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

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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

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

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 Court¹³

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

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 children²⁵—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.

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.

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

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 contentious judicial confirmation hearings.⁴¹ This scholarship provides contemporary empirical support for what Alexander Hamilton knew to be true even in the 18th century⁴²: 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 Court⁴³

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

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:

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

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

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 Gorsuch⁶⁶ 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

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 December 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

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).

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ACADEMIC APPOINTMENTS

Associate Professor of Politics, Pomona College (2016 – present)

Assistant Professor of Politics, Pomona College (2011 – 2016)

Visiting Scholar, Center for the Study of Law and Society, UC Berkeley School of Law (2010)

BOOKS

Separate But Faithful: The Christian Right's Radical Struggle to Transform Law and Legal Culture. With Joshua C. Wilson. Oxford University Press, 2020.

Ideas With Consequences: The Federalist Society & the Conservative Counterrevolution. Oxford University Press, 2015; 2019.

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).

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