HONIGMAN

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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 September 14, 2023 Letter to David Sokol

Dear Chairman Durbin and Senator Whitehouse:

We represent David Sokol in relation to your September 14, 2023 letter. We understand your inquiry stems from the Senate Judiciary Committee's interest in pursuing legislation designed to "strengthen . . . the rules and standards that apply to the Justices of the Supreme Court." We write to express our concerns about this effort because it appears to be rooted in an unconstitutional initiative—regulating the internal affairs of the United States Supreme Court.

Mr. Sokol's friendship with Justice Clarence Thomas spans over two decades, and like any other purely personal relationship, it was forged through common interests and natural connection. By way of example, Mr. Sokol and Justice Thomas have dedicated considerable energy to the educational advancement of youth who have experienced severe adversity. That background matters, of course, because the Committee's requests do not ask about a business relationship between Mr. Sokol and Justice Thomas—there is none—but rather for a chronicle of a personal friendship. After thoughtful consideration, we have concluded that the Committee lacks the authority to investigate this personal relationship, particularly because it appears to be an attempt to circumvent well-established divisions rooted in separation of powers jurisprudence.

The purpose of the Committee's investigation is laid bare in its request to Mr. Sokol: crafting legislation to remedy what it views as "shortcomings" of the "Statement of Ethics Principles and Practices" promulgated by the United States Supreme Court. Put differently, the Committee is looking to support legislation to impose its own views on the internal affairs of the Supreme Court. Congress has no such power, and even if it did, the creation of an ethics code designed to govern the Supreme Court—an unprecedented and constitutionally infirm pursuit—is well beyond the "limit which separates the legislative from the judicial power." *United States v. Klein*, 80 U.S. 128, 146 (1871). Any attempt by Congress to impose such rules or standards

would violate the Constitution's separation of powers no less than if the Supreme Court tried to impose an ethics code on the Senate. Further, the Committee's request to probe the personal relationships of a sitting Supreme Court Justice through a private citizen invites yet more separation of powers problems and lacks a valid legislative purpose.

Because your inquiry both exceeds Congress's authority and conflicts with the separation of powers, we have no choice but to respectfully decline your request for information. We are pleased to explain our positions below.

I. The Committee has no Power to Regulate the Internal Affairs of the Supreme Court, so its Investigation has no Valid Legislative Purpose.

Congress's power to investigate tracks its power to legislate. *See Quinn v. United States*, 349 U.S. 155, 161 (1955). The power to investigate thus has inherent limitations. "It cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Id.* "Nor does it extend to an area in which Congress is forbidden to legislate." *Id.* The Committee's request targets both of those common sense restrictions. Indeed, according to the September 14 Letter, the Senate is "consider[ing] legislative options to strengthen the ethical rules and standards that *apply to the Justices of the Supreme Court.*" (emphasis added). *See also* Senator Richard Durbin and Senator Sheldon Whitehouse, Joint Statement: Whitehouse, Durbin Request Complete Account of Gifts to Supreme Court Justices from Newly Implicated Right-Wing Billionaires (September 15, 2023) ("If the Chief Justice isn't going to . . . implement a strong code of ethics . . . then it's up to us in Congress to act."). The Committee's stated purpose is not valid because Congress lacks the power to impose ethics rules or standards on the Supreme Court Justices.

To start, the Constitution contains no enumerated power granting Congress the authority to impose ethics rules or standards on the Supreme Court. *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."). Thus, for Congress to impose an ethics code on the Supreme Court, the legislation must "be necessary and proper for carrying into Execution" Congress's powers or other powers vested by the Constitution. *See* U.S. Const., Art. I, § 8, cl. 18. We can discern no plausible connection between an enumerated power and imposing an ethics code on the Supreme Court. *Cf., e.g.*, U.S. Const. art. III, § 1 (granting Congress the power to create inferior courts); *id.* § 2, cl. 2 (granting Congress the power to make "Exceptions" to the Court's appellate jurisdiction). Indeed, as the Committee certainly knows, Justice Samuel Alito recently made this same point: "No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court – period." David B. Rivkin, Jr. and James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, Wall Street Journal (July 28, 2023).

