Newsweek

Sheldon Whitehouse's Mistaken Crusade Against the Supreme Court

ILYA SHAPIRO

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This past Wednesday, Senator Sheldon Whitehouse (D-Trial Lawyers) held his first hearing as chairman of the Senate Judiciary Committee's Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights. It won't be a surprise to anyone following Whitehouse's career that the hearing was called "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary."

The operative framework was that our courts have been "captured" by dark money and that groups who file *amicus curiae* ("friend of the court") briefs dance to the tune of corporate donors. But there's no evidence that judges do anything other than apply the law as they see it. Nor is there any evidence that *amicus* briefs are driven by donors, rather than donors' funding organizations whose missions they like. Senator Whitehouse is free to disagree with any particular legal argument or judicial decision, but he misunderstands that basic dynamic.

The hearing was kabuki theater at best. After representatives from left-wing organizations railed against Supreme Court decisions, the Federalist Society and Republicans generally, two witnesses addressed those drive-by calumnies. Case Western law professor Jonathan Adler, who edited a book called *Business and the Roberts Court*, refuted the myths that the Court has some sort of improper business-oriented bias. Scott Walter of the Capital Research Center detailed how the money flowing from progressive organizations dwarfs their conservative counterparts. I submitted written testimony, which focused on three things: (1) allegations that the Republican-appointed justices vote in lockstep; (2) problems with the Judicial Ads Act that was introduced in the last Congress to counteract "Court capture"; and (3) insinuations that filers of *amicus* briefs represent the cat's paw of various industry interests.

First, ever since Justice Anthony Kennedy retired in 2018, commentators, including Whitehouse himself, prophesied that President Donald Trump's replacement of that moderate jurist would lead to a conservative majority running roughshod over core liberal concerns. Justice Brett Kavanaugh was supposed to have single-handedly overturned *Roe v. Wade*, but a funny thing happened on the road to apocalypse. Kavanaugh has demonstrated a pragmatic approach; in his first term, he voted as often with Justices Stephen Breyer and Elena Kagan as with Justice Neil Gorsuch. Meanwhile, the liberal justices, led by the late Justice Ruth Bader Ginsburg, voted together much more than the conservatives. Most notably, last term Chief Justice John Roberts defected on three key cases, involving LGBTQ rights, the DACA immigration program and abortion.

Speculation always runs rampant over whether a conservative will go wobbly on the politically fraught cases, but the liberals are guaranteed to please their comrades. Senators, journalists and

academics love decrying the Roberts Five (now Six), but it's the Ginsburg Four (now Breyer Three) that are a bloc geared to progressive policy outcomes.

Second is the idea that "big money" has influenced judicial appointments and otherwise politicized the courts. Last fall, Senator Whitehouse testified at a House Judiciary Committee hearing similar to his own (full disclosure: so did I). "The sooner we clean up this mess," he concluded, "the sooner courts can escape the grimy swamps of dark-money influence and return to their place in the broad and sunlit uplands of earned public trust."

He and Senator Dianne Feinstein (D-CA) introduced the Judicial Ads Act, which would require a host of new disclosures for groups speaking about judicial nominations. Ironically, soon after the bill dropped, Whitehouse and Senator Sherrod Brown (D-OH) spoke to the American Constitution Society (ACS) on ways that progressive lawyers "can help fight back against these blatant attempts to use the court to achieve right-wing goals."

Ironically, ACS itself is a "dark-money group" that tries to influence judicial decision-making. Those who support the Judicial Ads Act are hypocritical if they don't condemn ACS for not releasing its donor list—or, even more, Demand Justice and Alliance for Justice, whose *raison d'être* is promoting judicial nominees they think will achieve progressive goals.

And yet Chairman Whitehouse has said that he'd be happy to take money from left-wing "dark money" groups. So maybe it's not so much "donor disclosures" that are the problem, but the partisan preferences of those who are donating or speaking?

