

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
One Hundred Sixteenth Congress

May 18, 2020

Ms. Sheryl L. Walter
Office of the General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E.
Washington DC, 20544

Dear Ms. Walter:

The Judicial Conference's Committee on Codes of Conduct is considering a draft advisory opinion, No. 117, that would effectively bar federal judges from membership in the Federalist Society or the American Constitution Society (ACS).¹ Consistent with the Judiciary Committee's oversight jurisdiction pursuant to the Rules of the House of Representatives, I write to request additional information about this draft advisory opinion.

In January of this year, a press outlet reported that the Judicial Conference's Committee on Codes of Conduct had distributed a draft advisory opinion finding that a judge's "formal affiliation with the ACS or the Federalist Society, whether as a member or in a leadership role, is inconsistent" with standards of judicial conduct.² The Committee on Codes of Conduct rationalized that a judge's "official affiliation" with both organizations could lead a reasonable person to conclude that the judge "endorses the views and particular ideological perspectives advocated by the organization," and may raise questions about the judge's "impartiality on subjects as to which the organization has taken a position."³ The advisory opinion suggested that a judge's association with these organizations may "frustrate the public's trust in the integrity and independence of the judiciary."⁴

In contrast, the Committee on Codes of Conduct wrote that a judge's membership in the American Bar Association's (ABA) Judicial Division "does not raise these same concerns and is not necessarily inconsistent" with standards of conduct.⁵ While the Committee on Codes of

¹ COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OPINION NO. 117, JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (Exposure Draft, Jan. 2020), available at <http://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf>.

² *Id.* at 11; Ed Whelan, *Draft Judicial Ethics Opinion Favors ABA over Federalist Society and ACS*, NAT'L REV. (Jan. 21, 2020), <https://www.nationalreview.com/bench-memos/draft-judicial-ethics-opinion-favors-aba-over-federalist-society-and-ac/>.

³ *Id.* at 11.

⁴ *Id.*

⁵ *Id.* at 11.

Conduct conceded that the ABA has taken positions that “could reasonably be viewed to favor liberal or progressive causes,” it commented that the ABA’s mission is “concerned with the improvement of the law in general and advocacy for the legal profession as a whole.”⁶

There are several problems with the reasoning of the Committee on Codes of Conduct in this draft advisory opinion which raise concerns about the biases and motivations of the opinion’s drafters. First, with respect to the articulated standard of “impartiality,” it is the ABA—not the Federalist Society—that has intervened in ongoing litigation in federal courts such that it could frustrate public trust in the independence of the judiciary. The ABA has openly advocated for liberal causes and directly engaged in cases or controversies before federal courts, even filing amicus briefs in high-profile Supreme Court appeals.⁷ In addition to taking affirmative stances on hot-button issues, the ABA rates judicial nominees and actively lobbies Congress.⁸ In comparison, the Federalist Society does not directly engage in matters before the federal judiciary. Commentators have noted that the Federalist Society “has never filed an amicus brief to influence a court on a legal controversy” in nearly 40 years.⁹ Likewise, the Federalist Society does not “lobby for legislation, take policy positions, or sponsor or endorse nominees and candidates for public service.”¹⁰

Second, although the Committee on Codes of Conduct celebrates the ABA’s mission of “improv[ing] . . . the law in general,” it ignores the Federalist Society’s work toward that same goal. The Federalist Society describes itself as an organization “committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”¹¹ Similar to the ABA, the Federalist Society provides judges and legal scholars with a forum to discuss topics that are central to the improvement of the law and legal profession. There is no rational basis to distinguish the Federalist Society from the ABA on this point.

The draft advisory opinion discriminates against the viewpoints of members of the judiciary who chose to associate with the Federalist Society. For this reason, nearly 30 Members of Congress and over 200 federal judges have also expressed concern with the draft advisory opinion.¹² While the draft opinion is not yet finalized, questions remain about the basis for and

⁶ *Id.* at 10-11.

⁷ Brief for American Bar Assoc., Supporting Respondent, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. __ (2018) (No. 16-111); Brief for American Bar Assoc., Supporting Petitioners, *June Medical Services L.L.C. v. Gee* (Argued Mar. 4, 2020)(No. 18-1323); see generally American Bar Assoc., *Amicus Library*, <https://www.americanbar.org/groups/committees/amicus/1998-present> (last visited May 11, 2020).

⁸ *Ratings*, AMERICAN BAR ASSOC., https://www.americanbar.org/groups/committees/federal_judiciary/ratings/ (last visited May 11, 2020); *Advocacy, Governmental and Legislative Work, About Us*, AMERICAN BAR ASSOC., https://www.americanbar.org/advocacy/governmental_legislative_work/about/ (last visited May 11, 2020).

⁹ Editorial Board, *Judicial Political Mischief*, WALL ST. J. (Jan. 21, 2020), https://www.wsj.com/articles/judicial-political-mischief-11579652574?mod=article_inline.

¹⁰ *Frequently Asked Questions*, THE FEDERALIST SOCIETY, https://fedsoc.org/frequently-asked-questions_ (last visited May 11, 2020).

¹¹ *Our Background*, THE FEDERALIST SOCIETY, <https://fedsoc.org/our-background> (last visited May 11, 2020).

¹² Letter from Sen. Ben Sasse, Sen. Mitch McConnell, Sen. Chuck Grassley, et al., to the Honorable Ralph R. Erickson, U.S. Court of Appeals for the Eighth Circuit, Chairman, Comm. on Codes of Conduct, Judicial

origin of this opinion and its drafting process. As such, I respectfully request that the Judicial Conference provide the following information and material:

1. Please explain whether the Committee on Codes of Conduct was unanimous in its support for its draft advisory opinion No. 117.
2. Please explain why the Committee on Codes of Conduct believed it necessary to issues a new draft advisory opinion changing its position on judicial membership to organizations such as the ACS or Federalist Society.
3. Please explain whether any members of the Committee on Codes of Conduct are members of the ABA, ACS, or Federalist Society.
4. Please produce all drafts prepared, considered, or exchanged by the Committee on Codes of Conduct for draft advisory opinion No. 117.
5. Please produce all minutes, notes, or other memorialization of all meetings of the Committee on Codes of Conduct referring or relating to draft advisory opinion No. 117.

We ask that the Judicial Conference provide this information as soon as possible but no later than 5:00 p.m. on June 1, 2020. In addition, I ask that the Judicial Conference be prepared to provide a briefing to the Committee about the drafting of draft advisory opinion No. 117 upon production of the documents and information requested above.

The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of the “judiciary and judicial proceedings,” and “[f]ederal courts and judges.”¹³ Mindful of the principles of judicial independence, we are conducting this oversight on generally applicable standards of conduct and not on any particular case of controversy before the federal judiciary.

If you have any questions about this letter, please contact Committee staff at 202-225-6906. Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Ranking Member

cc: The Honorable Jerrold L. Nadler, Chairman

Conference of the U.S., Admin. Office of U.S. Courts (Mar. 12, 2020); Letter from Hon. Gregory Katsas, Hon. Andrew Oldham, Hon. William Pryor Jr., et al., to Robert P. Deyling, Ass’t General Counsel, Admin. Office of the U.S. Courts (Mar. 18, 2020).

¹³ Rules of the House of Representatives, R. X, 116th Cong. (2019).