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The Network

The White House, The Department of Justice, and The Bench

> One fact is clear and compelling. No President exercises any power more far-reaching, more likely to influence his legacy, than the selection of federal judges.
>
> —*Edwin Meese III*[1]

Since the early years of the Federalist Society in the 1980s, its members have believed that the easiest way to change the law is to change the judges. They have been phenomenally successful in doing so. The Federalist Society came into being at a catalytic moment for remaking the judiciary. Southern resentment at the integration that followed *Brown v. Board of Education*, disenchantment by "law and order" citizens with the criminal procedure rulings of the Warren Court, and profound disagreement with the right to choose an abortion recognized in *Roe v. Wade* made large sectors of the conservative and Republican base angry at the Supreme Court. Ronald Reagan's election campaign and presidency and the general renaissance of conservative ideas created an opportunity both to galvanize the base to demand change on the bench and to recruit, educate, and groom a new generation of elite lawyers as judges. The nascent Federalist Society benefited from this confluence of events. Throughout the administrations of all three Republican presidents since its founding, Federalist Society members occupied key positions in the White House, the Department of Justice, and as outside advisors with respect to the nomination of federal judges. Working together with other conservatives, they have moved the federal judiciary significantly to the right over the past thirty years. And as they predicted it would, the law has followed.

The most obvious success of the Federalist Society is that it has four justices on the U.S. Supreme Court. Antonin Scalia helped found the society as a faculty advisor at the University of Chicago Law School. His sons Eugene and John are members; Eugene is the chairman of the Employment and Labor Law Practice Group, and John is the chairman of that group's publications subcommittee. Federalist Society members were key supporters of Clarence Thomas's nomination to the Supreme Court. Thomas remains a major figure in the Federalist Society and delivered the keynote speech at the 30th Annual Federalist Society Student Symposium in February 2011, where the theme was "Capitalism, Markets, and the Constitution."[2] Later in the year, as noted in the Introduction, Thomas and

Scalia were honored at the annual black-tie dinner of the society, a major fundraising event. They participated despite the fact that their activities as guests of honor would have been a clear violation of the Code of Conduct for United States Judges, for any federal judge other than Supreme Court justices.[3] Samuel Alito is a longtime member of the Federalist Society. He addressed the annual dinner of the group in 2009. Chief Justice John Roberts claimed during his confirmation hearings to have no recollection of being a member, although his name appeared in the organization's 1997–1998 leadership directory as a member of the steering committee of the Washington, D.C., chapter.[4] His support of the Federalist Society and its principles is evident from his appearances before the group, including his video tribute to the society, which is featured on its website.[5]

Success in obtaining Supreme Court appointments was the result of a long-term strategy by the Federalist Society and other conservatives in the Reagan administration. The first move was to get young members and friends of the society who were potential Supreme Court justices onto the lower federal courts. As David Kirkpatrick noted in the *New York Times*, the appointment of Alito to the Supreme Court was "the culmination of a disciplined campaign begun by the Reagan administration to seed the lower federal judiciary with like-minded jurists who could reorient the federal courts" toward the philosophy of originalism.[6] Those who made it to the Supreme Court were first appointed to one of the courts of appeals.

The eventual Supreme Court justices were part of a much larger pool of Federalist Society members or close friends named to the federal bench by Republican presidents, advised by lawyers who either were, or would become, Federalist Society members. Among those Reagan appointed to the lower federal courts were the original Federalist Society faculty advisors. He appointed Scalia to the D.C. Circuit; Ralph K. Winter, Yale Law School, to the Second Circuit; and Robert Bork, Yale Law School, to the D.C. Circuit. Other important appointments were Richard Posner (Seventh Circuit), Frank Easterbrook (Seventh Circuit), J. Harvie Wilkinson (Fourth Circuit), Edith Jones (Fifth Circuit), Alex Kozinski (Ninth Circuit), and Kenneth Starr (D.C. Circuit). Reagan later appointed Scalia to the Supreme Court. These judges were young when appointed and are either still on the bench or otherwise active in the law.[7] Among those George H. W. Bush appointed to the lower federal courts were Thomas (D.C. Circuit), Roberts (D.C. Circuit), Alito (Third Circuit), and Michael Luttig (Fourth Circuit). Bush Sr. later appointed Thomas to the Supreme Court, and Roberts and Alito were appointed to the Supreme Court by his son, George W. Bush.

From the moment they graduated from law school, the Federalist Society founders secured important positions in the White House and the Department of Justice (DOJ). The young Federalist Society lawyers, under the tutelage of Ed Meese, had a remarkably significant impact on legal and policy decisions during the Reagan administration, and their successors continued to do so, particularly in the administration of George W. Bush. At the same time, the White House and the DOJ served as incubators for conservative lawyers, predominantly members

of the Federalist Society, who would go on to take judicial appointments or become powerful lawyers or policymakers. Scalia served as assistant attorney general in the Office of Legal Counsel under President Nixon. Roberts, Alito, and Thomas all worked in the Reagan administration. Roberts was a special assistant to the attorney general and later associate counsel to the president. Alito was assistant to the solicitor general and later deputy assistant to Attorney General Meese. Thomas was assistant secretary for civil rights at the DOJ and later the chairman of the Equal Employment Opportunity Commission (EEOC). Roberts later became the principal deputy solicitor general under George H. W. Bush. Scalia's service under President Nixon predated the founding of the Federalist Society, but once the group was in existence, its networking resources made placing Federalist Society members and other conservatives in the federal legal apparatus much easier.

Once a large number of conservative judges and Supreme Court justices were on the bench, Federalist Society law graduates obtained clerkships with them, an important career stepping-stone. Edward Lazarus, a former Supreme Court clerk, called membership in the society during the eighties "a prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and the White House."[8] Eventually the Federalist Society developed a powerful pipeline from the law schools to judicial clerkships, White House and DOJ positions, judgeships, and other positions of power and influence.

As an example, consider two of the staff lawyers involved with judicial selection during the Bush administration, Rachel Brand and Kate Comerford Todd. Rachel Brand graduated from Harvard Law School in 1998, where she was the deputy editor in chief of the *Harvard Journal of Law and Public Policy* (the Federalist Society's law journal). She then clerked for Justice Charles Fried on the Massachusetts Supreme Judicial Court. After a brief stint as general counsel to Elizabeth Dole's Presidential Exploratory Committee, she worked two years for Cooper, Carvin & Rosenthal (where lead partner Charles J. Cooper is a Federalist Society member and former DOJ lawyer). She followed that with two years at the White House, as associate counsel to the president, one year as a clerk for Supreme Court Justice Anthony Kennedy, and four years at the DOJ. She left the DOJ to join the D.C. office of law firm behemoth WilmerHale in its Regulatory and Government Affairs and Litigation/Controversy Departments.[9] Kate Todd graduated from Harvard Law School in 1999. She clerked for two Federalist Society stalwarts, first for Judge Luttig on the Fourth Circuit Court of Appeals, and later for Justice Thomas on the Supreme Court. She became a partner at the Washington firm Wiley Rein & Fielding, at which time she was a vice chair of the Federalist Society's Federalism and Separation of Powers Practice Group. She went to the White House as associate counsel to the president when Fred Fielding became White House counsel. Kate's husband, Gordon Todd, also worked for the Office of Legal Counsel in the Bush administration, where he was special counsel for Supreme Court nominations, including that of Justice Alito. After Alito joined the court, Gordon Todd was hired

as one of his clerks. In June 2011, the Litigation Center of the U.S. Chamber of Commerce announced that it had hired both Rachel Brand and Kate Todd, Brand as chief counsel for regulatory litigation and Todd as chief counsel for appellate litigation. The chief legal officer of the chamber said their hiring "couldn't be more timely, given the aggressive regulatory overreach America's job creators now face."[10] If they want to go on the bench, Rachel Brand and Kate Todd are highly likely to be appointed to federal judgeships during the administration of the next Republican president.

