

Testimony before the U.S. Senate Judiciary Committee

Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights

Hearing on
“What’s Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary”

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Chairman Whitehouse, Ranking Member Kennedy, distinguished members of the Subcommittee, thank you for the opportunity to speak. At Capital Research Center, where I work, we’re in our fourth decade of studying the sort of money flows discussed in the *Captured Courts* report issued by the Democratic Policy and Communications Committee.¹

The report has 18 references to “dark money,” a popular insult among the political classes that’s rarely defined clearly. The page devoted to explaining “dark money” in *Captured Courts* certainly lacks legal precision: is it money in 501(c)(3) nonprofits? in (c)(4) nonprofits? (c)(6)s? in donor-advised funds? All these and more meet the report’s sole criterion of “funding for organizations and political activities that cannot be traced to actual donors.” The report goes on to call dark money “troubling,” “a uniquely pernicious threat” to our courts.²

Perhaps the best definition of “dark money” came from the wit who said, *Dark money is support for speech the Left wants to silence*. That definition brings to light the way “dark money” conjures up a bogeyman; it shifts debate away from the substance of legal and political disputes by implying that one’s opponents are nefarious, even though they simply use the same kind of funding arrangements that everyone else does.

That’s not to say all sides today are equal when it comes to “dark money.” The Left, by any measure, has far more of it than conservatives. And the Left’s funding arrangements are, in some ways, more dark than conservatives’ arrangements.

¹ Sens. Stabenow, Schumer, and Whitehouse, *Captured Courts: The GOP’s Big Money Assault On The Constitution, Our Independent Judiciary, And The Rule of Law* (Washington: Democratic Policy and Communications Committee, 2020).

² *Captured Courts*, p. 22.

Before we look at the numbers, let's consider how this very hearing is unthinkable without "dark money" flowing to everyone here. A decade ago, a liberal group coined "dark money" to refer only to 501(c)(4) nonprofits—the independent expenditure groups helped by, and demonized because of, the Supreme Court's *Citizens United* decision—though now the term is used vaguely to encompass all nonprofits, donor-advised funds, and sometimes super PACs.³

Well, the Democratic Members of this Subcommittee, according to the left-leaning OpenSecrets website, have had your election campaigns boosted via "outside spending" by (c)(4)s, super PACs, and the like,⁴ and all your witnesses, including me, work at nonprofits that receive regular, but not completely disclosed, support from major donors on the Left and Right. Both side's witnesses today include a professor from a nonprofit college, while Ms. Graves and I work at (c)(3)s and Mr. Jealous works at a (c)(4). To paraphrase President Nixon, we are all dark-money partakers now.

In short, to say that a group of people making an argument in the public square receives "dark money" is like saying that those people use words, that they talk on telephones, that they have friends—donors and fellow advocates—with whom they regularly work on common projects to support that argument.

People who receive "dark money" fight passionately *for*, and *against*, every judicial nominee this Committee considers; they loudly advocate for and against abortion, for and against deregulation, for and against forced union dues. In other words, they fight for and against every single issue mentioned in *Captured Courts*.

Yet the report keeps silent—"in the dark," let's say—that simple fact, with one glancing exception when it says in passing, "dark money" is "now used by Republican and Democratic interests alike."⁵ The report also keeps in the dark, save for one brief reference to the "liberal-

³ Michael E. Hartmann, "The Etymology of 'Dark Money,'" *Deception & Misdirection*, July 15, 2019; <https://capitalresearch.org/article/the-etymology-of-dark-money>.

⁴ The only exception is Sen. Padilla, because he was appointed rather than elected. Information on other Senators at these links: <https://www.opensecrets.org/races/outside-spending?cycle=2020&id=GAS1&spec=N>; <https://www.opensecrets.org/races/outside-spending?cycle=2018&id=RIS1>; <https://www.opensecrets.org/races/outside-spending?cycle=2020&id=NJS2&spec=N>; <https://www.opensecrets.org/races/outside-spending?cycle=2018&id=HIS2&spec=N>; <https://www.opensecrets.org/races/outside-spending?cycle=2016&id=VTS2&spec=N>.

