

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

<https://oversight.house.gov>

October 4, 2024

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

Dear Chief Justice Roberts:

We write with renewed concern about Justice Samuel Alito's apparent refusal to abide by the Supreme Court's Code of Conduct or constitutional and statutory guarantees that cases be heard by impartial judges. Recent reporting by the *New York Times* suggests that you took the "highly unusual" step of replacing Justice Alito as the author of the Supreme Court's opinion in *Fischer v. United States*, a case involving the January 6 insurrection, just days after the public learned that Justice Alito and his spouse repeatedly flew flags and banners supportive of the insurrectionists and the "Stop the Steal" movement.¹ Your decision suggests that you recognized that Justice Alito's partisan ideological activity called into question his impartiality with regard to the *Fischer* matter. Yet, Justice Alito, like Justice Clarence Thomas, whose own ties to the "Stop the Steal" movement are well established, was allowed to participate in the *Fischer* case, in violation of the Court's institutional commitment to the principle that a Justice must "disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned."²

On June 20, 2024, eight days prior to the release of the *Fischer* decision, we wrote to you that Justice Alito's participation in cases involving January 6 defendants and immunity for President Trump this term were highly troubling, particularly as Justice Alito has repeatedly

¹ *How Roberts Shaped Trump's Supreme Court Winning Streak*, New York Times (Sept. 15, 2024) (online at www.nytimes.com/2024/09/15/us/justice-roberts-trump-supreme-court.html); *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, New York Times (May 16, 2024) (online at www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html); *Another Provocative Flag Was Flown at Another Alito Home*, New York Times (May 22, 2024) (online at www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html).

² Supreme Court of the United States, *Statement of the Court Regarding the Code of Conduct* (Nov. 13, 2023) (online at www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf); see also, e.g. *Should Justice Thomas Recuse in the Trump 14th Amendment Case Because of Wife's Jan. 6 Role?*, ABC News (Feb. 6, 2024) (online at <https://abcnews.go.com/Politics/justice-thomas-recuse-14th-amendment-case-wifesjan/story?id=106803474>); *Alito and His Wife Are Captured in Audio Recordings Talking About Abortion Leak, Flag Controversy*, Politico (June 10, 2024) (online at www.politico.com/news/2024/06/10/alito-wife-supreme-court-recordings00162610).

shown support for the “Stop the Steal” movement.³ Following the 2020 presidential election and before the January 20, 2021, inauguration, Justice Alito and his spouse flew an upside-down American flag, a political rallying symbol of “Stop the Steal” movement supporters, at their home. In the summer of 2023, at their New Jersey residence, Justice Alito and his spouse flew a different banner, the “Appeal to Heaven” flag, which is also currently embraced by the “Stop the Steal” movement and was proudly displayed by some insurrectionists as they stormed the Capitol on January 6, 2021.⁴

We also raised concerns about Justice Thomas’s participation considering his own ties to the “Stop the Steal” movement. His wife, Ginni Thomas, helped lead the “Stop the Steal” campaign, attended the January 6, 2021, rally near the White House, and actively strategized with then-President Trump’s chief of staff about overturning the results of the 2020 elections—all of which raises serious conflicts of interest problems for cases before the Supreme Court. Justice Thomas recognized this conflict of interest in recusing himself from the Court’s case related to Trump attorney John Eastman, but, inexplicably, refused to recuse himself from either of the Court’s two January 6 cases, including *Fischer*.⁵

In a response to our letter, your counselor, writing on your behalf, explained that “each Justice has an independent obligation to decide whether he or she may participate in a case, whether or not there has been any suggestion that recusal would be appropriate,” and that the decision to recuse does not lie with the Judicial Conference or the Chief Justice.⁶ In essence, this response suggested that Justices of the Supreme Court are above the Constitution, federal law, and the Court’s own Code of Conduct and act as their own judges and a law unto themselves.

Last year, the Supreme Court issued a Code of Conduct setting out the “ethics rules and principles that guide the conduct of Members of the Court.”⁷ The Code instructs 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 For its part, federal law *requires* the recusal of partial judges and justices: “Any justice, judge, or magistrate judge of the United States *shall disqualify* himself in any proceeding in which his

³ Letter from Ranking Member Jamie Raskin and Vice Ranking Member Alexandria Ocasio-Cortez, Committee on Oversight and Accountability, to the Chief Justice John Roberts, United States Supreme Court (June 20, 2024) (online at <https://oversightdemocrats.house.gov/news/press-releases/ranking-member-raskin-and-vice-ranking-member-ocasio-cortez-demand-answers>).