At a Federalist Society conference entitled "The Presidency and the Courts," near the end of the president's second term in office, keynote speaker George W. Bush thanked the members of the "mighty Federalist Society" for their hard work in recruiting more Americans to the selection of good judges. He declared that with their support he had fulfilled his campaign pledge to appoint judges who would "faithfully interpret the Constitution—and not use the courts to invent laws or dictate social policy."[11]

To select judges who will be effective in moving the law in the direction he desires, the president has to be able to predict how a judicial candidate will rule, in general terms, once he or she is on the bench. It is generally agreed, however, that it is inappropriate to ask judicial candidates how they would decide specific issues likely to come before the courts. At various times, both Republicans and Democrats have accused presidents of the opposing party of employing ideological "litmus tests" in selecting judges. Presidents and their top advisors, of course, deny such charges, asserting that they choose judges based on their legal acumen, background and experience, and judicial temperament. Yet few would deny that President Franklin Roosevelt selected judges who would be more supportive of his New Deal policies than their predecessors, or that President Reagan nominated judges who shared his conservative social and economic views.

Federalist Society members and their allies argue that it is appropriate for a president to select judges based on their "judicial philosophy," which they define as the principles that determine the role that the judicial branch plays under our Constitution. They distinguish judicial philosophy from a judicial candidate's views on specific political issues that might arise in cases before the courts, such as abortion, prayer in schools, criminal procedure questions, and the like. In their view, it is inappropriate for presidents to ask judicial candidates about their opinions on such issues, but permissible and desirable to inquire about judicial philosophy.

Gary McDowell is a professor at the Jepson School of Leadership Studies at the University of Richmond, and he worked as a speechwriter for Meese when Meese was the attorney general. McDowell considers the Federalist Society to be "a revolutionary development in legal education" and a "powerful force for good."[12] In the mid-1980s, he viewed the courts as controlled by liberal judges and liberal thought, and he became a key player in early conservative efforts to remake the federal judiciary. According to Meese, during the Reagan administration McDowell was "instrumental" in developing a strategy in a series of articles and speeches about

"judicial allegiance to the Constitution and fidelity to it."[13] McDowell believes the country needs to return to the "old race of judges" who engaged in a strict interpretation of the constitution according to fixed rules. He identifies Clarence Thomas as the paradigmatic example of a judge who takes language and original meaning seriously. Robert Bork is another of his heroes. In McDowell's words, the Senate's rejection of Bork's nomination to the Supreme Court in 1987 was an event "we must never forget, must never forgive."[14] He looks for judges who will engage in judicial review but not "judicial activism," and examines a candidate's views concerning principles of federalism and separation of powers to determine his or her philosophy concerning judicial power.[15] The McDowell-Meese school of judicial selection has guided the thinking of Federalist Society members, and the actions of Republican presidents, for three decades.

The Reagan Administration

President Reagan came to Washington in 1981 committed to enacting a conservative social and economic agenda. Selecting judges who would support that agenda was a critical part of his program. The Republican Party platforms in 1980 and 1984 called for judges who would protect "the rights of law-abiding citizens," favor "decentralization of the federal government" and the return of decision-making power to state and local officials, respect "traditional family values" and "the sanctity of innocent human life," and be committed to "judicial restraint."[16] The Republicans contrasted judicial restraint with reading the Constitution to find individual rights not enumerated in the text. On the other hand, Reagan sought aggressive jurists when it came to enforcing the criminal law: "We don't need a bunch of sociology majors on the bench. What we need are strong judges who will aggressively use their authority to protect our families, communities, and our way of life . . . judges who do not hesitate to put criminals where they belong—behind bars."[17]

For the last three years of Reagan's second term, Federalist Society member Stephen Markman was the assistant attorney general in charge of the DOJ's Office of Legal Policy (OLP), the office that screened judicial candidates.[18] Markman has written that Reagan was determined to appoint only judges who were "committed to the rule of law and to the enforcement of the Constitution and statutes as those [that] were adopted by 'we the people' and their elected representatives."[19] Changing the philosophical orientation of the courts from the jurisprudence of the Warren Court era was essential to Reagan's overall program. According to Markman, once candidates had been identified, the OLP reviewed their written work, the comments of local bar leaders, and any recommendations by members of Congress. The OLP then determined which candidates to talk to, and invited them to the DOJ for four to five hours of interviews by several different DOJ lawyers. They discussed federalism, separation of powers, statutory interpretation, constitutional interpretation, criminal justice, and the candidate's reasons for wanting to be a judge. Markman asserts that they were interested in whether a candidate "reasoned from

constitutional premises," but that they did not ask about a candidate's views on individual issues or employ any "litmus test."

The OLP followed up the personal interviews by talking with public officials, bar leaders, sitting judges, and others in the candidate's home state. It then prepared a summary of each candidate's qualifications, and the attorney general selected one candidate to recommend to the President's Federal Judicial Selection Committee. The counsel to the president chaired the committee, which also included the attorney general, the deputy attorney general, and the assistant attorney general for the OLP. Officials at the White House also did their own background checks on proposed nominees.

If the committee decided to go forward with a nominee, it would send his or her name to the FBI and to the American Bar Association (ABA) Standing Committee on the Federal Judiciary. If they did not turn up information that revealed unfitness, the attorney general and the counsel to the president recommended the person to the president for formal nomination.

Federalist Society members and allies were critical participants in judicial selection in the Reagan administration. The Federalist Society was only formed in 1982 as a law student organization, so many of the important conservative lawyers in the Reagan administration were not initially members. Ed Meese, however, quickly realized the significance of the group and arranged for the Federalist Society founders to get jobs either in the White House or the DOJ after graduation from law school. Conservative lawyers in the administration began attending meetings organized by the society, and many eventually joined it or became frequent contributors to Federalist Society publications or speakers at its debates and panels.

Meese, originally as counselor to the president and later as attorney general, was a key figure in judicial selection. Peter J. Wallison was a principal advisor on judicial selection during Meese's tenure as White House counsel.[20] He later became an advisor on insurance issues to the Federalist Society's Financial Services and E-Commerce Practice Group and a frequent speaker at Federalist Society events. In 1986, Meese named Grover Rees III as a special assistant to review the judicial philosophy of judicial candidates. Rees is a frequent speaker at Federalist Society events. In fact, the first Federalist Society event held at Yale Law School, in January 1982, was a debate over *Roe v. Wade* between Rees, then a professor at the University of Texas Law School, and Burke Marshall, a former assistant attorney general in the Kennedy administration and then a member of the Yale law faculty.[21]

Professor Henry Abraham concluded that the Reagan administration was arguably "more effective than any of his recent predecessors" in selecting judges to pursue a "coherent and ambitiously systematic legal policy agenda."[22] Critics of judicial selection during the Reagan administration claimed that despite their protestations to the contrary, Reagan's advisors did use an "ideological litmus test" to select nominees.[23] Debra Cassens Moss reported in the *ABA Journal* that the DOJ was "thoroughly screening judicial candidates for ideology to ensure a conservative judiciary."[24] Contrary to the assertion by Markman that specific cases were not discussed, she

quotes Grover Rees as saying, "Of course we discussed particular cases, real as well as hypothetical, in the course of trying to figure out how the person approached the Constitution. I don't know any other way to do it. Otherwise, you're settling for somebody's slogans."[25] After Judge Roger J. Miner's death on February 18, 2012, his wife, Jacqueline, told the *New York Times* that his failure to tip his hand on how he would vote on the abortion issue may have cost him a seat on the Supreme Court. In 1987, it was widely thought that Miner was next in line when President Reagan's nomination of Robert Bork to the Supreme Court was failing. A Republican senator on the Judiciary Committee called Judge Miner at home to ask his views about abortion. While the judge was telling the senator that he would decide each case on its merits, his wife was shouting at him from the next room to be more politic. Reagan passed over Miner and appointed Anthony Kennedy to the court.[26]

Federalist Society members were heavily involved in the attempt to secure Senate approval for Bork's nomination to the Supreme Court in 1987. Peter Keisler was in the White House Counsel's Office and "was at Bork's side throughout the fight."[27] David McIntosh worked on the nomination at the White House, Clint Bolick at the Department of Justice, and Lee Liberman, who was then teaching at George Mason, recruited support. Nina Easton reports, "Five months after his defeat, an embittered Bork found solace in the embrace of the Federalist Society's annual conference, where he would be treated to four standing ovations and the sight of audience members sporting 'Reappoint Bork' buttons."[28] Ralph Reed, the first executive director of the Christian Coalition, is quoted by Easton as saying, "I have always felt the vicious treatment of Thomas (and Robert Bork) by the radical Left helped inspire our movement." Easton concluded, "And so, the movement would Bork back."[29]

Whether the interviewers asked candidates about specific cases or not, exploration of the potential nominee's "judicial philosophy" in fact provided sufficient information to predict how he or she might rule on many substantive questions. Professor Sheldon Goldman is a leading academic who has studied judicial selection for the past several decades; as he observed, candidates who believed in "judicial restraint" were likely to share President Reagan's views with respect to substantive issues such as the right to abortion, busing to desegregate public schools, the exclusionary rule in criminal cases (under which evidence gathered in violation of a defendant's Fourth Amendment rights is thrown out), the rights of criminal defendants, prayer in public schools, and affirmative action in employment and education.

