

United States Senate

WASHINGTON, DC 20510

September 4, 2023

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

Dear Chief Justice/Chairman Roberts:

I write to lodge an ethics complaint regarding recent public comments by Supreme Court Justice Samuel Alito, which appear to violate several canons of judicial ethics, including standards the Supreme Court has long applied to itself.

I write to you in your capacity both as Chief Justice and as Chair of the Judicial Conference because, unlike every other federal court, the Supreme Court has no formal process for receiving or investigating such complaints, and asserted violations by justices of relevant requirements have sometimes been referred to the Judicial Conference and its committees. I include all justices in carbon copy because I am urging the Supreme Court to adopt a uniform process to address this complaint and others that may arise against any justice in the future.

The recent actions by Justice Alito present an opportunity to determine a mechanism for applying the Judicial Conduct and Disability Act to justices of the Supreme Court. Nothing prohibits the Court or the Judicial Conference from adopting procedures to address complaints of misconduct. The most basic modicum of any due process is fair fact-finding; second to that is independent decision-making.

Background

Some of the background facts here were related by members of the Senate Judiciary Committee who signed a letter to you dated August 3, 2023.¹ As that letter explains, the *Wall Street Journal* on July 28, 2023, published an interview with Justice Alito conducted by David Rivkin and James Taranto. Justice Alito's comments during that interview give rise to this complaint.² The interview had the effect, and seemed intended, to bear both on legislation I authored and on investigations in which I participate.

During the interview, Justice Alito stated that “[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period.”³ Justice Alito's comments

¹ Letter from Sen. Richard J. Durbin et al., Senate Committee on the Judiciary, to Hon. John G. Roberts Jr., Chief Justice of the United States (Aug. 3, 2023).

² David B. Rivkin & James Taranto, Opinion, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7?st=4765zed61auy3j2&reflink=desktopwebshare_permalink.

³ *Id.*

appeared in connection to my Supreme Court Ethics, Recusal, and Transparency Act, which the Senate Judiciary Committee had advanced just one week before the publication of this interview.⁴ That bill would update judicial ethics laws to ensure the Supreme Court complies with ethical standards at least as demanding as in other branches of government.

Justice Alito's comments echoed legal arguments made to block information requests from the Senate Judiciary Committee and the Senate Finance Committee, on both of which I serve. Those arguments assert (in my view wrongly) that our constitutional separation of powers blocks any congressional action in this area, which in turn is asserted (also wrongly, in my view) to block any congressional investigation. Sound or unsound, it is their argument against our investigations, as reflected in the letter appended hereto. The subjects of these committee investigations are matters relating to dozens of unreported gifts donated to justices of the Supreme Court.

As the author of the bill at issue, and as the only Senator serving in the majority on both investigating committees, I bring this complaint.

Improper Opining on a Legal Issue that May Come Before the Court

On the Senate Judiciary Committee, we have heard in every recent confirmation hearing that it would be improper to express opinions on matters that might come before the Court. In this instance, Justice Alito expressed an opinion on a matter that could well come before the Court.

That conduct seems indisputably to violate the Code of Conduct for United States Judges. Canon 1 emphasizes a judge's obligation to "uphold the integrity and independence of the judiciary"; Canon 2(A) instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; and Canon 3(A)(6) provides that judges "should not make public comment on the merits of a matter pending or impending in any court." These canons help ensure "the integrity and independence of the judiciary" by requiring judges' conduct to be at all times consistent with the preservation of judicial impartiality and the appearance thereof.⁵

The Court's *Statement of Ethics Principles and Practices*, "to which all of the current members of the Supreme Court subscribe,"⁶ concurs. That document makes clear that, before speaking to the public, "a Justice should consider whether doing so would create an appearance of impropriety in the minds of reasonable members of the public. There is an appearance of impropriety when an unbiased and reasonable person who is aware of all relevant facts would doubt that the Justice could fairly discharge his or her duties."⁷ These same precepts are also enforced through the federal recusal statute, which requires all federal justices and judges to recuse themselves from any matter in which their impartiality could reasonably be questioned.⁸

⁴ *Id.*

⁵ Code of Conduct for U.S. Judges, Canon 1, Commentary.

