RONALD D. ROTUNDA
GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR OF LAW
PHONE: (703) 993-8041
Fax: (703) 993-8124
Email: rrotunda@gmu.edu

GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 N. FAIRFAX DR.
ARLINGTON, VA 22201-4426
: http://mason.gmu.edu/~rrotunda

4 November 2005

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

Re: PROPRIETY OF JUDGE ALITO'S FAILURE TO RECUSE IN CASE INVOLVING VANGUARD

Dear Chairman Specter:

Introduction and Summary

You have asked me about the propriety, under federal law, 28 U.S.C. §445, federal rules,[1] and related provisions of the ABA Model Code of Judicial Conduct, of Judge Alito's failure to recuse himself (and his later recusal when a litigant asked for recusal) in a case he heard in 2002.[2]

I have evaluated the situation and conclude, for the reasons discussed below, that neither federal statutes, nor federal rules, nor the Model Code of Judicial Conduct of the American Bar Association provide that a judge should disqualify himself in any case involving a mutual fund company (e.g., Vanguard, Fidelity, T. Rowe Price) simply because the judge owns mutual funds that the company manages and holds in trust for the judge. **The ethics rules treat all mutual fund companies alike and do not**

---

[1] *E.g.*, Code of Conduct for United States Judges, Canon 3(C)(3)(3)(i), http://www.uscourts.gov/guide/vol2/ch1.html#N_1 .

[2] For your information, I am attaching, at the end of this letter, a copy of my up-to-date *curriculum vitae*. Or, you may check my webpage, http://mason.gmu.edu/~rrotunda .

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

discriminate against Vanguard and in favor of, e.g., T. Rowe Price, because the ethics rules focus on substance, not labels.

The judge's ownership of shares in a mutual fund (e.g., the Vanguard Index Fund) is not an ownership interest in the Vanguard Company itself anymore than my ownership of a saving account makes me an equity owner of the Saving Bank.

In other words, the ethics rules make clear that a "depositor in a mutual savings association, or *a similar proprietary interest* [e.g., Vanguard], is a 'financial interest' in the organization *only if* the outcome of the proceeding could substantially affect the value of the interest."[3] Judge Alito's decision in a case that a pro se litigant filed and lost at every level, was not a case where the outcome of the proceeding could "substantially affect" the value of his Vanguard mutual funds. Indeed, the judge simply had no financial stake in this case.[4]

---

[3] Committee On Codes Of Conduct Advisory Opinion No. 49, revised July 10, 1998, http://www.uscourts.gov/guide/vol2/49.html (emphasis added).

[4] Ottenberg claimed that certain Individual Retirement Accounts (IRAs) should be available to pay creditors because the IRAs were the product of fraud, and the Massachusetts court agreed. Some of the IRAs were invested in Vanguard mutual funds. While this case was going on, Monga filed collateral proceedings in Philadelphia to enjoin the mutual fund companies from paying the accounts over to Ottenberg. That court dismissed the case in 1996, shortly before Mr. Monga's death. In 1998, the Massachusetts state court enjoined Monga's widow, Ms. Maharaj, from filing further actions in any state or federal court. But the law suits continued.

Judge Alito sat on 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. The Third Circuit panel of Judges Alito, Fuentes and Roth unanimously affirmed Judge Hutton without published opinion. The Supreme Court denied certiorari, but Maharaj was undaunted. She sought to reopen the case by making various claims, including the one at issue here: the argument is that because Judge Alito owned some mutual funds that Vanguard managed, he had to disqualify himself. To avoid further litigation, the judge recused himself and a different panel of the Third Circuit reheard the case and unanimously reached the same result, also in an unpublished opinion. The Supreme Court again denied certiorari.

