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July 11, 1994

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

Re: Judge Stephen Breyer

Dear Mr. Cutler:

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

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

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

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

3. I have assumed the following additional facts:

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

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

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

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

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

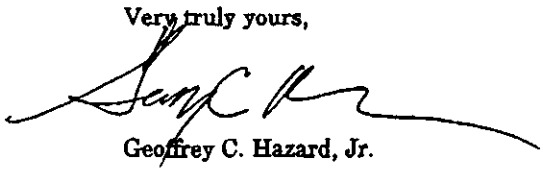
5. In my opinion, Judge Breyer's participation in the foregoing cases did not entail a violation of judicial ethics. None of the cases involved Lloyd's as a party or as having an interest disclosed in the litigation. None could have had a material effect on Judge Breyer's financial interests. None had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

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

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

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

Very truly yours,



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