

United States Senate

WASHINGTON, DC 20510

October 19, 2018

Mr. James C. Duff
Director
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. Duff:

We write to bring to your attention a “Federal Clerkship Training Academy” (hereafter “Academy”) sponsored by the Heritage Foundation. According to promotional materials, the purpose of the Academy is to train individuals who will serve as clerks to federal judges starting in 2019 on “originalism, textualism, habeas corpus, the Bill of Rights, and other substantive legal and practical subject matter, all aimed at preparing attendees to excel as clerks in the U.S. federal court system. Faculty for the academy will include “several distinguished judges who currently sit on the U.S. Circuit Courts of Appeals...”¹ For the reasons that follow, we believe that the participation of federal judges in secret, partisan training academies like this is inconsistent with the Code of Conduct for United States Judges. We are also concerned that judges who employ graduates of the Academy as clerks may have the integrity of their decisions called into question. Accordingly, we request that the Administrative Office of the United States Courts, and/or the Committee on Codes of Conduct, review this matter and provide guidance to participating judges as appropriate.

When the Heritage Foundation original publicized its Academy, it listed the following “mutual commitments” to which participants would have to agree as a condition for participating:

Keep strictly confidential, and not distribute to any other person, any written materials you receive from the Heritage Foundation of members of the faculty in connection with your participation as an accepted attendee of the Federal Clerkship Training Academy
Not use any information received from The Heritage Foundation or members of the faculty in connection with your participation as an accepted attendee of the Federal Clerkship Training Academy for any purpose contrary to the mission or interest of The Heritage Foundation.

A screenshot of the original webpage is attached as Exhibit A. Shortly after public attention was drawn to the program,² Heritage removed these two “mutual commitments.” While we do not know whether Heritage has in fact changed the conditions for participating in its Academy or

¹ <http://www9.heritage.org/2019-federal-clerkship-training-academy.html>

² See, e.g., Mark Joseph Stern, *The Heritage Foundation's New, Secretive Clerkship Boot Camp Is Going to Further Trumpify the Courts*, SLATE, Oct. 16, 2018, <https://slate.com/news-and-politics/2018/10/heritage-foundation-judge-clerk-boot-camp.html>.

simply hidden them from public view, the ethical analysis remains the same because judges must take care to avoid the appearance of impropriety as well as impropriety itself.³

Federal judges can, and should, play an active role furthering legal education and the public's understanding of the law. As with any official judicial duty, those activities must be undertaken consistent with the Code of Conduct. The Heritage Foundation's program puts participating judges at risk of violating Canons 1, 2, and 4 of that Code.

A federal judge "should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."⁴ In doing so, judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."⁵ While the Code of Conduct explicitly permits law-related, extrajudicial activities, "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, [or] reflect adversely on the judge's impartiality...."⁶

The little that is known about The Heritage Foundation's Academy should give any judge—one who participates as faculty or one who employs a graduate as a clerk—pause. The Academy purports to provide training that will help clerks "excel" while serving a member of the federal judiciary, yet demands that the training be kept secret and the information received not used for a "purpose contrary to the mission or interest of The Heritage Foundation." Neither requirement promotes the integrity and independence of the judiciary, nor do they enhance the perception by litigants or the general public that the courts are a domain that remains impartial to all parties who come before it.

We appreciate that an effective training program cannot take place entirely within the public eye. The Academy's "mutual commitments" go well beyond that, however, barring participants from disclosing any materials received to any other person. Presumably, that even includes the judges that employ its graduates. A judge who agrees to train judicial clerks under these conditions endorses the view that secrecy and fidelity to the "mission or interest of The Heritage Foundation" are appropriate for federal judicial clerks. That is inconsistent with a judge's obligation to promote an independent judiciary.

Our concerns are heightened given the mission and interests of The Heritage Foundation, a policy and advocacy organization that promotes "conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."⁷ The Heritage Foundation regularly sponsors events and publishes papers on policies and programs that currently are, or may be, challenged in federal court, such as the Affordable Care Act,⁸ the Deferred Action for Childhood Arrival program (DACA),⁹ federal tax law,¹⁰ and voting rights.¹¹

³ Code of Conduct for United States Judges, Canon 2.

⁴ Code of Conduct for United States Judges, Canon 1.

⁵ Code of Conduct for United States Judges, Canon 2(a).

⁶ Code of Conduct for United States Judges, Canon 4.

⁷ <https://www.heritage.org/about-heritage/mission>

⁸ <https://www.heritage.org/health-care-reform/commentary/obamacares-constitutionality-ends-when-its-tax-ends>

⁹ <https://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted>

The Heritage Foundation is affiliated with the Heritage Action for America, a 501(c)(4) lobbying and political action organization that claims to have

both thwarted the liberal agenda and advanced conservative principles. We have kept up momentum for Obamacare repeal even when the Establishment has declared it not worth fighting. We have led the fight for both spending cuts and tax cuts, and our bold stance against confirming any of Barack Obama's judicial nominees in 2016 paved the way for Neil Gorsuch's confirmation to the Supreme Court in 2017.¹²

It is reasonable to conclude that a clerkship training program run by an organization that so broadly and aggressively takes positions on matters before the federal courts, and that is affiliated with an advocacy organization that reinforces those positions through lobbying, would espouse a similar point of view. Although judges are encouraged to use their unique position to "contribute to the law, the legal system, and the administration of justice,"¹³ the Committee on Codes of Conduct has opined:

[A] judge's participation in a training program that will only benefit a specific constituency, as opposed to the legal system as a whole, cannot be characterized as an activity to improve the law within the meaning of Canon 4. For example, judge participation in legal training offered by an issue-specific advocacy group that appears regularly in the judge's court may be perceived as lending the prestige of the judicial office to advance the interests of the group.¹⁴

The Heritage Foundation espouses a specific point of view on a wide range of issues before the federal courts. It is hard to see how a judge's participation in a secret clerkship training program run by the Foundation could not appear to lend prestige to its efforts. Indeed, that is precisely the point.

