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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 23, 2024

The Honorable John G. Roberts, Jr.
Chief Justice of the United States
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Dear Chief Justice Roberts:

We write regarding recent *New York Times* reports that an upside-down American flag was displayed in Justice Samuel Alito’s yard in January 2021 and another flag associated with the January 6th attack on the Capitol was flown at another of Justice Alito’s residences in the summer of 2023.¹ For the following reasons, we urge you to immediately take appropriate steps to ensure that Justice Alito will recuse himself in any cases related to the 2020 presidential election and January 6th attack on the Capitol, including the question of former President Trump’s immunity from prosecution for his role in the events of January 6th in *Trump v. United States*. We also renew our call for the Supreme Court to adopt an enforceable code of conduct for justices. And we request a meeting with you as soon as possible, in your capacity as Chief Justice and as presiding officer of the Judicial Conference of the United States, to discuss additional steps to address the Supreme Court’s ethics crisis.

By displaying or permitting the display of prominent symbols of the “Stop the Steal” campaign outside his homes, Justice Alito clearly created an appearance of impropriety in violation of the *Code of Conduct for Justices of the Supreme Court of the United States* (hereinafter *Code of Conduct*) that all nine justices adopted last year. He also created reasonable doubt as to his impartiality in certain proceedings, thereby requiring his disqualification in those proceedings as established by the *Code of Conduct* and federal law.

According to photos and contemporaneous reports, the upside-down flag in front of Justice Alito’s house was on display for several days in mid-January 2021, while an “Appeal to Heaven” flag was displayed outside another of Justice Alito’s residences throughout July, August, and September 2023.² This was after these flags had been adopted as symbols of the “Stop the Steal” campaign to reject the results of the 2020 election and displayed by supporters

¹ Jodi Kantor, *At Justice Alito’s House, a ‘Stop the Steal’ Symbol on Display*, N.Y. TIMES (May 16, 2024), <https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html>; Jodi Kantor et al., *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), <https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html>.

² *Id.*

of former President Trump when they attacked the Capitol on January 6, 2021.³

In a statement to the *New York Times*, Justice Alito said the upside-down flag was “placed by Mrs. Alito in response to a neighbor’s use of objectionable and personally insulting language on yard signs.”⁴ Alito also spoke to *Fox News* about the incident and indicated that the flag was flown upside down partially in response to his neighbors’ display of political signage.⁵ Justice Alito’s comments reflect both his knowledge of the upside-down flag’s display and his understanding of the display’s political significance. Justice Alito has provided no explanation for the display of the “Appeal to Heaven” flag.

The *Code of Conduct* provides that Supreme Court justices should avoid impropriety and the appearance of impropriety in all activities, specifying that “[a] Justice should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁶ Furthermore, federal law requires the disqualification of a Supreme Court justice in any proceeding in which the justice’s impartiality might reasonably be questioned, and the *Code of Conduct* elaborates that “[a] Justice should disqualify himself or herself in a proceeding . . . where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties.”⁷

The Supreme Court also prohibits its employees from engaging in partisan political activity. That prohibition applies broadly to “political activity relating to elections contested by political parties.”⁸ The Court’s guidance to staff expressly advises them not to “[p]ublicly support or oppose a partisan political organization or candidate.”⁹ The *Code of Conduct* further states that a Supreme Court justice should refrain from political activity.¹⁰

By displaying the upside-down and “Appeal to Heaven” flags outside his homes, Justice Alito actively engaged in political activity, failed to avoid the appearance of impropriety, and failed to act in a manner that promotes public confidence in the impartiality of the judiciary. He also created reasonable doubt about his impartiality and his ability to fairly discharge his duties in cases related to the 2020 presidential election and January 6th attack on the Capitol. His recusal in these matters is both necessary and required.

These displays at Justice Alito’s homes are not the only recent instances of a Supreme Court justice’s failure to avoid impropriety and the appearance of impropriety. Although together the Court and the Judicial Conference have the ability and responsibility to enforce ethics rules

³ Justin Jouvenal & Ann E. Marimow, *Upside-Down Flag Flew at Justice Alito’s House After Neighbor Dispute*, WASH. POST (May 17, 2024, 5:25 P.M.), <https://www.washingtonpost.com/politics/2024/05/17/justice-samuel-alito-wife-upside-down-flag/>; Kantor et al., *supra* note 1.

