Testimony of Prof. John G.S. Flym
Before the Senate Judiciary Committee
Confirmation Hearing of Judge Samuel Anthony Alito, Jr.
January, 2006

Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Leahy, and distinguished members of the Committee, I am honored to be here today. Growing up in a NYC Harlem tenement, where my father worked as "super", I never imagined that someday I might appear before such an august body, to express my opinion about the qualifications of a presidential nominee to the highest court in the land. Nor did that change when, following military service as an enlistee, thanks to the GI bill, I went on to obtain degrees from Columbia University and the Harvard Law School. Nor, for that matter, when later I joined the faculty of Northeastern University School of Law. I am the prototype of an immigrant, a naturalized citizen, whose pride in this country's greatness is affirmed by the fact that humble origins do not bar access to the highest circles of government. Again, I thank you for your invitation and courtesy.

You do not know me, of course, and it is a matter of coincidence that I happen to have information which I hope you will consider relevant to your decision whether to approve Judge Alito's nomination to the Supreme Court of the United States. I am the attorney who assisted *pro bono,* the widow of D. Dev Monga, Shantee Maharaj, in preparing the November 24, 2003 Motion to Vacate Judge Alito's 2002 opinion upholding a lower court decision against my client, and in favor of The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., (hereafter "Vanguard").

My allotted time is brief, so I begin with my conclusion: I believe that Judge Alito's participation in the appeal of D. Dev Monga[1] against Vanguard[2], violated the federal recusal statute, 28 U.S.C. § 455, because of his financial and ownership interests in Vanguard. I further believe that Judge Alito's responses seeking to justify his failure to recuse himself in that case raise profound questions about Judge Alito's integrity. These doubts about Judge Alito's qualifications compel me to speak against his confirmation, and I hope that you will deny his bid for a seat on the Supreme Court bench of the United States.

I address below the technical reasons why I entertain grave doubts about Judge Alito's integrity, but they boil down to an analysis of two propositions underlying his asserted defenses, each of which I believe to be untenable:

First, Judge Alito claims the law did not require that he recuse himself from the Monga/Vanguard appeal. I find it impossible to agree with Judge Alito, or even to grant him the benefit of doubt, because the statute's language and its history leave no room for any hypothetical doubt. Centuries of jurisprudence on the principle of judicial impartiality as fundamental to the rule of law provide context for 28 U.S.C. § 455, the recusal statute enacted by Congress in its current form in 1974. Judge Alito claims to have "reviewed" that statute only after the filing of my 2003 motion challenging his active role in the Monga/Vanguard appeal. See Judge Alito's letter to Senator Specter. However, Judge Alito turns a blind eye to the recusal

[1] M. Monga is an immigrant from India, who prior to this case, exemplified the American dream.
[2] Among other parties. See U.S. Court of Appeals for the Third Circuit, Docket # 01-1827.

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statute's language explicitly relied upon in my 2003 motion, 28 U.S.C. § 455(b)(4), (which provides that a judge "shall" disqualify himself when "He knows that he ... has a financial interest in ... a party to the proceeding") & 28 U.S.C. § 455(d)(4), (which specifies that a "financial interest" means ownership of a legal or equitable interest, "however small"). Instead, Judge Alito chooses to focus on another, plainly irrelevant, clause in 28 U.S.C. § 455(b)(4), which provides a different basis for disqualification: in this alternative scenario which applies to other, non-financial, "interests", a judge must recuse only if such other "interest" might be "substantially affected by the outcome" of the appeal.

The relevant portion of the statute does not qualify its mandate obliging a judge to recuse in case of Vanguard investments. Since the definition of a "financial interest" is one "however small", a federal judge is required to disqualify himself independent of any calculation as to the potential effect of the appeal's, (or other proceeding's) outcome. In response to opinions taking the opposite view, I will develop this point below, as succinctly as I can, but with adequate technical detail to answer questions raised by others, under the heading "The Law".

For now, I measure my words in saying that I find deeply troubling Judge Alito's use of his academic and professional credentials, his considerable intelligence and legal skills, as well as his judicial stature and authority, to deny the statute its plain meaning by choosing to ignore the real issue and substituting a straw horse. I find it potentially dangerous to envision would-be Justice Alito applying this mode of self-serving analysis to the text of our Constitution, or laws enacted by Congress. Judge Alito's own words in this case betray a judicial temperament at odds with the standard of excellence essential in a Supreme Court Justice.

