tort, thereby establishing a favorable precedent for Embry in his own litigation.<sup>38</sup> Thus, the violation of due process consisted of Embry's participation in establishing a precedent favorable to himself on the issue of tortious bad

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29. *Id.* at 58.

30. *Id.* at 62.

31. *In re Murchison*, 349 U.S. 133 (1955).

32. *Id.* at 139.

33. *Id.* at 140 (Reed, J., dissenting).

34. *Id.* at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

35. *Id.*

36. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

37. *Id.* at 817.

38. *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), *rev'd*, 475 U.S. 813 (1986).

faith, which had made him, though indirectly, “a judge in his own case.”<sup>39</sup>

In sum, the Due Process Clause requires judicial recusal whenever there is a “possible temptation” to the average judge that “might” lead him to be less than impartial, and whenever it can be said that the judge is effectively acting indirectly as a judge in his own case.

### B. *The Federal Judicial Disqualification Statute*

In 1974, Congress amended the federal judicial disqualification statute, 28 U.S.C. § 455. This amendment substantially revised the statute, making “massive changes” in the statutory law of judicial disqualification.<sup>40</sup> Specifically, subsection 455(a) is an “entirely new ‘catchall’ recusal provision, covering both ‘interest or relationship’ and ‘bias or prejudice’ grounds, but requiring them *all* to be evaluated on an *objective basis*, so that what matters is not the reality of bias or prejudice but its appearance.”<sup>41</sup>

The catchall provision of subsection 455(a) is sparse in phrasing and sweeping in scope. It says: “Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>42</sup> As the Supreme Court has recognized, “[q]uite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’”<sup>43</sup>

Further, in subsection 455(b), the statute requires disqualification “also” in specified situations, the most important of which are: actual bias or prejudice;<sup>44</sup> “personal knowledge of disputed evidentiary facts concerning the proceeding;”<sup>45</sup> a financial interest, however small, in the outcome of the proceedings;<sup>46</sup> or “any other interest” that could be substantially affected by the outcome.<sup>47</sup>

39. *Aetna Life Ins. Co.*, 475 U.S. at 824 (quoting *Murchison*, 349 U.S. at 136).

40. *Liteky v. United States*, 510 U.S. 540, 546 (1994).

41. *Id.* at 548 (emphasis in original) (internal citations omitted).

42. 28 U.S.C. § 455(a) (2000).

43. *Liteky*, 510 U.S. at 548.

44. 28 U.S.C. § 455(b)(1) (2000).

45. *Id.*

46. *Id.* §§ 455(b)(4), (d)(4). “Ownership in a mutual or common investment fund that holds securities is not a ‘financial interest’ in such securities unless the judge participates in the management of the fund.” *Id.* § 455(d)(4)(i).

47. *Id.* § 455(b)(4).

The most important interpretation of section 455 is the Supreme Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, where the Court gave effect to the plain meaning of subsection 455(a).<sup>48</sup> *Liljeberg* was a declaratory judgment suit that centered on a disputed certificate of need from the State of Louisiana to build a new hospital.<sup>49</sup> Loyola University was not a party to the litigation but, because of a contract between Loyola and Liljeberg, the university had a substantial financial interest in Liljeberg's obtaining the certificate.<sup>50</sup>

After a trial, Federal District Judge Robert Collins awarded the certificate to Liljeberg.<sup>51</sup> Ten months later, Health Services Acquisition Corp., which had been the losing party, learned that Judge Collins had been a member of Loyola's board of trustees at the time of the trial.<sup>52</sup> Accordingly, Health Services moved to vacate the judgment and to retry the case before an impartial judge.<sup>53</sup>

As a board member, Judge Collins had been present at meetings when Loyola's contract with Liljeberg had been discussed.<sup>54</sup> However, another federal district judge, who conducted a hearing on the motion to vacate the judgment, found as a fact that Judge Collins had forgotten about Loyola's interest in the matter during the trial, and the Supreme Court accepted this finding in its discussion of subsection 455(a).<sup>55</sup> This did not answer the question, however, of whether a reasonable person *might* nevertheless *question* whether Judge Collins had really forgotten what he had known and might therefore question his impartiality.<sup>56</sup> The problem, the Court noted, is that members of the public too often have "suspicions and doubts" about the integrity of judges.<sup>57</sup> Congress

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48. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

49. *Id.* at 854.

50. *Id.* at 853.

51. *Id.* at 855.

52. *Id.* at 850.

53. *Id.* The motion was made under FED. R. CIV. P. 60(b)(6) (allowing a court to relieve a party from a final judgment for "any . . . reason justifying relief"), because 28 U.S.C. § 455 does not prescribe any particular remedy for a judge's failure to recuse himself when required to do so.

54. *Liljeberg*, 486 U.S. at 851.

55. *Id.* at 864.