⁵ *Captured Courts*, p. 22. There the report claims "dark money" was "originally a Republican political device," but it provides no evidence for this false claim. It is true that in some, but not the last two, election cycles, Republican-linked 501(c)(4) giving was larger than that supporting Democrats; see below.

leaning” American Constitution Society,⁶ the existence of the massive, interlocking web of donors, activists, and nonprofits of all kinds that use various forms of “dark money” in support of advocacy that aligns with the views of the report’s authors.

(A sidenote: Because *Captured Courts*—though published by the Democratic Policy and Communications Committee—includes those two momentary glimpses of the other side of these fights, it is actually less biased than the long *Washington Post* attack on Leonard Leo that the report relies on for its oft-repeated claim that he wields hundreds of millions of dollars.⁷ The *Post* never even hints that the liberal side of these debates has fundraisers, or nomination advocates, or “dark money.” When the *Post* article appeared two years ago, I wrote the lead author, whom I know, asking when he would devote thousands of words to the other side of his story? I also provided him with research showing Demand Justice, the top group opposing Trump’s judicial nominees, is less transparent than groups supporting those nominees. The world still awaits *that* article, and such skewed coverage demonstrates that non-monetary goods, including a partisan prestige press, provide power to the left side of these disputes.)

In the interest of painting Americans a more complete and accurate picture than *Captured Courts* provides, allow me to bring to light some of the many facts the report keeps in the dark. For example, the report says that in court battles, the Right “is fueled by hundreds of millions in special-interest dollars, the sources of which are never fully disclosed to the public.” This fuel powers “a complex network of think tanks, law school centers, policy front groups, political campaign arms, and public relations shops.”⁸ This may sound troubling unless one realizes that the authors are hiding their own friends at the generously funded Brennan Center, at Columbia’s Center for Social Welfare Policy and Law and Berkeley’s National Housing Law Project, at Demand Justice and Fix the Courts, at union-funded groups like the Economic Policy Institute, at Fenton Communications, and so many others.

Nineteen times the report decries “millions of dollars” in anonymous giving, yet hardly any of the nation’s more than a million nonprofits disclose their donors, nor does the law force such disclosure, nor does this donor privacy that is built into our laws lack for defenders on the left as well as right, including such pillars of liberalism as the American Civil Liberties Union,

⁶ See sidebar on p. 35.

⁷ Robert O’Harrow Jr. and Shawn Bobur, “A Conservative Activist’s Behind-the-scenes Campaign to Remake the Nation’s Court,” *Washington Post*, May 21, 2019.

⁸ *Captured Courts*, p. 6.

the Human Rights Campaign, and the NAACP. Those three groups just came out strongly against a scheme that would mandate government-coerced disclosure of nonprofit donors.⁹ In our days, when violent extremists at both ends of the political spectrum threaten Americans' ability to speak out, that is eminently reasonable.

Captured Courts never mentions, much less refutes, the Supreme Court's leading case in this area, *NAACP v. Alabama* (1958),¹⁰ but that is understandable: It would be embarrassing to acknowledge how the government named in that case—state officials that included the notorious bigot Bull Connor—tried to force the disclosure of donors who provided, and beneficiaries who received, “anonymous money.” Bull Connor's Alabama lacked the terms, but experienced the phenomena of, “dark money” and “cancel culture.”¹¹

Captured Courts also attacks “public interest” law firms supported by “Ideological foundations established by wealthy industrialists—such as the Olin Foundation, the Sarah Scaife Foundation, and the Lynde and Harry Bradley Foundation.”¹² Left unsaid: the Olin Foundation has been defunct since 2005, and the Scaife and Bradley Foundations' grantmaking, *combined*, is barely one-eighth of the grantmaking of the left-leaning Ford Foundation alone, for 2014-2017 (the years the report uses when calculating fundraising by the groups it claims have “captured” the courts).¹³ George Soros's philanthropies, to name but one more left-wing megadonor, are roughly equal to Ford in grantmaking, further dwarfing the conservative philanthropies the report targets. But Ford is the appropriate foundation to cite because it effectively invented the public interest law firm, years before conservatives founded the Pacific Legal Foundation that the report targets.¹⁴

⁹ Kevin Daley, “Liberal Groups Break With Whitehouse Over Controversial Donor Disclosure Rule: ACLU and NAACP have joined a Supreme Court challenge to the California rule,” Free Beacon, March 5, 2021; <https://freebeacon.com/courts/liberal-groups-break-with-whitehouse-over-controversial-donor-disclosure-rule>.