⁴ *At Justice Alito’s House, a ‘Stop the Steal’ Symbol on Display*, New York Times (May 16, 2024) (online at www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html).

⁵ E.g., *Should Justice Thomas Recuse in the Trump 14th Amendment Case Because of Wife’s Jan. 6 Role?*, ABC News (Feb. 6, 2024) (online at <https://abcnews.go.com/Politics/justice-thomas-recuse-14th-amendment-case-wifesjan/story?id=106803474>).

⁶ Letter from Robert M. Dow, Counselor to Chief Justice John Roberts, to Ranking Member Jamie Raskin and Vice Ranking Member Alexandria Ocasio-Cortez, Committee on Oversight and Accountability (July 12, 2024).

⁷ Supreme Court of the United States, *Statement of the Court Regarding the Code of Conduct* (Nov. 13, 2023) (online at www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf).

⁸ *Id.*

impartiality might reasonably be questioned.”⁹ And as this Court’s own decisions have recognized, the Constitution’s Due Process clause “requires recusal” of a biased judge.¹⁰

Your own conduct, in taking the “highly unusual step” of removing Justice Alito as the author of the *Fischer* opinion last May, just days after the public learned that he repeatedly flew flags and banners supportive of the January 6 insurrectionists, strongly suggests you recognized that Justice Alito’s conduct presented a situation “in which the Justice’s impartiality might reasonably be questioned.”¹¹ Yet by taking the half measure of replacing him as the opinion’s author, instead of requiring him, as well as Justice Thomas, to recuse wholly from the matter, you allowed the Court to violate and defy federal law, the Constitution, and its own Code of Conduct.

The notion that individual Justices can decide for themselves whether their own conduct violates the Constitution, federal law, or the Court’s Code of Conduct is untenable in our Republic and clearly violates the fundamental and original principle of due process that “no man can be a judge in his own case.”¹² In order to help us understand the Court’s processes and your own actions as we consider potential legislative action to make clear that the Justices of the Supreme Court, like every person in America, are bound by our Constitution and our laws, we respectfully request that you provide written responses to the following questions by October 18, 2024:

1. Did you, as Chief Justice, make the decision to replace Justice Alito as the drafter of the *Fischer* opinion?
 - a. When did you do so and what was your basis for doing so? Did public reporting that Justice Alito and his spouse displayed flags and banners supportive of the insurrectionists and the “Stop the Steal” movement play any role in this decision?
 - b. When and how did you become aware that Justice Alito and his spouse displayed flags and banners supportive of the insurrectionists and the “Stop the Steal” movement both in January 2021 and in the summer of 2023?
 - c. Were there any other individuals involved in making the decision to replace Justice Alito as the drafter of the *Fischer* opinion? Did you discuss this decision with any other sitting or retired Justice of the Supreme Court?

⁹ 28 U.S.C. § 455 – Disqualification of justice, judge, or magistrate judge (emphasis added).

¹⁰ *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

¹¹ Supreme Court of the United States, *Statement of the Court Regarding the Code of Conduct* (Nov. 13, 2023) (online at www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf); 28 U.S.C. § 455 – Disqualification of justice, judge, or magistrate judge.

¹² E.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

- d. How was the decision conveyed to Justice Alito?
2. Did you have any conversations with Justice Alito or Justice Thomas about whether either's participation in cases involving January 6 defendants was consistent with the Supreme Court's Code of Conduct, federal law, or the Constitution? In particular, did you have any discussion with Justice Alito or Justice Thomas about recusing from cases involving January 6 defendants?
3. Did you have any conversations with any sitting or retired Justice of the Supreme Court about whether the participation of Justice Alito or Justice Thomas in cases involving January 6 defendants was consistent with the Supreme Court's Code of Conduct, federal law, or the Constitution?

The Committee on Oversight and Accountability is the principal oversight committee of the House of Representatives and has the broad authority to investigate "any matter" at "anytime" under House Rule X. If you have any questions regarding this request, please contact Committee staff at (202) 225-5051.

Thank you for your attention to this important and increasingly urgent matter.

Very truly yours,


Jamie Raskin
Ranking Member


Alexandria Ocasio-Cortez
Vice Ranking Member

cc: The Honorable James Comer, Chairman