56. *Id.* at 860. The Court posited a reasonable person "knowing all the circumstances" standard (which included Judge Collins' denial of any recollection of Loyola's interest in the case). *Id.* at 861. *See also* *Sao Paulo v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

57. *Liljeberg*, 486 U.S. at 864.



enacted subsection 455(a) to eliminate such suspicions and doubts and to avoid “the appearance of impropriety whenever possible.”<sup>58</sup>

In addition, the district court made a finding of fact that eight days after he entered judgment in the case, Judge Collins received actual knowledge of Loyola’s financial interest in the award of the certificate of need.<sup>59</sup> The Supreme Court held that this constituted a separate violation of subsection 455(b)(4), which requires disqualification if a judge “*knows* that he . . . as a fiduciary, . . . has a financial interest in the subject matter in controversy or . . . any other interest that could be substantially affected by the outcome.”<sup>60</sup> (If Judge Collins had revealed the facts upon receiving knowledge of Loyola’s interest, Health Services could have filed a motion for a new trial within the ten day period allowed for such motions.)<sup>61</sup>

The holding in *Liljeberg* makes it clear that both subsection 455(a) and subsection 445(b) can be relevant in the same case; that is, although subsections 455(a) and 455(b) overlap considerably, they are complementary.<sup>62</sup> In *Liljeberg* there was a violation of subsection 455(a) during the trial because, despite the finding that the judge had forgotten about Loyola’s interest, a reasonable person might nevertheless question whether the judge had truly forgotten about it.<sup>63</sup> In addition, there was a violation of subsection 455(b)(4) because the judge, after judgment, had received knowledge of the ground for disqualification through a letter from Loyola - which implicates a distinct requirement of subsection 455(b)(4) - and had done nothing about it.<sup>64</sup> This complementary application of the two subsections is consistent, of course, with the introductory language of subsection 455(b): “He shall also disqualify himself in the following circumstances . . . .”<sup>65</sup>

Moreover, *Liljeberg* shows that subsection 455(a) can apply even in a case in which subsection 455(b)(4) is relevant but not fulfilled. That is, subsection 455(b)(4) requires recusal unless the judge “*knows*” of his financial interest in the case. Thus, Judge Collins, who had made no connection between the *Liljeberg* case and Loyola’s financial interest,

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58. *Id.* at 865.

59. *Id.* at 851.

60. *Id.* at 867 (emphasis added).

61. *Id.* at 851, 869.

62. *Id.* at 859-60.

63. *Id.* at 865.

64. *Id.* at 867.

65. 28 U.S.C. § 455(b)(4) (2000).

was not required to recuse himself under subsection 455(b)(4) during the trial (which was prior to his “knowing” in fact through the letter from Loyola). Nevertheless, Collins had been required to disqualify himself at the outset of the case under subsection 455(a), because a reasonable person might have questioned whether he had failed to recall Loyola’s interest at that time.

*C. Breyer’s Failures to Recuse Himself in the First Circuit*

In 1985, Judge Breyer was a member, or Name, in the Lloyd’s of London Merrett Syndicate 418, insuring asbestos and pollution losses.<sup>66</sup> Breyer’s exposure to liability through that syndicate was on-going at the time of his confirmation hearings in 1994. As of 1993, the total losses on the Merrett account were \$245.6 million.<sup>67</sup> The fortunes of other Names had been wiped out with Lloyd’s liabilities totaling nearly \$12 billion.<sup>68</sup> For years, therefore, the Names had been understandably anxious about additional ruinous losses.

The *New York Times* characterized Breyer’s membership in Lloyd’s as “[a] [t]ricky [i]nvestment.”<sup>69</sup> Although Breyer assured the Senate Judiciary Committee that he would get out of his membership as soon as possible, it appeared to be a questionable pledge.<sup>70</sup> He himself had testified that he had been trying to extricate himself for years. Also, according to Richard Rosenblatt, who headed a group of hundreds of American Names who were “afraid of being wiped out,” it would cost Breyer more than \$1 million to reinsure himself against his personal share of his syndicate’s losses.<sup>71</sup> Even then, he would have remained liable if his insurer had been unable to pay.<sup>72</sup>

In addition to his Lloyd’s insurance liability, Breyer and his wife held investments of over \$250,000 in chemical and pharmaceutical companies. Moody’s Investors Services said at the time that these were

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66. The information relating to Breyer’s involvement in Merrett Syndicate 418 was first revealed publicly in an article in *Newsday* on June 24, 1994. Timothy M. Phelps & Michael Weber, *Supreme Court Conflict?*, *NEWSDAY*, June 24, 1994.

67. *Id.*

68. *Id.*

69. Neil A. Lewis, *The Supreme Court: The Hearing; Taking Initiative, Nominee Defends Conduct As Judge*, *N.Y. TIMES*, July 13, 1994, at A1, A16.

