

EMBARGOED

CAPTURED COURTS

**The GOP's Big Money
Assault On The
Constitution, Our
Independent Judiciary,
And The Rule of Law**

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EXECUTIVE SUMMARY

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

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

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

How Did We Get Here?

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

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

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

The Federalist Society

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

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



The Federalist Society Logo

of the Federalist Society's backers. President Trump has acknowledged that the Federalist Society has "picked" his judges⁴: to date, fully 86% of Trump's nominees to the powerful federal appellate courts have been Federalist Society members.

Chief Justice Roberts' Right-Wing Rout

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

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

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

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

This is not calling "balls and strikes."

Follow the Money

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



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

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

Shredding Senate Norms

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

Why Does It Matter?

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

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

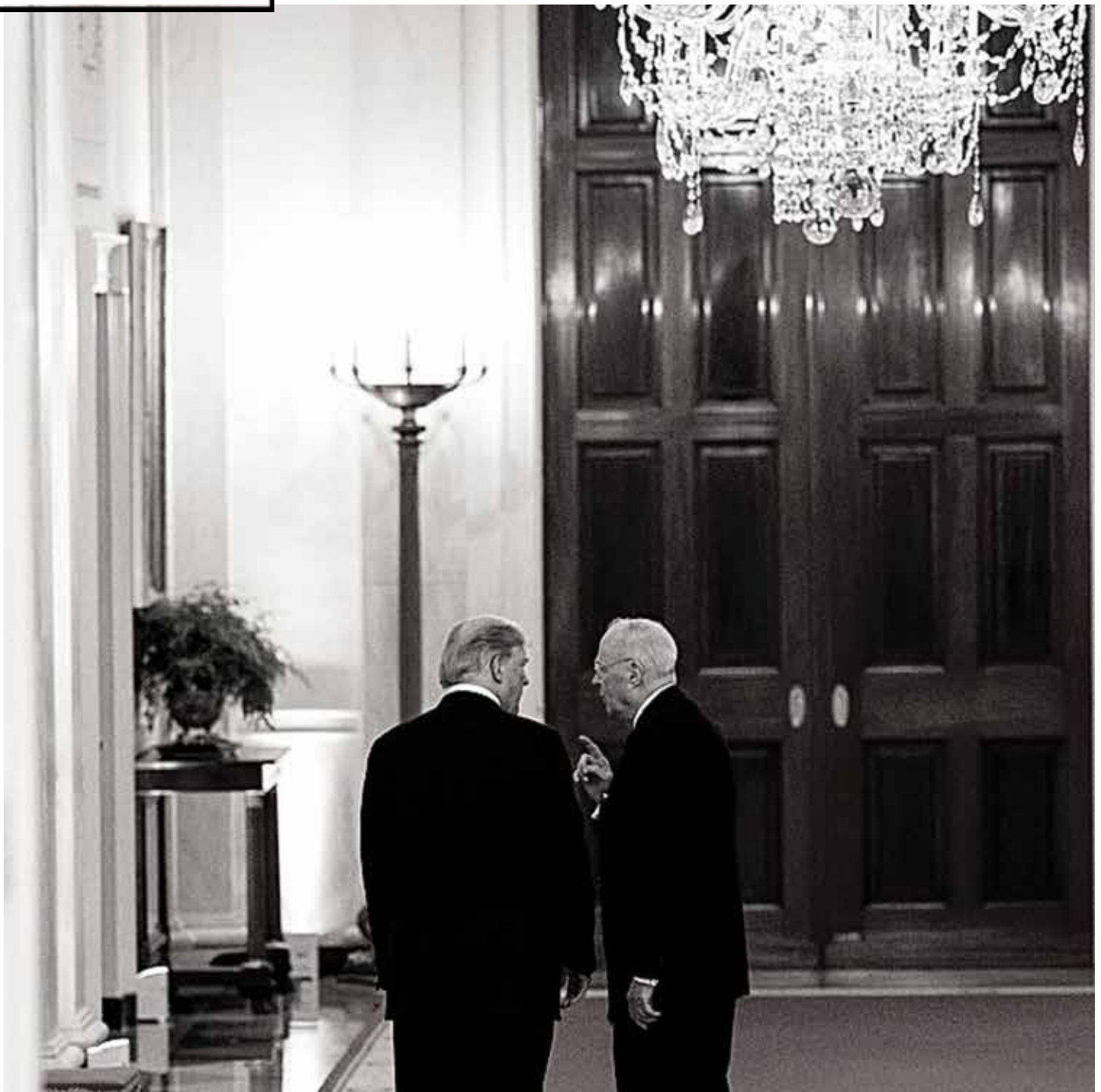
Over the coming months, Democrats in the Senate will shed light on the corruption and conflicts of interest now spreading around the Trump judiciary. As part of future efforts, we will show the real-world impact of the courts’ activist decisions on issues ranging from healthcare and reproductive rights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

