

Senator Elizabeth Warren
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The Corporate Capture of the Federal Courts

Thank you, Nancy, for that very kind introduction. And thank you to Caroline, Peter, and everyone at ACS for all the hard work you do. When I was a professor at Harvard, I was always happy to attend ACS events and contribute to the ACS journal – and I even managed to steal a few students who were members of ACS to be my research assistants.

I am very glad to have had a front-row seat – well, maybe more like a second-row seat – in watching ACS grow from a kernel of an idea to a real force.

And ACS is a force – a force that is more essential today than it has ever been. On most of the hotly debated issues of law and policy, conservatives are organizing themselves to put serious pressure on Congress and the courts to strip away some of the most important rights and reforms that we have fought so fiercely to win. We need ACS to push back.

The Founders greatly feared concentration of power. John Adams – a Massachusetts native, and the author of our state constitution – expressed the idea well. He said: “power must be opposed to power, force to force, strength to strength, interest to interest, as well as reason to reason, eloquence to eloquence, passion to passion.”¹ Balance, said Adams, was critical.

Here in Washington, power is not balanced. Instead, power is becoming more concentrated on one side. There are powerful, deep-pocketed corporate interests lined up to fight to protect their privilege and to resist any change that would limit corporate excesses. I saw one example of this up close and personal following the 2008 financial crisis when I fought for stronger financial regulation against the biggest banks, but there are many more.

These big corporate interests are savvy. They fight every day on Capitol Hill and in the agencies, devoting enormous resources to the task of bending legislation to benefit themselves. But they also devote enormous resources toward influencing the courts.

Why? Because they know that influencing those who interpret the law is another extremely effective way to achieve their goals. In our democracy, when we write our laws, reasoned debate, public opinion, and political accountability are all factors that can thwart the efforts of powerful interests.

¹ Marginalia by John Adams in MARY WOLLSTONECRAFT, AN HISTORICAL AND MORAL VIEW OF THE ORIGIN AND PROGRESS OF THE FRENCH REVOLUTION; AND THE EFFECT IT HAS PRODUCED IN EUROPE 398 (1794), available at <http://archive.org/details/historicalmoralv00woll>.

But even if those powerful corporations lose the fight in Congress—and yes, it happens! Think of the NLRB, the EPA, and our newest baby, the Consumer Agency! –even in those cases, they can turn defeat into victory if they can get a favorable court decision. Powerful corporate interests understand that if they can rig the courts, a friendly judicial system will give them a second bite at whatever they want.

I wanted to come here today because I had a message I wanted to bring personally. And here it is: there is an intense fight going on, right now, over what our federal courts will look like. It is a fight over whether those courts will remain a neutral forum, faithfully interpreting the law and dispensing fair and impartial justice – or whether we will see the corporate capture of the federal courts, with the courts transformed into one more rigged game. And right now, we are losing that fight.

The reasons are many.

Consider the composition of the federal bench. Look at the federal bench and you will see a striking lack of professional diversity among the lawyers who currently serve as federal judges.

According to a study published by ACS earlier this year, as of 2008, the federal appellate bench was "dominated by judges whose previous professional experience is generally corporate or prosecutorial."² The study examined the biographies of 162 judges listed in the Almanac of the Federal Judiciary. It found that 85% of the judges had worked in private practice, and also noted that it was "clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations."³

Meanwhile, only 3% - five judges total out of 162 - had substantial legal experience working for non-profit organizations. And none of those five judges had worked for such an organization more recently than 1981!⁴

Similarly, only 3% of the judges had worked for organizations or government agencies that enforce civil rights.⁵ Only three judges TOTAL appeared to have worked for organizations representing low income Americans, and only one judge—one out of 162!—appeared to have substantial experience litigating consumer protection cases.⁶

² ELLEN EARDLEY & CYRUS MEHRI, AM. CONST. SOC. FOR L. & POL'Y, DEFENDING TWENTIETH CENTURY EQUAL EMPLOYMENT REFORMS IN THE TWENTY-FIRST CENTURY 10 (Jan. 2013), *available at* https://www.acslaw.org/sites/default/files/Eardley_and_Mehri_-_Defending_Equal_Employment_Reforms.pdf.

³ *Id.* at 11 n.42.

⁴ *Id.* at 11 n.43.

⁵ *Id.* at 11.

⁶ *Id.* at 11-12.

