

STATEMENT OF MICHAEL B. MUKASEY

Before the United States Senate Judiciary Committee

May 2, 2023

Thank you for inviting me to testify today and to share my thoughts on issues surrounding Supreme Court Justices' ethics rules and their financial disclosures.

I am a retired partner and of counsel at Debevoise & Plimpton. The views I express today are my own, and do not represent the views of the firm. I served as Attorney General under President George W. Bush from 2007 to 2009, and as a U.S. District Judge for the Southern District of New York from 1988 to 2006.

I would like to deal today with two topics: one is policy principles relating to Supreme Court governance; the second relates to particular issues that have become current insofar as it is possible to determine the facts from publicly available information.

As to policy, I believe that basic principles of the separation of powers mean that the Court, as a separate branch of government and the only court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules. Just as Congress establishes the rules that govern the conduct of its members, and just as conflict of interest statutes that apply generally to government

employees do not apply to the President or the Vice President, it is basic to the structure of our government that the executive, legislative and judicial branches remain separate. It is the Supreme Court and not the Congress that has the constitutional prerogative to decide whether to adopt a formal code of conduct governing the individual Justices. It should go without saying that if Congress cannot compel the Court to adopt a formal code of conduct governing the individual Justices, neither may Congress impose such a code itself.

A law compelling the Court to adopt such a code, or purporting to impose one legislatively, would violate the principle of separation of powers, and would also be unworkable inasmuch as there is no authority other than the Justices themselves to apply such a code.

I am told of proposals to delegate issues of recusal of individual Justices to a Court employee. Here, my own experience as a judge may be instructive. Recusal decisions are fundamentally judicial decisions, and a judge is as much obligated not to recuse when recusal is not warranted as to recuse when recusal is warranted. This is especially compelling at the Supreme Court level because Justices cannot be replaced by other judges as if the Court were a professional baseball team calling up minor league players to fill gaps in the roster.

That is not to say that there are no principles and practices that in reality govern the conduct of the Justices. As Chief Justice Roberts wrote to the Chair of

this Committee on April 25, there is a Statement of Ethics Principles and Practices to which all of the current Justices have subscribed, and indeed he attached that Statement to his letter. That Statement itself covers the sources judges use when analyzing ethical issues in general, and discusses a variety of topics, including financial disclosure and recusal in particular. The Statement is more than two single spaced pages in length, and I would not burden the Committee with a recitation of its terms, or purport to summarize it. However, the Statement notes that since 1991 Supreme Court Justices have followed the substance of the Judicial Conference Committee on Financial Disclosure regulations that govern lower court judges, and “file the same annual financial disclosure reports as other federal judges.”

The Statement itself notes that the Judicial Conference committee reviews information in these reports and requests additional information when appropriate. It also provides ongoing guidance and in March provided additional clarification on the scope of the “personal hospitality” exemption to the disclosure rules.

That clarification provides a transition to particular issues that relate to Justice Thomas. I base my discussion of these issues on information generally available to the public. Justice Thomas has said that he and Harlan Crow have been close friends for many years, that Mr. Crow is in the construction business and does not have matters before the Court. There is one trivial exception to the last point, which I mention only because it shows how far some critics have gone. It

appears that in one case a business with which Mr. Crow is affiliated opposed an application by its adversary for a writ of certiorari and the writ was denied. Such applications are reviewed and summarized by a pool of clerks, not by the Justices themselves; it takes four votes to grant certiorari, so that if Justice Thomas had recused himself in that case the result would have been identical – denial of certiorari.

Justice Thomas has said that when accepting travel and vacation invitations from Mr. Crow, he consulted others, including colleagues, on whether applicable rules would prescribe including them on his financial disclosure form. He was advised that the “personal hospitality” exemption applied and that such accommodations need not be included. As the Chief Justice noted, the Judicial Conference committee recently provided a clarification of that exemption that appears to confirm that the advice Justice Thomas followed was correct, and Justice Thomas has said he will be guided by this clarification and will include such travel and vacation accommodations in all future reports.

In addition, Mr. Crow bought from Justice Thomas and his family three parcels of property in Savannah Georgia. The Savannah parcels had included two rental properties, but those were torn down; Justice Thomas’s mother, who was at least in her mid-80’s at the time of the transaction, lives in the remaining house, which has been improved over the years, and which did not have to be reported as a

rental property because it was the Justice's mother's home. She holds a lifetime occupancy right and lives in the property to this day.

Mr. Crow has said that he purchased the childhood home of Justice Thomas with the intention to convert it into a museum of sorts to tell the story of Justice Thomas's life. The total for the parcels was \$133,600, of which a third was Justice Thomas's share; that represented a loss to Justice Thomas. However, because the transaction was for more than \$1,000, Justice Thomas was obligated to report it on his financial disclosure form, but did not do so because he mistakenly believed he did not have to report a transaction in which he sustained a loss. He has said he intends to amend the financial disclosure form for the relevant period.

It bears mention that Justice Thomas will not be the first Justice to amend his financial disclosure forms – Justices Breyer and Ginsburg are among those who have done so without so much as the batting of an eye – and no doubt will not be the last.

Recent criticisms of Justice Gorsuch are also meritless. He sold an interest in a vacation home to a lawyer he had never met and who is a large contributor to Democrats, whose firm has litigated a dozen cases before the Court, winning eight and losing four. The merits of these cases have not been discussed by these critics, nor have they indicated whether Justice Gorsuch wrote an opinion in any of them or cast a deciding vote, and if so with what result. The lawyer in question says he did

not know that Justice Gorsuch was the seller until an offer had been made. That is the story – period.

Criticism has progressed – if that is the word – from meritless as to Justices Thomas and Gorsuch, to ludicrous as to Justice Alito and others, with the claim that the academy is exerting an improper conservative influence on the Court by hosting conservative Justices to teach or lecture. Apart from the history of similar invitations to liberal Justices, anyone even slightly familiar with the current political climate at law schools – such that even Scalia Law School at George Mason University had to host Justice Alito by Zoom rather than in person due to security concerns – knows this claim is ridiculous on its face.

The dark and intense criticism directed at Justices over these transactions – the acceptance of trips and vacations from a wealthy close friend with no business before the Court pursuant to a since-amended personal hospitality exception to the financial disclosure rules and a property sale to the same friend at a loss, the arms-length sale of a vacation home – is impossible for me to square with the professed concern by those making the criticism for the integrity of the Court. That integrity rests on the dedication of each Justice to fulfill his or her oath by deciding cases on their merits as the Justices see those merits, even when they see them differently from one another. That integrity remains very much intact.

If the public has a mistaken impression that the integrity of the Court has been damaged, the fault for that lies with those who continue to level unfair criticism at the Court and its Justices. It is impossible to escape the conclusion that the public is being asked to hallucinate misconduct so as to undermine the authority of Justices who issue rulings with which these critics disagree, and thus to undermine the authority of the rulings themselves.