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



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

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RIGGING THE GAME:

**How the “Conservative Legal Movement”
Has Rewritten Federal Law to Favor the
Rich and Powerful**

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

What does GOP court-packing mean for you?

Thanks to the Roberts Court:

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

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

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

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



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

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

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

Playing the Long Game: The Right’s 50-Year Project to Capture the Courts

Lewis Powell, Edwin Meese, and the Origins of the Republican Judicial Takeover

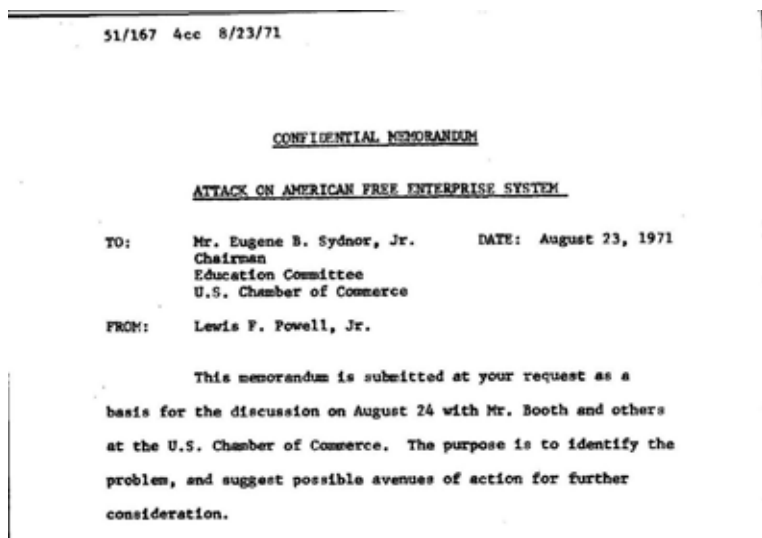
The right-wing plan to reshape our nation’s courts finds its roots in the 1960s and 1970s, amid a deep sense of corporate grievance and conservative racial resentment.

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

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

In certain corporate circles, these developments were met with alarm. In 1971, at the request of the U.S. Chamber of Commerce—which would grow to become, in the words of its president, “the biggest gorilla” in Washington¹²—a

corporate lawyer in Virginia wrote a confidential memo titled **“Attack on American Free Enterprise System.”** That lawyer was future Supreme Court Justice Lewis Powell.



The 1971 Powell Memo

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

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

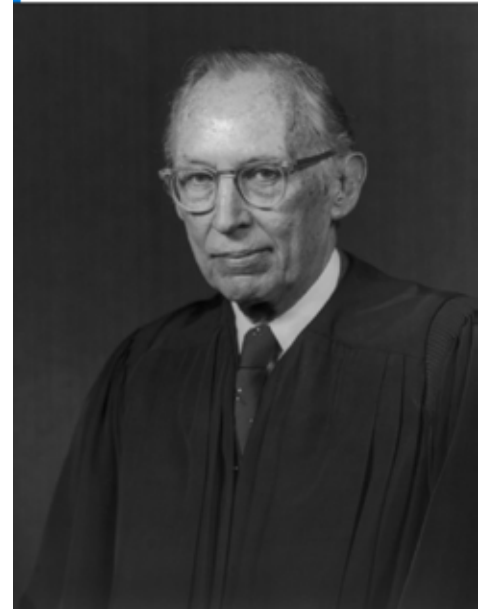
Powell urged the business community to mobilize its counterattack through “a broader and more vigorous role in the political arena.” This meant corporate lobbying in Congress.¹³ And lobby they did. In 1971, only 175 corporate firms had registered lobbyists in Washington; by 1982, nearly 2,500 firms had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