Since taking office, President Obama has been responsible for some notable exceptions to this trend. District Court Judge Edward Chen, worked for many years as a staff attorney at the ACLU.⁷ The President stood behind the Chen nomination – even re-nominating him three times over three years – before the Senate finally agreed to confirm him.⁸ Generally, however, even the president’s appointments have been in line with prior statistics. A study by the Alliance for Justice shows that the president has nominated 41 private sector lawyers to the federal Appeals Courts, while selecting only 3 legal aid lawyers and 3 public defenders.⁹

I want to be clear -- there are some really, really talented judges who come from the private sector. I myself have worked for private clients. And it is of course true that the personal views of an attorney often diverge from those of his or her clients.

But I think diversity of experience matters. At his induction ceremony, Judge Chen was quoted as saying that he never considered withdrawing his name from consideration because, as he explained, “I believe that someone should not be disqualified from the bench simply because they once represented the voiceless and unpopular, rather than the wealthy and the powerful.”¹⁰ Judge Chen is right.

Another important reason why we are at serious risk of losing this fight is the increasingly brazen and ideological pro-corporate tilt of our most important federal courts – especially the Supreme Court and the D.C. Circuit.

Data on the Supreme Court in recent years shows a heavy pro-corporate tilt. The five conservative justices currently sitting on the Supreme Court are in the top ten most pro-business justices in a half century – and Justices Alito and Roberts are numbers one and two – the most pro-business.¹¹ Or take a look at the win rate of the Chamber of Commerce. According to the Constitutional Accountability Center the Chamber moved from a 43% win-rate during the last five terms of the Burger Court, to a 56% win-rate under the very conservative Rehnquist court, and they are now at a 70% win rate with the Roberts Court.¹² Follow this pro-business trend to

⁷ See U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DISTRICT JUDGE EDWARD M. CHEN, <http://www.cand.uscourts.gov/emc> (last visited June 11, 2013).

⁸ Josh Richman, *U.S. Senate confirms Chen to federal bench*, SAN JOSE MERCURY NEWS, May 10, 2011.

⁹ ALLIANCE FOR JUST., JUDICIAL SELECTION SNAPSHOT 8 (2013), available at <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf>.

¹⁰ “Judge Edward M. Chen Confirmation Ceremony,” available at <http://www.youtube.com/watch?v=UNqriAtwjPU>.

¹¹ Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450-51 (2013), available at http://www.minnesotalawreview.org/wp-content/uploads/2013/04/EpsteinLanderPosner_MLR.pdf.

¹² Doug Kendall & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court - An Early Report for 2012-2013*, CONST. ACCOUNTABILITY CTR., (May 1, 2013), available at <http://theusconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report>.

its logical conclusion, and sooner or later you'll end up with a Supreme Court that functions as a wholly owned subsidiary of the Chamber of Commerce.

The consequences of this pro-corporate shift are staggering. And it's not just the Affordable Care Act, which came within an inch of being invalidated by this Supreme Court, or Citizens United, which unleashed an avalanche of secret corporate money into our political system.

Those cases get much of the attention. But other cases are just as damaging. We have a Supreme Court that chose absurd legal formalism over equal pay for equal work – forcing Congress to step in and correct their obvious error in the Lily Ledbetter case. We have a Supreme Court that rewrote our established understanding of the standards for filing lawsuits in the *Iqbal* and *Twombly* cases, making it easier for sophisticated, deep-pocketed parties to prevail against underdogs. And we have a Court that looks for every opportunity to undermine class actions—even if that means big companies can roll over millions of people.

In addition, the Supreme Court's unique ability to pick and choose which cases it will hear gives it tremendous power to shape the evolution of federal law. According to data collected and analyzed by Adam Chandler at *ScotusBlog*, the most successful groups at getting the Supreme Court to take their cert petitions are—and I'm quoting—"pro-business, anti-regulatory, and ideologically conservative."¹³ In the top 15 are some of the biggest advocates for big business -- the Chamber of Commerce (they're number 1 once again), the Cato Institute, the National Federation of Independent Businesses, the pharmaceutical industry lobby, and the American Bankers Association.¹⁴ These interest groups see a Supreme Court that scholars and analysts have called the most pro-business court in modern history.¹⁵ They are kids in a candy shop, kids with plenty of money to spend, bringing case after case to advance their political agenda.

Look beyond the Supreme Court to the D.C. Circuit, which hears most appeals of agency decisions and has often been called the second most important federal court in the land. The story is no better.

Some of the most consequential decisions of our time – the decisions about whether Wall Street Reform will have real bite or whether it'll be toothless – are only now bubbling up through the D.C. Circuit. Swaps dealers and the securities industry are trying to gut the Commodity Future

¹³ Adam Chandler, *Cert-stage Amicus "All Stars": Where Are They Now?*, SCOTUSBLOG, April 4, 2013, <http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now>.

