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

October 19, 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 October 5, 2023, Letter to Harlan R. Crow

Dear Chairman Durbin:

We write on behalf of Harlan Crow in response to your letter of October 5, 2023 ("October 5 Letter"), which (after a delay of several months) rejected our offer to produce a significant amount of information responsive to the questions contained in the Committee's original request of May 8, 2023. The Committee seeks a trove of information from decades ago about Mr. Crow's friendship with Justice Clarence Thomas. As we have explained before, these requests are improper, and exceed the Committee's investigative authority under the Constitution. Nothing in the October 5 Letter changes that conclusion.

Good faith cooperation in the course of this inquiry cannot be a one-way street. Mr. Crow made a fair and reasonable offer to assist the Committee and satisfy its desire for information, even though we do not believe the Committee's requests are legitimate. And we remain willing to cooperate with the Committee. But the Committee has not reciprocated Mr. Crow's good faith efforts. In fact, the Committee took nearly four months to reject our offer to provide it with extensive information responsive to its requests, and did so without addressing the numerous concerns we have raised about the nature and scope of this inquiry. Despite its own protracted delay, the Committee then gave Mr. Crow only two weeks to respond to the Committee's renewed demands.

We have indulged the Committee's effort to probe irrelevant and long-past details of Mr. Crow's personal relationship with Justice Thomas, in spite of the evident lack of legal justification and questionable need for the Committee's invasive inquiry. But the October 5 Letter's explanations for why the offer we made is allegedly inadequate only strengthen our view that the Committee is pursuing ends that are unconnected to Committee business through means that are beyond its authority. The Committee insists that it needs 25 years' worth of information about Mr. Crow's friendship with Justice Thomas, but it is obvious that much of the information the Committee seeks is of little or no relevance to the purported legislative

effort to enact forward-looking ethics standards for the Supreme Court, and in any event is already publicly available. Further, the bill the Committee wishes to enact and in support of which its inquiries are supposedly made has already been reported out of the Committee with the unanimous support of Committee Democrats, which further confirms the absence of any real need for the requested information. The Committee's decision to focus on Mr. Crow while ignoring other and more relevant sources of information similarly calls into question the purpose of this inquiry.

There is No Lawful Basis for The Committee's Inquiry

The position we have explained in our previous letters is unchanged, and unrebutted: There is no lawful basis for the Committee's inquiry. The Committee may only investigate "area[s] where legislation may be had." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 506 (1975). For at least two reasons, any law Congress enacted to impose an ethics code on the Supreme Court would be unconstitutional, which necessarily means that any investigative actions the Committee takes in support of drafting such legislation are also unlawful. *See Quinn v. United States*, 349 U.S. 155, 161 (1955).

First, the Constitution does not "confer[] upon Congress . . . all governmental powers, but only discrete, enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997). A congressional act that is not authorized by any enumerated power is therefore unconstitutional. *See United States v. Morrison*, 529 U.S. 598, 607 (2000). And there is no enumerated power under which Congress can regulate ethics standards and recusal decisions at the Supreme Court. *See* U.S. Const. art. I, § 2, cl. 5; *id.* art. III, § 2, cl. 2. Second, even were Congress authorized to regulate the internal workings of the Court to some extent, the imposition of an ethics standard on the Justices would violate the "sacred [principle] . . . that . . . separates the legislative . . . and judicial power." *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress 581 (1791)). Specifically, by requiring the Court to adopt an ethics code, Congress would be improperly "prescrib[ing]" the manner in which the Court exercises its judicial powers. *United States v. Klein*, 80 U.S. 128, 146–47 (1871). That level of control by Congress over the Court is "radically inconsistent with the independence of th[e] judicial power." *Hayburn's Case*, 2 U.S. 408, 410 (1792). Additionally, the legislation the Committee wishes to enact would "impair [the Court] in the performance of its constitutional duties," by exposing it to coercive pressure and political influence. *Loving v. United States*, 517 U.S. 748, 757 (1996).[1] Thus, Congress may neither "arrogate power to itself," nor "impair another in

[1] In particular, were Congress to enact an ethics standard, the standard would serve as an implicit threat to the Justices that, unless they decide cases the way Congress prefers, the standard might be amended, and made more onerous. Likewise, any mechanism for enforcing the standard would also leave the Justices vulnerable to political

the performance of its constitutional duties," and a law imposing ethics rules on the Court would do both. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010).