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

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

Growth of the Conservative Legal Movement

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



*Supreme Court Justice
Lewis F. Powell Jr.*

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

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

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

The New Judicial Activism

Ironically, this aggressively activist legal movement came masked as a call for “judicial restraint.” In the years following the Second World War, the Supreme Court recognized a constitutional right to privacy and reproductive rights, allowed government agencies to regulate pollution and other harmful externalities of industry, provided due process protections for criminal defendants, and imposed school desegregation and constitutional civil rights protections for

minorities. In particular, *Brown v. Board of Education*—the landmark Supreme Court case that unanimously declared racial segregation in public schools unconstitutional—became a lightning rod for conservative outrage.

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

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

acting as an agent of counterrevolutionary change.”¹⁶ Calabresi denounced the idea of “judicial restraint,” insisting that aggressive originalism should be the driving force of the conservative legal movement. Calabresi argued that “the courts and the executive must start using their constitutional powers to hold the Congress within its proper constitutional sphere.”¹⁷

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

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

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

A Right-Wing Rout at the Supreme Court

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

80 5-4 CASES ADVANCING PARTISAN GOALS

✓ HELPING REPUBLICANS WIN ELECTIONS

- Gutting Voting Rights Act
- Approving voter purges
- Allowing unlimited outside spending & dark money to flood elections
- Upholding gerrymandering by state legislatures

✓ PROTECTING CORPORATIONS FROM ACCOUNTABILITY

- Forcing workers and customers to waive their constitutional right to a jury
- Protecting corporations against employees they have harmed through discrimination and harrassment
- Protecting corporations from liability for egregious human rights violations

✓ TAKING AWAY CIVIL RIGHTS

- Gutting Voting Rights Act
- Curtailing integration & diversity in public schools
- Eviscerating workers' rights
- Denying contraceptive rights to workers who do not hold their employers' beliefs

✓ PUSHING A FAR-RIGHT SOCIAL AGENDA

- Upholding restrictive state abortion laws
- Granting corporations religious rights
- Rubber-stamping President Trump's Muslim travel ban
- Creating rights for the gun lobby and firearms manufacturers

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

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

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

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

<p>"STARE DECISIS IS AN IMPORTANT LIMITATION ON WHAT THE SUPREME COURT DOES."</p> <p>— 2005 Confirmation Hearing</p>	<p>"STARE DECISIS IS A LATIN PHRASE. IT MEANS TO LEAVE THINGS DECIDED WHEN IT SUITS OUR PURPOSES.</p> <p>"IT'S NOT DIFFICULT FOR A JUDGE TO MAKE THE STARE DECISIS INQUIRY COME OUT HOWEVER THE JUDGE WANTS IT TO COME OUT."</p> <p>— 2015 Federalist Society Gala</p>
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Originalism and other conservative “doctrines of convenience” are being used to rewrite the way our democracy works in at least **seven basic ways**. All of them follow a partisan agenda and consistently advance Republican Party interests. In the Republican Supreme Court majority’s view of the world:

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

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

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

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

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

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

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

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

EMBARGOED



FOLLOW THE MONEY:

**The Federalist Society, Leonard Leo, and
How Special-Interest Money Dominates
Our Courts**

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

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

Rise of the Federalist Society

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



The Federalist Society's Leonard Leo

The Federalist Society “proclaimed the virtues of individual freedom and limited government”⁴¹—code words for the anti-government, anti-regulatory agenda laid out in the infamous Powell Memo. The Federalist Society also openly embraced the Republican Party’s far-right social agenda—serving, for instance, as a hub for the



Supreme Court Justice Antonin Scalia

gun industry’s successful effort to create from whole cloth an individual right to bear arms under the Second Amendment (using a theory Republican-appointed Chief Justice Warren Burger once called a “fraud on the American public”).⁴²

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

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

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

The Federalist Society Chooses Our Judges

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

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

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

Just a “debating society,” indeed.

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

FEDERALIST SOCIETY PIPELINE TO THE BENCH

51

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

FLORIDA GOVERNOR RON DESANTIS

appointed 56 state court judges during his first year in office. He made sharing Federalist Society’s views his “singular test” for being appointed to the bench.⁵¹

86%

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

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

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

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

EMBARGOED

\$20.7M

the Federalist Society's total donations received in 2017.

