Federal Court Appointment Process

1. U.S. Department of Justice keeps a file on likely candidates, getting names from Senators and other important party leaders.

2. Informal investigation is conducted with outsiders by the Deputy Attorney General.

3. The names of leading candidates are sent to the American Bar Association (ABA) Standing Committee on the Federal Judiciary, and the Committee rated them:

   Exceptionally Well Qualified

   Well Qualified

   Qualified

   Not Qualified

   [Please note that this part of the appointment process was suspended by President Donald J. Trump as it was earlier by President Richard M. Nixon. Trump, moreover, replaced the American Bar Association with the conservative Federalist Society.]

4. An appointment decision is made by the Attorney General after which the Department of Justice consults with the U.S. Senate Judiciary Committee.

5. FBI investigation.

6. Recommendation from the Attorney General to the President.

7. Announcement of the nomination by the President, and it is sent to the Senate.

8. The Senate Judiciary Committee hold confirmation hearings, votes on the nominee, and reports to the full Senate where a final vote is taken.

9. The nomination goes to the President for signature after a majority vote of the Senate.

How the Trump Administration Is Remaking the Courts

Thanks to ruthless discipline — and a plan long in the making — the G.O.P is carrying out a sweeping transformation of the federal judiciary.

Jason Zengerle, The New York Times Magazine Online Edition, August 22, 2018.

Donald F. McGahn, the White House counsel, stood in the gilded ballroom of Washington's Mayflower Hotel last November to address the annual meeting of the Federalist Society. He seemed humbled, even a bit awed to be delivering the Barbara K. Olson Memorial lecture, named after the conservative lawyer who died in the Sept. 11 attacks. Noting some of the legal giants who gave the Olson lecture in years past, McGahn reflected, "You hear names like Scalia, Roberts and Gorsuch and then me; one of those names really is different than the rest." Unlike previous speakers — to say nothing of many of those to whom he was now speaking — McGahn, himself a member of the Federalist Society, hadn't attended an Ivy League law school; he went to Widener University, a "second tier" law school in Pennsylvania. He had never held a tenured professorship or boasted an appellate practice, much less a judgeship, that required him to think deeply about weighty constitutional issues; he specialized in the comparably mundane and technical field of campaign finance and election law. "But here we are," McGahn said to the audience, almost apologetically. In 2015, Donald Trump hired McGahn to be the lawyer for his long-shot presidential campaign. Then, after Trump shockingly won the election, he tapped McGahn, who had proved his talent and loyalty during the campaign, to be White House counsel. Trump, in other words, had made McGahn's wildest dreams come true. Now, McGahn told the Federalist Society, Trump was going to make their wildest dreams come true, too.

The Federalist Society for Law and Public Policy Studies, as it is officially known, has played a crucial role in putting conservative jurists on the bench. As White House counsel, McGahn is responsible for helping Trump select his judicial nominees. And, as he explained in his speech that November afternoon, he had drawn up two lists of potential judicial appointments. The first list consisted of "mainstream folks, not a big paper trail, the kind of folks that will get through the Senate and will make us feel good that we put some pragmatic folks on the bench." The second list was made up of "some folks that are kind of too hot for prime time, the kind that would be really hot in the Senate, probably people who have written a lot, we really get a sense of their views — the kind of people that make some people nervous." The first list, McGahn said, Trump decided to "throw in the trash." The second list Trump resolved "to put before the U.S. Senate" for a confirmation vote. The president, McGahn assured his audience, was "very committed to what we are committed

to here, which is nominating and appointing judges that are committed originalists and textualists."

As White House counsel, McGahn has exercised an unprecedented degree of control over judicial appointments. In previous White Houses, both Republican and Democrat, judicial nominations were typically crowdsourced among officials from different parts of the administration. Under George W. Bush, for instance, there was a judicial-selection committee made up of people from the offices of the White House counsel, political affairs and legislative affairs, as well as officials from the Justice Department. This tended to produce a leveling effect. "You killed nominees by committee," says one Republican involved in judicial confirmations. Under Trump, the job belongs exclusively to the White House Counsel's Office, with McGahn and his deputy, Robert Luther, and about 10 associate counsels identifying and then scrutinizing candidates. This process is unique in White House history. Instead of engaging in the typical legislative horse-trading for nominating judges — promising a senator, for instance, that the president will support the nomination of the lawyer who served as the senator's campaign-finance chairman in exchange for a yes vote on the administration's agriculture bill — the Trump White House has given the counsel's office near-absolute authority. In a White House known for chaos and dysfunction, the counsel's office, under McGahn, is generally viewed as an island of competence. "The White House is like a Dante's 'Inferno'-strange comedy," says one leading conservative lawyer who requested anonymity for fear of reprisal, "but the people in the counsel's office are like the A-Team." That many of the lawyers in the counsel's office are also Federalist Society members — as elite Republican lawyers today often are — has given McGahn a handy rebuttal to the complaint that Trump has outsourced his judicial-selection process to the group. "Frankly," McGahn has said, "it seems like it's been insourced."

While Trump has lagged behind other presidents in political appointments, the streamlining of the judicial-selection process has helped him deliver a historic number of judges to the federal bench. In 2017, the Senate confirmed 12 of Trump's appeals court picks — the most for any president in his first year in office. This year, the Senate has already confirmed 12 appellate judges and, according to a Republican Judiciary Committee aide, hopes to confirm at least four more. The White House refers to every new batch of judicial appointees Trump selects as "waves" — in early June, it announced the "Fifteenth Wave of Judicial Nominees"— as if they're soldiers landing on the beaches of Normandy.

Trump's appointees have tended to be unusually well credentialed and conservative. Republicans like to emphasize their academic and professional bona fides — the summa cum laudes, the Phi Beta Kappas, the Supreme Court clerks — and jokingly celebrate their "deep bench" of candidates. Democrats,

for their part, prefer to focus on the appointees' ideology. "If someone had said or written something half as controversial as these Trump nominees, they never would have been picked by President George W. Bush," says Kristine Lucius, a former Democratic Senate Judiciary Committee aide and now the executive vice president for policy at the Leadership Conference on Civil and Human Rights. "What once would have been disqualifying" — a nominee's stated views on contraception or gay rights or consumer protection — "is now motivating this president." Or perhaps, the nominees' views are what's motivating many conservatives to go along with Trump's presidency — which is what's motivating Trump.

When it comes to Trump's judicial appointments, the public has been understandably focused on the Supreme Court, with first Neil Gorsuch and now Brett Kavanaugh receiving most of the attention. When one of Trump's lower-court nominees has managed to penetrate public consciousness, it has usually been an outlier, like Brett Talley, whom Trump picked last year for an Alabama Federal District Court judgeship. Talley, who had never tried a case and whom the American Bar Association rated unanimously "not qualified," ultimately withdrew his nomination after it was discovered that he was a member of a ghost-hunting group and had apparently defended the honor of the early Ku Klux Klan on an Alabama Crimson Tide football fan message board.

More representative of Trump's judicial appointees are judges like James C. Ho. Born in Taiwan, Ho moved to the United States as a toddler. He graduated from Stanford and the University of Chicago law school before going on to clerk for Clarence Thomas at the Supreme Court. After working in George W. Bush's Justice Department, he succeeded Ted Cruz as Texas solicitor general. Ho is as pure a product as exists of the conservative legal movement created by the Federalist Society. Last October, Trump nominated Ho to the United States Court of Appeals for the Fifth Circuit. In December, he was confirmed by the Senate. And in April, Ho issued his first opinion — a blistering dissent in a campaign-finance case after a Fifth Circuit appellate panel ruled, 12 to 2, that the City of Austin, Tex., could prohibit individuals from donating more than $350 per election to municipal candidates. Ho used his dissent not only to voice his disapproval of campaign-finance laws but also to criticize those that regulated gun purchases and protected abortion; he even threw in a swipe, in a citation, at the Supreme Court's Obamacare ruling. Lamenting a government that has grown so large that it "would be unrecognizable to our founders," Ho wrote: "If there is too much money in politics, it's because there's too much government. The size and scope of government makes such spending essential."

To be sure, Ho's was a dissenting opinion, but what so cheered members of the conservative legal movement is that it was likely the first of many, because Ho

is only 45. And because there will be more and more judges like Ho on the federal bench, it's only a matter of time before such opinions will no longer be dissents. Indeed, after just 18 months, Trump has "flipped" two circuits — the Sixth and Seventh — from what Trump's supporters in the conservative legal movement consider "liberal" to more properly conservative. Two more — the Eighth and the 11th — are on the verge of tipping. Even circuits that are decidedly liberal are undergoing significant changes. "It'll be really important for the Second and the Ninth Circuits to have between two and four really good, high-octane intellectual conservative jurists," explains a person close to the judicial-nominations process, "because dissents provide a signaling function to the U.S. Supreme Court, and those are very important circuits."

In short, a radically new federal judiciary could be with us long after Trump is gone. Brian Fallon, a veteran Democratic operative who leads Demand Justice, a group formed to help Democrats with research and communications in the judicial wars, says, "We can win back the House this November, we can defeat Trump in 2020 and we'll still be dealing with the lingering effects of Trumpism for the next 30 or 40 years because of the young Trump-appointed judges."

And if Trump is re-elected? Newt Gingrich, who during the 2016 campaign began emphasizing the importance of judges to Trump, posits: "He could, by the end of his time in office, be the most important president since Franklin Delano Roosevelt in shaping the judiciary."

Like most members of the Republican establishment, Leonard Leo, the executive vice president of the Federalist Society, was initially skeptical — if not contemptuous — of Trump's political aspirations. A few months before Trump announced his presidential bid in 2015, Sam Nunberg, then a political adviser to Trump's campaign, tried to arrange a sit-down between his boss and Leo. "I told Leonard, 'Mr. Trump is a conservative now on these issues, and you're not going to believe how good he is going to be for you,' " Nunberg recalls. "He sat there like regular D.C. and listened, and who the hell knows what he said after I left. He probably said, 'Gee, I feel bad for that kid.' " The meeting between Trump and Leo never happened.

But by the time the Republican presidential primaries began in early 2016, Leo's thinking about Trump had evolved. Trump, by then, had established himself as a plausible candidate, maybe even a front-runner. That March, Leo was part of a small group of Washington Republicans, including Gingrich and the Heritage Foundation president at the time, Jim DeMint, who met with Trump for a lunch at the Jones Day law firm, where McGahn was a partner. When the meal was over, Leo, McGahn and Trump broke off from the larger group for a private meeting. Reaching into his suit-jacket pocket, Leo presented Trump with a list of potential Supreme Court nominees that

McGahn had asked him to bring — a combination of federal judges and State Supreme Court justices who Leo believed would be suitable successors to Justice Antonin Scalia, who died the previous month.

“I was really hoping for 12,” Trump told him.

“Well, you’ve got eight,” Leo replied.

“Can’t we find more?” Trump asked.

“We can try,” Leo pledged.

Trump, Leo recalls, had a question about the State Supreme Court justices on Leo’s list: Do they make “the final decision”? Leo explained that sometimes they do and sometimes they don’t, depending on whether the issue before them involves the United States Constitution. He asked why Trump wanted to know. “Because when you have to make a final decision, and it is the real final decision, you own it,” Trump explained. “And like a businessman, when you own something that you do, you take it very seriously, and it has consequences.”

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Appellate Judgeships Confirmed During First Congressional Term. Ronald Reagan, 19; George Bush, 18; Bill Clinton, 18; George W. Bush, 16; Barack Obama, 15; Donald Trump, 24

“It was an interesting insight that I hadn’t really thought of,” Leo told me. We were sitting at Morton’s, the venerable Washington steakhouse, where Leo, an owlish man in his 50s who wears a pocket watch, keeps a wine locker. “It was, I think, the best conversation I have ever had in my professional life with a Republican presidential candidate on the issue of judges,” he marveled.

It’s hard to take that claim at face value. In 2016 alone, Leo discussed judges with Jeb Bush — who, as governor of Florida, appointed more than 100 of them — and Ted Cruz, who clerked for Chief Justice William H. Rehnquist, argued nine cases in front of the Supreme Court and himself is a member of the Federalist Society. A mere two weeks after Trump shared his insights about the judiciary with Leo, he told an interviewer that he planned to appoint Supreme Court justices who “would look very seriously at her” — Hillary Clinton’s — “email disaster.” A few months after that, Trump promised a group of congressional Republicans that he would protect “Article XII” of the Constitution — an article that doesn’t exist.

Trump might not have known much about the law, but he needed, as Gingrich told me, to create the impression that he “would be reliable in terms of

conservative judges, because that would calm down and consolidate a very large bloc of his coalition." That is, what mattered to the Federalist Society — and the Heritage Foundation — was that Trump take their advice on judicial nominees. In an interview with Breitbart in June 2016, Trump pledged, "We're going to have great judges, conservative, all picked by Federalist Society."

Leo also figured out what mattered to Trump. "Leonard is smart," says David Lat, the founding editor of the influential legal website Above the Law and a former Federalist Society member. "He knows the way to Trump's heart is through his ego." And perhaps his pocketbook. In May, McClatchy reported that a mysterious $1 million donation to Trump's inaugural committee in December 2016 — made by a company called BH Group L.L.C. that was apparently formed to hide the source of the donation — was tied to Leo. (When I asked him about the McClatchy report, Leo declined to comment.) "Leonard had an instinct," Gingrich says, "that this could be the great opportunity to redevelop conservatism on the courts."

The Federalist Society was founded in 1982 by a small cadre of conservative law students at Yale and the University of Chicago. Its first faculty advisers were Robert H. Bork at Yale and Antonin Scalia at Chicago. The group quickly spread to other campuses, and within a few years it had received an infusion of cash from conservative donors, including the Koch brothers. Ever since then, if you were a law student with conservative leanings, it was more than likely you became a Federalist Society member and were absorbed into a sprawling network of law school chapters, practice groups, publications and seminars that could nurture you for your entire career. Today, the Federalist Society boasts more than 70,000 members.

For most of the organization's first three decades, its dominant philosophical emphasis was on judicial restraint: the idea that judges shouldn't overrule majority-passed, democratically enacted laws — that they shouldn't, as Amanda Hollis-Brusky, a Pomona College professor and the author of the 2015 book "Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution," puts it, "move the law too far, too fast." This philosophy emerged largely as a reaction to liberal rulings by the Warren and Burger courts — as well as those of lower-court judges — who, conservatives complained, tried to "legislate from the bench" on civil rights and civil liberties. But within the Federalist Society and the larger conservative legal movement, there was an emerging faction that favored a more aggressive approach. These libertarian legal theorists, led by the Georgetown law professor Randy Barnett, subscribed to the judicial philosophies of originalism and textualism, which hold that judges should interpret the Constitution according to the meaning of its plain text, instead of its intent or purpose, and,

more important, should not hesitate to overturn any law that deviates from that text.

Originalists and textualists gave intellectual and theoretical ballast to this approach in the academy. But they didn't achieve critical mass in the larger conservative legal movement until 2012, when the Supreme Court upheld the Affordable Care Act, with Chief Justice John G. Roberts Jr. writing the majority opinion. "Conservatives were so disappointed they had to stop and think, How did this happen?" says Barnett, who helped mount the challenge to the constitutionality of Obamacare by invoking the commerce clause. "And how did it happen at the hands of a chief justice who was a Bush appointee and who had been signed off on by the Federalist Society?" The conservative legal movement's long-held devotion to judicial restraint began to founder. "Now the situation has reversed itself," Barnett told me. "The originalism side, and invalidating laws if they're unconstitutional, has the upper hand."

Critics of the Federalist Society contend that the group actually favors judicial activism: Judges who will take a stance on social issues, particularly on abortion. Many of the group's members question the legal basis for Roe v. Wade and whether a right to privacy exists in the Constitution, as Roe held it does. Leo was hailed by the conservative legal activist and writer Ed Whelan in National Review in 2016 for being "more dedicated to the enterprise of building a Supreme Court that will overturn Roe v. Wade" than anyone else in the United States. Yet Leo accuses Democrats of "scare tactics" when they charge that Trump seeks to appoint judges who will outlaw abortion. Similarly, Trump, who at one point during the 2016 campaign pledged that Roe would be overturned because he would put "pro-life justices on the court," maintains that he did not bring up the topic of abortion in his interviews with Brett Kavanaugh.

The Federalist Society — and the Trump administration — are more forthright about the ways in which they hope originalism and textualism may apply to other arenas, particularly government regulation. "The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state," McGahn declared in his November speech to the Federalist Society, "and the most effective bulwark against that threat is a strong judiciary." He added, "Regulatory reform and judicial selection are so deeply connected." This idea is now at the heart of the Federalist Society, whose members believe that federal agencies have become an unaccountable "fourth branch" of government — and that their bureaucrats, oftentimes experts in their fields, should no longer be shown any deference by the courts in how they apply laws enacted by Congress, but should instead be restrained from doing anything beyond what the law, as Congress wrote it, stipulates. The originalists and textualists now favored by the Federalist Society and the Trump administration are decidedly disinclined to defer to executive-branch agencies,

whether it's the Environmental Protection Agency or the Food and Drug Administration or the Occupational Safety and Health Administration, when it comes to interpreting arguably (and often necessarily) ambiguous statutes about the environment or public health or workplace safety. Unless Congress explicitly mandates it, originalists and textualists believe, agencies can't do it.

