

Congress of the United States
Washington, DC 20510

Presidential Commission on the Supreme Court of the United States
The White House
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

May 18, 2021

Dear Commissioners:

Congratulations on your appointment to the Presidential Commission on the Supreme Court of the United States.

We understand that the Commission’s “purpose is to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform.”¹ To that end, we urge that the issues at the Supreme Court your Commission is tasked to consider cannot be addressed without grappling with pressing judicial ethics concerns, including the role of secretive special-interest influence in and around the Court.

By its own words, the last administration “insourced”² its judicial selection process to a single, anonymously funded outside group, the Federalist Society, which the former president acknowledged “picked” his judges.³ A majority of the Court’s sitting justices are active members of this group. The commanding role of this private organization in judicial selection coincided with enormous anonymous donations to the group.

The players at the center of this insourced judicial selection operation were also instrumental in raising multi-million-dollar anonymous donations to fund political ads to support confirmation of the selected nominees. These same forces appear to be behind judicial lobbying campaigns

¹ President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/>.

² Don McGahn, Federalist Society National Lawyers’ Convention, (Nov. 16, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> (“Our opponents of judicial nominees frequently claim the president has outsourced his selection of judges. That is completely false. I have been a member of the Federalist Society since law school. Still am. So, frankly, it seems like it’s been insourced.”).

³ Donald Trump, Breitbart News Interview (June 13, 2016).

conducted through arrays of *amicus curiae* briefs, also fueled by massive anonymous donations, often with common donors behind multiple briefs.

As we have argued elsewhere, the Roberts Court has produced a run of at least 80 partisan 5-4 decisions, each benefiting an easily identified Republican donor interest.⁴ Meanwhile, the Court has refused to bind itself to the code of ethical conduct applicable to all other federal judges, and has interpreted disclosure rules to provide less information than provided by other judges, by Members of Congress, or by senior executive officials. This is a potentially toxic combination. Secret private influence over the appointment and confirmation process, orchestrated flotillas of secretly-funded *amici curiae*, and weak or nonexistent ethical guardrails, particularly as a combination, raise issues squarely within this Commission's important charge. There is every reason to believe that most or all of the anonymous funding behind this effort comes from a small group of big donors. This set of interwoven problems connected by secret funding is likely the primary driving force behind the degradation of confidence that necessitated this Commission's formation.

Against this backdrop, we urge you to consider the following questions, and to invite such witnesses and secure such evidence as may be necessary to inform your judgment:

1. In American history, has a private organization ever been given the degree of control over judicial selections obtained in recent years by the judicial selection group operating within the Federalist Society? The evidence of this control is abundant.⁵ Secrecy likely obscures much more. Such a private role in a core constitutional, presidential function is unprecedented, and the Commission should fully understand the relationship between this judicial section operation and outside influence by private, secretly funded organizations.
2. If a country were to take the unique step to designate a private organization to control judicial selections, what safeguards would be prudent to protect against abuse? Were any such safeguards put in place by the Trump Administration or by the Federalist Society? For instance, were any disclosure or transparency requirements established? Were any conflicts of interest rules or firewalls implemented? Were there any restrictions or defenses against a quid pro quo being paid to the private organization (or any participant in the group) in return for a voice in judicial selection?
3. The Federalist Society, while it exerted significant control over judicial selection, received massive donations—some in the tens of millions of dollars.⁶ The multi-million dollar donors

⁴ See Question 9, *infra*.

⁵ See, e.g., Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/> (describing how the Federalist Society has raised hundreds of millions of dollars from mostly undisclosed donors to influence the judicial nominations process); Democratic Policy & Communications Committee, *Captured Courts: The GOP's Big-Money Assault on the Constitution, Our Independent Judiciary, And the Rule of Law* (May 2020), <https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf>.

⁶ O'Harrow & Boburg, *supra* n. 5; see also, e.g., Margaret Sessa-Hawkins and Andrew Perez, *Dark Money Group Received Massive Donation In Fight Against Obama's Supreme Court Nominee*, MAPLIGHT (Oct. 24, 2017),

are kept anonymous and there are no known rules or limitations that would prevent big donors buying access to the judicial selection process. The Commission should inquire into the connection between donors who gave massive donations and the judicial selection process.