\$5.5M

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

\$1.7M

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

\$50K

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

**AT
LEAST \$2.4M**

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

**\$100K
APIECE**

came from several large corporations such as Google, Koch Industries, and Walmart.

**\$50K
APIECE**

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

**\$25K
APIECE**

came from several large corporations such as Bank of America and Facebook.

WHAT IS “DARK MONEY”?

Dark money is funding for organizations and political activities that cannot be traced to actual donors. It is made possible by loopholes in our tax laws and regulations, weak oversight by the Internal Revenue Service, and donor-friendly court decisions.

After the Supreme Court’s *Citizens United* decision, dark money has increasingly dominated American politics. Originally a Republican political device, it is now used by Republican and Democratic interests alike. Democrats have proposed getting rid of it, through legislation like the Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act.

Dark money is troubling enough for our politics. But dark money is a uniquely pernicious threat when deployed to capture the institution in which fairness and equality under the law matters most: our courts. And unlike in politics, where elections can work to correct extreme policies or corruption, federal judges enjoy life tenure, and many judicial decisions cannot be overturned by Congress.

When dark money is deployed to capture seats on the federal courts, the effects can last for generations.

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

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

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

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

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

IS IT LEGAL?

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

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

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

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





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

Behind the Veil: Understanding Leo's Secret Influence Machine

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

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

THE CONSERVATIVE LEGAL MOVEMENT'S INFRASTRUCTURE:

-  deep-pocketed, special-interest donors, who provide the funds;
-  shell entities, which funnel the money and exploit tax laws to keep donors' identities secret;
-  public relations firms and political operatives who run multi-million-dollar ad campaigns to support and oppose judges and generate earned media to craft favorable public narratives; and
-  a brain trust of ideological think tanks, academic institutions, and "public interest" law firms, filled with lawyers and professors who generate "intellectual capital"—law review articles, *amicus* briefs, and so on—to advance the donors' interests through the courts.