Gorsuch is said to have risen to the top of Trump's Supreme Court list in large part because of a 2016 concurring opinion he wrote as a judge on the United States Court of Appeals for the 10th Circuit, in which he forcefully attacked what's known as "Chevron deference" — a term that stems from a 1984 Supreme Court case, Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., that instructed courts to grant policymaking flexibility to government agencies. Similarly, Don Willett, whom Trump appointed to the United States Court of Appeals for the Fifth Circuit and who is on the president's Supreme Court list, became a Federalist Society favorite largely because of a 2015 concurring opinion he wrote as a justice on the Texas Supreme Court. In Patel v. Texas Department of Licensing and Regulation, Willett struck down a state licensing requirement that mandated 750 hours of training for eyebrow threaders, denouncing what he described as a "nonsensical government encroachment" on "occupational freedom" and economic liberty. And when the White House rolled out Kavanaugh's nomination to the Supreme Court in early July, it circulated a memo to business groups that, according to Politico, praised the 75 times Kavanaugh, as a Court of Appeals judge, overruled federal regulators on cases involving issues like clean air, consumer protection and net neutrality in order to protect "American businesses from illegal job-killing regulation." "The Federalist Society has embraced judicial activism," Hollis-Brusky says. "They're just calling it a different name."

The ascendant wing of the Federalist Society has, according to critics, effectively managed to change how Washington operates, by shifting power away from the executive and legislative branches and toward the courts. It also represents something of a long-term strategy by the Republican Party. "By appointing judges who'll narrowly interpret congressional regulations and statutes," Hollis-Brusky says, "you're gambling that you won't be in power politically but that your judges will be on the bench and take a more active role in shaping laws over the next 30 years."

The appellate courts are especially important in this effort. Although the Supreme Court is the highest court in the land, its caseload, which was not huge to begin with, has become even smaller in recent years — declining from about 150 cases a term in 1980 to just 79 in the term that ended in June. The appeals courts, by contrast, collectively hear and decide thousands of cases each year. "The Courts of Appeals are the regional Supreme Courts of the nation," says Sheldon Goldman, a University of Massachusetts at Amherst

professor and a scholar of the American judiciary, “and are of greater importance, in many respects, than the Supreme Court.” Nan Aron, the president of the liberal judicial group Alliance for Justice, says liberals don’t always recognize the centrality of the appeals courts. “They’re making the law of the land in critically important areas,” she says. “It’s something that’s not lost on the Republicans. That’s why they have their eyes on the prize.”

And never have they been as focused as they have been under Trump, who, according to Randy Barnett, “has made as good a selection of judges as any Republican president in my lifetime.” Even Leo, who has enjoyed unrivaled influence for more than two decades, seems impressed by his — and the conservative legal movement’s — good fortunes in the Trump era. “This administration,” he said that afternoon at Morton’s, “is trying to hit as many triples and home runs as possible.”

When Trump Took office, he inherited not just an open Supreme Court seat but 107 additional judicial vacancies. Ronald Reagan, by contrast, had 35 unfilled judgeships; Obama had 54. “There’s a million qualified conservative lawyers out there,” says J.Scott Jennings, a Republican strategist close to Senator Mitch McConnell, the majority leader. “The hard part was securing the vacancies and actually having a place to put them all. That was the spade work done by Mitch McConnell in the Obama years.”
From the moment Obama entered the White House, McConnell led Senate Republicans in a disciplined, sustained, at times underhanded campaign to deny the Democratic president the opportunity to appoint federal judges. McConnell’s first move came six weeks after Obama’s inauguration, in the form of a letter, signed by all 41 Republican senators, which warned the new president that if he did not consult with — and, more crucial, receive the approval of — home-state senators for his judicial nominees, then the Republicans would filibuster, insisting on 60 votes to end debate. “They were very clear from the beginning that they were going to make this as difficult and as partisan as possible,” says Christopher Kang, who worked on judicial nominations in the Obama White House Counsel’s Office.

Republican approval would be conveyed by one of the Senate’s many cherished procedural instruments known as a “blue slip.” The blue slip is literally a slip of paper that a senator returns to the Judiciary Committee signaling that a given nominee in his or her state should receive a hearing. First introduced in 1917, the blue slip has been accorded varying weights by different Judiciary Committee chairmen, but when Obama took office, the committee’s chairman was Senator Patrick Leahy, a Vermont Democrat. Leahy, a strong institutionalist and protector of the Senate’s prerogatives, viewed the blue slip as something akin to a Holy Writ. If a home-state senator, a Republican or a Democrat, did not want a judicial nominee to have a hearing, Leahy would not schedule one — essentially putting a hold on the

nomination. In doing so, Leahy told me, he was giving “real meaning to ‘advise and consent’ ” and ensuring that the Senate kept “its institutional independence and didn’t become a rubber stamp.”

Even without Leahy’s strict blue-slip policy, Obama would probably still have sought Republican approval for his judges. He was less interested in making the judiciary more liberal than in making it more diverse. It was important, Obama once told The New Yorker, for minorities “to see folks in robes that look like them.” Surely, there were African-American, Latino, Asian, gay and female judges with moderate records and temperaments whom Republican senators could support. “We were in the business of picking judges,” says Michael Zubrensky, a former Department of Justice official who worked on judicial nominations in the Obama administration, “not picking fights.” The fundamental battles Obama wanted to wage with Republicans involved legislation, not a long game with the courts.

When Republican senators dragged out their consultations with the Obama administration on judicial nominees, the Obama White House did not press them; when a blue slip was finally returned and the Judiciary Committee held a hearing and voted a nominee out of committee, Senate Democrats would often take their time before scheduling a floor vote, which Republicans would usually insist couldn’t be held until after the maximum 30 hours of debate. “Judges at that time were sort of an afterthought,” recalls Brian Fallon, who was then an aide to Senator Chuck Schumer of New York. “It was viewed as something you got around to scheduling when you were in between big pieces of legislation and you needed some filler on the floor.”

The combination of Republican intransigence — “You had all of these nominees piling up on the calendar,” Kang says, “because Republicans felt any day without an Obama judge in place was a better day for them” — and Democratic dawdling meant that even though Democrats enjoyed a Senate majority, Obama, several months into his second term, had more than 60 unfilled judicial vacancies that lacked even a nominee. “In retrospect, I think we all didn’t react with enough alarm when it was happening,” Fallon says. “We indulged it for far too long in the Obama years, and now our chickens are coming home to roost.”

The issue came to a head in the fall of 2013 over three vacancies in particular — all of them on the United States Court of Appeals for the District of Columbia Circuit. Senate Republicans had been unable to prevent the nominees from receiving a hearing, because there were no home-state senators to withhold blue slips. But when the Senate’s majority leader at the time, Harry Reid, brought each of the three nominees to the floor, Republican senators, who by then numbered 45, refused to give them a vote. The Republicans didn’t object to the nominees themselves; all three were

considered moderate and eminently qualified. Rather, the Republicans argued that the District of Columbia Circuit's caseload was so meager that the judgeships should be eliminated. Reid decided to invoke what was known as the "nuclear option," doing away with filibusters for most nominations by presidents, including those to the lower courts.

With the filibuster for lower-court judicial nominations eliminated, Obama was able to score more than 100 judicial confirmations in just over a year. Then and now, Republicans denounced Reid's triggering of the nuclear option. "You'll regret this," Mitch McConnell warned in 2013, "and you may regret this a lot sooner than you think." But with Leahy leading the Judiciary Committee, Republican senators, even without the filibuster, still maintained some leverage — and whenever possible, they used their blue slips to bottle up Obama's judicial nominations. Saxby Chambliss and Johnny Isakson, both Georgia Republicans, held up Jill Pryor's nomination to the United States Court of Appeals for the 11th Circuit for two years, finally returning their blue slips only after Obama agreed to nominate one of their picks to another 11th Circuit vacancy and three of their picks to district court judgeships. Democrats might have played hardball with the nuclear option, but they still shrank from a fight, either because they agreed with Leahy that the blue slip was an important procedural safeguard or because they didn't have the stomach to pressure him to change his stance.

Republicans weren't as squeamish. After taking back the Senate in the 2014 midterm elections, McConnell, now the majority leader, began a near blockade of Obama's judicial appointments. In Reagan's final two years in office, 66 of his district court and 15 of his appeals court nominees were confirmed. Clinton managed 57 and 13 in his last two years. George W. Bush had 58 and 10. In Obama's final two years, 18 of his district nominees and just one of his appellate court nominees were confirmed — the lowest number since Harry Truman was president.

One of the earliest, and ultimately most prolonged, battles in McConnell's fight for Republican control of the judiciary began when a routine vacancy opened up on the United States Court of Appeals for the Seventh Circuit in Wisconsin in 2010. Wisconsin had long been considered a model of bipartisanship in filling vacancies in the federal judiciary. In 1979, the state's senators, William Proxmire and Gaylord Nelson, established a commission to depoliticize the judicial-selection process. Known as Wisconsin's Federal Nominating Commission, it was composed of 11 legal experts — some appointed by the senators, others by the state bar — and led by the dean of the law school at either Marquette or the University of Wisconsin. It solicited applications, vetted candidates and ultimately came up with a list of four to six individuals that the senators would review and forward to the White House for consideration.

