APPENDIX

GEOFFREY C. HAZARD, JR.
STERLING PROFESSOR OF LAW
YALE LAW SCHOOL
127 WALL STREET
NEW HAVEN, CONNECTICUT 06520

TELEPHONE: (203) 432-4971
FAX: (203) 432-2696

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Honorable C. Boyden Gray
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Gray:

This responds to your request for my opinion concerning the ethical propriety of conduct by Judge Clarence Thomas in sitting as a member of the panel of the Court of Appeals for the District of Columbia in the case of ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990).

It is my opinion that there was no impropriety on the part of Judge Thomas in this matter and, indeed, that it would have been inappropriate for him to disqualify himself.

The Alpo case involved an action by Alpo for damages and injunction under the Lanham Act, and a counterclaim by Ralston based on the same statute. The district court issued an injunction against both parties restraining future false advertising and made a damages award in favor of Alpo. On appeal the damages award was reversed. Judge Thomas participated as one of three judges determining the appeal and wrote the opinion for the court.

The suggestion has been made that Judge Thomas should have disqualified himself from the case. The argument supporting this suggestion is that: (1) Ralston was a party to the appeal and benefitted from the reversal of the judgment against it; (2) Senator Danforth and his family own substantial stock in Ralston; (3) Before being appointed to the bench, Judge Thomas had been employed in Senator Danforth's offices at two stages in Judge Thomas's career, and Senator Danforth was strongly supportive of Judge Thomas's appointment to the Court of Appeals, as indeed Senator Danforth is now supportive of Judge Thomas' nomination to the Supreme Court.

As you have advised me in more detail, the facts concerning the relationship between Judge Thomas and Senator Danforth are as

follows:

Judge Thomas worked for Senator Danforth from 1974 to 1977, when the Senator was Attorney General of the State of Missouri. After a two year interval, during which he worked in the Monsanto Corporate Counsel's office, he then went back to work for Senator Danforth as a legislative assistant in his Senate office from 1979 to 1981. Senator Danforth has strongly endorsed Judge Thomas for all the federal positions he has held. He played a leading role in Judge Thomas's confirmation for the Court of Appeals, and has done so again in the proceedings on Judge Thomas's nomination to be an Associate Justice.

Senator Danforth has told your office that he had no personal involvement in the case at issue. Indeed, he knew nothing about the case and never discussed it with Judge Thomas. He, his wife, and his children have significant holdings in Ralston Purina, but collectively they amount to substantially less than 1% of the total stock in the company.

No request was made by either party to the case that Judge Thomas disqualify himself. The lawyer for Alpo has stated that he was aware of Judge Thomas's friendship with Senator Danforth but made no request for disqualification because he considered the connections insignificant.

Whether Judge Thomas was required to be disqualified is determined by 28 U.S.C. (455. Section 455 defines a number of specific relationships that require disqualification and also has a general provision concerning disqualification. The general provision, which is (455(a), is interpreted in the context of the specific relationships that are defined in other subsection. These other subsections, for example, require disqualification where the judge was previously involved in the case while a lawyer (subsection (b)(2)); or was involved while in a government position (subsection (b)(3)); or where the judge "individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter..." (subsection (b)(4)). Judge Thomas had none of these relationships, or anything close to them.

It is noteworthy that the specific subsections of (455 do not preclude a judge from serving in a case in which a former law partner of the judge appears as advocate, or in a case involving a former employer of the judge, or in a case involving issues similar to those in which the judge was involved prior to becoming a judge. The specific restrictions in (455 thus have limited and carefully defined scope. This limitation is for good reason.

Most people appointed to the federal court have had extensive experience in law practice, government, business transactions, or politics, or a combination of such experience. Most of them have extensive acquaintance with government,

business and political officials, and civic leaders. If relationships arising from this experience and acquaintance were the basis for disqualification, the effects on the federal judiciary would be very adverse. Either judges could not serve in many cases involving the government, political issues, or business controversies, or appointments as federal judge would have to be limited to people with narrow legal backgrounds. It has been the carefully considered judgment in our country for years that neither of these consequences is desirable.

