

Federalist Society Speech
By Karl Rove, Deputy Chief of Staff, The White House
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As Prepared for Delivery

For some, it is the Bavarian Illuminati. For others, the Knights Templar. And in recent years, it has been the Trilateralists ... the Bilderbergers ... or the NeoCons.

But for Senators Kennedy, Durbin, Schumer, and Leahy, the most successful conspiracy in the history of mankind is one of the most visible and open, as shown by your willingness to put yourselves on display.

Who would have thought powerful members of the World's Most Exclusive Club would be so threatened by a movement of confident, principle-driven, egg-head lawyers?

So I say, good evening, fellow Federalists... It is an honor to be here tonight. The Federalist Society is one of America's most important intellectual organizations. Since your founding more than 20 years ago, you have made extraordinary efforts to return our country to constitutionalism. You have developed new generations of lawyers, judges, and legal scholars committed to that vision. And you have shaped America's legal, cultural, and political landscape in a constructive way.

Consider where America stands today versus where we stood when the great William Rehnquist was named to the High Court in 1972. That was right around the time judicial activism was most dominant. Now, the wind and tide are running in our favor – due in large measure to your organization.

I admire the Federalist Society for the commitment and energy of its members, and for their intellectual rigor and effectiveness. One of George W. Bush's greatest contributions as President will be the changes he has brought forth in the courts and our legal culture – and those changes would have been impossible without the Federalist Society. You have thoroughly infiltrated the ranks of the White House. In fact, there are so many Federalists in the Administration that Chief of Staff Andy Card

has asked me to announce there will be a special staff meeting in the back of the room following the dinner.

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I've thought long and hard about the best way to begin the formal portion of my remarks... The consistent advice I got was to start my remarks in a way my audience will find comfortable, familiar, and reassuring. That sounds about right to me. So here goes: My name is Karl – and I am a non-lawyer.

I say that with no sense of superiority. Instead, I offer it as a reminder of what must be a painful point for all with a JD. 99.7 percent of all Americans are non-lawyers. We may not have the power, but we non-lawyers are the majority. And it is clear today that many ordinary men and women – non-lawyers – believe our courts are in crisis. And their concerns are well-grounded.

I have seen this phenomenon for several decades. In the 1980s, in my home state, the Texas Supreme Court was dominated by justices determined to legislate from the bench, bending the law to fit their personal agenda. Millions of dollars from a handful of wealthy personal injury trial lawyers were poured into Supreme Court races to shift the philosophical direction of the Court. It earned the reputation as “the best court that money could buy,” in the words of the *Dallas Morning News*. Even *60 Minutes* was troubled; in 1987 it did a story on the Texas Supreme Court titled, “Justice for Sale.”

Texans had enough – and they took it upon themselves to change the courts. In a bipartisan reform effort, they recruited and then elected to the Texas Supreme Court distinguished individuals like Tom Phillips, Alberto Gonzales, John Cornyn, Priscilla Owen, Nathan Hecht and Greg Abbott. For those of you who know something about Texas politics, this was significant. After all, we had gone nearly 120 years without electing a single Republican to the Supreme Court and then were blessed with such able people.

I saw this again in Alabama. The state legislature passed tort-reform legislation in 1987. However, activist judges on the trial lawyer-friendly state Supreme Court struck it down, prompting a period of “jackpot justice” through the mid-1990s, where the median punitive-damage award in Alabama reached \$250,000 – three times the national average. *Time* magazine labeled Alabama “tort hell.”

Like in Texas, this led to a popular revolt against such judicial activism. It began in 1994, when Republican Perry Hooper challenged sitting Chief Justice and trial lawyer favorite Sonny Hornsby. Hooper pulled off a stunning upset, winning by 262 votes out of over 1.2 million cast. But after the election, several thousand absentee ballots mysteriously surfaced, none of them witnessed or notarized as required by state law and Hornsby tried to have them counted. It took *a year* of court battles before Hooper was finally seated. His ground-breaking victory would not have been possible without the work of many Alabamians – including a young dynamic lawyer by the name of Bill Pryor. Today, the Alabama Supreme Court is once again committed to the strict interpretation of the law.