The fact that the Constitution does not grant Congress this power is unsurprising. If the separation of powers means anything, it must prohibit a distinct branch of government from regulating the internal affairs of another. The Constitution, not Congress, created the Supreme Court. U.S. Const. Art. III, § 1. It places the Court at the head of a coequal branch of the government. *See id.* It is a "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). The Court's prerogative is to ultimately "say what the law is[.]" *Marbury*, 5 U.S. at 177. And it is meant to do so with an independence that allows the Justices to act "as the bulwarks of a limited Constitution against legislative encroachments[.]" The Federalist No. 78 (A. Hamilton). None of this particularly controversial.

By attempting to impose an ethics code on the Supreme Court—whether directly or through some other means—Congress seeks to invade the Court's core function and purpose. As Chief Justice Roberts has explained, 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). For that reason, it "is the Supreme Court and not the Congress that has the constitutional prerogative to decide whether to decide to adopt a formal code of conduct governing the individual Justices. . . . A law compelling the Court to adopt such a code, or purporting to impose one legislatively, would violate the separation of powers, and would also be unworkable . . . ." Supreme Court Ethics Reform: Hearing before the U.S. Senate Judiciary Committee (May 2, 2023) (Statement of Hon. Michael B. Mukasey). The Committee, of course, is well aware of that sentiment.

And consider if the separation of powers did not insulate the Supreme Court from the Committee's proposed intrusion: the Legislative Branch, or even the litigants before the Court, would be free to lever the threat of an "ethics" investigation to burden or harass the Court. That concern is particularly acute in our current political and social climate. More to the point, if the Judicial or Executive branch attempted to dictate ethical standards or rules to the Senate, little doubt exists that the Senate would fiercely resist, or simply ignore the directive—and for good reason. The Constitution's separation of powers protects against precisely this coercion. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

In sum, while we respect that the Committee has the power to investigate as a means to legislate in those areas where Congress has legislative authority, Congress lacks the power to impose ethics rules or standards on the Supreme Court and thus has no right to launch an investigation for that purpose.

II. The Investigation Into Justice Thomas's Personal Friendships has no Legitimate Legislative Purpose.

Even if Congress were authorized to regulate the internal affairs of the Supreme Court, it has "no 'general' power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (cleaned up). When a Congressional investigation targets a sitting Justice, it raises the same heightened concerns about improper efforts to undermine the separation of powers as it would if Congress targeted the head of the Executive branch. *See id.* at 2034 ("Without limits on its subpoena powers, Congress could 'exert an imperious control' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared.") (citing The Federalist No. 71 (A. Hamilton); *id.*, No. 48 (J. Madison); *Bowsher v. Synar*, 478 U.S. 714, 721–722, 727 (1986)). Because the Constitution "deals with substance, not shadows" *id.* at 2035 (quoting *Cummings v. Missouri*, 71 U.S. 277, 325 (1866)), the "separation of powers concerns are no less palpable" simply because requests about the Justice are "issued to third parties." *See id.*

And indeed, the Committee's requests are exceedingly broad, seeking among other things, a complete history of every instance in which Mr. Sokol "lodged or traveled" with Justice Thomas over the last two decades. The Committee ostensibly wants this information to draft ethics legislation, but prying into personal relationships with this level of detail suggests there may be some interest in "exposure for exposure's sake," or, worse yet, to influence the Court's decisions or composition. Little could undermine the separation of powers more. And in undermining the Constitution's separation of powers, it would undermine a key purpose behind that separation: "to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citing Montesquieu, The Spirit of the Laws 151–152 (T. Nugent transl.1949); 1 W. Blackstone, Commentaries *146–*147, *269–*270). Indeed, actions that undermine the Supreme Court's independence—which is "equally requisite to guard the constitution and the rights of individuals," The Federalist No. 78 (A. Hamilton)—might be the most pernicious.

The Committee's requests "do not represent a run-of-the-mill legislative effort" as they might in other circumstances. *Mazars*, 140 S. Ct. at 2034. They raise profound concerns about a lack of valid legislative purpose. For this reason, too, the Committee has no authority to pursue this investigation.

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In conclusion, because your inquiry conflicts with the separation of powers and has no legitimate legislative purpose, we must respectfully decline your request for information.

Sincerely,

HONIGMAN LLP

Matthew Schneider

cc: The Honorable Lindsey O. Graham
Ranking Member, Senate Judiciary Committee

The Honorable John N. Kennedy
Ranking Member, Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights