grandson, Sean. He took my grandson to a car show in Los Angeles and they were planning another outing. A lot of people wouldn't care anything about an 11-year-old kid, but Bob did.''

None of us is untouched by the terror of September 11, and many Californians were part of each tragic moment of that tragic day. Some were trapped in the World Trade Center towers. Some were at work in the Pentagon. And the fates of some were sealed as they boarded planes bound for San Francisco or Los Angeles.

I offer today this tribute to one of the 51 Californians who perished on that awful morning. I want to assure the family of Robert Penninger, and the families of all the victims, that their fathers and mothers, sons and daughters, aunts, uncles, brothers and sisters will not be forgotten.

ITALIAN BREAST CANCER SEMI-POSTAL STAMP

Mrs. FEINSTEIN. Mr. President, just over four years ago, the U.S. Postal Service began issuing semipostal stamps to raise money for breast cancer research. The breast cancer research stamp is the first postal stamp in our Nation's history to raise funds for a special cause. Since its inception in the summer of 1998, the program has raised over $27.2 million for research.

The stamp is just as strong today as it was 4 years ago when Congress passed legislation I introduced based on a creative idea of my constituent, Dr. Ernie Bodai, and the hard efforts of others, including Betsy Mullen of the Women's Information Network Against Breast Cancer and the Susan G. Komen Foundation.

The price of a breast cancer research stamp recently increased to keep pace with the cost of first class mail, ensuring that breast cancer research will continue to reap the benefits of the stamp's success.

It has also focused public awareness on a devastating disease and provided a symbol of hope and strength to breast cancer survivors, their loved ones, and others who care about eradicating breast cancer as a life-threatening disease.

I am pleased to announce today that the concept of a semipostal breast cancer research stamp has now spread across international borders. The country of Italy recently has followed the United States lead and is issuing a semipostal stamp for breast cancer research.

Breast cancer is not just an American problem, but it is also a global problem. Approximately 250,000 new cases of breast cancer are diagnosed annually in the European Union. Each year, in Italy alone, more than 30,000 women are diagnosed with breast cancer and 11,000 die of this disease.

Modeled after the U.S. version, the Italian stamp is priced above the value of a first class letter with proceeds dedicated to the battle against breast cancer. Converted into U.S. dollars, approximately 20 cents for each letter sent with the new semipostal will be used to fight breast cancer. In total, Italy expects to raise approximately $2.5 million dollars for breast cancer research, education, screening and treatment programs throughout the country.

Italy's new semipostal stamp, which will be available through 2003, commemorates the 50th anniversary of the death of Queen Elena di Savoia, whose philanthropic efforts included funding the first cancer center in Italy. Approximately 12.5 million stamps will be produced.

I am pleased that lessons we have learned from the launch of the U.S. breast cancer stamp are being applied in Italy. I would especially like to commend the Susan G. Komen Breast Cancer Foundation for its efforts to make the Italian stamp the success that it is here in the United States. In the words of Nancy Macgregor, the Komen Foundation's International Director: ''Breast cancer knows no boundaries, and Italy is no exception.''

I wish Italy the same success with its semipostal that we continue to enjoy here in the United States. Working together and building on each other's successes, we increase our strength in the battle against breast cancer.

NOMINATION OF D. BROOKS SMITH

Mr. LEAHY. Mr. President, I ask unanimous consent that following my statement on July 30, 2002, on the nomination of D. Brooks Smith, located on pages S7553–S7558, that three letters be printed in the RECORD. The letters are: resolution from the City Council of Philadelphia; Monroe Freedman, Professor of Legal Ethics, Hofstra University and; Stephen Gillers, Vice Dean and Professor of Law, New York University.

There being no objection, the letters was ordered to be printed in the RECORD, as follows:

RESOLUTION

Whereas, The nomination of Pennsylvania district court Judge D. Brooks Smith to the Third Circuit Court of Appeals in Philadelphia was voted out of the U.S. Senate Judiciary Committee on May 23, 2002 by a 12–7; and

Whereas, Judge Smith's nomination is opposed by a wide range of public interest organizations. Among the organizations that have formally expressed opposition to Smith's appeals court nomination are People For the American Way, Leadership Conference on Civil Rights, NAACP, Alliance for Justice, National Organization for Women, Community Rights Council, National Women's Law Center, NARAL, Earthjustice, ADA Watch Action Fund, National Partnership for Women & Families, Planned Parenthood, Defenders of Wildlife, National Employment Law Association, Committee for Judicial Independence, NOW Legal Defense and Education Fund, Disability Rights and Education Defense Fund, Feminist Majority, Friends of the Earth, Bazelon Center for Mental Health Law, National Disabled Students Union, and the National Council of Jewish Women; and

Whereas, Judge Smith's membership in a discriminatory club, his failure for ten years—in violation of governing ethical standards—to resign from the club despite his commitment to do so during his district court confirmation hearing, and the contradictory explanations he has offered for his actions all raise serious issues about Smith's judgment, willingness to follow rules, and candor; and

Whereas, Ethical questions have been raised regarding a highly publicized bank fraud case involving millions of dollars of public school money. Judge Smith continued to preside over and issue orders in the case, even though the fraud claims implicated a bank at which his wife was an employee and in which he had substantial financial interests. Several years later, he took on a related case, recusing himself only after he was requested to do so by one of the attorneys in the case, revealing only his wife's involvement and not his own financial interest. On March 14, 2002, after reviewing the facts and the arguments by Smith and his defenders, noted legal ethics professor Monroe Freedman wrote to the Senate Judiciary Committee that Smith committed ''repeated and egregious violations of judicial ethics'' and that Smith had been ''disingenuous before this Committee in defending his unethical conduct.'' Professor Freedman concluded that as a result, Smith is ''not fit to serve as a Federal Circuit Judge''; and

Whereas, Since his appointment in 1989, Judge Smith has been reversed by the court of appeals to which he has been nominated 51 times. This is a larger number of reversals than any of the judges approved and rejected by the Senate Judiciary Committee during this Congress for appellate court posts, including Judge Charles Pickering. More important than the number of these reversals, however, is their nature. Many of these reversals concern civil and individual rights, and reflect a disturbing lack of sensitivity towards such rights and a failure to follow clearly established rules of law and appellate court decisions; and

Whereas, A number of Smith's reversals have concerned discrimination or other claims by employees. For example, in Wicker v. Consolidated Rail Corp., 142 F.3d 690 (3rd Cir.), cert. denied, 525 U.S. 1012 (1998), the court of appeals unanimously reversed Smith's decision to dismiss a suit by Conrail employees who claimed that years of on-the-job exposure to toxic chemicals was making them sick. Smith had concluded that their lawsuit was barred because they had signed a waiver as part of a settlement of unrelated injury claims against the railroad. The appellate court ruled that Smith's ruling was contrary to the Supreme Court's interpretation of federal law; and

