LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

July 23, 2020

The Hon. James Lankford, Chairman
The Hon. Jeanne Shaheen
Senate Select Committee on Ethics
220 Hart Office Building
Washington, DC 20510

RE: Request for Investigation; The Hons. Dianne Feinstein, Patrick Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Mazie K. Hirono, Cory A. Booker, and Kamala D. Harris

Dear Senators Lankford and Shaheen:

Landmark Legal Foundation requests that the U.S. Senate Select Committee on Ethics investigate Senators Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Hirono, Booker and Harris to determine whether recent *ex parte* communications with three federal judges on the U.S. Circuit Court of Appeals for the Eleventh Circuit constitute improper conduct that may reflect upon the Senate. The Senate must immediately reprimand each of the senators, who constitute the full Democratic membership of the Senate Judiciary Committee, for their attempt to intimidate federal judges and improperly influence the outcome of a pending matter. This is a serious breach of both the separation of powers and of legal ethics that necessitates an immediate investigation by the Ethics Committee.

On July 21, 2020, all Judiciary Committee Democrats sent letters to Judges Robert Luck, Barbara Lagoa, and Andrew Brasher requesting an explanation for their "continued participation in *Jones v. DeSantis,* a case implicating the voting rights of 750,000 Florida residents." The Senators contend, wrongfully, that their inquiry is an exercise of their authority "as the first branch . . . to oversee the judiciary." The letters include reference to Rules of Judicial Ethics implying a threat to initiate complaints against the judges if they refuse to recuse themselves from the *Jones v. DeSantis* appeal. (Copies of the letters were sent by the Judiciary Committee Democrats to Judge Ralph R. Erickson, Chair of the federal judiciary's Committee on Codes and Ethics.)

As explained in a *National Review* "Bench Memos" analysis published today, the Judiciary Committee's Minority letters are an improper – and unethical – attempt to bully Judges Lagoa and Luck. (While focused on the Lagoa and Luck letters, the same ethical concerns apply in Judge Brasher's case. All three letters are attached.):

> The two letters are a brazen exercise in bullying federal judges, and they reflect a profound confusion about Congress's proper relationship with the federal judiciary in our constitutional system of separation of powers. Further, they constitute illicit ex parte communications with federal judges regarding motions pending before them.

Ed Whelan, "Senate Democrats Ignorantly Bully Eleventh Circuit Judges," *National Review Bench Memos,* (July 23, 2020) https://www.nationalreview.com/bench-memos/senate-democrats-ignorantly-bully-eleventh-circuit-judges/.

Mr. Whelan's analysis raises extremely important questions requiring the Select Committee on Ethics' investigation. In particular, whether the senators' conduct constitutes an attempt to intimidate members of the judiciary that reflects on the Senate; whether the Senators' letters constitute improper *ex parte* communications constituting unethical conduct by all but Senator Feinstein – the only non-attorney of the group, that reflects on the Senate; and whether the Senators' letters constitute an improper attempt to affect the outcome of a judicial matter that reflects on the Senate.

As Mr. Whelan explains:

> Congress does not possess a general authority "to oversee the federal Judiciary." Congress does (I think) have authority to enact conflict-of-interest rules for federal judges, and that legislative authority would include the ability to explore how well the rules that it has enacted are working. But even apart from the fact that minority members of a Senate committee can't invoke the authority of the committee (much less of Congress), that very limited ability would not remotely justify the Democrats' unprecedented demand that Luck and Lagoa explain to them their participation in *Jones v. DeSantis.*
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> Further, the Democratic senators have sent Luck and Lagoa their statements of support for plaintiffs' motion to disqualify at the very time that motion is pending before Luck and Lagoa. The senators did not seek the Eleventh Circuit's permission to contact the judges on this matter, nor did they even send counsel in *Jones v. DeSantis* copies of their letters. That means, as Eleventh Circuit chief judge William Pryor has informed the parties in the case, that the letters are "*ex parte* communications" to Luck and Lagoa on the merits of that motion.
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> The rules of professional conduct for lawyers bar lawyers from making unauthorized ex parte communications to judges—communications, that is, outside of the presence of the opposing party. (Each state has its own set of rules, but most track the ABA's Model Rules of Professional Conduct, which set forth the bar on ex parte communications in Rule 3.5(b).) Other than Feinstein, every Democratic signatory of the letters is a lawyer. If they are current members of a bar, they should be subject to discipline for their violation of the ban on *ex parte* communications.

