

# [***False Flag: Alito Incident Shows Need for Enforceable Court Ethics Code | Opinion***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6C2X-J221-JBR6-946K-00000-00&context=1516831)

Newsweek.com

May 21, 2024 Tuesday 8:38 AM EST

Copyright © 2024 Newsweek Inc. All Rights Reserved



**Length:** 769 words

**Byline:** Thomas G. Moukawsher

**Highlight:** The news that in 2021 Justice Samuel Alito's wife joined radical Trump supporters in flying the United States flag upside down should remind us that we still need an enforceable ethics code for the Supreme Court.

**Body**

The news that in 2021 Justice [*Samuel Alito*](https://www.newsweek.com/topic/samuel-alito?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)'s wife joined radical Trump supporters [*in flying the United States flag upside down*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.nytimes.com%2F2024%2F05%2F16%2Fus%2Fjustice-alito-upside-down-flag.html&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435479564%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=YQUxfMwRpY5ytW234y94TyGXZmRT7ceqK1G8nMSCze8%3D&reserved=0) should remind us that we still need an enforceable ethics code for the [*Supreme Court*](https://www.newsweek.com/topic/supreme-court?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships).

Remember the second half of January 2021? By that time, [*some sixty courts had ruled against former President Donald Trump's bogus election fraud claims. Some of the rulings came from judges he appointed*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.politifact.com%2Ffactchecks%2F2021%2Fjan%2F08%2Fjoe-biden%2Fjoe-biden-right-more-60-trumps-election-lawsuits-l%2F&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435484996%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=vdpIiF%2FEQAAbV6D0GuUjgq%2BN3J8J6Ki7co4pPczq6H0%3D&reserved=0).

[*Yet on January 17, 2021, and for two or three days, Justice Alito's flag joined the upside-down flags of extremists who continued to insist that the election was stolen.*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.politico.com%2Fnews%2F2024%2F05%2F18%2Fupside-down-flag-at-justice-alitos-home-another-blow-for-supreme-court-under-fire-00158772&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435490332%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=CRf5pUIx9sBwOww%2FUAy8sLRgSXQ5lyOePaXZLcV7FCY%3D&reserved=0)A few weeks later, in the case of Trump's challenge to Pennsylvania election results, [*Alito along with Justice Clarence Thomas opposed the Court's decision not to hear Trump's claims*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fapnews.com%2Farticle%2Fjoe-biden-donald-trump-pennsylvania-elections-us-supreme-court-5cc6aee8c328c7bb1d423244b979bcec&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435495694%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=u4aDJnCFXwFAvL7uQFgYSNckWLenlk80fD1lWnvYvAo%3D&reserved=0). Like Alito's vote, Thomas' was cast under a cloud. Before he voted, his wife had actively supported Trump's fraud claims, [*texting Trump's chief of staff some 29 times and labelling President Joe Biden's election "the greatest heist of our history*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-us-canada-60871794&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435501162%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=gWd53IB9wNG1aiNfO68NNdsnZeGcHhM%2BTSmlALCsX1k%3D&reserved=0)."

Of course, neither Alito nor Thomas had the right to shut down their wives' political statements, but they did have to decide whether these predicaments meant they must recuse themselves from voting on cases about a man publicly supported by their spouses. Maybe if they had told their wives they would have had to recuse themselves they might have been persuaded to stay out of matters in front of the court.

But neither Alito nor Thomas had any incentive to do that. Short of impeachment, there was nothing anyone could do about their behavior except further lower their esteem for the Supreme Court. And that's because the Supreme Court of the United States [*remains the only federal entity without an enforceable ethics code.*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.americanprogress.org%2Farticle%2Fwith-its-release-of-a-new-nonbinding-code-of-conduct-the-supreme-court-fails-on-ethics-again%2F&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435506528%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=KuqhlQ3Uo0AvODNXbKfC%2BBPmbTYNHhLkSkhqc36d65E%3D&reserved=0)

Yes, the court [*announced its first ever written code last year*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.cnn.com%2F2023%2F11%2F13%2Fpolitics%2Fsupreme-court-announcement%2Findex.html%23%3A~%3Atext%3DTitled%2520%25E2%2580%259CCode%2520of%2520Conduct%2520for%2Cinfluence%2520official%2520conduct%2520or%2520judgment.%25E2%2580%259D&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435511991%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=1UOYbiP8KiMSdzCwZmBIDsLqat4gDVRj9dE5KWtzJ30%3D&reserved=0). But that code included no mechanism to enforce it and no consequences for violating it. Without a code with consequences, Chief Justice [*John Roberts*](https://www.newsweek.com/topic/john-roberts?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) is left doing no more than he doubtless already has been doing, imploring justices to avoid impropriety or even the appearance of impropriety.

