

CONFIDENTIAL

May 22, 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 8, 2023, Letters to Harlan R. Crow, CH Asset Company, Carey Commercial Ltd., and Topridge Holdings, LLC

Dear Chairman Durbin:

We represent Harlan Crow in relation to your letters of May 8, 2023 (the “Letters”). Today, we also are responding on behalf of CH Asset Company, Carey Commercial Ltd., and Topridge Holdings, LLC. We recognize the important role the Senate Judiciary Committee has in considering legislation related to our federal court system, and we appreciate the opportunity to engage with the Committee.

After careful consideration, we do not believe the Committee has the authority to investigate Mr. Crow’s personal friendship with Justice Clarence Thomas. Most importantly, Congress does not have the constitutional power to impose ethics rules and standards on the Supreme Court. Doing so would exceed Congress’s Article I authority and violate basic separation of powers principles. That precludes the Committee from pursuing an investigation in support of such legislation.

Separately, the Committee has not identified a valid legislative purpose for its investigation and is not authorized to conduct an ethics investigation of a Supreme Court Justice. The Committee’s stated purpose of crafting new ethics guidelines for the Supreme Court is inconsistent with its actions and the circumstances in which this investigation was launched, all of which suggest that the Committee is targeting Justice Thomas for special and unwarranted opprobrium. Moreover, any information the Committee might legitimately need to draft legislation on this subject is readily available from other sources, the use of which would not trigger the same separation of powers concerns created by the Committee’s requests to Mr. Crow.

We address each of these points in greater detail below.

The Honorable Dick Durbin
May 22, 2023
Page 2

CONFIDENTIAL

The Committee Lacks a Valid Legislative Purpose Because the Legislation It Is Considering, If Enacted, Would Be Unconstitutional

The scope of the Committee’s investigative authority is necessarily limited by the bounds of Congress’s legislative authority. The “power to investigate . . . does [not] extend to an area in which Congress is forbidden to legislate.” *Quinn v. United States*, 349 U.S. 155, 161 (1955). A congressional investigation ostensibly carried out for the purpose of crafting legislation is therefore impermissible where the legislation in question, if enacted, would be unconstitutional. *See Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep’t of the Treasury*, 575 F. Supp. 3d 53, 67 (D.D.C. 2021) (noting that an investigation conducted to advance an unconstitutional piece of legislation would not have “a valid legislative purpose”).

The Committee’s Letter to Mr. Crow states that the Committee’s request is part of its “ongoing effort to craft legislation strengthening the ethical rules and standards that apply to the Justices of the Supreme Court.” But Congress lacks the authority to enact such legislation. As you know, Congress may act only pursuant to its enumerated powers. *See Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). None of those enumerated powers includes the authority to regulate the internal affairs and operations of the Supreme Court, a coequal branch of government. *See* U.S. Const. art. I, § 8. Likewise, in the absence of any enumerated power touching on the subject, the Necessary and Proper Clause cannot support the creation of a Supreme Court ethics code by the legislative branch. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”). Moreover, even if Congress had the power to regulate the Supreme Court’s internal affairs, the creation of an ethics code would transgress important separation of powers principles, and therefore be an improper use of Congress’s lawmaking authority. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012). In consequence, because a Supreme Court ethics code is beyond Congress’s power to legislate, the Committee necessarily lacks authority to conduct an investigation for the purpose of crafting such a law.

Unlike the lower federal courts, the Supreme Court was established by the Constitution, not by an act of Congress. *See* U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court.”). Thus, while Congress’s enumerated powers include the power to “constitute Tribunals inferior to the supreme Court,” and that power entails a degree of control over the operations of the lower courts, no similar authority exists with respect to the Supreme Court. U.S. Const. art. I, § 8, cl. 9; *see also Sheldon v. Sill*, 49 U.S. 441 (1850). Instead, the Constitution confers only a few, circumscribed powers that Congress may exercise with respect to how the Supreme Court functions. First, Congress may make “exceptions” to the Court’s appellate jurisdiction. U.S.

The Honorable Dick Durbin
May 22, 2023
Page 3

CONFIDENTIAL

Const. art. III, § 2, cl. 2. And second, Congress may impeach and remove Justices for high crimes and misdemeanors. *See* U.S. Const. art. I, § 2, cl. 5. Neither provision authorizes the enactment of an ethics code.

Nor can the Constitution's Necessary and Proper Clause serve as independent authority for Congress to create a Supreme Court ethics code. That clause permits Congress to enact only those laws that are "incidental to [its enumerated] power[s]." *M'Culloch v. Maryland*, 17 U.S. 316, 418 (1819). As noted, there is no enumerated power that endows Congress with the authority to regulate the Supreme Court's internal affairs, and the Supreme Court does not exist by virtue of any congressional enactment. While Congress's express power to establish lower federal courts may necessarily imply its authority to regulate the ethics of lower court judges, that is clearly not true of Supreme Court Justices.

