STATEMENT OF MICHAEL B. MUKASEY

Before the United States Senate Judiciary Committee

September 24, 2024

CHAIRMAN DURBIN, RANKING MEMBER GRAHAM, MEMBERS OF THE JUDICIARY COMMITTEE. I AM GRATEFUL FOR THIS CHANCE TO ADDRESS THE JUDICIARY COMMITTEE, WHICH I UNDERSTAND IS MEETING TO CONSIDER SOME OF THE RAMIFICATIONS OF THE SUPREME COURT'S JULY 1 DECISION IN TRUMP V. UNITED STATES. I UNDERSTAND THAT BECAUSE THAT IS WHAT I WAS TOLD, ALTHOUGH I HAVE TO BEGIN BY SAYING THAT I THINK THE TITLE OF THE HEARING – "WHEN THE PRESIDENT DOES IT, THAT MEANS IT'S NOT ILLEGAL: THE SUPREME COURT'S UNPRECEDENTED IMMUNITY DECISION" – IS NOT A REASONABLE DESCRIPTION OF WHAT THAT DECISION ACTUALLY SAID, ITS EFFECT GOING FORWARD, OR ITS RATHER UNREMARKABLE BASIS IN PRECEDENT.

THIS IS THE FIRST CASE IN WHICH THE COURT HAS EVER HAD TO CONSIDER THE EXTENT TO WHICH A FORMER PRESIDENT CAN BE PROSECUTED CRIMINALLY FOR ACTS COMMITTED WHILE IN OFFICE, BECAUSE THIS IS THE FIRST TIME A FORMER PRESIDENT HAS FACED CRIMINAL PROSECUTION. BUT AS PROFESSOR MASCOTT POINTED OUT, THE COURT WAS NOT WRITING ON A CLEAN SLATE. AN EARLIER CASE,

NIXON V. FITZGERALD, DECIDED IN 1982, HAD ALREADY HELD THAT A FORMER PRESIDENT WAS IMMUNE FROM BEING SUED CIVILLY FOR ACTS AT WHAT WAS CALLED THE "OUTER PERIMETER" OF HIS OFFICIAL DUTIES THAT HE PERFORMED WHILE IN OFFICE. THAT OPINION, IN TURN, WAS BASED ON PRECEDENT GOING BACK TO JUSTICE ROBERT JACKSON'S CONCURRING OPINION IN YOUNGSTOWN SHEET AND TUBE V. SAWYER, WHICH I THINK IS STILL CONSIDERED THE AUTHORITATIVE DESCRIPTION OF THE REACH OF PRESIDENTIAL AUTHORITY, AND THE DISCUSSION OF THE EXECUTIVE VESTING CLAUSE IN MARBURY V. MADISON TO THE EFFECT THAT A PRESIDENT'S OFFICIAL ACTS ARE NOT SUBJECT TO EXAMINATION IN THE COURTS.

I BELIEVE THE COURT'S RULING HERE WAS NARROW, CONSISTENT WITH PRECEDENT AND CONSTITUTIONAL PRINCIPLES, AND THAT THE THREE CATEGORIES OF PRESIDENTIAL CONDUCT THAT THE COURT DISCUSSED IN ITS IMMUNITY ANALYSIS ARE THEMSELVES ANTICIPATED IN JUSTICE ROBERT JACKSON'S OPINION: ACTS AT THE CORE OF THE PRESIDENT'S CONSTITUTIONAL POWERS, SUCH AS THE POWER TO PARDON OR TO CONDUCT FOREIGN RELATIONS; OTHER ACTS WITHIN HIS POWERS, SUCH AS SPEAKING IN CERTAIN SETTINGS AND CIRCUMSTANCES ON ISSUES OF PUBLIC POLICY; AND ACTS THAT ARE CLEARLY PRIVATE.

THIS RULING WAS ALSO MODEST. THE COURT SENSIBLY REMANDED THIS CASE TO THE LOWER COURTS FOR THEM TO CONSIDER IN THE FIRST INSTANCE, IN THE NORMAL COURSE, HOW TO DISTINGUISH WHAT MIGHT BE OFFICIAL ACTS FROM THOSE THAT ARE CLEARLY NOT, AND TO DETERMINE WHETHER EVEN SOME OFFICIAL ACTS CAN BE THE SUBJECT OF CRIMINAL PROSECUTION IF SUCH A PROSECUTION WOULD NOT IMPAIR THE FUNCTIONING OF THE EXECUTIVE BRANCH.

THE POLICY RATIONALE FOR THE IMMUNITY RECOGNIZED IN NIXON V. FITZGERALD AND IN THE CURRENT CASE IS THAT THE PRESIDENCY CANNOT RETAIN THE ENERGY AND INDEPENDENCE THAT WERE THE REASON FOR ITS CREATION IN THE FIRST PLACE IF THE OCCUPANT OF THE OFFICE OF THE PRESIDENT MUST LABOR UNDER THE THREAT OF BEING PUNISHED CIVILLY OR CRIMINALLY FOR OFFICIAL ACTS ONCE HE LEAVES OFFICE, AT THE INSTANCE OF THOSE WHO OPPOSE SUCH ACTS.