⁴ Kantor, *supra* note 1.

⁵ Jodi Kantor & Abbie VanSickle, *Display at Alito’s Home Renews Questions of Supreme Court’s Impartiality*, N.Y. TIMES (May 17, 2024), <https://www.nytimes.com/2024/05/17/us/justice-alito-flag-reactions.html>.

⁶ *Code of Conduct for Justices of the Sup. Ct. of the U.S.* (2023) [hereinafter *Code of Conduct*], Canon 2(A), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

⁷ 28 U.S.C. § 455(a); *Code of Conduct*, Canon 3(B)(2).

⁸ Kantor, *supra* note 1.

⁹ *Id.*

¹⁰ *Code of Conduct*, Canon 5.

applicable to the justices, it remains unclear what actions—if any—the judiciary has taken in response to allegations and reporting on ethical misconduct by Supreme Court justices.

In 2023, Justice Alito granted interviews to the *Wall Street Journal* in which he opined on the constitutionality of legislation under consideration by the U.S. Senate.¹¹ The interviews were conducted in part by an attorney representing a friend of Justice Alito in relation to misconduct allegations involving Justice Alito. That attorney also had a case before the Supreme Court, yet Justice Alito refused to disqualify himself in that case.¹² It appears that no questions have even been asked by the Court about what appear to be self-evident transgressions.

Justice Thomas has repeatedly participated in cases relating to the January 6th attack on the Capitol and the alleged surrounding plot to overturn the 2020 election. His wife's involvement likely provided grounds for recusal under the federal recusal law, but it appears that the Court has failed to ask what the facts were—particularly the critical facts as to what Justice Thomas knew about his wife's interactions with alleged participants and when he knew it. Justice Thomas also apparently failed to disclose an incident of forgiveness of a significant debt, which is by law income both under the judicial disclosure requirements and the federal tax code. It is not clear at this point that the Judicial Conference is establishing the facts in a proper way as to whether violations were committed of tax, false statement, and disclosure laws—despite a law that seems to give the Conference clear guidance, and considerable precedent, in cases involving other government officials.

The rule of law is founded on elemental propositions, including the collection of evidence by investigators without an interest in the subject of investigation and the use in the investigation of statements whose falsity would be sanctionable. The rule of law is also founded on the ancient principle *nemo iudex in sua causa*—the idea that no one is judge in their own case. For centuries, Supreme Court justices conducted themselves in such a way that the absence of proper procedures consistent with these principles was a moot failing. That is no longer true. The Court's *Code of Conduct* has failed to redress or prevent any of these ethics violations, largely because it contains no enforcement mechanism. Both the Court and the Judicial Conference appear to have failed to even investigate allegations of ethics violations by Supreme Court justices, much less provide any findings or sanctions.

We therefore call for Justice Alito to recuse himself from certain proceedings as outlined above, renew our call for the Supreme Court to adopt an enforceable code of conduct for Supreme Court justices, and request a meeting with you as soon as possible. Until the Court and the Judicial Conference take meaningful action to address this ongoing ethical crisis, we will continue our efforts to enact legislation to resolve this crisis.

¹¹ David B. Rivkin & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (Jul. 28, 2023), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7>.

¹² *Moore v. United States*, 600 U.S. ____ (Sept. 8, 2023) (statement of Alito, J.), https://www.supremecourt.gov/opinions/22pdf/22-800_1an2.pdf.

Thank you for your prompt attention to this important matter.

Sincerely,



Sheldon Whitehouse
United States Senator
Chairman, Subcommittee on
Federal Courts, Oversight,
Agency Action, and Federal
Rights



Richard J. Durbin
United States Senator
Chair, Senate Committee on
the Judiciary

cc: The Honorable Lindsey O. Graham
Ranking Member, Senate Committee on the Judiciary

The Honorable John N. Kennedy
Ranking Member, Subcommittee on Federal Courts, Oversight, Agency Action, and
Federal Rights