⁶ Letter from John G. Roberts, Jr., Chief Justice of the United States, to Sen. Richard J. Durbin, Chairman, Senate Committee on the Judiciary (Apr. 25, 2023).

⁷ See *Statement on Ethics Principles and Practices* at 2:8-15, 2:19.

⁸ See 28 U.S.C. § 455(a), (b)(1).

Making public comments assessing the merits of a legal issue that could come before the Court undoubtedly creates the very appearance of impropriety these rules are meant to protect against. As Justice Kavanaugh pointed out, prejudging an issue in this manner is “inconsistent with judicial independence, rooted in Article III,” because “litigants who come before [the Court] have to know we have an open mind, that we do not have a closed mind.”⁹

Justice Alito and every other sitting member of the Supreme Court told the Senate Judiciary Committee during their confirmation hearings that it would be (in the words of Justice Alito) “improper” and a “disservice to the judicial process” for a Supreme Court nominee to comment on issues that might come before the Court.¹⁰ Justice Thomas said that such comments would at minimum “leave the impression that I prejudged this issue,” which would be “inappropriate for any judge who is worth his or her salt.”¹¹ Justice Kagan echoed those comments, telling the Committee it would be “inappropriate” for her to “give any indication of how she would rule in a case”—even “in a somewhat veiled manner.”¹² And Justice Kavanaugh explained that nominees “cannot discuss cases or issues that might come before them.” He continued: “As Justice Ginsburg said, no hints, no forecasts, no previews.”¹³

Justice Gorsuch made clear during his confirmation hearing that this rule applies to the precise topic on which Justice Alito opined to the *Wall Street Journal*:

Senator Blumenthal. Thank you. I also want to raise a question, talking about court procedure, relating to conflicts of interest and ethics. I think you were asked yesterday about the proposed ethics rules that have been applied to your court—

Judge Gorsuch. Yes.

Senator Blumenthal: [continuing]. To the appellate court, to the District Court, but not to the Supreme Court. Would you view such legislation as a violation of the separation of powers?

Judge Gorsuch. Senator, I am afraid I just have to respectfully decline to comment on that because I am afraid that could be a case or controversy, and you can see how it might be. I can understand Congress’ concern and interest in this area. I understand that. But I think the proper way to test that question is the prescribed process of legislation and litigation.¹⁴

⁹ *Confirmation Hrg. on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong., at 123 (Sept. 5, 2018).

¹⁰ *Confirmation Hrg. on the Nomination of Hon. Samuel Alito to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong., at 517, 554 (Jan. 11, 2006).

¹¹ *Confirmation Hrg. on the Nomination of Hon. Clarence Thomas to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 102d Cong., at 180 (Sept. 11, 1992); *Confirmation Hrg. on the Nomination of Hon. Clarence Thomas to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 102d Cong., at 173 (Sept. 10, 1992).

¹² *Confirmation Hrg. on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 111th Cong., at 80 (June 29, 2010).

¹³ *Kavanaugh Hrg.*, *supra* note 9, at 123.

¹⁴ *Confirmation Hrg. on the Nomination of Hon. Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong., at 334 (Mar. 22, 2017).

You, Justice Sotomayor, and Justice Barrett each expressly cited the canons of judicial ethics as the source of a nominee’s obligation to refuse to comment on such matters.¹⁵ There seems to be no question that Justice Alito is bound by, and that his opining violated, these principles.¹⁶

Improper Intrusion into a Specific Matter

These principles apply broadly to any opining, on any issue that might perhaps come before the Court. But here it was worse; it was not just general opining, it was opining in relation to a specific ongoing dispute. The quote at issue in the article—“No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court”—directly follows a mention of my judicial ethics bill. Justice Alito’s decision to opine publicly on the constitutionality of that bill may well embolden legal challenges to the bill should it become law. Indeed, his comments encourage challenges to all manner of judicial ethics laws already on the books.