The influence of the young Federalists and the older conservative lawyers in the Reagan administration whom they recruited into the society was remarkable.[30] Among the Federalist Society members with crucial policy positions were Charles Cooper, head of the Office of Legal Counsel; Stephen Markman, head of the OLP; John Bolton, in the Office of Legislative Affairs; Douglas Ginsburg, in the Antitrust Division; Terry Eastland, in the Office of Public Affairs; and Steven Calabresi, David McIntosh, and Kenneth Cribb as special assistants.[31] Amanda Hollis-Brusky reports that Thomas A. Smith, one of the first Federalist Society members, described the Meese DOJ as a "Federalist Society shop."[32]

The Office of Legal Policy Reports

The young Federalist Society lawyers in the DOJ provided the intellectual capital for a series of government publications that informed the legal and constitutional agenda for conservatives inside and outside the government for the next three decades. The agenda was based on an original meaning method of constitutional interpretation, a limited role for the federal government, and judicial restraint with respect to the recognition of constitutional rights not explicitly enumerated in the text of the Constitution.

In *Report to the Attorney General: The Constitution in the Year 2000*, published in 1988, the OLP described fifteen areas of potential conflict on the Supreme Court between then and 2000. The emphasis on selecting the right judges to resolve these issues was paramount:

> [I]t is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible. There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.[33]

The report's areas of concern included the exclusionary rule in criminal cases, abortion, homosexual rights, morality as a basis for legislation, affirmative action and disparate impact cases, policies with a disparate impact based on wealth and social welfare spending, private education and the religion clauses of the First Amendment, the free exercise clause and accommodation of religious practices, freedom of association and protection from government policies as applied to private groups, the takings clause and the contracts clause, the authority of the president in foreign policy, protection of the states by the Tenth Amendment, the equity power of the federal courts to restructure local institutions, the rights of aliens, and separation of powers.

The prevailing philosophy of constitutional interpretation among Federalist Society members has been the original meaning school of thought, notably advanced in the opinions of Justices Scalia and Thomas. In a lengthy and detailed argument in favor of the original meaning approach, the OLP characterized the choice of interpretive methodology as "[t]he most basic issue facing constitutional scholars and jurists today."[34] The OLP report defined original meaning jurisprudence as "the enterprise of attempting to interpret the provisions of the Constitution as those provisions were generally understood at the time of their adoption by the society which framed and ratified them."[35]

William Bradford Reynolds, an assistant attorney general under Meese, and later a member of the Federalist Society's board of visitors, was an early proponent of original meaning jurisprudence. In an article about judicial selection, Reynolds wrote that "the Constitution and laws passed pursuant to it have meanings;

otherwise, the very idea of consent—of ratifying or amending the Constitution or voting for or against laws—would be absurd. Consent must mean knowing consent, and knowing consent is possible only if the constitutional provisions consented to have discernable meanings."[36]

Reynolds was also the author of the metaphor that Chief Justice Roberts famously employed to summarize his judicial philosophy in his testimony at his Senate confirmation hearings. To emphasize his contention that judges do not make law, Roberts quipped, "Judges are like umpires. Umpires don't make the rules; they apply them. . . . And I will remember that it's my job to call balls and strikes and not to pitch or bat."[37] In a 1990 article, Reynolds had criticized the manner in which the Senate exercised its advise and consent function in judicial selection: "[T]he job of a judge is much like that of an umpire or referee: simply to call the balls and strikes; not undertake to rewrite the rule book."[38] President George W. Bush quoted the phrase again in 2008 when speaking to the Federalist Society about how proud he was of his nomination of Roberts to the position of chief justice.

The legal theories that the Rehnquist Court later employed with respect to federalism and limits on the power of Congress mirrored those set out in the reports of the OLP during the Reagan administration.[39] In one of the most important of these reports, *Guidelines on Constitutional Litigation* (1988), the DOJ provided government lawyers with a set of positions that were presumptively to be followed unless a deviation from them was cleared with supervisors. The *Guidelines* analyzed the prevailing judicial doctrine on individual issues and identified points at which the administration's views as to what the law should be varied from the current law. The document analyzed Supreme Court opinions that were "consistent" and "inconsistent" with the administration's views. Professor Dawn Johnsen concluded, "The unmistakable premise of the Guidelines was that executive branch lawyers were to seek to advance the administration's understanding of the Constitution—and not simply what the courts said the Constitution means—even when at odds with 'inconsistent' Supreme Court decisions."[40] This is in line with the view that many Federalist Society members came to espouse: that there is a difference between the Constitution (the text) and constitutional law (the text as interpreted by the Supreme Court), and that a lawyer's ultimate loyalty is to the former.[41] The view is at odds with the Supreme Court's opinions in *Marbury v. Madison* and *Cooper v. Aaron*, which held that it is the Supreme Court that determines what the Constitution means.[42]

Professor Johnsen describes the *Guidelines*' success in the Supreme Court's adoption of the principles that the OLP articulated for limiting the power of Congress to enact legislation under section 5 of the Fourteenth Amendment.[43] Section 5 provides Congress with the authority to pass statutes to enforce the due process and equal protection guarantees of the Fourteenth Amendment. The Rehnquist Court adopted a narrow interpretation of Congress's power under section 5, as recommended in the *Guidelines*.[44] As a result, it declared unconstitutional

major portions of a series of civil rights acts, including the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, the Violence against Women Act, and the Americans with Disabilities Act.[45]

The ideology of small government and judicial restraint permeated the OLP reports. In *Religious Liberty under the Free Exercise Clause*, the authors asserted that a significant factor that had complicated free exercise clause jurisprudence was the advance of the welfare state. They wrote:

> The so-called "Affirmative Age" of government has transformed the way in which we approach constitutional rights by emphasizing entitlements over responsibilities, equality over liberty, and positive over natural law. Our rights-based era has cast the government—and particularly the courts—in the role of guardian of our rights, and because the influence of government is so widespread the power to determine what rights it will guard has become the power to determine the rights themselves.[46]

Another OLP publication, *Justice without Law: A Reconsideration of the "Broad Equitable Powers" of the Federal Court*, criticized the broad use of injunctions in school desegregation cases and suits alleging unconstitutional conditions in mental hospitals and prisons.[47] Based on its research into the equitable powers of English courts and the history of U.S. constitutional provisions, the OLP concluded that the Supreme Court's unanimous opinion in the remedy phase of *Brown v. Board of Education* was not supported by a proper analysis of equitable principles. It characterized the court's later unanimous decision approving busing as a desegregation remedy as based on "tautological and circuitous reasoning," and representative of the court's assumption of a "license-without-limit to make policy for social institutions."[48] The document reflects the ongoing Federalist Society critique of "activist judges," arguing that equity had become "a special judicial superpower that gives little recognition to issues of jurisprudence, constitutionalism, separation of powers, or federalism."[49]

