GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Michael D. Bopp
Direct: +1 202.955.8256
Fax: +1 202.530.9648
MBopp@gibsondunn.com

CONFIDENTIAL

May 8, 2023

VIA ELECTRONIC MAIL

The Honorable Ron Wyden, Chairman
United States Senate Committee on Finance
221 Dirksen Senate Office Building
Washington, DC 20510

Re: Response to April 24, 2023, Letter to Harlan R. Crow

Dear Chairman Wyden:

We represent Harlan Crow in relation to your letter of April 24, 2023 (the "Letter"). We recognize the Senate Finance Committee's important role in ensuring that our tax system is fair and efficient for all Americans, and we appreciate the opportunity to engage with the Committee.

As an initial matter, however, we have serious concerns about the scope of and authority for this inquiry. As you are aware, the Committee's powers to investigate are not unlimited. Indeed, the Committee must have a legitimate legislative purpose for any inquiry, and the scope of the inquiry must be reasonably related to that purpose. *See Trump v. Mazars*, 140 S. Ct. 2019, 2036 (2020). Moreover, issues that implicate the separation of powers require a heightened showing. *Id.* The Committee's letter meets none of those standards here. We address each of these issues in turn.

Lack of Legislative Purpose

Although the Committee has jurisdiction to oversee and propose amendments to federal gift tax laws, it does not have jurisdiction to conduct tax audits or judicial ethics inquiries. The Letter explicitly states that the Committee's purpose is to "better understand any federal tax considerations arising from [Mr. Crow's] gifts to Justice Thomas" and to provide the American public with a "full accounting" of those gifts. Letter at 3. By its own admission, therefore, the Committee effectively seeks to conduct a gift tax audit in an effort to expose private facts. The Supreme Court has explicitly stated that Congress has no authority to engage in law enforcement investigations or to conduct investigations aimed at exposing citizens' private affairs for the sake of exposure. *See Mazars*, 140 S. Ct. at 2032 ("Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'") (citation omitted); *Watkins v. United States*, 354 U.S. 178, 200 (1957) ("[T]here is no congressional power to expose for the sake of exposure."); *Kilbourn v. Thompson*, 103 U.S. 168, 190

(1881) (stating that neither the House nor Senate "possesses the general power of making inquiry into the private affairs of the citizen").

The timing of and context surrounding the Letter point to a different purpose. The Committee showed no interest in evaluating federal gift tax laws until the April 24 Letter, which came just two weeks after media reports regarding Mr. Crow's friendship with Supreme Court Justice Clarence Thomas, and has given no indication of any federal gift tax issues it seeks to investigate beyond those referenced in the Letter. Given the Letter's timing and focus, this inquiry appears to be a component of a broader campaign against Justice Thomas and, now, Mr. Crow, rather than an investigation that furthers a valid legislative purpose.

Lack of Authority

The Committee also lacks the authority to conduct a tax audit for the purpose of determining whether Justice Thomas complied with ethics standards the Chairman believes should apply in this instance.

We of course respect the authority of the Senate Finance Committee to consider and report tax-related legislation. But that is evidently not the goal of this attempt to tarnish the reputation of a sitting Supreme Court Justice and his friend of many years, Mr. Crow. Indeed, the Chairman's latest statement about this inquiry, made on May 4, 2023, and available on the Committee website, speaks of ethics standards (which are not the province of the Senate Finance Committee) and makes no mention of gift tax laws. Senate committees have no authority to investigate matters that do not fall within their specifically delineated jurisdiction. *See, e.g.*, *United States v. Rumely*, 345 U.S. 41, 44 (1953) (holding that a committee's "right to exact testimony and to call for the production of documents must be found in" "the controlling charter of the committee's powers"); *Watkins*, 354 U.S. at 206 ("committees are restricted to the missions delegated to them," and "[n]o witness can be compelled to make disclosures on matters outside that area").

Violation of the Separation of Powers

The Committee's main target in this inquiry appears to be an Associate Justice of the Supreme Court, which raises substantial separation of powers concerns comparable to those at issue in *Trump v. Mazars*. Thus, any congressional inquiry requires a heightened showing of legitimate legislative purpose and authority, and must be no broader than reasonably necessary to achieve legitimate legislative goals. *Mazars*, 140 S. Ct. at 2036. The Committee cannot satisfy that heightened burden.