70. *Id.*

71. *Id.*

72. *Id.*

“among the highest risks for Superfund liability.”<sup>73</sup> Moreover, Breyer also held significant long-term investments in several liability insurance carriers that, according to the *Financial Times*, had been “haunted by the prospect of big claims for environmental liability,” especially Superfund liability.<sup>74</sup> In 1994, Breyer’s biggest single U.S. investment was American International Group.<sup>75</sup> According to *Best’s Review*, an industry trade magazine and investment adviser, AIG was then “depending on . . . judicial trends” on Superfund for its future financial health.<sup>76</sup>

The judge also owned stock in General Re Corporation. That company’s 1994 annual report warned investors that their future earnings could be affected by “new theories of liability and new contract interpretations” by judges on Superfund.<sup>77</sup>

Bearing in mind the constitutional and statutory requirements of recusal, as well as Breyer’s heavy financial interest in Superfund liability, consider *United States v. Ottati & Goss, Inc.*<sup>78</sup> Two years after the Supreme Court explained the broad scope of subsection 455(a) in *Liljeberg*, Breyer failed to disqualify himself from *Ottati & Goss*, even though the case involved the Environmental Protection Agency’s powers to impose Superfund liability on polluters like those the judge knew he was insuring and whose stock he owned in substantial amounts.

*Ottati & Goss* arose under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (known as “CERCLA,” or the “Superfund Act”).<sup>79</sup> The case involved an effort by the EPA to require several companies to clean up thirty-four acres of hazardous waste sites and to reimburse the government for clean up that the agency had already undertaken. Lower court decisions were split on whether a trial court could review such an EPA decision *de novo*, or whether the EPA’s decision was only subject to judicial revision if its decision were found to have been an arbitrary and capricious abuse of its powers.<sup>80</sup>

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73. I am relying here on the reporting and analysis of Bruce Shapiro in Bruce Shapiro, *Breyer Conflicts*. (*Supreme Court Nominee Stephen G. Breyer*), *THE NATION*, July 18, 1994, at 76.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990).

79. *Id.* at 431. The Superfund Act is codified at 42 U.S.C. §§ 9601-57 (2000).

80. *Ottati & Goss*, 900 F.2d at 432.

Breyer expressly recognized that his decision would have important precedential effect, with “implications for other [Superfund clean-up] cases as well as this one,”<sup>81</sup> and with “implications beyond the confines of this case.”<sup>82</sup> Also, for all he knew, Breyer might have been insuring the company before him on appeal, or others like it in future cases.<sup>83</sup> Like Judge Embry in *Lavoie*, therefore, Breyer was in the position of effectively setting an important precedent that could affect the financial outcome in his own case or cases.<sup>84</sup> Moreover, in view of Breyer’s enormous potential liability, deciding *Ottati & Goss* would surely present “a possible temptation to the average . . . judge . . . which might lead him not to hold the balance nice, clear, and true . . . .”<sup>85</sup>

Turning from the Due Process Clause to the disqualification statute, it seems clear also that Breyer’s impartiality “might reasonably be questioned”<sup>86</sup> in *Ottati & Goss*, causing “suspicions and doubts” about the integrity of judges.<sup>87</sup> Furthermore, it would appear to be precisely the kind of situation Congress sought to avoid in subsection 455(a).<sup>88</sup>

How a judge ultimately decides a case has no effect on whether he had a duty to disqualify himself at the outset. In fact, however, Breyer’s decision in *Ottati & Goss* weakened the power of the EPA to impose liability on polluters, and his opinion was indeed influential, causing the EPA to change its own regulations.<sup>89</sup>

Similarly, Judge Breyer participated in *Reardon v. United States*,<sup>90</sup> where the First Circuit declared part of the Superfund Act

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81. *Id.*

82. *Id.*

83. Breyer did not know the specific companies for whose Superfund losses he was responsible. For that reason, he was also in violation of 28 U.S.C. § 455(c), which imposed upon him an absolute obligation to “inform himself about his personal . . . financial interest.” See *Hearing, supra* note 19, at 329.

84. It is true that Embry’s litigation was pending when he decided *Lavoie*, while Breyer’s liability was impending. However, Embry’s ultimate recovery of \$30,000 was paltry as compared with Breyer’s very real prospect of being bankrupted by his Superfund liability as a Lloyd’s Name.

85. *Tumey v. Ohio*, 273 U.S. 510, 532.

86. 28 U.S.C. § 455(a).

87. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988).

88. In *Liljeberg*, the Supreme Court relied primarily upon 28 U.S.C. § 455(a) while recognizing that subsection 455(b)(4) also applied. Breyer was “also” required to disqualify himself if he had “any . . . interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(4). Breyer’s financial wipe-out interest in Superfund liability, through Merrett Syndicate 418, qualifies as such an interest.

