OF DOG FOOD AND JUDICIAL ETHICS:

CLARENCE THOMAS' FIRST FAILURE TO RECUSE HIMSELF

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Abstract: In March 2022, the public was stunned to learn that Virginia Thomas, wife of Justice Clarence Thomas, was in steady communication with Mark Meadows, Donald Trump's Chief of Staff, supporting Trump's efforts to overturn the presidential election results of the 2020 election. Moreover, political leaders and legal practitioners were troubled that Clarence Thomas had not recused himself in *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022), a case involving Trump's application for an injunction against the National Archives turning over thousands of presidential documents to the House Select Committee, which was investigating the January 6, 2021 insurrection at the U.S. Capitol. This severe ethical lapse by Thomas is the latest in a series of ethical improprieties going back 30 years. The first in the catalogue of Thomas' ethical violations was his decision in *ALPO Petfoods, Inc. v. Ralston Purina Co*., 913 F.2d 958 (D.C. Cir. 1990), which materially changed the law of Lanham Act remedies in the D.C. Circuit. The article delves into Thomas' bizarre and erroneous legal analysis that resulted in overturning a multimillion-dollar false advertising damage award against pet food manufacturer Ralston-Purina. It will also discuss the unusually close mentor-mentee relationship between Thomas and Senator John Danforth of Missouri, grandson of the founder of Ralston-Purina and whose family owned a large holding of stock in the company. Danforth was instrumental in guiding Thomas' entire career and had a hand in obtaining every job in Thomas' post-law school life, including his present one. This extraordinarily close relationship created a conflict of interest that should have led Thomas to recuse himself from considering the *Alpo* case.

Keywords: Ethics, Recusal, Virginia Thomas, John Danforth, Clarence Thomas

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INTRODUCTION

On January 19, 2022, the United States Supreme Court issued its decision in *Trump v. Thompson, 142 S. Ct. 680, 680 (2022)* denying former President Donald Trump's application for a stay of mandate and injunction, thereby permitting the National Archives to turn over four tranches of Trump presidential records to the January 6 Select Committee of the U.S. House of Representatives. Several journalists and members of the Bar took notice at the time that Associate Justice Clarence Thomas was the sole dissent without a written justification. Many criticized Thomas for voting to permit Trump to exert executive privilege, contrary to the waiver of privilege by the sitting President, and shield the documents from scrutiny by the January 6 Committee investigating the aborted insurrection at the United States Capitol on January 6, 2021.

Norm Ornstein, a contributing editor for The Atlantic, argued that Justice Thomas should have recused himself, citing his wife, Virginia "Ginni" Thomas, who had signed an open letter critical of Liz Cheney and Adam Kinzinger, the two Republican members of the House Select Committee. Ornstein had tweeted, "The fact that Clarence Thomas continues to fail to recuse himself, given the activities of his wife that are directly related to the insurrection, is mind-boggling." Little more was made of Thomas' decision not to recuse himself in *Trump v. Thompson* – until, that is, the news broke two months later that Ginni Thomas had exchanged at least 29 text messages with then-White House chief of staff Mark Meadows, as both of them strategized about overturning the 2020 election result.[1] Following this disclosure, an avalanche of criticism erupted from journalists, elected officials, public figures and members of the Bar, most emphasizing the glaring conflict of interest Justice Thomas casually ignored when taking part in the *Thompson* decision. Suddenly, the press and Capitol Hill were briming with calls for Thomas' immediate resignation or impeachment over his failure to recuse himself and, some argued, his corrupt effort to shield from public view his wife's use of her access to Trump's inner circle to promote and seek to guide the president's strategy to overturn the election results.

Thomas's failure to recuse himself in *Trump v. Thompson* is the most recent (and most damning) in a long history of judicial ethics violations reaching back more than 30 years to Thomas' tenure on the U.S. Court of Appeals for the District of Columbia. This article reveals Clarence Thomas' first ethical lapse as a judge for failing to recuse himself in the face of a conflict of interest based on his relationship to someone nearly as close to him as Ginni Thomas.

On May 5, 2017, dozens of newspapers throughout the United States ran a short article by the Associated Press reporting on a speech that Clarence Thomas gave at a Law Day event sponsored by the Bar Association of Metropolitan St. Louis. Thomas did not say much beyond his usual stump speech heralding the concept of limited government. But the AP headline parroting Thomas's comments to former Missouri Senator John C. Danforth spoke volumes. During the speech Thomas turned to Danforth, then 80, and told him, "You are the reason why I'm here." Thomas further made the exuberant declaration that he owed his career to the former Senator.

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[1] B. Woodard & R. Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, Washington Post (March 24, 2022). https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/.

The Justice was not exaggerating - John Danforth was instrumental in guiding Thomas' entire career and had a hand in obtaining every single job in Thomas's post-law school life, including his present one. Thomas' heart-felt exclamations of gratitude to his mentor and political patron points a spotlight on a particular instance of what the author perceives to have been Thomas' first failure in judicial ethics - there have been several.[2]

Without a doubt, former President George H.W. Bush's nomination of Thomas to the court in 1991 was one of the most controversial Supreme Court appointments of the twentieth century. During the confirmation process, provocatively referred to by Thomas as a "high-tech lynching," Thomas was forced to answer to charges running the gamut from his purported disavowal of federal affirmative action policies, his supposed affinity to natural law concepts, to the more explosive issue of his more prurient tastes, shall we say, and alleged sexual harassment of female colleagues. Less of an issue at the time was the concern of many that Thomas did not meet the minimum threshold of judicial experience and legal scholarship that citizens should expect from a nominee to the nation's highest judicial body.[3]

Despite all of the scrutiny, one issue that Justice Thomas never had to publicly address during the confirmation process was his involvement, at the very outset of his

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[2] Other instances of potential unethical conduct include, for example, Thomas's failure to recuse himself in *Bush v. Gore*, 531 U.S. 98 (2000), which effectively terminated Al Gore's claim on the presidency. Virginia Thomas' was, at the time, employed by the Heritage Foundation and solicited resumes on behalf of the Bush campaign for candidates interested in positions in the prospective Bush administration. Christopher Marquis, *Job of Clarence Thomas' Wife Raises Conflict of Interest Questions*, New York Times (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html?ref=virginia_lamp_thomas. Subsequently, Mrs. Thomas herself landed a job in the Bush administration. Another example is Thomas' filing over several years of annual financial statements stating (under oath) that his wife made no income when she had, in fact, earned roughly $700,000 in income during the period. Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, Los Angeles Times (Jan. 22, 2011)), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html. website. Stephen Gillers, a professor at NYU School of Law, stated that Thomas' omission could be interpreted as a violation of law and could lead to some form of penalty. *Id*. "It wasn't a miscalculation; he simply omitted his wife's source of income for six years, which is a rather dramatic omission," Gillers said. "It could not have been an oversight." *Id*. The many ethics charges against Thomas over the years exceed the level of such charges against his brethren on the High Court (and probably other judges at the appellate level).