For example, even if the Committee were engaged in an inquiry to inform an effort to revise the gift tax laws, there would be no specific legislative need for gift-tax information

relating to Justice Thomas in particular, and thus it "may not look to him as a 'case study' for general legislation." *Id*. Nor may the Committee target personal information pertaining to a Justice of the Supreme Court "when other sources could provide Congress the information it needs." *Id*. To the contrary, congressional requests for information that implicate the separation of powers must be "no broader than reasonably necessary to support Congress's legislative objective," in keeping with the principle that the Committee is not a grand jury and thus is not entitled to obtain "every scrap of potentially relevant evidence . . . ." *Id*.[1]

It is irrelevant that the Letter was issued to a third party; the same was true in *Mazars*. *See id.* at 2034 ("The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity."). Here, instead of specificity, the Committee puts forth an unnecessarily broad request that amounts to an impermissible congressional intrusion into executive and judicial functions.

Gift Tax Laws

There is no plausible reason to believe that an individual inquiry into Mr. Crow's specific tax information would lead to any information that would aid the Committee in assessing the current gift tax framework. If the Committee seeks to evaluate or amend the current federal gift tax laws, there is a substantial amount of publicly available literature for the Committee to study, and, if the Committee is unsatisfied with the answer under current law, to initiate a policy review.

To the extent that the Letter addresses hospitality in the form of invitations to the Thomases to accompany the Crows on personal flights and boat trips, it appears to reflect a misunderstanding of the purpose and operation of the gift tax. The underlying justification for the federal gift tax is to serve as a backstop to the estate and income tax. That justification does not come into play in the context of personal hospitality provided to friends and family, because value is not transferred out of the hosts' taxable estates. As has been widely reported, Justice Thomas and his wife, Ginni Thomas, are long-time friends of Mr. Crow and his wife, Kathy Crow. The Crows and Thomases have been friends for well over two decades. While the Crows have provided hospitality to the Thomases, that hospitality is rooted in a deep friendship, and the Crows derive great satisfaction from spending time with their friends. Personal hospitality is a cherished part of our communal fabric. For that reason, since the federal gift tax was first enacted in 1924, the IRS has not been aggressive in arguing that it even applies in this context, nor has Congress taken any action to expand the law or clarify that it does, aside from legislation enacted in 1984 addressing the unique circumstance of gift and other below-market loans of cash.

---

[1] Even if the Committee had identified a legitimate legislative purpose that would be directly served by a narrow and specific request for Mr. Crow's tax information, which clearly it has not done and cannot do here, federal law would already provide a mechanism for obtaining such information, *see* 26 U.S.C. § 6103(f), making it impossible for the Committee to justify demanding such information from Mr. Crow.

The Letter also suggests that certain real estate transactions may raise gift tax issues. Mr. Crow's purchase of property in Savannah, Georgia (through his LLC) complied with federal and state gift tax laws. Contrary to news reporting, as part of the overall transaction to purchase Justice Thomas's mother's home and two lots, Mr. Crow's LLC provided a lifetime occupancy agreement for his mother, Mrs. Leola Williams, who was 84 years old at the time of the sale. Mr. Crow bought the home immediately so that he could preserve it as a possible future museum of the home where Justice Thomas grew up. In connection with the purchase, Mr. Crow allowed Mrs. Williams to live her remaining years in the home. Mr. Crow's LLC previously entered into a similar arrangement with the owner of the Oyster and Crab Cannery in Pin Point, Georgia, which Mr. Crow purchased in 2008 and renovated into a museum celebrating the Gullah Geechee culture. He entered into a lifetime occupancy agreement at the same time he signed the contract with the owner to purchase the property, which allowed the seller to stay in his home and for Mr. Crow to take possession of the factory and build a museum. These lifetime occupancy agreements were not gifts; they were part of the overall transactions, and the transactions likely would not have occurred unless the owners were allowed to remain in the properties.

* * *

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

Sincerely,

Michael D. Bopp