The George H. W. Bush Administration

George H. W. Bush became president in 1989. In his administration, the person principally responsible for screening nominees for judicial appointments was the White House counsel, C. Boyden Gray, now a member of the Federalist Society's board of directors. Gray's staff was considered "a bastion of bright conservatism."[50] Gray's most important staff member with respect to judicial nominees was Lee Liberman, one of the Federalist Society founders. Murray G. Dickman, Attorney General Dick Thornburgh's chief advisor on judicial nominations, said, "For information about people who are appeals court nominees, Lee has the best view of anyone in the country."[51]

President Reagan had appointed Dick Thornburgh as attorney general during his last six months in office, and President George H. W. Bush retained him. Under

Bush, Thornburgh changed the name of the Office of Legal Policy in the DOJ to the Office of Policy Development, and the selection of judicial candidates was removed from the newly named office. Originally the intent was to make Robert B. Fiske Jr. a deputy attorney general and to put judicial selection activity in his office. Conservative Republicans, however, objected to Fiske because he had been a member of the ABA Standing Committee on the Federal Judiciary. The Bush administration threatened to stop consulting with the ABA on judicial nominees unless it explicitly stated it would not take into account political or ideological views of nominees in considering their qualifications. After some negotiation, the ABA committee agreed. Fiske, however, withdrew his name when it became clear that the White House would not support his nomination. Thornburgh made Dickman, assistant to the attorney general, responsible for coordinating judicial selection at the DOJ.[52]

The Bush administration retained the systematic screening process that Reagan had initiated and also used the president's Committee on Federal Judicial Selection. Lawyers at the DOJ did the interviewing. They claimed that they did not ask candidates about particular cases. To emphasize the point, Gray said that when Attorney General Thornburgh and he appeared before the Judiciary Committee, they were "read the riot act" by Senators Joe Biden, Ted Kennedy, Orrin Hatch, Strom Thurmond, and Patrick Leahy, and told that they would not even give a hearing to a nominee who had been asked about his or her views on a specific issue.[53]

It is clear, however, that the administration, through its Federalist Society aides, did research and inquire into the judicial philosophy of potential nominees. Liberman, as assistant White House counsel, reviewed candidates' histories, including judicial opinions where available. Gray chaired the judicial selection committee, which met weekly at the White House. Dickman and Liberman were members of the committee, as were the attorney general, the deputy attorney general, the assistant to the president for personnel, and the assistant to the president for legislative affairs. The White House chief of staff was on the committee, but attended rarely because of other business.[54]

Roger J. Miner, of the Second Circuit Court of Appeals, was critical of the influence of the Federalist Society over judicial selection during this period, describing it as "in the hands of those who profess a blind adherence to the doctrine of original intent."[55] Noting that it was "well known" that no federal judicial appointment was made without the "imprimatur" of Liberman, Judge Miner wrote that "the hot flame of ideology" burned brightly in Gray's office, "tended by those who consider themselves the descendants of the original Federalists but who indeed are not."[56]

The George W. Bush Administration

During the administration of President George W. Bush, the Federalist Society brought its full weight to bear on the judicial selection process. Both Supreme Court justices appointed by Bush—Roberts, as chief justice, to replace William Rehnquist, and Alito, as associate justice, to replace Sandra Day O'Connor—were

members of the society. Both new justices were more conservative than their predecessors. Nearly half of the courts of appeals judges Bush appointed were members. As Professor Goldman and his colleagues put it, Bush successfully nominated and got confirmed to the courts of appeals "a veritable all-star team of conservative judges with strong appeal to the Republican base."[57]

The two most important staff lawyers for judicial selection during the first two years of this administration were Federalist Society members. Brett M. Kavanaugh was the associate White House counsel working under Alberto Gonzales, until the president nominated Kavanaugh himself to the D.C. Circuit Court of Appeals. Assistant Attorney General Viet Dinh was head of the reconstituted Office of Legal Policy in the DOJ. Both emphasized the significance of judicial appointments to the president. Kavanaugh stated that Bush "devoted more attention to the issue of judges than any other president."[58] Dinh said that the president's "legal legacy" would be as important as anything the administration did with respect to legislative policy, and that they sought to ensure "a judiciary that will follow the law, not make the law, a judiciary that will interpret the Constitution, not legislate from the bench."[59]

The president's judicial selection committee was the principal group in the government with responsibility for selection of federal judges, and its most important members were the White House counsel and the attorney general. Key staff people were also on the committee, but the Bush administration never made public the identity of all the members.[60] Initially, the committee was chaired by White House Counsel Alberto Gonzales, and the attorney general was John Ashcroft. In Bush's second term, Gonzales became attorney general and was replaced as White House counsel by Harriet Miers. When Gonzales resigned in mid-2007, Michael Mukasey became attorney general. Mukasey was a closet supporter of the Federalist Society during his years in government, and then formally joined it after he retired.[61] He is now a member of the Federalist Society's board of directors. When Miers left as White House counsel at the end of 2007, Fred Fielding took that position, one he had occupied in the Reagan administration. Fielding brought with him Kate Comerford Todd, a vice chair of the Federalist Society's Federalism and Separation of Powers Practice Group, to work on judicial selection.[62] Federalist Society member Rachel Brand had been an associate White House counsel during a portion of the first term before moving to the DOJ. She was promoted to assistant attorney general in charge of the OLP in the second term, where she was responsible for judicial selection.

The basic procedure for selecting judges remained similar through both terms.[63] The judicial selection committee developed lists of potential candidates that were sent to the president for initial approval before detailed vetting began. After the president gave that approval, the OLP would review the nominees and the FBI would do a field investigation. The interviews of potential nominees took place at the White House, with both White House lawyers and DOJ lawyers involved. Once the judicial selection committee finished vetting a potential nominee

and found him or her to be appropriate, it forwarded the name to the president for final approval.[64]

According to his biographer, Gonzales, as a Washington outsider, did not know much about the Federalist Society before he began his job as White House counsel.[65] Whether that is accurate or not, Gonzales assembled a staff based on the recommendations of advisors who were heavily involved with the Federalist Society, such as C. Boyden Gray, and which consisted predominantly of Federalist Society members. Gray was Gonzales's principal advisor during the transition period between the election and when the president assumed office.[66] Gonzales's deputy counsel was Timothy Flanigan. The staff included, among others, Brett Kavanaugh, who had been a senior deputy to Ken Starr; Bradford Berenson, at one point the chair of the Federalist Society's Criminal Law and Procedure Practice Group; Christopher Bartolomucci, who had been president of the student chapter of the Federalist Society at Harvard Law School; Noel Francisco, a former clerk for Justice Scalia; and Rachel Brand.[67] Citing the observations of several legal analysts, Gonzales's biographer notes that "the young, hungry attorneys on his staff saw the opportunity to pick such a large number of judges as a once-in-a-lifetime chance to transfer the strict constitutional aims of the Federalist Society to benches across America."[68] Nan Aron from the Alliance for Justice identified the Federalist Society as the "linchpin in the White House for identifying and grooming candidates for the federal bench."[69]

During the George W. Bush administration, Federalist Society members also served as significant outside advisors to the president with respect to judicial selection. There were frequent conference calls between White House staff and the "Four Horsemen," C. Boyden Gray, Jay Sekulow, Leonard Leo, and Ed Meese. According to Sekulow, these advisors were consulted at the beginning of President Bush's first term and had weekly telephone conferences with the White House. They played a "critical role": "We point out people that, we think, will be incredible nominees. But we always keep in contact regularly. This is not haphazard. It's very structured and organized."[70] In 2005, Leo took a leave of absence from his position as executive vice president of the Federalist Society to devote more time to advising the president on judicial selection.