Second, Judge Alito seeks to explain away his failure to recuse at an earlier point in the Monga/Vanguard appeal by reference to a so-called computer glitch, or variations on the theme. This amounts to a claim that he was unaware of the recusal issue before it surfaced when the November 2003 motion to set aside his July 2002 decision put the question on his radar screen. At the outset, there is a self-evident contradiction in Judge Alito's alternative positions: it is axiomatic, and part of the canons of judicial ethics that, if not obliged to recuse, Judge Alito had a duty to sit. The fact that he recused himself from ruling on the 2003 recusal motion speaks for itself. However, a number of other circumstances converge to make Judge Alito's "inadvertence" defense so implausible as to undermine confidence in his integrity: Among them, (1) In 1990, as nominee for a seat on the Third Circuit, Judge Alito promised in writing that he would recuse in any future case with Vanguard as a party - reflecting the self-evident fact that Justice Alito understood all too well what the 1974 recusal statute would oblige him to do whenever an appeal's caption included the name Vanguard. (2) Despite his 1990 promise to this Committee that he would recuse from any case in which Vanguard was a party, Judge Alito appears to have listed "Vanguard" on the recusal list he was required to file with the Third Circuit Clerk's Office only after my 2003 motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex.7.[3] (3) The three Vanguard entities – The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., were clearly named as Defendants/Appellees in the caption of the documents filed in the Monga/Vanguard appeal; (4) it appears in the pre and post-judgment orders he signed; (5) it appears in his own 2002 opinion; (4) Judge Alito was required to file annual statements with the Judicial Conference listing his

[3] The abbreviation "Ex." herein refers to one of the numbered documents attached hereto.

Vanguard investments. (6) Simultaneous with his participation in the Monga/Vanguard appeal, Judge Alito bought shares in Vanguard, before his 2002 Opinion, on 5/23/02, and 6/3/02, as well as on 10/7/02, a few weeks after he signed the *en banc* Order denying a rehearing.

It is hard to fathom how anyone could avoid the conclusion that Judge Alito turned a blind eye to the recusal issue. I will say a bit more on this point under the heading "The Facts", but, much less than I could because this statement is longer than I had intended.

Judge Alito's own words

The Questionnaire submitted to this Committee by Judge Alito includes, in relevant part, the following answer to question 23, (for ease of reference, I have separated the paragraph into seven numbered clauses):

> 15. Monga v. Ottenberg, No. 01-1827. ...
>
> (1) I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal.
>
> ...
>
> (2) My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit.
>
> (3) After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only 'if the outcome of the proceeding could substantially affect the value of the interest.' (... 28 U.S.C. 455(d)(4)(iii)).
>
> ...
>
> (4) Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome,
>
> (5) I took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case.
>
> (6) The new panel of judges reached the same unanimous conclusion as the prior panel.
>
> At page 54 (emphasis added)

Judge Alito's December 10, 2003, letter to Chief Judge Anthony J. Scirica states in part, (again, for ease of reference, separated into consecutively numbered clauses):

> (7) ... I do not own any shares in any party. ...
>
> (8) I do not believe that I am required to disqualify myself based on my ownership of the [Vanguard]mutual fund shares.

(9) ... Nor do I believe that I am a party.

(10) ... I am voluntarily recusing in this case. This will of course necessitate the reconstitution of a panel to consider the pending motion.
(emphasis added)

The Recusal Statute

28 U.S.C. § 455 provides in relevant part:

§ 455. Disqualification of justice, judge, or magistrate judge

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

(b) He shall also disqualify himself in the following circumstances:
...
(4) He knows that 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;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding ...;
...
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes ... appellate review ...;
...
(4) "financial interest" means ownership of a legal or equitable interest, however small ... except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities ...;
...
(iii) The proprietary interest of a policyholder in a mutual insurance company, of 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;

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).
(emphasis added)

As subsection (e) makes plain, disqualification for any ground specified in subsection (b) may not be waived.

The Law

A. 28 U.S.C. § 455(d)(4)(iii), a "definitions" subsection, upon which Judge Alito purports to rely, does not apply to mutual funds.

Judge Alito seeks refuge in the language of the "definitions" subsection (b)(4)(iii), - see clause numbered (3) above - which defines what "financial interest" means for " ... a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest ...." In such cases, recusal is mandated, "... only if the outcome of the proceeding could substantially affect the value of the interest."

However, subsection (d)(4)(iii) refers only to "policyholders" in "mutual insurance companies" and "depositors" in "mutual savings associations", or "similar proprietary interest[s]". That these categories do not extend to investments in mutual funds like Vanguard, is evident from subsection (d)(4)(i)'s explicit identification of "mutual or common investment funds" evidencing Congress's intent to specifically address "mutual funds" in a separate subsection as it has done in subsection (d)(4)(i). This will become perfectly clear when mutual funds are discussed below.

