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September 6, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

We are writing in response to letters sent to you by Professors Thomas Morgan and Ronald Rotunda. In these letters, the professors disagree with our view (offered in a Slate magazine article) that Judge John Roberts should have recused himself in *Hamdan v. Rumsfeld*. We have great respect for Professors Morgan and Rotunda and recognize their eminence and expertise in legal ethics. But after carefully studying their arguments, we conclude that they fail to deal accurately with the precedents we cited in our Slate article. In addition, other authorities, which space constraints did not allow us to discuss in Slate, further support the conclusion we reached there. We have seen no authority that contradicts that conclusion.

We believe that the Senate should have a complete and accurate understanding of these issues, and for that reason we explain why the contrary views of Professors Morgan and Rotunda are wrong. In short, Judge Roberts should have recused himself in Hamdan without being asked to do so; failing which, he should have given Mr. Hamdan's lawyers the opportunity formally to seek his recusal if so advised or to waive their right to do so. We are *not* commenting on Judge Roberts's fitness to be Chief Justice of the Supreme Court. As we said in Slate, we do not doubt Judge Roberts's integrity.[1] Nor do we question his judicial temperament or legal abilities.

Our concern may be stated quite simply. Judge Roberts was interviewing for a Supreme Court seat with top White House officials, including Attorney General Alberto

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[1] The article is Stephen Gillers, David J. Luban, and Steven Lubet, *Improper Advances: Talking Dream Jobs With the Judge Out of Court*, Slate.com, August 17, 2005, available at http://www.slate.com/id/2124603/. We wrote: "We believe he [Judge Roberts] is a man of integrity who voted as he thought the law required." We also wrote: "We do not cite these events to raise questions about Roberts' fitness for the Supreme Court."

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Gonzales, during the pendency of a case in which President Bush is a defendant. The Attorney General's Department is representing him and the other government defendants. Judge Roberts did not disclose these interviews until after *Hamdan* was decided and he had been nominated to the Court. This unusual state of affairs means that his impartiality in *Hamdan* might reasonably be questioned. When a judge's impartiality might reasonably be questioned, federal law requires the judge to recuse himself – even if *in fact* the judge is completely impartial. As the Supreme Court and lower federal courts have repeatedly said, this law, 28 U.S.C. § 455(a), serves the important purpose of maintaining public confidence in the fairness of our courts. As we will show, case law and judicial ethics opinions uniformly support our analysis.

Professors Morgan and Rotunda offer three main objections to our reasoning. First, they object that a rule requiring judges being considered for promotion to recuse themselves from important cases involving the government would disqualify far too many judges in far too many cases. Second, they disagree that legal authority supports our position. Third, they believe that we have substituted a vague charge of "appearance of impropriety" for the actual standard in the law. As we now explain, none of their objections correctly represents what the law requires.

Section 455(a) reads: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This broadly-worded standard does not spell out when a judge's impartiality might reasonably be questioned. Like all "reasonableness" standards in the law, it requires a fact-specific, case by case inquiry. This is the law Congress passed long ago. It applies to all federal judges. It has been construed in hundreds of cases in light of the facts of those cases, sometimes resulting in recusal. Those cases give content to the congressional standard.

Instead of addressing this statute directly, Professor Rotunda recharacterizes its test. He finds fault with something he labels the "Gillers Rule," which he describes this way: "a judge who learns that he is being considered for an appointment to the U.S. Supreme Court [must] recuse himself from cases where the Government represents one side, and that case is, in Gillers' words, 'hotly contested'" (Rotunda letter, p. 7). But nothing resembling this rule, or any other proposed rule, appears in our article. For good reason: the task is not to concoct rules but to apply Section 455(a) as Congress wrote it. It is, after all, the standard that Congress adopted and the President signed into law. Rather than reading some hypothetical "rule" into the standard, we far prefer the traditional, fact-specific approach of the common law. This has been the approach of the federal courts. Our conclusion, drawing on cases interpreting this standard, discussed below, was that Judge Roberts's impartiality might reasonably be questioned because of specific and highly unusual facts:

(1) Judge Roberts's first interviewer was Attorney General Gonzales, who had personally drafted a widely-publicized memo to the President advising him of the

inapplicability of the Geneva Conventions to suspected Al Qaeda members.[2] As it happens, the inapplicability of the Geneva Conventions to suspected Al Qaeda members is one of the issues *Hamdan* decided – with Judge Roberts casting a deciding vote for the position that Mr. Gonzales recommended to the President. Judge Roberts met with Mr. Gonzales just six days before the oral argument in *Hamdan*. When he heard the arguments, therefore, Judge Roberts had just been reminded that a possible Supreme Court appointment might hinge on Mr. Gonzales's assessment of him. The likelihood of a vacancy on the Court was widely regarded as great at that time because of the late Chief Justice Rehnquist's ultimately fatal illness. We reiterate that we are not accusing Judge Roberts of bias. Our point is only that, in the words of the law, "his impartiality might reasonably be questioned."

