

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

June 8, 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 Codes of Conduct:

We write to you concerning the Committee on Codes of Conduct's (the "Codes Committee") draft Advisory Opinion 117.¹ Draft Advisory Opinion 117 concludes that a judge's formal affiliation with the American Constitution Society or the Federalist Society is inconsistent with the Code of Conduct for United States Judges, the code of judicial ethics applicable to all federal judges except for the justices of the Supreme Court. The draft advisory opinion does not bar judges from participating in events sponsored by these organizations; only membership is prohibited. Draft Advisory Opinion 117, if adopted, would be a modest, incremental addition to a long line of previous advisory opinions, consonant with the Code of Conduct for United States Judges as a whole.

As the members of the Codes Committee are well aware, impartial justice and the public's faith in the integrity of our courts are not only among the most important principles of our constitutional democracy, they are also among the most in need of our constant vigilance to ensure they are maintained. The Codes Committee's process in finalizing this advisory opinion is, in effect, a test of both the Judicial Conference's commitment to those principles as well as the Judicial Branch's self-regulating approach to judicial ethics.

On the substance of the draft advisory opinion itself, we note only three things. First, that it is guided by an obvious point embodied in both the Code of Conduct and judicial precedent concerning the ethical requirements inherent in the judicial function and due process: "an appearance of impropriety occurs when reasonable minds would conclude that the judge's impartiality is impaired." Second, that public perception of the Federalist Society and the American Constitution Society cannot be reasonably disputed. And third, that it is clearly a problem for a judge to be a member of an organization with an ideological bent squarely targeted at reforming judges and the judiciary.

¹ We understand that draft advisory opinions are not normally released for comment outside of the federal judiciary. But as you are aware, Draft Advisory Opinion 117 was leaked, and both the draft opinion and the members of the Codes Committee have been subjected to concerted and in some cases *ad hominem* public attack. We feel that this letter is appropriate given these extraordinarily troubling circumstances.

Regarding the Codes Committee’s role and processes, we note the paramount importance of maintaining the vitality of the judiciary’s code of ethics. We also note the value of issuing advisory opinions that apply the generalized canons of the code to frequently occurring situations. Ultimately, the Codes Committee must be guided by principle, precedent, and common sense.

The code instructs all federal judges that they “should not be swayed by partisan interests, public clamor, or fear of criticism.”² We hope that the Codes Committee will not be deterred from issuing advisory opinions prohibiting federal judges from affiliating with extrajudicial organizations if that affiliation is inconsistent with the Code of Conduct for United States Judges and would “frustrate the public’s trust in the integrity and independence of the judiciary.”³

“The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.”⁴ We hope you will keep us informed of the Codes Committee’s important work.

Sincerely,



Jerrold Nadler
Chairman
Committee on the Judiciary



Henry C. “Hank” Johnson, Jr.
Chairman
Subcommittee on Courts, Intellectual Property,
and the Internet



Steve Cohen
Chairman
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

cc: The Hon. Jim Jordan, Ranking Member, Committee on the Judiciary

The Hon. Martha Roby, Ranking Member, Subcommittee on Courts, Intellectual Property,
and the Internet

The Hon. Mike Johnson, Ranking Member, Subcommittee on the Constitution, Civil Rights,
and Civil Liberties

² Canon 3(A).

³ Draft Advisory Opinion 117.

⁴ *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).