Although Proxmire and Nelson were both Democrats and a Democrat was president when the commission was created, the process also worked in times of divided government. In 2003, when Senate Democrats and George W. Bush were battling over his judicial nominees, Wisconsin's two Democratic senators, Herb Kohl and Russell Feingold, both supported Diane Sykes, Bush's choice for a Seventh Circuit seat. "There are a number of topics on which we do not see eye to eye," Feingold said in introducing Sykes at her Judiciary Committee hearing, but her "nomination is the result of a collaborative bipartisan process." (Today, Sykes is on Trump's list of Supreme Court candidates.)

To fill the Seventh Circuit vacancy in 2010, the commission recommended six candidates to replace Terence Evans, who was taking senior status. Kohl and Feingold forwarded the names to Obama for consideration. In July, Obama nominated Victoria Nourse, a University of Wisconsin law professor and former Senate Judiciary Committee staff member for Joe Biden. She was a fairly typical Obama nominee, in that she was a woman (42 percent of Obama's judges were women, the highest percentage of any president) and a moderate (besides working for Biden, Nourse worked on the Judiciary Committee with Orrin Hatch, a Utah Republican). She was also typical in that the Obama administration and Senate Democrats didn't seem to afford her nomination much urgency. At the end of 2010, Nourse still had not been scheduled for a confirmation hearing.

This would prove to be a problem when, in November of that year, Feingold lost his re-election campaign to Ron Johnson, a Republican businessman and Tea Party candidate. Although Feingold had returned his blue slip for Nourse, as well as for a nominee to a district court, Johnson, upon joining the Senate, essentially took them back. In Wisconsin, legal experts chalked up Johnson's move to inexperience. "Everybody just assumed that once he got up to speed, he would see these were quality nominees and would support them," says Michelle Behnke, a former state bar president who served on the commission. But Johnson was simply adhering to the Washington Republican playbook, outlined by McConnell in his original letter about judges to Obama two years earlier. Nourse says she repeatedly sought a meeting with Johnson so he could review her credentials, but he rebuffed her entreaties and refused to return her blue slip. In early 2012, after 18 months of waiting, Nourse withdrew her nomination. Johnson, meanwhile, said he wanted Wisconsin to come up with a new system for recommending judges, but he and Kohl couldn't agree on what it would look like. The Obama administration declined to nominate anyone until they could.

In 2012, Representative Tammy Baldwin, a Democrat, was elected to succeed Kohl in the Senate. One of her first acts was to meet with Johnson to start filling Wisconsin's judicial vacancies. Johnson insisted on a new nominating

commission with a different structure. No longer would the state bar or the state's law school deans participate, nor would a senator whose party was in the White House be able to appoint more members. Instead, the commission would consist of six members, three appointed by each senator. Under the commission's new rules, a judicial candidate needed five votes to be recommended for a judgeship; the commission was required to recommend four to six candidates. Baldwin agreed to Johnson's stipulations, and in April 2013, the commission was formed.

The commission began soliciting applications for the Court of Appeals for the Seventh Circuit seat in 2014, which by then had been vacant for more than four years. By the end of 2014, the commission had reviewed numerous applications for the position and interviewed eight candidates, but only two, a Madison lawyer named Don Schott and a Milwaukee Circuit Court judge named Rick Sankovitz, received the requisite five votes. Months later, when the commission was still at an impasse, Baldwin sent the White House the names of the eight candidates interviewed. Johnson and his commissioners cried foul. "In our view, there's no sense in which they were finalists," says Rick Esenberg, one of Johnson's commissioners.

Rather than take advantage of the deadlock to nominate a "finalist" of whom the commission's Republican members disapproved, the Obama administration sought to defuse tensions and quickly settled on Schott, one of two candidates who had received five votes, as its likely nominee. In late July 2015, the White House initiated Schott's F.B.I. background investigation and American Bar Association evaluation, which were concluded by early September. It stood to reason that Johnson would support Schott's nomination — after all, he had been recommended by the commission Johnson established — but the White House wanted to make sure before it went ahead with it. Johnson dragged his feet. First, according to a former government official familiar with the process, Johnson asked to see Schott's F.B.I. file. "I don't remember any other instance in which a Senate office made that request" before a nomination was made, the official says. When the Obama administration wouldn't give Johnson Schott's F.B.I. file, Johnson insisted on interviewing Schott himself. But then he didn't schedule an interview. Finally, Schott flew to Washington in early November to meet with Johnson. In January 2016, six years after the Seventh Circuit seat became vacant, Johnson told the White House that Schott was acceptable, and Schott was quickly nominated.

Then came another round of delays. First, Johnson didn't return his blue slip for Schott until March. Next, Charles E. Grassley, the Iowa Republican and chairman of the Judiciary Committee, stalled on scheduling a confirmation hearing. Finally, in May, Schott was given a hearing. Baldwin appeared to introduce him and speak on his behalf to the committee. Johnson did not

attend. Although he had returned his blue slip, he refused to offer Schott any support. “I have recommended the committee consider it,” Johnson explained. “What I am not going to do is publicly go out and make any other statements beyond that.” Nonetheless, in June, the Judiciary Committee voted 13 to 7 to advance Schott’s nomination. By now, however, there were only five months until the presidential election, and with McConnell already refusing to give Merrick Garland a hearing for his Supreme Court nomination, it seemed unlikely that he would schedule a floor vote for Schott. The White House and Baldwin pressed him; Johnson did nothing. In November, when Trump was elected and Johnson was re-elected, Schott still hadn’t been given a vote. His nomination was dead.

Even before Trump was sworn in as president, Don McGahn, Leonard Leo and other members of Trump’s transition team began vetting potential judicial candidates to fill all the empty seats on the bench. Together with McConnell, McGahn and transition officials devised a strategy to speed confirmations through the Senate: Trump would prioritize appellate judges, rather than district court ones, and initially fill vacancies from states with two Republican senators or from states with Democratic senators that had been won by Trump. Like George W. Bush, Trump wouldn’t allow the American Bar Association to vet potential judges before they were nominated. But under the new way of business, the Senate wouldn’t necessarily wait for the association to complete its vetting before the nominees were given hearings. The Judiciary Committee would also more regularly take the unusual step of holding confirmation hearings for two appellate nominees at a time.

The most crucial procedural maneuver, however, involved the blue slip. When Grassley became chairman of the Judiciary Committee in 2015 after Republicans took back the Senate, he publicly indicated (in a column in The Des Moines Register) and privately said (in a conversation with Leahy, according to Leahy) that he would afford blue slips the same weight as his Democratic predecessor. If both home-state senators didn’t return their blue slips, the nominee wouldn’t receive a hearing. Sure enough, in Obama’s final two years in the White House, Grassley denied hearings to four appellate court and five district court nominees who didn’t receive blue slips. (A Grassley spokesman maintains that the nominees didn’t receive hearings “solely” because of unreturned blue slips.) Although this benefited Republicans, it was viewed not as partisan but as principled; Grassley, in his sixth term and having just turned 80, was, like Leahy, an avowed institutionalist.

Then, last November, 10 months into Trump’s presidency, Grassley took to the Senate floor to announce that he had a new, more nuanced view of the blue slip. While he would be “less likely” to grant a hearing to a district court nominee who didn’t have support of their home-state senators, he would no longer allow a home-state senator to “wield veto power” over appellate

nominees. “Circuit courts cover multiple states,” Grassley said. “There’s less reason to defer to the views of a single state’s senator for such nominees.”

Grassley’s decision to disregard blue slips worries Leahy, who contends that it eviscerates the Senate’s “advise and consent” role. If a home-state senator can no longer put a hold on a nominee for an appellate judgeship, what’s to stop a president from nominating a judge who isn’t even from that state? “Depending on who’s in the majority and who’s president,” Leahy told me, “they might decide, ‘We’ve got to make this Texas court a little bit different, so we have this New Yorker who’d make a good judge down there,’ and nominate them and get them confirmed.” As to whether he regrets adhering to that principle, Leahy said: “The only regret I have is that the Republicans haven’t stuck to the position they claimed was the right position when there was a Democratic president. I’m old-school. I believe in senators sticking to their commitments.”

Grassley maintains that he still takes the Senate’s advise-and-consent role seriously. “My blue-slip policy is consistent with its traditional application as a way of promoting consultation with home-state senators,” he told me in a statement. “I find it a bit ironic that the same senators who opted to change the Senate’s filibuster rule in 2013 to silence the voices of 41 senators are now calling for the ability of a single senator to obstruct the Senate’s mere consideration of judicial nominees.” According to a Republican Judiciary Committee aide, Grassley has required that McGahn show him consultation logs — a ticktock of every communication the White House Counsel’s Office has with home-state senators about judicial nominations — to be assured that there’s meaningful home-state consultation. But as Senate Democrats note, “meaningful consultation” is in the eye of the beholder. “We’ve never relied on a chairman’s view of whether a senator was consulted before,” one Democratic aide says. “It was up to the senator about whether they were consulted.” Democrats charge that Grassley is not really concerned about the opinions of home-state senators. “If it’s what Donald Trump wants, they’re going to go along with it,” Leahy says. “That seems to be the standard.”

