

BakerHostetler

Baker & Hostetler LLP

Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403

T 202.861.1500
F 202.861.1783
www.bakerlaw.com

July 25, 2023

David B. Rivkin, Jr.
direct dial: 202.861.1731
drivkin@bakerlaw.com

VIA ELECTRONIC MAIL

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Chairman
Subcommittee on Federal Courts, Oversight, Agency
Action, and Federal Rights
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Response to July 11, 2023 Letter to Leonard Leo

Dear Chairman Durbin and Senator Whitehouse:

We write on behalf of Leonard Leo in response to your letter of July 11, 2023, which requested information concerning Mr. Leo's interactions with Supreme Court Justices. We understand this inquiry is part of an investigation certain members of the Senate Judiciary Committee have undertaken regarding ethics standards and the Supreme Court. While we respect the Committee's oversight role, after reviewing your July 11 Letter, the nature of this investigation, and the circumstances surrounding your interest in Mr. Leo, we believe that your inquiry exceeds the limits placed by the Constitution on the Committee's investigative authority.

Your investigation of Mr. Leo infringes two provisions of the Bill of Rights. By selectively targeting Mr. Leo for investigation on a politically charged basis, while ignoring other potential sources of information on the asserted topic of interest who are similarly situated to Mr. Leo but have different political views that are more consistent with those of the Committee majority, your inquiry appears to be political retaliation against a private citizen in violation of the First Amendment. For similar reasons, your inquiry cannot be reconciled with the Equal Protection component of the Due Process Clause of the Fifth Amendment. And regardless of its other constitutional infirmities, it appears that your investigation lacks a valid legislative purpose, because the legislation the Committee is considering would be unconstitutional if enacted.

The Committee's Inquiry Raises Serious First Amendment Concerns

Bedrock constitutional principles dictate that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In the guise of conducting an investigation concerning Supreme Court ethics, the Committee appears to be targeting Mr. Leo because of disagreement with his political activities and viewpoints on issues pertaining to our federal judiciary. An investigation so squarely at odds with the First Amendment cannot be maintained.

Mr. Leo is entitled by the First Amendment to engage in public advocacy, associate with others who share his views, and express opinions on important matters of public concern. “[T]he freedom to think and speak is among our inalienable human rights.” *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023). Indeed, expressive activity of this kind is afforded the greatest protection possible. *See Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the ‘highest rung of the hierarchy [sic] of First Amendment values,’ and is entitled to special protection.” (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))). Yet Mr. Leo has, for years, been the subject of vicious attacks by members of Congress, specifically including members of the Committee majority, because of how he chooses to exercise his rights. In reference to Mr. Leo’s public advocacy work, for example, Senator Whitehouse has called Mr. Leo the “little spider that you find at the center of the dark money web.” Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (Sept. 13, 2022). Similar remarks from Senator Whitehouse and others are too numerous to recount.

This campaign of innuendo and character assassination has now moved beyond angry speeches and disparaging soundbites. In the July 11 Letter, Committee Democrats have now wielded the investigative powers of Congress to harass Mr. Leo for exercising his First Amendment rights. That transforms what has to this point been a nuisance occasioned by intemperate rhetoric into a constitutional transgression.

“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quotation omitted). Thus, an official is prohibited from “tak[ing] adverse action against someone based on” that person’s expressive activity. *Id.* This bar against retaliatory action applies to Congress as much when it acts in its investigative capacity as when it legislates. *See Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“[T]he provisions of the First Amendment . . . of course reach and limit congressional investigations.”).

The Committee’s investigation into Mr. Leo’s relationship with Justice Alito quite clearly constitutes an adverse action for purposes of the First Amendment. The burden created by a congressional inquiry is significant. *See Watkins v. U.S.*, 354 U.S. 178, 197 (1957) (“The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference.”). It can chill expressive

activity and infringe on First Amendment rights. *See, e.g., Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (“Any form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.”); *see also United States v. Hansen*, 143 S. Ct. 1932, 1963 (2023) (Jackson, J., dissenting) (noting that an investigative letter sent by members of Congress “can plainly chill speech, even though it is not a prosecution (and, for that matter, even if a formal investigation never materializes).”).