LEONARD LEO'S SECRETIVE MONEY NETWORK

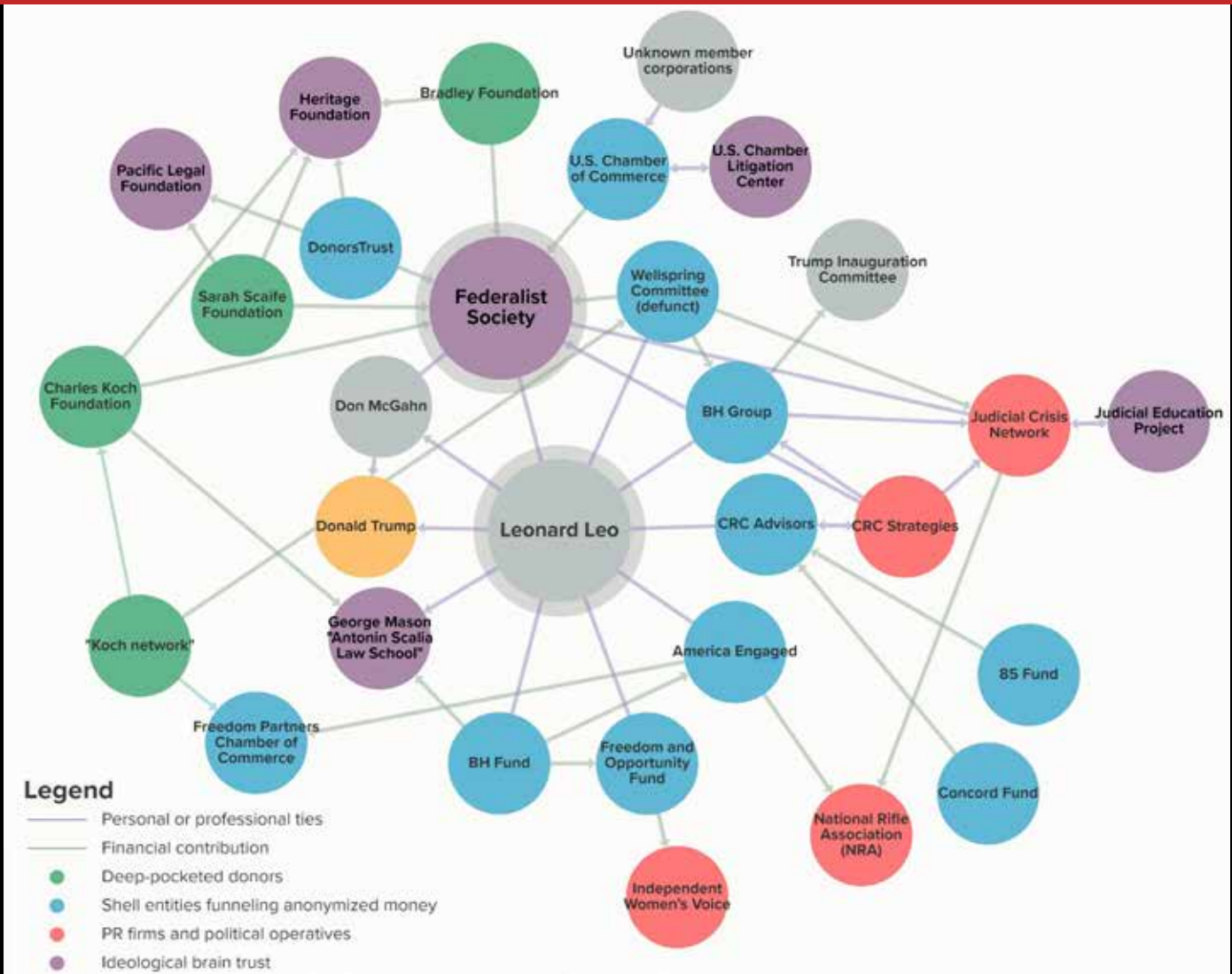


Chart of connections between some of the largest groups in Leonard Leo's secretive network. This chart is not exhaustive and mainly presents the groups selected for discussion in this report.

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

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

THE BIG-MONEY DONORS

Koch Industries/Charles & David Koch Foundations

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

The Scaife Foundations

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

THE COURT'S 800-POUND GORILLA



How the Chamber dominates the Supreme Court:

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

The Lynde and Harry Bradley Foundation

Founded in 1942 with funds from the Allen-Bradley manufacturing fortune, the Bradley Foundation has given over \$500 million to conservative "public-policy" experiments since 2000. Over the years, Bradley Foundation funding has supported voter suppression, efforts to privatize public schools, attacks on renewable energy, opposition to healthcare reform and Medicaid expansion, and systematic attacks on labor rights. The Foundation awarded the Federalist Society its Bradley Prize in 2009⁶⁵ and remains a key driver of Leonard Leo's influence engine.⁶⁶

U.S. Chamber of Commerce

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

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



Who does the U.S. Chamber Represent?

BIG BANKING

BIG OIL

BIG PHARMA

BIG TOBACCO

BIG GUN LOBBY

WHEN THE U.S. CHAMBER TALKS, THE ROBERTS COURT LISTENS

ROBERTS COURT (2006 - PRESENT)



Source: Constitutional Accountability Center

ROBERTS COURT ALIGNMENT WITH POSITIONS ADVANCED BY THE U.S. CHAMBER

THE FRONT GROUPS

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

DonorsTrust:

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

Big Money, Big Interests

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

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

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

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

Wellspring Committee funneled millions of dollars a year to other groups within Leo's network until it quietly shut down in 2018.⁷⁸ Founded by the Koch network and GOP political operatives in the lead-up to the 2008 election, Wellspring accounted for over 90% of the funding for the Judicial Crisis Network (JCN), a Leo-affiliated 501(c)(4) organization that often operates as the tip of the spear for the network's media attack campaigns.⁷⁹ Most of Wellspring's funds came from three multi-million-dollar secret donations. Wellspring's final tax return revealed that its largest donor accounted for \$8.9 million in funding that year, while another donor gave \$5.5 million, and a third provided \$2 million.⁸⁰ All of these donors' identities remain hidden.