A congressionally-imposed ethics code for Supreme Court Justices would also be unconstitutional as an improper intrusion on the authority of a coequal branch of government. "[L]aws that undermine the structure of government established by the Constitution" are not a "proper means for carrying into Execution Congress's enumerated powers." *Sebelius*, 567 U.S. at 559. And it is well-established that "complete independence of the courts is peculiarly essential in a limited constitution" such as ours. The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). If Congress enacted a Supreme Court ethics code, it would impermissibly undermine the independence of the judiciary in two distinct ways. First, such a code would usurp the inherent power the Supreme Court possesses under Article III of the Constitution to regulate its own affairs, which it is doing. The Chief Justice recently sent the Chairman the "Statement on Ethics Principles and Practices" to which every current member of the Supreme Court subscribes. Second, a congressionally-imposed code would interfere with the Court's exercise of its constitutional authority. Each of these intrusions on the judicial power is independently sufficient to invalidate a congressionally-imposed ethics code for Supreme Court Justices.

As to the first point, there is no question that Congress is without authority to "prescribe" how the Supreme Court exercises its judicial powers. *United States v. Klein*, 80 U.S. 128, 146 (1871). Any law that attempts to do so "passe[s] the limit which separates the legislative from the judicial power." *Id.* at 147. Further, inherent in the authority Article III vests in the Supreme Court is the power to "manage th[e] [Court's] own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). Among other things, this power includes the ability to "fashion an appropriate sanction for conduct which abuses the judicial process;" "discipline attorneys;" and "impose silence, respect, and decorum" in the Court's proceedings. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–45 (1991). Establishing rules of judicial ethics that preserve the dignity and proper functioning of the Court plainly fits squarely within these inherent powers of internal court governance. A statute that purported to impose ethics requirements

The Honorable Dick Durbin
May 22, 2023
Page 4

CONFIDENTIAL

on the Justices would therefore be a clear example of Congress appropriating to itself a power that, by the Constitution, must belong to the judiciary.

Relatedly, foundational principles of separation of powers prohibit Congress from interfering with how other constitutional officers exercise their authority. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (declining to extend Administrative Procedure Act requirements to presidential actions “[o]ut of respect for the separation of powers and the unique constitutional position of the President”). “Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, for example, because the President has a “unique status under the Constitution [that] distinguishes him from other executive officials,” he is generally insulated from congressional interference with his official actions. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The same is true of the Supreme Court, which also occupies a unique position in the constitutional structure. Like the President, the Court is the head of a co-equal branch, and derives its powers directly from the Constitution, not from an act of Congress. That means that Congress cannot insert itself into the how the Court executes its duties.

An ethics code imposed by Congress would frustrate the independent exercise of the Court’s authority in a number of ways. In particular, as Chief Justice Roberts has noted, the Court’s independent management of its internal affairs “insulates [it] from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government.” U.S. Supreme Court, 2021 Year-End Report on the Federal Judiciary 1 (Dec. 31, 2021). Congressional involvement in crafting a Supreme Court ethics code would thus risk inserting political influences into the Court’s affairs and interfere with the Court’s decisional independence. Enactment of a code of ethics would leave open the possibility that Congress could, on an ongoing basis, amend the code as it saw fit, creating an implicit threat to the Justices that Congress may create more intrusive and more burdensome ethics and disclosure obligations if it is unhappy with how the Justices decide cases. This risk is especially acute where, as here, the investigation purporting to inform legislation is being undertaken on a strictly partisan basis.

The Committee’s Investigation Does Not Meet the Heightened Standard That Applies in this Case

Even if the Committee had been engaged in legislative business when it wrote the Letters, its requests for financial information would not satisfy the heightened standards that apply where, as here, the request for “personal information implicate[s] weighty concerns regarding the separation of powers.” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020). In seeking details about a personal friendship of a Supreme Court Justice, the Committee may obtain the information for a valid legislative purpose only “if other sources

The Honorable Dick Durbin
May 22, 2023
Page 5

CONFIDENTIAL

could [not] reasonably provide Congress the information it needs in light of its particular legislative objective.” *Id.* at 2035–36. The Committee’s request must also be “no broader than reasonably necessary to support Congress’s legislative objective.” *Id.* at 2036. The Committee is not a grand jury and thus is not entitled to obtain “every scrap of potentially relevant evidence” *Id.*

