The Justice Alito Controversy: Justice Mired in Ethics Controversies in Surreptitiously Recorded, Raising Journalism Ethics Concerns

Recent controversies have placed Supreme Court Justice Samuel Alito at the center of debate surrounding the Supreme Court and journalism ethics. The controversies arose after the release of Justice Alito's surreptitiously recorded statements and the flying of flags with political meanings on his property. Lauren Windsor, a progressive documentary filmmaker and self-described "advocacy journalist," posed as a conservative at a Supreme Court Historical Society dinner and recorded, then published, her conversations with Justice Alito and Chief Justice John Roberts. Windsor's tactics have drawn criticism for breaching journalism ethics, while Justice Alito has been criticized for apparent bias demonstrated by his comments, raising the question of what media tactics can, and cannot, be justified when attempting to shed light on potential ethical violations of those in power, including Supreme Court Justices.

At the time that Windsor made her surreptitious recordings, Justice Alito was already embroiled in controversy. On May 16, 2024, *The New York Times* reported that an upside-down American flag had been displayed in Justice Alito's yard at his home in Virginia in January 2021. According to *The Times*, supporters of former President Donald Trump adopted the upside-down flag symbol after the 2020 election to signify their belief that President Biden stole the presidency. *The Times* reported that the upside-down flag appeared on Justice Alito's property on Jan. 17, 2021, three days prior to President Biden's inauguration, and just eleven days after rioters wielding the same symbol stormed the capitol during the January 6 riot. Justice Alito emailed a statement to *The Times* stating "I had no involvement whatsoever in the flying of the flag. It was briefly placed by Mrs. Alito in response to a neighbor's use of objectionable and personally insulting language on yard signs." *The New York Times* article is available online at: https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html.

While the flag was reportedly flying, the Court was deciding whether it would hear a case about the 2020 election and the Pennsylvania deadline for mail-in ballots. Leading up to the 2020 election, the Pennsylvania Supreme Court, relying on a state constitutional provision mandating that elections be

"free and equal," issued a ruling requiring Pennsylvania to count absentee ballots received up to three days after Election Day as long as they were postmarked no later than Election Day. Republican legislators and the Pennsylvania Republican Party challenged this ruling, contending that it would violate federal election law and the U.S. Constitution. The Court declined to take up the case, holding that the election's completion rendered the case moot. Justice Alito wrote a dissent, writing that the case should have been heard to address the constitutional questions likely to emerge in future elections. *Republican Party v. Degraffenreid*, 141 S. Ct. 732 (2021) (Alito, J., dissenting).

Although the Court did not take that case, it decided two other cases related to the 2020 election — specifically the January 6 riot — in the same term: *Fischer v. United States*, 144 S. Ct. 2176 (2024) and *Trump v. United States*, 144 S. Ct. 2312 (2024). In *Fischer*, the Court ruled in favor of a former police officer charged with obstructing an official proceeding based on his involvement in the January 6 riot. The Court held that the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1512(c), which prosecutors used to charge the officer, was intended to have a limited scope, remanding back to the lower courts to determine whether the officer "impaired the availability or integrity for use in an official proceeding of records, documents, objects, or . . . other things used in the proceeding." An explanation of the case published by *NBC News* is available online at: https://www.nbcnews.com/politics/supreme-court/supreme-court-rules-jan-6-rioter-challenging-obstruction-char-rcna155902. *Trump v. United States* reviewed an indictment against former President Donald Trump stemming from the pressure campaign he allegedly conducted against the Justice Department and former Vice-President Mike Pence in the hope of maintaining power after President Biden's election victory. The Court held, along ideological lines, that former President Trump has "absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority." An explanation of the case published by *NBC News* can be found online at: https://www.nbcnews.com/politics/supreme-court/supreme-court-rules-trump-may-immunity-federal-election-inter-rcna149135.

On May 22, 2024, *The New York Times* broke a second story about a controversial flag, known as the "Appeal to Heaven" flag, that had been flown at Justice Alito's vacation home in New Jersey in 2023, during the time when the Court was deciding whether to take up *Fischer v. United States*. *The Times* reported that, like the upside-down American flag, the Appeal to Heaven flag had emerged as a symbol of support for former President Donald Trump and was carried by

Capitol rioters on January 6. Both Justice Alito and the Court declined to comment on this flag to *The Times*. *The Times* noted that while the Appeal to Heaven flag was flying at Justice Alito's vacation home, the Court agreed to hear a January 6 case challenging whether the Capitol rioters could be prosecuted. See *Fischer v. United States*, 144 S. Ct. 2176. *The New York Times* article is available online at: https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html.