It seems clear that this targeted inquiry is motivated primarily, if not entirely, by a dislike for Mr. Leo’s expressive activities. Retaliatory motive can be shown in at least two ways: (1) where the “evidence of the motive and the [adverse action] [are] sufficient for a circumstantial demonstration that the one caused the other,” *Hartman v. Moore*, 547 U.S. 250, 260 (2006); or (2) where “otherwise similarly situated individuals not engaged in the same sort of protected speech” were not subjected to the same adverse action, *Nieves*, 139 S. Ct. at 1727. Both circumstances are present here.

As noted, Mr. Leo and the groups with which he is affiliated have been subjected to a barrage of disparaging remarks because of their views on judicial nominations and other judicial matters. Sen. Whitehouse has attacked “creepy right-wing billionaires who stay out of the limelight and let others, namely Leonard Leo and his crew, operate their” supposed “far-right scheme to capture and control our Supreme Court.” Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (July 12, 2023). Senator Durbin has similarly decried “Leonard Leo and the Federalist Society” for their “joint effort [with] very conservative groups, special interest, dark money groups, and the Republican party” to shape “what will be the future of the court.” Senator Richard Durbin, Interview with the Washington Post (July 13, 2023). And perhaps most tellingly, the present investigation was announced with a statement titled “Whitehouse, Durbin Ask Leonard Leo and Right-Wing Billionaires for Full Accounting of Gifts to Supreme Court Justices.” Sens. Richard Durbin and Sheldon Whitehouse, Press Statement (July 12, 2023).

These explicitly political attacks, and others like them, made over the course of many years and reaching a crescendo in the days immediately following the transmission of the letter to Mr. Leo, provide an ample basis for concluding that the July 11 Letter is animated by animus toward “conservative” “Right-Wing” views and organizations, rather than a purely genuine concern about Supreme Court ethics. *See Lyberger v. Snider*, 42 F.4th 807, 813 (7th Cir. 2022) (explaining that statements from officials who took adverse action can demonstrate retaliatory motive). The circumstances of the Committee’s investigation show that “retaliatory animus actually caused” the adverse action taken against Mr. Leo. *Nieves*, 139 S. Ct. at 1723.

This conclusion is confirmed by the targeted and one-sided nature of the investigation. Despite professing interest in potential ethics violations and influence-peddling at the Supreme Court, the Committee has focused its inquiries on individuals who have relationships with Justices appointed by Republican Presidents. Reported instances of Democrat-appointed Justices

accepting personal hospitality or other items of value from private individuals have been ignored. Here are some examples:

- In 2019, Justice Ruth Bader Ginsburg was given a \$1 million award by the Berggruen Institute, an organization founded by billionaire investor Nicolas Berggruen. *See* Andrew Kerr, *Ruth Bader Ginsburg's Mysterious \$1 Million Prize*, Washington Free Beacon (July 19, 2023). Justice Ginsburg used the money to make donations to various charitable causes of her choosing, most of which remain unknown. *See id.*
- Between 2004 and 2016, Justice Stephen Breyer took at least 225 trips that were paid for by private individuals, including a 2013 trip to a private compound in Nantucket with billionaire David Rubenstein, who has a history of donating to liberal causes. *See* Marty Schladen, *U.S. Supreme Court justices take lavish gifts — then raise the bar for bribery prosecutions*, Ohio Capital Journal (April 26, 2023).
- On September 30, 2022, the Library of Congress hosted an expensive investiture celebration for Justice Ketanji Brown Jackson that was funded by undisclosed donors. *See* Houston Keene, *Library of Congress explains why it hosted Jackson investiture but not for Gorsuch, Kavanaugh, Barrett*, Fox News (Sept. 30, 2022).
- On two occasions, Justice Sonia Sotomayor failed to recuse herself from cases involving her publisher, Penguin Random House, which had paid her \$3.6 million for the right to publish her books. *See* Victor Nava, *Justice Sonia Sotomayor didn't recuse herself from cases involving publisher that paid her \$3M: report*, N.Y. Post (May 4, 2023).
- Justice Sonia Sotomayor used taxpayer-funded Supreme Court personnel to promote sales of her books, from which she earned millions of dollars, including at least \$400,000 in royalties. *See* Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's staff prodded colleges and libraries to buy her books*, Associated Press (July 11, 2023).
- Throughout her tenure on the Supreme Court, Justice Ruth Bader Ginsburg maintained a close relationship with the pro-abortion group National Organization for Women (“NOW”), which frequently had business before the Court. *See* Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, Los Angeles Times (Mar. 11, 2004). Among other things, Justice Ginsburg helped the organization fundraise by donating an autographed copy of one of her decisions, and contributed to its lecture series, even as she participated in cases in which NOW filed amicus briefs. *See id.*; Katelynn Richardson, *Here Are the Times Liberal Justices had Political Engagements that Were Largely Ignored by Democrats*, Daily Caller (May 5, 2023).