In addition to providing direct advice to the president, Federalist Society members were active in a highly organized public campaign to support conservative judicial nominees. In February 2005, Leo, Meese, and Gray organized a group of grassroots organizers, public relations specialists, and legal strategists to "prepare a battle plan" for vacancies that might occur on the Supreme Court.[71] Roberts and Alito were among the eighteen potential nominees they researched. They worked through the Judicial Confirmation Network, a group that had been set up specifically to ease the path of Bush nominees, to "coordinate grass-roots pressure on Democratic senators from conservative states," and reached out to other conservative groups to coordinate their message.[72]

For five years, the chief counsel of the Judicial Confirmation Network was Wendy Long, a former law clerk to Justice Thomas and Judge Ralph K. Winter

of the Second Circuit, and a frequent contributor to Federalist Society publications and debates. Long attempted to preempt criticism of Roberts based on his Federalist Society membership in a "Bench Memo" in the *National Review Online*, asking which senators might be "goaded" at his nomination hearing into asking, "Judge Roberts, are you now, or have you ever been, a member of the Federalist Society?"[73] She was relying, of course, on the antipathy to the McCarthy-era question, "Are you now, or have you ever been, a member of the Communist Party?" In her piece, Long assures her readers that the principles of the Federalist Society are those that "the vast majority of Americans agree with and admire." The executive director of the Judicial Confirmation Network was Gary Marx, also a featured Federalist Society speaker.

Another group that lobbied publicly for the president's judicial nominees was the Committee for Justice, which Gray headed. In 2003, the committee aired television commercials that suggested that opposition by liberal senators to nominees Miguel Estrada and William Pryor was motivated by anti-Catholic bias. The commercials had a sign, "Catholics Need Not Apply," in front of a locked courthouse door.[74] In 2006, Spencer Abraham, one of the founders of the Federalist Society, became the committee's chairman. Curt Levey was the group's executive director during George W. Bush's second term and remains in that position. He is a member of the Executive Committee of the Federalist Society's Civil Rights Practice Group and the former director of legal and public affairs at the Center for Individual Rights.[75]

Although Supreme Court rulings are the decisions that establish the law for all the lower courts, the Supreme Court hears approximately only eighty cases per year. On the other hand, in the twelve-month period ending March 31, 2011, the circuit courts of appeals concluded over fifty-eight thousand cases.[76] The courts of appeals determine how constitutional provisions and federal statutes are interpreted unless and until the Supreme Court decides to consider an issue. And then it is the courts of appeals that subsequently apply the Supreme Court's decision to the multitude of new and different factual situations that may require further interpretation.

The significance of appointments to the courts of appeals is not often highlighted by the media and not appreciated by the general public. It certainly was appreciated, however, by the members of the Federalist Society who influenced the selection process during the Bush administration. As a result, the selection of judges to the court of appeals during the Bush years was skewed by candidates' political views. Indeed, Elliot Mincberg, former legal director of People for the American Way, stated that he had "never seen courts of appeals nominations [as] politicized" as they were during the Bush administration.[77] The Senate had rejected a number of the president's nominations during his first term, but when George W. Bush was reelected he promptly threw down the gauntlet by nominating them again. Professor Goldman and his fellow authors quote an unnamed senior aide to a Democratic senator on the Judiciary Committee who opined that it was no coincidence that those nominations were announced during the week that the Federalist Society

national convention was held in Washington. In his view, the White House made "a great effort to satisfy the appetites of activists from the right."[78] Some of the most controversial nominees the Senate rejected who were repeatedly renominated by President Bush were members or close friends of the Federalist Society: Janice Rogers Brown, Priscilla Owen, and William Pryor (ultimately confirmed); and Peter Keisler, one of the founding directors of the Federalist Society, and William Haynes (never confirmed).

Democratic senators on the Judiciary Committee frequently complained about the influence of the Federalist Society on the nomination process, particularly Senator Patrick Leahy (Vermont) and Senator Richard J. Durbin (Illinois). For example, during the discussion of Estrada's membership in the Federalist Society, Senator Leahy related a story about another judicial nominee who testified that although he had previously not really heard of the Federalist Society, he was told that if he wanted to be a judge during the current administration he should join. He did, and was subsequently appointed.[79] During the hearing regarding the nomination of John Tinder for the Court of Appeals, Senator Durbin asked, "I have a question, too, about one of your affiliations. I have asked this of many nominees, so you probably have been prepped: Durbin's bound to ask you about the Federalist Society. It seems to be the secret handshake here on the way to the Federal bench for many nominees."[80]

On the other hand, conservatives such as Roger Pilon of the Cato Institute, a member of the Federalist Society, criticized the Democratic senators on the Judiciary Committee of erecting "an ideological litmus test" that the Bush nominees could not pass.[81] With characteristic ideological reasoning of his own, Pilon ascribed the problem of ideological litmus tests for judges to the Progressive Era, where "social engineers" attempted to get government to do what properly belonged to the realm of the private sector, necessitating action by the courts to limit government to its constitutional limits. When the Supreme Court abandoned its commitment to laissez-faire economics in 1937 and began to sustain such legislation, "politics trumped law" and the court ultimately went down the wrong road, not only failing to confine government to its constitutionally limited sphere, but even worse recognizing unenumerated constitutional rights not found in the text of the Constitution. The Constitution became "thoroughly politicized" and is now interpreted through "the subjective understandings of judges about evolving social values." As a result, judicial selection has become correspondingly politicized.[82] Pilon believes the only solution is to go back to first principles, to recognize that "most of what the government is now doing is unconstitutional" and for judges to "come to grips" with "the full richness of the Constitution, including its natural rights foundations."[83]

The Department of Justice

During the administration of George W. Bush, members of the Federalist Society also substantially increased their numbers and their power within the federal legal

bureaucracy. Among Federalist Society members with important legal positions in the DOJ during this administration were Ted Olson, solicitor general (and a member of the Federalist Society's board of visitors); Paul Clement, solicitor general; Peter Keisler, who held several important positions in the DOJ, including acting attorney general; Larry Thompson, deputy attorney general; Viet Dinh, assistant attorney general for legal policy; Thomas L. Sansonetti, assistant attorney general for the environment and natural resources; J. Michael Wiggins, deputy assistant attorney general for civil rights (formerly vice chairman of the Federalist Society's Intellectual Property Practice Group); William H. Jordan, counsel to the assistant attorney general in the Civil Division (formerly president of the Atlanta chapter of the Federalist Society); David E. Nahmias, counsel to the assistant attorney general in the Criminal Division; and John G. Malcolm, deputy assistant attorney general in the Criminal Division (formerly chairman-elect of the Federalist Society's Criminal Law Practice Group).[84]

The DOJ also hired large numbers of Federalist Society members and other conservatives as staff lawyers and immigration judges during the George W. Bush administration. Many of these hires were politically motivated, in violation of written DOJ policy and federal statutes. Some of the legal positions at the DOJ, of a confidential or policy-determining character ("Schedule C positions"), are recognized as political, and it is appropriate to take politics into account in hiring for those positions. Most staff lawyers, however, are career appointments, as are immigration judges. Both the policy of the DOJ and federal statutes make it improper and illegal to consider political affiliations or ideology in making career appointments.[85]

As a result of the discharges of nine U.S. attorneys in 2006, which were widely perceived to be politically motivated, and complaints to Congress by a group of anonymous DOJ employees in 2006 regarding hiring in the department, there were several investigations into allegations of improper political influence in hiring. The Office of the Inspector General (OIG) of the DOJ and the Office of Professional Responsibility (OPR) of the DOJ conducted investigations into hiring practices in the Honors Program and the Summer Law Intern Program (SLIP),[86] hiring by Monica Goodling and other staff in the Office of the Attorney General (OAG),[87] hiring and other personnel actions in the Civil Rights Division of the DOJ,[88] and the firing of the nine U.S. attorneys.[89]

The investigations concluded there had been improper political influence in hiring and other personnel decisions at the DOJ, including favoritism toward members of the Federalist Society. One report concluded that Goodling, as White House liaison in the OAG, "inappropriately considered political and ideological affiliations in the selection and hiring" of certain assistant U.S. attorneys (AUSA) and other career attorneys in the department. The report also documented that Goodling, as well as Kyle Sampson (the chief of staff to the attorney general), and Jan Williams (Goodling's predecessor as White House liaison), "inappropriately considered political and ideological affiliations in selecting" immigration judges and members of the Board of Immigration Appeals.[90] Williams was a paid employee of

the Federalist Society from 1997 to 2001, first as the assistant lawyers division director and then as senior deputy lawyers division director.[91]

The report also concluded that Goodling "often used political or ideological affiliations to select or reject career attorney candidates for temporary details to Department offices," which was particularly damaging because "it resulted in high-quality candidates for important details being rejected in favor of less-qualified candidates."[92] Goodling recommended against hiring one AUSA because he was too "liberal," and was in favor of hiring another because he was a conservative "good American."[93] She recommended hiring another lawyer who had worked for the Federalist Society and was, according to Goodling's notes of the interview, "pro-God in public life" and "pro-marriage, anti-civil union."[94] The OIG and OPR report on the Goodling investigation is rife with similar details.