On May 23, 2024, Sens. Sheldon Whitehouse (D-R.I.) and Dick Durbin (D-Ill.) wrote to Chief Justice John Roberts calling for Justice Alito to recuse himself from cases related to the 2020 election and former President Trump's immunity from prosecution for his role in the events of January 6, including the now-decided immunity case, *Trump v. United States*. The senators also tied Justice Alito's conduct to broader concerns about judicial ethics and the inadequacy of the Supreme Court's Code of Conduct. They outlined other examples of failures to "avoid impropriety," including Justice Alito's interview with *The Wall Street Journal* where he expressed opinions on the constitutionality of pending legislation. *The Wall Street Journal* interview is available online at: https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7. The letter from Sens. Durbin and Whitehouse concluded with a call for Justice Alito's recusal and an enforceable code of conduct for Supreme Court Justices. The letter is available online at https://www.whitehouse.senate.gov/wp-content/uploads/2024/05/2024-05-23-Letter-to-CJ-Roberts.pdf.

On May 29, 2024, Justice Alito responded by letter to Sens. Durbin and Whitehouse, writing that his wife was solely responsible for the flags flown at their residences. He wrote, "My wife is fond of flying flags. I am not." Justice Alito cited the Supreme Court's code of conduct which states that justices are presumed impartial and should disqualify themselves when impartiality might be reasonably questioned. Justice Alito concluded his response by stating that, "[a] reasonable person who is not motivated by political or ideological considerations or a desire to affect the outcome of Supreme Court cases would conclude that this event does not meet the applicable standard for recusal. I am therefore duty-bound to reject your recusal request." Justice Alito's response letter is available online at: https://www.judiciary.senate.gov/imo/media/doc/Letter%20from%20Justice%20Alito%20to%20Senators%20Durbin%20and%20Whitehouse.pdf.

It was against this backdrop that on June 3, 2024, Lauren Windsor surreptitiously recorded Justice Alito's comments on political polarization and the role of "godliness" in the United States at the Supreme Court Historical Society's annual dinner in Washington, D.C. Windsor attended the dinner under her real name as a dues-paying member of the Historical Society. In conversations with Justice Alito and his wife, Martha-Ann, Windsor presented herself as a conservative and secretly recorded the conversations. During the conversation with Windsor, Justice Alito discussed political polarization, stating "[o]ne side or the other is going to win. There can be a way of working, a way of living together peacefully, but it's difficult, you know, because there are differences on fundamental things that really can't be compromised." Windsor continued the conversation, stating, "people in this country who believe in God have got to keep fighting for that, to return our country to a place of godliness." Justice Alito responded, "I agree with you, I agree with you." The recordings also included comments from Martha-Ann Alito related to the flag controversy and her plans to respond to Pride flags once Justice Alito is "free of this nonsense."

Chief Justice John Roberts also spoke with Windsor, but his remarks contrasted sharply with those of Justice Alito. Chief Justice Roberts rejected Windsor's assertion that the Court had an obligation to put the country on a moral path and that the United States is a Christian nation. He stated, "I don't know that we live in a Christian nation. I know a lot of Jewish and Muslim friends who would say maybe not, and it's not our job to do that." When discussing political polarization, the Chief Justice pointed to crises like the Civil War and Vietnam war as examples of high, but not irreparable, polarization. *Rolling Stone* first broke the story of the recordings on June 10, 2024, and the full story is available online at: https://www.rollingstone.com/politics/politics-features/samuel-alito-supreme-court-justice-recording-tape-battle-1235036470/. The recordings are available, in part, online from CNN: https://www.cnn.com/2024/06/10/politics/video/secret-recording-supreme-court-justice-samuel-alito-compromise-whitman-regret-ebof-digvid.

Following the release of the recordings, Windsor's methods of secretly recording the conversations and misrepresenting her own political opinions have been hotly debated. Windsor told *The Times*, "I wanted to get them on the record, so recording them was the only way to have proof of that encounter. Otherwise, it's just my word against theirs." Bob Steele, a retired ethics scholar at the Poynter Institute who has written journalism ethics guidelines on when it is appropriate

to use deception said, "I don't believe that in this particular case the level of misrepresentation of her identity and the surreptitious audio recording is justifiable." In the same article, Silha Center Director and Professor of Media Ethics and Law Jane Kirtley told *The New York Times*, "I think it's fair to say that most ethical journalists deplore those kinds of techniques. How do you expect your readers or your viewers to trust you if you're getting your story through deception?". The full article from *The Times* is available online at: https://www.nytimes.com/2024/06/10/us/politics/supreme-court-alito.html?smid=nytcore-ios-share&referringSource=articleShare.

Kirtley also told the *Background Briefing* podcast that, "[w]hen we're talking about journalism, one of the baseline ideas is that deceptive practices are only supposed to be used in extraordinary circumstances." She also noted that while Windsor's practices may not have been illegal, the ethical considerations are separate inquiry. "Legally speaking, I'm not here to excoriate what Ms. Windsor did, but law and ethics are not the same" said Kirtley. "I think you have to engage in a serious analysis in your own mind about how critical this story is and whether there is truly no other way to get it." The podcast is available online at: https://www.backgroundbriefing.org/2024/06/16/background-briefing-june-16-2024/.