Whereas, The Third Circuit unanimously reversed Smith's decision in Ackerman v. Warnaco, 55 F.3d 117 (3rd Cir. 1995), in which he upheld a company's unilateral denial of severance benefits to more than 150 employees after they were laid off; and

Whereas, In Colgan v. Fisher Scientific Co., 935 F.2d 1407 (3rd Cir.), cert. denied, 502 U.S. 941 (1991), the appellate court unanimously reversed Smith for granting summary judgment against an age discrimination claim as untimely by ruling that the statute of limitations began to run not when the employee was terminated, but instead when he simply received a negative performance review; and

Whereas, In Schafer v. Board of Public Educ. of the School Dist. of Pittsburgh, Pa., 903 F.2d 243, 250 (3rd Cir. 1990), the Third Circuit unanimously reversed Smith for dismissing a claim that a school district's family leave policy improperly allowed only women, not men, to take unpaid leave for ''childbearing'' as well as childbirth. Based

on such decisions, the National Employment Lawyers Association has opposed Smith's confirmation, explaining that his record displays ''an attitude inimical to employee and individual civil rights''; and

Whereas, In other reversals involving individuals or other plaintiffs against government or corporations, the Third Circuit has specifically criticized Smith for abusing his discretion or failing to follow the law. For example, in Urrutia v. Harrisburg County Police Dept., 91 F.3d 451, 456–457 (3rd Cir. 1996), the appellate court found that Smith had ''abused his discretion'' in refusing to allow a prisoner to amend a complaint contending that he had been repeatedly stabbed while handcuffed and in the custody of police officers who looked on while failing to take any action; and

Whereas, In Metzgar v. Playskool, 30 F.3d 459, 462 (3rd Cir. 1994), three Reagan appointees reversed Smith for dismissing a claim involving death by asphyxiation of a 15-month-old child who had choked on a toy, noting that they were ''troubled by the district court's summary judgment disposition'' of his parents' claims; and

Whereas, In In re Chambers Development Company, 148 F.3d 214, 223–225 (3rd Cir. 1998), concerning a claim against a county utility authority, the Third Circuit took the extraordinary step of issuing a writ of mandamus—an unusual direct command to a judge to rule a certain way—against Judge Smith, who had ''ignored both the letter and spirit of our mandate'' in a prior ruling in the case. As the court of appeals explained, this was a ''drastic remedy'' that is utilized only ''in response to an act amounting to a judicial usurpation of power''; and

Whereas, Judge Smith has also been criticized for rulings not later reversed on appeal. For example, the Washington Post expressed concern about his decision in United States v. Commonwealth of Pennsylvania, 902 F. Supp. 565 (W.D. Pa. 1995), aff'd, 96 F.3d 1436 (3rd Cir. 1996), in which the federal government had sued the state over allegedly substandard conditions in a facility for persons with mental disabilities. As the Post put it, although ''care was, in Judge Smith's words, 'frequently not optimal'—maggots were found in one resident's ear, ants on others' bodies—the judge found these to be 'isolated incidents' '' and concluded there was no constitutional violation. In another case, Quirin v. City of Pittsburgh, 801 F. Supp. 1486 (W.D. Pa. 1992), the National Employment Lawyers Association (NELA) found that Smith had improperly applied the ''aggressive'' standard of ''strict scrutiny,'' which is reserved for claims of racial, ethnic, and religious discrimination, to strike down an affirmative action policy designed to remedy past discrimination against women. As NELA concluded, such rulings ''show a disturbing pattern of disregard and hostility for the rights of minorities and protected classes,'' now therefore,

Be it resolved by the City Council of Philadelphia, That we hereby strongly urge the United States Senate to reject the nomination of Judge D. Brooks Smith to the Third Circuit Court of Appeals.

Further Resolved, That we hereby urge Pennsylvania Senators Specter and Santorum to withdraw their support for the confirmation of Judge D. Brooks Smith to the Third Circuit Court of Appeals.

Be it further resolved, That a copy of this resolution be sent to all members of the United States Senate as evidence of the grave concern by this legislative body.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, May 17, 2002.

Hon. RUSSELL D. FEINGOLD,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINGOLD: I am replying to your May 9, 2002 request for my views on three issues surrounding the nomination of Federal District Judge D. Brooks Smith to a seat on the United States Court of Appeals for the Third Circuit. I assume familiarity with your letter and with the facts, many of which have been discussed in testimony and correspondence the Committee has received. I do not know Judge Smith and have no interest one way or the other in whether Judge Smith is confirmed. I take my facts mainly from Judge Smith's testimony or his written submissions and partly from other materials you have sent me and which I cite below. The facts do not seem to be in dispute.

Briefly, my qualifications for giving my opinion on your questions are: I am vice-dean and professor of law at New York University School of Law, where I have taught since 1978. Regulation of Lawyers (''legal ethics'') is my primary area of teaching and research and writing. I have taught this course for a quarter century here and as a visitor at other law schools. I have a leading casebook in the area, first published in 1984 and now in its 6th edition. Legal ethics includes the ethical responsibilities of judges and a chapter of my book is devoted to those issues. I have published in the area in law journals and written extensively on the subject for the popular and legal press. I speak widely on legal ethics before bar groups, at judicial conferences, at law firms, and at corporate law departments.

In summary, my conclusions are:

A. If Spruce Creek Red and Gun Club is in fact a purely social club, and not a venue in which business or professional interests are pursued, then Canon 2(C) of the Code of Conduct for United States Judges would not forbid a federal judge to be a member of the club. On this assumption, the answers to the first two questions under Part A of your letter are ''yes'' (the club is exempt from the prohibition against membership in an organization that invidiously discriminates) and ''no'' (Judge Smith did not violate the Code by maintaining membership for 11 years). My answer to your third question is that Judge Smith had no obligation to seek an opinion from the Advisory Committee on the propriety of his membership in the club. Judge Smith had the responsibility to make sure that the club was and remained a purely social club and that his membership was therefore allowed.

B. A federal judge who is invited to a privately funded judicial education seminar, with expenses paid, has on obligation to identify the source of funding to ensure that acceptance of the gift is proper. This duty is not eliminated because the sponsor of the seminar is a law school or other educational institution that would not itself require the judge to refuse the invitation. Funding for the seminar may come from a person or entity whose generosity the judge should not accept but whose contribution does not appear on the face of the invitation. Consequently, Judge Smith should have inquired of the sponsor of private judicial seminars he attended to learn the source of funding and establish that there was no impropriety in accepting the invitation under the circumstances.

C. Your third inquiry, concerning the timing of Judge Smith's recusal decisions in SEC v. Black and U.S. v. Black, is quite complicated. In sum, I conclude that Judge Smith should have revealed his and his wife's investment in Mid-State Bank or in Keystone Financial, Inc., its holding company (hereafter, collectively ''Mid-State''), not later than October 27, 1997. Having failed to do so, he should have made this disclosure on October 31, when he did recuse himself. Failing to do so then, he should have done so as soon as he knew of Mid-State's financial exposure for Black's frauds so that counsel could, if advised, seek to vacate Judge Smith's rulings based on a violation of the judicial disqualification statute. Whether Judge Smith should have recused himself on October 27 given what he says he knew at the time is a more difficult question, which I address below. However, I conclude that Judge Smith should have recused himself on October 27 based on what he could have known and should have discovered on that day. Judge Smith should have recused himself form United States v. Smith as soon as it was assigned to him.