The Letters seek detailed information about gifts of a certain value, real estate transactions, and hospitality exchanged between Mr. Crow and any Supreme Court Justice, among other things. But this highly specific information is simply not relevant, let alone “reasonably necessary,” to help the Committee write an ethics code of general application that would cover all Supreme Court Justices in a wide variety of situations. The only conceivable reason the Committee could offer for why it needs to know the specifics of Mr. Crow’s interactions with the Justices would be if the Committee intended to use Mr. Crow and Justice Thomas as a “case study” to guide its legislative efforts, but the Supreme Court has made clear that such a justification is insufficient when, as here, separation of powers principles are implicated by a congressional request. *Id.*

Congress has extensive experience crafting ethics rules and standards for judges and executive branch officials. *See, e.g.*, 5 U.S.C. § 13103. If Congress in fact can constitutionally draft legislation prescribing ethics standards for the Supreme Court, whatever information the Committee may need to craft an ethics code is readily available from other sources, including information already reported regarding Justice Thomas’s relationship with Mr. Crow. As is known, Mr. Crow has extended personal hospitality to Justice Thomas to travel on his plane and to join Mr. Crow, his family, and other friends on his boat and at his summer home in the Adirondacks. The particular details of Mr. Crow’s relationship with Justice Thomas would not meaningfully aid the Committee in crafting a new ethics code—or add anything to the Committee’s deliberations beyond what publicly available information and its own expertise and experience can provide.

The Committee Lacks Authority to Conduct a Congressional Ethics Investigation of Justice Thomas

Although the Letters state that the Committee’s purpose is to craft legislation to impose new ethics rules and standards on Supreme Court Justices, and ask Mr. Crow and various registered agents about a variety of interactions he or they may have had with any Supreme Court Justices, the public statements of the Letters’ signatories and the timing and context of the Committee’s investigation tell a different story. *See Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968) (explaining that statements of Committee members and staff are an important source for identifying the purpose of an investigation); *see also Mazars USA, LLP*, 140 S. Ct. at 2036 (requiring a more searching assessment of the purpose behind an investigation “when Congress contemplates legislation that raises sensitive

The Honorable Dick Durbin
May 22, 2023
Page 6

CONFIDENTIAL

constitutional issues”). It is clear that the Committee’s investigation is part of a larger campaign to target and intimidate Justice Thomas and unearth what the Committee apparently believes will be embarrassing details of the Justice’s personal life. Those goals do not authorize the Committee to conduct a congressional ethics investigation of Justice Thomas.

“[T]here is no congressional power to expose for the sake of exposure.” *Watkins v. United States*, 354 U.S. 178, 200 (1957). Yet that is exactly what the Committee is seeking to do. As Senator Hirono, one of the Letters’ signatories, acknowledged recently, she does not think a code of ethics will actually pass Congress, but would still like to “point the finger where the finger needs to be pointed” because “half the battle is alerting the public to what’s going on.” Nick Grube, *It’s Astounding’: US Sen. Mazie Hirono Pushes Investigation Of Justice Clarence Thomas*, Honolulu Civil Beat (April 16, 2023). It is also notable that the Letters were sent a little less than a month after the Committee wrote Chief Justice Roberts urging him to investigate Justice Thomas’s friendship with Mr. Crow, in response to a *ProPublica* report published on April 6 about their friendship. As Senator Whitehouse said at the time, the Committee was seeking a “thorough and transparent investigation” to force Justice Thomas to “explain” his actions and was asking the Chief Justice to launch the investigation “immediately.” U.S. Senator Sheldon Whitehouse, Press Release: Whitehouse Calls for Investigation Into Justice Thomas’s Extravagant Billionaire-Funded Travel (April 6, 2023). Shortly thereafter, when it was apparent that the Chief Justice was not going to pursue the investigation the Committee sought, the Committee attempted to launch its own ethics investigation; to expose for the sake of exposure; to embarrass and harass a specific Supreme Court Justice.

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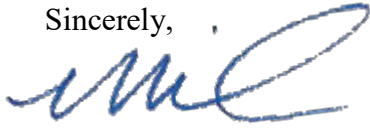
In 1964, the U.S. Senate created a committee to determine ethics rules that apply to its members and to investigate allegations of misconduct. The Chairman served on that committee and doubtless knows that it rightly claims authority from Article I of the Constitution, which empowers each House of Congress to “determine the Rules of its Proceedings [and] punish its Members for disorderly Behavior” U.S. Const. art. I, § 5, cl. 2. The Senate, of course, would not consider creating a committee to set and police the ethics of the Supreme Court as the Constitution gives it no authority to do so. Yet that is what is happening here.

The Honorable Dick Durbin
May 22, 2023
Page 7

CONFIDENTIAL

Please feel free to have your staff contact me with any questions concerning this response.

Sincerely,

A handwritten signature in blue ink, appearing to read "MB", is written over the word "Sincerely,".

Michael D. Bopp

cc: The Honorable Lindsey Graham
Ranking Member
U.S. Senate Committee on the Judiciary