Moreover, an equivalent conditional phrase,

"... that could be substantially affected by the outcome of the proceeding,"

first occurs in the subsection 455(b)(4). This substantive subsection identifies two kinds of "interests": "financial" and "other", but it modifies only "other" interests, not "financial" ones. That reading of the conditional phrase's application is the only plausible one, given subsection (d)(4)'s explicit definition of a financial interest as one which, "however small", is enough to trigger recusal. Should one seek to apply the "substantially affected by the outcome" condition to "financial", (as well as "other"), interests, the result would be the same: Judge Alito's "financial interest" in Vanguard, even if not "substantially affected" by the outcome of the Monga/Vanguard appeal, would remain a "financial interest", within the meaning of subsections (b)(4) & (d)(4) - which place no limit on how small an interest might be to nonetheless mandate recusal.

B. 28 U.S.C. § 455(b)(4) & (d)(4) imposed a duty on Judge Alito to recuse himself from participating in the Monga/Vanguard appeal.

1. A financial interest in a party, however small, triggers the obligation to recuse.

The statutory language is unequivocal. Its legislative history reveals that Congress explicitly considered, and rejected, alternative language which would have conditioned judicial

disqualification upon a showing that a judge's financial interest is more than *de minimis*. Instead, Congress enacted the "however small" definition:

> ... The next major changes to § 455 took place in 1974. ... The 1974 amendment rejected the "substantial interest" standard as too uncertain. Instead, Congress established a per se disqualification rule, enumerating several types of conflicts which automatically disqualify a judge. ... Under the new rule, even a de minimis financial interest required disqualification. ...

Ziona Hochbaum, "Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings," 71 Fordham L. Rev. 1669, 1678-80 (2003).

The Joint Committee on the Code of Judicial Conduct of the Judicial Conference of the United States reached the same conclusion in 1977:

> ... Following ABA approval of the Code of Judicial Conduct, the Congress in 1974 amended Section 455 of title 28 ... In so doing Congress departed from the provisions of the Canons in several respects. Most significantly the new statute requires disqualification in any case in which a judge has a financial interest "however small" and prohibits any remittal of disqualification based inter alia upon a financial interest. ...

"A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976," 73 F.R.D. 247 (1977). Cf. Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 Minn. L. Rev. 657 (1996), "... The Justice may not sit where she holds even a de minimis financial interest 'in a party to the proceeding.' ...," at n. 25. See also Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 Minn. L. Rev. 657 (1996), disqualification is automatic whenever a judge holds so much as a share of stock in a party to a proceeding ..., at n. 9.

Congress' 1974 choice of language in amending 28 U.S.C. § 455 comports with centuries of recusal jurisprudence. Federal judges have been prohibited from sitting in cases in which they have a financial interest since 1792. *Liteky v. United States*, 510 U.S. 540, 544 (1994), citing Act of May 8, 1792, ch. 36, paragraph 11, 1 Stat. 278. As early as 1813, Chief Justice Marshall and Justice Livingston of The U.S. Supreme Court disqualified themselves because they had pecuniary interests in matters before the Court. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Livingston & Gilchrist v. Maryland Ins. Co.*, 11 U.S. (7 Cranch) 506 (1813).

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), applied 455(b)(4) to a trial judge named Collins who had ruled in favor of defendant Liljeberg. Ten months later, the plaintiff learned that Judge Collins was a member of the Loyola University board of trustees, and that Loyola stood to benefit financially if Liljeberg prevailed in the litigation. The plaintiff thereupon filed a motion in the Fifth Circuit seeking to vacate the judgment. Judge Collins defended his failure to recuse claiming that he had forgotten about his position as a trustee. Rejecting Judge Collins' inadvertence claim, the Fifth Circuit vacated his judgment, and a petition for writ of certiorari to review that decision was granted.

The Supreme Court had no difficulty concluding that the judge's failure to recuse himself violated section 455(a), 455(b)(4) and perhaps 455(c). *Id.* at 867-68. The judge's position as university trustee, according to the Supreme Court, gave an appearance of partiality in violation of §455(a); it also constituted a financial interest in the proceeding because of the judge's fiduciary duties as trustee, a violation of § 455(b)(4); and the judge's failure to stay informed of his fiduciary interest "may well" have been a separate violation of §455(c). *Id.* The Court found it "remarkable, and quite inexcusable" that Judge Collins failed to disqualify himself when he read papers which should have reminded him of his fiduciary interest in a party. *Id.* at 865-87. In affirming vacatur, the Court, commended the Fifth Circuit's "willingness to enforce section 455." *Id.* at 868.