The law is also clear that "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."[5]

In the case in question, after the pro se litigant lost her case, she asked Judge Alito to recuse himself. The pro se litigant alleged that Judge Alito had a financial interest in a party; that he owned shares in a party; and *even that he was a party himself!*[6] All those allegations were false, but he promptly recused himself anyway because it was his personal practice to recuse himself when a party raised an issue and "any possible question might arise."[7] The case was sent to a new panel and it came out the same way.[8]

The Basis Ethics Rules Regarding Recusal When the Judge Owns Stock In a Party

In 1990, when Judicial Nominee Samuel Alito was responding to a Judiciary Committee question regarding conflicts, he said:

---

[5] *E.g.*, Code of Conduct for United States Judges, Canon 3(C)(3)(3)(i), http://www.uscourts.gov/guide/vol2/ch1.html#N_1 .

[6] Letter of Judge Alito to Chief Judge Anthony J. Scirica of 2 December 2003, regarding Monga v. Ottenberg, No. 01-1827.

[7] Id.

[8] *Monga v. Ottenberg*, (3d Cir. July 2004) (unpublished), 95 Fed. Appx. 463 (3d Cir. 2004), 125 S.Ct. 1328, 161 L.Ed.2d 135 (2005). This individual is very litigious. A list of cases related to this case is extensive. A Westlaw search shows that this case is one of 22 cases all part of this history of this one litigation. See note 4, *supra*.

Even if Judge Alito, in this case, were required to recuse himself sua sponte (on his own motion) *before* the litigant asked for recusal, there should be no ethical violation as long as the judge acted reasonably. Reasonable people are allowed to make reasonable mistakes. *See, e.g.* Richard Carelli, AP, *Justice Took Part In Cases Involving Husband's Stocks*, July 10, 1997, Westlaw, 7/10/97 AP Online 00:00:00: "Supreme Court Justice Ruth Bader Ginsburg may have violated a federal law 21 times since 1995 by participating in cases involving companies in which her husband owned stock. . . . Responding to queries by The Associated Press, Martin D. Ginsburg said he has ordered his broker to sell all his stock in the eight companies."

> I do not believe that conflicts of interest relating to my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard companies, the brokerage firm of Smith Barney, or the First Federal Savings & Loan of Rochester, New York.
>
> I would disqualify myself from any case involving my sister's law firm, Carpenter, Bennett & Morrissey, of Newark, New Jersey.

I do not know why Judge Alito said[9] that he would not hear any cases involving Vanguard, Smith Barney, or First Federal. It appears as if he acted out of an over-abundance of caution. However, the law is clear now — even if it were less clear 15 years ago — that *mutual fund companies (whether organized like a mutual insurance company or a publicly traded company) are now treated the same for recusal purposes.*

It is easiest to examine this issue by looking at a few examples. First, assume that Judge Alito owns 100 shares of IBM and that the brokerage firm Smith Barney holds those shares for him.

If he owned even one share of IBM, he must disqualify himself in any case where IBM is a party.[10] However, the rules do not contemplate that he should disqualify himself simply because Smith Barney is a party because he did not own shares in Smith Barney; that brokerage firm simply held those shares in trust for him.

Did Judge Alito Own Stock in Vanguard?

The Vanguard Company manages several of the Judge's mutual funds. Vanguard manages those funds in trust for the judge. But that fact does not make the Judge an

---

[9] It is not reasonable to argue that, in 1990, Judicial Nominee Alito was "promising" never to hear a case involving Carpenter, Bennett & Morrissey, or Vanguard, no matter what was the state of the law or the facts in the ensuing years. His 1990 statement, in context, can only mean that based on the law and the facts at the time as he understood them, he would — out of an overabundance of caution — not hear cases involving Smith Barney, Vanguard, or the law firm of Carpenter, Bennett & Morrissey. If the facts or the law would change, then the result would change. For example, if his sister no longer was working at Carpenter, Bennett & Morrissey, then he would no longer disqualify himself from hearing cases from that firm.

[10] *E.g.*, Federal Committee on Codes of Conduct, Advisory Opinion No. 20 (as revised on July 10, 1998), http://www.uscourts.gov/guide/vol2/20.html .

owner of Vanguard in the same way that the Judge would be an owner of IBM if he owned even one share of IBM.

Consider a famous mutual fund company, T. Rowe Price, which is publicly traded.[11] If a judge invests in one of the mutual funds that T. Rowe Price manages, that does not make him an owner of T. Rowe Price, and so the ethics rule is quite clear that that it does not contemplate the judge disqualifying himself just because he owns shares in a mutual fund that T. Rowe Price manages. He would own T. Rowe Price *only* if he bought shares of T. Rowe Price on the stock exchange.