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

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

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

BH Group/Fund:

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

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

Freedom and Opportunity Fund & America Engaged:

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

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



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

POLITICAL OPERATIVES

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



The Judicial Crisis Network ("JCN") is the political arm of the Leo network. Though it claims status as a 501(c)(4) "social welfare" group in order to shield itself from donor disclosure requirements,⁹⁰ JCN is effectively a political action committee (PAC) in disguise. JCN has made more than 10,500 ad buys since 2012, most of them so-called "issue ads" that don't explicitly tell viewers to support or oppose

particular candidates but do exactly that in effect.⁹¹ JCN's ties to Leo and the Federalist Society are kept intentionally opaque. As the *Post* reported, "JCN's office is on the same hallway as the Federalist Society in a downtown Washington building, though JCN's website and tax filings list a mailing address at a different location, an address shared by multiple companies."⁹² JCN spent \$7 million opposing President Obama's Supreme Court nominee Merrick Garland.⁹³ It then spent \$10 million more to support the confirmation of President Trump's Supreme Court nominee Neil Gorsuch (targeting "vulnerable Democrat Senators"), and pledged another \$10 million in advertising campaigns to support Brett Kavanaugh's nomination.⁹⁴ JCN also spent heavily on lobbyists, who worked to help shepherd the Gorsuch and Kavanaugh nominations through the Senate.

Two separate, anonymous \$17 million donations,⁹⁵ plus another \$23 million in anonymous money from the Leo-affiliated, now-defunct Wellspring Committee,⁹⁶

JUDICIAL CRISIS NETWORK

Anonymous Donations
received for Garland, Gorsuch, and
Kavanaugh's Nominations



WHO'S BEHIND THIS MONEY?

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

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

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

THE BRAIN TRUST

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

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

In addition to the considerable legal skills they bring to bear, these elites serve an important legitimizing, normalizing, and signaling function—particularly when the movement seeks to advance radical doctrinal change through the courts. As