[3] SENATE RECORD VOTE ANALYSIS, 102d Cong., 1st Sess., S-14704 Temp. Cong. Rec. (Oct. 15, 1991). In this brief synopsis of the positions taken by Senators in favor of and in opposition to Clarence Thomas' nomination to the Supreme Court, one point expressed by the opposition is as follows:

> On the issue of competence, we were distressed by his weak legal credentials. He practiced law for only five years, until age 31. He does not have an extensive record of scholarship or expertise in any area of law, and he served as a judge for a mere 17 months. An analysis done by the National Association for the Advancement of Colored People found him to be less qualified than the last 48 Judges who were appointed to the bench. We are told by Clarence Thomas' supporters that he has tremendous capacity for growth, but we believe that it would be a mistake to confirm a nominee whose most impressive legal credential is his capacity for growth.

This rather apt characterization of Mr. Thomas's level of legal experience and lack of scholarship calls into question former President George H.W. Bush's overstatement, told with no apparent sense of irony, that Clarence Thomas was "the most qualified person in the country for the position."

short stint as an appellate judge on the Court of Appeals for the D.C. Circuit, in a false advertisement lawsuit that posed significant ethical implications and called into question his judicial impartiality, and thus his suitability to sit on the highest court. While the issue was briefly, but forcefully, touched upon by a witness during the Senate confirmation hearings, the Senate Judiciary Committee quietly swept it under the carpet, probably because the lawsuit in question also involved the financial and family interests of Senator John Danforth, one of the most respected, even revered, members of that august body. With a few exceptions, the press and legal community unaccountably failed to seriously treat the matter, opting instead to focus almost complete attention on the salacious Anita Hill story.

Thomas' decision in *Alpo Petfoods, Inc. v. Ralston-Purina Co*., 913 F.2d 958 (D.C. Cir. 1990), has become a much-cited authority with respect to certain trademark and false advertising issues. That case announced significant changes in the law of trademark remedies in the D.C. Circuit: (i) the novel (and legally erroneous) concept that corrective advertising damages are actually an equitable award of profits, thus requiring a showing of bad faith; and (ii) a new rule that deterrence alone is not a basis for an award of a Lanham Act defendant's profits. Thomas' opinion in the case also seriously misread or ignored the factual findings of the trial court, contrary to applicable standards if review. This article will first analyze Justice Thomas' quirky and legally questionable analysis in the *Alpo* case and then discuss Thomas' violation of judicial ethical standards by his failure to recuse himself from considering the case – a harbinger of things to come.

I. THOMAS' *ALPO* DECISION RAN AFOUL OF SEVERAL LANHAM ACT EVIDENTIARY RULES AND IMPROPERLY ENGAGED IN A DE NOVO REVIEW OF THE FACTS

Alpo Petfoods, Inc. v. Ralston Purina Company has become one of the leading cases on the scope and evidentiary thresholds for monetary relief in trademark and false advertising cases. In *Alpo*, Ralston-Purina advertised that its Puppy Chow dog food would lessen the severity of canine hip dysplasia. Ralston-Purina ran nationally televised advertisements that stated the improved dog food "helps critical bone development." At the same time, Ralston-Purina's competitor, Alpo, was advertising that leading veterinarians preferred its product 2-1 over the "leading puppy food," impliedly referring to Puppy Chow. Both companies sued each other under Lanham Act, § 43(a), 15 U.S.C. § 1025(a) for the advertisements, claiming they were false and misleading.

After a two-month trial, U.S. District Judge Stanley Sporkin, mainly weighing expert testimony, first held there was no statistically significant empirical evidence to support the claims of Ralston-Purina that its puppy food would lessen the severity of canine hip dysplasia.[4] The court also concluded that Alpo's claims that veterinarians preferred its product were false.[5] The court entered injunctions against both Ralston-Purina and Alpo. However, because the court found only Ralston-Purina's conduct was willful and in bad faith, stressing that the company "perpetrated a cruel hoax" on dog owners, the court only awarded damages against Ralston-Purina.

Judge Sporkin awarded Alpo $10.4 million in corrective advertising damages. Applying the rationale in *U-Haul Int'l, Inc. v. Jartran, Inc*., 793 F.2d 1034, 1042 (9th Cir.

[4] *Alpo*, 913 F.2d at 962.
[5] *Id.*

1986), Judge Sporkin calculated the corrective advertisement damages by determining Ralston-Purina's expenditures in its advertisement campaign and then quartering it. The court also allowed each party an award of attorneys' fees. Ralston-Purina appealed to the Circuit Court of Appeals for the District of Columbia. Alpo did not appeal the judgment against it.

On appeal, Thomas, writing for the three-member panel that also included circuit judges Edwards and Sentelle, provided the proper framework for a false advertisement case - "to prevail in a false advertising suit under section 43(a), a plaintiff must prove that the defendant's ads were false or misleading, actually or likely deceptive, material in their effects on buying decisions, connected with interstate commerce, and actually or likely injurious to the plaintiff. "[6] The court affirmed the lower court's finding of liability against both Ralston-Purina and Alpo on each element. However, Thomas's decision set aside the corrective advertising damages awarded to Alpo as clearly erroneous.

In reversing the $10.4 million damages award, Clarence Thomas crafted an entirely new evidentiary threshold for awarding corrective advertising damages in false advertising cases. Generally, in Lanham Act cases, there is never a need to demonstrate bad faith or willfulness to obtain an award of reasonable corrective advertising damages or other legal damages.[7] Such legal damages were traditionally available to make the plaintiff whole, and did not typically turn on a defendant's scienter.[8] By 1990, however, a number of circuit courts had established that a finding of willfulness or bad faith is a requirement to recover the equitable remedy of profits in trademark, unfair competition and false advertising cases.[9] The Act itself dictates that an award of attorneys' fees requires "exceptional circumstances" which is generally understood to mean willfulness or bad faith. 15 U.S.C. § 1117.

Based on some unusually tortured reasoning, Judge Thomas construed the corrective advertising damages awarded by the lower court as an award of Ralston Purina's profits, thus invoking the bad faith evidentiary requirement some courts had adopted. But the district court made it quite explicit that it was awarding corrective advertising damages, not profits. For example, the lower court stated, "[a]fter considering the various measures of damages, the court finds the most appropriate measure would be one that is based on Ralston's advertising expenditures as they pertain to the dissemination of its deceptive message."[10]

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[6] *Alpo*, 913 F.2d at 964.