89. *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 445 (1st Cir. 1990).

90. *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991).

unconstitutional. In *Reardon*, the EPA had removed tons of contaminated soil and placed a lien on the property to secure payment of its costs.<sup>91</sup> The loss represented by that lien is the same kind of loss that Judge Breyer was liable to reimburse as an insurer. The effect of the decision, holding that the EPA did not have the power to impose the lien, made it more difficult for the EPA expeditiously to obtain payment of its costs.<sup>92</sup> Ultimately, therefore, Breyer participated in a case in violation of both the Constitution and the federal disqualification statute.

In response to my letter to the Senate Judiciary Committee opposing Breyer's confirmation as Associate Justice, Professor Stephen Gillers wrote a letter on behalf of Breyer.<sup>93</sup> In the course of that letter, Gillers focused principally on subsection 455(b)(4) (which had not been my principal reliance).<sup>94</sup> Subsection 455(b)(4), again, requires recusal when a judge knows that he has a financial interest in the subject matter in controversy or "any other interest that could be substantially affected by the outcome of the proceeding."<sup>95</sup>

In his discussion of that section, Gillers misstated the text of the statute in order to appear to refute my position.<sup>96</sup> Freedman, he said, was wrong to maintain that Breyer should have recused himself from *Ottati & Goss*<sup>97</sup> on the ground that the case "involved the [EPA's] powers to impose liability on polluters like those the Judge knew he was insuring."<sup>98</sup> "This is just wrong," Gillers asserted, "It is not the standard."<sup>99</sup>

The reason I was wrong, and misstated the standard, according to Gillers, was that "Professor Freedman cannot say with any degree of confidence that the decision [written by Breyer] *would* have [had] a *direct and* substantial effect on the judge's interests."<sup>100</sup> That was, of course, true. But note the italicized words, which are not the language of the text of subsection 455(b)(4). In fact, where Gillers substitutes the

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91. *Id.* at 1511.

92. *Id.* at 1522-23.

93. *Hearing, supra* note 19, at 336-44 (letter from Stephen Gillers, Professor of Law, New York University, to Hon. Joseph R. Biden, Chairman, Comm. on the Judiciary, U.S. Senate (July 15, 1994)).

94. *Id.*

95. 28 U.S.C. § 455(b)(4).

96. *Hearing, supra* note 19, at 337-42.

97. *Id.* at 340.

98. *Id.*

99. *Id.*

100. *Id.* at 340-41 (emphasis added).

word “would,” the Congress actually used “could;” and where Gillers interpolates the words “direct and” before “substantial effect,” Congress used only “substantial.”<sup>101</sup>

The difference is, of course, considerable,<sup>102</sup> because what I was indeed able to say with confidence was that Breyer’s decision “could” have had a “substantial” effect on his financial interests (a matter that was beyond dispute in view of Breyer’s exposure as a Name in Lloyd’s and his heavy holdings in chemical and pharmaceutical companies).

In addition, when Gillers turned to subsection 455(a), he gave a shrunken rendering of the language that the Supreme Court had so broadly interpreted in *Liljeberg*.<sup>103</sup> As we have seen, the Court in *Liljeberg* held that “the very purpose of [section] 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”<sup>104</sup> That is the effect of the statutory text referring to whether the judge’s impartiality “might reasonably be questioned.”<sup>105</sup> Similarly, the Due Process Clause requires recusal if there is a “possible temptation” that “might” lead a judge to be less than impartial.<sup>106</sup>

However, Gillers ignored the Supreme Court’s broad language in *Liljeberg*, relying instead upon *Union Carbide Corp. v. U.S. Cutting Services, Inc.*,<sup>107</sup> an appellate court case decided two years before *Liljeberg*. That enabled Gillers to rewrite the broad statutory text into a requirement that an “objective, disinterested observer . . . *would* entertain *significant* doubt that justice would be done.”<sup>108</sup> By doing so, Gillers was seemingly able to justify Breyer’s failures to recuse himself in the Superfund cases.

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101. 28 U.S.C. § 455(b)(4).

102. For the important distinction between “could” and “would,” see FREEDMAN & SMITH, *supra* note \*, at § 9.06 (“What a Reasonable Person ‘Might,’ ‘Could,’ and ‘Would’ Do”).

103. *Hearing, supra* note 19, at 339-40.

104. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988).

105. 28 U.S.C. § 455(a).

106. *Tumey v. Ohio*, 273 U.S. 510, 532.

107. *Hearing, supra* note 19, at 343; *Union Carbide Corp. v. U.S. Cutting Servs., Inc.*, 782 F.2d 710 (7th Cir. 1986).

108. *Hearing, supra* note 19, at 343 (quoting *Union Carbide*, 782 F.2d at 715). For that matter, though, I do entertain a significant doubt that a judge can be completely objective, no matter how hard he might try, when he has as much at stake in the cases as Breyer had.