We have seen similar court reform efforts in Mississippi, Ohio, West Virginia, Michigan and other states.

And, of course, all America saw the response to the activism of the Massachusetts’ Supreme Judicial Court with its *Goodridge* decision and its conviction that marriage is “an evolving paradigm.” Four judges in Massachusetts, by forcing same-sex marriages on an unwilling public and rebuking the legislative power, provoked a national grassroots efforts to defend marriage by amending state constitutions and passing statewide initiatives.

But the judicial activism about which Americans feel most deeply is to be found in our Federal courts. For decades, the American people have seen decision after decision that strike them as fundamentally out of touch with the Constitution. Let me offer just a few examples of a trend each of you can describe more powerfully and eloquently than I can.

- The Ninth Circuit Court has declared the phrase “under God” in the Pledge of Allegiance to be unconstitutional, arguing that it was an establishment of religion to require children to recite it in a public school.
- Earlier this year a federal district court judge dismissed a ten-count indictment against hard-core pornographers, alleging that federal obscenity laws violated the pornographers’ right to privacy – despite the fact that popularly-elected representatives in Congress had passed the obscenity laws and that the pornographers distributed materials with simulations where women were raped and killed.
- Just a few months ago, five Justices on the Supreme Court decided that a “national consensus” prohibited the use of the death penalty for murders committed under the age of 18. In its decision, the majority ignored the fact that, at the time, the people’s representatives in 20 states had passed laws permitting the death penalty for killers under 18, while just 18 states – or less than 50 percent of the states allowing capital punishment – had laws prohibiting the execution of killers who committed their crimes as juveniles.

These attempts – and many more over the past decades -- have led to widespread concern about our courts. While ordinary people may not be able to give each case number or explain in fine detail the legal principles being bent, they are clearly concerned about too many judges too ready to legislate from the bench. Why do average Americans have such an instinctive response to judicial activism? I suggest there’s an easy explanation. It’s called the fourth grade.

In the first civics course any of us ever take, we learn about the “separation of powers” – the doctrine that constitutional authority should be shared by three distinct branches of government: the legislative, the executive, and the judicial. Each has a role. That of the judiciary is to strictly apply the law and defend the Constitution as written. The Founders’ theory was a simple one: By dividing power, the three branches of government would be able to check the powers of the other.

The separation of powers makes so much sense even to young minds – because in devising our system of government, the Founders took into account the nature of man. They understood we needed a government that was strong but not overbearing, that provided order but did not trample on individual rights.

“If men were angels,” James Madison famously said, “no government would be necessary.” But men are not angels – and so government is necessary. Mr. Madison and his colleagues did not take Utopia as their starting point; rather, they took human beings as we are and human nature as it is. They believed ambition had to be made to counteract ambition.

Scholars of American government have pointed out the Founders were determined to build a system of government that would succeed because of our imperfection, not in spite of them. This was the central insight, and the great governing genius, of America’s Founders.

And in all of this the Founders believed the role of the judiciary was vital – but also modest. They envisioned judges as impartial umpires, charged with guarding the sanctity of the Constitution, not legislators.

In *Federalist* #78, Alexander Hamilton described the judiciary as the branch of government that is “least dangerous” to political rights. Because it was to have “no influence over either the sword or the purse,” the judiciary was “beyond comparison the weakest of the three departments of power.” As a result, Hamilton told us, “liberty can have nothing to fear from the judiciary alone.”

But Hamilton’s optimism has not been borne out.

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I don’t have to tell anyone in this audience that we have traveled a great long distance from where we began – and from what the Founders envisioned.