That should end the matter but the argument is made that Vanguard is "different" because it is organized like a mutual insurance company, where the policy holders are like the owners. Indeed, Vanguard advertises on its website that it is "owned" by its clients, the people who buy its mutual funds. [12] My bank, by the way, may advertise on its webpage that its customers are like family, but the bank president does not invite me to his home for Thanksgiving.

Vanguard is more precise when it describes its status in its prospectuses. There it says that the funds (not the shareholders) own Vanguard. A typical Vanguard Fund prospectus explains that it "is *owned* jointly *by the funds* it oversees and thus *indirectly* by the shareholders in those funds."[13]

Does this organizational set-up — whether the fund holders "own" Vanguard indirectly or not — require different ethics rules? Do the ethics rules discriminate against Vanguard because the funds that it oversees own Vanguard and clients invest in these funds, which Vanguard holds in trust for its clients?

The ethics opinions agree that the answer is no.

---

[11] T. Rowe Price Group, Inc.'s common stock trades on The NASDAQ Stock Market® in the United States under the symbol TROW.

[12] "Vanguard is different: We're client-owned. Helping our investors achieve their goals is literally our sole reason for existence. With no other parties to answer to and therefore no conflicting loyalties, we make every decision—like keeping investing costs as low as possible—with only your needs in mind." http://flagship3.vanguard.com/VGApp/hnw/content/Home/WhyVanguard/AboutVanguardWhyInvestContent.jsp .

[13] E.g., Vanguard Morgan Growth Fund, Prospectus at p. 9 (emphasis added) (under heading, "Plain Talk about Vanguard's Unique Corporate Structure").

Vanguard's organizational set-up is like a mutual insurance company or a mutual savings and loan. Hoover's, a company specializing in providing business information and company profiles, explains: "Unlike other funds, Vanguard is set up like a mutual insurance company."[14]

The ethics opinions uniformly hold that a "shareholder" in a mutual insurance company (State Farm) or in Vanguard is not like a shareholder in IBM. If I own $100 of the Vanguard Index Fund, I do not "own" Vanguard in the same way that I "own" IBM. Instead, I am just like someone who owns $100 of Fidelity Magellan Fund. I cannot get a stock certificate for Vanguard and sell my interest in Vanguard to another person; I can only sell my interest in the Vanguard Index Fund. That fund will pay me dividends, but I get no dividends from the Vanguard Company; I get no capital gains from the Vanguard Company if that company is worth more tomorrow than it is worth today. The only way I can secure a "share" in Vanguard is by buying a mutual fund, and when I sell that mutual fund I lose my "share" in Vanguard. I am like a depositor in a Savings & Loan. The bank may call me an "owner," and it may say in its various prospectuses that I own Vanguard "indirectly," but I am not like any owner of even one share of Citibank and BankAmerica.

What has happened is that some companies (such as Vanguard and State Farm Insurance) have set themselves up in a particular corporate structure for marketing purposes. But neither that corporate structure, nor any statement in a prospectus that speaks of "indirect owners," changes the law of ethics, because ethics is concerned about substance, not labels. An investor in Vanguard mutual funds is not an equity owner of Vanguard in the sense that a shareholder of BankAmerica is an owner of BankAmerica.

An owner of a Vanguard mutual fund is like a depositor in a mutual savings bank. To see what the rules are for Vanguard holders, we should look at the ethics rules for depositors in a mutual savings bank. After all, an ethics rule is supposed to focus on substance, not on form — on what is really going on, not on what label someone chooses to give.

Let me distill the law of ethics on this issue as follows:

> THE ETHICS RULES PROVIDE, IN SHORT, THAT A HOLDER OF A SAVINGS ACCOUNT IN A MUTUAL SAVINGS BANK IS JUST LIKE THE HOLDER OF A MUTUAL FUND IN VANGUARD. THAT VANGUARD HOLDER IS JUST LIKE THE HOLDER OF A MUTUAL FUND IN FIDELITY. THAT IS, HE DOES NOT OWN AN ECONOMIC INTEREST IN VANGUARD OR FIDELITY; HE ONLY OWNS AN

---

[14] http://premium.hoovers.com .