4. The secrecy maintained by the Federalist Society prevents analysis of the relationship between the judicial selection operation and cases that may have been pending before the courts to which appointments were made. If a party to a proceeding were involved in selecting and supporting the nomination of the judge who would hear their case, or if a party is regularly enough before courts to anticipate such a proceeding and is involved in the judicial selection process, the other parties certainly deserve to know of the secret arrangement so it can be appropriately addressed in the proceeding. Moreover, the secrecy itself is highly problematic, more generally, as it prevents other judges of the court from appropriately handling case assignments and recusals, and undermines the public's faith in the fair administration of the law. The Commission should determine whether or not there was overlap between major donors and cases, and whether or not major donors were regular litigants, in the Supreme Court or other courts.
5. The process of jury selection is carefully monitored to assure the parties a fair hearing and decision. Yet, in contrast, the processes for judicial selection and nomination are largely unsupervised and opaque. The Commission should consider how the process of selecting and nominating judges should compare to the process of selecting jurors, so as to prevent parties being able to acquire sympathetic jurors or judges and thereby influence the outcome of cases. In particular, the Commission should consider how the process of big donors making large and secret contributions to a private organization with significant influence over judicial appointments squares with the processes used to assure a fair and dispassionate jury. A jury is empaneled only once, and is discharged at the end of the case. Even so, we carefully police the integrity of jury selection, though only for one case. A repeat litigant can obtain far greater advantage by securing judges with sympathies favorable to its positions, as judges may persist in office for decades.
6. The *Washington Post* article cited above reported that the judicial selection operation conducted through the Federalist Society and Leonard Leo received \$250 million dollars in donations between 2014 and 2017.⁷ It strains credulity that there was no effort by donors to acquire influence over judicial selection given expenditures of that magnitude. The

<https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee/> (noting that the Judicial Crisis Network (JCN)—a group closely linked to the Federalist Society—received a \$17.9 million from a single, anonymous donor between 2015-2016, and then spent \$7 million to block President Obama's Supreme Court pick, Merrick Garland, and another \$10 million to secure Supreme Court Justice Neil Gorsuch's confirmation); Anna Massoglia and Andrew Perez, *Secretive conservative legal group funded by \$17 million mystery donor before Kavanaugh fight*, OPEN SECRETS NEWS (May 17, 2019), <https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh/> (noting that JCN received another \$17.1 million donation from an anonymous donor between 2017-2018, and then spent \$10 million to secure the confirmation of Supreme Court Justice Brett Kavanaugh).

⁷ O'Harrow & Boburg, *supra* n. 5.

Commission should ask the *Post* reporters for a briefing on their findings, and pursue the questions raised.

7. The Judicial Crisis Network received donations, some well in excess of ten million dollars, to run advertising campaigns for selected nominees.⁸ Given the opacity of the donations, for all we know, these several donations over ten million dollars may have come from a single donor. They sum to over fifty million dollars.⁹ It is unreasonable to assume that an expenditure of that magnitude was done without expectation of benefit. The Commission should inquire about these donations, the identity and interests of the donors to the Judicial Crisis Network, and the link to cases and issues before the Supreme Court.
8. The Federalist Society and the Judicial Crisis Network share a hallway in the same office building.¹⁰ After the Federalist Society Executive Vice President who oversaw the judicial selection operation was identified in the *Washington Post* article, he left for another group and was replaced in his judicial selection function by the top official of the Judicial Crisis Network.¹¹ Given the known influence of these organizations on judicial selection, the Commission should investigate how closely the Judicial Crisis Network interacted with the Federalist Society judicial selection operation. In light of the limited information available about the operations of these organizations, a number of important questions warrant investigation and scrutiny: Were they in fact the same operation behind their corporate veils? Were their major donors the same? How were the major donations arranged? What communications were had or understandings reached by and between each organization with whomever gave as much as fifty million dollars for advertising campaigns to support the selected candidates?
9. Under Chief Justice Roberts' tenure, we count at least 80 decisions that were decided 5-4, where the majority of 5 was comprised entirely of justices appointed by Republican Presidents, and where the decision advantaged a significant Republican Party donor

