MAINTAINING JUDICIAL INDEPENDENCE AND THE RULE OF LAW: EXAMINING THE CAUSES AND CONSEQUENCES OF COURT CAPTURE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 22, 2020

Serial No. 116–86

Printed for the use of the Committee on the Judiciary

Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

42–832 WASHINGTON : 2022

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MAINTAINING JUDICIAL INDEPENDENCE AND THE RULE OF LAW: EXAMINING THE CAUSES AND CONSEQUENCES OF COURT CAPTURE

Tuesday, September 22, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 2:02 p.m., 2141 Rayburn Building, Hon. Henry C. "Hank" Johnson, Jr. [Chair of the Subcommittee] presiding.

Present: Representatives Johnson of Georgia [presiding], Correa, Jeffries, Stanton, Lofgren, Cohen, Jackson Lee, Roby, Jordan, Chabot, Gaetz, Johnson of Louisiana, Biggs, Cline, and Tiffany.

Staff present: John Doty, Senior Advisor; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel; Rosalind Jackson, Professional Staff Member; Christopher Hixon, Minority Staff Director; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Counsel; Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will come to order. The chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to this afternoon's hearing on "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture."

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today.

If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I will now recognize myself for an opening statement.

This hearing has been rescheduled many times, and I thank my colleagues for their patience, as we have worked to find a date and I thank our Witnesses for their flexibility.

The issue of the politicization of our cherished court system is a matter of great importance to me and, I am sure, this sentiment is echoed by many of my colleagues here today.

I don't need to tell you that this hearing has taken on new weight, given the events of the past week. The loss of Supreme Court Justice Ruth Bader Ginsburg is something we all feel acutely.

She was inspirational, not just as a way paver and role model for generations of lawyers here and around the world. She fought to protect so many of the rights that shape our lives as citizens of this nation.

We are all better off in some small way because she touched our lives. We know her as someone who started her career fighting for women's equality and we know her as someone who had a deep heartfelt commitment to our Constitution.

This is a personal loss to all of us. No one can ever replace her, but we must honor her legacy by continuing to fight for the rights she championed her entire career and by protecting the institution that she loved.

What made Justice Ginsburg so beloved was her commitment to justice. She wasn't a rubber stamp for anyone, not for a president, not for a political party, not for an ideological society or organization, and certainly not for any corporate interests.

In an era when our Constitution is under attack and our fundamental rights hang in the balance, the sanctity of the third branch is essential to preserving our fragile democracy.

An independent and accountable court system is essential to a free and fair democratic society. Without an accountable and independent judiciary, the fundamental promise that all of us are equal in the eyes of the law becomes a lie, and if the American people believe that justice is no longer equal, our judges lose a principle source of their authority, public faith in their integrity.

Unlike the other branches of government, few responsibilities of the judiciary are explicitly laid out in the Constitution. The reason we entrust judges with so much authority today is because we trust them to wield that authority independently of politics, political ideology, and personal connections.

Judges should not serve presidents, parties, or political movements. They should not be seen as compromised by special interests and dark money.

Judges should serve the cause of justice. Unfortunately, over the past years we have seen the rushed appointment of former political operatives to judgeships, a political and ideological organization given undue weight in Federal judicial nominations, and tens of millions of dollars spent by political and ideological organizations on Federal nominations.

We have also seen the President repeatedly attack Federal judges in an attempt to intimidate the courts into doing what he says. We have also seen little movement by the judiciary to protect its integrity against these assaults on the Rule of law.

Somehow, the Supreme Court still refuses to adopt a code of ethics. Somehow, the Judicial Conference is unable to advise lower court judges that Membership in groups dedicated to reshaping the judiciary is incompatible with their ethical obligations.

Somehow, the Supreme Court still uses its shadow docket to make life or death decisions via unsigned unexplained orders issued in the dead of night. This should worry anyone who cares about the political neutrality and independence of our judicial system.

In the last few years, we have also seen the Senate fail to live up to its constitutional obligation to dispassionately consider each and every one of the President—of President Trump's judicial nominees.

Americans now see the Senate as a rushed rubber stamp and many of us on this side of the Capitol are forced to agree. Dark money, partisan pressure, ideological litmus tests, attacks by the President, a rubber stamp Senate, and a midnight judicial appointment.

This is how courts are captured. This is how our judges can be seen to have lost their connection to the American people and to the Constitution.

This is how we lose the faith of our fellow citizens. It is not too late. As a wise person once said, it is not dark yet.

Ladies and gentlemen, it is getting there. I, for one, am deeply worried and it is time we investigate the depth and the breadth of this trend.

I am looking forward to hearing from our esteemed Witnesses who have agreed to share their knowledge and experiences with us today.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentlewoman from Alabama, Ms. Roby, for her opening statement.

Ms. ROBY. Thank you, Mr. Chair, and thank you to all our distinguished Witnesses for being here with us this afternoon.

This past Friday, we all learned about the passing of Supreme Court Justice Ruth Bader Ginsburg. Justice Ginsburg was a faithful public servant and trailblazer.

She is an icon and will always be a role model for women and men of all ages in the years to come. My prayers remain with her family and loved ones.

Today's hearing is entitled "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture."

This provides a timely opportunity to examine the role and future of the Federal judiciary and the justices and judges who preside over impartial justice.

While the title is, certainly, a mouthful, we plan to discuss the resources and tactics by private groups during nomination and confirmation process of judges and the idea that one side is seemingly capturing the courts.

This hearing also plans to explore the participation of sitting Federal judges in legal organizations such as the Federalist Society, American Constitution Society, and the American Bar Association.

Under current Federal election laws, groups such as social welfare organizations, labor unions, trade associations, and Chambers of Commerce are not required to disclose names of individual donors unless they are making electioneering communications or

independent expenditures to expressly advocate for the election or defeat of a candidate.

Because these organizations generally advocate in regard to specific issues and not endorsing or opposing specific candidates, their activities are overseen by the IRS and do not fall under FEC jurisdiction.

This is in contrast with political action committees, also known as PACs, that advocate or donate on behalf of specific candidates. Our Witnesses will discuss balancing the importance of First amendment speech with the public's interest in understanding who is making financial contributions.

This hearing will also cover what the majority has termed court capture, which describes the idea that one party is taking over the courts, apparently by nefarious means.

Regardless of who is president, regardless of what party they come from, if there is an opening on the Federal judiciary, the President should nominate a person for that role and the Senate should decide whether the candidate is qualified enough to be confirmed so our Federal courts can continue to function effectively.

During the nomination and confirmation process, it is proper and the American public should be able to voice their opinions to their elected officials about how they believe would be the best nominee.

Whether a person's voice is expressed through a letter, phone call, email, or financial donation, the public should be able to make their voices heard. Private organizations have the right under current finance laws to advocate for policy positions and laws.

A President and Senators ultimately have the only authority on the judicial nominees, not outside groups, no matter how much money they spend with their advocacy campaign.

Just because a President, whether Democratic or Republican, nominates a candidate for the Federal bunch does not mean that they are, quote, "capturing the courts," end quote.

Finally, we will hear from our Witnesses on Advisory Opinion 117, released by the Judicial Conference Code of Conduct Committee earlier this year. In this advisory opinion, the Committee determined that membership in the American Bar Association was acceptable, but membership in the Federalist Society and the American Constitution Society was inconsistent with the Federal Judges Code of Conduct canons.

Following reports of the draft advisory opinion, there was a—there was widespread criticism and concerns on the reasoning behind barring membership in certain organizations while allowing membership in others.

The Administrative Office of the U.S. Courts decided to ultimately table Advisory Opinion 117 and not publish it. Although at this time the issue is, largely, moot, I still look forward to hearing from our Witnesses on this issue.

I want to, again, thank all our distinguished Witnesses for being here with us this afternoon and I look forward to hearing your testimony on all of these very important issues.

With that, Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady from Alabama.

There being no opening statements from either Full Committee Chair or Ranking Member of the Full Committee, I will proceed now to our Witness.

I will now introduce the first panelist.

Senator Sheldon Whitehouse has represented the State of Rhode Island in the United States Senate since 2007 where he serves on the Judiciary Committee, the Finance Committee, the Environment and Public Works Committee, and the Budget Committee.

Before being elected to the Senate, Senator Whitehouse served as Rhode Island's U.S. Attorney and State Attorney General. Senator Whitehouse is a graduate of Yale University and the University of Virginia School of Law.

Welcome, Senator Whitehouse, and you may begin.

Before your testimony, however, I am reminding you that your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury, pursuant to 18 USC 1001, which may result in the imposition of a fine or imprisonment of up to five years or both.

With that, you may proceed.

TESTIMONY OF HON. SHELDON WHITEHOUSE

Senator WHITEHOUSE. Thank you, Chair.

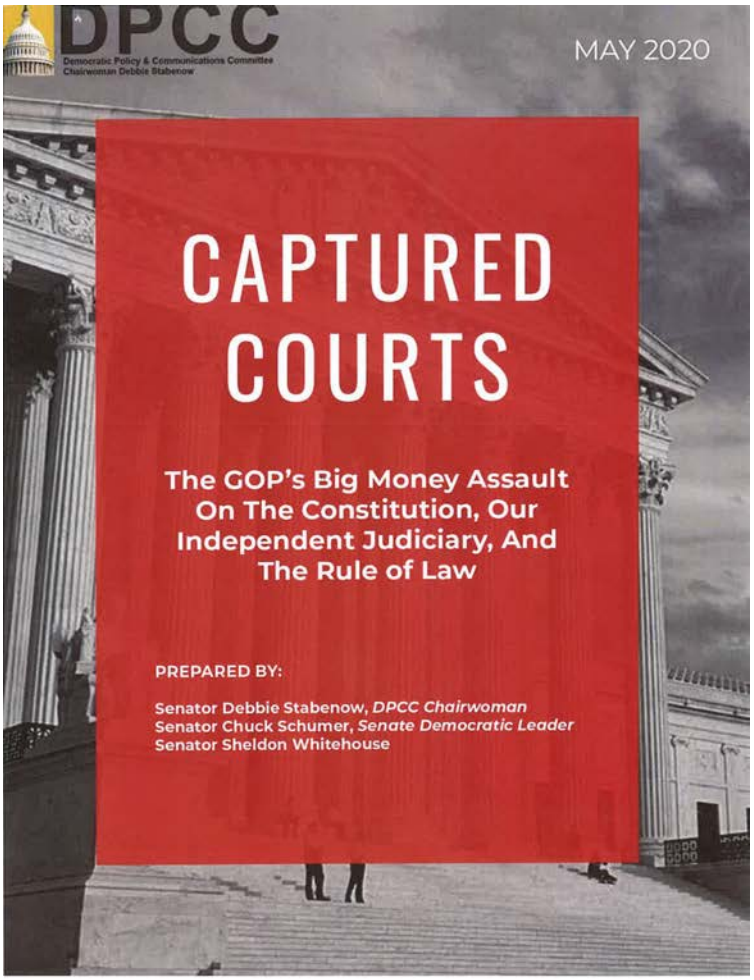
Chair Johnson, Ranking Member Roby, and Members of the Committee, first, I pay respect to Ruth Bader Ginsburg, whose life was a uniquely American story of passion and courage, leavened with determination and purpose to achieve justice and progress. She deserves a special place in America's pantheon. She will join our history among the greats, and I honor her today.

Second, I ask that our Senate Democratic Report on Court Capture and a Harvard Journal of Legislation article be made a part of the record.

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

THE HON. SHELDON WHITEHOUSE FOR THE RECORD


DPCC
Democratic Policy & Communications Committee
Chairwoman Debbie Stabenow
MAY 2020
CAPTURED COURTS
The GOP's Big Money Assault On The Constitution, Our Independent Judiciary, And The Rule of Law
PREPARED BY:
Senator Debbie Stabenow, DPCC Chairwoman
Senator Chuck Schumer, Senate Democratic Leader
Senator Sheldon Whitehouse

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EXECUTIVE SUMMARY

Under the Trump Administration, the Mitch McConnell-led Senate has produced few significant legislative accomplishments. Instead, it has prioritized packing the judiciary with far-right extremists, who then enjoy life tenure as federal judges. Working hand-in-hand with the administration and anonymously-funded outside groups, the Senate has confirmed **200 new life-tenured federal judges to aggressively remake the federal courts and rewrite the Constitution.** Most of these judges were chosen not for their qualifications or experience—which are often lacking—but for their demonstrated allegiance to Republican Party political goals. These judges have already begun rolling back the clock on civil rights, consumer protections, and the rights of ordinary Americans, reliably putting a thumb on the scale in favor of corporate and Republican political interests. From the Supreme Court on down, the special interests responsible for these judges' selection and confirmation are effectively capturing the judicial branch, packing our courts with politicians in robes.

With a captured judiciary, the Republican Party can do its donors' dirty work through the courts without fear of electoral consequences. This is anti-democratic and fundamentally un-American. Indeed, it is nothing less than a crisis for American democracy, which depends on a fair and impartial judiciary.

Behind this capture scheme lie hundreds of millions of dollars in anonymous spending funneled through an elaborate web of front groups. It is impossible to understand this capture scheme without understanding who is spending so much money to capture America's courts—and how and why.

How Did We Get Here?

Republican Party efforts to rig our nation's courts began long before President Trump came into office.

By the early 1970s, the emergence of popular, bipartisan public safety and welfare programs and civil rights protections had alarmed elements of corporate America and the conservative far-right. In response, future Supreme Court Justice Lewis Powell wrote the now-infamous "Powell Memo," which painted the business community as under attack by academics, the media, liberal politicians, and other progressives.[1] Powell urged corporate America to mobilize a counterattack.

The "conservative legal movement" became a key part of this reactionary counterattack. Constructed around novel theories of constitutional interpretation, this movement was at its core a political project to combat alleged "judicial activism" by allegedly left-leaning judges. In fact, the movement worked to ensure that corporate America, the ultra-rich, and the Republican Party would succeed in the courts.

The Federalist Society

In the 1980s, the Federalist Society for Law and Public Policy Studies became the institutional hub of this reactionary counterrevolution. Established in 1982, the Federalist Society "proclaimed the virtues of individual freedom and limited government"[2]—code words for its supporters' anti-government, anti-regulatory agenda.

The Federalist Society Logo

Today, the Federalist Society officially claims no role in politics, policy, or judicial nominations,[3] but the facts show that it is the nerve center for a complex and massively funded GOP apparatus designed to rewrite the law to suit the narrow-minded political orthodoxy

of the Federalist Society's backers. President Trump has acknowledged that the Federalist Society has "picked" his judges[4]: to date, fully 86% of Trump's nominees to the powerful federal appellate courts have been Federalist Society members.

Chief Justice Roberts' Right-Wing Rout

Chief Justice John Roberts has said there is no such thing as "Trump judges" or "Obama judges"—that "[w]hat we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[5] That sounds nice, but it doesn't hold up, given the Roberts Court's stunning record of partisan judicial activism.

Under Chief Justice Roberts, the Court's Republican-appointed five-justice majority handed down 80 partisan 5-4 decisions—joined by no Democratic appointee—that delivered wins to the Republican Party and the big corporate interests behind it.[6] These decisions have had (and will have) an enduring impact on voting rights, labor protections, environmental protections, civil rights, gun safety, and reproductive rights. The most flagrant of these partisan decisions—*Shelby County v. Holder* and *Citizens United v. Federal Election Commission*—have rigged the very rules of our democracy for Republican Party interests, resulting in voter suppression and corruption of our government through unlimited special-interest political spending.

Those notorious partisan decisions are just the tip of the iceberg—there are dozens and dozens more. By bare partisan majorities in these 80 decisions, Republican justices have greenlighted GOP gerrymandering and hobbled America's unions. They have slammed courthouse doors shut for workers and consumers, and gutted public safety regulations that kept our air and water clean. They have weaponized the Second Amendment to stymie sensible gun safety regulations, and curtailed access to reproductive healthcare.

More often than not, the Republican justices in these 80 decisions abandoned traditionally "conservative" principles like judicial restraint, respect for precedent, and even "originalism." As it turns out, these were doctrines of convenience, useful until they got in the way of a desired political result. For the "Roberts Five", they are summoned, or not, depending on the Republican Party's larger political goals.

This is not calling "balls and strikes."

Follow the Money

Republicans and their corporate and billionaire backers have used an outside-inside strategy to capture our courts: ultra-wealthy funders on the outside fund the operation, and politicians on the inside implement it. The Right's court-capture machinery is fueled by hundreds of millions in special-interest dollars, the sources of which are never fully disclosed to the public.

At the heart of this network is Leonard Leo. Mr. Leo, who co-chairs the Federalist Society and was until recently its well-paid Executive Vice President, has had unfettered access to President Trump as he makes judicial appointments that shape our country. At the same time, Leo manages and coordinates a secretive network of more than two dozen right-wing nonprofits that raised over $250 million between 2014 and 2017 alone—money targeted at efforts to support "conservative" policies and judges.[7] The true sources of that money—and the true interests of the anonymous donors—remain unknown to the public.

What is all this money used for? It funds a complex network of think tanks, law school centers, policy front groups, political campaign arms, and public relations shops, all focused on shaping the composition of the courts and the rulings they make. Deploying hundreds of millions of dollars from big-money donors like the Koch brothers and U.S. Chamber of Commerce, this network picks judicial nominees, wages media campaigns for their confirmation, props up the politicians that vote for them (while attacking those that don't), develops legal doctrines for them to adopt, then tees up cases for them to rule on—delivering big returns for the donors.

Shredding Senate Norms

Mitch McConnell's inside game has been just as important as the network's outside funding. Under his leadership, Senate Republicans have taken a wrecking ball to a century of bipartisan Senate norms. After McConnell became the Senate Majority Leader in January 2015, he obstructed President Obama's attempts to fill vacancies on the federal courts, leaving over 100 seats—including a stolen Supreme Court seat—for the next president to fill. Once a Republican president took over, the Republican majority then upended Senate rules to confirm President Trump's judicial nominees at a pace never before seen in the Senate. On the whole, these nominees have been notable for their inexperience, youth, and demonstrated partisan extremism. Rather than provide meaningful advice and consent on Trump's judicial nominees, McConnell's GOP Senate has been nothing more than a conveyor belt. It is unprecedented. But it is also a signal of just how central courts are to the Republican Party's reactionary political agenda.

Why Does It Matter?

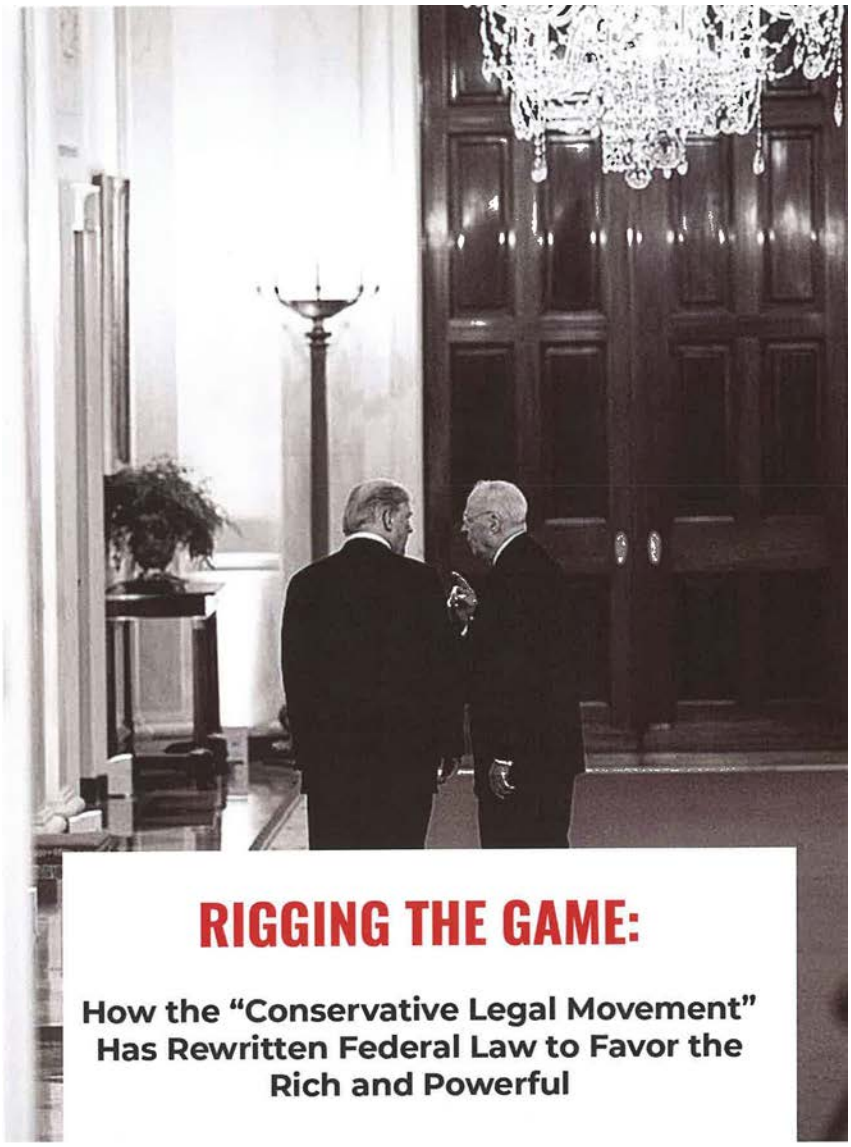
For McConnell-led Senate Republicans, confirming Trump judges has become the primary purpose of the Senate. The Democratic majority in the House has passed over 350 bills that have yet to even be considered by the Senate. Nearly 90% of these bills received bipartisan support and provide solutions that the voting public overwhelmingly approves of, such as lowering health care costs, combating the climate crisis, and reducing corruption in politics. Instead of passing legislation to help the American people, Mitch McConnell has chosen to bury those bills in his legislative graveyard.

There is a lot we have yet to learn about the special-interest "dark money" that fuels the complex court-packing scheme and its overlap with the funding behind the Republican Party. What is clear is that this effort has come at a tremendous cost for the American people and our democratic institutions.

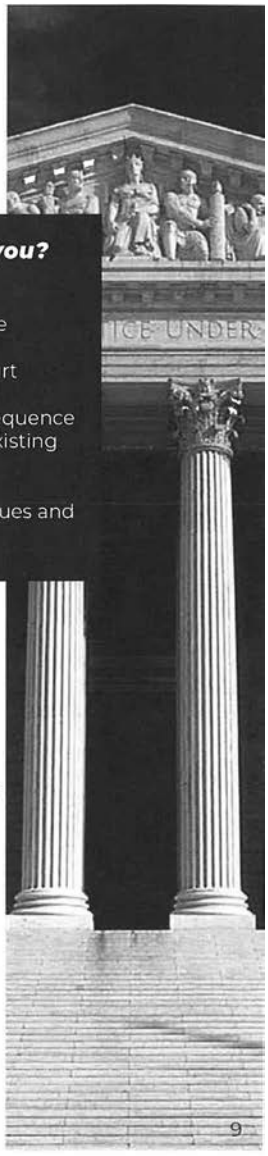
Over the coming months, Democrats in the Senate will shed light on the corruption and conflicts of interest now spreading around the Trump judiciary. As part of future efforts, we will show the real-world impact of the courts' activist decisions on issues ranging from healthcare and reproductive rights to voting rights and the climate. And we will propose legislative reforms to clean up this mess.

This report looks behind the curtain of the GOP's long campaign of judicial capture, into the fundamental threat it poses to the rule of law and American democracy.

Trump announces Judge Neil M. Gorsuch as his nominee to the U.S. Supreme Court


RIGGING THE GAME:
How the "Conservative Legal Movement" Has Rewritten Federal Law to Favor the Rich and Powerful

During Chief Justice Roberts's confirmation hearing, he famously assured the Senate that as a justice his role would be to do nothing more than **"call balls and strikes,"** and that judges must be **"bound by rules and precedents."**[8] But as one sitting federal judge recently observed, that pledge from Chief Justice Roberts "was a masterpiece of disingenuousness."[9]



What does GOP court-packing mean for you? Thanks to the Roberts Court:

- Voters across the country wait in line for hours to vote
- Special interests flood our airways with political ads
- Workers have discrimination cases thrown out of court
- Communities can't regulate gun violence
- Polluters can pollute our air and water without consequence
- Access to healthcare, including protections for pre-existing conditions, remains under attack

Democrats in the Senate will be documenting these issues and more over the coming months.

Rather than "call balls and strikes," that judge observed, "[t]he Court's hard right majority is actively participating in undermining American democracy. Indeed, the Roberts Court has contributed to ensuring that the political system in the United States pays little attention to ordinary Americans and responds only to the wishes of a relatively small number of powerful corporations and individuals." Earlier this year, another judge offered a similar rebuke of the Court in a letter of resignation from the Supreme Court Bar. He wrote to Chief Justice Roberts directly: "I believe that the Court majority, under your leadership, has become little more than a result-oriented extension of the right wing of the Republican Party."[10]

It is striking to hear these stinging critiques of the Supreme Court from fellow judges. But there's no denying their truth: wielding bare 5-4 partisan majorities, the Roberts Court has undone decades of precedent and bent the law toward the interests of the rich and powerful. In doing so, the "Roberts Five" eagerly overturned any decision or principle that stood in the way of their goals. In key cases, they even engaged in bizarre, non-factual fact-finding, well outside the appellate role.[11]

Now, with the addition of two hundred life-tenured Trump judges—more ideologically extreme and less experienced than any crop of judges in our nation's history—our federal courts risk becoming little more than an arm of the Republican Party's big donors.

It has become abundantly clear in the Roberts era that the idea that Federalist Society-approved federal judges are umpires in an honest game with rules that are fair to all Americans regardless of wealth, race, gender, or sexual orientation is a dangerous fiction. The reality is that in cases with political implications, these judges too often behave as politicians in robes, inflicting lasting harm to basic principles on which our country was founded.

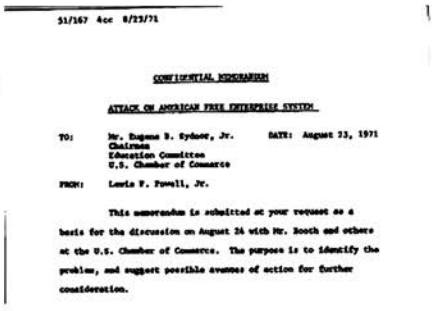
This has not come about by happenstance. It is the product of a long-term strategy to influence judicial selections and outcomes, which is well-funded by millions of dollars in anonymous, special-interest money.

Playing the Long Game: The Right's 50-Year Project to Capture the Courts
Lewis Powell, Edwin Meese, and the Origins of the Republican Judicial Takeover

The right-wing plan to reshape our nation's courts finds its roots in the 1960s and 1970s, amid a deep sense of corporate grievance and conservative racial resentment.

While the post-World War II economic boom broadened the middle class and allowed American business interests to prosper, many Americans still labored in unsafe and unsanitary workplaces, or suffered exposure to toxic consumer products and polluted air and water.

Against that backdrop, Americans mobilized to demand a government that would protect them from corporate excesses. The result was the bipartisan establishment of public safety and welfare programs and agencies that protect us to this day—such as President Johnson's "Great Society" programs and the Environmental Protection Agency, established by President Nixon.



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CONFIDENTIAL MEMORANDUM

ATTACK ON AMERICAN FREE ENTERPRISE SYSTEM

TO: Mr. Eugene B. Sydnor, Jr. DATE: August 23, 1971
Chairman
Education Committee
U.S. Chamber of Commerce

FROM: Lewis F. Powell, Jr.

This memorandum is submitted at your request as a basis for the discussion on August 24 with Mr. Booth and others at the U.S. Chamber of Commerce. The purpose is to identify the problem, and suggest possible avenues of action for further consideration.

The 1971 Powell Memo

In certain corporate circles, these developments were met with alarm. In 1971, at the request of the U.S. Chamber of Commerce—which would grow to become, in the words of its president, "the biggest gorilla" in Washington[12]—a corporate lawyer in Virginia wrote a confidential memo titled ***"Attack on American Free Enterprise System."*** That lawyer was future Supreme Court Justice Lewis Powell.

The Powell Memo sought to galvanize the business community toward political action. It announced that the "American economic system is under broad attack" from academics, the media, liberal politicians, and other progressives. In the wake of watershed civil rights advancements like the Court's ruling in *Brown v. Board of Education* and Congress's passage of the *Civil Rights Act of 1964*, Powell claimed that "we have seen the civil rights movement insist on re-writing many of the textbooks in our universities and schools." Against the popular force of the anti-war, civil rights, and environmental movements, Powell argued:

> [I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.

Supreme Court Justice Lewis F. Powell Jr.

Powell urged the business community to mobilize its counterattack through "a broader and more vigorous role in the political arena." This meant corporate lobbying in Congress.[13] And lobby corporations did. In 1971, only 175 corporate firms had registered lobbyists in Washington; by 1982, nearly 2,500 firms had registered lobbyists.[14]

Powell also identified the courts as a "vast area of opportunity." Bemoaning the "exploit[ation] of the judicial system" by groups such as the American Civil Liberties Union, Powell called on the business community to aggressively invest in the courts. "Under our constitutional system," Powell argued, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."

Just two months after submitting his memo, Powell was nominated by President Nixon to the Supreme Court. He was confirmed by a bipartisan vote of 89-1. This memo was not disclosed.

Growth of the Conservative Legal Movement

In the following decades, conservative Republicans and the American business community took up Powell's cause with remarkable zeal. Major business interests such as Exxon, Pfizer, RJR Nabisco, Koch Industries, Dow Chemical, Aetna, and Monsanto pumped millions of dollars into industry trade associations like the U.S. Chamber of Commerce. Ronald Reagan, then governor of California, and his state attorney general, Edwin Meese, encouraged the founding of Pacific Legal Foundation (PLF), the first of several business-funded "public interest" law firms. These groups filed strategic

lawsuits to advance business interests—and rewrite the laws—through the courts while obscuring the identities of the interests backing them. Ideological foundations established by wealthy industrialists—such as the Olin Foundation, the Sarah Scaife Foundation, and the Lynde and Harry Bradley Foundation—joined the fray. "Combining their vast resources," these "self-interested business concerns and ideologically driven foundations" invested millions of dollars into a broad array of programs designed to build the intellectual framework "for a new legal vision that was predominantly concerned with promoting and protecting commercial and private wealth", according to a report from Alliance for Justice.[15]

By the time Reagan became president, the conservative legal movement was well underway and well-funded. It now had an ally in the White House—and soon, under Attorney General Edwin Meese, one in the U.S. Department of Justice as well. The movement began aggressively pushing the courts to play an active role by striking down laws and reversing precedents it disliked.

Originalism is a political project, not a legal or constitutional one.

The New Judicial Activism

Ironically, this aggressively activist legal movement came masked as a call for "judicial restraint." In the years following the Second World War, the Supreme Court recognized a constitutional right to privacy and reproductive rights, allowed government agencies to regulate pollution and other harmful externalities of industry, provided due process protections for criminal defendants, and imposed school desegregation and constitutional civil rights protections for minorities. In particular, *Brown v. Board of Education*—the landmark Supreme Court case that unanimously declared racial segregation in public schools unconstitutional—became a lightning rod for conservative outrage.

Arguing that these developments were the product of liberal "judicial activism," the conservative movement countered by advancing the legal theory of originalism—that the Constitution's meaning should be treated as frozen in time at the moment of its ratification. The movement claimed that sticking closely to the "original intent" of the Framers was the only authoritative, neutral, and objective way to "follow the Constitution." In contrast to the liberals' so-called "activism" and the idea that our centuries-old Constitution must be interpreted to account for the needs of an evolving society, they argued that originalism was a model for "judicial restraint." Hardly.

Originalism is a political project, not a legal or constitutional one. Originalism is a judicial tool to achieve political and policy ends that serve corporate interests, social conservatives, and ultra-rich Americans. In the 1980s, the conservative legal movement began weaving an ornate tapestry of jurisprudential theory around "originalism," injecting it into legal academia and government. This provided an excellent screen for the work's true, political purpose, which was crystal clear behind the scenes. In a 1986 internal memo to Attorney General Edwin Meese, for example, Justice Department

lawyer Steven Calabresi criticized his department for "not acting as an agent of counterrevolutionary change."[16] Calabresi denounced the idea of "judicial restraint," insisting that aggressive originalism should be the driving force of the conservative legal movement. Calabresi argued that "the courts and the executive must start using their constitutional powers to hold the Congress within its proper constitutional sphere."[17]

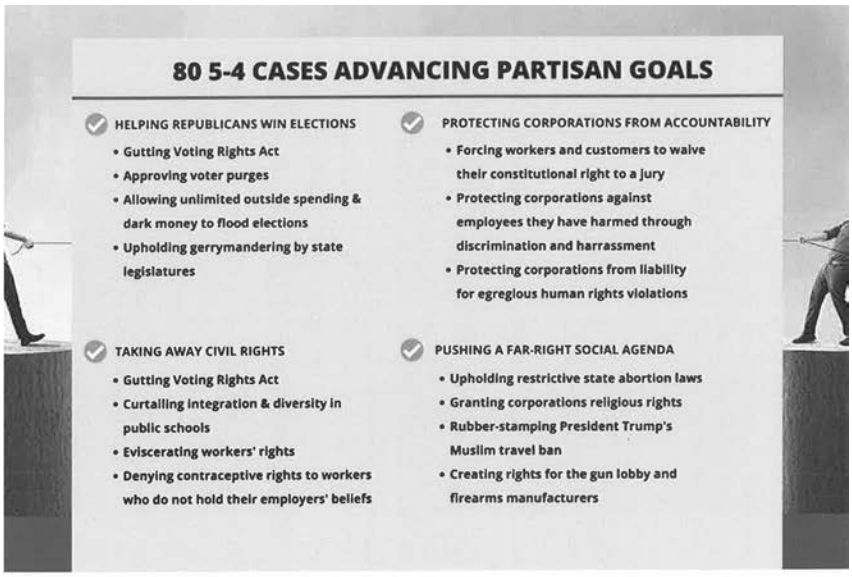
As one scholar wrote, "in addition to rolling back liberal judicial precedent, the movement conservatives in the Republican Party were intent on relitigating the New Deal by thoroughly reconceiving the scope of Congress's power vis-à-vis the states, and by attacking the constitutional legitimacy of the administrative state."[18]

Calabresi, who had co-founded the Federalist Society four years earlier, became an influential figure in the conservative legal movement. His vision of judicial activism and executive power, and of right-wing "counterrevolutionary" change through the courts, became the guiding light of the Federalist Society's legal movement. Not coincidentally, as Republicans gained political and judicial power under Reagan, George H. W. Bush, George W. Bush, and Trump, the purportedly foundational originalist concept of "judicial restraint" fell quickly by the wayside in favor of aggressive judicial review of Congressional lawmaking.

Before long, this "counterrevolutionary" project took hold at the Supreme Court. Originalism—with its aura of objectivity—provided the perfect cover. And where it didn't lead to sufficiently "counterrevolutionary" policy results, originalism—like other, *actually* law-conserving principles such as *stare decisis* and deference to fact finders—was conveniently ignored.

A Right-Wing Rout at the Supreme Court

The proof is in the numbers. During John Roberts's tenure as Chief Justice, the Court's five-justice Republican-appointed majority has handed down more than 80 partisan 5-4 decisions—joined by no Democratic appointee—that delivered wins to the Republican Party and the big corporate interests behind it. As we will address in greater detail as part of future efforts, these decisions have had dire consequences for ordinary Americans.

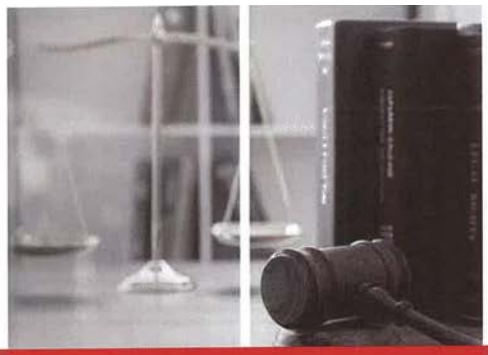


The most egregious of these partisan decisions—*Shelby County*, *Citizens United*, *Janus v. AFSCME*, and *District of Columbia v. Heller*, for example—are just the tip of the iceberg.[19] There are dozens and dozens more. By bare partisan majorities in these 80 cases, Republican justices have given the green light to rampant GOP voter suppression and gerrymandering (*Shelby County v. Holder*; *Husted v. Randolph Institute*;[20] *Rucho v. Common Cause*[21]). They have shut the courthouse doors to workers and consumers, allowing predatory corporations to enforce mandatory-arbitration contracts drafted heavily in their favor (*Epic Systems Corp. v. Lewis*;[22] *AT&T v. Concepcion*[23]). They have targeted America's labor unions with particular zeal (*Knox v. SEIU*;[24] *Harris v. Quinn*;[25] *Janus*[26]).

The "Roberts Five" have gutted regulations that once kept our air and water clean (*Michigan v. EPA*;[27] *Summers v. Earth Island Institute*[28]). They have rolled back the clock on civil rights, clearing the way for discrimination based on race, sex, and age (*Parents Involved v. Seattle School Dist. No. 1*;[29] *Ledbetter v. Goodyear Tire*;[30] *Gross v. FBL Financial Services*[31]). They have distorted the Second Amendment to stymie commonsense gun safety regulations (*Heller*;[32] *McDonald v. Chicago*[33]). They have curtailed access to reproductive healthcare (*Gonzalez v. Carhart*;[34] *Burwell v. Hobby Lobby*[35]). And through their ruling in *Citizens United*, they unleashed a "tsunami of slime" that has corrupted our government.[36]

Even when Chief Justice Roberts joins the Court's liberals, e.g., to uphold the Affordable Care Act, it appears he does so out of political, not legal, considerations. In reaching his ACA decision, Roberts "changed course multiple times," horse-trading votes with his colleagues and demanding that they agree to strike the ACA's Medicaid expansion as his price for upholding the broader law;[37] he also quietly narrowed the Constitution's Commerce Clause and created a "dragooning" (or coercion) theory to limit federal power over states.

On the way to this judicial landslide, the Republican majority on the Supreme Court has been stunningly cavalier with any doctrine, precedent, or congressional finding that gets in the way of furthering outcomes favored by the Republican Party and its big donors. Indeed, in over 50% of the 80 cases in the Republican judicial rout, the Court's majority ignored "conservative" principles like "originalism," "textualism," "judicial restraint," and "*stare decisis*," discarding them when they proved inconvenient. But in other cases—and often with little regard for the factual findings of lower courts or of Congress—the Court's right-wing majority selectively invoked these same "conservative" principles to bring about the Republican Party's policy goals again and again. And the majority has even invented "facts" when that helped it bring about the Republican party's political goals.[38]



Originalism and other conservative "doctrines of convenience" are being used to rewrite the way our democracy works in at least ***seven basic ways***. All of them follow a partisan agenda and consistently advance Republican Party interests. In the Republican Supreme Court majority's view of the world:

1. The President is all-powerful. The Roberts Court appears to be on the verge of embracing the conservative legal movement's "Unitary Executive Theory," a once-fringe legal doctrine that would give the president essentially unchecked power over administrative agencies.[39] Under President Trump, we have seen what an unchecked president can do, defying congressional oversight without accountability and shredding the rule of law.

2. Corporations trump people. Right-wing judges prioritize the rights of corporations over the rights of people. Under the Court's GOP majority, the rights of workers and consumers have been steadily whittled away, insulating wealthy interests from accountability when corporate malfeasance, discrimination, and harassment harm individual Americans. In fact, the Republican Court majority has repeatedly declared that corporations *are* people, entitled to their own constitutional rights, such as the First Amendment right to political speech.

3. Congress can't be trusted to legislate. In furtherance of its corporate agenda, the Court's Republican majority finds "rights" in the Constitution that make it difficult for Congress to pass laws that real people want; the majority casts aside the bipartisan work of Congress where it gets in its way. For example, in *Citizens United*, the Supreme Court invalidated a bipartisan campaign finance law based on a constitutional "right" to corporate political speech—a right found nowhere in the Constitution's text.

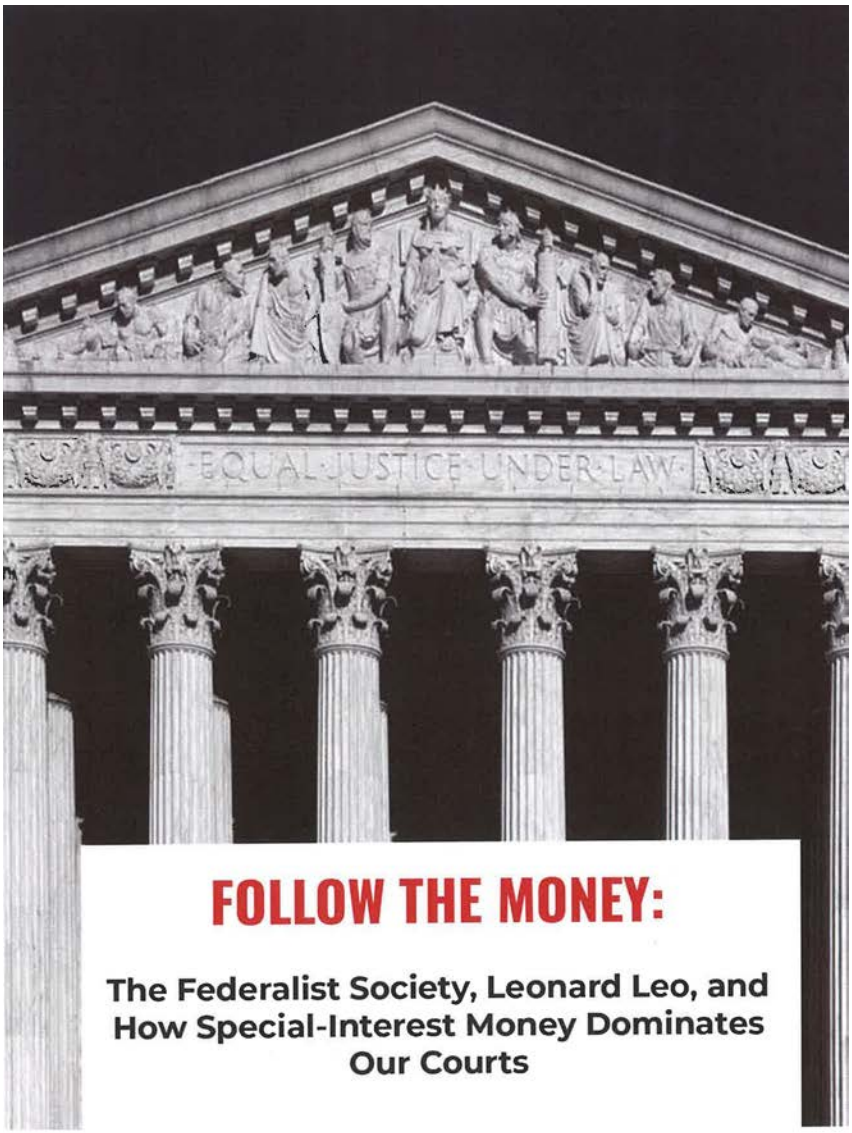
4. Administrative agencies can't be trusted to regulate. For decades we have relied on agencies like the Environmental Protection Agency, the Securities and Exchange Commission, and the Department of Labor to protect our environment, our financial security, and our workplaces. These agencies are designed to rely on expertise and evidence to make rules that benefit all Americans. The Roberts Court puts this system in jeopardy, undermining agency independence and the determinations of scientists, economists, and other experts.

5. Racism is a thing of the past. In justifying his decisive vote to gut the Voting Rights Act—which for decades protected minority voters from racially motivated voter suppression—John Roberts declared racism a relic of the past. Sure enough, in the decade that has followed that vote, the GOP has once again pursued race-based voter suppression. A similarly privileged and blinkered view of the world animates the Republican Court majority's hostility to school integration and affirmative action programs.

6. Everyday Americans can't be trusted to govern themselves. The Supreme Court has decided that it knows best how to regulate the basic terms of our democracy, and at every turn it has concluded that those with money and power should be in control. From campaign finance to voting rights to access to trial by jury, the rules of engagement are increasingly stacked in favor of big interests.

7. "Liberty for me, but not for thee." When individual rights and liberties come into tension with one another, the rights and liberties prized by Republicans always win out. In the Republican majority's view, for example, the individual right to own a gun is more important than the right of Americans to be safe from gun violence; a religious employer's right to "religious liberty" deserves more protection than an employee's right to access statutorily mandated contraceptive care.

For years, Republicans have argued that government is a threat to your liberty. The true threat to our liberty and equality is when unelected judges with life tenure act as servants to powerful business interests. With a judiciary captured by the special interests that fund the Republican Party, GOP politicians can trust the courts to do their dirty—and unpopular—work. They get to avoid the electoral consequences. This is anti-democratic and fundamentally un-American. Indeed, it represents nothing less than a crisis for American democracy, which relies at its core on a fair and impartial judiciary.


EQUAL JUSTICE UNDER LAW
FOLLOW THE MONEY:
The Federalist Society, Leonard Leo, and How Special-Interest Money Dominates Our Courts

Republican politicians and their billionaire backers have used an outside-inside strategy to capture our courts: wealthy funders on the outside fund the operation, and politicians on the inside put it into action. The entire operation is fueled by hundreds of millions of dollars of anonymous, special-interest "dark money."

At the center of the outside game sits the Federalist Society for Law and Public Policy Studies and its co-chair **Leonard Leo**.

The Federalist Society's Leonard Leo

Rise of the Federalist Society

In 1982, a small group of right-wing law students and professors at Yale University and the University of Chicago founded the Federalist Society for Law and Public Policy Studies. Supported by prominent conservatives such as future Supreme Court Justice Antonin Scalia, the Federalist Society aimed to provide an alternative to the liberal orthodoxy they viewed as dominating law school curricula and legal institutions.[40]

The Federalist Society "proclaimed the virtues of individual freedom and limited government"[41]—code words for the anti-government, anti-regulatory agenda laid out in the infamous Powell Memo. The Federalist Society also openly embraced the Republican Party's far-right social agenda—serving, for instance, as a hub for the gun industry's successful effort to create from whole cloth an individual right to bear arms under the Second Amendment (using a theory Republican-appointed Chief Justice Warren Burger once called a "fraud on the American public").[42]

Supreme Court Justice Antonin Scalia

Today, the Federalist Society has grown into a powerful nationwide political network, with tens of thousands of academics, practitioners, judges, politicians, and law students as members. It is a 501(c)(3) tax-exempt "charitable" organization that bills itself as a "debating society" for "a group of conservatives and libertarians interested in the current state of the legal order."[43] It claims it does not take legal or policy positions, or advocate for judicial nominees.[44]

Whatever its origins, the Federalist Society has effectively become a judicial lobbying interest group. As political scientists and journalists have documented, it provides the nerve center for a complex and massively funded apparatus—composed of think tanks, law school centers, policy front groups, political campaign arms, and public relations shops—all designed to rewrite the law according to the political orthodoxy of Federalist Society donors.[45]

Under Trump, the group has all but assumed complete control over the Administration's judicial selection and confirmation process, embedding its members in the White House and on the courts.[46]

The Federalist Society Chooses Our Judges

While the Federalist Society develops and promotes pro-corporate, pro-Republican-donor legal theories, it has also become the linchpin of Republican efforts to select and confirm judges.

Donald McGahn, a Federalist Society member and former Trump White House Counsel, remarked that Trump had "insourced" the Federalist Society for his judicial selection effort.[47] Leonard Leo, a leader of the Federalist Society and the architect of a secretive fundraising network, twice took formal "leave" from the Federalist Society to advise President Trump on his Supreme Court nominations,[48] raising a host of conflict-of-interest and financial-disclosure concerns. With McGahn, Leo crafted Trump's 2016 Supreme Court shortlist,[49] alleviating conservative Republicans' concerns that Trump might not nominate a reactionary Supreme Court justice and, in turn, securing a critical constituency for Trump's election.

As Trump himself stated plainly in 2016: "The Federalist Society vetted very carefully great scholars, pro-life, very, very fine people. Second Amendment—and you know, I think, a very good list. We have a list of twenty judges and all [have] been vetted by the Federalist Society and I think yeah, it's gotten great. It's gotten great marks." "We're going to have great judges," Trump promised, "all picked by Federalist Society."[50]

Just a "debating society," indeed.

Now, with a majority of the Supreme Court and hundreds of lower court judges aligned in lockstep with the Federalist Society's vision, it should come as little surprise that the courts are implementing the organization's political agenda—not to mention the Trump Administration's.[52] In doing so, they are handing consistent wins to the Republican Party, its socially conservative political base, and its corporate backers. This erodes the independence of our courts.

FEDERALIST SOCIETY PIPELINE TO THE BENCH

51

appearances by Brett Kavanaugh at Federalist Society events—some might call these auditions—before his nomination to the Supreme Court, Kavanaugh was also their celebrated guest after his confirmation.

FLORIDA GOVERNOR RON DESANTIS

appointed 56 state court judges during his first year in office. He made sharing Federalist Society's views his "singular test" for being appointed to the bench.[51]

86%

of Donald Trump's nominees to the Supreme Court and courts of appeals are Federalist Society members.

SUPREME COURT JUSTICES SCALIA, THOMAS, ROBERTS, ALITO, GORSUCH, AND KAVANAUGH

have all been affiliated with the Federalist Society and have regularly appeared at Federalist Society events.

FOLLOW THE MONEY (IF YOU CAN): THE FUNDING OF THE FEDERALIST SOCIETY

$20.7M the Federalist Society's total donations received in 2017.

$5.5M was routed through the Koch-linked group Donors Trust, an identity-laundering operation whose "donor-advised fund" structure hides the real identities of politically motivated megadonors.

$1.7M came from anonymous individuals. The bulk of that (at least $1.5 million) came from just nineteen anonymous individuals who each gave $50,000 or more.

$50K came from the United States Chamber of Commerce, which refuses to disclose its funding or even the businesses that make up its membership.

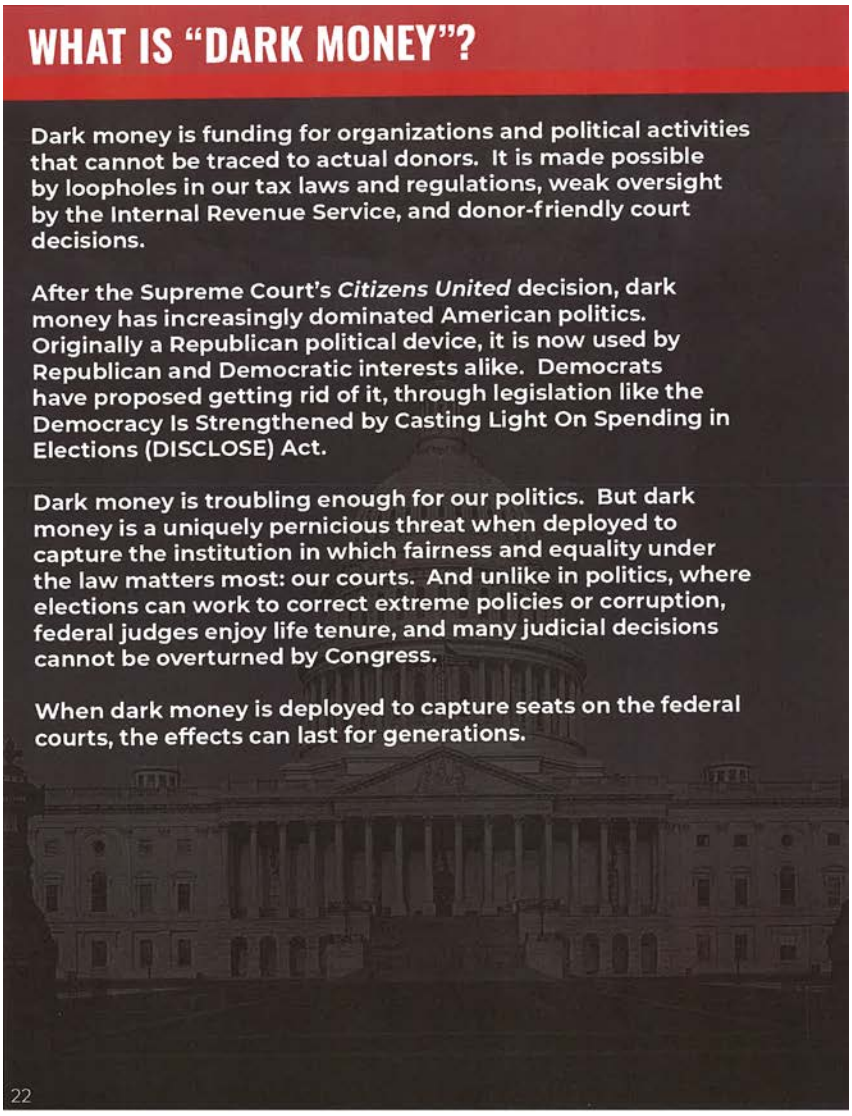
AT LEAST $2.4M came from private foundations or trusts, which are often tightly controlled by wealthy families with industry ties, and which use their tax-exempt status to spend unlimited sums on ideological causes.

$100K APIECE came from several large corporations such as Google, Koch Industries, and Walmart.

$50K APIECE came from several large corporations such as Chevron, Microsoft, and Pfizer. Prominent law firms that might argue cases before the Supreme Court, such as Baker & Hostetler and WilmerHale, also contributed tens of thousands of dollars to the Federalist Society.

$25K APIECE came from several large corporations such as Bank of America and Facebook.

21


WHAT IS "DARK MONEY"?
Dark money is funding for organizations and political activities that cannot be traced to actual donors. It is made possible by loopholes in our tax laws and regulations, weak oversight by the Internal Revenue Service, and donor-friendly court decisions.
After the Supreme Court's Citizens United decision, dark money has increasingly dominated American politics. Originally a Republican political device, it is now used by Republican and Democratic interests alike. Democrats have proposed getting rid of it, through legislation like the Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act.
Dark money is troubling enough for our politics. But dark money is a uniquely pernicious threat when deployed to capture the institution in which fairness and equality under the law matters most: our courts. And unlike in politics, where elections can work to correct extreme policies or corruption, federal judges enjoy life tenure, and many judicial decisions cannot be overturned by Congress.
When dark money is deployed to capture seats on the federal courts, the effects can last for generations.
22

Shadow Justice: Leonard Leo and the $250 Million Dark Money Judicial Influence Machine

In May 2019, the *Washington Post* published a groundbreaking investigation into Leonard Leo and his judicial-influence network. "At a time when Trump and Senate Majority Leader Mitch McConnell are rapidly reshaping federal courts by installing conservative judges and Supreme Court justices," the *Post* explained, "few people outside government have more influence over judicial appointments now than Leo." "For two decades, Leo has been on a mission to turn back the clock" at the Supreme Court.[53]

At a closed-door gathering of allies, Leo explained, "we're going to have to understand that judicial confirmations these days are more like political campaigns. . . . No one in this room has probably experienced the kind of transformation that I think we are beginning to see." Introduced as having "a significant leadership role in the selection and successful confirmation of a third of the currently sitting justices on the Supreme Court," Leo flexed his muscles: "I've seen that comment about the third of the Supreme Court, I prefer controlling interests," Leo said to laughs from the crowd. "But we haven't quite been able to launch a hostile takeover yet."[54]

While Leo was already "widely known as a confidant to Trump and as executive vice president of the Federalist Society," the *Post's* reporting revealed that, "behind the scenes, Leo is the maestro of a network of interlocking nonprofits working on media campaigns and other initiatives to sway lawmakers by generating public support for conservative judges."[55]

When pressed by the *Post* to explain his role coordinating the millions of dollars of special-interest money he is connected to, Leo avoided the question: "The *Washington Post* and other entities are more than welcome to write stories about money in politics," he demurred, "but I don't engage in that conversation because one, I'm not particularly knowledgeable about a lot of it, but, secondly, because it's just not what I do. . . . I don't waste my time on stories that involve money in politics because what I care about is ideas."[56]

IS IT LEGAL?

While presidents can of course seek advice, conflict-of-interest-laws require federal employees to disclose their potential conflicts of interest and to take steps to address them. Transparency prevents corruption.

Senate Democrats are investigating whether the Trump Administration and Leonard Leo, who took leave from his Federalist Society job to advise the Trump Administration, complied with these laws.

Working to help certain people to become judges is not in itself wrong. But orchestrating secret, multi-million-dollar campaigns to get judges on the bench who will reliably support your donors' interests may run afoul of federal law. And it certainly undermines the integrity of the courts.

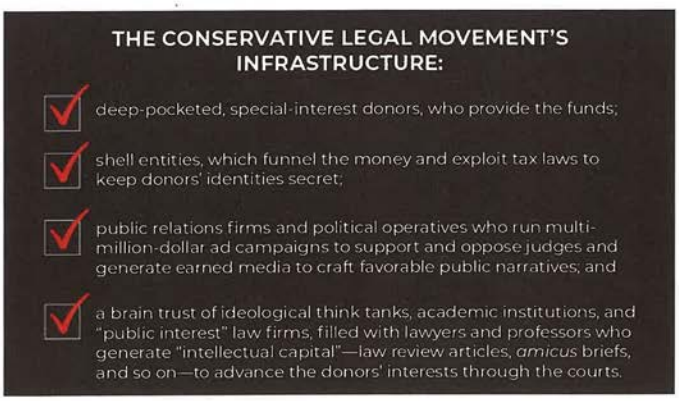
But building off previous investigative efforts by OpenSecrets and MapLight, the *Post* report found Leonard Leo at the heart of a network of more than two dozen right-wing nonprofit entities–groups that raised over $250 million between 2014 and 2017 alone.[57] As the *Post* reported, the money was largely used to promote far-right policies and legal doctrines, and the judicial nominees who advance them. The public has little idea who is funding this effort, or what their political or financial interests are before the courts, or how they stand to gain.

One thing seems clear: no one spends a quarter-billion dollars, anonymously, for no good reason.

Behind the Veil: Understanding Leo's Secret Influence Machine

In January 2020, Leonard Leo announced that he was stepping aside from his $400,000-per-year job as the Federalist Society's Executive Vice President.[58] While remaining as co-chair of the Federalist Society's board, Leo announced the formation of a new venture, CRC Advisors. Leo indicated it would spend a "minimum of $10 million for an issue advocacy campaign focusing on judges in the 2020 cycle."[59]

CRC Advisors is just one cog in the complicated and opaque machine working to influence and capture our judicial system. Even Leo himself seems unable to keep track of it all: "I have no idea how many groups I've been involved with over the years," he told the *Post*. But as the Post reported, "the groups in Leo's network often work in concert and are linked to Leo and one another by finances, shared board members, phone numbers, addresses, back-office support and other operational details, according to tax filings, incorporation records, other documents and interviews."[60] The extraordinary overlaps suggest a common effort seeking to hide behind a confusing but coordinated array of front groups.



LEONARD LEO'S SECRETIVE MONEY NETWORK

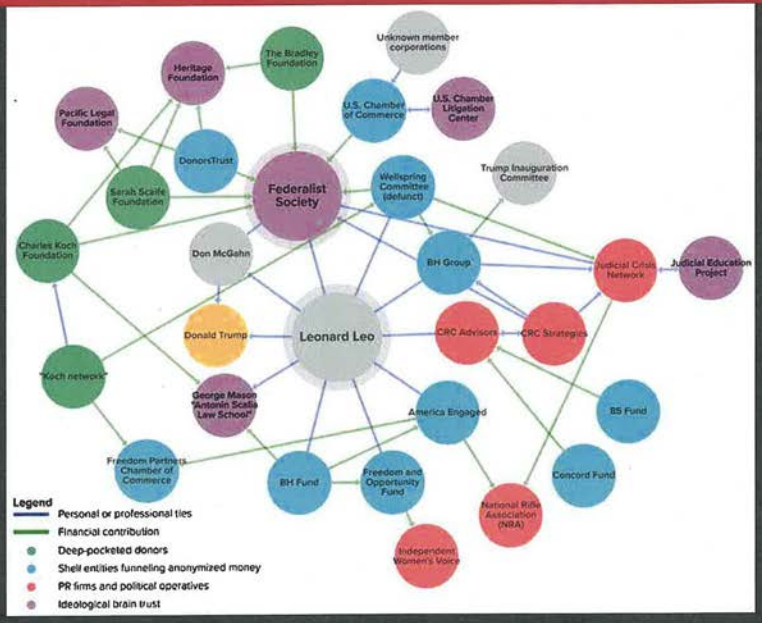


Chart of connections between some of the largest groups in Leonard Leo's secretive network. This chart is not exhaustive and mainly presents the groups selected for discussion in this report. Available at

This section provides a snapshot of just a few of the key players.

While many of the donor interests behind this machinery remain obscure, painstaking investigative reporting has shown that much of the money comes from ultra-wealthy corporate interests, such as Koch Industries and the U.S. Chamber of Commerce. These corporate interests are joined by an array of enormously wealthy and influential family foundations, whose fortunes generally derive from wealthy corporate interests.

THE BIG-MONEY DONORS

Koch Industries/Charles & David Koch Foundations
An avowed anti-government libertarian, Charles Koch controls Koch Industries, a sprawling, privately held conglomerate with multi-billion-dollar interests in fossil fuels, manufacturing, fertilizers, chemicals, energy, paper, ranching, and finance. Through Koch Industries and their individual foundations, Charles Koch and his late brother David have invested millions of dollars in the Federalist Society and Leonard Leo's other groups over the years.[61] At a private meeting in 2018 at the annual donor summit hosted by the Kochs, Leonard Leo, along with a leading Senate Republican, "told a small group of financiers that the Trump Administration was looking to overhaul a large chunk of the federal court of appeals by the end of the year."[62] He stated that "[b]y the end of this year [his] prediction is that basically 26% of the federal appellate bench will have changed under the Trump Administration," prompting "a round of applause."[63]

The Scaife Foundations
The Scaife Foundations are a trio of foundations formerly directed by the late Richard Mellon Scaife, principal heir to the Mellon banking, oil, and aluminum fortune. They have provided millions of dollars in funding to right-wing organizations such as the Federalist Society, Heritage Foundation, the American Legislative Exchange Council, the Cato Institute, and anti-immigrant groups such as the Center for Immigration Studies.[64]

THE COURT'S 800-POUND GORILLA

How the U.S. Chamber of Commerce dominates the Supreme Court:

- The U.S. Chamber of Commerce has given at least $800,000 to the Federalist Society, including at least $50,000 every year from 2006 to 2017 and at least $50,000 more in 2019.
- It has filed at least 448 *amicus* briefs in the Supreme Court since John Roberts became Chief Justice in 2005.
- During Roberts' tenure, the U.S. Chamber of Commerce's position has prevailed at the Court 70% of the time, an unparalleled win rate.

The Lynde and Harry Bradley Foundation
Founded in 1942 with funds from the Allen-Bradley manufacturing fortune, the Bradley Foundation has given over $500 million to conservative "public-policy" experiments since 2000. Over the years, Bradley Foundation funding has supported voter suppression, efforts to privatize public schools, attacks on renewable energy, opposition to healthcare reform and Medicaid expansion, and systematic attacks on labor rights. The Foundation awarded the Federalist Society its Bradley Prize in 2009[65] and remains a key driver of Leonard Leo's influence engine.[66]

U.S. Chamber of Commerce

The U.S. Chamber of Commerce is a pro-corporate trade group and the largest lobbying organization in the United States. It has spent almost $1.4 billion on lobbying the federal government over the last two decades, more than three times as much as the next largest spender.[67] While it describes itself as "the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions," the Chamber keeps its funding and the identities of its members secret.[68] In 2010, a *New York Times* investigation found that half of the Chamber's $140 million in contributions in 2008 came from just 45 big-money donors,[69] many of whom enlisted the Chamber to fight political and public opinion battles on their behalf (while avoiding accountability themselves). With strong ties to the tobacco and fossil fuel industries, the Chamber has aggressively opposed measures to combat smoking and address climate change.

Since John Roberts and Samuel Alito joined the Supreme Court in the 2005-2006 term, the Court has become increasingly friendly toward big business, ruling for the Chamber's position **70% of the time**.[70] The Chamber also actively lobbies Congress to confirm judges and justices who it believes are likely to rule in line with its pro-business, anti-climate, anti-worker agenda. In August 2018, for example, it sent a letter to all U.S. senators urging them to confirm Brett Kavanaugh to the Supreme Court, describing the confirmation vote as a "key vote" affecting its political endorsements (and, in turn, its political donations and attack-ad targeting).[71]

THE FRONT GROUPS

Leonard Leo takes advantage of a network of front groups that exploit the tax code to provide his donors anonymity as they fund the court-capture scheme. Through this loosely affiliated (but tightly controlled) network of groups, Leo can move and deploy money freely—and with hardly a trace. These groups allow self-interested donors to pull the levers of judicial power free from public scrutiny or repercussion.

DonorsTrust:
Known as the "dark-money ATM of the conservative movement," Donors Trust offers anonymity to its donors—laundering the identities of the donors off their money as it goes to their grantees.[72] Founded by a confidant of the Koch brothers,[73] DonorsTrust and its sister organization Donors Capital Fund have steered hundreds of millions of dollars to the most influential think tanks, foundations, and advocacy groups in the conservative movement. The public does not know—and cannot uncover—where this money comes from. DonorsTrust money has supported efforts to undermine collective bargaining rights, support state-level voter suppression, and spread climate denial. In 2017, DonorsTrust funneled the Federalist Society $5.5 million, accounting for 25% of the Federalist Society's total revenue that year.[74]

Big Money, Big Interests

Anonymous or opaque donors contribute staggering amounts of money to the Leo network.