INTEREST IN THE FUNDS THAT THE COMPANY MANAGES AND HOLDS IN TRUST FOR HIM. THE ETHICS RULES DO NOT PROVIDE THAT THE JUDGE MUST RECUSE HIMSELF SIMPLY BECAUSE HE INVESTS IN MUTUAL FUNDS THAT VANGUARD HOLDS, BECAUSE THE RULES FOCUS ON SUBSTANCE, NOT LABELS.

Let us now turn to the various ethics opinions that make this point quite clearly. Look at Canon 3C(3)(c)(iii), of the Code of Conduct for United States Judges.[15] This Code has been revised over the years, and I am referring to the versions that apply now and at the time that Judge Alito decided the case where Vanguard was a party. [16]

First, Canon 3C(3(c)(iii) provides that the judge must disqualify himself if he has **[1]** a financial interest in a party or **[2]** any other interest that could be affected "substantially" by the outcome of the proceeding. There is no doubt that he had no interest that could be affected "substantially" by the outcome of this proceeding. He owns interests in various mutual funds and none of them could be affected by the case that the pro se litigant brought.

However, did he have "a financial interest" in a party? Did he have a financial interest in Vanguard simply because Vanguard, like State Farm Insurance, is organized as a mutual insurance company? Canon 3C(3(c)(iii) says no:

> the proprietary interest of a policy holder in a *mutual insurance company*, or a depositor in a mutual savings association, *or a similar proprietary interest*, is a "financial interest" in the organization *only if* the outcome of the proceeding could substantially affect the value of the interest; . . .[17]

---

[15] http://www.uscourts.gov/guide/vol2/ch1.html#3 .

[16] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference. http://www.uscourts.gov/guide/vol2/ch1.html#N_3_ , at note 1.

[17] http://www.uscourts.gov/guide/vol2/ch1.html#N_3_ (emphasis added).

The ethics opinions interpreting this clause are all consistent. They treat shares in mutual funds managed by Vanguard the same way that they treat shares in mutual funds managed by Fidelity or T. Rowe Price. *The ethics rules are concerned about substance, not labels, and they have no interest in preferring one mutual fund company to another.*

For example, the Federal Committee on Codes of Conduct, Advisory Opinion No. 49 (as revised on July 10, 1998)[18] concludes that the: "Code of Judicial Conduct does not require a judge to disqualify in a case where a trade association appears as a party because judge owns a small percentage of outstanding, publicly-traded shares of one or more members of trade association."

The reasoning of this opinion is right on point. It explains that it is following the ABA lead and then relies on Professor Thode, who prepared the Reporter's Notes to the ABA Model Judicial Canons. The opinion quotes Professor Thode who explained that "deposits in a mutual savings association or a policy in a *mutual insurance company* create a '*technical legal interest*,' Professor Thode states that 'these technical interests, and *other similar ones*' should not be a basis for disqualification." (emphasis added).

Arguing that one "owns" Vanguard emphasizes technicalities, not substance. As Professor Thode said (and as the opinion quoted) :

> "In Canon 3C(3)(c) the Committee endeavored to set a standard for economic disqualification for indirect and technical interests that assures impartiality and the appearance of impartiality but at the same time makes available to a judge some types of nondisqualifying investments."

The opinion then concludes that a judge's interest in a trade association is similar, technical, minor, and hence not disqualifying: "the Committee sees no impropriety in a judge serving in a proceeding where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, subject, of course, to the general qualifications set forth in Canon 3C(1)(c) and 3C(3)(c) of the Code of Conduct."

Those general qualifications set out in Canon 3C(1)(c) and 3C(3)(c) also conclude that Judge Alito acted ethically. Canon 3C(1)(c) provides that the judge should disqualify himself if the judge has a financial interest in the party that could be "affected substantially by the outcome of the proceeding." For example, if the litigant asks the judge to rule that Vanguard was misleading the investors in charging fees in the

---

[18] http://www.uscourts.gov/guide/vol2/49.html .