The Committee provides no meaningful response to these objections. Instead, as to our separation of powers concerns, the October 5 Letter rehashes points that we have already addressed in prior correspondence. The Letter notes that the Judicial Conference is a creation of Congress, which ignores the plain and critical distinction (as we have explained) that exists between Congress's power over lower federal courts versus the Supreme Court. *See* U.S. Const. art. I, § 8, cl. 9; *Sheldon v. Sill*, 49 U.S. 441 (1850). The Letter observes that Congress has passed laws that purport to regulate Supreme Court ethics before, but that is no answer to the fact that the Supreme Court has never ruled on the constitutionality of such legislation and our point that "[p]ast practice does not, by itself, create power." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). As to our argument regarding the lack of any enumerated power authorizing the legislation the Committee seeks to enact, the October 5 Letter does not even attempt to identity any such authority. Finally, the Committee also leaves unanswered the point that its inquiry lacks a valid legislative purpose because the actual motivation behind the inquiry is to harass Justice Thomas, and "expose for the sake of exposure." *Watkins v. United States*, 354 U.S. 178, 200 (1957).

The October 5 Letter Underscores the Impropriety of the Committee's Requests

Despite these serious and unaddressed objections to the Committee's inquiry, we have offered to provide a substantial quantity of information that is responsive to the Committee's requests. The Committee's reasons for rejecting that offer as insufficient are not persuasive. Simply put, the Committee's continued demands for extensive, burdensome, and intrusive personal information lack any meaningful, logical connection to the aims the Committee claims to be pursuing. And the fact that there is ample information equally or more probative to these claims that the Committee is not pursuing casts doubt on the stated reasons for this probe in the first place.

We have expressed, and continue to express, our willingness to cooperate with the Committee. But we believe that the Committee's burdensome and legally ungrounded requests cannot be seriously entertained when we have nothing more than the Committee's say-so that

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retaliation, either from an executive branch prosecutor, or even from members of the public empowered to file frivolous ethics complaints. The interference with the Court's functions is obvious. Moreover, these concerns show why Committee's reliance on *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), is misplaced. Our position is not at odds with the Court's warning against taking an "archaic view of the separation of powers as requiring three air-tight departments of government." *Id.* Quite the opposite, our concerns are grounded in the Court's holding that the separation of powers is violated where Congress's actions "unduly disrupt[]" another branch's ability to "accomplish[] its constitutionally assigned functions." *Id.*

satisfaction of the requests is necessary for the Committee to fulfill its legislative function. The timing, status, and substance of this inquiry all belie the reasons given in the October 5 Letter for why Mr. Crow must acquiesce to the Committee's requests.

To begin, the centerpiece of the Committee's legislative efforts concerning Supreme Court ethics matters—in support of which the inquiry into Mr. Crow's personal relationship with Justice Thomas was launched—is S. 359, the Supreme Court Ethics, Recusal, and Transparency ("SCERT") Act of 2023. Senator Whitehouse has referred to the SCERT Act as "comprehensive judicial ethics legislation." Senator Sheldon Whitehouse, Remarks at Executive Meeting of Senate Judiciary Committee (July 20, 2023). Likewise, Chairman Durbin has said that the "solution to the problems we're seeing at the Supreme Court is a simple one. They need . . . to adopt an enforceable code of ethics," and the SCERT Act "would require the Supreme Court to adopt an enforceable code of conduct." Senator Richard Durbin, Remarks on the Floor of the United State Senate (July 12, 2023). According to the representations of these leading members of the Committee, therefore, the SCERT Act is the fulfillment of Chairman Durbin's commitment that, "[s]ince the Court won't act, Congress will." Senator Richard Durbin, Press Release: Durbin, Whitehouse Announce July 20 Vote in Senate Judiciary Committee on Supreme Court Ethics, Recusal, and Transparency Act (July 10, 2023).

The Committee has now acted on the bill. On July 20, 2023, by an 11-10 party-line vote, the Committee reported the SCERT Act to the full Senate. *See* Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 117th Cong. (as reported by S. Comm. on the Judiciary, Sept. 5, 2023) (hereinafter S. 359). It is therefore difficult to credit the Committee Democratic Members' belated claim that they need to gather more information to help craft legislation on this topic, since the Committee's leadership has already admitted that the issue of Supreme Court ethics is comprehensively addressed by S. 359, which is already outside of its jurisdiction. *See* Senate Rule XIV. The Committee's legislate first, investigate later approach to lawmaking gets things exactly backwards, and serves only to confirm our view that the Committee is not acting with a valid legislative purpose. *See Eastland*, 421 U.S. at 504. Pursuing an inquiry in support of a bill that is no longer pending before the Committee can only mean either that the bill as reported (with the support of all Democratic Committee members) was ill-informed, or that the Committee's inquiry is not actually being conducted in service of a legitimate legislative effort. Neither explanation provides a sound basis for the Committee to belatedly press Mr. Crow—who offered the Committee meaningful responses to their questions more than a month before the July 20 markup—for information allegedly needed to help write a bill that is already written, as part of a legislative project that, according to the representations of Committee leadership, is already completed.

