



Is the Supreme Court Showing Signs of Bias and Is Reform Needed?

BY JENNIFER L. ASHLEY¹

Recent reporting uncovered that United States Supreme Court Justice Samuel Alito had an American flag flying upside-down at his residential home. The inverted flag was flown for several days on and around January 17, 2021. Regardless of political affiliation, the act seems unpatriotic.

The United States Flag Code² sets forth flag etiquette and provides that the flag is not to be inverted except as a signal of dire distress in the case of extreme danger to life or property. The Flag Code is a guideline, establishing advisory rules for display and care of the national flag, and it is not legally enforceable or binding.

Justice Alito's response was that his wife, Martha-Ann Alito, had raised the inverted flag. He explained to Fox News on May 17, 2024 that his wife did so in response to a neighbor that had displayed a profane sign opposing former President Trump.³ Flying an inverted

flag has been used as a symbol by Trump supporters to convey that the 2020 election was stolen.

In addition, a flag stating "Appeal to Heaven" was flown in the backyard of Alito's New Jersey beach home in the Summer of 2023.⁴ That flag has been used to symbolize support for the so-called "Stop the Steal Movement" in which its supporters falsely believe the 2020 election was stolen from former President Trump. Justice Alito responded that the "Appeal to Heaven" flag was flown by his wife, that he did not know that it was connected with the "Stop the Steal Movement," and the title of the beach home in Mrs. Alito's name.

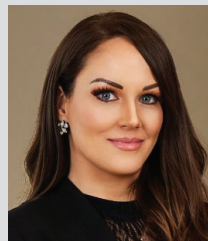
These flag controversies raise concern over a potential bias. As such, some lawmakers are demanding Justice Alito recuse himself from cases involv-

¹ *Editors' Note: This commentary was prepared by the author in her personal capacity. The statements, views and opinions expressed in this commentary are solely those of the author, and do not necessarily reflect the official policy or position of the Docket or its Editorial Board, or the Lake County Bar Association.*

² 4 U.S.C. § 5, et seq.

³ *Alito says wife displayed upside-down flag after argument with insulting neighbor*, <https://www.foxnews.com/politics/alito-wife-displayed-upside-down-flag-ar->

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⁴ *Another Provocative Flag Was Flown at Another Alito Home*, <https://www.nytimes.com/2024.05/22/us/justice-alito-flag-appeal-to-heaven.html?smid=nyt-core-ios-share>

ing the January 6th Capital attack. Others are also demanding a recusal from cases involving presidential immunity and former President Trump.

However, Justice Alito has rebuffed calls for his recusal on cases related to the 2020 election or to January 6th cases.⁵ On May 23, 2024, Senators Durbin and Whitehouse issued a letter requesting that Justice Alito recuse himself from such cases based on the two incidents involving flags flown at his residences. The Democratic Senators alleged an appearance of impropriety. Per Section (B)(2) of the Code of Conduct, which was adopted by the Supreme Court in November 2023, a Justice should disqualify himself or herself from cases in which their impartiality might reasonably be questioned. Justice Alito responded that his wife flew the upside-down flag and the “Appeal to Heaven” flag and he had no involvement. As such, he reasoned that the standard for recusal was not met.

Unfortunately, this is just one controversy that has plagued the Supreme Court in recent times that has caused public opinion of the Court to sour. It has been revealed that Justice Clarence Thomas accepted lavish gifts and luxury trips paid for by a conservative donor.⁶ In 2023, Justice Alito faced scrutiny regarding a luxury vacation from a billionaire conservative donor who had multiple cases before the court.⁷ Neither Justice disclosed the gifts on their financial disclosure forms. Justice Alito did not recuse himself from any cases involving said conservative donor.

Public trust and confidence in the Supreme Court have shown signs of eroding due to the various ethics scandals over the past year. According to Gallup, Americans’ trust in the court dropped 20 points from 2020 to 2022 to 47%, which is a record low.⁸

Many lawmakers believe the Supreme Court needs

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ethics reform. While a Code of Conduct was adopted by the Supreme Court in 2023, the provisions are self-enforced.⁹ It is hard to fathom that all lawyers in the United States are bound by ethical standards with penalties for their violations, but Supreme Court Justices face no such penalties.

In addition to an enforceable code of conduct, there has been a push for other types of reform. One suggestion

is staggered term limits of 18 years instead of lifetime appointments.¹⁰ This would allow each President to elect Justices, which would mean the voters would have some say in the type of judge appointed.

An additional element of the term limit proposal would allow Justices to serve on lower courts as senior judges after their 18 years are up.¹¹ Article III, Section 1 of the Constitution does not provide a specific term limit for Supreme Court Justices.¹² Rather, the absence of a term limit grants a lifetime appointment unless a Justice dies, resigns, or is impeached. It should be noted that at the time of its enactment, life expectancy was about 35 years, but today

it is about 79 years. Of the last 3 departing justices, Scalia and Kennedy served 30 years and Ginsburg served 27 years.

Another call for reform of the Supreme Court is to increase the number of justices from nine to 13.¹³ The size of the Supreme Court has fluctuated between 5 and 10 in the past but has remained at 9 since the passing of the Judiciary Act of 1869.¹⁴ In 1937, President Roosevelt submitted a plan to Congress to allow him to appoint up to 6 new judges, but it did not pass.¹⁵ And that was the last time a president asked Congress to increase the number of justices.

Perhaps this is the time for some changes to be made to the US Supreme Court and how its justices carry out their duties that are so vital to our democracy.

5 Alito rejects calls to recuse from Trump, Jan. 6 cases in light of flag controversies, <https://www.scotusblog.com/2024/05/alito-reject-calls-to-recuse-from-trump-jan-6-cases-in-light-of-flag-controversies>.

6 Clarence Thomas and the Billionaire, <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

7 Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court, <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>.

8 Supreme Court Trust, Job Approval at Historical Lows, <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

9 https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

10 *The Case For Supreme Court Term Limits*, A Paper by the U.S. Supreme Court Working Group, https://www.amacad.org/sites/default/files/publication/downloads/2023_SCOTUS-Term-Limits.pdf.

11 *Id.* at 11.

12 U.S. Const., art. III, § 1.

13 *Democrats to introduce bill to expand Supreme Court from 9 to 13 justices*, <https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132>.

14 *Why Do 9 Justices Serve on the Supreme Court?*, <https://www.history.com/news/supreme-court-justices-number-constitution>

15 *Id.*