THE SPRUCE CREEK ROD AND GUN CLUB

Judge Smith promised more than he had to at his 1988 confirmation hearings. The Code of Conduct for United States Judges did not then forbid membership in purely private clubs that had no business or professional purpose. Although the Code was thereafter strengthened, following on amendments to the ABA Model Code of Judicial Conduct in 1992, even as strengthen the Code does not forbid membership in Spruce Creek. This assumes, however, that the club has no business or professional purpose or function. Of course, the opportunity for club members to meet in informal, social situations, to get to know each other in that way, can itself be seen as professionally or commercially advantageous, but that alone does not make the club's discrimination ''invidious.'' Defining the line between clubs that may exclude women (or men, for that matter) and those that may not because they have a business or professional dimension is not always easy. But there is a line and it is rooted in constitutional jurisprudence.

I am assuming that club members sponsor no events or meetings that could be characterized as business-related or profession-related. If my assumptions are wrong, however, if the club is not strictly social, then my conclusion will change. I understand that the Committee has received information that the club did allow its members to host business or professional meetings. If it did, it would not be purely private as I have been using that term, and its discrimination against membership for women would then be ''invidious'' within the meaning of the Code's prohibition. This would be true even if women were allowed to attend some or all business or professional meetings hosted by the club's male members. Since the propriety of Judge Smith's membership depended on the club maintaining a purely social purpose, he had the responsibility of assuming that it has and retained this status.

Judge Smith suggests that he reexamined his obligations under the Code of Conduct in 1992, when it was revised, and concluded that his 1988 promise obligated him to do more than the Code required him to do. As I wrote, the post 1988 amendments actually strengthened the prohibition against membership in discriminatory clubs, but even as strengthened, Spruce Creek does not, on the assumptions made, qualify as a club that ''practices invidious discrimination on the basis of . . . sex'' within the meaning of Canon 2(C).

Two other comments on this issue: First, while Judge Smith could have asked the Advisory Committee to give him an opinion on whether the club's discriminatory policy was ''invidious,'' I know of no rule imposing a duty to do so. Second, I realize that Judge Smith made a promise to the Committee in 1988 and then seems to have concluded that

he had promised more than the Code required. Whether and to what extent the Committee should be influenced by Judge Smith's failure to keep his promise notwithstanding this later conclusion, or by the Judge's failure to inform the Committee that he did not intend to keep his promise because of this conclusion, is not properly a question for me.

JUDICIAL EDUCATION SEMINARS

As you know, expense-paid seminars for judges has been a challenging issue. The gap between judges' reactions to criticism of these events and the perspectives of the critics does not seem to be shrinking. Many judges are annoyed that anyone would think they would compromise their objectivity because of an invitation (or many invitations) to a privately funded judicial seminar. Critics, on the other hand, argue that only certain groups of litigants have the wherewithal to support these seminars and that it diminishes the appearance of justice when judges attend them at luxury resorts to hear programs designed by those who can afford to sponsor them. Unfortunately, we have little in the way of guidance, mainly Opinion 67 of the Advisory Committee and several judicial opinions, including Judge Winter's opinion in In re Aguinda, 241 F.3d 194 (2d Cir. 2001). Judge Winter wrote: ''[A]ccepting something of value from an organization whose existence is arguably dependent upon a party to litigation or counsel to a party might well cause a reasonable observer to life the proverbial eyebrow. . . . Judges should be wary of attending presentations involving litigation that is before them or likely to come before them without at the very least assuring themselves that parties or counsel to the litigation are not funding or controlling the presentation.'' Judge Winter cites In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992), another leading case from Judge Smith's Circuit. the judge there was disqualified after attending a conference without ascertaining the source of funding for it. The source made the judge's attendance improper.

The authorities agree that before attending an expense-paid judicial seminar, a judge should learn who is picking up the tab for the judge's travel and housing. This indeed is what Opinion 67 says: ''It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of litigation. If there is a reasonable question concerning the propriety of participation, the judge should take measures as may be necessary to satisfy himself or herself that there is no impropriety. To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge's attention.''

Obviously, there would be room for much mischief if a judge invited to an expense-paid judicial seminar could rely on the non-profit nature of an apparently neutral sponsor to immunize the judge's attendance. Judge Smith is therefore wrong in his assumption, in reply to your follow-up question 6a, when he wrote that because ''George Mason's sponsorship of LEC was apparent from the face of the materials I received regarding the seminars, I conclude that no further inquiry into sources of funding was required.'' If was required.

SEC V. BLACK

Conflicts in the Black cases arise from the fact that the Smiths owned stock in Mid-State or Keystone. How much is uncertain. I understand that Judge Smith's financial disclosure form In 1997 revealed between $100,000 and $250,000 in stock in Keystone. The form also indicated that his wife had a 401(k) account with Mid-state, where she was an officer. Her account ranged between $100,000 and $250,000, but Judge Smith's financial disclosure form did not say where the money was invested. In answers to recent questions you posed (question 14), Judge Smith wrote: ''At the time in question [October 1997], my wife and I held stock in Mid-state and she was employed by the company.'' So now we do know that Mrs. Smith also held stock in Mid-State, but we don't know how much. As a result, we do know the amount of the Smiths' joint holdings in Mid-State or Keystone in October 1997 and thereafter or what percentage of their wealth it represented.

Anoter basis for a possible conflict in the Black matters was the fact that Mrs. Smith was an officer in Mid-State. However, Judge Smith recently responded to your written quesiton1 7 by stating that his wife ''was a corporate loan officer for Mid-state, a position far removed from those parts of the bank that had dealings with John Gardner Black.''

In this answer,I will assume that the Smiths had a substantial financial interest in Mid-State or Keystone or both (it was between $100,000 and $500,000) and that that interest represented a signficant portion of their wealth. No submission offered by or on behalf of Judge Smith has asserted otherwise and the record we have supports this conclusion.

a. October 27, 1997

I want now to focus on October 27, 1997 and the weeks immediately preceding:

On October 24, ''all investment funds were removed from Mid-State Bank'' by the Trustee. Letter of Mark A. Rush, 2/22/02, at 2, Judge Smith knew this because the fact is recited in an order he issued October 27. Letter of Douglas A. Kendall, 2/20/02, at 5.

In the chambers conference with the Trustee and his counsel on October 27, Judge Smith was told ''that information, although in its very early developmental phases, was being uncovered which may change Mid-State-Bank's involvement in the case from that of merely a depository of funds.'' He was advised ''of only a developing but not confirmed suspicion by the Trustee that Mid-State Bank's role may be more than a depository.'' Rust letter at 2, 3.