¹⁰ 357 U.S. 449.

¹¹ In a grim repetition of a central demand of 1950s Alabama, *Captured Courts* complains that the Chamber of Commerce keeps “the identities of its members secret” (p. 27).

¹² *Captured Courts*, pp. 11-12.

¹³ Calculated by the Capital Research Center from publicly available IRS Form 990s.

¹⁴ See Walter Olson, “The Ford Foundation: Shaping America's laws by re-making her law schools,” *Foundation Watch*, July 2013, available at <https://capitalresearch.org/article/the-ford-foundation-shaping-americas-laws-by-re-making-her-law-schools>. “A few years between 1966 and 1969 saw the launch of most of the institutions that have dominated the field of public interest law ever since: in civil rights law, the Lawyers Committee for Civil Rights Under Law, Mexican American Legal Defense and Education Fund (MALDEF), Puerto Rican Legal Defense Fund, and Native American Rights Fund; in women's rights law, the ACLU Women's Rights Project and National Women's Law Center; in environmental law, the Environmental Defense Fund, Sierra Club Legal Defense Fund (later EarthJustice), and Natural Resources Defense Council.... For a while, things were touch and go, because it was far from clear the new kind of law would be granted the highly preferential [501(c)(3)] tax status its proponents

Captured Courts quotes with disdain a conservative’s observation that judicial confirmations “are more like political campaigns.”¹⁵ But the report scants the story of how, decades ago, the first eruption of judicial politicking of the ugliest sort—fueled by millions of dollars—arose when a lavishly funded campaign of attack ads was launched in 1987 against the nomination of Robert Bork, led by the “dark money” group People for the American Way—a group still so powerful in judicial politics that its current head was invited to testify today.

Captured Courts’ authors, quoting their allies at the *Washington Post*, note that the groups the report targets for attack “often work in concert” and are linked to “one another by finances, shared board members, phone numbers, addresses, back-office support and other operational details.” The report adds, “The extraordinary overlaps suggest a common effort seeking to hide behind a confusing but coordinated array of front groups.”¹⁶ The report hides the fact that this description perfectly describes the workings of Demand Justice, the leading advocacy group opposed to its targets. Demand Justice is a fiscally sponsored project of the Sixteen Thirty Fund, itself but one in-house nonprofit in the vast empire of “dark money” controlled by the for-profit Arabella Advisors LLC, which wields far more money and more front groups than *Captured Courts’* targets.

The Arabella empire behind Demand Justice is barely known, despite its immense size and influence. *Captured Courts* repeatedly cites its targets’ \$250 million in revenues from 2014-2017; over the same years, Arabella’s nonprofits raised \$1.5 billion. In the 2018 election cycle alone, those nonprofits raised \$1.2 billion, or more than double the funds raised by the DNC and RNC *combined*. Supposedly independent, Arabella’s nonprofits have heavily overlapping board

sought. They wanted their efforts to be accepted under the rubric of ‘public charity,’ just like the United Way. But looking for opportunities to sue people did not in itself sound like a particularly charitable endeavor, and if you accepted the idea that the ultimate goal was to change laws, you made it sound like lobbying, which isn’t entitled to charitable tax treatment either. Some in the Nixon administration strongly opposed the bid for charitable status, but following a big Establishment blitz, including a statement by former presidents of the American Bar Association, the Treasury Department caved and ruled in the movement’s favor in 1970. Other foundations followed Ford’s lead. Thus the Carnegie Endowment threw itself into the support of courtroom efforts to require public schools to instruct immigrant children in their first language, while the Edna McConnell Clark Foundation ... did much to assist lawsuits that forced mass deinstitutionalization of mental patients. Soon grantmaking that aimed to change the world through lawsuits came to seem normal and even uncontroversial.”

¹⁵ *Captured Courts*, p. 23.