The Select Committee on Ethic's jurisdiction is not limited to violations of specific Senate rules. Senate Resolution 338, as amended, gives the Select Committee the authority to

investigate Members who engage in "improper conduct which may reflect upon the Senate." U.S. Congress, Senate Select Committee on Ethics, Senate Ethics Manual, 2003 Edition, 108th Cong., 1st sess., S. Pub. 108-1 (Washington: GPO, 2003), p. 432. (Hereinafter, Senate Ethics Manual). In fact, "The Senate has disciplined Members for conduct that it has deemed unethical or improper, regardless of whether it violated any particular law or Senate rule or regulation." Id. at 12. Such conduct "has provided the basis for the Senate's most serious disciplinary cases in modern times." Id. at 432.

"Improper conduct" as set forth in the Senate Ethics Manual, Appendix E, "can be given meaning by reference to generally accepted standards of conduct, the letter and spirit of laws and Rules." Id. at 433. Actions amount to "improper conduct" when they are "so notorious or reprehensible" that they "could discredit the institution as a whole, not just the individual. Id. at 432. In these situations, the Senate is compelled to act to "protect its own integrity and reputation." Id.

In the past, the Senate has censured members for reading confidential communications on the Senate floor, and expelled members for accepting stock at reduced prices and then concealing the transaction. Id. at 433. Senators have been condemned for employing individuals with conflicts of interest and for not cooperating with Senate investigations. Id. These cases did not involve conduct that violated any law, rule, or regulation, but nevertheless, it was found to be in violation of "accepted standards and values controlling Senators' conduct." Id. at 434.

In more recent years, the Committee has reprimanded a Senator who failed to ensure separation of fund raising and official activities. Id. It also recommended expelling a member who abused his power by engaging in eighteen unwanted and unwelcome sexual advances over a period of twenty-one years. Id. at 435.

The Judiciary Committee minority's letters directed at judges of the Eleventh Circuit are within the same realm of this past unethical conduct. Their intimidation tactics may have a chilling effect on the administration of justice. Efforts to intimidate members of the federal judiciary reflect poorly on the Senate. This is greatly exacerbated by their role in the confirmation process.

Landmark requests that the Senate Select Committee on Ethics investigate whether Sens. Feinstein, Leahy, Durbin, Whitehouse, Blumenthal, Klobuchar, Coons, Hirono, Booker, and Harris have engaged in improper conduct warranting discipline. If it finds that a violation has occurred, the Committee should take immediate disciplinary action.

As Senator Coons is a subject of this complaint, this letter is addressed to the next ranking minority member of this committee.

Thank you for your attention to this important matter.

Sincerely,

Richard P. Hutchison
President

Attachments

United States Senate

July 21, 2020

The Hon. Robert Luck
United States Court of Appeals for the Eleventh Circuit
United States Courthouse Annex
111 North Adams Street, Room 5 SE
Tallahassee, FL 32301

Dear Judge Luck:

We write to request an explanation for your continued participation in *Jones v. DeSantis*, a case implicating the voting rights of 750,000 Florida residents.

The *Jones v. DeSantis* case addresses whether Florida can require individuals with past felony convictions to pay fines, fees, and other costs before regaining the right to vote. While a member of the Florida Supreme Court, you participated in an Advisory Opinion on this very issue, issued at the request of Governor Ron DeSantis. According to a motion to disqualify filed by the Campaign Legal Center, you participated in oral argument in that case on November 6, 2019 — just weeks before your confirmation to the Eleventh Circuit.