- Wellspring Committee has given the Judicial Crisis Network (JCN) money every year since 2005, including $23.5 million in 2016 and $15 million in 2017.
- JCN received a $17.9 million gift from a single anonymous source during the Garland and Gorsuch confirmation fights.
- JCN received a $17.1 million gift from a single anonymous source the next year, gearing up for the Kavanaugh nomination.

Few Americans have the resources to spend this kind of money to influence our public institutions. Presumably these funders view this money as well spent, ensuring certain returns in the years to come.

CRC Advisors: In January 2020, Leo announced that he was stepping down from his Executive Vice President position at the Federalist Society to start CRC Advisors, which he is running with longtime ally Greg Mueller.[75] CRC Advisors will be closely tied to Mueller's existing firm, Creative Response Concepts ("CRC"). Mueller's firm was hired by nonprofits associated with Leo to coordinate multimillion-dollar media campaigns supporting the Republican effort to block President Obama from filling a Supreme Court seat and later promoting Neil Gorsuch's nomination to that seat. CRC Advisors' first initiatives will include a "minimum of $10 million issue advocacy campaign focusing on judges in the 2020 cycle."[76] Initial reports suggest that CRC Advisors will "work with two existing non-profit groups, which will be rebranded as the Concord Fund and the 85 Fund," to "funnel tens of millions of dollars" of anonymous money into its campaigns.[77]

Wellspring Committee funneled millions of dollars a year to other groups within Leo's network until it quietly shut down in 2018.[78] Founded by the Koch network and GOP political operatives in the lead-up to the 2008 election, Wellspring accounted for over 90% of the funding for the Judicial Crisis Network (JCN), a Leo-affiliated 501(c)(4) organization that often operates as the tip of the spear for the network's media attack campaigns.[79] Most of Wellspring's funds came from three multi-million-dollar secret donations. Wellspring's final tax return revealed that its largest donor accounted for $8.9 million in funding that year, while another donor gave $5.5 million, and a third provided $2 million.[80] All of these donors' identities remain hidden.

8665 Sudley Rd Ste 182 Manassas, VA 20110 (Google Maps)

The address on file for the Wellspring Committee is for a mailbox at a UPS Store.

The Wellspring Committee funelled tens of millions of dollars to right-wing judicial nonprofits until it disbanded in 2018.

BH Group/Fund:
Campaign finance filings show that the unremarkably named BH Group has received millions of dollars from organizations connected to Leo.[81] In 2016, Leo became President of BH Fund, which has no office space, no website, and "virtually no public profile."[82] In 2016, Leo used the BH Fund to funnel $1 million to President Trump's inaugural committee. When asked about BH Fund, Leo had only this to say: "Um . . . BH Fund is a charitable organization. You can look it up. I'm sure its statement of purpose is listed."[83] That "charitable organization" received over $24 million from a single anonymous donor in 2016 and 2017 alone.[84]

In turn, BH Fund and affiliated front groups donated millions of dollars to organizations such as the National Rifle Association and Independent Women's Voice, which then ran ad campaigns and made media appearances to support Trump's judicial nominees.[85]

Freedom and Opportunity Fund & America Engaged:
Like BH Fund, these Leo-led groups were formed by a single law firm with deep ties to the conservative movement.[86] According to the *Post*, Leo's role as president of all three groups was not disclosed for nearly three years because of lags in how nonprofit groups report their annual operations to the IRS.[87] After BH Fund raked in over $24 million from a single anonymous donor, it distributed almost $3 million to these two groups.

In turn, America Engaged funneled nearly $1 million to the lobbying arm of the National Rifle Association, which then spent millions on ads boosting Supreme Court nominees Neil Gorsuch and Brett Kavanaugh—including one ad that promised Kavanaugh would "break the tie" in favor of the gun lobby on gun safety issues.[88] For its part, Freedom & Opportunity Fund poured $4 million into Independent Women's Voice, which led the effort to smear Dr. Christine Blasey Ford after she came forward with sworn testimony that Kavanaugh had sexually assaulted her.[89]

The NRA promised that Kavanaugh would "break the tie" in Second Amendment gun cases.

POLITICAL OPERATIVES

The special-interest money in Leo's network also funds an army of aggressive public relations groups and political operatives, who advance the network's interests through earned and paid media channels. Often branded to create the appearance of grassroots support (e.g., "Honest Elections Project," or "Concerned Women of America"), these groups rely on millions of anonymous dollars, not boots on the ground.

The Judicial Crisis Network ("JCN") is the political arm of the Leo network. Though it claims status as a 501(c)(4) "social welfare" group in order to shield itself from donor disclosure requirements,[90] JCN is effectively a political action committee (PAC) in disguise. JCN has made more than 10,500 ad buys since 2012, most of them so-called "issue ads" that don't explicitly tell viewers to support or oppose particular candidates but do exactly that in effect.[91] JCN's ties to Leo and the Federalist Society are kept intentionally opaque. As the *Post* reported, "JCN's office is on the same hallway as the Federalist Society in a downtown Washington building, though JCN's website and tax filings list a mailing address at a different location, an address shared by multiple companies."[92] JCN spent $7 million opposing President Obama's Supreme Court nominee Merrick Garland.[93] It then spent $10 million more to support the confirmation of President Trump's Supreme Court nominee Neil Gorsuch (targeting "vulnerable Democrat Senators"), and pledged another $10 million in advertising campaigns to support Brett Kavanaugh's nomination.[94] JCN also spent heavily on lobbyists, who worked to help shepherd the Gorsuch and Kavanaugh nominations through the Senate.

Two separate, anonymous $17 million donations,[95] plus another $23 million in anonymous money from the Leo-affiliated, now-defunct Wellspring Committee,[96] funded this work.

In turn, JCN has distributed millions of dollars to other organizations, many of which engage in direct and substantial political spending. Since 2011, JCN has given more than $38.2 million in "grants"—almost half of its total budget— to 501(c)(4), 501(c)(6), and 527 advocacy groups, with the largest contributions to groups with explicit political aims, such as the Republican Attorneys General Association. These grants—much like JCN's so-called "issue ads" targeting "vulnerable Democrat[ic] Senators"[97]—don't count against JCN's political spending limits, which allows the group to barge into the political arena while enjoying the donor anonymity afforded by its "social welfare" status.

Creative Response Concepts Public Relations (Later CRC Strategies) has served as the clearinghouse and public face of the network's public relations and communications strategy. CRC's president, Greg Mueller, describes himself as a friend of Leo and is Leo's partner in his new venture, CRC Advisors.[98] At least nine of the groups tied to Leo's network hired CRC for consulting and public relations services in 2016 and 2017, collectively paying it more than $10 million. CRC played an active role in the Kavanaugh nomination fight, working with Ed Whelan (of the so-called Ethics & Public Policy Center, another right-wing group) to develop the widely criticized "doppelganger" alibi suggesting that one of Kavanaugh's classmates was the true perpetrator of the sexual assault on Christine Blasey Ford.

Independent Women's Forum and **Independent Women's Voice** grew out of a group called "Women for Clarence Thomas." They are anti-feminist groups predominantly funded by right-wing foundations.[99] Both groups have taken an active role in public relations efforts surrounding controversial judicial appointments—for example, leading efforts to defend Brett Kavanaugh and stigmatize his accusers in the wake of their sexual assault allegations. As the *Post* reported, spokespeople for Independent Women's Voice have appeared frequently on Fox News, speaking in support of Trump and his judicial nominees.[100] According to the group's president, Heather Higgins, Independent Women's Voice "ha[s] worked hard to create a branded organization . . . that does not carry partisan baggage."[101] But she has also admitted that their nonpartisanship is a façade: "Being branded as neutral but actually having the people who know, know that you're actually conservative puts us in a unique position."

THE BRAIN TRUST

The Federalist Society is at the heart of a vast network of ideological nonprofit organizations, think tanks, lawyers, law professors, academic centers, and quasi-journalists. Many of them are funded directly by the big-money donors described above, or indirectly through Leo's secretive network.

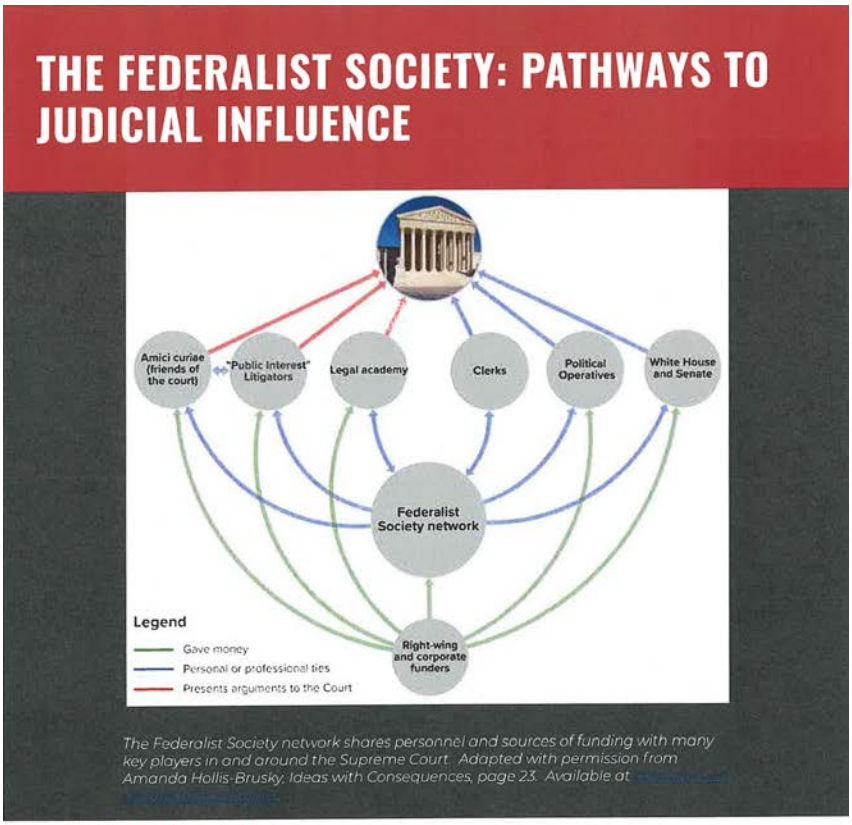
In her book *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, political scientist Amanda Hollis-Brusky explains how this brain trust creates "intellectual capital" to "frame, filter, or shape the outcome of the [judicial] decision-making process according to [its] own shared beliefs, principles, or values."[102] This network is populated by a conservative "legal elite"—former Supreme Court law clerks, chaired law school professors, high-profile partners at top law firms, and the like.

In addition to the considerable legal skills they bring to bear, these elites serve an important legitimizing, normalizing, and signaling function—particularly when the movement seeks to advance radical doctrinal change through the courts. As Hollis-Brusky explains, "by working to legitimize a set of ideas in the legal profession," the Federalist Society's intellectual elite "make it easier for judicial decision-makers who share these beliefs to articulate them in their opinions without the fear of being perceived as illegitimate." Legal scholar Steven Teles has described this as the "supply-and-demand relationship between the judges and the network."[103] Another scholar, Jack Balkin, put it this way: "The more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from 'positively loony' to 'positively thinkable,' and ultimately to something entirely consistent with 'good legal craft.'"[104] Ushering fringe legal ideas (that benefit donor interests) into the legal mainstream is a key function of the court-capture scheme.

"The more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from 'positively loony' to 'positively thinkable,' and ultimately to something entirely consistent with 'good legal craft.'"

—Jack Balkin, Yale Law School

The goal of the Federalist Society network is "political infiltration."[105] As its network "consolidates its power within government by placing its members in key positions as advisors or decision-makers, it stands to institutionalize its influence and ideas." This is exactly what is happening right now in our courts, as membership in the Federalist Society has become all but a prerequisite for an appellate judicial nomination from Trump. This subsection describes just a handful of the brain trust's powerful member groups:

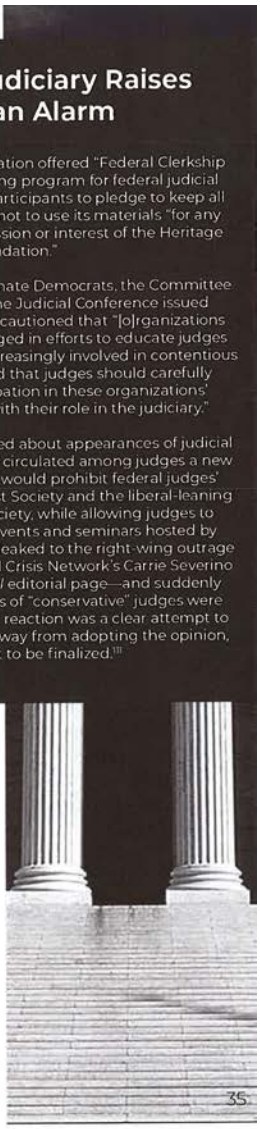


The Heritage Foundation:

Founded in 1973 with funding from brewing magnate Joseph Coors,[105] the Heritage Foundation is a think tank that describes itself as promoting "free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."[107] It has been described as a "White House in waiting for the Republican Party" while Republicans are out of power.[108] Affiliates of Heritage also testify before Congress "nearly 40 times a year" to push legal doctrines such as the "Unitary Executive Theory."[109] It also provides a platform for sitting judges to write reports opining on issues currently before the courts, such as appellate judge Douglas Ginsburg's *Legislative Powers: Not Yours to Give Away*, a summary of the far-right "non-delegation doctrine".[110]

Pacific Legal Foundation (PLF):
One of the oldest right-wing legal advocacy groups, PLF describes itself as "a nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse."[112] In practice, this often means defending corporate interests against environmental laws. PLF's first board chairman was a fossil fuel executive motivated by "apoplectic" fury against environmental lawsuits.[113] Its first offices were housed with the California Chamber of Commerce, whose president at the time was another oil executive defending against environmental litigation.[114] PLF regularly files *amicus* (or "friend of the court") briefs before the Supreme Court for its anonymous donors, particularly in high-profile cases against government efforts to preserve clean air, coastal environments, and protected wetlands. PLF has served as the template for dozens of other anonymously-funded right-wing legal nonprofits, such as the Southeastern Legal Foundation and Washington Legal Foundation.

U.S. Chamber of Commerce Litigation Center:
In addition to directly funding the Federalist Society and the conservative legal movement, the U.S. Chamber of Commerce operates its own in-house Litigation Center, which files lawsuits and lobbies the Supreme Court through its high-volume *amicus* practice—just as Lewis Powell envisioned in 1971. It does not disclose the Litigation Center's donors. Today, the Chamber is by far the Court's most prolific *amicus*: from Chief Justice Roberts' investiture in 2005 through the spring of 2016, the Chamber submitted 373 *amicus* briefs (the next-highest organization had 258).[114]



The Judiciary Raises an Alarm

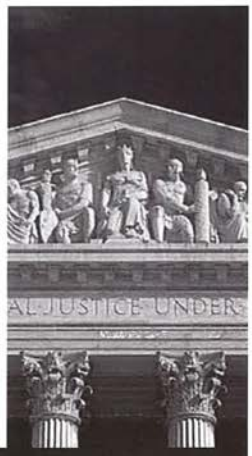
In 2018, the Heritage Foundation offered "Federal Clerkship Training Academy," a training program for federal judicial clerks. It initially required participants to pledge to keep all materials confidential and not to use its materials "for any purpose contrary to the mission or interest of the Heritage Foundation."

After objections raised by Senate Democrats, the Committee on Codes of Conduct of the Judicial Conference issued Advisory Opinion 116, which cautioned that "[o]rganizations that were once clearly engaged in efforts to educate judges and lawyers have become increasingly involved in contentious public policy debates," and that judges should carefully consider whether participation in these organizations' programs is "consistent with their role in the judiciary."

Earlier this year, still concerned about appearances of judicial partisanship, the Committee circulated among judges a new draft advisory opinion that would prohibit federal judges' membership in the Federalist Society and the liberal-leaning American Constitution Society, while allowing judges to continue participating in events and seminars hosted by these groups. The draft was leaked to the right-wing outrage machine—led by the Judicial Crisis Network's Carrie Severino and the *Wall Street Journal* editorial page—and suddenly the First Amendment rights of "conservative" judges were under attack. This histrionic reaction was a clear attempt to intimidate the Committee away from adopting the opinion, which has yet to be finalized.[111]

The Chamber boasts a staggeringly high success rate, winning 70% of the time it participates in a case before the Roberts Court.[116] The Chamber's former Litigation Director, Kate Todd, currently oversees judicial nominations in the Trump White House.

George Mason University Law School:
George Mason University (GMU) is a public university in Fairfax, Virginia. Its law school—together with the university's Koch-established Mercatus Center—has been a conduit for right-wing economic ideology since the 1970s.[117] In 2016, GMU Law received a $10 million donation from the Charles Koch Foundation. It also received a $20 million anonymous donation from a right-wing megadonor.[118] The legal executor of those donations was Leonard Leo, acting on behalf of the BH Fund. As revealed by an open-government records request, conditions of that donation included renaming the school for deceased justice and Federalist Society hero Antonin Scalia, giving a Koch loyalist control over all faculty hires as the school's dean, and requiring approval by the anonymous grantors before that dean could be fired. The grants also mandated the preservation of the Center for the Study of the Administrative State, an anti-regulatory think tank whose head, Neomi Rao, was soon appointed to the Office of Information and Regulatory Affairs (OIRA) and then to the seat previously held by Brett Kavanaugh on the D.C. Circuit Court of Appeals.



Taking the "Public" out of "Public Interest"

PLF is just one in an armada of so-called "public interest" law firms, related through common funding and often appearing in lockstep as *amici curiae* in important cases.

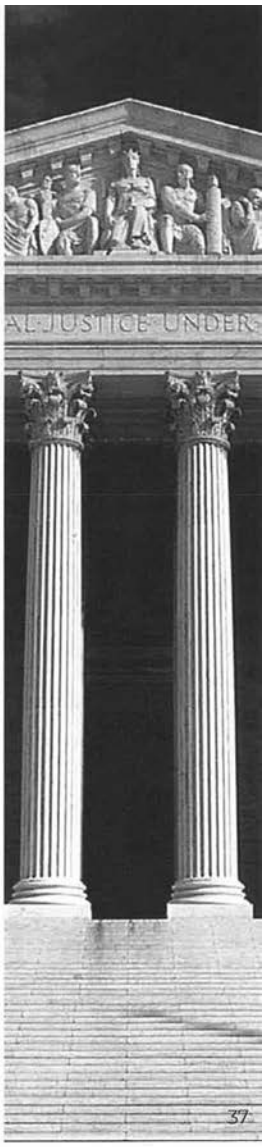
Others include: Alliance Defending Freedom; American Center for Law and Justice; American Civil Rights Union; Atlantic Legal Foundation; Becket Fund for Religious Liberty; Center for Individual Rights; Center for Law and Religious Freedom; Christian Legal Society; Eagle Forum Education & Legal Defense Fund; Honest Elections Project; Institute for Justice; Judicial Watch; Landmark Legal Foundation; Mountain States Legal Foundation; National Legal Foundation; National Right to Work Legal Defense Foundation; New England Legal Foundation; Pacific Justice Institute; Public Interest Legal Foundation; Rutherford Institute; Southeastern Legal Foundation; The Justice Foundation; Thomas More Law Center; and Washington Legal Foundation.

Judicial Lobbying: Special-Interest "Friends of the Court"

In recent years, *amicus curiae* briefs have become a favored vehicle for the Federalist Society network, allowing it to inject its boundary-pushing theories directly into Supreme Court jurisprudence. Submitted by non-parties to a case for the purpose of providing information, expertise, insight, or advocacy, *amicus* briefs have become a powerful judicial lobbying tool, and have increased in both volume and influence in the past decade. During the Supreme Court's 2014 term, *amici* submitted 781 *amicus* briefs, an increase of over 800% from the 1950s and a 95% increase from 1995. From 2008 to 2013, the Supreme Court cited *amicus* briefs 606 times in 417 opinions.

Although interest groups that lobby Congress face stringent financial-disclosure requirements, no similar requirements exist for this form of judicial lobbying. **The Supreme Court, for its part, does not require meaningful disclosure of *amicus* funding.** So there is no way for the public to know either who the funders are or what those anonymous funders' interests before the Court might be. Two recent examples show that many seemingly independent *amici* may be hiding common funders—financial ties that connect them to each other and to the ideological hothouse of the Federalist Society.

The first is the pending challenge to the constitutionality of the Consumer Financial Protection Bureau, *Seila Law v. CFPB*. The Center for Media and Democracy found that since 2014, 16 right-wing foundations donated a total of nearly $69 million to 11 groups that filed *amicus* briefs in favor of scrapping the CFPB. Over the same period, the same 16 foundations donated over $33 million to the Federalist Society.[119] Why does this matter? The challenge to the CFPB is based on the so-called "Unitary Executive Theory," a once-fringe theory of constitutional interpretation giving the president political dominance over any and all expert administrative agencies. The Federalist Society has promoted this theory for decades. It could now become law.



Janus v. AFSCME, the 2018 decision that dealt a major blow to public-sector labor unions, is another textbook example of a coordinated judicial lobbying campaign with massive political implications. That case garnered over 75 *amicus* briefs opposing the rights of public-sector labor unions, including many from groups funded by Federalist Society donors. Investigative reporting revealed that at least 13 of those "friends of the court" had been funded by the Koch brothers' DonorsTrust and Donors Capital Fund.[120] Similarly, the Lynde and Harry Bradley Foundation—a long-time Federalist Society donor and avowed foe of public-sector unions—is known to have funded 12 groups that filed *amicus* briefs in the *Janus* case.

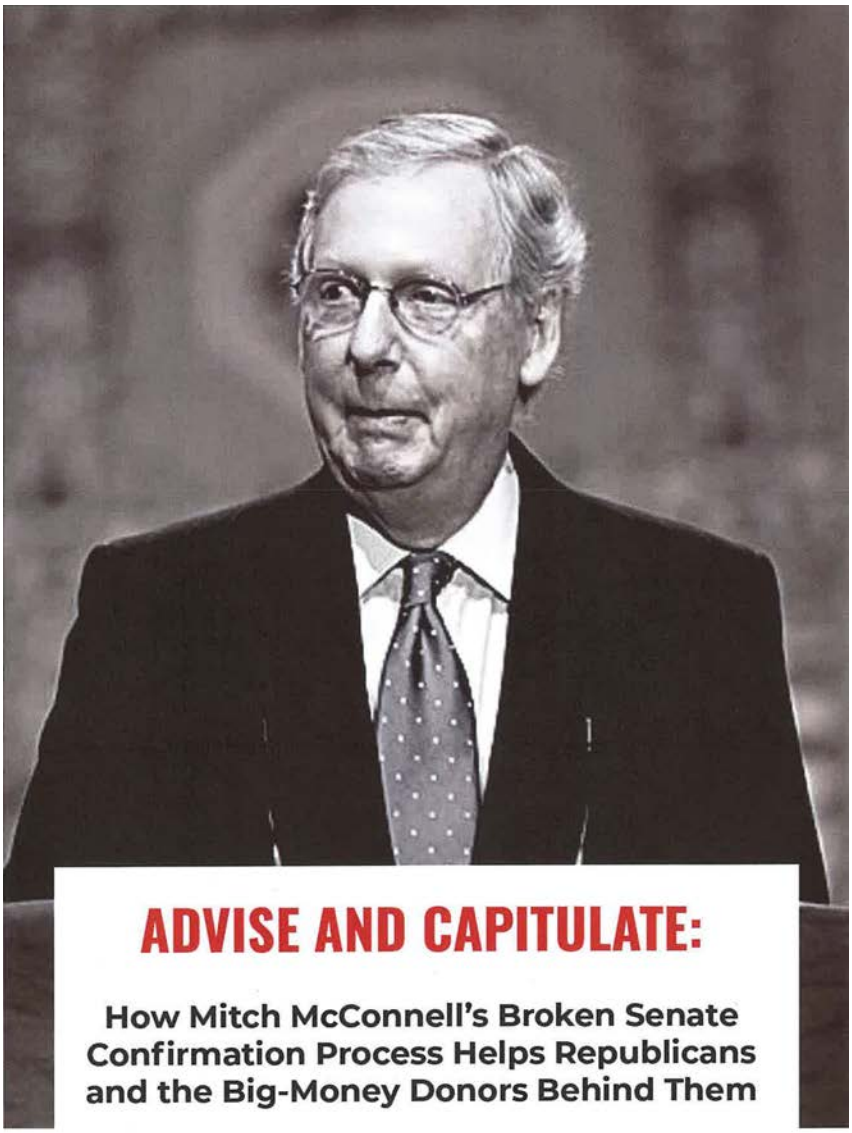
WHY DOES ANONYMITY MATTER?

Leonard Leo and his network take great pains to keep the identities of their donors secret. Why?

Some donors fear the public criticism that they or their companies may face for funding unpopular and self-serving positions, like gutting environmental protections or slamming the courthouse door on workers and consumers.

Others seek to cover up blatant conflicts of interest. When Justice Scalia passed away in 2016, he was staying in a $700-per-night room at a luxury hunting resort. A multi-millionaire—whose company had recently benefited from the Supreme Court's decision not to hear an age-discrimination case against its subsidiary—was footing the bill.[121]

These right-wing interests get one thing right: The public wouldn't stand for their judicial lobbying if it were done out in the open. Secrecy is a key part of their plan.


ADVISE AND CAPITULATE:
How Mitch McConnell's Broken Senate Confirmation Process Helps Republicans and the Big-Money Donors Behind Them

Betraying the Vision of Our Founders

In the delicate balance of separated powers, the Framers carefully designed a system of checks and balances to guard against tyranny by ensuring that no branch would wield too much power. "In framing a government which is to be administered by men over men," James Madison wrote in *Federalist* no. 51, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[122] The "ambition" of each branch, the Framers believed, "must be made to counteract ambition" of the others.

Critical to that balance was the principle that each branch would "protect the institutional and constitutional prerogatives of the [branch], rather than the interests of any political party," as one of our Republican Senate colleagues, Mike Lee (R-UT), put it in 2012.[123] As Senator Lee explained, among the constitutional means by which the Senate can assert its prerogatives is its advice-and-consent function, which includes its "ability to withhold its consent for a nominee, forcing the president to work with Congress to address that body's concerns." The Senate's advice-and-consent role is—short of judicial impeachment—Congress's only meaningful constitutional tool to check the extraordinary power inherent in life tenure.

While it didn't always work perfectly—politics have always intertwined with judicial appointments, to some extent—bipartisan cooperation around judicial confirmations was once the prevailing norm. For most of the 20th Century, Supreme Court justices were confirmed by broad bipartisan majorities. Conservative stalwart and Federalist Society icon Antonin Scalia, for example, was confirmed unanimously in 1986. Even after the heated battle over the 1987 nomination of another Federalist Society hero, Robert Bork—whose extreme ideological views led to his rejection by a bipartisan 58-42 vote—Senate norms of bipartisan advice and consent remained intact. Indeed, the following year, a Democratic-controlled Senate confirmed Reagan's replacement nominee, Anthony Kennedy, by a unanimous 97-0 vote. Republicans, too, adhered to that principle, confirming President Clinton's nominees, Ruth Bader Ginsburg and Stephen Breyer, by wide bipartisan margins. Such bipartisan comity was possible because presidents of both parties have historically nominated to the Supreme Court only those with unquestioned credentials and views broadly within the legal mainstream.

There has been even more cooperation, historically, for district and circuit court nominees. For over a century, the Senate "blue slip" process ensured that senators had a meaningful chance to provide input on nominations to judicial vacancies in their home states. This informal veto power over home-state nominees forced compromise and moderation when the president and home-state senators belonged to opposing political parties. This moderation accrued to the benefit of the independent judiciary and the rule of law. Nominees were often known to their local legal communities, with judicial nomination seen as the capstone of a distinguished legal career.

SPOTLILGHT ON NEOMI RAO

D.C. Circuit Judge and former George Mason University law professor Neomi Rao is a darling of the conservative legal movement, lauded for her hostility to public regulatory protections. The Dean of GMU's law school wrote to a Federalist Society-affiliated funder that his $1.5 million donation would be needed to entice Rao back to GMU after she "dismantles the administrative state while serving at OIRA" (Office of Information and Regulatory Affairs).[124]

Documents obtained through state FOIA requests show that she led fundraising for George Mason's Center for the Study of the Administrative State. The Center was funded by millions of dollars donated to the university from the Charles Koch Foundation and an anonymous donor later identified as Leonard Leo's BH Fund. Emails between Leo and GMU officials reveal that these donations secured influence over faculty selection at GMU, including at the Center, where Rao was the founding director.

During her confirmation hearing before the Senate Judiciary Committee, Rao went to great lengths to avoid testifying about who funded the Center's programs, giving affirmatively misleading answers—falsely testifying, for example, that her Center "did not receive money from an anonymous donor."[125]

In Rao's short time on the powerful D.C. Circuit, observers of her extreme jurisprudence have observed that her opinions "read like she's acting as Trump's personal protector."[126]

41

Thanks to Mitch McConnell, today all of this bipartisanship and moderation is a thing of the past. As Senate Judiciary Committee Democrats have documented in detail, Senate Republicans—from their unprecedented stonewalling of Judge Merrick Garland's nomination to the U.S. Supreme Court, to their destruction of the Supreme Court filibuster, to their abandonment of the circuit court blue slip—have spent the last four years engaged in a scorched-earth judicial power grab.[127] They have done so at significant cost to the prerogatives of their own institution, rendering meaningless the Senate's advice-and-consent function and tilting the critical balance of separated powers away from the legislative branch. As *The Economist* observed in 2017, "[t]he federal courts look stronger for including a range of legal philosophies . . . The problem is that conservatives are not striving for balance, but conquest."[128]

Today, in pursuit of that "conquest," a conveyor belt of candidates ideologically vetted by the Federalist Society plows through the nomination and confirmation process without meaningful review. Confirmation has become virtually automatic—a step in an assembly line finely tuned to achieve political and policy results through the judiciary. As a result of Senate Republicans' abdication of their constitutional duty, Trump's judicial nominees are younger, less experienced, and more ideologically extreme than any president's in history, and less diverse than any president's in decades. And many, such as D.C. Circuit Judge Neomi Rao, are plucked directly from Leonard Leo's network, sent to the bench on a mission to protect President Trump and "dismantle the administrative state."

This is all, of course, by design. It is a design conceived and executed in the service of the Republican Party's ultra-wealthy, anti-government donors. These donors also drive the Trump Administration's aggressive deregulatory agenda, often through the placement of industry cronies—like former EPA Administrator Scott Pruitt—at the heads of important regulatory agencies. The efforts converge. In describing the Trump Administration's efforts to nominate ideologically vetted Federalist Society members to the bench, former White House Counsel (and Federalist Society member) Donald McGahn put it plainly: "There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin."[129] In truth, the plan is best described not as the two "flip side[s]" of Mr. McGahn's "coin," but as three legs of a stool: deregulation and judicial selection are the first two legs, and donor interests are the third. All three reinforce each other and provide critical support for the persistent movement to undermine our government.

SPOTLILGHT ON JUSTIN WALKER

Justin Walker, at just 37 years old, was confirmed in 2019 to a federal district court in Kentucky. He had never tried a case, and the nonpartisan American Bar Association rated him "not qualified" for the bench. What *were* his qualifications? Political loyalty to Mitch McConnell, nearly 100 radio and TV appearances defending his friend Brett Kavanaugh against sexual assault allegations, and flag-waving allegiance to the Federalist Society and its GOP backers.

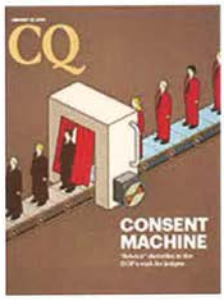
In March 2020, Mitch McConnell delayed the largest COVID-19 relief bill (the CARES Act), choosing instead to fly to Kentucky with Brett Kavanaugh to celebrate Justin Walker's investiture to the Western District of Kentucky. Walker's investiture speech was a partisan call-to-arms, comparing Brett Kavanaugh to St. Paul and castigating "critics who call us terrifying and who describe us as deplorable," a reference to a statement by Democratic nominee Hillary Clinton during the 2016 Presidential campaign.[130] Walker also joined over 200 conservative judges in a letter denouncing the Judicial Conference's draft ethics opinion prohibiting judicial membership in the Federalist Society, rallying to the organization's defense. Walker has been particularly vocal about his opposition to the Affordable Care Act, calling the Supreme Court decision upholding the law "indefensible."[131]

In April, after fewer than six months on the district court bench, the GOP rewarded this loyal foot soldier with a nomination to a lifetime seat on the D.C. Circuit, the nation's second most powerful court.

Converting the Senate into a Legislative Graveyard

During the 116th Congress, the Senate is dedicated to confirming judge after judge after judge. Confirming ideologically vetted judges in record numbers is a prize so valuable to Senate Republicans that they've all but abandoned their legislative role to do it.

More than 350 bills passed by the Democratic majority in the House of Representatives—nearly 90% of which received bipartisan support—now gather dust in Mitch McConnell's legislative graveyard, without so much as a hearing. Meanwhile, the Senate has been running a conveyor belt for overwhelmingly white, overwhelmingly male, right-wing judges. *Congressional Quarterly* described this "Consent Machine" in 2018, observing that "Senate Republicans are steamrolling the process and approving federal judges at a record pace."[132] And now, running out of court vacancies, McConnell is making direct overtures to sitting judges, pressuring them to retire to make room for Trump's younger, more extreme replacements.[133]



A recent *New York Times* investigation into Trump's appointments to the powerful federal appellate courts put this reality in stark relief: "the Trump class of appellate judges, much like the president himself, breaks significantly with the norms set by his Democratic and Republican predecessors, Barack Obama and George W. Bush."[134] Trump's 51 confirmed appellate judges comprise nearly 30% of the entire appellate bench. Two-thirds of those judges are white men (compared to 31% of America). "Thirty-three percent were under 45 when appointed, compared with just five percent under [President] Obama and 19 percent under [President] Bush."[135]

Thanks to Mitch McConnell's obstruction of President Obama's nominees in the years before Trump took office, more than a third of Trump's appellate appointees have filled seats previously occupied by Democratic appointees. And compared to judges appointed by previous presidents, Trump's appellate judges "were more openly engaged in causes important to Republicans, such as opposition to gay marriage and to government funding for abortion." Not surprisingly, they were "notably more likely than their peers on the bench to agree with Republican appointees and to disagree with Democratic appointees—suggesting they are more consistently conservative."

They are, to put it plainly, politicians in robes.

CONCLUSION

So how should we think about all this?

You have to step back in time. Republicans have spent **50 years planning** to pack our judicial system with far-right activist judges and to influence it with a right-wing ideology. From the Powell memo of the 1970s to the Trump era, there has been a consistent, secretive, relentless, and well-funded effort. The project has created an entire apparatus of front groups focused on influencing the courts and controlling judicial selection.

You have to step back in distance and look at **the *pattern* of decisions** throughout Chief Justice Roberts's tenure. It's not just the worst, most notorious decisions; the GOP's Supreme Court has run up a record of 80 decisions, all of which share these characteristics:

- They were decided 5-4 (even though larger majorities protect the credibility and standing of the Court).
- They were decided 5-4 **on a partisan basis** with no Democratic appointee joining the bare majority (a divide that undermines long-term confidence in the Court as an institution, though the Roberts Five don't seem to mind).
- They were civil cases in which big Republican donor interests were plainly implicated.
- And they were decided 80-0 in favor of the big Republican donor interests (a pattern lawyers would eagerly bring before a jury as evidence of bias in a discrimination case).

You have to step back and "follow the money." The extent of the **GOP's dark-money court-packing network** is astounding. Hundreds of millions of dollars of corporate and special-interest money flow into efforts to get the right results from the federal courts. This money flows into the group at the center of the judicial-selection effort, the Federalist Society. It funds the entity that runs political campaigns for nominees' confirmation, the Judicial Crisis Network. It funds litigation groups, like the Pacific Legal Foundation, that bring strategically selected cases to the Supreme Court. It funds an array of coordinated "*amicus curiae*" groups, who file in flotillas before the Court. It funds political power-hitters like the U.S. Chamber of Commerce. And it funds ideological hothouses like GMU's Mercatus Center where right-wing theories are incubated and propagated.

You have to understand *who* is behind this effort: who are the big funders of the judge-pickers? Who is behind *amicus* briefs? Who funds the litigation groups, and the political campaigns for judicial nominees? Is it not likely **the same big donors** behind *all* of it? All signs indicate that yes, it is.

You have to look around, and consider *why* the Senate has been so badly weakened to clear a path for judicial nominees, and *why* so much money is dedicated to pursuing this scheme, and why it mattered enough to the people behind it to invest decades of effort.

And you have to step back and understand, what is the goal? Packing courts with narrow-minded, activist judges who will distort our Constitution has a purpose. The purpose is that the judges will reliably vote in favor of Republican Party donor interests; gut vital public-safety and environmental protections; shield predatory corporations from accountability; disable the civil jury; dismantle civil rights; erode the separation of church and state; eliminate reproductive rights; rig democratic institutions to favor Republican interests; and impose regressive policies so deeply unpopular with the American people that even Republicans won't vote for them in Congress. Americans are already seeing the devastating results of this transformation—and it's only just gotten underway.

Americans have increasingly come to understand the culture of corruption that is undermining our politics. Yet too few people realize that these same corrupting forces are now hard at work to influence and capture our courts. Over the coming months, Democrats in the Senate will work to change that. We will shed light on the corruption and conflicts of interest now rampant around the Trump judiciary. We will document the real-world impact of the courts' increasingly activist decisions. And we will propose legislative reforms to clean up this mess.

It is time for America to reckon with the reality that our courts are being captured. It is time for Americans to understand the extent of the apparatus pursuing this capture, and to understand who is behind the apparatus. It's long past time to look behind the curtain. Nothing less than our democracy is at stake.

ENDNOTES

1 Lewis Powell, *Attack on American Free Enterprise System*, (Aug. 23, 1971), archived at Washington and Lee University School of Law, https://scholarlycommons.law.wlu.edu/powellmemo/1/.

2 Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, Oxford University Press (2015) (citing George W. Hicks Jr., *The Conservative Influence Of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J. L. PUB. POL'Y 625-717 (2006)).

3 *See* e.g., The Federalist Society Contributors, *available at* https://fedsoc.org/contributors ("The Federalist Society takes no position on particular legal or public policy issues.").

4 Jason Zengerle, *How the Trump Administration is Remaking the Courts*, NY TIMES (Aug. 22, 2018), *available at* https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html

5 Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), *available at* https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84.

6 For the first 73 cases, from Chief Justice Roberts' swearing-in through the term ending in summer 2018, *see* Sen. Sheldon Whitehouse, "A Right-Wing Rout: What the 'Roberts Five' Decisions Tell Us About the Integrity of Today's Supreme Court," American Constitution Society issue brief, Apr. 4, 2019, Appendix, archived at https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf. Seven more decisions from the term that ended in summer 2019 bring the count up to 80: *Nielsen v. Preap*; *Bucklew v. Precythe*; *Lamps Plus Inc. v. Varela*; *Franchise Tax Board of California v. Hyatt*; *Manhattan Community Access Corp. v. Halleck*; *Knick v. Township of Scott*; and *Rucho v. Common Cause* (jointly decided with *Benisek v. Lamone*; we count the joint ruling in *Rucho* and *Benisek* as one decision). The Court continues to issue 5-4 partisan decisions in the ongoing term and future reports will update this count after the current term concludes in June.

7 Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), *available at* https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/.

8 Confirmation hearing of John G. Roberts Jr. for Chief Justice of the United States, testimony before Senate Judiciary Committee, Sep. 12, 2005, archived at https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf.

9 Hon. Lynn Adelman, *The Roberts Court's Assault on Democracy*, HARV. L. POL'Y REV. (forthcoming) (posted Mar. 6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540318

10 Dahlia Lithwick, *Former Judge Resigns From the Supreme Court Bar*, Slate (Mar. 13, 2020). Experts who have watched the Court for years are making similar observations. *See, e.g.*, Jeffrey Toobin, *No More Mr. Nice Guy*, THE NEW YORKER (May 18, 2009) ("Roberts has served the interests . . . of the contemporary Republican Party."); Linda Greenhouse, *Polar Vision*, NY TIMES (May 28, 2014) ("...the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda."); Norm Ornstein, *Why the Supreme Court Needs Term Limits*, THE ATLANTIC (May 22, 2014) ("...the new reality of today's Supreme Court: It is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen.").

11 *See, e.g.*, John Pfaff, *The Supreme Court Justices Need Fact-Checkers*, NY TIMES (Oct. 18, 2017) ("[In] *Shelby County v. Holder*, . . . Justice John G. Roberts Jr. . . . misinterpreted how the Census Bureau reports race and ethnicity data and wrongly suggested that registration gaps between minorities and whites had shrunk significantly"); Judge Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination*, SLATE (June 26, 2013) ("*Shelby County v. Holder* . . . struck down a key part of the Voting Rights Act . . . as violating the 'fundamental principle of equal sovereignty' of the states. This is a principle of constitutional law of which I have never heard—for the excellent reason that . . . there is no such principle"); Jeffrey Rosen, "*Roberts versus Roberts*," THE NEW REPUBLIC (Mar. 2, 2010) ("Roberts didn't compromise on Citizens United . . . [Justice Anthony] Kennedy [wrote] a sweeping opinion that mischaracterized the landmark precedent *Buckley v. Valeo* by suggesting that it was concerned only about quid pro quo corruption rather than less explicit forms of undue influence on the electoral system. (Congress had come to the opposite conclusion in extensive fact-finding that Kennedy ignored.)").

12 *The Chamber Of Commerce Has Been Transformed Into One Of The Most Powerful Political Forces In Washington*, THE ECONOMIST, (Apr. 21, 2012), *available at* https://www.economist.com/business/2012/04/21/the-chamber-of-secrets.

13 *See supra* note 1.

14 David Vogel, *Fluctuating Fortunes: The Political Power of Business in America*, at 197 (1989).

15 Alliance for Justice, *Justice for Sale: Shortchanging the Public Interest for Private Gain* (1993), at 3.

16 Calvin TerBeek, *The Kavanaugh Nomination & Originalism as "Counterrevolutionary,"* A HOUSE DIVIDED (Sep. 26, 2018), *available at* https://ahousedividedapd.com/2018/09/26/the-kavanaugh-nomination-originalism-as-counterrevolutionary/.

17 *Id.*

18 *Id.*

19 *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S.Ct. 2448 (2018); *D.C. v. Heller*, 554 U.S. 570 (2008).

20 *Husted v. A. Philip Randolph Institute*, 138 S.Ct. 1833 (2018).

21 *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

22 *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

23 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

24 *Knox v. Serv. Emps. Int'l Union Local 1000*, 567 U.S. 298 (2012).

25 *Harris v. Quinn*, 573 U.S. 616 (2014).

26 *Janus v. American Federation of State, County, and Municipal Employees*, 138 S.Ct. 2448 (2018).

27 *Michigan v. Envtl. Prot. Agency*, 135 S.Ct. 2699 (2015).

28 *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

29 *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

30 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

31 *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

32 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

33 *McDonald v. Chicago*, 561 U.S. 742 (2010).

34 *Gonzales v. Carhart*, 550 U.S. 124 (2007).

35 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682¬ (2014).

36 Joe Hagan, *The Coming Tsunami of Slime*, NY MAG. (Jan. 20, 2012), *available at* https://nymag.com/news/features/negative-campaigning-2012-1/.

37 Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN (Mar. 25, 2019), *available at* https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html.

38 *See supra* note 11.

39 Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory*, 1981-2000, 89 DENV. U. L. REV. 197, 198 (2011) ("The UET... is but the latest in a long line of political instruments presidents have used to loosen the constraints on presidential power.").

40 *See* Michael Kruse, *The Weekend at Yale that Changed American Politics*, POLITICO (Oct. 2018), *available at* https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608.

41 *See* Hollis-Brusky (citing Hicks), note 2 *supra*.

42 Joan Biskupic, *Guns: A Second (Amendment) Look*, WASH. POST. (May 10, 1995), *available at* https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/courtguns051095.htm.

43 The Federalist Society, About Us, *available at* https://fedsoc.org/about-us.

44 *See supra* note 3.

45 *See* O'Harrow & Boburg, *supra* note 7.

46 Don McGahn, *Federalist Society National Lawyers' Convention*, (Nov. 16, 2017), *available at* https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn ("Our opponents of judicial nominees frequently claim the president has outsourced his selection of judges. That is completely false. I have been a member of the Federalist Society since law school. Still am. So, frankly, it seems like it's been insourced.").

47 *Id.*

48 David Montgomery, *Conquerors of the Courts*, WASH. POST MAG. (Jan. 2, 2019), *available at* https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/

49 David Savage, *Leonard Leo of the Federalist Society is the man you want to see if you aspire to the Supreme Court*, LOS ANGELES TIMES (Jul. 6, 2018), *available at* https://www.latimes.com/politics/la-na-pol-leo-court-search-20180706-story.html.

50 Pat Robertson Interviews Donald Trump, The Christian Broadcasting Network (Oct. 24, 2016), *available at* https://factba.se/transcript/donald-trump-interview-pat-robertson-cbn-october-24-2016.

51 Lawrence Mower, *DeSantis, new Florida judges are literally on the same page when it comes to law*, MIAMI HERALD (Feb. 3, 2020), *available at* https://www.miamiherald.com/news/politics-government/state-politics/article239926748.html.

52 *See* People For the American Way, *Confirmed Judges, Confirmed Fears: The Continuing Harm Caused by Confirmed Trump Federal Judges* (April 2019), *available at* https://www.pfaw.org/report/confirmed-judges-confirmed-fears-the-devastating-harm-already-done-by-confirmed-trump-federal-judges/.

53 *See* O'Harrow & Boburg, *supra* note 7.

54 Ryan Lovelace, *Trump adviser Leonard Leo details plans to overhaul judiciary*, WASH. EXAMINER (May 12, 2017), *available at* https://www.washingtonexaminer.com/trump-adviser-leonard-leo-details-plans-to-overhaul-judiciary.

55 *See* O'Harrow & Boburg, *supra* note 7.

56 Dalton Bennett, Jesse Mesner-Hage, and Jorge Ribas, *Pathways to power: The conservative movement transforming America's courts*, WASH. POST (May 21, 2019) *available at* https://www.washingtonpost.com/video/national/pathways-to-power-the-conservative-movement-transforming-americas-courts/2019/05/21/e1465572-549f-466d-9c09-9bafc1665a71_video.html.

57 *Id.*

58 Jonathan Swan and Alayna Treene, *Leonard Leo to shape new conservative network*, AXIOS (Jan. 7, 2020), *available at* https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html.

59 *Id.*

60 *See* O'Harrow & Boburg, *supra* note 7.

61 *See, e.g., Top supporters of Federalist Society for Law and Public Policy Studies*, Conservative Transparency, http://conservativetransparency.org/top/?recipient=842&yr=&yr1=&yr2=&submit= (data compiled from IRS Form 990 and other sources). Through 2014, the Koch-controlled Claude R. Lambe Charitable Foundation (now defunct) gave the Federalist Society at least $1,956,500, and the Charles Koch Foundation gave at least $1,405,000.

62 Brian Schwartz, *A top outside advisor to Trump secretly assures Koch donors that a lot more conservative judges are on the way*, CNBC (Aug. 2, 2018), *available at* https://www.cnbc.com/2018/08/02/leonard-leo-assures-koch-donors-about-trump-judiciary-picks.html.

63 *Id.*

64 The Center for Media and Democracy's SourceWatch, Scaife Foundations, *available at* https://www.sourcewatch.org/index.php?title=Scaife_Foundations.

65 Bradley Foundation, Past Winners: The Federalist Society, *available at* https://www.bradleyfdn.org/prizes/winners/the-federalist-society.

66 The Center for Media and Democracy's SourceWatch, The Lynde and Harry Bradley Foundation, *available at* https://www.sourcewatch.org/index.php/Lynde_and_Harry_Bradley_Foundation.

67 Public Citizen, Chamber Watch, *available at* https://chamberofcommercewatch.org/challengingthechamber/politicalspending/.

68 The U.S. Chamber of Commerce, About Us, *available at* https://www.uschamber.com/about/about-the-us-chamber-of-commerce.

69 Eric Lipton, Mike McIntire and Don Van Natta Jr., *"Top Corporations Aid U.S. Chamber of Commerce Campaign,"* NY TIMES (Oct. 21, 2010) https://www.nytimes.com/2010/10/22/us/politics/22chamber.html.

70 Constitutional Accountability Center, *Corporations and the Supreme Court*, *available at* https://www.theusconstitution.org/series/chamber-study/.

71 U.S. Chamber of Commerce, *Key Vote Letter Supporting the Nomination of Brett Kavanaugh to United States Supreme Court*, (Aug. 1, 2018), *available at* https://www.uschamber.com/letter/key-vote-letter-supporting-the-nomination-of-brett-kavanaugh-united-states-supreme-court.

72 Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), *available at* https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/.

73 Anne Nelson, *Shadow Network: Media, Money, and the Secret Hub of the Radical Right* (2019), at 140 ("In 1999 the Kochs helped to launch a new consortium called the DonorsTrust, with Whitney Ball in charge.").

74 David Armiak, *DonorsTrust Bankrolled Right-Wing Judicial Appointments, Trump's Acting AG, and Lobbying Front Groups in 2017*, PR WATCH (Feb. 19, 2019), *available at* https://www.prwatch.org/news/2019/02/13449/donorstrust-bankrolled-right-wing-judicial-appointments-trumps-acting-ag-and.

75 Swan and Treene, *supra* note 58.

76 *Id.*

77 *Id.*

78 Anna Massoglia and Andrew Perez, *Secretive conservative legal group funded by $17 million mystery donor before Kavanaugh fight*, OPENSECRETS (May 17, 2019) *available at* https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh/.

79 Anna Massoglia, *An influential dark money group turns off the lights for the last time*, OPENSECRETS (May 23, 2019), *available at* https://www.opensecrets.org/news/2019/05/an-influential-dark-money-group-turns-off-the-lights-for-the-last-time/.

80 *Id.*

81 Robert Maguire, *$1 million mystery gift to Trump inauguration traced to conservative legal activists*, OPENSECRETS (May 14, 2018), *available at* https://www.opensecrets.org/news/2018/05/mystery-gift-to-trump-inauguration-from-conservative-activists/.

82 *See* O'Harrow & Boburg, *supra* note 7.

83 *See* Bennett, Mesner-Hage, and Ribas, *supra* note 56.

84 *See* O'Harrow & Boburg, *supra* note 7.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 The Judicial Crisis Network, *About*, *available at* https://judicialnetwork.com/about-duplicate/.

91 Public Inspection Files of the Federal Communications Commission, *available at* https://publicfiles.fcc.gov/find/%22judicial%20crisis%20network%22/page-offset-0/order-best-match/filter-[]/#files .

92 *See* O'Harrow and Boburg, *supra* note 7.

93 The Judicial Crisis Network, *Judicial Crisis Network Launches $10 Million Campaign to Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee* (Jan. 9, 2017), *available at* https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/.

94 *Id.*

95 *See* Anna Massoglia & Andrew Perez, *Secretive Conservative Legal Group Funded by $17 Million Mystery Donor Before Kavanaugh Fight*, OPENSECRETS (May 17, 2019); *see also* Margaret Sessa-Hawkins & Andrew Perez, *Dark Money Group Received Massive Donation in Fight Against Obama's Supreme Court Nominee*, MAPLIGHT (Oct. 24, 2017) (reporting a "single $17.9 million contribution from a mystery donor").

96 Ronn Blitzer, *Mystery Donor Gave $28 Million to Help Get Gorsuch on Supreme Court*, LAW AND CRIME (Nov. 22, 2017), *available at* https://lawandcrime.com/politics/mystery-donor-gave-28-million-to-help-get-gorsuch-on-supreme-court/.

97 *See* Judicial Crisis Network, *supra* note 90.

98 *See* Swan and Treene, *supra* note 58.

99 Barbara Spindel, *Conservatism as the 'Sensible Middle': The Independent Women's Forum, Politics, and the Media*, 99-125, SOCIAL TEXT (2003), *available at* https://muse.jhu.edu/article/50303/pdf.

100 O'Harrow & Boburg, *supra* note 7.

101 Joan Walsh, *Meet the 'Feminists' Doing the Koch Brothers' Dirty Work*, THE NATION (Aug. 18, 2016), *available at* https://www.thenation.com/article/archive/meet-the-feminists-doing-the-koch-brothers-dirty-work/.

102 *See* Hollis-Brusky, *supra* note 2 at 15.

103 David Montgomery, *Conquerors of the Courts*, WASH. POST, (Jan. 2, 2019), *available at* https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/.

104 *See* Hollis-Brusky, *supra* note 2 at 13.

105 *Id.*

106 *See* Associated Press, *Brewery magnate Joseph Coors dies*, USA TODAY (Mar. 17, 2003), *available at* https://usatoday30.usatoday.com/money/industries/food/2003-03-17-coors_x.htm.

107 The Heritage Foundation, *About*, *available at* https://www.heritage.org/about-heritage/mission.

108 David Bauder, *Fox snaps up GOP hopefuls for 2012*, ASSOCIATED PRESS (May 5, 2010), *available at* https://www.telegram.com/article/20100505/NEWS/5050438?template=ampart.

109 *See supra* note 107.

110 The Hon. Douglas H. Ginsburg, *Legislative Powers: Not Yours to Give Away*, (Jan. 6, 2011), *available at* https://www.heritage.org/the-constitution/report/legislative-powers-not-yours-give-away.

111 *See* Adam Liptak, *Conservative Heritage Foundation Revives Training Academy for Judicial Clerks*, NY TIMES (Nov. 21, 2018), *available at* https://www.nytimes.com/2018/11/21/us/politics/heritage-foundation-clerks-training-academy.html; Committee on Codes of Conduct Advisory Opinion No. 116: *Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates* (Feb. 2019), *available at* 245 https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf; Carrie Campbell Severino, *The Judicial Campaign to Silence the Federalist Society (Part 1)*, NATIONAL REVIEW (Jan. 23, 2020) *available at* https://www.nationalreview.com/bench-memos/judicial-campaign-to-silence-federalist-society-part-1/); Wall Street Journal Editorial Board, *Judicial Political Mischief*, WALL STREET JOURNAL (Jan. 21, 2020), *available at* https://www.wsj.com/articles/judicial-political-mischief-11579652574.

112 The Pacific Legal Foundation, About, *available at* https://pacificlegal.org/about/.

113 Jefferson Decker, The Other Rights Revolution (2016), at 57.

114 Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1460 (1984).

115 Dr. Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), *available at* https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/.

116 *See* Constitutional Accountability Center, *supra* note 70.

117 *See generally*, Nancy MacLean, *Democracy in Chains* (2017); *see also* Jane Mayer, *Covert Operations*, THE NEW YORKER (Aug. 30, 2010), *available at* https://www.newyorker.com/magazine/2010/08/30/covert-operations. ("In the mid-eighties, the Kochs provided millions of dollars to George Mason University, in Arlington, Virginia, to set up another think tank. Now known as the Mercatus Center, it promotes itself as 'the world's premier university source for market-oriented ideas—bridging the gap between academic ideas and real-world problems." Financial records show that the Koch family foundations have contributed more than thirty million dollars to George Mason, much of which has gone to the Mercatus Center, a nonprofit organization.")

118 UnKoch My Campus, *Update to Report on "The Federalist Society's Takeover of George Mason University's Public Law School*, (Dec. 20, 2018), *available at* http://www.unkochmycampus.org/dec-20-2018-donor-control-at-gmu-update.

119 Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, CENTER FOR MEDIA AND DEMOCRACY (Feb. 13, 2020), *available at* https://www.exposedbycmd.org/2020/02/13/conservative-foundations-finance-push-kill-cfpb/.

120 Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*. IN THESE TIMES (Feb. 22, 2018), *available at* https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.

121 *See* Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, NY TIMES (Feb. 26, 2016), *available at* https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html.

122 James Madison, *The Federalist Papers* (1787), No. 51.

123 Sen. Mike Lee, *The Constitution is More Important Than Partisanship* (Feb 9, 2012), *available at* https://www.lee.senate.gov/public/index.cfm/blog?ID=B1FCEBE8-F685-45F1-9ACF-5C56532B9D5D.

124 Letter from Henry N. Butler to Federalist Society Board Member C. Boyden Gray (May 9, 2017), quoted in Allison Pienta, *Update to Report on "The Federalist Society's Takeover of George Mason Law School"*, UnKochMyCampus (Dec. 2018).

125 Responses to Questions for the Record by Neomi Rao, Feb. 2019, archived at https://www.judiciary.senate.gov/imo/media/doc/Rao%20Responses%20to%20QFRs.pdf.

126 Ian Millhiser, *Trump judge lays out an aggressive plan to protect Trump from congressional oversight*, VOX (Mar. 11, 2020), *available at* https://www.vox.com/2020/3/11/21173437/trump-judge-neomi-rao-mueller-grand-jury-dc-circuit.

127 Senate Judiciary Committee Minority Members Report (May 10, 2018), *available at* https://www.feinstein.senate.gov/public/_cache/files/b/7/b783e2d9-38be-4798-a7fb-e89ff11fd47c/A233636E649CB9CD98B0555FB3D18C88.judiciary-dems-final-judges-report-5.10.18-.pdf.

128 "Lexington", *Conservative lawyers are among the president's biggest enablers*, THE ECONOMIST (Nov. 23, 2017), *available at* https://www.economist.com/united-states/2017/11/23/conservative-lawyers-are-among-the-presidents-biggest-enablers.

129 Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against 'Administrative State'*, WASH. POST (Aug. 12, 2018), *available at* https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5e-c6c594024954_story.html

130 Todd Ruger, *Judge Justin Walker is a window into McConnell's sway on federal courts*, CQ ROLL CALL (Apr. 17, 2020), *available at* https://www.rollcall.com/2020/04/17/judge-justin-walker-is-a-window-into-mcconnells-sway-on-federal-courts/.

131 *Id.*

132 Todd Ruger, *Consent Machine: 'Advice' Dwindles in the GOP's Rush for Judges*, CONGRESSIONAL QUARTERLY (Jan. 18, 2018), *available at* https://www.rollcall.com/2018/01/18/senate-republicans-steamroll-judicial-process/.

133 Carl Hulse, *McConnell Has A Request for Veteran Federal Judges: Please Quit*, NY TIMES (Mar. 16, 2020), *available at* https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html.

134 Rebecca Ruiz et al., *These Judges Are Shifting the Appeals Courts to the Right*, NY TIMES (Mar. 14, 2020), *available at* https://www.nytimes.com/2020/03/14/us/trump-appeals-court-takeaways.html.

135 *Id.*

POLICY ESSAY

DARK MONEY AND U.S. COURTS: THE PROBLEM AND SOLUTIONS

SENATOR SHELDON WHITEHOUSE*

"There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." —James Madison

I. INTRODUCTION

The Founding Fathers had many threats in mind when they crafted a constitution for our young and fragile nation. Locke, Montesquieu, and other Enlightenment thinkers offered helpful political theory, but theory went only so far. Our Founders knew that patriotism could be overborne by selfish impulses and personal passions; that foreign governments and rapacious elites could exploit weak institutions; and that sharp differences divided the thirteen colonies. They planned for a lot of threats and dangers—but they did not plan for the corrupting power of corporations.

Today, corporations wield commanding power in our democracy. They do so directly, and through a network of trade associations, think tanks, front groups, and political organizations. That power too often is directed by cor- porate forces to dodge accountability for harms to the public; to subvert the free market to their advantage; and to protect their own political power by undermining democratic institutions.

This article explores the expansion of that corporate power in our government, and its extension into a branch of government customarily viewed as insulated from special interest influence: The Federal Judiciary. I begin with a brief historical overview of corporate influence in America and a discussion of how that influence grew after the Supreme Court's decision in *Citizens United* v. *FEC*.[1] I then tum to the fifty-year-long project of the corporate right to reshape both Federal law and the Federal bench; to the scheme's tools, particularly anonymous "dark money" and the network of front groups behind which these interests hide; and to the long-fought scheme's ultimate successes, culminating in the massive power grabs achieved in the Trump administration. The article concludes with recommendations for legislation that would increase transparency at the Court. We must address the crisis of legitimacy the courts now face before captured courts become a national scandal.

II. CORPORATIONS, THEN AND NOW

The Federalist Papers provide an important window into the concerns that animated the Founding Era as citizens considered a new Constitution for their colonies. The concerns that Alexander Hamilton, James Madison, and John Jay addressed were the prominent ones around which debate centered and on which the public needed reassurance. The main concerns were protecting individuals against the power of government (*e.g., The Federalist* No. 51);[2] protecting democracy against the emergence of a new aristocracy or royalty (*e.g., The Federalist* No. 38);[3] and protecting society from the power of faction—what we today call partisanship and special interest (*e.g., The Federalist* No. 10).[4]

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[1] 558 U.S. 310 (2010).

[2] THE FEDERALIST No. 51 (James Madison).

[3] THE FEDERALIST No. 38 (James Madison).

[4] THE FEDERALIST No. 10 (James Madison).

We honor our Constitution, but it alone did not satisfy the colonial public. The Framers had to draft our Bill of Rights to protect explicitly an array of individual rights and fortify those rights with powerful defenses. Thence came freedom of speech, access to the jury, clearly delineated criminal process rights, and other protections.[5] Together, the Constitution and Bill of Rights won the confidence of the American people and unified our country behind a single vision of Federal Government.

All of these efforts and robust debates reveal by omission that the Founders had a blind spot: They did not anticipate any threat to individuals from the power of corporations. It is easy to understand why not. For the Founders, corporations were not front of mind. The word "corporation" only appears in the eighty-five Federalist Papers three times, with one of those a reference to municipal corporations.[6] The word barely registers in Madison's note of the Federal Convention.[7] On our American continent, the big British corporation threatened no harm: The B1itish Hudson Bay Company operated in remote areas of Canada; the Massachusetts Bay Company had become a colony;[8] the British East India Company had been humbled[9] Such smaller corporations a existed in d1e colonie were creatioru of State legislatures, and operated und er the watchful eye of local political force, usually to provide roads, canals and other welcome infrastructure. If a corporation overstepped its bounds or harmed its local community, political authorities could revoke its charter.[10] At the Founding, corporate entities were no threat to the fledgling democracy and the idea of such non-human entities achieving a dominant role in a republic of "We the People" would have seemed fanciful.

Fast forward to the modem era where corporations are now ubiquitous and hold massive political power throughout government. Let's consider how.

One obvious exercise of that power is through corporate lobbying. Congress swarm with corporate lobbyists. In 2018 alone, corporations spent $3.4 billion on direct lobbying.[11] One trade organization, the U.S. Chamber of Commerce, has spent over $1.5 billion lobbying over the past two decades.[12] Much of its effort has been on political mischief like climate denial.[13] Mick Mulvaney, after leaving Congress to serve as the Director of the Office of Management and Budget, said something that illustrated one aspect of the problem: Be told an American Bankers Association conference that "[w]e had a hierarchy in my office in Congress, [i]f you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you."[14]

Which takes us to the next problem: Corporate spending in elections. Gone are the days when the problem was trickles of corporate money flowing from corporate

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[5] THE DECLARATION OF INDEPENDENCE (U.S. 1776); *see also* Gerard N. Magliocca, *The Bill of Rights as a term of Art*, 92 NOTRE DAME L. REV. 231, 236 (2016) (noting that "Jefferson did write one letter in 1792 that stated: '[M]y objection to the Constitution was, that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies, [and] trial by jury .... The sense of America has approved my objection and added the Bill of Rights.'").

[6] *See*, THE FEDERALIST Nos. 37, 45 (James Madison), No. 69 (Alexander Hamilton).

[7] *See*, James Madison, *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT (1787), *https://avalon.law.yale.edu/subject*__menus/debcont.asp [*https://perma.cc/8JWU-AV3C*].

[8] *See*, Massachusetts Bay Colony, FLETCHER CYC. CORP, ENCYC. BRITANNICA ONLINE, S.V.

[9] *See*, William Dalrymple, *The East Indian Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015), *https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders?CMP=share*__btn__*tw* [*https://perma.cc/T837-FPJD*].

[10] *See, e.g.*, Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO, J.L. & PUB. POL'Y 115, 135 (2012) (describing how Connecticut "reserved to the legislature a power to revoke or amend" the Connecticut Medical Society's charter and how "[t]he Pennsylvania General Assembly revoked [the Bank of North America's] corporate charter" by "rel[ying] on a committee report citing the bank's inordinate power").

[11] Karl Evers-Hillstrom, *Lobbying Spending Reaches $3.4 Billion in 2018, Highest in 8 Years*, CTR. FOR RESPONSIVE POL.: OPEN SECRETS NEWS (Jan. 25, 2019). *https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18* [*https://perma.cc/RKE9-WZ5K*].

[12] *See, Top Spenders*, CENTER FOR RESPONSLVE POL.: OPENSECRET, *https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2019* [*https://perma.cc/J7VK-YKZH*].

[13] *See, e.g.*, Corynne Cirilli, *The U.S. Chamber of Commerce Might Not Be What You Think, Vox Media: Racked* (Oct. 2, 2017), *https://www.racked.com/2017/10/2/16370014/us-chamber-commerce-cxplainer* [*https://perma.cc/7UVQ-GE7F*] ("Deferring to the goals of its large corporate backers, [CEO and then-president Tom] Donohue vowed to get the Chamber involved in 'many important political battles' in Washington. And climate was one of the first things on his list.'").