While Grassley and the White House have sought the input of some Democratic senators on judicial nominations from their states — notably those in the Democratic leadership, like Chuck Schumer, Richard Durbin and Dianne Feinstein, the ranking Democrat on the Judiciary Committee — they have, more often than not, steamrolled the rest of them.

When Senator Al Franken of Minnesota announced in September that he wouldn’t return his blue slip for David Stras, Trump’s first choice for a seat on the Court of Appeals for the Eighth Circuit, McGahn informed him that Stras would be nominated anyway. Then Grassley held a hearing for Stras, clearing the way for his confirmation. (Stras was confirmed in January, after Franken resigned; Franken’s successor, Tina Smith, voted against him.)

Similarly, Oregon's Democratic senators, Jeff Merkley and Ron Wyden, both refused to return their blue slips for Ryan Bounds, Trump's nominee for a judgeship on the Court of Appeals for the Ninth Circuit. Bounds had concealed newspaper columns he wrote as a Stanford undergraduate in the 1990s, in which he railed against "race-focused groups" on campus and likened the university's multicultural efforts to Nazi Germany. Nonetheless, Bounds received a Judiciary Committee hearing in June and was voted out of committee on an 11-to-10 party-line vote. His nomination was withdrawn minutes before a floor vote, when Senator Tim Scott of South Carolina, the only African-American Republican in the Senate, announced that he wouldn't vote for Bounds on account of those columns.

During the transition, Trump's advisers turned their attention to Wisconsin's Court of Appeals for the Seventh Circuit vacancy. Leonard Leo and several others recommended Mike Brennan for the spot. A Milwaukee lawyer and a founding member of that city's Federalist Society chapter, Brennan had been the chairman of an advisory committee that helped Gov. Scott Walker select his own state-level judges, many of whom had won plaudits from conservatives. In March 2017, seven weeks into Trump's presidency, the White House Counsel's Office interviewed Brennan for the appellate judgeship. This was somewhat awkward, because Johnson and Baldwin had intended to use their beleaguered commission to help fill the vacancy. Johnson prevailed upon the White House to hold off on making a nomination until the commission could review candidates, and in April it began accepting applications.

Brennan applied. So, surprisingly, did Schott. According to those familiar with the commission's deliberations, which are confidential, Schott initially received the same five votes he did two years earlier, but when the Republican commissioners realized that Brennan had fallen short of the required five votes — receiving just four — two commissioners changed their votes, and Schott finished with just three. If in 2014 the commission was able to give Johnson and Baldwin only two names, this time it came up with zero. In June, Schott was invited to Washington to interview with the White House Counsel's Office. Five weeks later, Trump nominated Brennan for the vacancy.

Johnson hailed the move, but Baldwin cried foul, noting that the commission hadn't recommended any candidates for the Seventh Circuit, nor did she believe that she had been sufficiently consulted by the White House Counsel's Office about Brennan. She said she wouldn't return her blue slip. But under Grassley's new blue-slip policy, that didn't matter. In January, the Judiciary Committee held a confirmation hearing for Brennan. Two weeks later, the committee approved Brennan's nomination 11 to 10 on a party-line vote. And in May, Brennan's nomination came before the full Senate, which approved it 49 to 46. After 3,044 days of sitting vacant, Terence Evans's Seventh Circuit seat was finally filled.

It remains difficult to parse Trump's own legal views. In the wake of Antonin Scalia's death during the Republican presidential primaries, he apparently became close with Scalia's widow, and he now views the Supreme Court justice as a judicial role model. Perhaps in Scalia, Trump saw something of himself: a Queens kid who likes to mix it up. "Whether or not he gets every nuance of textualism and originalism," says one Republican lawyer who has been involved in the Trump administration's judicial-selection process, "he gets that Scalia was courageous. He probably liked that Scalia was pugilistic in public."

Leo, McGahn and others have done a remarkable job of persuading the president that their intellectual judicial philosophy of originalism and textualism is in perfect sync with his visceral preferences that judges be "courageous" and "not weak." It's easy to see how, in Trump's mind, declaring war on "the administrative state" might dovetail neatly with his desire to go after the "deep state." "A lot of the things that make Trump so loathsome as a person and a politician," David Lat notes, "are why he's been nominating judges who are such great conservatives."

So far, Trump appears to be pleased with the decisions of the judges he has appointed. In June, after the Supreme Court decided 5 to 4, with Gorsuch in the majority, that the president does have the authority to ban travelers from certain majority-Muslim countries, reversing two lower-court rulings, Trump tweeted: "SUPREME COURT UPHOLDS TRUMP TRAVEL BAN. Wow!"

Yet despite Trump's record on judicial appointments, some in the conservative legal movement remain uneasy. "He's been great, and everything's good," one prominent conservative legal activist says, "but what happens if the Senate goes 50-50? What happens if Don McGahn gets replaced by Judge Napolitano?" Or what happens when an originalist judge does something that goes against Trump? When Neil Gorsuch was awaiting confirmation to the Supreme Court, he told a Democratic senator that Trump's attacks on the federal judge who temporarily blocked his travel ban were "demoralizing." According to The Washington Post, Trump contemplated withdrawing his nomination because Gorsuch was not "loyal." But after reading Gorsuch's note thanking him for the nomination — "Your address to Congress was magnificent," Gorsuch wrote — he decided to stay the course.

For the moment, Trump may believe that originalism and textualism cut in his favor, but there is no guarantee this will always be the case. While a president with an intellectual commitment to originalism and textualism would most likely be philosophical about a ruling from a like-minded judge that runs counter to his political or personal interests, this doesn't describe Trump. He would almost certainly interpret such a ruling as evidence of a judge's "cowardice" and "weakness." Yet Trump can't simply fire the offending judge

the way he fires a secretary of state; these are lifetime appointments and thus, unlike so many others whom Trump has ushered into power, judges are protected from his capriciousness. Earlier this year, McConnell, looking back on Trump's achievements in 2017, noted that the tax bill was "hugely important," but added that once Democrats took back control of the White House or Congress, they would revisit the tax code. By contrast, he said, "the thing that will last the longest is the courts" — whether Trump ultimately wants them to or not.

Correction: *August 28, 2018*

An earlier version of this article failed to attribute a characterization of the political leanings of several United States Courts of Appeals. It is President Trump's supporters in the conservative legal movement who believe that the Sixth, Seventh and Eighth Circuit Courts were "liberal" prior to recent appointments.

Jason Zengerle is a contributing writer for the magazine and the political correspondent for GQ. He last wrote about Devin Nunes, the chairman of the House Intelligence Committee.

A version of this article appears in print on Aug. 25, 2018, on Page 30 of the Sunday Magazine with the headline: Bench Warfare.

How Conservatives Weaponized the First Amendment

Image

Trump supporters signing a poster promoting free speech at a rally in 2017 in Berkeley, Calif.CreditJim Wilson/The New York Times

Adam Liptak, The New York Times Online, June 30, 2018.

WASHINGTON — On the final day of the Supreme Court term last week, Justice Elena Kagan sounded an alarm.

The court's five conservative members, citing the First Amendment, had just dealt public unions a devastating blow. The day before, the same majority had used the First Amendment to reject a California lawrequiring religiously oriented "crisis pregnancy centers" to provide women with information about abortion.

Conservatives, said Justice Kagan, who is part of the court's four-member liberal wing, were "weaponizing the First Amendment."

The two decisions were the latest in a stunning run of victories for a conservative agenda that has increasingly been built on the foundation of free speech. Conservative groups, borrowing and building on arguments developed by liberals, have used the First Amendment to justify unlimited campaign spending, discrimination against gay couples and attacks on the regulation of tobacco, pharmaceuticals and guns.

“The right, which had for years been hostile to and very nervous about a strong First Amendment, has rediscovered it,” said Burt Neuborne, a law professor at New York University.

The Citizens United campaign finance case, for instance, was decided on free-speech grounds, with the five-justice conservative majority ruling that the First Amendment protects unlimited campaign spending by corporations. The government, the majority said, has no business regulating political speech.

The dissenters responded that the First Amendment did not require allowing corporate money to flood the political marketplace and corrupt democracy.

“The libertarian position has become dominant on the right on First Amendment issues,” said Ilya Shapiro, a lawyer with the Cato Institute. “It simply means that we should be skeptical of government attempts to regulate speech. That used to be an uncontroversial and nonideological point. What’s now being called the libertarian position on speech was in the 1960s the liberal position on speech.”

