

# United States Senate

WASHINGTON, DC 20510

March 4, 2020

The Honorable Dale Cabaniss  
Director  
United States Office of Personnel Management  
1900 E St. NW  
Washington, DC 20415

Dear Director Cabaniss,

As members of the United States Senate, we have witnessed an unprecedented rise in anonymous funding which now pervades the process for selecting federal judicial nominees, confirming them, and advancing cases and legal theories that serve special interests to the detriment of the American people. We believe this anonymous funding, likely from entities that have interests before the federal courts, is undermining the rule of law and the bedrock American principle of equal justice under law.

Investigative reporting has brought attention to Leonard Leo's leading role in these efforts, including his service with the Trump Administration advising its judicial selection and nominations process.<sup>1</sup> In March 2016, Mr. Leo, who was then Executive Vice President of the Federalist Society, met with Don McGahn and then-candidate Donald Trump to provide a list of possible Supreme Court nominees. After President Trump's election, Mr. Leo reportedly also served on his transition team, took leave from the Federalist Society to advise the Trump Administration on Supreme Court nominations, and continues to serve as an advisor on nominations to federal district and appeals courts. To date, over 85 percent of President Trump's appellate court nominees, including both of his nominees to the Supreme Court, are current or former members of the Federalist Society.

This reporting also places Mr. Leo at the center of a complex network of nonprofit groups and shell entities funded largely by anonymous donors. Between 2014 and 2017 alone, Mr. Leo's network collected more than \$250 million in donations, the sources of which remain unknown. While much of this money has been directed toward advocacy spending in support of judicial nominees through advertising and other means, it appears that Mr. Leo also has a financial interest in these anonymous donations. Although he regularly received upwards of \$400,000 in annual compensation from the Federalist Society, Mr. Leo has declined to disclose his total compensation received through other entities in his network, including from the BH Group, which contributed \$1 million to President Trump's inaugural committee. In addition, he has recently indicated that he is forming a new venture which plans, among other things, to raise and spend millions on issue advocacy campaigns focusing on judges in the 2020 election cycle.

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<sup>1</sup> Robert O'Harrow & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, THE WASHINGTON POST (May 21, 2019).

Mr. Leo's prominent role in the Trump Administration's judicial selection and nominations process while maintaining a financial interest in advocacy efforts related to this process has raised questions regarding his potential status as a federal employee and compliance with accompanying laws and regulations. By outward appearances, Mr. Leo may have engaged in the performance of a federal function that must be conducted by government employees authorized to act on behalf of the United States by leading the Administration's efforts to identify and select judicial nominees, and press for their confirmation.<sup>2</sup>

As a federal employee, Mr. Leo would have been responsible for complying with federal records retention and financial disclosure requirements, as well as the criminal financial conflict of interest statute, 18 U.S.C. § 208. If he was not deemed a federal employee, Mr. Leo's role in the Trump Administration may have violated legal limitations on the federal government's acceptance of voluntary services or restrictions on access to non-public records.<sup>3</sup>

Mr. Leo's personal financial interest in advocacy efforts related to the judicial selection and nominations process while simultaneously serving with the Trump Administration to advise on the same process raises serious concerns regarding potential conflicts of interest. Documents within the custody of the Office of Personnel Management (OPM) may be relevant to this inquiry. As Congress conducts oversight and considers legislation related to conflicts of interest, and pursuant to 5 U.S.C. 552a(b)(9), we request that you provide records related to the following:

1. Mr. Leo's Financial Disclosures (OGE Form 278 or 450).
2. Any SF-50 for Mr. Leo, and any other documents indicating his employment classification and the legal authority under which he was hired.
3. Payroll records, pay stubs, or any other documentation indicating the dates on which Mr. Leo worked, the amounts he was paid, and any other benefits he received.
4. Documents or agreements related to the administration's compliance with the Antideficiency Act, 31 U.S.C. § 1341.
5. Recusal statements, waivers, authorizations, or other documents related to Mr. Leo's compliance with the Ethics in Government Act and associated regulations.

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<sup>2</sup> Mr. Leo's service appears to meet the legal definition of an "inherently governmental function" that is "so intimately related to the public interest as to require performance by Federal Government employees," 31 U.S.C. §501 note, at §5(2)(A), or that "involves, among other things, the interpretation and execution of the laws of the United States so as . . . to commission, appoint, direct, or control officers or employees of the United States," *id.* at §5(2)(B)(iv).

<sup>3</sup> 31 U.S.C. § 1342 ("An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property"); 5 U.S.C. § 552a(b)(1) (permitting disclosure of certain agency records only to "officers and employees" having a need for the record in the performance of their duties).

If OPM is unable to identify documents responsive to any of these requests, we request that you describe the steps taken to find them, and indicate whether, to OPM's knowledge, responsive documents may be located elsewhere in the federal government. We request that you provide the information requested no later than April 3, 2020.

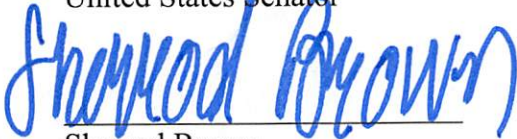
Sincerely,



Sheldon Whitehouse  
United States Senator



Richard J. Durbin  
United States Senator



Sherrod Brown  
United States Senator



Richard Blumenthal  
United States Senator



Mazie K. Hirono  
United States Senator