[14] Aaron Blake, *Trump's Rumored Next Chief of Staff Mick Mulvaney Admits to Selling Access a Congressman*, WASH. POST (Apr. 25, 2018), *https://www.washingtonpost.com/news/the-fix/wp/2018/04/25/trumps-rumored-next-chief-of-staff-mick-mulvancy-admits-to-selling-access-a-congressman/* [*https://perma.cc/9R7-WATW*].

political action committees ("PACs") and lobbyists' checkbooks into candidates' campaign war chests. Tn the wake of the Supreme Court's infamous *Citizens United* decision,[15] corporate interests have flooded huge sums of money into electioneering and advocacy groups, often anonymizing themselves in the process, and used this flotilla of front groups to sway election results. In the 2012 Federal election cycle immediately following *Citizens United*, spending by these so-called "outside" groups surged to more than triple their political spending from the cycle before.[16] By 2016, outside groups would spend over $1.4 billion in American election.[17] Today, in major elections around the country outside groups often outspend the actual candidates: In 2018, outside groups spent more than the candidates campaigns in twenty-eight different Federal races,[18] and in Indiana during the last election cycle dark-money and outside groups outspent the U.S. Senate candidates by nearly $35 million.[19] You don't spend this kind of money for long if you are not getting results.

Much of this spending is "dark money"—funding that cannot be traced to actual donors. In the decade since *Citizens United*, groups that don't disclose their donors have spent nearly $1 billion in elections, compared to only $129 million over the previous decade.[20] This staggering figure does not even include money spent on "issue ads," which are often just thinly veiled political attack ads, but are not reported to the Federal Election Commission.

Although the Citizens United decision imaginatively presumed a campaign finance system with "effective disclosure,"[21] corporate interests quickly exploited loopholes to keep their spending anonymous, and the Court has conspicuously failed to police its supposed "effective disclosure." Three loopholes have been particular favorites. Internal Revenue Code 501(c)(4) "social welfare" organizations have been allowed to spend on political altivities, but need not disclose their donors to the public.[22] Shell corporations (*e.g.*, limited liability corporations that obscure their true beneficial owners)[23] are a simple tool to hide donor identities. And donor-directed trusts have been subverted into massive laundering shops that strip donor identities away from contributions to politically active non-profits.[24] Because corporate brands

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[15] *Citizens United* v. *FEC*, 558 U.S. 310 (2010).

[16] *See, Outside Spending by Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, *https://www.opensecrcts.org/outsidespending/index.php?filtertype.A* [*https://perma.cc/957L-NK2L*].

[17] *Robert Maguire, $1.4 Billion and Counting in Spending by Super PACs, Dark Money Groups*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Nov. 9 2016). *https://www.opensecrets.org/news/2016/11/1-4-billion-and-counting-in-spending-by-super-pacs-dark-money-groups/* [*https://perma.cc/t266-5PJD*].

[18] *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS, *https://www.opensecret.org/outsidespending/outvscand.php?cycle=2018* [*https://perma.cc/GW3U-XQD4*].

[19] *Compare Summary Spending*. CTR. FOR RESPONSIVE POL.: OPENSECRETS, *https://www.opensecrets.org/races/summary?cycle=2118&id=INS1* [*https://perma.cc/3LQR-DHRG*], *With Outside Spending*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, *http://www.opensecrets.org/races/outside-spending?cycle=20l8&id=INSI&spec=N* [*https://perma.cc/4T4U-JPSP*).

[20] Kurl Ever-Hillstrom *et al., More Money, Less Transparency: A Decade Under Citizens United*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 14, 2020), *https://www.opensecrets.org/news/reports/a-decade-under-citizens-united* [*https://perma.cc/9CF8-E5VA*].

[21] *Citizens United* v. *FEC*, 558 U.S. 310, 370 (2010).

[22] *See* 26 U.S.C . 6033(a)(l) (2018); 26 C.F.R. l.50l(c)(4)–l(a)(2)(i) (2019); *see also* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 60 (2011) ("One way that for-profit corporations can throw their support behind, or undermine, a particular candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, pmchases a political ad. Under current tax law, for-profit political spending through non-profits such as social welfare organizations organized under Internal Revenue Code (IRC) section 50l(c)(4) is undetectable by the public.").

[23] Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 708 (2012) (arguing that "[t]he real disclosure issue arises when a 501(c)(4) social welfare organization, 50l(c)(6) trade association, or Super PAC reports donations from a dummy or shell corporation or LLC which gets its funds from one or a small number of shareholders, or from a nonprofit that does not have a mass Membership base but serves primarily as a vehicle for pooling funds from a small number of large donors and channeling them to independent spending committees").

[24] Donors Trust is one of these groups, for example, *See* Andy Kroll, *Exposed: The Dark Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), *https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/* [*https://perma.cc/S9M3-N7YC*] ("Donors Trust is a so-called 'donor-advised fund,' a breed apart from a family foundation like, say, the Lynde and Harry Bradley Foundation, which helped build the conservative movement over decades with donations totaling tens of millions of dollars. The people who donate to Donors Trust don't get final say over how their money isspent. But they get to recommend where their cash goes, and in exchange for giving up some

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and reputations are precious commodities, a broad array of trade associations, think tanks, and advocacy groups insulates corporations from the dirty practices and unpopular purposes of this vast new enterprise.

At the heart of this is money, but money alone is not the entire danger. As any politician can tell you, with the ability to spend millions of dollars in elections comes the ability to threaten or promise such expenditures. With the ability to spend millions of dollars anonymously, the menace of such threats darkens. Sometimes the threats or promises might be general and public;[25] but the greatest danger of corruption comes from threats or promises made covertly. The threat is real—a massive barrage of anonymous campaign spending in the waning days of a campaign can leave voters with no information about who is making the attack and the target with no time to respond. An early barrage can "define" (read, mercilessly smear) a candidate before his or her campaign even gets up and running. So threats are credible, and covert threats and acquiescence is the very definition of corruption.

Dark money fouls political debate, as well. From the shelter of anonymity, corporate interests can without accountability propagate a "tsunami of slime"[26]—the manufactured front group bears the onus for the smears and attacks, and can be disposed of like Kleenex.[27] And of course if just the threat of a slimy political attack is successful, it saves the special interest from actually having to spend the money. Worse, it leaves the public unaware that anything went on behind the scenes.

The policy result of unlimited special-interest spending power is unsurprising: A powerful political current bends elected officials toward the will of the special interests, even against the will of their constituents.[28] This weakens the political system's response to the general population, and skews political response toward wealthy interests. Empirically, one study found:

> [T]he views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third, with even larger disparities on specific salient roll call votes. Meanwhile, the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their Senators.[29]

The problem is not just in Congress. The ability of big interests to deploy unlimited money from behind dark-money from groups into presidential races has similar effects.[30] But much of the corporate political effort is down at the executive agency level. Corporations have grown adept at capturing regulatory agencies.[31] This involve one amount of high-powered agency lobbying, and some amount of simply outgunning ill-funded public interest advocates in administrative procedures but more often than npt it involves ending industry personnel to embed with regulators—the "revolving door." According to an analysis by ProPublica and Columbia Journalism Investigations the Trump administration has brought into official posi-

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control, they get a bigger tax write-off than they would with a family foundation. (And those who wish it get anonymity.)").

[25] *See*, Nicholas Confessore, *Koch Brothers' Budget of $889 Million for 2016 Is on Par With Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), *https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html* [*https://perma.cc/YD6E-8AJ5*].

[26] Joe Hagan, *The Coming Tsunami of Slime*, N.Y. MAG. (Jan. 20, 2012), *http://nymag.com/news/features/negative-campaigning-2012-1/* [*http://perma.cc/U2HR-HN8C*].

[27] *See, id.*; Sheldon Whitehonuse, *The Many Sins of "Cititzens United,"* NATION (Sept. 24, 2015), *https://www.thenation.com/article/archive/the-many-sins-of-citizens-united/* [*https://perma.cc/W3WU-CH8*].

[28] *See, e.g.*, Martin Gilens, AFFLULINCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLICAL POWER IN AMERICA 70–123 (2012) (explaining that the country's policymnkers respond almost exclusively to the preferences of the economically advantaged); *see also* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 1143–47 (2011) (noting that dependency donors cause Congress to spend more time on issues that matter to their funders than to the general public).

[29] Larry M. Bartels, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 253–54 (2008).

[30] *See, e.g.*, Robert Maguire, *GOP Donors Too "Embarrassed" to Publicly Support Trump Gave Millions to Dark Money Group*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Mar. 6, 2018), *https://www.opensecrets.org/news/2018/03/big-revenues-for-group-providng-cover-for-gop-donors-too-embarrassed-to-publicly-support-trump-in-2016/* [*https://perma.cc/RV7L-5Z2A*) (reporting that a dark money group "spent $45 million from the run-up to the 2016 presidential election into the early days of President Trump's administration").

[31] *See* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1555 (2018) (arguing that "[w]hile capture can occur through corruption, it can also happen in less obvious ways, such as when a regulator receives a job offer from a company which he or she regulates, or through a 'revolving door' between the agency and the regulated industry").

tions at least 281 former corporate lobbyists, just through October 2019.[32] That number increases when one includes the corporate executives embedded in the Trump administration who may not have technically lobbied for their company but nontheless are motivated to influence outcomes for their industry.

The result has been an unprecedented capture of regulatory agencies by the interests they should be regulating.[33] The Environmental Protection Agency ("EPA") under the Trump adminstration, for example, bas been overrun with officials tied closely to polluting industries. Former EPA Administrator Scott Pruitt rose to political power by raising funds for oil and gas industry groups.[34] Pruitt had demonstrated an unusual willingness to do the industry's bidding; in one instance, he put fossil fuel industry text verbatim onto his official Oklahoma Attorney General letterhead and submitted it to the EPA.[35] Later, as EPA Administrator, Pruitt could do the industry's bidding directly, without need for such subterfuge. Andrew Wheeler, Pruitt's successor as Administrator, had been a leading lobbyist for the coal industry.[36] Trump's first head of the EPA Office of Air and Radiation, Bill Wehrum, gained prominence by helping build and run an array of fossil fuel industry trade associations and front groups.[37]

Former oil lobbyist David Bernhardt serves as Secretary of the Department of the Interior, an agency charged with administering the bulk of Federal lands.[38] In that

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[32] David Mora, *We Found a Staggering 281 Lobbyists Who've Worked in the Trump administation*, PROPUBLICA (Oct. 15, 2019), *https://www.propublica.org/articlc/we-found-a-staggering-281-lobbyists-whove-worked-in-the-trump-administration* [*https://perma.cc/SCE8-NVSV3*].

[33] *See*, Lindsey Dillon *et al., The Envornmental Protection Agency in the Early Trump Administration Environmental Protection Agency in the Early Trump Administration*, 108 AM. J. PUB. HEALTH 589, 589 (2018), *https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360* [*https://perma.cc/GQX6-DXRV*] (explaining that an agency is effeclively captured by the private interests it regulates when its "'regulation is . . . directed away from the public interest and toward the interest of the regulated industry' by 'intent and action' of industries and their allies") (quoting DANIEL CARPENTER, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFUENCE AND HOW TO LIMIT IT 73 (2014)).

[34] *See*, Andrew Perez & Margare1 Sessa-Sawkins, *Conservative Group Led by EPA Chief Pruitt Received Dark Money to Battle Environmental Regulations*, FAST CO. (June 7, 2017), *https://www.fastcompany.com/4028688/conservative-group-led-by-epa-chief-pruitt-received-dark-money-to-battle-environmental-regalations* [*https://perma.cc/8O8Z-7UEW*] (reporting that "[a]n organization once led by [Scott Pruitt] raised more than $750.000 from conservative dark money groups to battle Federal regulations, including officials at the agency he now leads").

[35] *See*, Letter from E. Scott Pruitt. Attorney Genernl, Oklahoma, to Lisa Jackson, Administration, U.S. Environmental Protection Agency (Oct. 12. 2011). *https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html* [*https://perma.cc/9JSM-PL9J*]; E-mail from William F. Whitsitt. Executive Vice President of Public Affairs, Devon Energy Corp., to Pallick Wyrick, Office of the Attorney General, Oklahoma (Sept. 2. 2011, 2:55 p.m.) *https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html* [*https://perma.cc/9JSM-PL9J*] (attaching draft version of letter to EPA).

[36] *See*, Nihal Krishan, *Andrew Wheeler's Long History With the Energy Sector*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (July 10, 2018), *https://www.opensecrers.org/news/2018/07/andrew-wheeler-longtime-coal-lobbyist/* [*https://perma.cd/NTR8-KECF*]' (discussing how Wheeler became "a lobbyist for the law firm Faegre Baker Daniels, where he represented energy companies such as coal producer Murray Energy, which was his best-paying client. The coal-mining company paid his firm between $160,000–$559,000 annually [from 2009 through 2017, according to CRP's records. Murray Energy is privately owned by Robert Murray, whose company donated $300,000 to President Trump's inauguration.").

[37] *See*, Letter from Senator Sheldon Whitehouse, Senator Thomas R. Carper, *Ranking Member*, U.S. Senate Committee on Environment and Public Works, and Rep. Frank Pallone, Jr., *Chair*, U.S. House Committee on Energy and Commerce, to Charles Sheehan, *Acting Inspector General*, U.S. Environmental Protection Agency, at 2 n.6 (Feb. 21, 2019), *https://www.whitehouse.senate.gov/imo/media/doc/20190902-21%20Wehrum%20Letter%20to%20EPA%20IG%20final.pdf* [*https://perma.cc/9SA7-GNP7*] (explaining that one of Wehrum's former clients, the Utility Air Regulatory Group, "is not an incorporated entity and does not appear to have a staff, physical location, or presence of any sort outside of Hanton & Williams. Its membership and decision-making processes appear opaque, and it has been described as 'a front group of convenience [that] allows individual electric utility companies to shield their names and anti-public health crusades from public awareness." (quoting John Walke, *Is Your Power Company Fighting in Court Against Stafeguards From Mercury and Toxic Air Pollition?* NAT. RES. DEF. COUNCIL (May 25, 2012), *https://www.nrdc.org/experts/john-walke/your-power-company-fighting-court-against-safe-guards-mercury-and-toxic-air* [*https://perma.cc/W7YW-K35K*])).

[38] *See*, Anthony Andragna, *Senate Confirms Bernhardt To Head Interior*, POLITICO (Apr. 11, 2019), *https://www.politico.com/story/2019/04/11/david-bernhardt-secretary-interior-department-1345662* [*https://perma.cc/66HE-L2KN*] "Bernhardt currently acting secretary, will replace Ryan Zinke, who left Interior in January in the midst of several ongoing ethical in investigations. Bernhardt won bipartisan backing from the chamber despite concerns that he has

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position, Bernhardt has a central role administering oil and gas leasing, offshore drilling, and areas of policy of interest to the oil and gas industry. Bernhardt and his predecessor, Ryan Zinke, have helped to open massive tracts of Federal land to oil and gas development during their tenures.[39] They have also overseen suspicious delays in siting New England offshore wind energy projects-projects that would displace gas-fired electric generation in the region.[40]

The Founders would likely have been astounded that such a commanding political force arose in our Republic, exerting such control over our executive and legislativ branches. Industry lobbying distorts legislative outcomes. Post-*Citizens United* dark-money election spending constricts Ame1ica's political aperture. Regulatory capture in the Trump administration has spread corruption widely through government agencies. But the most coveted prize, tbe pearl beyond price of influence-seeking, lies in the courts.

III. The Corporate Influence Machine Targets Article III Courts

Courts set rules. Federal courts decide what the Constitution means. Federal courts decide how laws are applied. Federal courts set the ground rules for challenges to legislation; they set rules for executive agency process and review; and they set rules that govern commercial and political activity.

The prospect of resetting all those rules to advance systematically one's own power and position makes courts an alluring target for the influence machine. At the same time, because so many judicial practices and principles are designed to keep courts honest and independent, they are a difficult target. The stalking and capture of the courts had to be measured and slow. In 1971, prominent corporate lawyer and future Supreme Court Justice Lewis Powell wrote a secret memo to an official at the U.S. Chamber of Commerce. Powell warned that "the American economic system"—by which he seemed to mean corporate America—"is under broad attack" from academics, the media, leftist politicians, and other progressives.[41] To counter the progressive spirit that had delivered the New Deal and Great Society, Powell wrote, it was time for an unprecedented influence campaign on the part of corporate America. He advised:

> [I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the so political power available only through united action and national organizations.[42]

Corporate forces followed this advice, and today we see how much the "political power" made available through "united action" has delivered in the executive and legislative branches. Powell also flagged the value of pro-corporate "activist" judges to shape the courts and the law, and slowly but surely corporate forces began to reshape our judiciary. Over many patient year they produced not only pro-corporate, anti-regulatory judges and doctrine, but a coordinated array of front groups set up to effect this infiltration. Behind this network of front groups lurks a network of

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conflicts of interests related to past lobbying clients, criticism that he failed to keep adequate records, and worries about the department's plans to expand offshore drilling along the Atlantic and Pacific coasts.").

[39] *See, e.g.,* Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client*, N.Y. Times (Feb. 12, 2019), *https://www.nytimes.com/2019/02/12/climate/david-bemhardt-endangered-species.html* [*https://perma.cc/3D4C-KNSN*] ("As a lobbyist and lawyer, Dnvid Bernhardt fought for years on behalf of a group of California farmers to weaken Endangered Species Act protections for a finger-size fisb, the delta smelt, to gain access to irrigation water. As a top official since 2017 at the Interior Department, Mr. Bernhardt has been finishing the job: He is working to strip away the rules the farmers had hired him to oppose.").

[40] *See,* Chris Martin & Jennifer A. Dlouhy, *Trump Delay Casts Doubt on First Major U.S. Offshore Wind Farm*, Bloomberg News (Aug. 10, 2019), *https://www.bloomberg.com/oews/articles/2019-08-09/u-s-is-said-to-extend-review-of-first-major-offshore-wind-farm* [*https://perma.cc/39VR-QM7R*] (reporting that "[t]he Trump administration cast the fate of the nation's first major offshore wind farm into doubt by extending an environmental review for the $2.8 billion Vineyard Wind project off Massachusetts").

[41] Confidential Memorandum from Lewis F. Powell Jr., to Eugene B. Snydor, Jr., Chair, Education Committee, U.S. Chamber of Commerce 1 (Aug. 23, 1971), *https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo* [*https://perma.cc/5Q9B-RFTX*].

[42] *Id.* at 11.

corporate, right-wing donors who secretly fund this "united action" in the judiciary.[43]

There have long been competing philosophies of adjudication and legal analysis, a debate reflected over decades in different judicial philosophies from Republican and Democratic presidents' court nominees. This exercise was different. This was about winning, not about theories. Tellingly, the record of the many "conservative" wins under Chief Justice Roberts in the Supreme Court shows more often that conservative entities are the victors than that conservative judicial principles are followed.[44] The donors behind the scheme want victories and are not fussy about philosophy.

It is slowly becoming clear how the so-called conservative legal movement has been secretly bankrolled by corporate interests which benefit from that legal movement. It is even sometimes frankly admitted. Describing his efforts to stock the Federal judiciary, Donald McGahn, the former White House Counsel and early architect of the Trump administration's judicial selection efforts, did not even try to hide the connection: "There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin."[45] In other words, the "plan" is to groom and select judges who will then support the Republican political effort to roll back unwelcome laws passed by Congress and unwelcome regulations developed by independent agencies.

The influence machine's efforts in the Federal judiciary are particularly pernicious for government. First, unlike legislators and political appointees, Federal judges receive lifetime appointments. Successfully capturing a judicial seat can reward the capturer for decades,[46] and popular umbrage cannot "throw the bum out" in the next election.

Second, in a captured court, strategic advances can be won deep in the weeds of jargon and theory, where the public is less likely to appreciate the ultimate impact; judicial decisions expanding the "unitary executive" theory[47] or limiting *Auer*[48] and *Chevron*[49] deference to administrative agency expertise are not obvious blows to the environment or public health. Mischief can be done outside the spotlight of popular attention.

Third, special interests can ask captured courts to do things Republican legislators wouldn't dare vote for—like allowing unlimited and ultimately anonymous money into politics.[50] Courts are designed to make unpopular decisions in the service of justice; a captured court can deliver unpopular decisions in the service of politics.

> Finally, courts have traditionally been viewed as mostly apolitical—neutral arbiters of law and fact.[51] Accordingly, the political branches have treated them with deference, largely leaving it to the judiciary to set its own ground rules. As a result, the courts, and most notably the Supreme Court, operate in unusual secrecy, protected by a veneer of neutrality.

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[43] *See,* Jason Zengeric, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018). *https://www.nytime.com/2018/08/22/magazine/trump-remakng-courts-judiciary.html* [*https://perma.cc/W598-ZS9B*] (arguing that "even circuits that are decidedly liberal are undergoing significant changes" and that "a radically new Federal judiciary could be with us long after Trump is gone").

[44] *See,* Sheldon Whitehouse, *A Right Wing Rout: What the "Robert Five" Decisions Tell Us About the Integrity of Today's Supreme Court*, AM. CONST. SOC'Y.: ISSUE BRIEF (Apr. 2019), *https://www.acslaw.org/wp-content/uplouds/2019/04/Captured-Court-Whitehouse-IB-Final.pdf* [*https://perma.cc/H5UC-NQF9*].

[45] Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against "Administrative State"*, WASH. POST (Aug. 12, 2018), *https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5c-c6c594024954_story.html* [*https://perma.cc/6SM7-QXNX*].

[46] *See,* U.S. CONST. ART. III, § 1 (providing for lifetime tenure of Federal judges).

[47] *See,* Ian Millhiser, *The Supreme Court Will Decide If Trump Can Fire the CFPB Director. The Implications Are Enormous*, VOX (Oct. 18 2019), *https://www.vox.com/policy-and-politics/2019/9/18/20872236/trump-justice-department-supreme-court-cfpb-unitary-excecutive* [*https://perma.cc/2SAG-6GDDV*].

[48] *Auer* v. *Robbins*. 519 U.S. 452, 461 (1997).

[49] *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

[50] *See, e.g.*, Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Appellant, *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (acknowledging that "immensely wealthy individuals play a significant role in our political process" and asking the Court to allow "corporations to spend freely on independent candidate advocacy").

[51] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.").

IV. THE APPARATUS OF CAPTURE

To accomplish the capture effort, special interests and their sophisticated teams of lawyers and political operatives have systematically developed an apparatus whose purpose is first to influence the selection and confirmation of judges, and then to influence the judges' decisions in the courts.[52] This apparatus is most visible at the Supreme Court, but it operates in lower courts, too. Here is its battle plan:

- Select carefully vetted judges who embrace the desired pro-corporate world view.[53] This is done by giving a controlling role in judicial selection to an organization to which the interests give millions of dollars (the Federalist Society);
- Unleash millions in dark money supporting the nominee (or opposing him in Judge Merrick Garland's case).[54] This is done through an organization (the Judicial Crisis Network ("JCN")) that uses anonymous donations to fund political advertising campaigns for (or against) nominees;
- With their judges in place, tee up strategic cases and inundate courts with amicus briefs-best understood as lobbying documents. This is done through a flotilla of closely related front groups. These front groups sometimes appear as the litigant, behind a plaintiff of convenience; and sometimes among a flotilla of "amici curiae" signaling in harmony how the influence machine wants the court to decide.[55]

It's quite an investment, but it has paid stunning dividends.

The funding that fuels the judicial influence machine is difficult to expose because of its secrecy, but the coordination, tactics, and strategy of the influence machine are becoming less obscure. One case study is the outside spending group, JCN. According to tax filings, an unnamed donor gave $17 million to JCN to help block President Obama's nomination of Merrick Garland to the Supreme Court and support President Trump's nomination of Neil Gorsuch to that same vacancy.[56] Then, in 2018, a donor—perhaps the same one—gave another $17 million to JCN to support the troubled nomination of Brett Kavanaugh.[57] JCN received many more anonymous multimillion-dollar donations along the way. A sophisticated media relations campaign, orchestrated by a firm CRC Public Relations interconnected in the web

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[52] Press Release, Brennan Center, Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination Process (Jan. 26, 2006), *https://www.brennancenter.org/our-work/analysis-opinion/three-nominations-reveal-countrasting-influence-interest-groups-high-court* [*https://perma.cc/564L-WQQE*] (finding that "interest group spending on television ads and other lobbying tools can have a potent effect on who becomes a judge in America").

[53] *See, e.g.*, Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), *https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-now-a-trump-appointee/2019/12/21/d6fale98-2336-11ea-bed5-880264cc91a9-story.html* [*https://perma.cc/3TJ6-WQK*] ("The three circuit court that have flipped to Republican majorities this year have the potential to not only change policy but also benefit Trump professionally and politically. The 2nd Circuit, with its new right-leaning majority, will decide whether to rehear a case challenging Trump's ability to block critics on Twitter as well as one regarding Trump's businesses profiting while he's in office. The 11th Circuit, which handles appeals from Georgia, Florida and Alabama, is set to take up several voting rights cases."); Robert O'Harrow, Jr. & Shawn Boburg. *A Conservative Activist's Behind-the-Scenes Campaign To Remake the Nation's Courts*, WASH. POST (May 21, 2019), *https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/* [*https://perma.cc/GS2H-ZLMU*] (describing Federalist Society president Leonard Leo's role in selecting Neil Gorsuch and Bret Kavanaugh).

[54] *See*, O'Harrow & Boburg. *supra note* 53 (noting the Judicial Crisis Network spent $10 million to support Supreme Court Justice Neil Gorsuch's confirmation after spending $7 mil1ion to block President Barack Obama's Supreme Court pick, Meuick Garland).

[55] *See, e.g.*, Brian R. Frazelle, *Corporate Clout: As the Roberts Court Transforms, the Chamber Has Another Big Term*. CONST. ACCOUNT ABILITY CTR. (July 26 , 2017), *https://www.theusconstitution.org/think__think/corporate-clout/* [*https://perma.cc/VKM-9-TUYE*] (noting that in the 2016–17 term, the U.S. Chamber of Commerce "submitted friend-of-the-court briefs in 15 cases . . . [a]nd in 12 of those case, or 80%, the position advocated by the Chamber prevailed").

[56] *See*, Robert Maguire, *Group That Spent Millions to Boost Gorsuch Also Paid Mysterious Inaugural Donor*, CTR. FOR RESPONSIVE POL.: OPENSECRET'S NEW (May 16, 2018), *https://www.opensecrets.org/news/2018/05/group-that-spent-millions-to-boost-gorsuch-also-paid-mysterious-inaugural-donor/* [*https://perma.cc/M33S-9899*].

[57] *See*, Anna Massaglia & Andrew Perez, *Secretive Conservative Legal Group Funded by $17 Million Mystery Donor Before Kavanaugh Fight*. CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (May 17, 2018). *https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh* [*https://perma.cc/E9AS-S763*].

of dark money groups, put those millions to work on political-campaign-style advertising.[58]

JCN is one of many groups working in close coordination. To understand that coordination let's visit one prominent individual: Federalist Society Co-Chair Leonard Leo.[59] Prom his perch at the Federalist Society, Leo has been the lynchpin and chief strategist of the conservative legal movement's court-packing plan for the better part of two decades.

The Federalist Society claim it is merely a not-for-profit group for like-minded aspiring lawyers eeking to discuss conservative ideas and judicial doctrine. The truth, however is more complicated. In effect, tbere are three incarnation of tbe Federalist Society. The first is perfectly appropriate: A debating society for conservatives at law schools and in legal communities across the country to discuss traditionally conservative judicial values, like originalism and the merits of limited government. The second, is familiar in Washington, DC: A think tank tbat attract big-name conservative lawyers scholars, politicians, and even Supreme Court Justices to events; that publishes and podcasts and that holds galas.[60] The third role of the Federalist Society is the dangerous one: It is the vehicle for powerful interests seeking to reorder the judiciary by grooming, vetting, and selecting amenable judges.[61]

This Federalist Society role is the result of many years of work by Leo and his network of donors. As early as 2003, Leo was known in the Bush White House as the coordinator of "all outside coalition activity regarding judicial nominations."[62] In October 2006, Leo presented to students at the University of Virginia ("UVA") School of Law an overview of the measures used to help confirm George W. Bush nominees John Roberts and Samuel Alito. According to an article about the UVA event, Leo's strategies included the following:

- "Aggressive fundraising to hire a top media firm. About $15 million was spent for both confirmations on earned and paid media, telemarketing, and other grassroots mobilization
- "Advance work recruiting more than 60 organizations to support the nomination and confirmation of a person committed to conservative priorities
- "Polling to figure out what the American people thought the role of the court should be so that the message could be framed in a way that resonated with the public
- "Preparation of background memos and briefing materials on every conceivable nominee
- "Research into how Justices William Rehnquist and Sandra Day O'Connor affected the vote count in controversial areas of law
- "A search of history to learn how controversial issue areas had been handled in earlier confirmations
- "Publishing White papers to paint the ground favorably when it comes to the questions that are appropriate for a nominee to answer
- "Training expert lawyers in how to talk to the media

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[58] *See*, Press Release, Judicial Crisis Network, Judicial Crisis Network Launches $10 Million Campaign To Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee (Jan. 9, 2017), *https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-sculias-legacy-support-president-elect-trump-nominee/* [*https://perma.cc/DN23-MXWT*] (noting that JCN "expects to spend at least $10 million to confirm the next justice . . . [and] CRC Public Relations—President Greg Mueller will spearhead communication and media strategy").

[59] *See*, Jonathan Swan & Alayna Treene, *Leonard Leo to Shape New Conservative Network*, AXIOS (Jan. 7, 2020), *https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-nf2b-7b74f11617dlc.html* (*https://perma.cc/8RBG-CMVT*) (noting that until recently, and for the period relevant to this Article, Leo served as the Federalist Society's Executive Vice President and that it has been reported that he has Limited his role in the Federalist Society in order to establish a new dark money operation focusing on the judiciary.

[60] *See, 2019 National Lawyer Convention*, FED. SOC'Y. (Nov. 2019), *https://fedsoc.org/conferences/2019national-lawyers-convention* [*https://perma.cc/SJ45-8HPE]* (featuring Justices Gorsuch and Kavanaugh).

[61] *See*, Jason Zengerle. *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), *https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html* [*https://perma.cc/W598-ZS9B*] ("Trump might not have known much nbout the law, but he needed . . . to create the impression that he would be reliable in terms of conservative judges, because that would calm down and consolidate a very large block of coalition.' That is, what mattered to the Federalist Society—and the Heritage Foundation—was that Trump take their advice on judicial nominees. In an interview with Breitbart in June 2016, Trump pledged, 'We're going to have great judges, conservative. all picked by Federalist Society.'").

[62] O'Harrow & Boburg, *supra* note 53.

- "Holding dozens of background, off-the-record meetings with reporters to give them information about the nomination and confirmation process"[63]

This playbook is still in use today. In the spring of 2019, The Washington Post published an in-depth investigation of Leo and his present network of organizations.[64] It is massive, secretive, and lavishly funded, and its purpose is to pack and influence the courts.[65] As the Post found through public records and interviews, the groups in Leo's orbit work in close coordination and are linked through multiple vectors: Finances, board members, phone numbers, addresses, office support staff, and operational details.[66]

Anonymous funding is the lifeblood of this network and its judicial influence campaign. Between 2014 and 2017, Leo's nonprofits collected more than $250 million in dark-money donations.[67] Secret donors providing money at that quarter-billion-dollar scale obviously expect a robust return on their investment, and this money was used to carry out all manner of activities to achieve that return. The *Post* unearthed a list of clients of a conservative media relationsfirm outlining the network's role in the Garland and Gorsuch nomination battles:

> Nine of the [Leo-affiliated] groups hired the same conservative media relations firm, Creative Response Concepts, collectively paying it more than $10 million in contracting fees in 2016 and 2017. During that time, the firm coordinated a months-long media campaign in support of Trump's Supreme Court nominee, Neil M. Gorsuch, including publishing opinion essays, contributing 5,000 quotes to news stories, scheduling pundit appearances on television and posting online videos that were viewed 50 million times, according to a report on the firm's website.[68]

This description tracks closely the methods outlined by Leo years before at UVA.

While the plan has been long in the making, in the Trump administration it has become open and obvious. As a Member of the Senate Judiciary Committee, I have seen the dark-money-funded politicization of the judicial nomination and confirmation process emerge, climb to top political priority (it now dwarfs any legislative activity in the Senate), and pay remarkable dividends. According to an October 2019 analysis by the Senate Democratic Policy and Communications Committee, the Republican-controlled Senate had allowed less than one-sixth the number of votes on legislation and amendments compared to the Democratic-controlled House.[69] Meanwhile, as of February 2020, the Senate has confirmed 193 article III judges during the Trump administration, including fifty-one influential appellate judges—nearly as many as President Obama appointed in his eight-year presidency (fifty-five).

The Federalist Society now counts eighty-five percent of the Trump administration's Supreme Court and circuit court nominees as members.[70] In November 2019, at his first major public event since taking his seat on the Supreme Court bench, Justice Kavanaugh spoke to a high-priced Federalist Society gala fundraiser.[71] Justice Kavanaugh thanked Federalist Society member and Trump White House Counsel Donald McGahn for his help during the confirmation process;[72] McGahn once quipped that be had been "in-sourced" to the White House to deliver on the Federalist Society's priorities.[73] Justice Kavanaugh appreciatively called McGahn his "coach."[74]

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[63] *See*, Robin Cook, *Confirmation of High Court Justices Akin to Political Campaign, Leo Says*, UNIV. OF VA SCH. OF L. (Oct. 2, 2006), *https://www.law.virginia.edu/news/2006_fall/leo.html* [*https://perma.cc/T35W-3AJV*].

[64] *See*, See O'Harrow & Boburg, *supra* note 53.

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] Analysis on file with Democratic Policy and Communications Committee.

[70] Statistic on file with Office of Senator Whitehouse.

[71] Adam Liptak. *Kavanaugh Recalls His Confirmation at Conservative Legal Group's Annual Gala*, N.Y. TIMES (Nov. 14, 2019), *https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html* [*https://perma.cc/Q5FD-6H97*].

[72] Nina Totenberg, *Kavanaugh Hailed at Federalist Society as Protesters Attempt Disruption*, NAT'L. PUB. RADIO (Nov. 15. 2019), *https://www.npr.org/2019/11/15/79438921/kavanaugh-hailed-at-federalist-society-as-protesters-attempt-disruption* [*https://perma.cc/BS9Q-ABEC*].

[73] Lydia Wheeler, *White House Lawyer: "Completely False" That Trump Outsources Judicial Selections*, HILL (Nov. 17, 2017), *https://thehill.com/regulation/360981-white-house-lawyer-completely-false-that-trump-outsources-judicial-selections* [*https://perma.cc/TH6X-PAG9*].

[74] Robert Burnes & Ann E. Marimow, *As Trump Cases Arrive, Supreme Court's Desire To Be Seen as Neutral Arbiter Will Be Tested*, WASH. POST (Nov. 26, 2019), *https://www.washington post.com/politics/courts_law/as-trump-cases-arrive-supreme-courts-desire-to-be-seen-as-neutral-*

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With vetted and selected judges in place comes the next step: Strategically guiding the Court to desired outcome. Again dark money plays a role: Over years, anonymously funded group have sprung up to serve this effort. One task is to seek out case with fact pattern that support arguments for changes in law the big interests desire, and then bring those cases before the Court. To get there, these legal organization recruit plaintiffs, usually with the offer of free services. (Ordinarily, in real litigation, the plaintiff selects the lawyer, not vice versa.)

I saw this happen in a case I argued before the Supreme Court. The dark-money-funded Pacific Legal Foundation swept in from across the country and recruited a Rhode Island plaintiff, who agreed to let them bring this case before the Supreme Court.[75] When the Court' decision ultimately did not get them the result they wished to achieve, they dropped him, and went on to other cases. Pacific Legal Foundation is still at it before the Court.[76]

Once one of these groups gets the case up before the Court, an armada of related amici curiae ("friends of then court") sails in to echo and amplify the corporate message. Many of these amici are funded by the same donors.

In recent amicu brief I wrote, I pointed out tbe common funding of many of the other amici in that very case, and how at least thirteen of those amici were funded by entities that also have funded the Federalist Society.[77] The Center for Media and Democracy noted the brief and followed up with a more robust analysis—indeed a stunning analysis—finding that "sixteen right-wing foundations gave nearly $69 million to groups urging the Supreme Court to abolish the Consumer Financial Protection Bureau since 2014" and that the same sixteen foundations had given over $33 million to the Federalist Society over the same period.[78]

Applying the "united action" campaign to the courts required a long and patient effort, but the end result of all this investment is profound. A small group of large donors is funding the vetting and selection of judges, and funding the campaigns for their confirmation, and funding the litigants who present cases to them, and funding a swarm of front-group amici who provide amplification of the donors' message and an illusion of broad support.

V. Results at the Court

Mired in dark-money influence, the Supreme Court has become a reliable ally for corporate and Republican partisan interests. Professional observers know it. As renowned New York Times columnist Linda Greenhouse reluctantly concluded, it is "impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda."[79] Her sentiment is not unique. Veteran court watcher Norm Ornstein has written that the Supreme Court "is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen."[80] The New Yorker's Jeffrey Toobin was blunt in an assessment of Chief Justice Roberts, comparing Justice Scalia, "who has embodied judicial conservatism during a generation of service on the Supreme Court," with Chief Justice Roberts, who "has served the interests, and reflected the values, of the contemporary Republican Party."[81]

The hard proof is in the numbers. As I have documented, from the 2004 through 2017 Terms, the Roberts Court issued seventy-three five-to-four partisan decisions benefiting big corporate and Republican donor interests. By partisan, I mean that

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arbiter-will-be-tested/2019/11/26/1d186f92-106d-11ea-b0fc-62cc38411ebb_story.html [*https://perma.cc/3EZ7-8JLD*].

[75] *See Palazzolo* v. *Rhode lslnnd.* 533 U.S. 606 (2001).

[76] In 2019, Pacific Legal Foundation represented the petitioner in *Knick* v. *Township of Scott*, 139 S. Ct. 2162 (2019) where the Supreme Court overruled precedent that required properly owners to seek compensation for state and local property takings in State courts before seeking compensation in Federal courts. *Id.* at 2179.

[77] Brief for U.S Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirano as Amicus Curiae Supporting Respondent. *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, No. 19–7 (U.S. Jan. 22, 2020) *https://www.supremecourt.gov/DocketPDF/19/19-7/129418/20200121 1S258928_19-7%20Amici%20Brief.pdf* [*https://perma.cc/3DBS-GF6Q*].

[78] Alex Kotch, *Conservative Foundations Finance Push To Kill the CFPB*, Ctr. for Media and Democracy: PR Watch (Feb. 13, 2020), *https://www.prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb* [*https://perma.cc/P39U-P8FG*].

[79] Linda Greenhouse, *Polar Vision*, N.Y. Times (May 28, 2014), *https://www.nytimes.com/2014/05/29/opinion/greenhouse-polar-vision.html* [*https://perma.cc/E8VY-XR65*].

[80] Norm Ornstein, *Why the Supreme Court Needs Term Limits*, Atlantic (May 22, 2014), *https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/* [*https://perma.cc/6U9E-6J4V*].

[81] Jeffrey Toobin, *No More Mr. Nice Guy*, New Yorker (May 25, 2009), *https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy* [*https://perma.cc/6NLN-TXCV*].

it was all Republican appointees making up the five. The benefits to Republican donor groups are not hard to discern. They include allowing corporate interests to spend unlimited money in elections, hobbling pollution regulations, enabling attacks on minority voting rights, curtailing labor's right to organize, and restricting workers' ability to challenge employers in court.[82] In its 2018 Term, the Court added seven more of these five-to-four partisan decisions to this tally.[83]

In this run of now eighty partisan five-to-four cases (and counting), something else quite telling took place. The Republican majority routinely broke traditionally conservative legal principles, such as respect for precedent, "minimalism" in the scope of their decision, or "originalist" reading of the Constitution. The Justices in these bare partisan majorities even went on remarkable fact-finding expeditions, violating core traditions of appellate adjudication that leave fact-finding to lower courts.[84] (It added no luster to this effort that the facts they found were false.)[85] The consistent measure across these decisions is not traditional doctrines of conservative jurisprudence; it is the interests that win.

A results-oriented judiciary is anathema to our Founders' vision. A judiciary independent of the political branches, and with justice as its end rather than political gains for factions, is fundamental to our constitutional democracy. As Montesquieu put it, "There is no liberty, if the power of judging be not separated from the legislative and executive powers."[86] But corporate and partisan special interests are purposefully eroding that fundamental ideal to win this array of victories, and the Court seems content to be shepherded down that path. Some of these victories go beyond donor interests just pocketing a win in a particular case; the most dangerous victories actually tilt the political or legal or regulatory playing fields in favor of the donor interests in ways that will enable streams of future victories.

It is perhaps not a coincidence that polls show the public's faith in the courts receding. In one poll, only thirty-seven percent responded that they have "a great deal" or "quite a lot" of confidence in the Supreme Court.[87] By seven to one, Americans have reported in polling the belief that they are less likely before the Justices of this Court to get a fair shot against a corporation compared to vice versa.[88] That ought to be a hazard light flashing for the Court.

VI. Proposed Solutions: Bringing Transparency to the Judiciary

Millions of dollars in dark money have no business coursing through the judicial nomination and selection process, or funding litigants and so-called "friend of the Court." All this coordinated, anonymous funding creates an odor of rot, and it risks lasting damage to the institution of the Court. Congress can take steps to stop the erosion of confidence and restore the Court to its proper, constitutionally prescribed lane. While some have called for dramatic and sweeping structural change—like imposing term limits, or adding seats to the Court—a logical first step is to shine the light of greater transparency and accountability into the Court.[89]

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[82] Whitehouse, *supra* note 44.

[83] *See Niolsea* v. *Preap*, 139 S. Ct. 954 (2019); *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019); *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485 (2019); *Manhattan Cmty. Access Corp.* v. *Halleck,* 139 S. Ct. 1921 (2019); *Knick* v. *Twp. of Scott.*, 139 S. Ct. 2162 (2019); *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019).

[84] Brief for Sen. Whitehouse *et al.*, *supra* note 77.

[85] *See, e.g., The Effects* of *Shelby County* v. *Holder*, Brennan Ctr. for Justice (Aug. 6, 2018), *https://www.brennancenter.org/our-work/policy-solutions/effect-shelby-county-v-holder* [*https://perma.cc/27MX-DMMB*] (documenting new sate laws restricting voting rights after *Shelby County*); Richard L. Hasen, *The Decade of Citizens United*, Slate (Dec. 19, 2019), *https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html* [*https://perma.com/4DE8-VYXT*] (documenting the effects of *Citizens United* on anonymous campaign spending despite the decision's endorsement of the value of disclosure requirements).

[86] Charles de Montesquieu, The Spirit of the Laws (1748); *accord* The Federalist No. 78 (Alexander Hamilton).

[87] *Confidence in Institutions*, Gallup (Feb. 29, 2020. 10:11 a.m.), *https://news.gallup.com/poll/1597/confidence-institutions.aspx* [*https://perma.com/CYM6-WN49*].

[88] Mark Mellman, *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values*, Constitutional Accountability Ctr. 9 (Feb. 29, 2020, 10:24 a.m.), *https://www.theusconstitution.org/wp-content/uploads/2018/03/PUBLIC-Mellman-CAC-Poll-Presentation.pdf* [*https://perma.cc/BA53-DNAE*].

[89] *See Supreme Court Justice Term Limits: Where 2020 Democrats Stand*, Wash. Post *https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-term-limit/* (*http://perma.cc/X7AU-WX95*) (last visited Feb. 29, 2020) (showing that several 2020 Presidential candidates support or are open to term limit for Supreme Court Justices); Burgess Everett & Marianne Levine, *2020 Dems Warm To Expanding Supreme Court*, Politico (Mar.

Continued

In the political branches, we require transparency as a safeguard. Congress and the Executive Branch have extensive reporting requirement: The Lobbying Disclosure Act provides insight into who is influencing the legislative and rulemaking processes;[90] the Federal Election Campaign Act mandates public disclosures about political campaigns;[91] and the Ethics in Government Act requires financial disclosure from officials.[92]

By comparison to th eother branches the judiciary is largely a black box. It's not just that hidden donor lurk behind amici seeking to influence courts, or that groups like JCN need not disclose the donors behind political campaigns for judges; loopholes also allow Supreme Court justices and Federal judges to avoid disclosing travel and hospitality perk. Judges are nominally covered by the Ethics in Government Act, but judicial disclosures as implemented by the regulations of the Judicial Conference, are the least comprehensive and effective.[93] We would never have known of Justice Scalia's all-expenses-paid hunting vacation, except that he died on that vaca-tion so it made the news.[94]

For a branch of government without either force or purse, for one that bases its authority on its legitimacy, it's a mess. If conflicts of interest lurk behind the millions of dollars in anonymous money, it could produce reputational crisis for the Court. Legislation that I propose would go a long way to protect against those potential conflicts through the sunlight of public disclosure. Not for nothing did Supreme Court Justice Louis Brandeis say that "sunlight is the best disinfectant."[95]

It is hard to predict what true transparency would disclose, but the worst scenario is that a small cabal of special interest funders anonymously pays to (a) select the Justices, (b) campaign for their confirmation, (c) have cases strategically brought before the Court, (d) flood the Court with an echo chamber of scripted amici, and (e) fund elaborate travel and hospitality for the agreeable Justices. Ample evidence suggests the worst-case scenario may not be far from reality. So here are some proposed repairs for various danger areas.

A. Anonymous Amici Curiae

Amicus curiae briefs, written by non-parties for the purpose of providing information, expertise, insight or advocacy, have surged in both volume and influence in the past decade. Supreme Court and circuit court opinions often adopt language and arguments from amicus briefs.[96] During the Supreme Courts 2014 term, it received 781 amicus briefs, an increase of over 800% from the 1950s and a 95% increase from 1995.[97] From 2008 to 2013, the Supreme Court cited amicus briefs 606 times in 417 opinions.[98]

18, 2019), *https://www.po1itico.com/story/2019/03/2020-democrats-supreme-court-1223625* [*https://perma.cc/6T65-B7JV*] (stating that "[t]he surprising openness from White House hopefuls along with other prominent Senate Democrats to making sweeping change—from adding seats to the high court to imposing term limits on judges and more—comes as the party is eager to chip away at the GOP's growing advantage in the courts").

[90] Lobbying Disclosure Ac1 of 1995, 2 U.S.C. 1603(a)(I) (2018) ("No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives."); Lobbying Disclosure Act of 1995, 2 U.S.C. 1602(10) (2018) ("The tenn 'lobbyist' means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.").

[91] Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30104(b)(1)–(8) (2018).

[92] Ethics in Government Act of 1978, 5 U.S.C. App. § 10l(f) (2018).

[93] *See generally* CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES, Canon 4 (JUDICIAL CONFERENCE OF THE U.S. 2019).

[94] *See* Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016) *https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html* [*https://perma.cc/J495-7X94*).

[95] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913), *https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapler-v* [*https://perma.cc/2HYS-V8WE*].

[96] *See* Paul M. Collins Jr., Pamela C. Corley, & Jesse Hamner, *The Influence of Amicus Curiae Brieff on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y. REV. 917. 917 (2015) (finding "the justices adopt language from amicas briefs based primarily on the quality of the briefs argument, the level of repetition in the brief, the ideological position advocated in the brief, and the identity of the amicus").

[97] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 n.3 (2016).

[98] *Id.* at 1941.

Anricus briefs are an increasingly powerful advocacy tool for special interest group. When those interest groups lobby Congress, they face stringent financial disclose requirements;[99] no similar requirements exist for this form of judicial lobbying.

Janus v. *AFSCME*[100] (and its precursor, *Fredrichs* v. *California Teachers Association*)[101] presents a textbook example of coordinated, dark-money judicial Jobbying in a case with massive political implications.[102] The case garnered over seventy-five amicus briefs, including many opposing the 1ight of public- sector labor union to collect fees from non-union members. Many of these briefs were by amicus group with fonding from the same source: The conservative Lynde and Harry Bradley Foundation, which has a stated goal of ″reduc[ing] the size and power of public sector unions.″[103] None of this information was disclosed in either case to the Court or the parties. Instead, it fell to the diligent later research of transparency groups, using what public data is available, to document this web of influence with the Bradley Foundation at its heart.[104] While the Court in *Friedrichs* deadlocked at four-to-four becanse of the death of Justice Scalia, the radical right was right away ready with a new case in *Janus*. With Justice Gorsuch confirmed, the Court by a vote of five-to-four overturned forty years of settled law and undermined public sector unions' ability to engage in political advocacy.[105]

In *Seila Law* v. *CFPB*,[106] the case in which I filed my brief disclosing the common funding of other amici, a group of common funders had (a) supported at least thirteen amici attacking the constitutionality of the Consumer Financial Protection Bureau, (b) developed and propagated the so-called "unitary executive" theory of executive power their amici supported, and (c) funded the Federalist Society's efforts to bring on to the Court Justices who would be agreeable to this theory.[107]

Many of the amici in both *Janus* and *Seila* law claim status as "social welfare" organizations and thereby keep their donor list private.[108] Without knowledge of the common funding, one might consider thirteen amicus brief, to present a broad outpouring of support; once the common funding becomes apparent, it suggests an artificial echo chamber manufactured by a small cabal of self-interested entities.

Judges and parties should know who is trying to influence the outcome in their case, but disclosure rules are woefully inadequate for today's dark-money fueled legal advocacy. Supreme Court Rule 37(6) requires only that amicus briefs:

> [I]ndicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify

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[99] Lobbying Disclosure Ace of 1995, 2 U.S.C. 1603(b)(4) (2018) ("Each registration under this section shall contain . . . the name address, principal place of business, amount of any contribution of more than $5,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity . . . 1A.").

[100] S. Ct. 2448 (2018).

[101] 136 S. Ct. 1083 (2016).

[102] *See* Mary Botari, *Behind* Janus: *Documemts Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018). *https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html* (*https://perma.cc/K3KN-S5XS*] (noting "[i]n the past decade, a small group of people working for deep-pocketed corporate interests, conservative think tanks and right-wing foundation have bankrolled a series of lawsuits to end what and SPN, are tax-exempt charitable groups").

[103] *Free Markets: improving Opportunities for All Citizens by Promating Economic Growth*, BRADLEY FOUND. (Feb. 29, 2020, I0:20 a.m.), *https://www.bradleyfdn.org/impact/free-markets* [*https://perma.cc/81DY-L54C*].

[104] Brian Mahoney, *Conservative Group Nears Big Payoff in Supreme Court Case*, POLITICO (Jan. 11, 2016), *https://www.politico.com/story/2016/01/fredrichs-california-teachers-union-supreme-court-217525* [*http://perma.cc/93MA-RWW7*] (discussing that in *Friedrichs*, "The Bradley Foundation funds the Center for Individual Right, the conservative D.C. non-profit law firn that brought the case; it funds (or has funded) at least 11 organizations that submitted amious briefs for the plaintiffs; and it's funded a score o[conservative organizations that support the lawsuit's claim that the "fair-share fees" nonmembers must pay are unconstitutional").

[105] As Justice Kagan noted in her dissent, "The majority has overruled *Abood* [v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977)] for no exceptional or special reason, but because it never liked the decision . . . 1A. Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate." *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

[106] No. 19–7, 140 S. Ct. 427 (2019) (granting certiorari).

[107] *See* Brief for Sen. Whitehouse *et al., supra* note 77, at Appendix A.

[108] *See Bullock* v. *Internal Revenue Serv.*, 401 F. Supp. 3d 1144, 1159 (D. Mont. 2019) (invalidating a 2018 Internal Revenue Service rule that permitted 50l(c)(4) "social-welfare" organizations to keep their donor lists private).

every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.[109]

The Federal Rules of Appellate Procedure have a similar disclosure requirement,[110] but these rules allow for easy evasion. A group like the Bradley Foundation can fund dozens of organizations to participate as amici in a case. As long as the money is not directed to the "preparation or submission" of a particular brief (which may be taken to mean merely printing and mailing costs), the amicus need not tell the Court where it gets its money. The real interests lie back in the shadows, while their front groups—often groups with anodyne names that belie their true purposes—create an illusory chorus of support.

Worse, the rule is inconsistently applied. In 2018, the Court rejected an amicus brief funded through a GoFundMe campaign, with most donors giving ten or hundreds of dollars.[111] At the same time the Supreme Court routinely accepts amicus brief from the United States Chamber of Commerce. The Chamber refuses to disclose its funding; indeed the anonymity of Chamber membership in a selling-point for corporation seeking to influence policy and the courts without as associating their names with the often-toxic positions of the Chamber.[112] It is difficult to conjure any valid reason to reject one brief because an individual who donated $50 to the effort did not disclose her identity, while accepting another whose corporate donor in the millions of dollars remain anonymous.

This discrepancy seemed so obvious that I wrote to the Supreme Court to suggest that its disclosure rule should be changed.[113] Responding for the Court, Clerk of the Court Scott Harris wrote, "The language of Rule 37.6 strikes a balance .... While your letter suggests that non-disclosure of donor or member lists ['/favors 'well-heeled' amici, it is just as likely to protect organizations that advocate for the disadvantaged or unpopular causes. *See, e.g., NAACP* v. *Alabama*, 357 U.S. 449 461 (1958 recognizing right of AACP not to provide membership lists where disclosure might lead to retribution and could chill group activity)."[114]

The Court's response was troubling in two ways. First, it draws a false if not outright offensive equivalence between Alabama NAACP members at risk of physical violence during the Civil Rights era and large corporate interests seeking to bend the law anonymously to their advantage.[115] Second, the Court *did require* the disclosure of the small donors, who were the one much more comparable to the ordinary AACP members protected in the Alabama case. The Court's unwillingness to look behind these hidden big-money influence campaigns runs contrary to longstanding precedent that disfavors anonymity in judicial proceedings.[116] It would not be difficult to honor that precedent and fashion a rule of disclosure that allows an exception for true associational threats of violence, had the Court wished.

A legislative solution to this problem is the AMICUS (Assessing Monetary Influence in the Courts of the United States) Act. This very limited legislation would require disclosure by repeat players in the influence game—those who file three or

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[109] SUP. CT. R. 37(6).

[110] FED. R. APP. P. 29(a)(4)(E).

[111] *U.S. Supreme Court Rule Crimps GoFundMe Backed Amicus Brief*, YAHOO FIN. (Dec. 10, 2018), *https://finance.yahoo.com/news/u-supreme-court-rule-crimps-075351237.html* [*https://perma.cc/889T-RV5U*].

[112] Dan Dudis, *Chamber of Commerce Wages War Against Political Transparency*, THE HILL (Oct. 20, 2016), *https://thehill.com/blogs/pundits-blog/finance/302067-chamber-of-commcrce-wages-war-against-political-transparency* [*https://perma.cc/T9CG-9AR2*] (stating that "Chamber President Tom Donohue has said that the Chamber is in the business of providing 'reinsurance' to companies that need help lobbying for positions that aren't publicly or politically palatable. And key to the Chamber's ability to provide this 'reinsurance' is the fact that it can do the dlrty work for its member without them leaving their fingerprints behind").

[113] Letter on file with author.

[114] Letter on file with author.

[115] *See,* Dale E. Ho, *NAACP* v. *Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 433 (2012) ("[A]pplying *NAACP* v. *Alabama's* holding in a formally symmetrical manner to the relatively powerful ... without regard to context may undetermine rather than affirn the values underlying that decision.").

[116] *See, e.g.*, United States v. *Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (finding that a lower court erred when granting the "'rare dispensation' of anonymity against the world" when it allowed an amicus to file a brief anonymously, and that "the court has 'a judicial duty to iuquire into the circumstnnces of particular cases to determine whether the dispensation is warranted'"); *Doe* v. *Frank*, 951 F.2d 320, 324 (11th Cir. 1992) ("A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough."); Babak A. Rastgoufard. Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009 (2003).

more amicus briefs in the United States Supreme Court or the Federal courts of appeal during a calendar year. Disclosure would be required only of these groups' big-dollar funders, those who contributed three percent or more of the entity's gross annual revenue or over $100,000. In addition, the bill would prohibit covered amicus brief filers from making gifts or providing travel or hospitality to judges, akin to current restrictions on legislative lobbying.[117]

B. Judicial Travel and Hospitality

Another means of influence is the "soft" lobbying of gifts and travel. Supreme Court travel paid for by others is not infrequent. Reporting by the nonpartisan Center for Public Integrity and by the *Washington Post* revealed that the nine Supreme Court Justice received over 365 trips paid for by outside groups from 2011 to 2014.[118] Unlike the vulgar and immediate quid pro quo exchange of a thing of value for a specific judicial outcome in a particular case, soft lobbying plays the long game of mutual habituation and good will through more decorous activities like travel, wbicb happen to avail access to the donors and their intermediaries. The long game is well known to Leonard Leo, his corporate cabal, and the savvy repeat players who represent them.

There are myriad unreported ways interests can cultivate the good will of the Court. Linda Greenhouse described a recent Federalist Society gala as sending a message from the corporate donor community to the Justices: "We've been here for you, and we expect you to be here for us. If you want to come back, don't disappoint us."[119] Current judicial travel and gift disclosure requirements do not provide enough sunlight into these relationships.

While the Ethics in Government Act requires judges to provide some financial disclosure, judges and Justices are not required to identify the exact dollar value of the reimbursement, and they are exempted entirely from reporting any gifts in the form of "food, lodging, or entertainment received as personal hospitality."[120] The Executive Branch personal hospitality exemption is limited to "hospitality extended for a nonbusines purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or the individual's family";[121] the Senate's is virtually identical, and is commonly understood to be an exception for old friends and family.[122]

The death of Antonin Scalia demonstrated the difference for Justices. Justice Scalia was a well-known traveler, reporting 258 trips paid for by private sponsors over eleven years.[123] The $700-per-night accommodations at the West Texas hunting lodge where Justice Scalia died were paid by John Poindexter, owner of a corporate defendant in an age discrimination lawsuit, *Hinga* v. *MIC Group*,[124] that the Supreme Court the year before refused to hear,[125] to the company's advantage.[126] This all-expenses-paid hunting trip with a litigant was treated as personal hospitality. It seems fair to require that judges and Justices make the same disclosures that elected officials do. The Judicial Travel Accountability Act would require judicial officers' financial disclosure statements to include the dollar amount of transportation, lodging, and meal expense reimbursements and gifts, as well as a detailed description of any meetings and events attended. It would align judicial disclosures with disclosures required in the other branches. This legislation has bipartisan support and has been introduced in both houses of Congress.[127]

C. Supreme Court Transparency

The Supreme Court is such an opaque institution that the public has no idea whom the Justices meet with in their chambers. Recent reports show why that in-

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[117] *See*, 2 U.S.C. 1613 (2018).

[118] Mark Berman & Christopher Ingraham, *"Supreme Court Justices are Rock Stars." Who Pays When the Justices Travel Around the World?,* WASH. POST. (Feb. 19, 2016), *https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/what-supreme-court-justices-do-and-dont-disclose/* [*https://perma.cc/5QAU-KHPJ*].

[119] Linda Greenhouse, *Supreme Court Party Time*, N.Y. TIMES (Nov. 22, 2018), *https://www.nytimes.com/2018/11/22/opinion/supreme-court-federalist-society.html* [*https://perma.cc/38CM-CBCN*].

[120] Ethics in Government Act of 1978, 5 U.S.C. 102(a)(2)(A) (2018).

[121] 5 C.F.R. 2634.105(k) (2018).

[122] 5 U.S.C. App. 109(14) (2018).

[123] Lipton, *supra* note 94.

[124] 136 S. Ct. 246 (2015).

[125] *Id.*

[126] *See* Lipton, *supra* note 94.

[127] Judicial Travel Accountability Act, S. 2632, 116th Cong. (2019).

formation matters. In October 2019, Justices Alita and Kavanaugh met with representatives of the National Organization for Marriage (NOM).[128] NOM is a political advocacy group with both 50l(c)(3) and 50l(c)(4) not-for-profit corporate status.[129] It uses that dual status to oppose same-sex marriage initiatives in Federal and State legislatures and in the courts,[130] promoting "an understanding of marriage as the union of one man and one woman." [131] In this instance, NOM was an amicus curiae in three consolidated cases then pending, which presented the issue whether the Civil Rights Act protected against discrimination based on sexual orientation.[132]

It is a fair question whether Justices should even take such meetings with amici.[133] At a minimum, those meetings should be disclosed. If the disclosures show patterns suggesting bias, or might influence a recusal motion, or appear to tread close to ex parte meetings, further action may be appropriate. But no disclosure is required. We know the Justices met with these advocates only because of a social media post from NOM President Brian C. Brown.[134]

Most judges take great care to avoid even the appearance of an ex parte contact during pending litigation. To be sure, NOM was a friend of the court, not a party to the litigation. But it would seem fair for parties litigating an issue to know if their opponents among the amici are getting a special audience with two of the Justices deciding their case.

Similarly, the Associated Press recently reported that the Supreme Court can be rented for private events.[135] The Supreme Court's website says nothing about such a service, but again thanks to social media we know that for a fee, and with the sponsorship of a Justice, the Court's premises are available for hire. No surprise, the Federalist Society, sponsored by Justice Alito, held an event at the Court in July 2018.[136] The Court refuses to disclose either the groups that rent the Court or the sponsoring Justices. According to court spokeswoman Kathy Arberg, "The court does not maintain public records of organizations holding events." [137] If a Justice were sponsoring an event for a litigant, or regularly sponsored events for particular amici curiae, it would seem that other litigants and the public ought to know.

Simple legislation would make all this information public. The official calendars of the Justices and a list of private events with sponsoring Justices could be made public by the Court after an appropriate interval. The Justices could still meet with whomever they choose, and sponsor groups for events they support, but they would do so knowing their choices will become public. For an institution whose authority is grounded in its public legitimacy, it is far better to be open with the public than not.

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[128] *See*, Ephrat Livni, *An Unseemly Meeting a the U.S. Supreme Court Raises Ethics Questions*, QUARTZ (Nov. 2, 2019). *https://qz.com/1740845/scotus-justices-impartiality-questioned-after-unseemly-meeting/* [*https://perma.cc/92ZQ-XQZ5*].

[129] *About Us*, NAT'L. ORG. FOR MARRIAGE, *https://nationformarriage.org/about* [*https://perma.cc/MWSY-MKNX*] (last visited Mar. 4 2020).

[130] *Id.* (explaining that NOM "organiz[es] as a 50l(c)(4) nonprofit organization, giving it the flexibility to lobby and support marriage initiatives across the nation" and that "[c]onsistent with its 501(c)(4) nonprofit starns, NOM works to develop political messaging, build its national grassroots email database of voters, and provide political intelligence and donor infrastuncture on the State level").

[131] *Our Work*, NAT'L. ORG. FOR MARRIAGE. *http://nationformariage.org/main/ourwork-#navigation-bar* (last visited Mar. 4, 2020) [*https://perma.cc/DJX4-Z8A6*].

[132] Brief for National Organization for Marriage and Center for Constitutional Jurisprudence, as Amici Curiae Supporting Respondents, *Bostock* v. *Clayton Cty.*, 139 S. Ct. 1599 (2019) (No. 17–1617).

[133] *See, e.g.*, Elie Myslal. *Conservative Supreme Court Justices are Showing Their Biases on Twitter Now*. ABOVE THE LAW (Oct. 31, 2019), *https://abovethelaw.com/2019/10/conservative-supreme-court-justices-are-showing-their-biases-on-twitter-now/* [*https://perma.cc/M5GW-63BA*] ("It's really bad enough that conservative justices are so willing to give public aid and comfort to right-wing groups like the Federalist Society. Brett Kavanaugh who has been credibly accused of attempted rape, hns promised to take revenge on his enemies, so you can't really claim the justice's partisan hackery is surprising. But this meeting with the NOM is outrageous.").

[134] Brian S. Brown (@briansbrown), TWITTER (Oct. 29, 2019, 12:12 p.m.), *https://twitter.com/briansbrown/status/1189213352167428096* [*https://perma.cc/6CGS-U5LY*].

[135] Mark Sherman, *Who Made the New Drapes? It's Among High Court's Mysteries*. AP NEWS (Nov. 29, 2019, *https://apnews.com/a1781172562243a8acd91804a5c8ad10* [*https://perma.cc/BPA7-8SG7*].

[136] The Federalist Society, FACEBOOK (2018), *https://www.facebook.com/pg/Federalist.Society/photos/?tab=album&album__id=1O155760987728481* [*https://perma.cc/GU8A-JE3J*].

[137] Sherman, *supra* note 135.

D. Supreme Court Records

Currently, no law provides for the preservation of Supreme Court Justices' papers. The Federal Records Act specifically excludes the Supreme Court, and the Justice's papers are considered private property rather than public records.[138] As The New Yorker's Jill Lepore wrote in 2014:

> The decision whether to make these documents available is entirely at the discretion of the Justices and their heirs and executors. They can shred them; they can bum them; they can use them as placemats. Texts vanish; e-mails are deleted. The Court has no policies or guidelines for secretaries and clerks about what to keep and what to throw away. Some Justices have destroyed virtually their entire documentary trail; others have made a point of tossing their conference notes. "Operation Frustrate the Historians," Hugo Black's children called it, as the sky filled with ashes the day they made their bonfire.[139]

Given the life tenure and extraordinary power to shape American law that comes with a seat on the Supreme Court of the United States, there is a public interest in public access to Supreme Court records.

Following the model provided by the Presidential Records Act, which ensures public access to presidential records,[140] my Supreme Court Records Act would make Supreme Court records the public property of the United States; place the responsibility for the custody and management of records with the incumbent Justice and, upon the Justice's retirement the Archivist of the United States; allow an incumbent Justice to dispose of records that no longer have administrative; historical, informational, or evidentiary value, subject to the approval of the Archivist; and establish a process for restriction of public access to these records.