(2) As Attorney General, Mr. Gonzales heads the Department of Justice, and it was Department of Justice lawyers who defended the *Hamdan* case. This places Judge Roberts in the posture of discussing a possible Supreme Court appointment with the head lawyer of the "firm" (the Department of Justice) litigating a case before him – a head lawyer who previously gave his legal opinion to the president on a central issue in the case.

(3) Contrary to Professors Morgan and Rotunda, *Hamdan* was not merely a case that was "'important' to the Administration" or "hotly contested" (Morgan letter, p. 2; Rotunda letter, p. 7). President Bush was a named defendant in *Hamdan*. Nor was the President a named defendant only as a formality. President Bush created the military commissions at issue in *Hamdan* by executive order. On February 7, 2002 he personally declared in writing that the Geneva Conventions do not apply to alleged Al Qaeda members. And President Bush declared in writing that there is reason to believe that Mr. Hamdan is an Al Qaeda member engaged in terrorism, who therefore qualifies for trial before a military tribunal. In other words, the President is a defendant in the case because of official actions that he himself took – not because of mere formalities.

(4) Although President Bush did not interview Judge Roberts for the Supreme Court vacancy until some hours after the *Hamdan* decision came down, the numerous interviews prior to the decision were with the President's top aides and advisors, including Vice President Cheney, Chief of Staff Andrew H. Card, Jr., Vice President Cheney's Chief of Staff I. Lewis Libby, White House Counsel Harriet Miers, and Deputy Chief of Staff Karl Rove.

Taken together, these facts show that Judge Roberts was interviewing with top aides of a defendant in a case before his court, including the chief lawyer responsible for

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[2] Memorandum for the President (Draft), from Alberto Gonzales, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban, January 25, 2002.

defending that case, when the defendant had the sole power to nominate him to the Supreme Court. Furthermore, in this situation both the defendant and the lawyer have a real involvement in the issues of the case, not merely a nominal involvement; and the defendant is focused on the appointment to a greater extent than other judicial appointments. Even if every White House official who interviewed Judge Roberts carefully avoided the topics in the *Hamdan* case, with no hint of an improper suggestion to the judge about how the case should come out, the pressure on the judge not to disappoint or frustrate the President and his advisors is inherent in the situation itself. Any reasonable person would question whether a judge, even with the best will in the world, can impartially consider arguments that, if accepted, would frustrate and disappoint the person who holds the judge's promotion to the Supreme Court in his hands. The law requires recusal because the public does not expect judges to have superhuman abilities to ignore their own aspirations.

Contrary to Professor Rotunda, recusal is the result uniformly endorsed by the legal authorities. In our article, we described two leading cases in which judges were forced to recuse themselves because they had discussed possible future employment with the parties or lawyers while cases were pending. These decisions (which we did not identify by name in the article) are *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) and *Scott v. United States*, 559 A.2d 745 (D.C. 1989). In the first, Judge Richard A. Posner held that a judge who wished to leave the bench and return to private practice was forced to recuse himself from a case after his headhunter, contrary to the judge's instructions, contacted law firms litigating the case. In the second, a criminal conviction was thrown out because during the trial the judge was discussing a job with the Department of Justice, which was prosecuting the case. The Department of Justice conceded that these negotiations violated judicial ethics rules. According to Professor Morgan, these cases "break no new ground and provide no new insights relevant to this discussion." (Morgan letter, p. 2.) However, that is precisely the point: far from breaking new ground, these cases squarely represent the state of the law.

Professor Rotunda points to language in *Scott* that says, "By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself...." *Scott*, 559 A.2d at 755 (Professor Rotunda's emphasis). Professor Rotunda believes that this means the judge had no duty to recuse himself until he had decided to accept the job – and, by analogy, Judge Roberts had no duty to recuse himself until he had been offered, and decided to accept, the Supreme Court nomination. However, this is a badly mistaken reading of *Scott*, which explicitly says that the violation of the recusal standard occurred "when the trial judge who is presiding at the prosecution by the United States Department of Justice through the United States Attorney's Office is actively negotiating for employment with the Department's Executive Office for United States Attorneys." *Scott*, 559 A.2d at 750. Indeed, the court's holding in *Scott* reiterates this conclusion: "we hold that Judge Murphy violated Canon 3(C)(1) when he presided at Scott's trial *while he was actively seeking employment* with the Executive Office for United States Attorneys." *Scott*, 559

A.2d at 750 (our emphasis).[3]

Additional authorities reach the same conclusions. In *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262-63 (5th Cir. 1990), the Fifth Circuit Court of Appeals found that a judge should have retroactively recused himself and vacated two rulings when he thereafter accepted a job with a law firm representing one party in the case – even though he had no knowledge of the job prospect when he issued the rulings. A second panel reconsidering the case reached the identical conclusion. *In re Continental Airlines Corp.*, 981 F.2d 1450, 1462 (5th Cir. 1993). And Advisory Opinion 84 of the U.S. Judicial Conference's Committee on Codes of Conduct (1990; reviewed 1998) states that whenever a judge discusses future employment with a law firm, "no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." The Opinion adds: "The principles discussed would apply by analogy to other potential employers."[4]

Professor Morgan responds that "[a] judge's promotion within the federal system has not been – and should not be – seen as analogous to exploration of job prospects outside of the judiciary" (Morgan letter, p. 2). But the Committee on Codes of Conduct disagrees. The Committee's Advisory Opinion 97 (1999) discusses the reappointment of magistrate judges. Magistrates are reviewed for reappointment by a selection panel. The Committee writes:

> "An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1) the magistrate judge is required to recuse in such a case."

