

# United States Senate

WASHINGTON, DC 20510

March 12, 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, North Dakota 58102

Dear Judge Erickson,

We write to you today in your capacity as Chairman of the Committee on Codes of Conduct of the Judicial Conference of the United States regarding judges' participation in the Federalist Society and the American Bar Association.

The "exposure draft" of the Committee's Advisory Opinion No. 117, "Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association," concludes that "formal affiliation with . . . the Federalist Society, whether as a member or in a leadership role, is inconsistent with Canons 1, 2, 4, and 5 of the Code" because "[o]fficial affiliation . . . could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge's impartiality on subjects as to which the organization has taken a position; and generally frustrate the public's trust in the integrity and independence of the judiciary," though "as a general rule, participation in events sponsored by . . . the Federalist Society . . . that are open to the public and that address appropriate subject matter is permitted."<sup>1</sup> Nevertheless, the opinion also concludes that "membership in the ABA's Judicial Division is not necessarily inconsistent with the Code" because "the ABA's mission, unlike that of . . . the Federalist Society, is concerned with the improvement of the law in general and advocacy for the legal profession as a whole."<sup>2</sup>

Frankly, these conclusions are based on an extraordinarily distorted understanding of both organizations' missions and advocacy activities. We urge you to reconsider the proposed opinion.

The Federalist Society "is founded on 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."<sup>3</sup> These principles do not flow from any ideological, political, or factional commitment, but rather from the basic underpinnings of the Constitution and the rule of law. In fact, if any federal

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<sup>1</sup> COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 117, JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION 11 (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>.

<sup>2</sup> *Id.*

<sup>3</sup> *About Us*, THE FEDERALIST SOCIETY, <https://fedsoc.org/about-us> (last visited Mar. 2, 2020).

judges do *not* adhere to these principles, they are in violation of their oaths of office—plain and simple.

The Federalist Society pursues these principles by “sponsor[ing] fair, serious, and open debate,” which is its “main purpose.”<sup>4</sup> Forums hosted by the Federalist Society frequently feature voices from across the ideological spectrum, with its most recent National Lawyers Convention featuring such prominent progressives as Jack Balkin, Neil Eggleston, Michael Dorf, Jamal Greene, and Deepak Gupta.<sup>5</sup> While the Federalist Society’s membership may tend toward conservative and libertarian views—with frequent legal, policy, and political differences among its own members—the organization unequivocally states that “[m]embership is open to anyone who wishes to join.”<sup>6</sup> Most importantly, the Federalist Society emphatically does “not lobby for legislation, take policy positions, or sponsor or endorse nominees and candidates for public service.”<sup>7</sup> The organization does not take positions on legislation and does not submit amicus briefs.

To characterize membership in such an organization as a threat to the impartiality and reputation of the courts boggles the mind. If any of these groups is an “organization devoted to the law, the legal system, or the administration of justice,”<sup>8</sup> it is the Federalist Society.

The Federalist Society’s neutrality and openness stands in stark contrast to the zealous ideological advocacy of the American Bar Association. In fact, the Committee’s draft opinion acknowledges that the ABA does indeed take positions that “could reasonably be viewed to favor liberal or progressive causes.”<sup>9</sup> This description is too kind. There is no “reasonabl[e]” way to view the ABA’s advocacy as anything other than “liberal or progressive” when it supports denying individuals their constitutional right to keep and bear arms,<sup>10</sup> forcing Christian organizations on campuses to accept members that reject their faith,<sup>11</sup> subjugating states to the judgments of the World Court to overturn capital sentences,<sup>12</sup> recognizing same-sex marriage through judicial fiat instead of legislative debate,<sup>13</sup> banning state and local law enforcement from

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<sup>4</sup> *Frequently Asked Questions*, THE FEDERALIST SOCIETY, <https://fedsoc.org/frequently-asked-questions> (last visited Mar. 2, 2020).

<sup>5</sup> *2019 National Lawyers Convention*, THE FEDERALIST SOCIETY, <https://fedsoc.org/conferences/2019national-lawyers-convention> (last visited Mar. 2, 2020).

<sup>6</sup> THE FEDERALIST SOCIETY, *Frequently Asked Questions*, *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> CODE OF CONDUCT FOR U.S. JUDGES § 4(A)(3) (JUDICIAL CONFERENCE OF THE U.S. 2019).

<sup>9</sup> COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 117, JUDGES’ INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION 10 (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>.

<sup>10</sup> Brief for American Bar Ass’n Supporting Petitioner, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-270).

<sup>11</sup> Brief for American Bar Ass’n Supporting Respondent, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371).

<sup>12</sup> Brief for American Bar Ass’n Supporting Petitioner, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

<sup>13</sup> Brief for American Bar Ass’n Supporting Respondent, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

assisting in enforcing federal immigration law,<sup>14</sup> and removing restrictions on abortion.<sup>15</sup> These positions are far from “ancillary to the ABA’s core, neutral, and appropriate Canon 4A objectives,”<sup>16</sup> as the draft suggests. Not only does that conclusion unduly downplay just how much of the ABA’s activities are focused on advocacy for left-wing positions, but it also ignores how the ABA’s leftism has come to infect the organization’s purportedly “neutral” activities, from using its monopoly on law school accreditation to mandate hiring and admissions quotas<sup>17</sup> to trying to muzzle lawyers with a speech code under the guise of model ethics rules.<sup>18</sup>

There is perhaps no better example of the subjugation of the ABA’s ostensibly neutral functions to this left-wing agenda than its treatment of judicial nominees. Study after study over the past two decades has documented what one expert described as “systematic bias by the ABA in its ratings of Republican nominees.”<sup>19</sup> Sadly, the ideological infection of the ABA’s rating process is not limited to just bias in ratings, but has also escalated into outright character assassination attempts against some nominees, especially those with socially conservative track records. During the Reagan administration, the ABA tried to keep these activities covert before it was caught leaking the names of judicial candidates before nomination to the leftist Alliance for Justice in order to give a head start on its opposition research.<sup>20</sup> During the Trump Administration, the ABA has stopped relying on outsourcing the attacks and has itself publicly smeared several of President Trump’s nominees.

Its first target was one of your now-colleagues on the Eighth Circuit, Nebraska’s Judge Steve Gras. The ABA subjected Gras—whose responsibilities during his dozen years as the state’s Chief Deputy Attorney General included defending Nebraska’s law banning partial-birth abortion<sup>21</sup>—to an investigation led by two left-wing activists,<sup>22</sup> one of whom openly based her strong opposition to a past nominee on his perceived pro-life views.<sup>23</sup> The result was sadly

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<sup>14</sup> Brief for American Bar Ass’n Supporting Respondent, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182).

<sup>15</sup> Brief for American Bar Ass’n Supporting Petitioners, *June Medical Services v. Gee*, No. 18-1323 (S. Ct. argued Mar. 4, 2020)

<sup>16</sup> COMM. ON CODES OF CONDUCT, *supra* note 1, at 11.

<sup>17</sup> See Valerie Strauss, *U.S. Education Officials Question Diversity Standard*, WASH. POST, Jan. 8, 2007, <https://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010700997.html>.

<sup>18</sup> See Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, WASH. POST: THE VOLOKH CONSPIRACY (Aug. 10, 2016, 8:53 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on>.

<sup>19</sup> Thomas Jipping, *The Confirmation Process: That Was Then, This Is Trump*, NAT’L REVIEW: BENCH MEMOS (Oct. 24, 2019, 4:34 PM), <https://www.nationalreview.com/bench-memos/the-confirmation-process-that-was-then-this-is-trump/>.