A parallel argument applies here: It is "remarkable, and quite inexcusable" that Judge Alito failed to disqualify himself when he read papers, and signed orders, which must surely have reminded him of his financial investments in Vanguard, a party to the appeal. Judge Alito's purported failure to stay informed of his financial interest in connection with the Monga/Vanguard appeal could also represent a separate violation of §455(c).

The Second Circuit applied *Liljeberg* in *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120 (2d Cir. 2003), where the trial judge owned stock in Chase worth $250,000 to $300,000, received papers reminding him of his disqualifying financial interests, and ruled for Chase. The Second Circuit held that a §455 violation does not depend on proof that his financial interest affected the judge's actions:

> ... [W]e emphasize that there is no possibility here that the judge ruled for the banks in order to enrich himself. The asset size of Chase Manhattan Bank is such that its portion of the sizeable judgment originally entered by the judge would not cause any discernible increase in the value of the shares he owned. Moreover, the shares of Chase New Stock held by him were not even 1% of the particular judge's personal fortune. The disqualifying appearance here is of a different character. . . . Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest ...."

343 F.3d at 128 (citing *In re Certain Underwriter*, 294 F.3d 297 at 306 (2d Cir. 2002), (quoting from *Liljeberg*, 486 U.S. at 860)). See also *In Re Honolulu Consolidated Oil Co.*, 243 F. 348 (9th Cir. 1917).

The Chase Court determined that a violation of 455(b)(4) also establishes a 455(a) violation: "We hold that an appearance of partiality requiring disqualification under §455(a) results when the circumstances are such that: (i) a reasonable person, knowing all the facts, would conclude that the judge had a disqualifying interest in a party under §455(b)(4), and (ii) such a person would also conclude that the judge knew of that interest and yet heard the case. In short, we hold that §455(a) applies when a reasonable person would conclude that a judge was violating §455(b)(4)." *Id.*

See also, *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982)("[A] financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest."); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 780 (D. N.M. 1989), ("Even the slightest financial interest by the judge, the judge's spouse or the judge's minor child requires disqualification"); Judicial Conference, Advisory Opinion 20, www.uscourts.gov/guide/vol2/20.html: "Ownership of even one share of stock would require disqualification."

2. 28 U.S.C. §455 does not distinguish between investments in mutual funds and investments in stocks, treating both as "financial interests".

The statute's definitions subsection provides:

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

...

(4) "financial interest" means ownership of a legal or equitable interest, however small ... except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities ...

(emphasis added)

Congress did not mean to exclude investments in mutual funds from its definition of "financial interest". Had it meant to do so, it would not have included the otherwise unnecessary phrase, "in such securities". Subsection (d)(4)(i) would simply provide: "Ownership in a mutual or common investment fund that holds securities is not a 'financial interest'".

As enacted by Congress, subsection (d)(4)(i) articulates two sensible propositions:

(1) An investment in a mutual fund that holds securities is a "financial interest", within the meaning of subsection (b)(4); and

(2) Such a financial interest means that a judge owing mutual fund shares does not thereby have a financial interest in the particular securities held in the mutual fund portfolio, which are subject to change at any time.

As a matter of common sense, there is no basis for mandating recusal by a judge with a minimal investment in IBM, in a case where IBM is a party, and not mandating recusal by a judge with a minimal investment in Vanguard, in a case where Vanguard is a party. Congress made no such distinction in its 1974 recusal legislation. As one treatise observes:

> Ownership of a mutual fund or common investment fund is not a disqualifying financial interest as to any of the stocks or securities held by the fund, unless the judge participates

> in the management of the fund. Of course, the judge would be required to recuse if the common fund itself was a party to the suit. (emphasis added)

50 Am. Jur. Proof of Facts 3d 449.

The Facts

C. Judge Alito's ownership - and financial - interest in Vanguard's expenses.

Judge Alito denies being an owner of Vanguard. Vanguard explains that it is owned by its Funds, and therefore by the Vanguard funds' shareholders:

> Unique organizational structure. Vanguard has a unique organizational structure. The Vanguard Group is owned by the funds and thus by the funds' shareholders, instead of being controlled by an outside management firm, as most investment firms are . . . This enables us to pass along the sizable economies of scale involved in asset management to our shareholders - our owners

Vanguard's website www.vanguard.com under the link "Why Invest Here" further states:

> ... the shareholders and the owners are essentially one and the same at Vanguard. Vanguard shareholders own the Vanguard funds, which are independent investment companies that jointly own The Vanguard Group.