I DO NOT WISH TO SIMPLY REITERATE THE ANALYSIS PROVIDED BY PROFESSOR MASCOTT, WITH WHICH I FULLY AGREE, OR THE ANALYSIS IN THE MAJORITY OPINION ITSELF. RATHER, I WOULD LIKE TO FOCUS THESE BRIEF REMARKS ON TWO CLAIMS IN THE DISSENTING OPINIONS: THE FIRST IS TO THE EFFECT THAT THE MAJORITY OPINION WOULD IMMUNIZE THE PRESIDENT FROM CRIMINAL PROSECUTION FOR DIRECTING THE MILITARY TO ASSASSINATE A POLITICAL RIVAL, OR FROM ORGANIZING A

COUP, OR FROM TAKING A BRIBE TO CONFER A PARDON, OR FROM REMOVING A CABINET OFFICIAL BY POISONING HIM.

I BELIEVE RESPECTFULLY THAT THE DISSENTERS ATTRIBUTE A COMPLETE LACK OF COMMON SENSE TO THE MAJORITY, AND THUS MISREAD THE MAJORITY'S VIEW OF OFFICIAL ACTS. JUST TO TAKE THE FIRST OF THESE HORRIBLES – DIRECTING THE ASSASSINATION OF A POLITICAL RIVAL – YES , UNDER CERTAIN CIRCUMSTANCES, AND AFTER MAKING SPECIFIC FINDINGS THAT A PERSON IS ENGAGED ACTIVELY IN TERRORIST ACTIVITIES – FINDINGS PRESCRIBED IN A STATUTE – A PRESIDENT AS COMMANDER IN CHIEF IS EMPOWERED TO AUTHORIZE THE EXTRAJUDICIAL KILLING ABROAD EVEN OF AN AMERICAN CITIZEN, AS PRESIDENT OBAMA DID IN THE CASE OF ANWAR AL AWLAKI. PRESIDENT OBAMA SHOULD NOT BE, AND BY ANY COMMON SENSE STANDARD IS NOT, SUBJECT TO CRIMINAL PUNISHMENT OR CIVIL LIABILITY EVEN ON AN ARGUMENT THAT HIS FINDINGS WERE IN SOME SENSE INADEQUATE OR MISTAKEN.

BUT EVEN THOUGH THE PRESIDENT AS COMMANDER IN CHIEF MAY DIRECT THE MILITARY TO DO ACTS THAT ARE LETHAL, I DO NOT THINK THERE IS ANY SENSE IN WHICH AN ORDER TO DO SOMETHING FACIALLY UNLAWFUL LIKE ASSASSINATING A POLITICAL RIVAL, OR ORGANIZING A COUP, COULD BE CONSIDERED AN "OFFICIAL" ACT CONSISTENT WITH THE

MAJORITY OPINION. ALBEIT IN A FOOTNOTE, THE MAJORITY MAKES THE OBVIOUS SPECIFIC BY STATING THAT THE PRESIDENT COULD BE PROSECUTED FOR TAKING A BRIBE IN RETURN FOR A PARDON, SO LONG AS THE BRIBE AND THE PUBLIC RECORD OF THE PARDON COULD BE PROVED WITHOUT DELVING INTO THE DELIBERATIONS OF THE PRESIDENT SURROUNDING IT. [IN FACT, THERE WERE SOME WHO ARGUED THAT CONSIDERATION SHOULD HAVE BEEN GIVEN TO PROSECUTING PRESIDENT CLINTON FOR HIS GRANT OF A PARDON TO MARC RICH IN THE CLOSING DAYS OF HIS ADMINISTRATION, WITHOUT NOTIFYING THE JURISDICTION WHERE MR. RICH'S PROSECUTION WAS PENDING AND TAKING OTHER SHORTCUTS AROUND STANDARD PROCEDURE, CONCURRENT WITH ACCEPTANCE OF A DONATION OF HUNDREDS OF THOUSANDS OF DOLLARS TO HIS LIBRARY BY MR. RICH'S EX-WIFE, DENISE RICH. NO SUCH PROSECUTION WAS BROUGHT, AND I THINK AS A MATTER OF PRUDENCE THAT WAS PROBABLY THE RIGHT DECISION.]

THE SECOND FEATURE OF THE DISSENTS THAT I WANTED TO TOUCH ON IS THE CLAIM THAT THE IMMUNITY SUGGESTED BY THE MAJORITY OPINION IS UNNECESSARY BECAUSE, AS JUSTICE SOTOMAYOR ASSERTED, "EVERY SITTING PRESIDENT HAS SO FAR BELIEVED HIMSELF UNDER THE THREAT OF CRIMINAL LIABILITY AFTER HIS TERM IN OFFICE AND NEVERTHELESS BOLDLY FULFILLED THE DUTIES OF HIS OFFICE," OR, AS

THE CURRENT JUSTICE JACKSON PUT IT, “AMERICA HAS TRADITIONALLY RELIED ON THE LAW TO KEEP ITS PRESIDENTS IN LINE.”