⁸ See *supra* n. 5; Judicial Crisis Network, IRS Form 990 for 2015, http://990s.foundationcenter.org/990_pdf_archive/202/202303252/202303252_201606_9900.pdf; Judicial Crisis Network IRS Form 990 for 2016 (reporting \$21,464,995 from a single donor), <https://www.documentcloud.org/documents/4463990-Judicial-Crisis-Network-990-2016-2017.html>; Judicial Crisis Network IRS Form 990 for 2017 (reporting \$17,100,000 from a single donor), <https://www.documentcloud.org/documents/6007244-JCN-2017-990.html>; Judicial Crisis Network IRS Form 990 for 2018 (reporting \$15,881,000 from a single donor), <https://www.scribd.com/document/469403824/Judicial-Crisis-Network-990-2018-2019>; see also Wellspring Committee, IRS Form 990 for 2016 (reporting \$23,454,997 grant to JCN), https://projects.propublica.org/nonprofits/display_990/262046485/12_2017_prefixes_26-27%2F262046485_201612_9900_2017121315024630; Wellspring Committee, IRS Form 990 for 2017 (reporting \$14,814,998 grant to JCN), https://projects.propublica.org/nonprofits/display_990/262046485/02_2019_prefixes_25-26%2F262046485_201712_9900_2019022016111921.

⁹ *Id.*

¹⁰ O'Harrow & Boburg, *supra* n. 5.

¹¹ Tyler Olson, *An inside look at how Trump's Supreme Court list is made: 'A tremendous investment of time'*, Fox News (July 10, 2020), <https://www.foxnews.com/politics/behind-the-scenes-of-how-trumps-supreme-court-list-is-made>.

interest.¹² Eighty decisions would appear to constitute a pattern and in many of these cases, it appears that traditional judicially conservative doctrines were eschewed to reach the donor-favored outcome: doctrines like *stare decisis*, originalism, textualism, minimalism, and respect for the elected branches. The Commission should look at whether and to what extent conservative judicial doctrines explain the 80 cases' results.

10. Factfinding is not the ordinary role of an appellate court. In prominent cases affecting the political process (like *Citizens United* and *Shelby County*), however, the Supreme Court has embarked on factfinding outside of the legislative or judicial records. The facts found in those cases were considered erroneous by many at the time of the decisions; they clearly did not meet the standards of "taking judicial notice," and they were not supported by the legislative or judicial records in those cases.¹³ Events subsequent to the decisions then disproved the found facts beyond dispute.¹⁴ Having made decisions grounded on questionable facts, when those facts were later conclusively proven by events to be wrong, the Court then made no effort to clean up its errors. Should Congress then have a role in correcting these factual errors? This raises notable separation of powers issues. May the Executive Branch ignore decisions when it can show they were based on incorrect factfinding? What is the remedy? Should the Court clean up its own errors? If so, how and when? Or should decisions based on clearly erroneous factual premises be allowed to stand, notwithstanding the plain error, with all of government helpless to correct the wrong?¹⁵
11. The courts face an explosion of *amicus curiae* engagement.¹⁶ When should parties and judges know who is behind an *amicus* brief? At what point is an *amicus* filer really a front group for the actual interest to hide behind? Does Supreme Court Rule 37.6 (and Federal Rule of Appellate Procedure 29(a)) as presently applied adequately disclose to the parties, the Court and the public the true interest behind the *amicus* filing? If the real party in interest is not disclosed, how can the parties, the Court, and the public evaluate the motive and merits of

¹² *Captured Courts*, *supra* n. 5, endnote 6.