Vanguard XYZ Fund, and the judge has an interest in the XYZ Fund, he should disqualify himself.

Canon 3C(3)(c), the other referenced Canon, has a rule for "financial interest. However, as seen above, Canon 3C(3)(c)(iii) does *not* include ownership in mutual companies as a financial interest in the company itself. The second part of Canon 3C(3)(c) requires disqualification if the judge has "a relationship as director, advisor, or other active participant in the affairs of a party," which is simply not applicable here.

It is true that Vanguard's defense of this case must have cost it something in terms of lawyer's fees. But that burden on Vanguard does not impose any disqualification on the judge unless the litigation could "substantially" affect the value of his investment. Canon 3C(3)(c)(iii). For example, if the judge's interest in Vanguard Funds was so great that his investments totaled 25% of all of Vanguard's investments and the attorneys' fees in defending this case amounted to a substantial part of Vanguard's gross income that year, the judge should disqualify himself.[19]

Advisory Opinion No. 49 (as revised on July 10, 1998), discussed above, is no judicial orphan. Advisory Opinion No. 57 (as revised on July 10, 1998), also *reemphasizes* this point when it says that the judge's interest in mutual savings associations or mutual insurance companies are "technical" and *not disqualifying*, "even though the association or company is a party to a proceeding before him, *unless* the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable."[20]

It is quite clear that the judge's interests could not be "substantially" affected by this case. The broad test of Canon 3C(1) is that a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," a section that could not apply given that the subsection [3C(3)(c)(iii)] specifically approves of interests in a mutual insurance company or "a similar propriety interest" is not an ownership interest for purposes of disqualification.

---

[19] Checklists for Financial and Other Conflicts of Interest, at note 3, http://www.uscourts.gov/guide/vol2/checklist.pdf , which provides:

> [3]Shares in mutual funds do not constitute a financial interest in the companies whose stock is held by the mutual fund, unless the judge participates in management of the fund. However, shares in some mutual funds may convey an ownership interest in the mutual fund management company (in which case that company should be included on the conflicts list).

[20] http://www.uscourts.gov/guide/vol2/57.html (emphasis added).

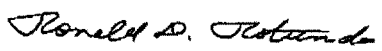
Conclusion

Let us say that a litigant brings a case before a judge in which the local water utility is a party. If the litigant wins, everyone's water rates will go down. The judge drinks water and hence benefits by the decision, but the ethics rules do not impose disqualification because the purpose of the ethics rules is to deal with substance and not to make silly distinctions. Hence, the judge's "mere status as a utility ratepayer, or as a taxpayer, is not in itself disqualifying. If the outcome of the proceeding could *uniquely affect* the amount to be paid by the judge to the utility, or in taxes, disqualification under Canon 3C(1)(c) would be required."[21]

Similarly, if the Judge owned shares in Vanguard Utility Fund, and a litigant sues the Vanguard Company because it complied with a court order to turn over the litigant's mutual funds to satisfy a court judgment, the judge is not disqualified. However, if the litigant is suing on the grounds that the fee structure of Vanguard Utility Fund violates a federal law, and the judge has a substantial interest in that particular fund, then there may be a proceeding pending or impending before the judge that could "substantially affect the value of the interest." But that is not what happened here.

The law for federal judges is now clear now after the Judicial Conference adopted substantial revisions to the Code a0t its September 1992 session. In this opinion, I have focused on the opinions of the Judicial Conference. However, the law is equally clear under the federal statutes and the ABA Model Judicial Code. That is why the federal Judicial Conference, in its opinions, frequently refers to the ABA Model Code and the Reporter's Notes. They all come to the same conclusion: a mutual insurance company, a mutual savings association, and a "mutual mutual" company (what Vanguard calls itself) are treated the same as their non-mutual cousins, i.e., an insurance company, a commercial bank, and a mutual company.

Sincerely



Ronald D. Rotunda

---

[21] Advisory Opinion No. 68 (Reviewed July 10, 1998), http://www.uscourts.gov/guide/vol2/78.html (emphasis added).