<sup>20</sup> See Howard Kurtz, *ABA Judge-Screening Panel Criticized*, WASH. POST, Dec. 24, 1985, <https://www.washingtonpost.com/archive/politics/1985/12/24/aba-judge-screening-panel-criticized/551409ba-ccf8-4d11-97d1-672bb3def8d5/>.

<sup>21</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 919 (2000).

<sup>22</sup> See Ed Whelan, *ABA Committee Smokes Gras—Part 3*, NAT’L REVIEW: BENCH MEMOS (Oct. 31, 2017, 7:13 PM), <https://www.nationalreview.com/bench-memos/steve-gras-aba-rating-3/>.

<sup>23</sup> *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1184, 1200 (2006) (letter of law professors opposing the nomination).

predictable; an investigation that stooped to the ABA interrogating Grasz on such personal subjects as his decision to send his children to a private religious school;<sup>24</sup> a last-minute, anonymously sourced attack on his integrity and fairness replete with conspiratorial insinuations and allegations;<sup>25</sup> and an eventual supplemental evaluation that acknowledged that the ABA's rating was based on a minority of its interviews but failed to acknowledge his support from prominent Nebraska Democrats such as former Governor and Senator Ben Nelson, Obama-era U.S. Attorney Deb Gilg, and multiple state senators.<sup>26</sup>

Its most recent target was another of your now-colleagues on a different circuit, Nevada's Judge Lawrence VanDyke. Perhaps in an effort to make its treatment of Judge Grasz somehow look fair, the ABA subjected VanDyke to an investigation led by an individual who had donated to the campaign of one of VanDyke's opponents in a recent judicial election.<sup>27</sup> The result was similarly unsurprising and regrettable: another hit job filled with vitriolic attacks on VanDyke's character, most notably the shocking claim that "VanDyke would not say affirmatively that he would be fair to any litigant before him, notably members of the LGBTQ community."<sup>28</sup> Frankly, the notion that someone with the commitment to public service in the courts that VanDyke has shown would refuse to commit to fairness to all litigants is laughable. For a person of integrity such as VanDyke, though, these bitter and deeply personal attacks can be far from laughing matters. Indeed, the most consequential result of the ABA's advocacy against his nomination came at his hearing when, upon being asked about the ABA's accusation, he struggled to hold back tears and strongly denied that he had ever said such a thing.<sup>29</sup> He explained that such views would be inconsistent with his "fundamental belief . . . that all people are created in the image of God and they should all be treated with dignity and respect,"<sup>30</sup> an assertion fully supported by VanDyke's fellow witness and now-Ninth Circuit colleague Judge Patrick Bumatay, who is gay and has been friends with VanDyke since law school.<sup>31</sup>

The ABA's treatment of Judge Grasz, Judge VanDyke, and other of your colleagues has been disingenuous, unfair, and shameful. It can hardly be dismissed as merely a minor feature of the organization. Rather, this record fatally undermines any notion that the ABA is capable of placing the core principles that undergird our legal system ahead of zealous advocacy for its left-wing agenda.

It is disappointing that sitting federal judges would want to lend their credibility to an organization that launches such vicious, spurious attacks on their colleagues. Perhaps most

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<sup>24</sup> *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 1, 2017) (statement of L. Steven Grasz).

<sup>25</sup> *Id.* (statement of Pamela A. Bresnahan on behalf of the ABA Standing Committee on the Federal Judiciary).

<sup>26</sup> *Nominations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 15, 2017) (supplemental statement of Pamela A. Bresnahan, Cynthia E. Nance, and Laurence Pulgram on behalf of the ABA Standing Committee on the Federal Judiciary).

<sup>27</sup> See Carrie Campbell Severino, *The ABA Has Outdone Itself Rating Lawrence VanDyke 'Not Qualified'*, NAT'L REVIEW: BENCH MEMOS (Oct. 30, 2019, 9:30 AM), <https://www.nationalreview.com/bench-memos/the-aba-has-outdone-itself-rating-lawrence-vandyke-not-qualified/>.

