



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

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

May 24, 2024

Dear Chief Justice Roberts:

I am writing on behalf of Citizens for Responsibility and Ethics in Washington (CREW), a nonpartisan, nonprofit organization committed to government ethics and transparency. I write to you today to urge you to immediately create an enforcement mechanism for the recently-adopted Code of Conduct for Justices of the Supreme Court of the United States (“the Code”). In light of the most recent revelations surrounding the problematic display of an inverted American flag at the home of Justice Samuel Alito, just days after the violent insurrection at the United States Capitol, as well as a second display of the “Appeal to Heaven” flag at his vacation home two years later, this ethics reform is urgently needed.¹ In addition, we ask that you use your role as head of the judiciary to encourage Justice Alito to disqualify himself from every case in which his impartiality might reasonably be questioned in light of recent reporting by *The New York Times*.

An independent and impartial judiciary is the backbone of our democracy. In the face of significant ethical lapses by some of your colleagues, coupled with the Court’s collective failure to adequately respond to the public’s calls for change, the Court’s public standing has plummeted. This has raised significant concerns as to whether public corruption has so infected the Supreme Court that it will undermine public confidence in democracy itself. In fact, the Court itself stated that the Code was promulgated to discount the “misunderstanding” by many in our nation that the justices, “unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”² And yet, the latest actions by Justice Alito appear to demonstrate that at least some members of the Court remain unapologetically “unrestricted by any ethics rules.”³

¹ Jodi Kantor, *At Justice Alito’s House, a ‘Stop the Steal’ Symbol on Display*, *The New York Times* (May 16, 2024), <https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html>; see also Jodi Kantor, Aric Toler & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, *The New York Times* (May 22, 2024), <https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html>.

² Sup. Ct. of the U.S., *Statement of the Court Regarding the Code of Conduct* 1 (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

³ *Id.*

According to reporting by *The New York Times*, an inverted American flag – a public symbol of the “Stop the Steal” movement – flew at the home of Justice Alito just days after the violent insurrection at the U.S. Capitol building, while the Court was considering certiorari in a 2020 election-related case.⁴ Justice Alito said in a statement that the flag was placed there by his wife during a politically charged dispute with a neighbor, who had a lawn sign referring to Donald Trump with an expletive near a bus stop during January 2021.⁵ In conversation with Fox News anchor Shannon Bream, Justice Alito described some of their neighbors as “very political,” and stated that his wife was upset after the neighbor blamed her for the events of January 6th and used vulgar language in a confrontation that Justice Alito witnessed.⁶ In response, Mrs. Alito hung the flag “for a short time,” according to Justice Alito.⁷ It remains unclear exactly how long the flag was displayed. It also remains unclear the extent of Justice Alito’s knowledge of its display, although in his statements he does not deny knowing that the flag was flown at his home or that the flag has a political meaning in seeming violation of the Code. Contrary to the justice’s suggestion, the fact that the flag was displayed amidst a dispute about politics is a damning fact, not a legitimate excuse.

This does not appear to be an isolated incident. Reporting indicates that a second deeply problematic and partisan flag was displayed multiple times at Justice Alito’s vacation home, as recently as September 2023, during a time when additional high stakes insurrection-related cases came before the Court.⁸ This flag, known as the “Appeal to Heaven” flag, was a symbol carried by insurrectionists on January 6th and has been associated with a far-right religious sect of the “Stop the Steal” movement which aims to remake our democratic government in Christian terms.⁹ This display, coupled with the previous display of the inverted American flag, speaks to a troubling pattern of behavior by Justice Alito.

While Justice and Mrs. Alito undoubtedly enjoy full protection of their First Amendment rights, that does not relieve Justice Alito of his ethical responsibilities. There is no question that the flying of a political flag at his home, regardless of who placed it there originally, suggests a lack of impartiality – or creates the appearance of the lack of impartiality – on the part of Justice Alito. To the extent that this speech reflects upon the justice’s own impartiality and obligations under the Code, the Court must take swift action to protect its independence and integrity.

⁴ Jodi Kantor & Abbie VanSickle, *Display at Alito’s Home Renews Questions of Supreme Court’s Impartiality*, *The New York Times* (May 17, 2024), <https://www.nytimes.com/2024/05/17/us/justice-alito-flag-reactions.html>.

⁵ *Id.*; see also Shannon Bream & Greg Norman, *Alito Says Wife Displayed Upside-Down Flag After Argument with Insulting Neighbor*, *Fox News* (May 17, 2024), <https://www.foxnews.com/politics/alito-wife-displayed-upside-down-flag-argument-insulting-neighbor>.

⁶ @ShannonBream, X (May 17, 2024, 10:58 AM), <https://x.com/ShannonBream/status/1791483561675022624>.

⁷ *Id.*

⁸ Kantor, Toler & Tate, *supra* note 1.

⁹ *Id.*

We ask the Court to consider the fact that these actions are likely in direct contradiction to several canons contained within the Code, as well as the law.¹⁰ Canon 1 of the Code provides that justices of the Supreme Court “should maintain and observe high standards of conduct in order to preserve the integrity and independence of the federal judiciary.”¹¹ It goes on to state in Canon 2 that a justice should respect the law and act at all times “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹² Furthermore, Canon 3B outlines the situations in which a justice should disqualify himself, including those where the “Justice’s impartiality might reasonably be questioned,” as well as situations where the justice has a “personal bias or prejudice concerning a party” to the proceedings.¹³

It is also a common precept amongst all federal judicial officers and employees – including justices – that a justice should refrain from political activity. This is so fundamental that Canon 5 provides both specific situations that justices should avoid, as well as the catchall cautioning that a justice “should not engage in *other* political activity.”¹⁴ (Emphasis added.) To that end, the Court goes so far as to caution its employees against all political displays, including signs and bumper stickers.¹⁵