CONFIRMATION HEARING OF SAMUEL A. ALITO, JR.

OPENING STATEMENT OF SENATOR CHARLES E. SCHUMER JANUARY 9, 2006

Judge Alito, welcome to you, Mrs. Alito and your two children. I join my colleagues in congratulating you on your nomination to the position of Associate Justice of the United States Supreme Court.

If confirmed, you will be one of nine people who collectively hold power over everyone who lives in this country. You will define our freedom; you will affect our security; you will shape our law.

You will determine, on some days, where we pray and how we vote; you will define, on other days, when life begins and what our schools may teach; and you will decide, from time to time, who shall live and who shall die.

The decisions are final, and appeals impossible.

That is the awesome responsibility and power of a Supreme Court Justice. It is, therefore, only appropriate that everyone who aspires to that office bear a heavy burden when they come before the Senate and the American people to prove that they are worthy.

But while every Supreme Court nominee has a great burden, yours, Judge Alito, is triply high.

First, because you have been named to replace Justice Sandra Day O'Connor, the pivotal swing vote on a divided Court; second, because you have been picked to placate the extreme right wing after the hasty withdrawal of Harriet Miers; and, finally, because your record of opinions and statements on a number of critical Constitutional questions seems quite extreme.

So, first, as this Committee takes up your nomination, we cannot forget recent history, because that history increases your burden and explains why the American people want us to examine every portion of your record with great care.

Harriet Miers's nomination was blocked by a cadre of conservative critics who undermined her at every turn. She did not get to explain her judicial philosophy; she did not get to testify at a hearing; and she did not get the up-or-down vote on the Senate Floor that her critics are now demanding that you receive.

Why? For the simple reason that those critics could not be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure with you.

The same critics who called the President on the carpet for naming Harriet Miers have

rolled out the red carpet for you, Judge Alito. We would be remiss if we did not explore why.

And there is an additional significance to the Miers precedent, which is this: Everyone now seems to agree that nominees should explain their judicial philosophy and ideology.

After so many of my friends across the aisle spoke so loudly about the obligation of nominees to testify candidly about their legal views and their judicial philosophy when the nominee was Harriet Miers, I hope we will not see a flip-flop now that the nominee is Sam Alito.

The second reason your burden is higher, of course, is that you are filling the shoes of Sandra Day O'Connor. Those are big shoes, to be sure.

But hers are also special shoes – she was the first woman Justice in the history of the High Court, is the only sitting Justice with experience as a legislator, and has been the most frequent swing vote in a quarter century of service on the Court.

While Sandra Day O'Connor has been at the fulcrum of the Court, you appear poised to add weight to one side. That alone is not necessarily cause for alarm or surprise, but it is certainly a reason for pause.

Balance is an important feature on the Court, and your nomination must be viewed in the context of the seat you are seeking, in this case one occupied for 25 years by a pragmatic and mainstream Justice – conservative to be sure, but within the broad conservative mainstream.

Are you in Justice O'Connor's mold? Or, as the President has vowed, are you in the mold of Justices Scalia and Thomas?

Most importantly, though, your burden is high because of your record.

Although I have not made up my mind, I have serious concerns about that record. There are reasons to be troubled. You are the most prolific dissenter in the Third Circuit.

This morning President Bush said Judge Alito has the intellect and judicial temperament to be on the Court. But the President left out the most important qualification – a nominee's judicial philosophy.

Judge Alito, in case after case after case, you give the impression of applying careful legal reasoning, but too many times you happen to reach most conservative result.

Judge Alito, you give the impression of being a meticulous legal navigator, but, in the end, you always seem to chart a rightward course.

Some wrongly suggest that we are being results-oriented when we question the results

you have reached. But just the opposite is true. We are trying to make sure that you are capable of being fair no matter the identity of the party before you.

Sometimes you give the Government a free pass, but refuse to give plaintiffs a fair shake.

We need to know that Presidents and paupers will receive equal justice in your courtroom.

We need to know that you will not bypass precedent when it is convenient. Or that you will apply strict rules of construction in some cases, but not in others because of the issues or parties involved.