It is against this background that the general provision of §455 is interpreted. This is §455(a), which provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In my opinion, the fact that Judge Thomas had a professional relationship with Senator Danforth, and personal friendship with the Senator based on that relationship, and that Senator Danforth and his family owned substantial stock in Ralston, is not a relationship such that Judge Thomas's impartiality in the Alpo case might reasonably be questioned. The amount involved in the case, although large compared with someone's personal income, is small for a national business corporation such as Ralston. The effect of the litigation on Ralston one way or the other would have been minor. The effect on Senator Danforth's financial situation would have been minuscule if it could be measured at all. There is no connection between Ralston and the relationship between Senator Danforth and Judge Thomas.

I am of the firm opinion that there was no basis on which Judge Thomas should have disqualified himself. Indeed, there was no basis on which he should have considered the possibility of disqualification a serious alternative. When grounds do not exist for a judge to be disqualified, the judge has an obligation to perform his duties as a judge. A judge should not be intimidated into disqualification by the prospect that some voices might later be critical. In the situation presented in the Alpo-Ralston case, in my opinion Judge Thomas fully met his legal and ethical responsibilities.

Sincerely,

Geoffrey C. Hazard, Jr.

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Ronald D. Rotunda
Professor of Law
217/333-3456
telex: 5106007653 UI LAW UD
FAX: (217)244-1478
bitnet: rrotunda@uiucvmd

UNIVERSITY OF ILLINOIS
College of Law
147 Law Building
504 E. Pennsylvania Ave.
Champaign, IL 61820-6998

July 28, 1991

C. Boyden Gray, Esq.
Counsel to the President
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Mr. Gray:

You have asked my opinion regarding the propriety of Judge Clarence Thomas's participation in *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), a unanimous opinion authored by Judge Thomas and joined by Judges Edwards and Sentelle. The Nation Institute, a not-for-profit organization, has said that Judge Thomas should have removed himself from that case because of Ralston Purina's connection to Senator John Danforth and his family, and Judge Thomas's connection to Senator Danforth. The Nation Institute's Supreme Court Watch issued a report claiming that "Judge Thomas clearly showed flagrant disregard for common sense and legally encoded standards of judicial conduct."

The Factual Background. You have explained to me that the facts, as your office has established them, are as follows. Judge Thomas worked for Senator Danforth from 1974 to 1977, when the Senator was Attorney General of the State of Missouri. From 1977 to 1979 Judge Thomas worked in the Monsanto Corporate Counsel's office, and then he went back to work for Senator Danforth as a legislative assistant in his Senate Office from 1979 to 1981. Senator Danforth has strongly endorsed Judge Thomas for all the federal positions that he has held, and the Senator played a leading role in

Judge Thomas' confirmation for the Court of Appeals.[1]

Senator Danforth has told your office that he had no personal involvement in the *Alpo Petfoods* decision, knew nothing about it, and never discussed it with Judge Thomas. Neither the Senator nor anyone in his family was a party to the *Alpo Petfoods* case, but Senator Danforth, his wife, and his children have significant holdings in Ralston Purina (which was a party). The Senator and his family collectively own an amount of stock that amounts to substantially less than 1% of the total stock of Ralston Purina.

When this case was assigned to Judge Thomas, no party made a request that he recuse or disqualify himself. The lawyer for Alpo has now stated publicly that he was aware, at the time the case was assigned to Judge Thomas, of the relationship between Judge Thomas and Senator Danforth, but the Alpo lawyer made no request for disqualification because he considered the connections insignificant. He continues to hold this view. This lawyer has made this statement even though he obviously now knows how Judge Thomas ruled in the *Alpo Petfoods* case.

In *Alpo Petfoods* Judge Thomas, for a unanimous court, affirmed the trial court decision finding that both Alpo and Ralston Purina violated § 43(a) of the Lanham Act, and that each is entitled to an award of actual damages.[2] Judge Thomas accepted the factual conclusions of the trial court and ruled that Alpo had satisfactorily carried its burden of proof on each element of its false advertising claim against Ralston.[3] However, the court overruled the trial court's decision to award to Alpo $10.4 million (which represented Ralston's profits) because Alpo did not show willful, bad-faith conduct, as previous caselaw requires. The court then sent the case back to the trial court so that it could determine what Alpo's actual damages were.