Justice Alito’s opining will also fuel obstruction of our Senate investigations into these matters. To inform its work on my bill and other judicial ethics legislation, and oversee the performance of the statutory Judicial Conference in this arena, the Senate Judiciary Committee is investigating multiple reports that Supreme Court justices have accepted and failed to disclose lavish gifts from billionaire benefactors.¹⁷ Separately, the Senate Finance Committee is investigating the federal tax considerations surrounding the billionaires’ undisclosed gifts to Supreme Court justices.¹⁸ Both committees’ inquiries have been stymied by individuals asserting that Congress has no constitutional authority to legislate in this area, hence no authority to investigate. Justice Alito’s public comments prop up these theories.¹⁹

As the author of the bill in question and as a participant in the related investigations, I feel acutely the targeting of this work by Justice Alito, and consider it more than just misguided or accidental general opining. It is directed to my work.

¹⁵ See *Confirmation Hrg. on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong., at 243 (Sept. 13, 2005) (citing Canon 3(A)(6) of the Code of Conduct for United States Judges); *Confirmation Hrg. on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 111th Cong., at 109 (July 14, 2009) (citing American Bar Association “rule on Code of Conduct”); *Barrett Confirmation Hearing, Day 2, Part 1*, C-SPAN Video, at 51:37–51:48 (Oct. 13, 2020) (citing “canons of judicial conduct”).

¹⁶ Indeed, another member of the Court has expressed how seriously federal judges and justices take these statements to the Judiciary Committee. See *Kavanaugh Hrg.*, *supra* note 9, at 123 (statement of Judge Kavanaugh) (“[B]elieve me, judges do feel bound by what they said to this Committee.”).

¹⁷ See, e.g., Letter from Sen. Richard J. Durbin, et al., Senate Committee on the Judiciary, to Harlan Crow (May 8, 2023), <https://www.judiciary.senate.gov/imo/media/doc/May%208,%202023%20letter%20to%20Harlan%20Crow16.pdf>.

¹⁸ See, e.g., Letter from Sen. Ron Wyden, Chairman, Senate Committee on Finance, to Harlan Crow (Apr. 24, 2023), <https://www.finance.senate.gov/imo/media/doc/Letter%20from%20Chairman%20Wyden%20to%20Harlan%20Crow%204.24.23.pdf>.

¹⁹ See, e.g., Letter from Harlan Crow to Sen. Ron Wyden, Chairman, Senate Committee on Finance (May 8, 2023), <https://s3.documentcloud.org/documents/23872250/harlan-crow-5-8-2023-letter-to-senate-finance.pdf>; Letter from Harlan Crow to Sen. Richard J. Durbin, Chairman, Senate Committee on the Judiciary (May 22, 2023), <https://s3.documentcloud.org/documents/23822173/harlan-crow-attorney-letter-to-senate-judiciary-committee.pdf>.

Improper Intrusion into a Specific Matter at the Behest of Counsel in that Matter

Compounding the issues above, Attorney David Rivkin was one of the interviewers in the *Wall Street Journal* piece, and also a lawyer in the above dispute. This dual role suggests that Justice Alito may have opined on this matter at the behest of Mr. Rivkin himself. Bad enough that a justice opines on some general matter that may come before the Court; worse when the opining brings his influence to bear in a specific ongoing legal dispute; worse still when the influence of a justice appears to have been summoned by counsel to a party in that dispute.

