

Congress of the United States
Washington, DC 20515

VIA ELECTRONIC TRANSMISSION

October 11, 2022

Richard Revesz
Director, American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear Director Revesz:

I write you regarding the American Law Institute's (ALI) recently approved Restatement of the Law, Consumer Contracts. My understanding is that this restatement departs dramatically from the ALI's historic mission to educate judges and instead proposes novel legal rules that advance a particular policy agenda. I am concerned that the ALI's deepening engagement in legal advocacy through novel restatements of the law, such as its attempted Restatement of Copyright Law, appears poised to mislead judges as to existing law and potentially compromise fairness in the courts.

The Consumer Contracts Restatement, for example, proposes a separate set of legal rules to govern virtually any agreement between a business and a consumer in the United States. Many of these proposed rules appear to represent innovations in contract law doctrine that no jurisdiction adopts. These novel rules appear to subject agreements between businesses and consumers to heightened judicial scrutiny with respect to the adoption, interpretation, and enforceability of contract terms supplied by businesses. This restatement also creates the impression that this one-sided view of contract law is firmly grounded in existing black letter law, and reflects prevailing contract law doctrine. This does not appear to be accurate based on my understanding of the law.

While the ALI is obviously free to propose new legal rules, the involvement of sitting federal judges in such an endeavor raises significant questions and concerns. It is my understanding that many sitting federal judges are elected ALI members. As you may be aware, the Code of Conduct for U.S. Judges expressly prohibits judges from engaging in political activity and cautions against participation in extrajudicial activities that "reflect adversely on the judge's impartiality." Accordingly, given both the concerns with this attempted "restatement" of the law and the involvement of sitting members of the federal judiciary, I ask that you answer the following questions by no later than December 31, 2022:

1. How many members of the federal judiciary are currently members of the ALI? Please provide the names of each federal judge—including Article I and territorial judges—who are members of ALI.
2. What level of participating do federal judges have in the development of restatements of law?

3. Does the involvement of sitting federal judges in the development of restatements of law create the appearance of impartiality or impropriety?
4. Should ALI restatements serve as a tool to reform the law through the inclusion of novel legal rules? Why or why not? If not, why has the ALI pursued such an approach in this restatement and in the Restatement of Copyrights, which I have previously written to you about with my concerns?
5. Should ALI restatements of law only be considered an educational resource that simply clarifies existing, black letter law?
6. Do you believe the inclusion of novel restatement provisions that do not reflect legal rules adopted by courts has increased during your tenure as ALI Director? If not, then how do you explain the situation with this current restatement and with your efforts on the Restatement of Copyrights?

Thank you for your prompt attention to these questions. I look forward to your answers and to gaining further understanding about the ALI's approach to restatements of law.

Sincerely,

A handwritten signature in blue ink that reads "Thom Tillis". The signature is written in a cursive, flowing style.

Thom Tillis
U.S. Senator