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[1] Senator Danforth has also strongly supported Judge Thomas in the proceedings and activities that have begun as a result of Judge Thomas's nomination to be an Associate Justice. That support has, of course, occurred after the 1990 Alpo Petfoods decision, for Judge Thomas was not nominated until a few weeks ago.

[2] Alpo did not appeal the trial court's ruling that its advertising of Alpo Puppy Food was "false, material, and aimed at Ralston." 913 F.2d at 962.

[3] 913 F.2d at 969.

and award only that amount to Alpo.[4] The court also reversed the district court's decision to award attorneys' fees to Alpo because the trial court did not find "exceptional" circumstances as the federal statute requires. And the court ordered the trial court to modify the prohibitory injunction against Ralston because it was so broad in restricting speech that it raised first amendment prior restraint concerns.[5] The attorney for Alpo has been quoted as noting that Alpo could end up collecting a larger award from Ralston in light of the formula that Judge Thomas and the appellate court ordered the trial judge to follow.

You have asked my opinion as to whether, on the facts as described, Judge Thomas' failure to disqualify himself was improper.

The Federal Statute. The federal statute that governs this situation is 28 U.S.C. § 455. Subsection (b) of this section lists various circumstances that require a judge to disqualify himself or herself. For example, if Judge Thomas or his spouse or his minor child residing in his house owned even one share of Alpo or Ralston stock, he would have had to disqualify himself. § 455(b)(4) & (d)(4). No party could waive this mandatory disqualification. § 455(e). However, no one in Judge Thomas's household is the owner of any relevant stock; hence this subsection is inapplicable.

The only subsection that appears to be applicable is § 455(a), which provides:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The Appearance of Impropriety Standard. During the fight over the nomination of Justice Brandeis, some of his detractors challenged his ethics, magnified every conceivable fault, and charged that Brandeis had improperly represented conflicting interests. Now lawyers recognize that acting like Brandeis, as "counsel to the situation," can

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[4] 913 F.2d at 969.

[5] The speech "suppresses more speech than protecting these interests requires." 913 F.2d at 972. "Especially given the prior restraint involved . . .." Id.

he the best service that a lawyer can render. G. Hazard, *Ethics in the Practice of Law* 64-65 (1978).

The Brandeis episode illustrates that the invitation in the federal statute to examine the appearance of impropriety is not intended to grant *carte blanche* authority to amplify every imagined mite or speck. In considering similar language in the Code governing lawyers, the Second Circuit warned that in dealing with ethical principles, "we cannot paint with broad strokes. The lines are fine and must be so marked. [T]he conclusion in a particular case can be reached only painstaking analysis of the facts and the precise application of precedent." *Fund of Funds, Ltd. v. Arthur Andersen & Co.*567 F.2d 225, 227 (2d Cir. 1977). The American Bar Association has also warned that the "appearance of impropriety" language should not degenerate into "a determination on an instinctive, or even *ad hominem* basis . . .." ABA Formal Opinion 342 (1975).[6] That, of course, is what happened during the controversy surrounding the Brandeis nomination.

No one wishes to go down that road again. Thus, in answering your inquiry, I have turned to the case law and have sought to avoid conclusory and vague statements.

The Case Law. State courts typically must comply with state law comparably worded to the federal law. Both state and federal guidelines direct the judge to disqualify himself if "his impartiality might reasonably be questioned." The standards are similar because both state and federal standards share a similar paternity in the ABA's Model Code of Judicial Conduct.

An analysis of both state and federal cases interpreting the catch-all section dealing with the "appearance of impropriety" indicate that Judge Thomas acted properly in not offering to disqualify himself unless both of the parties would waive any objection to his presence.[7]

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[6] Discussed in, Rotunda, Ethical Problems in Federal Agency Hiring of Private Attorneys, 1 Georgetown Journal of Legal Ethics 85, 102-104 (1987).