[7] *See* James M. Koelemay, *A Practical Guide to Monetary Relief in Trademark Cases*, 85 Trademark Rep. 263 (1995) (correctly characterizing corrective advertising monetary relief as a form of legal damages and stating that bad faith is not necessary for an award of damages, although the trend is to require a finding of bad faith for profits); Restatement (Third) of Unfair Competition, 36, Cmts. g, j & 37 (American Law Institute 1995) (wrongful intent is not required for damages, but is for an award of profits).

[8] *Id.*

[9] *See generally* Keith M. Stolte, *Remedying Judicial Limitations on Trademark Remedies: An Accounting of Profits Should Not Require a Finding of Bad Faith*, 87 Trademark Rep. 271 (1997). Other circuit courts rejected the bad faith requirement for an award of profits under the Lanham Act. In 2020, the Supreme Court unanimously resolved the circuit split, concluding that willful infringement is not a prerequisite to an award of profits under 15 U.S.C. § 1117(a). *Romag Fasteners, Inc. v. Fossil, Inc*., 140 S.Ct. 1492 (2020).

[10] *Alpo*, 720 F. Supp. at 215 (citing *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir. 1986)).

Judge Sporkin found Ralston-Purina had expended $5.2 million in its offensive advertisement program, but also found that an award of this amount was not enough for Alpo to correct the widespread deception caused by Ralston's ads.[11] Based on the Lanham Act's explicit provision for a court to increase damages by as much as three times,[12] Judge Sporkin doubled Ralston's $5.2 advertising expenditures and awarded Alpo $10.4 million in corrective advertising damages.[13]

In a strange attempt to fit a square legal peg into a round equitable hole, Thomas claimed that, while the trial court expressly stated that it was awarding damages, the court actually awarded profits.[14] This dubious assessment was based, in large part, on Judge Sporkin's gratuitous comparison of the comparative advertisement damages calculation to Ralston's adjusted profits arising from its sales of Puppy Chow: "This amount [$ 10.4 million] is close to the $11 million dollar adjusted net profits Ralston earned from the sales of its Puppy Chow products during the period of its CHD advertising program."[15] Had Judge Sporkin granted Alpo Ralston-Purina's profits, the monetary award would have been $600,000 (or 5.7 percent) greater. Sporkin's decision, on its face, demonstrates he did not award Ralston's profits. Thomas further based his assertion that the monetary relief granted to Alpo constituted profits on his mischaracterization that the Ninth Circuit in *U-Haul* construed corrective advertising awards as profits.[16] Only a convoluted reading of that case could result in such a construction.

In *U-Haul Intl, Inc. v. Jartran, Inc*., 601 F. Supp. 1140 (D. Ariz. 1984), the trial court granted the plaintiff $40 million in a false advertising case, one of the most substantial Lanham Act damages awards in history. The court calculated the base award of $20 million dollars on the grounds that the evidence established the plaintiff suffered lost revenues of approximately $22,500,000.[17] The court also stated, "I would arrive at the same damage award by allowing U-Haul its [corrective] advertising costs of $13,600,000 and awarding it the $6,000,000 expended by Jartran to carry out the offending ad campaign."[18] The court then doubled the base award to $40 million under the court's discretionary powers to increase damages in accordance with Lanham Act Section 35, 15 U.S.C. § 1117 or, alternatively, as punitive damages under the common law claims.[19].

Nowhere in the lower court's decision in *U-Haul* did the court ever mention or even hint at any intention to award the defendant's profits or to construe the lost revenue or corrective advertising damage calculations as an award of profits. On appeal, the Ninth Circuit acknowledged and affirmed the district court's award of "actual damages" of $20 million, and the alternative calculation of the defendant's actual advertising expenditures ($6 million) coupled with the plaintiff's expenditures of corrective advertising ($13.6 million).[20] Tangentially, the appellate court addressed the defendant's argument that the lower court erred in awarding the $6 million dollars it had spent in its false advertising

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[11] *Id.*
[12] 15 U.S.C. § 1117.
[13] *Alpo*, 720 F. Supp. at 215.
[14] *Alpo*, 913 F.2d at 967.
[15] *Alpo*, 720 F. Supp. at 215.
[16] *Alpo*, 913 F.2d at 967.
[17] *U-Haul*, 601 F. Supp. at 1146.
[18] *Id.*
[19] *Id.* at 1150.
[20] *U-Haul*, 793 F.2d at 1037, 1041-42.

program as "profits."[21]. The lower court, however, made no mention of an award of profits and did not equate that portion of the corrective advertising damages as profits. Despite this, the Ninth Circuit opined, in dicta, that the defendant's advertising expenditures reflected, in part, "the financial benefit [the defendant] received because of the advertising."[22] Ignoring entirely the lower court's published decision, Judge Thomas seized on this phrase by the Ninth Circuit and then mischaracterized the corrective advertising damages award in *U-Haul* as an award of the defendant's profits, not legal damages.[23]

Having now improperly invoked a bad faith requirement for the monetary relief granted by the lower court in *Alpo*, Thomas then took pains to hold that Judge Sporkin's willfulness findings were clearly erroneous. Even though Judge Sporkin found that there was evidence demonstrating Ralston-Purina (i) had intentionally "withheld vital information from the public, from the government and from [the] court,"[24] (ii) had allegedly destroyed certain adverse documents,[25] (iii) had used its offensive advertising claims to target and injure competitors, particularly Alpo,[26] and (iv) had "perpetrated a cruel hoax" on dog owners,[27] Judge Thomas nevertheless determined that this was not enough to prove bad faith, bad intent, or willfulness.[28] As one commentator sardonically declared, "[i]n sum and substance, the Thomas opinion considered all of Ralston's actions to be normal business practices that did not imply bad faith or willfulness."[29] In sum and substance, Judge Sporken's opinion did not.