E. DISCLOSE Act for Judicial Nominations

Judicial nominations and confirmations look more and more like political campaigns. Millions of dollars of dark money flow into social media, televion, and radio advertising supporting and opposing nominees. The ads target States whose Senators could be swayed on the nomination. It is political tradecraft, deployed for politicaI purpose, and all of it ought to be regulated like tbe political campaign spending that it is.

Two things need to happen for effective regulation of political spending on judicial nominations. First, the Federal Election Campaign Act (FECA) needs to cover these judicial nomination campaign so the spending is reported to the Federal Election Commission.[141]

Second, the law must deal with the post-*Citizens United* identity-laundering devices available to secretive donors. Existing FECA discloses do not reach behind the nominal donor to give a true picture of who's behind political spending.[142] So, we need a remedy like the DISCLOSE (Democracy Is Strengthened by Casting Light on Spending in Elections) Act[143] to unveil the real parties behind political advertising, who are now hiding behind shell corporations, donor trusts, and 50l(c)(4) organizations.

A Judicial DISCLOSE Act, which I plan to introduce, would require groups that that run political advertizements supporting or opposing Federal judicial nominations to disclose their biggest donors. The bill is modeled after the DISCLOSE Act, which would end the plague of dark money in our campaign finance system by requiring outside groups to disclose their donors to the FEC.

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[138] Federal Records Act of 1950 (FRA), 44 U.S.C. 3101 (2018).

[139] Jill Lepore, *The Great Paper Caper.* NEW YORKER (Dec. 1, 2014), *https://www.newyorker.com/magazine/2014/12/01/great-paper-caper* [*https://perma.cc/A83Z-2QLV*].

[140] The Presidential Records Act (PRA) of 1978, 44 U.S.C. 2201–07 (2018).

[141] Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 (2018) (currently defin1ng the term "candidate" as "an individual who seeks nomination for election, or election, to Federal office," but not including judicial nominees.

[142] Anna Massaglia, *"Dark Money" in Politics Skyrocketed in the Wake of Citizens United*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 27, 2020), *https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/* [*https://perma.cc/CJK8-3TQ8*] ("Dark money groups have reported nearly $1 billion in direct spending on U.S. elections to the FEC since *Citizens United* with just 10 groups bankrolled by secret donors spending more than $610 million of that.").

[143] S. 1147, 116th Cong. (1st Sess. 2019).

VII. CONCLUSION

We must be clear-eyed about the hurdles these reforms face. Enormous effort has been put by large and powerful interests into a fifty-year project to capture the courts. These interests seek to maintain, and indeed further en-trench, the corporate-friendly outcomes into which they have invested hun-dreds of millions of dollars. Transparency is inconsistent with their scheme. They will fight.

This is a fight worth having. Dark money is a plague anywhere in our political system. Citizens deprived of knowing the identities of political force are deprived of power, treated a pawns to be pushed around by anonymous money and message. Dark money encourages bad behavior, creating the "tsunami of slime" that has washed into our political discourse. Dark money corrupts and distorts politics. Bad as all that is, dark money around courts is even worse. The chances of corruption and scandal explode. The very notion that courts can be captured undercuts the credibility upon which courts depend. It is surprising that the Judiciary has not come to its own defense in these matters, but that makes it our job.

As Justice Brandeis also said, "If we desire respect for the law we must first make the law respectable."[144] The legislation I have proposed here would be an important—indeed necessary—first step to bringing a respectable transparency to our judiciary.

[144] Louis D. Brandeis, *The Brandeis Guide to the Modern World* 166 (Alfred Lief ed., 1941).

Senator WHITEHOUSE. Mr. Chair, the Supreme Court vacancy created by Justice Ginsburg's death makes this hearing salient as well as poignant. To understand the forces out to control the court, we must first look back.

Decades ago, business interests, spooked by upheaval in American society, needed a plan. Powerful men objected to the rise of the anti-war, environmental, civil rights, and women's rights movements.

Polluters dreaded accountability for the damage they were doing to our air and water. Tobacco interests dreaded accountability for the deaths they were causing. Corporate interests felt threatened.

So, the U.S. Chamber of Commerce turned to a prominent lawyer for corporate and tobacco interests. His recommendation? Corporate interests must get strongly involved in politics with a focus on controlling America's courts.

The lawyer's name was Lewis Powell. Weeks later, Powell went on to the Supreme Court where, in 1978, he led the 5 to 4 decision that first required a role for corporations in American politics, a role which has grown into, often, corporate dominance of American politics.

For big special interests, the rewards of an amenable judiciary are immense. A well-stocked bench can deliver things elected Members of Congress would never vote for, such as letting corporations spend unlimited money, even nowadays anonymous untraceable dark money in our elections or undoing the Voting Rights Act. The prizes are enormous and big special interests have the stamina to play the long game, which they did.

So, fast forward 40-some years from Lewis Powell's memo. Today, a dark money-funded private organization, the Federalist Society, has a dominant role in the selection of Federal judges.

Another dark money-funded private organization, the Judicial Crisis Network, takes anonymous donations, some as much as $17 million, to fund political ad campaigns for nominees' confirmations.

Other dark money-funded private organizations troll the country for plaintiffs of convenience to bring cases before the court that advance the big donors' agenda, and an obliging court majority relaxes standing requirements to hear those preferred cases.

Dark money-funded organizations then appear at the court in chorus by the orchestrated dozen as amici curiae, "friends of the court."

It is big. Last year, the *Washington Post* published an investigation showing Leonard Leo of the Federalist Society at the center of a sweeping web of groups fueled by at least a quarter billion dollars of dark money out to control the Federal judiciary.

This has the earmarks of a massive covert operation, screened behind dark money secrecy, run by a small handful of big special interests against their own country.

In occasional glimpses, we see the same family fortunes and corporate interests, suggesting a common scheme. We see overlap and funding sources, staff, board members, lawyers, mail drops, and office locations. We see cutouts, front groups, false narratives, hidden funding. It has the trade craft of a covert op.

Behind all that mess lurks a dark money-funded hothouse to incubate and propagate legal theories that give intellectual cover to

the donors' agenda, and we don't know much about travel and hospitality emoluments for justices because they are less transparent than the legislative and executive branches.

A quarter billion dollars is a lot of money. You don't spend that kind of money unless you expect something for it. So, look at climate change. The International Monetary Fund calculates the U.S. subsidy for fossil fuel at $600 billion—billion with a b—per year.

So, if you can get five Republican appointees onto the Supreme Court, knock back the Clean Power Plan, and stall progress on climate change for several years, the monetary value of that one delay could be hundreds of billions of dollars.

The capture scheme is an investment with perhaps a thousand to one return. Climate is a target, but there are many other issues targeted by this operation.

Voter suppression, where Leonard Leo, via the so-called Honest Elections Project, a rebrand of the Judicial Education Project, sister organization of the Judicial Crisis Network, is creating, as *The Guardian* reported on, quote, "a system where conservative donors have an avenue to both oppose voting rights and appoint judges to back that effort."

Destroying Obamacare, with a case to be argued in less than two months in the Supreme Court. Breaking the independence of regulatory agencies under the confected unitary executive theory. Neutering and crippling the civil jury to protect mighty corporate interests from the indignity of equal treatment before the law in courtroom.

The grand prize, the evil that makes other evils possible, a First amendment right to anonymous dark money in politics. Big special interests are already asserting that theory in anticipation.

As this anonymously-funded apparatus grasps for this Supreme Court vacancy, there are big questions for Congress to answer.

Why does so much special interest dark money surround the court? Why have there been over 80 partisan 5 to 4 decisions under Chief Justice Roberts giving victories to big Republican donor interests?

Why has the court been so feckless about proper disclosure from these groups? Are the various front groups in fact one large common scheme?

What and who are its goals? Whoever is behind this scheme what business do they have before the court?

Drill down. Follow the money. Who gave two $17 million plus donations to the Judicial Crisis Network to fund political campaigns against Judge Garland and for Judge Gorsuch, and to prop up Judge Kavanaugh's troubled confirmation?

Add to that another newly disclosed $15 million donation. From whom? What business did these donors or this repeat donor have before the court?

Who are the anonymous donors colluding with Leonard Leo to funnel that quarter billion dollars into this scheme and what do they expect in return?

This, obviously, matters. A baked-in bias within the Federal judiciary for special interests scheming behind an array of dark money front groups is a rotten situation that inflicts long-term harm on our judiciary.

For those who say both sides are to blame, great. Join me in fixing it. Let us bring transparency to judicial nominations, amicus briefs, and judges' gifts and hospitality no matter who is paying.

Mr. Chair, the sooner we clean up this mess, the sooner courts can escape the grimy swamps of dark money influence and return to their proper place in the broad and sunlit uplands of earned public trust.

Thank you, sir, for taking on this unpleasant but necessary challenge, and thank you for allowing me the opportunity to present these remarks today.

[The statement of Senator Whitehouse follows:]

Testimony before the U.S. House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture"

Senator Sheldon Whitehouse

September 22, 2020

Thank you, Mr. Chairman. First, I pay respect to Ruth Bader Ginsburg, whose life was a uniquely American story of passion and courage, leavened with determination and purpose, to achieve justice and progress. She deserves a special place in America's Pantheon; she will join our history among the greats; and I honor her today.

Second, may I ask that our Senate Democratic report on Court Capture be made a part of the record. Thank you.

The Supreme Court vacancy created by Justice Ginsburg's death makes this hearing salient as well as poignant. To understand the forces out to control the Court, first look back.

Decades ago, business interests, spooked by upheaval in American society, needed a plan. Powerful men objected to the rise of the anti-war, environmental, civil rights and women's rights movements. Polluters dreaded accountability for the damage they were doing to our air and water. Tobacco interests dreaded accountability for the deaths they were causing. Corporate interests felt threatened.

So the U.S. Chamber of Commerce turned to a prominent lawyer for corporate and tobacco interests. His recommendation? Corporate interests must get strongly involved in politics, with a focus on controlling America's courts. The lawyer's name was Lewis Powell.

Weeks later, Powell went on to the Supreme Court, where in 1978 he led the 5–4 decision that first required a role for corporations in American politics (*First National Bank v. Bellotti*) — a role which has grown into, often, corporate dominance of American politics.

For big special interests, the rewards of an amenable judiciary are immense. A well-stocked bench can deliver things elected Members of Congress would never vote for: such as letting corporations spend unlimited money – even nowadays anonymous, untraceable "dark money" – in our elections. Or undoing the Voting Rights Act. The prizes are enormous, and big special interests have the stamina to play the long game. Which they did.

Fast forward forty-some years from Lewis Powell's memo: today a dark-money-funded private organization, the Federalist Society, has a dominant role in the selection of federal judges. Another dark-money-funded private organization, the Judicial Crisis Network, takes anonymous

donations — some as much as 17 million dollars — to fund political ad campaigns for nominees' confirmations. Other dark-money-funded private organizations troll the country for plaintiffs of convenience, to bring cases before the Court that advance the big donors' agenda, and an obliging Court majority relaxes standing requirements to hear those preferred cases. Dark-money-funded organizations then appear at the Court in chorus, by the orchestrated dozen, as *amici curiae* ("friends of the Court"). It's big. Last year, the *Washington Post* published an investigation showing Leonard Leo of the Federalist Society at the center of a sweeping web of groups, fueled by at least a quarter-billion dollars of dark money, out to control the federal judiciary.

This has the earmarks of a massive covert operation, screened behind dark-money secrecy, run by a small handful of big special interests, against their own country. In occasional glimpses, we see the same family fortunes and corporate interests, suggesting a common scheme. We see overlap in funding sources, staff, board members, lawyers, mail drops and office locations. We see cut-outs, front groups, false narratives, hidden funding. It has the tradecraft of a covert op.

Behind all of that mess lurks a dark-money-funded hothouse to incubate and propagate legal theories that give intellectual cover to the donors' agenda. And we don't know much about travel and hospitality emoluments for Justices, because they are less transparent than the legislative and executive branches.

A quarter-billion dollars is a lot of money. You don't spend that kind of money unless you expect something for it. So look at climate change. The International Monetary Fund calculates the U.S. subsidy for fossil fuel at $600 billion per year. So, if you can get five Republican appointees onto the Supreme Court, knock back the Clean Power Plan and stall progress on climate change for several years, the monetary value of that one delay could be hundreds of billions of dollars. The capture scheme is an investment; with perhaps a thousand-to-one return.

Climate is a target, but there are many other issues targeted by this covert operation:

- voter suppression, where Leonard Leo, via the so-called "Honest Elections Project" (a rebrand of the "Judicial Education Project," sister organization of Judicial Crisis Network) is creating, as *The Guardian* reported, "a system where conservative donors have an avenue to both oppose voting rights and appoint judges to back that effort";
- destroying ObamaCare, with a case to be argued in less than two months in the Supreme Court;
- breaking the independence of regulatory agencies, under the confected "unitary executive" theory;
- neutering and crippling the civil jury, to protect mighty corporate interests from the indignity of equal treatment before the law in a courtroom;

- and the grand prize, the evil that makes other evils possible, a First Amendment right to anonymous dark money in politics. Big special interests are already asserting that theory, in anticipation.

As this anonymously-funded apparatus grasps for the Supreme Court vacancy, there are big questions for Congress to answer. Why does so much special interest dark money surround the Court? Why have there been over 80 partisan 5-4 decisions under Chief Justice Roberts giving victories to big Republican donor interests? Why has the Court been so feckless about proper disclosure from these groups? Are the various front groups in fact one large common scheme, and what — and whose — are its goals? Whoever is behind this scheme, what business do they have before the Court?

Drill down. Follow the money. Who gave two $17-million-plus donations to the Judicial Crisis Network to fund political campaigns against Judge Garland and for Judge Gorsuch and to prop up Judge Kavanaugh's troubled confirmation? (Add to that another, newly-disclosed $15 million donation, from whom?) What business did these donors — or this repeat donor — have before the Court? Who are the anonymous donors colluding with Leonard Leo to funnel that quarter-billion dollars into this scheme? – and what do they expect in return?

This matters. A baked-in bias within the federal judiciary for special interests scheming behind an array of dark-money front groups is a rotten situation that inflicts long-term harm on our judiciary. For those who say both sides are to blame, great — join me in fixing it. Let's bring transparency to judicial nominations, amicus briefs, and judges' gifts and hospitality — no matter who is paying.

The sooner we clean up this mess, the sooner courts can escape the grimy swamps of dark-money influence, and return to their place in the broad and sunlit uplands of earned public trust. Thank you for taking on this unpleasant but necessary challenge.

Mr. JOHNSON of Georgia. Thank you for your long-time work on this very important issue and others related to the integrity of the judicial process and system, and I thank you for your testimony today.

Mr. JORDAN. Mr. Chair?

Mr. JOHNSON of Georgia. Who seeks to be recognized?

Yes, the gentleman is recognized.

Mr. JORDAN. The Senator is not going to take questions?

Mr. JOHNSON of Georgia. No.

Mr. JORDAN. I think the last time the Senator was in front of the Oversight Committee he took questions from the Members. I mean, he came in here and leveled all kinds of accusations against Republicans, and is not going to take any questions from us?

Mr. JOHNSON of Georgia. Well, as the gentleman knows, it is our custom and tradition to not pose questions to our fellow colleagues when they appear as Witnesses.

Mr. JORDAN. The good Senator from Rhode Island took questions from us in the Oversight Committee just not too long ago because I was in that Committee and asked him some questions.

Mr. JOHNSON of Georgia. Well, it was not compulsory, and I guess the Chair of the Committee allowed it to happen.

Mr. JORDAN. Does the Senator not want to take our questions?

Mr. JOHNSON of Georgia. Yeah, our agreement with the Senator is that he would not take questions. That was our mutual understanding along with the Subcommittee.

So, with that, the gentleman has departed and we now have our second esteemed panel that is ready to go.

[Pause.]

Mr. JOHNSON of Georgia. All right. So, at this time we will reconvene to hear the testimony of our second panel. I will now introduce our second panel of Witnesses.

Professor Tom Ginsburg is the Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar and professor of political science at the University of Chicago Law School.

Professor Ginsburg focuses on comparative and international law from an interdisciplinary perspective. Professor Ginsburg has written and co-written award-winning books including "How to Save a Constitutional Democracy" with Aziz Z. Huq, "Judicial Review in New Democracies," "The Endurance of National Constitutions," and "Judicial Reputation." He currently co-directs the Comparative Constitutions Project, an effort funded by the National Science Foundation to gather and analyze the constitutions of all independent nation-states since 1789.

Professor Ginsburg holds the B.A., JD, and Ph.D. degrees from the University of California at Berkeley. Thank you, sir, for your appearance today.

Mr. Ilya Shapiro is the Director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute and publisher of the Cato Supreme Court Review.

Before joining Cato, he was a special assistant advisor to the multinational force in Iraq on Rule of law issues and he practiced at Patton Boggs and Cleary Gottlieb.

Mr. Shapiro is the author of "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court," co-author of

"Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution," and editor of 11 volumes of the Cato Supreme Court Review.

Mr. Shapiro received his Bachelor's degree from Princeton University, a Master's degree from the London School of Economics, and his JD from the University of Chicago Law School. Welcome, sir.

Judge Nancy Gertner is a Senior Lecturer on law at Harvard Law School and a former U.S. District Court judge out of Massachusetts. Judge Gertner was appointed to the Federal bench by President Bill Clinton in 1994.

In 2008, Judge Gertner was the second woman to receive the Thurgood Marshall Award from the American Bar Association section of individual rights and liberties. Judge Ginsburg was the first.

After retiring from the bench in 2011, Judge Gertner joined the faculty at Harvard Law School where she has taught a number of subjects including criminal law, criminal procedure, forensic science, and sentencing, and has continued to teach and write about women's issues around the world.

Judge Gertner received her Bachelor's degree from Barnard College, an M.A. in political science from Yale University, and her JD from Yale Law School. Welcome, Judge.

Last but not least, Professor Amanda Hollis-Brusky is an Associate Professor of politics at Pomona College where she teaches courses on American politics, the Supreme Court, and constitutional law.

Professor Hollis-Brusky is co-founder of the Southern California Law and Social Science Forum and editor at the Monkey Cage, a political science blog hosted by the *Washington Post*, and the author of two books and several articles on the Supreme Court and contemporary legal movements.

Professor Hollis-Brusky received her Bachelor's degree in philosophy and political science from Boston University, and her M.A. and Ph.D. degrees in political science from the University of California at Berkeley. Welcome, Professor.

We are happy to have you all here as a panel, and before you proceed with your testimony I want to remind you that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to 18 U.S.C 1001.

Please note that your written statements will be entered into the record in its entirety. I ask you to summarize your testimony in five minutes.

To help you stay within that time, there is a timing light in Webex. When the light switches from green to yellow you have one minute to conclude your testimony. When the light turns red, it signals your five minutes have expired.

Professor Ginsburg, you may now begin.

TESTIMONY OF TOM GINSBURG

Mr. GINSBURG. Thank you very much, Chair Johnson, Ranking Member Roby, and all the Members of the Subcommittee for the opportunity to discuss today a topic I have been researching for many years.

My work is on the origins, maintenance, and decline of constitutional democracy around the world, and work has taken me to dozens of countries.

Of course, I appear before you today in a time when Americans are worried about the quality of our own democracy and when the appointment of a Supreme Court justice is, again, going to be a major topic of discussion during our presidential election campaign. It is a good time to be thinking about the role of courts in democracy and how to ensure that our high-quality judiciary can fulfill its responsibilities under the Constitution.

At the same time, it is a moment of some risk. Major battles over judicial appointments risk politicizing the courts and depriving them of the legitimacy that is essential to their function.

This is not just a concern of scholars and journalists and court watchers, or those who have been tracking signs of democratic erosion in the United States. Much more importantly, it is a concern of the American people themselves. This perception of an independent judiciary that can constrain executive power is low and in decline on both sides of the political aisle.

Now, it is my view that even an old democracy like the United States can learn from the dynamics of democratic backsliding and democratic resilience around the world, and one of the things we observed in the context of democratic erosion is what might be called political capture of the judiciary.

In recent decades, for many reasons, courts have become very important in the politics of many countries, and this means that leaders who wish to take over their political systems first look to the courts as a first step in trying to end electoral competition and this has occurred in countries like Venezuela, Turkey, Hungary, even Poland.

At the same time, we also see countries in which the courts play a critical role in saving constitutional democracy in places like Colombia and Sri Lanka.

So, in my view, this outside information is relevant as we think about our own judiciary.

Now, it is also my view and finding election campaigns, presidential elections over judicial appointments is a distortion of our democracy, and so a key objective for Congress in the coming years must be to reduce the stakes of appointments to the Federal bench. Lowering the temperature of judicial appointments will be good for our democracy, good for our judiciary as well.

One way to do this would be to regularize the appointments process, and many other countries do this. Note that current discussions are not just about what kind of justice should replace Justice Ginsburg, but the very procedure by which that person will be nominated and confirmed, and this is, obviously, not healthy. Procedures must be set in advance.

In fact, I don't see in the current moment any principal stopping point in our partisan escalation. We could soon be in a situation where all appointments to the Supreme Court, maybe even all Federal courts, could only be made in periods when the presidency and Senate were in the hands of the same party, and this would lead to episodic rushes to confirm judges who are ever younger, less ex-

perienced, for the public to evaluate. Not good for the country, the court, or our democracy.

Now, it is true procedure is, largely, in control of the Senate's internal rules but it doesn't mean that Congress couldn't pass a statute seeking to regularize the procedure in terms of timelines, providing for outside vetting, and doing other things like introducing qualifications for Federal judges such as practice experience, which has arisen in a small number of recent nominations.

Chair mentioned the lack of a code of ethics to the Supreme Court, which is also something that could be addressed. All these things would give the public confidence that the procedure and standards of filling the judiciary and the people taking those jobs are not simply being manipulated on a partisan basis. So, I would like to see that.

I would also like to see us redirect the courts to fundamental issues of protecting our democracy. Right now, the dominant image of the courts is this kind of a referee between the two parties, famously captured by Justice Roberts in his own confirmation hearing in which he said the job of the judge was to call balls and strikes.

The problem is in a polarized era where the players themselves are picking the ump, each side is trying to get the calls sort of shaded to their side and sending more and more questions up to that umpire. My view is that most political decisions should be in the hands of democratic processes, and so the important role for courts is to preserve those processes.

Our courts do well in some core democratic areas like freedom of speech, freedom of association. They do less well in areas like the Voting Rights Act, and that is where I would like to see Congress instruct courts to give the right to vote maximum effect and to undo many of the efforts to suppress the vote that we have seen since the passage of the case of Shelby County.

Thank you very much, Mr. Chair, and I look forward to your questions.

[The statement of Tom Ginsburg follows:]

TESTIMONY BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY
U.S HOUSE OF REPRESENTATIVES

Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture

September 22, 2020

Tom Ginsburg
Leo Spitz Professor of International Law, University of Chicago Law School
Research Fellow, American Bar Foundation

My name is Tom Ginsburg and I am the Leo Spitz Professor at the University of Chicago Law School. I am grateful to Chairman Johnson, Ranking Member Roby, and the other Members of the Subcommittee for the opportunity to discuss a topic I have been researching for many years. I work on the origins, maintenance, and decline of constitutional democracy around the world. That work has taken me to dozens of countries, where I have worked with governments and development agencies on judicial independence, the rule of law, and constitutional reform.

I appear before you at a time when many Americans are worried about the quality of our own democracy, and when the appointment of a Supreme Court Justice is again going to be a major topic of discussion during our presidential election campaign. It is a good time to be thinking about the role of courts in democracy, and how to ensure a high-quality judiciary that can fulfill its responsibilities under our Constitution. At the same time, this is a moment of some risk. Major battles over judicial appointments risk politicizing the courts, depriving them of the legitimacy that is essential for their functioning. Furthermore, such battles channel legislative energy away from discussions of policy. Our era is a highly polarized one, with declining levels of public trust in government, and a number of analysts even believe that our democracy is at risk.

I believe that a key objective for Congress in future years should be to reduce the stakes of appointments to the Federal bench. Lowering the temperature of judicial appointments will be good for our judiciary and good for our democracy. One way to do this is to regularize the appointments process. A second important objective is focus the judiciary on a mission of protecting democratic institutions. This will safeguard the broader structure of American democracy, and reduce the judiciary's ability to plunge into squarely political matters.

Background

Before addressing specifics, let me set the stage by identifying two global trends that are relevant to the topic. Since the end of the Cold War, we have witnessed what scholars call the "judicialization of politics" in many countries around the world. This phrase refers to the fact that courts have assumed a major role in deciding issues of grave social and political import. Many courts acquired the power of constitutional review of legislation, now found in nearly 150 countries. In many places, courts have found themselves resolving high-profile cases that Professor Ran Hirschl calls "Mega-Politics."[1] Courts in dozens of countries have had to decide cases like *Bush v. Gore*, in which a judicial decision determined the result of a national election.[2] This means that the stakes of judicial decision-making have grown increasingly high.

One consequence of this development is what might be called the politicization of the judiciary, in which outside actors seek to influence courts, by controlling appointments, abusing systems of judicial discipline, and putting other forms of pressure on judges. The term "capture" comes from literature on the regulatory state, and refers to instances in which an agency is too aligned

[1] Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, ANNUAL REVIEW OF POLITICAL SCIENCE, Vol. 11, 2008.

[2] Id.

with the interests that it is supposed to represent.[3] But the larger problem is the attempt to capture courts by political forces around the world, as well as to influence their decision-making.

The second trend of our era is what we call democratic backsliding: the decline in the number of democracies around the world, and the decline in the quality of established democracies. Political scientists who measure these things tell us that the number of democracies peaked in around 2006, and has declined in every year since that.[4] Furthermore, there has been a decline in the *quality* of established democracies. This trend of democratic backsliding interacts with the first trend because the judiciary has become a target of leaders who wish to take over their political systems.

In some cases, such attempts are brazen. For example, upon taking power in Venezuela, for example, Hugo Chavez created a judicial disciplinary commission that fired hundreds of judges, and introduced a system of provisional contracts for those that remained in office.[5] He openly encouraged the public to disregard rulings he disagreed with. Similarly, Turkey's Recep Tayyip Erdogan moved decisively to reshape the Constitutional Court while he was Prime Minister, and subsequently arrested many judges of the ordinary courts that he though were hostile to him. Viktor Orbán in Hungary passed a new constitution that gave him the ability to appoint members of the Constitutional Court, while erasing the entire jurisprudence of the prior Court.

In Poland, a crisis occurred in 2015 when the Civic Platform Party, anticipating an electoral loss, tried to pack the constitutional court with a slate of last-minute appointees. When in October the Law and Justice Party took over it reused to seat these "Midnight Judges" appointed by the prior government. It then passed a law to reorganize the constitutional court to require a higher threshold to declare laws unconstitutional. A messy set of legal maneuvers followed, but the result is that the Constitutional Court is now firmly in the hands of a single party in Poland.[6] There followed a successful takeover of the council for judicial appointments, and a controversial set of laws to lower the mandatory retirement age for the judiciary so as to eliminate its senior leadership. While those laws were ultimately suspended after pressure from the European Union, observers believe that it is just a matter of time before the judiciary is controlled by one political party.[7]

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[3] J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018).

[4] See sources in Tom Ginsburg and Aziz Z. Huq, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (University of Chicago Press, 2018); Freedom House, FREEDOM IN THE WORLD 2019: DEMOCRACY IN RETREAT (2019).

[5] International Commission of Jurists, *Venezuela: Court Structure* (Nov. 14, 2014), available at https://www.icj.org/cijlcountryprofiles/venezuela/venezuela-introduction/venezuela-court-structure/; *see also* Jenna Eyrich, "Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela," 36 LOYOLA L.A. INT'L COMP. L. REV 1477-1503, 1480 (2014).

[6] Woijiech Sadurski, POLAND'S CONSTITUTIONAL BREAKDOWN (Oxford University Press 2019).

[7] Id.

The United States is not Venezuela or Hungary and will not become so. But some of the broader dynamics of democratic backsliding are present in our country, as many observers have argued.[8] It is therefore urgent to reverse efforts to politicize the judiciary and to avoid a situation in which candidates must signal a particular set of partisan ideological commitments in order to join the federal bench, which is already quite narrow in terms of the backgrounds of judges.

Importantly, it is not just academics or journalists, but Americans themselves who are concerned with the quality of our democracy and the role of courts in it. A project called Bright Line Watch, created by several political scientists, measures perceptions of the public and experts along twenty dimensions of democratic performance. For most of these dimension, less than half of Americans believe that the US fully or partly meets democratic standards. The project's survey of March 2020 showed that less than 50% of Americans believe that the US meets the standard of an independent judiciary. This is true among both supporters and opponents of President Trump. Furthermore, these numbers had declined from a year earlier.[9] The survey also shows that public and expert confidence that the judiciary can limit the executive is in decline. In other words, just when the judiciary might be most needed to help stave off democratic decline, its ability to do so may be diminished.

How did we get here? And what can be done?

Historians can trace the importance of the judiciary in our electoral politics all the way back to the appointment of "Midnight Judges" by the administration of John Adams just before handing over the presidency to Thomas Jefferson. The *Lochner* era, the New Deal, and Civil Rights era all saw battles over the proper role of the Supreme Court. Yet our era has seen a renewed ferocity over these issues. Televised confirmation hearings at the Supreme Court have become must-watch theatre, but do little to illuminate a candidates' views on jurisprudential issues. Scorched-earth battles like that over Justice Kavanagh in 2018 leave no one happy, and the public embittered.

In my view, our present situation has resulted because the stakes of judicial appointments are too high. American judges serve for a very long time, with terms averaging 25 years on the Supreme Court at present. In most other countries, judges who nominally serve for life are subject to a mandatory retirement age, but not in the United States. Countries with constitutional courts typically provide them with terms ranging from nine to fifteen years, long enough to insulate judges from partisan pressures but not so long as to lock in particular positions for long periods. Furthermore, the search for ever-younger candidates who can stay in office for many decades means that American judges have less experience than they might have in a system of fixed

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[8] According the Economist Intelligence Unit, the United States slipped from being a "full democracy" to a "flawed democracy" beginning around 2016. See Elena Holodnay, "The US has Been Downgraded to a 'Flawed Democracy,' " *Business Insider*, January 27, 2017, online at http://www.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1. The formula they use is complex, but our system of running elections seems to be at the heart to the matter. Other ratings systems have similarly downgraded American democracy. GINSBURG AND HUQ, note 4

[9] *Bright Line Watch*, March 2020 Survey results, available at http://brightlinewatch.org/impeachment-and-the-state-of-u-s-democracy-bright-line-watch-march-march-2020-survey/

terms, with appointments later in life. This may have an effect on the quality of judicial decision-making. It also means that the incoming judges have less extensive public records on which the public can base a prediction of future behavior.

Several ideas have emerged about appointments to the Federal bench that would lower the stakes of appointments. There is a good deal of constitutional flexibility in this regard. The Constitution requires the creation of one Supreme Court, but does not state the number of members it must have, and that number has fluctuated in the course of American history. The lower courts are a creature of the various incarnations of the Judiciary Act, and within the control of Congress to experiment with.

Again, we need not pretend that we are facing a unique challenge. There has been a good deal of thinking around the world as to how to ensure judicial independence, through insulating judicial appointments, protecting judicial salaries, and providing protections from arbitrary removal.[10] The Federal bench is institutionally quite independent. But the increasing power to judges also implies some need for judicial accountability. While judicial independence has been widely studied, accountability has been the subject of much less inquiry.[11] Accountability requires that the judiciary as a whole maintain some level of responsiveness to society, as well as a high level of professionalism and quality on the part of its members.

Reforms of judicial appointments and management reflect something of a dialectic tension between the need to depoliticize the judiciary and the trend toward judicializing politics. Independence is surely needed, but once given independence, judges may be asked to resolve an ever-expanding range of more important disputes. Should the judiciary begin to take over functions from democratic processes, pressure for greater accountability mounts.[12] This means that there is rarely a perfectly settled system of judicial appointments or accountability. Our own history of experimentation at the state level, where appointments systems vary widely and have changed over time, is evidence of this. In many countries we see tinkering with the system, and we should not be afraid to tinker with ours, within constitutional boundaries.

What reforms might we undertake? There are a number of proposals, on which I take no position. But would say that I would favor any plan that restores a degree of bipartisanship to the process and reduces the stakes of individual appointments. One might imagine an effort to restore the *status quo ante* of a filibuster rule, but encourage appointments to the federal courts in groups, so that both sides of the aisle would agree on a package of judges they would approve; the president could then pick who to nominate from this set of judges who had been pre-screened for bipartisan support. One could also imagine a political compromise in which both political

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[10] James Melton and Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, JOURNAL OF LAW AND COURTS 2: 187-217 (Fall 2014); Stephen B. Burbank, *The Architecture of Judicial Independence*, SOUTHERN CALIFORNIA LAW REVIEW 72: 315–51 (1999); John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, NEW YORK UNIVERSITY LAW REVIEW 77: 962–1038 (2002).

[11] David Kosar, *The Least Accountable Branch*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 11: 234–60 (2013).

[12] Nuno Garoupa and Tom Ginsburg, JUDICIAL REPUTATION (University of Chicago Press, 2015).

parties agree to allow the presidential nominations of the other party to get a fair hearing, election year notwithstanding. But as it is, the situation has escalated severely, and will likely continue to do so until Supreme Court seats can only be filled when the Presidency and Senate are in the hands of the same party. Each side will then seek young, identifiably partisan candidates. This will not be good for the Court, the country, or our democracy.

At a minimum, we should seek procedural regularity in the process of appointments to the Federal bench. Right now the process is governed by Senate Rules and the Constitution, which provides only minimal guidance. While the Constitution speaks to the roles of the president and a Senate majority, it does not stipulate that these are exclusive. If the parties could come to terms on issues such as that before us today—whether a nomination should proceed in the period immediately before an election—they might codify rules in a statute, which would tend to channel disputes into the merits of particular candidates rather than the process itself. The statute could stipulate timelines for hearings, so that there would be no "Midnight Judges" appointed without scrutiny. There is also the possibility of seeking outside information about judges. From the mid-1950s until the presidency of George W. Bush, the American Bar Association (ABA) provided a recommendation about the suitability of all nominees as part of the process. That rating process is now an informal one. In my view, the ABA rating system—or an equivalent—provides valuable information to the public, and I note that the Senate itself has recently rejected some of the candidates rated "unqualified" by the ABA.

Another way of ensuring broader accountability would be for Congress to require qualifications for judges. At present, to my knowledge federal judges need not have a law degree, or litigation experience of any kind. This makes us something of an outlier in comparative perspective, as I have not been able to identify another common law country which lacks the requirement that prospective judges have been admitted to practice before courts.

Accountability would also be enhanced were Congress to expand the range of legal experience that comprises the Federal bench. The Supreme Court today has a notable lack of diversity in backgrounds. All current justices attended Harvard or Yale for law school, and all but one came from the courts of appeals. None has significant experience in elected office or in trial litigation. Whereas several members of the Supreme Court have served as prosecutors, the last one to have significant defense-side experience was Thurgood Marshall. Indeed, the judiciary as a whole is heavily concentrated among those with executive branch experience, which may mean that it is deferential to state power in critical cases. Former prosecutors outnumber former public defenders three to one.[13] This has consequences for the enforcement of constitutional rights, whose violation is addressed by remedies that tend to be slow and weak.[14] Examining slates of nominations for their effects on professional and ideological diversity would be a valuable function. A target of balance among prosecutors, state supreme court judges, trial judges, and defense lawyers would give the federal judiciary far more diversity than it has today, with positive consequences for the quality of decision-making.

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[13] Ginsburg and Huq, note 4, at 219.

[14] Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies* DUKE LAW JOURNAL 65: 1–80(2015).

Finally, judicial ethics has largely been a matter of self-policing. Supreme Court justices, in particular, make their own decisions about recusal, presumably in conversation with each other. But Congress has adopted rules that require recusal in particular instances, such as when a justice "has a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy."[15] These rules should be regularly reviewed to make sure that Supreme Court justices avoid the "appearance of impropriety." I note that H.R. 1, passed by the House in March 2019, would require the Judicial Conference of the United States to adopt ethics rules for Supreme Court Justices. This is a welcome proposal.

Judges in a Democracy

Many of the debates about the judiciary in the United States and abroad come down to a core question: What should be the role of judges in a constitutional democracy? I think of democracy as a system of resolving conflicts on the basis of relatively stable rules. There are at least three possible views of the roles judges should play in this system.

One common image is that judges are umpires or referees, making sure the rules of the game are observed. Justice Roberts invoked this image in his own confirmation hearing in which he said the job of the judge was to "call balls and strikes."[16] But this conception of the role of the judge creates some risks in a highly polarized era, given that the referee is essentially chosen by the players themselves. If the players can choose the referee without constraint, they will surely seek one who is biased toward their side. This in turn may allow them to influence the rules in ways that advantage them, so that they never lose. The increasingly partisan battles over confirmation in my view reflect an attempt to shade the judiciary toward one or the other side in conflicts that are squarely political, and might even lead, as they have in other countries, to serious erosion of our democracy.

A related problem is the incentive to send to the court political disputes that might be resolved otherwise. The Supreme Court recognized this risk in deciding *Trump v. Mazars*, the case involving the House's subpoena of the Presidents financial documents this past Spring.[17] Noting that Congress and the executive had traditionally resolved subpoena disputes through negotiation and compromise, the Court then recognized "that this dispute is the first of its kind to reach the Court; that such disputes can raise important issues concerning relations between the branches; that similar disputes recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve these disputes among themselves without Supreme Court."[18] The Court seemed to be trying to fend of its politicization of the judiciary that would result from it having to play referee between the other branches. In short, while there is a superficial attraction to

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[15] 28 U.S.C. § 455.

[16] *"Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States," Hearings before the Committee on the Judiciary, United States Senate*, 109th Congress, U.S. Government Printing Office, 2005, 55-56.

[17] *Trump v. Mazars, LLP*, 591 U.S. ___ (2020)

[18] Id. at 10.

viewing the judge as a referee, and there is no doubt some accuracy in the image, in a polarized era it actually invites the parties to influence the referee.

Another vision of the role of judges is as a protector of minority rights, to compensate for those who are powerless. This vision goes back to the most famous footnote in constitutional law, found in the 1938 case of *Carolene Products.*[19] In that case, Justice Harlan Fiske Stone noted that, while the court would be very deferential to the political branches as far as economic legislation was concerned, it would continue to exercise scrutiny in which rights were at issue, or when regulations targeted "discrete and insular minorities." This came to stand for the idea that the Court would protect those who did not have a real possibility to exercise power through the political process. A generation later, this footnote justified the Warren Court's expansion of constitutional protections for African-Americans, and a whole host of rights claims. But while this vision has attractions, it does not really address the major risk of our time, which is whether the political process it itself working.

In an era of democratic erosion, we need a third vision of the role of courts in democracy, namely as a bulwark against democratic backsliding. The job of courts is not to decide substantive issues of policy, but it *does* have a role of ensuring that democratic institutions can operate so as to address issues of policy. Indeed, in comparative experience, we have several examples of courts that took effective action to save a democracy in danger of erosion.[20] I think the most appropriate way to think about it is that courts should not substitute judgment for elected officials, but should ensure that the elections for those officials have integrity.

Congress is not powerless to empower courts in this regard. American courts generally do well in enforcing the freedoms of speech and association in the First Amendment. But they do less well with the other essential democratic right, which is the right to vote. Voting, of course, is mainly handled by states in our system, but was federalized in the Fifteenth Amendment and the Voting Rights Act of 1965.

The 2013 case of *Shelby County v. Holder*[21] provides an example of a consequential case that has led to infringements on the right to vote. The case concerned the scheme in the Voting Rights Act which required certain states, mainly in the Jim Crow South, to "preclear" changes to their voting rules so as to ensure they did not deny or abridge the right to vote. Those provisions were renewed by Congress as late as 2006. In a 5-4 opinion, the Supreme Court held that Congress did not have adequate data to support its judgment to extend the preclearance scheme, and struck down the formula in Section 4(b) of the Act. There has followed a host of efforts to make voting difficult in the states formerly covered by the preclearance regime, including closing of polling places in African-American neighborhoods. States have also begun to aggressively purge voter rolls. I simply cannot understand why the world's oldest and most successful democracy would tolerate efforts to reduce the ability of its people to vote.

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[19] *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

[20] Sri Lanka, Colombia and Malawi come to mind. See Tom Ginsburg and Aziz Huq, *Democracy's Near Misses,* JOURNAL OF DEMOCRACY 29: 18-30 (2018).

[21] *Shelby County v. Holder*, 570 U.S. 529 (2013).

There are several steps that could be taken in this regard. Congress could respond to this state of affairs by developing a new formula for Section 4 preclearance. It clearly has the power to do this under the Fifteenth Amendment. It could undertake various other efforts to facilitate voting, some of which are contained in H.R.1.

More broadly, Congress could pass rules of interpretation for constitutional rights that urge judges to decide claims in ways that give maximum effect to the right at issue. Many other democracies do this. Examples include the Bill of Rights Act of New Zealand, which does not empower the courts to strike down laws, but instructs courts that "(w)herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."[22] Similarly, South Africa's Constitution instructs courts that "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[23] There have been proposals for Federal Rules of Statutory Interpretation of the kind that adopted in many U.S. states, and these could be used to protect the rights of individuals and groups in our constitutional order.[24] This in turn would deepen our democracy, and would be especially important in the realm of voting rights.

Conclusion

The United States is at a crucial juncture in terms of the quality of its democracy. One of the perversities of our constitutional system is that, with multiple veto points that make passage of legislation difficult, there is a tendency to turn to the courts to obtain political outcomes that are otherwise difficult to achieve. Of course, the United States has long had judicialized politics. As Alexis de Tocqueville famously said in 1835, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a subject of judicial debate."[25]
But the idea that judicial appointments would become a central issue in presidential election campaigns would be anathema to the founding fathers. Thomas Jefferson warned against judicialization when he wrote "there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."[26] We simply must find ways to reduce the stakes of judicial appointments, and reduce the temptation to politicize the judiciary further.

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[22] BILL OF RIGHTS ACT Section 6 (N.Z.).

[23] SOUTH AFRICA CONST. Sec. 39(2).

[24] Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

[25] Alexis De Tocqueville, DEMOCRACY IN AMERICA 309 (1835).

[26] *Letter to William Johnson, Mar. 1823*

Mr. JOHNSON of Georgia. Thank you, Professor Ginsburg.
Mr. Shapiro, you may begin.

TESTIMONY OF ILYA SHAPIRO

Mr. SHAPIRO. Thank you, Chair Johnson, Ranking Member Roby, distinguished Members of the Subcommittee. Thank you for this opportunity to discuss judicial independence and the rule of law.

Judicial independence is, of course, an important part of our constitutional structure, allowing the third branch of the Federal government to check the others. Those checks and balances maintain the separation of powers, which, in turn, protects our liberty by preventing the concentration of power.

Now, this hearing's subtitle implies that something called court capture is a threat to the rule of law. Yet, I am not sure that the courts have been captured or even what such a capture would look like.

Is it simply that President Trump has gotten many judges confirmed? Although this administration has had particular success with circuit judges, 53 confirmed with no remaining vacancies, its 216 article 3 judges represent only about a quarter of all such judges and less than a quarter of the authorized 870 article 23 judgeships.

By comparison, President Carter had 262 judges confirmed in one term, including 59 circuit judges, while President George H.W. Bush had 193.

If President Trump loses his bid for reelection, his total will not be much higher than the first President Bush's and significantly lower than that of President Carter, for whom Congress created many new judgeships to fill.

If President Trump is reelected, even assuming the Republicans keep the Senate, it is unlikely that his two-term total would be significantly higher than our last two presidents—George W. Bush with 327, Obama with 329.

For one thing, there are currently only about 60 vacancies, mostly for District judges in States where democratic Senators have refused to negotiate any sort of deals, preferring to leave their States shorthanded.

In other words, if the judiciary has been captured, it is the sort of capture we see under every president, and probably overstated, given the District court nominees in States like New York, where the democratic Senators have, indeed, made deals.

Maybe the nominees themselves have been captured by particular interests. This can happen with elected State judges and, historically, judicial politics have, indeed, been swayed by interests ranging from plantation slavery to the railroads, manufacturers, to New Deal allegiances.

Senator Whitehouse's own chosen Federal judge, John McConnell of the District of Rhode Island, was a well-known personal injury trial lawyer who gave generously to left-wing causes.

There is no indication that this administration's nominees are beholden to the entertainment or hotel industries in which Donald Trump plied his trade before coming down that golden escalator.

To his credit, the President has let the White House Counsel's Office run the show. Senators will occasionally insist on their local favorites, but the ration of intellectually rigorous and independent nominees to establishmentarians is exceedingly high and the result has been this President's biggest success, with judges of the same caliber as those whom conservative constitutionalist Ted Cruz would have picked.

This administration has surpassed even George W. Bush in picking committed and youthful originalists, particularly in the Circuit courts. Former White House counsel Don McGahn likes to say that rather than outsourcing judicial selections to the Federalist Society or anyone else, he had in-sourced the operation, meaning that his team, which was leaner than in previous administrations, all understood the need for solid judges with a record of accomplishment and demonstrated commitment to originalism and textualism.

That is why it is no surprise that so many of President Trump's nominees are already superstars and why Democrats have tried to smear them in various ways.

Senator Dianne Feinstein said about Seventh Circuit Judge Amy Coney Barrett, now a finalist for Justice Ginsburg's seat, that "the dogma lives loudly within you," which sounds like a rejected Star Wars line.

Fifth Circuit Judge Don Willett was assailed for humorous tweets. D.C. Circuit Judge Neomi Rao and Second Circuit Judge Steven Menashi were attacked for their pretty standard conservative or libertarian collegiate writings.

California Senators Feinstein and Kamala Harris tried especially hard to block their home State's Patrick Bumatay, who became the first openly gay Ninth Circuit judge and First Circuit judge of Filipino descent.

Indeed, Democratic Senators have used every trick in the book to stop or slow this high-quality judicial confirmation train, which Harry Reid eliminated for the lower courts in 2013.

So, they forced more cloture votes than all previous presidencies combined. Nearly 80 percent of Trump's judicial nominees have faced cloture votes, including many who are confirmed with upwards of 90 votes.

In comparison, about 3 percent of Obama's nominees faced cloture votes and fewer than 2 percent in the previous five presidencies.

To put it another way, Trump's 216 article 3 judicial appointees have received more than 4,600 no votes, while Obama's 329 got 2,039. Trump's judges have received nearly half of all no votes in U.S. history, in fact.

One final statistic. The average Democrat has voted against nearly half of all Trump nominees while the average Republican voted against fewer than 10 percent of Obama's.

It is a shame that quality nominees are confirmed on party line votes. We have gotten here because we are at the culmination of long trends where different legal theories map on to ideologically sorted parties, as I detail in my new books, "Supreme Disorder," which actually just came out today.

None of this is a sign of capture. Political considerations have always been part of the process.

Thank you, and I welcome your questions, including about actual threats to judicial independence like court packing.

Thank you.

[The statement of Mr. Shapiro follows:]

Testimony before the U.S. House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture"

Ilya Shapiro
Director
Robert A. Levy Center for Constitutional Studies
Cato Institute

September 22, 2020

Chairman Johnson, Ranking Member Roby, and distinguished members of the Subcommittee, thank you for this opportunity to discuss judicial independence and the rule of law. Judicial independence is of course an important part of our constitutional structure, allowing the third branch of the federal government to check the others. Those checks and balances maintain the separation of powers, which in turn protects our liberty by preventing the concentration of power. And all of that is part of the rule of law, the idea that we have clear rules that apply equally to everyone, including the government itself—rather than arbitrary and opaque rules that work differently for different people.

Now, this hearing's subtitle implies that something called "court capture" is a threat to judicial independence and the rule of law. Yet I'm not sure that the courts have been captured, or even what such a capture would look like. Is it simply that President Trump has gotten many judicial nominees confirmed? Although this administration has had particular success with circuit judges—53 confirmed, with no remaining vacancies—its just over 200 confirmed Article III judges represent only about a quarter of all such judges, and less than a quarter of the authorized 870 Article III judgeships.[1]

By comparison, President Carter had 262 judges confirmed—59 of them to the circuit courts—President Reagan had 383, President George H.W. Bush had 193, President Clinton had 378, President George W. Bush had 327, and President Obama had 329. If President Trump loses his bid for reelection, his total will be not much higher than the first President Bush's and significantly lower than that of President Carter (for whom Congress created many new judgeships to fill). And if President Trump is reelected, even assuming the Republicans keep the Senate, it's unlikely that his two-term total would be significantly higher than our last two presidents. For one thing, there are currently fewer than 70 vacancies—mostly for district judges in states where Democratic senators have refused to negotiate any sort of deals, preferring to leave their states shorthanded rather than to allow Trump to get any say in their judges.[2]

In other words, if the judiciary has been "captured," it's the sort of capture we see under every president—and probably overstated given the district court nominees in states like New York, where the Democratic senators have indeed made deals.

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[1] All historical data comes from the website of the U.S. Courts, https://www.uscourts.gov/judges-judgeships.
[2] *See* Madison Alder, "Blue States Create Hurdle for Trump's 2020 Judicial Appointments," *Bloomberg Law*, February 11, 2020, https://bit.ly/3hJum6d.

Maybe the nominees themselves have been captured by a particular interest? This can happen with elected state judges, of course, and historically the politics of judicial nominations have indeed been swayed by interests ranging from plantation slavery to the railroads, manufacturing concerns to New Deal allegiances. Senator Sheldon Whitehouse's own chosen federal judge, John McConnell of the District of Rhode Island, was a well-known personal-injury trial lawyer who gave generously to left-wing causes.[3]

But there's no indication that President Trump's judicial nominees are beholden to the entertainment or hotel-development industries in which Donald Trump plied his trade before coming down that golden escalator to launch his presidential campaign. To his credit, President Trump has let the White House Counsel's Office run the judicial-nominations show. Senators will occasionally insist on their own local favorites, but the ratio of intellectually rigorous and independent nominees to establishmentarians is exceedingly high. The result has been Trump's biggest success, with judges of the same kind and caliber as those whom conservative-constitutionalist Ted Cruz would have picked. This administration has surpassed even George W. Bush in picking committed and youthful originalists, particularly in the circuit courts. Former White House Counsel Don McGahn likes to say that, rather than "outsourcing" judicial selection to the Federalist Society or anyone else, he had "insourced" the operation, meaning that his team, which was far leaner than in previous administrations, all understood the need for solid judges with a record of accomplishment and demonstrated commitment to originalism and textualism.

That's why it's no surprise that so many of Trump's nominees are already superstars, and why Democrats have tried to smear them in various ways. Senator Dianne Feinstein (D-Calif.) said about Seventh Circuit Judge Amy Coney Barrett, the odds-on favorite to be elevated if Justice Ginsburg's seat becomes vacant, that "the dogma lives loudly within you"[4]—which sounds like a rejected Star Wars line. Fifth Circuit Judge Don Willett was assailed for humorous tweets. D.C. Circuit Judge Neomi Rao and Second Circuit Judge Steven Menashi were attacked for their (standard conservative-libertarian) collegiate writings. California Senators Feinstein and Kamala Harris tried especially hard to block Patrick Bumatay, who became the first openly gay Ninth Circuit judge and first circuit judge of Filipino descent. The American Bar Association too has been a source of renewed controversy, rating three circuit nominees "not qualified," seemingly based on ideological disagreements. (More on the ABA later.)

Indeed, Democratic senators have used every trick in their power to slow this high-quality judicial-confirmation train. They no longer have the biggest brake, the filibuster—which former Majority Leader Harry Reid eliminated for the lower courts in 2013, after having employed the first-ever partisan filibusters of circuit nominees a decade earlier—so they've forced more cloture votes than all previous presidencies combined. Nearly 80 percent of Trump's judicial nominees have faced cloture votes, including many who are confirmed with upwards of 90 votes. In comparison, about three percent of Obama's nominees faced cloture votes and fewer than two percent in the previous five presidencies. Until the Senate voted to cut back on floor time, Democrats also demanded the full 30 hours of floor time per nominee the rules allowed, even on judges who ultimately got approved by voice vote. Democrats are also refusing to return

[3] It's ironic that Sen. Whitehouse is leading the charge to "depoliticize" the judiciary given that McConnell donated $500,000 to various Democratic Party committees—much more than the partisan donations of any other Obama or Trump judicial nominee. *See* Carrie Severino, "Far-Left Obama-Appointed Judge Launches Political Attack on Conservative Federalist Society," Fox News, May 23, 2020, https://fxn.ws/3jXfD9M.

[4] Alexandra Desanctis, "Dianne Feinstein Attacks Judicial Nominee's Catholic Faith," *National Review*, Sept. 6, 2017, https://bit.ly/3jII6A5.

"blue slips," the home-state senators' prerogative to have a say in whether to let a nominee be considered. Judiciary Committee Chairman Chuck Grassley (R-Iowa) thus made them non-dispositive for circuit nominees, assuming that the White House engaged in good-faith consultation—a policy Lindsey Graham (R-S.C.) has continued as chairman.

To put it another way, Trump's just over 200 Article III judicial appointees have received more than 4,500 no votes, while Obama's 329 got 2,039.[5] Trump's judges have received nearly half of all no votes in U.S. history, an average of about 22 per judge (and about 36 per circuit judge)—as compared to just over six per judge under Obama, two under George W. Bush, 1.3 under Clinton, and the rest fewer than one. In 2019 alone, when the Senate confirmed 102 judges, those judges received 88 percent more no votes than all 2,680 judges confirmed in the 20th century. The number confirmed in 2019 is eclipsed only by the 135 in 1979, when Congress had just created 150 new judgeships and President Carter's Democrats had a 59–41 Senate majority. Judiciary Committee Chairman Ted Kennedy (D-Mass.) even considered seven circuit nominees in one hearing and the Senate confirmed more than 20 judges on a single day at least twice, confirming more than 97 percent of judges on voice vote and taking *no* cloture votes.

One final statistic: The average Democrat has voted against nearly half of all Trump judicial nominees, which the average Republican voted against fewer than ten percent of Obama nominees. It's a shame that quality nominees are confirmed on party-line votes; only 16 of 53 circuit judges confirmed under Trump have gotten more than 60 votes. But we've gotten here because we're at the culmination of a long trend whereby different legal theories map onto ideologically sorted parties.

None of this is a sign of "capture." And yet we have the now-withdrawn Advisory Opinion 117, the still-pending Judicial Ads Act, and other calls for so-called "reform." Is "capture" simply a term to describe the normal judicial selection and confirmation process when the person making the accusation doesn't like the president making the nominations? Because political considerations have always been a part of that process.

A Bit of History

When Justice Charles Evans Whittaker retired in March 1962 after just over five years on the Supreme Court, John F. Kennedy had his first opportunity to shape the high court. The youthful president selected a man of his own generation, Byron White. White had met JFK in England while on a Rhodes Scholarship—after having been runner-up for the Heisman Trophy and spending a year as the highest-paid player in the NFL—and the two became fast friends.

White was a vigorous 45 and serving as the deputy attorney general under Robert F. Kennedy. Kennedy formally nominated him on April 3, 1962. Eight days later, White had his confirmation hearing, a quick 90 minutes including introductions and supporting testimony from various bar association officials (during which the nominee doodled on his notepad). What questioning there was largely concerned the nominee's storied football career; "Whizzer" White was surely the last person to play a professional sport while attending Yale Law School. The judiciary committee unanimously approved him, and later that day so did the Senate as a whole, on a voice vote.

My, how times have changed.

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[5] "Biographical Directory of Article III Federal Judges: Export," Federal Judicial Center, last accessed Sept. 16, 2020, https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export.

The battle to confirm Brett Kavanaugh showed that the Supreme Court is now part of the same toxic cloud that envelops all of the nation's public discourse. Ironically, Kavanaugh was nominated in part because he was thought to be a safe pick, with a long public career that had been vetted numerous times. He was firmly part of the legal establishment, specifically its conservative mainstream, and had displayed a political caginess that made some on the right worry that he would be too much like John Roberts rather than Antonin Scalia or Clarence Thomas. As it turned out, of course, 11th-hour sexual assault allegations transformed what was already a contentious process into a partisan Rorschach test. All told, Kavanaugh faced a smear campaign unlike any seen since Clarence Thomas or even Robert Bork.

Confirmation processes weren't always like this. The Senate didn't even hold public hearings on Supreme Court nominations until 1916, a tumultuous time that witnessed the first Jewish nominee and the resignation of a justice to run against a sitting president. It wouldn't be until 1938 that a nominee testified at his own hearing. In 1962, the part of Byron White's hearing where the nominee himself testified lasted less than 15 minutes.

But while the confirmation process may not have always been the spectacle it is today, nominations to the highest court were often contentious political struggles. For the republic's first century, confirmation battles, including withdrawn and postponed nominations, or those upon which the Senate failed to act—Merrick Garland was by no means unprecedented—were a fairly regular occurrence.

George Washington himself had a chief justice nominee rejected by the Senate: John Rutledge, who had lost Federalist support for his opposition to the Jay Treaty. James Madison, the "father of the Constitution," also had a nominee rejected. And John Quincy Adams, who himself had declined a nomination from Madison, had a nominee "postponed indefinitely" during the lame duck period after Andrew Jackson had stopped his bid for reelection.

Jackson then had a nominee thwarted, but a change in Senate composition allowed Roger Taney to become chief justice a year later—and eventually author *Dred Scott*. John Tyler, who assumed the presidency in 1841 after the one-month presidency of William Henry Harrison, never lived down his nickname of "His Accidency." Congressional Whigs disputed his legitimacy and their policy disagreements extended to judicial nominations: the Senate rejected or declined to act on four Tyler nominees (three of them twice) before finally confirming one.

Indeed, most 19th-century presidents had trouble filling seats on the high court. Millard Fillmore was prevented from filling a vacancy that arose during his tenure, as was James Buchanan. Congressional elimination of Supreme Court seats stopped Andrew Johnson from replacing the two justices who died during his presidency. It took Ulysses Grant seven tries to fill three seats. Grover Cleveland ran into senatorial traditions regarding seats reserved for certain states—which he overcame only by nominating a sitting senator.

In the 20th century, Presidents Harding, Hoover, Eisenhower, Johnson, Nixon, and Reagan all had failed nominations—although Harding and Ike got their picks confirmed after resubmitting their names. FDR never had anyone rejected, but his court-packing plan was, both in Congress and at the polls. And LBJ's proposed elevation of Justice Abe Fortas triggered bipartisan opposition over ethics concerns—not a true filibuster because Fortas never gained majority support. Douglas Ginsburg withdrew before President Reagan could send his name to the Senate for having smoked marijuana with his law students; he is thus possibly the last public casualty of the War on Drugs.

Then of course there's Merrick Garland, the first nomination the Senate allowed to expire since 1881—but the last time a Senate controlled by the party opposite the president confirmed a

nominee to a vacancy arising in a presidential election year was 1888. As we know now, Senate Majority Leader Mitch McConnell's gamble worked: not only did it not hurt vulnerable senators running for reelection, but the vacancy held Republicans together and provided the margin for Donald Trump in key states. Then Neil Gorsuch was confirmed only after the Senate exercised the "thermonuclear option" and removed filibusters for Supreme Court nominees.

Opportunities for obstruction have continued—pushed down to blue slips, cloture votes, and other arcane parliamentary procedures—even as control of the Senate remains by far the most important aspect of the whole endeavor. The elimination of the filibuster for Supreme Court nominees was the natural culmination of a tit-for-tat escalation by both parties.

More significantly, by filibustering Gorsuch, Democrats destroyed their leverage over more consequential vacancies. Moderate Republican senators wouldn't have gone for a "nuclear option" to seat Kavanaugh in place of Anthony Kennedy, but they didn't face that dilemma. And they won't face it if President Trump gets the chance to replace Justices Ruth Bader Ginsburg or Stephen Breyer, which would be an even bigger shift.

Given the battles we saw over Gorsuch and Kavanaugh, too many people now think of judges and justices in partisan terms. That's too bad, but not a surprise when, as noted above, contrasting methods of constitutional and statutory interpretation now largely track identification with parties that are more ideologically sorted than ever.

Why all the focus on one office, however high? If Secretary of State John Kerry had died or resigned in the last year of the Obama presidency, it certainly would've been a big deal, but there's no doubt that the slot would've been filled if someone with appropriate credentials were nominated. Even a vacancy in the *vice presidency* wouldn't have lasted unduly long.

But of course executive appointments expire at the end of the presidential term, while judicial appointments usually outlast any president. A president has few constitutional powers more important than appointing judges. Justice Scalia served nearly 30 years on the high court, giving President Reagan's legal agenda a bridge to the 21st century. And that goes as much or more for nominees to the lower courts, which after all decided more than 50,000 cases a year even as the Supreme Court reduces its output. For example, a big ruling on nonprofit-donor disclosures was made in April 2016 by a district judge appointed by *Lyndon Johnson*.[6]

Even if politics has always been part of the process, and even if more justices were rejected in our country's first century than in its second, we still feel something is now different. Confirmation hearings are the only time that judges go toe-to-toe with politicians—and that's definitely a different gauntlet than even President Tyler's nominees ran. So is it all about TV and Twitter, the 24-hour news cycle and the viral video? Is it that legal issues have become more ideologically divisive? No, the nomination and confirmation process—an interplay among president, Senate, and outside stakeholders—hasn't somehow changed beyond the Framers' recognition, and political rhetoric was as nasty in 1820 as it is in 2020. All these parts of the current system that we don't like are symptoms of a larger phenomenon: As government has grown, so have the laws that courts interpret, and their reach over ever more of our lives.

Senatorial brinksmanship is symptomatic of a larger problem that began long before Kavanaugh, Garland, Thomas, or Bork: the courts' self-corruption, aiding and abetting the expansion of federal power, and then shifting that power away from the people's legislative representatives and toward executive branch administrative agencies. The Supreme Court is also

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[6] *Americans for Prosperity Found. v. Harris*, 2015 U.S. Dist. LEXIS 188240 (C.D. Cal. 2015). Judge Manuel Real, who became the last LBJ nominee on the federal bench, was appointed in 1966, took senior status in November 2018, and died in June 2019.

called upon to decide, often by a one-vote margin, massive social controversies, ranging from abortion and affirmative action to gun rights and same-sex marriage. The judiciary affects public policy more than it ever did—and those decisions increasingly turn on the party of the president who nominated the judge or justice.

So as the courts play more of a role in the political process, of course the judicial nomination and confirmation processes are going to be more fraught with partisan considerations. This wasn't as much of a problem when partisanship meant rewarding your cronies. But it's a modern phenomenon for our parties to be both ideologically sorted and polarized, and thus for judges nominated by presidents from different parties to have markedly different constitutional visions.

One aspect of that dynamic is the rise of the Federalist Society for Law and Public Policy Studies, which was founded nearly 40 years ago to counter the progressive orthodoxy in the legal profession. A network of more than 70,000 members, the Federalist Society has done much to enrich our public discourse and bring diverse perspectives to our law schools.

Advisory Opinion 117 and the Federalist Society

Earlier this year, the Judicial Conference's Code of Conduct Committee, which is chaired by Eight Circuit Judge Ralph Erickson—who was nominated by President Trump—and includes Rhode Island District Judge McConnell, released an "exposure draft" of Advisory Opinion 117, titled "Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association."[7] The upshot of this proposed guidance with respect to several canons of federal judges' Code of Conduct is that judges could remain members of the ABA, but could not be members of the Federalist Society or the American Constitution Society. Although the proposed rule was withdrawn last month after receiving significant criticism, it merits some discussion because it reflects the impetus for this hearing.

An astounding 210 federal judges signed a letter opposing AO117—which was suspiciously leaked to the *New York Times* on the eve of the confirmation hearings for now-D.C. Circuit Judge Justin Walker. Drafted by Circuit Judges Greg Katsas, Andrew Oldham, William H. Pryor Jr., and Amul Thapar, the letter was signed by appointees of every president since Richard Nixon.[8] Signatories included many non-members of the Federalist Society, while some judicial members did not sign (which doesn't necessarily mean they supporedt AO117). Many Trump appointees signed it, but many others did not. As one observer put it, "The main takeaway is that membership in the Federalist Society shouldn't be construed as a sign of how bold a judge is. . . . The second, and more critical conclusion, is that Donald Trump's appointees to the federal bench shouldn't be regarded as a monolithic group."[9]

The letter made the following claims: "We believe the exposure draft [1] conflicts with the Code of Conduct, [2] misunderstands the Federalist Society, [3] applies a double standard, and [4] leads to troubling consequences. [5] The circumstances surrounding the issuance of the exposure draft also raise serious questions about the Committee's internal procedures and transparency." These are indeed the key criticisms of AO117, which I will summarize:

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[7] Available at https://bit.ly/3hM1Lxg.
[8] Available at https://on.wsj.com/32y8ciC.
[9] "Federal Judges Push Back on the Judicial Conference's Advisory Opinion No. 117," Judicial Nominations Blog, July 6, 2020, https://bit.ly/33A8CnN.

1. Conflict with the Code of Conduct. The Judicial Code of Conduct urges that judges "not become isolated from the society in which they live." To that end, Canon 4 allows judges to serve as members—and even officers—of "nonprofit organization[s] devoted to the law, the legal system, or the administration of justice." The commentary to Canon 4 "encourage[s]" judges to "contribute to the law" through membership in "a bar association, judicial conference, or other organization dedicated to the law," including those focused on "revising substantive and procedural law." To change judicial policy and deny membership in such organizations separates judges from their communities and reduces opportunities for judges to expose themselves to a wide array of legal ideas.

2. Misunderstands the Federalist Society. Viewing the Federalist Society as a "political" or even "policy" organization is base error. The Federalist Society, unlike the ABA or ACS, has never taken any policy position—not even in an *amicus* brief. "We are at a loss to understand how membership can be seen as 'indirect advocacy' of the organization's policy positions when the organization itself takes no policy positions," the judges' letter states. The Committee noted that FedSoc has "promoted appreciation for the 'role of separation of powers; federalism; limited, constitutional government; and the rule of law in protecting individual freedom and traditional values." Of course, those are the bedrock principles of the American constitutional order, one where judges swear an oath to support and defend the Constitution. "Instead of taking specific legal or policy positions, it facilitates open, informed, and robust debate," the response letter explains. "Indeed, anyone who attends a Federalist Society event will encounter a diversity of ideas far exceeding that of many [I would say almost all] law school faculties."

3. Applies a double standard. FedSoc was formed partly as an alternative to the largest national voluntary bar association, the ABA. Yet the Committee allows ABA membership—even though the ABA most certainly takes policy/political positions, including filing briefs on controversial issues, including abortion, the travel ban, the Second Amendment, affirmative action, and same-sex marriage. The ABA also lobbies Congress. The Federalist Society does none of these things. The Committee's justification for the differential treatment is the public perception of FedSoc as conservative, while the ABA self-describes as nonideological or neutral.

4. Leads to troubling consequences. That sort of "evolving public perception standard" leads to an untenable situation where one of two horribles will be true: (1) A ban on judicial membership in only one organization that takes no legal, policy, or political positions, the Federal Society, which constitutes rank discrimination; or (2) an extended ban on judicial membership in a host of specialty bars, law school and alumni communities, and even churches and other religious organizations. Neither of these consequences is defensible.

5. Issues with the Committee's procedures and transparency. Reports suggest that no member of the Committee was allowed to dissent, despite some members' strong disagreement with the exposure draft. Other reports suggest that at least one Committee member was not allowed to vote on the draft. Essentially, the Committee functioned as a black box to reverse a previous interpretation of ethics rules that had long been considered settled.

I don't have any other kinds of argument against AO117, but I can add, from personal knowledge and experience, that characterizing the Federalist Society as a political organization, or one motivated by some kind of special interest *that it imposes on its members* is laughably wrong. The organization's own statement of purpose describes the Federalist Society as "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."[10] Again, these are all truisms that the most left-leaning federal judge would be hard-pressed to disagree with—with the devil of course being in the details of how to define "freedom," enforce the "separation of powers," or "say what the law is."

In all my years as a member—I joined in my first year of law school, 20 years ago—I have never been asked by anyone at the Federalist Society to take any position or sign my name to any statement. I'm constantly asked, on the other hand, about how best to frame a discussion in a particular area of constitutional law or legal policy, or whether I'd be amenable to debating a point I've made in a recent brief or article.

Having been formed in 1982 in opposition to the prevailing left-wing tilt in the legal culture—especially at law schools and the ABA—FedSoc strives to present debates and otherwise expose students to a wide range of ideas. It is not a monolith, and indeed I've had as many frank and serious disagreements, in person and in writing, with fellow Society members as with members of ACS and other organizations. During the same-sex marriage litigation, for example, law school faculty often declined to engage the issue, so FedSoc would provide *both* speakers (including, frequently, me) to hold debates.

The Federalist Society counts as members people who apply many different kinds of interpretive methods, from natural law theorists to libertarians, those who believe in judicial restraint and those who advocate judicial engagement, textualists and pragmatists, lovers of *Chevron* deference and those who want to "deconstruct the administrative state." Indeed, FedSoc-member jurists who are textualists nominated by the same president can disagree, as we saw in *Bostock v. Clayton County* this past term, in which Trump Supreme Court appointees Justices Gorsuch and Kavanaugh argued against each other regarding the proper interpretation of Title VII of the Civil Rights Act of 1964. And of course that decision gave fuel to the rising "common-good constitutionalists," as well as criticism by Senator Josh Hawley (R-Mo.) of the efficacy of a conservative legal movement that, in his view, increasingly fails to produce results for the voters who empower it.[11]

Moreover, progressives and liberals of various flavors are welcome at and regularly participate in Federalist Society events, whether sponsored by student chapters or at the national and regional lawyers' conventions. Surely people like Yale Law School Dean Heather Gerken, former acting solicitor general Neal Katyal, former ACLU president Nadine Strossen, and Harvard Law School *éminence grise* Laurence Tribe wouldn't want to legitimate an organization with right-wing advocacy goals, and yet they've all participated in Society events. (I myself have participated in ACS events, I should add, though I reiterate that ACS is different than the Federalist Society in various ways, including by taking policy positions.)

To put it in political terms, in the 2016 presidential election, Federalist Society members pulled the lever for Donald Trump, Hillary Clinton, Gary Johnson, and Evan McMullin, as well as writing in various others (anecdotally, Mike Lee and Ben Sasse were popular). Many went into the Trump administration, while others remained or became dedicated NeverTrumpers, leading such organizations as Checks and Balances. Still others remained on the sidelines because politics just ain't their bag.

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[10] "About Us," Federalist Society for Law and Public Policy Studies, https://fedsoc.org/about-us.
[11] See Adrian Vermeule, "Beyond Originalism," *The Atlantic*, March 31, 2020, https://bit.ly/2FqSKw1; Burgess Everett, "Hawley on LGBTQ ruling: Conservative legal movement is over," *Politico*, June 16, 2020, https://politi.co/3kmyPgh.

In short, the Federalist Society is a membership organization, not a think tank, public-interest law firm, or activist group. It doesn't fundraise for political campaigns or for judicial nominations. It's by no means a monolith; although its members tend to be conservatives and libertarians of some kind—again, this is a counterweight to the academy and organized bar—their shared policy commitments, appropriately for this hearing, don't extend far beyond a belief in judicial independence and the rule of law. What membership in the Federalist Society does indicate, however, is a seriousness of purpose, a devotion to the intellectual side of the law, and a rigorous search for truth. It also serves as a signaling mechanism that someone isn't a partisan hack but rather is interested in, as the commentary to Canon 4 of the Judicial Code encourages, "revising substantive and procedural law."

Separating judges from the Federalist Society is a solution in search of a problem, as are restrictions on advocating the types of judges people think would be good for the country.

The Judicial Ads Act and "Dark Money"

And so we come to the Judicial Ads Act, which, according a press release from lead co-sponsor Senator Feinstein, would:

- Require groups that spend more than $50,000 in a calendar year on advertisements related to federal judicial nominations to disclose donors who have given more than $5,000 to the group during that year and the preceding year.
- Require groups to disclose information about each advertisement related to a judicial nomination including the name of the nominee the advertisement is about.
- Require advertisements related to a judicial nomination to contain disclaimers—just like campaign ads—making clear the identity of the group funding the advertisement.
- Ban foreign nationals from funding advertisements related to a judicial nomination.[12]

Ironically, soon after the bill dropped, the other lead co-sponsor, Senator Whitehouse, along with Senator Sherrod Brown (D-OH), gave a presentation to the American Constitution Society on the topic of "Captured Courts: The GOP's Big Money Assault on the Constitution, Judiciary and Rule of Law."[13] ACS described that event, which must be the inspiration for this hearing, as covering "ways that progressive lawyers from across the country can help fight back against these blatant attempts to use the court to achieve right-wing goals."[14] The irony is that ACS itself fits the definition of a "dark-money group" that tries to influence judicial selection and decision making, taking in millions of dollars in donations from donors it doesn't disclose.

Now, I don't have a problem with ACS not releasing its donor list. By law, it doesn't have to match the Federalist Society's practice of listing all donors over $1,000 in its public annual report. And it shouldn't have to do so if it doesn't want to, because donor privacy is part of the freedom of association that's so important to civil society and civic engagement. But those who support the Judicial Ads Act are hypocritical if they don't condemn ACS—or, even more, Demand Justice or Alliance for Justice, whose sole *raison d'être* is promoting judicial nominees they think will achieve progressive goals and opposing those they think will not.

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[12] "Feinstein, Whitehouse Introduce Bill to Combat Dark Money in Judicial Nominations," https://bit.ly/307oj5o.
[13] Henry Rodgers, "Sen. Sheldon Whitehouse Speaks At Dark Money Group's Event After Railing Against Dark Money Groups," *Daily Caller*, July 17, 2020, https://bit.ly/3g9sFhR.
[14] Susan Crabtree, "Sen. Whitehouse's Dark-Money Dilemma," *Politico*, July 21, 2020, https://bit.ly/332pAwA.

And yet Senator Whitehouse has said that he'd be happy to take money from left-wing "dark money" groups.[15] Indeed, in 2018, liberal "dark money" groups—led by those managed by "dark money monster" Arabella Advisors[16]—outspent conservative ones for the first time, while reform hawks like Elizabeth Warren and Bernie Sanders had their own groups supporting their presidential campaigns.[17] So maybe it's not so much the "dark money" or "donor disclosures" that's the problem but the ideology or partisan preference of those who are donating or speaking? Those on the left get a pass because they're promoting justice, while those on the right are evil?

Moreover, former Federal Election Commission chairman Bradley Smith recently explained that so-called dark-money groups—nonprofit public policy organizations, not political committees—are much less significant than they're made out to be.[18] Since *Citizens United* allowed nonprofits, labor unions, and corporations to spend on electioneering in 2010, those groups labeled as "dark money" have usually accounted for 3-5% of total campaign spending.[19] So far in the current cycle, however, from January 2019 through July 2020, that number is under 1%. FEC data shows that of the more than $6.2 billion spent on federal campaigns during that period, "dark money" only totaled about $20.8 million, which is 0.3% of the total.[20]

Setting aside that issue of efficacy, as well as the unequal treatment and viewpoint-based discrimination—which the First Amendment doesn't allow—the Judicial Ads Act threatens to complicate our already unworkable campaign-finance regime by adding special rules for independent speakers who happen to speak about judicial nominations. Election lawyers must already be rubbing their hands with glee at the prospect of counseling clients how to avoid saying certain "magic words" or defending litigation over whither this or that ad actually concerns judges. Would an ad saying that Donald Trump or Joe Biden would make "the right decisions" (nudge nudge, wink wink) about abortion or gun control qualify as a judicial-nominations ad? How about an ad imploring a senator to vote for "the talented people President Trump has chosen to implement his policies"? Senator Whitehouse is essentially inviting the courts to police what can be said about their future colleagues and who can say it.

Because make no mistake: the Judicial Ads Act is not about voter information or political transparency, but instead is intended to chill speech. At a time when 62 percent of Americans are afraid to share their political views, when 32% of Americans (particularly well-educated Republicans) fear that disclosure of their political views could harm their careers—for good reason, as *half* of all strong liberals support firing Trump donors—should we really enact more disincentives to political involvement?[21] Another way to describe attacks on so-called dark money is as an attack on independent political speech and the freedom of association.

During the Civil Rights era, state governments attempted to force groups like the NAACP to disclose its membership lists. The Supreme Court stepped in and subjected such attempts to

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[15] William Davis, "Exclusive: Democratic Senator Hopes Liberal Dark Money Groups Donate To His Campaign," *Daily Caller*, Feb. 14, 2019, https://bit.ly/3gazobt.
[16] Hayden Ludwig, "How a $600 Million 'Dark Money' Monster Helped Leftists Gain Power," *Daily Signal*, Sept. 11, 2020, https://dailysign.al/3iB2zpv.
[17] Alex Seitz-Wald, "Democrats Used to Rail against 'Dark Money.' Now They're Better at It Than the GOP," *NBC News*, Sept. 13, 2020, https://nbcnews.to/35DRctf.
[18] Bradley A. Smith, "The 2020 Election Could See Record Lows for 'Dark Money' Influence," *Washington Examiner*, Sept. 2, 2020, https://washex.am/35DSeFD.
[19] Luke Wachob, "Putting 'Dark Money' In Context: Total Campaign Spending by Political Committees and Nonprofits per Election Cycle," Institute for Free Speech, May 8, 2017, https://bit.ly/32B9itZ.
[20] Smith, *supra* n. 18.
[21] *See* Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," July 22, 2020, https://bit.ly/2X4R295 (linking to Cato Institute/YouGov Summer 2020 National Survey).

"the closest scrutiny."[22] Violations of the freedom of association must advance a compelling state interest and be narrowly tailored to that interest. The narrow-tailoring requirement prevents the government from needlessly infringing on constitutional rights when less restrictive means of achieving its goal are available. The Court requires "'a fit that . . . employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective,'" which applies "[e]ven when the Court is not applying strict scrutiny."[23] This narrow-tailoring rule reflects decades of First Amendment precedent in cases concerning both associational and non-associational rights.

Reducing the First Amendment right to associate and speak anonymously would have profoundly damaging chilling effects in the current political climate. Times of political division bring attempts to silence political opposition, whether through direct government action or through threats and harassment. The NAACP was the subject of numerous attempts to force the organization to disclose its membership lists. In many cases, when individuals were discovered to be members of the NAACP, they quickly became targets of harassment, threats, and violence because of their affiliation with the group. By showing that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the NAACP demonstrated that forcing disclosure of their membership lists was "likely to affect adversely the ability of [the NAACP] and its members" to engage in their constitutionally protected association and advocacy.[24]

While the Civil Rights era was unique, the right to private association is still vital. Groups advocating any number of unpopular ideas still face many of the physical, social, and economic dangers that the NAACP faced for decades. During the past several years, donors and activists across the political spectrum have faced death threats, public harassment, and adverse economic actions because of their political views and activities. In 2014, in an early precursor to today's "cancel culture," former Mozilla Firefox CEO Brendan Eich was forced to resign after it came out that he gave just $1,000 to the Prop 8 initiative in California that prevented same-sex marriages from being recognized.[25] Since then, opponents of President Trump have used the internet to organize boycotts of companies because they or their officers donated to the president or other politicians who support him, or even said nice things about him.[26] Last year, Rep. Joaquin Castro (D-Tex.) tweeted a list of San Antonians who donated to the president, saying it was "[s]ad to see."[27] Most seriously, in October 2018 a pipe bomb was placed in the mailbox of billionaire philanthropist George Soros, who "donates frequently to Democratic candidates and progressive causes" and who is often portrayed as a villain by the right.[28]

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[22] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958).
[23] *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).
[24] *NAACP*, 357 U.S. at 462–63.
[25] *See, e.g.*, Ilya Shapiro, "Mozilla's CEO Showed The Cost Of Disclosure Laws By Crossing The Satan-Scherbatsky Line," *Forbes*, Apr. 6, 2014, https://bit.ly/3319Utm.
[26] *See, e.g.*, #GrabYourWallet, https://grabyourwallet.org; Paul Blest, "Here's How to Find Out Who Donated Thousands to Trump in Your Area," *Splinter News*, Aug. 7, 2019, https://bit.ly/2GUEtFj; Derrick Bryson Taylor, "Goya Foods Boycott Takes Off After Its President Praises Trump," *N.Y. Times*, July 10, 2010, https://nyti.ms/39zZ2Ur.
[27] Christian Britschgi, "Rep. Joaquin Castro's Doxxing of Trump Donors in His District Has Flipped the Campaign Finance Discourse on its Head," *Reason*, Aug. 7, 2019, https://bit.ly/2mq8ISs.
[28] William K. Rashbaum, "At George Soros's Home, Pipe Bomb Was Likely Hand-Delivered, Officials Say," *N.Y Times*, Oct. 23, 2018, https://nyti.ms/2D2hI1I.

In an era of increasing political polarization, protecting associational privacy becomes even more important. And when groups or individuals espouse unpopular or controversial beliefs, private association is critical. Supreme Court precedent is clear: no matter the level of judicial scrutiny, state actions that infringe First Amendment freedoms, such as the compelled disclosure of donor lists, must be narrowly tailored to the governmental interest asserted. Broader disclosures rules are only warranted where that interest outweighs the chilling of speech and potential for harassment and "cancellation." So we're back to "judicial capture," which seems to be nothing more than disagreement with the interpretive theories of the judges that have been appointed—and more fundamentally a frustration that Hillary Clinton wasn't making the picks. I get that, but as President Obama liked to say, elections have consequences.

In all of these attempts to stymie the appointment of constitutionalist judges and restrict First Amendment freedoms—not just AO117 and the Judicial Ads Act, but also H.R. 1, the DISCLOSE Act, and plenty of other "reforms"—I hear an echo to FDR's court-packing plan.

Court "Capture" and Court-Packing

After significant churn in the Supreme Court's personnel in the decade leading up to FDR's election in 1932, the new president was stymied by the "Nine Old Men" who kept rejecting his ambitions. Yes, he had Justices Louis Brandeis, Harlan Stone, and Benjamin Cardozo on his side—favoring the New Deal, holding an expansive view of federal power, and practicing judicial restraint that deferred to the political branches—but three out of nine is only good for batting averages. Frustrated at not being able to get any new blood onto the Court in his first term, the landslide-reelected Roosevelt sent to Congress on February 5, 1937, a plan for a massive "reorganization" of the judiciary that would allow the president to appoint an additional federal judge for each one who didn't retire within six months after turning 70.

The Judicial Procedures Reform Bill capped the number of total additional judges at 50 and the size of the Supreme Court at 15. Conveniently, six members of the Court, including the Four Horsemen—conservative or classical liberal justices who stood against the New Deal's constitutional innovations—and Chief Justice Charles Evans Hughes (the last chief justice in that role before John Roberts), were over 70. In a March 9 "fireside chat," Roosevelt assailed the Court majority for "reading into the Constitution words and implications which are not there, and which were never intended to be there" and argued that Congress "must take action to save the Constitution from the Court, and the Court from itself."[29] But the president overplayed his hand, sending a disingenuous message to Congress about "insufficient personnel" that was countered by Hughes himself, in an influential and statistics-laden letter to powerful Senator Burton Wheeler (D-Montana) that was co-signed by Brandeis.

The plan was met with fierce opposition, splitting the Democratic super-majority in Congress and drawing a public rebuke from FDR's own Vice President John Nance Garner. Curiously, three future justices supported the plan: Senator Sherman Minton was enthusiastic, scrapping his own bill that would've required a 7-2 vote to hold a law unconstitutional, as was Senator Hugo Black, and Wiley Rutledge, dean of Iowa Law School, was an important academic supporter. Meanwhile, Oswald Garrison Villard, publisher of the left-wing *The Nation*, testified that the bill "opens the way for dictatorship."[30] The Judiciary Committee negatively reported the

[29] Franklin D. Roosevelt, "Court-Packing" (speech, Washington, DC, March 9, 1937), *Presidential Speeches: Franklin D. Roosevelt Presidency*, Miller Center of Public Affairs at the Univ. of Virginia, https://bit.ly/3f8uaeS.
[30] Ronald Steel, *Walter Lippman and the American Century* (Boston: Little, Brown, 1980), 320.

bill; a month later the full Senate recommitted it to the committee 20-70—where it was stripped of its court-packing elements, becoming a technical reform that Roosevelt signed in August.

Of course, two important developments took place between the plan's announcement and Senate action. First, the Court started upholding legislation of the sort it had previously invalidated, with Chief Justice Hughes and Justice Owen Roberts shifting their votes in a series of cases involving the minimum wage, labor regulation, unemployment insurance, and Social Security. The duo to their graves denied the idea that their shift was politically motivated—FDR's court-packing scheme would almost certainly have failed regardless—but even so, the pragmatic Hughes surely moved out of a recognition of the handwriting on the wall.

But second, and even more importantly, Justice Willis Van Devanter, the oldest and longest-serving of the Four Horsemen, announced that he would retire on June 1, 1937. Finally, four-and-and-half years into his consequential presidency, FDR would have a Supreme Court vacancy. As it turns out, this was the first of nine, a number surpassed only by George Washington's table-setting. And they came quickly: by mid-1941, just four years after court-packing failed, only two justices remained whom FDR hadn't appointed—and one of those, Stone, Roosevelt had elevated to chief justice. In a very real sense, then, FDR packed the Court the old-fashioned way, by maintaining control of the White House and Senate and waiting for natural attrition—although Republicans capitalized on his political impatience to pick up eight Senate seats in the 1938 election, plus 81 in the House. There's a lesson there for 2020.

Where Do We Go From Here?

As one Court watcher wrote a quarter-century ago, "Today's confirmation battles are no longer government affairs between the President and the Senate; they are public affairs open to a broad range of players. Thus, overt lobbying, public opinion polls, advertising campaigns, focus groups, and public appeals have all become a routine part of the process."[31] Those trends have only accelerated in the intervening 25 years, such that Supreme Court nominations are perhaps the highest-profile set-pieces in the American political system. Not even set-pieces but months-long slogs. Once the inside game of picking the nominee ends—that traditional dance between president and Senate—the outside game begins, culminating in the literally made-for-TV hearing and then a vote that, as we learned with Justice Kavanaugh, can be just as dramatic.

It's not good, but we've gotten here because Congress and the presidency have gradually taken more power for themselves, and the courts have allowed them to get away with it, aggrandizing themselves in the process. As the Supreme Court has let both the legislative and executive branches swell beyond their constitutionally authorized powers, so have the laws and regulations that it now interprets. Competing theories battle for control of both the U.S. Code and Federal Register, as well as determining—often at the whim of one "swing vote"—what rights will be recognized. As we've gone down that warped jurisprudential track, the judiciary now affects the direction of public policy more than ever. So of course judicial confirmations are going to be fraught, particularly as competing interpretive theories essentially map onto political parties that are more ideologically coherent than ever.

There are two big buckets of cases where that dynamic has contributed to the ratcheting up of tensions that has both crumbled Senate norms in considering and filtered down into lower-court nominations: (1) cultural issues, ranging from abortion and LGBTQ issues to the Second

[31] John A. Maltese, *The Selling of the Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), at 143.

Amendment and death penalty, and (2) what I'll call "size of government" issues, which encompasses everything from environmental regulations to Obamacare, guidance documents to enforcement practices. And then there's an overlay of "structural" cases: *Bush v. Gore*, *Citizens United*, *Shelby County*, and partisan gerrymandering—whose legal issues in the abstract shouldn't have partisan valence, but in the real world of American politics obviously do.

As the response of the conservative legal movement to various judicial provocations has shifted, the debate over that constellation of issues has crystallized. From calls for restraint in the face of the Warren Court's making up social policy out of whole cloth—which ultimately led to too much deference to the political branches, and thus a long term loss for constitutional governance—the focus now is on engaging with the law, which often calls for invalidating the laws being reviewed rather than exercising "passive virtues." Indeed, "activism" has become a vacuous term that conveys nothing more than disagreement with the judge or opinion being criticized. The battle has been joined over the legal theory rather than judicial process.

That is, so long as we accept that judicial review is constitutional and appropriate in the first place—how a judiciary is supposed to ensure that the government secures and protects our liberties without it is beyond me—then we should only be concerned that a court "gets it right," regardless of whether that correct interpretation leads to the challenged law being upheld or overturned. To paraphrase John Roberts at his confirmation hearings, the "little guy" should win when he's in the right, and the big corporation should win when it's in the right. The dividing line, then, is not between judicial activism (or passivism) and judicial restraint, but between legitimate and vigorous judicial engagement and illegitimate judicial imperialism.

But the judicial debates we've seen the last few decades were never really about the nominees themselves—just like the proposals for court-packing and the like aren't about "good government." They're about the direction of the Court. The left in particular needs its social and regulatory agendas, as promulgated by the executive branch, to get through the judiciary. That's why progressive forces pull out all the stops against originalist nominees who would enforce limits on federal power. Indeed, all of the big nominee blowups in modern times—since the bipartisan opposition to Abe Fortas in 1968—have come with Republican appointments. The one quasi-exception didn't involve any attacks on the nominee, but the rare case of an election-year vacancy arising under divided government; Merrick Garland would've been confirmed had Justice Scalia died a year earlier.

Not that any of this is a good thing. "I really, really don't like where we are right now," sighs former solicitor general Don Verrilli, who had worked on nominations under Presidents Clinton and Obama and laments the evermore toxic atmosphere. "Something needs to be done to change the situation."[32] If nominations were depoliticized, whether through term limits or any other reforms, or some unpredictable shock that recalibrated norms, that would likewise depoliticize the exercise of judicial power, both in perception and reality.

But term limits would take a constitutional amendment and everything else is either unworkable or doesn't actually solve the identified problem. We can't just wave a magic wand and go back to some halcyon age where the issues we faced as a country, the development of the law, and the political dynamic, were all different. "If they could truly, truly go back, I hear from most senators that they would prefer a return to the pre-nuclear-option days," observes Ron

[32] Ilya Shapiro, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* (Washington: Regnery Gateway, 2020), at 332 (quoting phone conversation with author, Mar. 19, 2020).

Klain, former chief of staff to Vice Presidents Gore and Biden, "but in many ways, it's easier for them now, because there's very little constituency for voting for the other party's nominees."[33]

The only lasting solution to what ails our body juridic is to return to the Founders' Constitution by rebalancing and devolving power, so Washington isn't making so many big decisions for the whole country. Depoliticizing the judiciary and toning down our confirmation process is a laudable goal, but that'll happen only when judges go back to judging rather than bending over backwards to ratify the constitutional abuses of the other branches.

The judiciary needs to once again hold politicians'—and bureaucrats'—feet to the constitutional fire by rejecting overly broad legislation of dubious constitutional warrant, thus curbing executive-agency overreach and putting the ball back in Congress's court. And by returning power back to the states, and the people, while ensuring that majorities on the local level don't invade individual constitutional rights. After all, the separation of powers and federalism exist not as some dry exercise in Madisonian political theory but as a means to that singular end of protecting our freedom.

These structural protections are the Framers' best stab at answering the eternal question of how you empower government to secure liberty while also building internal controls for self-policing. Or, as Madison famously put it in Federalist 51, his disquisition on man's non-angelic nature, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

Ultimately, judicial power is not a means to an end, but an enforcement mechanism for the strictures of a founding document intended just as much to curtail the excesses of democracy as to empower its exercise. In a country ruled by law, and not men, the proper response to an unpopular legal decision is to change the law or amend the Constitution. Any other method leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process. Or to government by black-robed philosopher kings—and as Justice Scalia liked to say, why would we choose nine lawyers for that job?

In the end, all of this "reform" discussion boils down to re-arranging the deck chairs on the Titanic. And this Titanic is not the appointment process, but the ship of state. As noted earlier, the fundamental problem we face, and that the Supreme Court faces, is the politicization not of the *process* but of the *product*. The only way judicial confirmations will be detoxified, and the only way we reverse the trend whereby people increasingly see judges as "Trump judges" and "Obama judges," is for the Supreme Court to restore our constitutional order by returning improperly amassed federal power to the states; securing all of our rights, enumerated and unenumerated alike; and forcing Congress to legislate on the remaining truly national issues rather than delegating that legislative power to executive-branch agencies.

The reason we have these heated court battles is that the federal government is simply making too many decisions at a national level for such a large, diverse, and pluralistic country. There's no more reason that there needs to be a one-size-fits-all health care system, for example, than that zoning laws must be uniform in every city. Let federal legislators make the hard calls about truly national issues like defense or (actually) interstate (actual) commerce, but let states and localities make most of the decisions that affect our daily lives. Let Texas be Texas and California be California. That's the only way we're going to maintain "judicial independence and the rule of law," as well as defusing tensions in Washington, whether in the halls of Congress or in the marble palace of the highest court in the land.

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[33] *Id.* at 333 (quoting phone conversation with author, Mar. 18, 2020).

NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

SHELBY COUNTY AND THE VINDICATION OF MARTIN LUTHER KING'S DREAM

Ilya Shapiro*

In a year when we mark the 50th anniversary of Martin Luther King's "I Have a Dream" speech, civil rights leaders and elected officials bemoan what they consider to be a huge setback in the fight for racial equality: the Supreme Court's recent decision in *Shelby County v. Holder*.[1] Rep. John Lewis (D-GA), who shed blood at Selma and helped organize the March on Washington, said at this summer's commemoration that he was "not going to stand by and let the Supreme Court take the right to vote away from us."[2] Earlier, President Obama had intoned that the ruling "upsets decades of

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[1] 133 S. Ct. 2612 (2013).

[2] *See* Trip Gabriel, *Following King's Path, and Trying to Galvanize a New Generation*, N.Y. TIMES, Aug. 25, 2013, at A18.

well-established practices that help make sure voting is fair."[3] Hillary Clinton opined that "citizens will be disenfranchised, victimized by the law, instead of served by it."[4]

You could be forgiven for thinking that *Shelby County* means that racial minorities are now disenfranchised. But all the Court did was ease out an emergency provision enacted in 1965 to provide temporary federal oversight of state elections based on that era's racial disparities. While politicians and pundits irresponsibly liken the ruling to sanctioning Bull Connor's dogs and the murder of Medgar Evers, it actually shows the strength of our protections for voting rights.

What the Supreme Court struck down was Section 4(b) of the Voting Rights Act, which is the "coverage formula" used to apply Section 5, a provision requiring certain jurisdictions to "preclear" with the federal government any changes in election regulations—even those as small as moving a polling station from a schoolhouse to a firehouse.[5] The Court found that this formula was unconstitutional because it was based on 40-year-old data, such that the states and localities subject to preclearance no longer corresponded to incidence of racial discrimination in voting.[6] Indeed, black voter registration and turnout is consistently higher in the formerly covered jurisdictions than in the rest of the country.[7]

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[3] *See* David Jackson, *Obama Disappointed in Court's Voting Rights Decision*, USA TODAY (June 25, 2013, 1:22 PM), http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939.

[4] *See* Mark Z. Barabak, *Hillary Clinton Laments Supreme Court Decision on Voting Rights*, L.A. TIMES (Aug. 12, 2013, 4:37 PM), http://www.latimes.com/ news/politics/la-pn-hillary-clinton-award-20130812,0,6541071.story.

[5] Pub. L. No. 89-110, § 4(b), 79 Stat. at 438 (1965); Pub. L. No. 89-110, § 5, 79 Stat. at 439 (1965).

[6] *Shelby Cnty*, 133 S. Ct. at 2630-31.

[7] *Id.* at 2618-19. *See also Shelby Cnty v. Holder*, 679 F.3d 848, 889-91 (D.C. Cir. 2012) (Williams, J., dissenting) (analyzing racial disparities in voter registration and turnout in covered and uncovered jurisdictions in the 2004 election, the last statistics

In other words, just as the Court was correct in 1966 to approve the constitutional deviation that preclearance represents as an "uncommon" remedy to the "exceptional conditions" in the Jim Crow South,[8] it was correct now in restoring the constitutional order. As Justice Clarence Thomas wrote in another voting rights case four years ago, disabling Section 5 "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA."[9]

This anniversary year, if any, shouldn't we be marveling that Mississippi, then "a state sweltering with the heat of oppression,"[10] now has the best ratio of black-voter turnout to white-voter turnout?[11] And that the Magnolia State is one of a number of states where voter-registration rates are higher for blacks than for whites?[12]

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relevant to the 2006 reauthorization of § 5). For the raw data underlying that analysis, see U.S. Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004*, *tbl. 4a* in VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004—DETAILED TABLES, available by clicking the designated link at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html. For the latest data, from the 2012 election, see U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012*, *tbl. 4b* in VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2012—DETAILED TABLES, available by clicking the designated link at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

[8] South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

[9] Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2527 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

[10] Martin Luther King, Jr., *I Have a Dream*, Speech at the March on Washington (Aug. 28, 1963), *available at* http://www.archives.gov/press/exhibits/dream-speech.pdf.

[11] *See* Ilya Shapiro, *Voting Rights in Massachusetts and Mississippi*, CATO AT LIBERTY (Mar. 6, 2013, 1:55 PM), http://www.cato.org/blog/voting-rights-massachusetts-mississippi.

[12] *Id.*

Shouldn't we be celebrating that rather than lynching black people for trying to vote, we elected a black president and confirmed a black attorney general, our nation's chief law enforcement officer? And that these two were preceded by two black secretaries of state, including one who knew the schoolgirls killed in the Birmingham church bombing?[13] And that Section 5 states lead the nation in government officials who are racial minorities, including those elected statewide?[14] Instead, media and political elites focus on a Supreme Court ruling that, far from removing protections for racial minorities' voting rights, declares an end to the state of emergency that existed when those rights were systematically threatened.

The way that Chief Justice John Roberts began his opinion in *Shelby County* shows what was really at stake in the case. Although it doesn't explicitly state what the Court's ultimate ruling is, this preamble provides the key to the case and gives you all you really need to know about the modern Voting Rights Act—save one bit that I'll explain shortly after. To make this easier, I've divided Roberts's introduction into the logical points that he sequentially makes and then paraphrased them.

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[13] *See, e.g.*, Patricia Sullivan, *Condoleezza Rice's Memoir Focuses on Her Family*, HOUSTON CHRONICLE, Oct. 31, 2010, at 17.

[14] For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, and there is little doubt that appointed South Carolina senator Tim Scott will win his special election in 2014.

POINT 1:

> The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.[15]

Translation: The Voting Rights Act provisions at issue here are really, really unusual, outside the normal constitutional framework, and require some sort of extraordinary factual basis to support their constitutionality.

POINT 2:

> This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334.[16]

Translation: The really bad things going on in the Jim Crow South justified the Sections 4-5 constitutional deviation.

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[15] *Shelby Cnty*, 133 S. Ct. at 2618.
[16] *Id.*

POINT 3:

> Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. *See* Voting Rights Act of 1965, § 4(a), 79 Stat. 438.
>
> Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.[17]

Translation: These were supposed to be temporary measures, so it's notable that they are still in effect nearly 50 years later and are due to continue for nearly 30 more years; Jim Crow must still be roaming the land.

POINT 4:

> There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203-204(2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).[18]

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[17] *Id.*
[18] *Id.* at 2618-19.

Translation: Actually, no, and indeed there doesn't seem to be *any* evidence that racial minorities, or at least blacks, are systematically disadvantaged versus whites in terms of the right to vote—certainly not in Section 5-covered jurisdictions.

POINT 5:

> At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.[19]

Translation: Racial discrimination in voting hasn't been fully eradicated, of course, but does it really still exist in the same widespread, systemic way such that all those extra-constitutional measures—and the burdens they put on our federal structure—are still justified? After all, we've said repeatedly that remedies need to match wrongs.

After reading and digesting that framing, *Shelby County* becomes rather easy to understand: the Court must restore the constitutional order—the *status quo* that existed before the temporary Sections 4 and 5—because there's no longer systemic racial disenfranchisement. At the very least, there's no correlation between the coverage formula and racial discrimination in voting.[20]

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[19] *Id*. at 2619.

[20] Justice Ginsburg's dissent goes much more to the question of who gets to decide whether the facts on the ground justify continued application of Section 5, Congress or the courts. *See Shelby County*, 133 S. Ct. at 2632. (Ginsburg, J., dissenting). As a

In other words, the following questions are *completely irrelevant* to this case: Does racial discrimination still exist? Does racial discrimination in voting still exist? Is racial discrimination in voting more common in Section 5-covered jurisdictions than elsewhere?

Even if the answer to all those questions is yes—which it is to the first two but not the third—that's not enough to uphold the Sections 4-5 preclearance regime. Instead, the only question that matters is whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still exist such that an "uncommon exercise of congressional power" is still constitutionally justified—to again quote the 1966 ruling that approved Section 5 as an emergency measure.[21]

The answer to that question must be no; to hold otherwise is to insult those who fought for civil rights against fire hoses, dogs, Klansmen, and segregation laws. At the very least, political conditions have changed such that the 40-year-old voting data upon which Section 4(b) relied now subjects a seemingly random collection of states and localities to onerous burdens and unusual federal oversight. As Chief Justice Roberts wrote for the Court the last time it looked at this law, the "historic accomplishments of the Voting Rights Act are undeniable," but the modern uses of Section 5 "raise[] serious constitutional concerns."[22]

Yet Congress renewed Section 5 in 2006 without updating the Section 4 formula, and it ignored the Court's warning that "the Act imposes current burdens and must be justified by current needs."[23]

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proponent of judicial review and engagement, I see the role of judges as saying what the law is rather than avoiding such rulings—but that debate is beyond the scope of this essay. *See generally* Clark Neily, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013).

[21] South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

[22] Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2505 (2009).

[23] *Id.* at 2512.

Accordingly, it should be no surprise that the chief justice, again writing for the Court, noted that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[24]

For example, on the measures originally used to determine which jurisdictions should be covered by Section 5—racial disparities in voting and voter registration—Massachusetts is the worst offender, while Mississippi is our national model.[25] As Chief Justice Roberts explained in *Shelby County*, even if one views the thousands of pages of congressional record related to the 2006 reauthorization in their best light, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[26]

Moreover—and this was the extra bit I alluded to earlier—it's Section 2, the nationwide ban on racial discrimination in voting, that is the core of the Voting Rights Act, and it remains untouched.[27] Section 2 provides for both federal prosecution and private lawsuits, and allows prevailing parties to be reimbursed attorney and expert fees. As I described in the run-up to oral argument in *Shelby County*, there's no indication that Section 2 is inadequate.[28]

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[24] *Shelby Cnty*, 133 S. Ct. at 2618.

[25] Oral Arg. Tr. at 32, Shelby Cnty v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96). *See also* Shapiro, *Voting Rights in Massachusetts and Mississippi*, *supra* note 11. In the interest of full disclosure, I should note that I clerked for a Fifth Circuit judge in Jackson, Mississippi, and am a Boston Red Sox fan.

[26] *Shelby Cnty*, 133 S. Ct. at 2629 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *Nw. Austin Mun. Utility Dist.*, 557 U.S. at 201).

[27] Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

[28] Ilya Shapiro, Shelby County v. Holder: *Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting*, SCOTUSBLOG (Feb. 14, 2013, 12:20 PM), http://www.scotusblog.com/2013/

Sections 4 and 5, meanwhile, were supposed to supplement Section 2—and they succeeded brilliantly, overcoming "the conditions that originally justified these measures."[29] Of course, the Court really should've gone further, as Justice Thomas pointed out in his concurring opinion.[30] The Court's explanation of Section 4(b)'s anachronism applies equally to Section 5.

In practice, however, Congress will be hard-pressed to enact any new coverage formula, not simply due to current political realities, but because the "extraordinary problem"—the "insidious and pervasive evil" of "grandfather clauses, property qualifications, 'good character' tests," and other "discriminatory devices"[31]—that justified a departure from the normal constitutional order is, thankfully, gone. Bringing us full circle, then, Chief Justice Roberts concluded his opinion on that point: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[32]

Shelby County thus underlines, belatedly, that Jim Crow is dead, and that American election law is ready to return to normalcy.[33] Yet our political leaders are acting as if the last 50 years never happened. They've declared that *Shelby County* reverses the gains that have been made and enables "voter suppression" when actually it's

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02/shelby-county-v-holder-section-5-of-the-voting-rights-act-conflicts-with-section-2-which-provides-the-proper-remedy-for-racial-discrimination-in-voting.

[29] *Shelby Cnty*, 133 S. Ct. at 2618.

[30] *Id*. at 2631 (Thomas, J., concurring).

[31] *Katzenbach*, 383 U.S. at 309-14 (using these phrases to describe the Jim Crow South's evasion of laws and judicial decrees protecting voting rights).

[32] *Shelby Cnty.*, 133 S. Ct. at 2631.

[33] *See generally* Hans A. von Spakovsky, *The Voting Rights Act after the Supreme Court's Decision in* Shelby County, Testimony before the U.S. House of Reps. Comm. on the Judiciary, Subcomm. on the Constitution, July 18, 2013, *available at* http://judiciary.house.gov/hearings/113th/hear_07182013/Hans%20von%20Spakovsk%207-18-13.pdf.

a belated recognition that times have changed and that widespread, official racial discrimination in voting has disappeared. Attorney General Eric Holder has vowed to use "every tool" at his disposal to continue federal control, including joining a lawsuit against Texas's redistricting plan and filing his own against Texas's voter-identification laws.[34]

But the Justice Department's lawsuits—against both Texas and North Carolina's recent reforms[35]—prove the Supreme Court's wisdom. They show that plenty of laws exist to combat racial discrimination in voting, and it's the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, Section 2 of the Voting Rights Act grants both private parties and the federal government the right to go after state practices that constitute "a denial or abridgment of voting rights."[36] It empowers citizens to challenge specific instances of discrimination and allows them to recover from defendants the costs of their lawsuits.

Section 3, meanwhile, gives courts the power to order federal supervision—including Section 5-style preclearance—over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy.[37]

The only difference from the Section 5 regime is that the federal government will now actually have to *prove* the existence of systemic discrimination. If it can meet that standard, it will undermine the

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[34] *See* Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 26, 2013, at A1.

[35] *See* Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, POLITICO, (Sept. 30, 2013, 12:02 AM), http://www.politico.com/story/ 2013/09/justice-department-north-carolina-voter-id-law-97542.html.

[36] Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

[37] Pub. L. No. 89-110, § 3, 79 Stat. 437 (1965).

administration's claim that the Supreme Court made it impossible to enforce voting rights. If it can't, isn't that a good thing?[38]

Of course, the attorney general and his allies believe that voter-identification laws (and related ballot-integrity tweaks) are themselves evidence of discriminatory conduct. But the Supreme Court, in an opinion by Justice John Paul Stevens—not exactly a right-wing hack—approved Indiana's voter-ID law just five years ago.[39] And there's no evidence that such laws keep minorities from voting; indeed, a *Washington Post* poll last year showed that 65 percent of blacks and 64 percent of Latinos support the measures.[40] When more than 30 states—plus "progressive" places like Canada, Germany, Holland, Sweden, and Switzerland—have such commonsense requirements, surely racism isn't the motivation.

In sum, while Justice Ginsburg compared getting rid of Section 5 to "throwing away your umbrella in a rainstorm because you are not getting wet,"[41] it's actually more like stopping chemotherapy when the cancer is eradicated.[42] There's more to be done to achieve

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[38] Indeed, it's axiomatic that plaintiffs in civil rights cases have to actually prove discrimination. Eric Holder doesn't seem to have a problem with the antidiscrimination provisions in our education, employment, housing, lending, and public accommodations laws, for example, even if one can quibble with how he uses those laws to go after disparate "impact" not just disparate treatment. *See generally* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 CATO SUP. CT. REV. 53 (2009). That is just the way law works in the United States: having to prove liability (for racial discrimination or otherwise) in civil suits is equivalent to having to prove guilt in criminal prosecutions—and the evidentiary standard is easier to meet in the former.

[39] *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

[40] *Voter Identification Laws—Washington Post Poll July 7-9, 2012*, published in *Fear of Voter Suppression High, Fear of Voter Fraud Higher*, WASH. POST., Aug. 13, 2012, *available at* http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml.

[41] *Shelby Cnty*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

[42] For a longer treatment of *Shelby County* and what the case means for the future of the Voting Rights Act, see William S. Consovoy & Thomas R. McCarthy, Shelby

racial harmony in America, to be sure, but the best way to honor the heroes of 1963 is to build on their triumphs rather than pretend that we still live in their time.

County v. Holder: *The Restoration of Constitutional Order*, 2012-2013 CATO SUP. CT. REV. 31 (2013).

An Assessment of Minority Voting Rights Obstacles in the United States

FEBRUARY 2, 2018 • TESTIMONY

By Ilya Shapiro

You've asked me to present my thoughts on the scope and efficacy of the Justice Department's enforcement of the Voting Rights Act since the Supreme Court's decision in *Shelby County v. Holder*. This is an important topic but one I'm not fully capable of assessing because of my role as a constitutional lawyer and scholar, rather than as a social scientist, investigative journalist, or researcher of voting trends and behaviors. Nevertheless, I do want to make the point that *Shelby County* itself is beside the point of this Commission's analysis in this area because that ruling was fundamentally sound as a matter of constitutional law.

The goal of preventing voter disenfranchisement is unquestionably just and constitutional, but that purpose is no longer served by Section 5 of the Voting Rights Act. The provision was a constitutional overreach that, long after the situation necessitated it, perpetuated the very race-based political decisions it was intended to stop. As Justice Clarence Thomas explained almost a decade ago, "Admitting that a prophylactic law as broad as Section 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory."[1]

As described below, evidence of voting-rights violations, whether increased or decreased, is insufficient to justify an extraordinary, (supposed to be) temporary regime of federal preclearance—let alone an obviously outmoded coverage formula—unless it can be proven that other VRA provisions are inadequate for resolving the issues at hand (which it cannot).

Now, you could be forgiven for thinking that *Shelby County* meant that racial minorities would immediately be disenfranchised, but experience in the intervening years since the

Supreme Court's decision has shown us otherwise. All the Court did was ease out an emergency provision enacted in 1965 to provide temporary federal oversight of state elections based on that era's racial disparities. While politicians and pundits irresponsibly likened the ruling to sanctioning Bull Connor's dogs and the murder of Medgar Evers, the case actually illustrated the strength of our protections for voting rights.

What the Supreme Court struck down was Section 4(b), which is the "coverage formula" used to apply Section 5, a provision requiring certain jurisdictions to "preclear" with the federal government any changes in election regulations—even those as small as moving a polling station from a schoolhouse to a firehouse.[2] The Court found that this formula was unconstitutional because it was based on 40-year-old data, such that the states and localities subject to preclearance no longer corresponded to incidence of racial discrimination in voting.[3] Indeed, black voter registration and turnout is consistently higher in the formerly covered jurisdictions than in the rest of the country.[4]

In other words, just as the Court was correct in 1966 to approve the constitutional deviation that preclearance represents as an "uncommon" remedy to the "exceptional conditions" in the Jim Crow South,[5] it was correct to restore the constitutional order. Today shouldn't we be marveling that Mississippi, then "a state sweltering with the heat of oppression,"[6] now has one of the best ratio of black-voter turnout to white-voter turnout?[7] And that the Magnolia State is one of a number of states where voter-registration rates are higher for blacks than for whites?[8]

Shouldn't we be celebrating that rather than lynching black people for trying to vote, we elected a black president and confirmed two black attorneys general, our nation's chief law enforcement officers? And that these two were preceded by two black secretaries of state, including one who knew the schoolgirls killed in the Birmingham church bombing?[9] And that Section 5 states lead the nation in government officials who are racial minorities, including those elected statewide?[10] Instead, media and political elites focused on a Supreme Court ruling that, far from removing protections for racial minorities' voting rights, declared an end to the state of emergency that existed when those rights were systematically threatened.

The way that Chief Justice John Roberts began his opinion in *Shelby County* shows what was really at stake in the case. Although it doesn't explicitly state what the Court's ultimate ruling is, this preamble provides the key to the case and gives you all you really need to know about the modern Voting Rights Act—save one bit that I'll explain shortly after. To make this easier, I've divided Roberts's introduction into the logical points that he sequentially makes and then paraphrased them.

For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. Nikki Haley, now U.N. ambassador, was elected governor of South Carolina in 2010 and reelected in 2014. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, and appointed South Carolina senator Tim Scott won a special election in 2014 and election to a full term in 2016.

Point 1:

> The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.[11]

Translation: The Voting Rights Act provisions at issue here are really, really unusual, outside the normal constitutional framework, and require some sort of extraordinary factual basis to support their constitutionality.

Point 2:

> This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334.[12]

Translation: The really bad things going on in the Jim Crow South justified the Sections 4–5 constitutional deviation.

Point 3:

> Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. *See* Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

> Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.[13]

Translation: These were supposed to be temporary measures, so it's notable that they're still in effect nearly 50 years later and are due to continue for nearly 30 more years; Jim Crow must still be roaming the land.

Point 4:

> There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203–204(2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. ofCommerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).[14]

Translation: Actually no, and indeed there doesn't seem to be *any* evidence that racial minorities, or at least blacks, are systematically disadvantaged versus whites in terms of the right to vote—certainly not in Section 5-covered jurisdictions.

Point 5:

> At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.[15]

Translation: Racial discrimination in voting hasn't been fully eradicated, of course, but does it really still exist in the same widespread, systemic way such that all those extra-constitutional measures—and the burdens they put on our federal structure—are still justified? After all, we've said repeatedly that remedies need to match wrongs.

After reading and digesting that framing, *Shelby County* becomes rather easy to understand: the Court restored the constitutional order—the *status quo* that existed before the

temporary Sections 4 and 5—because there's no longer systemic racial disenfranchisement. At the very least there's no correlation between the coverage formula and racial discrimination in voting.[16]

In other words, the following questions were *completely irrelevant*: Does racial discrimination still exist? Does racial discrimination in voting still exist? Is racial discrimination in voting more common in jurisdictions formerly covered by Section 5 than elsewhere?

Even if the answer to all those questions were yes—which it is to the first two but not the third—that's not enough to uphold the Sections 4–5 preclearance regime. Instead, the only question that matters is whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still exist such that an "uncommon exercise of congressional power" is still constitutionally justified—to again quote the 1966 ruling that approved Section 5 as an emergency measure.[17]

The answer to that question must be no; to hold otherwise is to insult those who fought for civil rights against fire hoses, dogs, Klansmen, and segregation laws. At the very least, political conditions have changed such that the 40-year-old voting data upon which Section 4(b) relied now subjects a seemingly random collection of states and localities to onerous burdens and unusual federal oversight. As Chief Justice Roberts wrote for the Court the previous time it looked at this law, the "historic accomplishments of the Voting Rights Act are undeniable," but the modern uses of Section 5 "raises serious constitutional concerns."[18]

Yet Congress renewed Section 5 in 2006 without updating the Section 4 formula, and it ignored the Court's warning that "the Act imposes current burdens and must be justified by current needs."[19] Accordingly, it should be no surprise that the chief justice, again writing for the Court, noted that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[20]

For example, on the measures originally used to determine which jurisdictions should be covered by Section 5—racial disparities in voting and voter registration—Massachusetts was the worst offender in 2013, while Mississippi was our national model.[21] As Chief Justice Roberts explained in *Shelby County*, even if one views the thousands of pages of congressional record related to the 2006 reauthorization in their best light, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[22]

Moreover—and this was the extra bit I alluded to earlier—it is Section 2, the nationwide ban on racial discrimination in voting, that is the core of the Voting Rights Act, and it remains untouched.[23] Section 2 provides for both federal prosecution and private lawsuits, and allows prevailing parties to be reimbursed attorney and expert fees; there is no indication that Section 2 is inadequate.[24]

Sections 4 and 5, meanwhile, were supposed to supplement Section 2—and they succeeded brilliantly, overcoming "the conditions that originally justified these measures."[25] Of course, the Court really should've gone further, as Justice Thomas pointed out in his concurring opinion.[26] The Court's explanation of Section 4(b)'s anachronism applies equally to Section 5.

In practice, however, Congress will be hard-pressed to enact any new coverage formula, not simply due to current political realities, but because the "extraordinary problem"—the "insidious and pervasive evil" of "grandfather clauses, property qualifications, 'good character' tests," and other "discriminatory devices"[27]—that justified a departure from the normal constitutional order is, thankfully, gone. Bringing us full circle, then, Chief Justice Roberts concluded his opinion on that point: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[28]

Shelby County thus underlined, belatedly, that Jim Crow is dead, and that American election law was ready to return to normalcy.[29] Yet some of our political leaders act as if the last 50 years never happened. They declared that *Shelby County* reverses the gains that have been made and enables "voter suppression" when actually it's a belated recognition that times have changed and that widespread, official racial discrimination in voting has disappeared. Shortly after the decision was announced Attorney General Eric Holder vowed to use "every tool" at his disposal to continue federal control, including joining a lawsuit against Texas's redistricting plan and filing his own against Texas's voter-identification laws.[30]

Justice Department lawsuits against statutes enacted in both Texas and North Carolina in the wake of *Shelby County* prove the Supreme Court's wisdom. They show that plenty of laws exist to combat racial discrimination in voting, and it's the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, Section 2 of the Voting Rights Act grants both private parties and the federal government the right to go after state practices that constitute "a denial or abridgment of voting rights."[31] It empowers citizens to challenge specific instances of discrimination and

allows them to recover from defendants the costs of their lawsuits. The private right of enforcement it creates is a targeted remedy, empowering citizens to litigate specific discrimination—in contrast to Section 5's broad sweep, which ensnared every voting change, no matter how miniscule or banal. Originally, case-by-case enforcement was to be the principal remedial mechanism for Voting Rights Act enforcement, and as Section 2 remains intact, that means of enforcement is still available.

Section 3, meanwhile, gives courts the power to order federal supervision—including Section 5-style preclearance—over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy.[32] The only difference from the Section 5 regime is that the federal government now actually has to *prove* the existence of systemic discrimination. If it can meet that standard, it will undermine claims that the Supreme Court made it impossible to enforce voting rights. If it can't, isn't that a good thing?[33]

Of course, some believe that voter-identification laws (and related ballot-integrity tweaks) are themselves evidence of discriminatory conduct. But the Supreme Court, in an opinion by Justice John Paul Stevens—not exactly a right-wing hack—approved Indiana's voter-ID law just a decade ago.[34] And there's no evidence that such laws keep minorities from voting; indeed, a *Washington Post* poll from the time *Shelby County* was being litigated showed that 65 percent of blacks and 64 percent of Latinos support the measures.[35] When more than 30 states—plus "progressive" places like Canada, Germany, Holland, Sweden, and Switzerland—have such common-sense requirements, surely racism isn't the motivation.

In sum, while Justice Ruth Bader Ginsburg compared getting rid of Section 5 to "throwing away your umbrella in a rainstorm because you are not getting wet,"[36] it's actually more like stopping chemotherapy when the cancer is eradicated.[37] And nothing has changed in the half-decade since *Shelby County* was decided that would suggest the Court arrived at the wrong conclusion. Unfortunately, we don't live in a colorblind world, but discrete instances of discrimination on the ground do nothing to change the legal analysis.

With *Shelby County*,the Court properly put an end to unconstitutional overreach that had been going on for far too long. While no longer so pervasive that case-by-case enforcement is impossible, racial discrimination in voting is still unconstitutional and Section 2 and 3 remain as effective and appropriate tools for combatting the problem whenever and wherever it rears its ugly head. There's more to be done to achieve racial harmony in America, to be sure, but the way to do that is to build on the successes of the Civil Rights Era instead of pretending that nothing's changed and that we still live in that time.

* * *

About Ilya Shapiro

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Notes

[1]*Nw. Austin Mun. Util. Dist. No. One v. Holder ("NAMUDNO")*, 5587 U.S. 193, 226 (2009) (Thomas, J., concurring in part and dissenting in part).
[2] Pub. L. No. 89–110, § 4(b), 79 Stat. at 438 (1965); Pub. L. No. 89–110, § 5, 79 Stat. at 439 (1965).
[3]*Shelby County*, 133 S. Ct. at 2631.
[4]*Id*. at 2618–19. *See also Shelby County v. Holder*, 679 F.3d 848, 889–91 (D.C. Cir. 2012) (Williams, J., dissenting) (analyzing racial disparities in voter registration and turnout in covered and uncovered jurisdictions in the 2004 election, the last statistics relevant to the 2006 reauthorization of § 5). For data underlying that analysis, *see* U.S. Census Bureau,

Voting and Registration in the Election of November 2004, https://www.census.gov/prod/2006pubs/p20-556.pdf For the latest data, from the 2016 election, *see* U.S. Census Bureau, *Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016*, inVoting and Registration in the Election of November 2016, available by clicking the designated link at https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

[5]*South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

[6] Martin Luther King, Jr., *I Have a Dream*, Speech at the March on Washington, Aug. 28, 1963, available at http://www.archives.gov/press/exhibits/dream-speech.pdf.

[7]*See* Ilya Shapiro, *Voting Rights in Massachusetts and Mississippi*, Cato at Liberty (Mar. 6, 2013), http://www.cato.org/blog/voting-rights-massachusetts-mississippi.

[8]*Id*.

[9]*See, e.g.*, Patricia Sullivan, *Condoleezza Rice's Memoir Focuses on Her Family*, Houston Chronicle, Oct. 31, 2010, at 17.

[10]For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. Nikki Haley, now U.N. ambassador, was elected governor of South Carolina in 2010 and reelected in 2014. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, and appointed South Carolina senator Tim Scott won a special election in 2014 and election to a full term in 2016.

[11]*Shelby County*, 133 S. Ct. at 2618.

[12]*Id*.

[13]*Id*.

[14]*Id*. at 2618–19.

[15]*Id*. at 2619.

[16] Justice Ruth Bader Ginsburg's dissent goes much more to the question of who gets to decide whether the facts on the ground justify continued application of Section 5, Congress or the courts. *Shelby County*, 133 S. Ct. at 2632. (Ginsburg, J., dissenting). As a proponent of judicial engagement, I see the judicial role as saying what the law is rather than avoiding such rulings—but that debate is beyond the scope of this essay. *See generally* Clark Neily, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013).

[17]*Katzenbach*, 383 U.S. at 334.

[18]*NAMUDNO*, 129 S. Ct. at 2511, 2514.

[19]*Id*. at 2512.

[20]*Shelby County*, 133 S. Ct. at 2618.

[21] Oral Arg. Tr. at 32, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12–96). *See also* Shapiro, *Voting Rights in Massachusetts and Mississippi*, *supra* note 7.

[22]*Shelby County*, 133 S. Ct. at 2629 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *NAMUDNO*, 557 U.S. at 201).

[23] Pub. L. No. 89–110, § 2, 79 Stat. 437 (1965).

[24] Ilya Shapiro, Shelby County v. Holder*: Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting*, SCOTUSblog (Feb. 14, 2013), http://www.scotusblog.com/2013/02/shelby-county-v-holder-section-5-of-the-voting-rights-act-conflicts-with-section-2-which-provides-the-proper-remedy-for-racial-discrimination-in-voting.

[25]*Shelby County*, 133 S. Ct. at 2618.

[26]*Id.* at 2631 (Thomas, J., concurring).

[27]*Katzenbach*, 383 U.S. at 309–14 (using these phrases to describe the Jim Crow South's evasion of laws and judicial decrees protecting voting rights).

[28]*Id.* at 2631 (majority op.).

[29]*See generally* Hans A. von Spakovsky, *The Voting Rights Act after the Supreme Court's Decision in* Shelby County, Testimony before the U.S. House of Reps. Comm. on the Judiciary, Subcomm. on the Constitution, July 18, 2013, available at http://judiciary.house.gov/hearings/113th/hear_07182013/Hans%20von%20Spakovsk%207-18-13.pdf.

[30]*See* Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. Times, July 26, 2013, at A1.

[31] Pub. L. No. 89–110, § 2, 79 Stat. 437 (1965).

[32] Pub. L. No. 89–110, § 3, 79 Stat. 437 (1965).

[33] Indeed, it's axiomatic that plaintiffs in civil rights cases have to actually prove discrimination. Former Attorney General Holder didn't seem to have a problem with the antidiscrimination provisions in our education, employment, housing, lending, and public accommodations laws, for example, even if one could quibble with how he used them to go after disparate impact rather than mere disparate treatment. *See generally* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008–2009 Cato Sup. Ct. Rev. 53 (2009). That's just the way U.S. law works: having to prove liability (for racial discrimination or otherwise) in civil suits is equivalent to having to prove guilt in criminal prosecutions—and the evidentiary standard is easier to meet in the former.

[34]*Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

[35]*Voter Identification Laws—Washington Post Poll July 7–9, 2012*, published in *Fear of Voter Suppression High, Fear of Voter Fraud Higher*, Wash. Post., Aug. 13, 2012,

http://www.washingtonpost.com/page/2010–2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml.

[36] *Shelby County*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

[37] For a longer treatment of *Shelby County* and what the case means for the future of the Voting Rights Act, see William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder: *The Restoration of Constitutional Order*, 2012–2013 Cato Sup. Ct. Rev. 31 (2013).

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THE BATTLE FOR THE CONSTITUTION

Term Limits Won't Fix the Court

But they could help restore confidence in the confirmation process and eliminate public concerns about aging justices.

By Ilya Shapiro

MANDEL NGAN / Getty / The Atlantic

SEPTEMBER 22, 2020 SHARE

About the author: *Ilya Shapiro is the director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. He is the author of* Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.

The death of Ruth Bader Ginsburg on Friday has prompted, once again, a wave of discussion about the idea of limiting the terms of Supreme Court justices. If only Ginsburg had been forced to retire years ago, the theory goes, the country would not be facing down the uncertainty of a confirmation fight in the midst of an already tumultuous election season. The hope, which first gained traction in modern times after Robert Bork's failed nomination in 1987, is that by more regularly replacing longtime justices with newer ones, adding predictability to when those switches occur, the judicial-nomination process would become less divisive and disruptive. This is largely right—term limits could help restore confidence in the confirmation process and eliminate the morbid health watches we now have as justices age—but there are other problems they wouldn't fix.

During and after the Bork showdown, the Court was in a period of rapid turnover, with six new justices in eight years (1986 to 1994), and for a while term limits seemed to be beside the point. Then, after Stephen Breyer joined the bench in 1994 and no further vacancies arose for over a decade, the drumbeat for term limits grew.

Norm Ornstein: Why the Supreme Court needs term limits

The scholarship culminated in a proposal that the Northwestern University law professors Steven Calabresi and James Lindgren published in the *Harvard Journal of Law and Public Policy* in 2006. They argued for staggered 18-year terms, such that a vacancy would occur every two years, in nonelection years, giving each president two

appointments per term. They also analyzed various possible outcomes of enacting such a reform by statute and found them wanting, and therefore recommended a constitutional amendment to achieve their goal.

Of course, the idea for limited judicial tenures is hardly a new one; it was debated at the founding. Back then, the idea of lifetime appointments seemed the best way to establish an independent judiciary, insulating judges from the political forces that might endanger constitutional rights and liberties. But many now believe that the pendulum swung too far the other way, with a high court too reflective of past political fights and thus unresponsive to contemporary realities. Even if these critics are wrong, if public perception is that the justices are out-of-touch ideologues, that isn't good for the Supreme Court as an institution or the American body politic more broadly. But if term limits were instituted, they would represent significant bipartisan consensus, given the difficulty of ratifying a constitutional amendment. That sort of consensus alone would indicate the resolution of many of the problems that term limits are being asked to remedy.

This post is adapted from Shapiro's new book.

Still, the reasons for the growing public interest are clear. First, the average length of tenure has increased as a result of rising life expectancies, increased prestige of the job, and a reduction in the difficulties associated with service. Second, life tenure enables justices to time their retirement for political purposes, which takes away from the idea that the Court is detached from the partisan gamesmanship of Congress and the presidency. Third, the longer justices serve, the less accountable they become to democratic sentiments and the more independent they're perceived to be from the cultural zeitgeist that inevitably informs the public's response to the Court's rulings. Finally, as Calabresi and Lindgren put it, "the irregular occurrence of vacancies on the Supreme Court means that when one does arise, the stakes are enormous," and the brutal and often-drawn-out political combat that results affects the Court "directly, since it is deprived of one of its nine members, and indirectly, since rancorous confirmation battles lower the prestige of the Court."

Calabresi and Lindgren argued that their proposal would address these and other concerns. First, 18-year terms would reduce the post-1970 average tenure of more than 25 years. Second, if presidents continued to appoint justices in their mid-50s, ages at retirement would drop, thus lowering the risk of mental or physical decrepitude. Third, the proposal would solve the problem of "hot spots": Irregular vacancies are often clustered. Since Sandra Day O'Connor was confirmed in 1981, each of the past six presidents has been limited to two appointment opportunities in consecutive years. If vacancies were set to occur once every two years, every president would be able to pick two justices each term, which would, as Calabresi and Lindgren put it, "reduce the stakes of the nomination process and eliminate the uncertainty that now exists regarding when vacancies will occur," making the Court "more democratically accountable and legitimate by providing for regular updating of the Court's membership." In other words, there would be a more direct connection between the will of the people and the direction of the Court.

But there are real risks, and ways in which instituting staggered term limits could spectacularly backfire. Imagine a scenario in which a GOP-controlled Senate blocks a Democratic president's 2025 and 2027 nominations. A Republican president is then elected in 2028 and the Senate confirms *four* nominees: in 2029 and 2031, to serve

the regular 18-year terms, and for the two empty seats, with 14 and 16 years left on their terms, respectively. This could happen in every cycle of divided government, and would exacerbate, not lessen, the politicization of the confirmation process.

Richard L. Hasen: The Supreme Court may no longer have the legitimacy to resolve a disputed election

What's more, if these 18-year terms had been around for the past few decades, the Court's makeup would hardly be different; there would now be three George W. Bush appointees, four Barack Obama appointees, and two Donald Trump appointees. In the past 50 years, there have been 30 years of Republican presidents and 20 years of Democratic ones; if anything, liberal voices have been overrepresented on the Court. In other words, term limits wouldn't change the ideological composition of the Court over time. Nor, for that matter, would they address the fundamental power that each justice wields, which is the reason we see such ferocious political battles every time a vacancy occurs.

There are also transition problems. Since term limits wouldn't apply to sitting justices, for decades we would have term-limited justices serving alongside life-tenured ones. Moreover, it would take decades to get each seat's 18-year term aligned with the others. Future vacancies wouldn't arise in an orderly manner, so some transitional justice could serve five or 10 years before another one arrives. At a certain point, someone could end up "limited" to 20, 25, or even 35 years. Fixes could be put in place to prevent all this, but at some point the complications become more trouble than they're worth.

Could the Court weather accusations of illegitimacy and special-interest capture in these novel circumstances? And, as some commentators have indicated, 18 years is still a long time—more than the pre-1970 average tenure—so even with a biennial vacancy, the stakes would remain high, especially for those confirmation fights in which the Court's balance is at stake.

Even if term limits wouldn't change the Court's decision making, they might be worth trying anyway, because at least there would be less randomness about when vacancies arise. As the UC Berkeley law professor Orin Kerr put it, "If the Supreme Court is going to have an ideological direction—which, for better or worse, history suggests it will—it is better to have that direction hinge on a more democratically accountable basis than the health of one or two octogenarians."