[7] Subsection 455(e) allows a judge to sit, notwithstanding a violation of subsection 455(a) [the "appearance of impartiality" standard], if the parties waive the alleged disqualification. However, if one is not required to disqualify oneself under § 455(a), then there is no need to disclose the alleged "ground for disqualification" under § 455(e). If there is no violation of §

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Prior to the 1974 amendment to 28 U.S.C. § 455, federal courts generally held that a judge had a "duty to sit" in cases where there was no technical violation of the disqualification statute. The amended section removes this "duty to sit" requirement by requiring disqualification if there is merely a "reasonable" question as to the judge's impartiality. However, this "reasonableness" test does not mean that the judge should disqualify himself or herself merely because there might be unreasonable charges of impartiality. The test of when § 455(a) comes into effect is objective: would a "reasonable man knowing all the circumstances [come] to the conclusion that the judge's 'impartiality might reasonably be questioned' . . ." Reporter's Notes to [ABA] Code of Judicial Conduct 60 (1973). Thus, although there is no duty to sit, judges still should not disqualify themselves merely to avoid difficult or controversial cases. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 6 (1974). "Public Policy forbids a judge to disqualify himself for frivolous reasons which would delay the proceedings, overburden other judges, and encourage improper judge-shopping."[8] Litigants, in short, have no right to disqualify a judge just because they do not want that judge. Such a system would mean that "some judges would never try cases, others would be heavily overburdened, and the system of assigning judges would become much too cumbersome for everyday

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455(a), then no party could force the judge to disqualify himself under that section. If no party could force the judge to disqualify himself, there is no need to make disclosure under § 455(e), because there is no need to secure any waiver from any party.

This issue whether Judge Thomas should have disclosed his prior relations with Senator Danforth is moot in the present case because the lawyer for Alpo acknowledges that he already knew of Judge Thomas' friendship and relationship with Senator Danforth, and saw no need to seek disqualification.

If Judge Thomas specifically thought about his relations with Senator Danforth, and also thought that he (Judge Thomas) might not be able to judge the case impartially in light of his friendship for the Senator, then Judge Thomas should disqualify himself because he has a "personal bias or prejudice" concerning a person who has an indirect financial interest in the case. Cf. 28 U.S.C. § 455 (b)(1). However, no facts support such an assumption.

[8] R. Rotunda, Professional Responsibility 217 (West Pub. Co. 2d ed. 1988).

operation."[9]

Consider *Davey v. Connecticut Bar*, 170 Conn. 520, 368 A.2d 125 (1976). The judge in that litigation properly decided the case where the state bar is the defendant, even though the judge was a member of the bar and any judgment against the bar could raise his dues. In *Rinden v. Marx*, 116 N.H. 58, 351 A.2d 659 (1976) the attorney was a defendant before the judge on a drunken driving charge. Earlier the attorney had served a complaint on the judge because the judge was a clerk of the corporate defendant and was therefore the person authorized to receive service of process. The judge did not have to disqualify himself, for there was no reason to believe that he would be personally liable for any adverse judgment. In *Alpo Petfoods*, as well, Judge Thomas had no financial interest in the judgment. He owned no Ralston stock, had no direct or indirect financial interest in either party, and could not be personally liable, either directly or indirectly, for any damages that the trial judge, on remand, might impose on Ralston.

It has long been the rule that a judge is not disqualified from hearing a case simply because an appellate court reversed the judge's ruling and remanded the case for further proceedings. *Mayberry v. Maroney*, 558 F.2d 1159 (3d Cir. 1977). For example, in *Alpo Petfoods* the D.C. Circuit remanded the case back to the trial judge who had committed error. Similarly, there is no evidence of the appearance of impartiality merely because the appellate court ruled against Alpo on certain issues. See also, *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980). IBM claimed that the trial judge was biased against IBM because 66% of 10,000 oral motions and 74 out of 79 written motions were decided against IBM and in favor of the Government. Adverse rulings alone do not create the appearance of impartiality. In *Alpo Petfoods* Thomas joined two other judges in deciding some issues against Alpo, but that fact does not demonstrate the appearance of impropriety.

In *Commonwealth v. Perry*, 468 Pa. 515, 364 A.2d 312 (1976) the judge was acquainted with the victim, a police officer, in a murder case. In fact, the judge attended the victim's funeral. The officer had often appeared in the judge's court as a witness. The murder suspect sought to reverse his conviction because the judge did not disqualify himself, but the appellate court affirmed the decision of the judge not to disqualify himself. The court reasoned that judges do not and should

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[9] C. Wolfram, Modern Legal Ethics 989 (West Pub. Co. Practitioner's Ed. 1986).

not live in a vacuum, and a ruling favoring disqualification could result in judges being disqualified in too many cases. A judge should be permitted to form social relationships and society should not reasonably expect judges to be prejudiced merely because of the fact of such relationships.