Without the benefit of all the detailed evidence that Judge Sporkin heard over a two-month trial and the attendant ability to make witness credibility determinations, Thomas summarily declared that Ralston's ads were based on "honest differences of scientific opinion," and that there was no "connection between [the] defendant's awareness of its competitors and its actions at those competitor's expense."[30] Thomas did note that comparative false advertising claims have been equated to passing off of a trademark, but nevertheless found lacking evidence that the advertisement in Alpo was directed specifically at a competitor.[31] Thomas simply ignored Judge Sporkin's factual findings that Ralston intentionally deceived and mislead the public for the specific purpose of injuring Alpo's launch of a competitive product.[32] A fair and objective review of both the district court's and appellate court's decisions in *Alpo*, compels the conclusion that Thomas

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[21] *Id.* at 1043.
[22] *Id*.
[23] *Alpo*, 913 F.2d at 967.
[24] *Alpo*, 720 F. Supp at 216.
[25] *Id.*
[26] *Id*. at 201.
[27] *Id*. at 213.
[28] *Alpo*, 913 F.2d at 966.
[29] Felix H. Kent, *The Damage Issue in Section 43(a) Actions*, N.Y. L. J., vol. 206, no. 120, p. 3 (1991).
[30] *Alpo*, 913 F.2d at 966.
[31] *Id*. (citing *General Mills, Inc. v. Kellogg Co*., 824 F.2d 622, 627 (8th Cir. 1987)).
[32] *Alpo*, 720 F. Supp. at 201.

and his colleagues overreached their authority in holding Judge Sporkin's factual findings of bad faith and willfulness clearly erroneous.[33]

The court remanded the case for computation of actual damages suffered by Alpo, which the court instructed "must have support in the record." These damages, Thomas wrote, can include the profits lost by the plaintiff for sales actually diverted to the defendant; profits lost as a result of the plaintiff's need to lower prices to compete, costs of completed advertising to respond to the false advertising, and quantifiable harm to the "goodwill" of the plaintiff (but only to the extent that corrective advertising has not, and cannot, repair the harm).[34] The district court was further instructed to consider the difficulty of proof of such damages.[35] The court also reversed the award of attorneys' fees because the lower court did not make a finding of bad faith. [36]

The D.C. Circuit's decision in *Alpo* raises a number of questions that have been ignored by other courts and commentators. For example, why did the court deviate from established law to require bad faith or willfulness in order to obtain an award of corrective advertising damages, which is a legal not equitable form of relief? Why did the court improperly equate corrective advertising damages to a defendant's profits? Why did the court ignore the trial court's specific factual findings of Ralston-Purina's bad faith and substitute its own business moral paradigm instead?

One could conclude that Thomas' very limited experience on the bench (*i.e.*, weeks) at the time and his lack of familiarity with evidentiary rules applicable to Lanham Act cases might explain these anomalies. Or there may be another, more insidious basis for the legal flaws and factual overreaches in Thomas's *Alpo* decision; one that takes into account that Thomas's greatest professional mentor, patron and close friend of more than 16 years owned a significant amount of Ralston-Purina's stock and whose family founded the company and exercised corporate control of the company for nearly a century. The next section explores the exceedingly close professional and social relationship between Thomas and former Senator John C. Danforth of Missouri, and suggests that Thomas violated established rules of judicial conduct by failing to recuse himself as a member of the *Alpo* appellate panel because of this close relationship and the questions of impropriety that reasonably arose under the circumstances.

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[33] *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"). Rule 52(a) mandates clearly erroneous review of all district court fact findings: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). The rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *see also Inwood Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 855-58 (1982). The Supreme Court has emphasized on multiple occasions that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123 (1969). A fair reading of the appellate court's decision in Alpo suggests that the court's factual assessment of Ralston's intent (an issue typically tied to the credibility of witnesses) was based on a *de novo* review.

[34] *Alpo*, 913 F.2d at 969.

[35] *Id*.

[36] *Id*. at 971. Thomas left undisturbed the lower court's award of attorney's fees to Ralston-Purina on the basis that Alpo did not appeal this issue.

II. THOMAS' CLOSE RELATIONSHIP WITH SENATOR DANFORTH MANDATED HIS RECUSAL FROM THE ALPO APPELLATE PANEL

A. Clarence Thomas was an Intimate Friend and Protégé of Senator Danforth for Most of his Adult Life

No one can reasonably question the crucial assistance and contributions former Senator John Danforth[37] provided in every aspect of Clarence Thomas' career.[38] In fact, Thomas' close association with Senator Danforth would "prove to be the most important in his professional life[39] as Thomas himself conceded in his May 5, 2017 speech at the St. Louis Law Day event. Danforth was instrumental in securing Thomas' first job out of law school, his last job as an Associate Justice of the Supreme Court, and every position in between. Thomas's hugely beneficial relationship with John Danforth began in 1974 when Danforth, then Missouri's Attorney General, hired Thomas straight out of law school to serve as one of his assistants.[40] Thomas remained with Danforth for about three years, from 1974 until 1977, when he decided to seek employment in the private sector. "[W]ith a recommendation from Mr. Danforth, he went to work for the Monsanto Chemical Corporation, as an in-house counsel." [41] Monsanto is a massive conglomerate headquartered in Missouri and, reasonably, had an interest in maintaining good relations with the state's public officials.

Once Danforth was elected to the U.S. Senate, he again tapped Thomas to work in his office, this time as a legislative assistant.[42] Thomas was employed by the Senator from 1979 to 1981, when President Reagan nominated Thomas as the Assistant Secretary for Civil Rights in the U.S. Department of Education.[43] Danforth gave Thomas a ringing endorsement.[44] In 1982, Reagan appointed Thomas, whose career was obviously spiraling upward in an unusually fast pace, to become the Chairman of the Equal Employment Opportunity Commission.[45]

In 1989, President Bush nominated Thomas as an appellate judge to the D.C. Circuit. During the confirmation process, Danforth fervently supported his close friend's and protégé's nomination and strenuously defended Thomas against the opposition of

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[37] Danforth was a three-term Republican Senator from Missouri.

[38] *See generally* John C. Danforth, RESURRECTION: THE CONFORMATION OF CLARENCE THOMAS, Viking Press (1994). Three years after Clarence Thomas' confirmation to the Supreme Court, Senator Danforth published an account of the confirmation proceedings. The book is liberally peppered throughout with passages that plainly illustrate the Senator's long-time close professional and personal relationship with Justice Thomas.

[39] Scott Douglas Gerber, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS, N.Y. Univ. Press, at 12 (1999).

[40] *See* Danforth, *supra* note 38, at 5; Andrew Peyton Thomas, CLARENCE THOMAS, A BIOGRAPHY, Encounter Books, at 148-161 (2001); 137 Cong. Rec. S12335 (Aug. 2, 1991).

[41] 137 Cong Rec. S12342 (Aug. 2, 1991).

[42] Danforth, *supra* note 38, at 5; Thomas, *supra* note 40, at 177-80; 137 Cong. Rec. S12335 & S12342.

[43] Thomas, *supra* note 40, at 185-86; 136 Cong. Rec. S2157.