¹³ Kalvis Golde, *Whitehouse alleges "demonstrably false" fact-finding by conservative justices*, SCOTUSBLOG (Apr. 28, 2021), <https://www.scotusblog.com/2021/04/whitehouse-alleges-demonstrably-false-fact-finding-by-conservative-justices/>; Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017), <https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find>; Lawrence Norden, *Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions*, BRENNAN CENTER (Jan. 30, 2017), <https://www.brennancenter.org/our-work/research-reports/fact-check-what-supreme-court-got-wrong-its-money-politics-decisions>.

¹⁴ *Id.*

¹⁵ See Supreme Court Fact-Finding and the Distortion of American Democracy, Hearing Before the Senate Judiciary Subcomm. on Federal Courts, Oversight, Agency Action and Federal Rights, 117th Cong. (2021) (Testimony of Ms. Allison Orr Larsen, Mr. Theodore M. Shaw, and Mr. Paul M. Smith), <https://www.judiciary.senate.gov/meetings/supreme-court-fact-finding-and-the-distortion-of-american-democracy>.

¹⁶ 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. Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT'L L.J. (Aug. 19, 2015). From 2008 to 2013, the Supreme Court cited *amicus* briefs 606 times in 417 opinions. Supreme Court opinions also often adopt language and arguments from *amicus* briefs. Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 LAW & SOC. INQUIRY 955, 961 (2007).

the filing? When *amici* flood the Court, how can the parties, the Court and the public know of the orchestration and coordination without adequate disclosure?¹⁷

12. The justices of the Supreme Court appear to interpret their disclosure requirements regarding gifts, travel, hospitality and other emoluments to require less disclosure than is required is required of Court of Appeals judges. The interpretation of its disclosure requirements by the Court requires less disclosure than is required of Cabinet members and other senior officials in the Executive branch, and less disclosure than is required of elected members of the Legislative branch.¹⁸ Though the justices purport to abide by the financial disclosure guidelines promulgated by the Judicial Conference Committee on Codes of Conduct, these guidelines are not binding on them. Why should the highest court require less disclosure of its members than the highest ranks of the other branches? Why should the highest court in the land have the lowest standard of transparency? Court administrative and security records over the past decade could illuminate for the Commission the scale of unreported gifts, travel, and hospitality.

Sincerely,


SHELDON WHITEHOUSE
United States Senator


HENRY C. "HANK" JOHNSON, JR.
Member of Congress


MAZIE K. HIRONO
United States Senator


RICHARD BLUMENTHAL
United States Senator

¹⁷ See Memo to Advisory Committee on the Federal Rules of Appellate Procedure Re: AMICUS Act and Potential Amendments to Rule 29 (Mar. 12, 2021), <https://assets.documentcloud.org/documents/20618053/amicus-act.pdf>.

¹⁸ The Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989, requires senior government officials—including the President and Vice President, officers and high-level employees of the Executive Branch, Members of Congress, and judicial officers—to annually disclose outside income, gifts, and reimbursements. The executive branch and both chambers of Congress have issued implementing regulations and/or rules that require disclosures beyond what the statute requires. See, e.g., 5 C.F.R. 2634 (Executive Branch Financial Disclosure, Qualified Trusts, And Certificates of Divestiture), <https://ecfr.federalregister.gov/current/title-5/chapter-XVI/subchapter-B/part-2634>; U.S. House of Representatives, Committee on Standards of Official Conduct, House Ethics Manual, 110th Congress, 2nd Session (2008), https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf; U.S. Senate, Select Committee on Ethics, Senate Ethics Manual, 108th Congress, 1st Session (2003), <https://www.ethics.senate.gov/downloads/pdf/manual.pdf>. For example, executive and legislative branch disclosure rules require descriptions (and, in Congress's case, documentation) of reimbursed expenditures; require disclosure of the dollar value of reimbursed expenses; restrict officials' receipt of certain gifts and travel; and require prompt online publication of, and easy public access to, financial disclosures. The Judicial Conference Committee on Codes of Conduct has also issued financial disclosure regulations, but these are significantly less stringent than the executive and legislative branch rules. Even those requirements, however, do not apply to the Justices of the Supreme Court. As a result, the Justices of our highest court are subject to the lowest standards of transparency of any senior officials across the federal government.