And an increasingly conservative judiciary has been more than a little receptive to this argument. A new analysis prepared for The New York Times found that the Supreme Court under Chief Justice John G. Roberts Jr. has been far more likely to embrace free-speech arguments concerning conservative speech than liberal speech. That is a sharp break from earlier eras.

As a result, liberals who once championed expansive First Amendment rights are now uneasy about them.

“The left was once not just on board but leading in supporting the broadest First Amendment protections,” said Floyd Abrams, a prominent First Amendment lawyer and a supporter of broad free-speech rights. “Now the progressive community is at least skeptical and sometimes distraught at the level of First Amendment protection which is being afforded in cases brought by litigants on the right.”

Many on the left have traded an absolutist commitment to free speech for one sensitive to the harms it can inflict.

Take pornography and street protests. Liberals were once largely united in fighting to protect sexually explicit materials from government censorship. Now many on the left see pornography as an assault on women's rights.

In 1977, many liberals supported the right of the American Nazi Party to march among Holocaust survivors in Skokie, Ill. Far fewer supported the free-speech rights of the white nationalists who marched last year in Charlottesville, Va.

There was a certain naïveté in how liberals used to approach free speech, said Frederick Schauer, a law professor at the University of Virginia.

"Because so many free-speech claims of the 1950s and 1960s involved anti-obscenity claims, or civil rights and anti-Vietnam War protests, it was easy for the left to sympathize with the speakers or believe that speech in general was harmless," he said. "But the claim that speech was harmless or causally inert was never true, even if it has taken recent events to convince the left of that. The question, then, is why the left ever believed otherwise."

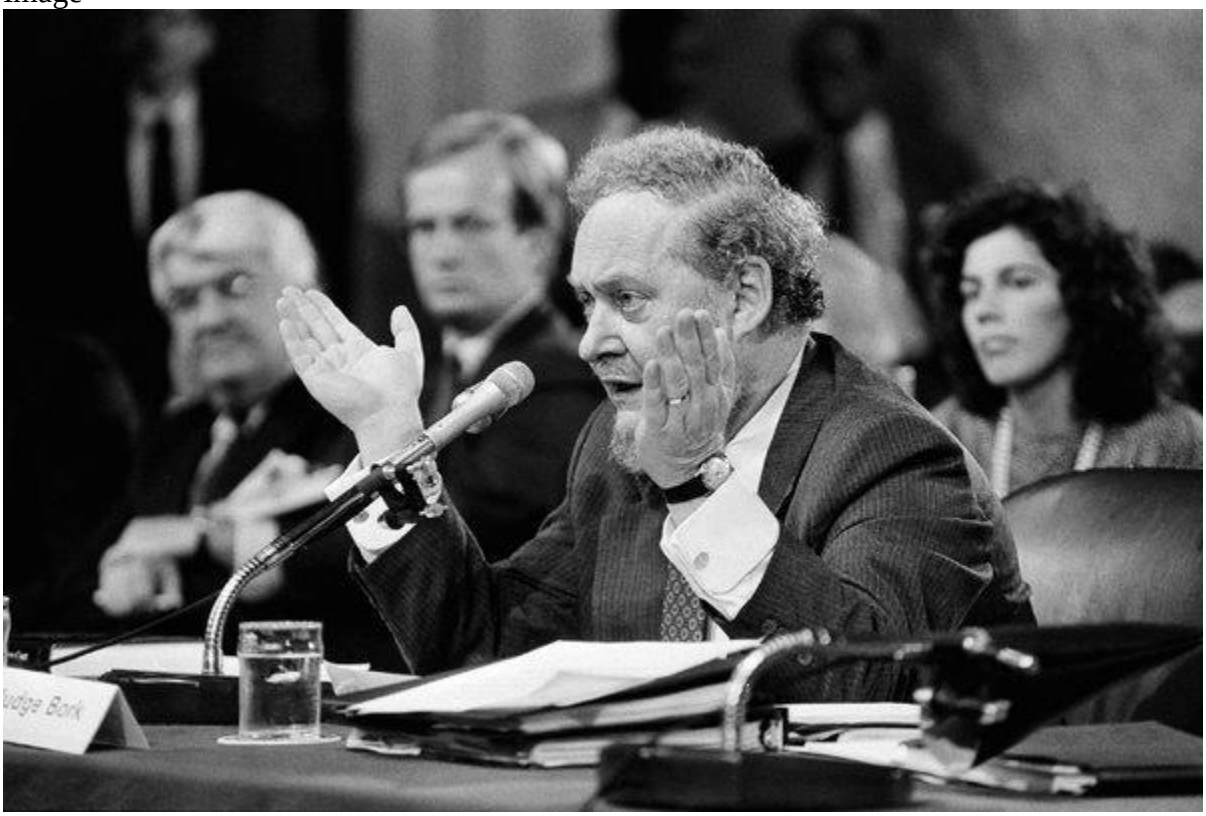
Some liberals now say that free speech disproportionately protects the powerful and the status quo.

"When I was younger, I had more of the standard liberal view of civil liberties," said Louis Michael Seidman, a law professor at Georgetown. "And I've gradually changed my mind about it. What I have come to see is that it's a mistake to think of free speech as an effective means to accomplish a more just society."

To the contrary, free speech reinforces and amplifies injustice, Catharine A. MacKinnon, a law professor at the University of Michigan, wrote in "The Free Speech Century," a collection of essays to be published this year.

"Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful," she wrote. "Legally, what was, toward the beginning of the 20th century, a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections."

Image



Judge Robert H. Bork in 1987. “Constitutional protection should be accorded only to speech that is explicitly political,” he wrote in 1971 in a law-review article. “There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”CreditJose R. Lopez/The New York Times

Changing Interpretations

In the great First Amendment cases in the middle of the 20th century, few conservatives spoke up for the protection of political dissenters, including communists and civil rights leaders, comedians using vulgar language on the airwaves or artists exploring sexuality in novels and on film.

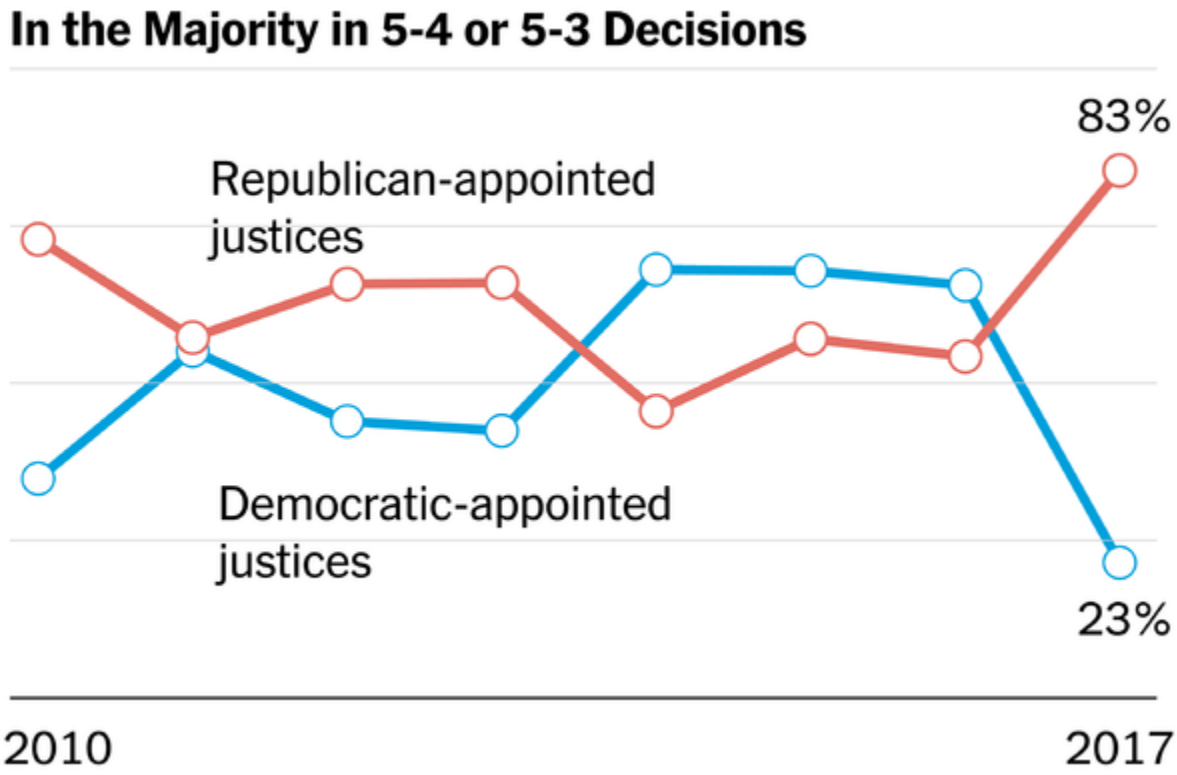
In 1971, Robert H. Bork, then a prominent conservative law professor and later a federal judge and Supreme Court nominee, wrote that the First Amendment should be interpreted narrowly in a law-review article that remains one of the most-cited of all time.

