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Thomas Gives Himself a Pass, But Judges Others by the Book

Column

In her regular column, Emory Law's Tonja Jacobi examines thorny issues facing the US Supreme Court and ethics in the legal profession. Here, she considers whether Justice Clarence Thomas holds himself to the same high standard he applies to litigants appearing before the court.

As remarkable as the financial controversies swirling around Justice Clarence Thomas are, his excuses are equally astonishing. And the more you know about Thomas' jurisprudence, the more shocking they are.

Thomas and his wife took vacations, with at least one valued at half a million dollars, paid for by Republican donor Harlan Crow. Crow also bought property from Thomas at seemingly overvalued rates, and he lent him his private jet.

Thomas' excuse for his failure to disclose all this beneficence? He was "advised" by unnamed colleagues that "this sort of personal hospitality from close personal friends ... was not reportable."

This excuse does not pass the smell test: The idea that rides on private jets and stays on super-yachts count as personal hospitality would be questionable under any circumstances. The fact that the exception fits within a rule that exempts reporting other gifts of less than \$100 makes it laughable.

And it is not first time Thomas has offered absurd excuses when caught hiding his profits. For five years, Thomas reported his wife's salary, which during that time exceeded \$600,000, as zero. Thomas' excuse that time? He said it was an error "due to a misunderstanding of the filing instructions."

For any Supreme Court justice to claim not to be able to read a basic document is astounding. But it is particularly striking for Thomas, who prides himself on his constitutional sophistry and legal formalism.

He is a judge who insists on a strict reading of the text. In an oral argument heard just three weeks ago, *Lora v. United States*, Thomas told an attorney that he would get her argument if the relevant provision referred to a "section," but it referred to a "subsection."

Thomas is also known for his rigidity, frequently carving out concurrences to stake out how the court's decision departs from his formalistic view of the law. In multiple cases, Thomas has joined his colleagues' opinions, but pedantically exempted a single footnote from his joinder due to a reference being made to the anti-textualist practice of considering legislative history. And yet he wants us to believe he doesn't understand what it means to check a box saying his wife had no income.

And it is not just that Thomas is notoriously particular and legalistic that makes his excuses unbelievable. His record in criminal matters makes those excuses galling. Along with Justice Samuel Alito, he is the justice least likely to accept any criminal defense, siding with the prosecution in 83% of criminal procedure cases.

Thomas dissented in both *Atkins v. Virginia* and *Roper v. Simmons*, cases that limited application of the

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justices, on the other hand, should be held to a more forgiving standard.

And despite his reliance on colleagues to counsel him on the meaning of basic governmental forms, Thomas also suggested that the court should overrule *Gideon v. Wainwright*, the case that recognized the fundamental right of all to be represented by an attorney in a criminal trial.

Though Thomas infrequently shows leniency to criminal defendants, he has consistently held that rich people don't need to be held accountable for how they try to influence public debate and public officials.

Thomas has led the charge against campaign finance laws requiring disclosure of what funds are being channeled to which politicians. In the controversial *Citizens United* case, he thought the court didn't go far enough in striking down campaign finance regulations. He objected to laws requiring the disclosure of which politicians are receiving money as an interference that would "prevent the lawful, peaceful exercise of First Amendment rights."

This starkly contrasts with his views on the Fourth Amendment, which he reads much more narrowly than the First Amendment. For instance, he dissented from a Supreme Court ruling saying that searching the breasts and pubic area of a teenage girl in order to look for Advil was unconstitutionally intrusive. Thomas believed the school could search "any area where small pills could be concealed." You can't ask politicians where they are getting their money from, but school children's bodies can be intruded upon on the off chance of finding drugs that are not even illegal.

And in the jurisprudence on bribery of public officials, Thomas has happily joined the Roberts court's rulings making it harder for governments to hold accountable public officials who receive bribes, requiring explicit quid pro quo exchanges to be made. All that is required is a wink and a nod to avoid this kind of oversight.

Thomas is not alone in signing onto these cases, but he stands out because this is the sole area where he is sympathetic to criminal defendants.

Accountability applies to the poor saps facing criminal charges, who Thomas thinks should be left to defend themselves without an attorney. But pity the Supreme Court justice who gets befuddled by governmental forms that he has filled out repeatedly. And don't dare ask him or his rich friends to say what they are doing with their cash.

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