



Gabe Roth

Executive Director

Comment on Draft Advisory Opinion No. 117
by the Judicial Conference Committee on Codes of Conduct

February 6, 2020

I am writing on behalf of myself and my colleagues at Fix the Court in support of draft advisory opinion no. 117, “Judges’ Involvement with the American Constitution Society, the Federalist Society, and the American Bar Association.”

At a time when the federal judiciary is playing an increasingly prominent role in our democratic system, it is natural that judges would face increased scrutiny over their extrajudicial activities. That is why it is laudable that the Committee reconsider the impact that judges’ formal affiliations may have on the third branch and on public perception thereof.

Though Fix the Court is often critical of the transparency and accountability shortcomings of the judiciary, we strive to credit the institution for positive reform efforts. We concur with the Committee’s view that judges should no longer pay dues to, or hold leadership roles in, the American Constitution Society or the Federalist Society. We agree that the American Bar Association is a fundamentally different organization, so a formal affiliation, consistent with guidance from the Code of Conduct for U.S. Judges and other advisory opinions, may be appropriate.

We reached this conclusion as supporters and admirers of much of the work of both ACS and FedSoc. Fix the Court frequently collaborates with law professors and students who are leaders in each, and we have cosponsored more than dozen joint ACS-FedSoc events at law schools across the country. The advisory opinion, if adopted, would not change any of that.

Nor would it fundamentally change judges’ day-to-day connections to these organizations, which is the point of our comment. That the draft opinion states “[judges’] participation in events sponsored by the ACS [and] Federalist Society [...] is permitted” makes this clear. Every judge who previously spoke at or attended ACS or FedSoc would still be able to speak at or attend ACS or FedSoc. (We do wish that more judges appointed by Republican presidents would attend the ACS National Convention and more judges appointed by Democratic presidents would attend the FedSoc National Lawyers Convention; in 2019, for example, there was almost no overlap).

In the course of our work, we hear judges express their frustration with the press when they are referred to as a “Democratic-appointed” or “Republican-appointed” judges. Much as we would like to reduce the prevalence of these epithets, we likely can’t without a constitutional amendment, and neither can the Committee. But what the Committee can do is remove a different label that partisans are increasingly using to disparage conscientious public servants.

Just as federal judges, under the Code of Conduct and advisory opinions, may not attend a political caucus or convention, give a political speech or donate to a federal candidate, maintaining a paid membership or a leadership role with groups that any disinterested party would describe as political should be seen as an extension of these rational prohibitions, not as an anti-First Amendment eye poke. Again, prohibiting judges from appearing as ACS or FedSoc lecturers, panel guests or audience members would have been a step too far. But the draft does no such thing.

It seems as if the topline grievance with the draft to date is that painting ACS and FedSoc with a political brush is incorrect. But in determining whether membership in these organizations is appropriate, the Committee begins with how the organizations have chosen to describe themselves: FedSoc defines itself as “a group of conservatives and libertarians” in opposition to “a form of orthodox liberal ideology”; ACS calls itself a “progressive legal organization,” formed as “the progressive response” to “the conservative vision” of the Constitution. A neutral observer would likely regard these terms as political monikers.

Though defining themselves as simply in opposition to dogma may leave some rhetorical room for the groups or individual members to claim that they are the one who are the nonpolitical actors here, this too misses the mark. Even granting this dubious framing, there’s no credible way to suggest that one is apolitically battling a political order.

When pushed, some might suggest that the organizations have ideological orientations but take no partisan political positions – and this should be dispositive in their favor. This distinction is immaterial, however, since, as the opinion notes, judges have a duty not only to avoid associations that would in fact impair their impartiality but also to avoid associations that would create the appearance of impropriety. As the opinion stipulates, public perception “is an important consideration when evaluating whether involvement in law-related activities is consistent with the Code.”

The draft considers the American Bar Association and ultimately finds that it is distinguishable from ACS and FedSoc on whether formal membership would unacceptably imply political bias to the public. The ABA states its mission and goals as “promoting legal education, professionalism, and public service” and “advancing the rule of law” – neither of which has any political valance and, in the words of the draft opinion, is “clearly oriented toward the improvement of the law as a whole.” Any politically tinged activities undertaken by the ABA are therefore ancillary to its mission and so would not color overall membership in the organization.

In considering whether the opinion gets at something that needed addressing, it’s worth reflecting on how it is that we got here today specifically. The Committee did not publish this draft opinion. It appears that it was leaked with the intended purpose to cause a political backlash against the Committee. This tactic underscores the very point that the draft opinion makes.

The response this opinion has received should only strengthen the Committee’s resolve. Whether its members feel safe in advancing it will show whether the legal community has the strength to stand up to political actors seeking to break it.

We hope it does, and we hope to continue to support the good work of the Committee in the future.