Similarly, in *Matthews v. Rodgers*, 651 S.W.2d 453, 456 (Ark. 1983), the court held that there was no need to disqualify the lower court judge merely because he had asked one of the attorneys appearing before him to be a pallbearer at his father's funeral: "friendships within the bench and bar do not, of themselves, cause prejudice . . . The public and the clients are aware of their mutual acquaintances and friendships." 651 S.W.2d at 456. Such actions did not demonstrate that there was lack of impartiality. 651 S.W.2d at 457. See also, *Duncan v. Sherrill*, 341 So.2d 946 (Ala. 1977), ruling that there was no disqualification required when a party was also the homeroom teacher for the judge's child. And *Berry v. Berry*, 654 S.W.2d 155 (Mo. App. Ct. 1983), ruled that there was no disqualification required when the judge's wife was the teacher of the party's child.

See also, *T.R.M. v. State*, 596 P.2d 902 (Okl. Crim. App. Ct. 1979). The complaining witness in a rape prosecution was a high school classmate and good friend of the judge's daughter, who was present during the proceedings. The rape victim was to be maid of honor in the wedding of the judge's daughter. The court held that the judge acted properly in refusing to disqualify himself.

In *Meeropol v. Nizer*, 429 U.S. 1337 (1977), the Meeropols (the sons of Julius and Ethel Rosenberg, who were executed in 1953) sued attorney Louis Nizer for libel, invasion of privacy, and infringement of copyright. They also filed a motion before U.S. Supreme Court Justice Marshall to designate judges from other circuits to sit as appellate judges. Justice Marshall had earlier been a member of the second circuit panel that years earlier had denied relief to Morton Sobell, the Rosenberg's codefendants. Justice Marshall ruled that he did not believe that he should disqualify himself on appearance of impartiality grounds.

The judge may have close relations with persons who are not parties or lawyers to the proceeding, but that fact does not require disqualification. Thus, the court did not impose disqualification although the judge's son was associated in a party's law firm, when the son did not personally act as a lawyer in the proceeding. *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir.

(1977), cert. denied, 434 U.S. 1035 (1978).

Another case involving a judge's relationship is *Amidon v. State*, 604 P.2d 575 (Alaska 1979), where the defense counsel had publicly criticized the judge in the past and the judge had earlier referred the lawyer to the lawyer discipline authority; the court still ruled that the defense counsel may not require the judge to disqualify himself, notwithstanding claims that the judge had a personal animus against the lawyer.

See also, *Black v. American Mutual Insurance Co.*, 503 F. Supp. 172 (E.D. Ky. 1980): no ground for disqualification because the judge, while a lawyer in practice, had litigated unrelated product-liability cases against the present corporate defendants.

In *Union Carbide Corporation v. United States Cutting Service*, 782 F.2d 710 (7th Cir. 1986), Judge Susan Getzendanner got married in the midst of discovery in a large antitrust class action. Her new husband had stock of IBM and Kodak in his self-managed retirement account. Because IBM and Kodak had brought products from the defendant, the judge would normally have to disqualify herself. However, to avoid this result, the judge immediately ceased ruling on motions in the case while her husband sold his interest in the two companies. The court of appeals upheld this procedure and the judge's refusal to disqualify herself. After the sale, the court reasoned, the judge's husband no longer had an interest in the stock. The court also rejected the defendant's argument that the judge "might be sore at Union Carbide" because her husband, in selling the stock, had to pay nearly $1000 in brokerage fees and give up the expected potential appreciation in the stock. Subsequently, Congress amended the federal law, 28 U.S.C. § 455(f) to explicitly incorporate the holding of this decision.