In documents and written testimony submitted to the Committee as part of your Eleventh Circuit nomination you promised under oath that, if confirmed to the Eleventh Circuit, you would recuse yourself from cases in which you participated as a Florida Supreme Court Justice. Specifically:

- In your Senate Judiciary Questionnaire (SJQ), you stated that you would "recuse [yourself] from any case where [you] have ever played any role." You likewise asserted you would "address any real or potential conflicts of interest by reference to section 455 of Title 28 of the United States Code and all applicable canons of the Code of Conduct for United States Judges." (SJQ at 56) Notably, 28 U.S.C. § 455 requires a judge disqualify himself or herself "in any proceeding in which his impartiality might reasonably be questioned."

- In Questions for the Record (QFRs) submitted to the Committee, you "anticipate[d] that there will be matters from which [you would] need to recuse [yourself], most notably cases on which [you] served as a lawyer, or as a trial or appellate judge." (Response to Leahy QFR 18(a))

Your participation in the decision to grant *en banc* review in *Jones*, and any further participation in this case, appears to contradict the commitments you made to the Committee that you would recuse yourself from *any* case where you have "ever played any role."

Your involvement in this case also appears to violate the Code of Conduct for United States Judges. Canon 3(C) of the Code governs "Disqualification," and 3(C)(1)(e) directs a judge to disqualify himself or herself where he or she "participated as a judge (in a previous judicial position) . . . concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy."

As the first branch, it falls to Congress to oversee the federal Judiciary. That oversight includes a responsibility to ensure that sitting federal judges honor their commitments to the Senate and the public and follow all applicable rules and codes of judicial conduct. Consistent with this congressional oversight purpose, we ask you to explain how your involvement in the decision to grant *en banc* review in *Jones v. DeSantis* — and your continued participation in this case — is consistent with the commitments you made to the Senate Judiciary Committee and the Code of Conduct.

Sincerely,

DIANNE FEINSTEIN
Ranking Member

PATRICK LEAHY
United States Senator

United States Senator

SHELDON WHITEHOUSE
United States Senator

AMY KLOBUCHAR
United States Senator

CHRISTOPHER A. COONS
United States Senator

RICHARD BLUMENTHAL
United States Senator

MAZIE K. HIRONO
United States Senator

CORY A. BOOKER
United States Senator

KAMALA D. HARRIS
United States Senator

cc: The Hon. Ralph R. Erickson; The Hon. William H. Pryor, Jr.

United States Senate

July 21, 2020

The Hon. Barbara Lagoa
United States Court of Appeals for the Eleventh Circuit
James Lawrence King Federal Justice Building
99 Northeast Fourth Street, Room 1223
Miami, FL 33132

Dear Judge Lagoa:

We write to request an explanation for your continued participation in *Jones v. DeSantis*, a case implicating the voting rights of 750,000 Florida residents.

The *Jones v. DeSantis* case addresses whether Florida can require individuals with past felony convictions to pay fines, fees, and other costs before regaining the right to vote. While a member of the Florida Supreme Court, you participated in an Advisory Opinion on this very issue, issued at the request of Governor Ron DeSantis. According to a motion to disqualify filed by the Campaign Legal Center, you participated in oral argument in that case on November 6, 2019 — just weeks before your confirmation to the Eleventh Circuit.

In documents and written testimony submitted to the Committee as part of your Eleventh Circuit nomination you promised under oath that, if confirmed to the Eleventh Circuit, you would recuse yourself from cases in which you participated as a Florida Supreme Court Justice. Specifically:

- In your Senate Judiciary Questionnaire (SJQ), you stated that you "would recuse [yourself] from any case in which [you] participated as a justice on the Supreme Court of Florida." (SJQ at 54)

- In Questions for the Record (QFRs) submitted to the Committee, you reaffirmed this commitment to recuse yourself from "cases involving either the Supreme Court of Florida or the Florida Third District Court of Appeals while [you were] a member of either court." (Response to Leahy QFR 19(a))

Your participation in the decision to grant *en banc* review in *Jones*, and any further participation in this case, appears to contradict your commitment to recuse yourself from *any* case in which you participated during your time on the Florida Supreme Court.