While Justice Alito contends that he had “no involvement whatsoever in the flying of the flag,” his statement misses the point entirely. Justices aren’t just required to abstain from activities that actually compromise their impartiality, but they are also required to avoid the “*appearance* of impropriety in the minds of reasonable members of the public.”¹⁶ (Emphasis added.) Indeed, the Code’s own rules on disqualification build off of this appearance standard. Under the Code, disqualification is encouraged in situations where “an unbiased and reasonable person who is aware of all relevant circumstances would doubt” the justice’s impartiality.¹⁷ The importance of the “reasonable person” standard cannot be understated. In this instance – where widely-known political symbols tied to the insurrection were displayed above a Supreme Court justice’s homes – a reasonable person could easily conclude that the justice’s impartiality has been compromised; it would also be reasonable to assume that the justice had pre-judged cases before the Court, including the election-related case he considered while the inverted American flag was flying above his home.¹⁸ Accordingly, recusal is the bare minimum action that Justice Alito should take in order to save the integrity and independence of this Court.

¹⁰ See, e.g., Sup. Ct. of the U.S., *supra* note 2; see also 18 U.S.C. § 455.

¹¹ Sup. Ct. of the U.S., *supra* note 2, at 1.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.* at 8.

¹⁵ Abbie VanSickle, *What Do Judicial Rules Say About Alito and a ‘Stop the Steal’ Symbol?*, The New York Times (May 17, 2024), <https://www.nytimes.com/2024/05/17/us/alito-stop-steal-flag-ethics.html>.

¹⁶ See Kantor, *supra* note 1; see also Sup. Ct. of the U.S., *supra* note 2, at 5.

¹⁷ Sup. Ct. of the U.S., *supra* note 2, at 2.

¹⁸ Michael Levenson, *How Election Deniers Claimed the Upside-Down Flag*, The New York Times (May 19, 2024), <https://www.nytimes.com/2024/05/17/us/upside-down-american-flag-alito.html>; see also Kantor & VanSickle, *supra* note 4.

Although the Code suggests recusal in this situation, the law likely commands it. 28 U.S.C. § 455 makes clear that a justice “shall disqualify himself” (emphasis added) where “he has a personal bias or prejudice concerning a party.”¹⁹ At the time it was flown outside his home the inverted flag was widely seen “as an emblem of Trump supporters who denied the legitimacy” of the 2020 election.²⁰ Furthermore, the “Appeal to Heaven” flag, which until about 2013 had been left in the annals of history, has since been revived and is now widely understood to communicate the religious far-right’s support of the “Stop the Steal” movement. Both separately and together these instances seem to indicate “a personal bias or prejudice” on the part of Justice Alito, seemingly legally requiring his recusal.

It is hard to think of a more apt situation for recusal than the one at hand. This is particularly true when you consider the plethora of cases the Court is set to rule on this term in which Justice Alito’s apparent “bias or prejudice” seems to be implicated, including *Trump v. United States* and *Fisher v. United States*. Moreover, it also calls into question whether Justice Alito should have recused from several past decisions by the Court, including *Trump v. Anderson*, an appeal of the Colorado Supreme Court’s decision to remove Donald Trump from the state’s presidential primary ballot based on his disqualification under Section 3 of the 14th Amendment for engaging in the January 6, 2021 insurrection.

Despite a clear obligation under the law and under the Code to recuse, there has so far been no indication from Justice Alito that he intends to do so. Furthermore, recent reporting indicates that the Court was put on notice of this problematic and political display at Justice Alito’s house, and yet did nothing about it.²¹ This lack of recognition of the need to respond to his misconduct by both the Court and Justice Alito demonstrates the need for immediate reforms to the Code in order to preserve the Court’s integrity and impartiality. As an initial matter, the Court must amend the Code to create an enforcement mechanism to ensure judicial compliance with the Code’s ethical requirements, including creating an investigative process to conduct an inquiry into situations such as this. The commentary to the Code contemplates as much, stating that the Court “will assess whether it needs additional resources in its Clerk’s Office or Office of Legal Counsel to perform initial and ongoing review of recusal and other ethics issues.”²²

In addition, in light of the Court’s embrace in the Code of the doctrine of the “rule of necessity,” which subjugates the justices’ duty of disqualification, we urge the Court to reconsider whether disqualification should be the presumption in instances where there is no loss of quorum and the basis for disqualification stems from circumstances that are avoidable and entirely within the control of the justice. After all, if the rule of necessity is so integral to the functioning of the court, then the justices must adopt and abide by more stringent ethical rules and other prophylactic measures to prevent the need for

¹⁹ 28 U.S.C. §455(b)(3).

²⁰ Levenson, *supra* note 18.

²¹ Kantor, *supra* note 1.

²² Sup. Ct. of the U.S., *supra* note 2, at 14.

disqualification in the first place. Applying this standard to Justice Alito, we believe he is obligated to recuse in several open matters before the Court, including all cases related to January 6th and the 2020 election, and any future matters involving similar parties and issues in which his impartiality would be reasonably questioned.

By allowing these political displays at his homes, Justice Alito harmed our democracy by explicitly mixing politics and judicial decision-making. This is a crisis of democracy. We urge you to preserve the integrity of the Court by creating prophylactic enforcement mechanisms that will strengthen the Code the Court promulgated last November. We fear that if the Court fails to act, the integrity of this institution that we all revere will be beyond saving.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder". The signature is stylized and cursive, with the first name "Noah" and the last name "Bookbinder" written in a fluid, connected script.

Noah Bookbinder

CC: Justice Samuel Alito