The best argument for term limits is that they would make the Supreme Court more of a standard issue in presidential and Senate campaigns and thus less of a political football when the winners of those elections get to nominate and confirm justices.

This post was adapted from Shapiro's new book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.

Mr. JOHNSON of Georgia. I thank the gentleman for his testimony.

Judge Gertner, you may begin.

Judge GERTNER. I thank the gentleman for his testimony.

TESTIMONY OF JUDGE NANCY GERTNER (RET.)

Ms. GERTNER. Thank you.

Chair Johnson, Ranking Member Roby, and Members of the Committee, let me start by saying that I don't want to just memorialize Justice Ginsburg. I was a friend and I, candidly, mourn her.

I was a Federal judge for 17 years, serving in the District of Massachusetts. I left the bench to become a full-time professor of practice at Harvard Law School. I am now teaching there part time as well as teaching criminal law at Yale Law School this semester.

My testimony here derives from my judicial experience. My goal is to be as dispassionate and careful in this testimony as I know how to be.

I testify today because of my deep concern for the parties'—the public's growing view of the bench as partisan and, thus, not meaningfully different from the other branches.

The legitimacy of the courts depends upon the public's belief in its neutrality. Their faith in the institution depends upon their trust that it is fully and completely independent of the political process.

Attacks on the judiciary by our President undermine that legitimacy and that faith. When the President criticizes opinions with which he disagrees as coming from Obama or Clinton judges, he undermines all judges and the institution as a whole.

That is why Chief Justice Roberts made clear that we don't have, quote, "Obama judges or Trump judges, Bush judges or Clinton judges. We have an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them," unquote.

The selection process for Federal judges under the Trump administration, in my view, undermines the Chief Justice's observations.

While in the past there have not been Bush I, Bush II, Clinton, or Obama judges. There are, or at least I fear the public perceives, that there are, quote, "Trump judges."

The administration has explicitly said as much. These are, after all, quote, "his" judges.

The unique judicial selection process has produced them and the public's perception of Trump judges could undermine the rest of the bench.

I talk about 28 U.S.C 1404—it is 455(a), which is a provision of the Judicial Code of the statutes that talks about not just the reality of bias but the appearance of bias, and my concern is that how one selects judges for a life-tenured position may well be as important as who you select. How you select plays a role in determining the respect with which the public holds the bench.

While in the past the public understood that the process was political in the sense that the President nominated the candidates, one thing was clear. No matter who the President was, the pipeline for judicial appointments was wide and bipartisan often.

The range of acceptable views was broad. Candidates, as Senator Lindsey Graham has said, were in the mainstream of judicial thought whether they were on the right or the left side of that stream.

This process has been truncated, partisan, and seems to depend upon the imprimatur of one organization, directly affecting the way the public perceives the bench.

Even before the President was sworn in he announced, quote, "slate of nominees," in a way that resonated with the kind of slate one sees in a judicial election.

It was not an ordinary slate, as Professor Hollis-Brusky will describe. It was curated by one organization, the Federalist Society.

In fact, at one point, Leonard Leo was quoted as saying to the President, "That is a great idea. You are creating a brand"—a judicial brand, precisely what casts doubt on the independence of the judiciary.

In fact, the relationship between the President's nominees and the Federalist Society has been praised by Orrin Hatch, by Don McGahn, "Yes, these are people that have—this is a set of nominees that have been outsourced to the Federalist Society."

Contrast that with the statements of other Republican administrations. William Marshall, in a Federalist Society panel, said, "We are now treating elections as if they are mandates to change the meaning of the Constitution. That is troubling."

Professor William Kelley, at the same meeting, said, "It seems to license people to do what they otherwise might not do. It is one thing to have a political view when you come into office. It is another thing to be told by the election process that it is okay to apply that political view in your opinions. Over-politicization of the process provides a license to judicial nominees to effectuate their choices."

In short, I am not talking about whether these are qualified or not. These candidates are qualified. I focus on the process by which they are selected, what that process communicates to the public, and the ways in which it undermines the public's perception of the bench.

If the public believes that one of these nominees are the arm of one political party, or worse, of a subgroup of that party, the core faith in an independent judiciary is undermined.

Thank you.

[The statement of Ms. Gertner follows:]

TESTIMONY BEFORE THE U.S. HOUSE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON COURTS INTELLECTUAL PROPERTY, AND THE INTERNET

Hearing on "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture

JUDGE NANCY GERTNER (RET.)

September 22, 2020

I was a federal judge for seventeen years, serving in the District of Massachusetts. I left the bench to become a full time Professor of Practice at Harvard Law School. I changed my full-time status to part time and continue to teach at Harvard Law School, Law and Neuroscience and Mass Incarceration and Sentencing. This semester, I am also teaching criminal law at Yale Law School.

My testimony today derives from my judicial experience. My goal is to describe what I see as the problem in the most dispassionate way I know how.

As a judge, I was especially concerned with the way the public viewed the institution of which I was a part. I testified in favor of cameras in the courtroom while I was on the bench because of my concern that the institution had to be more transparent. In an age of internet coverage of many of the institutions of government, when respect for the judiciary could no longer be assumed but had to be demonstrated, I wanted to open the doors of the court to the new virtual world. My testimony was in opposition to the position taken by the Judicial Conference of the U.S. Courts. I also spoke out about sentencing policy – particularly mandatory minimums and sentencing guidelines – which were unfair, irrational, and excessively punitive.

I testify today because of my concern about the public's growing view of the bench as partisan, and as such, not meaningfully different from the other branches. The legitimacy of the courts depends upon the public's belief in its neutrality. Their faith in the institution depends upon their trust that it is independent of the political process.

Attacks on the judiciary by our President undermine that legitimacy and that faith. When the President criticizes opinions with which he disagrees as coming from "Obama" or "Clinton" judges, he undermines all judges and invites disrespect for the institution. That is why Chief Justice Robert made it clear that "we don't have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[1]

But the selection process for federal judges under the Trump administration may well undermine the Chief Justice's observation. While in the past, there have not been Bush I, Bush II, Clinton or Obama judges, there are - or at least the public perceives there are - "Trump judges." The administration has explicitly said as much; these are "his" judges. The unique judicial selection process of this administration has produced them. And the public's perception of "Trump judges" could well infect the rest of the bench.

How you select a judge for a life tenured position is as important as *who* you select. How you select plays a role in determining the respect with which the public holds the bench. As I describe, this administration's judicial selection process, unlike that of any other administration, has effectively ceded the work to one organization, the Federalist Society. The Federalist Society selects judicial candidates from a narrow pipeline of candidates who have its imprimatur, and virtually none other. And because it is making the selection, the Senate's advise and consent role is necessarily undermined. The process can be rushed; it does not even pretend to bipartisanship.

Before I go further, however, I want to make clear that I am not debating the substance of the policies these nominees reflect. Nor am I addressing their qualifications. I want to address the impact of this selection process on the public's perception of the neutrality of the judges that emerge from it.

The appearance of bias

Sitting Judges are subject to rules governing not merely the actuality of bias, but the appearance of bias. 28 U.S. C. § 455 (a) calls for a federal judge to be

[1] Robert Barnes, "Rebuking Trump's criticism of 'Obama Judge,' Chief Justice Roberts defends judiciary as 'independent,' Washington Post, November 21, 2018.

disqualified not only when she is biased against a party, but whenever her impartiality "might reasonably be questioned." It was this concern that animated the United States Judicial Conference to investigate privately funded programs for judicial education. Since 1979, such privately funded programs for judicial education had been the subject of considerable public discussion and criticism. [2] Several organizations petitioned the Judicial Conference seeking clarification of whether the code of judicial ethics allowed federal judges to attend these programs. The charge was that these conferences were a "veiled effort to lobby the judiciary,"[3] that judges might be influenced by those who sponsor the programs and may become litigants before them. The issue was not the reality of bias; it was the appearance of bias to the public judges serve.

The Judicial Conference adopted a policy that provides for timely disclosure by educational program providers and the judges who attend the programs. Judges are to disclose the dates and times of the program, the topics, the speakers, the funding source, and the sponsors of the program. The goal was greater transparency to the public; party, attorney or the public could check on the local court's website to determine whether a judge has recently attended a seminar covered by the policy. The judge may factor in who the sponsor was in deciding whether to attend at all.

While the situation is not entirely analogous, some of the concerns that drove the private seminar policy should apply to the judicial selection process – transparency about who is funding a judicial candidate's campaign, who are the donors, how much money have they given, what seminars have they attended, etc.

In a similar vein, the Judicial Conference Code of Conduct Committee, released a draft of Advisory Opinion 117, which indicated that judges could remain members of the American Bar Association, but not the Federalist Society or the American Constitution society. The concern was that membership in these organizations, as opposed to attending conferences run by them, ran the risk of linking the judge to the policy positions of the organization of which they were a member. It may be false; the judge may well entirely disagree with some or all

[2] Bruce Green, May Judges Attend Privately Funded Educational Programs? Questions of Judicial Ethics and Policy, 29 Fordham Urb. L. J. 941, 942 (2002).
[3] Id. at 943.

the organization's policies. While the Judicial Conference ultimately withdrew the opinion, in part because of the difficulty drawing lines between organizations that judges could be members of and those it could not, the controversy underscored my point. The issue was the appearance of bias, the impact membership would have on the public perception of, and respect for, the judiciary.

Judicial Selection Prior to the Trump Administration

While in the past, the public surely understood that the process for the selection of federal judges was political in the sense that the president nominated the candidates, subject to Senate confirmation, one thing was clear. No matter who the president was the pipeline for judicial appointments was wide and often bipartisan. The range of acceptable views was broad. The candidates were those in the mainstream of judicial thought, even if on the right or left side of that stream. In the confirmation of Elena Kagan as an Associate Justice of the Supreme Court, for example, Senator Lindsey Graham stated that he based his vote in favor of Justice Kagan not on whether he agreed with her views but rather on whether he believed she was qualified for the federal bench and situated in the mainstream of American legal thought. Senator Jim Talent agreed, making it clear that there was not "one narrow mainstream" of views, that a judicial nominee can hold "a wide range of reasonable positions."[4]

The Blue slip process insured a degree of bipartisanship. Under President Bush, for example, no single sitting federal judge was nominated by President in the face of a negative vote by the home state senator. [5] Indeed, as Professor William K. Kelley pointed out in a Federalist Society Panel Discussion, in 2001 two of President Bush's ten court of appeals nominees were nominees of President Clinton who didn't get confirmed. [6] One was a judge who had been nominated after the Democratic Party had lost the election.[7]

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[4] Wm. Grayson Lambert, The Real Debate Over the Senate's Role in the Confirmation Process, 61 Duke L.J. 1283, 1284-85 (2012).
[5] Meryl J. Chertoff, William K. Kelley, William P. Marshall, Harold F. See, Jr., Diane S. Sykes, Federalist Society Panel Discussion: Judicial Selection, Federal and State, 32 Am. J. Trial Advoc. 453, 458 (2009).
[6] Id. at 473.
[7] Id. at 473.

Judicial Selection in the Trump Administration.

A judicial selection process that is truncated, intensely partisan, and that seems to depend upon the imprimatur of one conservative organization, directly affects the way the bench is perceived by the public, the appearance of bias standard of § 455(a). Even before the President was sworn in, his campaign announced a "slate" of nominees, in a way that resonated with the kind of slate one sees in judicial election. And it was no ordinary slate as Professor Hollis-Brusky has described. It had been "curated" by the Federalist Society to attract Republican votes. [8] Leo described the list to President Trump (in an interview with *New Yorker* writer Jeffrey Toobin) as follows: "That's a great idea- you're creating a brand."[9]

It is fair to say that the pipeline of candidates for that slate was extremely narrow, narrower than it had ever been before. It was restricted to candidates known to, identified by, and vetted by the Federalist Society. As Professor Hollis-Brusky has reported in her conversation with federalist society member Michael Greve, "on the left there a million ways of getting credentialed, on the political right, there's only one way in these legal circles." [10] It was not simply a question of whether these candidates were in the judicial mainstream, as Senator Graham described; the issue was that they were all in one channel, or at least, that is how it appears.

Nor was the effort remotely subtle. At a 2018 Federalist Society gala, former Senator Orin Hatch noted: "Some have accused President Trump of outsourcing his judicial selection process to the Federalist Society. I say, 'Damn right!'" [11] Indeed, in an earlier speech before the same group, Don McGahn, former White House Counsel under President Trump and Federalist Society member, joked that it is more than that; President Trump through McGahn has been "in-sourcing" judicial selection to that group.[12] Jeffrey Toobin referred to

[8] Testimony of Professor Amanda Hollis-Brusky, "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture, " (September 22, 2020) at p. 14.
[9] Jeffrey Toobin, The Conservative Pipeline to the Supreme Court, *The New Yorker* (April 10, 2017).
[10] Testimony of Professor Amanda Hollis-Brusky, supra n. 7 at p. 13.
[11] Caroline Richardson and Eric J. Segall, Trump Judges or Federalist Society Judges? Try Both, *The New York Times* (May 20, 2020).
[12] Id.

the Federalist society as President Trump's "subcontractor" in the selection of Justice Gorsuch.[13]

And since the administration had effectively ceded the nominating process to the Federalist society, and Republicans controlled the Senate, nominations could speed through at a pace unheard of in other administrations. Not only was the input of the opposing party undermined but also that of a wide range of organizations. Leonard Leo, executive vice president of the Federalist Society, as the *New York Times* reported in 2017, "sits at the nexus of an immensely influential but largely unseen network of conservative organizations, donors and lawyers" all of whom are committed to filling the federal courts with those who share their ideology.[14]

Contrast this selection process with those of other Republic administrations. Indeed, in a Federalist Society panel discussion in 2009, Professor William P. Marshall was critical of an approach to judicial selection that looks very much like that of this administration. He said:

> " From my perspective, I read Attorney General Meese's papers that came out of the Reagan Justice Department talking about how Republican administrations needed to appoint judges with particular philosophies in order to be able to accomplish constitutional change. That does not sound to me like a blueprint for the appointment of judges who are going to apply the law in an evenhanded fashion. It sounds to me like Attorney General Meese believed judges should be picked with an ideological agenda in mind."[15]

And he added,

> "We now treat elections as if they are mandates to change the meaning of the Constitution. This, to say the least, is more than troubling. And we need to fix it."[16]

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[13] Toobin, supra at n. 8.
[14] Eric Lipton and Jeremy W. Peters, In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary, *The New York Times* (March 28, 2017).
[15] 32 Am. J. Trial Advoc. 453, 460–61.
[16] Id.

Professor William P. Marshall took his remarks one step further:

> "I think we all need to do what Professor Kelley discussed. We all need to get above the game a little bit. We need to talk about qualifications more. We need to talk about other kinds of neutral criteria in order to be able to move the process along so that it is not broken and there is not a continual escalation of tactics... But I think it's going to have to be people like the people on this panel and others who talk about the necessity of trying to de-politicize the process if we're going to have the kind of judiciary we desire."[17]

And he added that the politicization of the judicial selection process could well skew judicial decision-making:

> "[I]t seems to license people to do what they otherwise might not do. It is one thing to have a political view when you come into office. It's another thing to be told by the election process that it is okay to apply that political view in your judicial opinions. I'm afraid the over-politicization of the process provides license to judicial nominees to seek to effectuate their political choices in a way they should not." [18]

Conclusion

I do not go as far as Professor Marshall did in these remarks, that the politicization of the process will provide "license" to judicial nominees to implement their views – their agenda, if you well – after they have taken the oath of office and ascended to the bench. Nor am I addressing the qualifications of these nominees. I focus only on the process by which they were selected, what that process communicates to the public, and the ways in which it undermines the public's perception the bench. If the public believes that the bench is nothing more than the arm of one political party, or worse, the arm of a subgroup within that party, the core faith in an independent judiciary, on which checks and balances depend, will be diminished.

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[17] Id. at 473.
[18] Id.

Mr. JOHNSON of Georgia. Thank you, Judge Gertner.
Professor Hollis-Brusky, you may begin.

TESTIMONY OF AMANDA HOLLIS-BRUSKY

Ms. HOLLIS-BRUSKY. Thank you, Mr. Chair. Thank you to the Members of this Committee for the opportunity to testify this afternoon.

My name is Amanda Hollis-Brusky and I am an Associate Professor of politics at Pomona College. I am also the author of two books on the Supreme Court and the conservative legal movement.

In my written testimony, I draw on my own published work as well as that of other law and court scholars to provide thorough and detailed answers grounded in research to the question animating today's hearing.

In my brief remarks this afternoon I want to highlight one development in particular that threatens to undermine judicial independence and the rule of law.

That is the growing public perception of a judiciary that appears to be both driven by partisan politics and captured by a single interest group.

I will talk about the corrosive effects this has on the people's perception of the judicial branch as an independent neutral arbiter of law and of the Constitution.

Our current court is at once more partisan and more divided than any time in the last 100 years. Since 2010, the Supreme Court has been strictly divided along party lines, not just ideological lines, with every justice appointed by a Democratic President voting more liberally than every justice appointed by a Republican president, and vice versa.

Far from being the historical norm, this partisan divide is out of step with traditional patterns of voting and alignment on the court. It is also the most divided court since the New Deal court of the 1930s.

In its decisions the current Supreme Court has split or sharply divided, for example, 5 to 4, on nearly one of every five decisions it has handed down, and that is the highest rate of division in 100 years.

This means that more often than not votes on major issues that affect millions of Americans on health care, housing discrimination, who gets to get married, gun control, reproductive rights, the separation of church and State, who gets to stay in this country, and who gets deported come down to a single vote, and more often than not, that vote has been 5 to 4 along party lines.

The current partisan divide on the Supreme Court is amplified by the fact that the five Republican-appointed justices all have identifiable ties to a single organization: The Federalist Society for Law and Public Policy Studies.

I read extensively about the Federalist Society and its influence on the Supreme Court and Republican judicial selection in my book, "Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution."

For the purposes of this hearing, I will emphasize a single point about the organization. Over the past three and a half decades, the Federalist Society has achieved, and I will quote one of its mem-

bers here directly, "A de facto monopoly on the training, selection, and disciplining of Republican-appointed judges."

Over the course of the Trump administration, as I and many others have documented, this influence has become at once more visible and more consolidated than ever before.

All of this has consequences for court legitimacy. The currency of the court, its only real power, is its legitimacy, its power to persuade we, the people, that its decisions are legitimate and grounded in law, not grounded in partisan politics or influenced by interest group politics.

We know from political science that the single greatest threat to the legitimacy of the judiciary is when the public begins to believe, and I quote, "that judges are little more than politicians in robes."

When the judiciary is viewed as just another political institution, people lose faith in the legitimacy of the court. People lose faith in the Rule of law.

Now, whether or not judges and justices are actually motivated in their decisions by their partisan allegiances that doesn't matter, and whether or not the Republican-appointed judges and justices on the Federal bench, now numbering around 400 in total, are actually influenced by their connections with and membership in the Federalist Society, that doesn't really matter either.

What matters is how all of this looks to we, the people. Research tells us that the appearance of partisan-motivated voting, the appearance of Federalist Society capture, will harm the people's faith in and trust in the Federal judiciary.

So what it looks like, how it is perceived by the public, should matter to anyone who cares about judicial independence and the Rule of law and it should matter especially to the Members of this body and the Members of this Committee.

Thank you, and I look forward to hearing your questions.

[The statement of Ms. Hollis-Brusky follows:]

Testimony before the Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
United States House of Representatives

Amanda Hollis-Brusky, Ph.D.
Associate Professor of Politics
Pomona College | Claremont, CA

"Maintaining Judicial Independence and the Rule of Law:
Examining the Causes and Consequences of Court Capture"
September 22, 2020

Thank you for the opportunity to testify before the committee. My name is Amanda Hollis-Brusky and I'm an associate professor of Politics at Pomona College, where I teach courses on American politics, the Supreme Court and constitutional law. I'm also the cofounder of the Southern California Law and Social Science Forum, an editor at The Monkey Cage – a political science blog hosted by *The Washington Post* - and the author of two books on the Supreme Court and contemporary legal movements.

In my testimony today, I will draw on my own published work as well as that of other law and courts scholars to provide answers, grounded in research, to the question animating today's hearing; namely, the causes and consequences of court capture and its relationship to judicial independence and the rule of law. My testimony will be largely descriptive – describing why judicial independence matters for the rule of law, describing specific threats to each of these core democratic values, and examining the causes and consequences of these threats. What I won't do today is offer concrete policy prescriptions or fixes for these problems – this is outside the scope of my scholarship and expertise. That being said, I believe my testimony can inform the contours of what a reform agenda might look like; by identifying the issues and contemporary developments that Congress should focus its attention on as it considers paths forward.

Why Judicial Independence Matters for The Rule of Law

Once upon a time, in the late 18th and early 19th centuries, the phrase "judicial independence" struck fear into the hearts of many Americans, especially those associated with the Anti-Federalist movement. For example, Robert Yates, writing under the pseudonym "Brutus" in opposition to the ratification of the constitution wrote that the proposed independence of the judicial branch, coupled with what he viewed to be their incredible power and latitude to construe the constitution in any way they pleased, was "unprecedented in a free country" and would enable these unelected, unaccountable men to "mould the government into almost any shape they please." [1] Yates wrote of the proposed independence of the judiciary:

> [The constitution has] made the judges *independent,* in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[2]

Brutus was not alone in sounding the alarm about the dangers of a truly independent judiciary.[3] Thomas Jefferson, in a letter to Spencer Roane in 1819, expressed his dismay about the behavior of the Supreme Court and some of its decisions in the early Republic. Jefferson referred to the constitution as "a mere thing of wax in the hands of the judiciary which they may twist and shape in to any form they please." Judicial independence, according to Jefferson, was the key enabler of this constitutional villainy: "it should be remembered as an axiom of eternal truth in politics that whatever power in any government is independent, is absolute also."[4]

Alexander Hamilton, as persuader-in-chief of the constitutional ratification period, provided a rebuttal to these alarmist critiques of the proposed design for the federal judiciary. In

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[1] Letters of Brutus. XI. *The Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago: The University of Chicago Press, 1981) Volume Two, Part 2, 417-422

[2] Letters of Brutus. XV. Storing, 186-189.

[3] See, e.g., Stephen B. Burbank, "The Architecture of Judicial Independence." *Southern California Law Review.* 72 (1998-1999), at 321.

[4] Letter from Thomas Jefferson to Spencer Roane 6 September 1819. Can be found here at Founders Archives.

an essay we now refer to as The Federalist No. 78,[5] Hamilton vigorously defended the importance of judicial independence for the rule of law and for the integrity of our written constitution.

Hamilton emphasized that the judicial branch, precisely because of its structural independence – that is, because its members have "permanent tenure"[6] and are not accountable to the whims of democratic majorities that influence the elected branches – was the only branch positioned to serve as the guardian of the constitution. Constitutional rights and protections, Hamilton reasoned would be safe – or at least safest given the alternatives – with a judiciary removed from public pressures:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[7]

Free from the constraints of what political scientists refer to as "the electoral connection,"[8] judicial independence would promote, in Hamilton's words, "a steady, upright and impartial administration of the laws"[9] and would encourage judges to act as "the bulwarks of a limited constitution."[10] In other words, judicial independence is an essential ingredient of the rule of law.

But there are caveats – significant ones – in Hamilton's essay. The judiciary had to exercise its power in a particular way, separated and distinct from politics and from the political branches. If the courts were to be perceived as simply another arm of the legislative or executive branches, Hamilton warned, the threats this "union" would pose to liberty and the rule of law

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[5] Alexander Hamilton. The Federalist No. 78. *The Federalist Papers.* Eds. Clinton Rossiter. Mentor Books. New York, NY: 1999, pp. 432-440.

[6] Alexander Hamilton. The Federalist No. 78, 437.

[7] Alexander Hamilton. The Federalist No. 78, 437.

[8] See generally David Mayhew, *Congress: The Electoral Connection.* Yale University Press. New Haven, CT: 1974.

[9] Hamilton. The Federalist No. 78., at 433.

[10] Hamilton. The Federalist No. 78., at 437.

would be frightful.[11] Not only would liberty and the rule of law be threatened, but the perception of such a union would effectively render the judicial branch illegitimate. For the only power the federal judiciary has is the power to persuade the other political branches and the citizenry at large that its decisions are legitimate. Lacking the "sword" of the executive branch or the "purse" of the legislative, as Hamilton phrased it, members of the judiciary have only the power to persuade the public at large that their decisions are the product not of politics or of political preferences but of reasoned "judgment."[12] It stands to reason that were these Hamiltonian caveats to be realized, judicial independence would not only be threatened, it would also be threatening. That is, under certain conditions, judicial independence – as Brutus, Jefferson and the Anti-Federalists feared – would in fact become dangerous for and destructive to the American constitutional system and the rule of law.

I will show in this testimony that political science has corroborated Hamilton's hunch and, in doing so, validated some of Brutus et al.'s fears. In the pages that follow, I'll identify three developments in our contemporary politics that present a tangible threat to judicial independence and the rule of law: 1) polarization and the rise of a politicized and partisan judiciary; 2) court capture or the appearance of court capture; 3) judicial supremacy.

Threats to Judicial Independence & The Rule of Law: A Politicized and Partisan Court[13]

In the 1830s, Alexis de Tocqueville observed something rather unique about the fledgling American democracy; namely, that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[14] Almost three centuries later, this observation rings truer than ever. With polarization and gridlock in Congress, individuals and organized interest groups are increasingly looking to the judicial branch to carry out their policy agendas. The Supreme Court, itself intensely divided along partisan lines, has demonstrated a

[11] Hamilton. The Federalist No. 78., at 434.

[12] Hamilton. The Federalist No. 78., at 434.

[13] This section draws heavily from a previously published essay. See Amanda Hollis-Brusky, "An Activist's Court: Political Polarization and the Roberts Court." In *Parchment Barriers: Political Polarization and the Limits of Constitutional Order.* Eds Zachary Courser, Eric Helland, and Kenneth P. Miller. University of Kansas Press: 2018. Pp. 80-96.

[14] Alexis de Tocqueville, *Democracy in America.* Book I, Chapter XVI. Philips Bradley, ed. Knopf, New York, NY. 1945, p. 280.

willingness to play a more active, hands-on role in politics. In the last decade, for example, the high court has issued divided and divisive rulings on voting rights,[15] campaign finance,[16] gun rights,[17] contraception,[18] marriage equality,[19] and healthcare.[20]

As political scientists since Alexis de Tocqueville have observed, certain underlying features of our political system and our political culture invite lawyers and judges to play a significant role in policymaking in the United States. These features include a mismatch between our inherited political institutions and our political culture and a politically selected, independent federal judiciary with the power of judicial review.

That our political institutions reflect a profound distrust and skepticism of concentrated power has been an implicit feature of our political culture. As James Madison famously wrote in *Federalist* No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[21] Dividing and fragmenting power through federalism and the separation of powers, our Madisonian system of government was designed to reign in and prevent an overly active or energetic government.[22] On the other hand, and in tension with this set of inherited political and constitutional structures, we have a political culture that increasingly seeks out and demands "total justice"[23]—that is, a set of attitudes that "expects and demands comprehensive governmental protections from serious harm, injustice and environmental dangers."[24] In short, Americans increasingly want the government to protect them from harm—to ensure their airplanes and vehicles are safe, their food and water are not

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[15] Shelby County v Holder, 570 U.S. 529 (2013)

[16] Citizens United v FEC, 558 U.S. 310 (2010); McCutcheon v FEC, 572 U.S. 185 (2014)

[17] District of Columbia v Heller, 554 U.S. 570 (2008), McDonald v City of Chicago, 561 U.S. 742 (2010)

[18] Burwell v Hobby Lobby, 573 U.S.682 (2014)

[19] Obergefell v Hodges, 576 U.S. 644 (2015)

[20] NFIB v Sebelius, 567 U.S. 519 (2012); King v Burwell, 576 U.S. 988(2015)

[21] The Federalist No. 51, *The Federalist Papers*, ed. Rossiter, p, 290.

[22] Robert Kagan, *Adversarial Legalism*. Cambridge, MA: Harvard University Press. 2001, pp 13-14. See also Thomas Burke, *Lawyers, Lawsuits and Litigation*. University of California Press. Berkeley, CA: 2004., at 7.

[23] See generally, Lawrence Friedman, *Total Justice* (Russel Sage, NY: 1994).

[24] Kagan, *Adversarial Legalism*, 15.

poisoned, their toys are not harmful to children[25]—but the fragmented political institutions we have inherited on top of our lingering skepticism of "Big Government" make courts, not legislatures or bureaucracies, a much more appealing option for satisfying these demands.

Thomas Burke, building on the work of Robert A. Kagan, explains how and why this mismatch between our political structures and our political culture invites and encourages policymaking through litigation and courts: "First, courts offer activists a way to address social problems without seeming to augment the power of the state… Second, [policymaking through litigation] offer[s] a means of overcoming the barriers to activist government posed by the structures of the Constitution… activists [can] surmount the fragmented, decentralized structure of American government, which, (as its creators intended and James Madison famously boasted) makes activist government difficult."[26]

An independent and politically selected judiciary makes litigation even more attractive to policy entrepreneurs; especially to those on the losing end of the political process. Political losers and political minorities turn to the independent (that is, unelected and unaccountable) judiciary in the hopes of persuading judges of claims that fail to command a majority in the legislature. Because federal courts have the power of judicial review, interest groups and policy entrepreneurs routinely ask them to strike down federal statutes and state statutes, or to overturn the rulings of administrative agencies. Additionally, the decentralized structure of the American judiciary actively encourages forum shopping; that is, policy entrepreneurs with resources testing their claims in multiple courts in the hopes of finding a sympathetic judge who is willing to creatively interpret existing statutory or constitutional language to advance their policy agenda (or to thwart the policy agenda of their political opponents).[27]

The underlying structural and cultural features that have long invited judges and lawyers to play a role in American politics have been amplified over the past twenty years by political polarization in Congress, the rise of divided government, and alternating and uncertain party control of government. These developments in our legislative politics have further incentivized groups or movements seeking policy change to opt for a strategy of litigation over legislation.

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[25] Lawrence Friedman, *Law in America*. Modern Library Press, New York: NY. 2004., pp. 6-7.

[26] Burke, *Lawyers, Lawsuits and Legal Rights* p. 7.

[27] Kagan, *Adversarial Legalism*, 16.

Since 1980, the ideological distance between the Democrat and Republican elites has grown at a remarkable rate.[28] Prior to Ronald Reagan's rise to power, there was "no meaningful gap in the median liberal-conservative scores of the two parties," with both Democrats and Republicans in Congress occupying "every ideological niche."[29] Fast forward a quarter of a century, and there is currently no ideological overlap between the two parties in Congress. The most liberal Republican is still to the right of the most conservative Democrat, and vice-versa. Political scientists refer to this phenomenon as "political polarization," and it affects the judiciary in two important ways. First, because, "the Supreme Court follows the election returns," our polarized politics have produced a polarized, ideologically divided judiciary.

As regime politics theory details, because we have a politically selected judiciary, over time the courts will tend to reflect the values of the electoral coalition that dominates.[30] As Cornell Clayton and Michael Salamone write, "During the past 40 years, American politics has been dominated by a partisan regime that is at once more conservative than the New Deal regime it replaced, but also more closely divided and polarized than any in more than a century."[31] Control of the White House and control of the Senate has vacillated between Republicans and Democrats since the early-1990s, when the most senior associate justice was appointed to the Supreme Court. This pattern of alternating party dominance in national electoral politics, coupled with the rise of strategic retirements by judges and justices since President Clinton (that is, retiring under an ideologically compatible or same-party president),[32] has left us with a correspondingly divided and polarized Supreme Court.

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[28] Devins, Neal and Lawrence Baum, "Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court." *William and Mary Law School Research Paper* NO. 9-276 (2016), 28

[29] Devins and Baum 2016, 29

[30] See, e.g., Robert A. Dahl, "Decision Making and Democracy: The Supreme Court as a National Policy Maker," *Journal of Public Law* 6 (1957): 279; and Howard Gillman, "Courts and the Politics of Partisan coalitions," in *The Oxford Handbook of Law and Politics,* ed. Gregory A. Caldeira, Daniel Keleman, and Keith Whittington (New York: Oxford University Press, 2008).

[31] Clayton, Cornell and Michael S. Salamone, "Still Crazy after all these years: The Polarized Politics of the Roberts Court Continue," *The Forum* 12 (no. 4): 740 (2015).

[32] Bartels, Brandon L. "The Sources and Consequences of Polarization in the US Supreme Court," in *American Gridlock: The Sources, Character and Impact of Political Polarization,* ed., James A. Thurber and Antoine Yoshinaka. N Cambridge University Press. New York: NY. 2015. at 179

Since 2010, for example, the Supreme Court has been strictly divided along partisan lines, with every justice appointed by a Democratic president voting more liberally than every justice appointed by a Republican president.[33] Far from being the historical norm, this partisan divide is out of step with traditional patterns of voting and alignment on the Court.[34] For example, the Roberts Court has split or "sharply divided" (5-4, 4-4, 4-3, or 3-2) on nearly one of every five decisions it has rendered, which is the highest rate of division of any court since the New Deal.[35] This partisan split on the Court has produced divided and divisive 5-4 rulings on major issues such as gun control, health care, voting rights, campaign finance, and fair housing. As Brandon Bartels notes, a "vicious circle" exists between polarization on the Supreme Court and the nomination process, with each political party vying for the chance to create the first ideologically homogenous voting bloc on the Supreme Court since the Warren Court.[36]

Secondly – and directly relevant to the subject of today's hearing – this polarization on the Supreme Court has invited politicians, scholars, and commentators to attack and attempt to delegitimize judicial rulings by noting that the judiciary is doing nothing more than enacting its preferred policy and voting on strictly partisan lines.[37]

Political science literature puts an exclamation point on this, demonstrating empirically the damaging and corrosive effects these portrayals of the federal judiciary as "just another political institution" can have on the legitimacy of the courts.[38] Stephen Nicholson and Thomas Hansford write that the public's perception of the Supreme Court as a "legal" versus a "political" institution is key to the public's perception of its legitimacy.[39] James L. Gibson and Michael

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[33] Devins and Baum 2016, 7

[34] As Lawrence Baum and Neal Devins document, between 1937 and 2010, there was no clear partisan divide on the Court. Devins and Baum 2016, 22-24

[35] Clayton and Salamone 2015, 745.

[36] Bartels 2015, 172.

[37] See, e.g., James L. Gibson "The Legitimacy of the US Supreme Court in a Polarized Polity." *Journal of Empirical Legal Studies* 4, No. 3 (2007).

[38] Gibson, James L. and Michael Nelson, "Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy." *Journal of Empirical Legal Studies.* 14(3): 592-2017 (2017).

[39] Stephen P. Nicholson and Thomas G. Hansford, "Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions." *American Journal of Political Science.* 58(3): 620-636 (2014).

Nelson confirm this finding with more recent survey research. These scholars conclude that the single greatest threat to the Supreme Court's legitimacy comes from its perceived politicization; that is, the belief that "judges are little more than 'politicians in robes.'"[40] More recent research suggests how perceptions of a politicized judiciary can be exacerbated by high-profile and contentions judicial confirmation hearings.[41] This scholarship provides contemporary empirical support for what Alexander Hamilton knew to be true even in the 18th century[42]: the judiciary's power under our constitution - its very legitimacy - depends on the people seeing it as distinct from politics.

Threats to Judicial Independence & The Rule of Law: A Captured Court[43]

When courts become deeply involved in politics and policymaking, in addition to putting their institutional legitimacy on the line, they also run the risk of provoking some of the more pernicious features of our constitutional design. Policymaking through courts can invite elite capture or minority tyranny and weaken the checks and balances built into the constitution. Policymaking through courts invites a handful of elite, unelected lawyers and judges to craft and shape policy, which in turn facilitates the kind of minority capture our Constitution was designed to guard against.

When policy entrepreneurs turn to courts instead of legislatures, they can effectively circumvent the various safeguards and constitutional veto points built into the legislative process (congressional committees, majority requirements, supermajority requirements, the presidential veto). These veto points are designed to decelerate the legislative process, to ensure broad coalitions for governing, and to prevent smaller, energetic "factions" from capturing and dominating the process. As James Madison wrote in The *Federalist* No. 10, among the

[40] Gibson and Nelson 2017, at 595.

[41] Christopher Krewson and Jean R. Schroedel, "Public Views of the U.S. Supreme Court in the Aftermath of the Kavanaugh Confirmation." *Social Science Quarterly.* 101(4) (2020).

[42] See generally, Alexander Hamilton, The Federalist No. 78.

[43] This section draws heavily from a previously published essay. See Amanda Hollis-Brusky, "An Activist's Court: Political Polarization and the Roberts Court." In *Parchment Barriers: Political Polarization and the Limits of Constitutional Order.* Eds Zachary Courser, Eric Helland, and Kenneth P. Miller. University of Kansas Press: 2018. Pp. 80-96.

"numerous advantages" of this model of government was its ability to "break and control the violence of faction" by "extending the sphere" and multiplying the number of competing voices and distinct interests involved in the process.[44] These multiple veto points "foster more pluralistic legislative inputs and outputs" and prevent legislatures from acting swiftly and energetically.[45]

Policymaking by lawyers and judges circumvents these checks, leaving policy in the hands of the few, unelected elite, which, if we follow Madison's analysis in *Federalist* No. 10, facilitates tyranny of the minority, or elite capture: "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression." When it comes to judicial policymaking, the number of individuals with access to power and the "compass" within which they are placed are both incredibly small.

To make policy through the Supreme Court, for example, policy entrepreneurs simply need to secure five votes. And, while historically the justices of the Supreme Court have come from diverse backgrounds, education, and careers, we currently have a Supreme Court that is composed entirely of Ivy League–educated lawyers with no political or legislative experience.[46] As Mark Graber writes, the Supreme Court "Justices tend to act on elite values because justices are almost always selected from the most affluent and highly educated stratum of Americans."[47] In other words, Madison's recipe for elite capture in *Federalist* No. 10 (a small number of people with uniform interests and backgrounds who can readily and easily concert to execute their plans) reads like a template for our current Supreme Court.

Moreover, because judicial policymaking requires lawyers to argue and bring cases to the courts (judges and justices cannot simply make cases and questions appear before them "as if by

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[44] James Madison, The Federalist No. 10, p. 45. Kesler and Rossiter ed .Mentor Books. (New York: 1999)

[45] Mark Graber, "Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order." Boston University Law Review. Vol 94: 643 (2014).

[46] http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-diversity-ivy-league-20141028-story.html.

[47] Mark Graber, "The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making." *Howard Law Journal,* Vol 56, No. 3, 664.

magic"),[48] the policymaking process is de facto captured and controlled by this unelected, elite group. This capture by lawyers has become even more pronounced over the past two decades, with the rise of the Federalist Society on the right and the American Constitution Society on the left.[49] As I write in *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution,* these two groups of lawyers are actively working to shape both the "supply side" of judicial policymaking (bringing cases, organizing litigation campaigns, providing intellectual support for judicial decisions) as well as the "demand side" (working to get particular kinds of judges and justices nominated and confirmed).

For reasons I explore in more depth in *Ideas,* only one of these groups has managed to actually achieve a "de-facto monopoly" on the "training, promotion and disciplining of lawyers and judges"[50]: the Federalist Society for Law and Public Policy Studies. It's worthwhile for that reason to spend some time examining how they achieved this "monopoly" as this could be perceived by the public as capture or at the very least politicization of the courts.[51]

Launched in 1982 by a small group of conservative and libertarian law students at Yale Law School and the University of Chicago Law School, the Federalist Society was founded to provide an alternative to the perceived liberal orthodoxy that dominated the law school curriculum, the professoriate, and most legal institutions at the time. Almost forty years later, the Federalist Society has moved beyond the law schools and has grown into a vast network of upwards of 70,000 conservative and libertarian lawyers, policymakers, legislators, judges, journalists, academics and law students. The project of the Federalist Society was and is to create a conservative counter-elite – that is, a group of interconnected legal professionals dedicated to conservative judicial and policy positions – and to actively work to get these people into positions of power where they can push the law and push public policy in a conservative direction. Federalist Society co-founder Steven Calabresi described this project in our interview together:

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[48] See Charles Epp, *The Rights Revolution.* University of Chicago Press. Chicago, IL: 1998. See also Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution.* Oxford University Press. New York, NY. 2015, 2019.

[49] See, Hollis-Brusky, *Ideas with Consequences*, pp. 165-175.

[50] Hollis-Brusky, *Ideas*, 152-155.

[51] This section borrows heavily from my previously published work. See Hollis-Brusky, *Ideas with Consequences.*

> I think my own goal for the Federalist Society has been . . . [to] have an organization that will create a network of alumni who have been shaped in a particular way. . . . [B]ecause many of our members are right of center and because they tend to be interested in public policy and politics, a lot of them go on to do jobs in government and take positions in government where they become directly involved in policymaking. So I think it's fair to say that Federalist Society alumni who go into government have tended to push public policy in a libertarian–conservative direction.[52]

As I detail in *Ideas with Consequences,* and as I'll just summarize here, the Federalist Society has been incredibly successful in its project to "push public policy" and judging in a conservative-libertarian direction. Given the focus of this hearing on the courts, I'll limit my testimony to describing three ways the Federalist Society exerts its influence on the federal courts:

1) **Judicial selection**[53] - As several Federalist Society members said to me in our interviews together, "policy is people." There is a recognition that in order for ideas to have consequences, you need to get people who share those ideas and provide them with access to the levers of power. When it comes to the federal courts, this is done first by populating White House counsel and those responsible for judicial selection under Republican administrations with Federalist Society network members. Don McGahn, former White House Counsel under President Trump and stalwart Federalist Society member, has openly and repeatedly referred to this as "in-sourcing" judicial selection to the Federalist Society.[54] Those network members working within the administration then identify, vet and select judges with identifiable and reliable ties to the Federalist Society network. In this way, as

[52] Hollis-Brusky, *Ideas with Consequences*, 10.

[53] See Hollis-Brusky *Ideas* pp. 153-155.

[54] Barnes, Robert, "Federalist Society, White House Cooperation on Judges Paying Benefits," *Washington Post*, November 18, 2017. It is worth noting that at a March 2020 conference on the future of judicial nominations at Princeton University that I attended, McGahn's keynote doubled down on the synchronous relationship between the Republican Party and the Federalist Society, noting that he only hired Federalist Society members in his office and his office only considered Federalist Society judges because this credential signaled loyalty to the team.

Federalist Society member Michael Greve put it in our interview together in 2008 the Federalist Society has "a de facto monopoly" on the process. Highlighting the contrast between the Federalist Society on the right and attempts to replicate its influence on the left, Greve emphasized, "on the left there a million ways of getting credentialed, on the political right, there's only one way in these legal circles."[55]

2) **Lobbying the courts**[56] – Once those Federalist Society judges are appointed to the federal bench, they can then be lobbied or helped by fellow network members who support them in pushing the law in a conservative-libertarian direction. Primarily, this involves Federalist Society members providing judges and their clerks with what I call "intellectual capital" to help them justify radically altering or reshaping longstanding constitutional frameworks. Because judges and Justices do not simply "vote" like legislators, but instead publish judicial opinions that outline their reasoning and provide justifications for their decisions, courts are uniquely susceptible to this kind of intellectual influence and lobbying. As I show in *Ideas*, in some of the most controversial decisions of the conservative counterrevolution currently underway on SCOTUS, the Federalist Society network played a key role in providing the intellectual support and scaffolding for these judicial opinions.

3) **Acting as a vocal and vigilant "judicial audience"**[57] – To have a serious and lasting influence on the direction of constitutional law and jurisprudence—a constitutional revolution—you need to appoint the right kinds of judges and Justices to the federal judiciary and then you need to make sure that, once appointed, they do not fall victim to "judicial drift"—that is, the observed tendency for some conservative Supreme Court appointees to moderate their beliefs during their tenure on the court. It has been well-documented that the Federalist Society influences the first half of this equation under Republican administrations —who gets appointed—but as I show in *Ideas,* it also influences the second half of the equation by exerting social and psychological

[55] Hollis-Brusky *Ideas* 152

[56] See Hollis-Brusky *Ideas* pp. 148-152.

[57] See Hollis-Brusky *Ideas* pp. 155-159.

> pressure to keep these judges faithful to their Federalist Society principles once on the bench. This function is best understood in light of political scientist Lawrence Baum's concept of a "judicial audience." In his book *Judges and Their Audiences*,[58] Baum draws on research in social psychology to argue that judges, like all other people, seek approval or applause from certain social and professional groups and that the manner in which a judge decides cases and writes opinions may be influenced by certain "audiences" that the judge knows will be paying attention to his or her "performance."[59] Moreover, Baum shows that of all the types of audiences for whom a judge might perform, "social groups and the legal community have the greatest impact on the choices of most judges."[60] The Federalist Society for Law and Public Policy, as a social and professional network extending to all levels of the legal community, can be understood as a hybrid of both of these most influential referent groups for judges. I provide anecdotes from my interviews with Federalist Society members who describe approaching judges and Justices at Federalist Society conferences and dinners and meetings and telling them "face to face" that these judges and Justices erred. In fact, these members valued the opportunity, through the Federalist Society, to provide "direct feedback" to these judges.[61]

Whereas the pages of *Ideas with Consequences* (initially published in 2015) chronicle the subtle, behind-the-scenes manner in which Federalist Society members worked in the Reagan, George H.W. and George W. Bush administrations to influence judicial selection and decisionmaking, the Trump administration has taken Federalist Society access and influence to a new zenith. Even before Trump was sworn into office, his campaign took the unprecedented step of releasing a list of 21 potential Supreme Court nominees – a list curated by multiple Federalist Society network members including Vice President of the Federalist Society Leonard Leo – two

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[58] Baum, Lawrence, *Judges and the Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006).

[59] Baum 2006, 24–49.

[60] Baum 2006, 118.

[61] See especially Hollis-Brusky *Ideas* p. 155, 157.

months prior to the election with the aim of wooing partisan Republicans who might otherwise be loath to vote for Trump.[62]

Now-president Trump has made good on his promise to appoint judges "in the mold of Justice Scalia," repaying partisan Republicans and the Federalist Society network for their loyalty.[63] With Federalist Society Vice President Leonard Leo at his side, advising him and helping to shepherd his nominees through confirmation, it is no overstatement to say that Trump has changed the face and the ideological balance of the federal judiciary, appointing young, conservative Federalist Society type judges for lifetime terms.[64] As his first term comes to a close, Trump can claim over 200 Article III appointees to the federal judiciary.

Perhaps most consequentially in terms of the subject of this hearing, Trump has helped the Federalist Society for Law and Public Policy Studies secure a five-Justice majority on the Supreme Court for the first time in history.[65] Brett Kavanaugh has joined fellow Federalist

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[62] Hohmann, James. 2016. "Donald Trump urged to name Utah senator to high court." *The Washington Post.* April 7, 2016; Malcolm, John. 2017. "How Trump Changed the Courts in 2017." *Heritage Foundation.* December 27, 2017. Retrieved from https://www.heritage.org/courts/commentary/how-trump-changed-the-courts-2017 (accessed December 10, 2018).

[63] Adler, Jonathan. 2017. "How Scalia-esque will Donald Trump's Supreme Court nominee be?" The Volokh Conspiracy at *The Washington Post*. January 26, 2017.

[64] Berenson, Tessa. 2018. "Inside Trump's Plan to Dramatically Reshape U.S. Courts." *Time Magazine.* February 8, 2018. Retrieved from http://time.com/5139118/inside-trumps-plan-to-dramatically-reshape-us-courts/ (accessed December 10, 2018).

[65] Just weeks into his term as president, Trump selected long-time Federalist Society member and conservative judge Neil Gorsuch to fill Scalia's seat on the Supreme Court. In another Federalist Society-friendly twist of fate, in June of 2018, Reagan appointee Anthony Kennedy announced his retirement from the Supreme Court. In addition to being the Supreme Court's last remaining centrist or swing vote, Kennedy was the last remaining Republican-appointed justice on the Supreme Court with no ties to the Federalist Society. Kennedy was replaced with Brett Kavanaugh who, as was well-documented during his extremely controversial confirmation hearings, has long-standing and deep ties to the Federalist Society network. See, generally, Gerstein, Josh. 2017. "Gorsuch takes victory lap at Federalist dinner." *Politico.* November 16, 2017. Retrieved from https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538 (accessed December 10, 2018) and Toobin, Jeffrey. 2017. "The Conservative Pipeline to the Supreme Court" *The New Yorker.* April 17, 2017.

Society members John Roberts, Clarence Thomas, Samuel Alito and Neil Gorsuch[66] to form a majority voting bloc on the Supreme Court.[67] As I tell my students every year when I do my judicial process lecture, the late Justice William Brennan was reported to have told every incoming class of law clerks that the "Rule of Five" is the most important rule to learn in Supreme Court jurisprudence. Why? Because, "with five votes, you could accomplish anything."[68]

If we trust the political science on this matter – and I do – then the Federalist Society's increasingly open ties to the Republican Party and specifically to the Trump administration is problematic from the standpoint of judicial independence and judicial legitimacy. Recall that political scientists have shown empirically that when the public views the courts as "just another political institution," their trust in and belief in the legitimacy of the courts suffers.[69] Whether the courts have, in fact, been captured by the Federalist Society is not what I am here to debate. Just as the standard in campaign finance law is not just "corruption" but also "the appearance of corruption," our conversation needs to focus not just on "capture" but also on "the appearance of capture." I'll reiterate a point I have tried to drive home throughout this testimony: what the public thinks about the courts and their independence matters greatly for judicial legitimacy and the rule of law.

The Federal Judicial Conference recognized this, too. Advisory opinion 117 sought to amend the Judicial Code of Conduct to bar sitting federal judges from participating in

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[66] Kruse, Michael. 2018. "The Weekend at Yale That Changed American Politics." *Politico Magazine.* September/October. Retrieved from https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608 (accessed December 10, 2018); Grayer, Annie. 2018. "Brett Kavanaugh was concerned with his Federalist Society membership in 2001, emails show." *CNN.* August 19, 2018. Retrieved from https://www.cnn.com/2018/08/19/politics/brett-kavanaugh-federalist-society-emails/index.html (accessed December 10, 2018).

[67] Feldman, Noah. 2018. "Democrats Can't Stop Brett Kavanaugh's Confirmation." *Bloomberg.* September 4, 2018. Retrieved from https://www.bloomberg.com/opinion/articles/2018-09-04/kavanaugh-hearings-federalist-society-is-so-close-to-victory (accessed Decmber 10, 2018).

[68] Stern, Seth and Stephen Wermiel. 2010. *Justice Brennan: Liberal Champion.* Houghton Mifflin Harcourt. New York, NY, at 196.

[69] Gibson and Nelson, "Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy." *Journal of Empirical Legal Studies.* 14(3): 592-2017 (2017).

conferences and seminars sponsored by groups "generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations."[70] Though this advisory opinion was eventually withdrawn after intense opposition from Republican Senators and over 200 Republican-appointed judges, its objectives were consistent with what the political science literature tells us. When judges participate in organizations that are "generally viewed by the public as having adopted a consistent political or ideological point of view," judicial legitimacy suffers.

Threats to Judicial Independence & The Rule of Law: Judicial Supremacy

Perhaps equally as pernicious for our constitutional design and the rule of law, political polarization in Congress effectively weakens the checks and balances built into the constitution by empowering judges to have the final say in the interpretation and implementation of policy. When political scientists discuss the checks and balances between the courts and Congress, they often point out that the courts do not necessarily have the final say in matters of statutory and constitutional interpretation.[71] "The governing model of congressional-Supreme Court relations," Richard Hasen writes, "is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court's interpretations."[72]

If, for instance, the courts interpret a federal statute in a way Congress does not like or agree with, the latter can pass an override that revises or fixes the statute, which is what happened when the Supreme Court narrowly interpreted the statute of limitations for filing an equal pay lawsuit regarding pay discrimination under the Civil Rights Act of 1964.[73] Congress responded by passing the Lilly Ledbetter Fair Pay Act of 2009, which clarified that the statute of

[70] Hollis-Brusky, Amanda and Calvin TerBeek, "The Federalist Society Says It's Not an Advocacy Organization, These Documents Show Otherwise," *Politico*, August 31, 2019.

[71] Baum, Lawrence and Lori Hausegger, "The Supreme Court and Congress: Reconsidering the Relationship." Miller and Barnes, ed. *Making Policy, Making Law*, p. 107

[72] Hasen, Richard L. "End of the Dialogue?" *Southern California Law Review* Vol 86: 104 (2013): 205-261.

[73] Ledbetter v Goodyear Tire and Rubber Co, 550 U.S. 618 (2007).

limitations resets with every paycheck affected by discriminatory action.[74] If the courts strike down part of a statute as unconstitutional, Congress can propose a constitutional amendment to address it, as it did with the Twenty-Sixth Amendment, which overrode the Supreme Court's decision regarding lowering the voting age in *Oregon v Mitchell* (1970). Alternatively, Congress can rewrite the statute or part of the statute so that it aligns with the court's understanding of the constitution.

But when political polarization results in gridlock and paralysis in Congress, its ability to "counteract" the "ambition" of the courts is severely compromised (to return to Madison's *Federalist 51*). Two different scholars, using different methodologies, studied congressional overrides of Supreme Court decisions and reached the same conclusion: the number of congressional overrides of court decisions has dramatically declined since 1998.[75] This means that, for all intents and purposes, the Court has the final say in matters of statutory and constitutional interpretation, which has real, practical consequences for the checks and balances between the branches. As Hasen concludes, "In a highly polarized atmosphere and with Senate rules usually requiring sixty votes to change the status quo, the Court's word on the meaning of statutes is now final almost as often as its word on constitutional interpretation."[76] In practice, this can mean that five men – and five men alone – get the final say on the most significant political questions facing our country.

When the Supreme Court, by a five-to-four vote, struck down Section 4 (the coverage formula) of the Voting Rights Act in *Shelby County v Holder* (2013), Chief Justice John Roberts suggested in his opinion that Congress could simply update the coverage formula and make the statute constitutional: "Congress may draft another formula based on current conditions… Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[77] But, as all astute political observers at the time recognized, this invitation to Congress to simply "draft another formula" would not be taken up. In the dialogue that has traditionally characterized

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[74] Lilly Ledbetter Fair Pay Act of 2009. Pub. L. 111-2, S. 181

[75] See Hasen 2013 and Eskridge, William and Matthew R. Christiansen, "Congressional Overrides of Supreme Court statutory interpretation decisions 1967-2011." *Texas Law Review*, Vol 92: 1317 (2014).

[76] Hasen 2013, 105

[77] *Shelby County v Holder*, 570 U.S. 529. Roberts, C.J. Majority, at 24.

Court-Congress relations, Congress has effectively silenced itself through polarization and gridlock and has, as a consequence, shifted the balance of power to the courts.

Given this shift of power to the judiciary, it is worthwhile to recall Thomas Jefferson's warnings in 1819 about the unique threat judicial supremacy poses for our entire constitutional system. In his letter to Spencer Roane, Jefferson warned that making the judiciary – an unelected, unaccountable branch of government – too powerful would constitute, in his words, a "felo de se" (suicide) of our constitutional system: "for intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given according to this opinion, to one of them alone the right to prescribe rules for the government of the others; and to that one too which is unelected by, and independent of, the nation."[78] As we will recall from the opening section of this testimony, Jefferson is reminding us of the dark side of judicial independence: the possibility of an unaccountable and unchecked rule by a few over the many.

Returning to the Rule of Law & Restoring Judicial Independence

As this testimony has demonstrated, over the past two decades especially, our polarized politics have led to ideologically-motivated and partisan appointments to the federal courts, invited minority capture of the policymaking process by a small group of unelected lawyers and judges, aggravated some of the more pernicious features of our constitutional design and encouraged – even rewarded – more partisan decisionmaking by the judges and Justices on the federal bench.

Political science warns us that the politicization of the federal courts has grave consequences for judicial independence. The mere perception that courts are partisan and captured – whether or not we are convinced that this is an empirical reality – can cause "we the people" to call into question the very legitimacy of the federal courts and their rulings. That is, it can cause real and lasting damage to the rule of law. When we couple these problematic perceptions of the judiciary with the very real fact that the word of the courts is increasingly final and increasingly supreme on account of polarization and gridlock here in Congress, then it is no overstatement to say we are at an inflection point in our constitutional democracy. To recall Jefferson's concerns in his

[78] Letter from Thomas Jefferson to Spencer Roane 6 September 1819. Can be found here at Founders Archives.

1819 letter to Spencer Roane, if we continue along this path, we run the risk of a constitutional "felo de se;"[79] that is, constitutional suicide.

Suggesting specific reforms for the problems that currently plague our courts is outside the scope of my expertise and published scholarship. But I trust that my research, along with the political science literature I have surveyed in this testimony, has highlighted what I consider to be the relevant issues and contemporary developments that might form the core of a future reform agenda. As Congress deliberates about potential paths forward, I invite members to remember that our judiciary is first and foremost the product of our politics. As Pamela Karlan writes, "The composition of the [federal judiciary] is itself the consequence of our political choices. The [judiciary] follows the election returns… in the more fundamental sense that its composition is a product of who wins elections and what the winners do about judicial nominations."[80] If we care about judicial independence and the rule of law – and I have suggested in this testimony that there are reasons we should care deeply about both – we need to first change our politics. And that begins here, in Congress.

[79] Letter from Thomas Jefferson to Spencer Roane 6 September 1819. Can be found here at Founders Archives.

[80] Karlan, Pamela. "Democracy and Disdain." *Harvard Law Review,* Vol 126: I, p.6 (2012).

Abridged Curriculum Vitae

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GERMANE ARTICLES
"Higher Law: Can Christian Conservatives Transform Law Through Legal Education?" With Joshua C. Wilson. *Law and Society Review*, Volume 52, No. 4 (2018).

"Playing for the Rules: How and Why New Christian Right Public Interest Law Firms Invest in Secular Litigation." With Joshua C. Wilson. *Law and Policy*, Vol. 39, Issue 2: 121-141 (2017)

"Lawyers for God and Neighbor: The Emergence of 'Law as a Calling' as a Mobilizing Frame for Christian Lawyers." With Joshua C. Wilson. *Law and Social Inquiry* 39(2) (2014).

"It's the Network: The Federalist Society as a Supplier of Intellectual Capital for the Supreme Court." *Studies in Law, Politics, and Society* Vol. 61 (2013).

"Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000." *Denver University Law Review* 89 (1) (2011-2012).

"Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement." *Law and Social Inquiry* 36 (2): 551-74 (2011).

Mr. JOHNSON of Georgia. Thank you, Professor Hollis-Brusky.

Votes have been called. I understand it will be three votes. Since we are in the middle of the first vote, I recommend that the Witnesses be subjected to questions from myself and Ms. Roby, at which time we will then recess for the Members to vote.

I suggest that the Members remain for the second vote and vote, and then come back to the Committee, whereupon we will resume questioning of the Witnesses as far as we can get until it is time to go vote for that third vote.

There being no objection that I have heard, I would now ask the Ranking Member to consider the request that I extended to her earlier of allowing our colleague, Sheila Jackson Lee, to maintain a seat on the podium during the hearing.

Ms. ROBY. Mr. Chair, I have no objection. I would like to note for the record—have no objection to my friend and colleague joining us here on the dais today.

I would like to note for the record that there is at least one instance in another Subcommittee where the minority has made a similar request and not been extended the same courtesy, and I believe that is very unfortunate.

Welcome, Ms. Sheila Jackson Lee, to the dais today.

Mr. JOHNSON of Georgia. Well, if I could assure the Ranking Member, who has always extended courtesy to me, that courtesy would always be re-extended to you. We would not be hypocritical in any way.

Ms. ROBY. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. I thank the chair.

With that, we will begin our questions of the first Witness. We proceed under the five-minute rule. I now recognize myself for five minutes.

Professor Ginsburg, you have written that the Federal courts have acquired legitimacy with the public through their association with historical causes such as the civil rights movement.

Now, the courts and, particularly, the Supreme Court are increasingly associated with efforts to dismantle the rights that once helped secure.

The right to vote, the right to be free from discrimination because of your age, your gender, your language, or the color of your skin, the right to control your own body, the right to clean air and clean water, it has all been rolled back.

Professor Ginsburg, is this trend consistent with your vision of courts as bulwarks against democratic backsliding?

Mr. GINSBURG. Thank you for the question, Mr. Chair.

Certainly, consistent with my view of the role that courts should play in terms of facilitating democracy and not reducing participation, taking actions which are activist in nature and hurts the majority, and that seems to be what many of the things you listed would fall under that category.

The fact is, this term activism often gets thrown around, and I see in my friend Professor Shapiro's testimony even notes that activism is something more of an epithet than an analytic tool these days.

The fact is, many of the decisions which have come in recent years, many of the most consequential decisions can be described

as nothing other than activist attempts to roll back the administrative State, to reduce the right to vote and to facilitate free flow of money in our politics. That is my reading of those decisions.

Mr. JOHNSON of Georgia. Thank you.

Judge Gertner, what happens to our democracy when the judiciary becomes associated with weakening people's basic rights instead of protecting them?

[No response.]

Mr. JOHNSON of Georgia. You may unmute yourself, please.

Ms. GERTNER. Federal judges are not used to being muted.

Thank you for your question. I think that the role that an independent judiciary has played in the United States and, I might add, as an icon for the rest of the world has been the role of supporting minority rights against the majority political party, for example.

That was what the carveout was for *Brown* v. *Board of Education*, for the various LGBTQ decisions. When the majoritarian institutions failed to protect minority rights, the Supreme Court stepped in.

The view of the court as protecting majority rights, protecting corporate rights, is a new one and inconsistent with what it has been in the past.

My concern is not just the direction of the court. My concern is the perception of the direction of the court. It is as Professor Ginsburg described and what I have begun to call the undoing project—the project to undo the rights and the core principles of the past 40 years on the bench.

So, activism no longer means rejecting—no longer suggests that rejecting precedent is a bad thing. We now have literature, particularly from the Federalist Society, describing the importance of overturning precedent and overturning settled expectations in the court.

My point before was really more even if one agrees with that, one has to be troubled by a single-lane pipeline to the United States Supreme Court and the lower Federal courts, which is a pipeline that is monitored and controlled by one organization. Even if you agree with them, that has got to be a troubling development.

Mr. JOHNSON of Georgia. Thank you, Judge.

Professor Hollis-Brusky, what happens to our democracy.

Ms. ROBY. Your mic.

Mr. JOHNSON of Georgia. When the judiciary associated with weakening people's rights is also associated with ideological and partisan groups funded by groups like the Federalist Society network?

Ms. ROBY. Your mic.

Mr. JOHNSON of Georgia. I am sorry. You didn't hear my question. I didn't have my mic on, Professor Hollis-Brusky.

What I would like for you to respond to is the question, what happens to our democracy when a judiciary associated with weakening people's rights is associated with ideological and partisan groups funded by groups like the Federalist Society?

Ms. HOLLIS-BRUSKY. Thank you for the question.

Under a certain theory of government, it is important to recognize that the judicial role should be a minimal role. In fact, this

was the same theory of government embraced by people like Justice Scalia back in the 1980s, judges like J. Harvie Wilkinson, who believed that judges should exercise restraint, particularly when it came to the will of the democratic majority.

So, the role of the judge was to, in most cases whenever possible, uphold the democratic will, but in those cases where the Constitution clearly commanded it, to strike down infringements on minority rights or to hold the democratic majority accountable to provisions in the Constitution.

Now, this used to be called judicial restraint and the opposite of that would be judicial activism: A judicial branch that goes out of its way to overturn long-established precedent, a judicial branch that moves the law too far too fast, and a judicial branch that answers questions that are not asked of it.

So, in my book, "Ideas With Consequences," I talk, in particular, about the decision in Citizens United and how this represented a new kind of judicial activism within the Federalist Society.

The Roberts court answered a question that was not asked of it and used this decision as a vehicle to further deregulate campaign finance law, which handcuffs the people's ability to control the corrosive effects of money in elections.

Mr. JOHNSON of Georgia. Thank you. My time has expired.

Next, we will have five minutes of questions from the gentlelady from Alabama, Congresswoman Roby.

Ms. ROBY. Thank you, Mr. Chair.

Mr. Shapiro, I will give you an opportunity if you want to respond to any of the other Witnesses' responses to Chair's questions.

Mr. SHAPIRO. I appreciate that. Thanks very much.

On the topic of Shelby County, which has been mentioned a few times, I have a Law Review article called "Shelby County and the Vindication of Martin Luther King's Dream." I will send that to your staff to be entered into the record rather than taking up the oral time for that.

This idea of the Federalist Society, I think, has been mischaracterized and I want to push back on this idea of a single-lane pipeline or a dominant interest group because the Federalist Society isn't an interest group.

It is a network of lawyers and law students. It is a membership organization. It is much like the American Bar Association.

In fact, it was formed to be a counterpart to the academy for law students and to the ABA for practicing lawyers, both of which had then and probably even more have now a left-wing or progressive skew.

To be clear, I have been a member of the Federalist Society for 20 years. In fact, 28 years ago I was a first-year law student.

It was right about now 20 years ago that I was joining it, and I have never been asked by anyone at the Federalist Society to take any position, acknowledge any positions, sign my name to any statement.

I am constantly asked, however, about how best to frame a discussion in a particular area of constitutional law or legal policy, or whether I would be amenable to debating a point I have made in a recent article with another member of the Federalist Society.

In fact, the Federalist Society strives to present debates and otherwise expose students to a wide range of ideas. It is not a monolith.

In fact, during the same-sex marriage litigation, for example, law school faculty often refused to engage in the battle of ideas so the Federalist Society would provide both speakers including, frequently, I was on the pro same-sex marriage side—to hold debates.

The Federalist Society counts as members people who apply many kinds of interpretive methods, from natural law theorists to libertarians, those who believe in judicial restraint and those who believe in traditional engagement, textualists and pragmatists, lovers of Chevron deference, and those who want to deconstruct the administrative State.

Indeed, Federalist Society member jurists who are textualists nominated by the same President can disagree, as we saw this past term in the Bostock case in which Justices Gorsuch and Kavanaugh argued against each other about the meaning of title 7 of the Civil Rights Act of 1964.

Of course, that decision gave fuel to the rising so-called common good constitutionalists. That was criticism by Senator Josh Hawley of the efficacy of a conservative legal movement that, in his view, increasingly fails to produce results for the voters who empower it.

In short, there is no monolith. There is no talking points or marching orders. I have had many more debates, certainly, many more productive debates, with other members of the Federalist Society, as much or more as with the American Constitution Society or otherwise.

What it is a signaling mechanism to show that you are unafraid to declare at your law school, because most are very left leaning, as I said, especially the student bodies, that you are committed to certain principles, originalism, textualism, certain modes of interpretation.

This is not about being results oriented. That might be a bit of projection, perhaps, from some people on the other side.

It is about intellectual rigor and commitment to taking ideas seriously and the commitment to, indeed, the focus of this panel: The Rule of law and judicial independence.

Ms. ROBY. Mr. Shapiro, some academics and stakeholders have argued for increased donor disclosure laws, particularly as it relates to spending by 501(c) organizations. Do you have any concerns about compelling donor disclosure and how that may chill free speech?

Mr. SHAPIRO. I do. I detail some of that in my written remarks. Just to summarize, going back to *NAACP* v. *Alabama*, the idea that the freedom of speech or independent speech—we are not even talking about donations or support of particular candidates or parties—that the State will demand anyone who is participating in that, certainly, will chill activity.

I work for the Cato Institute. We are a 501(c)(3), not a (c)(4). Still, we are very jealous of our donors' privacy because freedom of association and private association are important constitutional protections.

Ms. ROBY. Thank you. My time has expired. I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

We will recess to take votes one and two. We should be back in probably 30 to 45 minutes, ladies and gentlemen, and we appreciate your forbearance with us.

[Recess.]

Mr. JOHNSON of Georgia. The hearing will resume. With that, we will have five minutes of questions from the gentlelady from California, Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chair, and this has been a very important hearing, especially given the events of the last few days, the tragic loss of our Ruth Bader Ginsburg, such a icon justice, and the hope and future for equal rights. I think back on all the things that would have been different in my life had she not been a member of the Supreme Court.

So, I would like to talk about how we maintain and continue or, in some cases, regain confidence in the Supreme Court, and I would like to get into the question of all the Witnesses of ethics.

Right now, the Supreme Court, that Congress has, basically, left ethics to the court itself. Justices do not disclose if they are taken on trips, who is paying for various things that they might enjoy. I am wondering whether you think that should be part of any steps we take. There has been concern about the capture of the court and the role that the Federalist Society plays.

Is Federalist Society also taking justices on trips? I don't know. Are other groups doing the same thing? Certainly, if you had a direct financial interest in a case you would disqualify yourself. You might have an ideological interest in a case and, yet, be funding justices to go to various trips or other benefits.

What do the various Witnesses think about that subject?

I will start with you, Ms. Hollis-Brusky.

Ms. HOLLIS-BRUSKY. Thank you, Congresswoman, and I appreciate the opportunity to speak to that question.

I want to circle back for a minute to Mr. Shapiro's comments about what the Federalist Society is, and I have to say I respectfully dissent with his portrayal of the Federalist Society and two things I want to speak to particularly.

First, I think it is telling that the lone Witness the Republican Members of this Committee have called to persuade us that there is no inappropriate relationship between the Federalist Society and the Republican Party is himself a Federalist Society member.

The second thing I want to mention, he brought up Don McGahn's comments about in-sourcing judicial selection. Don McGahn was the head of White House counsel, and I was sitting next to Mr. Shapiro, in fact, at a lunch talk that Don McGahn gave the keynote at, and he doubled down when asked about what in-sourcing by the Federalist Society meant in the Trump administration.

He said, "It means two things. I was in charge of judicial selection as the White House counsel. I only hired Federalist Society members to work in my office." That was the first thing. He said, "They needed to demonstrate loyalty to the team. I needed to know that we were on the same page."

Secondly, it meant that judicial selection was run by the vice President of the Federalist Society, Leonard Leo, who was working for the White House, and it was exclusively through Leo and

McGahn that judges were selected also based on their qualifications and credentials and ties to the Federalist Society.

So, what that means is that in order to be selected as a judge or part of the judicial selection process within the Republican Party as it stands right now under President Trump, one has to be involved with the Federalist Society for Law and Public Policy Studies, and I think those are important things to put in front of the Committee as we debate moves forward.

Ms. LOFGREN. Thank you very much. I wonder if you could comment on the ethics question that I asked, the disclosure requirements.

Ms. HOLLIS-BRUSKY. Sure, Congresswoman.

So, as I write in my testimony, my expertise is, largely, descriptive and I am going to talk about what I see as the major issues when it comes to the public's perception of the legitimacy of the Supreme Court.

I think my colleague, Professor Ginsburg, is better positioned to talk about reforms, given his broad expertise in comparative politics.

Ms. LOFGREN. All right. Turning to Professor Ginsburg then.

Mr. JOHNSON of Georgia. The gentleady's time has expired.

Ms. LOFGREN. I yield back then, Mr. Chair.

Mr. JOHNSON of Georgia. The gentleman from Virginia, Mr. Cline, is recognized. Five minutes.

Mr. CLINE. Thank you, Mr. Chair. Appreciate that. I will briefly ask Professor Hollis-Brusky, have you ever contributed to an organization called Demand Justice?

Ms. HOLLIS-BRUSKY. No.

Mr. CLINE. Have you ever contributed to an organization called the 1630 Fund?

Ms. HOLLIS-BRUSKY. No.

Mr. CLINE. Because these two groups, Mr. Chair, are left-leaning groups with former Obama and Clinton staffers at the helm that sought to spend $5 million to, in the case of Demand Justice, to try and block the confirmation of Brett Kavanaugh.

The structure of Demand Justice allows it not only to mask the names of its donors but the size of their contributors and the 1630 Fund reportedly spent $141 million on more than 100 left-leaning causes during the mid-term election year, which surpassed any amount ever raised by a left-leaning political nonprofit. The 1630 Fund is reportedly one of the fiscal backers of Demand Justice.

In 2019, Issue One, a think tank, found that liberal dark money groups outspent their conservative counterparts during the 2018 election, spending 54 percent of the total $150 million expended by all dark money groups.

The reality is that dark money is not swamping the system. In Citizens United, such spending has never reached even 6 percent of total political spending in an election cycle.

In 2018, according to the numbers at the pro-regulation Center for Responsive Politics it was between 2.2 percent and 5.2 percent, depending on how it is calculated.

So, I would ask Mr. Shapiro if you would like to respond to any of the comments that were made by the last Witness.

Mr. SHAPIRO. Sure. Thank you, Congressman.

So, Don McGahn was the White House counsel. That is a government position. When he talked about in-sourcing that meant that government officials were selecting, debating, vetting, and ultimately recommending to the President the individuals who would be nominated or considered to be nominated for judgeships.

Membership in the Federalist Society in that has been used as a signaling function that has replaced Republican allegiances or partisan allegiances.

Decades ago, before the Federalist Society existed, or even in its early years, indications of allegiances would be partisan allegiances.

I think it is a healthier development that we have an intellectually rigorous organization—membership organization committed to ideas that is being used as that signal that you are willing to stand up and say that you dissent from the kind of prevailing progressive orthodoxy in the legal profession.

That is what it is used as. There is no secret handshake. There is no oath of allegiance. There is no agreement on any particular policy issues or legal interpretations.

So, I think it is perfectly appropriate for government officials, as they are vetting people whom they might want to appoint, they look at all sorts of characteristics, including any indications of devotion to a particular methodological framework to apply or view of interpretive theories because it is wrong to ask litmus tests.

It is inappropriate just to give these posts to cronies. I think it is great to find intellectually rigorous judges and populate the other positions in an administration with people who are demonstrating a commitment to ideas, not simply the old partisanship of the past.

I will leave it there.

Mr. CLINE. Mr. Shapiro, I quoted a couple of statistics about the percentage of contributions, of all political spending, during the last election cycle and that in 2018 dark money represented between 2.2 and 5.2 percent.

Do you think that statistic suggests that concerns about the use of dark money in the political process are accurate or are these concerns a way for the left to try and silence voices on the right?

Mr. SHAPIRO. I think the concerns and so-called reform efforts regarding dark money are definitely an attempt to chill political speech of various kinds, whether about so-called normal politics or about judicial confirmations.

I mean, I think Demand Justice spent $5 million opposing Brett Kavanaugh. The 1630 Fund and the New Venture Fund that you mentioned raised nearly a billion dollars in 2017, 2018, for all sorts of purposes.

Look, it is kind of bizarre because you can assume that whoever funds—well, I believe [inaudible] is going to the exact person. I am not sure what kind of boat or other information that gives you.

Mr. CLINE. Thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you.

Next, Mr. Deutch, if you are on camera let yourself be seen. If not, then we will go to Mr. Jeffries, the gentleman from New York, for five minutes.

Mr. JEFFRIES. I thank the distinguished Chair for convening this hearing as well as for yielding.

Mr. Shapiro, do you support the current effort by the Senate Republican majority to jam a replacement for Justice Ruth Bader Ginsburg down the throats of the American people so close to an election day?

Mr. SHAPIRO I haven't made up my mind precisely on a strategy and a lot will depend on how the nomination proceeds, how the hearing process commences.

Senator McConnell has not committed to having a vote before the election. It might happen after. We will have to see. I can tell you that, historically, the main determinant is whether there is a unified government, whether the same party controls the White House and the Senate.

In those cases, in election year vacancies, all but twice has there been a confirmation. Conversely, when the Senate and White House are controlled by opposing parties only once has there been a confirmation.

So, historically speaking there is plenty of precedent to confirm in the same year. Politics always works differently, however, so I am not going to—

Mr. JEFFRIES. Right. Reclaiming my time, sir. I have got limited time.

You, apparently, took a very different position in 2016 so, I am just trying to get an understanding of what accounts for the difference.

I would just ask, Mr. Johnson, for unanimous consent to enter into the record a Forbes article dated February 14th, 2016, written by Mr. Shapiro entitled, "Don't Confirm Scalia's Replacement Until After the Election."

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

MR. JEFFRIES FOR THE RECORD

DON'T CONFIRM SCALIA'S REPLACEMENT UNTIL AFTER THE ELECTION

BY ILYA SHAPIRO

Justice Antonin Scalia was one of a kind, a giant who heralded a renaissance of both originalism and and textualism. He reoriented the study and practice of law toward the meaning of the actual constitutional and statutory text. As we've seen in cases like *District of Columbia* v. *Heller*—confirming the individual right to bear arms, where both sides argued over the meaning of the Second Amendment in historical context—we're all originalists now.

Scalia was also, of course, a conservativee icon: The justice most likely to be identified by lawyers and civilians alike, and the one most likely to be read by law students. Agree or disagree with him on any particular case—I did plenty of both—he was a force to be reckoned with.

Which is all the more reason that in this hazy, crazy, bizarre election year, his seat should remain vacant until the American people can decide whether they want to swing the balance of the Supreme Court, possibly for decades. For Scalia is one of four conservatives on the Court, who, when joined by Justice Anthony Kennedy, form a majority that has been crucial for enforcing the First and Second Amendments, federalism, the separation of powers, and other constitutional protections for individual liberty.

If he's replaced by a progressive jurist—or even a "moderate" one—all that comes crashing down and there will be no further check on the sorts of executive abuses that have only increased under a President who thinks that when Congress doesn't Act on his priorities, he somehow gets the authority to enact them regardless. (And many criminal-procedure cases—regarding the Fourth amendment protection against warrantless searches and the Sixth amendment right to confront witnesses, for example—feature heterodox coalitions of the more principled justices against the more pragmatic ones, so a centrist would be bad there too.)

In other words, this is one of the rare instances where I agree with a *strategy laid out* by Senate Majority Leader Mitch McConnell and Judiciary Committee Chair Charles Grassley, namely not to consider any nominee until after the Presidential election. To put a finer point on it, given how consequential Justice Scalia's replacement will be, it would be irresponsible for the Senate to confirm any nominee President Obama may send them.

A new President will take office in 11 months and the stakes are just too high in our politically schizophrenic Nation to change the Supreme Court's direction without an interceding popular vote. On the other side of the ledger, only about 15–25% of the cases each year are decided on a 5 to 4 vote, so an eight-justice court can be almost fully functional.

Indeed, because it's exceedingly unlikely that a new justice could be confirmed in time to consider and decide cases by the end of June, this term's close cases will either be released with a 4–4 non-decision (affirming the lower court without setting a precedent) or carried over to the next term. Next term starts in October, so pushing until the November election would cause minimal disruption.

If the Democrats keep the White House, at that point there would really be little justification for the Senate to continue its policy and the normal process of hearings and votes could begin—subject to filibuster or not, depending on how that separate procedural debate goes. Given that no justice has been nominated and confirmed during a presidential-election year since *before World War Two*, there would really be very little remarkable to having Justice Scalia's replacement play out this way. (Justice Kennedy was confirmed in 1988, but (a) he was nominated in the year before and (b) this was President Reagan's third attempt to fill a vacancy that originated in July 1987.)

Finally, while some may argue that it's somehow "*illegitimate*" or even unconstitutional for the Senate not to provide its "advice and consent" as specified under article II, section 2, there's simply *no basis* to conclude that this provision constitutes an obligation to Act on presidential nominations. Much as Senators have defended their institutional prerogative by placing "holds" on executive nominees—and just like the Senate refused to take up nominees to the National Labor Relations Board in *a case that resulted* in the Supreme Court's unanimous invalidation of President Obama's recess appointments—they can certainly decide to slow-walk this Supreme Court nomination.

This is purely a political debate; I'm not making a legal argument beyond the axiomatic one that the Senate doesn't have to do anything it doesn't want to. Justice Scalia's death has given the Republican Party the opportunity to make the Supreme Court into the national election issue it claims more Americans should prioritize.

Refusing to consider President Obama's nominee—whoever he or she is—certainly ratchets up the stakes in an already volatile campaign, but giving the American people an opportunity to weigh in on such an important matter is every legislator's paramount duty.

Mr. JEFFRIES. So, on February 14th, which is one day after Supreme Court Justice Antonin Scalia died, you wrote an op-ed for Forbes entitled, "Don't Confirm Scalia's Replacement Until After the Election."

Is there anything in that article that talks about this unified government theory of why this would be an exception at this moment right now?

Mr. SHAPIRO. I don't have the article in front of me but what I have argued throughout the saga over the battle to fill the Scalia seat and the nomination of Merrick Garland is that divided government is different than unified government, and equally or more importantly, we had a situation where the voters had re-elected President Obama in 2012 and then given the Republicans the Senate in 2014.

So, in effect, 2016 was the deciding rubber match, if you will. So, ultimately, voters are going to have to decide whether the positions that politicians of both parties are taking now—there is a lot of switching sides involved that aren't appropriate—

Mr. JEFFRIES. Thanks a lot. Reclaiming my time.

You wrote in your article, just to refresh your recollection, "in this hazy crazy bizarre election year, his seat should remain vacant until the American people can decide whether they want to swing the balance of the Supreme Court possibly for decades."

Is that correct?

Mr. SHAPIRO. That sounds right.

Mr. JEFFRIES. You also argued in this article, "A new President will take office in 11 months and the stakes are just too high in our politically schizophrenic Nation to change the Supreme Court's direction without an interceding popular vote."

Is that true?

Mr. SHAPIRO. I am sure you are accurately quoting from my article.

Mr. JEFFRIES. You also wrote in that article that "Giving the American people an opportunity to weigh in on such an important matter is every legislator's paramount duty, and given how consequential Justice Scalia's replacement will be, it would be irresponsible for the Senate to confirm any nominee President Obama may send them."

Correct?

Mr. SHAPIRO. That sounds right.

Mr. JEFFRIES. Now, Justice Scalia was a consequential justice, we can agree. Was Justice Ruth Bader Ginsburg a consequential justice in the history of American jurisprudence?

Mr. SHAPIRO. Undoubtedly.

Mr. JEFFRIES. This election is not going to take place just 11 months away from this moment that we are in right now, as was the case when you wrote that article. It is a few weeks away.

Is that correct?

Mr. SHAPIRO. Correct.

Mr. JEFFRIES. Did you say anything, again, about this unified theory of government that you and others are now inventing at this moment out of convenience? Did you say anything about that in this article in terms of making the case as to why Scalia should not be replaced?

Mr. SHAPIRO. Congressman, I just wrote a book about the history of judicial nomination roles.

Mr. JEFFRIES. Well, let me ask one last question, sir. Sir, let me ask one last question, just to clear it up because my time is running out.

Why does the Scalia standard not apply to Ruth Bader Ginsburg? Is it because the conservatives are bent on destroying the health care of the American people and having the ACA declared unconstitutional, and you are desperately trying to secure a Supreme Court majority to accomplish that end?

Mr. SHAPIRO. Congressman, I see your time is up, but I am not going to answer when I stopped beating my wife either.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JEFFRIES. Thank you. I think that answer speaks for itself. I yield back.

Mr. JOHNSON of Georgia. We now move to Ranking Member Jordan for five minutes of question.

Mr. JORDAN. Thank you, Mr. Chair.

Professor Hollis-Brusky, in Senator Whitehouse's opening statement he talked about his assessment was that conservatives and Republicans, with the help of the Federalist Society, are trying to capture the court was the words he used. Do you agree with Senator Whitehouse's assessment?

Ms. HOLLIS-BRUSKY. Thank you for the question.

I don't make a claim in my written statement and I won't make one here today about whether they are, in fact, captured or whether the courts are, in fact, captured by the Federalist Society.

What I do make an argument about is that the appearance of capture is, certainly, reasonable, given the optics of the Trump administration and how big of a role the Federalist Society has played in judicial nominations since—

Mr. JORDAN. There are other ways to capture the court? Are there other appearances of capturing the court?

Ms. Hollis-Brusky?

Ms. HOLLIS-BRUSKY. I am not sure. I am not certain what you are asking but—

Mr. JORDAN. Let me give you an example. The Speaker of the House, the minority leader of the Senate, and a number of our Democrat colleagues have said if, in fact, they win the election and have power and take control of the government that they are going to pack the court with six new justices. They are going to go from nine to 15.

That seems to me you want to use the word capture the court, I don't think you could come up with a better way of describing capturing the court than what the Democrats are proposing. Is that capturing the court?

Ms. HOLLIS-BRUSKY. Historically, that has been called court packing. It could, certainly, be viewed as capturing the court to some extent.

Mr. JORDAN. Yeah. We got this false idea that somehow the Federalist Society has got this conspiracy going, using dark money, when, in fact, as the gentleman from Virginia pointed out, you got this Demand Justice spending $5 billion to stop Justice Kavanaugh.

You have got these two organizations—1630, New Venture Fund, spent $987 million in 2017 and 2018 alone. That is the real dark money. The real capturing of the court is what the Democrats want to do. I mean, they have been straight up about it. We are going pack the court. We are going to go from nine justices, which has been the norm of the court for 150 years, we are going to go to 15.

Mr. Shapiro excuse me, Mr. Shapiro, Ms. Hollis-Brusky also said people lose faith in the Rule of law when what the Democrat Witnesses and Senator Whitehouse talked about, if, in fact, that would happen.

If the Democrats win power and pack the court, would that cause Americans to lose faith in an important institution our government, the Supreme Court?

Mr. SHAPIRO. Well, I think two wrongs don't make a right and court packing, historically, has been a wrong that has inured to the detriment of our country and, for that matter, to the party that has propounded it.

Mr. JORDAN. I think the Senator also said membership in groups dedicated to restructuring the judiciary. He used that phrase in his opening statement.

Let me ask this question. Does the Federalist Society file amicus briefs with the Supreme Court on important cases or on any case, for that matter?

Mr. Shapiro?

Mr. SHAPIRO. It does not.

Mr. JORDAN. Does it endorse or oppose judicial nominees?

Mr. SHAPIRO. It does not.

Mr. JORDAN. Does not. The entities on the left that are helping the Democrats, spending $987 million in two years alone, Demand Justice spent $5 million just to go after Judge Kavanaugh, they do those two things, don't they, Mr. Shapiro?

Mr. SHAPIRO. They do, and the American Constitution Society takes positions all the time, and the ABA takes positions all the time of a particular ideological bent.

Mr. JORDAN. So, it looks like the Democrats are going after the one organization that is actually doing it right, not filing briefs—amicus brief with the court, not endorsing candidates, not speaking out on certain cases. They are the ones that are somehow capturing the court when, in fact, Democrats have all said for years now but, certainly, in the last week after the passing of Justice Ginsburg that they are going to pack the court.

That is the real capture of the court we need to be concerned about. That is what we need to be focused on stopping.

With that, I yield back.

Mr. JOHNSON of Georgia. I next will recognize the gentleman from California—excuse me, from Hawaii, Ted Lieu, if he is on.

[Pause.]

Mr. JOHNSON of Georgia. Oh. Ted Lieu from California. I am sorry. He is not on.

With that, we will move—

Mr. JORDAN. Mr. Chair, I could just ask unanimous consent to enter into the record the piece from the Wall Street Journal yesterday, "Questions for Senator Whitehouse."

As I indicated at the start of the hearing, we were not able to question the Senator so I would ask unanimous consent to enter this piece into the record.

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

MR. JORDAN FOR THE RECORD

https://www.wsj.com/articles/questions-for-senator-whitehouse-11600729418

OPINION | REVIEW & OUTLOOK

Questions for Senator Whitehouse

A chance to ask the Democrat about his ties to 'dark money.'

By The Editorial Board
Sept. 21, 2020 7:03 pm ET

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Rhode Island Senator Sheldon Whitehouse
PHOTO: TOM WILLIAMS/ZUMA PRESS

The Supreme Court is now a central issue in the election campaign, and House Democrats are helpfully holding a hearing Tuesday on the subject. This is a chance for the Republican minority to ask Rhode Island Senator Sheldon Whitehouse about his ties to what he likes to call "dark money" and court packing.

The subject of Jerry Nadler's Judiciary Committee hearing is "Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture." One purpose of the hearing is to give Mr. Whitehouse, who is in the Senate minority, a chance to showcase his political campaign against the High Court.

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The Senator has released reports accusing Republicans of "working hand-in-hand" with "anonymously-funded outside groups" to pack the judiciary with "far-right extremists, who then enjoy life tenure as federal judges." He calls the current High Court "Chief Justice Roberts' Right-Wing Rout." His evidence is mostly innuendo and news clips. But as a House witness Mr. Whitehouse has an obligation to tell the truth, and Rep. Jim Jordan and other committee Republicans ought to find out what they can about the Whitehouse method.

They can start by asking about Arabella Advisors. This for-profit entity manages nonprofits including the Sixteen Thirty Fund and the New Venture Fund that support progressive groups and projects. Together the two reported more than $987.5 million in revenue in 2017 and 2018, mostly from contributions and grants, according to their most recent public disclosures. That's a lot of political cash. As nonprofits, they need not disclose their donors or most vendors, so the money trail goes dark.

Republicans can also ask Mr. Whitehouse about his ties to Demand Justice, which describes itself as a "project" of the Sixteen Thirty Fund and New Venture Fund. In 2018 it spent some $5 million opposing Brett Kavanaugh, and it's gearing up for the next Supreme Court fight. Demand Justice wants Democrats to pack the Supreme Court "to balance out Trump's ideologically extreme, illegitimate picks."

When a Daily Caller reporter asked Mr. Whitehouse last year if Demand Justice and groups like it have donated to his campaign, the Senator replied, "hope so." So has he received money from Demand Justice and other Arabella affiliates? Has he collaborated with them to block President Trump's judicial nominees?

Mr. Whitehouse is also leading a political assault on the Federalist Society, the network of lawyers and students that sponsors legal conferences. The conspiracy-minded Senator says the group "is at the center of a network of dark-money-funded conservative organizations whose purpose is to influence court composition and outcomes." Sounds nefarious. But unlike Mr. Whitehouse, the Federalist Society files no amicus briefs with the Supreme Court. And unlike Demand Justice, it doesn't endorse or oppose judicial nominees.

Another question is what role Arabella's affiliates played in a failed attempt this year by a committee of the U.S. Judicial Conference to ban federal judges from belonging to the Federalist Society. Did Mr. Whitehouse discuss such a ban with his longtime ally John McConnell, the federal judge who sat on the committee that drafted proposed revisions to the judicial Codes of Conduct? The revisions were scuttled after a judicial uproar.

Curious minds may also wonder if any group that directly or indirectly receives funding from Arabella has paid for the briefs Mr. Whitehouse has filed at the Supreme Court. One of those briefs threatened the Court with being "restructured" if it didn't rule the way he and four Senate colleagues demanded. Mr. Whitehouse has pushed for donor disclosure by entities whose political advocacy focuses on the judiciary, so should Demand Justice and other Arabella affiliates have to disclose their donors?

Mr. Whitehouse is trying to stifle the donations and speech of his political opponents. The least he can do is set an example by disclosing his own dark-money network and its plans to undermine judicial independence.

Appeared in the September 22, 2020, print edition.

Mr. JOHNSON of Georgia. We will now go to the gentleman from Arizona, Mr. Stanton.

Mr. STANTON. Thank you very much, Mr. Chair, for holding this hearing. Thank you to the Witnesses for being here today.

A few days ago, our Nation lost an icon, an amazing pioneer—legal pioneer, social justice pioneer. Justice Ruth Bader Ginsburg led the way for some of the most fundamental rights for Americans today. Without her, our American judicial system and way of life would be far different. So, I extend my deepest condolences to her loved ones and those around the country who are mourning her loss.

When our Founding Fathers established our republic, they were keenly aware of the importance of an independent judiciary, one that does not give in to pressure by outside interests but instead remains committed to the Rule of law and the people it serves.

The effectiveness of our laws and the respect given to them by the American people rely on independent fair decisions from our judiciary. If our judicial system is incapable of doing so, then our democracy and Rule of law as we know it are at stake.

It is extremely troubling that a 2019 Quinnipiac poll—University poll found that most Americans believe that the Supreme Court is motivated by politics, not by law.

Our judicial system works when the American people believe it is fair, independent, and transparent, and I hope we can all agree that our judicial system needs to be independent and free of partisan entanglements that we so often see in other branches of government.

One area I want to talk about here today was amicus briefs, amicus briefs filed with the U.S. Supreme Court in particular. Amicus briefs are legal documents filed by nonlitigants with strong interest in the subject matter. They are meant to provide relevant information that the court may wish to consider before rendering a decision.

However, to file an amicus brief there is a cost that can range anywhere from $10,000 to $50,000 and above. There are over 500 briefs filed with the Supreme Court every year. That adds up to a large sum of money, and right now there is no disclosure requirements of the funds used to pay for these briefs.

Judge Gertner, I would like to ask you a question in particular. In one high-profile case this coming Supreme Court term, *Google* v. *Oracle*, a group called the Internet Accountability Project filed an amicus brief supporting Oracle's position.

Bloomberg subsequently reported that Oracle, one of the parties to the case, had donated between $25,000 and $99,999 to the Internet Accountability Project last year.

IAP did not disclose that fact that they had been funded directly by Oracle, one of the parties to the litigation and the Supreme Court's rules did not require such disclosure.

I want to get your opinion on this. As a general matter, do you think it is appropriate for an amicus to file a brief in a case where it directly receives funding from one of the parties?

Ms. GERTNER. I have two answers to your question.

I think it is a disclosure matter. I think there should be a disclosure. The problem is that with respect to Supreme Court practice,

just as with Representative Lofgren's question, this has to be something that the Supreme Court imposes on itself.

It can't be something that the Congress imposes on the Supreme Court because of separation of powers issues. I think you are quite right, that ought to be disclosed. It really is not the case that the right and the left are equivalent with respect to pressuring the court.

I just want to sort of look at the other answers to other questions here, which was that the left, as Michael Greve, who is a Federalist Society member, said, "On the left there are a million ways of getting credentials. On the right there is only one way."

However, one characterizes the Federalist Society, it is wrong that it be the way to the Federal bench as opposed to other organizations and other funnels that would channel people to the bench.

Mr. STANTON. Your Honor, I have one more—that is a great point. I just have one additional question. I want to make sure I have—my time is short. I want to talk about the Judicial Code of Ethics.

The judicial code of ethics applies to every other Federal judge except Supreme Court justices. Especially now, what message do you think it sends to the American people that the Supreme Court does not have a code of ethics and what message would it send if they adopted a code of ethics upon themselves?

Ms. GERTNER. I think the Supreme Court should adopt a code of ethics. I think we are sufficiently divided. There are these kinds of issues that are challenges to judicial independence, that all judges should participate in a judicial code of ethics. The Supreme Court must, however, impose it on itself. I think that that is the right thing to do.

Mr. STANTON. All right. I have a short time.

Any of the other Witnesses like to comment on the judicial code of ethics for the Supreme Court?

Mr. GINSBURG. I might say one thing, if I can, Representative, which is that the For the People Act passed last year does call on the Judicial Conference of the United States to draft such a code of ethics.

So, only the court can impose it on itself in our constitutional system. We can give them some content for that and that would increase the pressure on the court to do so.

Mr. STANTON. Maybe the Federalist Society could take this issue up, Mr. Shapiro.

I yield back.

Mr. JOHNSON of Georgia. The gentleman's time has expired. You may respond, Mr. Shapiro.

Mr. SHAPIRO. I am not a judicial ethics expert and I don't represent the Federalist Society. I will do what I can.

Mr. JOHNSON of Georgia. Thank you.

We will next go to the gentleman from Ohio, Mr. Chabot, five minutes.

Mr. CHABOT. Thank you very much, Mr. Chair, and thank you to the Witnesses for testifying at this afternoon's hearing.

In light of the recent passing of Justice Ruth Bader Ginsburg, this hearing is not only timely but relevant.

According to the Administrative Office of the United States Courts, there are nearly 70 Federal court vacancies, mostly for District court appointments that currently sit unfilled.

Thus, in his administration, the President has successfully appointed over 200 Federal judges including Supreme Court Justice Neil Gorsuch and, of course, Brett Kavanaugh.

That success rate is attributed to the quality of the lawyers and jurists that the President has nominated, and that the Senate has confirmed for the Federal bench.

It is that success rate that has drawn criticism about the membership in organizations like the Federalist Society, which was founded on, quote, "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."

Somehow those principles in which it was founded were ignored when the Judicial Conference, the organization that sets policy for the Federal judiciary, issued Draft Advisory Opinion No. 117, which found that formal affiliation with the Federalist Society, whether as a member or in leadership position, was inconsistent with the code of conduct's canons.

That same advisory opinion did not raise similar concerns with a similar membership organization, the American Bar Association.

Advisory Opinion 117 was drafted despite canon four of the judicial code of conduct, which allows judges to serve as members and officers of nonprofit organizations, quote, "devoted to the law, the legal system, or the administration of justice," unquote, which I would submit is exactly what sort of work the Federalist Society undertakes.

Mr. Shapiro, I would like to ask just a few questions from you with the time I have remaining. At the outset, would you agree with the general premise that I just laid out?

Mr. SHAPIRO. I think I would agree with that, yeah.

Mr. CHABOT. Thank you.

Now, in your view, is the Federalist Society devoted to the law, the legal system, and the administration of justice as defined in canon four of the code of conduct for United States judges and—first of all, would you say that is accurate, in your view?

Mr. SHAPIRO. I haven't studied the judicial canons in depth. It sounds to me like it is accurate.

Mr. CHABOT. Okay. Thank you.

Does the Federalist Society take policy positions of any sort?

Mr. SHAPIRO. It does not.

Mr. CHABOT. Okay. Does the Federalist Society actively lobby Congress?

Mr. SHAPIRO. It does not.

Mr. CHABOT. Could anyone be a member of the Federalist Society? Is that accurate?

Mr. SHAPIRO. Anyone can. I believe in law schools there is a $5 membership fee.

Mr. CHABOT. Okay. Five dollars.

Would you agree that the American Bar Association takes on a more politically active role than the Federalist Society?

Mr. SHAPIRO. Yes, and it is not even close.

Mr. CHABOT. Could you describe, briefly, how the two associations, the two organizations, are different? How they differ?

Mr. SHAPIRO. Sure. I think I was briefly a member of the ABA out of law school. They gave law students free memberships or something like that. This is not your father's or your grandfather's ABA.

Lewis Powell was the President of the ABA and from that that was a launching pad for him to join the Supreme Court. The prestige of the organization has gone down, as has the membership. I forget what the percentage of lawyers in the ABA is now, but it is significantly lower.

The ABA does take positions both on amicus briefs and in terms of just organizational core positions on various issues of controversy, sometimes even nonlegal issues, I think I recall.

The Federalist Society does none of that. The Federalist Society is purely a membership organization that organizes both social and professional events.

Mr. CHABOT. Thank you. In the short time I have got left, let me just say that you mentioned you had been a member of a dues-paying member of the American Bar Association.

I was, too, for quite a few years until they came out and took a position on *Roe* v. *Wade* against the pro-life position. I happen to be pro-life and felt that I couldn't any longer in good faith pay dues to that organization. So, I dropped out of the ABA and was better for it.

So, thank you very much. I yield back my time.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Next, the gentleman from 10nessee, Mr. Cohen, for five minutes.

Mr. COHEN. Thank you, Mr. Chair.

It has been an interesting exercise in fiction. Ever since *Bush* v. *Gore* when the Supreme Court decided to kill the vote in Florida and elect a Republican candidate for president, the court has lost and continues to lose the respect that it once had as an independent body that determined cases by the law instead of by politics.

Bush v. *Gore* was a low point that has continued in a rather parallel course, and we see now with the Federalist Society having control over who gets on the bench what we are seeing is diminution and the destruction of American values.

Mr. Shapiro, do you believe in diversity among judges and among government leaders?

Mr. SHAPIRO. Depends how you define diversity.

Mr. COHEN. I don't define it as White men. That is what President Trump has appointed, predominantly, and at the Court of Appeals he has appointed only whites. A few women, not many. Almost all White males, no blacks, no Hispanics. A record that is even worse than any President since Ronald Reagan.

He has appointed about 200 judges and only eight of them have been African American. Only eight have been Hispanic. None—no African Americans to the Court of Appeals.

That is despicable because diversity is an important part of what America is about, giving people opportunities, giving people—like Clarence Thomas got his opportunity. He hasn't risen to the level

of Thurgood Marshall but he has been on the bench and served Scalia well.

People and George Bush understood appointing an African American. Donald Trump doesn't get it. The Federalist Society apparently doesn't get it either and they apparently got some problem with Episcopalians and Presbyterians and Unitarians and maybe even Jews.

It seems to be predominantly Catholics that they get when they recommend. Catholics are great people and I almost—my brothers went to Catholic schools and I came close to doing it.

They shouldn't have a monopoly on the bench, and to the exclusion of Episcopal, other Protestant religions, and Jewish people.

Merrick Garland happened to be Jewish. Ruth Bader Ginsburg happened to be Jewish. Her wish wasn't considered. Merrick Garland's nomination wasn't. The fantasy that has been put on display here by you, Mr. Shapiro, that there is something okay when the President is of the same party of the Senate to allow a nominee to go through in the last couple of months because the President is of the same party is basically saying that there is no basis to believe that the judges are really ruling based on philosophy and the law but that it is all about politics and we want to get in our team.

Merrick Garland should have been given a vote, and nobody talked back then about oh, well, the President was of a different party and that is why the Rule exist.

No, it was said by McConnell and all his acolytes that it was that the nomination was in an election year and we don't do that, and now they are hypocrites turning around. The hair of the hypocrite is so apparent on the Republican Senate and on you, Mr. Shapiro.

You mentioned about these judges becoming so controversial and being along party lines. I know you don't have much respect for the American Bar Association. I do. They look into each of the nominees and they rate them as qualified or not qualified.

When President Obama nominated people, no person he nominated was considered not qualified. President Trump has nominated nine people who were not qualified, seven of whom were approved by the Republican Senate even though they weren't qualified, and some of those people had allegiances and respect of Confederate histories and didn't respect *Brown* v. *Board of Education* and they are White people who don't respect the *Brown* v. *Board of Education* and want to repeal *Roe* v. *Wade*. What you have done with the Federalist Society is the end of the Supreme Court as we knew it and you should be embarrassed.

I yield back the balance of my time.

Mr. JOHNSON of Georgia. The gentleman yields back.

Mr. Biggs from Arizona is recognized for five minutes.

Mr. BIGGS. Thank you, Mr. Chair.

I am really kind of disappointed that Senator Whitehouse chose to leave because I had some questions I wanted to ask him.

Because he is always talking about the dangers of dark money in politics, and what I would ask him and say, do you support your own past comments encouraging dark money in liberal politics.

Why is it okay for you, Senator Whitehouse, to accept and encourage support from dark money organizations while at the same time attacking dark money?

I would ask him if he supported Arabella Advisors' efforts to plan for and organize unrest should President Trump be reelected and, moreover, what has just been reported this very day, the unrest that they are paying for to attack Lindsey Graham and Mitch McConnell in the Senate.

I would ask him if he supported Arabella Advisors facilitating a fake news organization as a way to avoid FEC rules banning micro targeting by political organizations. I would ask him a few of those questions.

I would ask him this question. I would say, you just said, I will quote what he said, "a well-stocked bench can institute policy when Congress fails to act," closed quote. I guess my question would be isn't that seeking some kind of judicial activism.

Mr. Chair, I don't know if somebody has got their phone going off or what. I can hear somebody's phone.

So, I would ask him, because if you start talking about capturing the court and some of you talking up there that I heard today, and Senator Whitehouse, I find myself saying, where have you been for the last 40 some-odd years.

When I first came out of law school, conservative intellectuals, court observers, and writers were talking about what you are calling court capture today but a liberal activist bent in the Federal courts.

Judicial activism. That was what was going on. That was okay because that is what you want. That is what you want.

The reality is this. Senator Whitehouse didn't like what happened when the Pacific Legal Foundation took him to court representing somebody in his district when he was the AG in that State.

I will tell you one other thing that I have written recently. It says you can't forget that Democrats believe the best bet for enacting their policies is a legislatively active Supreme Court.

They have promised to pack the court if President Trump gets any more of his nominees on the bench, and as my colleague from Ohio said, what better way to capture the court than to pack it.

So, when someone says and indicates that the conservatives are trying to capture the court by advertising, lobbying, and supporting nominees by this president, where were you four years ago or six years ago when the same thing was going on for liberal judicial activists being nominated by President Obama?

When I hear let us talk about diversity, how about diversity on the court? How about different judicial philosophies? Well, you don't want that, do you? I would suggest you probably don't want that.

So, that becomes a problem. How about when you start talking about not party and you start talking about procedure and regulation, how important that is to restore the credibility of courts, how about getting jurists that follow the Constitution instead of actively trying to legislate from the bench?

Who are trying to create law, not interpret law? Not apply the law to the case before them?

I think of the first case of seeing this kind of outrageousness conduct towards a judicial nominee. You remember Robert Bork. I

watched that hearing. I was a practicing young lawyer at the time. I could not believe what was happening.

Then the criticisms levied by my colleague across the aisle from Tennessee about Clarence Thomas. I watched that. That was an unbelievable hearing, the ruthless nature of that. It was all topped by just a couple years ago, Brett Kavanaugh.

So, I will tell you, if you want to see people capture the court, then you need to pull yourselves back out of it as well.

With that, Mr. Chair, I have some documents I would like to submit for the record.

I have got the letter from James Burling dated September 5, 2018, regarding Senator Whitehouse. I have got an article from Fox dated two days ago, questions from Senator Whitehouse from the Wall Street Journal. Another piece dated from September 22, 2020. Another one about Sheldon Whitehouse.

Another one about Whitehouse—"Senator Whitehouse Blames Dark Money." Another one called "Schumer-Tied PAC Received $1.7 Million from Dark Money Group." Another one called "Democrats Used to Rail Against Dark Money: Now They are Better at it Than the GOP."

"Documents Reveal Massive Dark Money Group Boosted Democrats in 2018." "Left's Point Person for Post-Election Violence Prep Linked to Arabella Advisors." "Wealthy Donors Pour Millions into Fight Over Mail-in Voting."

"Newsroom or PAC? Liberal Group Muddies Online Information Wars." Facebook—

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. BIGGS. I know, and these are for submission to the record.

Mr. JOHNSON of Georgia. Okay. All right. Proceed.

Mr. BIGGS. Thank you. "Facebook Cracks Down on Fake News Sites Including Far Left Operation Funded by Dark Money." "Network of News Sites Must Register as Political Committee Due to Democratic Links, Complaint Alleges." Then, finally, "Climate Change Dark Money."

If they would be admitted, sir.

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

MR. BIGGS FOR THE RECORD

Network of news sites must register as a political committee due to Democratic links, complaint alleges

A complaint filed with the Federal Election Commission alleges that Courier Newsroom should not be exempt from registering as a political group and reporting its donors and expenses. (Chip Somodevilla/Getty Images)

A new complaint filed Thursday with the Federal Election Commission alleges that a national network of local media websites must register as a political committee because of its ties to a Democratic-aligned group.

Courier Newsroom, which includes seven news sites concentrated in presidential swing states, is backed by ACRONYM, a politically active nonprofit run by Democratic strategist Tara McGowan.

Federal election laws and regulations do not apply to media outlets unless they are "owned or controlled by" a political party, committee or candidate and are acting as a media outlet rather than a political one.

But the complaint, filed by Americans for Public Trust, a watchdog group affiliated with former Nevada attorney general Adam Laxalt, a Republican, alleges that Courier Newsroom is not eligible for that exemption and that the media group failed to register as a political group and report its donors and expenses as is required of political groups under federal law.

The complaint points to a June 2019 ACRONYM internal memo, in which McGowan wrote that the group was launching a "for-profit digital media company building out online news properties in seven 2020 battleground states" of Wisconsin, Michigan, Pennsylvania, Virginia, North Carolina, Florida and Arizona.

In the memo, McGowan warned that Democrats are "losing the media war" online to the Republican Party and to President Trump's campaign, and laid out her plan for Courier Newsroom to counter that GOP advantage.

"Building this media content network — majority owned by ACRONYM — will: Enable Democrats to compete with Republican echo chambers online; Build nimble communications infrastructure for Dems in critical states; Reach voters with strategic narratives + information year-round; Make cyclical investments in paid advertising more cost-efficient + effective over time," according to the memo, which is included in the legal complaint.

"Through digital storytelling framed to both elevate Democratic candidates and issues important to core audiences, ACRONYM News Corp will finally compete with Republican news properties and narratives where they are already reaching voters online," the memo reads.

On its website, Courier Newsroom describes itself as "a progressive media company." On its website, it states: "We believe that by investing in the work of local journalists across the country we can positively impact civic participation and build a healthier democracy from the ground up."

A staff of reporters and editors work for Courier Newsroom and its affiliated websites, both through aggregating news coverage and through writing original stories, ranging from concerns over the politicization of the Postal Service to the impact of Trump's response to the coronavirus pandemic.

The local websites under the Courier Newsroom umbrella include the Copper Courier (Arizona), The Keystone (Pennsylvania), Cardinal & Pine (North Carolina) and The 'Gander (Michigan).

Rithesh Menon, the chief operating officer for Courier Newsroom, said in a statement that while the newsroom is left-leaning, it is neither partisan nor political.

"Courier Newsroom is a for-profit media corporation that is filling the void left by shuttering local news," Menon said in the statement. "We are a progressive newsroom but we are neither a partisan nor political organization, nor are we controlled by any candidate, political party, or political organization."

He called the complaint politically motivated.

"This complaint, filed by a Republican-led organization in an effort to undermine our values and journalistic integrity, is completely without merit and we have confidence the FEC will come to the very same conclusion," Menon said.

The complaint comes as researchers raise concerns about the proliferation of websites and groups that purport to be local or business news publications but have ties to politically active groups, including so-called "dark money" groups like ACRONYM that do not disclose their donors.

More than 1,200 such websites have cropped up in recent years, sparking worries that political operatives may be using the demise of local news organizations to create "partisan outlets masquerading as local news organizations," according to research by the Tow Center for Digital Journalism at Columbia University's Graduate School of Journalism.

These efforts have been tied to conservatives as well, such as a network of entities covering news critical of elected Democratic representatives and supportive of conservative candidates in Michigan, which was traced to a conservative businessman.

The FEC's media exemption is applied broadly to account for First Amendment activity, to make sure that anti-corruption rules designed for political candidates and groups do not infringe upon the freedom of the press, legal experts say.

The FEC's test hinges on whether the entity is a bona fide news outlet that is producing and disseminating the news to inform the public even if it has a political tilt, rather than a political group acting on behalf of a party or candidate.

In a 2019 interview with Bloomberg News, McGowan rejected criticisms that her Courier Newsroom endeavor is a politically motivated effort to sway Democratic voters.

"A lot of people I respect will see this media company as an affront to journalistic integrity because it won't, in their eyes, be balanced," she told Bloomberg News. "What I say to them is, balance does not exist anymore."

Through a spokesman, McGowan declined to comment for this article or on the content of the FEC complaint.

ACRONYM and its affiliated super PAC, PACRONYM, have gotten the attention of many of the Democratic Party's wealthiest donors, some of whom have donated hundreds of thousands of dollars to support the groups' efforts, according to interviews with donors and FEC records. Their donations finance an array of initiatives under ACRONYM and PACRONYM, not just Courier Newsroom.

From May 2018 through April 2019, ACRONYM had 100 percent of ownership in Courier Newsroom, according to its 2018 tax return.

ACRONYM said Courier Newsroom now has other investors and that ACRONYM no longer has full ownership.

Caitlin Sutherland, the executive director of Americans for Public Trust, said in an interview that her group is seeking an FEC investigation because it believes that Courier Newsroom is "actually a political committee masquerading as a newsroom and hiding behind a news exemption."

"The key issue that we are looking to highlight is that they are an unregistered political committee," Sutherland said. "It's been well documented since their inception that they were never set out to function as a newsroom. Tara McGowan herself said that they decided to counter the Trump and RNC digital spending, not to disseminate news."

However, the FEC currently does not have enough commissioners to take a formal vote on the complaint. The independent agency, responsible for enforcing election laws, is facing a mounting backlog of complaints relating to campaign activity.

Axios reported last month that Facebook executives plan to crack down on content creators that have "direct, meaningful ties" to a political entity or group.

Courier Newsroom has purchased at least $1.8 million in Facebook advertising, the complaint notes, citing data from the Facebook Political Ad Archive.

EXCLUSIVE: Democratic Senator Hopes Liberal Dark Money Groups Donate To His Campaign

Sen. Sheldon Whitehouse (D-RI) asks a question as former acting Attorney General Sally Yates testifies about potential Russian interference in the presidential election before the Senate Judiciary Committee on Capitol Hill Washington, D.C., U.S. May 8, 2017. REUTERS/Aaron P. Bernstein | TPX IMAGES OF THE DAY

REUTERS/Aaron P. Bernstein

Democratic Rhode Island Sen. Sheldon Whitehouse admitted on tape that he is willing to accept campaign donations from so-called "dark money" groups, as long as they have a progressive bent.

A reporter asked Whitehouse about his stance on dark money as the flustered senator made his way through the Hart Senate Office building in Washington,

It would also require advertisements connected to judicial confirmations to disclose who is funding the spot and would ban foreign nationals from funding advertisements related to a judicial nomination.

The bill comes after Senate Democrats published a report claiming President Donald Trump's outside judicial advisor, Leonard Leo, and his vast network have helped rig the process through which the president has pushed through a large number of judicial appointments.

Leo responded to those claims in a text message to CNBC, suggesting that they should be more focused on responding to the coronavirus pandemic.

The Trump administration has nominated and confirmed at least 200 judges, including two Supreme Court justices, Brett Kavanaugh and Neil Gorsuch.

Throughout both of the Supreme Court hearings, "dark money" groups, such as the conservative Judicial Crisis Network and the more progressive Demand Justice, unleashed ad campaigns arguing either for or against Trump's nominees.

Those attempts to influence confirmation processes led to the crafting of the "Judicial Ads Act," Feinstein said in a statement. Democrats are the minority party in the Senate. So far no Republicans have signed on to help sponsor the bill.

"The American people have a right to know who is trying to influence judicial nominations," Feinstein said. "Our bill would help shine light on the process, requiring major donors to these campaigns to be identified and removing the serious potential for undisclosed conflicts of interests."

Whitehouse said the outside effort by these groups comes down to corporate interests.

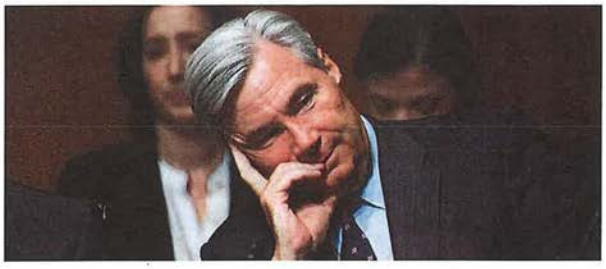
"A decades-long effort by big corporations and partisan donors to rig the courts using dark money is working; they've won over 80 partisan, 5-4 decisions," Whitehouse said in a statement.

The bill is back by the Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, the Project on Government Oversight, Public Citizen, Democracy 21 and End Citizens United.

D.C.

Whitehouse reiterated that he believes "any dark money group" should have to publicly disclose its donations, but vaguely claimed that some groups are more "transparent" about their donations than others. **(RELATED: Senator Whitehouse: Dems Will Investigate Kavanaugh And FBI 'As Soon As Democrats Get Gavels')**

Whitehouse was asked specifically about "liberal dark money" groups such as Demand Justice and League of Conservation Voters, Whitehouse admitted that he hoped they would donate to his campaign. Whitehouse was easily re-elected in 2018 and has served as Rhode Island's junior senator since 2007.



Sen. Sheldon Whitehouse, D-R.I., listens to testimony by Dr. Christine Blasey Ford during the Senate Judiciary Committee hearing on the nomination of Brett M. Kavanaugh… Tom Williams/Pool via REUTERS

Whitehouse is a member of the Senate Judiciary Committee and was a staunch critic of conservative groups that backed Justice Brett Kavanaugh's nomination to the Supreme Court, specifically the Judicial Crisis Network which ran ads during Kavanaugh's contentious confirmation process.

"Secret money campaigns have politicized the judicial nomination process and cast a cloud over recent nominees," Whitehouse said at the time. A multi-million dollar advertising campaign supporting a Supreme Court nominee further exacerbates the perception that corporate special interests have captured this Supreme Court.

Whitehouse has also been a fierce critic of the Supreme Court's decision in the 2010 *Citizens United v. FEC* case.

POLITICS

Democratic bill would require dark money judicial groups to reveal donors

PUBLISHED THU, JUL 2 2020·10:02 AM EDT UPDATED THU, JUL 2 2020·10:57 AM EDT

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KEY POINTS

Democratic lawmakers are introducing a bill that would require "dark money" judicial groups to reveal their donors after years of anonymous funding.

The bill would demand that groups which spend $50,000 in a calendar year on advertisements linked to federal judicial nominations release the names of their donors who give over $5,000.

The bill comes after Senate Democrats published a report claiming President Trump's outside judicial advisor, Leonard Leo, and his vast network have helped rig the nomination process.

Sens. Dianne Feinstein and Sheldon Whitehouse, both members of the Senate Judiciary Committee, filed the bill titled the "Judicial Ads Act."

The bill, co-sponsored by eight other Democratic lawmakers, demands that groups which spend $50,000 in a calendar year on advertisements linked to federal judicial nominations to release the names of their donors who give over $5,000. These organizations have always kept their donors anonymous.

It would also require advertisements connected to judicial confirmations to disclose who is funding the spot and would ban foreign nationals from funding advertisements related to a judicial nomination.

The bill comes after Senate Democrats published a report claiming President Donald

be more focused on responding to the coronavirus pandemic.

The Trump administration has nominated and confirmed at least 200 judges, including two Supreme Court justices, Brett Kavanaugh and Neil Gorsuch.

Throughout both of the Supreme Court hearings, "dark money" groups, such as the conservative Judicial Crisis Network and the more progressive Demand Justice, unleashed ad campaigns arguing either for or against Trump's nominees.

Those attempts to influence confirmation processes led to the crafting of the "Judicial Ads Act," Feinstein said in a statement. Democrats are the minority party in the Senate. So far no Republicans have signed on to help sponsor the bill.

"The American people have a right to know who is trying to influence judicial nominations," Feinstein said. "Our bill would help shine light on the process, requiring major donors to these campaigns to be identified and removing the serious potential for undisclosed conflicts of interests."

Whitehouse said the outside effort by these groups comes down to corporate interests.

"A decades-long effort by big corporations and partisan donors to rig the courts using dark money is working; they've won over 80 partisan, 5-4 decisions," Whitehouse said in a statement.

The bill is back by the Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, the Project on Government Oversight, Public Citizen, Democracy 21 and End Citizens United.

Newsroom or PAC? Liberal group muddies online information wars

2020 elections

A news outlet called Courier, funded by a Democratic-aligned digital group, is blurring the lines between campaign advocacy and a newsroom.

New York Rep. Max Rose got some unexpected new help in his reelection battle in his Staten Island-based district. | Manuel Balce Ceneta/AP Photo

By ALEX THOMPSON

07/14/2020 04:30 AM EDT

Updated: 07/14/2020 11:14 AM EDT

- *Facebook*

WhatsApp

Rep. Max Rose, one of the most vulnerable Democrats in Congress this November, couldn't have written a better headline himself.

"Rep. Max Rose Deploys With National Guard to Get Hospital Ready For Coronavirus Patients," read an April 17 article about the freshman congressman from New York. The article — boosted into circulation in New York by thousands

of dollars in targeted Facebook ads — was mostly a rewrite of the congressman's press release from the previous day. The same thing happened the next month: A May 28 press release touting coronavirus legislation of Rose's quickly turned into an article with almost exactly the same headline as the release.

The articles and Facebook ad dollars look like the efforts of a run-of-the-mill political group. But they are actually from a news outlet: CourierNewsroom.com, also known as Courier, which was created and funded by the Democratic-aligned digital organization Acronym. Courier has spent over $1.4 million on Facebook ads this election cycle, mostly to promote its flattering articles and videos about more than a dozen endangered House Democrats at the top of the Democratic Party's priority list this November, according to Facebook's political ad tracker.

But because Courier is organized as a media outlet, it does not have to disclose its donors or the total money it spends promoting Democratic politicians.

POLITICO Dispatch: July 14

Mark Meadows came to the West Wing with big plans, hoping his friendship with President Trump would help him avoid turbulence. Then reality — and the coronavirus pandemic — hit.

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The $1.4 million in Facebook ads is likely just a fraction of the money behind the Courier project, which includes a newsroom of at least 25 people and eight separate websites with content often focused on local issues in presidential swing states. But this activity — creating an unregulated advertising stream promoting Democratic officeholders, more akin to a PAC than a newsroom — diverges from other partisan news outlets that are proliferating online as local newspapers struggle.

And in setting up the enterprise, Acronym — a sprawling digital organization whose programs include millions of dollars in traditional political advertising and voter engagement efforts, with financing from some of the deepest pockets in progressive politics, such as liberal billionaires Reid Hoffman, the co-founder of LinkedIn, and Laurene Powell Jobs, the majority owner of The Atlantic — has stirred outrage and provoked debate about the ethics of such political tactics and the future of the press.

Backers believe they are simply ahead of the curve. Courier, they say, is where news is heading in the Wild West of social media, where partisan stories often

thrive and the old business model is failing. With public-facing editorial standards similar to other media organizations, Courier is an answer to the deluge of false partisan content consumers face, they argue. They also point to the long history of explicitly partisan news outlets in the U.S. and elsewhere.

"More quality reporting with integrity — even if it has a partisan bent and as long as that bent is disclosed — anything to combat the spread of misinformation is important," said Nicco Mele, the former director Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, who is supportive of Courier.

But while some Democratic operatives concede the premise that their party needs to be more competitive online, they believe Courier and Acronym's tactics are unethical but also ineffective given the high cost.

Courier is not the first to experiment with versions of this model, but it is likely the most robust attempt so far. In 2014, the Republican Party's congressional campaign arm set up "news" sites that criticized Democrats and bought ads on Google to promote the pieces. At the time, the Democratic Congressional Campaign Committee blasted the Republicans for "deception." Asked if they approved of Courier's 2020 tactics boosting their members, the DCCC did not respond to repeated requests for comment.

"We look forward to Democrats denouncing these dark money fake news groups meddling in our elections," said Bob Salera, a spokesperson for the National Republican Campaign Committee, who said the party no longer operates such sites. "Since they represent everything Democrats claim to oppose in politics, this should be an easy call."

Courier's operations differ from the NRCC in that it is a for-profit newsroom, and election law doesn't regulate the press due to its First Amendment protections. As a result, Courier raises new digital-age questions about what is and is not a news organization — questions that political ad regulators are unlikely to answer, according to election experts, leaving this murky space open for "abuse," said Brendan Fischer, the federal reform director at the Campaign Legal Center.

"I don't know how the FEC would treat Courier because the 'media exemption' is the third rail of campaign finance," Fischer said. "Neither the Democrats or Republicans want to be in the business of determining what is a media entity."

So far, Courier's web traffic has been light. Its signature site is ranked 76,004 in the United States, according to the Amazon-owned Alexa, and has under 6,000 "likes" on Facebook. The organization did not release any other traffic information. Its most-watched video on YouTube, with over 570,000 views, was a well-reported story showcasing Amazon's ability to place laudatory stories about itself in local news broadcasts. But the next most-viewed video only had about 2,500 views, and the company's laudatory clips of their favorite congressional candidates have far less than that. Its YouTube channel has just 735 subscribers.

While campaign finance watchdogs worry about the trend of "dark money" influencing American politics and media experts say that Courier and similar endeavors only further undermine trust in news and shared facts, Courier and their supporters dismiss these concerns as liberal hand-wringing more concerned with being pure than with winning.

"Coupling original, fact-based reporting with paid content distribution, Courier is reaching Americans in their newsfeeds and is providing a powerful counter to conservative misinformation which dominates platforms like Facebook," Courier Newsroom COO Rithesh Menon said in a statement through an Acronym spokesperson. "We're so proud of what Courier has built in its first year, and hope others in the progressive space invest in this type of digital media ecosystem - because the Right has for years."

Courier and Acronym did not make anyone available for an on-the-record interview. After publication, Acronym's founder and CEO Tara McGowan wrote on Twitter that "Courier's reporters would also never publish drag pieces with anonymous critics that further weaken the standards of journalism just for cheap clicks to make their stakeholders richer [shrug emoji] but you know, here's to journalistic integrity!"

With the exception of the targeted Facebook ads, Courier does mostly operate like other explicitly progressive news organizations. It produces long, earnest features — like a 3,000-plus word story on corporate PACs. Its journalists gather quotes and occasionally reach out to Republicans for comment. And unlike many liberal news outlets that chase clicky national stories, many of Courier's swing-state verticals focus on local issues like school board infighting and police civilian

review board meetings. Its newsroom includes reporters that came from more traditional outlets such as The Sentinel, a local paper covering Pennsylvania's Cumberland County, along with veterans from digital-first progressive outlets like VICE.

But in other ways, the news organization also acts like a loose arm of the Democratic Party. Its seven local news-focused verticals are strategically focused on major presidential swing states: Florida, Virginia, North Carolina, Arizona, Michigan, Pennsylvania and Wisconsin. While the sites disclose they are "progressive" in their "About Us" sections, they also come with nondescript names like *Cardinal and Pine* for North Carolina, *Keystone* for Pennsylvania and *Up North News* for Wisconsin that suggest a more traditional paper.

Experts in media ethics and misinformation worry that the advocacy-cloaked-in-journalism tactic is pouring gasoline on a raging fire of consumer trust and online disinformation.

"It's super opaque to the consumer," said Kelly McBride, chair of the Poynter Institute's Craig Newmark Center for Ethics and Leadership. "When you click on Vox or some other news website that has a liberal bent to it, it still was created with the idea of putting out news for the sake of a business model. In this case, the very purpose for this site to exist is different."

Jennifer Kavanagh, the co-author of the 2018 RAND study "Truth Decay," said that Acronym's project would likely frustrate voters. "From the perspective of a voter who is looking for accurate information on a candidate, it just makes the situation harder. It's just creating more noise," she said. She added that Courier is likely part of a larger trend that will at least continue into the near future. "We are in a period where the economic incentives push more toward more subject, more commentary, more gear toward producing a more emotional response and we are a long way from turning the corner of coming out of this."

The criticism puts some of Acronym's financial backers in an awkward position. Powell Jobs' "social change organization," Emerson Collective, boasts of its media projects "strengthening democracy." She has invested in a number of high-profile media organizations, including Axios and Mother Jones, and is majority owner of The Atlantic.

An Emerson Collective spokesperson told POLITICO that "Emerson Collective does not fund Courier Newsroom." Asked if Powell Jobs had any problem with

Acronym starting and funding Courier, the spokesperson said they had nothing to add.

"If I were on her leadership team at The Atlantic, I would be talking to her about that," said McBride.

Wealthy donors pour millions into fight over mail-in voting

WASHINGTON (AP) — Deep-pocketed and often anonymous donors are pouring over $100 million into an intensifying dispute about whether it should be easier to vote by mail, a fight that could determine President Donald Trump's fate in the November election.

In the battleground of Wisconsin, cash-strapped cities have received $6.3 million from an organization with ties to left-wing philanthropy to help expand vote by mail. Meanwhile, a well-funded conservative group best known for its focus on judicial appointments is spending heavily to fight cases related to mail-in balloting procedures in court.

And that's just a small slice of the overall spending, which is likely to swell far higher as the election nears.

The massive effort by political parties, super PACs and other organizations to fight over whether Americans can vote by mail is remarkable considering the practice has long been noncontroversial. But the coronavirus is forcing changes to the way states conduct elections and prompting activists across the political spectrum to seek an advantage, recognizing the contest between Trump and Democrat Joe Biden could hinge on whether voters have an alternative to standing in lines at polling places during a public health crisis.

Some groups are even raising money to prepare for election-related violence.

"The pandemic has created a state of emergency," said Laleh Ispahani, the U.S. managing director for Open Society, a network of nonprofits founded by billionaire progressive donor George Soros. "Donors who haven't typically taken on these issues now have an interest."

How much will be spent is unclear because many of the organizations are nonprofits that won't disclose those details to the IRS until well after the election. Even then, many sources of money will remain unknown because such groups don't have to disclose their donors, commonly referred to as "dark money."

Tax filings, business records and campaign finance disclosures offer some clues. They reveal vast infrastructure that funnels money from wealthy donors, through philanthropic organizations and political groups, which eventually trickles down to smaller nonprofits, many of which operate under murky circumstances.

On the conservative side, organizations including Judicial Watch, the Honest Elections Project, True the Vote and the Public Interest Legal Foundation are litigating cases related to voting procedures across the U.S.

A substantial portion of the financing comes from Donors Trust, a nonprofit often referred to as the "dark money ATM" of the conservative movement. The organization helps wealthy patrons invest in causes they care about while sheltering their identities from the public.

In other instances, funding comes from charitable foundations built by the fortunes of Gilded Age industrialists.

Litigation is a primary focus. Democrats and good government organizations are pushing to eliminate hurdles to absentee voting, like requiring a witness's signature or allowing third parties to collect ballots.

Full Coverage: Election 2020

Conservatives say that amounts to an invitation to commit voter fraud. As these issues wind their way through courts, they say judges could decide complex policy matters that often were already debated by state legislatures.

"The wrong way to go about this is to run to court, particularly a week or two before an election, trying to get judges to intervene and second-guess decisions legislatures have made," said Jason Snead, the executive director of the Honest Elections Project.

His organization is a newly formed offshoot of the Judicial Education Project, a group that previously focused on judicial appointments and received more than $25.3 million between 2016 and 2018 from the Donors Trust, records show. They are deeply intertwined with the conservative Catholic legal movement and share an attorney, William Consovoy, with the Republican National Committee, which has pledged $20 million for voting litigation.

Leonard Leo, a Trump confidant who was instrumental in the confirmations of the president's Supreme Court nominees, plays a leading role. He's now chairman of a public relations firm called CRC Advisors, which is overseeing a new effort to

establish a clearinghouse for anonymous donors to fund conservative causes, including the fight over vote by mail.

The firm played a significant role in the 2004 election by publicizing unfounded claims made by a group called Swift Boat Veterans for the Truth, which questioned Democratic nominee John Kerry's record as a Vietnam War hero, records show.

The group's involvement in vote by mail marks a sea change for Republicans. Claims of widespread voter fraud have long energized segments of the party's base. But it did not elicit much interest from donors, and the handful of groups devoted to the issue operated on minuscule budgets.

But in recent years, Democrats have mounted legal challenges that threatened voting laws championed by conservatives. And Trump's repeated focus on "rigged elections" has made the issue part of a broader culture war.

Still, some activists question the GOP establishment's commitment to the cause.

"They aren't going to take on Republicans like we have," said Catherine Engelbrecht, the founder of True the Vote.

While Republicans are focused on the courts and raising doubts about vote by mail, the challenge faced by Democrats is far more daunting.