The Committee's insistence that 25 years' worth of information is essential to their inquiry is equally unsubstantiated. Any legitimate inquiry would necessarily account for the fact that, with the passage of time, "evidence [is] lost, memories . . . fade[]," and information becomes "stale." *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013). Our offer of information going back five years was entirely reasonable, and consistent with the judgment Congress itself made about the appropriate limitations period for disclosures under the Ethics in Government Act. *See* 28 U.S.C. § 2462 (five-year statute of limitations). There is nothing arbitrary about relying on this five-year period to limit the scope of our responses to the Committee's inquiry. To the contrary, what is arbitrary is the Committee's insistence on reviewing information from decades ago, which, even if available, would, due to its age, almost certainly be "plainly incompetent or irrelevant" to the Committee's declared purpose. *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 21 (D.D.C. 1994). It is settled that Congress does not need "every scrap of potentially relevant evidence" to "craft legislation," yet that and more is what the Committee demands here. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020).

Other aspects of the Committee's inquiry similarly cast doubt on its legitimacy. It is clear that the Committee is not focused exclusively, or even primarily, on the Justices' disclosures of gifts and hospitality. For example, the SCERT Act's most significant provisions would impose a comprehensive code of conduct on the Justices, and force the Justices to recuse in certain cases. *See* S. 359 §§ 2, 4. Those provisions would apply irrespective of any disclosure obligations. *See id.* And statement after statement from Democratic members of the Committee confirm that the Committee's concerns center more on supposed improper access by individuals with business or interests pending before the Court than on the disclosure of gifts. *See, e.g.*, Senator Sheldon Whitehouse, Remarks at Executive Meeting of Senate Judiciary Committee (July 20, 2023) (describing the SCERT Act as a safeguard against a supposed "Court-capture scheme"). The October 5 letter also asserts that concern about "[p]arties with matters before the Court . . . tak[ing] advantage of access to justices" is foremost among the objects of the Committee's attention.

Given this focus, the thrust of the Committee's questions, and its insistence that Mr. Crow answer them without limitation, are puzzling, to say the least. We have already stressed to Committee staff that Mr. Crow's personal friendship with Justice Thomas is just that, and only that. When the two men travel together or socialize, they do not discuss business pending before the Court. Nor does Mr. Crow invite others to attend social outings with Justice Thomas in order to expose Justice Thomas to the entreaties of people with a stake in the cases the Court decides. The notion that either Mr. Crow or Justice Thomas would even consider using their time together for any such purpose is baseless and offensive. Thus, the Committee is seeking to double-down on its burdensome requests directed to a private individual who has nothing of substance to tell the Committee that is relevant to the stated focus of their inquiry.

Moreover, by the Committee's own admission, much of the information it seeks has already been publicly reported.

The misalignment between the Committee's professed objectives and its excessive requests to Mr. Crow is particularly striking in light of the potential sources of information that the Committee has *not* chosen to target. If the Committee were truly concerned about litigants, or more broadly entities or individuals who have an interest in the Court's work, gaining improper access to the Justices, its resources would be more productively employed investigating the large number of conferences and gatherings and other events, both disclosed and undisclosed, that the Justices attend where any member of the legal or business community with interests in or matters pending before the Court can engage with the Justices over coffee breaks or cocktails on any matter they choose. The common theme is that these sidebars, casual conversations, and informal meetings are themselves *all undisclosed*. Focusing on interactions between personal friends with no business before the Court instead of these kinds of frequent undisclosed meetings that occur at publicly disclosed conferences attended by actual litigants or other people who have interests in the Court's work makes no sense. Rather than conducting a general inquiry regarding past and present Supreme Court Justices' practices in this area, the Committee has singled out Justices Thomas and Alito for these intrusive inquiries, making it hard not to conclude that the Committee is acting out of partisan rancor, not in pursuit of a legitimate legislative objective.

In fact, since our last correspondence, the Committee has only deepened its focus on Republican-appointed Justices to the exclusion of Democrat-appointed Justices, sending additional letters to friends of Justices Thomas and Alito. The "underinclusiveness" of the Committee's inquiry raises serious "doubts about whether the [Committee] is in fact pursuing the interest it invokes." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

It is also not lost on us that the Committee let its inquiry languish for nearly four months before responding to our offer. Our last formal correspondence with the Committee was transmitted on June 5, and our offer to produce a significant amount of responsive information followed on June 12. The Committee's lengthy delay in responding occurred despite Chairman Durbin's past insistence that the need for Supreme Court ethics reform is urgent, and that the "Supreme Court needs to clean up its act and fast." Senator Richard Durbin, Remarks on the Floor of the United State Senate (April 18, 2023).