[44] Thomas, *supra* note 40, at 186.

[45] 136 Cong. Rec. S2157.

many of the Senator's colleagues.[46] Danforth's culmination of support for Thomas came during the Supreme Court confirmation proceedings. As one prominent senator stated:

> As a result of his long personal and professional relationship with Clarence Thomas, Jack Danforth felt that the Supreme Court nominee had been unfairly pilloried by the press and certain members of the Senate. He strongly and emotionally defended both Clarence Thomas' character and his credentials to serve on the Supreme Court. Clarence Thomas' ultimate confirmation to serve on the U.S. Supreme Court can in no small measure be attributed to the efforts of Senator Jack Danforth.[47]

In his 2007 memoir, My Grandfather's Son, Thomas mentions Danforth's interventions into his personal financial matters, including a particular financial crisis involving a default of one of Thomas' student loans:

> "[O]ur financial situation was no laughing matter, and it became deadly serious when a bank foreclosed on one of my student loans. [...] Nobody at the bank had time to listen to me, so I called the regional office of the Department of Health, Education, and Welfare, which supervised the student-loan program. The man to whom I spoke suggested that I try to get a consumer loan to repay the bank, but because of my low salary and lack of credit history, I assumed that no one would be willing to take a chance on me. Once again, the attorney general saved the day: I mentioned my problem to him, and he referred me to the president of a local bank, a friendly small-town type who believed that character matters as much as collateral. He took Jack Danforth's word for my character and agreed to lend me the money. "Don't disappoint me," he said as I left his office. I didn't.[48]

Thus, for 17 years prior to his participation in the *Alpo* case, Clarence Thomas reaped huge benefits from his mentor and primary patron in government, both in terms of financial remuneration and status. Thomas was deeply indebted to Danforth - at every elevation of his career, Senator Danforth was either the person who hired Thomas directly or acted as his number one cheerleader. This was not merely a casual nor even a collegial relationship; it was a long term, intimate friendship and professional collaboration that

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[46] Cong. Rec. S2025-30. (Mar. 5, 1990) (statement of Senator Danforth). Addressing his comments to the opposition of some senators to Thomas' D.C. Circuit nomination, Danforth declared "I rise to address the Senate as a person who has known Clarence Thomas not for a few hours or for a day, but I have known him for 16 years." *Id.* at S2025. So exuberant was Danforth's support and defense of his protégé that it moved Senator Simpson, of Wyoming, to comment:

> I have been through these hearings before, with regard to judgeships. Some of them are quite anguishing. I think, in regards to this nomination, we should put a great deal of credence in the statements of my colleague from Missouri [Senator Danforth], for whom I have a great deal of respect. He knows Clarence Thomas and in all my time here, I have never heard a more moving and extraordinary presentation about a man's record and philosophy and character than I did when Senator Danforth appeared before the Judiciary Committee that day when Clarence Thomas's name was presented.

Id. at S2027.

[47] 140 Cong. Rec. S 14220 (Oct. 5, 1994) (statement of Senator DeConcini).

[48] Clarence Thomas, MY GRANDFATHER'S SON, Harper, at 201 (2007).

culminated, for Thomas, in what can only be regarded as a mercurial rise to one of the most powerful positions in the United States government.

B. Danforth's Significant Connections with Ralston-Purina

William Danforth, the Senator's paternal grandfather, founded the Ralston-Purina Company in 1894. He managed the company for much of the first half of the Twentieth Century, and made it, for many years, one of the country's 100 largest corporations. Later, Donald Danforth, the Senator's father, served as chairman of the company. At about the time Clarence Thomas wrote the decision in the *Alpo* case, Senator Danforth reportedly owned Ralston-Purina stock worth between $7.5 million and $8.5 million (between $15 million and $17 million in today's dollars), making him one of the wealthiest members of the Senate at the time.[49]

Two of Danforth's brothers were also then members of the company's board of directors and each also owned significant stock in Ralston Purina, collectively as much as 6.5 percent.[50] His brother William Danforth was also Chancellor and a trustee of Washington University, which itself was a large stockholder in the company, a holder of as much as 7.17 percent of the stock.[51] Therefore, when the *Alpo* case was assigned to Thomas, John Danforth and his family were not only closely identified with Ralston-Purina since its formation, but also had huge financial and corporate interests in the company and its goodwill. In fact, it appears that the *Alpo* court's reversal of the $10 million award against Ralston Purina may have had a significant beneficial effect on Senator Danforth's and his family's fortunes. In the three business days following Judge Thomas' decision in *Alpo*, Ralston's stock price increased five dollars a share.[52] While only an estimate because publicly available financial statements reflecting Senator Danforth's stock holdings at the time are vague, this $5 increase in Ralston Purina's stock price resulted in an increase of the Senator's holdings by roughly $440,000 (almost

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[49] *See* Monroe Freedman, *Thomas' Ethics and the Court -- Nominee 'Unfit to Sit' For Failing to Recuse in Ralston Purina Case*, Legal Times, Vol XIV, 20, 23 (1991). In this article, Monroe Freedman, a legal ethics professor at Hofstra University, was one of very few legal scholars to publicly call attention to Thomas' possible violation of judicial ethics by failing to recuse himself from the *Alpo* case. A handful of other short articles appeared in the legal and mainstream press within a few weeks preceding and following Mr. Freedman's article. *See e.g*. *League Neutral on Thomas*, St. Louis Post-Dispatch, p. IA (Jul. 22, 1991), 1991 WLNR 502075 (reporting that Danforth owned at least $8 million in stock); James Crowley, *Liberal Group Says Thomas Should Not Have Decided Case*, Associated Press (July 22, 1991). (reporting that Danforth owned more than $8.5 million in Ralston Purina stock); Ronald Rotunda, *Stop the Smear Campaign Against Thomas*, Texas Lawyer, p. 12 (Sept. 2, 1991). The press and legal scholarly community largely ignored the issue, and the Senate almost completely ignored it during the Thomas confirmation hearings. Professor Freedman surmised that one of the reasons the Senate Judiciary Committee deep-sixed the Thomas/*Alpo* ethical flap was "because of the threat of 'blackmail' brought by an attack on the ethics of Sens. Joseph Biden, Ted Kennedy and Alan Cranston. The three were the subject of a television ad produced by a pro-Thomas group called Conservatives for Victory." *The Thomas Hearings*, 78 A.B.A.J. 50, 51 (Jan. date, 1992).

