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Honorable Arlen Specter, Chair
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Recent press accounts suggest that some believe it was improper for Judge Samuel Alito to have participated in a case called *Monga v. Ottenberg*, decided by a panel of the Third Circuit in 2002. In my opinion, there is no basis for suggesting his action was in any way improper.

To briefly suggest my background to draw such a conclusion, I have taught and written in the field of legal and judicial ethics for over thirty years. The law school text that I co-author has long been the most widely used in the country, and it covers judicial ethics in considerable detail.

Judge Alito's required annual financial disclosure forms list among his holding several Vanguard mutual funds that offer diverse kinds of investment products. Some of the funds are shown as valued in the range $15,000 to $50,000; others are in range $50,000 to $100,000.

Based on the relatively sketchy reports we have available, the *Monga v. Ottenberg* case arose after Mr. Monga's business failed. A Massachusetts court appointed Mr. Ottenberg as receiver. Mr. Ottenberg claimed that certain Individual Retirement Accounts (IRAs) had been created by fraudulent transfers and thus that their assets should be available to pay creditors. The Massachusetts court agreed with him and so ordered. The IRAs were invested in several mutual funds, including some managed by Vanguard.

Even prior to that adverse ruling, Mr. Monga had filed collateral proceedings in federal court in Philadelphia seeking to enjoin the mutual fund companies from paying the accounts over to Mr. Ottenberg. That case had been dismissed in 1996, shortly before Mr. Monga's death. Later, in 1998, the Massachusetts state court had enjoined Mr. Monga's widow, Ms. Maharaj, from filing any other such action in any state or federal court.

The case on which Judge Alito sat was an appeal from the decision of Federal District Judge Hutton granting the motions of Vanguard and Founders Funds to dismiss yet another collateral federal action and to allow the companies to comply with the Massachusetts order. It

should not be surprising, given the repeated factual findings in favor of Mr. Ottenberg, that the Third Circuit panel consisting of Judges Alito, Fuentes and Roth unanimously affirmed Judge Hutton without published opinion. The Supreme Court denied certiorari.

As apparently a last ditch effort to keep her case alive, Ms. Maharaj then sought to reopen the case by suggesting that because Judge Alito had owned Vanguard mutual funds at the time of the Third Circuit decision, the result was somehow tainted. Thus, a different panel of the Third Circuit reheard the case and unanimously reached the same result, again in an unpublished opinion. The Supreme Court again denied certiorari.

The relevant statutory provision, 28 U.S.C. § 455, requires a federal judge such as Judge Alito to disqualify himself (a) "in any proceeding in which his impartiality might reasonably be questioned," or (b) if he "has a financial interest in * * * a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

Part (d) of § 455 then defines "financial interest" to mean "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."

The best technical argument that Judge Alito did something wrong seems to be that he had a "financial interest" in "a party to the proceeding," because Vanguard was technically one of the defendants in the collateral proceeding for injunction that was on review. The argument collapses, however, in view of the clear statement in § 455(d) that ownership of a mutual fund is expressly *not* a financial interest "unless the judge participates in the management of the fund."

I have seen it suggested that Vanguard apparently regards its mutual fund purchasers as "owners" in the same way that mutual insurance companies call their policyholders "owners." In both situations, investors or policyholders may "own" the company in some theoretical sense, but that fact no more makes Judge Alito part of the "management of the [Vanguard] fund" than a policyholder could be said to "manage" his or her insurance company. There is, in short, simply no way that Judge Alito fits within the prohibition of 28 U.S.C. § 455.

Further, and going more to the real issue in any ethics charge, it is absolutely clear that there is no way Judge Alito stood to profit from deciding the *Monga* case one way rather than another. Putting aside the infinitesimal share of the Vanguard funds that Judge Alito owned, Vanguard had no material stake in the outcome of the *Monga* case. Vanguard presumably wanted the case to be over; that is likely why it moved to dismiss the federal proceeding. But Vanguard held money that belonged either to Mr. Monga, or to the receiver Mr. Ottenberg.

Nothing that Judge Alito did or could do would change the fact that the money did not belong to Vanguard or Vanguard's theoretical "owners" such as Judge Alito.

There is thus no actual or technical substance to the suggestion that Judge Alito did something wrong in hearing the *Monga* case. One may say that judges must avoid even "the appearance of impropriety," but no reasonable person could believe that Judge Alito violated even that standard. It should not "appear" improper to decide a case which the judge has no incentive to decide other than in accordance with the law.

Finally, I have seen it said in the media that Judge Alito promised your Committee at the time of his confirmation in 1990 that he would recuse himself from "any cases involving the Vanguard companies." I have not seen the context of that "promise," but I greatly doubt that your Committee understood it to require more than the law governing disqualification requires.

In any event, even if Judge Alito had undertaken special responsibilities involving disqualification in cases in which Vanguard appeared in any form, I do not see his failure to recuse himself in the *Monga* case as other than one of the inadvertent failures to disqualify that occur from time to time because of the volume of cases and press of business in the federal courts. In 1997, for example, press reports said that Justice Ginsburg had participated in some twenty-one Supreme Court cases involving companies in which her husband held stock. The mistakes were clearly inadvertent, did not affect any result, and no one saw the incidents as suggesting anything other than oversights to be avoided in the future.

The name of the *Monga* case was *Monga v. Ottenberg*. The names of Vanguard and the other mutual funds appeared later in the case title to be sure, but it was obvious to everyone that they were not the real parties in interest. The decision in question ultimately turned on the finality of Massachusetts state court rulings in a dispute between two individuals, Monga and Ottenberg. It is thus utterly unjustified to call Judge Alito's participation in that case a conflict of interest or a breach of faith with this Committee.

In my opinion, Judge Alito's participation in the *Monga* case was in no way improper, nor does it give any reason to doubt that he would fully comply with his ethical responsibilities if he is confirmed as an Associate Justice of the United States Supreme Court.

Respectfully,

Thomas D. Morgan
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