I SERVED UNDER ONLY ONE PRESIDENT, GEORGE W. BUSH. THAT SAID, I DID HAVE OCCASION TO PARTICIPATE IN MEETINGS RELATING TO MILITARY ACTIVITY ABROAD, TO THE ALLOCATION OF RESOURCES TO CERTAIN LAW ENFORCEMENT ACTIVITIES AS OPPOSED TO OTHERS, AND THE LIKE, AND NEVER SAW ANY INDICATION THAT WHAT GUIDED THOSE DECISIONS INCLUDED ANY CONSIDERATION OF POSSIBLE CRIMINAL PROSECUTION BY A SUBSEQUENT ADMINISTRATION FOR AUTHORIZING MILITARY ACTION WITHOUT PROPER BASIS, OR CONSPIRING TO OBSTRUCT THE FUNCTIONING OF ONE AGENCY BY ALLOCATING RESOURCES TO ANOTHER.

NOR DO I THINK THAT PRESIDENT ROOSEVELT CONSIDERED, OR SHOULD HAVE CONSIDERED, POSSIBLE CRIMINAL PROSECUTION BY A SUBSEQUENT ADMINISTRATION FOR WHAT IS NOW CONSIDERED THE SHAMEFUL CONFINEMENT OF U.S. CITIZENS OF JAPANESE ANCESTRY DURING WORLD WAR II – WITH THE ACTIVE SUPPORT OF THE THEN-GOVERNOR OF CALIFORNIA EARL WARREN, OR HIS ORDER TO ATTORNEY GENERAL BIDDLE TO TRY GERMAN SABOTEURS BEFORE A MILITARY TRIBUNAL IN 1943 EVEN THOUGH THE COURTS WERE OPEN.

I THINK IF ONE EXAMINES THE HISTORICAL RECORD OF CONTROVERSIAL ACTS BY PRESIDENTS, IT WOULD BE DANGEROUS, PARTICULARLY ALTHOUGH NOT EXCLUSIVELY AS TO ACTS THAT IMPACT NATIONAL SECURITY SUCH AS BORDER OR DRUG ENFORCEMENT, TO SUBJECT PRESIDENTS TO THE CONSTANT THREAT OF PROSECUTION FOR OFFICIAL ACTS WHEN THEY LEAVE OFFICE. AND EVEN MORE POINTEDLY, I DOUBT THAT MANY PEOPLE THINK THAT OUR COUNTRY WOULD BE BETTER OFF IF PRESIDENT LINCOLN, ROOSEVELT, CLINTON, OR OBAMA WERE PROSECUTED OR IMPRISONED FOR CONTROVERSIAL DECISIONS THEY MADE IN OFFICE.

MANY CRIMINAL STATUTES ARE BROADLY WORDED AND COULD APPLY TO THE OFFICIAL ACTS OF A PRESIDENT. FOR EXAMPLE, TITLE 18 SECTION 371 OF THE U.S.CODE HAS BEEN HELD TO CRIMINALIZE "ANY CONSPIRACY FOR THE PURPOSE OF IMPAIRING, OBSTRUCTING OR DEFEATING THE LAWFUL FUNCTION OF ANY DEPARTMENT OF GOVERNMENT." AS THE SUPREME COURT NOTED, "VIRTUALLY EVERY PRESIDENT IS CRITICIZED FOR INSUFFICIENTLY ENFORCING SOME ASPECT OF FEDERAL LAW (SUCH AS DRUG, GUN, IMMIGRATION, OR ENVIRONMENTAL LAWS)." WITHOUT IMMUNITY, EVERY PRESIDENT—INCLUDING THE CURRENT ONE—COULD BE HALED INTO COURT BY AN

ENTERPRISING PROSECUTOR IN A SUBSEQUENT, ANTAGONISTIC ADMINISTRATION. THE DANGER OF THIS SHOULD BE APPARENT TO ALL.

WE HAVE NEVER REQUIRED PRESIDENTS TO FUNCTION UNDER THE THREAT THAT THEIR OFFICIAL ACTS MIGHT SUBJECT THEM TO CRIMINAL CHARGES UNDER A SUBSEQUENT ADMINISTRATION. WHAT HAS ALLOWED OUR SYSTEM TO FUNCTION IS THAT, EVEN IN DOUBTFUL CASES WE HAVE, SO FAR, DECLINED TO BECOME THE KIND OF COUNTRY IN WHICH INCOMING ADMINISTRATIONS TAKE OUT THEIR GRIEVANCES AGAINST THEIR PREDECESSORS BY PROSECUTING THEM. WE SHOULD NOT BECOME THIS KIND OF COUNTRY.