The most systematic use of political or ideological affiliations was in screening candidates for immigration judges. Sampson created the problem in 2004 when he changed the process so that the OAG selected all candidates for immigration judge positions. The White House was the principal source for these candidates, but Sampson, Goodling, and Williams used other Republican sources as well, including the Federalist Society.[95] The report documents that the White House itself often reached out to the Federalist Society for candidates for legal positions in the administration.[96] Although Williams looked to the White House, other DOJ political appointees, and the Federalist Society for potential candidates for immigration judges, she refused to consider candidates supplied by the Executive Office of Immigration Review (EOIR).[97]

Goodling screened the candidates for political acceptability, including researching their political contributions and voting registration records, searching the Internet with a string of political terms (e.g., "iran contra," "spotted owl," "florida recount," "downsiz!," "enron," "wmd," "gay!," "homosexual!," "firearm!"), discussing political topics (abortion, gay marriage) with candidates, and asking candidates political questions during interviews (e.g., "Why are you a Republican?").[98] The political vetting of the immigration judges caused delays in hiring and a shortage of judges that led to backlogs in the immigration courts.[99]

The report found that Goodling provided inaccurate information to a DOJ Civil Division attorney defending a lawsuit by an unsuccessful immigration judge candidate, by falsely stating to the government lawyer that she had not taken political factors into account in hiring immigration judges. The report also concluded that Williams provided false information to the OIG and OPR regarding the Internet searches. She denied using the search string of political terms more than once, but independent records from LEXIS showed that she had used it repeatedly.[100] The report does not mention it, but it is a federal felony to make false statements or misrepresentations of material facts with respect to any matter within the jurisdiction of the executive, legislative, or judicial branches.[101] Neither Goodling, who received immunity from Congress in connection with her testimony before the Judiciary Committee of the House of Representatives, nor Williams was ever

indicted. The Virginia State Bar gave Goodling a public reprimand in 2011 for her misconduct in taking political affiliations into account in hiring at the DOJ.[102]

The Honors Program is a competitive hiring program for entry-level lawyers in the DOJ, and SLIP is a competitive paid summer internship program. Individual divisions and components within the DOJ were responsible for hiring their own lawyers and interns. In 2002, however, the leadership of the DOJ greatly expanded the involvement of political appointees in the hiring of career lawyers. During the selection process, individual divisions had to submit materials on prospective hires to the screening committee of the Office of the Deputy Attorney General. The screening committee was composed primarily of political appointees from leadership offices in the DOJ. The screening committee had the authority to deselect candidates previously identified by the divisions, which ended their candidacy unless a division appealed its decision and the screening committee reinstated the person.

The OIG and OPR found evidence of reliance on political and ideological considerations by the screening committee. There was no evidence of hiring based on political affiliation by the individual divisions and components within the DOJ, except for the Civil Rights Division, which was the subject of a separate report. In 2002, the screening committee deselected candidates with liberal affiliations at a "significantly higher rate" than candidates with conservative affiliations, and in 2006, it "inappropriately used political and ideological considerations to deselect many candidates."[103]

The OIG and OPR data showed that in 2002 the screening committee deselected 80 of 100 candidates with liberal affiliations (80 percent), only 4 of 46 candidates with conservative affiliations (9 percent), and 223 of 765 candidates with neutral affiliations (29 percent). With respect to the most qualified applicants (based on which law school they attended, their class rank, whether they had a federal judicial clerkship, and whether they were members of the law review), the committee deselected 15 of 18 candidates with liberal affiliations, 0 of 5 candidates with conservative affiliations, and 11 of 48 candidates with neutral affiliations. The committee deselected all 7 applicants who were members of the liberal American Constitution Society (ACS), but only 2 of 29 who were members of the Federalist Society.[104] The data with respect to affiliations were comparable with respect to SLIP candidates who were deselected, including the fact that 12 of the 13 applicants who were members of the ACS were deselected, while none of the 12 applicants who were members of the Federalist Society was deselected. The head of the screening committee was Andrew Hruska, senior counsel to the deputy attorney general; after the OIG and OPR had analyzed the data, Hruska, through his attorney, declined to be interviewed regarding the results.[105] The OIG and OPR found no evidence of the use of political affiliations in hiring between 2003 and 2005.

The OIG and OPR did find substantial evidence of the use of political affiliation in hiring again in 2006. The report provided data that established a pattern of reliance on political affiliation, and specific evidence that two of the three members

of the screening committee "inappropriately considered political and ideological affiliations in the deselection process."[106] The two were the chair, Michael Elston, the deputy attorney general's chief of staff, and Esther Slater McDonald, a counsel to the associate attorney general.

In 2006, the screening committee deselected 83 out of 150 (55 percent) of Honors Program candidates with liberal affiliations, only 5 out of 28 (18 percent) of candidates with conservative affiliations, and 98 out of 424 (23 percent) of candidates with neutral affiliations. With respect to highly qualified applicants, the committee deselected 35 out of 87 (40 percent) with liberal affiliations, only 1 out of 17 (6 percent) with conservative affiliations, and 35 out of 275 (13 percent) with neutral affiliations. There was little difference in the percentage deselected between applicants who identified as members of ACS and those who identified as members of the Federalist Society, but a significantly higher percentage (48 percent) of those who had Democratic Party affiliations were deselected than those who had affiliations with the Republican Party (27 percent).[107] With respect to SLIP applicants, the committee deselected 82 percent of those with liberal affiliations, only 13 percent of those with conservative affiliations, and 39 percent of those with neutral affiliations. Among highly qualified applicants, the committee deselected 25 out of 31 (81 percent) with liberal affiliations, 1 out of 6 (17 percent) with conservative affiliations, and 77 out of 231 (33 percent) with neutral affiliations.[108] With respect to candidates whose applications indicated membership in the ACS, the committee deselected 5 out of 6 (83 percent), but deselected only 1 out of 10 (10 percent) who indicated membership in the Federalist Society.

The OIG and OPR found that McDonald conducted Internet searches on some applicants and made notations about political affiliations she discovered, identified political items on applications that caused her concern (such as membership in the ACS or employment with a liberal judge), and voiced concerns that certain applicants might have views contrary to those of the administration. McDonald declined to be interviewed by OIG and OPR, hired a lawyer, and then resigned abruptly during their investigation.[109] Elston, who as head of the committee failed to take action against McDonald, also deselected candidates based on their liberal affiliations, and gave reasons for deselection that did not withstand scrutiny. OIG and OPR concluded that the third member of the committee, Daniel Fridman, a career lawyer in the DOJ, did not use ideological or political criteria in making decisions.[110] Elston resigned from the DOJ in June 2007.[111]

It should be noted that Peter Keisler, the then–assistant attorney general for the Civil Division and a prominent Federalist Society member, called to Elston's attention that people within the department thought the deselections were so irrational that it raised the possibility they were motivated by politics. Elston denied political influence. Keisler also raised these concerns with Acting Associate Attorney General William Mercer and Principal Deputy Associate Attorney General Gregory Katsas. There was little or no other complaint or criticism at the time from leadership personnel in the DOJ about the issue.