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

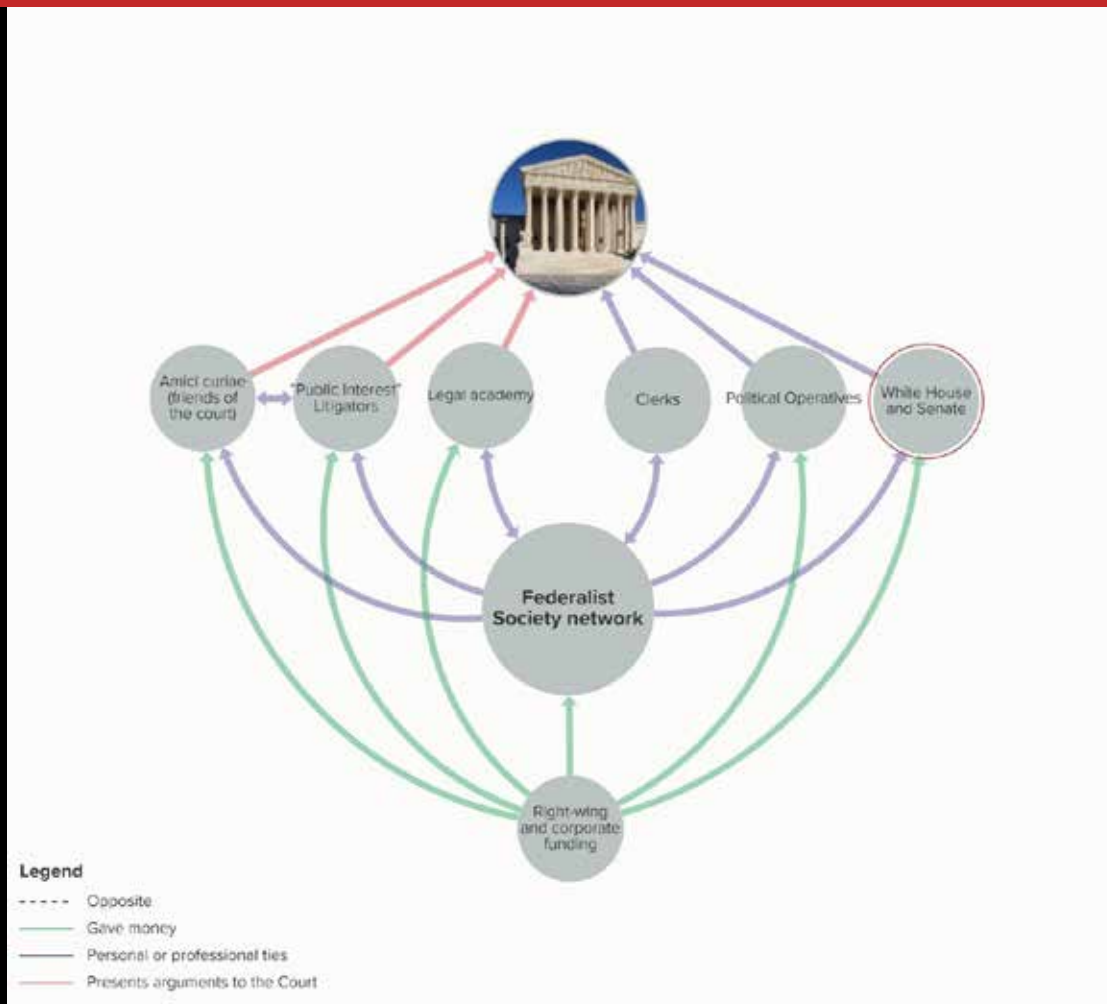
—Jack Balkin, Yale Law School

Hollis-Brusky explains, “by working to legitimize a set of ideas in the legal profession,” the Federalist Society’s intellectual elite “make it easier for judicial decision-makers who share these beliefs to articulate them in their opinions without the fear of being perceived as illegitimate.” Legal scholar Stephen Teles has described this as the “supply-and-demand relationship between the judges and the network.”¹⁰³ Another scholar, Jack Balkin, put it this way: “The more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from ‘positively loony’ to ‘positively thinkable,’ and ultimately to something entirely consistent

with ‘good legal craft.’”¹⁰⁴ Ushering fringe legal ideas (that benefit donor interests) into the legal mainstream is a key function of the court-capture scheme.

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

THE FEDERALIST SOCIETY: PATHWAYS TO JUDICIAL INFLUENCE



The Federalist Society network shares personnel and sources of funding with many key players in and around the Supreme Court. Adapted with permission from Amanda Hollis-Brusky, Ideas with Consequences, page 23.

The Heritage Foundation:

Founded in 1973 with funding from brewing magnate Joseph Coors,¹⁰⁶ the Heritage Foundation is a think tank that describes itself as promoting “free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.”¹⁰⁷ It has been described as a “White House in waiting for the Republican Party” while Republicans are out of power.¹⁰⁸ Affiliates of Heritage also testify before Congress “nearly 40 times a year” to push legal doctrines such as the “Unitary Executive Theory”.¹⁰⁹ It also provides a platform for sitting judges to write reports opining on issues currently before the courts, such as appellate judge Douglas Ginsburg’s Legislative Powers: Not Yours to Give Away, a summary of the far-right “non-delegation doctrine”.¹¹⁰

Pacific Legal Foundation (PLF):

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

U.S. Chamber of Commerce Litigation Center:

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

**The Judiciary Raises an Alarm**

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

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

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



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

George Mason University Law School:

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



Taking the “Public” out of “Public Interest”

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

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

Judicial Lobbying: Special-Interest “Friends of the Court”

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

Although interest groups that lobby Congress face stringent financial-disclosure requirements, no similar requirements exist for this form of judicial lobbying.

The Supreme Court, for its part, does not require meaningful disclosure of *amicus* funding. So there is no way for the public to know either who the funders are or what those anonymous funders’ interests before the Court might be. Two recent examples show that many seemingly independent *amici* may be hiding common funders—financial ties that connect them to each other and to the ideological hothouse of the Federalist Society.

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



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



WHY DOES ANONYMITY MATTER?

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

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

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

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



ADVISE AND CAPITULATE:

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

Betraying the Vision of Our Founders

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

Critical to that balance was the principle that each branch would “protect the institutional and constitutional prerogatives of the [branch], rather than the interests of any political party,” as one of our Republican Senate colleagues, Mike Lee (R-UT), put it in 2012.¹²³ As Senator Lee explained, among the constitutional means by which the Senate can assert its prerogatives is its advice-and-consent function, which includes its “ability to withhold its consent for a nominee, forcing the president to work with Congress to address that body’s concerns.” The Senate’s advice-and-consent role is—short of judicial impeachment—Congress’s only meaningful constitutional tool to check the extraordinary power inherent in life tenure.

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

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

SPOTLIGHT ON NEOMI RAO



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

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

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

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

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

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

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

SPOTLIGHT ON JUSTIN WALKER



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

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

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

Converting the Senate into a Legislative Graveyard

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

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



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



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

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

CONCLUSION

So how should we think about all this?

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

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

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

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

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

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

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

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

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

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