Moreover, the timing of the Committee's belated attempt to reactivate its investigation could not be more telling. The Committee's latest demand for information—and its reckless and baseless allegations of impropriety, including that Mr. Crow "may have engaged in . . . efforts to influence the Court through Justice Thomas's wife, Ginni Thomas"—were sent, with accompanying press statements, on October 5, two days after the Supreme Court came back

into session from its summer recess and commenced its October 2023 term. It appears that, far from being driven by any urgent need for information to guide its lawmaking activities, the Committee's actions are timed to coincide with whenever the Supreme Court is most likely to be in the headlines, and therefore most likely to help draw attention to the Committee's accusations of misconduct. *Cf. Reyes-Orta v. Puerto Rico Highway & Transp. Auth.*, 811 F.3d 67, 78 (1st Cir. 2016) (holding that unusual "timing" of government action may demonstrate improper "politicized" motivation).

In short, the Committee's proffered rationales for its belatedly renewed demands for information cannot be reconciled with the substance of those demands. The Committee's inquiry is allegedly urgent, but it lay dormant for nearly four months. The inquiry is purportedly necessary for the Committee to craft the SCERT Act, but the SCERT Act has already been reported out of Committee. The inquiry is supposedly focused on concerns about improper access to the Justices by parties with matters before the Court, but it ignores the most pertinent sources of information that could shed light on that subject. From every angle, it is clear that the requests directed to Mr. Crow lack any legitimate legislative purpose.

Against this backdrop, the only reasonable conclusion is that the Committee's inquiry seeks to advance aims that are nakedly political. Among other things, Committee Democrats appear intent on using the inquiry to browbeat and harass Justice Thomas in an effort to coerce him into stepping aside in upcoming, high-profile cases where his judicial philosophy may not coincide with the Committee majority's political preferences. Chairman Durbin, for example, has called on Justice Thomas to recuse himself from *Loper Bright v. Raimondo,* which could be one of the most consequential administrative law cases decided by the Court in recent memory. *See* Senator Richard Durbin, Press Release: Durbin Calls for Justice Clarence Thomas to Recuse Himself from *Loper Bright v. Raimondo* in Upcoming Supreme Court Term (Sept. 22, 2023). Other members of the Committee majority have used this investigation to raise money for their reelection campaigns. *See* Patrick Hauf, *Senate Dems target Clarence Thomas in fundraising emails: 'We cannot lose momentum'*, Fox News (May 7, 2023) ("Four Senate Democrats sent fundraising emails Friday to capitalize on allegations that Supreme Court Justice Clarence Thomas took gifts from a GOP mega-donor friend [Harlan Crow]."). One recent fundraising email tells prospective donors that "our judiciary system has been hijacked by the far-right," and gives as an example "the recent revelation that Justice Clarence Thomas has been accepting undisclosed luxury trips and other favors from GOP megadonor Harlan Crow," before it asks donors to "chip in $10 now" in order to "continue this fight."[2]

[2] Email from Cory Booker for Senate (May 18, 2023).

"Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187. Despite the invalidity of the Committee's inquiry, and its lack of a legitimate legislative purpose, we extended a good-faith offer to provide information to meet the Committee halfway. The Committee's reasons for rejecting that offer suggest with little room for error that the inquiry is spurred by partisan motives and a desire to "expose for the sake of exposure" details of Mr. Crow's and Justice Thomas's private lives. *Id*. at 200.

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The Committee's every action in the course of this inquiry has had the likely effect of undermining the "public confidence" in the Supreme Court that is "vital to the functioning of the Judicial Branch." *Raines v. Byrd*, 521 U.S. 811, 83 (1997) (Souter, J., concurring). As we have explained, this inquiry appears calculated to target and intimidate Justice Thomas by unearthing details about his private life that the Committee evidently believes will embarrass him and inflict public humiliation. A more foursquare effort to undermine public faith in our judicial institutions is hard to imagine.

When it reported the SCERT Act out of Committee, the Committee included (after protracted equivocation) a provision that condemned politicized and racially charged statements by elected officials that are meant to "humiliate, punish, and demean Justice Thomas." S. 359 § 10(a)(10). The Committee would do well to heed its own words and promptly conclude this partisan investigation.

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