In September and October, the press in Pennsylvania reported the possibility that defrauded school districts would sue Mid-state. Kendall letters, 5/10/02, at 4 and exhibits. Certainly, the possibility of bank liability, or at least exposure to litigation, would have been apparent to any lawyer. Suits were in fact filed, starting as early as October 31, 1997. Id at 4. The suit was reported in the press the next day. Id.

Papers before Judge-Smith suggested that the bank prepared reports to the school districts showing the market value of their account at $157 million, while reporting to Black that the market value of these accounts was only $86 million. This information was in a footnote that was in an exhibit to an exhibit in the papers before Judge Smith, who apparently did not recognize its significance or did not see it. Reply to your follow-up question 8. However, the discrepancy was reported in the local press on October 31. Id. at 3.

In the October 27 chambers conference, Judge Smith told the Trustee and his counsel ''of his wife's employment in an unrelated division of Mid-State Bank.'' And the Judge ''indicated an intention to consider recusing himself based on the potential for a future appearance of a conflict.'' Rush letter at 3. Judge Smith did not then reveal the Smiths' financial interest in Mid-State or Keystone.

The information Judge Smith knew on October 27 required him to reveal his family's financial interest before ruling on the applications before him. So far as the Trustee and his counsel knew, the only basis for recusal was Mrs. Smith's employment in an ''unrelated division'' of the bank. That is all they were told. Understandably, they did not see that as a fact that required recusal or further discussion. (More on this below.) But had Judge Smith revealed the Smiths' financial interests in Mid-State on October 27, then the Trustee and his counsel, and counsel for the school districts seeking to unfreeze money held by Black in non-Mid-State banks, would have been able to provide the Judge with information (already in the press) about Mid-State's and Keystone's potential future liability for Black's frauds. Then, the footnote in the exhibit to the exhibit in the papers before Judge Smith could have surfaced and its import explained. Then, too, the public discussion about the possibility of legal action against Mid-State could have surfaced. The Trustee and counsel would then have had reason to be more expansive about their statement in chambers that ''Mid-State Bank's involvement in the case [may change] from that of merely a depository of funds.''

In fact, had Judge Smith revealed not merely his wife's employment in an ''unrelated division'' of the bank on October 27, but also his family's substantial financial investment in the bank, it would have been incumbent on counsel to reveal all they knew about the bank's legal exposure and to explore with the Judge whether what they knew, but did not see any need to elaborate, and what Judge Smith knew, but did not reveal, required recusal under Section 455(b)(4), which disqualifies a judge if the judge or the judge's spouse has ''any . . . interest that could be substantially affected by the outcome of the proceeding.'' Based on what parties collectively knew at the time, this exploration should have led to Judge Smith's recusal on October 27, before he ruled on the school districts' effort to unfreeze non-Mid-State accounts in Black's control (totalling about $175 million). Once Judge Smith learned of the probable lawsuits against Mid-State, he would have had to step out of the case. By failing to reveal his family's financial interest, however, Judge Smith effectively prevented the entire inquiry and led to a ruling he was disqualified from making because a bank in which his family had a substantial investment had an interest in the ruling, as discussed further below.

Although I focused above on the particular ruling Judge Smith made on October 27, that ruling is incidental to a more imposing fact. Even if there were no application for a ruling on October 27, Judge Smith should still have recused himself based on information that he could and should have discovered on that date. That information revealed the enormity of Mid-State's potential liability. As stated above, and as reported in the press in October, Mid-State's own documents showed a potential shortfall of $71 million in school district funds that Black had deposited with Mid-State. So I want to stress that it was this exposure, and not alone the ruling Judge Smith was asked to make on October 27, that required recusal by that date if not sooner. In short, Judge Smith should not have been sitting in a matter when, as he could have and should have known, a bank in which he had a substantial investment faced financial liability in tens of millions of dollars. As we now know, Keystone eventually paid $51 million to settle depositor claims.

b. October 31, 1997

On October 31, Judge Smith recused himself citing only his wife's employment. He has explained to the Committee that he did so because he foresaw the possibility that the bank might be a source of evidence in the case. Letter of 2/25/02, at 2. As stated, Judge Smith has acknowledged that his wife was in a ''position far removed from those parts of the bank that had any dealing with John Gardner Black.'' It is hard to understand why Mrs. Smith's position caused Judge Smith to recuse himself, even assuming that Mid-State officials might be deposed or that Mid-State might be the source of documents. At this point Judge Smith believed that the bank was merely a ''depository.'' If that were all it was, it should make no difference that officers or employees, from a part of the bank ''unrelated'' to the one in which his wife worked, might be deposed or that the bank might be a source of documents. In fact, Judge Smith does not appear to believe that he even had to recuse for this reason. In his answer to your question 13, he wrote that he had no ''legal obligation'' to recuse when he did, but did so ''out of an abundance of caution.'' (See also the answer to your question 14.) Judge Smith acknowledges in his answer to question 18 that there was a possibility that his wife might herself be a witness. By failing to reveal the Smiths' investments on October 31, Judge Smith denied the litigants information that they could have used to overturn on October 31, Judge Smith denied the litigants information that they could have used to overturn his October 27 ruling refusing to unfreeze half the money (about $77 million) that Black maintained in non-Mid-State accounts.

A ruling by a judge who should have been disqualified may be vacated. This is true even if the judge, when ruling, was unaware of the basis for the disqualification. Liljeberg v. Health Services Acquisition Corp., 486 U.s. 847 (1988) Judge Smith's rulings in SEC v. Black, and in particular his ruling on October 27 refusing to unfreeze all of the non-Mid-State funds in Black's control, could have been challenged based on the Smiths' financial interest. However, because Judge Smith did not reveal the Smiths' financial interest in Mid-State on October 27, or on October 31 when the Judge did recuse himself, or thereafter, parties to the proceedings before him, including the school districts that sought to unfreeze all of their non-Mid-State funds, could not use this interest as a basis for vacating the Judge's rulings. While it is true that a judge may recuse without giving any reason, where there are reasons for recusal that could retroactively affect the legitimacy of orders already entered, the judge must reveal that information so that the parties can determine whether to challenge the judge's orders on this basis. Id. at 867. The fact that a judge might not believe that a particular fact would suffice to warrant recusal, or to warrant an order vacating a ruling, is not a justification for failing to make the disclosure. A judge should not, through silence, be the ultimate arbiter of his or her own disqualification. If a fact could reasonably support disqualification or an effort to overturn a ruling, as is true here, that fact should be revealed so that counsel may argue it or bring it to the attention of another judge or an appellate court. Id.

c. Events after October 31, 1997

Even if Judge Smith continued to believe on October 31 that the bank's role was solely as a prospective witness in its capacity as depository, it shortly thereafter became apparent, when lawsuits were filed, that this was not so, and that in fact the bank would be exposed to financial liability. At that point, at least, Judge Smith should have revealed the Smith's financial investment in Mid-State. While it is true that Judge Smith no longer had jurisdiction over SEC v. Black after October 31, he did not need jurisdiction to make financial information known. So even assuming Judge Smith did not realize the bank's financial exposure as of October 31, which I do assume, and even assuming (which I do not) that he had no duty even to explore the possibility of the bank's financial exposure with counsel on October 27, Judge Smith should nevertheless have revealed his family's financial interest in the bank once its potential civil liability became evident, as it did soon after October 31.