By contrast, however, in a recent op-ed article, Gillers criticized then District of Columbia Circuit Judge John Roberts, Jr., for participating in *Hamdan v. Rumsfeld*<sup>109</sup> (a terrorism case), but made no reference to *Union Carbide* or to any other restrictive appellate decision on recusal.<sup>110</sup> Instead, Gillers quoted *Liljeberg* for the holding that “the very purpose of [subsection 455(a)] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”<sup>111</sup>

The importance of Gillers’ consistent support of Breyer’s failures to recuse himself will become apparent shortly.

#### IV. BREYER’S PUZZLING AND TROUBLING RECUSAL POLICY ON THE SUPREME COURT

This section is in two parts: (A) Breyer’s initial recusal policy on the Court, and (B) Breyer’s recent recusal policy on the Court.

##### *A. Breyer’s Initial Recusal Policy on the Court*

Not long after Justice Breyer had become a member of the United States Supreme Court, I received a telephone call from a lawyer who identified himself as a good friend of Justice Breyer. He had called to call my attention, first, to two recent Supreme Court cases in which Breyer had recused himself and to inform me that Breyer had, at considerable expense, reinsured his potential liability as a Lloyd’s Name.<sup>112</sup> Moreover, some of the Supreme Court cases in which Breyer had recused himself were significantly less serious cases for recusal than some of those on which Breyer had chosen to sit when he was a judge in the First Circuit.<sup>113</sup>

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109. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.D.C. 2005), *rev’d*, 126 S. Ct. 2749 (2006).

110. Stephen Gillers, David J. Luban, & Steven Lubet, *Improper Advances: Talking Dream Jobs with the Judge out of Court*, SLATE, Aug. 17, 2005, <http://slate.com/id/2124603/?nav=tap3> (last visited Sept. 1, 2006).

111. *Id.*

112. See also Tony Mauro, *Wave of Recusals Marks Breyer’s Debut*, LEGAL TIMES, Oct. 10, 1994, at 8; Neil A. Lewis, *Justice Breyer Severs Ties to the Lloyd’s Syndicate*, N.Y. TIMES, Nov. 11, 1994, at A24 (Breyer had reinsured himself “at a hefty price”).

113. See, e.g., *Gen. Elec. Capital Corp. v. Nat’l Union Fire Ins. Co.*, 513 U.S. 916 (1994) (denying cert.).

In short, either on his own or in response to private pressure from one or more members of the Senate Judiciary Committee, Breyer had adopted a policy consistent with the criticisms in my letter to the committee. Accordingly, I wrote a letter to the *New York Times*, where I had also criticized Breyer, saying that I had been wrong in predicting that Breyer would disregard his ethical obligations as a member of the Supreme Court.<sup>114</sup>

### B. Breyer's Recent Recusal Policy on the Court

Unfortunately, in recent cases, Justice Breyer seems to be reverting to his pre-Supreme Court policy with regard to recusal.

#### 1. The *PhRMA* Case

For example, in 2003 the Supreme Court decided *Pharmaceutical Research and Manufacturers of America v. Walsh* (“*PhRMA*”).<sup>115</sup> The case involved an action by an association of pharmaceutical companies to keep their profits up by challenging state efforts to reduce the cost of prescription drugs to consumers.<sup>116</sup> The immediate question before the Court was whether a district court judge had properly granted a preliminary injunction against one such plan in Maine.<sup>117</sup>

According to his financial disclosure statements at the time, Breyer continued to hold stock in three major pharmaceutical companies who were suing through the Pharmaceutical Research and Manufacturers of America – Merck & Co., Genzyme Corp., and Schering-Plough Corp.<sup>118</sup> Again, the decision regarding recusal was to be made at the outset of the case, yet Breyer did not recuse himself.

Breyer did concur with the Court in vacating the preliminary judgment on the ground that it had been issued on an incorrect standard, and he concurred in remanding the case for further proceedings.<sup>119</sup> However, Breyer, writing alone, used his opinion to make, in effect, a

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114. Monroe H. Freedman, Letter to the Editor, *Justice Breyer Takes Ethics Seriously*, N.Y. TIMES, Nov. 9, 1994, at A26.

115. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003).

116. *Id.* at 644.

117. *Id.*

118. Tony Mauro, *Maine Case: Prescription for Recusal?*, LEGAL TIMES, Sept. 30, 2002, at 3.

119. *Pharm. Research & Mfrs. of Am.*, 538 U.S. at 670, 674.



tactical suggestion to PhRMA about how a preliminary injunction could be justified on remand.<sup>120</sup> Breyer expressed the view that a decision by the Secretary of Health and Human Services should be given particular weight by the district court.<sup>121</sup> (The Secretary, of course, might have been persuaded to be more amenable to PhRMA's position than the district court judge had been.) Breyer also urged the district court to defer to any decision by the Secretary.<sup>122</sup>

When the *PhRMA* case first came before the Supreme Court, a reporter raised the question of whether Breyer should recuse himself.<sup>123</sup> Again, Professor Gillers came to Breyer's defense, opining somewhat delphically that because the named party was an association of pharmaceutical companies (including those in which Breyer was an investor), "[i]t's a more fluid standard . . . . You have to follow the potential consequences of the case on the investment."<sup>124</sup>

120. *Id.* at 671.