As members of the Senate Judiciary Committee, we observe firsthand the political battle for the control of the federal courts. While some of that occurs by constitutional design and is inevitable, the politicization of the courts has reached a critical level. Anonymous donors spend millions of dollars of dark money to affect the votes of Senators on judicial nominations. Courts are now deluged with amicus briefs, a form of judicially lobbying signaling how non-party interests would like a court to rule. These same groups in turn spend millions of dollars to elect politicians who support their positions.

Federal judges cannot control the actions of outside groups seeking to influence the courts, but they can control their own conduct. Staying above the political fray does not mean being naïve or willfully ignorant of it. As Chief Justice John Roberts said on October 16, 2018, in the wake

¹⁰ <https://www.heritage.org/taxes/commentary/the-left-arguing-constitutional-right-tax-deduction-heres-why-itll-fail>

¹¹ <https://www.heritage.org/election-integrity/commentary/texas-wins-dogged-fight-voter-id>

¹² <https://heritageaction.com/about>


¹³ Code of Conduct for United States Judges, Commentary to Canon 4.

¹⁴ Committee on Judicial Conduct Advisory Op. 105. *See also* Advisory Op. 87 ("[M]erely because a provider offers CLE credit or is a "non-profit" entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2.").

of the confirmation of Justice Brett Kavanaugh, the courts do not serve “one party or one interest” but “one nation.” Issuing guidance urging federal judges to avoid involvement in secret and partisan clerkship training programs is one way to heed the Chief Justice’s call.

Sincerely,


Sheldon Whitehouse
United States Senator


Richard Blumenthal
United States Senator


Mazie K. Hirono
United States Senator

cc: Chief Justice John G. Roberts, Jr.

Exhibit A

Exhibit A



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2019 Federal Clerkship Training Academy

Apply Today for the 2019 Federal Clerkship Training Academy

You are cordially invited to apply to attend the 2019 Federal Clerkship Training Academy, hosted by The Heritage Foundation in Washington, DC on February 6-8, 2019. Topics covered will include originalism, textualism, habeas corpus, the Bill of Rights, and other substantive legal and practical subject matter, all aimed at preparing attendees to excel as clerks in the U.S. federal court system. Faculty will include several distinguished judges

who currently serve on U.S. Circuit Courts of Appeals, and several professors who teach at various prominent law schools. The program is designed exclusively for attendees who, as of the dates of their respective applications, have already accepted offers for federal clerkships with start dates in 2019.

Acceptance to the 2019 Federal Clerkship Training Academy is competitive, as seats are limited. Completed applications must be received by no later than October 26, 2018. Acceptances may be made on a rolling basis until all seats are filled. You are therefore encouraged to submit your application as soon as reasonably possible. All applicants will be notified of decisions regarding acceptances by no later than November 16, 2018.

[Apply Now](#)

MUTUAL COMMITMENTS

To prospective applicants desiring to attend the Federal Clerkship Training Academy:

The Federal Clerkship Training Academy is made possible by generous

Exhibit A

donors, whose benefactions ultimately constitute a significant financial investment in each and every attendee. As such, attendees are expected, and by signing the attached application below you agree and commit if accepted, to:

(a) Keep strictly confidential, and not distribute to any other person, any written materials you receive from The Heritage Foundation or members of the faculty in connection with your participation as an accepted attendee of the Federal Clerkship Training Academy;

(b) Not use any information received from The Heritage Foundation or members of the faculty in connection with your participation as an accepted attendee of the Federal Clerkship Training Academy for any purpose contrary to the mission or interest of The Heritage Foundation;

(c) Attend and participate in the Federal Clerkship Training Academy in its entirety; and

(d) Provide thorough evaluations and feedback to The Heritage Foundation regarding the content of the sessions and the overall Federal Clerkship Training Academy experience and, if requested by The Heritage Foundation, engage in reasonable efforts to identify other individuals who may wish to apply to attend future Federal Clerkship Training Academy events.

In return, The Heritage Foundation will ensure that reasonable expenses incurred for the following expenses are covered for Federal Clerkship Training Academy attendees:

(a) Round-trip airfare or train fare up to a maximum of \$250.00 per attendee for travel to and from the Federal Clerkship Training Academy in Washington, DC (attendees will simply need to cover airfare or train fare amounts above \$250.00);

(b) Hotel accommodations for two nights for attendees who do not reside within a reasonable commuting distance from the event (or three nights, if the attendee is traveling from a place of residence in the Mountain Time Zone or farther west), including the requisite taxes, during the Federal Clerkship Training Academy;

(c) All scheduled meals at Federal Clerkship Training Academy events; and

(d) All provided materials.

Please direct any and all questions regarding these mutual commitments (and any related matters pertaining to the logistics for the Federal Clerkship Training Academy) to Jessica Kline at Jessica.Kline@heritage.org, 202-608-6184.

Exhibit A

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