

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

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

Senator Sheldon Whitehouse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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