In addition to litigation, they must mobilize their base during a pandemic. That includes educating the public about vote by mail, a difficult task when door-to-door canvasing isn't an option.

Some groups are donating directly to local governments. In Wisconsin, the Center for Tech and Civic Life, a nonprofit with ties to left-leaning philanthropy, has donated $6.3 million to the state's five largest cities to set up ballot drop boxes, help voters file absentee ballot requests and expand in-person early voting.

Even before the pandemic, government funding for elections was limited. Since then, the outbreak has escalated costs while cratering tax revenue.

"Due to COVID, there definitely has been a higher cost," said Mayor John Antaramian, of Kenosha, which received $863,000 through the grant — roughly four times what the city budgeted for the election. "Is there a financial shortfall on that basis? Of course."

Much of the untraceable money on the left is likely to come from a series of nonprofit funds managed by the consulting firm Arabella Advisors, which typically route upwards of $500 million a year to causes supported by liberal donors. The firm was founded by Eric Kessler, who served in Bill Clinton's White House.

The operation has been instrumental in financing so-called resistance groups following Trump's election. And some nonprofits they've provided seed money were responsible for millions of dollars in TV advertising that blistered Republicans during the 2018 midterms.

They've also pioneered the practice of creating "pop-up" organizations: groups that appear to be grassroots-driven efforts to influence public policy, which use trade names that obscure a deep pool of resources from those with ideological or financial motivations.

The firm recently registered a handful of trade names for groups that appear to be focused on voting rights, records show.

Another effort Arabella Advisors are involved in, the Trusted Elections Fund, aims to raise between $8 million and $10 million in case the pandemic leads to chaos in November.

The group is preparing for potential foreign hacking of state voting systems, "election day or post-election day violence," as well as contested results.

A Trusted Elections Fund representative declined to comment. But a two-page summary available online elaborated on their aims.

"Philanthropy has a responsibility to make sure that we are prepared for emergencies that could threaten our democracy," it read.

—

Beaumont reported from Des Moines, Iowa.

Left's Point Person for Post-Election Violence Prep Linked to Arabella Advisors

Getty Images

The point person for the Fight Back Table, a coalition of liberal organizations planning for a "post-Election Day political apocalypse scenario," leads a progressive coalition that is part of a massive liberal dark money network.

Deirdre Schifeling, who leads the Fight Back Table's efforts to prepare for "mass public unrest" following the Nov. 3 election, founded and is campaign director for Democracy for All 2021 Action, a project of Arabella Advisors' Sixteen Thirty Fund. The Sixteen Thirty Fund is a dark money network that provides wealthy donors anonymity as they push large sums into the left's organizational efforts.

The connections suggest that post-election mobilization isn't just the project of a liberal fringe, but that powerful Democratic Party interest groups are also involved.

Created in 2019, Democracy for All 2021 Action includes more than 20 labor union, think tank, racial justice, and environmental groups that push for automatic and same-day voter registration, prohibiting voter ID laws, and removing "barriers" to naturalization, among other initiatives. While the Sixteen Thirty Fund does not report Democracy for All 2021 Action in its D.C. business records, the group acknowledges that it is a project of the Sixteen Thirty Fund at the bottom of its website. The Sixteen Thirty Fund has been used as an avenue for donors to funnel hundreds of millions of dollars to state-based and national groups in recent years. In 2018 alone, $141 million was passed through the fund to liberal endeavors.

A complete list of groups that make up the Fight Back Table is not publicly available, but Schifeling's group appears to be an integral part of its efforts. Beyond being the point person for the Fight Back Table's election war games, Schifeling has ties to two of the Fight Back Table's founding groups, Demos and Color of Change, which are part of Democracy for All 2021 Action. Schifeling's group is also a part of Protect the Results, a separate coalition that is collaborating with the Fight Back Table on mass mobilization to "protect the results of the 2020 elections" in more than 1,000 locations across the United States.

The post-Election Day prep follows other doomsday planning scenarios by liberal activists. The Transition Integrity Project released a 22-page document that mentioned "violence" 15 times, "chaos" 9 times, "unrest" 3 times, and "crisis" 12 times. The Fight Back Table, likewise, is preparing for extreme outcomes, including violence and mass mobilization efforts following the elections.

"There are a lot of scary scenarios," Sean Eldridge, a former Democratic congressional candidate that leads Protect the Results, told the *Daily Beast,* who first reported on the Fight Back Table's efforts. "We have to be prepared to mobilize in unprecedented ways." Protect the Results's massive coalition also includes other groups involved with the Fight Back Table, including Demos and MoveOn.

The liberal activists are planning for "civil and political" unrest following the elections if Biden does not win in a landslide. According to the *Daily Beast*, their simulations have included scenarios where Trump's camp releases "classified documents for political purposes, fueling manufactured rumors," halting "assets of individuals and groups the president determines to be a threat," and "restricting internet communications in the name of national security."

The war game preppers also saw scenarios where Trump could "rely on surrogates to embed operatives inside protests to encourage violent action" and "mobilize a range of law enforcement actors … who might, without proper training or if led by politicized actors, escalate matters." Additionally, they envisioned scenarios in which Trump invokes the Insurrection Act and sends the military into cities to "restore order," "protect" voting locations, and "confiscate 'fraudulent' ballots," among other hypothetical outcomes. Eldridge said that if Biden were to lose and concede a contested election, his group would not support the mass mobilization efforts.

Democracy for All 2021 Action did not respond to a request for comment on the war games or the group's relationship to the Sixteen Thirty Fund.

Schifeling's group is just one of dozens that fall under funds affiliated with Arabella Advisors. The funds have facilitated more than $1 billion in anonymous funding since President Donald Trump took office.

Funds affiliated with Arabella Advisors act as a "fiscal sponsor" to liberal nonprofits by providing tax and legal status to the groups. This setup means that the nonprofits do not have to file individual tax forms to the IRS, which include information such as board members and overall financials.

Some of the most prominent groups on the left fall under these funds, including Demand Justice, which fights Trump's judicial nominations, and numerous prominent state-based groups. Funds at Arabella are also used to push grants to outside groups not contained within their network, including David Brock's American Bridge, John Podesta's Center for American Progress, the Center for Popular Democracy, and America Votes.

Update 09/17/20, 5:00 PM: This story has been updated to specify that funds affiliated with Arabella Advisors provide fiscal sponsorship, not Arabella Advisors itself.

Documents reveal massive 'dark-money' group boosted Democrats in 2018

A little-known nonprofit called The Sixteen Thirty Fund pumped $140 million into Democratic and left-leaning causes.

The group's 2018 fundraising surpassed any amount ever raised by a left-leaning political nonprofit, according to experts, who pointed to the Koch network and the Crossroads network as rare right-leaning groups that posted bigger yearly fundraising totals at the height of their powers.

The Sixteen Thirty Fund's rise last year is a sign that Democrats and allies have embraced the methods of groups they decried as "dark money" earlier this decade, when they were under attack from the money machines built by conservatives including the Kochs.

"In terms of the size of dark money networks, there are only a few that have gone into the $100 million-plus range," said Robert Maguire, the research director for

the watchdog group Citizens for Responsibility and Ethics in Washington and an expert in political nonprofits.

"These kinds of totals aren't unheard of," Maguire added. "I do think they're unheard of on the liberal side. I think that's what's so striking about this."

In an email, Sixteen Thirty Fund executive director Amy Kurtz wrote that the group "provides support to advocates and social welfare organizations around the country, and we are pleased with the growth we had in 2018."

Sixteen Thirty Fund played a role in the battle for the House of Representatives in 2018, a crucial contest for Democrats trying to seize back power after Trump's rise. The election featured dozens of Democratic candidates who decried the influence of money in politics on the campaign trail.

The nonprofit operated under four dozen different trade names in 2018, many of which have benign-sounding local titles like Arizonans United for Health Care and Floridians for a Fair Shake. POLITICO revealed in 2018 that a number of these linked groups were collectively spending millions of dollars to pressure Republican members of Congress on their stances on health care, taxes and the economy through TV ads and grass-roots organizing.

A related organization called the Hub Project controlled the flow of money for this effort from Sixteen Thirty Fund into states and districts, according to reporting by The New York Times. This year, the group is "continuing to work on campaigns that Americans care about," Hub Project spokesman Dan Crawford said, including campaigns focused on health care, taxes and the economy.

Demand Justice, the courts-focused group helmed by former Hillary Clinton press secretary Brian Fallon, also ran out of Sixteen Thirty Fund. Demand Justice spent millions of dollars on TV ads as Democrats tried to prevent Brett Kavanaugh from being confirmed to the Supreme Court in 2018. More recently, the group projected a video of Christine Blasey Ford accusing Kavanaugh of assault on the side of a truck outside a Washington gala where Kavanaugh was speaking.

In addition to the direct spending conducted under prominent trade names, Sixteen Thirty Fund also distributed more than $91 million in grants to 95 other groups in 2018, according to the tax filing. These funds made Sixteen Thirty Fund a major source of money for political nonprofits pushing an array of changes to state and federal law.

More than $27 million of that money went to America Votes, another liberal nonprofit that describes itself as "the coordination hub of the progressive community" on its website. That grant by itself was nearly twice the amount America Votes had ever raised in a single year ($14.2 million), according to federal tax records.

Sixteen Thirty Fund also directed tens of millions of dollars directly into state-level politics, including a series of successful ballot measures. The group gave $6.25 million to a group urging passage of a Nevada ballot measure promoting automatic voter registration, as well as $6 million to a Michigan group pushing changes to the state's redistricting process. Another $2.65 million went toward boosting a Florida constitutional amendment restoring voting rights to felons. Groups pushing minimum wage increases in Arkansas, Missouri and other states received millions more.

More than $10 million flowed from the Sixteen Thirty Fund into Colorado alone, to organizations supporting Democrats in state legislative races and campaigns for statewide office, as well as several more focused on expensive ballot measure campaigns.

"The ballot initiative process offers an important counterbalance to the failings of partisan politics and we are proud of our support for some of the most impactful and important initiatives of the 2018 cycle," Kurtz, the Sixteen Thirty Fund executive director, wrote in an email.

The group does disclose the amount of money of each donation, which shows several strikingly large contributions: One donor gave the group $51,705,000; a second gave $26,747,561 and a third gave $10,000,000. And The Hub Project disclosed three of its donors in 2017: Seattle venture capitalist Nick Hanauer, the union American Federation of Teachers and the Wyss Foundation, founded by businessman and environmentalist Hansjörg Wyss.

The huge size of Sixteen Thirty Fund and its donations raise questions about whether it has its own independent base of donors or if whether acts as one part of a larger network, said Brett Kappel, campaign finance lawyer at Akerman LLP.

"When you see a very large contribution — which is more than a third of the money raised — that raises the possibility that other groups are funneling money to this group to distribute to individual states," said Kappel. "Is this part of a dark money network? And what's its function?"

There are some signposts that partly show Sixteen Thirty Fund's operators and potential sources of its funding. Sixteen Thirty Fund is closely tied to Arabella Advisors, a firm that advises donors and nonprofits about where to give money and was founded by former Clinton administration appointee Eric Kessler. Kessler is president and chair of Sixteen Thirty Fund, and Arabella Advisors provides "business and administrative services" to the nonprofit, according to the tax filing.

Several of the biggest donors and organizations in Democratic politics also have public links to Sixteen Thirty Fund. Potential presidential candidate and megadonor Michael Bloomberg gave $250,000 to a super PAC linked to Sixteen Thirty Fund, Change Now, in 2018. And the Democratic donor group Democracy Alliance, which has dozens of members including billionaire George Soros, recommended last spring that donors invest several million dollars into Sixteen Thirty Fund, according to documents obtained at the time by POLITICO.

Democrats used to rail against 'dark money.' Now they're better at it than the GOP.

WASHINGTON — When allies of former President Barack Obama set up a super PAC to support his 2012 re-election, the White House disowned the group, The New York Times published a scathing editorial and former Democratic Sen. Russ Feingold of Wisconsin gave a speech warning Democrats would "lose our soul" if they allowed big money into the party.

But fears of being outgunned trumped those principled objections and, less than a decade later, Democratic super PACs are spending more than Republican ones. Liberal "dark money" groups, which obscure the source of their funds, outspent conservative ones for the first time in 2018. Even reform hawks like Elizabeth Warren and Bernie Sanders had their own personal big-money groups supporting their presidential campaigns.

"Their mantra of not 'unilaterally disarming' was really their justification for learning how to master super PACs and dark money and all that, and they're doing

a better job of it right now than the Republicans," said Craig Holman, a lobbyist for the good-government group Public Citizen.

Advocates are concerned with super PACs, which can accept donations of unlimited size but have to reveal the names of their donors and regularly disclose their activity. But they're more worried about dark money groups: nonprofit organizations that can't be as explicitly political as super PACs, but can keep their donors secret forever and don't have to reveal much about activities before elections.

While concerns about campaign finance reform that once animated Democratic voters have been eclipsed by the desire to oust President Donald Trump, advocates are left to wonder if the party can really be trusted to follow through on its promises to dismantle a system that may help them get elected.

"If Democrats were to win the Senate and the White House, there is reason to be concerned that they may not carry through with their commitments," Holman added. "I have no doubt that we are going to have to hold their word over their head."

The Democratic National Committee adopted a platform last month calling for a ban on dark money, and Joe Biden says one of his first priorities as president would be signing the sweeping reform bill House Democrats passed last year that would, among other things, match small donations 6-to-1 to encourage grassroots giving.

But his campaign also says they'll take all the help they can get for now and that bill, known as H.R.1, would have to compete for limited legislative bandwidth with efforts to address the coronavirus pandemic, the economy and much more.

Republicans, who generally oppose major campaign finance reform efforts, cry hypocrisy.

"It's just like everything else Biden stands for. He believes it until it's of political benefit to reverse himself," said Trump campaign communications director Tim Murtaugh.

Democrats, however, argue that the only way they can rein in big money in politics is to first use big money in politics to win.

"We aren't going to unilaterally disarm against Donald Trump and right-wing conservatives, but look forward to the day when unlimited money and super PACs

are a thing of the past, even if it means putting our own PAC out of business," said Guy Cecil, the chairman of Priorities USA, the super PAC first founded to support Obama's re-election.

'Arms race'

On principle, Democrats opposed Citizens United, the Supreme Court's landmark 2010 decision that opened the floodgates to virtually unlimited money in politics. But they also were against it because they were sure Republicans and their big-business allies would outspend them.

At first, Obama set the example for his party by trying to keep his hands clean of the super PAC game. "It was just this slog to try to get Democrats to think there was any benefit at all to giving to outside groups," said a Democrat involved in early efforts to raise money for a super PAC.

Quickly, though, party leaders concluded their position against unlimited donations and dark money wasn't tenable, and it turned out there was plenty of it flowing on the Democratic side, too. Obama eventually blessed Priorities USA, which helped kick off a proliferation of liberal big-money groups.

"If Democrats don't compete, it would be like preparing for a nuclear war by grabbing your fly swatter," said Jesse Ferguson, a Democratic operative who has worked for both campaigns and outside groups.

Democrats at first said they felt sick about doing it and vowed to hold themselves to a higher standard. They would support super PACs, which publicly disclose their donors, but railed against dark money groups, which don't. But that standard eventually eroded, the apologies grew more perfunctory and they ended up diving in head-first, looking for new loopholes to exploit. And Trump's election has supercharged the spending.

In 2016, conservative dark money dwarfed liberal dark money nearly 4-to-1: $143.7 million to $37.8 million. But two years later, in the 2018 midterms, the backlash against Trump helped liberal dark money groups outspend their counterparts for the first time, according to an analysis by Issue One, a bipartisan political reform organization. And they're on track to potentially do it again this year.

It's impossible to comprehensively track dark money spending in real-time, which is one of the most controversial parts about it. But the limited picture that has

emerged so far in 2020 shows $14.2 million in dark money has been spent supporting Democrats or against Republicans versus $9.8 million to support Republicans or attack Democrats, according to Open Secrets.

"Campaign spending is frequently like an arms race. Once one side develops a new weapon, both sides want to have it in their arsenal," said Michael Beckel, research director for Issue One.

Taking dark money to new levels

Sheila Krumholz, executive director of the Center for Responsive Politics, which runs the campaign finance data warehouse OpenSecrets.org, said her group has tracked liberal groups "taking dark money in politics to a new level of opacity" and caught them trying new tricks, such as creating faux news sites to make their attack ads seem more credible.

While overall dark money spending is roughly even between the parties right now, Democrats have a clear edge in congressional races, Krumholz said. Around 65 percent of dark money TV ads in 2020 Senate races and 85 percent of dark money TV ads in House races are sponsored by liberal groups, according to Krumholz.

"Unfortunately, there has been comfort with this that has grown over time on both sides of the aisle," Krumholz said. "Nobody wants to be the sucker that is playing by the rules when someone is getting away with murder."

One large dark money group, the Sixteen Thirty Fund, has funneled millions of dollars to more than 100 liberal groups, accepting individual donations as large as $51.7 million and $26.7 million, all without having to reveal any information about who is behind those donations.

Amy Kurtz, the Sixteen Thirty Fund's executive director, said they're just playing by the rules.

"We support and have lobbied in favor of reform to the current campaign finance system (through H.R. 1), but we are equally committed to following the current laws to level the playing field for progressives in this election," Kurtz said in a statement.

Now, many super PACs, which disclose their donors, are routing money through allied nonprofits, which do not have to make their contributors' names public,

further obscuring the ultimate source of the cash.

"For a voter who simply wants to know where the money is coming from and going to, you almost have to be a full-time researcher or investigative reporter to connect all the dots," Krumholz said.

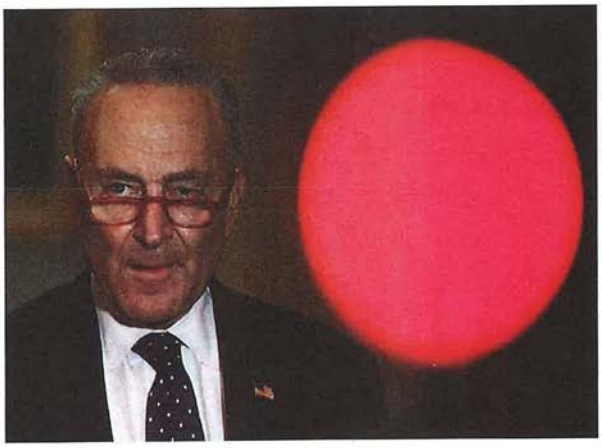
Meanwhile, Senate Majority Leader Mitch McConnell, R-Ky., remains one of the fiercest opponents of campaign finance reform, not only blocking bills like H.R.1 and disclosure measures, but even intervening in legal battles to overturn state campaign finance rules.

He sees it as a free speech issue, hailing the Citizens United decision as "an important step in the direction of restoring First Amendment rights."

All this leaves campaign finance reform advocates dependent on Democrats winning in November — even if it takes some dark money to get them there.

"We are on the cusp of having the best opportunity to repair the campaign finance system since the Watergate scandal of the 1970s," said Fred Wertheimer, a veteran good-government advocate and president of Democracy 21. "But that depends on how the elections come out."

Schumer-Tied PAC Received $1.7 Million From Dark Money Group



Chuck Schumer / Getty Images

A political action committee linked to Senate Minority Leader Chuck Schumer (D., N.Y.) has received $1.7 million from a liberal dark money group for shared staff and office space since 2015, tax and Federal Election Commission forms show.

Schumer, who has said that dark money is "casting a shadow over our political process," has condemned groups on the right that do not disclose their funders. He also demanded one right-leaning organization release a list of its donors, saying the public "deserves to know who is funding" campaigns against Democrats.

Despite the condemnation of dark money groups, the Schumer-linked Senate Majority PAC, which works to elect Democrats in the Senate, is closely affiliated

with Majority Forward, a 501(c)(4) nonprofit that does not disclose its funders.

From June 18, 2015, to late 2018, Majority Forward paid the Senate Majority PAC for the "sharing of facilities, equipment, mailing lists, or other assets" and employees. The group pushed $487,870 to the PAC for office space while disbursing another $1.2 million for employees, three years' worth of tax forms and FEC records show.

Majority Forward was the biggest dark money spender of the 2018 election cycle and is currently launching attacks against Republican Senate candidates up for election in 2020.

Throughout the 2018 election cycle, Majority Forward poured $46 million into independent expenditures for Democrats, which accounted for nearly a third of the $150 million total spent by all groups who do not disclose their donors.

Majority Forward has laid out plans to attack Sens. Cory Gardner (R., Colo.), Susan Collins (R., Maine), David Perdue (R., Ga.), Martha McSally (R., Ariz.), and Joni Ernst (R., Iowa) for the 2020 election cycle. It began pouring hundreds of thousands into ads against the vulnerable Republicans in early 2019, according to the Center for Responsive Politics. The group on Tuesday launched a six-figure television and digital ad campaign against Collins.

The Senate Majority PAC did not respond to a request for comment on the money it has received from Majority Forward since 2015 for its shared staff and office space.

Schumer and other Democrats have chastised Republican dark money groups such as the Judicial Crisis Network, a right-leaning organization. Schumer and Democratic senators earlier this year demanded JCN make public the names of individuals who have given the group more than $10,000 since 2017. The senators released a letter in response to a $1.1 million ad campaign from JCN that called on the 2020 Democratic presidential candidates to release their lists of judges.

"The American public deserves to know who is funding these attacks, and whether the same individuals are financing litigation before the Court that will ultimately be decided by the Justices and judges they helped to confirm," the letter said.

POLITICS

Whitehouse Blames 'Dark Money' For Why He Raised So Much For '18 Campaign

April 23, 2019

Ian Donnis

Discussed in this article
Sheldon Whitehouse
campaign finance
US Senate
Robert Flanders

U.S. Senator Sheldon Whitehouse of Rhode Island raised a large amount of money for his re-election campaign last year. Whitehouse said the untraceable campaign spending known as dark money made him do it.

by Ian Donnis

Whitehouse talking with constituents in 2017. Ian Donnis

Results from Rhode Island's statewide election started coming in at 8 pm last November 6th. It didn't take long for a local TV station to declare Democratic U.S. Senator Sheldon Whitehouse the winner over his Republican challenger, Robert Flanders.

"Like at 8:01," recalled Whitehouse.

Whitehouse enjoyed a lopsided victory, with more than 61 percent of the vote, so the race was easy to call. Like most incumbents, Whitehouse had some big advantages. One of them was money.

Since his last election back in 2012, Whitehouse had raised more than $6 million. Flanders got into the race in November 2017, so he had a lot less time to seek contributions. The Republican raised a little more than $1 million, an amount dwarfed by Whitehouse's campaign account.

"He was able to effectively out-spend me five or six to one, particularly with television ads, which are so important in a statewide race," Flanders said.

Some Republicans had high hopes for Flanders' challenge to Whitehouse. Flanders is a high-profile lawyer and former Rhode Island Supreme Court justice. During his campaign, he accused Whitehouse of being an out-of-touch elitist. But with millions more in his campaign account, Whitehouse dominated the TV airwaves with messages condemning President Trump's tax cut and congressional Republicans.

Ian DonnisFlanders said it was difficult competing against an incumbent with exponentially more campaign money.

"They're going to take the trillions of dollars they gave to the wealthiest Americans and they're going to pull it out of the healthcare of regular Americans," Whitehouse said in one commercial. "There is no way I'm going to let that happen."

Congressional incumbents generally win re-election more than 90 percent of the time, and Whitehouse is unapologetic about his aggressive fundraising. Whitehouse says spending more than $5 million on his re-election was part of what it took to show Rhode Islanders that he wanted their votes.

"And even if you had no opponent, they would want to see a big effort," he said. "They'd want to see you talking to them on television, they'd want to see your mail in their mail slots, they'd want to see you out there hustling."

Spending in the most expensive U.S. Senate race last year – between Texas Sen. Ted Cruz, a Republican, and Democratic challenger Beto O'Rourke -- topped $100 million last year.

But Brown University political science professor Wendy Schiller said incumbent senators from small states like Whitehouse rarely spend so heavily to win re-election. (Whitehouse, however, spent a comparable amount -- $5.2 million -- during his 2012 re-election campaign against a lesser-known GOP opponent, Barry Hinckley.)

"What's extraordinary about Sheldon Whitehouse is that he spent that much money in a very small state," Schiller said. "So it was either overly cautionary on his part, or he was scared of something in that race, because the number is large for the size of the state and the fact that it was his second re-election campaign."

The thing that concerned Whitehouse was a potential attack fueled by millions of dollars in dark money from powerful hidden interests. Dark money comes from shell corporations, donors' trusts and charitable entities.

"If there's a person in the Senate who the fossil fuel industry and the big dark money crowd is more annoyed with than me, I don't know who that person is," Whitehouse said. "So I viewed myself as being very high up that target list."

Dark money has been around since the 1970s. But the amount of dark money in U.S. elections exploded after 2010. That was when the Supreme Court's Citizens United decision lifted restrictions on campaign spending by unions, nonprofits and businesses. None of these groups need to disclose their contributors, and they can make unlimited independent expenditures to influence the outcome of elections.

Because of this, Whitehouse said, he needed a big pile of campaign money as a form of self-defense. The watchdog group the Center for Responsive Politics says the top industries contributing to Whitehouse since 2013 include law firms, retirees, and the finance sector.

Whitehouse remains an outspoken critic of some kinds of campaign spending. His book, "Captured: the Corporate Infiltration of American Democracy," was just published in paperback. In a note, Whitehouse said he wrote the book based on his experience in the Senate "and thinking a lot about why so many Americans are so disaffected," and how progress gets blocked.

A super PAC called RIMF raised about $180,000 and spent most of that on TV ads in support of Flanders' campaign toward the end of the 2018 campaign season. The group attracted contributions from deep-pocketed individuals, including $50,000 from former Hasbro chairman and CEO Alan Hassenfeld.

But as it turned out, dark money interests did not come after Whitehouse last year.

Schiller, the Brown University professor, said the Citizens United decision has left a relatively even playing field for Democrats and Republicans.

"The Democrats have gained much more parity with the Republicans in their capacity to raise and spend money," she said. "The tech industry tends to be liberal and more Democratic than they are Republicans, so they manage to find sources to raise a lot of money to be competitive with the Republicans."

But Whitehouse said Citizens United fundamentally changed the rules of American politics.

"Once you let big special interests spend unlimited money, you necessarily give them the power to threaten to spend that same unlimited money," he said. "And it's cheaper and it's easier to get on the phone to a candidate and say, 'it's your ass if you dare cross us on this and you know we're serious, because we can spend $10 million in the next primary against you, and so, are you going to behave?' "

Whitehouse said it's often easier for candidates to behave, "and then you never see the $10 million spend. You've just fixed the deal secretly and behind the scenes."

The influence of dark money seems unlikely to fade any time soon. Whitehouse has a proposal called the DISCLOSE Act that would require contributors to be identified for any federal campaign expenditure of more than $10,000. But he's introduced the DISCLOSE Act every year since 2012, and it has yet to become law.

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Sen. Sheldon Whitehouse - Rhode Island

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Contributors 2015 - 2020

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2020

SELECT A PROFILE

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- ○ Leadership PAC Profile Only
- ◉ Campaign Committee & Leadership PAC Combined

Top 20 contributors to Campaign Committee & Leadership PAC Combined Download .csv file

Top: 20

Rank	Contributor	Total	Individuals	PACs
1	League of Conservation Voters	$190,261	$168,449	$21,812
2	Democracy Engine	$82,938	$82,938	$0
3	Technology Crossover Ventures	$56,200	$56,200	$0
4	Aloha Partners	$47,900	$47,900	$0
5	American Assn for Justice	$42,500	$2,500	$40,000
6	Kleiner, Perkins et al	$38,900	$38,900	$0
7	CVS Health	$36,535	$6,535	$30,000
8	Walt Disney Co	$36,210	$24,210	$12,000
9	Centerbridge Partners	$35,400	$35,400	$0
10	WilmerHale LLP	$33,639	$33,639	$0
11	Mandell, Schwartz & Boisclair	$33,600	$33,600	$0

Rank	Contributor	Total	Individuals	PACs
12	Motley Rice LLC	$33,475	$33,475	$0
13	International Brotherhood of Electrical Workers	$33,400	$0	$33,400
14	Comcast Corp	$32,660	$15,160	$17,500
15	National Beer Wholesalers Assn	$32,500	$0	$32,500
16	Kazan, McClain et al	$32,300	$32,300	$0
17	Brown University	$30,999	$30,999	$0
18	Masimo Corp	$29,356	$27,150	$2,206
19	PG&E Corp	$29,020	$250	$28,770
20	Sheet Metal, Air, Rail & Transportation Union	$28,500	$0	$28,500

*registrants, or active lobbying firm

These tables list the top donors to candidates in the 2015 - 2020 election cycle. **The organizations themselves did not donate, rather the money came from the organizations' PACs, their individual members or employees or owners, and those individuals' immediate families.** Organization totals include subsidiaries and affiliates.

Why (and How) We Use Donors' Employer/Occupation Information

METHODOLOGY

NOTE: All the numbers on this page are for the 2015 - 2020 election cycle and based on Federal Election Commission data released electronically on September 08, 2020. **("Help! The numbers don't add up...")**

2020 PRESIDENTIAL ELECTION · **Published** September 20

Rep. Andy Biggs: Trump, nominate RBG replacement now – here's why it's so important

Delaying Ginsburg's replacement is not justified, and is actually dangerous to institutions of this nation

OPINION By **Rep. Andy Biggs | Fox News**

Trump says he has 'obligation' to nominate Supreme Court justice

Brett Tolman, former Senate Judiciary Committee Counsel joins 'FOX & Friends.'

President Trump should not hesitate to nominate a replacement for Ruth Bader Ginsburg on the Supreme Court.

Justice Ginsburg helped blaze the trail for women in law and society. She served America for decades and will long be remembered. Nevertheless, delaying her replacement is not justified, and

is actually dangerous to the institutions of this nation.

The Left opposes swift action by the president. A few Republican senators said they will not vote for a replacement before the November election. Leftists are promising violence – more rioting, looting, murder and mayhem – if President Trump nominates anyone before the election.

SEN. TED CRUZ: AFTER GINSBURG – 3 REASONS WHY SENATE MUST CONFIRM HER SUCCESSOR BEFORE ELECTION DAY

A Republican senator said she would not support a pre-election nominee because, "fair is fair." The implication is that following the Constitution and Senate rules is unfair. The rulebook here is the U.S. Constitution, which is silent on the timing of appointments to the Supreme Court.

What would really be unfair is to effectively shorten the term of President Trump by failing to consider his SCOTUS nominee because of the upcoming election. Waiting would undermine the will of the people who elected him in 2016 for a full four-year term, and not for a term of office that has constraints put on his constitutional authority by selfish senators.

CLICK HERE TO GET THE OPINION NEWSLETTER

Of course, the recent riots and the outrageous misconduct of Democrat senators during the Brett Kavanaugh confirmation hearings are merely a small appetizer to the banquet of violence and vitriol that the next confirmation process will produce.

The next nominee will be 'Borked' like never before. The crazies on the Left are already promising to burn "it to the ground." While not specifying what they will burn, if the recent mobocracy is any indication, they intend to attack anything and everyone who happens to be in their path.

More from Opinion

- **Harmeet Dhillon: Ruth Bader Ginsburg's vacant seat and Biden's flip-flop-flip on Supreme Court vacancies**
- **Andrew McCarthy: Ruth Bader Ginsburg's death means Trump should pivot to this surprising strategy**
- **Penny Nance: After Ruth Bader Ginsburg's death conservative women are ready to fight for Trump's nominee**

America cannot succumb to the threats of those who want to tear down our institutions, ruin lives and control our country through intimidation and violence.

This is just more of the left-wing hatred of America. They disdain this president, whom the radicals, and quite frankly, many Democrats, believe was not duly elected. We simply cannot cave to the mob.

Senate Majority Leader Mitch McConnell, R-Ky., who has promised to swiftly bring the confirmation to the floor for a vote, must crack down on the Democrats in the Senate, who already seem to have lost their minds on this. They have vowed to stop this nominee at all costs, a la Sen. Dianne Feinstein's last-minute harassment of Kavanaugh.

McConnell must make sure that those who wish to put the nominee through hell pay the price for overstepping the bounds of the Senate rules.

> **Never forget that Democrats believe the best bet for enacting their policies is a legislatively active Supreme Court.**

It goes without saying that, were the shoe on the other foot, the Democrats would support the immediate nomination of a replacement. They would argue that it is the president's prerogative, that he has constitutional authority, and that it would be unfair to limit his authority due to time constraints.

What they are saying now is that, "We should wait until we have a new president" to confirm a nominee.

But what if President Trump is reelected? Will they then support a nominee? Of course not. They will riot and try to make the life of the nominee a living hell. So, there is no advantage to waiting.

If Joe Biden wins, will the Left fall in line to allow a lame duck President Trump's nominee get a fair confirmation hearing? Nope. They will riot and try to make the life of the nominee a living hell. Again, the advantage is to appoint now.

What the radicals on the Left wanted was for RBG to remain on the court until Trump was defeated and Biden could appoint her replacement. But it didn't happen that way. They are now mobilizing to tear the country down because things didn't go their way on RBG anymore than they did in the 2016 elections.

Another reason that the president and Senate must immediately act is because Democrats are laying the groundwork to steal the 2020 election. Courts in two states have already determined that they will accept ballots long after the polls are closed on Nov. 3. It would be wise to understand that the presidential election of 2020 will likely be thrown into the lap of the U.S. Supreme Court. We need to have a full complement of justices to tackle that mess.

Never forget that Democrats believe the best bet for enacting their policies is a legislatively active Supreme Court. They have promised to pack the court if President Trump gets anymore of his nominees on the bench. He must make the nomination now to try and militate against the effects of a leftist-packed Supreme Court.

The president simply has no choice but to immediately nominate a replacement of Justice Ginsburg, and Senate Leader McConnell must conclude the confirmation process with alacrity.

Public interest litigation, Senator Whitehouse, and the Kavanaugh hearings
https://pacificlegal.org/public-interest-litigation-senator-whitehouse-and-the-kavanaugh-hearings/
September 05, 2018 | By James Burling

Senator Sheldon Whitehouse is not a fan of Pacific Legal Foundation. In the past he has accused us, wrongly, of being a "creepy front group" in the thrall of large corporate deniers of global climate change. We weren't impressed when we learned that Senator Whitehouse called for criminal investigations under the Racketeer Influenced and Corrupt Organizations Act of climate skeptics. Indeed, the Senator's call created the bizarre situation where PLF was included in a RICO based subpoena dragnet of climate skeptics. I say "bizarre" because PLF has never taken a position on climate science. We're not scientists. We're lawyers.

Which leads to the real reason why Senator Whitehouse doesn't like Pacific Legal Foundation: He doesn't like public interest litigation. He had a line of questioning at today's hearings for Supreme Court nominee Brett Kavanaugh that laid this bare.

> Senator Whitehouse: You will often see briefs brought by groups like for instance, the Pacific Legal Foundation. Are you familiar with that group?"
>
> Judge Kavanaugh: I've seen briefs by the Pacific Legal Foundation.
>
> Senator Whitehouse: Do you know what they do?
>
> Judge Kavanaugh: I'll take your description.

Senator Whitehouse: They get money from right wing conservative and corporate interests and they look for cases around the country that they believe they can use to bring arguments before the Court. I argued against them in the Supreme Court at one point, they came all the way across the country to the shores of Winnapaug Pond, Rhode Island, to hire a client whose case they could take to the Supreme Court with a purpose to make a point.... and it causes me to think that sometimes the true party in interest is actually not the named party before the Court but rather the legal group that has hired the client and brought them to the Court more or less as a prop in order to make arguments trying to direct the Court in a particular direction. Is that an unreasonable concern for us to have about the process?"

He's talking about Anthony Palazzolo, a great man who fought the State of Rhode Island all the way to the Supreme Court. Of course, we didn't hire Anthony. He hired us (for free) because after nearly forty years of trying to use his property, he understood we were the only hope he had left after he lost at the Rhode Island Supreme Court. Anthony was a tow-truck driver with a small towing business who bought a few acres in 1959 and 1960. He had been trying to get permits to use it for decades, but at every turn he was denied. In fact, the Rhode Island Supreme Court even said he had no right to be in court because he converted the ownership from a business structure to his personal ownership.

We were proud that Anthony asked for our help, and even prouder to fly across the country to the Supreme Court to make a point: Landowners should have the right to sue government when their property is taken without just compensation – no matter when they acquired the property. When I argued that point, then Attorney General Whitehouse took the opposite tack: landowners should never have the right to sue government if regulations are in place when a property's ownership is altered.

Anthony won his case and Palazzolo v. Rhode Island has turned out to be an immensely important case. It has been cited nearly 700 times in the courts since it was decided in 2001.

The Senator continued in his dialog with Judge Kavanaugh by lamenting that "special interest groups [are] going out and trying to lose cases to get before the Court" and calling that "faux litigation." With all due respect, that's utter nonsense. We never intend to lose a case. We'd prefer to win them all in the lower courts so there would be no need to play the long odds to get a case up to the Supreme Court. But more importantly, the Senator should not call out public interest litigation because he lost the case. Palazzolo is simply one of a long string of public interest cases that date back to the founding of the republic. Years before he became a justice at the Supreme Court, Thurgood Marshall crafted and brought the ultimate public interest lawsuit: Brown v. Board of Education, which ended the pernicious "separate but equal" doctrine that had been upheld in Plessey v. Ferguson. Indeed, Plessy was brought by opponents to racial segregation as a public interest lawsuit. Unfortunately they lost, but their arguments were eventually vindicated in Brown.

And let's not forget the original public interest lawsuit in America, the case against the so-called "writs of assistance." In 1761, the highly regarded lawyer James Otis argued for hours that British troops had no right to smash down doors of private homes to look for violations of customs duties. Otis argued that case for free: "For in such a cause as this," he said, "I despise a fee." And although he lost that case, the lawsuit energized the colonists. A young John Adams was in the courtroom that day and he later said, "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of independence was born."

People across the nation understand and support our mission. (And most of our donations come from regular people, not large "dark money" corporate donors that the Senator likes to rail against.) Public interest litigation is about representing the Anthony Palazzolos of the world against government that has forgotten its mission is to protect the rights of the people, not to control and limit those rights. We will be forever proud of all our victories against government overreach, and grateful to all those clients who have asked for our help to ensure that liberty and justice remain the essential core of the American experiment.

For Rhode Island-specific resources and updates on the coronavirus outbreak, CLICK HERE

11.21.19

CLIMATE CHANGE AND DARK MONEY

The earth is spinning toward climate catastrophe. The international community has about a decade to take the steps necessary to avoid breaching the 1.5 degrees Celsius safety zone that the scientific community has established. It will take American leadership to achieve that goal, which means not only bold action in Congress, but meaningful leadership from the president, our allies around the globe, and leadership from powerful forces like major corporations.

Unfortunately, much of corporate America so far failed to step up and sufficiently support policies that would begin to address the existential threat of climate change. Many individual corporations, perhaps out of conviction, perhaps out of the desire to keep and win over new customers, profess to be on the side of fighting climate change. But in an act of rank hypocrisy, they turn around and support business associations, like the US Chamber of Commerce and the American Petroleum Institute, which have been relentless adversaries of climate action.

Take the Chamber. The US Chamber is not the local chamber of commerce sponsoring your main street businesses. It runs a massive influence machine on behalf of big corporations, touching every part of the federal government.

In federal agencies, the Chamber is an 800-pound gorilla in virtually every room where climate policy comes up. It lobbies agency officials, files regulatory comments by the dozen, and deploys its public relations machine whenever regulators turn to matters affecting the fossil fuel industry.

In courts, the Chamber is in a league of its own. During a three-year period late in the Obama administration, the Chamber filed friend-of-the-court briefs in 476 cases and was a litigant in another 25. Environmental issues were its third most litigated subject, and its position always aligns with polluters.

In Congress, the Chamber is the largest lobbyist, spending roughly three times more than the next biggest group. Energy and environmental issues are a big part of that lobbying effort. Every year, the Chamber sends out dozens of letters and key vote alerts telling members which way it expects them to vote. Those letters and alerts inevitably support fossil fuel and oppose reducing emissions.

The Chamber aggressively attacks climate action with the last piece of its machine: election spending. The Chamber has spent almost $150 million on congressional races since the Citizens United decision of 2010. In most congressional election cycles, it is the biggest dark-money spender. The Chamber is known for having sharp political elbows. Cross them and you risk triggering an ad against you — like the one run against a US Senate candidate in Pennsylvania in 2016 suggesting her climate position was akin to stealing youthful energy from American children.

Some Chamber members who say they support climate action may well be funding the efforts to oppose climate action in Washington through the Chamber and other groups. This doubletalk needs to end.

To fight back, companies that care about climate ought to demand full disclosure of who funds climate obstruction at the Chamber, as well as at API and other big lobbying and influence groups. Justice Louis Brandeis said, "Sunlight is . . . the best of disinfectants." Send sunbeams into the dark-money corners where climate denial and obstruction fester.

Better yet, these "pro-climate" companies should demand that those organizations stop blocking climate action and instead support real action in Congress to address climate change. Corporate shareholders ought to know whether their company funds groups that block climate legislation. And corporations who are board members of these denial and obstruction groups have their own governance obligations to know if they're throwing good money after bad, allowing their goals to be diluted by the influence of the fossil fuel industry.

The stakes are high: There are massive economic risks flowing from climate change. Don't take our word for it; listen to the Bank of England, Freddie Mac, Nobel Prize laureate economists, and hundreds of our own government's most knowledgeable experts.

Corporate America can still choose which side of the climate fight to be on. But the clock is running out.

US Senator Charles E. Schumer, Democrat from New York, is the Senate minority leader. US Senator **Sheldon Whitehouse** is a Democrat from Rhode Island.

By: Senators Sheldon Whitehouse (D-RI) and Chuck Schumer (D-NY)

Source: **https://www.bostonglobe.com/2019/11/21/opinion/climate-change-dark-money/**

Facebook cracks down on 'fake news' sites, including far-left operation funded by dark money

'Courier Newsroom is a fake news operation,' former Nevada Attorney General Adam Laxalt says

Facebook unveiled a new policy "differentiating a straight news outlet from a political persuasion operation" on Tuesday that will help prevent operations like the far-left Courier Newsroom from driving one-sided messaging and provide transparency about who funds the operation.

"Facebook is rolling out a new policy that will prevent U.S. news publishers with 'direct, meaningful ties' to political groups from claiming the news exemption within its political ads authorization process, executives tell Axios," wrote reporter Sara Fischer, who broke the news. "The biggest and most sophisticated example of this type of website is Courier Newsroom, which is backed by ACRONYM."

COURIER NEWSROOM TARGETS BATTLEGROUND STATES' VOTERS WITH DEMOCRATIC TALKING POINTS BILLED AS NEWS

Facebook will reportedly crack down on sites like Courier Newsroom, which is tied to a multibillion-dollar, left-wing dark money operation.

Facebook confirmed Axios' report and provided Fox News with the updated policy.

Last month, Fox News explored how Courier Newsroom, which is tied to a multibillion-dollar, left-wing dark money operation and strategically placed websites in key battleground states running "news stories" that often appear to be little more than Democratic Party talking points made to look like local news outlets.

The same operation also promotes its content on social media platforms and places expensive ads on Facebook, where it was categorized as a Media/News organization.

LIBERAL 'DARK MONEY' GROUPS OUTSPENT CONSERVATIVE ONES IN 2018 ELECTIONS

Facebook will now ensure groups like Courier Newsroom are "held to the same standard as political entities" when it comes to advertising and will no longer be eligible to appear on the Facebook News tab.

"Facebook confirms what Americans for Public Trust has been reporting on for months -- Courier Newsroom is a fake news operation," Americans for Public Trust outside counsel and former Nevada Attorney General Adam Laxalt told Fox News.

"This latest venture, led by liberal dark money operation Arabella Advisors, poses as a local news outlet yet pushes a partisan agenda -- both in its 'stories' and in the digital ads promoting the stories," Laxalt said.

Courier Newsroom did not immediately respond to a request for comment.

"Identifying politically connected publishers is a new process for us, and we will learn and adapt as needed, while continuing to make ads on Facebook more transparent and protect the integrity of elections," Facebook wrote when announcing the changes.

Last month, Politico published a story about the Courier Newsroom headlined, "Newsroom or PAC? Liberal group muddies online information wars," which detailed how the group "is blurring the lines between campaign advocacy and a newsroom."

The Courier Newsroom has set up websites that appear to be local, small-town news organizations in major swing states such as Pennsylvania, Wisconsin, Michigan, Florida, Virginia, North Carolina and Arizona, all complete with names such as "Up North News" and "The 'Gander" to give them a local feel. Laxalt feels that Courier Newsroom intends to influence House races and push electoral votes to Democrats.

Facebook's ad library indicates that Courier regularly places advertisements that appear to be news stories on the social media platform. The advertisements include stories pushing vote-by-mail, attacking President Trump's coronavirus response and praising Democratic members of Congress.

"It was a deceptive and effective practice while it lasted. These new policy changes by Facebook and its tech rivals should help to reduce the distribution of these sites, or at least provide more transparency to users about who is really behind them," Fischer wrote.

Courier Newsroom bills itself as "a progressive media company owned by the nonprofit ACRONYM and other private investors." ACRONYM is a nonprofit dedicated to "advancing progressive causes through innovative communications, advertising and organizing programs."

The New Venture Fund gave ACRONYM $250,000 in 2018 and is one of a number of nonprofit groups controlled by Arabella Advisors, a Washington-based philanthropy company. Both Arabella and New Venture Fund were founded by Eric Kessler, who worked in President Bill Clinton's administration.

An Arabella Advisors spokesperson provided Fox News with the following statement: "Arabella Advisors is a consulting business that supports philanthropy. Our clients include a variety of nonprofit organizations that hire Arabella for shared administrative services, including the New Venture Fund. These nonprofits make grants to a range of projects across the ideological spectrum. Arabella Advisors is not the source of funding for any of these organizations, and we do not exert control over the spending decisions of our clients."

Mr. BIGGS. Thank you.

Mr. JOHNSON of Georgia. The gentleman's time has expired.

We will commence a second round of questions.

Mr. Shapiro at this time I would like to excuse Judge Gertner, who I understand must depart at 5:00 p.m.

So, without objection, you are excused and thank you for your appearance today.

Ms. GERTNER. Thank you very much.

Mr. JOHNSON of Georgia. Thank you.

Mr. Shapiro, Professor Hollis-Brusky mentioned—I believe it was her in her testimony that when the U.S. Supreme Court decided the case of Citizens United it, in a fit of judicial activism, after discarding the robes of originalism and textualism, decided an issue that was not brought before the court, which was whether a corporation had a First amendment right.

Do you agree with her characterization of the Supreme Court's action as judicial activism?

[No response.]

Mr. JOHNSON of Georgia. You should unmute.

Mr. SHAPIRO. If I did. [Inaudible.]

Mr. JOHNSON of Georgia. Okay. Can you hear me? Okay, we can hear you now.

Okay. We can't hear you now.

Mr. SHAPIRO. I am on?

Mr. JOHNSON of Georgia. You are popping in and out.

Mr. SHAPIRO. Mr. Chair.

Mr. JOHNSON of Georgia. I will note while you are struggling to answer my question my time is running.

Mr. SHAPIRO. It looks like a green light, Mr. Chair. I don't know what is going on here.

Can you hear me? I am sorry.

Mr. JOHNSON of Georgia. Yes, and I would like for you to answer that question.

Mr. SHAPIRO. Sure. Sorry. So really quick, activism has been thrown around by both parties when they don't like the opinions. I don't like any activism in general.

Mr. JOHNSON of Georgia. Well, let me ask the like this. Let me ask the question like this, Mr. Shapiro.

Was the issue of corporations having a First amendment right of freedom of speech the issue that was first argued before the U.S. Supreme Court in the Citizens United case?

Mr. SHAPIRO. It was not. It was Justice Alito asked the deputy solicitor general whether it would be possible to ban a book that was produced using corporate funds, and the answer was essentially quite possibly.

Mr. JOHNSON of Georgia. So, what?

Mr. SHAPIRO. That opened this larger question.

Mr. JOHNSON of Georgia. Yeah. Well, I mean, the court ended up deciding a question that was not brought before it by the litigants. Isn't that correct?

Mr. SHAPIRO. Yes. On occasion, during the course of oral argument or other Supreme Court proceedings, other issues arise that the court requires supplemental briefing or even, as in this case.

Mr. JOHNSON of Georgia. On the issues that were originally brought by the parties to the court for a decision, that was a fundamental breach of appellate court etiquette.

Do you agree with that, Professor Hollis-Brusky?

Ms. HOLLIS-BRUSKY. I am not sure about rules of etiquette, but I can tell you that traditionally that has been one way to define judicial activism is when courts and judges invite questions that were not briefed to be brought before them so that they can make decisions they think are appropriate.

Mr. JOHNSON of Georgia. So, one thing that the Federalist Society is known for is that its members who serve on the bench are generally loathe to support any regulations of businesses, to support Second amendment rights, to be in favor of overturning *Roe* v. *Wade*, deregulation of business, and they also have a habit of wanting to never take race into account in making decisions, and they generally don't believe in measures that would promote racial balance.

Isn't that correct, Mr. Shapiro?

Mr. SHAPIRO. There were a lot of statements there I would have to take individually. Do you want to ask me one of them?

Mr. JOHNSON. of Georgia. Well, let us take *Roe* v. *Wade*, number one. Federalist Society judges are prone to want to overturn *Roe* v. *Wade*, correct?

Mr. SHAPIRO. I don't know what is in their heart of hearts. I don't think a single one has had the opportunity yet to Rule on the question of whether *Roe* v. *Wade* should be overturned.

Mr. JOHNSON of Georgia. Well, we do know that *Roe* v. *Wade* is a litmus test for Federalist Society judicial nominees to be in favor of overturning *Roe* v. *Wade*. Isn't that correct?

Mr. SHAPIRO I have not been in meetings in the White House counsel's office. So, I don't know exactly what is asked. I highly doubt, that type of litmus test question is asked.

Mr. JOHNSON of Georgia. Professor Hollis-Brusky, what is your opinion on that question?

Ms. HOLLIS-BRUSKY. So, like Mr. Shapiro, I have not been inside the White House counsel and observed anything directly. What I would say is that with the rise of Leonard Leo as the vice President of the Federalist Society who is very openly anti-abortion, anti-reproductive rights, given that he is controlling judicial nominations, one could make some inferences from that.

So, I will go back to the appearance that with Leo in the White House that that certainly could be a litmus test question.

Mr. JOHNSON of Georgia. Thank you.

Since the clock was running during my time with the technical difficulties, I want to yield a minute to my friend and colleague from the State of Texas, Sheila Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chair very much and the Ranking Member as well for their courtesies. I am a guest on this Subcommittee. I am a Senior Member on the Judiciary Committee.

I was reading the definition of the Federalist Society that indicated their textualist and originalist interpretation of the Constitution. I hold this book and it is well known that the Constitution has been viewed and it is most effective as a living breathing docu-

ment to ensure that all the nuances of America are protected under the law.

I don't believe we had any need to lobby this present administration because the White House counsel that he had at the very early stages was very engaged with the Federalist Society. So, rather than lobby, they simply had to pick up the phone and call or simply had to submit a list.

Let me ask Professor Hollis-Brusky, and thank you so very much, what happens when you have a court that is skewed specifically on a political basis, and as someone who was in Florida during 2000 actually counting chads, and because of the secretary of State Republican, the governor Republican, our counting was actually cut off.

When the two parties went to Supreme Court—and I say parties, principals—it was a 5 to 4 political decision, and that decision was also contrary to the vote.

Can you just give the downside of what happens when a court is so skewed one way or the other as it relates to justice?

Ms. HOLLIS-BRUSKY. Thank you, Congressman.

I will give two answers. One, from Alexander Hamilton's famous essay on the judiciary, Federalist 78: "We know that the judiciary has no power to enforce its own decisions and its only real power is the power to persuade the public that its decisions are well reasoned and legitimate, not grounded in politics, not grounded in partisan politics."

So, any decision that has the appearance or the valence of partisan politics is problematic for judicial independence and for judicial legitimacy. Political science corroborates this. A wealth of political science research shows that the single greatest threat to judicial legitimacy is the perception that a Supreme Court is acting on politics, that it is politicized, not an independent arbiter of the law.

So, I would give you an answer from Hamilton and an answer from political science, but they are basically the same. Legitimacy suffers.

Mr. JOHNSON of Georgia. Reclaiming my time.

Ms. JACKSON LEE. Yield back. Thank you.

Mr. JOHNSON of Georgia. Which has expired.

I will now turn to the gentlelady from Alabama for her five minutes.

Ms. ROBY. I thank Chair, and I yield to the gentleman from Ohio.

Mr. JORDAN. I thank the gentlelady for yielding.

Professor Hollis-Brusky, is it appropriate for Democrats to impeach the President for following the law?

Ms. HOLLIS-BRUSKY. I am not a lawyer or constitutional lawyer myself. Impeachment is a political process, and it has always been a political choice.

Mr. JORDAN. So, you think it is? You think what the Speaker suggested on Sunday on one of the Sunday talk shows that the President following what the Constitution requires, naming and putting up a nominee for a court vacancy, do you think it is appropriate for the Speaker and the Democrats to move ahead with impeachment for that reason?

Ms. HOLLIS-BRUSKY. That is not what I said.

Mr. JORDAN. No, but that is what I am asking.

Ms. HOLLIS-BRUSKY. What I said is that impeachment is a political process.

I am not taking a position on what is and what is not an impeachable offense. I don't feel qualified to answer that.

Mr. JORDAN. Well, there can't be an impeachable offense because he is doing what the Constitution says. So, I am just asking if doing what the Constitution says, nominating an individual for the Supreme Court now that there is a vacancy and the Speaker said she was open to impeaching the President to stop that nominee from being confirmed in the Senate, I am just asking you if that is appropriate.

Ms. HOLLIS-BRUSKY. What I will say about that comes from my understanding of comparative democratic norms and how democracies die, which is we are in a process where parties are escalating against one another, and according to the political science, that is how democracies die, when you abandon mutual toleration for the other party and respect, and if you don't engage in forbearance, which is restraint of one's power to respect the spirit of the constitutional system.

So, what I am hearing from you sounds a lot to me like another level of escalation that we have been engaged with between these two parties over something.

Mr. JORDAN. Is packing the court escalation?

Ms. HOLLIS-BRUSKY. I think Levitsky and Ziblatt in "How Democracies Die" would call this constitutional hardball, and I think yes, they would characterize it as another escalation.

Mr. JORDAN. Yes. It has been norm for 150 years and they are going to put six new justices, take it from nine to 15. They have been very clear about that. That is the biggest escalation you could talk about.

You earlier said that the Federalist Society's actions and conservatives' actions, quote, "have led people to lose faith in the Rule of law."

Would Americans lose faith in the Rule of law if the Democrats proceeded with impeachment based solely on the fact they are trying to slow up the President's constitutional duty to name someone to the court, and would Americans lose faith in the Rule of law if the Democrats packed the court?

Ms. HOLLIS-BRUSKY. Was that a question for me, Congressman?

Mr. JORDAN. Yep.

Ms. HOLLIS-BRUSKY. Okay. Again, I would take a step back here and say it doesn't matter where this behavior started if we end in mutually assured destruction. So, what I am seeing happening is escalation and I believe that the President putting a nominee through this close to the election will be understood also as escalation, given what happened with the Garland nomination.

So yes, I think that court packing would be the next step in escalation and were the Republicans to take back power they may expand the court again or engage in jurisdiction stripping. This is exactly the kind of behavior that they talk about.

Mr. JORDAN. So, are you opposed to the Democrats' court packing plan?

Ms. HOLLIS-BRUSKY. I haven't read the—I am listening to reports of it today and I am not—

Mr. JORDAN. Well, it is a simple question, Professor. The Democrats want to add six people to the court. Are you for that or against it?

Ms. HOLLIS-BRUSKY. It would have to depend on what happens over the course of the next month and what the Republicans do.

Mr. JORDAN So, if the Republicans follow the Constitution, the President names a nominee and the Senate does what it is supposed to do, have hearings and confirm or deny that nominee, we will have to see what happens. If they follow the Constitution, somehow that is escalating.

That is following the law. That is following the Constitution. When the Democrats add six to the court that is okay? Is that what you are saying?

Ms. HOLLIS-BRUSKY. All I will say is that according to Levitsky and Ziblatt, the only way to get out of this vicious cycle of escalation is for the party in power, and that right now is the Republicans, to engage in forbearance, which is intentional restraint of one's power to respect the spirit of the broader constitutional system to take the totality of the—

Mr. JORDAN. Yeah. I think the spirit that should be respected is what the American people elected the President to do and elected a Republican Senate to do, and that is put conservatives on the court, and all we are doing is following the Constitution to do that.

Mr. Ginsburg, do you agree with the Democrats' plan to pack the court?

Mr. GINSBURG. I would distinguish between the expanding the number of members of the court and packing it, and as the number is.

Mr. JORDAN. Well, you think they are going to put conservatives on the court?

Mr. GINSBURG. I could imagine a bipartisan agreement that would restore the balance.

Mr. JORDAN. You are crazy. There is no way that is going to happen.

[Laughter.]

Mr. JORDAN. They are going to add six new people to the court, and they are going to make three liberals and three conservatives? In your dreams.

Mr. GINSBURG. I would like to see a restoration of the filibuster rule, which would require that kind of bipartisan cooperation. That is how we get out of this.

Mr. JORDAN. Well, they have said they are getting rid of that too, Mr. Ginsburg. Senator Schumer said he is getting rid of the filibuster.

Mr. GINSBURG. This has been an escalation as you well know.

Mr. JORDAN. You guys are living in a dream world because that is not where they are at. They have said they are going to impeach the President for following the law. They are going to pack the court.

They are going to get rid of the filibuster and a whole host of other crazy things that go right at the structure, and somehow you guys come here and blame Republicans for the concern.

I think the American people see through it. They see what the Democrats are trying to do, change fundamental institutions, fundamental structures in our government, and you are saying oh, it is going to be warm and fuzzy and bipartisan. There is no way.

With what they are threatening, what they are pressuring, what they are saying, no way that is going to happen.

Mr. GINSBURG. I would say it should be bipartisan, Mr. Jordan.

Mr. JORDAN. Would adding six new justices cause people to lose faith? Same question I asked Professor Hollis-Brusky. Mr. Ginsburg, would that cause Americans to lose faith in our Rule of law?

Mr. GINSBURG. I think the question, again, is who are they and how is it done, and I don't think that just adding justices on its own is fundamentally going to cause people to lose faith. If it is part of this process of partisan escalation then yes, and that is why I would like to see the actual restoration of this.

Mr. JORDAN. Well, so I would disagree with that. Adding six new people to the court that is like saying oh, we don't like what is happening, so we are going to change the rules. We are going to say that now we get the court is 15. I don't see how that strengthens our institutions or helps in any way.

Mr. GINSBURG. Well.

Mr. JORDAN. Is packing the court capturing the court? Seems a term that Mr. Whitehouse used.

Mr. GINSBURG. Packing—

Mr. JORDAN. Some of you have used this in your statements. Capturing the court, it seems to me, the most obvious capturing of the court is when you say we are going to change the rules and we are going to add six of our folks to it. We will capture it that way. Is packing the court capturing the court, Mr. Ginsburg?

Mr. GINSBURG. One way to capture a court is to control its personnel and establish a dominant faction on the court.

Mr. JORDAN. It is the easiest way. Maybe the easiest way.

Mr. GINSBURG. Yeah. Yeah.

Mr. JORDAN. Change the rules. We will changes the rules so we get control of the court. We are not going to follow the rules. We are not going to let the American people decide through elections who gets elected, who gets to nominate. We lost the election, but now we won one, so we are going to add six new people to the court.

That is not fair, and the American people understand it. It was tried once. Thank goodness it didn't happen, and I hope it doesn't happen. I hope it never happens.

I yield back.

Mr. JOHNSON of Georgia. The gentleman yields back.

Next up is the gentlelady from California, Ms. Lofgren, for five minutes.

Ms. LOFGREN. Thank you, Mr. Chair.

It is interesting listening to the latest exchange because there are some assumptions that are unwarranted.

It is as if Mr. McConnell succeeds in jamming through a confirmation within either after presidential election or before that somehow that is going to result in an expansion of the court. No one has said that. Certainly, Mr. Biden has not said that.

I think the real issue is following the rules and being fair is important for the preservation of our democracy, and we have seen, in my view, this administration has repeatedly violated norms and, in some cases, statutes because he can in pursuit of power.

There are some things that are more important than power and keeping power, and that is the preservation of our democratic republic. There have been plenty of times when I have been on the losing side of an election. The person I was backing didn't win.

You don't do everything. You don't violate rules and norms. You don't jeopardize confidence in the democracy just to keep power. That way leads to the end of this beautiful experiment in our democracy.

So, I would just like to say I think it is important. The gentleman from Ohio and the Ranking Member was talking about following the rules. The Rule was set and there is a little creative spinning of it now, but Members of the Senate, when the last Obama nomination, that we would not do a confirmation in an election year and, in fact, it used to be called the Biden rule. They quoted the Biden rule, that has been kind of the standard that people accepted.

Now, because apparently the President must assume he is going to lose the election, there is a rush to not live within that norm that had been established to try and grab power at the expense of the confidence that the country has in the court.

We know from polling that a majority of the American people now believe the court is political, and that is both Republicans and Democrats believe that the court has become a political animal.

That is very dangerous for our country, and I think it is important that we think of ways that we, each of us, can pull back from our corners and see how we can take steps to build confidence in the institutions of our government, in the institutions of our society to preserve this democracy.

Now, I am going to get to a quick question, if I can. The other gentleman from Ohio, Mr. Chabot, talked about the code of conduct that was then withdrawn, and I thought it was interesting that the Rule didn't say that you couldn't accept trips. It just said you couldn't be a member of the association.

I am wondering, Professor Ginsburg, whether you think that it undercuts confidence among people to see members of the Supreme Court accepting lodging, travel, meals, paid by the Federalist Society or others, any ideological group that might have an interest in the outcome of decisions, and couldn't the Congress set some standards and requirements for the Supreme Court to actually disclose information and benefits that they—

Mr. GINSBURG. I am a big believer in the idea that sunshine is the best disinfectant. So, I think disclosure is important and I think it can be done and, certainly, the code of ethics that has been proposed to be passed by the Judicial Conference for the Supreme Court could be adopted by the Supreme Court. They could adopt a code tomorrow, and I don't see why they don't.

I think that, really, just making the public more aware of this issue would put some pressure on them to do so. It is not like I think that they are engaged in nefarious activity. The public has a right to know if we have a lot of power at the court.

Ms. LOFGREN. I am not saying it is nefarious. The perception is important, and what we are talking about now is the confidence of the American people in the institutions of their government: Legislative, judicial, and executive.

I see my time has expired, Mr. Chair, and I yield back.

Mr. JOHNSON of Georgia. Thank you.

We will now have five minutes from the gentleman from Virginia, Mr. Cline.

Mr. CLINE. I thank the Chair, and I want to thank the gentlelady for her remarks. I know she has been an advocate for preservations of the rules and the norms of not only this Committee but of our system of our republic.

Working for my predecessor, Congressman Goodlatte, when he was alongside the gentlelady from California, I think there was a bipartisanship there. Often, they would put aside partisan differences to work to preserve those norms.

The preservation of the democratic republic rests in part on the restoration of confidence in this institution. When this institution devolves into partisan power plays, I think whether it is appointments to the court or impeachments of the President, if they are not done for reasons that are legitimate then it does reduce the confidence of the people in this institution and in their entire system.

So, to restore that confidence, I agree, we must respect the norms of American society and American governance, and those include maintaining a nine-person court. Those include respecting the Article 3 advise and consent role of the Senate decision to appoint and confirm Article 3 judges under Article 1, and restoration and respect for the filibuster Rule is a norm that over time has become part of the system and that has been abandoned for partisan political reasons.

The gentlelady mentions actions in pursuit of power, and I would argue that the expansion of the court to name justices of one party or another or lean one direction or another would be an action in pursuit of power, and if you question that all you really have to do is flip it on its head and say if the current President sought to do the same thing and sought legislation currently to expand by six justices the Supreme Court and name six additional justices right now, that would be viewed by my colleagues on the other side as action in pursuit of power.

Therefore, you must view what the minority in the Senate is currently proposing as equally based in the pursuit of power.

So, I long for a return to these norms, a respect for these norms. That is the respect that I have for this Committee. It is why I got on this Committee, and so I hope to contribute to that as a Member of the Committee.

I will say, the gentlelady also spoke about accountability on the court and about transparency on the court. Transparency is something I am very interested in when it comes to the Federal Government, and I have co-sponsored a bill with the gentleman from Rhode Island, Mr. Cicilline, called the Judicial Travel Accountability Act that requires a judicial officer to annually disclose the source, description, and value of certain gifts, a detailed description of meetings and events attended including the names of other

known attendees and total expenses for transportation, lodging, and meals.

That bill, I believe, is in this Committee. I would love to see it moved forward in a bipartisan way, and so to further encourage that norm of transparency which has developed over time and restore confidence in the institution of government and the institution of the courts, and in this institution.

So, with that, Mr. Chair, I don't have any other questions and I will yield back.

Mr. JOHNSON of Georgia. The gentleman yields back.

With that, we will conclude this hearing. I want to thank the Witnesses for their testimony. Let us see. You will bear with me one second.

[Pause.]

Mr. JOHNSON of Georgia. If there is any need to supplement the record in any way, it will remain open. All As will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 5:29 p.m., the Subcommittee was adjourned.]