121. *Id.* at 672.

122. Breyer explained:

By vacating the injunction, we shall also help ensure that the District Court takes account of the Secretary's views in further proceedings that may involve a renewed motion for a preliminary injunction. It is important that the District Court do so . . . .

. . . .

In addition, the legal doctrine of "primary jurisdiction" permits a court itself to "refer" a question to the Secretary. That doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position with a regulatory regime . . . .

. . . .

[I]n my view, even if [the state] should choose not to obtain the Secretary's views on its own, the desirability of the District Court's having those views to consider . . . is relevant to the "public interest" determination that often factors into whether a preliminary injunction should issue . . . .

*Id.* at 672-74.

123. Mauro, *supra* note 118.

124. *Id.*

## 2. The Federal Sentencing Guidelines Cases – Breyer’s “Bias” and His “Personal Triumph”

In 2004, the following year, the Supreme Court agreed to hear two cases attacking the constitutionality of the Federal Sentencing Guidelines.<sup>125</sup> Previously, when Justice Breyer had been sitting in the First Circuit, he had announced in *United States v. Wright*<sup>126</sup> that he would “automatically” recuse himself from any case that involved a “serious legal challenge to the Guidelines themselves.”<sup>127</sup> This was consistent with a position that had been taken by the Department of Justice, which had maintained that Breyer should only recuse himself in a case that would “jeopardize the continued existence of the Guidelines system.”<sup>128</sup>

The particular aspect of Breyer’s involvement with the Guidelines that he referred to in *Wright* was that Breyer was then in the last year of his four years as a member on the Sentencing Guidelines Commission.<sup>129</sup> This was considered enough by both Breyer and the DOJ to justify his automatic recusal in a challenge to the validity of the Guidelines, even though the Supreme Court had held that service on the Commission was “an essentially neutral endeavor.”<sup>130</sup> In fact, simply being a member of the Commission was the least significant part of Breyer’s history of involvement with the Guidelines system.

Of far more importance to Breyer’s recusal is the fact that he was “the primary architect of the federal sentencing guidelines” when he served as Chief Counsel of the Senate Judiciary Committee.<sup>131</sup> Indeed,

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125. The cases are reported together as *United States v. Booker* and *United States v. Fanfan*, 543 U.S. 220 (2005).

126. *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989).

127. *Id.* at 447. Both Breyer and the Department of Justice distinguished the case in which Breyer would be called upon to interpret the Guidelines. This same distinction is adopted in FREEDMAN & SMITH, *supra* note \*, at 254-55.

128. *Wright*, 873 F.2d at 437.

129. *Id.*

130. *Id.* at 446 (Breyer, J., writing separately); *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

131. Naftali Bendavid, *Judicial Traitor or Consensus Builder? Breyer’s Role as Sentencing Pioneer Still Rankles*, LEGAL TIMES, May 16, 1994, at 7 (relying in part on Professor Albert Alschuler). See also Linda Greenhouse, *Supreme Court Changes Use of Sentencing Guides*, N.Y. TIMES, Jan. 13, 2005, at A1, A29 (Breyer “played a leading role in the passage of the Sentencing Reform Act”); Patrick Strawbridge, *Breyer Still Backs Sentencing Guides*, OMAHA WORLD-HERALD CO., Nov. 19, 1998, at 22 (“Breyer spent years helping to build sentencing guidelines for federal judges”).

Breyer expressly recognized, in a formal law school address in 1998, the "bias" that may result from "my own participation in the creation of the Guidelines."<sup>132</sup> In the same address, Breyer expressed the view that the guidelines system should not be abandoned.<sup>133</sup>

Also of more importance than Breyer's mere service on the Commission, is his significant achievement as a Commission member of salvaging the entire Guidelines project at the beginning of his tenure on the Commission. As the new Commission struggled to establish workable guidelines, "the panel erupted into bitter disputes."<sup>134</sup> Meanwhile, federal judges were "furious" with the guideline scheme being proposed, ultimately creating "fierce opposition" from the judiciary.<sup>135</sup>

With the deadline approaching, "Breyer stepped in and single-handedly wrote the concept of the [G]uidelines we now have."<sup>136</sup> According to a former sentencing commission staffer, Breyer was "a wonderful consensus-builder, a brilliant analyst."<sup>137</sup> "He's responsible for the conceptual framework of the [G]uidelines and for striking the key compromises."<sup>138</sup>

To sum up, then, the mere fact of Breyer's membership on the Commission is the least significant aspect of his role regarding the Guidelines. He was the "primary architect" of the Guidelines; he saved the Guidelines at the outset of the commission's existence when they were in jeopardy; he "single-handedly wrote the concept of the [G]uidelines we now have,"<sup>139</sup> and is "responsible for the conceptual framework of the [G]uidelines."<sup>140</sup> Finally, he has, in a formal public context, acknowledged "bias" on his part that might result from his intensive and crucial involvement in the project.