If the record showed that an umpire repeatedly called 95 percent of pitches strikes when one team's players were up and repeatedly called 95 percent of pitches balls when the other team's players were up, one would naturally ask whether the umpire was really being impartial and fair.

In many areas, we will expect clear and straightforward answers because you have a record on these issues – for example, executive power, Congressional power, and personal autonomy, just to name a few.

The President is not a king – free to take any action he chooses, without limitation by law; the Court is not a legislature – free to substitute its own judgment for that of the elected bodies; and the people are not subjects – powerless to control their own most intimate decisions.

Will your judicial philosophy preserve these principles? Or erode them?

In each of these areas, there is cause for concern. In the area of executive power, Judge Alito, you have embraced and endorsed the theory of the "unitary executive."

You have thus endorsed, in writing, a truly vast power for the President. Under this view of separation of powers, the Independent Counsel Act was unconstitutional, and the FTC, the SEC, and all of the regulatory agencies are unconstitutional. Even the 9/11 Commission may have been an unconstitutional encroachment upon the "unitary executive."

Your deferential and absolutist view of separation of powers raises other questions. Under your view, the President would, for instance, also seem to have inherent authority to wiretap

American citizens without a warrant, to ignore Congressional acts at will, or to take any other action he saw fit under his inherent powers.

We need to know: When a President goes too far, will you be a check on his power, or will you issue him a blank check to exercise whatever power he alone thinks appropriate?

Right now, that is an open question given your stated views.

Similarly, on the issue of federalism, you seem to have taken an extreme view, substituting your own judgment for that of the legislature. Certainly, in one important case, you wrote in U.S. v. Rybar that Congress had exceeded its power by prohibiting the possession of fully automatic machine guns.

The other judges on your court all disagreed with you. And all five other circuits that had considered the issue up to that point also disagreed with you.

Do you still hold these cramped views of Congressional power? Will you engage in judicial activism to find ways to strike down laws that the American people want their elected representatives to pass and that the Constitution authorizes? Because of your stated views, right now, these are also open questions.

And, of course, you have made strident statements expressing your view that the "Constitution does not protect a right to an abortion." In fact you said in 1985, that you "personally believe very strongly" this is true.

You also spoke, while in the Justice Department, of the "opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade."

It should not be surprising that these statements will bring a searching inquiry – as many of my colleagues have already suggested.

So we will ask you: Do you still "personally believe very strongly. . . that the Constitution does not protect a right to an abortion"?

We will ask: Do you view elevation to the Supreme Court – where you will no longer be bound by High Court precedent – as the long-sought "opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade," as you stated in 1985?

And there are other areas that we will have to explore. From the neutral application of the civil rights laws to the wisdom of the one-man-one-vote rule, your record has given us reason to ask questions.

I sincerely hope that you will answer our questions, Judge Alito. Most of the familiar arguments for ducking direct questions no longer apply and certainly do not apply in your case.

For example, the logic of the mantra – repeated by John Roberts at his hearing – that one could not speak on a subject because the issue was likely to come before him quickly vanishes when the nominee has a written record, as you do on so many subjects.

Even under the so-called "Ginsburg precedent" – which was endorsed by Judge Roberts, Republican Senators, and the White House – you have an obligation to answer questions

on topics that you have written about.

On the issue of choice, for example, because you have already made blanket statements about your view of the Constitution and your support for the overruling of Roe, you have already given the appearance of bias; you have already given the suggestion of pre-judgment on a question that will likely come before the Supreme Court. So, I respectfully submit, you cannot use that as a basis for not answering.

So, I hope, Judge Alito, that when we ask you about prior statements you have made about the law – some strong, some even strident – you will not simply answer, "No comment"; that you will not dismiss prior expressions of decidedly legal opinions as merely "personal beliefs."

That will enhance neither your credibility nor your reputation for careful legal reasoning.

In the end, Judge, it is more important that you answer than what you answer. We can have a respectful disagreement on the law, after an open and honest discussion, but we will serve neither the American people nor the democratic process if we learn little about those views.

I look forward to a full and fair hearing. And I look forward to learning a good deal more about you, Judge Alito.