That isn't enough. The court should create an ethics commission for itself. To avoid tying the court in knots with frivolous complaints, there could be limits on the types of complaints and who could make them. Members could be evenly divided between members appointed by the court and members appointed by the other branches. Its rulings could face an up-or-down vote from the full court. The consequences of violations should at least include recusals and perhaps other penalties, too.

Let's consider for a moment how the code might affect justices Alito and Thomas in light of their wives' activities. The [*code says that a justice is disqualified from sitting on a case when the justices' impartiality might reasonably be questioned*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.supremecourt.gov%2Fabout%2FCode-of-Conduct-for-Justices_November_13_2023.pdf&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435517986%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=04q5hNUKlQuZb0t%2BQMqL0QAbjAcbvsa9dQgaBuRkGMU%3D&reserved=0). While we might assume that the justices could struggle mightily into neutrality against the publicly avowed interests of their spouses, would it surprise us that a reasonable person might question their neutrality?

Yet, in Alito's case, perhaps it would turn out that neither the justice nor his wife knew that Trump supporters were flying upside-down flags. Perhaps the Alito flag was merely a sign of distress over feelings of oppression at the hands of vulgar, insulting, and intimidating neighbors. There does seem [*some basis for this belief in what Alito told The New York Times*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.nytimes.com%2F2024%2F05%2F16%2Fus%2Fjustice-alito-upside-down-flag.html&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435523478%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=JXVsxBCiPAHgXfgcychztYlzQhu79GdszCew4aKwzlI%3D&reserved=0), but we will never know if that's the right view because only partisans have interpreted the event for us. A clean bill from a credible commission could help put the Alito matter to rest. While things might be more troubling in Thomas's case because of his wife's undoubted activism, we will never know what it should mean for Thomas because, without an ethics commission, her activities and his potential conflict will never be examined.

What to think and more importantly what to do about these cases would be better resolved by a commission. Ethics questions have been [*raised about justices of every stripe and have been around since the Founding Fathers,*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.usnews.com%2Fnews%2Fthe-report%2Farticles%2F2023-06-16%2Fsupreme-court-ethics-questions-reach-far-beyond-clarence-thomas&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435529758%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=g5XSUVhOL8y1eRLujg%2FtooAoamw%2BtDQxIQchPt7S7n0%3D&reserved=0)but contemporary ***politics*** have placed the present Supreme Court under a microscope. A commission could insulate the court from attack by exonerating the blameless and creating consequences for the blameworthy.

***Thomas G. Moukawsher****is a former Connecticut complex litigation judge and a former co-chair of the American Bar Association Committee on Employee Benefits. He is the author of the new book,*[*The Common Flaw: Needless Complexity in the Courts and 50 Ways to Reduce It*](https://nam12.safelinks.protection.outlook.com/?url=https%3A%2F%2Fbrandeisuniversitypress.com%2Ftitle%2Fthe-common-flaw-needless-complexity-in-the-courts-and-50-ways-to-reduce-it%2F&data=05%7C02%7Cj.fields%40newsweek.com%7C605d3be54d364e7d584f08dc78cdd176%7Cc6bc3eb5d7334f82ba021aa6e30053d3%7C0%7C0%7C638518074435538565%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=wnTivx0K54%2BSaToHT8EM09Fid1nfGif9aKRr3ZDEVpg%3D&reserved=0)*.*

*The views expressed in this article are the writer's own.*

[*Link to Image*](https://d.newsweek.com/en/full/2396632/alito-thomaas.jpg)

**Graphic**

Alito and Thomaas

Jacquelyn Martin-Pool/Getty Images

Supreme Court justices Clarence Thomas and Samuel Alito attend a private ceremony for retired Supreme Court Justice Sandra Day O'Connor on Dec. 18, in Washington, DC.

**Load-Date:** May 21, 2024

**End of Document**