<sup>28</sup> *Nominations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 30, 2019) (statement of William C. Hubbard, Chair, ABA Standing Committee on the Federal Judiciary).

<sup>29</sup> *Id.* (statement of Lawrence VanDyke).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



importantly, it is deeply unfair to organizations that are actually “devoted to the law, the legal system, or the administration of justice” such as the Federalist Society to deign to label the ABA to be such an organization when it so evidently does not meet such a standard.

We applaud your Committee’s desire to demonstrate your impartiality and fairness at a time when many of our institutions both inside and outside of government have lost public trust. We also appreciate 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. And we recognize that the judiciary is at its best when it polices itself. Nevertheless, when this effort produces an outcome that punishes the Federalist Society and rewards the American Bar Association—both unduly—the result undermines the principles that the judiciary nobly seeks to vindicate.

We urge you to change course. Withdraw this flawed draft opinion.

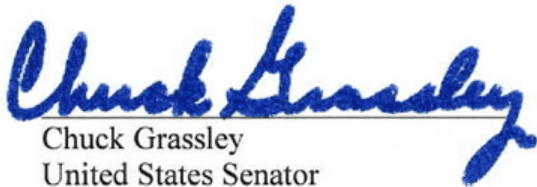
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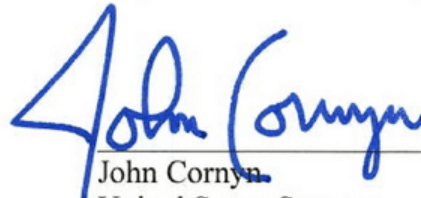
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United States Senator



Mitch McConnell  
United States Senator



Chuck Grassley  
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John Cornyn  
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Mike Lee  
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Ted Cruz  
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Dan Sullivan  
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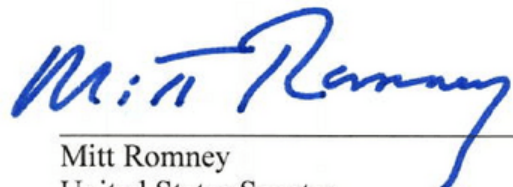
  
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James M. Inhofe  
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Rick Scott  
United States Senator

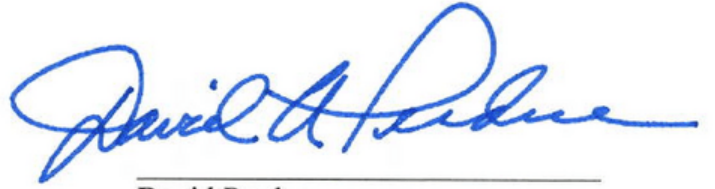
  
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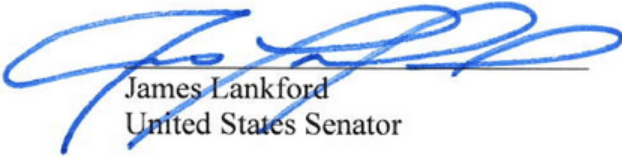
  
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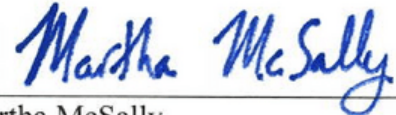
Pat Toomey  
United States Senator



David Perdue  
United States Senator



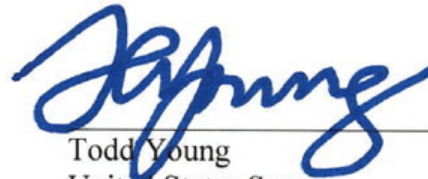
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Martha McSally  
United States Senator



Steve Daines  
United States Senator



Todd Young  
United States Senator



John Thune  
United States Senator



M. Michael Rounds  
United States Senator



Kelly Loeffler  
United States Senator