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"

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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.

[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

[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:

[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/2mq8lSs.
[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).