¹⁶ *Captured Courts*, p. 24.

members and share the same address as well as the same general counsel and chief financial officer as Arabella itself.¹⁷

This “dark money” colossus enjoys major funding from billionaires like Bill Gates and Warren Buffett, and it sends their cash through a legal structure that darkens its donors and their dollars far more thoroughly than normal nonprofits can achieve. By law, a nonprofit need not reveal its donors, and very few do. But normal nonprofits, like those targeted by *Captured Courts*, must disclose revenues, assets, board members, salaries, largest vendors, total expenses (broken into categories like fundraising and travel), lobbying, grants to other nonprofits, and much more. The *Washington Post* relied on such public disclosures in its attack on conservative judicial groups, but the Arabella empire avoids those disclosures by concocting hundreds of “pop-up” groups fiscally sponsored by its four umbrella nonprofits. These hundreds of projects, like Demand Justice and Fix the Court, reveal neither their donors nor any details a genuine nonprofit must disclose. Nor can you try to pressure their board members, because they haven’t any. Each is merely a website and an accounting code at one of the four umbrella nonprofits. Although those four nonprofits file the usual disclosures, each one amalgamates data from dozens of pop-up groups, obscuring any particular project’s information.

No mainstream news outlet has ever exposed this scheme, although Politico has called one of Arabella’s nonprofits—the Sixteen Thirty Fund, fiscal sponsor of Demand Justice—a “massive ‘dark money’ network.”¹⁸ The *Washington Post* editorial page, after reading Politico’s report, expressed outrage that Sixteen Thirty’s top donors anonymously gave \$51.7 million, \$26.7 million, and \$10 million. The *Post* concluded that Sixteen Thirty caters to “big campaign donors who want to have impact but hide their identity.”¹⁹ Note that those anonymous donation amounts are considerably larger than the ones *Captured Courts* complains of.

¹⁷ Hayden R. Ludwig, *The Shadow over America: An Update on Arabella Advisors’ \$600 Million Empire in 2018* (Washington: Capital Research Center, 2020);

https://capitalresearch.org/app/uploads/CRC_TheShadowOverAmerica-09-10-2020_FINAL.pdf.

¹⁸ Scott Bland and Maggie Sevens, “Documents reveal massive ‘dark-money’ group boosted Democrats in 2018: A little-known nonprofit called The Sixteen Thirty Fund pumped \$140 million into Democratic and left-leaning causes,” Politico, November 19, 2019; <https://www.politico.com/news/2019/11/19/dark-money-democrats-midterm-071725>.

¹⁹ “Big campaign donors have exploited a loophole,” *Washington Post*, November 21, 2019; https://www.washingtonpost.com/opinions/big-campaign-donors-have-exploited-a-loophole-congress-must-change-the-law/2019/11/21/ab31cf3a-0bd6-11ea-bd9d-c628fd48b3a0_story.html.

Amusingly, *Captured Courts* reports that its targets are forming “a new venture, CRC Advisors,” but it hides the fact that the name was chosen explicitly to highlight the “dark” behemoth, Arabella Advisors, arrayed against the new venture.²⁰

Captured Courts also bemoans how its targets fundraise from “enormously wealthy and influential family foundations, whose fortunes generally derive from wealthy corporate interests,”²¹ an especially ironic complaint to make when the authors’ preferred policies and advocacy groups receive generous funding from giant foundations like Ford, Pew, MacArthur, Surdna, and other beneficiaries of corporate wealth—with the added insult that those philanthropies have been entirely captured by the Left, which treats their original donors’ intent with contempt.

A repeated target of *Captured Courts* is DonorsTrust, a provider of donor-advised funds that caters to conservative givers. Yet the report ignores that DonorsTrust was not the first donor-advised fund provider with an ideological bent. That honor goes to the left-wing Tides Foundation, which was established a quarter-century earlier and has grown into an empire of “dark money” comprising eight nonprofits that channel nearly double the dollars flowing out of DonorsTrust and its sister Donors Capital Fund.²² Tides was originally founded by a wealthy investment banker aiming to help rich donors anonymously support left-wing causes, and at its birth relied on money from the Reynolds tobacco fortune.²³

Tides incubated People for the American Way or PFAW, which later became an independent nonprofit and is now run by my fellow witness Ben Jealous. Tides has long channeled anonymized money across the left-wing landscape, including to PFAW and to the Center for Media and Democracy, a nonprofit group whose research is often cited by Chairman Whitehouse and which is represented today by witness Lisa Graves.²⁴

Yet another group targeted in *Captured Courts* is called the Wellspring Committee, which closed in 2018 after a decade of funneling “millions of dollars a year” to “right-wing

²⁰ Jonathan Swan and Alayna Treene, “Leonard Leo to shape new conservative network,” Axios, January 7, 2020; <https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html>.