Those appealing Judge Smith's order would have benefited from knowledge of the facts and amounts of the Smiths' Mid-State investment because that investment meant Judge Smith should not have ruled on any issue that could affect Mid-State's financial exposure. The effort to unfreeze the non-Mid-State money is such an issue because the more money available from other sources to compensate school districts with Mid-State accounts, the smaller would be Mid-State's exposure. In other words, if money in non-Mid-State banks could be used to compensate districts whose funds were in Mid-State accounts, Mid-State could be benefited. So could the Smiths as substantial investors.

In Liljeberg, supra, Judge Collins ruled in a case even though at the time, he was a fiduciary of a non-party (Loyola) that stood to gain financially from the ruling. At the time he ruled, he did not know of Loyola's interest in the matter, although he previously knew of it and learned of it again later. The Court agreed that Judge Collins could not have recused himself when he lacked knowledge of the disqualifying fact. A ''judge could never be expected to disqualify himself based on some fact that he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know.'' 486 U.S. at 860. The Court then went on to hold that ''[n]o one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation.'' Id. at 861. Doing so might ''promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.'' Id. at 865. Judge Collins ''silence,'' once he recalled Loyola's interest, ''deprived respondent of the basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.'' Id. at 867. So, too, here.

Judge Smith no longer had jurisdiction of the case after October 31, and therefore could not recuse himself or vacate his orders, as the Supreme Court ruled Judge Collins could have done. But once he learned of the bank's exposure, Judge Smith could have taken the lesser step of informing counsel of his family's financial interests in the bank. He should have done this because he should have realized that the following facts, once publicly known, would undermine confidence in the judiciary and create the appearance of impropriety. These facts are:

(1) Judge Smith was told on October 27 that the bank may be more than a mere depository:

(2) papers before Judge Smith on October 27 showed a substantial discrepancy between what the bank was telling depositors and what the bank was telling Black;

(3) the press in Pennsylvania was reporting on the prospect of lawsuits against the bank;

(4) the Smiths had a substantial financial interest in the bank:

(5) three days prior to October 27, as Judge Smith knew, the Trustee had removed all of the school district funds from the bank and placed it in another institution;

(6) on October 27 Judge Smith made a ruling that an objective observer could view as beneficial to Mid-State by keeping frozen monies that might be available to compensate school districts that had accounts in Mid-State;

(7) despite the information available to him on October 27, Judge Smith made no effort to conduct a further inquiry of counsel into the possible financial exposure of Mid-State or reveal his family's investment in Mid-State.

The upshot of this is that even if we assume that as of October 31 Judge Smith thought of Mid-State as merely a depository whose personnel might be witnesses, nonetheless, in retrospect, Judge Smith should have realized from the facts itemized above that his conduct threatened confidence in the impartiality of the courts and that he had to take steps to correct that, Liljeberg, quoting the lower court's opinion, states: ''The goal of Section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the Judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.'' Id. at 860 (internal citations omitted). See also In re School Asbestos Litigation, 977 F.2d at 784, quoting some of the same language from Liljeberg. It is hard to fathom Judge Smith's silence after October 31 even if one accepts his explanations for his conduct until that time.

UNITED STATES V. BLACK

This brings me to United States v. Black, the criminal case against Mr. Black, assigned to Judge Smith in 1999, when Mid-State's financial exposure was apparent. Judge Smith kept the case for five months, until a motion to recuse him was made and granted. Again judge Smith cited his wife's employment as the basis for granting the motion. I don't understand why, if an ''abundance of caution'' caused Judge Smith to recuse himself sua sponte in SEC v. Black because of the prospect of testimony from bank personnel, or because the bank might be a source of documents, he did not recuse in United States v. Black immediately. Be that as it may, for other reasons Judge Smith should never have accepted United States v. Black. First, Third Circuit precedent directly on point prohibited Judge Smith from accepting the case. ''We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding because the strict overarching standard imposed by §455(a) requires that the appearance of impartiality be maintained.'' United States v. Nobel, 696 F.2d at 231, 235 (3rd Circuit 1982). This is a holding of the case and cannot be more explicit. The court went on to conclude that on the particular facts disqualification had been waived under §455(e). But the court would not have had to consider waiver unless it had first found that the judge, as an investor in the defrauded institution (''INA''), was disqualified from sitting in judgment of the man accused of defrauding that institution.

The facts here are even stronger than the facts in Nobel. Nobel also held that §455(a) would have required disqualification of the trial judge even though ''by the time of the criminal trial a settlement had been effected which called for defendant to repay INA for substantially all of the funds which defendant received as a result of the fraud.'' Id. at 234. Since INA had recovered its lost money in Nobel, no ruling in that case could have affected the size of the investing judge's loss. Not so here. Mid-State was either the victim of Black's misconduct or civilly liable for facilitating it (or perhaps both). In either event, unlike INA, it stood to lose or have to pay a lot of money (as in the end it did) in part as a result of Black's acts. Obviously, it was in the bank's interest to minimize the amount it would lose or have to pay, and in furtherance of that goal it would want to shift as much blame to Black as possible. It was in the interest of the Smiths as Mid-State investors to achieve the same objectives. It should have been apparent that these objectives might be furthered by rulings in Black's criminal case and by limiting any monetary sanction against Black, as next discussed. Judge Smith's defense (in answer to your question 20) that Nobel is inapposite because Mid-State was not a ''victim'' in the same way that INA was a victim entirely misses the purpose of the disqualification statute and the reasoning of Nobel.

Judge Smith should have realized that decisions he might make in Mr. Black's criminal case could affect the civil actions then pending against Mid-State. This could happen in at least two ways. First, Judge Smith would be called upon in Black to make evidentiary rulings that could lead to the revelation, or to the concealment, of information that might affect the course of the civil litigation against Mid-State. Second, I understand that in the event of a conviction, Black would have been subject to monetary sanctions. Obviously, the more money Black had to pay as a criminal sanction, the less money he would have available to compensate the school districts allegedly harmed by Mid-State and Black. Consequently, Mid-State would have an interest in Black retaining as much money as possible so that his wealth could be used to offset depositor losses. If somehow Judge Smith did not appreciate that his family's Mid-State investments required recusal, he should have revealed this information to counsel so they, and the defendant, could decide whether to act on it.