Vanguard's website, www.vanguard.com during the relevant period, it's 2002 Annual Report, and its Corporate Disclosure Statement, (Third Circuit LAR 26.1 required Vanguard to file this document which is included as part of the Monga/Vanguard appeal record).

As one of Vanguard's owners, Judge Alito, despite his denial, was therefore an owner of a "party" to the Monga/Vanguard appeal.

Indeed, the federal Judicial Conference checklist as adopted, after the 1974 statute was enacted, contains this explicit warning:

> ... 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 lists ....

www.uscourts.gov/guide/vol2/checklist.pdf; www.uscourts.gov/ttb/jun98ttb/reminder.html; and www.uscourts.gov/ttb/sep99ttb/interview.html.

Thus, 28 U.S.C. 455(b)(5) provides another reason why Judge Alito had a duty to recuse.

The statutory test is objective. Whether or not Judge Alito chose to ignore the checklist warning, whether or not he read the Vanguard documents telling him that he owns Vanguard, he

is an owner of Vanguard, therefore a "party" to this proceeding, and thereby disqualified by the mandatory text of 28 U.S.C. § 455(b)(5).

As an illustration of that warning, Vanguard explains, with unmistakable clarity, that its "unique" structure enables it pass along to its "owners" the benefits of economies of scale involved in management expenses. Vanguard's Corporate Disclosure Statement explains:

> ... Management expenses, which are one part of operating expenses, include . . . other costs of managing a fund — such as legal . . . expenses ....

www.vanguard.com. Thus, among other financial interests in Vanguard was Judge Alito's share of management operating expenses, which include "legal ... expenses", and their contingency upon the outcome of Appellant's case against Vanguard. Assuming Judge Alito's investment to be 1/2 million dollars, Vanguard's own estimate is that over a period of 10 years he would pay around $33,600.00 in management fees.[4]

The mandatory language of 28 U.S.C. §455, "Any justice .. shall disqualify himself ...", places upon the judge the duty to recuse himself. *Sao Paulo State v. Am. Tobacco Co.*, 535 U.S. 229 (2002). See also. *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir.1992) (quoting *In re Murchison*, 349 U.S. 133 (1955)). "No action by a party is required to invoke the . . . statute;" 13A Charles Alan Wright et al., Federal Practice and Procedure §3550 (1984).

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[4] ANNUAL FUND OPERATING EXPENSES (expenses deducted from the Fund's assets)
Management Expenses: 0.50%
12b-1 Distribution Fee: None
Other Expenses: 0.04%
Total Annual Fund Operating Expenses: 0.54%

The following example is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds. It illustrates the hypothetical expenses that you would incur over various periods if you invest $10,000 in the Fund's shares. This example assumes that the Fund provides a return of 5% a year and that operating expenses match our estimates. The results apply whether or not you redeem your investment at the end of the given period.

This example should not be considered to represent actual expenses or performance from the past or for the future. Actual future expenses may be higher or lower than those shown.

1 Year	3 Years	5 Years	10 Years
$55	$173	$302	$677

PLAI N TALK A BO U T
Fund Expenses
All mutual funds have operating expenses. These expenses, which are deducted from a fund's gross income, are expressed as a percentage of the net assets of the fund. We expect Vanguard Growth Equity Fund's expense ratio for the current fiscal year to be 0.54%, or $5.40 per $1,000 of average net assets. The average large-cap growth mutual fund had expenses in 2002 of 1.57%, or $15.70 per $1,000 of average net assets (derived from data provided by Lipper Inc., which reports on the mutual fund industry). Management expenses, which are one part of operating expenses, include investment advisory fees as well as other costs of managing a fund—such as account maintenance, reporting, accounting, legal, and other administrative expenses.

Congress and the federal judiciary have adopted and implemented a comprehensive set of rules and procedures designed to identify a disqualifying financial interest at the earliest stage. The statutory test is objective.

D. Judge Alito's inaccurate statements.

1. Judge Alito listed Vanguard funds on the Third Circuit's recusal list only after the 2003 motion accusing him of having failed to recuse himself from the Monga/Vanguard appeal.

