



Senate Judiciary Committee
Hearing: Supreme Court Ethics Reform
May 2, 2023

Testimony of People For the American Way

People For the American Way works to inspire and mobilize community and cultural leaders to advance Truth, Justice and the American Way. We're convening courageous Americans, producing compelling media and organizing campaigns to defend our democracy from authoritarian threats and advance America's promise that everyone will enjoy freedom, safety and a vote that counts.

Since our founding in the 1980s, we have advocated for fair courts and the nomination and confirmation of fair-minded, federal judicial nominees who understand that the justice system should protect all of us, not just the wealthy and well-connected.

People For the American Way is pleased that the Senate Judiciary Committee is holding this hearing on Supreme Court ethics reform. The Court is long overdue for a binding and enforceable code of ethics. If it does not adopt one voluntarily, then Congress must impose one. On the specific matter of Justice Clarence Thomas, the Department of Justice should pursue both civil and criminal fines against him for his recently uncovered ethics violations.

The Impact of this Issue on Our Lives

Federal courts make decisions that affect all of us. Judges impact our access to healthcare, our right to abortion, our ability to hold violent police officers accountable, our ability to vote, and much more. Judges who are true to their calling make real the Constitution's promises of equal justice under the law. Insulated from political considerations like having to be reelected, federal judges can empower the marginalized and protect individuals and communities from being unfairly and unlawfully victimized by those with political and economic power.

At their best, the Supreme Court and lower federal courts drove a stake into Jim Crow when elected officials were still standing in the schoolhouse door; held that people arrested by the police have a right to an attorney; imposed much-needed limitations on abuses by law enforcement; prevented states from criminalizing private decisions such as those involving abortion and contraception; recognized our right to impose reasonable limits on corporations' mistreatment of working people and our environment; and much more.

But in the past generation, we have seen the rise of a different kind of judge. Enormous amounts of money have been spent to transform our courts into institutions that will protect the wealthy and powerful. Far too often, law enforcement officials escape accountability for using deadly force against Black Americans; laws making it harder for people of color to vote are upheld; burdens on the lives of immigrants are upheld; people are denied access to legally protected health care, including abortion care; working people are prevented from effectively getting

higher wages and better working conditions; and companies are protected when they discriminate against employees.

When we walk into a courtroom, we deserve a judge – or a justice – who will hear our case fairly. We are entitled to someone who will protect the rights of all of us, not just the wealthy and powerful.

All federal judges are empowered to make important rulings. But only the Supreme Court has the final word. So, the public is rightly concerned that the justices wielding this power are not subject to the same binding and enforceable code of ethics that apply to every other federal judge.

“Trust Us” Is Not Enough: The Supreme Court Must Have a Binding Code of Ethics

The American public’s respect for the Supreme Court has been plummeting. Just this week, [a survey by the Marist Institute for Public Opinion, NPR, and the PBS NewsHour](#) indicated that 62 percent of Americans have little or no confidence in the Supreme Court. That is a sharp rise from the 36 percent who felt that way [just four years ago](#).

In part, that is because a 6-3 far-right majority of questionable legitimacy has stripped Americans of our constitutional right to abortion, among other dangerous rulings. The Court increasingly decides cases in ways unmoored from any principle except to help the privileged and powerful. In areas touching our lives like abortion care, gun violence, the rights of working people, and the right to vote, the current majority casts aside laws and precedents they disagree with.

Against that backdrop, justices who behave as if they are above the law are doing even more to undermine the Court’s legitimacy. Justice Thomas’s repeated decisions not to report information about his financial transactions with and gifts from right-wing billionaire Harlan Crow are just the latest examples, which we discuss in detail below. Other examples include:

- [Justice Thomas participated in a case](#) involving the efforts to overturn the 2020 presidential election, even though his wife was involved in those efforts.
- [Justice Alito’s draft opinion in *Dobbs* was leaked to the press](#), signaling the majority’s plan to overrule *Roe v. Wade*. The subsequent “investigation” controlled by the chief justice [did not require justices to answer questions under oath](#) like their clerks and Court employees.
- [Justice Alito is reported to have revealed the *Hobby Lobby* result](#) to an anti-abortion activist over dinner weeks before the opinion was released. Their meeting was part of a multi-year campaign coordinated by far-right leader Rob Schenck in which political activists pursued personal relationships with conservative justices and lobbied them.

- [Justice Barrett has participated in cases involving Shell](#), where her father worked for many years. As a Seventh Circuit judge, she had recused herself from Shell cases, as ethics rules require. But those rules do not bind her as a justice.
- [Justice Gorsuch sold property in Colorado but did not report the identity of the buyer](#). The property had sat unsold for nearly two years. The sale closed just days after his confirmation to the Supreme Court. *Politico* discovered that the buyer was a prominent attorney whose firm has since had several cases before the Court.
- A judicial panel [dismissed 83 ethics complaints against Brett Kavanaugh](#) for misconduct during and before his Supreme Court confirmation hearings. Once he was confirmed, he was no longer subject to the ethics rules that had previously bound him.