In sum, assuming that Judge Smith did not know of Mid-State's financial exposure on October 27, 1997, and did not therefore recognize a need to recuse himself in SEC v. Black, still there was sufficient information before him to warrant both further inquiry and revelation of his family's investments in Mid-State. Inquiry and revelation at this point would have resolved the issue and made disqualification immediately necessary. As stated above, a federal judge does have a duty to be forthcoming with facts that could support a request for recusal. Once Mid-State's financial exposure became apparent, as early as press reports of the first lawsuit on November 1, Judge Smith's continued silence is inexplicable. His order of October 27 was being challenged and his family's financial investment would have provided the challengers with strong arguments to vacate it, perhaps more quickly. Just as Judge Collins in Liljeberg should have immediately revealed his reawakened knowledge of Loyola's interest in a litigation before him, Judge Smith should have revealed his family's financial interest in the bank immediately on learning that the bank had financial exposure in the events underlying SEC v. Black.

For the reasons given above, Judge Smith should never have accepted United States v. Black. Rulings in that case have affected the amounts of money Mid-State would eventually have to pay and therefore the value of the Smiths' investment. Even if they could not, Circuit precedent required his recusal.

I hope I have answered your questions. Please don't hesitate to ask if I can be of further assistance.

Sincerely,

STEPHEN GILLERS,
Vice Dean.

HOFSTRA UNIVERSITY,
SCHOOL OF LAW,
Hempstead, NY, May 21, 2002.

Re nomination of Judge D. Brooks Smith.

Hon. RUSSELL D. FEINGOLD,
Committee on the Judiciary, Hart Senate Office Building, U.S. Senate, Washington, DC.

DEAR SENATOR FEINGOLD. This letter is in response to your letter to me of May 9, 2002, requesting my opinion on ethical issues that have arisen in connection with the nomination of United States District Judge D. Brooks Smith to the United States Court of Appeals for the Third Circuit. These issues related to (A) Membership in the Spruce Creek Rod and Gun Club; (B) Attendance at Judicial Education Seminars; and (C) Judicial Disqualification Requirements.

(A) Membership in the Spruce Creek Rod and Gun Club

I had originally concluded that Judge Smith's membership in the Spruce Creek Rod and Gun Club was not a ground for denying him a judgeship on the Court of Appeals. In reaching that conclusion, I was relying in significant part on the opinion expressed in the letter to Senator Orrin G. Hatch of April 23, 2002 by Professor Ronald D. Rotunda, for whom I have considerable respect. Subsequent research has convinced me, however, that Professor Routunda's analysis in this instance is seriously flawed, that his conclusion is clearly wrong, and that Judge Smith's membership in the Club is a serious violation of his ethical responsibilities as a judge.

I was troubled from the outset, of course, that Judge Smith's membership in the Rod and Gun Club violates the plain meaning of Canon 2C of the Code of Conduct for United States Judges. That provision forbids a judge to hold membership in an organization that ''practices invidious discrimination on the basis of . . . sex. . . .'' Since the bylaws of the Rod and Gun Club arbitrarily restrict membership to men, and since Judge Smith held membership in the Club for eleven years while he was a federal judge, his violation of Canon 2C appears to be obvious.

Nevertheless, two aspects of Professor Rotunda's letter persuaded me that this plain-meaning reading was not the final word. First, I accepted Professor Rotunda's assertion that the Club is a ''purely social'' organization with no formal business or professional activities. In this regard, Professor Rotunda may well have been misled by Judge Smith himself, who has repeatedly mischaracterized the Club to the Judiciary Committee as a ''purely social group'' that does not conduct any business or professional activities. In any event, I now understand that the crucial factual premise is false, because professional meetings are in fact held at the Rod and Gun Club.

Of equal importance to my original judgment is the fact that I accepted Professor Rotunda's statement regarding §2.14(b) of the Code of Conduct for United States Judges, Compendium of Selected Opinions (2002). In Professor Rotunda's words, that section holds that: ''[T]he Masonic Order, which limits full membership to males does not practice 'invidious' sex discrimination because it does 'not provide business or professional opportunities to members.'' Frankly, I have difficult with the notion that important business and professional contacts are not made at a club where business and professional men interact and bond with each other and with important political figures and judges. Moreover, I was troubled that this exception for the Masons—as stated Professor Rotunda—would effectively swallow up the rule against discrimination on grounds of sex. Nevertheless, for purposes of forming an opinion about Judge Smith's compliance with the Code of Judicial Conduct, I accepted Professor Rotunda's representation that such a distinction has been made in the Compendium of Opinions.

However, the full summary of the opinion regarding the Masons in §2.14(b) of the Compendium is not based simply on the premise that the organization does not provide business or professional opportunities to members (which is a factual premise that, in any event, is inapplicable to the Rod and Gun Club). Rather, the summary refers only once to the absence of business or professional opportunities, but refers twice to the religious purposes of the Masons. Compare, then, the actual summary set forth in §2.14(b) with Professor Rotunda's rendering of that summary, which is quoted supra: ''Masonic Order, represented to be fraternal organization devoted to charitable work with religious focus and not providing business or professional opportunities to members, is not consider to be an organization practicing invidious discrimination although women are not permitted to be full-fledged members. Organization is considered to be dedicated to the preservation of religious and cultural values of legitimate common interest to members. Commentary to Canon 2C.'' Because of this reiteration in §2.14(b) of the Masons as being ''devoted'' and ''dedicated'' to the preservation of religious values through charitable work, the exception for the Masons does not swallow up the proscription of Canon 2C against discrimination on grounds of sex. Instead, the Masons' exception becomes a limited one that respects the First Amendment's guarantee of freedom of religion.

Contrary to Professor Rotunda's abridged version of §2.14(b), therefore, the full text of §2.14(b) does not support the conclusion that the Spruce Creek Rod and Gun Club's discrimination against women is permissible. Accordingly, Judge Smith was clearly in violation of Canon 2C for most of the eleven years that ''dragged on'' while Judge Smith was on the bench and remained a member.

Finally, with respect to the specific questions that you raised on this issue in your letter to me:

1. Judge Smith is incorrect in asserting that revisions to Canon 2 of the Code of conduct exempt clubs like Spruce Creek from the ban on membership in discriminatory organizations. Indeed, that assertion is fanciful, on a plain-meaning reading of Canon 2C: ''A judge should not hold membership in any organization that practices invidious discrimination on the basis of . . . sex . . .'' Moreover, the exceptions in the Comment reinforce the conclusion that the Rod and Gun Club falls within this plain language. For example, the Comment exempts an organization that is ''dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members [like the Masons], or that is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.'' Obviously, neither clause in that exception describes the Spruce Creek Rod and Gun Club.

2. Judge Smith violated ethical standards by remaining a member of the Spruce Creek

Rod and Gun Club for eleven years—or, at least, for most of those years—while serving as a federal district judge. The 1998 Code reiterates the language of the 1992 Code in allowing a judge a maximum of two years to make immediate and continuous efforts to change the club's policy before resigning. Since Judge Smith claims to have made such efforts beginning in 1988, he should have resigned at least by 1992, when he knew that four years of efforts had already been unavailing.