Setting aside unequal treatment, the Judicial Ads Act would complicate our already-unworkable campaign finance law. Would an ad saying that Joe Biden makes "the right decisions" about abortion qualify as a judicial nominations ad? How about one imploring a senator to vote for "the talented people President Joe Biden has chosen to oversee his policies?" Judges would have to police what can be said about their future colleagues, as well as who can say it.

Make no mistake: This is not about voter information. It is just intended to chill speech. At a time when 62 percent of Americans are afraid to share their political views and when 32 percent (particularly well-educated Republicans) fear that disclosing their views could harm their careers, should we enact *more* disincentives to political involvement?

Curtailing the right to associate and speak anonymously would do profound damage in the current political climate. The Supreme Court in 1958 declined to force the NAACP to give Alabama its membership lists for good reason; those advocating controversial ideas have long faced death threats, harassment and adverse economic actions. In a 2014 precursor to "cancel culture," Mozilla Firefox CEO Brendan Eich was forced to resign after it came out that he gave $1,000 to a California initiative that opposed same-sex marriage. Opponents of President Trump have organized boycotts of companies because their officers donated to the president or, in some instances, merely said nice things about him. In October 2018, a pipe bomb was put in the mailbox of billionaire philanthropist George Soros, funder of myriad Democratic candidates and progressive causes.

In various attempts to restrict First Amendment freedoms, I hear echoes of earlier times, with government officials facilitating and enabling private harassment. No wonder the most important case of this Supreme Court term involves protections for nonprofit donors, *Americans for Prosperity Foundation v. Becerra*. The challengers to an oppressive California disclosure law

drew 41 *amicus* briefs representing dozens of groups, including the ACLU, NAACP, Electronic Freedom Foundation and my own Cato Institute.

That brings us to the *third* issue, these nefarious *amicus* briefs. You may recall that last year, Whitehouse filed a brief in a Second Amendment case that was ultimately mooted out. "Perhaps the Court can heal itself before the public demands it be restructured in order to reduce the influence of politics," he wrote ominously there.

Now, in the new term's big property rights case, he's at it again. In *Cedar Point Nursery v. Hassid*, he targets the motives of petitioners and their *amici*. "Backed by untold financial support from regulated industry interests that have long sought to hobble labor unions and the American regulatory system," Pacific Legal Foundation—for whom Whitehouse's disdain goes back 20 years, when he personally lost a case to them—and its fellow travelers are a corporate cabal plotting against the American way of life. "At least eleven of the *amici* who filed briefs in support of petitioners are funded by the same set of industry-tied foundations and anonymous money groups," the brief says, citing Cato among others.

Despite Whitehouse's idiosyncratic crusade against *amicus* brief funding, there's nothing fishy about foundation donations. Cato itself is funded mostly by individuals (75 percent in 2019), and while we do get some funding from foundations (20 percent), we can hardly do the bidding of donors whose identities we don't know. We also get a tiny bit of corporate funding (3 percent), which is much less than Whitehouse gets from corporate political action committees (PACs).

In short, the attack on *amicus* briefs and their funders is misguided. It also misplaces the causation arrow between funding and issue advocacy.

As one Court-watcher wrote a quarter-century ago, "Today's confirmation battles are no longer government affairs between the president and the Senate; they are public affairs open to a broad range of players. Thus, overt lobbying, public opinion polls, advertising campaigns, focus groups and public appeals have all become a routine part of the process." Those trends have only accelerated, such that Supreme Court nominations are perhaps the highest-profile set-pieces in our contemporary political system.

But we can't just wave a magic wand and return to some halcyon age where the political dynamic is different. The reason we have these heated judicial nomination battles is that the federal government is making too many decisions for such a large, diverse country. Let Congress—not executive agencies—make the hard calls about truly national issues like defense or (actually) interstate commerce, but let states and localities make most of the decisions that affect our daily lives. That's the only way we're ultimately going to cure the "big-money assault on our judiciary."

Ilya Shapiro is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute and author of Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.