[50] Freedman, *supra* note 48, at 23. Senator Danforth and his two brothers collectively controlled over 5 percent of Ralston-Purina's stock at the time. *Thomas' Impartiality Questioned; Group Cites Ralston-Purina Case; District Judge Endorses Nominee*, Seattle Post-Intelligencer, p. A3 (Jul. 22, 1991), 1991 WLNR 1388116. Another source reported in 1989 that brothers William and Donald Danforth collectively owned as much as 6.5 percent of the company's stock, in addition to the Senator's holdings, according to filings at the Securities and Exchange Commission. Sabrina Eaton, States News Service (Oct. 23, 1989).

[51] *Id.*

[52] Ralston Purina's share price on Sept. 6, 1990, the day before the issuance of the *Alpo* decision, was $92 and 3/8. By Sept. 12, 1990, the price had jumped to $97 and 3/8, an increase of $5 per share within the first three business days following the decision.

$900,000 in today's dollar) in less than a week.[53] Apart from the court's issuance of the *Alpo* decision, nothing else of a material nature was reported to have transpired that week to explain an almost 6 percent rise in the stock price.[54]

C. The Judicial Ethics Rules Required Thomas to Recuse Himself in *Alpo*

Canon 2 of the Code of Judicial Conduct mandates that federal judges "avoid" impropriety and the appearance of impropriety in all activities.[55] Canon 2(a) requires federal judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[56] The Code of Conduct sets the general parameters with respect to the ethical obligations of federal judges. Canon 3(e)(1) mandates that "a judge shall disqualify himself or herself in a proceeding in which his impartiality might reasonably be questioned."[57]

In 1974, the spirit of these canons was more precisely codified in 28 U.S.C. §455(a) of the Judicial Code, which requires judges to recuse themselves when their impartiality is reasonably at issue. Section 455(a) states as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. [58]

The recusal statute stands for the fundamental principle of justice and due process that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[59] In other words, "justice must satisfy the appearance of justice."[60]

The standard for recusal under section 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality.[61]

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[53] Based on the stock price generally in 1990 and the reports that Danforth owned between $7.5 million and $8.5 million in Ralston Purina stock, the Senator owned in the area of 85,000 to 100,000 shares. During and after Thomas' confirmation hearings, Senator Danforth curiously denied that he had any interest in the outcome of the *Alpo* case. Danforth, *supra* note 37, at 13; Statement of Senator Danforth, (Jul. 19, 1991), Papers of Lee Liberman, George H. W. Bush Presidential Library. Given his and his family's significant stockholdings in Ralston Purina at the time of the *Alpo* decision, and his family's close association with the company and its goodwill for almost a century, Danforth's assertion that he "had no interest in the outcome" seems disingenuous.

[54] Some may criticize the author's potential linkage of the sharp rise in Ralston Purina's stock price three days following the *Alpo* decision to the D.C. Circuit's vacatur of the $10.4 million damages award as conjecture. Such criticism would be somewhat warranted – it is conjecture, but it is reasonable conjecture, which is all we are left with. This conundrum is precisely why the Code of Judicial Conduct and 28 U.S.C. § 455 are in effect, to avoid the need to engage in speculation in order to assess the aftermath of a potential ethical violation.

[55] ABA Model Code of Judicial Conduct, Canon 2.

[56] ABA Model Code of Judicial Conduct, Canon 2A.

[57] ABA Model Code of Judicial Conduct, Canon 3(e)(l).

[58] 28 U.S.C. 455(a) (emphasis added). The 1974 standard employs and objective standard. Before 1974, the recusal statute used a subjective standard requiring recusal only if "in his opinion" a judge believed that he should not participate in a case.

[59] *Commonwealth Coatings Corp. v. Continental Casualty Co*., 393 U.S. 145, 150 (1968).

[60] *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (*quoting In re Murshison*, 349 U.S. 133, 136 (1955)).

[61] *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991). *See also In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001); Richard E. Flamm, JUDICIAL DISQUALIFICATION, § 24.2.1 (1996).

Thus, violations of the Code of Conduct may give rise to a violation of section 455(a) if doubt is cast on the integrity of the judicial process. While section 455(a) is concerned with actual and apparent impropriety, the statute requires recusal even when a judge's "impartiality might reasonably be questioned."[62]

The paramount principle of requiring judicial disqualification to preserve the "appearance of impartiality" was well established in 1988 by the Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp*., a case decided three years before the *Alpo* decision. In *Liljeberg*, a federal district judge was a trustee of Loyola University in New Orleans. While the university was not a party to the case, it had a significant interest in the outcome. The judge at one time knew of Loyola's interest but had forgotten and did not associate Loyola with the case when he decided the matter. The judge's decision indirectly benefited the university.

After learning of the judge's relationship with Loyola, the losing party moved to vacate the decision and sought a new trial. The Supreme Court agreed, and vacated the prior decision. The court explained that, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."[63]

Similar to the judge in *Liljeberg*, by failing to recuse himself in *Alpo*, or even to advise the parties of his close personal ties to a patron to whom he owed his entire career, Thomas crossed the line. Viewed in the context of the long-term and intimate relationship Thomas had with his professional sponsor, Senator Danforth, and the immense benefits he reaped from that relationship extending back over 17 years, Thomas' participation in the *Alpo* case would naturally lead a reasonable, informed observer to question Thomas' impartiality.

Is it possible that a reasonable person would believe Judge Thomas was unaware of or had forgotten about his long-time patron's significant ties with and financial interests in Ralston-Purina? Justice Thomas himself removed all doubt on that score when, in his 2007 memoir, Thomas described the first time he met Danforth. The description demonstrates Thomas was acutely aware of Danforth's familial and financial relationship with Ralston Purina from the moment they met:

> "Clarence, there's plenty of room at the top," the attorney general said as we sat down to talk. That's easy for you to say, I thought, knowing that he was one of the heirs to the Ralston Purina fortune and had been elected attorney general of Missouri while he was still in his early thirties. Maybe there was room at the top for people like him, but so far I hadn't even managed to find it at the bottom.[64]

Would a reasonable person believe that the D.C. Circuit's vacatur of a $10 million-dollar award would have no beneficial effect on Ralston-Purina and its major stockholders such as the Danforth family? Objectively speaking, there would have been little question that a reversal of the $10 million award in Ralston-Purina's favor would have a beneficial

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[62] 28 U.S.C. § 455(a).
[63] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 865 (1988).
[64] Thomas, *supra* note 48, at 87.

impact on the company and its major stockholders, such as Danforth and his family. Indeed, it did.