A document which I just obtained, Ex 1, pp. 23-38, appears to show that, despite his 1990 promise that he would recuse in any Vanguard case, Judge Alito did not name Vanguard on the recusal lists he filed with the Third Circuit Clerk's Office, either before 1999 when the "system" was "automated", or before. The first such filing appears to have occurred in December 2003, after the motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex. 1. pp. 25-30.

If this is accurate, then evidently Judge Alito's "oversight", computer glitch & similar exuses are specious.

If it is inaccurate, i.e. if it turns out that Judge Alito did list Vanguard on his recusal list, the same excuses would fare no better, for such evidence would show that Judge Alito knew all too well that he had no choice but to recuse in any Vanguard case.

2. Judge Alito's claim that he asked for a new panel to rehear the case.

Judge Alito claims that he "... took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case ...," see Alito's own words (5) above. That statement was made in 2005, as part of the questionnaire he filed with this Committee. In fact, Judge Alito's December 2003 letter to CJ Scirica observes only that his recusal, "... will of course necessitate the reconstitution of a panel to consider the pending motion" to set aside his 2002 opinion and judgment.

The distinction between recusal from the 2003 motion to vacate his 2002 judgment, as opposed to recusal from the appeal in 2002, is consequential. It, along with other inaccuracies in Judge Alito's account of his role in the Vanguard appeal, casts serious doubts on his credibility: One can't know if a discovered reason for mistrust is just the tip of an iceberg.

3. Judge Alito claims that the second panel reheard the case.

The fact that Judge Alito only recused himself from deciding the 2003 motion - entitled "Motion by Appellant to Vacate the July 30, 2002 Judgment, Disqualify Judge Alito from this Appeal and to Order a New Appeal to be Heard" - also came to have more significance than one would suspect. It may be that Judge Alito expected the new panel to absolve him of having failed to recuse from the appeal itself.

Instead, by letter dated December 17, 2004, the Clerk's office notified all parties that the case had been listed on the merits, (nothing other than the motion to vacate was pending). The Clerk requested both an acknowledgment of receipt to be sent on "an enclosed copy of this letter" with the name of the attorney who would present oral argument, and whether such attorney was a member of the Third Circuit bar. Ex. 1[5]. Ms. Maharaj gave notice that I would argue on her behalf. Letter dated 12/20/03, Ex. 2; Docket entry dated 12/21/03, Ex. 3. It happens that I have been a member of Third Circuit bar since the 1980s. Thereafter, in lieu of hearing & deciding the 2003 motion, CJ Judge Scirica issued an Order on January 12, 2004, setting aside the 7/30/02 Judgment, thereby mooting the motion Judge Alito had described as "pending", and further providing that a new panel would be appointed which would decide how to proceed:

> ... Because Judge Alito recused himself from this matter (sic), the judgment will be recalled and the judgment vacated.
>
> The appeal will be resubmitted to another panel for whatever action the new panel deems appropriate. ...

Docket Sheet entry dated 1/12/04, Ex. 3. Judge Scirica evidently decided that Judge Alito's failure to recuse as of 2002 could not be justified and, acting *per curiam*, that the better part of wisdom was to treat Judge Alito's recusal from the pending motion, (recharacterized by Judge Scirica as a recusal "from this matter") as a recusal from the case. This revision of Judge Alito's "recusal" served as predicate for Judge Scirica ordering the 2002 "judgment ... recalled and ... vacated."

On January 21, 2004, I filed my appearance as counsel for the Appellants. Docket entry dated 1/21/04, Ex. 3. For the next 11 weeks, through March 31, 2004, I and my client regularly inquired of the Clerk's Office, and checked the docket sheet available through PACER, to see whether a new panel had been appointed. We found no entry concerning a new panel, and were orally advised that no new panel had been appointed. Ex. 4, Affidavit of Shantee Maharaj, dated April 13, 2004. I was therefore shocked when, on the afternoon of April 6, 2004, I received a letter dated March 30, 2004, addressed to Ms. Maharaj and all counsel of record - but conspicuously omitting my name, advising that the appeal "... was submitted on the briefs on Thursday, February 12, 2004, and, in a sentence at the bottom, below the signature, advising that "... your appeal will (sic) be submitted to the following panel ...," naming CJ Scirica as one of the three judges. A check of the docket via the internet on PACER revealed a new entry dated 2/12/04, stating that the case had been "SUBMITTED Thursday, February 12, 2004", and naming the members of the new panel, without mention of when the panel members had been designated, and without mention of what procedures had been adopted or by whom. Docket entry dated 2/12/04, Ex. 3.

