

United States Senate  
WASHINGTON, DC 20510

May 11, 2020

The Honorable Ralph R. Erickson  
U.S. Court of Appeals for the Eighth Circuit  
Quentin N. Burdick U.S. Courthouse  
655 First Avenue North  
Fargo, ND 58102

Dear Judge Erickson and Members of the Committee on the Codes of Conduct,

We write to comment on the advisory opinion proposed by the Committee on the Codes of Conduct (Committee) to address judicial membership in certain law-related organizations.

Signs point to eroding public trust in the independence of our courts; indeed, one recent poll showed 55 percent of Americans believe the Supreme Court is “motivated mainly by politics.”<sup>1</sup> Clear guidance will help insulate the courts from outside political influence and the perception thereof, and the Committee’s proposed opinion can help address the rampant politicization of our federal courts.

We believe deeply in the importance of an impartial judiciary. Every litigant who enters a federal court is entitled to feel they will be treated fairly, regardless of the judge or judges hearing the case. This is a foundational principle of the American legal system and the Code of Judicial Conduct. A rigged courtroom is anathema to our system.

Advisory Opinion 117 is a logical clarification of the Code to address the current pressures facing the judiciary. This builds off prior guidance that judges cannot hold leadership positions in organizations like the Federalist Society and ACS. Leadership in those organizations could reasonably imply endorsement of the ideologies those groups advance, which may cast doubt on the impartiality of an affiliated judge.

The Committee’s longstanding policy against judges holding such leadership positions was never controversial, and indeed, reflected commonsense existing practice. To offer one prominent example, Judge Robert Bork noted in a 1985 letter that he had “made it a policy since becoming a judge not to serve on the board of any organization with an announced ideological orientation,” and “for that reason, . . . declined an invitation to serve on the board of the Federalist Society.”<sup>2</sup>

Contrary to the suggestions of some of the proposed opinion’s critics, the draft opinion permits judges to continue to attend and participate in events sponsored by the Federalist Society

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<sup>1</sup> Quinnipiac Poll (May 22, 2019).

<sup>2</sup> Letter from The Hon. Robert H. Bork, D.C. Cir., to Mr. Karl W. Saur, Ed.-in-Chief, Harv. J.L. & Pub. Pol’y (Sept. 16, 1985).

and ACS. Nothing in the opinion would limit judges' ability to "contribute to [a] robust legal community," "expose themselves to a wide array of legal ideas,"<sup>3</sup> or even receive honoraria for their participation in events hosted by these organizations. The proposed opinion would have little effect on how these organizations operate.

Yet this unremarkable draft opinion has sparked a remarkable outpouring of opposition. The genesis of this opposition merits your scrutiny, as it signals a need for the proposed opinion. The backlash to the Committee's draft advisory opinion, which the Committee circulated internally among judges for feedback, was prompted by a leak. Once the draft was leaked, there quickly followed a chorus of opposition from individuals and groups either affiliated or aligned with the Federalist Society. That is telling behavior on its own.

Much of this opposition, moreover, makes overheated and factually incorrect claims about the scope of the opinion, suggesting that it limits judges' ability to participate freely in organizational activities. The *Wall Street Journal* editorial page even speculated—without support—that the opinion was the product of a conspiracy between one of the signers of this letter and a judge serving on the committee. That is simply false.

We now find that the outcry over the draft has continued outside the public eye. On March 12, twenty-nine Republican Senators privately urged the Committee to withdraw the "flawed" opinion, and urged you not to bend to the "contemptible pressure under which the federal judiciary has been placed by those who seek to undermine confidence in it unless it delivers their preferred ideological outcomes."<sup>4</sup>

On March 18, 210 judges wrote in opposition to the opinion by offering a full-throated defense of the Federalist Society. Republican presidents appointed 93% of the signatories to that letter. Again, the behavior is telling.

These letters provide further telling evidence in the selective nature of their defense of the Federalist Society alone. The Senators appear to embrace the Committee's proposed membership ban if it were applied to the ABA ("the ABA's leftism has come to infect the organization's purportedly 'neutral' activities"), but not to the Federalist Society ("The Federalist Society's neutrality and openness stands in stark contrast to the ideological advocacy of the American Bar Association"). The judges, too, jump to the defense of only the Federalist Society, an organization defined, in the judges' characterization, by "partiality to the Constitution itself." Neither letter expresses any concern over the draft opinion's membership ban with respect to ACS.

The judges go so far as to argue that the Committee's proposed opinion may infringe on First Amendment speech or association rights. Of course, federal judges forgo a variety of rights to protect the integrity of the judiciary. No one expects a judge to campaign for political or partisan goals, though those expressive activities enjoy the First Amendment's protections. If a judge values his membership in a private organization more than his perceived judicial impartiality, that judge is free to leave the bench and enjoy the organization.

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<sup>3</sup> Letter from federal judges to Asst. Gen. Counsel Robert P. Deyling, Admin. Office of the U.S. Courts (Mar. 18, 2020).

<sup>4</sup> Letter from Republican Senators to Hon. Ralph R. Erikson, Chairman, Comm. on Codes of Conduct of the Judicial Conference of the United States (Mar. 12, 2020).

The core question here is whether a judge’s membership in the Federalist Society could suggest partiality, so let’s look at that.