“Constitutional protection should be accorded only to speech that is explicitly political,” he wrote. “There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”

But a transformative ruling by the Supreme Court five years later began to change that thinking. The case, a challenge to a state law that banned advertising the prices of prescription drugs, was filed by Public Citizen, a consumer rights group founded by Ralph Nader. The group argued that the law hurt consumers, and helped persuade the court, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, to protect advertising and other commercial speech.

The only dissent in the decision came from Justice William H. Rehnquist, the court's most conservative member.

Kathleen M. Sullivan, a former dean of Stanford Law School, wrote that it did not take long for corporations to see the opportunities presented by the decision.



Conservatives in Charge, the Supreme Court Moved Right

Justice Anthony M. Kennedy's last Supreme Court term contained hints of his retirement and foreshadowed a lasting rightward shift.

June 28, 2018

“While the case was litigated by consumer protection advocates,” she wrote in the Harvard Law Review, “corporate speakers soon became the principal beneficiaries of subsequent rulings that, for example, struck down restrictions on including alcohol content on beer can labels, limitations on outdoor tobacco advertising near schools and rules governing how compounded drugs may be advertised.”

That trend has continued, with businesses mounting First Amendment challenges to gun control laws, securities regulations, country-of-origin labels, graphic cigarette warnings and limits on off-label drug marketing.

“I was a bit queasy about it because I had the sense that we were unleashing something, but nowhere near what happened,” Mr. Nader said. “It was one of the biggest boomerangs in judicial cases ever.”

“I couldn’t be Merlin,” he added. “We never thought the judiciary would be as conservative or corporate. This was an expansion that was not preordained by doctrine. It was preordained by the political philosophies of judges.”

Not all of the liberal scholars and lawyers who helped create modern First Amendment law are disappointed. Martin Redish, a law professor at Northwestern University, who wrote a seminal 1971 article proposing First Amendment protection for commercial speech, said he was pleased with the Roberts court’s decisions.

“Its most important contributions are in the commercial speech and corporate speech areas,” he said. “It’s a workmanlike, common sense approach.”

Liberals also played a key role in creating modern campaign finance law in Buckley v. Valeo, the 1976 decision that struck down limits on political spending by individuals and was the basis for Citizens United, the 2010 decision that did away with similar limits for corporations and unions.

One plaintiff was Senator Eugene J. McCarthy, Democrat of Minnesota, who had challenged President Lyndon B. Johnson in the 1968 presidential primaries — from the left. Another was the American Civil Liberties Union’s New York affiliate.

Professor Neuborne, a former A.C.L.U. lawyer, said he now regrets the role he played in winning the case. “I signed the brief in Buckley,” he said. “I’m going to spend long amounts of time in purgatory.”

To Professor Seidman, cases like these were part of what he describes as a right-wing takeover of the First Amendment since the liberal victories in the years Chief Justice Earl Warren led the Supreme Court.

“With the receding of Warren court liberalism, free-speech law took a sharp right turn,” Professor Seidman wrote in a new article to be published in the Columbia Law Review. “Instead of providing a shield for the powerless, the First Amendment became a sword used by people at the apex of the American hierarchy of power. Among its victims: proponents of campaign finance reform, opponents of cigarette addiction, the L.B.G.T.Q. community, labor unions, animal rights advocates, environmentalists, targets of hate speech and abortion providers.”

The title of the article asked, “Can Free Speech Be Progressive?”

“The answer,” the article said, “is no.”

Shifting Right

The right turn has been even more pronounced under Chief Justice Roberts.

The Supreme Court has agreed to hear a larger share of First Amendment cases concerning conservative speech than earlier courts had, according to the study prepared for The Times. And it has ruled in favor of conservative speech at a higher rate than liberal speech as compared to earlier courts.

The court’s docket reflects something new and distinctive about the Roberts court, according to the study, which was conducted by Lee Epstein, a law professor and political scientist at Washington University in St. Louis; Andrew D. Martin, a political scientist at the University of Michigan and the dean of its College of Literature, Science and the Arts; and Kevin Quinn, a political scientist at the University of Michigan.

“The Roberts court — more than any modern court — has trained its sights on speech promoting conservative values,” the study found. “Only the current court has resolved a higher fraction of disputes challenging the suppression of conservative rather than liberal expression.”

The court led by Chief Justice Earl Warren from 1953 to 1969 was almost exclusively concerned with cases concerning liberal speech. Of its 60 free-expression cases, only five, or about 8 percent, challenged the suppression of conservative speech.

The proportion of challenges to restrictions on conservative speech has steadily increased. It rose to 22 percent in the court led by Chief Justice Warren E. Burger from 1969 to 1986; to 42 percent in the court led by Chief Justice William H. Rehnquist from 1986 to 2005; and to 65 percent in the Roberts court.

The Roberts court does more than hear a larger proportion of cases concerning conservative expression. It is also far more likely than earlier courts to rule for conservative speech than for liberal speech. The result, the study found, has been "a fundamental transformation of the court's free-expression agenda."

In past decades, broad coalitions of justices have often been receptive to First Amendment arguments. The court has protected videos of animal cruelty, hateful protests at military funerals, violent video games and lies about military awards, often by lopsided margins.

But last week's two First Amendment blockbusters were decided by 5-to-4 votes, with the conservatives in the majority ruling in favor of conservative plaintiffs.

On Tuesday, Justice Clarence Thomas wrote for the majority that requiring health clinics opposed to abortion to tell women how to obtain the procedure violated the clinics' free-speech rights. In dissent, Justice Stephen G. Breyer said that was a misuse of First Amendment principles.

"Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech," Justice Breyer wrote.

On Wednesday, in announcing the decision on public unions, Justice Samuel A. Alito Jr. said the court was applying settled and neutral First Amendment principles to protect workers from being forced to say things at odds with their beliefs. He suggested that the decision on public unions should have been unanimous.

"Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned," he wrote. "Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues — say,

the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this."

In response, Justice Kagan said the court's conservatives had found a dangerous tool, "turning the First Amendment into a sword." The United States, she said, should brace itself.

"Speech is everywhere — a part of every human activity (employment, health care, securities trading, you name it)," she wrote. "For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices."

A version of this article appears in print on July 1, 2018, on Page A1 of the New York edition with the headline: How Free Speech Was Weaponized By Conservatives.

Inside the Christian legal powerhouse that keeps winning at the Supreme Court

By The Washington Post | Posted Online July 05, 2018

The Supreme Court in Washington is seen at sunset. (AP Photo/J. Scott Applewhite, File)

WASHINGTON - Two days before the announcement of Justice Anthony Kennedy's retirement, a woman who stood to gain from it was on the steps of the Supreme Court once again. Kristen Waggoner's blond bob was perfectly styled with humidity-fighting paste she'd slicked onto it that morning at the Trump hotel. Her 5-foot frame was heightened by a pair of nude pumps, despite a months-old ankle fracture in need of surgery. On her wrist was a silver bracelet she'd worn nonstop since Dec. 5, 2017, the day she marched up these iconic steps, stood before the justices and argued that a Christian baker could legally refuse to create a cake for a gay couple's wedding.

Her job was to be the legal mind and public face of the Alliance Defending Freedom, an Arizona-based Christian conservative legal nonprofit better known as ADF. Though it is far from a household name, the results of ADF's

work are well known. Masterpiece Cakeshop v. Colorado Civil Rights Commission was just one of ADF's cases at the Supreme Court this term.

The organization has had nine successful cases before the court in the past seven years, including Burwell v. Hobby Lobby, which allowed corporations to opt out of covering contraceptives based on religious beliefs. And it was ADF that created model legislation for "bathroom bills," which bar students from using restrooms that don't correlate to their sex at birth.

Supreme Court Associate Justice Anthony Kennedy testifies on Capitol Hill in Washington on March 23, 2015. Kennedy last month announced he'll be retiring in July. (AP Photo/Manuel Balce Ceneta, File)

Opponents say ADF is seeking to enshrine discrimination into law. But to its supporters, ADF is fighting for the right of Christians to openly express their faith - and winning.

Or as ADF's CEO, Michael Farris, put it: "We would say the combination of hard work and God's blessing appears to be paying off."

With Donald Trump in the White House, a savvy media strategy boosting donations, and a new Supreme Court justice on the way, ADF is poised to become more influential than ever.

But first, Waggoner was about to find out whether the organization had a chance of returning to the court for another high-profile battle. ADF's win in Masterpiece was considered to be a narrow ruling. The justices avoided the case's central question - whether the business owner had the right to decline to make a creation for a same-sex wedding - but acknowledged it would have to be answered someday, in some future case.