The fact that Danforth himself was not a party in *Alpo* is irrelevant. Danforth clearly had a significant financial and, because of his family's century-old ties with Ralston, reputational stake in the outcome of the *Alpo* litigation. The Supreme Court in *Liljeberg* confirmed that a judge's relationship with a non-party could lead to the appearance of impartiality if that non-party has a significant interest in the outcome of the litigation. A number of federal appellate courts have also required disqualification in other circumstances in which a judge enjoyed a close or longstanding friendship with a nonparty who had a significant interest in the outcome of the litigation.

For example, in *U.S. v. Jordan*, 49 F.3d 152 (5th Cir. 1995); the Court of Appeals for the Fifth Circuit found that the district court had abused her discretion in not recusing herself based on the judge's close and longstanding friendship with a non-party who had hostile relations with a criminal defendant. *Id*. at 156-57. In *U.S. v. Kelly*, 888 F.2d 732, 738, 745-46 (11th Cir, 1989), the court found a violation of section 455(a) where the trial judge failed to s*ua sponte* recuse himself from a case in which the husband of a close friend of the judge's wife would appear as a witness for the defendant. In a case involving political relationships, the Court of Appeals for the Eighth Circuit disqualified a district court judge on remand because the judge was a close friend of Hillary Clinton, a non-party to the litigation, who, together with her husband, was a close friend and political associate of a party. *U.S. v. Tucker*, 78 F.3d 1313, 1324-25 (8th Cir. 1996).

During the 2002 Supreme Court term, Justice Thomas himself recognized the need under section 455(a) to recuse himself in a death penalty review where the defendant was convicted for murdering the father of Judge Luttig of the Court of Appeals for the Fourth Circuit.[65] Citing his "familiarity with Judge Luttig," Thomas recused himself, presumably on the basis that Judge Luttig provided significant support and assistance to Thomas during the Supreme Court confirmation process, just as Senator Danforth had provided crucial support and backing during Thomas' confirmation to the D.C. Circuit. Would a reasonable person distinguish the appearance of impartiality in circumstances where a judge received assistance during confirmation hearings from a non-party with a significant interest in the outcome of one case from circumstances where the judge was, in virtually every step of his career, either directly employed by, or strongly supported by, a non-party with a significant interest in the outcome of another case?

Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges participate in cases in which they, or someone extremely close to them, have a significant interest in the outcome. While such participation may not actually compromise a judge's impartiality - the appearance or possibility of partiality may be all there is – but an appearance or possibility of partiality is enough to invoke the ethical canons and Section 455(a). A judge's failure to recuse himself or herself in circumstances where there may be an objective appearance of impropriety simply compromises what

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[65] Paul Duggan, *Killer of Judge's Father Executed*, Wash. Post, p. A06 (May 29, 2002), https://www.washingtonpost.com/archive/politics/2002/05/29/killer-of-judges-father-executed/050d497a-0932-4d17-ada6-5b2b1831c3a1/. Justices Souter and Scalia also recused themselves in the case. *Id.* During the Supreme Court confirmation proceedings, Luttig was the Assistant Attorney General in charge of the Office of Legal Counsel. *See also*, Danforth, *supra* note 37, at 1. Luttig was assigned by the White House to help prepare Thomas for his confirmation hearings. *Id.*

Edmund Burke justly regarded as the "cold neutrality of an impropriety judge." "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges."[66] Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, decide cases the outcome of which would directly benefit the judge, his or her spouse and family or even a longtime professional friend and patron whose exuberant support and assistance assured a lifetime of success.

During the Thomas Supreme Court confirmation process, the George H. W. Bush White House was sufficiently concerned about the possibility of an ethical violation to invite three law professors specializing in legal ethics to render opinions on whether or not Thomas may have violated the rules of ethics in failing to recuse himself in the *Alpo* case.[67] While White House Counsel Boyden Gray briefly apprised Messrs. Hazard, Rotunda and Johnstone of the history of Senator Danforth's employment and sponsorship of Thomas, the one paragraph description fails to accurately elicit the intimate professional and personal relationship that developed between the two men over a 17-year period prior to the *Alpo* case. Gray's letters certainly did not convey what Thomas himself publicly declared in May 2017 – that Thomas owed his entire career to John Danforth. Gray's letters also parroted Senator Danforth's claim that he and his family had no significant interest in the *Alpo* case, a claim shown to be factually incorrect.

Professors Hazard and Rotunda provided opinions, each written within two or three days from the time of Boyden Gray's request, that Clarence Thomas did not violate section 455(a).[68] Curiously, the George H. W. Bush Library records do not appear to list any opinion or other response from Professor Johnstone. Professor Hazard's opinion offers little legal analysis except to erroneously confine the scope of the general provisions for recusal under section 455(a) to the context of the specific relationships defined in other narrower subsections of section 455. Hazzard seems to suggest that a violation of the general, catch-all section 455(a) requires conduct that would violate the narrower subsections that describe specific relationships:

> The general provision, which is (455(a), is interpreted in the context of the specific relationships that are defined in other subsection (sic). 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 of anything close to them.[69]

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[66] 64 ABA, Code of Judicial Conduct, Canon 1, cmt.

[67] *See* letter dated Jul. 24, 1991 from former White House Counsel C. Boyden Gray to Professors Geoffrey Hazard, Ronald Rotunda and Quinton Johnstone, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

[68] *See* letter dated Jul. 26, 1991 from Professor Ronald Rotunda to White House Counsel C. Boyden Gray and letter dated July 27, 1991 from Professor Geoffrey Hazard to C. Boyden Gray, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

[69] Letter dated July 27, 1991 from Professor Geoffrey Hazard to C. Boyden Gray, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

To construe and limit a general catch-all provision (455(a)) to the narrower contexts of subsections of 455(b)(2)-(4) itemizing specific violative relationships renders the general provision superfluous and meaningless. Professor hazard also ignores that the preamble phrasing of section 455(b) reads as follows: "He [the judge] shall **also** disqualify himself in the following circumstances . . ." Thus, on their face, the specific subsections of section 455(b) define additional circumstances requiring recusal separate and apart from the "appearance of Impartiality" standard of section 455(a).

If Professor Hazard is correct in his analysis (which, incidentally, made no mention of any the applicable case law), then the decisions in *Liljeberg v. Health Servs. Acquisition Corp, U.S. v. Jordan, U.S. v. Kelly and U.S. v. Tucker*, discussed above, were wrongly decided. Yet, these cases still define the law of judicial recusal as it applies to 28 U.S.C. § 455(a). Professor Hazard's legal conclusion would also cast doubt on the propriety of Justices Thomas', Scalia's and Souter's recusals in the criminal case involving Judge Luttig's father.