We understand that the Society does not litigate or file amicus briefs, does not lobby, and does not take formal legal, policy, or political positions. The Federalist Society serves an educational mission, provides a gathering place, and is a D.C. think-tank style entity. No one objects to those roles, but they are not the point of concern.

The Federalist Society has become the de facto gatekeeper for judicial nominations in the Trump administration. The President and his former White House Counsel, a prominent Federalist Society member, have stated so publicly. To date, over 86 percent of the President’s appellate court nominees, including both his Supreme Court nominees, have been Society members. The President boasts of sourcing his top judicial nominees from the Federalist Society. Membership has become, in essence, a seal of ideological approval for the Republican Party. And the Federalist Society’s relationship with Republican-appointed judges is symbiotic: last year’s Federalist Society National Lawyers Convention, for example, featured a sold-out banquet headlined by Justice Kavanaugh.

The vetting, sorting, and promotional efforts behind President Trump’s judicial selection process have been run by Leonard Leo, co-chair of the Federalist Society’s Board and, until recently, its Executive Vice President. Last May, the *Washington Post* reported that Mr. Leo was at the heart of a \$250 million “dark money” network of “interlocking nonprofits working on media campaigns and other initiatives to sway lawmakers by generating public support for conservative judges.”<sup>5</sup> According to the *Post*, one hub of this network, the Judicial Crisis Network (JCN), runs anonymously funded multi-million dollar political campaigns for judicial confirmations out of offices it shares with the Federalist Society. JCN’s president, Carrie Severino, has led the opposition to the Committee’s proposed opinion, appearing on television and authoring five opinion pieces in the *National Review*.

The Federalist Society and Mr. Leo argue that Mr. Leo’s judicial selection efforts are made on his personal time, unrelated to the \$400,000-per-year position he held with the organization. Even if that were true—and given the extent of those efforts, it is difficult to imagine how it is—the two are linked in the eyes of the public. Step back a little, and you see that the donors of the Leo network are also donors of the Federalist Society, and also fund political operations of the Republican Party. The same donors are working across all these platforms toward the same political and policy goals, and they see courts as an opportunity.

Look at the proceedings of *Seila Law v. Consumer Financial Protection Bureau*, an important and politically charged administrative and constitutional law case argued this term at the Supreme Court. Sixteen foundations—all Federalist Society funders—funded eleven different groups that filed a chorus of *amicus* briefs arguing against the constitutionality of the Consumer Financial Protection Bureau,<sup>6</sup> using constitutional arguments long promoted by the Society. None of the funding behind these groups was disclosed to the Court, the parties, or the public.

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<sup>5</sup> Robert O’Harrow & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, Wash. Post (May 21, 2019).

<sup>6</sup> Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, PR Watch (Feb. 13, 2020).

At the end of the day, the Federalist Society is at the center of a network of dark-money-funded conservative organizations whose purpose is to influence court composition and outcomes. That makes the Society much more than the ideological campus group whose board Judge Bork eschewed. The Federalist Society is in league with litigation groups seeking specific policy outcomes, such as those filing briefs in *Seila Law*. The Society is in league with overtly political actors, like JCN, waging aggressive political campaigns on judicial nominations. And the policy positions these efforts pursue are policy positions sought by the funders behind these multiple platforms, and which they seek to achieve through courts.

When you see all the pieces together, there is not much difference between the Federalist Society in this role and an industry lawyers group that advocates for clients who are polluters or make dangerous products or offer sketchy financial products. Goals like deregulation, opposition to science, more political leverage, less transparency, and “unitary executive” theory all would be congruent.

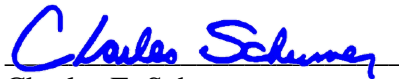
We have no qualms with the Committee’s analysis and conclusions with respect to ACS or the ABA. As to the latter, it appears that the charges of ABA partisanship principally reflect that the ABA’s judicial-nominee rating process has declared unqualified judicial nominees to be unqualified. Nevertheless, if the Committee determines, after careful consideration, that such charges are indeed well-founded, we submit that the Committee should err on the side of protecting judicial impartiality and restrict judicial membership in that organization as well.

Judges have long appreciated that with the power of their positions comes the duty to maintain the highest levels of impartiality, both actual and perceived. The draft opinion’s findings are based off that core principle. The overheated campaign to influence the Committee’s deliberative decision-making provides added evidence that this important principle has rarely before faced such pressure. The Committee is a needed bulwark to protect the vital American principle that a litigant need fear no force of influence in an American courtroom. The draft opinion is an important step in the right direction.

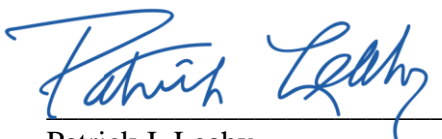
Sincerely,



Sheldon Whitehouse  
United States Senator



Charles E. Schumer  
United States Senator



Patrick J. Leahy  
United States Senator



Richard J. Durbin  
United States Senator



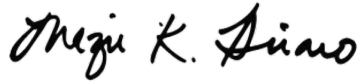
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Sherrod Brown  
United States Senator



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Richard Blumenthal  
United States Senator



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Mazie K. Hirono  
United States Senator