Your involvement in this case also appears to violate the Code of Conduct for United States Judges. Canon 3(C) of the Code governs "Disqualification," and

3(C)(1)(e) directs a judge to disqualify himself or herself where he or she "participated as a judge (in a previous judicial position) . . . concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy."

As the first branch, it falls to Congress to oversee the federal Judiciary. That oversight includes a responsibility to ensure that sitting federal judges honor their commitments to the Senate and the public and follow all applicable rules and codes of judicial conduct. Consistent with this congressional oversight purpose, we ask you to explain how your involvement in the decision to grant *en banc* review in *Jones v. DeSantis* — and your continued participation in this case — is consistent with the commitments you made to the Senate Judiciary Committee and the Code of Conduct.

Sincerely,

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CORY A. BOOKER
United States Senator

KAMALA D. HARRIS
United States Senator

cc: The Hon. Ralph R. Erickson; The Hon. William H. Pryor, Jr.

United States Senate

July 21, 2020

The Hon. Andrew Brasher
United States Court of Appeals for the Eleventh Circuit
Hugo L. Black United States Courthouse
1729 Fifth Avenue North, Room 268
Birmingham, AL 35203-2000

Dear Judge Brasher:

We write to request an explanation for your involvement in *Jones v. DeSantis*, a case implicating the voting rights of 750,000 Florida residents.

The *Jones v. DeSantis* case addresses whether Florida can require individuals with past felony convictions to pay fines, fees, and other costs before regaining the right to vote. While Alabama's Solicitor General, you participated in a related case, *Thompson v. Alabama*, in which plaintiffs challenged an Alabama felon disenfranchisement law similar to that at issue in *Jones*. According to a motion to disqualify filed by the Campaign Legal Center, in *Thompson v. Alabama*, you "raised the same legal arguments to defend against plaintiffs' . . . claims as the State" of Florida raises in *Jones*. (Campaign Legal Center Motion to Disqualify at 17)

In documents submitted to the Committee as part of your Eleventh Circuit nomination you promised under oath that, if confirmed to the Eleventh Circuit, you would recuse yourself from cases implicating laws or policies that you had defended in your role as Solicitor General. Specifically:

- In your Senate Judiciary Questionnaire (SJQ), you stated that you "will recuse in any litigation where [you] have ever played a role." You added that you "intend to recuse from any current or future case that challenges a government law or policy that [you] have previously defended." (SJQ at 48)

- You likewise asserted in your SJQ that, "[f]or a reasonable period of time, [you] anticipate recusing in cases where the Office of the Alabama Attorney General represents a party." (*Id.*)

Your apparent plan to participate in the *Jones* case appears to contradict the commitments you made to the Committee that you would recuse yourself from *any* litigation where you have *ever* played a role. As the Campaign Legal Center highlights, the outcome in *Thompson* "will likely be controlled by the decision in this case." It likewise contradicts your commitment to recuse from cases implicating laws or policies that you had previously defended.

Your involvement in this case also appears to violate the Code of Conduct for United States Judges. Canon 3(C) of the Code governs "Disqualification," and 3(C)(1)(e) directs a judge to disqualify himself or herself where he or she "participated as a . . . counsel . . . concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy."

As the first branch, it falls to Congress to oversee the federal Judiciary. That oversight includes a responsibility to ensure that sitting federal judges honor their commitments to the Senate and the public and follow all applicable rules and codes of judicial conduct. Consistent with this congressional oversight purpose, we ask you to explain how your potential involvement in *Jones v. DeSantis* is consistent with the commitments you made to the Senate Judiciary Committee and the Code of Conduct.

Sincerely,

DIANNE FEINSTEIN
Ranking Member

PATRICK LEAHY
United States Senator

United States Senator

SHELDON WHITEHOUSE
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cc: The Hon. Ralph R. Erickson; The Hon. William H. Pryor, Jr.