By its own term, the [Code of Conduct for United States Judges](#) does not apply to Supreme Court justices. In his 2011 year-end report to Congress, Chief Justice Roberts insisted that the Court is not exempt from the code's ethical principles, because the justices "consult" it. He makes the same argument now. In rejecting Judiciary Committee Chair Dick Durbin's invitation to appear before the committee for this hearing, Roberts wrote:

Justices, like other federal judges, consult a wide variety of authorities to address specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, disciplinary decisions, and the historical practice of the Court and the federal judiciary. They may also seek advice from the Court's Legal Office and from their colleagues.

They "may." That means they might, and they might not – the choice is theirs. That's a far cry from being bound to follow the rules that apply to all lower court judges.

And the consequences of noncompliance are quite different. Lower court judges who violate the canons are subject to formal discipline from ethical panels comprised of other federal judges. But there is no similar accountability for Supreme Court justices who behave in unprofessional ways. Short of impeachment by the House and removal by the Senate, there is no mechanism to address even the rankest corruption.

Essentially, the chief justice is saying, "trust us." But that goes against the fundamental idea that there must be checks against potential abuses of governmental power. Indeed, the constitutional separation of powers reflects the American people's recognition that in a democracy, we don't simply trust people with power without checks.

The Supreme Court needs a binding and enforceable code of ethics. There is currently a robust and healthy public discussion, both in and out of Congress, on what that code should look like. But the need for such a code cannot seriously be doubted.

The Court has the ability to adopt a code on its own initiative. Unfortunately, the chief justice's response to Chair Durbin's invitation does not give cause for confidence.

For instance, Chair Durbin invited Roberts “or another Justice whom you designate” to appear before the committee. Roberts’ reply provided reasons that he felt *a chief justice* should not appear before the committee to discuss this issue. But he notably ignored the invitation to the other eight justices. That is not the action of a person who is engaged on this issue in good faith.

If the Court will not act, then Congress must. We do not believe that the Constitution prohibits Congress from imposing reasonable ethics obligations on justices of the United States. Indeed, a Supreme Court unmoored from ethical practices poses a threat to that very Constitution. The current situation is untenable.

Accountability Concerning Justice Thomas

In addition to adoption of an ethics code for the Supreme Court going forward, it is crucial to provide accountability for past ethical misconduct by Justice Thomas. People For and many others have called for Thomas’ [resignation](#) for this serious misconduct, which is considered more “[egregious](#)” than what caused Justice Abe Fortas to resign in the 1960s, but recognize that Thomas is unlikely to do the “[decent and honorable thing](#).” So other methods of providing accountability are necessary.

As discussed below, clear evidence indicates that Thomas has violated binding federal ethics law by failing to report extensive travel, vacation, and other [gifts](#) from billionaire Harlan Crow since 2004, as well as by failing to disclose a 2014 [real estate deal](#) with Crow which produced over \$44,000 and other benefits to Thomas. The Justice Department clearly can and should investigate and pursue civil and criminal penalties.

Justice Thomas Violated Federal Ethics Law by Failing to Report Crow’s Gifts and Real Estate Transaction

Post-Watergate federal ethics law, which applies to federal officials in all three branches, including Supreme Court justices, has long required disclosure of gifts on a form that must be submitted every year. See 5 U.S. Code 13103, 13104. The law defines “gift” as the receipt of money or “any thing of value,” including “overnight lodging.” 5 U.S. Code 13101 (5), (5) (D).

Pro Publica recently [reported](#), however, that Justice Thomas has received very frequent and significant travel and vacation gifts from billionaire Crow without reporting them since 2004. Many of Crow’s gifts were luxurious vacations with him, Thomas, and others. These have included an island-hopping cruise in Indonesia worth around \$500,000, vacations to the all-male Bohemian Grove resort in California, an extended cruise around New Zealand, and frequent vacations to Crow’s Lakeside resort Camp Topridge in upstate New York.

According to Pro Publica, Crow has also gifted Thomas with use of his private jet, sometimes with Crow to or from these vacations, and sometimes for Thomas’ own use to a “destination” he is visiting, without any apparent participation by Crow. For example, Crow gifted the use of his private jet to Thomas for a trip to New Haven valued at around \$70,000.

