

Debating the Subtle Sway of the Federalist Society

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WASHINGTON, July 31 - "I am a member of the Federalist Society, and I do not know, quite frankly, what it stands for."

The transcript does not say whether people in the Senate hearing room responded with disbelief. But that is how one person headed for a top job in the Justice Department, Viet D. Dinh, described his relationship with the society, a conservative legal group whose influence is the source of ever-swelling myth, mystery, insinuation, denial and debate.

In a new Washington ritual, President Bush has repeatedly drawn from the Federalist Society for cabinet members, senior aides and judges. And perhaps to deflect what many conservatives call unfair attacks by liberals, the nominees have repeatedly claimed to know little about the group's beliefs.

White House aides have worked hard to put distance between the society and John G. Roberts, the federal appeals judge Mr. Bush has nominated for the Supreme Court. They have even demanded corrections from newspapers that identified him as a member.

Then an old directory surfaced last week, listing Judge Roberts as part of one of the group's steering committees. The White House spokesmen clung to their line; since Judge Roberts had not, apparently, written a \$25 membership check, he was not a formal member.

Who cares? Lots of people, it seems, because a fight over the influence of the Federalist Society is a proxy in the war over the federal judiciary and the Constitution itself.

Remarkable in its growth and reach, the society was founded in 1982 by law students unhappy with what they saw as liberal dominance in law school faculties and the courts. It now claims 35,000 participants (some paying dues and some not) and has chapters in virtually every law school and in 60 cities. Part of the society's influence stems from its sponsorship of public debates, which hone and promote conservative points of view.

But much of the influence, and most of the intrigue, flows from an informal social network, which members use to advance one another's causes and careers. Openly and

behind the scenes, members have played prominent roles in the most pitched political battles in recent years, including the impeachment of President Bill Clinton and the Florida recount fracas in 2000 that led to the election of Mr. Bush.

The society takes few official positions. But to some liberal critics, the activism of its members conjures all they fear about the legal right, from the defense of states' rights and business interests to attacks on affirmative action, gay rights and abortion. One liberal blog, democrats.com, called the group "the conservative cabal that is attacking America from within."

Ralph G. Neas, president of People for the American Way, a liberal advocacy group, did not go that far in an interview last week. But he pointed to the society as a link between Judge Roberts and two Supreme Court justices many on the left abhor, Antonin Scalia and Clarence Thomas. Justice Scalia was a faculty adviser to the society, and Justice Thomas has praised its work and spoken at its events.

"Just because someone belongs to the Federalist Society does not inherently disqualify them," Mr. Neas said. "But it certainly raises a lot of questions about whether that individual adheres to the judicial philosophy of Clarence Thomas and Antonin Scalia," who are not "mainstream conservatives," he said.

Leaders of the group cry foul. Steven G. Calabresi, a law professor at Northwestern University who helped found the group as a law student at Yale and is now chairman of its board, evoked the question Senator Joseph McCarthy used a half-century ago in hunting Communists: "There's been an element of 'Are you now or have you ever been a member of the Federalist Society?'"

"It's worse than McCarthyism, because at least McCarthy was going after people who advocated a total dictatorship," he said. "We don't even hold a unified set of views."

Although the group endorses a few broad principles like the separation of powers and a faithful adherence to Constitutional text, Mr. Calabresi said there was much disagreement on particulars. "The Federalist Society is a debate club," he said.

The blurred lines between the group's official debate-club role and the private activities of many of its members were on display last week as the group's longtime president, Eugene B. Meyer, dismissed as "silly" accusations that the society was exercising secret influence. "That's just not how we operate," he said.

Mr. Meyer said outside observers often failed to recognize the idealism that attracted members. "I don't mean to sound too goody-two-shoes about this, but it's an interest in good government and how people can do the best for the society," he said.

Recalling a trip through rural Mexico, Mr. Meyer spoke of the "Stone Age" living conditions there as an example of how people suffer "when they haven't had the rule of law."