Breyer's recusal from the Supreme Court cases challenging the constitutional validity of his project would therefore seem to have been inevitable. Apparently, in wanting to ensure his key role as preserver of

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132. Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 1999 WL 730985, at \*11 (1999).

133. *Id.* See also Strawbridge, *supra* note 131, at 22.

134. Bendavid, *supra* note 131, at 7.

135. *Id.*

136. *Id.* (quoting Professor Ronald Wright, who specializes in sentencing at Wake Forest University).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

his creation, however, Breyer sought an opinion that would justify his participation in the case, and turned, not surprisingly, to Professor Gillers.

In response, Gillers wrote Breyer a brief, superficial opinion letter containing virtually no legal analysis and making no reference to *Liljeberg* or to any other Supreme Court decision dealing with recusal.<sup>141</sup> However, Gillers was able to conclude that there is “no reason” for Breyer to follow the “cautious approach” he had announced in his *Wright* opinion in 1989. Indeed, Gillers even found no need to “invite the litigants to address your qualification to sit,”<sup>142</sup> because there is no “reasonable basis to question your impartiality on the issue of the validity of the Guidelines.”<sup>143</sup>

The reference to “inviting the litigants to address [the Justice’s] qualification to sit”<sup>144</sup> was to subsection 455(e), which allows a judge to avoid disqualification if he can obtain a waiver from the parties, “preceded by a full disclosure on the record of the basis for disqualification.”<sup>145</sup> Apparently, neither Breyer nor Gillers trusted the parties to grant such a waiver if provided with full disclosure of the circumstances.

Finally, Gillers assured the Justice, “Nor is there any other basis to question your authority to sit in such a case by virtue of your prior service.”<sup>146</sup> The prior service mentioned in the letter was that Breyer had been a member of the Sentencing Commission.<sup>147</sup> Subsequently, however, Gillers took a contrary position in a less compelling case, when Justice Samuel A. Alito, Jr., chose a law clerk who had worked for Time Warner and for the government. The clerk, Gillers opined, “cannot work for the justice on any cases that come before the court if he worked on those matters at Time Warner or the government.”<sup>148</sup> As Gillers correctly explained with regard to the clerk, “You don’t want him to judge the quality of his own work.”<sup>149</sup>

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141. Letter from Stephen Gillers, Professor of Law, to Justice Stephen Breyer (July 2, 2004) [hereinafter Gillers Letter] (on file with author).

142. *Id.*

143. *Id.*

144. *Id.*

145. 28 U.S.C. § 455(e).

146. Gillers Letter, *supra* note 141.

147. *Id.*

148. Adam Liptak, *New Clerk for Alito Has a Long Paper Trail*, N.Y. TIMES, Feb. 14, 2006, at W14.

149. *Id.*

Moreover, Giller's letter seriously understated Breyer's role in creating and preserving the Guidelines. Left unmentioned, and obscured by the opaque reference to "[no] other basis"<sup>150</sup> for recusal, were Breyer's role as the "primary architect"<sup>151</sup> of the Guidelines, Breyer's success in saving the Guidelines when they were in jeopardy,<sup>152</sup> Breyer's achievement in "single-handedly [writing] the concept of the [G]uidelines we now have,"<sup>153</sup> Breyer's responsibility for "the conceptual framework of the [G]uidelines,"<sup>154</sup> and Breyer's own acknowledgment of the "bias" on his part that might result from that intensive and crucial involvement in the project.<sup>155</sup>

Fortified by Gillers' short and inadequate letter, Justice Breyer not only sat on the Guidelines cases, but he cast the decisive vote in a 5-4 split, and he further wrote the opinion that preserved the Guidelines from oblivion.<sup>156</sup> Again, the decision regarding recusal should be made at the outset, and the judge's ultimate decision is not material. However, the case for Breyer's recusal is pithily expressed in the report of the decision by Linda Greenhouse in the *New York Times*.<sup>157</sup> "The Sentencing Commission remains intact and the guidelines are still on the books, with the presumption that most judges will follow them most of the time."<sup>158</sup> Therefore, Greenhouse concluded, the decision was something of a "personal triumph" for Justice Breyer, who had once again saved his creation from oblivion.<sup>159</sup>

## V. THE BREYER COMMITTEE REPORT

Chief Justice Rehnquist's mandate to the Breyer Committee is brief and explicit.<sup>160</sup> The committee is to "evaluate how the federal judicial system is dealing with misbehavior and disability."<sup>161</sup> Moreover,

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150. *Id.*

151. Bendavid, *supra* note 131.

152. *Id.*

153. *Id.*

154. *Id.*

155. Breyer, *supra* note 132, at \*11.

156. *United States v. Booker*, 543 U.S. 220, 226 (2005).