3. If Judge Smith somehow believed after 1992 that he could ethically remain a member of the Club (a conclusion that is difficult to credit) he should at least have consulted with the Advisory Committee on Judicial Conduct before continuing his membership. Apart from that, having given his word to the Judiciary Committee that he would resign from the Club if it did not change its discriminatory bylaw, Judge Smith should have informed the Committee of his intention to break his word and his reasons for doing so.

(B) Attendance at Judicial Education Seminars

In answer to your specific question, Judge Smith is not correct in asserting that under existing ethical standards, he was not required to inquire into the identity of corporate financial supporters of an organization like the Law and Economics Center at George Mason University.

As noted in the Comment to Canon 2A, the appearance of impropriety depends on the appearance to a reasonable person who has ''knowledge of all the relevant facts that a reasonable inquiry would disclose.'' Thus, if a reasonable inquiry would reveal the source of the funding, the source of the funding is relevant to determining whether there is an appearance of impropriety and, thereby, whether the judge has committed a violation of the standard. In order to conform his conduct to the rule, therefore, the judge must at least make the same reasonable inquiry that the hypothetical reasonable person would be making into the source of the funds for the seminar.

It is important to address here Professor Rotunda's disparaging comments on the appearance of impropriety as a standard in judges' and lawyers' ethics. Professor Rotunda is correct in saying that some authorities have rejected the appearance of impropriety as a standard. That has come about, however, for reasons that have nothing to do with the merits of the standard. Moreover, the views of those authorities could not overrule either the Due Process Clause of the Constitution or the Code of Conduct for United States Judges.

In fact, the appearance of impropriety is central in judges' and lawyers' ethics, and, specially, in the Code of Conduct for United States Judges. Moreover, a fundamental principle of constitutional due process of law is that ''any tribunal permitted by law to try cases and controversial not only must be unbiased but also must avoid even the appearance of bias.'' That is, ''to perform its high function in the best way, justice must satisfy the appearance of justice.''

As recently as 1998, the Judicial Conference of the United States reiterated its commitment to avoiding the appearance of impropriety on the part of judges. As stated in the Comment to Canon 2A:

''Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome of the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.'' Then, directly addressing Professor Rotunda's complaint that the appearance of impropriety is ''too vague to be a standard,'' the Comment explains precisely what is meant by the standard of an appearance of impropriety: ''Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.''

Thus, the Code tells us, that an appearance of impropriety is one that would cause a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, to believe that the judge has violated a specific provision of the Code, or has violated the law, or has violated court rules, in such a way that impairs the judge's impartiality.

Consistent with that definition, the appearance of impropriety with regard to the judicial seminars is the appearance that a party is buying special access to the judge, both by financing an expert to express ex parte opinions to the judge, and by making a gift to the judge to induce the judge to pay special attention to the expert's ex parte opinion. Thus, judge Smith's conduct violates Canons 2, 2B, and 6, and appears to violate Canon 3A(4), as explained below.

As a general matter, there is nothing in the Code of Conduct for United States Judges that would forbid a judge from attending a privately-sponsored judicial seminar. Also as a general matter, there is no limitation—nor should there be—on the ways in which judges engage in continuing legal education.

However, a specific rule of critical importance in Canon 3A(4), which forbids a judge to consider ''ex parte communications on the merits * * * of a pending or impeding proceedings.'' This rule goes so far as to forbid a judge to receive the ex parte advice even of a ''disinterested expert'' on the law applicable to a proceeding before the judge, unless the judge gives nothing to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Also relevant is Canon 6, which provides that a judge may not receive reimbursement of expenses to judicial seminars ''if the source of such payment * * * give[s] the appearance of influencing the judge in the judge's judicial duties or otherwise give[s] the appearance of impropriety.''.

I understand that Judge Smith has attended seminars in which experts addressed legal issues that appeared to be the same as the issues that were presented in matters that were then before him. In addition, it is entirely possible that one or more of the speakers discussed those issues in informal contacts with the judge at those seminars.

Your letter refers, for example, to Gerber v. Medtronic, Inc. This was a products liability case that Judge Smith was adjudicating when he attended a seminar at Hilton Head. At the seminar, experts discussed ''Risk, Injury, and Liability.'' In the Center's words, this seminar ''demonstrates the superiority of a legal system that assigns liability to those best able to avoid injury over a system that seeks only to spread losses by assigning them to the 'deepest pockets.'''. Also, one of the lecturers at the seminar published a paper the same year arguing for federal preemption of state tort claims involving pharmaceuticals subject to federal regulation.

Upon returning home, Judge Smith granted summary judgment in favor of Medtronic—the party that had provided financial support to the Law and Economics Center, which had sponsored the seminar. The ground for Judge Smith's decision was federal preemption of the state tort claims.

On those facts, there is an appearance that Judge Smith violated Canon 3A(4) by receiving ex parte communications on issues then before him in the Medtronic case.

Under the language of Canon 3A(4), of course, it is irrelevant whether the seminars were funded by a party appearing before the judge. However, the fact that a party before the judge was providing financial support for a seminar at an expensive resort, the fact that the judge stayed at the resort without cost, and the fact that the expert's ex parte presentation was also financed in part by the party, would all heighten the appearance of impropriety. Specifically, the appearance is that the party is buying special access to the judge, both by making a gift to the judge and by financing an ex parte communication by an expert.

In addition, Judge Smith's attendance at the seminar violated Canon 6 because of the source of the reimbursement of the judge's expenses ''give[s] the appearance of influencing the judge in the judge's judicial duties or otherwise give[s] the appearance of impropriety.''

(C) Judicial disqualification requirements

Your final question to me is whether there is anything in Judge Smith's answers to your written questions that changes the opinion in my letter to the Committee of March 14, 2002 (which I adopt here by reference).

The answer is no. Judge Smith's written answers like his testimony before the Committee, consist of obfuscation and disingenuousness. In addition, those answers confirm the conclusion stated in my earlier letter that Judge Smith has committed repeated and egregious violations of judicial ethics; that to this day he has failed to inform himself of his obligations under the Federal Judicial Disqualification Statute; and that he has been disingenuous before this Committee in defending his unethical conduct.

For example, in answer to your Question 7a, Judge Smith says: ''Starting on October 27th, I began to develop concerns that MidState's involvement in SEC v. Black might, in the future, require it to play a more prominent evidentiary role in the litigation. I may have told the Trustee and his lawyer that I would consider recusing myself based on the potential for a future appearance of impropriety...'' In those two sentences, Judge Smith displays either an ignorance of the nature of conflict of interest law or a desire to confuse the issue with meaningless verbiage (''the potential for a future appearance of impropriety'').