None of these incidents has resulted in inquiries from the Committee. Yet, Committee Democrats have not meaningfully distinguished these examples from the supposed ethics lapses committed by Republican-appointed Justices that are the focus of the Committee’s investigation. Moreover, for all of Committee Democrats’ statements disparaging Mr. Leo for his First Amendment-protected advocacy pertaining to the law and the judiciary, they have evinced no interest in investigating the largest “dark money” network in American politics, that associated with the Democratic Party-aligned Arabella Advisors. *See* Emma Green, *Democrats Have Made Their Peace With Dark Money*, *The Atlantic* (Nov. 2021). Nor have they pursued the new Democratic Party-aligned coalition of “dark money” groups established specifically to “mold the [Supreme Court’s] future.” Adam Edelman, *Dem-aligned groups launch campaign to keep Supreme Court front of mind in 2024*, *NBC News* (June 12, 2023). To the contrary, Sen. Whitehouse—who has repeatedly attacked Mr. Leo for his advocacy—“praised the new campaign as a tool that could help combat” his policy opponents’ advocacy. *Id.*

Where, as here, the scrutiny of an investigation is aimed at only one side of the political spectrum, it is a fair inference that politics is the motivating factor. *See O’Brien v. Welty*, 818 F.3d 920, 935 (9th Cir. 2016) (holding that university’s decision to block a student with a “conservative point of view” “from posting about certain issues” on a school forum “while at the same time allowing posts expressing left-leaning viewpoints to remain” supported inference of First Amendment retaliation).

The Committee’s failure to make any inquiries into similar incidents involving Democrat-appointed Justices is all the more troubling when juxtaposed against the focus of the Committee’s questions to Mr. Leo. The July 11 Letter was apparently spurred by a report about a single fishing trip that Mr. Leo took with Justice Alito *over fifteen years ago*. Even assuming that trip is somehow relevant to present concerns about Supreme Court ethics, the connection is highly attenuated, focused on “an object remote” from purported “legitimate concerns” about ethics standards. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). The notion that a fishing trip a decade and a half ago is more pertinent to the Committee’s current work than a \$1 million award given to a Justice less than four years ago is not plausible and bolsters the conclusion that the Committee’s inquiries are motivated by its distaste for Mr. Leo’s political views. *Cf. Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 802 (2011) (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

The Committee’s Inquiry Violates Equal Protection

The Equal Protection component of the Due Process Clause of the Fifth Amendment prohibits government actions that are “based on ‘an . . . arbitrary classification.’” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). That protection extends to individuals who are not part of a protected class, *see Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), such as where unfavorable government action is taken because of “malicious or bad faith intent to injure” a particular person, *Cobb v. Pozzi*,

363 F.3d 89, 110 (2d Cir. 2004); *see also Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 849 (10th Cir. 2005) (finding equal protection violation where differential treatment of “class of one” was undertaken “out of sheer malice”). And like the First Amendment, the protections of the Fifth Amendment fully apply in the context of a congressional investigation. *See Quinn v. United States*, 349 U.S. 155 (1955).

An unlawful, discriminatory exercise of government power occurs where a person is “intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment.” *Olech*, 528 U.S. at 564. For reasons already given, those conditions are met here. Mr. Leo is clearly being treated differently from similarly-situated individuals who also have close personal relationships with Supreme Court Justices or who have travelled privately with a Justice. Whereas Mr. Leo is now the subject of a congressional inquiry, the many individuals and organizations who have facilitated travel for Democrat-appointed Justices, or exchanged gifts or personal hospitality with those Justices, are apparently immune from the Committee’s attention. These are clearly individuals and organizations “who engaged in similar conduct” to Mr. Leo. *United States v. Blackley*, 986 F. Supp. 616, 618 (D.D.C. 1997) (emphasis omitted). Yet their treatment by the Committee is vastly different from its treatment of Mr. Leo.

