

Background Memorandum: Possible Enforcement of Federal Gift Disclosure Statute Against Clarence Thomas

A recent [report](#) by [Pro Publica](#) has revealed extensive travel, vacation and other gifts to Justice Clarence Thomas from billionaire Harlan Crow since 2004, none of which were reported by Thomas as required by federal law. Thomas has acknowledged the gifts but claims that until a recent clarification by the Judicial Conference, those gifts were considered personal hospitality and were not subject to reporting. As demonstrated below, however, this assertion by Thomas is wrong. Thomas violated federal law by failing to report these gifts, and while that law has only limited enforcement, some enforcement action can and should be undertaken by the Justice Department with respect to Thomas.

Justice Thomas Violated Federal Ethics Law by Failing to Report Gifts

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 is required to be submitted every year. See 5 U.S. Code 53103,4. Congress enacted the statute after Watergate to help safeguard against ethical violations by federal officials. 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 Crowe 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 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 53101 (14), 53104(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.

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, a serious ethics flaw that many have noted. 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.

These civil and criminal penalties cannot substitute for a binding code of conduct for Supreme Court justices with real accountability, which should be promptly put into place. But a DOJ investigation of Justice Thomas for violating binding federal ethics law and failing to report extensive gifts from billionaire Crow, coupled with appropriate civil and criminal penalties, can provide an important measure of accountability and justice for Thomas’ blatant misconduct.