In the 1770s we saw, within just a few hundred miles of here, the greatest assemblage of political philosophers since ancient Athens. Yet today the counsel of Madison and Hamilton and the other Founders too often goes unheeded, at least in influential law schools and among too many of our judges. And this failure has led to increasing politicization of the judiciary and increased activism on the part of many of its members.

At the end of the day, though, the views of the Founders will prevail because of the core defects of Judicial Imperialism – including the mistaken supposition that our charter of government is like hot wax: pliable, inconstant, and easily shaped and changed.

America's 43rd President believes, as you do, that judges should base their opinions on strictly and faithfully interpreting the text of a document that is reliable and remarkable: the United States Constitution. William Gladstone called it “the greatest work ever struck off at a given time by the brain and purpose of man.”

Critics of constitutionalism say it is resistant to social change. But if people want to enact or repeal certain laws, they can do so by persuading their fellow citizens on the merits through legislation and Constitutional amendments. This makes eminent good sense – and it allows for enormous adaptability.

The difficulty for those who do not anchor judicial decision in the words and meaning of the Constitution is that those decisions are anchored in nothing at all. In the compelling words of Justice Antonin Scalia:

"Panta rei [“everything is constantly changing”] is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?

“As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practical constitutional philosophy.”

Another defect of Judicial Imperialism is it undermines self-government. The will of the people is replaced by the personal predilections and political biases of a handful of judges. The result is that Judicial Imperialism has split American society, politicized the court in ways the Founders never intended. And it has created a sense of disenfranchisement among a large segment of American society – people who believe issues not addressed by the Constitution should be decided through elections rather than by nine lawyers in robes.

One of the strengths of constitutionalism is that it produces results that both sides may not agree with, but which are seen as legitimate outcomes of a free and fair debate. And Constitutionalism offers the possibility of compromise as well. In the words of a recent *Wall Street Journal* editorial, "the Court has hijacked ... social disputes from democratic debate, preventing the kind of legislative compromises that would allow a social and political consensus to form."

But this we know: The will of the people cannot be subverted in case after case, on issue after issue, year after year, without provoking a strong counter-reaction. The public will eventually insist on reclaiming their rights as a sovereign people – and they will further insist that government return to its founding principles. We have seen the court overreach in the past – in *Dred Scott*, *Lochner* and in many other cases – and corrective measures usually follow.

We will see one of two things come to pass. The Courts will, on their own, reform themselves and return to their proper role in American public life; or we will see more public support for Constitutional amendments and legislation to reign them in. It will be one, or it will be the other.

Will we see the kind of self-restraint those of you in this room, and those of us who work in this Administration, want? I believe we will. I say this because we are now seeing the fruits of your good works and the good works of many others.

More than 200 exceptionally well-qualified nominees – many of whom have found intellectual sustenance and encouragement from The Federalist Society – have been confirmed as Federal judges since 2001, not easily or quickly, but confirmed after a hard effort. On the Supreme Court we see an individual like Chief Justice John G. Roberts, Jr., who conducted himself brilliantly before the Senate Judiciary Committee. And soon, Chief Justice Roberts will have as his colleague a proud member of the Federalist Society, Judge Samuel Alito, Jr.

The willingness of these brilliant legal minds to put aside lucrative careers in private practice to serve a greater public good should make us all optimistic and hopeful.

Our arguments will carry the day because the force and logic and wisdom of the Founders are on our side. We welcome a vigorous, open, fair-minded, and high-minded debate about the purposes and meaning of the courts in our lives. And we will win that debate.

In America, conservatives are winning the battle of ideas on almost every front – and few are more important than the battle over the judiciary. The outcome of that debate will shape the course of human events. And the reason we will prevail rests in large measure on the good work of the Federalist Society – and those of you in this room this evening.

The President is grateful for your support, for your tireless efforts on behalf of constitutionalism, and above all, for your dedication to our country.

Thank you and may God bless America.