

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 29, 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 to request information regarding your enforcement of the Code of Conduct for Justices of the Supreme Court, which was promulgated and signed by the Justices less than one year ago. Recent reports indicate that Justice Samuel Alito displayed a flag indicating support for the so-called “Stop the Steal” movement a mere eleven days after the January 6, 2021 attack on the United States Capitol. This incident, which Justice Alito has largely confirmed, constitutes both public participation in political activity and the appearance of the absence of impartiality in violation of Canons 5 and 3 of the Code of Conduct.

On January 17, 2021, Justice Alito’s neighbors took pictures of an upside-down flag raised on a pole in front of his home. The inverted flag flew next to his house for multiple days before it was eventually removed. At the time of the incident, inverted flags were widely known to be an indication of support for Donald Trump, after he attempted to stay in office by promoting the lie that the 2020 presidential election had been stolen.¹ The former President’s agitation culminated in the January 6th insurrection, in which Trump supporters attacked the Capitol building, seeking to “hang Mike Pence,” “kill Nancy Pelosi,” and otherwise render violence against Members of Congress.² Approximately 140 law enforcement officers were assaulted on January 6th, and five police officers ultimately lost their lives in connection with this act of domestic terrorism.³

¹ Adam Serwer, *Why Was Alito Flying the Flag Upside Down After January 6?*, THE ATLANTIC, May 17, 2024, <https://www.theatlantic.com/ideas/archive/2024/05/justice-alito-upside-down-flag-jan-6/678410/>

² Kevin Breuninger, *Trump chief of staff said the president thought Pence ‘deserves’ chants of ‘hang Mike Pence’ on Jan. 6, ex-aide testifies*, CNBC, Jun. 28, 2022, <https://www.cnbc.com/2022/06/28/jan-6-hearing-trump-thought-pence-deserved-chants-to-hang-him-aide-says.html>; Nolan D. McCaskill, *QAnon believer who plotted to kill Nancy Pelosi came to D.C. ready for war*, POLITICO, Jan. 13, 2021, <https://www.politico.com/news/2021/01/13/qanon-nancy-pelosi-murder-plot-458981>

³ 24 Months Since the January 6 Attack on the Capitol, DEPT. OF JUSTICE, Jan. 4, 2023, <https://www.justice.gov/usao-dc/24-months-january-6-attack-capitol>

While upside down flags can have other meanings, it is difficult to contemplate a situation in which Justice Alito's inverted flag had any meaning other than to convey political support for Donald Trump. Justice Alito has publicly acknowledged that this flag was raised upside down by his wife outside of their shared home. She did this, he wrote, "In response to a neighbor's use of objectionable and personally insulting language on yard signs."⁴ He has since acknowledged that this yard sign conveyed strong anti-Trump sentiment, implying that the Alitos felt the need to respond with a show of support for Donald Trump.⁵

The Supreme Court Code of Conduct was adopted on November 13, 2023 "to set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court."⁶ Canon 5 explicitly establishes that "A Justice should not...publicly endorse or oppose a candidate for public office."⁷ Additionally, Canon 3(B)(2) makes clear that "A Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned, that is, 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."⁸

Justice Alito appears to have violated both of these rules. By allowing the inverted flag to be flown outside his home for multiple days, Justice Alito appeared to express support for a candidate who is still running for office today. Moreover, reports indicate that the January 17, 2021 incident may be part of a broader pattern of similarly unethical conduct.⁹ Any reasonable person, knowing that Justice Alito has repeatedly and openly expressed his support for the former president—including in the immediate aftermath of the attack on the Capitol—would rightly question his ability to remain impartial in any case involving Donald Trump.

And yet, Justice Alito has continued to hear cases involving Donald Trump. The Supreme Court issued its *per curiam* decision in *Trump v. Anderson* on March 4, 2024, with no recusal from Justice Alito.¹⁰ He likewise sat for oral argument in *Trump v. United States*, which will decide whether and to what extent presidents are immune from criminal prosecution.¹¹ The decision in this case will have a sweeping impact—the former president faces 91 felony counts

⁴ 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?unlocked_article_code=1.sU0.0yWX.zzuHOt566eaH&smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb

⁵ 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 Statement of the Court Regarding the Code of Conduct, U.S. Supreme Court, Nov. 13, 2023, https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf

⁷ CODE OF CONDUCT FOR JUSTICES OF THE S. CT. OF THE U.S., Can. 5 (2023) https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf

⁸ *Id.* at Can. 3.