The timeline of the *Wall Street Journal* interview suggests that its release was coordinated with Mr. Rivkin's efforts to block our inquiry. Mr. Rivkin's interview with Justice Alito was reportedly conducted in "early July" 2023.²⁰ On July 11, Senate Judiciary Committee Chair Durbin and I sent a letter to Mr. Rivkin's client inquiring about undisclosed gifts and travel provided to justices.²¹ On July 20, the Senate Judiciary Committee voted to advance my judicial ethics bill mentioned above. (Notably, the Rivkin/Alito Congress-has-no-authority argument fared poorly in the committee that day, with no Republican rising to rebut the arguments against it.) On July 25, Mr. Rivkin by letter refused to provide the requested information on the purported ground that "any attempt by Congress to enact ethics standards for the Supreme Court would falter on constitutional objections."²² That response, appended hereto, was instantly published in *Fox News*.²³ Three days later, on July 28, the *Wall Street Journal* editorial page published the supportive opining from Justice Alito.²⁴

²⁰ Rivkin & Taranto, *supra* note 2.

²¹ Letter from Sens. Sheldon Whitehouse & Richard J. Durbin, Senate Committee on the Judiciary, to Leonard Leo (July 11, 2023).

²² Letter from David B. Rivkin, Jr. to Sens. Sheldon Whitehouse & Richard J. Durbin, Senate Committee on the Judiciary (July 25, 2023).

²³ Andrew Mark Miller, *Conservative activist rejects Senate Dem demand for help in Supreme Court probe: 'Political retaliation'*, FOX NEWS (July 25, 2023), <https://www.foxnews.com/politics/conservative-activist-rejects-senate-dem-demand-help-supreme-court-probe-political-retaliation>.

²⁴ Separately, Mr. Rivkin is also counsel of record in a case the Supreme Court recently agreed to hear, *see Moore v. United States*, No. 22-800—a matter that presents distinct ethical issues, including possible conflicts of interest, that should also be addressed. Questions abound about the extent of private access Justice Alito has afforded Mr. Rivkin, who has appeared before the Court numerous times, particularly while Mr. Rivkin's petition for a writ of *certiorari* was pending in *Moore*. Mr. Rivkin's efforts in *Moore* have been publicly supported by the *Wall Street Journal* Editorial Board, which has approved three pieces written by or involving interviews with Justice Alito in four months—including a piece by Justice Alito "prebutting" reporting on the non-disclosed gifts that Leonard Leo arranged for Justice Alito to receive. *See* Editorial Bd., Opinion, *Is a U.S. Wealth Tax Constitutional?*, WALL ST. J. (June 14, 2023), <https://www.wsj.com/articles/wealth-tax-ninth-circuit-moore-v-u-s-charles-and-kathleen-moore-supreme-court-constitution-6cdfba92>; James Taranto & David B. Rivkin Jr., Opinion, *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023), <https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9>; Samuel A. Alito Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?mod=hp_opin_pos_3#cxrecs_s; Editorial Bd., Opinion, *A Wealth-Tax Watershed for the Supreme Court*, WALL ST. J. (June 27, 2023), <https://www.wsj.com/articles/supreme-court-moore-v-u-s-wealth-tax-patrick-bumatay-ninth-circuit-83610ed>.

Improper Intrusion into a Specific Matter Involving an Undisclosed Personal Relationship

On top of all this, the dispute upon which Justice Alito opined involves an individual with whom Justice Alito has a longstanding personal and political relationship. As my colleagues and I pointed out in our August 3 letter, “Mr. Rivkin is counsel for Leonard Leo with regard to [the Judiciary] Committee’s investigation into Mr. Leo’s actions to facilitate gifts of free transportation and lodging that Justice Alito accepted from Paul Singer and Robin Arkley II in 2008.”²⁵ Mr. Leo was Justice Alito’s companion on the luxurious Alaskan fishing trip in 2008 and facilitated the gifts to the justice of free transportation and lodging. Two years earlier, Mr. Leo’s political organization “had run an advertising campaign supporting Alito in his confirmation fight, and Leo was reportedly part of the team that prepared Alito for his Senate hearings.”²⁶

The timing of Justice Alito’s opining suggests that he intervened to give his friend and political ally support in his effort to block congressional inquiries. It appears that Justice Alito (a) opined (b) on a specific ongoing dispute (c) at the behest of counsel in that dispute (d) to the benefit of a personal friend and ally. Each is objectionable, and appears to violate, *inter alia*, Canon 2(B) of the Code of Conduct for United States Judges, which provides, “A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.”