Clearly, a circuit judge being considered for a Supreme Court appointment is equally "aware that his or her past service as a judge is being carefully reviewed and scrutinized."

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[3] Canon 3(C)(1) is the recusal rule in the ABA's Code of Judicial Conduct, which the court notes is substantially similar to Section 455(a). *Scott*, 559 A.2d at 749, note 8. It was subsequently adopted in the official Code of Conduct for United States Judges. See http://www.uscourts.gov/guide/vol2/ch1.html#3

[4] The Committee's Advisory Opinions are available at http://www.uscourts.gov/guide/advisoryopinions.htm

And so, by the reasoning of this opinion, the circuit judge is required to recuse in any case involving an attorney or party who is directly involved in the process of selecting the Supreme Court nominee. The Committee reached the same result in an informal Advisory Opinion issued in 1992. It concerns a judge on the U.S. Military Court of Appeals, nearing the end of her 15-year-term, who sought recommendation by the Department of Defense for reappointment. The Committee on Codes of Conduct found that the judge was required to recuse herself from a high-profile case in which the Defense Department was a party.[5] If mere reappointment to the judiciary raises reasonable questions about impartiality, promotion to the Supreme Court obviously does as well.

Against the unanimous weight of these opinions and decisions, Professor Rotunda cites "[t]he case that seems most on point" in his view, *Baker v. City of Detroit*, 458 F.Supp. 374 (D. Mich. 1978), in which a judge declined to recuse himself from a case. However, *Baker* concerns an entirely different issue: personal friendship between a judge and a litigant. In the words of the judge in *Baker*, "The crux of plaintiffs' claim is that this Court...should recuse itself from presiding at the trial of this case because of the friendship between myself and Coleman A. Young, Mayor of the City of Detroit and a nominal party to this action." 458 F.Supp. at 375. One basis of the friendship (not the only one he mentions) is that Mayor Young had been a member of a panel that recommended Judge Keith for promotion to circuit judge. But at the time of the recusal ruling, that recommendation had already been made, and indeed Judge Keith had already been appointed Circuit Judge. Thus, in the relevant time period, Mayor Young no longer had any role to play in Judge Keith's promotion. *Baker* therefore has nothing at all to do with the question of whether a judge must recuse himself when a litigant is in a position to appoint him to a job he very much wants.

Finally, we wish to comment briefly on Professors Morgan and Rotunda's objection to the "appearance of impropriety" standard, which they believe adds nothing, is too vague and misstates Section 455(a). We find this criticism puzzling, because our article never used the phrase "appearance of impropriety," except once in a direct quote from a Supreme Court opinion. We did use the phrase "appearance of impartiality," which is far less vague than the all-purpose word "impropriety," and which has appeared in scores of federal court cases discussing Section 455(a). Section 455(a) speaks of proceedings in which a judge's "impartiality might reasonably be questioned" – in other words, proceedings that might *appear* to a reasonable person to violate impartiality, whether or not they actually do. As one distinguished court writes, "we join our sister circuits in concluding that an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be

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[5] The opinion is published in 5 Military Justice Gazette (January 1993), in MILITARY JUSTICE GAZETTE: THE FIRST TEN YEARS 1-2 (National Institute of Military Justice 2001).

demonstrated to compel recusal under section 455." *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981). With all due respect, Professors Morgan and Rotunda are engaged in semantic quibbling over the word "appearance." Nothing in our reasoning depends on the phraseology. Our conclusions depend only on Section 455(a), the facts of the case, and the authorities we cite. Professor Rotunda argues at great length that the ABA and other rule-writers have rejected "appearance of impropriety" standards. But Professor Rotunda's scholarly demonstration is entirely beside the point, because it pertains only to rules governing practicing lawyers, not judges. Canon 2 of the ABA's Code of Judicial Conduct, like the Code of Conduct for United States Judges, continues to state that "A judge shall avoid impropriety *and the appearance of impropriety* in all of the judge's activities" (emphasis added).

In conclusion, we find that Professors Morgan and Rotunda have not adequately conveyed the remarkable consensus among distinguished authorities that a judge being interviewed for a desirable job must recuse himself from cases involving the interviewers, whether they are parties or lawyers (or, as specified in Canon 3D of the Code of Conduct for United States Judges, obtain written permission to remain in the case from all parties, after disclosure on the record of the basis for disqualification). Nor have they focused on the specific facts that place Judge Roberts's situation, from April through mid-July, squarely within the ambit of the federal law requiring him to disqualify himself. We hope this letter is of use to you and your Committee.

Yours very truly,

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cc: Senator Patrick Leahy