President Donald Trump speaks to the media regarding the announcement that Supreme Court Associate Justice Anthony M. Kennedy will retire at the end of July, in the Oval Office of the White House in Washington, June 27, 2018. (AP Photo/Pablo Martinez Monsivais)

If Waggoner has her way, that day will come soon, and the case will be one of hers. ADF has four cases pending in the lower courts regarding Christian business owners who will serve gay people but won't make custom creations for same-sex weddings. On this morning in late June, the court was going to decide the fate of one of them: Barronelle Stutzman, a florist from Washington state.

Lower courts had ruled unanimously against her. Because the justices had just ruled in Masterpiece, they were unlikely to take her case immediately. Waggoner knew they could decline to touch it altogether. Or they could order the Washington courts to give Stutzman a do-over - giving ADF a clear path back to the Supreme Court.

Waggoner kept her eyes on her phone, where the SCOTUSblog website was posting minute-by-minute updates about what was happening inside the court. News cameras waited for her reaction. Her silver bracelet dangled on her wrist. It was engraved with a line from the Bible's Book of Esther: "For such a time as this." Nine Supreme Court cases in seven years and ADF had won them all. She was hoping it was such a time that God would grant them another.

Masterpiece Cakeshop owner Jack Phillips decorates a cake inside his store in Lakewood, Colo., March 10, 2014. (AP Photo/Brennan Linsley)

Legal work is a family endeavor

Seven months earlier, in a Washington D.C. hotel room, Waggoner's 15-year-old daughter, Grace, awoke in a panic. An alarm clock was going off, and beside her, her mom was still asleep. With her father, brother and grandparents, Grace had flown in from Arizona to be here for this morning, the most important day in her mom's career. They all had to be at the

Supreme Court with the baker, Jack Phillips, in just a few hours. Grace started shaking her mom awake.

"I had purposely set the alarm for 10 minutes early and I had a second alarm set," Waggoner said, laughing as she told the story. "But it was very sweet."

This work had long been a family affair for the 45-year-old attorney, who grew up in Longview, Washington, as the daughter of a Christian school superintendent. She credits her father with instilling the values and views that populate the 121 active cases she oversees at ADF, where there are 63 lawyers operating on a budget of more than $50 million.

To describe these cases is to traffic in loaded language. ADF regularly sues colleges for creating versions of "safe spaces" that it sees as First Amendment violations. What some people call birth control, ADF calls "abortion-inducing drugs" and argues that the government is forcing those who oppose abortion to provide them. Allowing transgender students into their chosen bathrooms is, to ADF, failing to protect the privacy of the majority of students.

Activists rally at the Supreme Court as President Donald Trump prepares to choose a replacement for Justice Anthony Kennedy, on Capitol Hill in Washington, June 28, 2018. (AP Photo/J. Scott Applewhite)

Asked whether she believes it is possible for a person to be transgender, Waggoner said she believes "it is possible to be confused about your gender." Waggoner answers all questions about her work, even on the most contentious of issues, with a smile. Her colleagues say she is always, always smiling. Her incessant pleasantness can come off as strategic, a way of disarming those trying to paint her as cruel or intolerant. She says joy is just the mark of a person of faith.

Critics point to LGBT-disparaging rhetoric from the man who helped found ADF in the 1990s as proof of what the organization is really after. The Southern Poverty Law Center classifies ADF as a "hate group," a claim ADF has responded to by calling the SPLC a "radical leftist organization."

"Whether they are truly committed to religious freedom, or whether they are using it as a way to package and sell their opposition to homosexuals and abortion, I don't know," said the American Civil Liberties Union's David Cole, who represented the gay couple in Masterpiece.

The justices of the U.S. Supreme Court gather for an official group portrait on June 1, 2017. (AP Photo/J. Scott Applewhite, File)

Key question: what counts as expression?

Those at ADF believe their positions on same-sex marriage and abortion should be irrelevant when it comes to the First Amendment. In court briefs, press releases and interviews, they repeat mantras such as "Tolerance is a two-way street" and "If we want freedom for ourselves, we must extend it to others." In other words, it doesn't matter if you don't agree with the baker's views. The government can't force him to express something that goes against them.

But what counts as expression? When Waggoner stood before the justices in December, they bombarded her with rapid-fire versions of this question. A pre-made cake in the cooler? Not expression, Waggoner assured them. The person who designs the invitations? That would be expression, she said. How about the hairstylist? The menu designer? The jeweler? Her answerscame just as fast: No. Yes. It depends.

"Who else then?" Justice Ruth Bader Ginsburg asked. "Say the person who does floral arranging, who owns a floral shop?"

Thinking of Stutzman, Waggoner smiled. She was ready to answer the question.

This undated photo provided by Alliance Defending Freedom shows Breanna Koski, left, and Joanna Duka in Phoenix. An Arizona appeals court in June upheld a Phoenix anti-discrimination law that makes it illegal for businesses like the women's wedding invitation business to refuse service to same-sex couples because of religion. The ADF is representing them. (Alliance Defending Freedom via AP)

The florist herself was in the back of the courtroom. ADF had flown her in to watch, a preview of what she might one day face. Stutzman and her husband had spent hours waiting in line to get a seat inside, but ended up sitting so far back, she couldn't make out what the justices were saying. She tried to glean meaning from their body language instead.

Because of the baker's case, her own case had been put on hold. Again. It had been five years since she had declined to make floral arrangements for the wedding of her client Rob Ingersoll, since the attorney general of Washington state had sued her and the shop she inherited from her mother, Arlene's Flowers. Five years of hate mail, of vile phone calls, of going on TV to say again and again: "I serve everybody who comes in my shop" and "Because my faith teaches me that marriage is between a man and a woman, that just wasn't something I could do for Rob."

Constantly putting Stutzman before the media is Waggoner's strategy, which became ADF's strategy when she was put in charge of their legal division in 2014. Each big case - the printer who won't make shirts for a pride parade, the teen girl who feels unsafe with "a man" in her school bathroom, the pregnancy centers accused of misleading women - gets a mini-documentary about their personal journeys and dedication to their faith.

Baker Jack Phillips, owner of Masterpiece Cakeshop, manages his shop Monday, June 4, 2018, in Lakewood, Colo., after the U.S. Supreme Court ruled that he could refuse to make a wedding cake for a same-sex couple because of his religious beliefs did not violate Colorado's anti-discrimination law. (AP Photo/David Zalubowski)

"If we can't show their souls to people, their constitutional freedoms will falter," Waggoner said. "We have to show what is at stake."

Supporters send cards, letters and Bibles

Come June, as Waggoner was on the steps of the Supreme Court, Stutzman was waiting for the news of her case's future in her shop in Washington state. She was sorting bills in her office. Her desk was filled with cards, letters and Bibles sent from her supporters, her favorite of which was from a youth group. She was always worrying whether the next generation has what it takes to defend their faith.

Just after 6:30 a.m., her phone rang. She braced herself for the news.

"GVR," Waggoner shouted into her ear. "GVR!"

Stutzman knew what that meant: Grant, vacate, remand. The case was coming back to Washington state. Her previous losses no longer mattered. They still had a chance.

Supporters of baker Jack Phillips, owner of Masterpiece Cakeshop, hug inside Phillips' shop Monday, June 4, 2018, in Lakewood, Colo., after the U.S. Supreme Court ruled that he could refuse to make a wedding cake for a same-sex couple because his religious beliefs did not violate Colorado's anti-discrimination law. (AP Photo/David Zalubowski)

"The videographer will be at the shop at 7:30," Waggoner said. They needed to film a reaction video to send to reporters. Then would come a media call, a few more interviews, a two-hour drive to Spokane so she could appear on Fox News the next morning. An earnest plea for donations would appear on the ADF website: "The threat to Barronelle's religious freedom is a threat to your religious freedom."

The next morning, Waggoner was back on the Supreme Court steps to hold a news conference celebrating ADF's second win of the term, NIFLA v. Becerra, a case about California's mandate that religious pregnancy centers notify women that the state provides free or low-cost access to abortions.

The next morning, Waggoner was back on the Supreme Court steps to hold a news conference celebrating ADF's second win of the term, NIFLA v. Becerra, a case about California's mandate that religious pregnancy centers notify women that the state provides free or low-cost access to abortions.

She stepped up to the podium and read a line from the majority opinion, written by Justice Kennedy.

"Government must not be allowed to force persons to express a message contrary to their deepest convictions," she read. That line, she was sure, was going to help Stutzman and so many of ADF's cases.

The next day, a great week got better. At the news of Kennedy's retirement, Waggoner whooped, loudly, in the middle of the law office. ADF quickly put out a press release: It looked forward to a justice who would uphold "the original public meaning of the Constitution." That night, Waggoner and her daughter went to dinner and a movie in celebration of a week - a year, really - that had gone in their favor. Then, back in her room in the Trump hotel, she returned to her work.

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