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CONFIDENTIAL

June 5, 2023

VIA ELECTRONIC MAIL

The Honorable Dick Durbin, Chairman
U.S. Senate Committee on the Judiciary
221 Dirksen Senate Office Building
Washington, DC 20510

Re: Response to May 26, 2023, Letter to Harlan R. Crow

Dear Chairman Durbin:

We write on behalf of Harlan Crow in response to your letter of May 26, 2023 (the "May 26 Letter") responding to our May 22, 2023 letter ("Response"), which raised serious concerns about your original request of May 8, 2023 for information regarding Mr. Crow's friendship with Justice Clarence Thomas. Please note that CH Asset Company, Carey Commercial Ltd., and Topridge Holdings, LLC have asked us to respond on their behalves and we are doing so today. While the concerns we expressed in our Response about the Committee's investigation remain, we respect the Senate Judiciary Committee's important role in formulating legislation concerning our federal courts system, and would welcome a discussion with your staff.

In our Response, we explained why we believe the Committee lacks authority to conduct its investigation of Mr. Crow and Justice Thomas. To reiterate, Congress does not have the power to impose ethics standards on the Supreme Court. It therefore cannot mount an investigation for the purpose of helping craft such standards. The Committee also may not pursue an investigation for the purpose of targeting and exposing private facts about an individual. Finally, because the Committee has requested information about the leadership of a coequal branch of government—implicating sensitive separation of powers considerations—it must satisfy a higher standard in order to establish a valid legislative purpose for seeking the requested information. On this point, too, the Committee's investigation comes up short.

The Constitutional Limits on the Committee's Authority Are Clear

In our Response, we explained in detail why Congress lacks power to impose ethics standards on the Supreme Court. The fact that Congress has enacted ethics legislation previously—a point on which the May 26 Letter relies heavily—is no answer to our concerns. "[P]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S.

491, 532 (2008) (quotations omitted). The constitutionality of the legislation the Committee claims it is crafting must be assessed on its own terms, not based on whether it is consistent with other laws, the constitutionality of which has never been tested.

Nor does Congress's ability to enact laws governing mere administrative functions of the Supreme Court mean that Congress also has the authority to take the very different and more intrusive step of imposing ethics standards on the Justices. Congress's power to create laws "necessary and proper for carrying into Execution" the provisions of the Constitution must be "[r]ead together" with the precise contents of those provisions. *Bond v. United States*, 572 U.S. 844, 874–75 (2014) (Scalia, J., concurring). To do otherwise would create "unlimited congressional power" inconsistent with the constitutional design. *Id*. at 877.

Thus, Congress may undertake measures to facilitate Article III's vesting of judicial power in the Supreme Court, such as by fixing the number of Justices who serve on the Court above the constitutional minimum. *See* U.S. Const. art. III, § 1; U.S. Const. art. I, § 3, cl. 6; *id*. § 8, cl. 18. But fixing the number of Justices is, as this Committee has recognized in the past, done "for purely administrative purposes." S. Rep. No. 75-711 at 12 (1937). It is a ministerial measure to help execute the *vesting* of judicial power. It is not a regulation of the *exercise* of judicial power, which the Constitution reserves to the judiciary. *See Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("[T]he judicial Power of the United States can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power." (quotations omitted)). And Congress's ability to enact measures that effectuate the vesting of judicial power does not imply plenary authority to enact any and all laws that may be related to the judicial function. *Cf. Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) ("The enumeration presupposes something not enumerated.").

In stark contrast to a statute fixing the number of seats on the Supreme Court, an ethics standard would be a substantive regulation of the conduct of the Justices in both their official and private lives. It is different in kind from laws that facilitate the vesting of the judicial power because it is not "incidental" to the basic administrative functioning of the Court. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012). Nor is an ethics standard a "prerequisite" to the Court's exercise of judicial power. *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018). It is therefore beyond Congress's authority under the Necessary and Proper Clause. Further, the May 26 Letter does not identify any other enumerated power that could possibly support the enactment of an ethics standard. That means an ethics standard of any kind, imposed on the Court by Congress, would be unlawful. *See United States v. Morrison*, 529 U.S. 598, 607 (2000).[1]

[1] The May 26 Letter also mistakenly suggests that the Supreme Court has acquiesced in Congress's imposition of ethics standards on the Justices. Chief Justice Roberts has consistently affirmed that whether statutory ethics

Moreover, even if the Committee could find authority to legislate on the subject in an enumerated power, any attempt to enact Supreme Court ethics standards would still run afoul of the separation of powers. Indeed, this Committee rejected President Franklin Roosevelt's proposal to expand the number of seats on the Supreme Court because the proposal would have "permit[ted] executive and legislative interferences with the independence of the Court, . . . a permission which constitute[s] an afront to the spirit of the Constitution." S. Rep. No. 75-711 at 12 (1937). Thus, even if a measure like modifying the number of seats on the Court would ordinarily be permissible, it cannot be undertaken where it would erode the "essential balance created by" separating "the legislative from the judicial power." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221–22 (1995).

