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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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November 8, 2018

James C. Duff
Director
Administrative Office of the U.S. Courts
One Columbus Circle N.E.
Washington, D.C. 20544

Dear Mr. Duff:

Recent reports have raised concerns about a training program for incoming federal judicial employees sponsored by the Heritage Foundation. Participation in the program would give the appearance of partiality and outcome-based decision-making that is predetermined before litigants have an opportunity to present the facts. This is antithetical to our judicial system and undermines the credibility of all federal courts. We write to request your office immediately investigate this and any similar programs, and issue clear guidance addressing participation in any training program that might raise the appearance of or actually compromise the impartiality and independence of federal judicial employees and judges.

Specifically, the Heritage Foundation recently announced that it would host a “Federal Clerkship Training Academy.” This program was open only to individuals who had already accepted offers for federal judicial clerkships beginning in 2019. The Heritage Foundation’s website indicated that program participants would receive free travel, accommodations, meals, and tuition. Participating clerks had to pledge secrecy and promise not to use the training “for any purpose contrary to the mission or interest of The Heritage Foundation”¹ (emphasis added).

The Heritage Foundation’s stated mission is to advance conservative policies based on limited government and the free market in the political arena and in the courts.² Among other things, the Heritage Foundation has sought to repeal reproductive

¹ *2019 Federal Clerkship Training Academy Application*, The Heritage Foundation (www.heritage.org) (archived copy on file with Democratic Committee staff).

² *About Heritage*, The Heritage Foundation, <https://www.heritage.org/about-heritage/mission>.

rights; dismantle affirmative action; limit voting rights; and invalidate the Deferred Action for Childhood Arrivals; and has advocated on many other issues likely to come before the federal judiciary. For example, in 2012 the Heritage Foundation filed an amicus brief in a case challenging the constitutionality of the Affordable Care Act.³

Requiring incoming judicial clerks to adhere to this mission raises significant questions about the clerks' ability to comply with the Code of Conduct for Judicial Employees, which will require them to "uphold[s] the integrity and independence of the Judiciary" and avoid "the appearance of impropriety."⁴ The ethics guidelines also prohibit clerks from accepting gifts, including "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance or similar item having monetary value," in return for "being influenced in the performance of an official act."⁵ Similarly, clerks may not engage in outside activities that might "adversely reflect on the operation and dignity of the court."⁶

Participation in the proposed Heritage Foundation training – through which "generous donors" pay all of the costs to train clerks – appears to run afoul of several of these guidelines and has been roundly criticized by ethics experts.

Given this, it is important that the Administrative Office immediately investigate the existence of this or any similar program and issue guidance specifically addressing participation in any such program. Guidance should address whether and when a training program violates the Code of Conduct for Judicial Employees or has political overtones that threaten the public's trust in the fairness, impartiality, and independence of the courts.

Additionally, reports about the program indicated that the faculty included several sitting federal appeals court judges. Guidance from the Administrative Office should thus also address whether and when participation as faculty in such a training program violates the Code of Conduct for United States Judges.

³ Brief of The Heritage Foundation et al. as Amici Curiae Supporting Respondents at 34, *U.S. Dep't of Health and Human Svcs. v. Florida*, 2012 WL 484070 (Feb. 13, 2012).

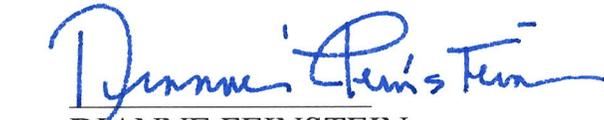
⁴ Code of Conduct for Judicial Employees, Canon 1-2; see *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks (Fourth Ed.)*, Federal Judicial Center (2013) at 1.

⁵ *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* at 18 (citing Judicial Conference Gift Regulations §620.25). While participants might not have started their clerkships at the time of the training, the program was only open to individuals who had accepted a clerkship that would be starting in fall 2019. The training – and free travel, meals, and accommodations – were all conditioned on their employment as federal law clerks.

⁶ *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* at 20.

Ensuring the independence of federal judges and judicial staff is of the utmost importance to keeping the public trust and confidence in the judicial branch of our federal government. Thank you for your assistance and attention to this very important matter. We ask for a reply to this request on or before December 3, 2018.

Sincerely,


DIANNE FEINSTEIN
Ranking Member


PATRICK J. LEAHY
United States Senator


RICHARD J. DURBIN
United States Senator

cc: The Honorable Charles E. Grassley, Chairman
The Honorable John G. Roberts Jr., Chief Justice of the United States