

“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,

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*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. Estess 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 unvetted 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