After these reports were written, in September 2008, the attorney general wrote to Honors Program candidates who had been deselected in 2006, offering them an opportunity to reapply for the positions and giving them two weeks to do so. Some of the deselected candidates who did not reapply filed suit against officials in the DOJ and the government. Judgment was entered in favor of the officials and the government in December 2011, for technical reasons, although the court recognized that the officials had engaged in misconduct.[112]

The OIG and OPR also found that Bradley Schlozman, a deputy assistant attorney general in the Civil Rights Division of the DOJ, "inappropriately considered political and ideological affiliations in hiring experienced attorneys in the sections he supervised and entry-level attorneys throughout the division for the Attorney General's Honors Program."[113] Schlozman actively recruited members of the Federalist Society for positions in the Civil Rights Division. In 2004, he told coworkers that he went to the Federalist Society events and student symposiums specifically to recruit applicants. In one e-mail, he said, "If we get a speaking role, it might be useful to spread the word and get more applications from these fine young Americans."[114] Schlozman boasted about his politically motivated hiring practices. An attorney that Schlozman hired in the Special Litigation Section e-mailed Schlozman that he was so happy to be where he was, and that his office is "even next to a Federalist Society member." Schlozman replied, "Just between you and me, we hired another member of 'the team' yesterday. And still another ideological comrade will be starting in one month. So we are making progress."[115] A statistical overview of the attorneys hired by Schlozman in the Civil Rights Division from 2003 to 2006 showed that 97 percent of them had conservative or Republican affiliations. Attorneys hired by Schlozman were twice as likely to be conservative or Republican than those not hired by Schlozman.[116]

Schlozman was assisted by front office counsels Jason Torchinsky and Matt Dummermuth in screening applicants and deciding who would be interviewed.[117] Torchinsky is a member of the Federalist Society.[118] Dummermuth is on the advisory board and steering committee of the Federalist Society's Iowa lawyers chapter, and he has been a member of the Religious Liberties Practice Group and the Federalism and Separation of Powers Practice Group since law school.[119] His wife, Rebecca Dummermuth, was the associate director for legal affairs of the George W. Bush White House Office of Faith-Based and Community Initiatives, and is the chair of the Publications Subcommittee of the Federalist Society's Religious Liberties Practice Group.[120] Torchinsky declined to be interviewed by the OIG and OPR.[121] Matt Dummermuth admitted to investigators that the hiring committee looked for "candidates who would focus on enforcing the law as it stood and not necessarily pursuing the most creative interpretations of the law as possible." Membership in the ACS or the Americans United for Separation of Church and State indicated a "more activist approach to law enforcement," and was a negative factor in hiring. Conversely, for Dummermuth, membership in the Federalist Society was a positive factor.[122] Following the investigations, Attorney General

Michael Mukasey announced the DOJ would not pursue criminal charges against any of those involved.[123] After serving briefly as the U.S. attorney for Iowa as a result of a recess appointment by President Bush (he was never confirmed by the Senate), Dummermuth went into private law practice in Cedar Rapids, Iowa. In 2011, he made unsuccessful attempts to get a seat on the Iowa Supreme Court and to get the Republican nomination for a state senate seat.

Schlozman's political biases influenced the assignment of attorneys to cases, as well as hiring decisions. The OIG and OPR found that he inappropriately considered political and ideological affiliations when he forced three career attorneys to transfer out of the Appellate Section. He had frequently talked of his plan, once he had the power, to move certain attorneys out of the Appellate Section to make room for "real Americans."[124] He told section chiefs not to assign important matters to lawyers who were "not on the team," "against us," "not trustworthy," or "a pinko." In one case, he directed a section chief not to allow a certain attorney to argue an appeal, because "[t]he potential stakes are too great to entrust this to either a lib or an idiot."[125]

Finally, the report concluded that Schlozman made false statements to Congress about his use of political considerations in hiring, both in oral sworn testimony and in written responses to questions.[126] The OIG and OPR referred the matter for prosecution to the U.S. Attorney's Office in the District of Columbia, but it declined to prosecute Schlozman.[127] Schlozman resigned from the DOJ on August 17, 2007. He is now of counsel to the Hinkle Law Firm in Wichita, Kansas, which notes on its website that he "held a series of high-level posts in the Department of Justice."[128]

The last report in this series, concerning the removal of nine U.S. attorneys, raised multiple issues that are beyond the scope of this book. Its conclusions, however, were consistent with the picture the other investigations painted of the improper politicization of the DOJ. The report found that the "Chief of Staff to the Attorney General Kyle Sampson, with very little input from other Department officials, designed, selected, and implemented the removal process, with little supervision or oversight."[129] As we discussed above, Sampson also engaged in improper activities with respect to hiring immigration judges. The report found "significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys."[130] The OIG and OPR, however, were not able to fully develop the evidence because several witnesses refused to be interviewed and the Bush White House refused to make internal documents available to the investigators.

One may expect the influence of the Federalist Society to continue in the administrations of future Republican presidents, at least judged by their influence with presidential hopefuls. Mitt Romney enlisted several prominent Federalist Society members and friends for his Advisory Committee on the Constitution and the Courts during his 2008 campaign, several with previous experience advising presidents on judicial selection. Among them were Bradford A. Berenson, James Bopp Jr., Timothy Flanigan, Tom Gede, Allyson Ho, James Huffman, Gary L.

McDowell, Jay Sekulow, and Richard Willard. Romney contributed $25,000 to the Federalist Society in 2005, and another $10,000 the following year, through his family charitable foundation.[131]

Democratic Administrations

Federalist Society members are also active with respect to judicial nominations when the president is a Democrat. David Kirkpatrick noted that during the Clinton administration, "Federalist Society members and allies had come to dominate the membership and staff of the Judiciary Committee, which turned back many of the administration's nominees."[132] Spencer Abraham was a senator from Michigan and on the Judiciary Committee during this time.

In 2010, the Judicial Confirmation Network, formed to promote George W. Bush's judicial nominations, changed its name to the Judicial Crisis Network (JCN), once President Obama began nominating judges. Carrie Severino, a former clerk for Justice Thomas and Judge David Sentelle of the D.C. Circuit (a Reagan appointee and a frequent speaker at Federalist Society events), took over as chief counsel. Severino is a Federalist Society member and a member of its Northern Virginia Women's Caucus. Severino blogs on the JCN website on a variety of political and legal topics, from a conservative point of view. She attacks judicial nominees by President Obama whom she perceives to be too liberal. Her critique of five Obama nominees in February 2011 runs the gamut of conservative concerns. She described Professor Goodwin Liu, who later withdrew his nomination to the Ninth Circuit Court of Appeals in the face of unrelenting Republican opposition, as "at the top of the list of likely judicial activists," based on his support for constitutional rights in the fields of welfare and health care, busing to achieve school integration, and same-sex marriage. She faulted Edward Chen, later confirmed as a district judge, for acknowledging that a judge's racial and ethnic background might affect his decisions through "understanding the human impact of legal rules upon which the judge must decide." She criticized John McConnell, later confirmed as a district judge, and Louis Butler, whose nomination as a district judge was rejected twice by the Senate, for advocating an enterprise theory of lead paint liability. She stated that Caitlin Halligan, whose nomination to the D.C. Court of Appeals was filibustered by Republican senators, "toes the liberal line on every major issue," including marriage equality and a standard for cruel and unusual punishment that varies with societal norms.[133]

The American Bar Association

Over the years, as the Federalist Society became more influential in selecting federal judges, conservatives have also lobbied to limit or eliminate the role of the American Bar Association (ABA) in the selection process. Presidents since Dwight Eisenhower had furnished the ABA with the names of prospective federal judicial

nominees before publicly announcing them, permitting the ABA to conduct an investigation to determine whether the candidates were "qualified" to be federal judges. Beginning with President Reagan, the role of the ABA in the judicial nomination process was gradually diminished under Republican presidents. By the time of the George W. Bush administration, some observers argued that the Federalist Society had "stepped into the breach" left by the removal of the ABA from the pre-nomination process, and that it was "playing an even more central judgemaking role than had ever been attributed to the ABA."[134]

During the Reagan administration, the White House and the DOJ did not furnish candidates' names to the ABA until after the President's Federal Judicial Selection Committee had settled on a presumptive nominee. In 1990, Meese argued that the ABA review process could be helpful to the president's advisors on judicial selection, but that it was important for the ABA committee to stay within proper bounds and avoid making judgments about the judicial philosophy and political ideology of candidates.[135] By 1997, Meese was arguing that Congress should completely strip the ABA of any special role in judicial selection, because in his view the ABA had become a special-interest group by taking substantive (and liberal) positions on a variety of legal questions.[136]

During George W. Bush's presidency, White House Counsel Gonzales announced that the administration would not furnish names to the ABA before their names were submitted to the Senate or released to the public.[137] The ABA was removed from the selection process and had no opportunity to express an opinion on a candidate for the bench until after President Bush had already made a final decision to nominate the person. The ABA did have an opportunity to present its views to the Senate Judiciary Committee before confirmation, but that was very different from the role it had historically played in the process.