First, all conflicts of interest are concerned with potentials—that is, with the risk of substantive ethical violations that might arise in the future. As explained by the Restatement of the Law Governing Lawyers, ''conflict of interest'' refers to whether there is a ''substantial risk'' that a substantive violation of one's ethical obligations will arise in the future. (With regard to a judge, this would refer, e.g., to the risk that the judge's impartiality might come to be impaired in the course of the litigation.) To be ''substantial,'' the risk must be ''more than a mere possibility.'' However, it need not be

''immediate, actual, and apparent.'' On the contrary, as explained in the comment to Restatement §121, a risk can be substantial, within the meaning of the rule, even if it is ''potential or contingent,'' and despite the fact that it is neither ''certain or even probable'' that it will occur. The ultimate test is that there be a ''significant and plausible'' risk of adverse effect on one's ethical responsibilities.

When Judge Smith said, therefore, that on October 27th he ''began to develop concerns that Mid-State's involvement in SEC v. Black might, in the future, require it to play a more prominent evidentiary role in the litigation,'' he was acknowledging that he had a conflict of interest that required him immediately to recuse himself. That is, he was acknowledging that there was a ''significant and plausible risk''—even if it was not ''certain or even probable''—that he would find himself adjudicating a case in which he had a substantial financial interest.

Moreover, Judge Smith reiterates that ''Mid-State Bank was not a party to the litigation before me.'' As a Federal Judge for fourteen years, Judge Smith should be familiar with the leading Supreme Court case of Liljeberg v. Health Services Acquisition Corp. He should know, therefore, that it is immaterial whether the Bank had been a party. In Liljeberg, for example, Loyola University was not a party and, indeed, the judge had forgotten that Loyola had any possible interest in the outcome of the case. Nevertheless, simply because the judge had been a trustee of Loyola, the Supreme Court vacated the judgment under the Federal Disqualification Statute (28 U.S.C. §455).

For all of the reasons in my earlier letter and in this one, therefore, I continue to believe that Judge D. Brooks Smith should not be honored with advancement to a distinguished Federal Circuit Court.

Respectfully submitted,

MONROE H. FREEDMAN,

Lichtenstein Distinguished Professor of Legal Ethics.

TRIBUTE TO ROY S. ESTESS

Mr. COCHRAN. Mr. President, one of my State's finest Federal Government officials, Roy S. Estess, announced last week his retirement from the National Aeronautics and Space Administration.

Mr. Estes had served as Director of the Stennis Space Center in Mississippi since January 20, 1989. He has been responsible for managing the center and overseeing the Center's role as the lead center for rocket propulsion testing and the lead center for implementing commercial remote sensing applications. Prior to becoming Director, he had been the Deputy Director of the Center for nine years. He had played a pivotal role in having the Mississippi Test Facility selected as the test site for the Space Shuttle main engine.

Roy graduated from Mississippi State University with a degree in aerospace engineering, and he also completed the advanced management program at the Harvard Graduate Business School.

Roy has held various engineering and management positions during his 42 years of Government service. Thirty-seven of those years have been spent with NASA. His wide ranging experience with NASA included service as a special assistant in NASA Headquarters in Washington, DC, for two consecutive NASA Administrators. Roy also served temporarily as acting director of the Johnson Space Center in Houston, TX.

Among the numerous awards and honors he has received over the years are: the Presidential Distinguished Service Award—twice—and Meritorious Senior Executive Award; NASA's Distinguished Exceptional Service, Equal Opportunity and Outstanding Leadership Medals; the National Distinguished Executive Service Award for Public Service; and Alumni Fellow of Mississippi State University; as well as Citizen of the Year in his home town of Tylertown, MS.

We will truly miss having the benefit of the thoughtful, intelligent leadership of Roy Estess.

He has been a great friend and a trusted source of good advice and counsel for me throughout my career.

I commend Roy Estess on his truly outstanding career and I wish for him much satisfaction and happiness in the years ahead.

PHARMACEUTICAL RESEARCH AND DEVELOPMENT

Mr. HATCH. Mr. President, I rise to speak on a subject related to the debate that we concluded yesterday—at least for the time-being—and that subject is pharmaceutical research and development.

Yesterday, the Senate was unable to reach consensus on the appropriate structure and scope of the much-needed Medicare prescription drug benefit. This was unfortunate for millions of senior citizens across America, including thousands of Utahns.

It is my hope that after the August recess it will be possible for the Senate to match the success of the House of Representatives and pass a Medicare drug bill. I know that we sponsors of the tripartisan proposal will not give up. Senators BREAUX, JEFFORDS, GRASSLEY, SNOWE, and I will redouble our efforts to build support for our plan.

It was also unfortunate yesterday that the Senate adopted S. 812, the Greater Access to Pharmaceuticals Act.

This is the legislation that was originally introduced by Senators MCCAIN and SCHUMER and virtually re-written in the HELP Committee in the form of an amendment sponsored by Senators EDWARDS and COLLINS.

Let me be clear. I am supportive of reasonable changes to the Drug Price Competition and Patent Term Restoration Act, commonly referred to as Waxman-Hatch, or Hatch-Waxman.

I do not oppose amending the Act. However, I do oppose the way in which it was amended, both in the HELP Committee and here on the floor.

I have spoken at some length about the deficiencies of this bill—that appeared only the day before the mark-up on July 10th, and was rocketed straight to the Senate floor the next week. While it was pending for over 2 weeks, it is accurate to say that the central matter under consideration was the Medicare drug benefit issues and that there was relatively little focus on the specifics of the underlying bill.

Despite the lopsided vote yesterday, I have explained why I thought, and still think, that it would have been preferable to hold hearings on this potentially important but largely un-vetted bill.

As ranking Republican member of the Senate Judiciary Committee, I have made known my objections to the manner in which the HELP Committee has acted to usurp the jurisdiction of the Judiciary Committee. When all is said and done, S. 812 is fundamentally an antitrust bill colored by civil justice reform and patent law considerations.

We all know that S. 812 became the floor vehicle for the Medicare drug debate for one major reason the Democratic leadership recognized that if the regular order were observed and a mark-up were held in the Finance Committee, it was almost certain that the tripartisan bill would have been reported to the floor.

I would point out to my colleagues that have just secured final passage of the conference report to accompany the omnibus bipartisan trade package. This bipartisan bill—perhaps the most important economic legislation of this Congress and a bill that will have lasting impact for years to come—came out of the Finance Committee.

I think most would agree that the Finance Committee has a long track record of reaching bipartisan consensus on major issues facing our country.

Perhaps if the Democratic leadership had given the Finance Committee the opportunity to do its job, the great success of the trade legislation would have been duplicated with respect to the Medicare drug benefit.

Instead, we come to the August recess without a Senate Medicare drug benefit bill to conference with the House.

We also come to August, almost as punishment for failing on the Medicare drug benefit issue, with the flawed HELP Committee substitute to S. 812 now adopted by the full Senate.

We could have held hearings on the actual language of the substitute.

We could have taken time to study the facts and recommendations of the major Federal Trade Commission report of the very provisions of law that S. 812 amends.

We could have learned why the Patent and Trademark Office opposes the language of the bill.

We could have learned what the Food and Drug Administration and Department of Justice, and the Office of the United States Trade Representative had to say about the bill.

But we did not.

Instead of taking the time for a careful evaluation of a potentially important change in the law, for the sake of