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Honorable Arlen Specter
United States Senate
Washington, D.C.

Re: Judge Samuel Alito: Vanguard Recusal

Dear Senator Specter:

This responds to your inquiry as to whether Judge Alito properly handled the situation in which a panel of the Third Circuit Court of Appeals, of which he was a member, was presented with a case involving a claim against Vanguard.

In my opinion Judge Alito handled it quite properly, in correcting a situation in which he can be said to have made a mistake about recusal.

The case coming before the panel was a claim that Vanguard had improperly disbursed proceeds of a fund account, which the claimant said she was entitled to. Vanguard refused to make the disbursement, relying on a judgment of a Massachusetts court directing the disbursement. Hence, the case involved the effect of the Massachusetts judgment, not the Vanguard disbursement as such. Judge Alito was assigned to the panel, which had unanimously decided against the claimant. The claimant then asserted that he should not have participated because the case

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involved Vanguard and he had funds in a Vanguard mutual fund. Judge Alito immediately asked that he be removed from the panel and that the case be reassigned. It was reassigned to a panel without him, which also rejected the claimant's appeal.

In my opinion Judge Alito's initial participation in the appeal was not improper under 26 U.S.C.§455, which establishes the governing rules. A mutual fund is a diversified pool of securities managed by an investment company. The investment company has managerial responsibility for investing the funds and fiduciary responsibility for doing so in accord with principles of trust law. The investors do not share that responsibility and have no authority to make decisions about the investments or distributions or disbursements. Hence, having a Vanguard mutual fund is not owning an interest in the Vanguard managing company, any more than having a bank account in a commercial or savings bank involves an ownership interest in the bank. On the contrary, investors in a mutual fund, like depositors in a bank, are creditors or potential creditors against the fund managers.

The claim against Vanguard was in the thousands of dollars, whereas the Vanguard investment management companies are worth millions. Hence, there was no practical possibility that the claim could create risk to Judge Alito's mutual fund investment.

On this basis, Judge Alito had no conflict of interest and should not have recused himself. Balanced against the requirement that a judge recuse himself or herself, where required under §455, is the duty of a judge to sit and decide in all other case. This concept is commonly called the "duty to serve." In busy courts, such as the Third Circuit, the duty has real significance.

Some of the discussion of this situation has pointed out that Vanguard advertises that its fund investors are the "owners" of the company. The fund investors are in economic terms in substance owners of the funds, although technically they are not even that: For example, the fund participants could not redirect the portfolio holdings in a fund, which they could if they were really owners. Technically, they are beneficiaries of trust obligations owed by

Vanguard to the investors. The Vanguard advertising is harmless, and indicates the dedication the company has had to its investors. But statements in the Vanguard advertisements do not transform the trustee-beneficiary relationship into one of company and stockholder.

I was directly involved in the discussions leading to the model on which 28 U.S.C.§455 was adopted. It was recognized that investing in mutual funds is a very appropriate way for judges to put away savings in securities without becoming owners in the companies whose shares are held in a mutual fund. Many judges do that, and properly so.

In any event, the amount involved in the claimant's dispute with Vanguard was not enough in my opinion to create an "appearance of impropriety" even if Judge Alito had been an owner of stock in Vanguard. The practice with federal judges has been that they recuse if they own any shares in a company involved in a case coming before them. However, Judge Alito did not stand in that situation.

A different issue is presented concerning Judge Alito's statement about his Vanguard holdings during his confirmation hearing as Circuit Judge fifteen years ago. He said he would recuse himself in cases involving "Vanguard." That statement can reasonably be interpreted as covering the situation that subsequently arose and which has drawn this attention. So it can be said that he thereby promised to recuse himself in cases where the legal standard in §455 did not require doing so, and, on the contrary, would require fulfillment of the "duty to serve."

In my opinion, Judge Alito was incautious in making the statement in such nontechnical terms, because it did not take into account the important difference between being a depositor in a mutual fund and a stockholder in a mutual fund manager. In my opinion that statement is a basis for mild criticism. In my opinion it is not a basis for substantial criticism, and certainly not for serious criticism about Judge Alito's standards of judicial ethics. On the

contrary, when the situation was called to his attention, he recused himself even though he was not, in my opinion, required to do so.

We should reflect on whether any of us has led a life without making mistakes, particularly mistakes as insignificant as this.

I should add that I have known Judge Alito since he was a law student, and that he participated in a seminar with me. My other information about him is that his character is and has been exemplary.

I am willing to make whatever presentation of these views might be considered appropriate.

Sincerely,

Geoffrey C. Hazard, Jr.