The independence of the Court is exactly what is at issue here. If Congress were empowered to enact ethics standards targeting the Justices, that power could readily be used to coerce or harass them for exercising the judicial power in ways deemed objectionable by legislators. An ethics standard imposed by Congress on the Justices would loom over the Court's independence as an implicit and omnipresent threat that the political branches may, at any time, "punish the Justices whose opinions [they] resent." S. Rep. No. 75-711 at 12 (1937). If dissatisfied with a decision, Congress could amend the standard, effectively giving Congress a "general superintending power" over the Court. *Calder v. Bull*, 3 U.S. 386, 398 (1798) (Iredell, J., concurring). Likewise, any enforcement mechanism for such an ethics standard would further undermine the constitutionally mandated independent role of the Supreme Court. A code enforced by the Judicial Conference of the United States, for example, would impermissibly invert the hierarchy of the judicial department, placing lower court judges in a supervisory role over the Supreme Court. Similarly, an ethics code enforced by executive branch officials would expose the Justices to potential harassment by political actors. And a congressionally mandated code that was meant to be enforced by the Justices themselves would be a usurpation by Congress—a command to the Justices to exercise in a particular way an inherent judicial power that is reserved exclusively to the Justices' discretion. *See Patchak*, 138 S. Ct. at 905 ("The separation of powers, among other things, prevents Congress from exercising the judicial power.").

These risks are particularly acute because of key differences between the Supreme Court and the political branches. Both Congress and the President have ample constitutional powers that can be freely wielded at their discretion in the course of inter-branch conflicts, such as Congress's appropriations and impeachment powers, and the President's veto power and wide-ranging administrative authority. Both political branches also enjoy the political support of their respective constituents. By contrast, the Supreme Court has no political

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standards are binding on the Supreme Court is an open question that raises concerns about the independence of the Court. *See, e.g.*, U.S. Supreme Court, 2021 Year-End Report on the Federal Judiciary 1 (Dec. 31, 2021); U.S. Supreme Court, 2011 Year-End Report on the Federal Judiciary 6 (Dec. 31, 2011).

base, no role in the legislative process, and no authority to control, influence, or investigate the administration or execution of the laws outside the context of specific cases or controversies initiated and pursued by government or third-party litigants. This relative lack of power and political support vis-à-vis the political branches renders the Court more vulnerable to political intimidation. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441 (1977) (finding separation of powers concerns reduced because the "Executive Branch became a party to the [statute's] regulation" when the President signed it into law and where executive officials "promulgate and administer the regulations that are the keystone of the statutory scheme"). Further, unlike lower courts, the Supreme Court possesses the ultimate power to "say what the law is" for the entire country, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), including the ability to depart from past precedents where they are "unworkable or are badly reasoned," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). That gives the Supreme Court a singularly important place in our system of government, and makes any impairment of its "performance of its constitutional duties" a unique threat to the constitutional structure. *Loving v. United States*, 517 U.S. 748, 757 (1996).

In short, separation of powers principles dictate that each branch must be "entirely free from the control or coercive influence, direct or indirect," of the other branches. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Yet permitting Congress to arrogate to itself the power to impose an ethics standard on the Supreme Court would create a substantial risk of both direct and indirect coercion of the Court by the political branches—a risk made all the more apparent by recent calls to pack the Court or retaliate against the Justices if they "go forward" with certain decisions. *See, e.g.*, Jess Bravin, *Chief Justice John Roberts Rebukes Chuck Schumer Over 'Pay the Price' Comments*, Wall Street Journal (Mar. 5, 2020).

The Constitutional Objections to Imposing Ethics Standards on the Justices Bar the Committee's Investigation

Given the foregoing considerations, the Committee's investigation is inconsistent with the Constitution. Congress's investigative authority extends only to subjects "on which 'legislation could be had.'" *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 506 (1975) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)). Contrary to the claims in the May 26 Letter, courts have made clear that, if an investigation is aimed at crafting a constitutionally objectionable law, it is not permitted. *See Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("Congress may only investigate into those areas in which it may potentially legislate or appropriate."); *see also United States v. Lamont*, 18 F.R.D. 27, 33 (S.D.N.Y. 1955) ("[T]he Supreme Court has steadfastly held that the congressional power to investigate is not boundless."). While an investigation may be carried out to aid the enactment of a lawful statute—and may proceed even if it might also be used to help write other bills that may not withstand constitutional scrutiny—an investigation is barred where it

has no legitimate legislative objective. *See Quinn v. United States*, 349 U.S. 155, 161 (1955). That is the case here.