²¹ *Captured Courts*, p. 25.

²² Capital Research Center calculations from publicly available IRS Form 990s. See also the entry for Tides Nexus on InfluenceWatch.org.

²³ David Callahan, *Fortunes of Change: The Rise of the Liberal Rich and the Remaking of America* (J. Wiley & Sons, 2010), p. 275.

²⁴ See the relevant entries for Tides Nexus, People for the American Way, and Center for Media and Democracy on InfluenceWatch.org.

judicial nonprofits.”²⁵ This is one of the report’s richest ironies, because Wellspring is also the name of a left-wing entity that was launched years earlier, still exists, and may be the darkest, most opaque nonprofit I’ve come across in decades of study. The Wellspring Philanthropic Fund was created in 2001 as part of a secretive network of grantmaking organizations funded by three hedge fund billionaires. *Philanthropy News Digest* reports their intent was to “disguise” donations and “avoid almost all public scrutiny.”²⁶ The group was originally named after the Hebrew for “anonymous gift,” but what makes the group extraordinarily opaque is the way it sent every penny of its donations from 2001 to 2016 through donor-advised funds at the commercial providers run by Fidelity and Vanguard; these donations averaged around \$50 million a year.²⁷ Of course, when conservatives donate using donor-advised funds, *Captured Courts* denounces the practice for “laundering” donors’ identities, but Wellspring Philanthropic will no doubt be safe from such abuse because, now that it’s making some publicly disclosed donations, we learn that it supports causes perfectly aligned with the report’s authors, including the Alliance for Justice (\$550,000 in 2017), the American Constitution Society (\$200,000), and the Center for Popular Democracy (\$420,000).²⁸ That last group is best known for the time one of its leaders, protesting the Brett Kavanaugh nomination, blocked the elevator doors for Sen. Jeff Flake (R-AZ) as a CNN camera broadcast live.²⁹

Unfortunately, the sorts of distortions and half-truths found in *Captured Courts* also crop up in Judiciary Committee hearings, all because partisans want to pretend that there’s something odd, or diabolical, when conservatives form groups, then cooperate with each other on a public policy issue where they agree, and fundraise from a donor universe far smaller and poorer than the one their left-wing peers enjoy. For example, one hears Members citing Center for Media and

²⁵ *Captured Courts*, p. 29.

²⁶ “Anonymous Donors of More Than \$1 Billion Revealed,” *Philanthropy News Digest*, May 9, 2014; <https://philanthropynewsdigest.org/news/anonymous-donors-of-more-than-1-billion-revealed>.

²⁷ See the entry for Wellspring Philanthropic Fund on InfluenceWatch.org.

²⁸ *Ibid.*

²⁹ Elise Viebeck, “Ana Maria Archila reflects on confronting Jeff Flake over Kavanaugh nomination,” *Washington Post*, September 28, 2018; https://www.washingtonpost.com/politics/i-was-demanding-a-connection-ana-maria-archila-reflects-on-confronting-jeff-flake-over-kavanaugh-nomination/2018/09/28/7593b4fe-c381-11e8-97a5-ab1e46bb3bc7_story.html.

Democracy (CMD) research that claims to expose “the \$45 million money trail” behind the *Janus* decision.³⁰

How did CMD concoct that big scary number? First, it looked at the two nonprofits bringing the *Janus* suit and 15 groups filing *amicus* briefs in support. Then it ignored that those groups weren’t a majority of all *amici* in the suit. CMD targeted these 17 groups because they received funding from either or both DonorsTrust and the Bradley Foundation, which are two of the largest funders of conservative groups (albeit much less large than the biggest funders of left-wing groups). CMD then totaled every penny any of these groups received from those funders *for an entire decade*, willfully ignoring that only a minute fraction of the funding went for work on the *Janus* suit; that, in fact, nearly all the funding was earmarked for completely different projects or for no project at all.