Improper Use of Judicial Office for Personal Benefit

The final unpleasant fact in this affair is that Justice Alito’s opining, apparently at the behest of his friend and ally’s lawyer, props up an argument being used to block inquiry into undisclosed gifts and travel received by Justice Alito. At the end, Justice Alito is the beneficiary of his own improper opining. This implicates Canon 2(B) strictures against improperly using one’s office to further a personal interest: a justice obstructing a congressional investigation that implicates his own conduct.

The Senate Judiciary Committee’s investigation encompasses reports that Justice Alito accepted but did not disclose gifts of travel and lodging valued in the tens of thousands of dollars. Further investigation may reveal additional information that Justice Alito would prefer not come to light. The facts as already reported suggest that Justice Alito likely violated the financial disclosure requirements of the Ethics in Government Act.²⁷ Perhaps Justice Alito should also have recused himself as required by the recusal statute in a 2014 case involving a company owned by Paul Singer, one of the billionaires who attended and paid for his Alaskan fishing vacation.²⁸ Justice Alito’s public suggestion that these laws are unconstitutional as applied to the Supreme Court, and that Congress lacks authority to amend them or investigate their implementation or enforcement, appears designed to impede Senate efforts to investigate these and other potential abuses.

²⁵ Letter from Sen. Richard J. Durbin et al., *supra* note 1.

²⁶ Justin Elliott, Joshua Kaplan, & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>.

²⁷ See 5 U.S.C. §§ 13101, *et seq.*

²⁸ Elliott, Kaplan, & Mierjeski, *supra* note 26; see 28 U.S.C. § 455.

* * *

Conclusion

In the worst case facts may reveal, Justice Alito was involved in an organized campaign to block congressional action with regard to a matter in which he has a personal stake. Whether Justice Alito was unwittingly used to provide fodder for such interference, or intentionally participated, is a question whose answer requires additional facts. The heart of any due process is a fair determination of the facts. Uniquely in the whole of government, the Supreme Court has insulated its justices from any semblance of fair fact-finding. The obstructive campaign run by Mr. Rivkin and Mr. Leo, fueled by Justice Alito's opining, appears intended to prevent Congress from gathering precisely those facts.

As you have repeatedly emphasized, the Supreme Court should not be helpless when it comes to policing its own members' ethical obligations. But it is necessarily helpless if there is no process of fair fact-finding, nor independent decision-making. I request that you as Chief Justice, or through the Judicial Conference, take whatever steps are necessary to investigate this affair and provide the public with prompt and trustworthy answers.

Sincerely,



SHELDON WHITEHOUSE

Chairman

Senate Judiciary Subcommittee on

Federal Courts, Oversight, Agency Action, and

Federal Rights

Enclosure

cc: The Honorable Samuel A. Alito, Jr., Associate Justice, Supreme Court of the United States
The Honorable Clarence Thomas, Associate Justice, Supreme Court of the United States
The Honorable Sonia Sotomayor, Associate Justice, Supreme Court of the United States
The Honorable Elena Kagan, Associate Justice, Supreme Court of the United States
The Honorable Neil M. Gorsuch, Associate Justice, Supreme Court of the United States
The Honorable Brett Kavanaugh, Associate Justice, Supreme Court of the United States
The Honorable Amy Coney Barrett, Associate Justice, Supreme Court of the United States
The Honorable Ketanji Brown Jackson, Associate Justice, Supreme Court of the United States
The Honorable Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States