157. Greenhouse, *supra* note 131, at A29.

158. *Id.*

159. *Id.*

160. See JCDA STUDY COMM., *supra* note 5, at app. A at 131.

161. *Id.*

Rehnquist anticipated that this study would be the first “comprehensive” look into the judicial discipline system since 1991.<sup>162</sup>

Understandably, a principal concern of the committee was with cases of judicial impropriety that have had high visibility. The committee noted that high-visibility cases are of special importance because “the public is particularly likely to form a view of the judiciary’s handling of all cases on the basis of these few.”<sup>163</sup>

As noted at the outset of this article, the appointment of the committee resulted, in substantial part, from the intense criticisms caused by the failures of Supreme Court Justices to recuse themselves when required to do so. Those cases, such as Justice Scalia’s denial of recusal in the *Cheney* case, are the highest visibility cases of all. Indeed, it is doubtful that many members of the public have been at all as aware of recusal failures by lower court judges.

Thus, the Breyer Committee had a mandate to take a comprehensive look at the problem of judicial misconduct, and the committee itself recognized the critical importance to that mandate of high-visibility cases. Nevertheless, the committee chose to ignore the highest-visibility cases of all, in which Supreme Court justices have, with impunity, ignored their statutory and constitutional obligations to recuse themselves.

The way the committee accomplished that was to announce at the outset of its report, without giving any reason, that the task before it was not a comprehensive one, but “a narrow one.”<sup>164</sup> The committee also asserted that it had not been asked to “rewrite” the Judicial Conduct and Disabilities Act.<sup>165</sup> That, of course, is accurate. However, the Chief Justice had directed the committee to “evaluate” how the federal judicial system as a whole was dealing with judicial misbehavior.<sup>166</sup> Further, he had directed the committee to determine whether there are “any real problems.”<sup>167</sup> Moreover, the Chief Justice had contemplated a “comprehensive” investigation.<sup>168</sup> Most important, although the committee had not been asked to “rewrite” the relevant legislation, the committee did recognize that it was expected to “evaluate how the

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162. *Id.*

163. *Id.* at 5.

164. *Id.* at 2.

165. *Id.*

166. See *id.* at app. A at 131.

167. *Id.*

168. *Id.*

federal judicial system is dealing with judicial misbehavior” and to make appropriate recommendations to respond to congressional criticisms.<sup>169</sup> Accordingly, the committee did, in fact, devote an entire concluding chapter to Recommendations.<sup>170</sup>

How, then, did the Breyer Committee manage to ignore the most serious problem of all? The answer lies in the fact that the Judicial Conduct and Disability Act applies to all federal judges except members of the Supreme Court.<sup>171</sup> Thus, by declining to “rewrite” that statute, the committee tried to give the impression that it was also beyond its mandate even to recommend that new legislation might be written by Congress to deal with judicial misconduct by members of the Supreme Court.<sup>172</sup>

Accordingly, the Breyer Committee labored for over two years, produced a hefty report, and ignored completely any mention of the principal problem that had given rise to the committee’s existence.

## VI. CONCLUSION

Supreme Court Justices have been ignoring the mandates of both the Due Process Clause and the federal disqualification statute, repeatedly refusing to recuse themselves in cases in which their impartiality might reasonably be questioned. In response to widespread criticism of these recusal failures, former Chief Justice William Rehnquist established the Judicial Conduct and Disability Act Study Committee. Unfortunately, Rehnquist appointed Justice Stephen Breyer to chair the committee.

Breyer was a particularly inappropriate choice to head up such a committee because, both in the First Circuit and in recent cases in the Supreme Court, he has conspicuously disregarded his own recusal obligations. In addition, he has brushed aside criticisms of Justice Scalia’s denial of a recusal motion in the *Cheney* case, which was a particular focus of the criticisms of judicial misconduct that led to the establishment of the committee.

Predictably, therefore, the Breyer Committee’s report and recommendations have ignored completely the most highly visible and important cases of judicial misconduct – those involving Breyer himself

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169. *Id.*

170. *Id.* at 107-125.

171. 28 U.S.C. § 351(d)(1).

172. How that might best be done will be the subject of a subsequent article.

and his colleagues on the Supreme Court of the United States. Accordingly, the future of judicial impartiality on the Supreme Court looks bleaker than ever.