The Committee’s focus on Mr. Leo has sometimes been explained with reference to “dark money” and “phony front groups” that are supposedly out to “capture” the Supreme Court. Senator Sheldon Whitehouse, Remarks on the Floor of the United State Senate (Sept. 13, 2022). But no member of the Committee’s Majority has expressed similar concern about liberal organizations like Arabella Advisors that fully merit the “dark money” label, and that use their clout to advocate for judicial reforms favored by progressives. *See Emma Green, The Massive Progressive Dark-Money Group You’ve Never Heard Of*, *The Atlantic* (Nov. 2, 2021); Editorial Board, *The Stifle Speech Act of 2022*, *Wall Street Journal* (Sept. 22, 2022). Again, the politically based difference in treatment is unmistakable and telling.

Further, as we have already described at length, Committee Democrats have an extensive record of vilifying Mr. Leo for his lawful public advocacy, attacking him in the harshest possible partisan terms. It is hard to conclude that the disparate treatment to which Mr. Leo is being subjected is the result of anything other than “sheer vindictiveness” motivated by politics. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). It therefore violates Equal Protection.

The Committee Lacks a Valid Legislative Purpose

Congress cannot conduct an investigation in connection with legislation that it cannot constitutionally enact. *See United States v. Rumely*, 345 U.S. 41, 45 (1953). Thus, a bill that, if enacted, would be unconstitutional cannot supply the Committee with a valid legislative purpose for its investigation. *See Quinn*, 349 U.S. 155, 161. That is true of the *Supreme Court Ethics, Recusal, and Transparency Act of 2023* (“Ethics Bill”), which the Committee, on purely partisan

lines, ordered reported on July 20, 2023. The Committee’s inquiry is therefore impermissible for reasons independent of the infringement of Mr. Leo’s constitutional rights.

The Ethics Bill would, among other things, establish a process by which private individuals could file complaints against Supreme Court Justices, and would empower lower court judges to rule on those complaints. *See* S. 359, 118th Cong. (2023). That arrangement offends basic separation of powers principles in at least two ways. First, it would elevate lower court judges to the position of overseers of the Supreme Court, turning upside down the hierarchy of the judicial branch mandated by the Constitution. *See* U.S. Const. art. III, § 1. Second, the bill’s complaint process would work as an engine for generating continuous harassment of Supreme Court Justices, who could be deluged with frivolous ethics complaints that would distract them from their constitutional duties. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (explaining that separation of powers principles are implicated where Congress harasses a coordinate branch in the performance of its duties).

More generally, any attempt by Congress to enact ethics standards for the Supreme Court would falter on constitutional objections. There is no enumerated power in Article I of the Constitution that authorizes Congress to regulate the inner workings of the Supreme Court. *See* U.S. Const. art. I. Ethics standards imposed by Congress on the Supreme Court would therefore necessarily be unconstitutional. *See New York v. United States*, 505 U.S. 144, 177 (1992) (holding congressional action unlawful where it “[i]es] outside Congress’ enumerated powers”). Likewise, regardless of their particulars, any ethics standards Congress may enact would raise separation of powers concerns of sufficient magnitude to render them invalid. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (holding that each branch of government must be “entirely free from the control or coercive influence, direct or indirect” of the other branches). The fact that Congress has already enacted laws that purport to impose ethics standards on the Justices does not change this conclusion. The legality of those laws has never been tested in court. And as Chief Justice Roberts has made clear, the Supreme Court has never acquiesced to Congress’s assertion of authority over the Court’s ethics standards, and Congress of course cannot expand its own power under the Constitution by passing an unconstitutional statute.

* * *

The Senate’s investigative authority should, as a matter of both law and prudence, be exercised consistent with the freedoms guaranteed to every American by the Bill of Rights. Turning the Senate into a “platform of irresponsible sensationalism” where an individual’s “right to hold unpopular beliefs” and “right of independent thought” are disregarded is a course that we know from past experience can serve no good end. Senator Margaret Chase Smith, Declaration of Conscience (June 1, 1950). We will not be part of that journey.

July 25, 2023
Page 8

Sincerely,

A handwritten signature in blue ink, appearing to read "David B. Rivkin, Jr." with a stylized flourish at the end.

David B. Rivkin, Jr.
Partner