The *Janus* debate also presents us with the bizarre spectacle of Members who, on the one hand, produce reports that attack Americans’ voluntary contributions to groups they agree with, and on the other hand, demand that courts coerce American workers into involuntary contributions to unions they don’t agree with.

Before closing, let me note just how strongly the big numbers on “dark money” skew leftward. In the 501(c)(4) universe of giving that expanded after the *Citizens United* decision and was the original definition of “dark money,” the numbers show that for both the 2020 election cycle and the 2018 cycle—for half a decade—the Left and Democrats have received more such “dark money” than the other side. In 2018, the Left enjoyed 54% of the cycle’s \$150 million,³¹ while in 2020, the Democratic presidential candidate enjoyed, in rounded terms, a whopping \$132 million to \$22 million advantage over the Republican candidate, according to the left-leaning Center for Responsive Politics.³²

But all these numbers are dwarfed by the “dark money” ocean in which sail 501(c)(3) nonprofits active in public policy disputes. The Capital Research Center studies the Left/Right

³⁰ “Senator Whitehouse Calls Out Dark-money Networks Behind Amy Coney Barrett’s SCOTUS Nomination,” October 13, 2020; <https://www.exposedbycmd.org/2020/10/13/senator-whitehouse-calls-out-dark-money-networks-behind-amy-coney-barretts-scotus-nomination>.

³¹ Michael Beckel, “In 2018 midterms, liberal dark money groups outspent conservative counterparts for first time since Citizens United,” IssueOne, January 23, 2019; <https://www.issueone.org/in-2018-midterms-liberal-dark-money-groups-outspent-conservative-counterparts-for-first-time-since-citizens-united>.

³² Fredreka Schouten, “Democrats deride ‘dark’ money, but a new analysis shows it helped boost Joe Biden,” CNN Politics, November 27, 2020; <https://www.cnn.com/2020/11/27/politics/dark-money-democrats-joe-biden/index.html>.

split here, where one finds think tanks like Heritage and the Center for American Progress, media watchdogs like Media Matters and Media Research Center, public interest law firms like EarthJustice and Alliance Defending Freedom, and so many more. A few years ago, the Left's advantage was about 3.4 to 1 in revenue, but the 2018 data now available shows the Left's advantage grew to 3.7 to 1.³³ In raw dollars, that was \$2.2 billion for conservatives versus \$8.1 billion for liberals, and note that these sums dwarf both *Citizens United*-fueled independent expenditures by (c)(4) nonprofits and "hard" dollars given to candidates and parties.

Still, money is *not* magic. It never guarantees success. Capital Research Center found that in the six federal election cycles from 2004-2014, the top-spending outside individual donors lost, whether it was left-wing billionaires like Herbert and Marion Sandler in 2004 supporting John Kerry for President, or right-wing billionaires like Sheldon and Miriam Adelson spending \$93 million in 2012 in a fruitless attempt to help Mitt Romney become President and the Republicans take the Senate.

Most recently, Democratic candidates and their outside allies outraised and outspent Republicans and their allies in eight of the top 10 most expensive Senate races (by spending) in this cycle.³⁴ Yet Republicans won six. In the two races with a Republican advantage (in Georgia), Republican allies outspent Democratic allied outside groups; Democrats won anyway.³⁵

Which brings us to where we started: Focusing on money is always a dangerous mistake, whether in Senate races or judicial politics. I'd suggest that focusing on making better arguments to the public is a much better strategy than focusing on the money possessed by your less-rich opponents. Maybe you should stop trying to restrict others' speech and try harder to produce persuasive speech for your preferred policies.

³³ Shane Devine and Michael Watson, "Political and Policy-Oriented Giving After Citizens United: An Update to CRC's 2017 Analysis," December 17, 2020; <https://capitalresearch.org/article/political-and-policy-oriented-giving-after-citizens-united-an-update-to-crcs-2017-analysis>.

³⁴ See OpenSecrets data: <https://www.opensecrets.org/elections-overview/most-expensive-races>.

³⁵ See OpenSecrets data: <https://www.opensecrets.org/races/outside-spending?cycle=2020&id=GAS2&spec=N>.