The main case that superficially might suggest a contrary conclusion is *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988).[10] In this case the trial judge decided a case without a jury. The issue was who owned a hospital corporation. The loser of this case discovered that the trial judge was a trustee of Loyola University. While the case was pending, Liljeberg (the ultimate winner) was negotiating with Loyola to buy some land for a hospital. Prevailing in the litigation was central to Loyola. Liljeberg's proposal

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[10] This case, as well as Union Carbide, are discussed in T. Morgan & R. Rotunda, Problems and Materials on Professional Responsibility 523-25 (Foundation Press, 5th ed. 1991).

to reopen the Loyola negotiations was formally approved at Loyola's Board meeting of November 12th, which the trial judge attended. The judge regularly attended their meetings, including this crucial November 12th meeting. The trial judge ruled for Liljeberg, which thereby benefitted Loyola.

The *Liljeberg* judge should have disqualified himself under § 455(b)(4). He was a fiduciary of Loyola (he was a trustee), which had "a financial interest in the subject matter in controversy." While holding office in the not-for-profit Loyola University is not a "financial interest" in the securities held by the organization [§455(c)(4)(ii)], Loyola's interest in the land and its sale is not a security, and so is not covered by this exception.

However, the judge argued that since he had forgotten about his fiduciary interests, § 455(b)(4) was not violated, because that section required a "knowing" violation. At a hearing, the trial judge testified that he knew about the land dealings before the case was filed, but he had forgotten all about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then the judge, inexplicably, did not disqualify himself or tell the parties what he now knew.

The Supreme Court accepted the interpretation that § 455(b)(4) required a "knowledge," even though the justices regarded the judge's memory lapses "remarkable."[11] The Supreme Court also ruled that the judge should have disqualified himself for violating this section on March 24, 1982, when the trial judge once again had admitted actual knowledge of the need to disqualify himself under § 455(b)(4). At that point, he violated that subsection by not disqualifying himself.[12]

In addition, the Court ruled (5 to 4) that the trial judge should also have disqualified himself under § 455(a). The Supreme Court relied on the "impartiality might reasonably be questioned" language of § 455(a) but also noted that the trial judge's claim that he was not informed of his fiduciary interest in Loyola "may well constitute a separate violation of § 455,"[13] citing § 455(c), which provides that a judge "should inform himself about his personal and fiduciary financial

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[11] 108 S.Ct. at 2203.

[12] 108 S.Ct. at 2206.

[13] 108 S.Ct. at 2206.

interests ."

Liljeberg, in short, is not analogous to the present circumstances In *Liljeberg* the trial judge knew, on March 24, 1982, that he was violating § 455(b)(4). His failure to disqualify himself at that point led also to a violation of § 455(a), as the Supreme Court pointed out.[14] To make *Liljeberg* comparable to Judge Thomas's situation, one must assume, among other things, that Judge Thomas was also violating one of the other provisions of § 455, but that assumption is contrary to the facts outlined above.

Conclusion. In any given instance, one might argue, "what is the harm of a judge disqualifying himself in a particular fact situation, so as to avoid later charges that he might have acted unethically?" If ethics is good, why not be extra-ethical?

It is certainly true that when presented with an unusual set of facts, one can always argue that the judge should err on the side of disqualification. However, at the end of the day, if one added up this litany of situations where judges perhaps should disqualify themselves, the list would become quite long. When I clerked for a federal judge on the Second Circuit, a law clerk for another judge had the personal rule that he would not work on a case if he played golf with a lawyer for a law firm that represented one of the parties. The result of this highly ethical law clerk was that he disqualified himself in a lot of cases, giving him more time to play golf, resulting in more opportunities to create conflicts, allowing him to disqualify himself in even more cases.

I know of judges who have refused to disqualify themselves when one of the attorneys was the best man in the judge's wedding, or one of the attorneys is the judge's best friend. Such judges are not acting unethically. It is the judges who are too quick to disqualify themselves who are not obeying the intent of the federal statute. We expect and encourage judges to have friends, to be part of the world that they must judge. The federal law, as the cases indicate, limit the cases where a judge must disqualify himself or herself on the grounds that their impartiality might reasonably be questioned.

Over the years I have dealt with many judges and lectured at judicial conferences. In particular, I have lectured on the question of when judges should disqualify themselves. Before the charges raised by The Nation Institute, it would never have occurred to me that a

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[14] 108 S.Ct. at 2206.

judge in Judge Thomas' position should disqualify himself. But then, in reaching my conclusion I am no different than the lawyer for Alpo, who still does not claim that Judge Thomas should have disqualified himself.