In short, the appeal was being treated as if it was still a *pro se* appeal by Ms. Maharaj, relying on Ms. Maharaj's *pro se* briefs, and dispensing with oral argument. I instantly drafted "Appellant's Motion for Leave to File a Substitute Brief, or to File a Supplemental Brief, and for Oral Argument," This motion was served by hand on Vanguard's Boston counsel on April 7, 2004, served by hand on Philadelphia counsel for some Appellees early in the morning of April

[5] "Ex." refers to exhibits attached hereto.

8, 2004, Ex. 5. This motion was also filed by hand with the Clerk's Office in Philadelphia at about 9AM, date-stamped April 8, 2004. Ex. 6. To my dismay, I learned that the new panel had filed its "NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION" the prior day, affirming the lower court's decision. Docket entries dated 4/7/04, Ex. 3. This April 7 opinion is a verbatim replica of Judge Alito's 2002 Opinion, except for the addition of one footnote.

The Docket contains no entry about the motion I filed April 8, 2004.

On April 21, 2004, I filed a petition for rehearing. Like my April 7 motion, my April 21 motion argued that the "new" panel's procedure violated both Ms. Maharaj's constitutional right to the assistance of counsel in her appeal, as well as federal appellate rules governing right to counsel and the right to oral argument.

In short, the second panel did not "rehear" the case. In fact, neither did Judge Alito's panel. There was no hearing whatsoever in this appeal.

4. Judge Alito's role in the appeal voided his 2002 Judgment

Judge Alito claims that, "... my vote on the unanimous panel did not affect the outcome," Alito's own words (4) above, and observes that, "The new panel of judges reached the same unanimous conclusion as the prior panel" - implying that his failure to recuse was a mere technicality with no impact on the disposition of the Monga/Vanguard appeal, either the first or second panel's. The fact is that his failure to recuse in the Monga/Vanguard appeal rendered his panel's own NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION void, and that the second panel's decision to proceed as it did can only be premised on the assumption that it did not regard the first panels decision as void. Otherwise, the second panel would have had to accord Ms. Maharaj a fresh appeal, with all of the accustomed procedures, including the right of her *pro bono* counsel to file briefs and present oral argument.

28 U.S.C. §46(b) mandates that a panel should consist of not less than three judges. As construed in *Khanh Phuong Nguyen v. United States*, 39 U.S. 69, 123 S.Ct. 2130 (2003), the statute requires a properly constituted panel:

> ". . . the statutory authority for courts of appeals to sit in panels, 28 U.S.C. §46(b), requires the inclusion of at least three judges in the first instance. . . . although the two Article III Judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, ... it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized conformably to the requirements of the statute. . .

Khanh Phuong Nguyen , 123 S.Ct. at 2138-39 (emphasis added)

United States v. American-Foreign S.S. Corp., 363 U.S. 685, 690–691 (1960), vacated the judgment of a Court of Appeals sitting *en banc*, because a Senior Circuit Judge who had participated in the decision was not authorized by statute to do so. The Court declined to conduct

a prejudice inquiry as impracticable, it being impossible to determine *post hoc* the unlawful adjudicator's role in the appellate process, which is collective, deliberative, and occurs behind closed doors.

Indeed, the "mere participation [of a disqualified judge] in the shared enterprise of appellate decisionmaking . . . pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986). "[T]he collegial decisionmaking process that is the hallmark of multimember courts [may lead] the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity." *Id* at 833; *accord Crump v. Bd. of Educ.*, 392 S.E.2d 579, at 588 (N.C. 1990) ("One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations.") See also *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1893) (holding that because the composition of the panel violated a federal statute, its ruling was invalid); *Moran v. Dillingham*, 174 U.S. 153, 158 (1899); and *William Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913).

Unsurprisingly, six federal Courts of Appeals - including the Third Circuit - have recognized the impossibility of determining the prejudicial effect of one unlawful adjudicator upon the lawfully-appointed panel members. See, e.g., *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941):

> ... Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured ....

See also *Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Hicks v. City of Watonga, Okla.*, 942 F.2d 737, 748-49 (10th Cir. 1991); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966).

Accordingly, where, as here, a disqualified judge, (Judge Alito), sits on a federal Court of Appeals, this unlawful arrangement constitutes "... a structural defect that [goes] to the validity of the very proceeding under review." *Freytag v. Comm'r*, 501 U.S. 868 at 884, 898 (1991). Such an error "undermines the structural integrity of the . . . tribunal." *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

Errors in the composition of an appellate court are regarded as jurisdictional defects. Where an error "embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

In short, the judgment rendered by the improperly constituted panel in which Judge Alito took part was void, and the fact it was rendered unanimously has no judicial relevance. The second panel's truncated process deserves the same fate, since it republished Alito's decision without affording Maharaj's new counsel an opportunity to present her case.