Factually, Professor Hazard engaged in unsupported (and irrelevant) conjecture by suggesting that the impact of the reversal of the $10 million damage award on Ralston-Purina would have been minor, a fact that appears to be debunked by the significant increase in the company's stock price within days after Thomas' decision was issued. He also assumed that "the effect on Danforth's financial situation would have been miniscule if it could be measured at all." As previously noted, the immediate rise in Ralston Purina's stock price netted Senator Danforth a gain of over $400,000 (roughly $900,000 in today's dollars) in less than a week. It is also odd that Professor Hazard would even bother to address his view of the insignificance of the potential harm that Thomas' failure to recuse himself in *Alpo* would have caused, since Hazard is credited by a prominent colleague for his observation that the notion of "no harm, no foul" is "invalid as an ethical proposition."[70]

Professor Rotunda's opinion presents a more thorough and credible legal analysis. But his opinion justifies its conclusion that Thomas committed no ethical violation by ignoring controlling case law and focusing on readily distinguishable cases, far removed from the circumstances Clarence Thomas faced in the *Alpo* case, *i.e.*, (i) the judge rendered a prior adverse judgment against the party; (ii) judge was a casual acquaintance of a party, (iii) party was the state bar, of which the judge was necessarily a member, and an adverse judgment might increase his dues; (iv) party was the homeroom teacher of the judge's child; (v) complaining witness was a classmate and friend of the judge's daughter; etc. Moreover, most of the cases Rotunda cites were state cases based on state law, not on 28 U.S.C. § 455(a).[71]

Professor Rotunda dismissed the applicability of the Supreme Court's opinion in *Liljeberg*, clearly the most relevant decision he discusses, by noting that in *Liljeberg* the judge was found to have violated both the general "appearance of impropriety" provision of section 455(a) as well as the more specific provision of section 455(b)(4) (fiduciary

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[70] Monroe Freedman, *supra* note 49, at 23.

[71] Letter dated Jul. 26, 1991 from Professor Ronald Rotunda to White House Counsel C. Boyden Gray. Not content to simply satisfy the White House over concerns of Thomas' potential ethical gaffs in *Alpo*, Professor Rotunda repackaged his analysis and published it in a series of legal newspapers around the country about a month later, making him Thomas' most vocal cheerleader in the legal press. *See, e.g.*, Ronald Rotunda, *Stop the Smear Campaign Against Thomas*, Texas Lawyer (Sept. 2, 1991); Ronald Rotunda, *Removal Not Needed in Ralston Case*, Conn. Law Tribune (Sept. 9, 1991).

duties to a person having a financial interest), whereas Thomas' failure to recuse himself would only have implicated section 455(a), at most. No case has ever determined that recusal by a judge is required under Section 455(a) only where the judge would also violate a second provision of the statute.

Worse still, as far as his analysis goes, Professor Rotunda also seems to suggest that the Supreme Court determined that the judge's failure to recuse under his knowing violation of subsection 455(b)(4) directly resulted in his violation of the general catch-all provision of section 455(a). "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." In other words, Rotunda assumes that the Court linked liability under Section 455(a) specifically to the judge's knowing violation of subsection 455(b)(4), somewhat echoing Professor's Hazard's erroneous analysis, discussed above, requiring a violation of a 455(b) subsection for there to be a violation of section 455(a).

The Supreme Court did no such thing. It affirmed the appellate court's finding of a violation of Section 455(a) after a full examination of the law governing that section in Part III of the *Liljeberg* opinion. The Court then conducted a separate analysis of the judge's conduct under subsection 455(b)(4) and section 455(c) in Part VI of the opinion. It imposed no linkage requirement to find separate and independent liability under any of these provisions.

CONCLUSION

Disqualification is mandatory in circumstances that call a judge's impartiality into question.[72] The statute is meant to be self-enforcing.[73] The decision in *Alpo v. Ralston Purina,* which substantially changed the law of the D.C. Circuit in numerous respects,[74] was rendered by a judge who unaccountably failed to recuse himself under Section 455(a) when he should have done so. Nevertheless, there were no consequences. There were also no consequences when Thomas failed to recuse himself in *Gore v. Bush* despite the fact that his wife was actively assisting George Bush in selecting and recruiting candidates for

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[72] See 28 U.S.C. § 455(a); *In re School Asbestos Litig*., 977 F.2d 764, 783 (3d Cir. 1992).

[73] *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982); 28 U.S.C. §144.

[74] In addition to treating corrective advertising relief as profits rather than legal damages, as was historically the case, the *Alpo* decision also expressly held that the deterrence theory alone cannot justify an award of profits in trademark and false advertising cases. *Alpo*, 913 F.2d at 969. Previously the D.C. Circuit and all other circuits recognized that profits could be awarded on any one of three grounds: (1) as a rough surrogate of the plaintiff's damages, (2) under principles of unjust enrichment, and (3) to deter future offensive conduct. *See* Stolte, *supra* note 8, at 283-92; *see also Foxtrap, Inc. v. Foxtrap, Inc*., 671 F.2d 636, 641 (D.C. Cir. 1982) (stating that it was "customary", as opposed to mandatory, that a Lanham Act plaintiff show bad faith to obtain profits, but also stating that even where no bad faith is shown, profits can be available under the unjust enrichment basis). Curiously, Thomas' opinion in *Alpo* seems to merge the unjust enrichment basis for recovery into the deterrence theory, despite the long existence of the three mutually separate bases for awarding profits. *Alpo*, 913 F.2d at 968. The unjust enrichment theory of trademark profits has long been grounded on the restitutional concept of "*trust ex maleficio*". *Hamilton-Brown Shoe co. v. Wolf Bros. & Co*., 240 U.S. 251, 259 (1916). This theory has nothing to do with deterrence, or bad faith for that matter. Thus, Thomas' decision in *Alpo* substantially narrowed the circumstances in which a trademark or false advertising plaintiff may obtain an award of profits or corrective advertising damages, at least within the D.C. Circuit.

official positions in his future administration.[75] Nor were there any consequences when Thomas failed to account for his wife's income of about $700,000 over a six-year period in annual financial statements he filed.[76] The Supreme Court has explained that Congress "delegated to the judiciary the task of fashioning the remedies that will best serve the purpose" of the disqualification statute.[77] It remains to be seen whether Thomas will face consequences for his failure to recuse himself in *Trump v. Thompson* in the face of his wife's active involvement in Donald Trump's efforts to overturn the 2020 election result.

[75] Christopher Marquis, *Job of Clarence Thomas' Wife Raises Conflict of Interest Questions*, New York Times (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html?ref=virginia_lamp_thomas.
[76] Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, Los Angeles Times (Jan. 22, 2011), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html.
[77] *Liljeberg*, 486 U.S. at 862.