According to *Rolling Stone*, Windsor was motivated to record the justices because of their refusal to "submit to any accountability in the face of overwhelming evidence of serious ethics breaches." She further defended her tactics in an interview with *Politico*, saying: "[t]he Supreme Court is shrouded in secrecy, and they've really been dodging any accountability to the American public. Is it a bigger ethics problem for me to pretend like I'm a fangirl, or is it a bigger ethics problem for them to accept millions of dollars of undisclosed gifts from GOP donors? Obviously this is what I believe, but maybe the media and others — instead of pearl-clutching — should be trying to get more answers from the court and more accountability."

Windsor also noted that her interest in speaking with Justice Alito increased because of the flag incident. When asked if she thought her methods of reporting would add to polarization, Windsor said, "my reporting and my role is to expose public servants" who aim to lead the country down a path of theocracy. Windsor affirmed that in her mind, the tactics were worthwhile to "force a conversation" about the stakes of the Supreme Court's decisions. *Politico*'s interview with Windsor is available online at:

https://www.politico.com/news/magazine/2024/06/11/alito-recording-undercover-interview-00162808.

The Times previously reported on Windsor's tactics — posing as a conservative when speaking with Republican leaders — in 2021. The report noted, "her methods fall beyond the pale of mainstream journalism, where reporters generally shy away from assuming false identities and secretly recording conversations." Windsor contended, however, that, "[e]xtraordinary times call for extraordinary measures. Acting like you're one of them — you're going to elicit different answers than if you have a recorder in somebody's face and they know you're a journalist." *The Times* article is available online at: https://www.nytimes.com/2021/10/07/us/politics/lauren-windsor-republicans.html.

The Wall Street Journal Editorial Board published a critical piece about Windsor's tactics following the Alito recording, opining that Windsor's recordings were "creepy" and that "the sorry truth about our present political moment is that harassment by the left is shrinking the public space in which Justices, or at least conservative Justices, and their families can operate." The article is available here: https://www.wsj.com/articles/samuel-alito-martha-ann-alito-lauren-windsor-supreme-court-historical-society-tapes-19771448.

The Washington Post compared the reporting to the "hardball political tactic[s]" employed by groups like Project Veritas. (For more information on Project Veritas, see "U.S. District Court for the Southern District of New York Rejects Project Veritas's First Amendment Arguments in Ashley Biden Diary Case" in the Winter/Spring 2024 issue of the Silha *Bulletin*; "Project Veritas Raises Complicated First Amendment Issues" in the Fall 2021 issue; *Project Veritas Faces Renewed Criticism Following Disputed Election Fraud Claims and Targeting CNN Editorial Meetings* in "Misinformation Concerns Precede and Follow Presidential Election" in the Fall 2020 issue; "Letter Sent on Behalf of President Trump Threatens Legal Action Against CNN, Prompting Criticism" in the Fall 2019 issue; "Undercover Video Maker James O'Keefe Continues Attacks on the News Media, Faces Setbacks in Some Legal Disputes" in the Winter/Spring 2018 issue; *Political Operatives Target Hidden Camera Videographer in Civil Lawsuit* in "Controversial Undercover Video Makers Face Legal Action and Ethical Concerns" in the Summer 2017 issue; and *NPR Executives Resign After Hidden Camera Sting* in "Prank Phone Call, Hidden Camera Spur Ethical Controversies for News Media" in the Winter/Spring 2011 issue.)

Steve Vladeck, a law professor at the University of Texas, told *The Post* that he was "sad that we've reached the point where the justices are getting caught in these gotcha moments, but if there was nothing to get, then this wouldn't be a story." The article is available online at: https://www.washingtonpost.com/politics/2024/06/10/alito-secret-recordings-political-divide/. Windsor, in an interview with *Vanity Fair*, pushed back against comparisons to Project Veritas, arguing that she "target[s] people who are in positions of power" rather than going after interns on a campaign. Her interview with *Vanity Fair* is available online at: https://www.vanityfair.com/news/story/lauren-windsor-secret-recordings.

Nevertheless, Windsor's reporting has contributed to questions about impartiality and the appearance of impropriety at the Supreme Court. These questions culminated in articles of impeachment introduced on July 8, 2024, by Rep. Alexandria Ocasio-Cortez (D-N.Y.) against Justice Alito and Justice Clarence Thomas. Rep. Ocasio-Cortez stated in a press release, "Justice Thomas and Alito's repeated failure over decades to disclose that they received millions of dollars in gifts from individuals with business before the court is explicitly against the law. And their refusal to recuse themselves from the specific matters and cases before the court in which their benefactors and spouses are implicated represents nothing less than a constitutional crisis." The press release, which also includes links to the resolutions filed against Justices Alito and Thomas is available online at: https://ocasio-cortez.house.gov/media/press-releases/ocasio-cortez-introduces-articles-impeachment-against-justice-thomas-and.

On July 25, 2024, *The Washington Post* reported that Justice Elena Kagan called for ethics enforcement through a committee of judges to examine violations. The report is available online at: https://www.washingtonpost.com/politics/2024/07/25/supreme-court-kagan-ethics-code-reform/?utm_source=alert&utm_medium=email&utm_campaign=wp_news_alert_revere&location=alert.

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