5. **Judge Alito's motives - and mine.**

Since others, friends and reporters, have asked me why Alito failed to recuse, (e.g. did I think it was "hubris"), you likely may have the same question. Indeed the recusal statute itself seems to suggest such an inquiry by using the phrase "financial interest", the disqualifying circumstance upon which Ms. Maharaj relies. I refuse to speculate about Judge Alito's motive(s).

The objective of the recusal statute is judicial "impartiality" and the appearance thereof, without which public respect for law and our institutions of justice would collapse. The first section 28 U.S.C. § 455 provides:

> (a) Any ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section (a) charges the judge with the general obligation of recusing himself whenever his impartiality might reasonably be questioned. Section (b) goes on to list circumstances automatically mandating that a judge recuse, among them when a judge has a financial interest in a party. In other words, a violation of section (b) means that Judge Alito's "...impartiality might reasonably be questioned ...," and therefore necessarily also violates section (a). See e.g. the Second Circuit's 2003 opinion in *The Chase Manhattan Bank, supra*:

> ... Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest ...."

343 F.3d at 128. The trial judge in *Chase* owned Chase stock worth between $250,000 and $300,000. During his participation in the Monga/Vanguard appeal, Judge Alito's investments in Vanguard far exceeded $300,000.

So, at bottom, Judge Alito's motives are irrelevant. What matters is what he did, not why.

On the other hand, I can speak of my motives in undertaking Ms. Maharaj's case. After my dad died 25 years ago, my mom discovered that the pension he had left her was worth $700. She was devastated, and as a neophyte attorney with a predominantly *pro bono* practice and personal debts, I was in no position to help her. This set of circumstances is likely one all-too-familiar to millions of Americans today, and for them it promises to get worse.

The effect of Judge Alito's ruling is to undermine the Supreme Court's trilogy in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990), *Patterson v. Shumate*, 504 U.S. 753 (1992) and, just last year, *Rousey v. Jacoway*, 125 S.Ct. 1561 (2005), which hold that Congress meant to protect retirement savings, such as IRAs, from the reach of creditors. On the most dubious of legal grounds, Judge Alito's ruling fosters abuses in debt collection through just the kind of strategic manipulation of the law which *Patterson* warned against. IRAs are now ready targets for overreaching debt collectors. As happened to Ms. Maharaj, a creditor could

seize IRAs simply by by inventing allegations of fraudulent transfers into IRAs: During oral argument on Ms. Maharaj's appeal before the Massachusetts Appeals Court last Fall, after I argued that there had been no fraud whatsoever, Judge Graham asked a direct question of counsel for Vanguard: Is there any evidence of fraudulent contributions into Monga's IRAs? Vanguard's counsel replied that there is none.

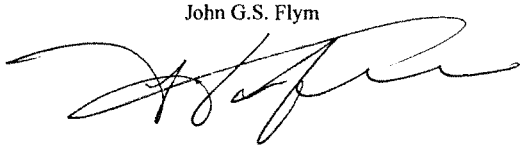
I find Judge Alito's callous treatment of Ms. Maharaj an ominous sign of how he might treat the over 40 million Americans with IRAs worth over $2.3 trillion. Though Judge Alito professes respect for separation of powers, and in particular the scope of Congress's jurisdiction, his actions in the Monga/Vanguard appeal suggest that he may do so selectively, and that his "default", (using computer terminology), allegiance is to corporate America, here symbolized by Vanguard.

Conclusion

I have found it necessary to write more, and more technically than I had envisaged, because my oral presentation will, understandably, be limited to 5 minutes, and so much misinformation about Judge Alito's role in the Monga/Vanguard appeal has been so widely published. Unfortunately, several of my colleagues in academia have based their arguments in support of Judge Alito's nomination on this misinformation. I hope that this Committee will conduct its own research into Judge Alito's conduct in this case.

I end by concluding that Judge Alito's inaccurate account of his role in the Vanguard appeal, on issues of law and fact sounds like "the 13th stroke of the crazy clock that makes you wonder about the 12 which came before," (a phrase one of my Harvard Law School professors, named Braucher, liked to use when the words fit), meaning you can't trust the clock as to what time it is. Applied to Judge Alito's statements, it means you can't tell what to believe.

I urge this Committee to recommend reject the nomination of Judge Alito for the U.S. Supreme Court.

January 10, 2006

John G.S. Flym