In a written [response](#) to these revelations, Justice Thomas has not denied the facts, but claimed that he was “advised” by colleagues that he did not need to report these gifts because they were “personal hospitality” from a friend, which did not need to be reported until the issuance of guidelines this year from the Judicial Conference. This claim is wrong for several reasons.

First, the statute is clear on its face that at least some of the largesse from Crow should have been reported. As someone required to comply with the law and as a strict textualist, Thomas should have paid attention to the language of the ethics law. While the Judicial Conference has provided helpful guidance concerning the ethics reporting requirements, it cannot – and did not -- change the law itself.

Specifically, the statute itself defines the “personal hospitality” exception as including “food, lodging or entertainment” (not transportation) that is “extended” either “at” a friend’s residence or “on” their “property or facilities.” 5 U.S Code 13101 (14), 13104(a)(2)(A). It might be arguable that on the yacht trips, Crow “extended” food, beverages and sightseeing while “on” his yacht property. But nothing in the language of the law could possibly cover the private jet travel gifts to Thomas. This includes travel to the yachts and other vacation venues as well as reported examples where Crow gave Thomas personal use of his private jet for other purposes, not connected to any of his junkets. As Dahlia Lithwick and Mark Joseph Stern put it, [“Thomas broke the law, and it isn’t particularly close.”](#)

In addition, Thomas’ own behavior concerning gift disclosure contradicts his explanation. The [Los Angeles Times](#) published a 2004 story relating to Thomas’ past acceptance of a [“wealth of gifts”](#) based on disclosure forms he and other justices filed up to 2004. It reported that Thomas had accepted and disclosed a number of valuable gifts from Crow, including a [1997 trip to and stay](#) at the Bohemian Grove in California. After the 2004 article concerning gifts to him appeared, however, Thomas effectively [stopped disclosing](#) almost all gifts, and never again disclosed trips and stays at the Bohemian Grove or similar largesse from Crow. If the 1997 Bohemian Grove trip and stay were reportable gifts by Thomas, there is no good reason why similar handouts should not have been reported after 2004.

With respect to the real estate transaction, Thomas’ violation appears even more clear. As [Pro Publica](#) has [reported](#), a Crow corporation in 2014 purchased three properties in Savannah, where Thomas grew up, in which Thomas owned a 1/3 share. The cash benefit to Thomas (1/3 of the reported \$133,363 sales price) would thus have been over \$44,000. The federal ethics law requires reporting of any real estate transaction over \$1000 except for those relating to the filer’s personal residence or with spouse or children. See 5 US Code 13104(a)(5). None of those exceptions apply, but Thomas has [never](#) disclosed and reported the 2014 sale.

[The Justice Department Should Investigate and Pursue Appropriate Civil and Criminal Penalties Against Thomas](#)

The federal ethics statute contains specific provisions for enforcing its requirements. See 5 US Code 13106. With respect to lower court judges, among other things, possible violations are reported to the Judicial Council for the Circuit of the judge. 5 US Code 13106 (b). The Council or the Judicial Conference can undertake a number of [enforcement actions](#) against lower court

judges, including public or private censure or reprimand, ordering that no further cases be assigned to the judge on a temporary basis, and requesting that the judge resign.

None of this judicial discipline applies to Supreme Court justices like Thomas. But the general federal ethics law also contains other enforcement mechanisms that apply to all those subject to it, including Supreme Court justices. Although never used against any justice to our knowledge, the ethics law's enforcement methods include investigation by the Justice Department and possible civil and criminal penalties.

Specifically, 5 U.S. Code 13106(a)(1) authorizes the Attorney General to investigate and "bring a civil action" in court "against any individual who knowingly and willfully" either falsifies a report listing gifts and other information or "fails to file or report" any such information. The law prescribes a civil penalty of "up to \$50,000." The statute is unclear as to whether the penalty can be assessed multiple times for Thomas' multiple failures to report.

In addition, 5 U.S. Code 13106 (a)(2)(B)(ii) provides that such conduct is also a criminal offense for which an individual "shall be fined under Title 18." The amount of such a fine would be up to \$5000. 18 U.S. Code 3571(b). Again, the statute is unclear as to whether the fine can be assessed multiple times for multiple failures to report.

A DOJ investigation of Justice Thomas for violating binding federal ethics law and failing to report extensive gifts from and a property sale to billionaire Crow, coupled with appropriate civil and criminal penalties, can provide an important measure of accountability and justice for Thomas' blatant misconduct. People For and a number of individuals and organizations have called for such an investigation, including members of this Committee. More than 11,000 people have signed our petition urging such action by DOJ.

We also welcome and support action by this Committee to investigate and report on Thomas' misconduct. This hearing is an important start to that effort. We urge the Committee to continue its work on general Supreme Court ethics reform, as well as on the issue of accountability for the ethical misconduct of Justice Thomas.