Yet down the hall from Mr. Meyer's office, a vacated desk testified to the more activist role that members often play. It belonged to Leonard A. Leo, the executive vice president, who doubles as the head of Catholic outreach for the Republican Party and who has taken a leave of absence to help Judge Roberts win confirmation.

As he argued that the society's influence flowed from its intellectual work - "I sound a little like a broken record, but what I'm excited about are the ideas"- Mr. Meyer also said he had benefited from news media training by Creative Response Concepts. That is the public relations firm that represented Swift Boat Veterans for Truth, the group whose advertisements in last year's presidential campaign attacked the war record of Senator John Kerry, the Democratic nominee.

The Federalist Society hired the firm, Mr. Meyer said, to train members and place them on television shows during the confirmation process. He said the goal was to educate the public on the role of judges and courts. "Given the general philosophical outlook, the chances are very good that they'll support the nominee," Mr. Meyer said. "But that's not the purpose."

In the early days of the Bush presidency, administration officials said about a quarter of their judicial nominees were recommended by the Washington headquarters of the society. Mr. Meyer said the advice came from staff members speaking in their private capacities, not as official representatives.

With an annual budget of \$5.5 million, the society has benefited from decades of support from prominent conservative organizations, including the John M. Olin, Sarah Scaife, and Lynde and Harry Bradley Foundations.

In the 1990's, three Federalist Society lawyers, Jerome M. Marcus, Richard W. Porter and George T. Conway, played important but covert roles in helping Paula Corbin Jones sue President Clinton for sexual harassment. They also worked behind the scenes to disclose Mr. Clinton's affair with a White House intern, Monica Lewinsky.

Kenneth W. Starr, the independent counsel whose report led to Mr. Clinton's impeachment, is a prominent member of the society, as is Theodore B. Olson, who successfully argued *Bush v. Gore*, the case that stopped the Florida recount in 2000 and ensured Mr. Bush's election.

According to the Senate Judiciary Committee, 15 of the 41 appeals court judges confirmed under Mr. Bush have identified themselves as members of the group. Complaining that the society serves as "the secret handshake" of Mr. Bush's judicial nominees, Senator Richard J. Durbin, an Illinois Democrat on the committee, has repeatedly questioned them about the group's mission statement. Their answers, he said, have "ranged from the amusing to the preposterous."

Carolyn Kuhl, who later withdrew her stalled bid for an appeals court seat, wrote, "I did not participate in writing the mission statement."

"Therefore I am unable to opine," she said.

Jeffrey S. Sutton, who won a seat on the United States Court of Appeals for the Sixth Circuit, said, "I have no idea what their philosophy is."

Mr. Dinh, who left his Justice Department position in 2003 and now teaches law at Georgetown, said he answered candidly at his confirmation hearing. "I did not know, and still do not know, what the society stands for because it has no stated philosophy other than the exchange of ideas," he said. "There's no evasion in that. It's just as straightforward as it gets."

Mr. Durbin's questions did bring sharp words from one society member. "I am on the board of advisers of the Federalist Society, and I am darn proud of it," said Senator Orrin G. Hatch, a Utah Republican on the Judiciary Committee. Mr. Hatch called the society a group of lawyers "who are just sick and tired of the leftward leanings of our government."

Among those with a complex view of the group is Guido Calabresi, a federal appeals court judge and an uncle of Steven Calabresi. Judge Calabresi, a former dean of Yale Law School, was appointed by President Clinton, and his academic views are to the left of his nephew's.

"The Federalist Society was, when it got started, a wonderful idea," Judge Calabresi said, and it has made "a lot of conservative thought seem as respectable and attractive as it is." But he worries that its career-advancement role invites distrust and promotes conformity.

"It becomes something of a secret society," he said. "The conversation becomes a conversation among people who already know what they're going to say."

Anticipating the criticism, Steven Calabresi fired off a pre-emptive e-mail message to a reporter, arguing that the same could be said of elite law schools like Yale.

Unlike many arguments about the Federalist Society, though, this one promises to end amicably: the two Calabresis, close friends and mutual admirers, will soon be off for a shared vacation.