Nan Aron of the Alliance for Justice, a liberal critic of many of President Bush's judicial nominees, said that taking the ABA out of the process until after a nomination was made had a "chilling effect" on the willingness of lawyers to criticize the candidates candidly. Moreover, she argued that the administration's purpose was to "shroud the entire judicial selection process in secrecy."[138]

Brett Kavanaugh defended the decision by stating, "The President felt it was unfair and unwise to give one outside group preferential access to the process, particularly when there are a number of bar associations that we hear from and the ABA had this preferred role, which seemed unwise."[139] At the same time, although the Federalist Society had no role in judicial selection as an organization, during the Bush administration the process was almost completely in the hands of Federalist Society members.

How Conservative Are the Judges?

The available data demonstrates that the Federalist Society strategy of changing the law by changing the judges is working. First, judges appointed by Republican

presidents render more conservative decisions than judges appointed by Democratic presidents, as empirical research demonstrates. Professor Cass Sunstein and his fellow authors have analyzed "striking evidence" of the relationship between the political party of the president and the way in which his judicial appointees decided cases.[140] Their analysis of 6,408 published opinions of three judge panels from the Circuit Courts of Appeals strongly showed that in "ideologically contested cases, involving the most controversial issues of the day," "Republican appointees vote very differently from Democratic appointees."[141]

The Federalist Society has moved the judiciary further to the right than the traditional orientation of judges appointed by Republican presidents. Sunstein's data demonstrated that the judicial decisions of appointees of Presidents Reagan, Bush Sr., and George W. Bush were more conservative than the appointees of Presidents Eisenhower, Nixon, and Ford.[142] The recent Republican administrations are the ones, as we have seen, where the Federalist Society has exercised decisive influence over the appointments of judges. Moreover, the data in this study documented "a statistically significant trend over time toward more conservative voting," between 1981 and 2004.[143] The authors observed a number of phenomena that may explain the ever increasing influence of Federalist Society approved judges on the law. One is what they term "ideological amplification," the tendency of both Democrats and Republicans to become respectively more liberal or more conservative the more of their party members there are on the panel. Another is "group polarization," or "the tendency of a group of like-minded people, including judges, to move to relative extremes."[144] Overall, they observed that when the federal courts have a growing number of Republican appointees, "they are likely to become more conservative."[145]

The Sunstein data concerned decisions by judges on the courts of appeals. A different empirical study of opinions by federal district court judges reached similar conclusions. Researchers concluded that the trial court judges appointed by George W. Bush "are not only the most conservative of the eight most recent administrations . . . but indeed they are the most conservative for all presidential cohorts going back to Woodrow Wilson!"[146] The authors analyzed more than 75,000 opinions by more than 1,800 judges, from 1933 to 2005, including 795 decisions by George W. Bush appointees. The cases were chosen for the study based on whether they contained clear liberal-conservative dimensions.

Overall, 33 percent of George W. Bush judges' opinions were decided in a liberal direction. By way of comparison, the liberal decision percentages of judges appointed by other presidents were: Johnson, 52 percent; Carter, 52 percent; Clinton, 49 percent; Nixon, 38 percent; Ford, 43 percent; Reagan, 36 percent; Bush Sr., 37 percent.[147] The greatest conservative gap between the George W. Bush appointees and other judges was in the area of civil rights and civil liberties (abortion, freedom of speech, right to privacy, racial discrimination, and the like). In this category, only 27.2 percent of the decisions of the George W. Bush judges were liberal, compared with: Johnson, 57.9 percent; Carter, 50.9 percent; Clinton, 41.2 percent; Nixon, 37.8 percent; Ford, 39.7 percent; Reagan, 32 percent; Bush Sr., 32.1 percent.[148] In

the other large categories of cases studied by these authors, criminal justice and labor and economic regulation, the George W. Bush judges were more similar to those of other recent Republican presidents, but still substantially more conservative than judges appointed by Democratic presidents.[149]

Finally, a study of decisions reached by judges who are members of the Federalist Society demonstrated convincingly that such judges are significantly more conservative than nonmembers appointed by Republican presidents.[150] Professors Nancy Scherer and Banks Miller analyzed all courts of appeals "nonconsensual" decisions involving a motion to suppress evidence under the Fourth Amendment between January 1, 1994, and December 31, 2005, and those involving a challenge to the constitutionality of a federal statute on Tenth and Eleventh Amendment grounds between January 1, 1996, and December 31, 2006. By "nonconsensual," they mean cases where there was a split decision on the appellate panel, or where the appellate panel reversed a decision by the district court. The Fourth Amendment motion to suppress cases involved the "exclusionary rule," under which courts prohibit the use of evidence that came from an unconstitutional search or seizure. Ideology tends to influence one's view of whether discarding evidence that could prove a defendant guilty is justified by the need to require the police to observe the constitutional rights of suspects. The Tenth and Eleventh Amendments protect states' rights and the sovereign immunity of state governments. Again, ideology influences how one views questions of "federalism," the constitutional division of power between the federal government and the states.

The authors identified judges as belonging to the Federalist Society if they acknowledged membership on their judicial questionnaires, or if they were identified as members in two separate newspaper articles.[151] They analyzed judges' decisions with respect to a number of independent variables in addition to Federalist Society membership, including ranking them on ideological grounds by traditional judicial ideology measures.

The analysis showed that for judges appointed by Bush Sr., Federalist Society membership raised the probability of a conservative vote on Tenth and Eleventh Amendment cases for judges who were deemed less conservative by traditional measures from .52 to .88; for a judge at the median on the ideology scale from .70 to .94; and for judges deemed most conservative on the scale from .72 to .94. For George W. Bush appointees, Federalist Society membership increased the probability of a conservative vote on these questions for the less conservative judges from .59 to .90; for the median judge from .66 to .93; and for the most conservative judges from .73 to .95.[152]

In the Fourth Amendment cases, for judges appointed by Bush Sr., Federalist Society membership raised the probability of a conservative vote for judges who were deemed less conservative by traditional measures from .38 to .75; for a judge at the median on the ideology scale from .42 to .78; and for judges deemed most conservative on the scale from .44 to .80. For George W. Bush appointees, Federalist Society membership increased the probability of a conservative vote

on these questions for the less conservative judges from .40 to .77; for the median judge from .41 to .78; and for the most conservative judges from .43 to .79.[153] The authors concluded, "Without question, our results demonstrate that Federalist Society membership has a statistically significant and substantively large impact on judicial decision-making behavior on the U.S. Courts of Appeals."[154] The authors note that the Federalist Society has achieved this in part by "educating young lawyers to reject the conventional method of constitutional interpretation taught in the nation's law schools, and instead, adopt originalism as the only correct method of interpretation."[155]

The results of these empirical studies are probably not surprising to anyone other than those who would argue that law is nothing more than a set of neutral principles mechanically applied to the facts as they vary from case to case. Resolving legal questions, however, is in fact far more complicated than "calling balls and strikes." Often there is no controlling precedent in the case law, or the relevant constitutional or statutory provisions are not specific enough to decide the case at hand without interpretation. Given that, a judge's views on a myriad of questions inform his or her decisions, including: how power should be distributed in a federal system, the role of the courts vis-à-vis the legislature and the executive, what "liberty" means, how fundamental fairness is defined, and many general issues of politics and economics. As Sunstein et al. wrote, "No reasonable person seriously doubts that ideology, understood as moral and political commitments of various sorts, helps to explain judicial votes."[156]

Federalist Society members shared that assessment, and, as we have seen, have worked hard since the administration of Ronald Reagan to influence judicial nominations. This has been a central element of their strategy to move the law in conservative directions. In the remaining chapters of this book, we analyze complementary activities of Federalist Society members in a variety of areas of the law.