When Justice Marshall recently resigned, I recall seeing one of his interviews. He remarked how President Johnson was a warm, personal friend of his. It was Johnson, after all, who appointed Justice Marshall to several offices, including the Supreme Court. But, said Marshall, both he and Johnson knew that once a judge, Marshall would have to decide cases based on the merits, not on his friendship for Johnson. Marshall did not disqualify himself whenever President Johnson was very interested, or was thought to be very interested, in the outcome of a case, even though Marshall enjoyed a warm friendship with the person responsible for putting him on the Supreme Court. Similarly, Justice Marshall did not make it a practice to disqualify himself simply because the NAACP or the Legal Defense Fund was very interested in, or concerned about, a case. To require Marshall and the other judges to disqualify themselves in such circumstances would be bad policy, for it would subject judges to a vague, standardless gauge. And it would deprive us of their judgment and would force judges to live in a ivory tower, removed from the world that they must judge.

The Nation Institute is advancing the argument that Judge Thomas acted unethically in not disqualifying himself in the *Alpo* case. This argument does not find support in the case law, in the statute, and in the experience and practice of other judges in both reported and nonreported cases.

I trust that this letter has responded to your inquiry. If I can be of further assistance, please let me know.

Sincerely,

Ronald D. Rotunda
Professor of Law

Mr. RULE. The report is based on our analysis of publicly available material concerning Judge Thomas' personal and professional background and on the judicial opinions that Judge Thomas has written as a judge on the Court of Appeals for the District of Columbia Circuit.

In addition, because of the public interest in Judge Thomas' views on natural law and because his opinions as a judge are utterly silent on the issue, we examined his published speeches and articles that discuss natural law. After reviewing these materials, as well as some of the recently published criticisms of Judge Thomas, we reached three general conclusions.

First, we concluded that especially in light of his age, Judge Thomas' professional qualifications and achievements are by any measure impressive. We were impressed not only by Judge Thomas' well-chronicled success in overcoming poverty and prejudice, but also by the extraordinary breadth of his professional experience, which—as we know—includes service in State government and every branch of the Federal Government, and in the legal department of a major corporation.

Second, we concluded that although it is not extensive, Judge Thomas' record as a member of the Court of Appeals for the DC circuit reflects the qualities of an outstanding jurist, including judicial temperament, intelligence, and clarity of expression.

As the report states, Judge Thomas' opinions reveal a refined ability to resolve complex issues. At the same time, his opinions place him squarely in the mainstream of American law both in the substance of his views and in his approach to legal analysis.

We also found that Judge Thomas' opinions exhibit highly principled decisionmaking, in particular in the exercise of judicial restraint in deference to the political branches of government. His opinion in the *Otis Elevator* case is a good example of his conscientious efforts to give effect to the will of Congress without regard to his own personal views.

Third, we concluded that the speeches and articles that Clarence Thomas wrote before becoming a judge do not support the alarmist views of his critics that he would use natural law to trump the Constitution and constitutionally enacted statutes.

Before Judge Thomas had uttered a word in these hearings, we independently concluded that, read fairly, his natural law arguments are instances of political rather than legal reasoning. Rather than espousing a natural law defense of judicial activism, Clarence Thomas' writings invoke natural law as a means to persuade and inspire his fellow citizens to political action.

As the report points out, in his confirmation hearings for the court of appeals, Judge Thomas' response to the question of his use of natural rights in constitutional adjudication was identical to the response he has given in these hearings. Nothing in his court of appeals opinions contradicts that testimony.

Moreover, we noted that in his writings Judge Thomas has made repeated and unequivocal statements supporting judicial restraint. One area is in the area of protecting economic rights where even though he views those ideas as attractive, he rejects them as a rule of decisionmaking.

At the end of the report, we summarized our overall assessment of Judge Thomas' record as follows: Based on our study of Judge Thomas' academic and professional record, his speeches and articles, and especially his opinions as a circuit judge, it is clear to us that Judge Thomas has all the qualities of intellect and character and experience required for the office to which he has been named. We therefore believe that Clarence Thomas is eminently qualified to serve as an Associate Justice of the Supreme Court. After almost 2 weeks of hearings, we remain equally convinced that Judge Thomas is well qualified to become Associate Justice Thomas.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rule follows:]