The cases on which the May 26 Letter relies to suggest otherwise involved circumstances where the court did "not know the particulars of any legislation that Congress might ultimately enact," and had "no reason to conclude . . . that any legislation in the areas considered by the Committee would necessarily present a constitutional problem." *Trump v. Mazars USA, LLP*, 39 F.4th 774, 809 (D.C. Cir. 2022). Here, by contrast, the Committee's intentions are clear: It seeks to enact ethics standards for the Supreme Court, and is considering specific bills to accomplish that goal. *See, e.g.*, Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023); Supreme Court Ethics Act, S. 325, 118th Cong. (2023). It is equally clear that any ethics standard that Congress requires the Supreme Court to follow would exceed Congress's authority, for all the reasons set forth above. The Committee's investigation thus presents a quintessential example of an impermissible inquiry on a subject on "which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161.

Seeking Information about a Sitting Supreme Court Justice from a Private Party Further Implicates Separation of Powers Concerns, Which Impose a Heightened Standard for Showing a Legislative Purpose

The Committee's requests also cannot withstand constitutional scrutiny for an additional reason. Because its requests are aimed at obtaining private information about a sitting Justice of the Supreme Court, they squarely implicate the separation of powers, which means the Committee's investigation must satisfy a heightened standard in order to establish a valid legislative purpose for seeking the requested information. But the Committee makes no effort to meet that heightened standard.

Most importantly, the May 26 Letter mistakenly claims that the Committee's requests do not implicate the separation of powers because they ask for the records of "private entities, not a coequal branch of government." As a matter of both Supreme Court precedent and common sense, that distinction is irrelevant. "The Constitution does not tolerate such ready evasion; it 'deals with substance, not shadows.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020) (*quoting Cummings v. Missouri*, 71 U.S. 277, 325 (1866)). When, as here, Congress is demanding information about the leadership of a coordinate branch of government, the request "present[s] an interbranch conflict no matter where the information is held." *Id*. Those "separation of powers concerns are no less palpable . . . simply because the [Letter] w[as] issued to [a] third part[y]." *Id*. The Committee's requests are plainly aimed at obtaining information about Justice Thomas and, accordingly, they trigger the heightened standards that apply to such interbranch investigations.

Those standards require that congressional requests be "no broader than reasonably necessary to support Congress's legislative objective," and that the Committee rely on other sources for the information it seeks if those "sources could reasonably provide [the Committee] the information it needs." *Mazars*, 140 S. Ct. at 2035–36. The Committee is not

entitled to every piece of conceivably relevant information, particularly where other sources are available to guide the Committee's work. The May 26 Letter makes no effort to explain how the Committee's requests satisfy these standards. Simply asserting that the information requested from Mr. Crow "could be helpful in our legislative effort," Senator Richard Durbin, Remarks on the Floor of the United State Senate (May 30, 2023), fails to meet the standards that govern when "separation of powers principles [are] at stake," *Mazars*, 140 S. Ct. at 2035. It is also apparent that the Committee has an abundance of information and other sources to draw upon to inform its legislative efforts without resorting to intrusive requests for details about Justice Thomas's private life. *See id*. at 2036 ("[E]fforts to craft legislation involve predictive policy judgments that are not hampered in quite the same way [as are criminal proceedings] when every scrap of potentially relevant evidence is not available." (quotations omitted)).

The May 26 Letter disclaims any inappropriate focus on Justice Thomas, based in part on work done in previous Congresses related to Supreme Court ethics. But the work of past Congresses is of limited relevance; what matters is what the Committee is doing today. On this point, the May 26 Letter is clear. It states that "[t]his year, ProPublica released not one, not two, but three different reports about unreported gifts or transactions Justice Thomas has received from or engaged in with [Mr. Crow]." No other Justice has been singled out by name for supposed ethics lapses. The focus of the Committee's inquiry is unmistakable, and appears designed to expose Justice Thomas's private affairs "for the sake of exposure." *Watkins v. United States*, 354 U.S. 178, 200 (1957). That does not qualify as a valid legislative purpose.

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The Senate Judiciary Committee has often served as a bulwark of constitutional values in our Republic. In the face of past efforts to undermine the Supreme Court's independence, this Committee committed itself to "maintaining inviolate the independence of the three coordinate branches of government." S. Rep. No. 75-711 at 16 (1937). Respectfully, we ask that the Committee Majority reassess the partisan course it is pursuing, which has no place under our Constitution.

Please feel free to have your staff contact me with any questions concerning this response and to set up a time to further discuss your requests.

Sincerely,

Michael D. Bopp