¹⁴ *Id.*

¹⁵ Epstein, *supra*, at 1449, 1471 (finding the Roberts Court "much friendlier to business" than Burger or Rehnquist Courts and that five of the ten Justices most favorable to business serving from 1946 through 2011 are currently serving, including two - Justices Alito and Roberts - ranking most business friendly of all post-war Justices); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 983 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280276 (identifying the Roberts Court as "the most pro-business court of any since the mid-1930s.").

Trading Commission's rules – rules that prevent excessive speculation on Wall Street.¹⁶ The Business Roundtable and Chamber of Commerce are fighting to prevent shareholders from getting information about candidates for boards of directors.¹⁷ Corporations are challenging recess appointments of regulators. The list goes on. Auto dealers, oil companies, and others are challenging rules right and left.

And the next time you hear someone claim that the D.C. Circuit doesn't need any more judges, you can remind them that the President with the most appointees sitting on the D.C. Circuit right now is Ronald Reagan.¹⁸ And it's been twenty-five years since his last appointment to that court.

As lawyers and law students, we all know that the D.C. Circuit must defer to agency interpretations, and that it is not allowed to substitute its own judgment for that of the agency.

But that is no longer the expectation in Washington. The D.C. Circuit seems increasingly hostile toward agency rulemaking by financial regulators.

And the result is that at some agencies in Washington, minority commissioners are gaining extra leverage in policymaking because it is increasingly believed that if the minority dissents, the D.C. Circuit will use that dissent as way to swoop down and nullify the rule. We've already seen this happen. In a case called *Business Roundtable v. SEC*, the D.C. Circuit struck down a rule developed under Dodd-Frank that would give shareholders more information about nominating directors at their companies.¹⁹ In that case, the court held that the rule was "arbitrary and capricious" and even cited directly to the dissenting statements of the losing commissioners.²⁰

So let's put these pieces together, from beginning to end:

- Because of *Citizens United*, powerful interests have undue influence over elections and therefore over what legislation gets passed.
- The Affordable Care Act Case dramatically rewrites Congress's authority to legislate under the Commerce Clause.
- The D.C. Circuit's aggressive approach to reviewing agency decisions means that some laws passed by Congress will, in effect, be neutered by a hostile court.

¹⁶ Kevin McCoy, *Who Killed Financial Reform?; After Three Years, Key Parts of the Plan to Avert Another Wall Street Crisis Remain Undone*, USA TODAY, March 30, 2013, at 1A.

¹⁷ James B. Stewart, *Bad Directors and Why They Aren't Thrown Out*, N.Y. TIMES, March 30, 2013, at B1.

¹⁸ See UNITED STATES COURT OF APPEALS: DISTRICT OF COLUMBIA CIRCUIT: ABOUT THE COURT: JUDGES, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges>.

¹⁹ *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

²⁰ *Id.* at 1146.

- And even if laws get passed and agencies can make their regulations stick, decisions to restrict access to justice mean that individual citizens may never be able to get in the door to exercise their rights in court.

Each line of decisions is a serious problem, but together each magnifies the impact of the others. So what can we do?

I don't kid myself. Fighting back isn't easy. Powerful interests invested in the status quo know what is at stake. They are organized, they are effective, and they come to this battle with armies of lobbyists and lawyers. We are up against a conservative movement that for thirty years – since President Reagan – has dedicated itself to packing the courts with pro-business, anti-regulation, conservative allies. They are tough and they are prepared.

We will not win all the fights ahead. But if we are going to have a chance, we begin by speaking out about what is happening in our courts.

Above all, we must make judicial nominations a priority. It's time for a new generation of judges, judges whose life experience extends beyond big firms, federal prosecution, and white-collar defense. We need sustained pressure to get those judges in front of the Senate. Pressure—pressure on our President, pressure on Senators, pressure in the press. And if the judges don't get a vote, if they are blocked, if they can't get through – we need to change the filibuster rules so we can get them through.

If you care about the Affordable Care Act, if you care about the Voting Rights Act, if you care about financial reform, then your fight is not just on the policy, your fight is not just in Congress, your fight is in the courts. Your fate is tied to the judges who will decide these cases – and your fight must be to bring a new generation of judges to the bench.

We don't need judges who put a thumb on the scales of justice. We need judges who will be fair. Judges who will be even-handed. And judges who have the experience to consider all sides of an issue.

This will be a hard fight, and there will be many battles ahead, but I believe in what we can do together. The people in this room and the lawyers all across the country who are active in ACS are tough, resourceful, and creative. Together, we can get a new generation of judges on the bench – and we can prevent the corporate capture of the federal courts.

Thank you for having me here today, and thank you for all you do.