⁹ 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>

¹⁰ 601 U.S. 100 (2024)

¹¹ Richard Lempert, *Trump v. United States: Can presidents get away with anything?*, BROOKINGS, Apr. 24, 2024, <https://www.brookings.edu/articles/trump-v-united-states-can-presidents-get-away-with-anything/>

in state and federal courts.¹² And then there are the cases yet to come. When Donald Trump lost the 2020 presidential election, he filed over 60 cases in courts around the country.¹³ As there is no reason to believe he will behave differently if he loses again in 2024, it is possible the Supreme Court will again decide the fate of our country.

In the Statement of the Court published as a preamble to the Code of Conduct, you wrote, “The absence of a Code...has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”¹⁴ Adopting a code of ethics was meant to remedy that misunderstanding—but adopting a code of ethics and failing to enforce only serves to reinforce the perception that Supreme Court justices operate without consequences for clearly unethical behavior.

In the common interest of preserving the reputation of the Court for generations to come, we request that you reply to the below questions no later than June 28, 2024.

- 1) There are no enforcement mechanisms in the Code of Conduct for Justices of the Supreme Court that the Justices adopted on November 13, 2023. How do you plan to enforce the Code of Conduct?
- 2) In the Statement accompanying the Code of Conduct, the Justices wrote, “[t]he Court has long had the equivalent of common law ethics rules, that is, a body of rules derived from a variety of sources, including statutory provisions, the code that applies to other members of the federal judiciary, ethics advisory opinions issued by the Judicial Conference Committee on Codes of Conduct, and historic practice, and that the Canons “largely represent a codification of principles that we have long regarded as governing our conduct.” Does Justice Alito’s decision to fly the inverted flag in support of former President Donald Trump and the “Stop the Steal” movement violate those “common law ethics” principles?
- 3) Canon 3(B)(2) stipulates that “[a] Justice should disqualify himself or herself in a proceeding in which the Justice’s impartiality might reasonably be questioned, that is, 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.” Do you plan to request Justice Alito recuse himself from any cases related to Donald Trump? If not, why not?
- 4) Has this incident encouraged you to reconsider the absence of an enforcement mechanism in the Code of Conduct for Supreme Court Justices has no enforcement mechanism?

¹² David Graham, *The Cases Against Trump: A Guide*, THE ATLANTIC, May 8, 2024, <https://www.theatlantic.com/ideas/archive/2024/05/donald-trump-legal-cases-charges/675531/>

¹³ Aaron Navarro, *Liz Cheney calls on Republicans to "make clear we aren't the party of white supremacy"*, CBS NEWS, February 23, 2021, <https://www.cbsnews.com/news/liz-cheney-calls-on-republicans-to-make-clear-we-arent-the-party-of-white-supremacy/>; (When the inverted flag was flying at Justice Alito’s home, two Trump election cases were before the Court. Justice Alito dissented from the Court’s decision to deny review in these cases.)

¹⁴ Statement of the Court Regarding the Code of Conduct, U.S. Supreme Court, Nov. 13, 2023, https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf

The Honorable Chief Justice Roberts

May 29, 2024

Page 4

- 5) The *New York Times* reported that Justice Alito's neighbors informed the Supreme Court of the inverted flag in early 2021. When did you, as the Chief Justice of the Supreme Court, learn of the flag displayed at Justice Alito's home?
- 6) Does the Chief Justice have an obligation to report political speech or other violations of the Code of Conduct to the public? To Congress?

Sincerely,



Ranking Member

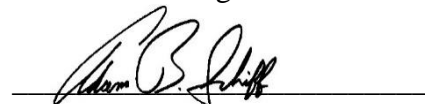
House Judiciary Committee



Zoe Lofgren
Member of Congress



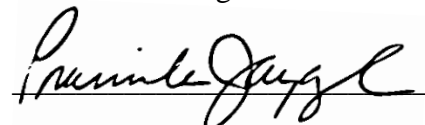
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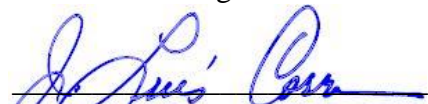
Madeleine Dean



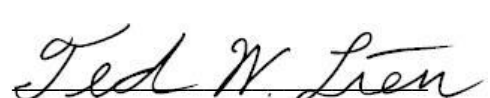
Sheila Jackson Lee
Member of Congress



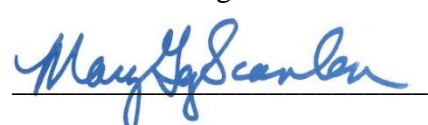
Henry C. "Hank" Johnson, Jr.
Member of Congress



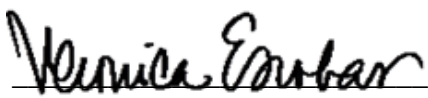
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The Honorable Chief Justice Roberts


May 29, 2024

Page 5

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